THE YEAR IN REVIEW 2010

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

INTRODUCTION

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

ADMINISTRATIVE LAW

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Alaska Supreme Court

Anchorage Board of Adjustment v. LBJ

In *Anchorage Board of Adjustment v LBJ*,[1] the supreme court held that a road near a school qualifies as an urban improvement area and therefore must meet urban collector standards.[2] In 2005, the Platting Board determined that a section of road adjacent to a new school would have to be improved to meet standards similar to urban collector standards.[3] The Board of Adjustment reversed the Platting Board's determination and found that it was not supported by substantial evidence.[4] The superior court reversed the decision of the Board of Adjustment and reinstated the determination of the Platting Board.[5] The superior court reasoned that the only way to read the administrative record was to conclude that the section of road was in an urban improvement area and to require by operation of law that the road be improved to meet urban collector standards.[6] The superior court also found that the school board had supplied no reasonable basis to defend

[1] 228 P.3d 87 (Alaska 2010).
[2] *Id.* at 87. Citations to pages 88–93 are to the superior court's decision, which was attached as an appendix. *Id.*
[3] *Id.* at 88. By requiring a road to meet "urban collector standards," the Board was requiring curbs, gutters, lighting, paved shoulders, and a multi-use path. *Id.*
[4] *Id.*
[5] *Id.* at 87.
[6] *Id.* at 90, 92.

the Board of Adjustment's decision.[7] Accordingly, the supreme court affirmed, holding that a road near a school qualifies as an urban improvement area and therefore must meet urban collector standards.[8]

Doubleday v. State, Commercial Fisheries Entry Commission

In *Doubleday v. State, Commercial Fisheries Entry Commission*,[9] the supreme court held: (1) a fisherman cannot use the spoliation of evidence doctrine to shift the burden of proof when he is unable to make a showing that records were lost due to the fault of the state, and (2) he is required to exhaust his administrative remedies to challenge the number of fishery permits issued by the Commercial Fisheries Entry Commission (Commission) and could not be excused on grounds of futility.[10] Doubleday's applications for permits for two fisheries were denied by the Commission because he failed to produce sufficient evidence of participation in either fishery.[11] Doubleday argued that he could not meet the burden of proof because the state destroyed or lost records necessary to prove his case, and therefore the spoliation of evidence doctrine supplied a rebuttable presumption that the missing documents would have established facts unfavorable to the Commission.[12] The supreme court held that even if the spoliation of evidence doctrine could apply to this type of case, Doubleday failed to produce any evidence in support of the claim that the government destroyed records negligently or intentionally.[13] Doubleday's claim that the Commission violated the Limited Entry Act by incorrectly calculating the maximum number of fishery permits was denied because Doubleday did not exhaust his administrative remedies.[14] Affirming the superior court, the supreme court held that: (1) a fisherman cannot use the spoliation of evidence doctrine to shift the burden of proof when he is unable to make a showing that records were lost due to the fault of the state, and (2) he is required to exhaust his administrative remedies to challenge the number of fishery permits issued by the Commercial Fisheries Entry Commission.[15]

Gottstein v. State, Department of Natural Resources

In *Gottstein v. State, Department of Natural Resources*,[16] the supreme court held that the department does not necessarily violate the due process rights of interest holders in an oil and gas lease by refusing to hold a hearing before deciding an appeal of the approval of a proposed plan of development.[17] Interest holders in a Cook Inlet oil and gas lease appealed three final agency decisions pertaining to their lease.[18] The superior court affirmed the agency decisions,[19] and the interest holders appealed.[20] In considering

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[7] *Id.* at 92.
[8] *Id.* at 87.
[9] 238 P.3d 100 (Alaska 2010).
[10] *Id.* at 106–09.
[11] *Id.* at 101.
[12] *Id*.
[13] *Id*. at 106–07.
[14] *Id.* at 107–11.
[15] *Id.* at 106–09.
[16] 223 P.3d 609 (Alaska 2010).
[17] *Id.* at 620–27.
[18] *Id*.
[19] *Id*.

whether the due process rights of the interest holders were violated, the court noted the Commissioner's conclusion that all information consulted and relied upon was available on the public record and that the interest holders did not subsequently object to this conclusion or give notice of any specific disputed material facts.[21] Affirming the superior court's decision, the supreme court held that a department does not necessarily violate the due process rights of interest holders in an oil and gas lease by refusing to hold a hearing before deciding an appeal of the approval of a proposed plan of development, and the superior court did not abuse its discretion by denying a motion for trial de novo.[22]

Hymes v. Deramus

In *Hymes v. Deramus*,[23] the supreme court held that a prison inmate is not required to exhaust administrative remedies for a medical malpractice claim based on an irreparable harm that cannot be corrected by the agency.[24] Hymes was a federal prisoner who was temporarily held at a state facility.[25] He brought suit against the physician and physician's assistant at that facility, alleging several instances of medical malpractice that caused him irreparable harm.[26] The superior court granted the physician's motion for summary judgment, holding that Hymes had not exhausted administrative remedies before bringing suit.[27] The supreme court reversed and remanded, holding that one of Hymes's claims was not subject to the exhaustion requirement.[28] Hymes was allegedly prescribed a medication that caused him irreparable harm, and the supreme court reasoned that the policy objectives of an exhaustion requirement are not advanced when the error is completely in the past and the agency has no way of correcting it.[29] Reversing the lower court, the supreme court held that a prison inmate is not required to exhaust administrative remedies for a medical malpractice claim based on an irreparable harm that cannot be corrected by the agency.[30]

Kingik v. State, Department of Administration

In *Kingik v. State, Department of Administration*,[31] the supreme court held that determining whether there has been a procedural due process violation requires considering the government's interest, the private individual's interest, and the risk that the private individual will be erroneously deprived of her interest.[32] Kingik's husband submitted an Application for Retirement Benefits to the Division of Retirement and Benefits (Division).[33] Kingik provided a notarized signature on the application consenting to her husband's choice of a retirement option that did not include spousal

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[20] *Id*.
[21] *Id.* at 621.
[22] *Id.* at 620–27.
[23] 222 P.3d 874 (Alaska 2010).
[24] *Id*. at 882–83.
[25] *Id*. at 878.
[26] *Id*.
[27] *Id*. at 880.
[28] *Id*. at 882–83.
[29] *Id*.
[30] *Id*.
[31] 239 P.3d 1243 (Alaska 2010).
[32] *Id.* at 1248.
[33] *Id.* at 1246.

benefits after his death.[34] After Kingik's husband died, the Division discontinued benefits to Kingik.[35] The superior court upheld the Division's denial of benefits.[36] Kingik appealed, arguing the Division violated her due process rights by failing to safeguard her right to survivor benefits.[37] The supreme court held that because the application's plain language was reasonably clear, an erroneous deprivation of survivor benefits was unlikely; consequently, Kingik's due process rights were not violated.[38] The court further held that Kingik's waiver of survivor benefits was effective.[39] Affirming the lower court, the supreme court held that determining whether there has been a procedural due process violation requires considering the government's interest, the private individual's interest, and the risk that the private individual will be erroneously deprived of her interest.[40]

Nash v. Matanuska-Susitna Borough

In *Nash v. Matanuska-Susitna Borough*,[41] the supreme court held that an individual's due process rights are violated when an agency, during an administrative hearing, bars that individual from presenting witnesses and relevant, material evidence that is essential for a fair trial.[42] Nash entered a timber contract with the Matanuska-Susitna Borough (Mat-Su) on September 25, 1998, which they amended twelve times.[43] On October 25, 2002, Mat-Su notified Nash that due to breach, his contract was terminated.[44] Nash appealed his contract termination with the local board of adjustment and appeals.[45] Nash inquired about bringing witnesses to support his appeal and was informed that interested parties could testify, but only if they had testified previously.[46] Because this was not an appeal from a previous hearing, Nash moved to have parties speak on his behalf and sent the board a list of individuals for approval.[47] He received no response from the board and thus did not ask most of his witnesses to take time off to attend the hearing.[48] The board upheld Mat-Su's termination of Nash's contract, and Nash sued Mat-Su in superior court *inter alia* for breach of contract.[49] Nash argued that his trial should be de novo because the board hearing was unfair and violated his due process rights.[50] The superior court, finding no due process violation, affirmed the administrative agency's decision.[51] Nash appealed, and the supreme court found that although due process in administrative hearings is not identical to court proceedings, it

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[34] *Id.* at 1246–47.
[35] *Id.* at 1247.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 1249.
[39] *Id.* at 1246.
[40] *Id.* at 1248.
[41] 239 P.3d 692 (Alaska 2010).
[42] *Id.* at 701.
[43] *Id.* at 693–94.
[44] *Id.* at 695.
[45] *Id.* at 696.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 697.
[50] *Id.*
[51] *Id.*

should still be consistent with the essentials of a fair trial.[52] Reversing the superior court and remanding for a trial de novo, the supreme court held that an individual's due process rights are violated when an agency, during an administrative hearing, bars that individual from presenting witnesses and relevant, material evidence that is essential for a fair trial.[53]

Pietro v. UNOCAL

In *Pietro v. UNOCAL*,[54] the supreme court held that a Workers' Compensation Board must: (1) evaluate lay testimony and consider significant issues in order to determine whether an employee has proven claims by a preponderance of the evidence; and (2) must provide detailed reasons for its decisions.[55] After working at a UNOCAL plant where he was exposed to arsenic, Pietro developed peripheral neuropathy and eventually skin cancer.[56] Pietro asked for workers' compensation benefits, which the Workers' Compensation Board denied after finding UNOCAL had presented sufficient evidence to rebut the presumption of compensability.[57] Pietro appealed the decision and the supreme court found that UNOCAL presented sufficient evidence to rebut the presumption of compensability and thus the Board did not err.[58] However, the Board was required to then weigh testimony to determine whether Pietro had proven his claim by a preponderance of the evidence, which the court found the Board had failed to do.[59] The court also found the Board's conclusory statement did not provide enough information to assess its accuracy, as the Board did not give reasons to reject Pietro's experts' testimony and placed too much reliance on a 24-hour urine test.[60] Affirming in part and vacating in part, the supreme court held that a Workers' Compensation Board must: (1) evaluate lay testimony and consider significant issues in order to determine whether an employee has proven claims by a preponderance of the evidence; and (2) must provide detailed reasons for its decisions.[61]

Smart v. State, Department of Health & Social Services

In *Smart v. State, Department of Health & Social Services*,[62] the supreme court held that: (1) the Department of Health and Social Services (DHSS) must give adequate notice of audit decisions and appeal periods; and (2) a DHHS promulgated audit protocol was not a regulation under Alaska's Administrative Policy Act (APA).[63] DHSS audited Smart, a care coordinator, for Medicaid overpayments.[64] In June 2007, DHHS sent Smart a final audit report indicating total DHHS payments during the audit; the letter failed to

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[52] *Id.* at 699.
[53] *Id.* at 701.
[54] 233 P.3d 604 (Alaska 2010).
[55] *Id.* at 613–617 .
[56] *Id*. at 607–610.
[57] *Id.*
[58] *Id.* at 611–12.
[59] *Id.* at 612.
[60] *Id.* at 615.
[61] *Id.* at 613–617 .
[62] 237 P.3d 1010 (Alaska 2010).
[63] *Id.* at 1016, 1018.
[64] *Id.* at 1013.

specify an overpayment and recoupment amount and Smart did not appeal.[65] Subsequently, in August 2007, DHSS issued a notice of recoupment for $2,370 and provided no opportunity for appeal.[66] Smart filed a putative class action complaint alleging that DHHS's failure to promulgate its audit protocol violated the APA and that DHHS violated due process by failing to provide an opportunity to appeal notices of recoupment issued without support for the recoupment determination.[67] The superior court granted DHSS's motion to dismiss, finding that Smart failed to file a timely appeal with DHHS and thus failed to exhaust her administrative remedies.[68] Smart appealed the decision and the supreme court found that DHSS's notice to Smart did not comply with due process because the recoupment amount and the appeal period should have been clearly stated in the same letter as a description of DHHS's specific findings.[69] Additionally, the supreme court found that the protocol DHSS used for the audit process was not a regulation under the APA because it was a "statistically valid sampling methodolog[y]."[70] Reversing and remanding in part and affirming in part, the supreme court found that: (1) the DHSS must give adequate notice of audit decisions and appeal periods; and (2) a DHHS promulgated audit protocol was not a regulation under the APA.[71]

Yost v. State of Alaska, Dep't of Commerce

In *Yost v. State of Alaska, Department of Commerce*,[72] the supreme court held that a doctor's civil action regarding her license application was properly treated as an administrative appeal.[73] Dr. Yost made a good faith answer to a licensing examination question that actually proved to be misleading.[74] During the course of the ensuing litigation, the superior court converted her civil action to an administrative appeal.[75] Dr. Yost argued that the case was fundamentally about her contract and not properly characterized as an administrative appeal.[76] Because the case required the court "to consider the propriety of an agency determination",[77] the supreme court held that the action was properly treated as an administrative appeal, irrespective of the framing of Dr. Yost's argument in contract terms.[78]

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[65] *Id.* at 1012–13.
[66] *Id.* at 1015–16.
[67] *Id.* at 1013–14.
[68] *Id.*
[69] *Id.* at 1016.
[70] *Id.* at 1018.
[71] *Id.* at 1016, 1018.
[72] 234 P.3d 1264 (Alaska 2010).
[73] *Id.* at 1272.
[74] *Id.* at 1267.
[75] *Id.* at 1273.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 1273–74.

BUSINESS LAW

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Alaska Supreme Court

Holmes v. Wolf

In *Holmes v. Wolf*,[79] the supreme court held that when a court finds that a corporation's directors have breached their fiduciary duty, the shareholders are not automatically entitled to an award of nominal damages.[80] Holmes, a shareholder of Lesnoi, Inc., joined as a plaintiff in a derivative shareholder lawsuit against three of Lesnoi's five directors.[81] Holmes claimed, *inter alia*, that the directors had failed to obtain and send out audited financial reports.[82] The superior court concluded that the directors had breached their fiduciary duty by failing to inform themselves about the federal audit requirement.[83] On appeal, Holmes argued that the superior court erred in not awarding nominal damages after finding the directors had breached their fiduciary duty.[84] Because the superior court found that the directors acted in good faith and in the interest of Lesnoi, the supreme court held that failing to award nominal damages was not an abuse of discretion.[85] Affirming the lower court, the supreme court held that when a court finds that a corporation's directors have breached their fiduciary duty, the shareholders are not automatically entitled to an award of nominal damages.[86]

CIVIL PROCEDURE

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United States District Court for the District of Alaska

Dietzmann v. United States

In *Dietzmann v. United States*,[87] a magistrate judge held that the U.S. Department of Justice (DOJ) is not relieved from compliance with a previous order that required representatives from both parties be present at a settlement conference.[88] The judge previously ordered that every party have a representative, with full authority to settle claims, present at the settlement conference.[89] Ten days before the conference, DOJ stated that it would not have anyone in attendance with full authority to settle because only high-ranking officials had that authority and requiring a high-ranking official to attend would create a hardship.[90] The court noted that DOJ had notice of the settlement

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[79] 243 P.3d 584 (Alaska 2010).
[80] *Id.* at 590.
[81] *Id.* at 586.
[82] *Id.*
[83] *Id.* at 589.
[84] *Id.*
[85] *Id.* at 590.
[86] *Id.*
[87] No. 3:09-CV-0019-RJB, 2010 U.S. Dist. LEXIS 133445 (D. Alaska Dec. 3, 2010).
[88] *Id.* at *18.
[89] *Id.* at *6–7.
[90] *Id.* at *8–10.

conference.[91] The court also noted that DOJ only cited its own regulations—not a statute—for the proposition that only high-ranking officials have the authority to settle large cases.[92] The court concluded that it has the power to review DOJ's regulations and to require that someone with full authority to settle claims be present at a settlement conference.[93] Thus, the magistrate judge held that DOJ is not relieved from compliance with a previous order that required representatives from both parties be present at a settlement conference.[94]

Alaska Supreme Court

Anderson v. Alyeska Pipeline Service Co.

In *Anderson v. Alyeska Pipeline Service Co.*,[95] the supreme court held that the operator of a pipeline pump station was a "project owner" under the exclusive liability provision of the Workers' Compensation Act and was therefore immune from suit, but that an offer of judgment in the amount of ten dollars was a nominal offer and did not trigger the application of Alaska Civil Rule 68.[96] Anderson was injured at work, received workers' compensation benefits, and filed a negligence action against Alyeska Pipeline Service (Alyeska) under the theory that Alyeska was not a statutory employer and should not be immune from suit under the Alaska Workers' Compensation Act.[97] Alyeska responded, highlighting 2004 changes to the exclusive liability provisions of Alaska's Workers' Compensation Act that showed a strong likelihood that Alyeska would be considered a "project owner."[98] Alyeska then made an offer of judgment for ten dollars, which Anderson rejected.[99] When the superior court dismissed Anderson's claim, Alyeska was granted attorneys' fees.[100] Anderson appealed the summary judgment and the award of attorneys' fees.[101] The court found, based on the legislative history of the 2004 changes and the statutory definition of "project owner," that Alyeska clearly met the definition of "project owner" and was covered by the exclusive liability provisions of AS 23.30.055 and that the superior court was correct in granting summary judgment for Alyeska.[102] However, the court acknowledged, and left open, the "difficult hypothetical examples" raised by Anderson about the potential for small businesses to abuse the exclusive liability provisions through the use of contractors.[103] Finally, the court held that a ten-dollar offer, made at the outset of a case that presented a novel legal question, did not serve the purpose of Rule 68 to encourage settlement and should be considered nominal.[104] The supreme court affirmed the superior court decision that the operator of a

[91] *Id.* at *10–11.
[92] *Id.* at *15–17.
[93] *Id.* at *14–17.
[94] *Id.* at *18.
[95] 234 P.3d 1282 (Alaska 2010).
[96] *Id.* at 1288, 1289–90.
[97] *Id.* at 1284.
[98] *Id.* at 1285.
[99] *Id.*
[100] *Id.* at 1285–86.
[101] *Id.* at 1286.
[102] *Id.* at 1288.
[103] *Id.*
[104] *Id.* at 1289.

pipeline pump station was a "project owner" under the exclusive liability provision of the Workers' Compensation Act and was therefore immune from suit but reversed and remanded the lower court's Rule 68 attorney's fee award, holding that an offer of judgment in the amount of ten dollars was a nominal offer and did not trigger the application of Rule 68.[105]

Angleton v. Cox

In *Angleton v. Cox*,[106] the supreme court held that members of a nonprofit organization did not have the right to bring a derivative action.[107] Following suspension of several members of various lodges, members of a fraternal organization brought suit against other members asserting claims for breach of settlement agreement and a derivative action on behalf of the organization.[108] The superior court dismissed the derivative suit.[109] On appeal, the supreme court held the derivative action was appropriately dismissed because Alaska law does not recognize a derivative right of action for members of nonprofit organizations.[110] Affirming the dismissal of the derivative action, the supreme court held that members of a nonprofit organization did not have the right to bring a derivative action.[111]

Armstrong v. Tanaka

In *Armstrong v. Tanaka*,[112] the supreme court held that a balancing test is required to weigh the parties' interests and to determine whether stay is appropriate when an individual facing criminal charges brings a civil action and either party requests a stay of civil proceedings pending resolution of criminal charges.[113] Tanaka reported Armstrong to the police after Armstrong gave Tanaka's son an explicitly sexual and violent book.[114] The police obtained a warrant to search Armstrong's home and workplace and eventually charged Armstrong with several counts of felony possession and distribution of child pornography.[115] After criminal charges were filed, Armstrong initiated a defamation suit against Tanaka.[116] Armstrong refused to answer several deposition questions on the basis that they violated his right against self incrimination and he moved to stay civil proceedings pending the resolution of criminal charges.[117] The superior court dismissed the civil suit and awarded Tanaka attorneys' fees.[118] The supreme court held that applying a balancing test best safeguards a criminal defendant's right against self-incrimination and right to due process while maintaining a civil defendant's right to

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[105] *Id.* at 1288, 1289–90.
[106] 238 P.3d 610 (Alaska 2010).
[107] *Id*. at 614–618.
[108] *Id*. at 611–612.
[109] *Id*. at 611.
[110] *Id*.
[111] *Id*. at 614–618.
[112] 228 P.3d 79 (Alaska 2010).
[113] *Id.* at 85.
[114] *Id.* at 81.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 82.

defend himself.[119] The court remanded the case and held that a balancing test is required to weigh the parties' interests and to determine whether stay is appropriate when an individual facing criminal charges brings a civil action and either party requests a stay of civil proceedings pending resolution of criminal charges.[120]

Berg v. Vandervest

In *Berg v. Vandervest*,[121] the supreme court held that when a pro se litigant makes a clear effort to comply with court procedure, the court has an obligation to inform him of the procedural steps necessary to achieve his obvious objective.[122] Due to a mistake in Berg's preparation of his 2007 taxes, the Child Support Services Division ("CSSD") complied with his request to submit a motion to modify his child support payments.[123] Berg submitted a memorandum and affidavit in support of the motion, as well as a motion to vacate his 2006 child support order.[124] However, after receiving additional information from Berg's ex-wife, the CSSD withdrew its motion,[125] and the superior court took no further action on his memorandum and affidavit.[126] The court considered Berg's motion to vacate as a relief from judgment.[127] However, the court denied his motion due to untimeliness.[128] After the CSSD withdrew its motion, Berg had no vehicle to achieve the payment modification himself.[129] Since his submitted materials made it clear that his goal was to modify his payments,[130] and he was operating in good faith,[131] the supreme court determined that the superior court should have either interpreted Berg's accompanying memorandum and affidavit in a way that would have survived the withdrawal of the CSSD motion or provided him information about how to file his own motion.[132] Remanding, the supreme court held that when a pro se litigant makes a clear effort to comply with court procedure, the court has an obligation to inform him of the procedural steps necessary to achieve his obvious objective.[133]

Bolden v. State, Department of Corrections

In *Bolden v. State*,[134] the supreme court held that because it was unclear whether a prisoner's claim was an administrative appeal or a claim for damages under 42 U.S.C. § 1983, the superior court erred in dismissing the claim without notice or an opportunity to clarify the nature of the claim.[135] Bolden, a prisoner at the Fairbanks Correctional Center

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[119] *Id.* at 85.
[120] *Id.*
[121] No. S-13136, No. 1364, 2010 Alas. LEXIS 60 (Alaska Jun. 23, 2010).
[122] *Id*. at *11.
[123] *Id*. at *4–5.
[124] *Id*. at *6–7.
[125] *Id*.
[126] *Id*. at *7-8.
[127] *Id*. at *8.
[128] *Id*. at *8.
[129] *Id*. at *11.
[130] *Id*. at *12.
[131] *Id*. at *14.
[132] *Id*.
[133] *Id*. at *11.
[134] No. S-12925, 2010 Alas. LEXIS 75 (Alaska Jul. 14, 2010).
[135] *Id.* at *14.

("FCC"), filed a grievance against the FCC asserting that his Eighth Amendment rights had been violated when his toilet overflowed, ruining the cast on his injured leg, and he was forced to remain in his cell overnight without getting a new cast.[136] Bolden's grievance was denied by the FCC, as was his subsequent appeal to the Director of Institutions.[137] He filed a pro se claim with the superior court, which, *sua sponte*, interpreted Bolden's claim as an administrative appeal and dismissed it for lack of subject matter jurisdiction.[138] On appeal, Bolden argued that the dismissal violated due process; that the superior court did have subject matter jurisdiction, and that his treatment in his cell did raise an Eighth Amendment constitutional issue.[139] The court found elements of a § 1983 claim based on the Eighth Amendment, but it was unclear that this was what Bolden intended because the superior court dismissed the action without affording Bolden an opportunity to be heard.[140] Reversing the lower court, the supreme court held that because it was unclear whether a prisoner's claim was an administrative appeal or a claim for damages under 42 U.S.C. § 1983, the superior court erred in dismissing the claim without notice or an opportunity to clarify the nature of the claim.[141]

Bradshaw v. State, Department of Administration

In *Bradshaw v. State, Department of Administration*,[142] the supreme court held that Alaska's ten-year statute of limitations does not bar the Alaska Division of Motor Vehicles (DMV) from charging a $100 statutory fee to reinstate a driver's license.[143] Bradshaw's license was suspended in 1995.[144] In 2007, Bradshaw applied to have his license reinstated and the DMV charged him a $100 statutory reinstatement fee.[145] Bradshaw sued, arguing that the ten-year statute of limitations barred the DMV from charging the fee.[146] The supreme court affirmed the grant of summary judgment to the State,[147] holding that a government agency's charging of a fee is not an "action for a cause" subject to the statute of limitations.[148] The court also held that the DMV properly charged Bradshaw the fee because the statute applies to the status of suspension and not the initial act of suspension.[149] Affirming the lower court, the supreme court held that Alaska's ten-year statute of limitations does not bar the DMV from charging a $100 statutory fee to reinstate a driver's license.[150]

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[136] *Id.* at *1–2.
[137] *Id.* at *2–3.
[138] *Id.* at *4–5.
[139] *Id.* at *7.
[140] *Id.* at *10, *14.
[141] *Id.* at *14.
[142] 224 P.3d 118 (Alaska 2010).
[143] *Id.* at 120–21.
[144] *Id.* at 120.
[145] *Id.* at 121.
[146] *Id.* at 121–22.
[147] *Id.* at 120.
[148] *Id.* at 122–23.
[149] *Id.* at 123–26.
[150] *Id.* at 120–21.

Hertz v. Carothers

In *Hertz v. Carothers*,[151] the supreme court held that: (1) the execution of a judgment is void if improperly served even when the debtor had actual knowledge of the execution; and (2) section 09.08.030(f)(5) of the Alaska Statute does not conflict with section 33.30.201(d) of the Alaska Statute.[152] The state attempted to execute a judgment for attorneys' fees against Hertz, a state prisoner, by levying Hertz's prisoner trust account.[153] Hertz had actual knowledge of the execution and the state served Hertz with a faxed copy of the judgment delivered by a prison guard.[154] Hertz claimed he was improperly served and that section 09.08.030(f)(5) was invalid.[155] Alaska Rule of Civil Procedure 4 governs personal service and requires service to be made by a peace officer or a person specially designated to serve notice.[156] The supreme court held that the service violated civil rule 4, reasoning that strict adherence to the service rules was needed to protect the due process rights of litigants and debtors even when the debtor was not prejudiced by the error.[157] Section 09.08.030(f)(5) explains that prisoners do not receive protection from judgments that low-wage earners receive.[158] Section 33.30.201(d) provided for prisoners' wages to be placed in a trust account for the primary purpose of being available for prisoners.[159] Section 33.30.201 also identified the protocol for how prisoners' wages should be disbursed, including for the execution of judgments.[160] The supreme court reasoned that both statutes accommodated the execution of a judgment against prisoners' trust account and thus do not conflict.[161] Reversing the lower court, the supreme court held that: (1) the execution of a judgment is void if improperly served even when the debtor had actual knowledge of the execution; and (2) section 09.08.030(f)(5) of the Alaska Statute does not conflict with section 33.30.201(d) of the Alaska Statute.[162]

Hertz v. State, Department. of Corrections

In *Hertz v. State, Department of Corrections*, [163] the supreme court held that the Alaska Prison Litigation Reform Act ("APLRA") did not violate due process when barring an inmate's claim for reinstatement of gate money.[164] Hertz, a prisoner, filed a complaint claiming that the department of corrections had violated a 1990 Final Settlement Agreement ("FSA") when it decided to stop paying "gate money" to all prisoners upon release.[165] The superior court denied his claim, finding that Hertz had

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[151] 225 P.3d 571 (Alaska 2010).
[152] *Id.* at 572.
[153] *Id.* at 573.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 574.
[157] *Id.*
[158] *Id.* at 575.
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 572.
[163] 230 P.3d 663 (Alaska 2010).
[164] *Id*. at 665.
[165] *Id*. at 666.

failed to state a right to gate money as required by the APLRA.[166] On appeal, Hertz argued that the FSA was a contract which created a right to gate money and he demanded continued prospective enforcement.[167] The supreme court rejected Hertz's argument and affirmed the lower court, reasoning that it was not the intentions of the parties to guarantee that all of the FSA's provisions would continue indefinitely.[168] Additionally, the supreme court held that the APLRA's termination of prospective enforcement did not violate property rights.[169] Affirming the lower court, the supreme court held that the APLRA did not violate due process when barring an inmate's claim for reinstatement of gate money.[170]

Johnson v. Johnson

In *Johnson v. Johnson*,[171] the supreme court held that it was improper to award full attorneys' fees in a divorce case when the former husband raised potentially meritorious claims in several motions and did not act in bad faith.[172] The lower court, applying Alaska Civil Rule 82, awarded full attorneys' fees to Ms. Johnson at the end of the Johnsons' divorce proceedings.[173] Because Mr. Johnson's claims were not completely devoid of legal or factual merit, they did not support a finding that he made his motions in bad faith.[174] The supreme court held that it was improper to award full attorneys' fees in a divorce case when the former husband raised potentially meritorious claims in several motions and did not act in bad faith.[175]

Krause v. Matanuska-Susitna Borough

In *Krause v. Matanuska-Susitna Borough*,[176] the supreme court held (1) while damages are not available for constitutional claims, declaratory or injunctive relief is an appropriate and traditional relief from an unconstitutional statute, and (2) a motion for leave to amend a complaint to apply equitable tolling should be granted unless the claim is legally insufficient on its face.[177] The Krauses objected to a decision made by the Mat-Su Borough that made access to and from their property difficult and dangerous.[178] After unsuccessful negotiations with the Borough and landowners, the Krauses filed a complaint with the superior court alleging a violation of a Mat-Su Borough Ordinance and violation of their equal protection and due process rights.[179] The superior court dismissed their constitutional claims, ruling that this claim is unavailable when there is alternative relief, and it dismissed the rest of the claims as being time-barred.[180] The

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[166] *Id.*
[167] *Id*. at 667.
[168] *Id.* at 670.
[169] *Id*. at 669–70.
[170] *Id*. at 665.
[171] 239 P.3d 393 (Alaska 2010).
[172] *Id.* at 401–03.
[173] *Id.* at 397.
[174] *Id.* at 403.
[175] *Id.* at 401.
[176] 229 P.3d 168 (Alaska 2010).
[177] *Id.* at 175–176.
[178] *Id.* at 171.
[179] *Id.*
[180] *Id.* at 171–73.

Krauses then appealed.[181] The supreme court reaffirmed the unavailability of a constitutional claim for damages when alternative remedies are available, but reversed the lower court's ruling on declaratory and injunctive relief. It found these types of relief are "traditional" and "particularly appropriate" where constitutional rights were allegedly violated.[182] The court also reversed the lower court's denial of the Krauses' motion for leave to amend because leave should be freely given unless the amendment would be futile.[183] Reversing the superior court, the supreme court held (1) while damages are not available for constitutional claims, declaratory or injunctive relief is an appropriate and traditional relief from an unconstitutional statute, and (2) a motion for leave to amend a complaint to apply equitable tolling should be granted unless the claim is legally insufficient on its face.[184]

Law Project for Psychiatric Rights, Inc. v. State

In *Law Project for Psychiatric Rights, Inc. v. State*,[185] the supreme court held that a public interest law firm lacked standing to bring a suit on behalf of minors who were compelled to take psychotropic drugs.[186] The Law Project for Psychiatric Rights (LPPR) filed suit against the State, seeking declaratory and injunctive relief regarding minors' rights in compelled psychotropic administration.[187] The State moved for judgment on the pleadings and to stay discovery, arguing that LPPR lacked standing for failing to "identify a single individual who has been harmed by the alleged violations."[188] LPPR argued that it satisfied citizen-taxpayer standing.[189] The superior court granted both of the State's motions, reasoning that LPPR "failed to establish any parent or guardian with a legitimate grievance on behalf of their . . . child," and awarded the State attorneys' fees.[190] The supreme court reasoned that LPPR did not establish standing because it had failed to demonstrate that the issues raised were of public significance or that it was an appropriate litigant.[191] Affirming the superior court, the supreme court held that a public interest law firm lacked standing to bring a suit on behalf of minors who were compelled to take psychotropic drugs.[192]

Mat-Su Regional Medical Center v. Burkhead

In *Mat-Su Regional Medical Center v. Burkhead*,[193] the supreme court held that patients cannot assign their personal injury claims to health care providers so they may not intervene or bring actions on behalf of patients.[194] Burkhead was injured by Voss in a

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[181] *Id.* at 173–74.
[182] *Id.* at 175.
[183] *Id.* at 176.
[184] *Id.* at 175–176.
[185] 239 P.3d 1252 (Alaska 2010).
[186] *Id.* at 1256.
[187] *Id.* at 1254.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* at 1255–56.
[192] *Id.* at 1256.
[193] 225 P.3d 1097 (Alaska 2010).
[194] *Id.* at 1104.

car accident and received medical treatment at Mat-Su.[195] During the course of her treatment, Burkhead signed consent forms assigning all her claims for payment against third parties to the hospital, which also recorded a lien against Burkhead.[196] Mat-Su then brought an action against Voss to recover the cost of Burkhead's treatment.[197] The superior court granted summary judgment against Mat-Su, holding that the lien remedy in section 34.35.475 of the Alaska Statute was Mat-Su's exclusive remedy in such situations.[198] On appeal, Mat-Su argued that assignation of personal injury claims was a common law remedy for which it did not need statutory authorization[199] and that Alaska's lien statute did not prohibit such assignations.[200] The supreme court reasoned that the legislature could have adopted a statutory assignment remedy as it did in other areas of tort law but instead chose to create the lien remedy,[201] and that if it did recognize assignment of personal injury claims to healthcare providers, there would be an increased risk of patients assigning their claims under duress or without informed consent.[202] In addition, assignments are less necessary because health care providers are still able to collect money from their patients as creditors.[203] Affirming the lower court, the supreme court held that patients cannot assign their personal injury claims to health care providers so they may not intervene and bring actions on behalf of patients.[204]

Mullins v. Local Boundary Commission

In *Mullins v. Local Boundary Commission*,[205] the supreme court held that a lawsuit seeking a stay of an election may be dismissed as moot when the result of the election obviates the need for judicial review of the claim.[206] In such cases, only declaratory relief is available and relief is unnecessary because similar claims will frequently receive judicial review.[207] Mullins appealed a decision by the Local Boundary Commission ("LBC") approving a petition to incorporate and sought an injunction to stay a public referendum necessary to certify the approval of LBC.[208] The voters rejected the proposed incorporation.[209] Mullins appealed to the supreme court.[210] The supreme court found that, although the superior court abused its discretion by failing to grant Mullins the full time period to which she was entitled to file her response to LBC's motion to dismiss, she was not prejudiced by the abuse because the superior court ultimately considered her motion for reconsideration and because the supreme court reviewed her

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[195] *Id.* at 1099.
[196] *Id.*
[197] *Id.*
[198] *Id.* at 1100.
[199] *Id.* at 1101.
[200] *Id.* at 1102–03.
[201] *Id.* at 1102.
[202] *Id.* at 1104.
[203] *Id.*
[204] *Id.*
[205] 226 P.3d 1012 (Alaska 2010).
[206] *Id.* at 1014.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 1014–15.
[210] *Id.* at 1015–17.

substantive objections *de novo*.[211] The supreme court held that the election had rendered her claims against LBC moot, and that the public interest exception did not permit the court to rule here because any future misconduct by LBC would likely be challenged in court.[212] Affirming the superior court, the supreme court held that a lawsuit seeking a stay of an election may be dismissed as moot when the result of the election obviates the need for judicial review of the claim.[213]

Okagawa v. Yaple

In *Okagawa v. Yaple*,[214] the supreme court held that, under Alaska Rule of Civil Procedure 68, an award of attorneys' fees based on reasonable hourly rates is permissible even when a previous contingency agreement exists.[215] Yaple won damages from Okagawa in a tort suit and received attorneys' fees based on an hourly rate under Rule 68.[216] Okagama argued that Yaple was not entitled to attorneys' fees because he had a contingency fee agreement and that the fees were unreasonable.[217] The supreme court held that it is permissible to award attorneys' fees even if a contingency fee agreement is in place.[218] The court also held that the trial court did not abuse its discretion in awarding attorneys' fees based on the nature and length of the case.[219] The award should be based on the value of the services rendered, not on a previous agreement.[220] Affirming the lower court, the supreme court held that, under Alaska Rule of Civil Procedure 68, an award of attorneys' fees based on reasonable hourly rates is permissible even when a previous contingency agreement exists.[221]

Roderer v. Dash

In *Roderer v. Dash*,[222] the supreme court held that dismissal, judgment notwithstanding the verdict, and a new trial are inappropriate sanctions for a party that failed to timely file an expert witness report where the violation was not willful, where there was little resulting prejudice to the other litigant, and where the nonconforming party ultimately filed the appropriate report.[223] Dash sued Roderer for medical malpractice.[224] Roderer moved to dismiss when Dash's attorney failed to file an expert report by the pre-trial deadline, even though Dash's attorney filed a "working draft" of the report.[225] The superior court denied the motion, but issued an order requiring Dash's attorney to pay a sanction.[226] Dash was awarded damages; Roderer moved for judgment

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[211] *Id.* at 1016.
[212] *Id.* at 1017–20.
[213] *Id.* at 1014.
[214] 234 P.3d 1278 (Alaska 2010).
[215] *Id.* at 1281.
[216] *Id.* at 1279.
[217] *Id.* at 1282.
[218] *Id.* at 1281.
[219] *Id.* at 1282.
[220] *Id.* at 1280–81.
[221] *Id.* at 1281.
[222] 233 P.3d 1101 (Alaska 2010).
[223] *Id.* at 1106–11.
[224] *Id.* at 1103–05.
[225] *Id.* at 1104–05.
[226] *Id.*

not withstanding the verdict and, in the alternative, a new trial.[227] The superior court denied these requests and Roderer appealed.[228] The supreme court affirmed the denial because it was not "arbitrary, capricious, manifestly unreasonable" or the result of an "improper motive" and because the circumstances of the discovery violation were not sufficiently extreme to warrant dismissal.[229] The denial of Roderer's motion for a directed verdict was also upheld because Roderer's counsel failed to move for a directed verdict at the close of evidence, pursuant to Alaska Civil Rule 50(b).[230] Affirming the superior court, the supreme court held that dismissal, judgment notwithstanding the verdict, and a new trial are inappropriate sanctions for a party that failed to timely file an expert witness report where the violation was not willful, where there was little resulting prejudice to the other litigant, and where the nonconforming party ultimately filed the appropriate report.[231]

Schofield v. City of St. Paul

In *Schofield v. City of St. Paul*,[232] the supreme court held that it is generally acceptable to exclude the results of an investigation by the district attorney or Police Standards Counsel, but it is an abuse of discretion to exclude statements made during the course of an investigation that potentially go to the core of an individual's claim.[233] Schofield, a police officer in St. Paul, met with the Chief of Police after evidence arose that he was married to two women.[234] Because of the meetings, Schofield resigned.[235] In 2006, Schofield filed suit alleging wrongful termination and constructive discharge.[236] The jury found no constructive discharge.[237] On appeal, Schofield argued that the superior court improperly excluded the content of the meetings from evidence.[238] The supreme court reversed the lower court, reasoning that because Schofield had resigned immediately after the meetings, the content was extremely relevant and the relevance outweighed any potential to mislead.[239] Furthermore, the court found that because Schofield was alleging constructive termination stemming from the meetings, the content could corroborate his key claim, and because admitting the content of the meetings did not require admitting the results of the investigation, the exclusion was sufficiently prejudicial to constitute a reversible error.[240] The supreme court held that it is generally acceptable to exclude the results of an investigation by the district attorney or Police Standards Counsel, but it is an abuse of discretion to exclude statements made during the course of an investigation that potentially go to the core of an individual's claim.[241]

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[227] *Id.* at 1105.
[228] *Id.* at 1105–06.
[229] *Id.* at 1107.
[230] *Id.* at 1108.
[231] *Id.* at 1106–11.
[232] 238 P.3d 603 (Alaska 2010).
[233] *Id.* at 608.
[234] *Id*. at 605.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 606.
[238] *Id.* at 606–07.
[239] *Id.* at 608–10.
[240] *Id.* at 608–09.
[241] *Id.* at 608.

Schug v. Moore

In *Schug v. Moore*,[242] the supreme court held that discretionary acts made by the assistant attorney general, while working within the scope of authority as assistant attorney general, were protected by official immunity.[243] Schug, after an unsuccessful suit against the Alaska Department of Corrections (DOC) for alleged personal injury while in DOC custody, filed a claim against Moore, the Assistant Attorney General, for "attorney malpractice" stemming from her role as defense attorney for DOC in Schug's case.[244] Moore filed a motion for summary judgment, which the superior court granted on the grounds that Moore had absolute immunity and that Schug's claims were "unsustainable as a matter of law."[245] The supreme court first determined that the complaints against Moore involved actions taken by Moore in her official capacity as Assistant Attorney General.[246] The court then found that Moore's actions were discretionary, thereby triggering official immunity.[247] Because Schug offered no evidence that Moore acted "corruptly, maliciously, or in bad faith," the court did not determine whether Moore's immunity was absolute or qualified.[248] Affirming the lower court, the supreme court held that discretionary acts made by the assistant attorney general, while working within the scope of authority as assistant attorney general, were protected by official immunity.[249]

Shooshanian v. Dire

In *Shooshanian v. Dire*,[250] the supreme court held that: (1) refusal to grant a continuance is valid when there is no "weighty reason" for a continuance; (2) it is not an abuse of discretion when a court does not inform a pro se litigant as to each step in litigating a claim; (3) an attorney is not a necessary witness at trial when his pretrial involvement is not material to the disputed facts; and (4) a tenant may be evicted when he has an option right to purchase the residence if a further contract is necessary to accomplish the purchase.[251] Shooshanian attempted to exercise an option right to purchase a condo that he had rented for several years.[252] In response, the property owner informed Shooshanian the property price had increased and accordingly tried to collect back rent.[253] Nearly a year later, the owner attempted to evict Shooshanian, and the matter was transferred to superior court because of Shooshanian's assertion he held "two option to buy leases."[254] Shooshanian's motion for a continuance was denied, and Shooshanian appealed when the superior court granted the owner judgment for possession. Affirming the lower court, the supreme court held that: (1) refusal to grant a continuance is valid when there is no "weighty reason" for a continuance; (2) it is not an

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[242] 233 P.3d 1114 (Alaska 2010).
[243] *Id.* at 1117.
[244] *Id.* at 1116.
[245] *Id.*
[246] *Id.* at 1117.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] 237 P.3d 618 (Alaska 2010).
[251] *Id.* at 622–27.
[252] *Id.* at 621.
[253] *Id.*
[254] *Id.*

abuse of discretion when a court does not inform a pro se litigant as to each step in litigating a claim; (3) an attorney is not a necessary witness at trial when his pretrial involvement is not material to the disputed facts; and (4) a tenant may be evicted when he has an option right to purchase the residence if a further contract is necessary to accomplish the purchase.[255]

Smallwood v. Central Peninsula General Hospital, Inc.

In *Smallwood v. Central Peninsula General Hospital, Inc.*,[256] the supreme court held that the superior court is without jurisdiction to substitute parties or dismiss a case while it is on appeal.[257] The supreme court also held that a plaintiff does not abandon his claim when he has won an injunction but fails to contest whether the defendant has complied with the injunction.[258] Smallwood won an injunction ordering Central Peninsula General Hospital to stop "balance billing" Medicaid patients, but when the hospital submitted an affidavit describing the procedures enacted to avoid balance billing, Smallwood did not dispute the affidavit.[259] The supreme court held that because Smallwood already obtained an injunction, he did not abandon his claim merely by failing to contest the hospital's compliance with the injunction.[260] Smallwood passed away while the case was on appeal.[261] The superior court dismissed the case because another plaintiff was not substituted for Smallwood within ninety days, as required by Alaska Civil Rule 25(a)(1).[262] The supreme court stated that once a notice of appeal is filed, the appellate court holds the "supervision and control" of the proceedings.[263] Therefore, superior courts lack jurisdiction to order substitution of parties, or dismissal due to the death of parties while cases are on appeal.[264] Thus, the supreme court held that the superior court is without jurisdiction to substitute parties or dismiss a case while it is on appeal.[265]

State Dep't of Corr. v. Anthoney

In *State Department of Corrections v. Anthoney*,[266] the supreme court upheld a superior court ruling that designated an inmate as the "prevailing party" in a litigation because he prevailed on the main issue and affirmed the superior court's award of costs to the inmate.[267] Anthoney, an inmate at Spring Creek Correctional Center ("SCCC"), was involved in an altercation while working in the kitchen.[268] Anthoney claimed before the SCCC disciplinary committee that he did not strike the other inmate who was involved in the incident and that security camera footage and eyewitness testimony would

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[255] *Id.* at 622–27.
[256] 227 P.3d 457 (Alaska 2010).
[257] *Id.* at 460.
[258] *Id.* at 459.
[259] *Id.*
[260] *Id.* at 460.
[261] *Id.* at 459.
[262] *Id.*
[263] *Id.* at 459–60.
[264] *Id.* at 460.
[265] *Id.* at 459.
[266] 229 P.3d 164 (Alaska 2010).
[267] *Id.* at 167–68.
[268] *Id.* at 165.

confirm his story.[269] However, the committee did not review the footage or hear any witness testimony and convicted Anthoney for "mutual combat."[270] Anthoney appealed his conviction to the superior court and argued that he was convicted of a more severe charge than the one of which he was actually guilty.[271] The court reduced his conviction to "using abusive or obscene language" and declared him to be the prevailing party in addition to awarding him costs of $411.44 on his motion for the same.[272] The State appealed his designation as the prevailing party and the award of costs and argued that Anthoney did not prevail on the main issue because he was still guilty of violating correctional rules.[273] The supreme court affirmed the superior court's holding that a prevailing party is the party that identifies and prevails on the main issue of the litigation.[274]

Weimer v. Continental Car & Truck, LLC

In *Weimer v. Continental Car & Truck, LLC*,[275] the supreme court held that the statute of limitations of Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss.[276] Weimer brought a class action suit against an automobile dealership more than two years after purchasing his car, alleging that the dealership charged him a last minute preparation fee in violation of UTPA.[277] The UTPA statute of limitation provides that "[a] person may not commence an action under this section more than two years after the person discovers or reasonably should have discovered that the loss resulted from an act or practice declared unlawful by [UTPA].[278] Although Weimer did not know that the dealership's act was unlawful until after more than two years,[279] the supreme court held that the language of the statute made clear that the limitations period begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss; the supreme court rejected Weimer's assertion that the statute of limitations begins to toll when a plaintiff learns that the conduct was illegal.[280] Affirming the superior court, the supreme court held that the statute of limitations of Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) begins to run when the plaintiff discovers, or reasonably should have discovered, that the conduct in question caused a loss.[281]

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[269] *Id.*
[270] *Id.*
[271] *Id.* at 166.
[272] *Id.*
[273] *Id.* at 166–67.
[274] *Id.*
[275] 237 P.3d 610 (Alaska 2010).
[276] *Id.* at 614.
[277] *Id.* at 612.
[278] ALASKA STAT. § 45.50.471(f) (2010).
[279] 237 P.3d at 611.
[280] *Id.* at 614.
[281] *Id.* at 614.

United States Court of Appeals for the Ninth Circuit

Kirk v. Carpeneti

In *Kirk v. Carpeneti*,[282] the Ninth Circuit held that the nomination of state judges by a judicial council that is not popularly elected does not violate the Equal Protection Clause of the U.S. Constitution.[283] In Alaska, judges are nominated by a council that consists of the chief justice of the state supreme court, three lay members, and three attorney members elected by the Board of Governors of the Alaska Bar Association.[284] The plaintiffs alleged that the nomination of judges by a non-elected body violates the Equal Protection Clause.[285] The court reasoned that the Alaska Bar Association is a "limited purpose entity" since it has no power to impose taxes or to enact laws,[286] so its elections are not governed by the Equal Protection principle that citizens must be able to participate in elections on equal footing.[287] Thus, the Ninth Circuit held that the nomination of state judges by a judicial council that is not popularly elected does not violate the Equal Protection Clause of the U.S. Constitution.[288]

Alaska Supreme Court

Croft v. Parnell

In *Croft v. Parnell*,[289] the supreme court held that a ballot initiative that proposes a new government program and a new tax violates article II, section 13 of the Alaska Constitution when the only connection between the program and the tax is the "soft dedication" of the tax to fund the program.[290] The Lieutenant Governor denied certification to a ballot initiative proposing: (1) a program that would provide public funding to state office candidates and (2) a tax on oil that the legislature "may appropriate" for the campaign finance program.[291] The initiatives' sponsors sued, and the superior court granted summary judgment to The Lieutenant Governor.[292] On appeal, the sponsors argued that the initiative did not violate the Alaska Constitution's single-subject rule because the tax was calibrated to collect the amount of revenue necessary to fund the campaign finance program and because there was a "soft dedication" of the tax to the program.[293] The supreme court reasoned that because article IX, section 7 of the Alaska Constitution prohibits the binding dedication of state revenues for certain programs, a

[282] 623 F.3d 889 (9th Cir. 2010).
[283] *Id.* at 896.
[284] *Id.* at 891.
[285] *Id.*
[286] *Id.* at 896 –98.
[287] *See id.* at 896.
[288] *Id.*
[289] 236 P.3d 369 (Alaska 2010).
[290] *Id.* at 370–74.
[291] *Id.* at 370–71.
[292] *Id.* at 371.
[293] *Id.* at 371–72.

"soft dedication" of funds is not enough to unite two provisions of an initiative into a single subject.[294] Because there was no single subject embracing both the campaign finance program and the oil tax, the certification was correctly denied.[295] Affirming the lower court, the supreme court held that a ballot initiative that proposes a new government program and a new tax violates article II, section 13 of the Alaska Constitution when the only connection between the program and the tax is the "soft dedication" of the tax to fund the program.[296]

Kohlhaas v. State, Office of the Lieutenant Governor

In *Kohlhaas v. State, Office of the Lieutenant Governor*,[297] the supreme court held that a ballot initiative may be denied if it either seeks secession from the Union or a change to the Alaska Constitution to allow secession.[298] Kohlhaas proposed an initiative seeking a statewide vote on whether Alaska should secede from the United States and the lieutenant governor refused to certify it.[299] Kohlhaas challenged the decision, and the superior court held that the refusal was proper because secession is an unconstitutional end.[300] Kohlhaas drafted a second initiative calling for a statewide vote on whether the Alaska Constitution should be changed to allow secession.[301] The lieutenant governor again refused to certify the initiative and the superior court affirmed the decision.[302] Kohlhaas appealed and the supreme court affirmed the superior court's decision on two grounds.[303] First, the state may deny a proposed initiative seeking unconstitutional ends because Alaska is committed to an "indestructible Union" and to upholding the United States Constitution.[304] Because secession was at the core of Kohlhaas's second initiative, it too was unconstitutional and an "improper subject for the initiative process."[305] Affirming the lower court, the supreme court held that a ballot initiative may be denied if it either seeks secession or a change to the Alaska Constitution to allow secession.[306]

West v. State, Board of Game

In *West v. State, Board of Game*,[307] the supreme court held that the "sustained yield clause" of the Alaska Constitution and the "intensive game management statute" require the Board of Game (Board) to apply principles of sustained yield when managing predator species.[308] West filed suit to challenge the Board's 2006 predator control plans.[309] The supreme court first held that, based on the history and plain language of the

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[294] *Id.* at 373–74.
[295] *Id.* at 374.
[296] *Id.* at 370–74.
[297] 223 P.3d 105 (Alaska 2010).
[298] *Id.* at 113.
[299] *Id.* at 106.
[300] *Id.*
[301] *Id.*
[302] *Id.*
[303] *Id.* at 113.
[304] *Id.* at 110, 112.
[305] *Id.* at 110–11.
[306] *Id.* at 113.
[307] No. 6497, 2010 Alas. LEXIS 80 (Alaska Aug. 6, 2010).
[308] *Id.* at *2.
[309] *Id.* at *8.

sustained yield clause, the clause applies to both predator and prey species; however, management preference to prey populations over predator populations is not unconstitutional.[310] Next, the court held that, based upon the text of the intensive game management statute and the preference for statutory construction consistent with constitutional principles, the sustained yield principle in the intensive management statute applies to predator species.[311] However, because the Board's 2006 predator control plans include safeguards to ensure that predator populations do not fall below certain levels, West did not demonstrate that the plans fail to comply with constitutional or statutory sustainable yield principles.[312] Affirming the lower court, the supreme court held that the "sustained yield clause" of the Alaska Constitution and the "intensive game management statute" require the Board to apply principles of sustained yield when managing predator species.[313]

Alaska Court of Appeals

Vann v. State

In *Vann v. State*,[314] the court of appeals held that a lab technician testifying about a genetic test performed in part by another technician does not violate the confrontation clause of the Sixth Amendment of the United States Constitution even though the other employee did not testify.[315] The state charged Vann with kidnapping and sexual assault.[316] Lab technician Duda testified for the state about the results of comparing DNA samples from the victim and defendant against five DNA samples from items at the crime scene.[317] Duda tested three of the five samples, an associate, Cohen, tested two of the samples, and Duda interpreted and verified Cohen's results.[318] Vann objected to Duda's testimony as a violation of his right to confront Cohen as a witness against him.[319] The trial judge overruled Vann's objection and held that Duda's testimony needed only to fulfill the requirements for an expert testifying about another's work under Rule of Evidence 703.[320] In determining the extent that the confrontation clause limited an expert testifying about another person's work, the court of appeals decided that an expert cannot act as a mere conduit for another's opinion but can offer an independent analysis based in part on another person's work.[321] The court of appeals held that because Duda examined Cohen's results and made an independent verification of Cohen's conclusions, Duda's testimony about all five DNA samples did not violate Vann's right to confront witnesses against him.[322] Affirming the lower court, the court of appeals held that a lab technician testifying about a genetic test performed in part by another technician does not violate the

[310] *Id.* at *15–22.
[311] *Id.* at *25.
[312] *Id.* at *2, *29–35.
[313] *Id.* at *2.
[314] 229 P.3d 197 (Alaska Ct. App. 2010).
[315] *Id.* at 199–200.
[316] *Id.* at 199.
[317] *Id.*
[318] *Id.*
[319] *Id.* at 202.
[320] *Id.*
[321] *Id.* at 205–06.
[322] *Id.* at 207–08.

confrontation clause of the Sixth Amendment of the United States Constitution even though the other employee did not testify.[323]

CONTRACT LAW

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Alaska Supreme Court

Commercial Recycling Center, Ltd. v. Hobbs Industries, Inc.

In *Commercial Recycling Center, Ltd. v. Hobbs Industries, Inc.*,[324] the supreme court held that a party to a contract cannot unilaterally rescind the agreement and a court will not equitably rescind the agreement if the only remaining obligation is monetary.[325] Austin and Lori Hobbs contracted with Tiplady and Cucullu to buy their Hobbs Industries, Inc ("HIAK") shares.[326] After the Hobbs failed to perform on their payment obligations, Tiplady and Cucullu sent a letter purporting to rescind the contract and sold their shares to Commercial Recycling Center ("CRC").[327] CRC sought a court order to establish its ownership interest in HAIK.[328] The supreme court held that the letter attempting to rescind the agreement was invalid because one cannot rescind a contract unilaterally.[329] It remanded for consideration whether there exists an equitable rescission based on a breach of fiduciary duty.[330] Equity demands a rescission when one party fails to perform but will not grant the rescission if the only remaining performance is a monetary payment, because the preferred outcome is a remedy for a breach.[331] An equitable rescission is available if a fiduciary induces a contract through unfair persuasion.[332] The supreme court affirmed in part and reversed in part, holding that a party to a contract cannot unilaterally rescind the agreement and a court will not equitably rescind the agreement if the only remaining obligation is monetary.[333]

Wenzell v. Ingrim

In *Wenzell v. Ingrim*,[334] the supreme court held that while working as a dentist at a federal nonprofit agency is "the practice of dentistry," but it is a disputed question of fact whether that practice violated a covenant not to compete.[335] Ingrim sold his dental practice to Wenzell and signed a covenant not to compete.[336] The covenant stated that Ingrim could not "engage in the practice of dentistry" within a fifteen mile radius for two

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[323] *Id.* at 199–200.
[324] 228 P.3d 93 (Alaska 2010).
[325] *Id.* at 96, 99–100.
[326] *Id.*
[327] *Id.* at 97.
[328] *Id.*
[329] *Id.* at 99.
[330] *Id.* at 100–01.
[331] *Id.* at 100.
[332] *Id.* at 101.
[333] *Id.* at 96, 99–100.
[334] 228 P.3d 103 (Alaska 2010).
[335] *Id.* at 105.
[336] *Id.*

years.[337] Ingrim then began working as a dentist at the Alaska Native Medical Center (ANMC), a federally-funded clinic providing free services to Alaska Natives, which was located within fifteen miles of his former practice.[338] Wenzell sued, claiming that Ingrim had violated the covenant.[339] The superior court held that Ingrim's new position at ANMC did not constitute the "practice of dentistry" based on Alaska Statute 08.36.350(a).[340] On appeal, the supreme court re-examined the covenant terms and held that the purpose of the contract was to prevent Ingrim from competing with Wenzell, not to bar Ingrim from the practice of all dentistry.[341] The supreme court also noted that the superior court had misinterpreted AS 08.36.350, because Ingrim's work constituted the "practice of dentistry."[342] But the supreme court stated that when a party attempts to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization offering low-cost services, competition is not presumed; it must be proven.[343] The supreme court then remanded to determine whether Ingrim's practice actually competed with Wenzell's.[344] The supreme court held that a dentist working for the Alaska Native Service is "practicing dentistry," and that it is a question for the fact-finder whether this conduct violated a covenant not to compete.[345]

CRIMINAL LAW

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United States Court of Appeals for the Ninth Circuit

United States v. Hunter

In *U.S. v. Hunter*,[346] the Ninth Circuit held that ordering people convicted of mail fraud to repay wages earned through employment obtained fraudulently was an appropriate interpretation of the Mandatory Victims Restitution Act.[347] Hunter stole the identity of a nurse in order to obtain a nursing license, which she used to obtain employment as a school nurse and with the Department of Labor where she was paid $12,558 and $5,457 respectively.[348] Hunter was arrested, sentenced to ninety-six months incarceration, and ordered to pay back the $12,558 and $5,457, which she appealed.[349] The Ninth Circuit affirmed the decision, holding that the Mandatory Victims Restitution Act "requires courts to order restitution to victims of certain criminal offenses, such as mail fraud."[350] Loss is determined by comparing what would have happened if the

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[337] *Id.*
[338] *Id.* at 105–06.
[339] *Id.* at 106.
[340] *Id.*
[341] *Id.* at 107–08.
[342] *Id.* at 108–09.
[343] *Id.* at 109.
[344] *Id.* at 109–12.
[345] *Id*. at 105.
[346] 618 F.3d 1062 (9th Cir. 2010).
[347] *Id.* at 1064.
[348] *Id.* at 1063–64.
[349] *Id.* at 1064.
[350] *Id.*

criminal had acted lawfully and what actually happened.[351] The employers paid for the services of a registered nurse which they never received and loss requires no reduction from all wages paid for the value of work Hunter performed.[352] Affirming the lower court, the Ninth Circuit held that ordering people convicted of mail fraud to repay wages earned through employment obtained fraudulently was an appropriate interpretation of the Mandatory Victims Restitution Act.[353]

United States v. Lozano

In *United States v. Lozano*,[354] the Ninth Circuit held that: (1) evidence found in probation and consensual searches was admissible as evidence of prior bad acts; and (2) transporting a package from Barrow to Anchorage and detention of the same package for twenty-two hours was reasonable.[355] Lozano appealed his conviction of attempted possession of marijuana with intent to distribute after a package sent to his P.O. box in Barrow was found to contain eleven pounds of marijuana.[356] The Ninth Circuit held that cash and a photograph of Lozano at a marijuana "grow" were admissible under Rule of Evidence 404(b) because evidence of Lozano's prior possession or sale of drugs was material to the charges and not too remote in time.[357] The Ninth Circuit also held that the decision to detain the package was reasonable because Lozano had earlier asked whether mail could be searched for drugs and the package listed a fictitious sender and addressee.[358] Further, the delay was reasonable because it was less than one day and part of the delay came from the remoteness of Barrow.[359] Affirming the lower court, the Ninth Circuit held that: (1) evidence found in probation and consensual searches was admissible as evidence of prior bad acts; and (2) transporting a package from Barrow to Anchorage and detention of the same package for twenty-two hours was reasonable.[360]

United States District Court for the District of Alaska

Stavenjord v. Schmidt

In *Stavenjord v. Schmidt*,[361] a magistrate judge recommended the denial of a prisoner's habeas petition because the state court of appeals' rejection of the prisoner's ineffective assistance of counsel claim was not contrary to federal law and was not an unreasonable application of federal law.[362] Stavenjord was convicted of first-degree murder.[363] On appeal, his lawyers did not argue that that the police lacked probable cause to substantiate search warrants of Stavenjord's home.[364] After reviewing the

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[351] *Id.*
[352] *Id.* at 1064–65.
[353] *Id.* at 1064.
[354] 623 F.3d 1055 (9th Cir. 2010).
[355] *Id.* at 1059–61.
[356] *Id.* at 1058–59.
[357] *Id.* at 1059–60.
[358] *Id.* at 1060.
[359] *Id.* at 1061.
[360] *Id.* at 1059–61.
[361] 2010 U.S. Dist. LEXIS 71028 (D. Alaska July 14, 2010).
[362] *Id.* at *7–*9.
[363] *Id.* at *2.
[364] *Id.* at *3.

record, the magistrate judge determined that Stavenjord's appellate lawyers made a strategic choice in their argument selection.[365] The magistrate judge noted that attorneys have the obligation to winnow out less meritorious claims on appeal.[366] Because Stavenjord did not identify acts or omissions by his lawyers that were outside the range of competent legal assistance, the state court of appeals did not err when denying his claim.[367] Thus, the magistrate judge recommended the denial of a prisoner's habeas petition because the state court of appeals' rejection of the prisoner's ineffective assistance of counsel claim was not contrary to federal law and was not an unreasonable application of federal law.[368]

U.S. v. Mujahid

In *U.S. v. Mujahid*,[369] the district court held that the Anchorage Division's jury selection process did not violate constitutional or statutory law even though African-Americans were underrepresented in jury pools.[370] Mujahid, an African-American, moved for an alternative jury selection process because African-Americans constitute 5.2% of the Anchorage Division's population but only 2.06% of master jury wheels in the district.[371] He argued that the 60% comparative disparity violated constitutional and statutory fair cross-section requirements, and that the jury wheels could be more representative by using a different selection process.[372] The court reasoned that district courts must look at absolute disparities, not comparative disparities, and that an absolute disparity of 3.14% is not sufficient to change the jury selection process.[373] In addition, reliance on voter lists is facially neutral and not susceptible to abuse.[374] The district court held that the Anchorage Division's jury selection process did not violate constitutional or statutory law even though African-Americans were underrepresented in jury pools.[375]

Alaska Supreme Court

Diaz v. State

In *Diaz v. State*,[376] the supreme court held that an inmate in electronic monitoring is still in custody and therefore complaints relating to custody and interrogation by Department of Correction (DOC) officers should be examined under the Fourteenth Amendment, and not the Fourth Amendment.[377] While serving in an electronic monitoring program, Diaz was accused of misconduct, taken into custody for questioning, and eventually returned to jail.[378] Diaz filed a § 1983 claim against the DOC

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[365] *Id.* at *7.
[366] *Id.* at *8–*9.
[367] *Id.* at *7–*8.
[368] *Id.* at *7–*9.
[369] No. 3:10-cr-00091 JWS, 2010 U.S. Dist. LEXIS 128738 (D. Alaska Dec. 3, 2010).
[370] *Id.* at *4.
[371] *Id.* at *2.
[372] *Id.* at *2, *3.
[373] *Id.* at *2.
[374] *Id.* at *3.
[375] *Id.* at *4.
[376] 239 P.3d 723 (Alaska 2010).
[377] *Id.* at 724–32.
[378] *Id.* at 724–26.

for violating her rights under the Fourth and Fourteenth Amendments during the questioning.[379] Because inmates in electronic monitoring are still considered in custody, Diaz was in DOC custody when the officers picked her up.[380] Accordingly, her complaints are not evaluated under the Fourth Amendment, only under the Fourteenth Amendment.[381] Affirming the lower court, the supreme court held that an inmate in electronic monitoring is still in custody and therefore complaints relating to custody and interrogation by DOC officers should be examined under the Fourteenth Amendment, and not the Fourth Amendment.[382]

Greenwood v. State

In *Greenwood v. State*,[383] the supreme court held that a defendant arrested for drunk driving is entitled to a jury instruction on the necessity defense as long as there is some evidence that: (1) the defendant sought to prevent significant evil; (2) the defendant reasonably believed there was no adequate alternative; (3) given the facts perceived by the defendant, the harm avoided was not disproportionate to the harm caused; and (4) the defendant stopped driving as soon as she reasonably believed the necessity ended.[384] After drinking with Way, Greenwood overheard Way mumble that he was going to burn down Greenwood's camper and his parents' home and leave no witnesses.[385] Greenwood witnessed Way throw candles inside her camper, hit her dog, and start driving around on his four wheeler.[386] In response, Greenwood called the police, drove to Way's parents' house, honked her horn in warning, and then drove to the main road to meet the police.[387] The trial court refused to instruct the jury on the necessity defense, and Greenwood was convicted of drunk driving.[388] The supreme court reversed, reasoning that there was some evidence showing that until Greenwood stopped to wait for the police, she saw driving as the only way to prevent arson and physical harm to herself and Way's parents.[389] The court further reasoned that because Greenwood took precautions, there was some evidence that Greenwood's drunk driving was relatively less serious than the harms she sought to prevent.[390] The supreme court held that a defendant arrested for drunk driving is entitled to a jury instruction on the necessity defense as long as there is some evidence that: (1) the defendant sought to prevent significant evil; (2) the defendant reasonably believed there was no adequate alternative; (3) given the facts perceived by the defendant, the harm avoided was not disproportionate to the harm caused; and (4) the defendant stopped driving as soon as she reasonably believed the necessity ended.[391]

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[379] *Id.* at 726–27.
[380] *Id.* at 727–28.
[381] *Id.* at 729.
[382] *Id.* at 724–32.
[383] 237 P.3d 1018 (Alaska 2010).
[384] *Id.* at 1021-27.
[385] *Id.* at 1020.
[386] *Id.* at 1020-21.
[387] *Id.* at 1021.
[388] *Id.*
[389] *Id.* at 1023-27.
[390] *Id.* at 1027.
[391] *Id.* at 1021-27.

Kalmakoff v. State

In *Kalmakoff v. State*,[392] the supreme court held that the trial court must determine certain issues of fact before considering whether an individual was in custody for purposes of determining the legality of subsequent statements.[393] Kalmakoff gave statements to Alaska State Troopers during a series of four interviews.[394] The trial court admitted ostensibly confessional statements made during two of these interviews and portions of a third interview.[395] Kalmakoff appealed the decision and argued that the interviews were inadmissible because they were tainted by portions of the interviews which were found inadmissible.[396] To determine whether subsequent interviews have "purge[d] the taint" of prior inadmissible interviews, courts must consider several factors related to the defendant's condition in between the interviews.[397] The supreme court held that earlier, inadmissible inculpatory statements may have played a role in Kalmakoff's participation in the interviews, which were found to be admissible.[398] Therefore, the court remanded, holding that the trial court must determine certain issues of fact before considering whether an individual was in custody for purposes of determining the legality of subsequent statements.[399]

Marshall v. State

In *Marshall v. State*,[400] the supreme court held that the right against self-incrimination requires a trial court to hold a hearing on the affirmative defense of entrapment even when the defendant fails to submit evidence supporting each element of the defense.[401] Marshall was convicted of selling OxyContin pills to an undercover police officer.[402] The superior court denied his motion for a hearing on an entrapment defense because he failed to allege specific evidence that supported his claim that the pills did not belong to him.[403] The supreme court held that the trial court was required to hold a hearing on the affirmative defense of entrapment in this situation because requiring the defendant to submit an affidavit alleging specific evidence is contrary to Alaska's right against self-incrimination.[404] In such a hearing, the defendant may establish his or her defense by relying on methods outside of his or her own testimony.[405] The supreme court remanded the case to the superior court, holding that the right against self-incrimination requires a trial court to hold a hearing on the affirmative defense of entrapment even when the defendant fails to submit evidence supporting each element of the defense.[406]

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[392] 232 P.3d 1223 (Alaska 2010).
[393] *Id*. at 1225.
[394] *Id*. at 1223.
[395] *Id*.
[396] *Id*. at 1224.
[397] *Id.*
[398] *Id*. at 1225.
[399] *Id*.
[400] 238 P.3d 590 (Alaska 2010).
[401] *Id.* at 590.
[402] *Id.* at 591.
[403] *Id.*
[404] *Id*. at 593–94.
[405] *Id*. at 593.
[406] *Id.* at 593–94.

Alaska Court of Appeals

Andrew v. State

In *Andrew v. State*,[407] the court of appeals held that: (1) pursuant to section 11.16.100 of the Alaska Statutes, there is no distinction between proving a defendant's culpability with evidence related to her own personal conduct and proving a defendant's culpability with evidence related to her vicarious responsibility for the conduct of an accomplice; and (2) juries are not required to specify any such distinction in their verdict.[408] Andrew and her boyfriend, Haws, burglarized a home, stole several items, and concealed the items among several other stolen items from earlier burglaries.[409] Andrew appeared to have played a lesser role in the burglary than Haws.[410] Andrew was convicted of burglary of a residence and theft.[411] Andrew argued on appeal that (1) the evidence may have supported a conviction based on her vicarious liability but did not support a conviction based on her personal conduct; and (2) the jury's failure to specify the theory under which she was convicted renders the verdicts invalid.[412] The court of appeals disagreed, noting that it is immaterial whether the defendant is convicted for her own acts or those of an accomplice for whom she is legally responsible.[413] Additionally, so long as only one criminal act is alleged, the jury does not have to unanimously articulate one theory for conviction if multiple theories are sufficient to prove the defendant's guilt.[414] Affirming the superior court, the court of appeals held that: (1) pursuant to section 11.16.100 of the Alaska Statutes, there is no distinction between proving a defendant's culpability with evidence related to her own personal conduct and proving a defendant's culpability with evidence related to her vicarious responsibility for the conduct of an accomplice; and (2) juries are not required to specify any such distinction in their verdict.[415]

B.F.L. v. State

In *B.F.L. v. State*,[416] the court of appeals held that when the superior court determines that a minor in a juvenile delinquency proceeding needs ongoing government supervision, the superior court must impose the least restrictive alternative that will satisfy the minor's rehabilitative needs and protect the public.[417] B.F.L. had a three year history of juvenile delinquency that included failures on probation and in non-detention placements.[418] Following a hearing in 2009, the superior court imposed the most restrictive of the three dispositions in Alaska Statute 47.12.120(b).[419] On appeal, B.F.L

[407] 237 P.3d 1027 (Alaska Ct. App. 2010).
[408] *Id.* at 1038–40.
[409] *Id.* at 1029–32.
[410] *Id.*
[411] *Id.* at 1032.
[412] *Id.* at 1038.
[413] *Id.* at 1034–37.
[414] *Id.* at 1040–41.
[415] *Id.* at 1038–40.
[416] 233 P.3d 1118 (Alaska Ct. App. 2010).
[417] *Id.* at 1119.
[418] *Id.* at 1118–21.
[419] *Id.* at 1119, 1122.

argued that the superior court failed to adequately consider the two less-restrictive dispositions, both of which would have kept B.F.L. out of a detention facility.[420] The court of appeals first held that its prior holdings—which required courts to refrain from removing children from their homes "in all but extreme cases"—had been superseded by Delinquency Rule 11(e) and Alaska Statute 47.12.140(2),[421] which require courts to impose the least restrictive alternative given the needs of the minor and the need to protect the public.[422] The court then held that the record supported the conclusion that a detention disposition was the least restrictive alternative for B.F.L.[423] Affirming the lower court, the court of appeals held that in a juvenile delinquency proceeding, the superior court must choose the least restrictive disposition that will satisfy the two goals of rehabilitating the minor and protecting the public.[424]

Chase v. State

In *Chase v. State*,[425] the court of appeals: (1) held that Alaska's mandatory seatbelt law was supported by a sufficient public interest; and (2) rejected the defendant's claim that it was an unconstitutional means of providing pretext for police stops.[426] Chase was pulled over in Fairbanks for driving while not wearing a seatbelt.[427] During the traffic stop, the officer discovered that Chase's drivers' license had been revoked.[428] He was arrested and convicted on several misdemeanors.[429] Chase claimed that the seatbelt law facially violates Article I, Section I of the Alaska Constitution, which guarantees liberty and autonomy and argued that there was no public benefit from the law.[430] The court of appeals cited legislative history that the Alaska law would reduce deaths and injuries from car accidents.[431] Finally, the court of appeals held the seatbelt law was not merely a pretext for officers to stop citizens looking for other crimes.[432] The court of appeals: (1) held that Alaska's mandatory seatbelt law was supported by a sufficient public interest; and (2) rejected the defendant's claim that it was an unconstitutional means of providing pretext for police stops.[433]

Clark v. State

In *Clark v. State*,[434] the court of appeals held that police properly seized and opened property left in a stolen vehicle based on the vehicle owner's consent to the search and the property owner's reduced privacy interest in the item left in the car.[435]

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[420] *Id.* at 1118.
[421] *Id.* at 1124.
[422] *Id.* at 1119.
[423] *Id.* at 1125.
[424] *Id.* at 1124–25.
[425] 243 P.3d 1014 (Alaska Ct. App. 2010).
[426] *Id.* at 1019–20.
[427] *Id.* at 1015.
[428] *Id*.
[429] *Id.*
[430] *Id.* at 1016.
[431] *Id*.
[432] *Id.* at 1019–20.
[433] *Id.*
[434] 231 P.3d 366 (Alaska Ct. App. 2010).
[435] *Id.* at 366.

Officers detained Clark after she got into the passenger seat of a vehicle that had been reported stolen.[436] With the permission of the vehicle's owner, Roatch, the officers searched the car and found a cigarette case containing packets of cocaine, which Clark later admitted belonged to her.[437] Clark argued that the evidence regarding the cocaine and her statements about it should be suppressed because the officers did not have a warrant to search the car.[438] However, the court determined that the search was appropriate because Roatch consented to it, and officers are empowered to conduct warrantless searches, including opening contents related to the search, if they have the general consent of the person who has control of the place to be searched.[439] The court also noted that Roatch could agree to the search of the property Clark left in the car because someone who leaves property in a stolen vehicle has no expectation of privacy with respect to that property.[440] In response to Clark's argument that she did not know the car was stolen, the court explained that the salient issue was actually whether the officers on the scene could have reasonably believed that the car was stolen and were therefore justified in concluding that Clark had a reduced privacy interest in any property she left in the vehicle.[441] Since the officers reasonably concluded that the car was stolen, the court of appeals held that it was proper to determine that the owner of any property left in the car had a reduced expectation of privacy and that the property was subject to search with the consent of the vehicle's owner.[442]

Davis v. State

In *Davis v. State*,[443] the court of appeals held that the State was entitled to enforce laws that were adopted from federal regulations, and that a tractor-trailer was considered a commercial motor vehicle, even if it was not used exclusively for commercial purposes.[444] During a routine commercial vehicle inspection, Davis's tractor-trailer was ordered "out of service" for noncompliance with state rules for commercial vehicles.[445] Davis was stopped four hours later and cited for operating a commercial vehicle that had been placed "out of service."[446] A year later, he was cited for driving a commercial vehicle without the required medical examiner's certificate.[447] Though Davis asserted that the State lacked the authority to enforce federal law regulating commercial vehicles, the court disagreed because the federal regulations had been adopted as state law; therefore, it was state law that Davis violated.[448] Davis also disputed that he was driving a commercial motor vehicle because he was using his truck for non-commercial purposes.[449] The court rejected this argument because the only tractor-trailers that are

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[436] *Id.* at 366–67.
[437] *Id.* at 367.
[438] *Id.*
[439] *Id.*
[440] *Id.* at 368.
[441] *Id.*
[442] *Id.*
[443] 235 P.3d 1017 (Alaska Ct. App. 2010).
[444] *Id.* at 1019–22.
[445] *Id.* at 1019.
[446] *Id.*
[447] *Id.* The two claims are consolidated on appeal. *Id.*
[448] *Id.* at 1019–20.
[449] *Id.* at 1020.

excluded from the scope of these commercial vehicle regulations laws are those that are used exclusively for non-commercial purposes.[450] Davis could not show that his tractor-trailer was used exclusively for non-commercial purposes and thus fell under the exception.[451] Affirming the lower courts, the court of appeals held that the State was entitled to enforce state laws adopted from federal regulations, and that a tractor-trailer was considered a commercial motor vehicle, even if it was sometimes used for non-commercial purposes.[452]

Fallon v. State

In *Fallon v. State*,[453] the court of appeals held that a trooper's stop was a valid caretaker stop and the trooper was authorized to request the defendant's driver's license, and the defendant resisted arrest by force because his conduct went beyond non-submission.[454] Fallon was arrested after a trooper saw his vehicle in a ditch.[455] The trooper concluded Fallon had been drinking and arrested him for driving under the influence.[456] During the arrest, Fallon pushed his body away from the car and became belligerent, so the trooper had to use pepper spray.[457] Fallon was convicted of driving under the influence and resisting arrest.[458] Fallon appealed, arguing that he was illegally seized when the trooper retained his driver's license for several minutes and that the court should have suppressed the evidence as a result.[459] The court of appeals found the trooper's stop to be a valid community caretaker stop, allowing seizure without suspicion of criminal activity because Fallon's vehicle was in a ditch, where the driver might have needed help.[460] Defining "force," the court concluded Fallon's behavior and continual struggle differed from mere non-submission.[461] The court of appeals affirmed the superior court's ruling, holding that a trooper's stop was a valid caretaker stop and the trooper was authorized to request the defendant's driver's license, and the defendant resisted arrest by force because his conduct went beyond non-submission.[462]

Felber v. State

In *Felber v. State*,[463] the court of appeals held that a defendant who pleads guilty to multiple crimes and receives a composite sentence cannot successfully appeal the length of his sentence if the sentence is within the aggregated guideline ranges of crimes.[464] Felber was a third-felony offender[465] who pled guilty, *inter alia*, to second-

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[450] *Id.* at 1020–21.
[451] *Id.* at 1021–22.
[452] *Id.* at 1019–22.
[453] 221 P.3d 1016 (Alaska Ct. App. 2010).
[454] *Id.* at 1019–21.
[455] *Id.* at 1017.
[456] *Id.* at 1017–18.
[457] *Id.* at 1018.
[458] *Id.* at 1017.
[459] *Id.*
[460] *Id.* at 1018–19.
[461] *Id.* at 1020–21.
[462] *Id.* at 1019–21.
[463] 243 P.3d 1007 (Alaska Ct. App. 2010).
[464] *Id.* at 1009.
[465] *Id.* at 1008.

degree murder, vehicle theft, and four counts of first-degree assault in exchange for a sentence of between fifty and eighty-five years.[466] At the sentencing hearing, Felber asked the superior court judge to rescind the plea agreement because he felt the proposed sentence was too long for what he had done.[467] The judge refused and sentenced Felber to sixty-six years in prison.[468] On appeal, Felber argued that because a second-degree murder conviction would only result in a thirty-year sentence, the judge should have rescinded the plea agreement.[469] When reviewing a composite sentence, however, the court of appeals looks at the potential aggregated sentences for all of the crimes to which the defendant pleaded guilty.[470] The aggregated potential sentences for Felber's multiple crimes would have been 246 years.[471] Affirming the lower court, the court of appeals held that a defendant who pleads guilty to multiple crimes and receives a composite sentence cannot successfully appeal the length of his sentence if the sentence is within the aggregated guideline ranges of crimes.[472]

Forster v. State

In *Forster v. State*,[473] the court of appeals held that one illegally obtained statement does not taint future legal interrogations where *Miranda* rights were waived; good-time credit or mandatory parole cannot be withheld without further findings.[474] Forster shot and killed a uniformed police officer.[475] Forster was interrogated five times in a five-day span, with four instances occurring after his first court appearance.[476] The superior court suppressed the first and fifth interrogations due to *Miranda* and Sixth Amendment violations, respectively, but convicted Forster of murder based on the other interrogations and sentenced him to 99 years in prison.[477] Forster appealed on grounds that the three other interrogations should have been suppressed due to violations of his rights.[478] The State cross-appealed on grounds that the trial court erred in its sentencing.[479] The court of appeals found that, while Forster's mental state did not permit him to competently waive his *Miranda* rights for the first interrogation, the intervening court appearance between the first and second interrogations sufficiently reduced his stress levels enough for him to knowingly waive his rights thereafter.[480] Addressing the State's cross appeal, the court ruled that murder of a uniformed police officer engaged in official duties carries a 99-year mandatory sentence without the possibility of any parole or credit under Alaska law.[481] In Forster's case, the jury was not asked to find whether the

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[466] *Id.*
[467] *Id.*
[468] *Id*.
[469] *Id.* at 1009.
[470] *Id.*
[471] *Id.*
[472] *Id.*
[473] 236 P.3d 1157 (Alaska Ct. App. 2010).
[474] *Id.* at 1175.
[475] *Id.* at 1160.
[476] *Id.*
[477] *Id.* at 1159–61.
[478] *Id*.
[479] *Id.*
[480] *Id.* at 1165.
[481] *Id*. at 1169.

murdered officer was engaged in official duties, and the trial judge ruled that this did not permit the mandatory sentence; he instead imposed the maximum sentence within the normal first-degree murder range and left Forster eligible for good-time credit and both discretionary and mandatory parole.[482] Thus, the court of appeals held that one illegally obtained statement does not taint future legal interrogations where *Miranda* rights were waived; good-time credit or mandatory parole cannot be withheld without further findings.[483]

Lestenkof v. State

In *Lestenkof v. State*,[484] the court of appeals affirmed a trial court's decision to move a trial to another location because the judge made a reasonable, diligent attempt to seat a jury where the alleged offense occurred.[485] The trial judge encountered problems trying to seat a jury for Lestenkof's trial in Saint Paul and, after four days of jury selection, only 11 prospective jurors had not been excused.[486] After examining several options, the trial judge determined that the only alternative was to change venue.[487] The judge eventually transferred the trial to Dillingham.[488] The court of appeals found that the trial judge made considerable efforts to empanel a jury before moving the trial and that any additional steps the judge could have taken to empanel a jury in Saint Paul were unreasonable.[489] The court of appeals also found that the Dillingham jury was a fair cross section of the Saint Paul community because the Dillingham community has a similar composition to Saint Paul[490] and there was no record of any cognizable group being underrepresented in Dillingham.[491] Therefore, the court of appeals affirmed a trial court's decision to move a trial to another location because it made a reasonable, diligent attempt to seat a jury where the alleged offense occurred.[492]

Procter v. State

In *Proctor v. State*,[493] the court of appeals held using evidence of behavior in prison to establish patterns does not violate a person's right to confrontation even though he would have to admit he had been incarcerated in order to cross-examine witnesses testifying about his time in prison.[494] Proctor was arrested after a neighbor, who had witnessed him yelling and hitting a woman, called the police. In a jury trial, Proctor was convicted of second and third degree assault.[495] On appeal, Proctor argued that the trial

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[482] *Id.*
[483] *Id.* at 1175.
[484] 229 P.3d 182 (Alaska Ct. App. 2010).
[485] *Id.* at 184.
[486] *Id.* at 184–85.
[487] *Id.*
[488] *Id.*
[489] *Id.* at 189.
[490] *See id.* at 192 ("Dillingham is a rural and predominantly Native community in the same senate election district as Saint Paul").
[491] *Id.* at 193.
[492] *Id.* at 184.
[493] 236 P.3d 375 (Alaska Ct. App. 2010).
[494] *Id.* at 376.
[495] *Id.*

court improperly admitted evidence of his behavior in prison.[496] The court noted that while "character evidence is generally inadmissible" because Proctor had claimed he was not the aggressor, the state could introduce such evidence to rebut his claim.[497] The court of appeals affirmed the trial court's decision to allow the state to introduce evidence of Proctor's behavior while incarcerated because it was a community with which he habitually associated.[498] Proctor argued that his right to confrontation was violated by the correctional officer's testimony because he could not cross-examine him without revealing that he had previously been incarcerated.[499] The court held that Proctor's right had not been violated because his decision not to cross-examine the officer was a strategic move.[500] Affirming the lower court, the court of appeals held using evidence of behavior in prison to establish patterns does not violate a person's right to confrontation even though he would have to admit he had been incarcerated in order to cross-examine witnesses testifying about his time in prison.[501]

Rogers v. State

In *Rogers v. State*,[502] the court of appeals held that a defendant in a felony prosecution can be convicted of an offense other than the one charged in the indictment as long as the grand jury's findings include the essential elements of that offense.[503] Rogers's gun discharged in a bar, killing the victim.[504] Rogers was indicted for first-degree murder.[505] At trial, the prosecution alleged that Rogers intentionally fired the gun at the victim, while the defense argued that Rogers's gun had accidentally fired.[506] The jury convicted Rogers of manslaughter.[507] Rogers appealed, arguing that there was a "fatal variance" between the trial jury's manslaughter verdict and the grand jury's indictment for first-degree murder.[508] The court of appeals held that a defendant can be found guilty of a lesser offense that is "necessarily included" in the charged offense.[509] Whether a lesser offense is included in the charged offense depends on the facts charged in the indictment and the evidence presented at trial.[510] Because Rogers's manslaughter conviction flowed from the evidence presented at trial,[511] and because the grand jury finding of intentional killing included the essential elements of reckless killing, the court held that there was no fatal variance.[512] Affirming the superior court's denial of Rogers's motion to dismiss, the court of appeals held that a defendant in a felony prosecution can

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[496] *Id.*
[497] *Id.* at 377.
[498] *Id.* at 377–78.
[499] *Id.* at 378–89.
[500] *Id.*
[501] *Id.* at 376.
[502] 232 P.3d 1226 (Alaska Ct. App. 2010).
[503] *Id.* at 1240–41.
[504] *Id.* at 1229.
[505] *Id.*
[506] *Id.*
[507] *Id.* at 1233.
[508] *Id.* at 1236.
[509] *Id.*
[510] *Id.*
[511] *Id.* at 1237.
[512] *Id.* at 1241.

be convicted of an offense other than the one charged in the indictment as long as the grand jury's findings include the essential elements of that offense.[513]

Silvera v. State

In *Silvera v. State*,[514] the court of appeals held that words or actions directed at third parties could be evidence of serious provocation with respect to mitigating factors.[515] Silvera along with Surina (his fiancée), Moore, and others took a taxi cab after spending the night drinking.[516] An argument ensued and Moore allegedly called Surina a "whore" and then kicked her.[517] Silvera then jumped up and cut the side of Moore's face with a knife.[518] At sentencing, the trial judge rejected the mitigating factor of serious provocation because the provoking acts and words were not directed at Silvera.[519] Silvera appealed.[520] The court of appeals held that provocation can be found when the actions were directed either at the defendant or at someone the defendant was defending.[521] The court reasoned that to find otherwise would prohibit a finding of serious provocation in circumstances in which the heat of passion defense has traditionally been allowed.[522] Reversing the lower court, the court of appeals held that words or actions directed at third parties could be evidence of serious provocation with respect to mitigating factors.[523]

Smith v. State

In *Smith v. State*,[524] the court of appeals held that a sixteen-year-old defendant involved in a shooting is not entitled to statutory mitigation of his sentence for duress or compulsion based on a theory that he was provoked, but the defendant may be entitled to non-statutory mitigation because of his extraordinary potential for rehabilitation and his developmental immaturity.[525] Smith, a sixteen year old, entered a plea of guilty as an adult to first-degree assault for providing a cohort with a handgun, with which the cohort then wounded another teenager.[526] At sentencing, Smith requested mediation on three grounds: (1) duress, coercion, threat, or compulsion; (2) extraordinary potential for rehabilitation; and (3) developmental immaturity.[527] Developmental immaturity is a mitigating factor that Alaska courts have not yet recognized.[528] Despite evidence that the victim provoked Smith, the superior court rejected Smith's request for mitigation based on duress mental or emotional compulsion does not meet the standards for provocation as

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[513] *Id.* at 1240–41.
[514] 244 P.3d 1138 (Alaska Ct. App. 2010).
[515] *Id.* at 1147–49.
[516] *Id.* at 1141.
[517] *Id.* at 1141–42.
[518] *Id.*
[519] *Id.* 1142, 1148.
[520] *Id.*
[521] *Id.* at 1147–48.
[522] *Id.* at 1148.
[523] *Id.* at 1147–49.
[524] 229 P.3d 221 (Alaska Ct. App. 2010).
[525] *Id.* at 223.
[526] *Id.* at 223–24.
[527] *Id.* at 223.
[528] *Id.*

defined in Alaska statutes.[529] The superior court also rejected Smith's non-statutory mitigating factors despite considerable testimony by Smith's experts supporting his position without making any findings of fact as to the merit of the mitigating factors in Smith's case.[530] The court of appeals affirmed the superior court's rejection of Smith's statutory duress mitigating factor argument but vacated the superior court's rulings as to the non-statutory mitigating factors and remanded the case for reconsideration to include findings of fact.[531] In addition, the court of appeals tepidly supported developmental immaturity as a new mitigating factor, citing United States Supreme Court precedent.[532] Affirming in part and vacating in part, the court of appeals held that a sixteen-year-old defendant involved in a shooting is not entitled to statutory mitigation of his sentence for duress or compulsion based on a theory that he was provoked, but the defendant may be entitled to non-statutory mitigation because of his extraordinary potential for rehabilitation and his developmental immaturity.[533]

Solomon v. State

In *Solomon v. State,*[534] the court of appeals held that although Alaska recognizes a defense of unwitting intoxication to a DUI charge, the defense is available only if the defendant became intoxicated due to a reasonable, non-negligent mistake about the intoxicating nature of the substance the defendant ingested.[535] Solomon was arrested for driving under the influence and argued at his trial that he had not been drinking but had ingested a quart of NyQuil.[536] Solomon stated that he had not read the label on the bottle and did not realize that NyQuil contains ten percent alcohol.[537] Solomon requested a jury instruction on the defense of unwitting intoxication because he did not have actual knowledge that he had consumed an intoxicating substance, but the superior court judge denied the request.[538] The court of appeals affirmed the denial of the jury instruction.[539] Solomon contended that this defense should be allowed when a defendant does not knowingly consume an intoxicant and that the State should be forced to prove beyond a reasonable doubt that the intoxicant was knowingly consumed.[540] The court of appeals found cases from other jurisdictions persuasive that limited the defense to instances in which a defendant non-negligently consumed a substance that he reasonably believed was not intoxicating.[541] Because no reasonable juror could have believed that Solomon's failure to read the label on the NyQuil bottle was non-negligent, the court of appeals affirmed the lower court ruling.[542] The court of appeals held that although Alaska recognizes a defense of unwitting intoxication to a DUI charge, the defense is available

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[529] *Id.* at 225–28.
[530] *Id.* at 228–31.
[531] *Id.* at 231–32.
[532] *Id.* at 230.
[533] *Id.* at 223.
[534] 227 P.3d 461 (Alaska Ct. App. 2010).
[535] *Id.* at 468.
[536] *Id.* at 462.
[537] *Id.* at 463.
[538] *Id.* at 464.
[539] *Id.* at 469.
[540] *Id.* at 464.
[541] *Id.* at 467.
[542] *Id.* at 469.

only if the defendant became intoxicated due to a reasonable, non-negligent mistake about the intoxicating nature of the substance the defendant ingested.[543]

Starkweather v. State

In *Starkweather v. State*,[544] the court of appeals held that when criminal defendants are convicted of both first degree assault and attempted murder, the crimes must be merged for sentencing purposes.[545] Starkweather was convicted of burglary, theft, sexual assault, attempted murder, and first-degree assault after attacking his neighbor.[546] Starkweather argued during sentencing in the superior court that he should not receive separate sentences and punishments for attempted murder and first degree assault because they arose from the same act and, if not merged, would constitute double jeopardy.[547] The superior court denied his claim, reasoning that assault and attempted murder were sufficiently discrete crimes to support separate convictions and punishments.[548] The court of appeals reversed, holding that legislative indicated attempted murder and assault were not meant to be punished as separate crimes, and that the nature of the conduct should instead be considered only as an aggravating or mitigating circumstance in sentencing.[549] The court of appeals held that criminal defendants may be charged with both attempted murder and assault, but if the jury finds both crimes to be proven, they must be merged into a single conviction for attempted murder.[550]

State v. Shetters

In *State v. Shetters*,[551] the court of appeals held that a defendant is entitled to good time credit for time spent in a correctional center or halfway house as a condition of mandatory parole and for time spent there pending final decision about parole revocation.[552] Shetters was released on mandatory parole, but he was taken back into custody, based on concerns of parole violation, and released to a "correctional restitution center" (CRC) while the parole board determined whether to revoke his parole.[553] The Board permitted him to stay on parole so long as he remained at the CRC for four additional months.[554] He was arrested for another parole violation, after which he returned to jail; he was not given credit toward his release date for his time spent in the CRC.[555] The court determined that serving mandatory parole is tantamount to serving time in prison and does not mitigate a sentence like parole.[556] Reversing the lower court, the court of appeals held that a defendant is entitled to good time credit for time spent in a

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[543] *Id.* at 468.
[544] 244 P.3d 522 (Alaska Ct. App. 2010).
[545] *Id.* at 532–33.
[546] *Id.* at 523, 533–34.
[547] *Id.* at 528.
[548] *Id.*.
[549] *Id.* at 529–33.
[550] *Id*. at 532.
[551] 246 P.3d 332 (Alaska Ct. App. 2010).
[552] *Id.* at 333.
[553] *Id.* at 333–34.
[554] *Id*.
[555] *Id.* at 336.
[556] *Id.*

correctional center or halfway house as a condition of mandatory parole and for time spent there pending final decision about parole revocation.[557]

State v. Shetters (On Rehearing)

In *State v. Shetters,*[558] the court of appeals held that mandatory parolees remanded to a non-prison correctional center by the Parole Board are entitled to credit for time served and good time credit if they are later ordered to serve their remaining sentence.[559] The State of Alaska petitioned the court of appeals to reconsider a prior holding.[560] The state challenged the court's prior holding by making two arguments: (1) parolees that reside at non-prison correctional centers are entitled to good time credit but not time served credit; and (2) the Parole Board may use its discretion in awarding credit for time served to parolees residing at non-prison correctional centers.[561] The court of appeals rejected both of these arguments, reasoning that there are no situations where an inmate may be entitled to good time credit but not for time served.[562] The court of appeals also held that credit for time served is not a discretionary reduction of the defendant's time to serve.[563] Re-affirming its prior decision, the court of appeals held that mandatory parolees remanded to a non-prison correctional center by the Parole Board are entitled to credit for time served and good time credit if they are later ordered to serve their remaining sentence.[564]

State v. Siftsoff

In *State v. Siftsoff*,[565] the court of appeals held that the hot pursuit warrant exception did not apply when a police officer followed a speeder home and entered his home without showing a compelling need for immediate action.[566] A police officer was in pursuit of Siftsoff for a speeding violation and eventually ended up at his trailer home.[567] The officer told him not to enter the trailer, but Siftsoff ignored him.[568] The officer then entered the trailer and observed that Siftsoff was intoxicated.[569] The trial court judge excluded the evidence of intoxication.[570] The court of appeals reasoned that because the officer had not shown "a compelling need for official action and no time to secure a warrant" the judge correctly suppressed the evidence.[571] The court of appeals affirmed the district court and held that the hot pursuit warrant exception did not apply when a

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[557] *Id.* at 333.
[558] *246 P.3d 338* (Alaska Ct. App. 2010).
[559] *Id.* at 342.
[560] *Id.* at 339.
[561] *Id.* at 340.
[562] *Id.*
[563] *Id.*
[564] *Id.* at 342.
[565] 229 P.3d 214 (Alaska Ct. App. 2010).
[566] *Id*. at 214–15.
[567] *Id*.
[568] *Id.* at 215.
[569] *Id*.
[570] *Id*.
[571] *Id*.

police officer followed a speeder home and entered his home without showing a compelling need for immediate action.[572]

Twogood v. State

In *Twogood v. State*,[573] the court of appeals held that: (1) the amendment of a prior judgment did not constitute a new sentencing act that would entitle a defendant to an appearance before the court;[574] (2) it was not plain error to require a sex offender to submit to random drug testing if he had a history of substance abuse;[575] and (3) the Department of Correction's (DOC) elimination of programs a defendant was required to complete while incarcerated should have been addressed in a civil action against DOC.[576] Twogood was indicted on multiple felony counts.[577] As part of his plea, Twogood was permitted to serve his sentences consecutively, though the judge refused to specify the order of the sentences.[578] On appeal, the court of appeals clarified the order and directed the superior court to amend its earlier judgment.[579] Twogood appealed.[580] He argued that the modifications effectively served as a new sentence, entitling him to address the judge in person.[581] The court of appeals held that the amendments were merely ministerial because the superior court judge had no discretion in making them.[582] Twogood also appealed a requirement that he submit to random drug screenings, arguing that the necessary "direct relationship" between this condition and his crime was absent.[583] The court held that because "direct relationship" requirement is interpreted broadly the judge did not commit plain error by including this condition based on Twogood's history of drug abuse.[584] Twogood further claimed that, because the DOC had stopped counseling incarcerated prisoners, he was denied his right to the rehabilitative treatment that he was ordered to complete.[585] The court of appeals referred him to the DOC.[586] Affirming the lower court, the court of appeals held that: (1) the amendment of a prior judgment did not constitute a new sentencing act that would entitle a defendant to an appearance before the court;[587] (2) it was not plain error to require a sex offender to submit to random drug testing if he had a history of substance abuse;[588] and (3) the DOC's elimination of programs a defendant was required to complete while incarcerated should have been addressed in a civil action against the DOC.[589]

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[572] *Id*. at 214–15.
[573] 223 P.3d 641 (Alaska Ct. App. 2010).
[574] *Id*. at 646.
[575] *Id*. at 647.
[576] *Id*. at 649.
[577] *Id*. at 644.
[578] *Id*.
[579] *Id*. at 645.
[580] *Id*.
[581] *Id*. at 646.
[582] *Id*.
[583] *Id*. at 647.
[584] *Id*.
[585] *Id*. at 649.
[586] *Id*.
[587] *Id*. at 646.
[588] *Id*. at 647.
[589] *Id*. at 649.

Wilson v. State

In *Wilson v. State*,[590] the court of appeals held that a prima facie case of ineffective assistance of counsel is established when an individual is advised that entering a no-contest plea in a criminal trial will not prejudice a later civil case against that individual.[591] Wilson pled no-contest to a charge of assault in the second degree.[592] Wilson's attorney advised him that entering the no-contest plea could not be used in a civil trial as proof of the plaintiff's allegations.[593] The court of appeals reasoned that, while there is normally a presumption of competence in ineffective assistance of counsel claims, this presumption does not apply to advice relating to whether or not to enter a plea to a criminal charge.[594] Thus, the court of appeals held that a prima facie case of ineffective assistance of counsel is established when an individual is advised that entering a no-contest plea in a criminal trial will not prejudice a later civil case against that individual.[595]

CRIMINAL PROCEDURE

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United States Court of Appeals for the Ninth Circuit

United States v. Lightfoot

In *United States v. Lightfoot*,[596] the Ninth Circuit held that, when a criminal defendant pleading guilty waives his right to appeal his sentence, the waiver does not encompass his right to appeal a subsequent decision by the district court not to reduce the defendant's sentence under section 3582(c)(2) of the United States Code, unless the waiver expressly states as much.[597] Lightfoot pled guilty to, *inter alia*, possession of crack cocaine with intent to distribute; his plea included a broad waiver of his right to appeal the resulting sentence, and he was sentenced within the then-applicable guidelines range.[598] Subsequently, the United States Sentencing Commission reduced the guidelines range for possession of crack cocaine and gave the reduction retroactive effect.[599] Lightfoot filed a motion for reduction of his sentence pursuant to section 3582(c)(2) of the United States Code, which the government opposed, asserting that Lightfoot posed a continuing danger to society.[600] The court held that motions for reduction of sentence are "discretionary decision[s] separate from the original sentencing," and the parties to the original plea agreement probably did not contemplate whether the waiver encompassed the right to appeal a section 3582(c)(2) decision, or else the agreement would have

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[590] 244 P.3d 535 (Alaska Ct. App. 2010).
[591] *Id.* at 539.
[592] *Id.* at 537.
[593] *Id.*
[594] *Id.* at 538.
[595] *Id.* at 539.
[596] 626 F.3d 1092 (9th Cir. 2010).
[597] *Id.* at 1095.
[598] *Id.* at 1093.
[599] *Id.*
[600] *Id.*

"expressly included or expressly excluded" a statement to that effect.[601] Moreover, because section 3582(c)(2) motions are substantially different proceedings, they do not constitute an attack on the original sentence to which the waiver applied.[602] Thus, the Ninth Circuit held that, when a criminal defendant pleading guilty waives his right to appeal his sentence, the waiver does not encompass his right to appeal a subsequent decision by the district court not to reduce the defendant's sentence under section 3582(c)(2) of the United States Code, unless the waiver expressly states as much.[603]

Alaska Supreme Court

Bailey v. State, Department of Corrections

In *Bailey v. State, Department of Corrections,*[604] the supreme court held that parole should not be revoked for failure to participate in a substance abuse program when the parole board did not inform the parolee that failure to participate in a program would result in automatic revocation of parole.[605] Bailey's judgment mandated that he successfully *complete* substance abuse treatment if offered during his incarceration.[606] After Bailey unsuccessfully applied to various programs, a parole violation hearing was held and Bailey was instructed to *apply* for substance abuse treatment.[607] Bailey applied to the program but was not admitted,[608] and, after a year, his parole was revoked for failure to complete offered substance abuse treatment.[609] The superior court affirmed the revocation.[610] On appeal, Bailey alleged that he did not have sufficient notice that his failure to be accepted into the program would result in revocation of his parole.[611] The court acknowledged that due process required reasonable notice of what conditions must be met to prevent parole revocation and reasoned that, during the parole violation hearing, the parole board had simply ordered Bailey to *apply* to programs and had not made it clear that if Bailey's application was rejected his parole would be automatically revoked.[612] The court found that Bailey's original judgment did not provide constructive notice, because it only required him to enter a program if it was offered.[613] Reversing the decision of the lower court, the supreme court held that parole should not be revoked for failure to participate in a substance abuse program when the parole board did not inform the parolee that failure to participate in a program would result in automatic revocation of parole.[614]

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[601] *Id.* at 1095.
[602] *Id.*
[603] *Id.* at 1095.
[604] 224 P.3d 111 (Alaska 2010).
[605] *Id*. at 112.
[606] *Id*. at 113 (emphasis added) (citation omitted).
[607] *Id*. at 113–14.
[608] *Id*. at 114.
[609] *Id*. at 115.
[610] *Id*.
[611] *Id*. at 116.
[612] *Id*. at 117.
[613] *Id*.
[614] *Id*. at 112.

Bradshaw v. State, Department of Administration

In *Bradshaw v. State, Department of Administration*,[615] the supreme court held that Alaska's ten-year statute of limitations does not bar the Alaska Division of Motor Vehicles ("DMV") from charging a $100 statutory fee to reinstate the driver's license of a person whose license suspension began over ten years prior to applying for reinstatement.[616] Bradshaw's license was suspended in 1995.[617] In 2007, Bradshaw applied to have his license reinstated, and the DMV charged him a $100 statutory reinstatement fee.[618] Bradshaw sued, arguing that the ten-year statute of limitations barred the DMV from charging the fee.[619] The supreme court affirmed the grant of summary judgment to the State,[620] holding that a government agency's charging of a fee is not an "action for a cause" subject to the statute of limitations.[621] The court also held that the DMV properly charged Bradshaw the fee under Alaska Statute 28.15.271(b)(3)(A), which requires the fee if the license has been suspended "within the 10 years preceding the application."[622] The court held that the statute applies to the status of suspension and not the initial act of suspension.[623] Affirming the lower court, the supreme court held that Alaska's ten-year statute of limitations does not bar the Alaska DMV from charging a $100 statutory fee to reinstate the driver's license of a person whose license suspension began over ten years prior to applying for reinstatement.[624]

Farmer v. State

In *Farmer v. State*,[625] the supreme court held that judicial expungement of criminal records should only be an exceptional or extraordinary remedy.[626] The FBI prevented Farmer, a convicted felon, from purchasing a gun.[627] Farmer proceeded to file a *pro se* petition in superior court to expunge his record, arguing that ever since finishing probation "he has led an honest and upright life," that he needed the gun for hunting and self defense, and that refusal to expunge would violate his Second Amendment "constitutional right to bear arms."[628] The superior court denied Farmer's petition and held that there is no constitutionally protected right to purchase arms.[629] Farmer appealed the denial and argued on appeal that the superior court prevented his motion for reconsideration of the court's judgment.[630] In declining to decide if Alaska courts possess the authority to expunge, the court found that even if it did, Farmer's circumstances were not extraordinary; first, because Farmer failed to prove that his conviction and record

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[615] 224 P.3d 118 (Alaska 2010).
[616] *Id.* at 120–21.
[617] *Id.* at 120.
[618] *Id.* at 121.
[619] *Id.* at 121–22.
[620] *Id.* at 120.
[621] *Id.* at 122–23.
[622] *Id.* at 125–26.
[623] *Id.* at 123–26.
[624] *Id.* at 120–21.
[625] 235 P.3d 1012 (Alaska 2010).
[626] *Id.* at 1012–17.
[627] *Id.* at 1012–13.
[628] *Id.* at 1013.
[629] *Id.*
[630] *Id.*

were unlawful or invalid, and second, because restricting felons' ability to purchase firearms does not violate the limited Second Amendment right to bear arms.[631] Finally, the court found that the superior court did not abuse its discretion when the superior court dismissed Farmer's action with prejudice because absent Farmer's filing a defective motion, there was no reason for the superior court to know Farmer needed guidance.[632] Affirming the lower court, the supreme court held that judicial expungement of criminal records should only be an exceptional or extraordinary remedy.[633]

Majaev v. State

In *Majaev v. State*,[634] the supreme court held that a peace officer's simple hand signal directing an individual driver to stop, or come back to the officer, is a seizure when it would compel a reasonable individual not to leave.[635] Majaev began to drive away from a turnout after an Alaska State Trooper pulled up next to Majaev's truck.[636] The trooper stepped out behind Majaev's truck then waved Majaev back and gave him a sobriety test.[637] Majaev was charged with driving under the influence and moved to dismiss the charge, arguing that he was subjected to an unlawful seizure.[638] The district court denied Majaev's motion, and the court of appeals affirmed, reasoning that a hand signal is not sufficient to lead a reasonable person to believe that he is not free to leave; thus, there was no seizure.[639] The supreme court found that there is a seizure when an officer's use of authority would cause an objectively reasonable individual to feel compelled to stay.[640] The Court reasoned that because section 28.35.182 of the Alaska Statute subjects persons to criminal penalties for failure to stop vehicles at the signal (including hand signals) or request of a peace officer, an objectively reasonable individual in Majaev's position would have felt compelled to stay and follow the trooper's instructions in order to avoid criminal penalty.[641] Reversing the lower courts, the supreme court held that a peace officer's simple hand signal directing an individual driver to stop, or come back to the officer, is a seizure when it would compel a reasonable individual not to leave.[642]

Alaska Court of Appeals

Alexie v. State

In *Alexie v. State*,[643] the court of appeals held that first-time felony offenders convicted of first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes are subject to the sentencing range of 7 to 11 years specified in section 12.55.125(c)(2) of the

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[631] *Id.* at 1014–16.
[632] *Id.* at 1016–17.
[633] *Id.* at 1012–17.
[634] 223 P.3d 629 (Alaska 2010).
[635] *Id*. at 632–34.
[636] *Id.* at 631.
[637] *Id*.
[638] *Id*.
[639] *Id*.
[640] *Id*. at 632.
[641] *Id*. at 633–34.
[642] *Id*. at 632–34.

[643] 229 P.3d 217 (Alaska Ct. App. 2010).

Alaska Statutes.[644] Alexie pled no contest to first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes, which involved recklessly causing serious physical injury to another using a dangerous instrument.[645] The superior court sentenced Alexie under section 12.55.125(c) of the Alaska Statutes; subsection (2) of the statute stated that if the defendant caused serious physical injury or death during the offense then the presumptive sentencing range is 7 to 11 years.[646] The supreme court had interpreted a previous version of the sentencing statute not to provide a shorter sentence for reckless manslaughter than reckless assault.[647] Alexie challenged the current statute using similar reasoning as the challenge to the earlier statute—that it was illogical for the legislature to provide the same punishment for reckless manslaughter and reckless assault.[648] The court of appeals affirmed the superior court's sentence, reasoning that it was the province of the legislature, not the judiciary, to set the sentencing guidelines.[649] The court of appeals held that first-time felony offenders convicted of first-degree assault under section 11.41.200(a)(1) of the Alaska Statutes are subject to the sentencing range of 7 to 11 years specified in section 12.55.125(c)(2) of the Alaska Statutes.[650]

Borchgrevink v. State

In *Borchgrevink v. State,*[651] the court of appeals held that "first complaint" evidence is admissible and may include a victim's identification of the perpetrator only if the victim testifies at the defendant's trial.[652] Borchgrevink was convicted of first-degree assault and for a merged count of first-degree sexual assault and first-degree sexual abuse of a minor.[653] During a medical examination for injuries to her head and genitals, E.P., the minor-victim, identified Borchgrevink as her assailant.[654] Before the trial the superior court judge ruled that E.P.'s identification of Borchgrevink during the "first complaint" would be allowed at trial; but when E.P. took the stand, Borchgrevink's attorney had E.P. declared incompetent as a witness.[655] Borchgrevink appealed his convictions claiming the "first complaint" evidence was improperly admitted in light of E.P.'s failure to testify.[656] The court of appeals held that the superior court erred in admitting the "first complaint" identification information as evidence.[657] While admitting E.P.'s "first complaint" testimony at trial was an error, because Borchgrevink did not object during trial to the admittance of the identification information, the court of appeals further held it was reasonable to assume Borchgrevink made a tactical decision not to object and therefore it was not a reversible error.[658] Affirming the lower court, the court of appeals

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[644] *Id.* at 221.
[645] *Id.* at 218.
[646] *Id.*
[647] *Id.* at 219.
[648] *Id.* at 220.
[649] *Id.* at 221.
[650] *Id.* at 221.
[651] 239 P.3d 410 (Alaska Ct. App. 2010).
[652] *Id.* at 422.
[653] *Id.* at 412.
[654] *Id.*
[655] *Id.* at 420.
[656] *Id.* at 412.
[657] *Id.* at 421.
[658] *Id.* at 424.

held that while a trial judge has the discretion to redact identification information from "first complaint" testimony, such identification testimony is admissible only if the victim testifies at trial.[659]

Cleveland v. State

In *Cleveland v. State*,[660] the court of appeals held: (1) an appellate decision becomes final when the time for filing a petition for hearing expires or the day after the Alaska Supreme Court denies a petition for hearing; and (2) the statute of limitations for filing for post conviction relief is not tolled while a motion to correct an illegal sentence is pending.[661] Cleveland's petition for a hearing on an assault conviction was denied by the supreme court in 2004.[662] In 2007, Cleveland filed for post-conviction relief. The superior court granted the State's motion to dismiss because the petition was untimely.[663] Cleveland appealed, arguing that because he had filed a motion to correct an illegal sentence in the superior court before the supreme court had denied his petition for hearing, the statute of limitations was tolled.[664] The court of appeals first stated that section 12.72.020(a)(3) of the Alaska Statutes requires criminal defendants who were unnsuccessful on appeal to file for post-conviction relief within one year of the court of appeals' final decision.[665] The court then determined that an appellate decision becomes final either when the time for filing a petition for hearing expires or the day after Alaska Supreme Court denies a petition for hearing.[666] Since the decision affirming Cleveland's conviction became final when the Supreme Court denied his petition for hearing in 2004, his 2007 application for post conviction relief was untimely.[667] The statute of limitations was not tolled while Cleveland's motion to correct an illegal sentence was pending.[668] Affirming the lower court, the court of appeals held: (1) an appellate decision becomes final when the time for filing a petition for hearing expires or the day after the Alaska Supreme Court denies a petition for hearing; and (2) the statute of limitations for filing for post conviction relief is not tolled while a motion to correct an illegal sentence is pending.[669]

Deemer v. State

In *Deemer v. State*,[670] the court of appeals held that when the police have probable cause to believe that physical evidence of a driver's identity is evidence of a crime, they may search the passenger compartment and places where one would reasonably expect to find that evidence.[671] A state trooper stopped Deemer for a traffic violation.[672] Deemer

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[659] *Id.* at 419, 424–26.
[660] 241 P.3d 504 (Alaska Ct. App. 2010).
[661] *Id.* at 506–07.
[662] *Id.* at 505.
[663] *Id.*
[664] *Id.* at 505–06.
[665] *Id.* at 506.
[666] *Id.*
[667] *Id.* at 507.
[668] *Id.* at 506.
[669] *Id.*
[670] 244 P.3d 69 (Alaska Ct. App. 2010).
[671] *Id.* at 72.
[672] *Id.* at 70.

lied to the trooper about her identity, but another trooper recognized Deemer and ran her name through the computer.[673] The search revealed an outstanding warrant, so the troopers arrested Deemer then searched her car and found a handgun and cocaine.[674] Deemer challenged the search and the court of appeals initially found the search lawful.[675] The United States Supreme Court later issued a decision altering federal search and seizure law and the Alaska Supreme Court ordered the court of appeals to reconsider Deemer's case.[676] Police have the authority to search a vehicle incident to an arrest if they have a reasonable belief that evidence relevant to the crime of arrest might be found in the vehicle.[677] Because Deemer had just committed the offense of falsely identifying herself, the officers had the authority to search the vehicle for evidence of her identification.[678] Affirming the lower court, the court of appeals held that when the police have probable cause to believe that physical evidence of a driver's identity is evidence of a crime, they may search the passenger compartment and places where one would reasonably expect to find that evidence.[679]

Evans v. State

In *Evans v. State*,[680] the court of appeals held that a defendant is entitled to a mistrial when the State discloses information mid-trial that should have been disclosed earlier and fails to prove that the late disclosure was not prejudicial to the defendant.[681] Evans was convicted of burglary, theft, and criminal mischief.[682] On appeal, Evans argued that the trial judge should have declared a mistrial because the State waited until the middle of his trial to disclose exculpatory statements made by Evan's co-defendant during a police interview.[683] The court of appeals noted that the State was required to disclose the contents of the interview pursuant to Criminal Rules 16(b)(1)(A)(iii) and 16(b)(3).[684] Because the interview was not disclosed, Evans's attorney had no reason to believe the interview contained exculpatory statements.[685] After the interview statements were disclosed mid-trial, Evans's co-defendant claimed privilege and would not testify as a witness.[686] Consequently, the State failed to prove that its late disclosure was not prejudicial, and Evans was entitled to a mistrial.[687] The court of appeals held that a defendant is entitled to a mistrial when the State discloses information mid-trial that should have been disclosed earlier and fails to prove that the late disclosure was not prejudicial to the defendant.[688]

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[673] *Id.*
[674] *Id.*
[675] *Id.* at 70–71.
[676] *Id.* at 71.
[677] *Id.* at 73.
[678] *Id.* at 75.
[679] *Id.* at 72.
[680] 231 P.3d 918 (Alaska Ct. App. 2010).
[681] *Id.* at 919–20.
[682] *Id.* at 918.
[683] *Id.* at 918–19.
[684] *Id.* at 920.
[685] *Id.*
[686] *Id.* at 919.
[687] *Id.*
[688] *Id.* at 919–20.

Ferguson v. State

In *Ferguson v. State*,[689] the court of appeals held that the failure of an attorney to adequately convey the implications of a plea agreement that a defendant accepts constitutes incomplete legal advice, and the defendant is entitled to withdraw the plea.[690] After consulting with his attorney, Ferguson accepted the State's plea agreement under the assumption that four years of his seven-year term of imprisonment would be suspended.[691] He also believed he would be eligible for good time credit against the three-year portion of the sentence that he would actually serve, so he would only have to serve two years.[692] After realizing that he would not receive the good time credit, Ferguson filed petition for post-conviction relief based on incompetent legal advice concerning the plea agreement.[693] On appeal, the court held that a defendant is entitled to withdraw a plea if: (1) the defendant was given incomplete advice concerning the nature of the sentence he would receive upon accepting a plea bargain; and (2) the defendant would not have entered into the plea bargain if he had received accurate advice.[694] Reversing the lower court, the court of appeals held that the failure of an attorney to adequately convey the implications of a plea agreement that a defendant accepts constitutes incomplete legal advice, and the defendant is entitled to withdraw the plea.[695]

Guthrie v. State

In *Guthrie v. State*,[696] the court of appeals held that a jury cannot convict an individual for failure to appear unless the appearance is required and a defendant challenging a court's denial to sever charges must show that joinder of the charges created a prejudice against him.[697] Guthrie failed to attend a scheduled court proceeding regarding his upcoming assault trial.[698] The State charged Guthrie with misdemeanor failure to appear and consolidated both charges.[699] The court denied Guthrie's request to sever the charges and the jury convicted Guthrie of both crimes.[700] The court of appeals reversed, finding that under section 12.30.060 of the Alaska Statutes, a jury cannot convict an individual for failure to appear unless the state presents evidence that appearance is required.[701] Here, the State presented no evidence proving that the trial judge imposed an obligation for Guthrie to appear.[702] Additionally, the court of appeals declined to determine Guthrie's severance request because Guthrie failed to present evidence showing that the joinder created any jury prejudice.[703] Reversing in part and

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[689] 242 P.3d 1042 (Alaska Ct. App. 2010).
[690] *Id*. at 1048–49.
[691] *Id*. at 1044.
[692] *Id*.
[693] *Id*.
[694] *Id*. at 1049.
[695] *Id*. at 1048–49.
[696] 222 P.3d 890 (Alaska Ct. App. 2010).
[697] *Id.*
[698] *Id.* at 891.
[699] *Id.*
[700] *Id.*
[701] *Id.* at 893.
[702] *Id.* at 892–94.
[703] *Id.* at 894–95.

affirming in part, the court of appeals held that a jury cannot convict an individual for failure to appear unless the appearance is required, and a defendant challenging a court's denial to sever charges must show that joinder of the charges created a prejudice against him.[704]

Lamkin v. State

In *Lamkin v. State*,[705] the court of appeals held that sentencing judges may not suspend the imposition of sentence for a defendant convicted of felony assault.[706] Lamkin pled guilty to one count of assault in the third degree.[707] At his sentencing hearing, he argued that the court should suspend his sentence pursuant to section 12.55.125 of the Alaska Statutes, under which he was convicted.[708] The superior court judge refused, citing section 12.55.085, which restricts a judge's authority to suspend a sentence if the offender is convicted of certain crimes, including assault in the third degree.[709] The court of appeals affirmed, resolving the apparently contradicting authority by using a rule of statutory construction that favors specific statutes to more general ones.[710] Here, although the statute criminalizing Lamkin's assault allows a judge to suspend the sentence of certain offenders, a more focused statute that deals primarily with suspension of sentence forbids the judge from doing so.[711] Affirming the lower court, the court of appeals held that sentencing judges may not suspend the imposition of sentence for a defendant convicted of felony assault.[712]

Lindoff v. State

In *Lindoff v. State*,[713] the court of appeals held that a defendant requesting to withdraw a previously-accepted plea of guilty or no contest by arguing that he was not advised on the consequences of the plea must, at a minimum, unequivocally assert that he would not have entered the plea had he had been told the consequences.[714] Lindoff, who had already been convicted of a sex offense, was indicted for a second sex offense and agreed to plead guilty.[715] Under Criminal Rule 11(c)(4), a judge must advise two-time sex offenders that they must register as sex offenders for life, but the judge did not do so in this case.[716] Lindoff moved to withdraw his guilty plea because he had not been warned that he would be forced to register for life.[717] After an evidentiary hearing, the superior court judge denied Lindoff's motion.[718] The court of appeals noted that when Lindoff was asked whether he would have pled guilty had he had known of the registry

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[704] *Id.*
[705] 244 P.3d 540 (Alaska Ct. of App. 2010).
[706] *Id.* at 541.
[707] *Id.* at 540.
[708] *Id.* at 541.
[709] *Id.*
[710] *Id.*
[711] *Id.* at 541–42.
[712] *Id.* at 541.
[713] 224 P.3d 152 (Alaska Ct. App. 2010)
[714] *Id.* at 157.
[715] *Id.* at 153–54.
[716] *Id.*
[717] *Id.* at 154.
[718] *Id.*

requirement, he stated, "I do not know that I would have."[719] The court held that Lindoff bore the burden of producing evidence showing the judge's violation of Rule 11(c) prejudiced him, and this equivocal assertion made Lindoff's request to withdraw the plea insufficient as a matter of law.[720] Affirming the lower court, the court of appeals held that a defendant attempting to withdraw a previously-accepted plea of guilty or no contest by arguing that he was not advised of the consequences of the plea must, at a minimum, unequivocally assert that he would not have entered the plea had he had been told the consequences.[721]

Linehan v. State

In *Linehan v. State*,[722] the court of appeals held that: (1) hearsay evidence of a murder victim's statement evincing his state of mind before the murder is admissible only if it is relevant to proving something about the victim's conduct that will be disputed at trial;[723] and (2) testimony regarding a criminal defendant's expression of admiration for a movie is not admissible unless there is a close nexus between the movie and the defendant that shows the testimony is being presented for a reason other than circumstantial evidence of bad character.[724] Linehan was convicted of first-degree murder.[725] On appeal, Linehan argued that the trial court improperly admitted evidence of a letter, written by the victim, asserting that Linehan had a split personality and that if the victim was killed, Linehan would likely be responsible.[726] Linehan also argued that the trial court improperly admitted evidence of his admiration of a character in a movie.[727] On appeal, the court reasoned that the trial court erred in admitting evidence of the letter because there was no dispute regarding any aspect of Leppink's mental state or conduct that was alluded to in the letter.[728] The court then held that because the case was based mostly on circumstantial evidence and the letter essentially contained an "accusation from the grave," it was likely that the letter affected the verdict.[729] The court also held that Alaska Rule of Evidence 404 barred testimony that Linehan admired the main character in the movie.[730] The nexus between Linehan and the movie was not close enough for the evidence to have been anything more than impermissible circumstantial character evidence.[731] Reversing the lower court, the court of appeals held that: (1) hearsay evidence of a murder victim's statement evincing his state of mind before the murder is admissible only if it is relevant to proving something about the victim's conduct that will be disputed at trial;[732] and (2) testimony regarding a criminal defendant's expression of admiration for a movie is not admissible unless there is a close

[719] *Id.* at 157.
[720] *Id.* at 156–57.
[721] *Id.* at 157.
[722] 224 P.3d 126 (Alaska Ct. App. 2010).
[723] *Id.* at 130, 134.
[724] *Id.* at 146–49.
[725] *Id.* at 129.
[726] *Id.* at 129, 132.
[727] *Id.* at 129.
[728] *Id.* at 133–38.
[729] *Id.* at 142–43.
[730] *Id.* at 146–49.
[731] *Id.*
[732] *Id.* at 130, 134.

nexus between the movie and the defendant that shows the testimony is being presented for a reason other than circumstantial evidence of bad character.[733]

Ulak v. State

In *Ulak v. State*,[734] the court of appeals held that unproven assertions in a presentence report must be removed.[735] Ulak plead guilty to assault in the third degree for injuring C.S., a three-year old child, and admitted to aggravating factors, specifically that she manifested deliberate cruelty.[736] After her sentencing, however, she denied that she ever injured C.S. and moved to strike her grandchildren's hearsay statements that she deliberately injured C.S. from the presentence report.[737] The superior court denied the motion but supplemented the record with Ulak's version.[738] On appeal, the court of appeals held that when a defendant denies hearsay assertions, the burden is on the State to present live testimony to support the assertions.[739] The court noted that the superior court failed to explicitly make a determination of fact and that it was not sufficient to merely note disputed assertions in the presentence report.[740] Remanding the case, the court of appeals held that unproven assertions in a presentence report must be removed.[741]

West v. State

In *West v. State*,[742] the court of appeals held that when a jury does not address a factor upon which a presumptive sentencing range hinges, and the factor is raised by the defense prior to sentencing, a new jury trial on that factor does not violate the double jeopardy clause.[743] West was convicted of first-degree robbery following a jury trial.[744] Under Alaska's sentencing law, West's presumptive sentencing range depended on whether he personally possessed or used a firearm during the robbery.[745] During the trial, that specific issue of fact was not asked to, or answered by the jury.[746] After his conviction West challenged the jury instruction, arguing that he was entitled to have a jury decide whether he was personally armed during the robbery.[747] The trial court granted the new trial, but West appealed, arguing that it would violate the Double Jeopardy Clause.[748] The court of appeals reasoned that even if the jury instructions had omitted an essential element of the crime, West could not be acquitted under the double jeopardy clause.[749] Affirming the lower court, the court of appeals held that when a jury

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[733] *Id.* at 146–49.
[734] 238 P.3d 1254 (Alaska Ct. App. 2010).
[735] *Id.* at 1257–58.
[736] *Id.*
[737] *Id.* at 1256.
[738] *Id.*
[739] *Id.*
[740] *Id.* at 1257–58.
[741] *Id.*
[742] 223 P.3d 634 (Alaska Ct. App. 2010).
[743] *Id*. at 640–41.
[744] *Id*. at 635.
[745] *Id*.
[746] *Id*.
[747] *Id*.
[748] *Id*.
[749] *Id*. at 639–40.

does not address a factor upon which a presumptive sentencing range hinges, and the factor is raised by the defense prior to sentencing, a new jury trial on that factor does not violate the double jeopardy clause.[750]

ELECTION LAW

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United States District Court for the District of Alaska

Miller v. Treadwell

In *Miller v. Treadwell*,[751] the United States District Court for the District of Alaska held that: (1) counting ballots that misspell a candidate's name does not violate the Elections Clause; and (2) the failure to create uniform rules for counting ballots does not violate the Equal Protection Clause when it is done uniformly by the same panel of officials.[752] Miller filed claims contesting the results of the election for Lisa Murkowski's U.S. Senate seat because she did not appear on the ballot but was declared the winner of the race after receiving enough write-in votes to defeat both Miller and the Democratic candidate.[753] Miller claimed that counting the numerous write-in ballots for Murkowski that misspelled her name violated the Elections Clause of the Constitution because Alaska law requires voters write in the candidate name "as it appears on the write-in declaration of candidacy."[754] The district court agreed with the Alaska Supreme Court in rejecting this claim, stating that the intent of the voter was paramount.[755] Next, citing *Bush v. Gore*, Miller claimed the Division of Elections' failure to create "specific standards" and "uniform rules" for elections violated the Equal Protection Clause of the U.S. Constitution.[756] The district court also rejected this claim, distinguishing the case from *Bush* because, though subjectivity was involved in accepting or rejecting the write-in ballots, it was all done uniformly by the same panel of officials.[757] Affirming the lower court, the United States District Court for the District of Alaska held that: (1) counting ballots that misspell a candidate's name does not violate the Elections Clause; and (2) the failure to create uniform rules for counting ballots does not violate the Equal Protection Clause when it is done uniformly by the same panel of officials.[758]

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[750] *Id*. at 640–41.
[751] 736 F. Supp. 2d 1240 (D. Alaska 2010).
[752] *Id.* at 1246.
[753] *Id.* at 1241.
[754] *Id.* at 1242.
[755] *Id.* at 1243.
[756] *Id.* at 1243–44 (citing Bush v. Gore, 531 U.S. 98 (2000)).
[757] *Id*. at 1244–45.
[758] *Id.* at 1246.

Alaska Supreme Court

Apone v. Fred Meyer, Inc.

In *Apone v. Fred Meyer, Inc.*,[759] the supreme court held: (1) the Alaska Workers' Compensation Board may recognize a worker's expert witnesses while giving little weight to their testimony; and (2) while the Board's duty to assist pro se litigants is similar to that of a court, the Board is not required to give guidance on strategy decisions.[760] Apone, a Fred Meyer gas station attendant, sought workers' compensation benefits for a physical illness he attributed to workplace exposure to gasoline fumes.[761] At a workers' compensation hearing, the Alaska Workers' Compensation Board allowed the testimony of Apone's expert witnesses—a chiropractor with no certification in toxicology and an anti-toxins advocate who did not examine Apone or the work environment at Fred Meyer.[762] However, the Board gave their testimony less weight than the testimony of the physician who conducted the employer's independent medical evaluation (EIME).[763] The Board determined that Apone had failed to prove his claim.[764] Apone appealed to the superior court, arguing that the Board did not adequately assist him in preparing his case and that the Board abused its discretion by not recognizing his expert witnesses.[765] The superior court affirmed the Board's decision, and Apone appealed to the supreme court.[766] The supreme court held that it was reasonable for the Board to give less weight to Apone's witnesses because Apone's chiropractor did not have training specific to toxins and because the toxins expert was not a medical doctor capable of linking Apone's illness to exposure at work.[767] Additionally, because the EIME physician was specifically trained in toxicology, the court found it reasonable for the Board to rely more heavily on his testimony.[768] The court also held that because medical testimony is not required in all workers' compensation cases, whether to present a medical expert is a strategy decision.[769] Therefore, the Board was not required to advise Apone, a pro se litigant, on the use of expert testimony.[770] Affirming the superior court, the supreme court held: (1) the Board may recognize a worker's expert witnesses while giving little weight to their testimony; and (2) pro se litigants are not entitled to guidance on strategy decisions from the Board.[771]

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[759] 226 P.3d 1021 (Alaska 2010).
[760] *Id.* at 1028–29.
[761] *Id.* at 1023.
[762] *Id.* at 1024–25.
[763] *Id.* at 1025–26.
[764] *Id.* at 1026.
[765] *Id.*
[766] *Id.*
[767] *Id.* at 1027–28.
[768] *Id.* at 1029.
[769] *Id.*
[770] *Id.*
[771] *Id.* at 1028–29.

Burke v. Houston NANA, L.L.C.

In *Burke v. Houston NANA, L.L.C.*,[772] the supreme court held: (1) when an employee is already receiving temporary total disability (TTD) benefits, the burden is on the employer to show that the employee is no longer disabled;[773] and (2) denial of reimbursement for travel costs to a workers' compensation hearing is an abuse of agency discretion when the employee was unable to know in advance whether his credibility would be an issue and his attendance necessary.[774] Burke, an employee of Houston NANA, L.L.C., was injured while working as a pipe fitter on the Alaska pipeline.[775] The Alaska Workers' Compensation Board denied certain portions of Burke's claim for medical and disability benefits, and Burke contested the denials.[776] The superior court affirmed the Board's decision, and Burke appealed.[777] The supreme court held that since Burke was already receiving TTD benefits, there was a presumption of disability that Houston NANA had the burden to disprove.[778] Since Houston NANA did not provide substantial evidence to rebut the presumption, the Board erred in denying Burke's request for TTD benefits.[779] The court also held that the Board abused its discretion by denying Burke's travel costs to attend his workers' compensation hearing because he did not know prior to the hearing whether his credibility would be an issue.[780] Reversing in part the superior court, the supreme court held: (1) when an employee is already receiving TTD benefits, the burden is on the employer to show that the employee is no longer disabled;[781] and (2) denial of reimbursement for travel costs to a workers' compensation hearing is an abuse of agency discretion when the employee was unable to know in advance whether his credibility would be an issue and his attendance necessary.[782]

Okpik v. City of Barrow

In *Okpik v. City of Barrow*,[783] the supreme court held that a former employee's wrongful termination claim can survive summary judgment when she presents admissible evidence disputing the justification for her demotion that is sufficient to raise an issue of material fact regarding whether the employer violated its implied covenant of good faith and fair dealing.[784] The city of Barrow overpaid Mayor Nathaniel Olemaun.[785] Both Mayor Olemaun and finance director Lucy Okpik knew about the overpayment.[786] Olemaun demoted Okpik and the day after her demotion Okpik resigned.[787] Okpik brought suit alleging she was demoted in retaliation for her role in Olemaun's

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[772] 222 P.3d 851 (Alaska 2010).
[773] *Id.* at 862–63.
[774] *Id.* at 863–64.
[775] *Id.* at 854.
[776] *Id.*
[777] *Id.* at 858.
[778] *Id.* at 862.
[779] *Id.* at 863.
[780] *Id.* at 863–64.
[781] *Id.* at 862–63.
[782] *Id.* at 863–64.
[783] 230 P.3d 672 (Alaska 2010).
[784] *Id.* at 674–682.
[785] *Id.* at 675.
[786] *Id.*
[787] *Id.* at 676.

overpayment.[788] The superior court granted Barrow's motion for summary judgment and Okpik appealed the court's summary judgment on her due process, whistleblower and wrongful termination claims.[789] The supreme court affirmed summary judgment on the due process and whistleblower claims but reversed the wrongful termination claim, finding that a breach of "the implied covenant of good faith," along with actual termination, will support a wrongful conviction claim.[790] The supreme court found that Okpik's rebuttal of some of the reasons for her demotion, her presentation of positive employment evaluations, and evidence that Olemaun was personnel director, was sufficient to create an issue of material fact regarding whether Barrow breached the implied covenant of good faith and demoted Okpik for reasons other than her performance and Olemaun's overpayment.[791] Thus, the supreme court held that a former employee's wrongful termination claim can survive summary judgment when she presents admissible evidence disputing the justification for her demotion that is sufficient to raise an issue of material fact regarding whether the employer violated its implied covenant of good faith and fair dealing.[792]

Peterson v. State, Department of Natural Resources

In *Peterson v. State, Department of Natural Resources,*[793] the supreme court held that (1) review of a summary judgment should be based only on information available to the lower court;[794] (2) an employer does not breach the implied covenant of good faith when its employment decisions were made in good faith;[795] (3) a discrimination claim fails if the employee cannot demonstrate that his employer's justifications for its decision are merely pretext;[796] and, (4) a hostile work environment claim requires evidence of persistent and abusive conduct.[797] An employee claimed his employer breached its implied covenant of good faith and fair dealing by withdrawing his firefighting qualifications.[798] The employee claimed that the employer discriminated against him when it gave a position he had applied to someone else,[799] and created a hostile work environment because other employees made demeaning comments about him.[800] The superior court granted summary judgment against the employee.[801] The employee then submitted additional information to be considered by the supreme court.[802] The supreme court refused to consider the additional information, concluding that it would only review information available to the lower court.[803] The court found no breach of the employment

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[788] *Id.*
[789] *Id.*
[790] *Id.* at 679.
[791] *Id.* at 680–81.
[792] *Id.* at 674–682.
[793] 236 P.3d 355 (Alaska 2010).
[794] *Id*. at 362.
[795] *Id*. at 369.
[796] *Id*. at 367.
[797] *Id*. at 364.
[798] *Id*. at 359, 368.
[799] *Id*. at 366.
[800] *Id*. at 360, 363.
[801] *Id*. at 358.
[802] *Id*.
[803] *Id*. at 361–62.

contract because the decision to withdraw the employee's qualifications had been made by a good faith reliance on the available evidence about his professional conduct.[804] The court determined that the discrimination claim failed because he could not show that the non-discriminatory justifications the employer cited for its employment decision were mere pretext.[805] Finally, the supreme court rejected the employee's hostile work environment claims because the comments at issue were too ambiguous, isolated, and inoffensive to produce a hostile environment.[806] The supreme court affirmed, holding that (1) review of a summary judgment should be based only on information available to the lower court;[807] (2) an employer does not breach the implied covenant of good faith when its employment decisions were made in good faith;[808] (3) a discrimination claim fails if the employee cannot demonstrate that his employer's justifications for its decision are merely pretext;[809] and, (4) a hostile work environment claim requires evidence of persistent and abusive conduct.[810]

Shehata v. Salvation Army

In *Shehata v. Salvation Army*,[811] the supreme court held that in workers' compensation cases, employees can only be forced to repay benefits obtained via fraud when the fraud directly led to the procurement of the benefits.[812] Shehata injured his shoulder while working for the Salvation Army and received disability benefits.[813] Without notifying the Salvation Army, Shehata began working part-time for pay.[814] When the Salvation Army confronted Shehata about the job, he denied that he was being paid.[815] The Salvation Army petitioned the Alaska Workers' Compensation Board for reimbursement of benefits pursuant to section 23.30.250(b) of the Alaska Statutes, which permits the Board to order repayment of fraudulently earned benefits.[816] The Board ruled that Shehata lied and was required to repay all of the disability benefits he received as well as more than $14,500 in attorneys' fees.[817] Shehata immediately appealed to the Alaska Workers' Compensation Appeals Commission, but the commission affirmed the decision and further awarded the Salvation Army over $5200 in additional attorneys' fees because Shehata's appeal was "frivolous."[818] The supreme court agreed with the Commission that employers are entitled to reimbursement of benefits gained via fraud, and also agreed that the employers need not fully prove all elements of common law fraud to be repaid.[819] However, the court held that Shehata's misrepresentation did not

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[804] *Id*. at 369.
[805] *Id*. at 366–67.
[806] *Id*. at 364.
[807] *Id*. at 362.
[808] *Id*. at 369.
[809] *Id*. at 367.
[810] *Id*. at 364.
[811] 225 P.3d 1106 (Alaska 2010).
[812] *Id.* at 1120.
[813] *Id.* at 1109.
[814] *Id.*
[815] *Id.* at 1109–10.
[816] *Id.* at 1110.
[817] *Id.* at 1111.
[818] *Id.* at 1111–12.
[819] *Id.* at 1114–15.

directly cause him to receive benefits, as the false statement came more than a month after he began receiving disability payments.[820] Additionally, the court held that Shehata's appeal was not frivolous because it was brought in good faith and material questions of law and fact remained.[821] Therefore, the court overturned the attorneys' fees awarded for the appeal and the repayment of any benefits received prior to the fraud.[822] Reversing in part, the supreme court held that in workers' compensation cases, employees can only be forced to repay benefits obtained via fraud when the fraud directly led to the procurement of the benefits.[823]

Smith v. Anchorage School District

In *Smith v. Anchorage School District*,[824] the supreme court held that terminated employees must offer sufficient material evidence to prove claims of employment discrimination and breach of the convent of good faith and fair dealing against the school district where they were employed.[825] The Anchorage School District terminated Smith from his security position and he sued claiming race, age, and disability discrimination as well as breach of the covenant of good faith and fair dealing.[826] The supreme court held summary judgment was proper on all claims because Smith failed to present any evidence raising a genuine issue of material fact.[827] Affirming the lower court decision, the supreme court held that terminated employees must offer sufficient material evidence to prove claims of employment discrimination and breach of the convent of good faith and fair dealing against the school district where they were employed.[828]

State v. Public Safety Employees Association

In *State v. Public Safety Employees Association*,[829] the supreme court held that arbitrators' decisions are entitled to substantial deference when parties bargain for a binding arbitration agreement, even if the court would have reached a different outcome.[830] After a Department of Transportation officer was terminated because of inappropriate comments he made while intoxicated, the Public Safety Employees Association ("PSEA") filed a grievance with the State that went to arbitration.[831] The arbitrator determined that mitigating factors made termination excessive, and he ordered the Department to reinstate the officer without back pay.[832] The State appealed to the superior court, which granted summary judgment to PSEA.[833] The supreme court affirmed, holding that the arbitrator's decision was entitled to deference because the State

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[820] *Id.* at 1115.
[821] *Id.* at 1119.
[822] *Id.* at 1120.
[823] *Id.*
[824] 240 P.3d 834 (Alaska 2010).
[825] *Id.* at 838.
[826] *Id.*
[827] *Id.* at 841.
[828] *Id.* at 838.
[829] 235 P.3d 197 (Alaska 2010).
[830] *Id.* at 199.
[831] *Id.* at 199–200.
[832] *Id.* at 200–01.
[833] *Id.* at 201.

failed to show the arbitrator had committed gross error.[834] Affirming the lower court, the supreme court held that arbitrators' decisions are entitled to substantial deference when parties bargain for a binding arbitration agreement, even if the court would have reached a different outcome.[835]

ENVIRONMENTAL LAW

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Alaska Court of Appeals

Charles v. State

In *Charles v. State*,[836] the court of appeals held that a defendant was not entitled to raise a subsistence defense after violating regulations that require hunters to have harvest tickets, and that for a state regulation to be inconsistent with federal law there must be some deficiency in the administrative proceedings or the regulation must have been arbitrary or unreasonable.[837] The superior court convicted Charles for unlawful possession and transportation of game and hunting without the required harvest tickets for his involvement in a situation where deer were shot on federal land on Prince Wales Island.[838] Charles argued that the subsistence priority found in the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) entitled him to defend against the charges by claiming the hunting was needed for subsistence.[839] The court determined that Charles was not entitled to raise a subsistence defense because, without a regulation authorizing subsistence hunting, he had no right to violate the current regulations.[840] Charles also argued that the current state regulations conflicted with the ANILCA and the state regulations were therefore invalid.[841] Charles' hunting of does, however, violated both federal and state regulations, which weighs against a conflict.[842] Further, Charles provided no record of deficiencies in the administrative proceedings that developed the regulations or that the regulations were arbitrary and unreasonable when enacted, which would be required to challenge the regulations.[843] Affirming the lower court, the court of appeals held that a defendant was not entitled to raise a subsistence defense after violating regulations that require hunters to have harvest tickets, and that for a state regulation to be inconsistent with federal law there must be some deficiency in the administrative proceedings or the regulation must have been arbitrary or unreasonable.[844]

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[834] *Id.* at 202.
[835] *Id.* at 199.
[836] 232 P.3d 739 (Alaska Ct. App. 2010).
[837] *Id.* at 744–45.
[838] *Id.* at 741.
[839] *Id.*
[840] *Id.* at 743–44.
[841] *Id.* at 744.
[842] *Id.*
[843] *Id.* at 744–45.
[844] *Id.* at 744–45.

ETHICS AND PROFESSIONAL RESPONSIBILITY

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Stewart v. Elliott

In *Stewart v. Elliott*,[845] the supreme court held that when a driver's attorney in a criminal action is not a party to the post-conviction relief action and neither directed nor controlled that litigation, the post-conviction relief decision does not have preclusive effect in a malpractice action.[846] A driver was arrested for a felony driving under the influence (DUI) on the day a new DUI law took effect.[847] The driver pleaded no contest to the DUI charge in exchange for a reduction from a felony to a misdemeanor.[848] The superior court later granted the driver post-conviction relief, concluding his counsel was ineffective in failing to recognize that the new DUI law became effective at the time of the arrest.[849] The driver brought a malpractice suit against the attorney, relying on the decision in the post-conviction relief action to demonstrate the attorney did not recognize the date discrepancy.[850] The superior court declined to give the post-conviction decision preclusive effect and ruled that the driver presented insufficient evidence to prove negligence.[851] The supreme court agreed, holding there was no privity for the defendant attorney with the prior decision, and there was insufficient evidence to prove a breach of attorney duty.[852] Affirming the lower court, the supreme court held that when a driver's attorney in a criminal action is not a party to the post-conviction relief action and neither directed nor controlled that litigation, the post-conviction relief decision does not have preclusive effect in a malpractice action.[853]

FAMILY LAW

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Alaska Supreme Court

Barbara P. v. State, Department of Health and Social Services

In *Barbara P. v. State, Department of Health and Social Services*,[854] the supreme court determined that a finding that a parent has not remedied the conduct or conditions that places his or her child at risk is a question of fact that will only be reviewed for clear error.[855] The Office of Children's Services ("OCS") filed a petition to terminate Barbara's parental rights and the father's parental rights to their two children.[856] The superior court terminated both parents' parental rights because both children were in need

[845] 239 P.3d 1236 (Alaska 2010).
[846] *Id*. at 1243.
[847] *Id*. at 1237.
[848] *Id*.
[849] *Id*.
[850] *Id*.
[851] *Id*. at 1239.
[852] *Id.* at 1242–43.
[853] *Id*. at 1243.
[854] 234 P.3d 1245 (Alaska 2010).
[855] *Id.* at 1253.
[856] *Id.* at 1252.

of aid[857] due to: (1) domestic violence by both parents, substance abuse by both parents, Barbara's mental health issues, and abandonment by the father, (2) the parents' failure to remedy the conduct and conditions that placed the children at risk of harm, and (3) OCS made reasonable efforts to provide services to reunite the family.[858] The supreme court held that determinations of whether or not a parent has remedied conduct that places a child at risk is best determined by a trial court and will be reviewed for clear error.[859] The supreme court then found that the superior court's findings were adequately supported by the record.[860] Affirming the lower court, the supreme court determined that a finding that a parent has not remedied the conduct or conditions that places his or her child at risk is a question of fact that will only be reviewed for clear error.[861]

Barnett v. Barnett

In *Barnett v. Barnett*,[862] the supreme court held that courtship costs do not qualify as marital debt under Alaska law for purposes of calculating spousal support, and that immigration sponsorship pledges are not actionable for support under federal law.[863] Mr. Bennett paid for his courtship visits and the entire costs of Mrs. Bennett's pre-marital move from Belarus to Fairbanks.[864] These expenses included the filing of immigration paperwork for Mrs. Bennett and her daughter, in which Mr. Bennett pledged to be their sponsor and to support them.[865] After Mr. Bennett filed for divorce, Mrs. Bennett requested spousal support and attorneys' fees under both state and federal law, contending that the immigration sponsor pledge required Mr. Bennett to support her for ten years after her entry into the country.[866] On appeal, the supreme court affirmed the superior court's award of no support under federal law, but remanded the state law spousal support question.[867] The supreme court found that the superior court had improperly treated Mr. Bennett's "courtship costs" as "marital debt" that reduced the state law spousal support award and therefore remanded for reconsideration of Mrs. Bennett's monthly spousal support and for more factual findings regarding her earning capacity and educational expenses.[868] The supreme court held that courtship costs do not qualify as marital debt under Alaska law for purposes of calculating spousal support, and that immigration sponsorship pledges are not actionable for support under federal law.[869]

Brotherton v. Warner

In *Brotherton v. Warner*,[870] the supreme court held that superior courts may order child custody payments beyond the child's eighteenth birthday, even if the parents have

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[857] *Id.* at 1254.
[858] *Id.* at 1252.
[859] *Id.* at 1253.
[860] *Id.* at 1255–59.
[861] *Id.* at 1253.
[862] 238 P.3d 594 (Alaska 2010).
[863] *Id.* at 596.
[864] *Id.*
[865] *Id.*
[866] *Id.* at 596–97.
[867] *Id.* at 603.
[868] *Id.* at 602.
[869] *Id.* at 596.
[870] 240 P.3d 1225

designated another person to care for the child.[871] Brotherton was ordered to pay child custody payments under section 25.24.170(a) of the Alaska Statutes after his child turned eighteen.[872] On appeal, he argued that the statute did not apply to him because his child's caretakers were not parents, guardians, or designees.[873] He argued that the caretakers may have been designees before the child turned eighteen, they could no longer be considered designees because after turning eighteen his child could not be subject to the legal custody of another person.[874] The supreme court noted that the statute was enacted to protect children who were still in high school when they turned eighteen; the court noted that Brotherton's interpretation would render the statute meaningless.[875] The supreme court held that superior courts may order child custody payments beyond the child's eighteenth birthday, even if the parents have designated another person to care for the child.[876]

Cartee v. Cartee

In *Cartee v. Cartee*,[877] the supreme court held that a 60/40 property division was not an abuse of discretion and that property awards made to facilitate career training should be analyzed under the property division statute and not under the rehabilitative alimony standard.[878] In a divorce action, the husband appealed the trial court's award of sixty percent of the marital property to his former wife, arguing in part that the court had improperly awarded rehabilitative alimony.[879] While there is a presumption that an equal division of marital property is equitable, section 25.24.106(a)(4) of the Alaska Statutes allows for an unequal property division if a court, after taking into consideration the "*Merrill* factors," determines that an unequal property division would fairly allocate the economic effects of divorce.[880] The standard for determining rehabilitative alimony is narrower than for property division and serve the specific purpose of funding a spouse's education or job training.[881] Here, because the wife sacrificed career advancement to care for the couple's child, the court gave her a greater percentage of the marital property.[882] Because the allocation did not require the wife to return to school but rather provided the opportunity, the more general property division was held to be the appropriate standard rather than the more rigid rehabilitative alimony standard.[883] The supreme court affirmed the trial court decision, holding that a 60/40 property division was not an abuse of discretion and that property awards made to facilitate career training should be analyzed under the property division statute and not under the rehabilitative alimony standard.[884]

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[871] *Id.* at 1230.
[872] *Id.* at 1228.
[873] *Id.* at 1230.
[874] *Id.*
[875] *Id.*
[876] *Id.* at 1230.
[877] 239 P.3d 707 (Alaska 2010).
[878] *Id.* at 712–14.
[879] *Id.* at 709.
[880] *Id.* at 712. "AS 25.24.160(a)(4) codifies and expands the factors articulated in *Merrill v. Merrill,* 368 P.2d 546, 547–48 n.4 (Alaska 1962)." *Id.* at 712 n.9.
[881] *Id.* at 714.
[882] *Id.* at 713.
[883] *Id.* at 714.
[884] *Id.* at 712–14.

Charles v. State

In *Charles v. State*,[885] the supreme court held that it was appropriate to terminate parental rights where the Office of Children's Services (OCS) made active efforts to prevent the break-up of an Alaska Native family and where returning the children to the parent's custody would result in harm to the children.[886] To terminate parental rights, the court must find that active efforts were made to rehabilitate the parent and keep the family intact.[887] The trial court determined that OCS's repeated referrals of Charles to substance abuse and anger management programs, scheduling of visitation with his children, provision of bus passes and phone cards, and creation of a personalized case plan were sufficient to meet this standard.[888] Termination of rights also requires a showing, including testimony by an expert witness, that returning the children to the parent's care would likely result in "serious emotional or physical damage" to the children.[889] Charles disputed the testimony provided by the expert in his trial, claiming that it was based only on generalizations.[890] The trial court disagreed.[891] Affirming the lower court, the supreme court held that it was appropriate to terminate parental rights where OCS made active efforts to prevent the break-up of an Alaska Native family and where returning the children to the parent's custody would result in harm to the children.[892]

Colton v. Colton

In *Colton v. Colton*,[893] the supreme court held that, when dividing property in a divorce proceeding, the court should employ contract law principles that unexpressed intentions and mental reservations do not override objective indications of assent to terms of an agreement.[894] This case arose out of a divorce proceeding in which the parties reached an agreement on all property division issues.[895] The trial court entered into the record that the husband was to make a cash payment to his wife.[896] The husband appealed, arguing (1) the superior court erred in finding the husband agreed to make this payment to his wife because he did not understand it would result in unequal property division, and (2) the superior court abused its discretion in enforcing this agreement because it was made without the husband's full understanding.[897] The supreme court held that all objective evidence pointed against the husband's assent being contingent on an "equal" division and therefore the lower court did not err in enforcing the agreement.[898] Affirming the judgment of the trial court, the supreme court held that,

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[885] No. S-13794, 2010 Alas. LEXIS 131 (Alaska 2010).
[886] *Id.* at *5, *10.
[887] *Id.* at *5–*6.
[888] *Id.* at *8–*10.
[889] *Id.* at *10.
[890] *Id.* at *11.
[891] *Id.* at *12.
[892] *Id.* at *5, *10.
[893] 244 P.3d 1121 (Alaska 2010).
[894] *Id*. at 1128–29.
[895] *Id*. at 1123.
[896] *Id*.
[897] *Id*. at 1122–23.
[898] *Id*. at 1128–29.

when dividing property in a divorce proceeding, the court should employ contract law principles that unexpressed intentions and mental reservations do not override objective indications of assent to terms of an agreement.[899]

Doug Y. v. State, Dep't of Health & Social Services

In *Doug Y. v. State, Dep't of Health & Social Services*,[900] the supreme court held that an Office of Children's Services (OCS) petition to terminate parental rights should be granted when a parent fails to change behavior that put his child at risk despite receiving adequate time and reasonable family services.[901] First in 2005, and then in 2007, OCS was called to investigate Doug Y. for beating his son, Damien.[902] OCS created a case plan for Doug with the goal of allowing him to regain custody.[903] In 2009, due to Doug's failure to fully comply with the plan and Damien's continuing trauma, the superior court granted a termination of Doug's parental rights.[904] Doug appealed, arguing that Damien was not a child in need of aid due to Doug's substance abuse, OCS did not prove that Doug failed to change his harmful behavior, OCS failed to make a reasonable effort to provide Doug with family support services, and terminating Doug's parental rights was not in Damien's best interest.[905] The supreme court first held that a finding that a child is in need of aid for any of the reasons in section 47.10.011 of the Alaska Statutes is sufficient to support termination. Since Doug conceded physically harming Damien, his substance abuse was irrelevant.[906] Next, the court applied the factors listed in section 47.10.088(b) and found that Doug did not remedy the behavior that put Damien at risk for substantial harm.[907] Finally, the court found that OCS provided adequate family support services, despite not hiring a counselor for Doug, and that the superior court was justified in finding termination of Doug's rights to be in Damien's best interest.[908] Affirming the lower court, the supreme court held that an OCS petition to terminate parental rights should be granted when a parent fails to change behavior that put his child at risk despite receiving adequate time and reasonable family services.[909]

Hill v. Bloom

In *Hill v. Bloom*,[910] the supreme court held that five months of income data was not sufficient to qualify as new evidence requiring the modification of child support and that, even if the data did qualify, it was not sufficient to show a material and permanent change in circumstances.[911] The superior court calculated Hill's child support payments to Bloom based on a five-year average of Hill's income from her business, excluding

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[899] *Id*.
[900] 243 P.3d 217 (Alaska 2010).
[901] *Id*. at 224–30.
[902] *Id*. at 219.
[903] *Id*. at 220–21.
[904] *Id*. at 221–23.
[905] *Id*. at 224–30.
[906] *Id.* at 224.
[907] *Id.* at 224–26.
[908] *Id*. at 227–30.
[909] *Id*. at 224–30.
[910] 235 P.3d 215 (Alaska 2010).
[911] *Id.* at 218, 220.

dramatically lower income from 2007, which the court found an "aberration."[912] Later, Hill filed a motion to modify child support, arguing that business changes depressed her earnings during the first six months of 2008 and her income would be dramatically less than anticipated.[913] The court found that concerns over prompt modification of payments must be balanced with the need to let sufficient time pass to prove a change in income.[914] Here, the superior court averaged income over five years and only five months had passed since the decision.[915] Because small businesses are prone to dramatic fluctuations, the supreme court held that it was not error to deny Hill's motion for child support modification without an evidentiary hearing.[916] The supreme court affirmed the superior court's denial of Hill's motion to modify child support without an evidentiary hearing, finding that five months of income data was not sufficient to qualify as new evidence requiring the modification of child support and that, even if the data were considered new evidence, it was not sufficient to show a material and permanent change in circumstances.[917]

Husseini v. Husseini

In *Husseini v. Husseini*,[918] the supreme court held: (1) a divorce decree dissolving a marriage is a final judgment even when some issues have been reserved;[919] and (2) in the absence of exceptional circumstances, it is error for a trial court to sell marital assets prior to issuing a divorce judgment.[920] After separating from her husband, Janice continued to occupy the marital residence.[921] At a hearing held before the divorce was finalized, the trial court gave Janice thirty days to refinance the home in her name and, against her objections, bifurcated the divorce from the property proceedings.[922] Janice was unable to refinance, so the court ordered the sale of the house.[923] Janice appealed, arguing the trial court erred in bifurcating the divorce proceedings and in ordering the sale of the home prior to a final judgment on property division.[924] The supreme court held that Janice's appeal of the bifurcation was untimely and a divorce decree is a final judgment even when some issues have been reserved.[925] Because that rule had not been announced prior to this decision, the supreme court considered the merits of Janice's claim.[926] The supreme court determined that the trial court committed harmless error in bifurcating the divorce proceedings but erred in ordering the pre-judgment sale of the house because it did not make factual findings showing a pressing reason for the sale.[927]

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[912] *Id.* at 217.
[913] *Id.* at 217–18
[914] *Id.*
[915] *Id.*
[916] *Id.* at 218–19.
[917] *Id.* at 218, 220.
[918] 230 P.3d 682 (Alaska 2010) (per curiam).
[919] *Id.* at 686.
[920] *Id.* at 688.
[921] *Id*. at 684.
[922] *Id*.
[923] *Id*.
[924] *Id.*
[925] *Id.* at 686.
[926] *Id.*
[927] *Id.* at 688.

Vacating and remanding, the court held: (1) a divorce decree dissolving a marriage is a final judgment even when some issues have been reserved;[928] and (2) in the absence of exceptional circumstances, it is error for a trial court to sell marital assets prior to issuing a divorce judgment.[929]

Kent V. v. State, Department of Health & Social Services

In *Kent V. v. State, Department of Health & Social Services*,[930] the supreme court held that the state's second petition to terminate a father's parental rights was not barred by the doctrine of res judicata because the state raised new material facts.[931] The defendant appealed the superior court's decision to allow the state to relitigate its parental rights termination case after a prior holding that termination of parental rights was not necessary.[932] The court held that new psychological evidence, which suggested the child would not be able to develop properly if he were kept with his parents, was a new material fact, and that the state's second petition therefore was not barred by res judicata.[933] Thus, the supreme court held that the state's second petition to terminate a father's parental rights was not barred by the doctrine of res judicata because the state raised new material facts.[934]

Millette v. Millette

In *Millette v. Millette*,[935] the supreme court held that the cost of nutritional supplements recommended by a physician and purchased from a clinic are reasonable health care expenses for reimbursement pursuant to a child support order.[936] Pursuant to a child support order requiring payment for cost of natural health care, the divorced mother of an autistic child sought reimbursement from her ex-husband for nutritional supplements that were recommended to her by a health care practitioner.[937] The superior court ordered the ex-husband to pay for the nutritional supplements.[938] On appeal, the ex-husband argued that he should not have to pay these expenses because the supplements are part of the child's nutritional expenses, not health care expenses.[939] The supreme court reasoned, however, that the cost of these nutritional supplements could be considered health care expenses because the nutritional supplements had been purchased directly from a clinic, the invoices for the supplements also contained charges for appointments, and the supreme court has consistently interpreted "health expenses" for child support broadly.[940] Affirming the lower court, the supreme court held that the cost

[928] *Id.* at 686.
[929] *Id.* at 688.
[930] 233 P.3d 597 (Alaska 2010).
[931] *Id*. at 602–03.
[932] *Id.* at 597.
[933] *Id*. at 602–03.
[934] *Id*. at 602–03.
[935] 240 P.3d 1217 (Alaska 2010).
[936] *Id.* at 1225.
[937] *Id.* at 1219.
[938] *Id.*
[939] *Id.* at 1220.
[940] *Id.* at 1221.

of nutritional supplements recommended by a physician and purchased from a clinic are reasonable health care expenses for reimbursement pursuant to a child support order.[941]

Misyura v. Misyura

In *Misyura v. Misyura*,[942] the supreme court held: (1) is not an abuse of discretion for a trial court to find a history of domestic violence based solely on the testimony of a the battered spouse; and (2) a trial court errs by allowing a spouse to condition continued visitation rights on participation in an intervention program.[943] Lyudmila Misyura obtained a domestic violence protective order against her husband, Sergey Misyura, after testifying of two separate instances of abuse.[944] During the divorce proceeding, she testified about many other instances of domestic violence that occurred during the marriage.[945] The trial court found a history of domestic violence, awarded sole legal and physical child custody to Lyudmila, and ordered that Lyudmila could require Sergey to attend an intervention program as a prerequisite to exercising his unsupervised visitation rights.[946] The trial court had discretion to determine the credibility of the plaintiff's testimony, even without any corroborating evidence or witnesses.[947] The court, not a spouse, decides whether a party must attend an intervention program to maintain visitation rights.[948] Affirming in part and reversing in part, the supreme court held: (1) is not an abuse of discretion for a trial court to find a history of domestic violence based solely on the testimony of a the battered spouse; and (2) a trial court errs by allowing a spouse to condition continued visitation rights on participation in an intervention program.[949]

Osterkamp v. Stiles (I)

In *Osterkamp v. Stiles*,[950] the supreme court held that in determining whether a foster parent has established psychological parent status, a court may rely on the short length of the parent-child relationship, the child's young age, and the fact that the foster parent allowed somebody else to adopt the child.[951] Osterkamp and Stiles were foster parents for a child until Stiles adopted the child when he was sixteen months old.[952] The two domestic partners separated after the adoption.[953] Stiles began limiting Osterkamp's custody and visitation and he filed a complaint, asking for custody and visitation.[954] The superior court awarded sole physical and legal custody to Stiles and Osterkamp appealed.[955] The supreme court determined that for Osterkamp to establish custody

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[941] *Id.* at 1225.
[942] 242 P.3d 1037 (Alaska 2010).
[943] *Id*. at 1041–42.
[944] *Id.* at 1038.
[945] *Id.* at 1038–39.
[946] *Id.* at 1039.
[947] *Id.* at 1041.
[948] *Id.* at 1042.
[949] *Id*. at 1041–42.
[950] 235 P.3d 178 (Alaska 2010).
[951] *Id.* at 189.
[952] *Id*. at 181.
[953] *Id*.
[954] *Id*.
[955] *Id*. at 182.

despite Stiles's objections, he would have to first prove that he was the child's psychological parent at the time of the custody application by clear and convincing evidence.[956] Since the relevant time period for determining the relationship was so short, the child was so young, and Osterkamp voluntarily allowed Stiles to adopt the child by herself, the supreme court affirmed the superior court's decision that psychological parent status was not established.[957] Affirming the superior court's ruling, the supreme court held that in determining whether a foster parent has established psychological parent status, a court may rely on the short length of the parent-child relationship, the child's young age, and the fact that the foster parent allowed somebody else to adopt the child.[958]

Osterkamp v. Stiles (II)

In *Osterkamp v. Stiles*,[959] the supreme court held that an adoptive mother could not be equitably estopped from withholding consent for her partner to adopt her child when she never unconditionally agreed to allow the adoption.[960] Stiles adopted a foster child that she and Osterkamp had raised for sixteen months.[961] At the adoption hearing Osterkamp did not object to Stiles adopting the child individually and did not request post-adoption rights.[962] Osterkamp and Stiles originally agreed that Osterkamp's adoption of the child was dependent upon an improvement in their relationship.[963] After the couple separated, Osterkamp filed for joint custody; the superior court denied because Osterkamp had proved neither psychological parent status nor that denying custody would be detrimental to the child.[964] Osterkamp then filed a petition for adoption.[965] In response to Stiles' motion to dismiss, Osterkamp argued that Stiles could be equitably estopped from withholding consent.[966] The superior court judge allowed that equitable estoppel might sometimes be applicable but found that the evidence did not support the claim and Osterkamp appealed.[967] The supreme court did not decide whether equitable estoppel might apply in some petitions for adoption, but explained that reasonable reliance and resulting prejudice are generally required for equitable estoppel.[968] Thus, the supreme court held that an adoptive mother could not be equitably estopped from withholding consent for her partner to adopt her child when she never unconditionally agreed to allow the adoption.[969]

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[956] *Id*. at 185–86.
[957] *Id*. at 188–89.
[958] *Id.* at 189.
[959] 235 P.3d 193 (Alaska 2010).
[960] *Id.* at 194.
[961] *Id.*
[962] *Id.*
[963] *Id.* at 197.
[964] *Id.* at 195.
[965] *Id.* at 195.
[966] *Id.*
[967] *Id.*
[968] *Id.* at 196, 196 n.19.
[969] *Id.* at 194.

Partridge v. Partridge

In *Partridge v. Partridge*,[970] the supreme court held that a lower court's fair evaluation of the economic effect of a divorce is a three-step process reviewable under the abuse of discretion standard.[971] During the divorce proceedings, the trial court determined that an even division of assets at the legal date of separation was appropriate.[972] James Partridge challenged the court's allocation of assets claiming the court mischaracterized assets and failed to consider his contributions of separate property to the marriage.[973] The supreme court articulated a three-step property division test to be reviewed under the abuse of discretion standard as: (1) the characterization of property as separate or marital; (2) the value placed upon the property; and (3) the allocation of property as equitable.[974] The supreme court found that not crediting James for marital debt he paid and a failure to determine the existence of pension funds at the time of trial were an abuse of discretion, and all other evaluations by the trial court were neither clearly erroneous nor an abuse of discretion.[975] The supreme court reversed and remanded, holding that a lower court's fair evaluation of the economic effect of a divorce is a three-step process reviewable under the abuse of discretion standard.[976]

Sparks v. Sparks

In *Sparks v. Sparks*,[977] the supreme court held that proceeds from a court settlement are marital property when the evidence shows an intent to donate the disputed portion of the settlement proceeds to the marital estate.[978] Shelia Sparks retired early due to a disability and sued her disability insurance carrier for discontinuing payments; she settled the case in 2004.[979] A portion of the settlement provided monthly payments for Shelia and Richard Sparks that would continue in reduced payments if Shelia predeceased Richard.[980] The supreme court reasoned that the inclusion of Richard Sparks as a payee in the settlement and the continuation of payments to him if Shelia died demonstrated an intent to donate those settlement payments to the marriage.[981] The supreme court affirmed the superior court's holding that damage payments replacing long-term disability payments which served as retirement benefits should be divided based on the length of the marriage[982] and that the superior court did not clearly err in finding an intent to donate damages when the settlement listed the husband as a payee.[983] Affirming the lower court, the supreme court held that proceeds from a court settlement

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[970] 239 P.3d 680 (Alaska 2010).
[971] *Id*. at 682–85.
[972] *Id.* at 682.
[973] *Id.*
[974] *Id.* at 685.
[975] *Id.* at 685–92.
[976] *Id.* at 692.
[977] 233 P.3d 1091 (Alaska 2010).
[978] *Id.* at 1093.
[979] *Id.*
[980] *Id.*
[981] *Id.* at 1096.
[982] *Id.* at 1095.
[983] *Id.* at 1096.

are marital property when the evidence shows an intent to donate the disputed portion of the settlement proceeds to the marital estate.[984]

Wee v. Eggener

In *Wee v. Eggener*,[985] the supreme court held that: (1) a trial court errs when it awards joint custody and fails to address a presumption against custody for a party with a history of domestic violence; and (2) an independent basis must exist with respect to each party when a mutual restraining order is ordered.[986] The domestic relationship between Wee and Eggener was plagued by abuse allegations by Wee, which resulted in a protective order being issued against Eggener.[987] Eggener and Wee both filed for sole legal and primary physical custody of their child, and the trial court ordered joint physical custody and granted a mutual no contact order.[988] The supreme court denied custody to Eggener because the trial court found that Eggener had a history of domestic violence, but did not address a statutory rebuttable presumption against awarding custody to a parent who has a history of domestic violence.[989] Further, the court vacated the no-contact order as it applied to Wee because no independent basis existed for a no-contact order against Wee.[990] Vacating the lower court, the supreme court held that: (1) a trial court errs when it awards joint custody and fails to address a presumption against custody for a party with a history of domestic violence; and (2) an independent basis must exist with respect to each party when a mutual restraining order is ordered.[991]

Williams v. Barbee

In *Williams v. Barbee*,[992] the supreme court held that, when allegations of domestic violence arise in custody hearings, the superior court must make a finding as to whether there has been a "history of domestic violence" under section 25.24.150(h) of the Alaska Statutes.[993] During a custody hearing, Williams presented evidence that Barbee had been convicted of assaulting her while they were married.[994] The trial court weighed this evidence against other factors and granted both parents joint custody.[995] On appeal, Williams argued that Barbee should not have been granted custody because he had a history of domestic violence and section 25.24.150(h) creates a rebuttable presumption against the violent parent.[996] The supreme court noted that a single instance of domestic violence can be considered a "history of domestic violence" for purposes of the statute.[997] It also noted that the superior court had not made a finding as to whether there was a

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[984] *Id.* at 1093.
[985] 225 P.3d 1120 (Alaska 2010).
[986] *Id*. at 1122–27.
[987] *Id.*
[988] *Id.* at 1123–24.
[989] *Id.* at 1125.
[990] *Id.* at 1127.
[991] *Id*. at 1122–27.
[992] 243 P.3d 995 (Alaska 2010).
[993] *Id.* at 1004.
[994] *Id.* at 996–97.
[995] *Id.* at 999.
[996] *Id.* at 997.
[997] *Id.* at 1004.

history of domestic violence.[998] The supreme court held that, when allegations of domestic violence arise in custody hearings, the superior court must make a finding as to whether there has been a "history of domestic violence" under section 25.24.150(h) of the Alaska Statutes.[999]

Worland v. Worland

In *Worland v. Worland*,[1000] the supreme court held: (1) courts may not equitably divide total retirement pay; and (2) when issuing sanctions courts must identify either the nature of the sanction or the rule upon which they relied to impose the sanction.[1001] Jacqueline Worland filed for divorce against her former husband, Charles.[1002] The superior court entered an amended divorce decree assigning Jacqueline 50% of Charles's gross military retirement pay as a sanction for him removing Jacqueline from the survivor benefits plan.[1003] On appeal, Charles argued that the court erred in awarding Jacqueline 50% of his gross retirement pay and that he was sanctioned erroneously.[1004] The supreme court held that "a court may not equitably divide total retired pay; it may equitably divide only the amount of retired pay remaining after the court deducts waived retired pay and the cost of purchasing survivor benefits."[1005] As for the possibility that dividing the total retirement pay was a sanction against Charles, the court held that while trial courts have the authority to sanction through the use of fines, they must identify either the nature of the sanction or the rule upon which it relied.[1006] Because the superior court did neither, the supreme court vacated the sanction.[1007] Remanding the issue of the proper allocation of Charles's retirement pay, the supreme court held: (1) courts may not equitably divide total retirement pay; and (2) when issuing sanctions courts must identify either the nature of the sanction or the rule upon which they relied to impose the sanction.[1008]

INSURANCE LAW

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[998] *Id.*
[999] *Id.*
[1000] 240 P.3d 825 (Alaska 2010).
[1001] *Id.* at 831.
[1002] *Id.* at 827.
[1003] *Id.* at 828, 831.
[1004] *Id.* at 830–31.
[1005] *Id.* at 831 (quoting Young v. Lowery, 221 P.3d 1006, 1011 (Alaska 2009)).
[1006] *Id.*
[1007] *Id.*
[1008] *Id.* at 831.

Alaska Supreme Court

Dale H. v. State, Department of Health & Social Services

In *Dale H. v. State, Department of Health & Social Services*,[1009] the supreme court held a father's parental rights can be terminated under ICWA when he has a history of abandonment and domestic violence.[1010] Dale pled no contest to a fourth degree assault charge against a woman while she was pregnant.[1011] After another incident involving the newborn, OCS petitioned the superior court to recognize the child as a "child in need of aid" under the ICWA.[1012] The court found probable cause sufficient to award OCS temporary custody of the child and set forth a case plan for Dale that allowed him to pursue reunification subject to violence, parenting, and substance abuse counseling.[1013] In the spring of 2009, OCS received three protective services reports involving domestic incidents between Dale and a new wife and stepson and subsequently moved to terminate Dale's parental rights.[1014] The superior court terminated Dale's parental rights, and he appealed.[1015] Citing prior precedent, the supreme court affirmed, stating that Dale's one-year abandonment of his child and his "propensity" for domestic violence made emotional and physical damage to the child if reunited "almost certain."[1016] The court reaffirmed that the "best interests" standard is related chiefly to the bonds developed between the child and his foster family, and found that the child was happy and thriving.[1017] Affirming the lower court, the supreme court held a father's parental rights can be terminated under ICWA when he has a history of abandonment and domestic violence.[1018]

Lucy v. State, Department of Health & Social Services

In *Lucy v. State, Department of Health & Social Services* [1019] the supreme court held that to terminate parental rights under the Indian Child Welfare (ICWA) and Child in Need of Aid (CINA) statutes, a court must find by clear and convincing evidence that the child has been exposed to conditions resulting in mental injury; that the parent failed to remedy unsuitable conduct; that active efforts were made to prevent the breakup of the family; that, as established by an expert witness, continued custody by the parent will result in damage to the child; and finally, that termination of parental rights is in the best interests of the child.[1020] In October 2004, the Office of Children's Services (OCS) took

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[1009] 235 P.3d 203 (Alaska 2010).
[1010] *Id.* at 205–15.
[1011] *Id.* at 206.
[1012] *Id*.
[1013] *Id.*
[1014] *Id.* at 209.
[1015] *Id.*
[1016] *Id.* at 210–14.
[1017] *Id.* at 215.
[1018] *Id.* at 205–215.
[1019] 244 P.3d 1099 (Alaska 2010).
[1020] *Id.* at 1110. Lucy is affiliated with the Tlingit and Haida Tribes, and her children are Indian children. *Id.* at 1102.

custody of Jack and filed an Emergency Petition for Adjudication of Child in Need of Aid.[1021] Lucy sought various forms of treatment for substance abuse until the fall of 2005, when she relapsed before the birth of her second child.[1022] Over the next few years, her behavior included several incidences of child neglect, continual substance abuse, and refusal to seek treatment.[1023] In 2006, the children were put in foster care.[1024] She had a third child in 2007.[1025] Her substance abuse and neglect continued, and in 2009, OCS terminated Lucy's parental rights.[1026] On appeal, the supreme court found that Lucy did not remedy her drug and alcohol abuse; that active efforts were made to prevent the break up of the family; and that terminating Lucy's rights was in the children's best interests.[1027] Affirming the trial court, the supreme court held that to terminate parental rights under ICWA and CINA statutes, a court must find by clear and convincing evidence that the child has been exposed to conditions resulting in mental injury; that the parent failed to remedy unsuitable conduct; that active efforts were made to prevent the breakup of the family; that, as established by an expert witness, continued custody by the parent will result in damage to the child; and finally, that termination of parental rights is in the best interests of the child.[1028]

PROPERTY LAW

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Alaska Supreme Court

Dias v. State, Dep't of Transportation and Public Facilities

In *Dias v. State, Dep't of Transportation and Public Facilities*,[1029] the supreme court held that the state's easement over private property unambiguously included a right of passage and the right to construct a road when the easement conveyed a "right of way."[1030] The state was conveyed an easement over the disputed property in 1969; in 1992, the Diases were conveyed the land subject to the easement.[1031] When the state attempted to negotiate future road construction along the encumbered land, the Diases filed suit to quiet title, claiming that the easement was solely for mineral removal, not for road construction.[1032] The state moved for summary judgment and the superior court granted the motion, finding that the state's right of way easement included road construction.[1033] According to the definition of right of way and past supreme court decisions, the "right of passage" was unambiguously included in the state's easement.[1034]

[1021] *Id.* at 1102.
[1022] *Id*. at 1102-4.
[1023] *Id.* at 1104–05.
[1024] *Id.* at 1106.
[1025] *Id.* at 1108.
[1026] *Id.* at 1108–10.
[1027] *Id.* at 1112–21.
[1028] *Id.* at 1110.
[1029] 240 P.3d 272 (Alaska 2010).
[1030] *Id.* at 274 –75.
[1031] *Id.* at 273–74.
[1032] *Id.* at
[1033] *Id.* at
[1034] *Id.* at 274–75.

Affirming the lower court, the supreme court held that the state's easement over private property unambiguously included a right of passage and the right to construct a road when the easement conveyed a "right of way."[1035]

State, Department of Natural Resources v. Alaska Riverways, Inc.

In *State, Department of Natural Resources v. Alaska Riverways, Inc.*,[1036] the supreme court held that the Alaska Department of Natural Resources ("DNR") had authority to mandate that commercial riparian landowners enter into leases for exclusive use of state-owned public trust shorelands but that rent amounts in such leases cannot be based on the number of passengers transported.[1037] Alaska Riverways, a tour boat company, owned property along the Chena River.[1038] Alaska Riverways and DNR tried and failed to agree on terms for a lease.[1039] DNR later issued a final decision, stating that riparian owners "wharfing out" for commercial use had no natural property rights and that Alaska Riverways must enter into a lease for $1000 per year or $0.25 per paying customer, whichever was greater.[1040] Alaska Riverways appealed, claiming both that the lease structure discriminated against commercial users and that the fee structure violated federal law.[1041] Although the superior court held that DNR had no authority to bind Alaska Riverways to any lease, such a lease structure would not violate Alaska Riverways' equal protection rights or federal law.[1042] The supreme court held that the public trust doctrine does not itself require riparian owners to sign leases with the government but that the legislature had created such authority independently.[1043] The court held that DNR was permitted to require Alaska Railways to sign a lease and that such a lease did not violate equal protection rights.[1044] However, court held the $0.25 per passenger component of the lease agreement unconstitutional.[1045] Federal law requires that states levy fees directly proportional to the benefit provided by the state.[1046] Since the value of the state's service was the same regardless of how many passengers boarded, the lease fee was set at $1000.[1047] The supreme court held that DNR had the authority to bind riparian landowners to leases but that the choice of lease fees based on passenger counts violated federal law.[1048]

Williams v. Fagnani

In *Williams v. Fagnani*,[1049] the supreme court held that owners of servient estates may not maintain a gate obstructing the dominant owners' implied easements unless the

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[1035] *Id.* at 274 –75.
[1036] 232 P.3d 1203 (Alaska 2010).
[1037] *Id.* at 1222–23.
[1038] *Id.* at 1206.
[1039] *Id.*
[1040] *Id.* at 1206–07.
[1041] *Id.* at 1207.
[1042] *Id.*
[1043] *Id.* at 1211–15.
[1044] *Id.* at 1220.
[1045] *Id.*
[1046] *Id.* at 1222.
[1047] *Id.* at 1222–23.
[1048] *Id.*
[1049] 228 P.3d 71 (Alaska 2010).

benefit to the servient estate outweighs the inconveniences to the dominant estate.[1050] The superior court held that Fagnani was entitled to maintain a locked gate that limited access to the roadway because the easement only provided for private use.[1051] The supreme court reasoned that a locked gate imposes a significant burden on a homeowner's right to access his or her property.[1052] Therefore, locked gates would only be allowed where the locked gate provides a substantial benefit to the servient estate, such as providing security.[1053] In situations where both benefit to the servient estate and detriment to the dominant estate are present, the two must be weighed against one another.[1054] Vacating and remanding, the supreme court held that owners of servient estates may not maintain a gate obstructing the dominant owners' implied easements unless the benefit to the servient estate outweighs the inconveniences to the dominant estate.[1055]

TORT LAW

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Alaska Supreme Court

Allstate Ins. Co. v. Dooley

In *Allstate Ins. Co. v. Dooley*,[1056] the supreme court held that the tort of spoliation is not appropriate when evidence is concealed but not destroyed, and instead the newly recognized tort of fraudulent concealment of evidence is the proper cause of action.[1057] After a slip and fall trial, Dooley discovered that Allstate failed to produce a material piece of evidence and sued Allstate for spoliation of evidence and fraud and misrepresentation.[1058] On partial summary judgment for the spoliation claim, the supreme court held that spoliation is not the proper tort when evidence is concealed but not destroyed.[1059] Spoliation is a remedy if evidence is completely inaccessible and any damage calculation would be speculative, but evidence that is not destroyed can still be submitted to a fact-finder.[1060] Instead, the proper claim should be under a newly recognized tort in Alaska, fraudulent concealment of evidence, which applies when: (1) the defendant concealed material evidence; (2) the plaintiff's cause of action was viable; (3) the evidence could not reasonably have been procured from another source; (4) the defendant concealed the evidence with the intent to disrupt or prevent litigation; (5) the withholding damaged the plaintiff from having to rely on an incomplete evidentiary record; and (6) the plaintiff had no available remedy when the evidence was discovered.[1061] Remanding for further proceedings, the supreme court held that the tort of

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[1050] *Id.* at 75–76.
[1051] *Id.*
[1052] *Id.* at 75.
[1053] *Id.*
[1054] *Id.* at 76.
[1055] *Id.* at 75–76.
[1056] 243 P.3d 197 (2010).
[1057] *Id.* at 203–04.
[1058] *Id.* at 198–199.
[1059] *Id.* at 199–200.
[1060] *Id.* at 203.
[1061] *Id.* at 204.

spoliation is not appropriate when evidence is concealed but not destroyed, and instead the tort of fraudulent concealment of evidence is the proper cause of action.[1062]

Christoffersen v. State

In *Christoffersen v. State*,[1063] the supreme court held that court-appointed child custody investigators retain "absolute quasi-judicial immunity," which also extends to the state, that shields them from civil lawsuits resulting from the performance of their duties.[1064] A court-appointed investigator did not immediately notify the Christoffersens that their minor son had previously been accused of inappropriately touching a minor child.[1065] After receiving the custody report that included the information about the inappropriate touching, the Christoffersens learned that the son had "sexually abused" their daughter and sued the state, claiming that the investigator failed in her duty to protect children from abuse and immediately report any sexual abuse that she discovered.[1066] The superior court granted both of the state's motions for summary judgment, holding that "custody investigators are entitled to absolute quasi-judicial immunity" from tort suits related to their official duties, and that the custody investigator in this case had no duty to warn the Christoffersens.[1067] The supreme court affirmed the superior court's disposition of the immunity issue without reaching the duty to warn.[1068] The doctrine of absolute judicial immunity extends to court-appointed experts and to others whose duties are "sufficiently related to the judicial process," including custody investigators.[1069] Finally, the court held that the state was not vicariously liable for these experts because "a government employee's official immunity from suit bars vicarious liability claims against the government for the same conduct."[1070] Affirming the lower court, the supreme court held that court-appointed child custody investigators retain "absolute quasi-judicial immunity," which also extends to the state, that shields them from civil lawsuits resulting from the performance of their duties.[1071]

Lindsey v. E&E Automotive & Tire Service, Inc.

In *Lindsey v. E&E Automotive & Tire Service, Inc.*,[1072] the supreme court held that a plaintiff's negligence claim against a mechanic does not withstand a motion for summary judgment when the mechanic fulfilled the duty to: (1) not "increase the risk of harm" during vehicle repairs; (2) not induce reliance on a vehicle that is unsafe; and (3) warn the vehicle owner of dangers the mechanic knows, or should have known, result from any unrepaired aspects of the vehicle.[1073] Lindsey was injured when a truck rolled backwards over him due to a parking brake failure.[1074] The truck had previously been

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[1062] *Id.* at 203–04.
[1063] *242 P.3d 1032* (Alaska 2010).
[1064] *Id.* at 1033.
[1065] *Id.*
[1066] *Id.*
[1067] *Id.* at 1034.
[1068] *Id.*
[1069] *Id.* at 1034–35.
[1070] *Id.* at 1036.
[1071] *Id.* at 1033.
[1072] 241 P.3d 880 (Alaska 2010).
[1073] *Id*. at 882–89.
[1074] *Id*. at 882–83.

sent to E&E Automotive to repair its brakes.[1075] The mechanic who worked on the truck did not know how to fix the parking brake and told the owner that it still did not work.[1076] Nonetheless, the owner put the truck back in service.[1077] Lindsey sued E&E for negligence, and E&E moved for summary judgment.[1078] The superior court found that a mechanic's duty of care is to inform a vehicle owner that a vehicle is still impaired or that a repair has not been made.[1079] Because it was not disputed that the mechanic told the owner that the brake still did not work, the court granted the motion for summary judgment.[1080] On appeal, the supreme court found that E&E did not negligently make the truck more dangerous, did not induce the owner's reliance on the truck, and did warn him that the truck was not repaired.[1081] Affirming the lower court, the supreme court held that a plaintiff's negligence claim against a mechanic does not withstand a motion for summary judgment when the mechanic fulfilled the duty to: (1) not "increase the risk of harm" during vehicle repairs; (2) not induce reliance on a vehicle that is unsafe; and (3) warn the vehicle owner of dangers the mechanic knows, or should have known, result from any unrepaired aspects of the vehicle.[1082]

Mueller v. Buscemi

In *Mueller v. Buscemi*,[1083] the supreme court held that the trial court did not abuse its discretion when excluding evidence alleging (1) inadequate maintenance; (2) substantially similar events; and (3) habitual practice.[1084] Mueller slipped on ice and hurt herself in Buscemi's parking lot.[1085] She sued Buscemi arguing that Buscemi's failure to remove ice and provide lighting in the lot proximately caused Mueller's injuries.[1086] At trial, the jury returned a verdict in favor of Buscemi.[1087] Mueller appealed, arguing that the trial court incorrectly excluded evidence.[1088] The supreme court affirmed,[1089] holding that the trial court did not abuse its discretion when it excluded evidence of inadequate maintenance. Mueller failed to offer proof as to the substance of the evidence both during pretrial motions, and at trial.[1090] Additionally, the supreme court reasoned that the trial court did not abuse its discretion when excluding proffered evidence of substantially similar accidents because Mueller failed to overcome the burden of substantial similarity.[1091] Finally, the supreme court reasoned that the trial court did not abuse its discretion when excluding evidence of habitual failed maintenance because the

[1075] *Id*.
[1076] *Id*.
[1077] *Id*. at 883.
[1078] *Id*.
[1079] *Id*.
[1080] *Id*.
[1081] *Id*.
[1082] *Id*. at 882–89.
[1083] 230 P.3d 1153 (Alaska 2010).
[1084] *Id.* at 1154–57.
[1085] *Id.* at 1154.
[1086] *Id.*
[1087] *Id.*
[1088] *Id.*
[1089] *Id.* at 1157.
[1090] *Id.* at 1155–57.
[1091] *Id.* at 1155–56.

photographs Mueller provided were not dated and were thus insufficient to support an inference of habit.[1092] Affirming the trial court, the supreme court found the lower court did not abuse its discretion when it excluded evidence alleging (1) inadequate maintenance; (2) substantially similar events; and (3) habitual practice.[1093]

Smith v. Radecki

In *Smith v. Radecki*,[1094] the supreme court held that a physician performing an independent medical examination is not liable for medical malpractice because he does not have a physician-patient relationship with the examinee.[1095] Smith injured his back and filed a workers' compensation claim, prompting his employer to arrange for Radecki to conduct an independent medical examination.[1096] Prior to the examination, Smith was informed that no physician-patient relationship would develop as a result of the examination.[1097] Radecki did not discover several spinal injuries during this examination, causing Smith to file suit.[1098] The superior court decided Radecki's summary judgment motion in his favor and Smith appealed.[1099] The supreme court reasoned that a physician that conducts an independent medical examination arranged by an employer does not owe the examinee the duty of care that accompanies a traditional physician-patient relationship.[1100] The court also refused to extend a limited duty of care to Radecki's actions because that limited duty was not implicated in Smith's case.[1101] Thus, the supreme court held that a physician performing an independent medical examination is not liable for medical malpractice because he does not have a physician-patient relationship with the examinee.[1102]

Weed v. Bachner Co. Inc.

In *Weed v. Bachner Co. Inc.*,[1103] the supreme court held that state procurement officials are only entitled to qualified immunity when defending against common law claims arising out of bid evaluation processes.[1104] Bachner was not awarded a state contract and sued the procurement officials as individuals, alleging that they had intentionally interfered with Bachner's prospective economic opportunity.[1105] The officials moved to dismiss the claim on the basis of absolute immunity.[1106] The superior court denied the motion and held that the procurement officials only had qualified immunity.[1107] The supreme court affirmed, applying a three factor test.[1108] The first

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[1092] *Id.* at 1156–57.
[1093] *Id.* at 1154–57.
[1094] 238 P.3d 111 (Alaska 2010).
[1095] *Id.* at 112.
[1096] *Id.*
[1097] *Id.*
[1098] *Id.* at 113.
[1099] *Id.* at 114.
[1100] *Id.* at 115.
[1101] *Id.* at 116–17.
[1102] *Id.* at 117.
[1103] 230 P.3d 697 (Alaska 2010).
[1104] *Id.* at 703.
[1105] *Id.* at 698–99.
[1106] *Id.* at 699.
[1107] *Id.*

factor, the nature and importance of the officials' function to the administration of government, weighed in favor of qualified immunity.[1109] The second factor, the likelihood that the officials will face frequent litigation and the difficulty of defending themselves, also weighed in favor of qualified immunity.[1110] The final factor, the availability of alternative remedies to the bidders, weighed in favor of absolute immunity.[1111] The supreme court affirmed the superior court and held that state procurement officials are only entitled to qualified immunity when defending against common law claims arising out of the bid evaluation process.[1112]

TRUSTS & ESTATES LAW

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Alaska Supreme Court

Farmer v. Farmer

In *Farmer v. Farmer*,[1113] the supreme court held that the superior court did not abuse its discretion by appointing a temporary limited conservator for a person who demonstrated an inability to manage his property and finances.[1114] A probate master found Robert Farmer was "incapacitated" because he could not manage his finances and appointed his daughter Barbara as partial limited conservator.[1115] The superior court conducted a hearing de novo and approved the probate master's findings.[1116] Robert appealed, arguing that the evidence was insufficient to support a conservator appointment.[1117] Applying a clearly erroneous standard of review, the supreme court held that the superior court's factual findings supported the conclusion that Robert was unable to manage his property and affairs.[1118] The supreme court noted that "incapacity" necessitating a conservator, under § 13.26.165(2)(A) of the Alaska Statutes, is different from "incapacity" necessitating guardianship; establishing "incapacity" necessitating a conservator focuses on the individual's ability to manage his property and affairs.[1119] The superior court found that Robert was unable to prioritize his finances.[1120] The supreme court held that the superior court did not abuse its discretion by appointing a temporary limited conservator for a person who demonstrated an inability to manage his property and finances.[1121]

[1108] *Id.* at 698.
[1109] *Id.* at 700–01.
[1110] *Id.* at 702.
[1111] *Id.* at 703.
[1112] *Id.*
[1113] 230 P.3d 689 (Alaska 2010).
[1114] *Id.* at 691, 693.
[1115] *Id.* at 692.
[1116] *Id.*
[1117] *Id.* at 693.
[1118] *Id.* at 693–95.
[1119] *Id.* at 693.
[1120] *Id.* at 695.
[1121] *Id.* at 691, 693.