THE YEAR IN REVIEW 2012

SELECTED CASES FROM THE ALASKA SUPREME COURT, THE ALASKA COURT OF APPEALS, THE UNITED STATES SUPREME COURT, THE 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

Alaska Fish & Wildlife Conservation Fund v. State, Department of Fish & Game

In *Alaska Fish & Wildlife Conservation Fund v. State, Department of Fish & Game*,[1] the supreme court (1) upheld a regulation setting out criteria for classifying fisheries, and (2) found that per capita consumption of wild food in the home community of various users was permissible data for the Board of Fisheries ("Board") to use in making their determination.[2] At different points in the last several decades, the Chitina subdistrict of the Copper River Basin has been classified as either a "personal use" fishery or a subsistence fishery.[3] Most recently, the Board labeled Chitina as "personal use," and citizen groups challenged this finding by claiming the regulation used to make it was facially unconstitutional, in large part because it favored rural communities.[4] The superior court held that the regulation was constitutional, but remanded to the Board to better articulate its standard in applying the regulation, with instructions not to consider the per capita consumption of wild food in the home community of various users.[5] On appeal, the supreme court agreed with the superior court's finding that the regulation was

[1] 289 P.3d 903 (Alaska 2012).
[2] *Id.* at 905.
[3] *Id.* at 904–06.
[4] *Id.* at 905, 908.
[5] *Id.* at 905.

constitutional, but found that information regarding per capita consumption may be relevant in making a subsistence or "personal use" designation, and therefore should not be categorically excluded.[6] Affirming in part and reversing in part, the supreme court (1) upheld a regulation setting out criteria for classifying fisheries, and (2) found that per capita consumption of wild food in the home community of various users was permissible data for the Board of Fisheries to use in making their determination.[7]

Alyeska Pipeline Service Co. v. State

In *Alyeska Pipeline Service Co. v. State*,[8] the supreme court held that the Alaska Department of Natural Resources' ("Department") calculation of the fair market value of land covered by right-of-way leases for the Trans Alaska Pipeline System ("TAPS") may properly (1) exclude reductions for reserved rights, and (2) include uncontested submerged lands.[9] Alyeska Pipeline Service Company ("Alyeska") appealed the terms of its TAPS lease renewal imposed by the Department.[10] Alyeska claimed that the renewal was improper under the Alaska statute that governs the calculation of the lease price.[11] The supreme court determined that the lease price was properly calculated based on the fair market value of the state land and did not require consideration of the rights granted or retained in the lease.[12] The supreme court also held that the TAPS lease may properly include submerged lands because the state holds presumptive title to all submerged lands within its original 1959 borders unless the federal government has contested or claimed an interest in those lands.[13] Affirming, the supreme court held that the Department calculation of the fair market value of land covered by right-of-way leases for TAPS may properly (1) exclude reductions for reserved rights, and (2) include uncontested submerged lands.[14]

Caywood v. State, Department of Natural Resources

In *Caywood v. State, Department of Natural Resources*,[15] the supreme court held that (1) restrictions on the use of the Rex Trail imposed by the Department of Natural Resources ("Department") are authorized by law,[16] and (2) restrictions imposed by the Department limiting the weight of vehicles that may travel on the Rex Trail during certain times of year met the reasonable basis standard for decision-making by a state agency.[17] In 2008, the Department's northern region manager issued a decision restricting vehicles weighing more than 1,500 pounds from using the Rex Trail between April 15 and October 31, due to potential road damage.[18] Caywood appealed the decision, the Department

[6] *Id.* at 905, 913.
[7] *Id.* at 905.
[8] 288 P.3d 736 (Alaska 2012).
[9] *Id.* at 737.
[10] *Id.* at 738.
[11] *Id.*
[12] *Id.* at 740−41.
[13] *Id.* at 743−45.
[14] *Id.* at 737.
[15] 288 P.3d 745 (Alaska 2012).
[16] *Id.* at 750.
[17] *Id.* at 751–52.
[18] *Id.* at 746–47.

Commissioner denied Caywood's appeal, and the superior court affirmed.[19] On appeal to the supreme court, Caywood argued that the Commissioner did not have authority to impose the restrictions, or alternatively that the necessity of the restrictions was not supported by substantial evidence.[20] The supreme court first agreed that the Commissioner did not have authority under the relevant Alaska statute because that statute was limited to situations in which the land is held by a grantee, but it reasoned that the Commissioner did have authority under the administrative code, which recognizes the Commissioner's authority over certain rights-of-way.[21] Next, the supreme court disagreed that the restrictions must be supported by substantial evidence, instead holding that policy decisions regarding restrictions on the use of state land are reviewed under the reasonable basis standard, and that the Commissioner had ample evidence to make his decision.[22] Affirming, the supreme court held that (1) restrictions on the use of the Rex Trail imposed by the Department are authorized by law,[23] and (2) restrictions imposed by the Department limiting the weight of vehicles that may travel on the Rex Trail during certain times of year met the reasonable basis standard for decision-making by a state agency.[24]

Cutler v. Kodiak Island Borough

In *Cutler v. Kodiak Island Borough*,[25] the supreme court held that the Kodiak Island Borough ("Borough") does not have authority to record liens for non-payment of garbage services.[26] The Sabados hired David to tear down a structure on their property in Kodiak.[27] Unbeknownst to the Sabados, David set up a commercial garbage account with the Borough, and accrued a $5000 balance on that account.[28] David failed to pay, and the account became delinquent.[29] In 2009 the Borough recorded a lien against the property, and in 2010 petitioned for foreclosure.[30] Upon learning of the lien and foreclosure action, Cutler, the new owner of the property, filed an answer and counterclaim arguing that the lien had been wrongfully recorded.[31] The superior court granted summary judgment in favor of the Borough and entered default judgment on the garbage-service liens.[32] Relying on other instances where the legislature specifically granted boroughs the authority to record property liens, the supreme court reasoned that boroughs do not possess this authority where the legislature has not made such a grant.[33] Reversing, the

[19] *Id.*
[20] *Id.* at 750–51.
[21] *Id.*
[22] *Id.* at 751–52.
[23] *Id.* at 750.
[24] *Id.* at 751–52.
[25] 290 P.3d 415 (Alaska 2012).
[26] *Id.* at 417.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 419.

supreme court held that the Borough does not have the authority to record liens for non-payment of garbage services.[34]

In re Joan K.

In *In re Joan K.*,[35] the supreme court held that a thirty day involuntary commitment to a psychiatric institute was justified where clear and convincing evidence supported the finding that the individual suffered from a mental illness and posed a substantial risk of bodily harm to herself.[36] Joan disappeared for three weeks, and her mother later found her and brought her to a hospital.[37] Emergency room staff examined Joan and found her confused, and she also tested positive for amphetamines and cocaine.[38] A physician sought Joan's involuntary commitment for mental health treatment.[39] The lower court ordered a thirty day commitment, which Joan appealed.[40] The supreme court affirmed, reasoning that Joan's continued illegal drug use would exacerbate her mental illness and cause a self-destructive downward spiral of her mental and physical health.[41] The court noted that, although Joan never articulated a desire to harm herself, she showed symptoms of lethargy and opioid withdrawal that follow stimulant abuse.[42] The court further noted that the plain text of the relevant Alaska statute directs courts to consider recent behavior and does not require affirmative statements regarding future drug use.[43] Affirming, the supreme court held that Joan's thirty day involuntary commitment was justified where clear and convincing evidence supported the finding that she suffered from a mental illness and posed a substantial risk of bodily harm to herself.[44]

McCleod v. Parnell

In *McCleod v. Parnell*,[45] the supreme court held that (1) state records which are preserved or are appropriate for preservation under the Records Management Act are subject to review under the Public Records Act, and (2) the use of private email accounts to conduct state business, alone, is not a *per se* obstruction to "public records."[46]McCleod brought an action in superior court seeking a declaratory judgment that all emails sent between Sarah Palin and her husband's private email accounts were "public records" if the subject of the email in any way related to official business of the state, and also seeking an injunction compelling the governor's office to preserve these emails, stop using private email accounts to conduct government business, and to retrieve deleted emails from those accounts.[47] The superior court ultimately granted the State's motion for summary judgment and dismissed the case, holding that not every email referring to state business

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[34] *Id.*
[35] 273 P.3d 594 (Alaska 2012).
[36] *Id.* at 602.
[37] *Id.* at 595.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 601.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 602.
[45] 286 P.3d 509 (Alaska 2012).
[46] *Id.* at 515.
[47] *Id.* at 511–12.

is a "public record," that there is an element of discretion in deciding which emails to preserve, and that using private emails to conduct state business is not a *per se* obstruction of access to public records.[48] However, the court held additionally that state employees who fail to preserve public records that should be preserved might violate the law.[49] The supreme court agreed in part, reasoning that the legislature intended that both public records that are preserved and those that are appropriate for preservation are subject to review under the Public Records Act,[50] but that the use of private emails is no more of a violation of the Act than communicating through paper letters.[51] Affirming in part, the supreme court held that (1) state records which are preserved or are appropriate for preservation under the Records Management Act are subject to review under the Public Records Act, and (2) the use of private email accounts to conduct state business, alone, is not a *per se* obstruction to "public records.".[52]

Price v. Unisea, Inc.

In *Price v. Unisea, Inc.*,[53] the supreme court held that an international organization is immune from suit where immunity has not been expressly waived.[54] In 2006, Price was injured while working for the International Pacific Halibut Commission ("IPHC"),an international organization established by a treaty between the United States and Canada.[55] Price filed a negligence action but the superior court dismissed the suit on immunity grounds.[56] Price appealed, arguing that IPHC had waived immunity in their employment agreement.[57] The supreme court rejected Price's arguments, reasoning that the International Organizations Immunities Act provides absolute immunity to international organizations that must be expressly waived.[58] Furthermore, the court reasoned that the employee benefits clause in the contract did not transform into a clause waiving immunity for suits related to those benefits in state court.[59] Affirming, the supreme court held that an international organization is immune from suit where immunity has not been expressly waived.[60]

Runstrom v. Alaska Native Med. Ctr.

In *Runstrom v. Alaska Native Med. Ctr.*,[61] the supreme court held that an employer can rebut an employee's claim of being temporarily totally disabled by providing substantial evidence that the employee could actually return to work.[62] While working, Runstrom's

[48] *Id.* at 512–13.
[49] *Id.* at 513.
[50] *Id.* at 514.
[51] *Id.* at 515.
[52] *Id.*
[53] 289 P.3d 914 (Alaska 2012).
[54] *Id.* at 916.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 920.
[59] *Id.* at 921.
[60] *Id.* at 916.
[61] 280 P.3d 567 (Alaska 2012).
[62] *Id.* at 574.

eyes were sprayed with fluids from an HIV-positive patient.[63] Subsequently, she received temporary total disability ("TTD") until the Alaska Native Medical Center ("Center") later controverted her benefits because the Center determined no further medical care was needed after her HIV test came back negative.[64] The Center also attempted to place Runstrom back into her previously held position, but she refused.[65] About a month later, Runstrom was terminated for her failure to return to work.[66] On appeal, Runstrom argued that she was improperly denied TTD benefits from the Alaska Workers' Compensation Board because her employer failed to provide substantial evidence to rebut the presumption that she was disabled.[67] The supreme court affirmed the Workers' Compensation Commission, reasoning a doctor and a primary health provider's opinions that she could return to work provided substantial evidence supporting the employer's and the Board's determinations.[68] Furthermore, the court noted that Runstrom failed to offer any evidence to the contrary.[69] Affirming the Commission, the supreme court held that an employer can rebut an employee's claim of being temporarily totally disabled by providing substantial evidence that the employee could actually return to work.[70]

Sitkans for Responsible Government v. City & Borough of Sitka

In *Sitkans for Responsible Government v. City & Borough of Sitka*,[71] the supreme court held that an initiative to make current law applicable to all, instead of just some, transactions of a certain type cannot be contrary to law and, therefore, unenforceable.[72] Sitka law required that the city's assembly pass an ordinance which must be ratified by Sitka voters before large land transactions could be completed.[73] However, Sawmill Cove was put under the management of a board of directors who only needed a resolution from the assembly in order to complete large land transactions.[74] After a citizens' petition to align large land transactions involving Sawmill Cove with all other land transactions by the city was denied by the city's municipal clerk before collection of supporting elector signatures, a complaint was filed in superior court.[75] On appeal, the citizens argued that the initiative did not violate the Sitka Charter because it would not add any procedures that were not already in place for similar transactions.[76] The supreme court agreed and reversed the superior court's decision, reasoning that the initiative was only an extension of current applicable law.[77] It further reasoned that even if supporting elector signatures are necessary before a voter approval is appropriate under the Sitka Charter, such grounds cannot justify finding an extension of current applicable law contrary to law just because

[63] *Id.* at 569.
[64] *Id.* at 570.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 573.
[68] *Id.* at 575.
[69] *Id.*
[70] *Id.* at 574.
[71] 274 P.3d 486 (Alaska 2012).
[72] *Id.* at 493.
[73] *Id.* at 489.
[74] *Id.*
[75] *Id.* at 490.
[76] *Id.* at 492.
[77] *Id.* at 493.

current applicable law may violate the charter.[78] Reversing the lower court's decision, the supreme court held that a citizens' initiative that would make current law applicable to all, instead of just some, transactions of a certain type cannot be contrary to law, and, therefore, unenforceable.[79]

State, Department of Natural Resources v. Nondalton Tribal Council

In *State, Department of Natural Resources v. Nondalton Tribal Council*,[80] the supreme court held that the 2005 Bristol Bay Area Plan ("BBAP") – a plan that directs how the Department of Natural Resources ("DNR") will manage state uplands, shorelands, tidelands, and submerged lands – is not a regulation.[81] Tribal councils filed suit against the DNR alleging that the DNR unlawfully adopted the BBAP, and sought declaratory judgment that the BBAP no longer had any legal effect.[82] The DNR argued that the causes of action at issue were barred because they were not brought within the proper limitations period.[83] Tribal councils argued that, since the BBAP was a regulation, it was subject to judicial review at any time.[84] The lower court concluded that the BBAP was a regulation and therefore was subject to judicial review.[85] The supreme court reversed the lower court's decision, reasoning that the BBAP did not affect the public and was not used by the agency in dealing with the public.[86] The court noted that, though the BBAP certainly affected the public in a broad sense, this nonspecific, downstream effect alone was insufficient to demonstrate sufficient meaningful impact.[87] Reversing the lower court, the supreme court held that the BBAP is not a regulation.[88]

State Department of Health & Social Services v. North Star Hospital

In *State Department of Health & Social Services v. North Star Hospital*,[89] the supreme court held that an agency calculating Medicaid rates may abuse its discretion by relying on outdated data when current data would produce significantly different results.[90] The Department of Health & Social Services (DHSS) calculated the Medicaid payment rate for North Star Hospital (NSH) for fiscal years 2008–2011 using a report from 2005 even though NSH's home-office costs nearly doubled in 2006.[91] Nevertheless, since NSH could only provide an unaudited report for 2006 to DHSS sixty days before the start of the re-basing year, NSH's base rate was set using the 2005 report.[92] The lower court held that DHSS abused its discretion.[93] On appeal, DHSS argued that it did not abuse its

[78] *Id.*
[79] *Id.*
[80] 268 P.3d 293 (Alaska 2012).
[81] *Id.* at 296, 305.
[82] *Id.* at 297.
[83] *Id.*
[84] *Id.* at 298.
[85] *Id.*
[86] *Id.* at 303.
[87] *Id.*
[88] *Id.* at 305.
[89] 280 P.3d 575 (Alaska 2012).
[90] *Id.* at 581–82.
[91] *Id.* at 577.
[92] *Id.* at 577–78
[93] *Id.* at 580.

discretion because it needs at least sixty days to calculate rates and an unaudited report was unreliable for the calculation.[94] The supreme court affirmed the lower court's decision, reasoning that a temporary base rate could have been given to NSH until a final rate could have been calculated using an audited report from fiscal year 2006.[95] The court further reasoned that NSH was not at fault for the delay of the report, and DHSS approved temporary rates for two other medical centers and did not set its final rate until the audited report for NSH was completed.[96] Affirming the lower court's decision, the supreme court held that an agency calculating Medicate rates may abuse its discretion by relying on outdated data when current data would produce significantly different results.[97]

State, Department of Labor & Workforce Development, Division of Workers' Compensation, Second Injury Fund v. Tongass Business Center

In *State, Department of Labor & Workforce Development, Division of Workers' Compensation, Second Injury Fund v. Tongass Business Center*,[98] the supreme court held that a party has thirty days to appeal a decision of the Workers' Compensation Board, which begins to run the day the decision is served on the parties.[99] Tongass Business Center sought reimbursement from a government fund ("Fund") for payments made to a workers' compensation claimant.[100] The Workers' Compensation Board granted the petition and the Fund appealed.[101] The Workers' Compensation Appeals Commission ("Commission") denied the Fund's motion to accept a late-filed appeal, and dismissed the appeal.[102] On appeal, the supreme court reversed the Commission's decision.[103] The court reasoned that, because the Fund timely requested reconsideration, its appeal was due within thirty days after the date the request for reconsideration was denied.[104] The court noted that a petition is considered denied if no action on a petition is taken within the time allowed for ordering a reconsideration.[105] The court further noted that the Commission was not justified in its conclusion that the petition was denied because action was taken on the petition.[106] Thus, reversing the Commission, the supreme court held that a party has thirty days to appeal a decision of the Workers' Compensation Board, which begins to run the day the decision is served on the parties.[107]

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[94] *Id.*
[95] *Id.*
[96] *Id.* at 581.
[97] *Id.* at 581–82.
[98] 276 P.3d 453 (Alaska 2012).
[99] *Id.* at 457.
[100] *Id.* at 454.
[101] *Id.*
[102] *Id.* at 455.
[103] *Id.*
[104] *Id.* at 456.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 457.

State, Department of Commerce, Community & Economic Development v. Wold

In *State, Department of Commerce, Community & Economic Development v. Wold*,[108] the supreme court held that a desk review with conclusory statements does not provide the substantial evidence necessary to support violations of the Uniform Standards of Professional Appraisal Practice ("USPAP").[109] Wold appraised two residential properties and a partial interest in a marina facility for a divorce proceeding[110] The divorce proceeding went to trial, where Wold's appraisals were determined to be significantly lower than the actual value of the assets.[111] Subsequently, after Wold's appraisals were investigated and reviewed by the Board of Certified Real Estate Appraisers, the Board determined his appraisals violated provisions of the USPAP.[112] Wold appealed the Board's decision and the superior court reversed seven of the Board's eight findings, holding that these findings were not supported by substantial evidence.[113] On appeal, the supreme court affirmed the lower court's decision in part and reversed in part, finding that no violations had occurred.[114] It reasoned that under the substantial evidence test for administrative factual findings, the expert-supplied desk review relied upon during the Board's findings was inadequate because most conclusions were given without sufficient supportable evidence.[115]Affirming in part and reversing in part, the supreme court held that a desk review with conclusory statements does not provide the substantial evidence necessary to support violations of the USPAP.[116]

Toliver v. Alaska State Commission for Human Rights

In *Toliver v. Alaska State Commission for Human Rights*, the supreme court held that the State Commission for Human Rights ("Commission") has a statutory duty to reasonably investigate claims, and this duty implies that the Commission must make reasonable efforts to interview witnesses.[117] Pro se appellant Toliver filed a complaint with the Human Rights Commission alleging that two stores violated his rights and privileges on the basis of race.[118] The Commission concluded that the allegations were not supported by any substantial evidence and closed the case.[119] Toliver appealed the case to the superior court, which affirmed the decision of the Commission and concluded that conducting interviews was not necessary because the named individuals had not been present when the incidents occurred.[120] The supreme court reversed the superior court, holding that the Commission must make reasonable efforts to investigate.[121] The court reasoned that the Commission breached its statutory duty to conduct an impartial investigation when it did not interview the individuals Toliver identified who could

[108] 278 P.3d 266 (Alaska 2012).
[109] *Id. at* 268.
[110] *Id.* at 269.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id. at* 268.
[115] *Id. at* 272, 274, 279.
[116] *Id.* at 268.
[117] 279 P.3d 619 (Alaska 2012).
[118] *Id.* at 621.
[119] *Id.* at 622.
[120] *Id.*
[121] *Id.* at 624.

corroborate his claim.[122] Reversing the superior court, the supreme court held that the Commission has a statutory duty to reasonably investigate claims, and this duty implies that the Commission must make reasonable efforts to interview witnesses.[123]

Winterrowd v. State, Department of Administration, Division of Motors Vehicles

In *Winterrowd v. State, Department of Administration, Division of Motor Vehicles*,[124] the supreme court held that dismissal of a suit against the DMV is proper when a plaintiff has not exhausted his administrative remedies.[125] Winterrowd struck a moose while driving.[126] Pursuant to the DMV's policy of suspending the licenses of uninsured drivers who get in accidents where damages exceed $501, the DMV informed Winterrowd that his license would be suspended.[127] Winterrowd contested the suspension by claiming his damages did not exceed $501, so the DMV scheduled an administrative hearing and informed Winterrowd that his failure to attend would waive his right to challenge the DMV's ruling.[128] Before he received the hearing notice, Winterrowd filed suit seeking to keep the DMV from suspending his license, and several days before the scheduled hearings the superior court dismissed the case for failure to exhaust administrative remedies.[129] After dismissal, Winterrowd failed to attend his hearing, and the superior court denied his motion for reconsideration.[130] On appeal, the supreme court agreed that Winterrowd must exhaust his administrative remedies before filing suit, and filing suit before his hearing as well as his subsequent failure to attend it warranted dismissal of his complaint.[131] Affirming the superior court, the supreme court held that dismissal of a suit against the DMV is proper when a plaintiff has not exhausted his administrative remedies.[132]

Alaska Court of Appeals

Luckart v. State

In *Luckart v. State*,[133] the court of appeals held that the general requirement that a sentencing panel sentence a defendant in the presumptive range for their crime does not apply when a court has referred a case to the panel because the court feels a punishment in the presumptive range would be manifestly unjust.[134] Luckart was convicted of attempted first-degree sexual assault but was young and had no prior record.[135] The lower court referred the case to the three-judge sentencing panel, finding it would be manifestly

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[122] *Id.*
[123] *Id.*
[124] 288 P.3d 446 (Alaska 2012).
[125] *Id.* at 451.
[126] *Id.* at 448.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 448–49.
[131] *Id.* at 450–51.
[132] *Id.* at 451.
[133] 270 P.3d 816 (Alaska Ct. App. 2012).
[134] *Id.* at 820.
[135] *Id.* at 817.

unjust to impose a sentence within the presumptive range for the offense.[136] The panel agreed, but believed it could not extend a more lenient sentence to Luckart because AS 12.55.175(e) required the panel to conclude Luckart had potential for rehabilitation in order to sentence outside the presumptive range.[137] On remand, the lower court sentenced Luckart within statutory range, and Luckart appealed.[138] The court of appeals vacated the sentence imposed by the lower court and remanded the case to the three-judge panel to impose a sentence, reasoning that the three-judge panel misread AS 12.55.175(e).[139] The court of appeals noted that the statute does not apply to cases that are referred to the three-judge panel based on a finding that any sentence within the applicable presumptive range would be manifestly unjust.[140] Instead, the court reasoned that the statute only applies to cases that are referred based on the non-statutory mitigator of exceptional potential for rehabilitation.[141] Vacating and remanding the case to the lower court, the court of appeals held that the general requirement that a sentencing panel sentence a defendant in the presumptive range for their crime does not apply when a court has referred a case to the panel because the court feels a punishment in the presumptive range would be manifestly unjust.[142]

BUSINESS LAW

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Alaska Supreme Court

Airline Support, Inc. v. ASM Capital II, L.P.

In *Airline Support, Inc. v. ASM Capital II, L.P.*,[143] the supreme court held that there may be a disputed question of material fact as to whether an accounting manager has apparent authority to execute an assignment agreement.[144] ASM Capital entered into an agreement with Airline Support, Inc. ("Airline") through Airline's accounting manager to buy a claim of unsecured creditors.[145] Airline filed suit in superior court to have the agreement set aside.[146] The superior court declined to do so finding that Airline's accounting manager had apparent authority to execute the agreement on behalf of Airline.[147] On appeal, the supreme court reversed the lower court's decision, reasoning that there was a genuine issue of fact as to apparent authority; specifically, the reasonableness of the third party's interpretation of the principal's manifestations and the reasonableness of the third party's reliance.[148] The court noted that, while it was reasonable to infer that Airline had purposely put the solicitation before its accounting manager because she had the authority

[136] *Id.*
[137] *Id.*
[138] *Id.* at 818.
[139] *Id.* at 820.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 816.
[143] 279 P.3d 599 (Alaska 2012).
[144] *Id.* at 610.
[145] *Id.* at 603.
[146] *Id.* at 604.
[147] *Id.*
[148] *Id.* at 606.

to transfer the claim, it is also reasonable to infer that the title "accounting manager" does not obviously carry with it the authority to sell a company's significant assets.[149] Reversing and remanding for further proceedings, the supreme court held that there may be a disputed question of material fact as to whether an accounting manager has apparent authority to execute an assignment agreement.[150]

Borgen v. A & M Motors, Inc.

In *Borgen v. A & M Motors, Inc.*,[151] the supreme court held that, under the Unfair Trade Practices and Consumer Protection Act (UTPA), a good faith defense is not available to a seller if the seller misrepresents a material fact about an item.[152] In 2004, Borgen purchased a used motor home from A & M.[153] The used motor home was sold to Borgen as a 2003 model.[154] However, Borgen discovered that the motor home was actually a 2002 model.[155] A jury found that A & M had not engaged in unfair or deceptive acts under the UTPA, but that it had misrepresented the model year.[156] On appeal, Borgen argued that only a material misrepresentation and subsequent damage were necessary to establish a claim under UTPA.[157] The supreme court agreed, reasoning that the language in UTPA implied that "knowingly" did not apply to affirmative misrepresentations.[158] The court further found that other courts had deemed the seller's intent, whether good or bad, irrelevant when dealing with affirmative misrepresentations under similar statutes.[159] Vacating and remanding the lower court's decision, the supreme court held that a good faith defense is not available to a seller if the seller misrepresents a material fact about an item.[160]

Rude v. Cook Inlet Region, Inc.

In *Rude v. Cook Inlet Region, Inc.*,[161] the supreme court held that a corporation may be awarded attorneys' fees when litigation arises due to materially misleading proxy statements.[162] When up for re-election as director of the Cook Inlet Region, Inc. ("CIRI"), Rude ran on an independent slate called New Alliance for the Future of CIRI, Inc. ("New Alliance").[163] CIRI filed suit against New Alliance for including materially misleading statements in its proxy materials.[164] The superior court found that five sets of statements in the materials were egregiously misleading, voided the New Alliance

[149] *Id.* at 607–08.
[150] *Id.* at 610.
[151] 273 P.3d 575 (Alaska 2012).
[152] *Id.* at 578.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 581.
[157] *Id.* at 585–86.
[158] *Id.* at 587.
[159] *Id.*
[160] *Id.* at 578.
[161] 294 P.3d 76 (Alaska 2012).
[162] *Id.* at 79.
[163] *Id.* at 80.
[164] *Id.* at 81.

proxies, and awarded CIRI attorneys' fees.[165] The supreme court affirmed, reasoning that most of Rude's claims were technically moot since he had been removed from the board,[166] that CIRI followed all statutory and common law procedures in holding its board of directors election,[167] and that attorneys' fees were appropriately awarded.[168] Affirming the superior court on all counts, the supreme court held that a corporation may be awarded attorneys' fees when litigation arises due to materially misleading proxy statements.[169]

State, Commercial Fisheries Entry Commission v. Carlson

In *State, Commercial Fisheries Entry Commission v. Carlson*,[170] the supreme court held that the punitive interest rate used for tax delinquency should not be used as a prejudgment interest rate where it would result in an unjust windfall for one party.[171] A class of nonresident fishermen sued the State for charging nonresident fishermen three times more than resident fishermen for permits and licenses.[172] The case was appealed to the supreme court five times.[173] On one previous appeal, the supreme court determined the State owed the nonresident fishermen a refund with interest, and that the interest should be calculated under the rate used for delinquent taxpayers in AS 43.05.280.[174] In this fifth appeal, the supreme court found that an interest rate calculated according to its previous holding would lead to a manifestly unjust result.[175] The court reasoned the AS 43.05.280 rate was too high for the present case, seeing as the State would be required to pay over $62 million in interest.[176] Reversing its previous decision, the supreme court held that the punitive interest rate used for tax delinquency should not be used as a prejudgment interest rate where it would result in an unjust windfall for one party.[177]

CIVIL PROCEDURE

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Alaska Supreme Court

Ahtna Tene Nené v. State, Department of Fish & Game

In *Ahtna Tene Nené v. State, Department of Fish & Game*,[178] the supreme court held that a pro se litigant who has a law degree but no bar license may not recover attorney's fees.[179] In response to displeasure regarding the system that regulated hunting permits,

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[165] *Id.* at 82–83.
[166] *Id.* at 87–88.
[167] *Id.* at 88–94.
[168] *Id.* at 98–100.
[169] *Id.* at 79.
[170] 270 P.3d 755 (Alaska 2012).
[171] *Id.* at 760–65.
[172] *Id.* at 757.
[173] *Id.*
[174] *Id.* at 759.
[175] *Id.* at 760–765.
[176] *Id.*
[177] *Id.*
[178] 288 P.3d 452 (Alaska 2012).
[179] *Id.* at 462.

the Alaska Board of Game established a new system.[180] Kenneth Manning, a pro se litigant with a law degree, decided to challenge this new system.[181] Successful at trial with help from the State, Manning was awarded attorney's fees even though he was not a bar-licensed attorney.[182] On appeal, the supreme court ruled that it was improper to grant Manning attorney's fees.[183] The court reasoned that pro se litigants without a law degree are the same as non-bar-licensed law graduates.[184] For both, it is difficult for courts to value the time of non-lawyers performing legal services and, more importantly, allowing non-bar attorneys to recover fees would create an incentive to not expend the time or money necessary to be admitted to and maintain membership in a bar association.[185] Vacating the lower court's decision, the supreme court held that a pro se litigant who has a law degree but no bar license may not recover attorney's fees.[186]

Alliance of Concerned Taxpayers v. Kenai Peninsula Borough

In *Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*,[187] the supreme court held that when both parties prevail on main issues, the court may refrain from designating a prevailing party, so that neither is entitled to attorneys' fees and costs.[188] Alliance of Concerned Taxpayers requested a court declaration that two ballot initiatives establishing term limits for school board members and members of the Kenai Peninsula Borough Assembly ("Borough") be applied to the incumbents reelected in the same election when the initiative was approved, while the Borough argued such initiatives should not apply.[189] The superior court granted partial summary judgment to each party and as a result chose not to designate either party as the prevailing party, so that neither was entitled to recover attorneys' fees and costs.[190] The supreme court affirmed the lower court's ruling, holding that when both parties prevail on main issues the court may refrain from designating a prevailing party, so that neither is entitled to attorneys' fees and costs.[191]

Barton v. North Slope Borough School District

In *Barton v. North Slope Borough School District*,[192] the supreme court ruled that expert testimony regarding the standards used to design sports fields set forth in a manual could appreciably assist a jury.[193] Barton was injured at a high school football game when she was struck, near the sidelines, by at least one player who ran out of bounds.[194] She sued

[180] *Id.* at 455–56.
[181] *Id.* at 456–57.
[182] *Id.* at 457.
[183] *Id.* at 455.
[184] *Id.* at 462.
[185] *Id.* at 462–63.
[186] *Id.* at 462.
[187] 273 P.3d 1123 (Alaska 2012).
[188] *Id.* at 1127–28.
[189] *Id.* at 1123–24.
[190] *Id.*
[191] *Id.*
[192] 268 P.3d 346 (Alaska 2012).
[193] *Id.* at 353.
[194] *Id.* at 347.

the school district for negligent design of the football field.[195] The superior court found the school district not negligent.[196] On appeal, Barton argued that the superior court should not have excluded an expert's testimony concerning the use of a manual to ensure sports fields were designed correctly.[197] The supreme court held that the standards in the manual could have appreciably assisted the jury because the jury could have used the information to draw their own inferences of whether negligence was involved.[198] However, the court found that excluding the testimony was harmless error because the main dispute between the two sides did not concern the field's dimensions.[199] Affirming the lower court, the supreme court ruled that expert testimony regarding the standards used to design sports fields set forth in a manual could appreciably assist a jury.[200]

Friends of Willow Lake, Inc. v. State, Department of Transportation & Public Facilities

In *Friends of Willow Lake, Inc. v. State, Department of Transportation & Public Facilities*,[201] the supreme court held that to satisfy associational standing not all the members of an association have to participate in the suit and the matter does not have to be a pure question of law.[202] Willow Lake is a float plane facility operated by the State.[203] The State issued a use plan that set forth rules for Willow Lake's recreational and aircraft users.[204] Friends of Willow Lake ("FOWL"), a non-profit corporation whose members are Alaska residents and Willow Lake users, filed suit.[205] The superior court ruled that FOWL lacked standing and that the use plan was properly issued.[206] On appeal, the supreme court held an association can have standing if its members would otherwise have standing, the issues are related to the association's purpose, and the claim and relief requested do not require the participation of individual members.[207] FOWL's constitutional and statutory claims were mostly questions of law and did not require the participation of individual members.[208] Reversing the superior court, the supreme court held that to satisfy associational standing not all the members of an association have to participate in the suit and the matter does not have to be a pure question of law.[209]

In re Jeffery E.

In *In re Jeffery E.*,[210] the supreme court held that a trial court can find a respondent to be gravely disabled even if he or she appears to be functioning at the time of the finding.[211]

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 353.
[199] *Id.* at 355.
[200] *Id.* at 353.
[201] 280 P.3d 542 (Alaska 2012).
[202] *Id.* at 548.
[203] *Id.* at 544.
[204] *Id.* at 544 –545.
[205] *Id.* at 545.
[206] *Id.*
[207] *Id.* at 546.
[208] *Id.* at 548.
[209] *Id.*
[210] 281 P.3d 84 (Alaska 2012).

Respondent, Jeffery, was in a catatonic state – not eating, drinking, or sleeping – for several days.[212] His family brought him to a hospital and after he was put on medication, his condition improved.[213] Jeffery, however, lacked insight into his prior condition and his doctors feared that if he were released he would go off his medication and return to a catatonic state.[214] The hospital filed a petition for an involuntary thirty-day commitment.[215] At the hearing, Jeffery appeared to be "functioning," yet the superior court found him to be gravely disabled.[216] Reviewing the superior court's decision for clear error, the supreme court upheld the finding.[217] The court reasoned that recent behavior is probative as to whether a respondent is gravely disabled and that a determination of gravely disabled is forward-looking.[218] Because Jeffery had very recently experienced catatonia and because it was likely that his catatonia could reoccur in the near future, the superior court did not err in finding Jeffery to be gravely disabled.[219] Affirming the superior court, the supreme court held that a trial court can find a respondent to be gravely disabled even if he or she appears to be functioning at the time of the finding.[220]

Smith v. State

In *Smith v. State*,[221] the supreme court held that statutes of limitations apply to constitutional claims.[222] Smith filed a takings action against the State over twenty-five years after a sawmill he operated on United States Forest Service property was acquired by the State and conveyed to a third party.[223] The lower court dismissed Smith's claim, finding that under any statute of limitations the claim would be time-barred.[224] On appeal, Smith argued that statutes of limitations cannot bar claims involving constitutional rights.[225] The supreme court affirmed the lower court's decision, holding that statutes of limitations apply to all civil claims.[226] The court further reasoned that the continuing violation doctrine was inapplicable because Smith did not allege any ongoing series of incidents.[227] Affirming the lower court, the supreme court held that statutes of limitations apply to constitutional claims.[228]

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[211] *Id.* at 88.
[212] *Id.* at 85.
[213] *Id.*
[214] *Id.* at 86.
[215] *Id.* at 85.
[216] *Id.* at 86.
[217] *Id.* at 89.
[218] *Id.* at 87–88.
[219] *Id.* at 88.
[220] *Id.* at 88.
[221] 282 P.3d 300 (Alaska 2012).
[222] *Id.* at 301.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.* at 304.
[227] *Id.*
[228] *Id.* at 301.

Thompson v. Cooper

In *Thompson v. Cooper*,[229] the supreme court held that expert opinions based on practical experience in the relevant field are not subject to *Daubert* analysis.[230] Cooper crashed his truck into Thompson's truck and Thompson subsequently filed suit.[231] At trial, Thompson moved to offer the testimony of one his physicians regarding the back pain he experienced since the accident.[232] The testimony consisted of the physician inferring, based on Thompson's statements that his symptoms began after the accident, that he was injured in the accident.[233] The superior court excluded the evidence, reasoning that it was merely a common sense inference and not expert testimony.[234] On appeal, Cooper insisted that the testimony should be kept out because it would fail a *Daubert* analysis.[235] The supreme court reversed, explaining that *Daubert* analysis only applies to expert testimony based on technical or scientific research.[236] Another acceptable form of expert testimony is testimony based on experience, to which *Daubert* does not apply.[237] In Thompson's case, the physician was an experience-based expert who had substantial experience with injuries similar to Thompson's.[238] Because causation was a central issue and the exclusion of the testimony could have had a substantial effect on the verdict, the supreme court held that the testimony should have been admitted.[239] Reversing, the supreme court held that expert opinions based on practical experience in the relevant field are not subject to *Daubert* analysis.[240]

Alaska Court of Appeals

Andrews v. State

In *Andrews v. State*,[241] the court of appeals held that the testimony of a nurse who performed a sexual assault examination on a victim is admissible even without pre-trial notice where the defendant knows the nurse may testify and does not argue that he is surprised by the content of her testimony.[242] Andrews was charged with second-degree sexual assault for engaging in sexual penetration of T.P. while she was incapacitated.[243] Prior to trial, the State did not list the nurse who examined T.P. as an expert witness.[244] Andrews moved to preclude the nurse from offering any expert testimony, but the superior court judge said he would admit the nurse's testimony unless Andrews indicated

[229] 290 P.3d 393 (Alaska 2012).
[230] *Id.* at 399–400 (referencing Daubert v. Merrell Dow Parm., Inc., 509 U.S. 579, 589 – 95 (1993)).
[231] *Id.* at 395.
[232] *Id.* at 396.
[233] *Id.*
[234] *Id.* at 397.
[235] *Id.* at 399.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 400.
[239] *Id.*
[240] *Id.* at 399–400.
[241] 286 P.3d 780 (Alaska Ct. App. 2012).
[242] *Id.* at 781.
[243] *Id.*
[244] *Id.*

to the judge that he was surprised by the content of the testimony.[245] Andrews did not argue that the content of the nurse's testimony surprised him.[246] On appeal, the court of appeals agreed that the testimony should be allowed, reasoning that when a defendant was aware of the substance of an expert witness's testimony, such testimony was admissible even without pre-trial notice if there were no unfair surprise.[247] Affirming the superior court, the court of appeals held that the testimony of a nurse who performed a sexual assault examination on a victim is admissible even without pre-trial notice where the defendant knows the nurse may testify and does not argue that he is surprised by the content of her testimony.[248]

Rogers v. State

In *Rogers v. State*,[249] the court of appeals held that evidence of a similar crime committed by a third-party in the same general area as the crime allegedly committed by the defendant should be excluded unless there is a direct connection between this third-party's crime and the defendant's alleged crime.[250] Rogers was charged with shooting three people, and was convicted of one count of first-degree murder and two counts of attempted first-degree murder.[251] On appeal, Rogers argued that he should have been allowed to present evidence that a similar crime occurred in the same general area that could have cast doubt on his guilt concerning the shootings.[252] The court of appeals affirmed the lower court's decision, agreeing that this evidence was too speculative.[253] The court reasoned that witness testimony regarding a light-colored sedan and a man in dark clothing at both crime scenes did not provide sufficient reason to believe that that man, not Rogers, committed both crimes.[254] Affirming the lower court, the court of appeals held that evidence of a similar crime committed by a third-party in the same general area as the crime allegedly committed by the defendant should be excluded unless there is a direct connection between this third-party's crime and the defendant's alleged crime.[255]

[245] *Id.*
[246] *Id.*
[247] *Id.* at 782.
[248] *Id.* at 781.
[249] 280 P.3d 582 (Alaska Ct. App. 2012).
[250] *Id.* at 588.
[251] *Id.* at 584.
[252] *Id.*
[253] *Id.* at 588.
[254] *Id.* at 587.
[255] *Id.* at 588.

United States Court of Appeals for the Ninth Circuit

United States v. Henry

In *United States v. Henry*,[256] the Ninth Circuit held that the Second Amendment right to bear arms does not extend to possession of a homemade machine gun.[257] Officers seized a loaded assault rifle that had been converted into a machine gun by Henry.[258] Henry was convicted by a jury for knowingly possessing a machine gun in district court.[259] Henry appealed, arguing in part that the Second Amendment protected his right to possess a homemade machine gun in his home.[260] Affirming, the Ninth Circuit held that machine guns are not protected by the Second Amendment.[261] The court reasoned that machine guns are highly dangerous and unusual weapons, and that every circuit court to address the issue has held that the Second Amendment does not protect such weapons.[262] Affirming the lower court, the Ninth Circuit held that the Second Amendment right to bear arms does not extend to possession of a homemade machine gun.[263]

United States District Court for the District of Alaska

Shell Offshore Inc. v. Greenpeace, Inc.

In *Shell Offshore Inc. v. Greenpeace, Inc.*, [264] the district court held that it may be in the public interest to enjoin protests from taking place around sea vessels.[265] Shell Oil Company ("Shell") filed a motion to enjoin Greenpeace from engaging in certain illegal acts at sea against Shell vessels.[266] Shell submitted evidence that it was under threat of injury due to Greenpeace's "Stop Shell" campaign, which could be found over web pages and other materials.[267] Greenpeace did not indicate that the organization would not attempt tortious or unlawful acts against Shell.[268] The court found that Shell had shown that it was likely Greenpeace would engage in these acts, and moved on to determine whether it was constitutional to enjoin protests in safety zones around Shell's vessels.[269] The court held that such an injunction was proper, noting that public sidewalks are the quintessential example of a public forum, while the ports and seas of the United States are not such a forum.[270] Instead, the court explained that there is a significant public

[256] 688 F.3d 637 (9th Cir. 2012).
[257] *Id.* at 637.
[258] *Id.* at 638.
[259] *Id.*
[260] *Id.* at 639.
[261] *Id.*
[262] *Id.* at 640.
[263] *Id.* at 637.
[264] 864 F.Supp.2d 839 (D. Alaska 2012).
[265] *Id.* at 853.
[266] *Id.* at 841.
[267] *Id.* at 847.
[268] *Id.* at 849.
[269] *Id.* at 850.
[270] *Id.* at 852.

interest in the safe operation of marine commerce in these areas.[271] Thus, the court held that it may be in the public interest to enjoin protests from taking place around sea vessels.[272]

Alaska Supreme Court

Alliance of Concerned Taxpayers v. Kenai Peninsula Borough

In *Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*,[273] the supreme court held that (1) voter approval was not required to increase sales taxes to three percent due to prior voter approval of a sales tax of up to three percent, and (2) an ordinance requiring voter approval for capital projects costing more than one million dollars violated the Alaska Constitution.[274] In 2005, the Kenai Peninsula Borough Assembly ("Borough") enacted an ordinance raising the sales tax rate from two to three percent, and the Borough's voters passed an initiative requiring voter approval for any capital projects costing over one million dollars.[275] The Alliance of Concerned Taxpayers ("ACT") brought suit in superior court challenging the sales tax increase and seeking enforcement of the voter initiative, but the superior court granted summary judgment to the Borough on each matter.[276] On appeal, the ACT argued that the ordinance increasing sales tax was not permissible under AS 29.45.670 because it had not been approved by voters, and that the ordinance requiring voter approval of capital projects did not violate the Alaska Constitution because it did not explicitly make or repeal any appropriation.[277] The supreme court disagreed, reasoning that the sales tax ordinance was valid because voters had authorized an increase of up to three percent in 1964 and that defeat of a 2006 referendum which would have repealed the increase constituted further ratification.[278] As to the second ordinance, the court determined that requiring voter approval for all capital projects with costs exceeding one million dollars was invalid because this action would compromise the Borough's ability to utilize resources and allocate funds for competing uses effectively.[279] Affirming, the supreme court held that (1) voter approval was not required to increase sales taxes to three percent due to prior voter consent of a sales tax of up to three percent, and (2) an ordinance requiring voter approval for capital projects costing more than one million dollars violated the Alaska Constitution.[280]

Holiday Alaska, Inc. v. State, Division of Corporations

In *Holiday Alaska, Inc. v. State, Division of Corporations*,[281] the supreme court held that a state statute does not violate due process by imposing fines on a store licensed to sell

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[271] *Id.*
[272] *Id.* at 853.
[273] 273 P.3d 1128 (Alaska 2012).
[274] *Id.* at 1130.
[275] *Id.*
[276] *Id.*
[277] *Id.* at 1134–36.
[278] *Id.* at 1134–35.
[279] *Id.* at 1138.
[280] *Id.* at 1130.
[281] 280 P.3d 537 (Alaska 2012).

tobacco when an employee is convicted of selling tobacco to a minor.[282] Holiday Alaska, Inc. ("Holiday") was licensed to sell tobacco in stores across Alaska, but five stores were cited for illegally selling tobacco to minors, each incident resulting in a conviction of the employee.[283] The superior court upheld the decision of an Administrative Law Judge to impose a $300 civil penalty and license suspension, concluding that Holiday was unable to rebut the statutory presumption of negligence established by the convictions.[284] Holiday challenged the statute under which the stores were charged, arguing that it violated due process because it denied a meaningful hearing and prevented the defendant from challenging the presumption of negligence on the part of the company.[285] The supreme court disagreed, reasoning that the amended version of the statute actually improved procedural protections and did in fact allow the licensee to challenge the presumption of negligence.[286] Affirming the superior court, the supreme court held that a state statute does not violate due process by imposing fines on a store licensed to sell tobacco when an employee is convicted of selling tobacco to a minor.[287]

Khan v. State

In *Khan v. State*,[288] the supreme court held that the Alaska Constitution requires that, in order to convict a defendant, a jury agree unanimously on the specific criminal conduct committed by a defendant.[289] Kahn was charged with one count of perjury for allegedly making four false statements on a financial document.[290] Kahn claimed he did not make the false statements knowingly.[291] The superior court instructed the jury that to find Kahn guilty of perjury, the jurors did not all have to agree as to which statements were false, all that was necessary was that each juror find him guilty with respect to at least one statement.[292] Kahn was convicted and his conviction was affirmed by the court of appeals.[293] Kahn appealed, arguing that a unanimous jury verdict is a constitutional right.[294] Reversing, the supreme court held that jury unanimity is required, and explained that jury unanimity means that jurors must all agree as to the defendant's guilt and specific criminal conduct.[295] The court further noted that jurors can disagree as to alternate theories of a crime, but not as to alternate crimes.[296] The court concluded the Alaska Constitution's due process protects the criminal defendant's right to have jurors unanimously agree on the specific underlying criminal conduct.[297] Reversing the court of appeals, the supreme court held that the Alaska Constitution requires that, in order to

[282] *Id.* at 537–39.
[283] *Id.* at 537–38.
[284] *Id.* at 538.
[285] *Id.* at 539.
[286] *Id.* at 540.
[287] *Id.* at 541.
[288] 278 P.3d 893 (Alaska 2012).
[289] *Id.* at 897–99.
[290] *Id.* at 895.
[291] *Id.* at 896.
[292] *Id.*
[293] *Id.*
[294] *Id.* at 897.
[295] *Id.* at 897–99.
[296] *Id.*at 899.
[297] *Id.*

convict a defendant, a jury agree unanimously on the specific criminal conduct committed by a defendant.[298]

Larson v. State, Department of Corrections

In *Larson v. State, Dep't of Corr.*,[299] the supreme court held that prison officials must provide reasonable accommodation to a prisoner's serious medical needs to avoid deliberate indifference in violation of the Eighth Amendment, and such accommodation may not be satisfied by medical testing alone.[300] Larson was incarcerated and claimed to suffer from paruresis, a condition that makes it extremely difficult to urinate in the presence of others.[301] He complained repeatedly to prison officials about the pain he endured during mandatory urinalysis tests in which he was forced to urinate in the presence of a guard.[302] Larson's grievances were denied and, acting pro se, he filed suit against prison officials under 42 U.S.C. § 1983 claiming a violation of the Eighth Amendment.[303] The superior court granted the state's motion to dismiss, reasoning that the fact that the officials had ordered medical evaluations of Larson's condition showed they were not deliberately indifferent.[304] On appeal, the supreme court reversed and remanded, holding that inconclusive medical testing of a prisoner does not, in itself, avoid the possibility of deliberate indifference.[305] The supreme court held that prison officials must provide reasonable accommodation to a prisoner's serious medical needs to avoid deliberate indifference in violation of the Eighth Amendment, and such accommodation may not be satisfied by medical testing alone.[306]

Ross v. State, Department of Revenue

In *Ross v. State, Department of Revenue*,[307] the supreme court held that the Alaska statute disqualifying anyone who was absent for ten consecutive years from the state from receiving dividends is constitutional.[308] Ross was absent from the state since 1990, but maintained Alaska residency and received a permanent fund dividend each year.[309] In 1998, the Alaska Legislature amended the dividend qualifications to provide that anyone who was allowably absent for ten consecutive years would no longer be eligible for dividends.[310] Ross was absent for ten consecutive years, and was thus denied of dividend payment.[311] Ross appealed and the denial was upheld at an informal agency appeal, a formal agency appeal, and by the superior court.[312] The supreme court affirmed the superior court's judgment, reasoning that the ten-year rule is fairly and substantially

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[298] *Id.* at 897–99.
[299] 284 P.3d 1 (Alaska 2012).
[300] *Id.* at 9.
[301] *Id.* at 4.
[302] *Id.*
[303] *Id.* at 5.
[304] *Id.* at 9.
[305] *Id.*
[306] *Id.*
[307] 292 P.3d 906 (Alaska 2012).
[308] *Id.* at 915.
[309] *Id.* at 908.
[310] *Id.*
[311] *Id.*
[312] *Id.* at 909.

related to the legitimate state interests of limiting dividends to permanent Alaska residents and preventing fraud and also the ten-year rule is rationally related to the legitimate state purpose of reducing administrative burdens.[313] Thus, affirming the superior court's decision, the supreme court held that the Alaska statute disqualifying anyone who was absent for ten consecutive years from the state from receiving dividends is constitutional.[314]

CONTRACT LAW

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United States District Court for the District of Alaska

Millo v. Delius

In *Millo v. Delius*,[315] the district court held that adult children are not presumed to be dependents under Alaska's wrongful death statute.[316] Bret Millo was fatally shot during a guided hunting trip by another hunter.[317] His wife filed a complaint claiming the hunter acted with reckless indifference seeking, in part, wrongful death damages for her adult daughters.[318] The issue before the court was whether Millo's three adult daughters could be considered statutory beneficiaries under Alaska's wrongful death statute.[319] The court granted summary judgment for the defendant, holding that the three daughters were economically independent from their father and thus not statutory beneficiaries.[320] The court recognized that generally Alaska's wrongful death statute presumes a surviving spouse or minor child of the victim is a dependent, whereas dependency must be established for all other individuals.[321] Granting summary judgment to the defendant, the court held that adult children are not presumed to be dependents under Alaska's wrongful death statute.[322]

Alaska Supreme Court

Alaska Interstate Construction, LLC v. Pacific Diversified Investments, Inc.

In *Alaska Interstate Construction, LLC v. Pacific Diversified Investments, Inc.*,[323] the supreme court held that where there are claims for violations of the Unfair Trade Practices Act ("UTPA"), such claims can only be preempted by laws which specifically address the conduct at issue.[324] Pacific Diversified Investments ("PDI") entered into an agreement to lease two aircraft to Alaska Interstate Construction ("AIC") for an hourly

[313] *Id.* at 911–13.
[314] *Id.* at 915.
[315] 872 F.Supp.2d 867 (D. Alaska 2012).
[316] *Id.* at 870.
[317] *Id.*
[318] *Id.* at 876.
[319] *Id.*
[320] *Id.*
[321] *Id.* at 878.
[322] *Id.* at 870.
[323] 279 P.3d 1156 (Alaska 2012).
[324] *Id.* at 1167–68.

fee.[325] Subsequently, without prior approval, PDI began charging monthly fees to AIC for the use of one aircraft, resulting in overpayments.[326] At trial, the jury found that PDI committed unfair and deceptive acts under the UTPA, awarding AIC $7.3 million in damages.[327] The superior court entered judgment notwithstanding the verdict ("JNOV") nullifying the $7.3 million award, concluding that the conduct was exempt from the UTPA because it dealt with aviation, an industry regulated by the Federal Aviation Administration ("FAA").[328] Reversing, the supreme court held that that the superior court erroneously granted a JNOV because the UTPA was not exempted by other aviation laws.[329] The supreme court reasoned that regulations under FAA law focus on aviation safety, not aircraft leasing, and without regulations specifically regulating the activity at issue, the UTPA would not be exempted.[330] Reversing, the supreme court held that where there are claims for violations of the Unfair Trade Practices Act ("UTPA"), such claims can only be preempted by laws which specifically address the conduct at issue.[331]

Kiernan v. Creech

In *Kiernan v. Creech*,[332] the supreme court held that, despite the statute of frauds, a party may invoke promissory estoppel and part performance to enforce an oral agreement if the party materially relied on the agreement to his or her detriment.[333] Kiernan and Creech each owned separate towing companies and entered an oral agreement to share a lot out of which to operate their separate businesses.[334] Because Kiernan owed money to the IRS, the lot was placed exclusively in Creech's name.[335] Kiernan split the expenses for the lot, paying half of all the associated costs.[336] Kiernan, however, continued to experience problems with the IRS.[337] Kiernan and Creech's relationship soured and Kiernan brought suit against Creech.[338] The lower court dismissed Kiernan's claims, holding that the statute of frauds bars oral co-ownership agreements and no exception to the statute of frauds applies.[339] The supreme court reversed, reasoning that if Kiernan was able to prove the terms of the oral agreement by clear and convincing evidence then the oral agreement may be specific enough to support promissory estoppel.[340] The court also reasoned that the part performance exception to the statute of frauds may be available when a party significantly changes its position in reliance on the oral agreement.[341] Reversing the lower court, the supreme court held that, despite the statute of frauds, a

[325] *Id.* at 1161.
[326] *Id.*
[327] *Id.* at 1162.
[328] *Id.* at1159 – 60.
[329] *Id.*
[330] *Id*. at 1167.
[331] *Id.* at 1167–68.
[332] 268 P.3d 312 (Alaska 2012).
[333] *Id.* at 314.
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.* at 315.
[340] *Id.* at 315–16.
[341] *Id.* at 317–18.

party may invoke promissory estoppel and part performance to enforce an oral agreement if the party materially relied on the agreement to his or her detriment.[342]

Perotti v. Corrections Corp. of America

In *Perotti v. Corrections Corp. of America*,[343] the supreme court held that a prisoner does not have the right to receive monetary damages for breach of contract under the *Cleary* Final Settlement Agreement.[344] Perotti was a prisoner in the Alaska Department of Corrections ("DOC") and contested the ramifications of violation of the *Cleary* Settlement.[345] The *Cleary* Settlement provides that if overcrowding occurs in the prisons, then the DOC must present a plan to the superior court to reduce the population of prisoners.[346] Perotti was placed in segregated housing.[347] He filed a claim against the Corrections Corporation, alleging that it was in breach of the terms of its contract during the time that Perotti had been segregated.[348] The lower court held that Perotti, as a third-party beneficiary, lacked standing to bring the claim.[349] Affirming the lower court, the supreme court reasoned that, as a *Cleary* class member and third-party beneficiary, Perotti was not entitled to damages.[350] The court reasoned that Perotti would not be entitled to compensatory, liquidated, or punitive damages because these damages do not extend to third-party beneficiaries under contract law.[351] Therefore, affirming the lower court, the supreme court held that a prisoner does not have the right to receive monetary damages for breach of contract under the *Cleary* Final Settlement Agreement.[352]

CRIMINAL LAW

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Alaska Supreme Court

McGraw v. Cox

In *McGraw v. Cox*,[353] the supreme court held that threats amounting to attempted coercion are sufficient to justify a domestic violence protective order.[354] When Cox and McGraw's relationship ended, Cox was granted a temporary domestic violence order, and then sought a long-term domestic violence protective order on the basis that McGraw had coerced her with various threats that would jeopardize her ongoing custody dispute with her ex-husband.[355] The superior court granted the order, finding that McGraw's threatened to reveal information that Cox had "brainwashed" her children and allowed

[342] *Id.* at 314, 319.
[343] 290 P.3d 403 (Alaska 2012).
[344] *Id.* at 405.
[345] *Id.* at 405–06.
[346] *Id.* at 405.
[347] *Id.*
[348] *Id.* at 405–06.
[349] *Id.* at 407.
[350] *Id.*
[351] *Id.* at 408–10.
[352] *Id.* at 405.
[353] 285 P.3d 276 (Alaska 2012).
[354] *Id.* at 279−81.
[355] *Id.* at 277.

one child to fondle her breasts.[356] McGraw appealed, arguing there was insufficient evidence to support the finding.[357] The supreme court found that McGraw did not commit the crime of coercion because Cox was never compelled to act in response to the threats; however, the court held his actions constituted an attempt to coerce Cox, which was sufficient to support a domestic violence protective order.[358] Affirming the lower court, the supreme court held that threats amounting to attempted coercion are sufficient to justify a domestic violence protective order.[359]

Nelson v. State

In *Nelson v. State*,[360] the supreme court held that a defense counsel's invocation of the Fifth Amendment privilege against self-incrimination during a post-conviction relief proceeding based on a claim of ineffective assistance of counsel does not, by itself, rebut the presumption of counsel's competence or shift the burden of proof to the defense.[361] Nelson was convicted by a jury of five counts of sexual abuse of minors and his convictions were upheld on appeal.[362] He retained new counsel and filed a petition for post-conviction relief, alleging thirty-five counts of ineffective assistance of counsel.[363] Nelson's former counsel invoked his Fifth Amendment privilege against self-incrimination, and refused to answer questions for a required affidavit supporting Nelson's claim.[364] The superior court subsequently dismissed thirty-four counts in Nelson's petition.[365] The court of appeals upheld the decision, and asserted that no adverse inference could be drawn from the former counsel's invocation of privilege.[366] On appeal, the supreme court held that a defense counsel's invocation of Fifth Amendment privilege in a post-conviction proceeding will not generally give rise to an adverse inference, but that it may give rise to a permissible adverse inference if he refuses to testify against specific evidence offered against him.[367] Affirming, the supreme court held that a defense counsel's invocation of the Fifth Amendment privilege against self-incrimination during a post-conviction relief proceeding based on a claim of ineffective assistance of counsel does not by itself rebut the presumption of counsel's competence or shift the burden of proof to the defense.[368]

Rofkar v. State

In *Rofkar v. State*,[369] the supreme court held that Alaska's double jeopardy clause may be violated if a defendant receives separate convictions for possessing drugs and for

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[356] *Id.*
[357] *Id.* at 277.
[358] *Id.* at 280.
[359] *Id.* at 279−81.
[360] 273 P.3d 608 (Alaska 2012).
[361] *Id.* at 611–12.
[362] *Id.* at 610.
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.* at 611.
[367] *Id.* at 611–12.
[368] *Id*.
[369] 273 P.3d 1140 (Alaska 2012).

maintaining a dwelling or building to keep those same drugs.[370] Rofkar was arrested and charged with four felony counts: manufacturing one ounce or more of marijuana, possessing marijuana of one pound or more, possessing twenty-five or more marijuana plants, and maintaining a dwelling for the keeping of a controlled substance.[371] The court of appeals merged the first three claims, but refused to merge the maintaining charge with the other three, leaving Rofkar with two felony charges.[372] Rofkar raised the issue of double jeopardy on appeal, but did not argue that the controlling precedent should be overruled or distinguished until his reply brief.[373] The court of appeals thus refused to hear the double jeopardy issue on the merits.[374] The supreme court vacated the court of appeals' decision and remanded, reasoning that the court of appeal's categorical approach to double jeopardy in possession/maintaining crimes may violate case law and constitutional law.[375] Vacating and remanding, the supreme court held that Alaska's double jeopardy clause may be violated if a defendant receives separate convictions for possessing drugs and for maintaining a dwelling or building to keep those same drug.[376]

State v. Corbett

In *State v. Corbett*,[377] the supreme court held that an immunized witness does not retain the ability to assert the privilege against self-incrimination, and the accompanying right to refuse to testify, based on the possibility that the witness may be prosecuted for committing perjury during that immunized testimony.[378] Corbett was accused of strangling his son Dupri.[379] Dupri was granted immunity but refused to testify, invoking his privilege against self-incrimination under both the Alaska Constitution and the United States Constitution.[380] The superior court found that because Dupri intended to testify that his father had not assaulted him, and the State would likely find such testimony perjurious, then Dupri could refuse to testify due to the risk of self-incrimination.[381] The supreme court held that while immunity is intended to shield witnesses from offering perjuries testimony and self-incrimination, immunity does not protect witnesses from future perjury, and thus a witness that has been granted immunity cannot refuse to testify.[382] Reversing, the supreme court held that an immunized witness does not retain the ability to assert the privilege against self-incrimination, and the accompanying right to refuse to testify, based on the possibility that the witness may be prosecuted for committing perjury during that immunized testimony.[383]

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[370] *Id.* at 1143.
[371] *Id.*at 1141.
[372] *Id.*
[373] *Id.*
[374] *Id.*
[375] *Id.* at1143.
[376] *Id.*
[377] 286 P.3d 772 (Alaska 2012).
[378] *Id.* at 774.
[379] *Id.* at 773.
[380] *Id.*
[381] *Id.* at 773–74.
[382] *Id.* at 776.
[383] *Id.*

State v. Gibson

In *State v. Gibson*,[384] the supreme court held that the police may have reasonable belief that a warrantless search is necessary where (1) the police respond to a domestic violence call and find that serious violence has occurred, and (2) it is unclear whether all injured parties are accounted for.[385] Gibson's girlfriend called 911 and told police Gibson was threatening to stab her.[386] When police arrived at Gibson's trailer, they detained both known parties, and then entered the trailer to determine if there were any injured parties.[387] Upon entry, police discovered evidence of methamphetamine manufacturing.[388] Gibson was convicted of methamphetamine related charges after a motion to suppress the evidence of the meth lab was overruled.[389] Vacating, the court of appeals concluded that the police did not have an objectively reasonable belief of emergency when they searched the trailer.[390] Reversing, the supreme court concluded that the court of appeals took a narrower view of what constitutes an emergency than Alaska law requires, and held that it is sufficient if the police have good reason to believe there might be someone injured on the premises.[391] The court reasoned that the police have wide latitude when acting out of safety concerns, particularly when the situation involves violence.[392] Reversing, the supreme court held that the police may have reasonable belief that a warrantless search is necessary where (1) the police respond to a domestic violence call and find that serious violence has occurred, and (2) it is unclear whether all injured parties are accounted for.[393]

Yi v. Yang

In *Yi v. Yang*,[394] the supreme court held that when a police officer has probable cause to instigate a felony arrest, any procedural deficiencies in a corresponding citizen's arrest are irrelevant.[395] Police officers reported to a premise after numerous emergency phone calls by several individuals.[396] Though testimony was inconsistent, it was determined that the manager of the premises had served eviction papers on Yi.[397] As the manager was leaving the premises, Yi used a broom handle to break the front and back windows of the manager's vehicle, and also struck the manager's wrist and broke his wristwatch.[398] The manager said that he was in fear for his life, and the police detained Yi as part of a citizen's arrest.[399] Yi challenged the citizen's arrest, and argued that he was falsely

[384] 267 P.3d 667 (Alaska 2012).
[385] *Id.* at 659.
[386] *Id.* at 648.
[387] *Id.* at 648–49.
[388] *Id.*
[389] *Id.* at 649.
[390] *Id.* at 663.
[391] *Id.* at 664–65.
[392] *Id.* at 665.
[393] *Id.* at 667.
[394] 282 P.3d 340 (Alaska 2012).
[395] *Id.* at 342.
[396] *Id.* at 342–43.
[397] *Id.* at 343.
[398] *Id.*
[399] *Id.* at 343–44.

arrested because it had not met procedural standards.[400] The superior court granted summary judgment and dismissed the suit in favor of the police, reasoning that the arrest was justified by probable cause that Yi had committed or was committing a felony, regardless of the fact that Yi was actually detained in a citizen's arrest.[401] The supreme court affirmed the lower court and held that when a police officer has probable cause to instigate a felony arrest, any procedural deficiencies in a corresponding citizen's arrest are irrelevant.[402]

Alaska Court of Appeals

Ahvakana v. State

In *Ahvakana v. State*,[403] the court of appeals held that warrantless entry is justified when police reasonably believe there is an emergency and immediate need for assistance.[404] The police responded to a domestic violence report.[405] Black answered the door with cuts and blood on her face, and she told the police that Ahvakana was not there.[406] Police then entered the home and arrested Ahvakana who was hiding in a closet.[407] At trial, Ahvakana was convicted of fourth-degree assault.[408] Ahvakana appealed, arguing that the police had committed a warrantless entry.[409] Affirming, the court of appeals held that warrantless entries such as the entry in this case are justified when performed under the emergency aid exception.[410] The court noted that the exception requires police to have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.[411] The court reasoned that police had reasonable ground to enter because the police were responding to complaints of yelling and crying, Black answered the door with cuts, and a concern existed that there might be other victims.[412] Affirming, the court of appeals held that warrantless entry is justified when police reasonably believe there is an emergency and immediate need for assistance.[413]

Bachmeier v. State

In *Bachmeier v. State*,[414] the court of appeals held that an inmate's self-defense claim requires a showing that the inmate reasonably believed an officer was about to strike him without justification.[415] Bachmeier was moving laundry when a corrections officer

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[400] *Id.* at 345.
[401] *Id.* at 346.
[402] *Id.* at 342.
[403] 283 P.3d 1284 (Alaska Ct. App. 2012).
[404] *Id.* at 1286.
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.* at 1286.
[409] *Id.*
[410] *Id.*
[411] *Id.*
[412] Id. at 1286–88.
[413] *Id.* at 1286.
[414] 276 P.3d 494 (Alaska Ct. App. 2012).
[415] *Id.* at 498.

demanded some materials in the laundry basket.[416] A physical confrontation ensued, and Bachmeier claimed self-defense.[417] Bachmeier was convicted of assault. [418] On appeal, the court of appeals held that for an inmate to prove they were acting in self-defense, they do not need to show that the officer was using unlawful force against them.[419] Rather, the court noted that a reasonable belief that the unlawful use of force is imminent would meet the requirements for a self-defense claim.[420] Reversing the lower court's decision, the court of appeals held that an inmate's self-defense claim requires a showing that the inmate reasonably believed an officer was about to strike him without justification.[421]

Benson v. State

In *Benson v. State*,[422] the court of appeals held that it is not plain error a court to refuse to appoint conflict counsel, sua sponte, to a defendant in proceedings to determine whether the defendant is financially qualified for court-appointed counsel.[423] Benson was charged with misconduct involving a controlled substance in the third degree.[424] At his arraignment, upon Benson's request, a superior court judge appointed the Office of Public Advocacy to represent Benson.[425] However, the Office of Public Advocacy filed two motions in superior court to withdraw from representation of Benson on the grounds that he was financially ineligible for representation.[426] The superior court judge determined that Benson was financially capable of paying for an attorney and granted the second motion.[427] Benson subsequently represented himself at trial and was convicted.[428] On appeal, Benson argued that the determination of his eligibility for appointed counsel was a critical stage of the proceedings against him, and therefore both the United States and Alaska Constitutions gave him a right to court-appointed counsel as an indigent defendant.[429] The court of appeals disagreed, reasoning that applicable case law did not support his assertion that this determination was a critical stage of the proceedings against him.[430] Moreover, the court found that because Benson did not argue in superior court that he was constitutionally entitled to court-appointed counsel in superior court, the issue could only be reviewed for plain error.[431] Affirming, the court of appeals held that it is not plain error a court to refuse to appoint conflict counsel, sua sponte, to a defendant in proceedings to determine whether the defendant is financially qualified for court-appointed counsel.[432]

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[416] *Id.* at 495.
[417] *Id.* at 496.
[418] *Id.*
[419] *Id.* at 498.
[420] *Id.*
[421] *Id.*
[422] 273 P.3d 1144 (Alaska Ct. App. 2012).
[423] *Id.* at 1147.
[424] *Id.* at 1144.
[425] *Id.* at 1144–45.
[426] *Id.* at 1145.
[427] *Id.*
[428] *Id.*
[429] *Id.* at 1145–46.
[430] *Id.* at 1146.
[431] *Id.* at 1146–47.
[432] *Id.* at 1147.

Christian v. State

In *Christian v. State*,[433] the court of appeals held that defendants have no constitutional right to serve as co-counsel in their own trials or to receive hybrid representation when they are represented by counsel.[434] Christian was sentenced to 106 years in prison for various charges.[435] At trial, the judge rejected Christian's requests to serve as co-counsel in his trial and to personally deliver the opening statement because (1) he did not have sufficient time to efficiently conduct the necessary research; and (2) he would be permitted to make statements about the case without taking the stand and undergoing cross-examination.[436] Reviewing for clear error, the court of appeals upheld the trial judge's decision.[437] Noting the distinction between pro se defendants seeking assistance from counsel and defendants that are represented by counsel but who desire to serve as co-counsel, the court of appeals held that defendants like Christian have a lesser need for hybrid representation and that trial judges can take various factors, including timeliness, into consideration when deciding such requests.[438] Affirming, the court of appeals held that defendants have no constitutional right to serve as co-counsel in their own trials or to receive hybrid representation when they are represented by counsel. [439]

Collins v. State

In *Collins v. State*,[440] the court of appeals held that a defendant's case should be referred to a three-judge sentencing panel if the defendant can sufficiently demonstrate that he does not have a history of unprosecuted sexual offenses, or that the he has "normal" or "good" prospects for rehabilitation.[441] Collins was convicted of first-degree sexual assault and sentenced to twenty years of incarceration.[442] In 2006, the legislature had increased the sentencing ranges for sexual offenders, and Collins was subject to a sentencing range of twenty to thirty years.[443] In order to avoid the presumptive minimum, Collins asked the judge to send his case to a three-judge panel but his request was denied.[444] Reversing, the court of appeals held that defendants convicted of sex offenses should be able to obtain referrals to the three-judge sentencing panel if they refute that they are atypically dangerous, and that they have atypically poor prospects for rehabilitation.[445] The court reasoned that the legislature's choice of presumptive sentencing range depended on underlying assumptions, and that a defendant able to refute such assumptions may receive sentencing from a panel.[446] Accordingly, the court of appeals held that a defendant's case should be referred to a three-judge panel if the defendant can show that

[433] 276 P.3d 479 (Alaska Ct. App. 2012).
[434] *Id.* at 484.
[435] *Id.* at 481.
[436] *Id.* at 485.
[437] *Id.* at 484.
[438] *Id.*
[439] *Id.*
[440] 287 P.3d 791 (Alaska Ct. App. 2012).
[441] *Id.* at 797.
[442] *Id.* at 794.
[443] *Id.*
[444] *Id.*
[445] *Id.* at 797.
[446] *Id.*

he does not have a history of unprosecuted sexual offenses, or that the he has "normal" prospects for rehabilitation.[447]

Dickie v. State

In *Dickie v. State*,[448] the court of appeals held that the statutory definition of "nonconsensual" does not require an element of coercion or force.[449] Dickie knocked on the front door of the Petersens' house one night holding a bag of beer and asking for someone named Sherry.[450] They informed him that nobody of that name lived there, but over the next several weeks he kept returning to put food on their front porch.[451] The Petersons warned Dickie that they would call the police if he returned.[452] Later, when the family saw Dickie enter their yard and crouch down with a large gun, Mr. Petersen called the police, who apprehended Dickie at his home.[453] Dickie was convicted of three charges, including a count of first-degree stalking.[454] On appeal, Dickie contended that the definition of "nonconsensual" used by the stalking statute was unconstitutionally broad and required an element of coercion or force.[455] The court of appeals disagreed with Dickie, reasoning that his first visit to the Petersens' residence, during which he was informed that nobody named Sherry lived at the home, was sufficient notice that any continued contact with the family would be without their consent.[456] Affirming the lower court, the court of appeals held that the statutory definition of "nonconsensual" does not require an element of coercion or force.[457]

Eberhardt v. State

In *Eberhardt v. State*,[458] the court of appeals held that the date of deferred prosecution does not count as the date of prior conviction for purposes of the felony DUI statute.[459] In 1994, Eberhardt was accepted into a deferred prosecution program following his first DUI charge in Washington.[460] In 2004, he was convicted of the DUI after he violated the terms of the program.[461] In 2009, the superior court convicted him of felony DUI because he had two prior DUI convictions within the preceding ten years, counting the 2004 conviction rather than the 1994 deferred prosecution.[462] He appealed arguing that the 1994 order accepting him into deferred prosecution program qualified as a conviction, outside of the ten-year look-back period for felony DUI.[463] Affirming the superior court,

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[447] *Id.*
[448] 282 P.3d 382 (Alaska Ct. App. 2012).
[449] *Id.* at 385–86.
[450] *Id.* at 383.
[451] *Id.*
[452] *Id.*
[453] *Id.* at 383–84.
[454] *Id.* at 384.
[455] *Id.*
[456] *Id.* at 385.
[457] *Id.* at 385–86.
[458] 275 P.3d 560 (Alaska 2012).
[459] *Id.* at 563–65.
[460] *Id.*
[461] *Id.*
[462] *Id.* at 561.
[463] *Id.*

the court of appeals found that the statute and previous court decisions did not consider a deferred prosecution as a conviction.[464] The court held that a formal finding of guilt was not entered until 2004.[465] Thus, the court of appeals held that the date of deferred prosecution does not count as the date of prior conviction when deferred prosecution was later terminated for purposes of counting prior convictions for a felony DUI charge.[466]

Grossman v. State

In *Grossman v. State*,[467] the court of appeals held that a DUI arrestee's right to contact an attorney before consenting to a breath test does not permit the defendant to interrupt the testing process after the fifteen minute pre-test observation period.[468] Grossman was arrested for driving under the influence and was taken to the police station for a breath test.[469] An officer informed Grossman of his right to contact an attorney at the beginning of the fifteen minute pre-test observation period, but Grossman made no calls.[470] Grossman was subsequently uncooperative in providing an adequate breath sample.[471] At the point the officer was prepared to charge Grossman with breath test refusal, Grossman requested that he be able to contact an attorney, further interrupting the test.[472] The officer refused and charged Grossman with both DUI and the crime of breath test refusal.[473] On appeal, Grossman argued that the officer violated his rights by refusing to interrupt the breath test to allow Grossman to contact an attorney.[474] The court of appeals affirmed the judgment of the lower court, holding that a DUI arrestee's right to contact an attorney before consenting to a breath test does not permit the defendant to interrupt the testing process after the fifteen minute pre-test observation period.[475]

Harvey v. State

In *Harvey v State*,[476] the court of appeals held that privately retained attorneys, like court-appointed attorneys, must engage in meaningful consultation with a defendant when the defendant demonstrates an interest in pursuing an appeal or when the attorney should reasonably know that a rational defendant would want to appeal.[477] Harvey was sentenced for sexual abuse, and claimed to engage in discussion with his counsel about pursuing an appeal, but his counsel took no action following the sentencing.[478] Harvey petitioned the superior court for post-conviction relief arguing that he received ineffective counsel from his attorney, but the superior court denied Harvey's petition, and Harvey

[464] *Id.* at 563.
[465] *Id.* at 565.
[466] *Id.* at 563–65.
[467] 285 P.3d 281 (Alaska Ct. App. 2012).
[468] *Id.* at 284.
[469] *Id.* at 282.
[470] *Id.*
[471] *Id.*
[472] *Id.* at 282–83.
[473] *Id.*
[474] *Id.* at 283.
[475] *Id.* at 284.
[476] 285 P.3d 295 (Alaska Ct. App. 2012)
[477] *Id.* at 297.
[478] *Id.* at 301.

appealed.[479] The court of appeals held that privately retained attorneys are held to the same standard as court-appointed attorneys, and thus Harvey's attorney did not have a lessor obligation to engage in meaningful consultation with Harvey about the possibility of seeking post-judgment remedies.[480] Reversing the superior court, the court of appeals held that privately retained attorneys, like court- appointed attorneys, must engage in meaningful consultation with a defendant when the defendant demonstrates an interest in pursuing an appeal or when the attorney should reasonably know that a rational defendant would want to appeal.[481]

Johnson v. State

In *Johnson v. State*,[482] the court of appeals held that prior specific acts of violence may be admissible where they are introduced to show the reasonableness of another party's use of defensive force.[483] Johnson was charged with, among other things, attempted first-degree murder for cutting three individuals, including Moulder, with a box cutter.[484] At trial, Johnson claimed self-defense against all three victims.[485] The superior court did not allow Johnson to introduce evidence of Moulder's statement that he had attacked a neighbor the night before.[486] Johnson appealed.[487] The court of appeals reversed the superior court's judgment, reasoning that where Johnson was aware of Moulder's past acts of violence, and evidence of those acts of violence was offered to prove the reasonableness of Johnson's use of defensive force, evidence of Moulder's specific acts is not barred.[488] The court reasoned that the evidence was not being used as character evidence but to show the reasonableness of Johnson's use of defensive force.[489] Thus, reversing the superior court, the court of appeals held that prior specific acts of violence may be admissible where they are introduced to show the reasonableness of another party's use of defensive force.[490]

Joseph v. State

In *Joseph v. State*,[491] the court of appeals held that separate convictions for first-degree sexual assault do not merge when there are distinct types of penetration involved and there is a break in time between their occurrences, but convictions for second-degree sexual assault can merge with convictions for first-degree sexual assault.[492] Joseph forcibly performed nonconsensual oral sex on his wife.[493] He then attacked his wife when

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[479] *Id.* at 297.
[480] *Id.* at 305.
[481] *Id.*
[482] 268 P.3d 362 (Alaska Ct. App. 2012).
[483] *Id.* at 366.
[484] *Id.* at 364.
[485] *Id.*
[486] *Id.*
[487] *Id.*
[488] *Id.* at 366.
[489] *Id.*
[490] *Id.*
[491] 293 P.3d 488 (Alaska Ct. App. 2012).
[492] *Id.* at 493.
[493] *Id.* at 491.

she began to struggle.[494] After a period, he then forced her to engage in genital intercourse.[495] Joseph was convicted on three counts of first-degree sexual assault and multiple counts of second-degree sexual assault, and he appealed.[496] Affirming, the court of appeals reasoned that the first-degree convictions do not merge because distinct types of sexual penetration support separate convictions for sexual assault, and there was a break between the penetrations that occurred before and after Joseph was interrupted by the children walking into the room.[497] The court also held that Joseph's second-degree sexual assault convictions merge with his first-degree sexual assault convictions because when two sexual acts are performed as part of a single transaction with a single incident of sexual penetration, conviction should be based on the most serious contact, which in this case is the sexual penetration.[498] The court of appeals held that separate convictions for first-degree sexual assault do not merge when there are distinct types of penetration involved and there is a break in time between their occurrences, but convictions for second-degree sexual assault can merge with convictions for first-degree sexual assault.[499]

Lawrence v. State

In *Lawrence v. State*,[500] the court of appeals held that an individual who steals a container can be convicted of stealing the contents of the container even when he or she was ignorant of those contents at the time of the taking.[501] Lawrence stole a purse containing the victim's debit card and social security card.[502] AS § 11.81.900(b)(1) defines these cards as "access devices," and stealing them is second-degree theft.[503] Lawrence was convicted by a jury of two counts for stealing the access devices.[504] On appeal, she argued that the court erred by instructing the jury they could infer Lawrence's intent to steal the contents of the purse based on her theft of the purse itself.[505] She contended that this instruction violated the rule that the State must prove beyond a reasonable doubt every element of an offence, including the relevant mental states.[506] The court of appeals affirmed the jury's verdict, reasoning that Alaska precedent and authority from other jurisdictions permit conviction under these circumstances when the contents of the container are not unusual.[507] The court declared that when the probable contents of a particular kind of container are common knowledge, then the jury may rightly infer from a person's intentional theft of the container that she also intended to steal the contents.[508] The court did not decide whether this rule applies when the container's contents are

[494] *Id.*
[495] *Id.*
[496] *Id.*
[497] *Id.* at 492–93.
[498] *Id.* at 493.
[499] *Id.*
[500] 269 P.3d 672 (Alaska Ct. App. 2012).
[501] *Id.* at 675.
[502] *Id.* at 673.
[503] *Id.* at 673–74.
[504] *Id.* at 673.
[505] *Id.* at 674.
[506] *Id.*
[507] *Id.* at 675.
[508] *Id.*

unusual.[509] Affirming, the court of appeals held that an individual who steals a container can be convicted of stealing the contents of the container even when he or she was ignorant of those contents at the time of the taking.[510]

Maillelle v. State

In *Maillelle v. State*,[511] the court of appeals held that a court can require a defendant convicted of a crime to pay restitution to Alaska's Medicaid program when that program has paid for the medical expenses incurred by the victim of the crime.[512] Maillelle pled guilty to second-degree assault after striking her daughter with a truck.[513] Maillelle's daughter suffered extensive injuries, and incurred nearly $102,000 in medical expenses, which were paid for by Alaska's Medicaid program.[514] The superior court ordered Maillelle to pay restitution to the state under AS 12.55.045(a).[515] On appeal, Maillelle argues that the state's Medicaid program was neither a victim of the crime nor a provider of medical services, and therefore the statute did not authorize the superior court to order her to pay restitution to the program.[516] The court of appeals disagreed with Maillelle and affirmed the superior court's decision, reasoning that because the program lost money as a result of the crime, it was a "victim or other person injured by the offense" within the meaning of the statute.[517] Moreover, the court found that it did not matter that the program was not a provider of medical services because the doctors and other staff that provided the services were paid for by Medicaid.[518] Affirming, the court of appeals held that a court can require a defendant convicted of a crime to pay restitution to the state's Medicaid program when Medicaid has paid for the medical expenses incurred by the victim of the crime.[519]

Milligan v. Alaska

In *Milligan v. Alaska*,[520] the court of appeals held that a witness' alcohol-related memory loss may be used to impeach evidence of her memory.[521] The victim and a group of friends were drinking at a bar when she invited them to drink at her house.[522] They returned to her apartment, where they continued drinking.[523] The victim later woke up and found Milligan on top of her.[524] The lower court, in a jury trial, held that Milligan was guilty of first and second degree sexual assault.[525] Milligan attempted to introduce

[509] *Id.*
[510] *Id.*
[511] 276 P.3d 476 (Alaska Ct. App. 2012).
[512] *Id.* at 479.
[513] *Id.* at 477.
[514] *Id.*
[515] *Id.*
[516] *Id.* at 477–78.
[517] *Id.* at 478.
[518] *Id.*
[519] *Id.* at 479.
[520] 286 P.3d 1065 (Alaska 2012).
[521] *Id.* at 1067.
[522] *Id.* at 1068.
[523] *Id.*
[524] *Id.*
[525] *Id.*

evidence that the victim experienced other alcohol-related memory losses near the time of this incident, but the trial judge excluded this evidence, and Milligan appealed arguing prejudicial error.[526] The court of appeals agreed, reasoning that the court may permit evidence of alcohol related memory loss because evidence of a witness's mental state may affect the witness's ability to recall the events leading up to the incident, and therefore may be admitted as evidence of a witness's sensory capacity.[527] Therefore, reversing and remanding to the lower court, the court of appeals held that a witness's alcohol-related memory loss may be used to impeach evidence of her memory.[528]

N.G. v. Superior Court

In *N.G. v. Superior Court*,[529] the court of appeals held that an order requiring production of all medical records is improper where those records are protected by a psychotherapist-patient privilege and the defendant has not shown an overriding interest in disclosure or that the patient's medical history is relevant to the case.[530] Standifer was charged with sexual assault, attempted sexual assault, and physical assault for an alleged attack on N.G.[531] Because the subsequent examination of N.G. made reference to previous alcohol abuse and bipolar disorder, the superior court granted Standifer's request for the production of all of N.G.'s medical treatment records.[532] The superior court reasoned that it could separate privileged and non-privileged information in those records through *in camera* inspection.[533] On appeal, N.G. argued that the superior court should not have granted Standifer's request.[534] The court of appeals agreed, reasoning that it was unlikely that there was any non-privileged information in those records because the psychotherapist-patient privilege applies to all confidential communications made for diagnosis or treatment and to information generated during the psychotherapist-patient relationship.[535] Moreover, the court reasoned that even if Alaska's courts allowed the psychotherapist-patient privilege to be overcome if the defendant shows a strong interest in disclosure, the superior court did not make any such finding in this case.[536] Lastly, the court found that Standifer did not offer any proof that N.G.'s medical history would make it more likely that she could not reliably recall facts from the incident, and therefore did not support the assertion that an *in camera* review of N.G.'s history would be necessary.[537] Reversing, the court of appeals held that an order requiring production of all medical records is improper where those records are protected by a psychotherapist-patient privilege and the defendant has not shown an overriding interest in disclosure or that the patient's medical history is relevant to the case.[538]

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[526] *Id.* at 1067.
[527] *Id.* at 1068–69.
[528] *Id.* at 1067.
[529] 291 P.3d 328 (Alaska Ct. App. 2012).
[530] *Id.* at 340.
[531] *Id.* at 329.
[532] *Id.* at 329–30.
[533] *Id.* at 330.
[534] *Id.*
[535] *Id.* at 332.
[536] *Id.* at 338.
[537] *Id.* at 340.
[538] *Id.*

Oskolkoff v. State

In *Oskolkoff v. State*,[539] the court of appeals held that when a defendant is prosecuted for either "repeat" or "habitual" minor consuming, the defendant's predicate criminal history is an element of the offense which must be proved to a jury beyond a reasonable doubt.[540] A jury convicted Oskolkoff for "habitual minor consuming."[541] On appeal, Oskolkoff argued that the lower court erred by determining that a defendant's prior convictions constituted a sentencing factor under AS 04.16.050, rather than an element of the offense.[542] The court of appeals agreed, reasoning that under statutes which create increased levels of offense for repeat offenders, each level is a separate offense and the prior convictions are elements of that offense, unless the legislature clearly indicates otherwise.[543] Subsequently, upon analysis of the legislative history of AS 04.16.050, the court found no indication to the contrary.[544] Reversing the conviction and remanding for new trial, the court of appeals held that when a defendant is prosecuted for either "repeat" or "habitual" minor consuming, the defendant's predicate criminal history is an element of the offense which must be proved to a jury beyond a reasonable doubt.[545]

Pocock v. State

In *Pocock v. State*,[546] the court of appeals held that the "small quantities" mitigator is applicable to a drug offense when the quantity of drug sold is uncharacteristically small in comparison to the broad middle ground of conduct prohibited by statute.[547] Pocock was convicted of three counts of second-degree controlled substance misconduct for three sales of heroin, totaling 0.12 grams.[548] Because he was a third felony offender, the presumptive range for his sentence was 15 to 20 years.[549] The superior court judge rejected Pocock's argument that the "small quantities" mitigator was applicable to his sentence because he concluded that the amounts sold were not small in the context of the use of heroin.[550] On appeal, Pocock argued that the superior court erred by not applying this mitigating factor.[551] The court of appeals agreed, reasoning that under *Dollison v. State*,[552] the question for determining whether the "small quantities" mitigator applies is whether the sale falls within the broad middle ground of conduct prohibited by the statute.[553] Next, the court determined that the statute under which Pocock was convicted, AS 11.71.020(a)(1), covers the entire spectrum of heroin sales, and that the amount at issue in this case was within the least severe sentencing range for sales of heroin under

[539] 276 P.3d 490 (Alaska App. 2012).
[540] *Id.* at 493.
[541] *Id.* at 491.
[542] *Id.*
[543] *Id.* at 493.
[544] *Id.*
[545] *Id.*
[546] 270 P.3d 823 (Alaska Ct. App. 2012).
[547] *Id.* at 825.
[548] *Id.* at 824.
[549] *Id.*
[550] *Id.*
[551] *Id.*
[552] 5 P.3d 244 (Alaska Ct. App. 2000).
[553] 270 P.3d at 825.

federal law.[554] Vacating and remanding for resentencing, the court of appeals held that the "small quantities" mitigator is applicable to a drug offense when the quantity of drug sold is uncharacteristically small in comparison to the broad middle ground of conduct prohibited by the statute.[555]

Rogers v. State

In *Rogers v. State*,[556] the court of appeals held that a continuance may be denied when the requesting party repeatedly fails to demonstrate diligence in avoiding the continuance.[557] Rogers was granted several continuances for his sentencing hearing, the third of which was granted so that he could obtain a psychiatric evaluation and diagnosis by a psychiatrist licensed in California.[558] A fourth continuance was later granted, at which point Rogers' attorney understood that Rogers may need to find a different psychiatrist for licensing reasons.[559] Instead, Rogers' attorney filed a motion attacking the constitutionality of the licensing statute.[560] The superior court found the statute to be constitutional and Rogers then asked for a fifth continuance to find another psychiatrist.[561] The superior court denied the motion, finding primarily that Rogers failed to show diligence.[562] The court of appeals affirmed, holding that a lack of diligence may result in a denial of a continuance.[563] Given the number of continuances and Rogers' lack of efforts to obtain a temporary permit or a new psychiatrist, the court of appeals agreed.[564] Affirming the superior court, the court of appeals held that a continuance may be denied when the requesting party repeatedly fails to demonstrate diligence in avoiding the continuance.[565]

Ruaro v. State of Alaska

In *Ruaro v. State of Alaska*,[566] the court of appeals held that evidence provided at a search warrant hearing, including potential past criminal activity, inconsistent statements about a package's contents, and emotional and angry actions by a suspect, was insufficient to establish probable cause that the package contained cocaine.[567] A supervisor at a shipping facility notified the police that a suspicious package had arrived at the facility for Ruaro.[568] The supervisor reported that Ruaro had been angry at a delay in a previous shipment, and that his pattern of receiving abnormally taped packages was unusual.[569] Ruaro refused to allow the police to search the box and also provided inconsistent

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[554] *Id.*
[555] *Id.* at 825.
[556] 275 P.3d 574 (Alaska Ct. App. 2012).
[557] *Id.* at 577–79.
[558] *Id.* at 577.
[559] *Id.* at 577–78.
[560] *Id.* at 578.
[561] *Id.*
[562] *Id.*
[563] *Id.* at 578–79.
[564] *Id.*
[565] *Id.* at 577-79.
[566] 280 P.3d 1233 (Alaska Ct. App. 2012).
[567] *Id.* at 1235−37.
[568] *Id.* at 1233−34.
[569] *Id.* at 1234.

information as to the shipper of the box and the box's contents.[570] Additionally, the trooper testified that after they received phone calls regarding Ruaro's alleged involvement with drugs approximately two years prior, the police interviewed him and he denied having any involvement in selling drugs.[571] The magistrate found probable cause to issue the warrant, and the trooper found one hundred grams of cocaine hidden inside of the box.[572] Ruaro moved to suppress the evidence arguing that the warrant was not supported by probable cause.[573] The superior court found that it was reasonable for the magistrate to conclude that Ruaro's behavior was suspicious; however, his suspicious behavior coupled with the Crime Stoppers report did not establish probable cause that his package contained cocaine.[574] Reversing the superior court's decision to deny the motion to suppress evidence obtained from the warrant, the court of appeals held that evidence provided at a search warrant hearing, including potential past criminal activity, inconsistent statements about the package's contents, and emotional and angry actions by a suspect was insufficient to establish probable cause that the package contained cocaine.[575]

Scholes v. State

In *Scholes v. State*,[576] the court of appeals held that (1) intentional causation of extreme pain during a sexual assault was sufficient to establish the aggravator deliberate cruelty,[577] and (2) the fact that conduct could have supported multiple convictions establishes the aggravator that the conduct is among the most serious within the definition offense.[578] Scholes kidnapped a fifteen-year-old near a Juneau school, bound her, and took her to his home.[579] There, Scholes removed her clothes with scissors, and raped the girl with both his penis and a wine shaped bottle.[580] The trial court found two aggravators: deliberate cruelty and conduct among the most serious within the definition of the offense.[581] Affirming, the court of appeals found that both aggravators were established.[582] Deliberate cruelty was established when, during the penetration of the girl by the narrow end of the bottle, Scholes asked the girl if it hurt.[583] When she replied yes, he then inserted the wide end.[584] As to the most serious conduct within the definition, the court of appeals reasoned that a single charge which could encompass multiple charges, like the various sexual penetrations in this case, generally permit the use of the aggravator.[585] The court of appeals also found no other reason in the briefs to deviate

[570] *Id.*
[571] *Id.* at 1235.
[572] *Id.*
[573] *Id.*
[574] *Id.* at 1236.
[575] *Id.* at 1235−37.
[576] 274 P.3d 496 (Alaska Ct. App. 2012).
[577] *Id.* at 498.
[578] *Id.*
[579] *Id.* at 497.
[580] *Id.*
[581] *Id.*
[582] *Id.*
[583] *Id.* at 498.
[584] *Id.*
[585] *Id.* at 499.

from that policy.[586] Affirming, the court of appeals held that (1) intentional causation of extreme pain during a sexual assault was sufficient to establish the aggravator deliberate cruelty,[587] and (2) the fact that conduct could have supported multiple convictions establishes the aggravator that the conduct is among the most serious within the definition offense.[588]

Sitigata v. State

In *Sitigata v. State*,[589] the court of appeals held that, under the principle of joint accountability, an award of restitution for injuries caused by a joint assault may properly be imposed on a single defendant even when the charging document does not specify that he is being held accountable as an accomplice.[590] Sitigata and Fuavai jointly assaulted Bays, breaking Bays' teeth and jaw.[591] Sitigata pleaded guilty to third-degree assault and, as part of his sentencing, was subsequently ordered by the superior court to pay restitution for the expenses attributable to the broken teeth and jaw.[592] Sitigata argued on appeal that Fuavai caused the broken teeth and jaw and that Sitigata should therefore not be ordered to pay the entire restitution, especially because the charging document did not specify that Sitigata was being charged as Fuavai's accomplice.[593] The court of appeals rejected this argument, holding that co-defendants are both liable for injuries caused during their crime.[594] The court stated that all participants are criminally accountable for any resulting injury or death when two or more people jointly engage in an assault, and further noted that it is irrelevant whether the charging document expressly charged one as an accomplice.[595] Affirming the lower court, the court of appeals held that under the principle of joint accountability, an award of restitution for injuries caused by a joint assault may properly be imposed on a single defendant even when the charging document does not specify that he is being held accountable as an accomplice.[596]

Starkey v. State

In *Starkey v. State*,[597] the court of appeals held that the issuance of a search warrant mere minutes after officers entered a home may absolve any error in the officers' initial entry.[598] Officers arrived at Starkey's house after receiving an anonymous tip about marijuana he was growing.[599] After knocking on the door with no response, they smelled a strong marijuana plant odor and noticed unusual electrical activity indicative of a drug grow, and subsequently sent another officer to obtain a search warrant.[600] When Starkey

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[586] *Id.* at 502.
[587] *Id.* at 498.
[588] *Id.*
[589] 280 P.3d 595 (Alaska Ct. App. 2012).
[590] *Id.* at 598.
[591] *Id.* at 595–96.
[592] *Id.* at 596.
[593] *Id.*
[594] *Id.*
[595] *Id.*
[596] *Id.* at 598.
[597] 272 P.3d 347 (Alaska Ct. App. 2012).
[598] *Id.* at 349.
[599] *Id.*
[600] *Id.* at 348.

arrived home, the remaining officers entered his house and began searching it under the reasonable belief that he had given them consent to do so.[601] Approximately five minutes later, the officer returned with a valid search warrant.[602] At trial, Starkey filed a motion to suppress the marijuana evidence gathered on grounds that he hadn't actually given unequivocal consent for the officers to enter his home.[603] Finding that the independent source doctrine applied, the court of appeals reasoned that the officer obtaining the warrant had no knowledge that the other officers had entered the house and therefore that fact did not influence the warrant application.[604] Affirming the lower court, the court of appeals held that the issuance of a search warrant mere minutes after officers entered a home may absolve any error in the initial entry.[605]

Vent v. State

In *Vent v. State*,[606] the court of appeals held that a trial judge fails to act impartially if he conducts research of out-of-state records without prior notice to the parties and relies on evidence outside of the record.[607] A jury convicted Vent of second-degree murder and several charges of assault and robbery.[608] Vent brought a claim for post-conviction relief for ineffective assistance of counsel.[609] The trial court denied Vent's motion for post-conviction relief.[610] On appeal, Vent argued that the judge failed to act impartially and actively sought impeachment information in order to deny admitting evidence.[611] The court of appeals agreed, reasoning that a reasonable person would believe that the judge was partial to the side of the State because the judge researched out-of-state records without prior notice to the parties and relied on his findings from that research to impeach evidentiary material Vent had offered at the post-conviction relief hearing.[612] Reversing the lower court, the court of appeals held that a trial judge fails to act impartially if he conducts research of out-of-state records without prior notice to the parties and relies on evidence outside of the record.[613]

Wing v. State

In *Wing v. State*,[614] the court of appeals held that, by itself, an arrestee's comment that her cell phone is in her pocket does not constitute an affirmative request to contact her attorney.[615] After being arrested for DUI, Wing was taken to a police station.[616] At the station, Wing was shown a video that informed her that she could have, in addition to the

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[601] *Id.* at 348–49.
[602] *Id.* at 348.
[603] *Id.* at 349.
[604] *Id.* at 350–51.
[605] *Id.* at 349.
[606] 288 P.3d 752 (Alaska Ct. App. 2012).
[607] *Id.* at 757.
[608] *Id.* at 754.
[609] *Id.* at 754–55.
[610] *Id.* at 755.
[611] *Id.*
[612] *Id.* at 757.
[613] *Id.*
[614] 268 P.3d 1105 (Alaska Ct. App. 2012).
[615] *Id.* at 1109.
[616] *Id.* at 1107.

breath test already taken, an independent chemical test conducted.[617] Additionally, if she did not understand this right, she could contact an attorney.[618] After answering that she wanted to call someone and mentioning that her cell phone was in her pocket, Wing used the phone provided at the police station to call a co-worker.[619] On appeal, Wing argued that her right to contact an attorney was violated because she was denied access to her attorney's phone number, which was in her cell phone.[620] The court of appeals affirmed the lower court's decision, reasoning that Wing, after mentioning that she had her cell phone in her pocket, failed to mention her cell phone again after being granted access to the police station phone.[621] The court further reasoned that Wing never informed the arresting officer that her attorney's number was in her cell phone or asked to make another call.[622] Affirming the lower court, the court of appeals held that, by itself, an arrestee's comment that her cell phone is in her pocket does not constitute an affirmative request to contact her attorney.[623]

CRIMINAL PROCEDURE

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United States Court of Appeals for the Ninth Circuit

U.S. v. Golden Valley Election Association

In *U.S. v. Golden Valley Election Association*, [624] the Ninth Circuit held that energy records may be relevant to a Drug Enforcement Administration ("DEA") investigation and thus subject to subpoena.[625] Golden Valley, a member-owned cooperative which provides electricity, was subpoenaed by the DEA to provide records pertaining to three customers.[626] The DEA claimed the information was relevant to determine whether the three residents were involved in the manufacture and distribution of controlled substances.[627] After Golden Valley did not comply, the government petitioned the district court to enforce the subpoena, and the petition was granted.[628] Affirming, the Ninth Circuit held that the information subpoenaed need only be relevant to an agency investigation, not the crime. The court noted that the information requested by the DEA in this case satisfied relevancy requirements because the record could be used to compare electricity usage in the vicinity.[629] Affirming, the Ninth Circuit held that energy records may be relevant to a DEA investigation and thus subject to subpoena.[630]

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[617] *Id.*
[618] *Id.*
[619] *Id.*
[620] *Id.* at 1108.
[621] *Id.* at 1109.
[622] *Id.*
[623] *Id.*
[624] 689 F.3d 1108 (9th Cir. 2012).
[625] *Id.* at 1114.
[626] *Id.* at 1111.
[627] *Id.* at 1114.
[628] *Id.*
[629] *Id.*
[630] *Id.*

Alaska Supreme Court

Davison v. State

In *Davison v. State*,[631] the supreme court held that a sexual assault victim's statements to a doctor are not admissible under Alaska's medical treatment exception to hearsay when the statements are not made for the purpose of medical diagnosis or treatment.[632] R.D. informed her mother that she was sexually assaulted by her father, Davison.[633] R.D. was brought to the hospital for an examination.[634] In the course of the exam, the doctor performed a physical evaluation of R.D. and collected a verbal account of what occurred.[635] Davison was later convicted of sexual assault.[636] Davison appealed his conviction, arguing in part that the trial court erroneously admitted hearsay by admitting statements made during the exam.[637] The supreme court recognized that while hearsay is generally not admissible, statements made for the purposes of medical diagnosis or treatment may be admissible.[638] The supreme court reasoned that the circumstances of the case, including that a trooper arranged the interview and the doctor's emphasis on the forensic purpose of the exam, indicated that the exam's goal was primarily forensic and not medical.[639] However, the court found the statements were harmless to the conviction. Affirming the conviction, the supreme court held that a sexual assault victim's statements to a doctor are not admissible under Alaska's medical treatment exception to hearsay when the statements are not made for the purpose of medical diagnosis or treatment.[640]

Phillips v. State

In *Phillips v. State*,[641] the supreme court held that a judge may be removed from a case based solely on the reasonable appearance of bias, and that *de novo* review is appropriate for determining such appearance.[642] Phillips was convicted of sexual assault, and appealed on grounds that the trial judge should have recused himself when he realized he knew the victim's sister.[643] The trial judge lived in the same neighborhood as the victim's sister, his wife was friends with her, and their kids played together.[644] On appeal, the supreme court held that, in general, a judge may be forcibly disqualified if the circumstances are such that the judge would appear biased to a reasonable person.[645] However, the court found that this situation did not create the appearance of bias.[646] Affirming the lower court's ruling, the supreme court held that a judge can be removed

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[631] 282 P.3d 1262 (Alaska 2012).
[632] *Id.* at 1270.
[633] *Id.* at 1264.
[634] *Id.*
[635] *Id.* at 1264–65.
[636] *Id.* at 1265.
[637] *Id.*
[638] *Id.* at 1266.
[639] *Id.* at 1269–70.
[640] *Id.* at 1270.
[641] 271 P.3d 457 (Alaska 2012).
[642] *Id.* at 459.
[643] *Id.* at 458.
[644] *Id.* at 462.
[645] *Id.* at 466–67.
[646] *Id.* at 470.

from a case based solely on the reasonable appearance of bias, and that *de novo* review is appropriate for determining such appearance.[647]

Alaska Court of Appeals

Berezyuk v. State

In *Berezyuk v. State*,[648] the court of appeals held that a claim is deemed waived on appeal if the opening brief only mentions the claim without any argumentation or supporting citation.[649] Berezyuk was convicted of possession of heroin with intent to sell.[650] On appeal, he made several arguments concerning deficient *Miranda* warnings or, alternatively, that his rights were violated through threats of deportation and increased punishment if he did not cooperate. [651] In Berzyuk's opening brief, twelve pages were devoted to his *Miranda* rights claims, but he never asserted that he was improperly coerced.[652] The court of appeals rejected his *Miranda* claims and ruled that his claim of involuntariness was forfeited.[653] Berezyuk had the opportunity to further argue the coercion claims already raised in the opening brief, but failed to do so.[654] The court of appeals held that a claim is waived on appeal if the opening brief only mentions the claim without any argumentation or supporting citation.[655]

Diggs v. State

In *Diggs v. State*,[656] the court of appeals held that a defendant is not required to take the stand at a competency hearing because it is part of a criminal proceeding.[657] Diggs, who had a history of mental illness, was charged with two counts of assault.[658] After reports were submitted that Diggs was not competent to stand trial, the State requested a hearing to contest the doctor's opinion.[659] The State declared its intention to call Diggs as a witness.[660] The superior court granted the motion, concluding that Diggs' rights against self-incrimination would not be violated so long as his statements were not admissible at trial and were used solely for determining his competency.[661] On appeal, the court of appeals held that, since legal proceedings had begun, a competency hearing was part of a "criminal case" under the United States Constitution and part of a "criminal proceeding" under the Alaska Constitution.[662] Therefore, the court found that the right against self-incrimination applied to Diggs in this case and, as a defendant in a criminal proceeding,

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[647] *Id.*
[648] 282 P.3d 386 (Alaska Ct. App. 2012)
[649] *Id.* at 399.
[650] *Id.* at 389
[651] *Id.*
[652] *Id.* at 399.
[653] *Id.*
[654] *Id.* at 401.
[655] *Id.*
[656] 274 P.3d 504 (Alaska Ct. App. 2012).
[657] *Id.* at 507.
[658] *Id.* at 504.
[659] *Id.* at 505.
[660] *Id.*
[661] *Id.*
[662] *Id.* at 506–07.

he could not be called against his will to take the stand.[663] Reversing the superior court, the court of appeals held that a defendant is not required to take the stand at a competency hearing because it is part of a criminal proceeding.[664]

Jones v. State

In *Jones v. State*,[665] the court of appeals held that if a defendant intends to testify at a post-conviction evidentiary hearing and such hearing hinges on the defendant's credibility as a witness, then the defendant must be transported to the hearing.[666] Jones accepted a plea bargain for second-degree murder.[667] Subsequently, Jones filed a petition for post-conviction relief, challenging the representation his lawyer had previously provided.[668] To attend the hearing, Jones filed a motion asking to be transported to Anchorage.[669] The lower court denied the motion because the judge thought his credibility as a witness could be fairly assessed whether the testimony was given in person or over the phone; Jones later testified at the hearing by telephone.[670] On appeal, Jones challenged the lower court's decision to not allow him to provide testimony in person.[671] Vacating the lower court's decision, the court of appeals concluded that Jones should have been allowed to attend this hearing.[672] The court reasoned that, under Alaska law, if a convicted defendant's testimony will be "material" and based on facts within the defendant's personal knowledge, then the defendant's presence at such hearings is necessary.[673] Vacating the lower court, the court of appeals held that if a defendant intends to testify at a post-conviction evidentiary hearing and such hearing hinges on the defendant's credibility as a witness, then the defendant must be transported to the hearing.[674]

Leopold v State

In *Leopold v State*,[675] the court of appeals held that a defendant's composite sentence of 109 years' imprisonment is not inherently excessive.[676] Leopold invited his sister to a party at his house and raped her after she fell asleep.[677] He was convicted of first-degree sexual assault, second-degree sexual assault, and incest.[678] Based on the court's finding that Leopold was a worst offender, it sentenced him to a composite sentence of 109 years' imprisonment.[679] On appeal, Leopold challenged the court's finding that he was a

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[663] *Id.*
[664] *Id.*
[665] 284 P.3d 853 (Alaska Ct. App. 2012).
[666] *Id.* at 860.
[667] *Id.* at 854.
[668] *Id.*
[669] *Id.* at 855.
[670] *Id.*
[671] *Id.* at 857.
[672] *Id.* at 860.
[673] *Id.* at 859.
[674] *Id.* at 860.
[675] 278 P.3d 286 (Alaska Ct. App. 2012).
[676] *Id.*
[677] *Id*.
[678] *Id*. at 289.
[679] *Id.* at 295–96.

worst offender and the length of his sentence.[680] The court of appeals upheld the worst offender finding due to Leopold's multiple prior convictions, the unlikelihood of his rehabilitation, and the extreme danger he posed to the public.[681] The court of appeals also upheld Leopold's composite sentence because it was reasonable for the judge to find such a sentence necessary to protect the public.[682] Affirming the lower court, the court of appeals held that a defendant's composite sentence of 109 years' imprisonment is not inherently excessive.[683]

McKinley v. State

In *McKinley v. State*,[684] the court of appeals declined to extend the scope of the statute which gives defendants credit for time spent in custody to include credit for the entire time spent in a residential treatment program.[685] McKinley was charged with theft.[686] While he was awaiting trial, he entered a residential treatment facility for five months.[687] Later, he pled guilty and received a sentence of sixty months, but asked the superior court to give him five months of credit for the time he spent in the residential treatment program.[688] The court gave him credit for only thirty days because only the first thirty days of the program satisfied AS 12.55.027(c)(2)'s strict requirement that the conditions must approximate those experienced by someone who is incarcerated.[689] On appeal, McKinley argued that the court should follow a more liberal standard for granting credit.[690] Affirming, the court of appeals held that the statute clearly only allows credit for time spent in conditions similar to incarceration.[691] The court of appeals reasoned that the wording of the statute was clear, although possibly contradictory to the legislature's policy goals and the goals of the prison system.[692] Affirming, the court of appeals declined to extend the scope of the statute which gives defendants credit for time spent in custody to include credit for the entire time spent in a residential treatment program.[693]

Selig v. State

In *Selig v. State*,[694] the court of appeals held that the police are not required to record the non-interrogative aspects of DUI processing.[695] After causing a collision, Selig was arrested for driving under the influence.[696] A breath test and an independent blood test

[680] *Id*. at 294.
[681] *Id.* at 295.
[682] *Id.* at 296.
[683] *Id.* at 286.
[684] 275 P.3d 567 (Alaska Ct. App. 2012).
[685] *Id.* at 567–68.
[686] *Id.* at 568
[687] *Id.*
[688] *Id.*
[689] *Id.*
[690] *Id.* at 567.
[691] *Id.* at 573.
[692] *Id.*
[693] *Id.* at 567–68.
[694] 286 P.3d 767 (Alaska Ct. App. 2012).
[695] *Id.* at 771.
[696] *Id.* at 767.

revealed a blood alcohol level more than double the legal limit in Alaska.[697] Selig argued in district court that the results of the tests should be suppressed because the officers did not make an audio recording of the DUI processing.[698] The district court denied the motion, reasoning that the *Stephan* rule that requires an audio recording of every custodial interrogation did not apply because the trooper did not interrogate Selig during the DUI processing.[699] On appeal, Selig renewed his argument that the evidence from his DUI processing should be suppressed because the processing was not recorded.[700] The court of appeals also disagreed, reasoning that the purpose of the *Stephan* rule was narrowly tailored to assure that confessions were voluntarily made.[701] Further, the court reasoned that police time logs could independently verify that the requirement for a fifteen minute observation period before a breath test was followed.[702] Affirming, the court of appeals held that the police are not required to record the non-interrogative aspects of DUI processing.[703]

Stansberry v. State

In *Stansberry v. State*,[704] the court of appeals held that a defendant's opportunity to understand and regain the right to attend their proceedings can be satisfactorily explained to them even if they are not physically present in the courtroom.[705] The trial court judge removed Stansberry from the courtroom after he failed to demonstrate his ability to control himself within the courtroom.[706] Stansberry was placed in a holding cell equipped with audio and visual equipment that enabled him to watch his trial, and his attorney was able to communicate with him at will.[707] After being convicted, Stansberry argued that he was not properly informed of his right to reenter the courtroom.[708] Affirming Stansbery's conviction, the court of appeals held that even though Stansberry was not physically present in the courtroom when the judge informed him he would be allowed to return if he reformed his behavior, the audio and visual equipment was sufficient to ensure that Stansberry was aware of his right to return.[709] The court reasoned that the record clearly showed Stansberry was able to hear the proceedings.[710] Affirming, the court of appeals held that a defendant's opportunity to understand and regain the right to attend their proceedings can be satisfactorily explained to them even if they are not physically present in the courtroom.[711]

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[697] *Id.*
[698] *Id.*
[699] *Id.* at 768 (citing Stephan v. State, 711 P.2d 1156, 1159 (Alaska 1985)).
[700] *Id.* at 769.
[701] *Id.* at 770.
[702] *Id.* at 771.
[703] *Id.*
[704] 275 P.3d 579 (Alaska Ct. App. 2012).
[705] *Id.* at 595.
[706] *Id.* at 590–92.
[707] *Id.* at 595–96.
[708] *Id.* at 597.
[709] *Id.*
[710] *Id.*
[711] *Id.* at 595.

Wilkerson v. State

In *Wilkerson v. State*,[712] the court of appeals held that a witness' opinion concerning a defendant's character is inadmissible when the witness lacks personal knowledge of the defendant.[713] The trial court found Wilkerson guilty of first-degree murder, evidence tampering, and third-degree weapons misconduct in the death of his brother.[714] On appeal, Wilkerson argued that it was improper to permit the State to present character evidence consisting of the testimony of a police detective when that testimony was based on hearsay.[715] The court of appeals agreed, reasoning that personal knowledge is necessary when a witness provides character opinions.[716] The police detective lacked this personal knowledge since his opinion of Wilkerson was created by review of case files and not personal acquaintance with Wilkerson.[717] Accordingly, the trial court wrongfully allowed the police detective to give his opinion of Wilkerson, but the court found the error was harmless because eyewitness agreement rendered the opinion's admission moot.[718] Affirming, the court of appeals held that a witness' opinion concerning a defendant's character is inadmissible when the witness lacks personal knowledge of the defendant.[719]

ELECTION LAW

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Alaska Supreme Court

In re 2011 Redistricting Cases

In *In re 2011 Redistricting Cases*,[720] the supreme court held that the Alaska Redistricting Board ("Board") must design a reapportionment plan based on the requirements of the Alaska Constitution and then that plan must be tested against the Voting Rights Act ("VRA").[721] The superior court found that although the Board's initial drawing of the redistricting corresponded with the VRA, four districts did not comply with the Alaska Constitution.[722] The supreme court upheld the superior court's ruling.[723] Upon remand, the Board made changes but only to the four districts.[724] The superior court rejected the amended plan.[725] The supreme court upheld the superior court's rejection of the Board's amended plan, reasoning that the Board created the twenty-two districts to comply with the VRA as the first priority instead of first meeting the Alaska Constitution's requirements of compactness, contiguity, and socio-economic integration as the primary

[712] 271 P.3d 471 (Alaska Ct. App. 2012).
[713] *Id.* at 477.
[714] *Id.* at 472.
[715] *Id.*
[716] *Id.* at 477.
[717] *Id.*
[718] *Id.* at 478.
[719] *Id.* at 477.
[720] 294 P.3d 1032 (Alaska 2012).
[721] *Id.* at 1037–38.
[722] *Id.* at 1034.
[723] *Id.* at 1035.
[724] *Id.* at 1036.
[725] *Id.* at 1037.

consideration.[726] The supreme court held that the Board must design a reapportionment plan based on the requirements of the Alaska Constitution and then that plan must be tested against the VRA.[727]

EMPLOYMENT LAW

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Alaska Supreme Court

Boyko v. Anchorage School District

In *Boyko v. Anchorage School District*,[728] the supreme court held that an employer's refusal to provide a recommendation for an employee does not violate a resignation agreement in which the employer promised not to make negative statements about the employee.[729] Boyko resigned from her teaching position in lieu of termination after violating an agreement which conditioned her continuing employment on several provisions relating to alcoholism treatment.[730] Boyko recorded a conversation with the Anchorage School District's human resources director in which the director stated that, upon her resignation, no information would be released and no negative information would be on her record.[731] Following her resignation, the School District declined to provide recommendations for her when contacted by Boyko's prospective employers.[732] Boyko sued the School District for breach of the resignation agreement.[733] The superior court granted summary judgment for the School District and dismissed all of Boyko's claims.[734] The supreme court remanded the issue of whether the resignation agreement was a contract, but held that the School District's refusal to provide a recommendation for Boyko did not violate the resignation agreement.[735] Affirming, the supreme court held that an employer's refusal to provide a recommendation for an employee does not violate a resignation agreement in which the employer promised not to make negative statements about the employee

Grundberg v. Alaska State Commission for Human Rights

In *Grundberg v. Alaska State Commission for Human Rights*,[736] the supreme court held that the non-discriminatory reasons an employer provides for not promoting a person are immaterial when evaluating whether that person provided substantial evidence that could support an inference of discriminatory employer intent.[737] Grundberg, a 58 year-old Asian-American female, held an Engineer I position.[738] While employed in this position,

[726] *Id.* at 1038.
[727] *Id.* at 1034.
[728] 268 P.3d 1097 (Alaska 2012).
[729] *Id.* at 1101.
[730] *Id.* at 1098–99.
[731] *Id.* at 1099.
[732] *Id.* at 1099–1100.
[733] *Id.* at 1100.
[734] *Id.* at 1099.
[735] *Id.* at 1101–02.
[736] 276 P.3d 443 (Alaska 2012).
[737] *Id.* at 452.
[738] *Id.* at 445.

recruitment for an Engineer II position took place.[739] After being denied the position for facially legitimate reasons given by her interviewers, Grundberg filed a complaint.[740] The commission charged with investigating the complaint ultimately concluded that the complaint was not supported by substantial evidence despite a letter Grundberg filed alleging multiple accounts of adverse employment actions she had been subjected to over the course of her employment.[741] The superior court affirmed this conclusion.[742] On appeal, Grundberg argued that she produced enough evidence to rebut her employer's facially legitimate reasons for hiring someone else for the Engineer II position.[743] The supreme court reversed and remanded for further proceedings.[744] It reasoned that since direct evidence is difficult to produce because it is often in the hands of the employer, the evidence produced by Grundberg was substantial enough to support an inference of discriminatory intent regardless of the reasons given by the employer.[745] Reversing the lower court's decision, the supreme court held that the non-discriminatory reasons an employer provides for not promoting a person are immaterial when evaluating whether that person provided substantial evidence that could support an inference of discriminatory employer intent.[746]

Lentine v. State

In *Lentine v. State*,[747] the supreme court held that an employer may be found to breach an implied covenant of good faith when terminating an employee by having a biased supervisor involved in the decision only if the plaintiff proves that the biased supervisor either (1) played a significant role in the decision, or (2) was motivated by bad faith.[748] Lentine was terminated from her position with the State for falsifying information on a timesheet.[749] Subsequently, she filed a complaint against the State, alleging her termination violated an implied covenant of good faith and fair dealing because a supervisor involved acted in bad faith during the termination.[750] The superior court ruled in favor of the State.[751] On appeal, Lentine argued that the superior court erred because her supervisor acted in bad faith during the termination process.[752] Affirming, the supreme court found there was not a breach of the implied covenant because the supervisor did not play an active role in the dismissal, and there was not adequate evidence that the supervisor acted in bad faith.[753] Affirming the superior court, the supreme court held that an employer may be found to breach an implied covenant of good faith when terminating an employee by having a biased supervisor involved in the

[739] *Id.* at 446.
[740] *Id.* at 447.
[741] *Id.* at 447–49.
[742] *Id.* at 449.
[743] *Id.*
[744] *Id.* at 452.
[745] *Id.* at 451–52.
[746] *Id.* at 452.
[747] 282 P.3d 369 (Alaska 2012).
[748] *Id.* at 377.
[749] *Id.* at 374.
[750] *Id.* at 375.
[751] *Id.*
[752] *Id.* at 376–79.
[753] *Id.* at 377.

decision only if the plaintiff proves that the biased supervisor either (1) played a significant role in the decision, or (2) was motivated by bad faith.[754]

Oels v. Anchorage Police Department Employees Ass'n.

In *Oels v. Anchorage Police Department Employees Ass'n.*,[755] the supreme court held that Anchorage Municipal Code § 03.30.068(A)(4), which establishes a retire/rehire program for city employees, requires that city employees be rehired into the same position or into a position in the same or similar class.[756] Oels was a sergeant in the Alaska Police Department ("APD") who sought to retire from his position and then be rehired as a sergeant under a program established by § 03.30.068(A)(4).[757] Section 03.30.068(A)(4) provides that an employee may retire and be rehired "at the entry level salary, leave accrual, and seniority."[758] Oels was told that, if approved, he would be rehired as a patrol officer, an entry level position below the rank of sergeant.[759] The superior court found the "entry level" language of § 03.30.068(A)(4) ambiguous and held that it allowed the APD to rehire officers under the program at an entry level position.[760] On appeal, the supreme court reversed the lower court's judgment, declaring that § 03.30.068(A)(4) unambiguously permitted the APD to rehire officers only at an entry level "salary, leave accrual, and seniority," but not at an entry level position.[761] The supreme court reasoned that the purpose of the retire/rehire program was to allow city employees to retire and receive the benefits of their city retirement program, but still return to work for the city under a new retirement program.[762] Reversing, the supreme court held that § 03.30.068(A)(4) requires that city employees be rehired into the same position or into a position in the same or similar class.[763]

Peterson v. State

In *Peterson v. State*,[764] the supreme court held that based on Alaska's Public Employment Relations Act ("PERA"), a union-relations privilege is recognized for communications (1) between an employee or employee's attorney and union representatives, (2) made in confidence, (3) in connection with representative services relevant to anticipated or ongoing grievance or disciplinary proceedings, and (4) by representatives acting in official representative capacity.[765] Peterson was a member of Alaska State Employees Association ("ASEA") and requested time credit for a previous period of employment with the State.[766] During an investigation of his request, the State determined that Peterson's job application failed to disclose a prior felony and the State terminated his

[754] *Id.*
[755] 279 P.3d 589 (Alaska 2012).
[756] *Id.* at 599.
[757] *Id.* at 590.
[758] *Id.* at 591.
[759] *Id.* at 590.
[760] *Id.*
[761] *Id.* at 598.
[762] *Id.* at 597.
[763] *Id.*
[764] 280 P.3d 559 (Alaska 2012).
[765] *Id.* at 567.
[766] *Id.* at 560.

employment.[767] Peterson first filed a grievance and after unsuccessfully resolving the grievance, he filed suit in superior court for wrongful termination.[768] The State subpoenaed the ASEA representative who had handled Peterson's grievance and the superior court denied Peterson's motion for a protective order preventing the ASEA representative from testifying.[769] Reversing, the supreme court reasoned that while the attorney-client privilege did not extend to union representations, the court could recognize a new privilege if it was found in state statutes, court rules, or the state or federal constitutions.[770] The supreme court found the privilege implied in Alaska's statutes, noting that the right granted by PERA for unions to operate free of harassment and undue interference from the State includes the right to confidential communications with union representatives.[771] Reversing the superior court's discovery ruling, the supreme court held that a union-relations privilege is recognized for communications (1) between an employee or employee's attorney and union representative, (2) made in confidence, (3) in connection with representative services relevant to anticipated or ongoing grievance or disciplinary proceedings, and (4) by representatives acting in official representative capacity.[772]

Trudell v. Hibbert

In *Trudell v. Hibbert*,[773] the supreme court held that project owners who are potentially liable for securing workmen's compensation include business owners who hire contractors to perform work that benefits their business.[774] The Hibberts hired a contractor to repair their residence, part of which functioned as the office for their cab business.[775] Trudell was the contractor's employee and was seriously injured after falling from a ladder while performing his work.[776] The contractor did not have workers' compensation insurance.[777] Trudell sued his employer, who subsequently filed for bankruptcy, as well as the Hibberts as project owners.[778] After a bench trial, the superior court found in favor of the Hibberts, declaring that project owners as defined by AS 23.30.045 are limited to business owners that contract out their usual work to others.[779] On appeal, the supreme court held that the statutory definition of "project owner" does not limit liability to instances when a business contracts out its usual work to others, reasoning that the statutory text and the legislative history display the broad purpose of ensuring workers compensation by requiring businesses to make sure their contractors have insurance or to get it themselves.[780] The proper test for determining project owner liability is the extent to which the business benefitted from the work performed and the

[767] *Id.* at 560–61.
[768] *Id.* at 561.
[769] *Id.*
[770] *Id.* at 562.
[771] *Id.* at 565.
[772] *Id.* at 567.
[773] 272 P.3d 331 (Alaska 2012).
[774] *Id.* at 343.
[775] *Id.* at 332.
[776] *Id.* at 333.
[777] *Id.* at 332.
[778] *Id.* at 333.
[779] *Id.* at 335.
[780] *Id.* at 340.

connection between the work and the business.[781] Reversing the supreme court held that project owners who are potentially liable for securing workmen's compensation include business owners who hire contractors to perform work that benefits their business.[782]

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N/A

ETHICS AND PROFESSIONAL RESPONSIBILITY

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Alaska Supreme Court

L.D.G., Inc. v. Robinson

In *L.D.G., Inc. v. Robinson*,[783] the supreme court held that the existence of an unsettled area of law does not excuse an attorney from a duty of care.[784] Freeman was served alcohol while visibly intoxicated by L.D.G., an authorized server of alcohol.[785] Freeman subsequently murdered a woman.[786] In the following wrongful death action, Robinson, L.D.G.'s attorney, did not assert a defense of third party liability, and the court found against L.D.G. for a substantial sum.[787] L.D.G. then sued Robinson for failing to assert a defense of third party liability.[788] The supreme court first examined the relied upon case law and found that, despite Robinson's argument to the contrary, the law was unsettled regarding dram shop liability and liability of consuming patrons.[789] The supreme court then examined the duty of care of attorneys when the law is unsettled.[790] It concluded that the attorney must at least recognize the uncertainty and advise the client as to how to proceed in light of the uncertainty.[791] Therefore, Robinson had breached his duty of care.[792] Reversing and remanding, the supreme court held that the existence of an unsettled area of law does not excuse an attorney from a duty of care.[793]

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[781] *Id.* at 343.
[782] *Id.*
[783] 290 P.3d 215 (Alaska 2012).
[784] *Id.* at 222.
[785] *Id.* at 216.
[786] *Id.*
[787] *Id.*
[788] *Id.* at 217.
[789] *Id.* at 220.
[790] *Id.*
[791] *Id.* at 222.
[792] *Id.*
[793] *Id.*

Alaska Supreme Court

Adoption of Xavier K.

In *Adoption of Xavier K.*,[794] the supreme court held that a biological parent who already has a legal parent-child relationship with his or her own child is not qualified under Alaska adoption statutes to adopt that child.[795] Katz and Smith had a child, Xavier, but never were married.[796] Following a disagreement, Katz petitioned to adopt Xavier, arguing that Smith's consent was not needed since he had abandoned Xavier for at least six months, had no meaningful communication with Xavier, and did not provide child support payments.[797] The superior court concluded that Smith did not need to consent to the adoption, but decided that it was not in Xavier's best interests to grant the adoption to Katz and therefore denied the petition.[798] On appeal, the supreme court found that adoption would terminate a father's parental rights without his consent and without a legally obligated adult as a replacement, which contravened the purposes of adoption.[799] Alaska's adoption statutes allow for an individual to adopt another individual to create a parent-child relationship.[800] The court reasoned that since Katz already had a legal parent-child relationship with her son, Katz could not use the adoption process to terminate the parental rights of Smith.[801] Affirming the decision of the superior court denying Katz's petition, the supreme court held that a biological parent who already has a legal parent-child relationship with his or her own child is not qualified under the adoption statutes to adopt the child.[802]

Berry v. Berry

In *Berry v. Berry*,[803] the supreme court held that in order for attorney fees to be awarded in a divorce proceeding where the economic status of both parties is essentially equal, one party must act in bad faith.[804] April Berry filed a complaint for divorce from her husband, Michael Berry.[805] April was represented by an attorney, and Michael represented himself.[806] At the end of trial, the superior court ordered Michael to pay April for her part of her attorney's fees based on both parties' misconduct.[807] Reversing in part, the supreme court found that the superior court abused its discretion in awarding fees

[794] 268 P.3d 274 (Alaska 2012).
[795] *Id.* at 277.
[796] *Id.* at 274.
[797] *Id.* at 275.
[798] *Id.* at 276.
[799] *Id.*
[800] *Id.*
[801] *Id.* at 277.
[802] *Id.*
[803] 277 P.3d 771 (Alaska 2012).
[804] *Id.* at 773.
[805] *Id.*
[806] *Id.*
[807] *Id.* at 780.

because the record did not show Michael acted in bad faith.[808] The supreme court reasoned that there is a two-step rule for awarding attorney fees in a divorce proceeding: first, the court must determine how much of the fees each party would have had to bear in order "to level the playing field;" second, the court may adjust the award to account for a party's bad faith or misconduct.[809] Reversing in part, the supreme court held that in order for attorney fees to be awarded in a divorce proceeding where the economic status of both parties is essentially equal, one party must act in bad faith.[810]

Coleman v. McCullough

In *Coleman v. McCullough*,[811] the supreme court held that a father is not entitled to a child support deduction for obligations to his first child even if he had commenced a relationship with the mother of his second child prior to the first child's birth.[812] Coleman had two minor sons with two different mothers.[813] Coleman had started a relationship with the second mother prior to the birth of the first son. [814] When the first mother petitioned for child support, Coleman argued that he should be allowed a deduction because his relationship with the second mother began before his first son was born.[815] The superior court ruled that Coleman was not entitled to a deduction.[816] The supreme court rejected Coleman's contention that his income should be adjusted due to his current support of and residency with the second son.[817] The supreme court reasoned that a parent's duty of support begins the day of a child's birth.[818] Coleman therefore had a duty of support to his first son on the day of his birth, and the fact that Coleman's relationship with the second mother began prior to the birth of his first son was immaterial to determining support obligations.[819] Affirming the superior court, the supreme court held a father is not entitled to a child support deduction for obligations to his first child even if he had commenced a relationship with the mother of his second child prior to the first child's birth.[820]

Cox v. Floreske

In *Cox v. Floreske*,[821] the supreme court held that awarding a lifetime right of first refusal after marital property division is inequitable and an abuse of discretion.[822] During the marriage between Cox and Floreske, the couple accumulated a marital estate largely consisting of three businesses and two subdivisions.[823] According to their divorce

[808] *Id.*
[809] *Id.*
[810] *Id.*
[811] 290 P.3d 413 (Alaska 2012).
[812] *Id.* at 414.
[813] *Id.* at 413.
[814] *Id.*
[815] *Id.* at 414.
[816] *Id.*
[817] *Id.*
[818] *Id.*
[819] *Id.* at 415.
[820] *Id.* at 414–15.
[821] 288 P.3d 1289 (Alaska 2012).
[822] *Id.* at 1293–94.
[823] *Id.* at 1290.

proceedings, Floreske was awarded two of the businesses and a few real-estate properties; Cox was awarded the other business and the majority of the properties in the subdivisions.[824] The court granted both parties a right of first refusal in the properties: if one party tried to sell an awarded property, the other party had an opportunity to match any offer tendered on the property.[825] On appeal, Cox argued that this right of first refusal should be vacated because of its indefiniteness.[826] Agreeing with Cox, the supreme court reversed the lower court's decision to uphold the right of first refusal judgment.[827] The supreme court reasoned that the lifetime right of first refusal was not equitable.[828] Further, allowing Floreske to have this power over the property awarded to Cox could create friction and was fundamentally against the goal of disentangling the parties.[829] Reversing the lower court's decision, the supreme court held that awarding a lifetime right of first refusal after marital property division is inequitable and an abuse of discretion.[830]

Day v. Williams

In *Day v. Williams*,[831] the supreme court held that if there is no evidence that funds were wasted between the date of separation and the trial, then valuing funds at the date of separation to determine final property distribution upon divorce is improper.[832] Day and Williams separated in 2007.[833] After their separation but before the trial to determine the final property distribution, Day used $33,548 for her living expenses, which she withdrew from a joint checking account.[834] The superior court distributed this amount to Day in its property distribution.[835] On appeal, Day argued that this money should not have been included in the final property division or alternatively that it should have been valued closer to the time of trial.[836] Reversing the lower court, the supreme court held that property value should be calculated near the trial date, not near the date of separation.[837] The court reasoned that, so long as funds are used for normal living expenses, recapture of those funds cannot be justified.[838] Reversing the lower court's decision, the supreme court held that if there is no evidence that funds were wasted between the date of separation and the trial, then valuing funds at the date of separation to determine final property distribution upon divorce is improper.[839]

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[824] *Id.* at 1290–91.
[825] *Id.* at 1291.
[826] *Id.*
[827] *Id.* at 1294.
[828] *Id.* at 1293.
[829] *Id.* at 1293–94.
[830] *Id.*
[831] 285 P.3d 256 (Alaska 2012).
[832] *Id.* at 264.
[833] *Id.* at 258.
[834] *Id.* at 263.
[835] *Id.*
[836] *Id.*
[837] *Id.* at 264.
[838] *Id.*
[839] *Id.*

Gorton v. Mann

In *Gorton v. Mann*,[840] the supreme court held that, for the purposes of calculating child support payments, a parent is only permitted to deduct from his adjusted annual income the amount of money actually paid for the support of children from a prior relationship.[841] Gorton and Mann were the parents of a minor child.[842] Gorton was also a parent of two children from a prior marriage.[843] After Gorton and Mann divorced, Gorton sought to reduce the amount of child support he was required to provide Mann by deducting from his adjusted annual income not only the amount he actually paid to his other ex-wife for the support of their two children, but also an additional percentage for what he claimed to pay in support of those children while they were living with him.[844] The superior court ruled against Gorton's claim.[845] The supreme court affirmed, reasoning that, in shared custody arrangements, additional deductions for the amount of money that a parent spends on the children while they are in his custody are prohibited because this amount has already been taken into account by the formula used for determining payments.[846] Affirming, the supreme court held that, for the purposes of calculating child support payments, a parent is only permitted to deduct from his adjusted annual income the amount of money actually paid for the support of children from a prior relationship.[847]

Hannah B. v. State, Department of Health and Social Services

In *Hannah B. v. State, Department of Health and Social Services*,[848] the supreme court held that the superior court may consider a child in need of aid's placement with a relative as a factor weighing against the termination of parental rights in certain circumstances, but such a consideration does not necessarily outweigh other factors like permanency in determining the best interests of the child.[849] Hannah B., a mother with a long and troubled history of drug abuse, sought to prevent termination of parental rights to her son, Jacob.[850] Jacob had been placed with his maternal grandmother beginning at 16 months of age and continuing, mostly without significant contact with his mother, until he was three-and-a-half years old, when the Office of Children's Services initiated termination proceedings.[851] The superior court granted termination, finding that Hannah B. had failed to make timely and substantial progress in her treatment programs and that Jacob required a permanent, stable arrangement immediately.[852] On review, the supreme court upheld the superior court's ruling, reasoning that a child's need for permanence and stability may rightly govern the court's best-interests analysis.[853] The supreme court rejected the claim that since a child would remain with a maternal grandparent whether or

[840] 281 P.3d 81 (Alaska 2012).
[841] *Id.* at 81.
[842] *Id.* at 82.
[843] *Id.* at 81–82.
[844] *Id.* at 83.
[845] *Id.* at 82.
[846] *Id.* at 83–84.
[847] *Id.* at 81.
[848] 289 P.3d 924 (Alaska 2012).
[849] *Id.* at 933–35.
[850] *Id.* at 928.
[851] *Id.*
[852] *Id.* at 929.
[853] *Id.* at 933–34.

not parental rights were terminated, it is clear error for the superior court to terminate rights in this circumstance.[854] The supreme court held that the superior court may consider a child in need of aid's placement with a relative as a factor weighing against the termination of parental rights in certain circumstances, but such a consideration does not necessarily outweigh other factors like permanency in determining the best interests of the child.[855]

Helen S.K. v. Samuel M.K.

In *Helen S.K. v. Samuel M.K*,[856] the supreme court held that a parent's due process rights are not violated by a court conducting in camera interviews with their three children during custody proceedings, so long as the parties are provided summary transcripts.[857] Helen S.K. and Samuel M.K. divorced, and subsequently went to a custody hearing for their three children.[858] At the conclusion of a hearing on interim custody, the superior court agreed with Samuel's request to interview the children despite Helen's objection that putting this responsibility on the children would be unhealthy and that they had already been overly involved in the process.[859] On appeal, Helen argued that the superior court violated her right to due process by conducting in camera interviews with the children because the transcripts of the interviews were not disclosed, and she did not know the evidence that would be used against her at trial.[860] Affirming, the supreme court reasoned that while in camera interviews should be used only rarely because of the possibility that they might constitute infringement of a parent's due process rights, sometimes in camera interviews may be in the best interests of the children.[861] The court then explained that as long as the parties are provided summaries of the interview transcripts, the parents' due process rights are not violated.[862] Affirming, the supreme court held that a parent's due process rights are not violated by a court conducting in camera interviews with their three children during custody proceedings, so long as the parties are provided summary transcripts.[863]

Hunter v. Conwell

In *Hunter v. Conwell*,[864] the supreme court held that repeated but inconsistent problems with telephonic visitation by a non-custodial parent does not, by itself, constitute a substantial change of circumstances justifying a modification of parental rights.[865] Conwell was awarded sole legal custody of the two sons he had with Hunter.[866] Two years later, Hunter sought modification of the custody arrangement, alleging that a substantial change in the children's circumstances had occurred because, among other

[854] *Id.* at 934.
[855] *Id.* at 933–35.
[856] 288 P.3d 463 (Alaska 2012).
[857] *Id.* at 474–75.
[858] *Id.* at 467.
[859] *Id.*
[860] *Id.* at 474.
[861] *Id.*
[862] *Id.* at 475.
[863] *Id.* at 474–75.
[864] 276 P.3d 413 (Alaska 2012).
[865] *Id.* at 421.
[866] *Id.* at 414.

things, Conwell was interfering with court-ordered telephonic visitation.[867] The superior court found that Hunter had not demonstrated a substantial change in the circumstances warranting modification of custody, but noted that the problems in telephonic visitation would amount to a substantial change if not remedied.[868] On appeal, the supreme court affirmed the superior court's decision, and reiterated the admonition of the importance of telephonic visitation when geographic separation makes frequent in-person parental visitation impossible.[869] Affirming the lower court, the supreme court held that repeated but inconsistent problems with telephonic visitation by a non-custodial parent does not, by itself, constitute a substantial change of circumstances justifying a modification of parental rights.[870]

In the Matter of the Protective Proceedings of M.K

In *In the Matter of the Protective Proceedings of M.K*,[871] the supreme court held that Alaska's guardianship statutes do not require that a public guardian be appointed only when no other qualified person is available.[872] M.K., a thirty-four-year old woman, suffered from many psychological disorders.[873] The superior court held that M.K. required a guardian because she was incapacitated as defined in Alaska's guardianship statutes and that the Office of Public Advocacy ("OPA") should be appointed as guardian in her best interests.[874] M.K. appealed, arguing that her mother should have been appointed as her guardian because the OPA should be appointed only if no other person was willing and able to perform the functions of a guardian.[875] The supreme court reasoned that, while Alaska's guardianship statutes set an order in which qualified persons have priority for appointment as a guardian, the order may be altered if it is in the best interests of the incapacitated person.[876] The court explained that the Alaska's statutes' plain meaning does not express that public guardians may be appointed only in the case where there is no person willing and qualified to serve as a guardian.[877] The supreme court further stated that the legislative history supported appointing a public guardian if it was in the person's best interests.[878] Affirming the superior court, the supreme court held that Alaska's guardianship statutes do not require that a public guardian be appointed only when no other qualified person is available.[879]

Josh L. v. State, Department of Health and Social Services delete?

In *Josh L. v. State, Department of Health and Social Services*,[880] the supreme court held that the Office of Children's Services' ("OCS") active-effort obligation under the Indian

[867] *Id.* at 415.
[868] *Id.*
[869] *Id.* at 419–20.
[870] *Id.* at 421.
[871] 278 P.3d 876 (Alaska 2012).
[872] *Id.* at 883.
[873] *Id.* at 878.
[874] *Id.* at 879–80.
[875] *Id.* at 880.
[876] *Id.* at 881–82.
[877] *Id.* at 882.
[878] *Id.* at 883.
[879] *Id.*
[880] 276 P.3d 457 (Alaska 2012).

Child Welfare Act ("ICWA") to place a child in need of aid with a member of the same family or tribe is determined on a case-by-case basis and is limited by the practical circumstances of the case, including the parent's inaction or incarceration and the suitability of options within the family or tribe.[881] Josh was indicted on charges of sexual assault and agreed that his special-needs daughter Eva be temporarily placed in a therapeutic foster home, deviating from the placement preference requirement of the ICWA.[882] After OCS failed to identify a family member or tribe suitable for Eva, Josh appealed the superior court's decision that OCS had fulfilled its active-effort obligation by failing to seek placement with Josh's extended family.[883] Affirming the lower court, the supreme court held that OCS's efforts constituted active effort to prevent the break-up of an Indian family, reasoning that each determination must be case-specific. The court noted that OCS attempted to gain the consent of Josh's mother to take Eva, determined that several of his sisters had known sex offenders in their household, and attempted to identify a Native village with the requisite resources to care for Eva.[884] Affirming, the supreme court held that the OCS's active-effort obligation under the ICWA to place a child in need of aid with a member of the same family or tribe is determined on a case-by-case basis and is limited by the practical circumstances of the case, including the parent's inaction or incarceration and the suitability of options within the family or tribe.[885]

Lewis v. Lewis

In *Lewis v. Lewis*,[886] the supreme court held that a divorce settlement agreement which splits assets in an amount exceeding 100% is not enforceable as there is no meeting of the minds.[887] Following Chad and Jessica Lewis's divorce, they participated in a settlement conference in superior court.[888] Although the court initially recited a proposed settlement that was agreed to by both parties, it subsequently accepted proposed findings of fact and conclusions of law drafted by Jessica, which were materially different from the terms initially cited.[889] On appeal, Chad argued that the superior court's findings of fact were clearly erroneous and that the initial settlement should control.[890] The supreme court agreed in part with Chad's argument.[891] The court reasoned that the only evidence of the parties' intent was in the initially recited agreement, and there was no evidence for the superior court to find that they had any different intent.[892] However, the court reasoned that the recited agreement could not control either because its terms created an impossible outcome.[893] Vacating and remanding, the supreme court held that a divorce settlement

[881] *Id.* at 465.
[882] *Id.* at 460.
[883] *Id.* at 464.
[884] *Id.* 465–67.
[885] *Id.* at 465–66.
[886] 285 P.3d 273 (Alaska 2012).
[887] *Id.* at 276.
[888] *Id.* at 274.
[889] *Id.*
[890] *Id.* at 275.
[891] *Id.* at 276.
[892] *Id.*
[893] *Id.*

agreement which splits assets in an amount exceeding 100% is not enforceable as there is no meeting of the minds.[894]

Mallory D v. Malcolm D

In *Mallory D v. Malcolm D*,[895] the supreme court held that the presumption precluding a parent with a history of domestic violence from obtaining legal or physical custody of the children does not apply when both parties have committed acts of domestic violence during the marriage.[896] When Mallory and Malcolm filed for dissolution of their marriage, the two agreed that, in addition to joint legal custody, they would share physical custody of their three children.[897] However, at a subsequent, Mallory moved to change this custody agreement.[898] During the proceedings, both Mallory and Malcolm testified regarding domestic violence by the other on two separate occasions during the marriage.[899] As a result, the lower court denied Mallory's motion to modify the custody agreement.[900] The supreme court affirmed, reasoning that if the lower court found that both parents had a history of domestic violence and neither was more likely to continue this violence, the lower court had discretion to not apply the presumption to either parent.[901] Affirming the lower court's decision, the supreme court held that the presumption that precludes a parent with a history of domestic violence from obtaining legal or physical custody of the children does not apply when both parties had committed acts of domestic violence during the marriage.[902]

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

In *Martha S. v. State, Department of Health & Social Services*,[903] the supreme court held that a therapist's testimony regarding statements made during a therapy session may be admissible under a medical treatment exception to the hearsay rule.[904] The Office of Children's Services took custody of Martha's two youngest children.[905] At a later adjudication, the superior court found that the children were in need of aid and were to remain outside the home for a period not to exceed 18 months.[906] On appeal, Martha challenged several of the superior court's evidentiary rulings, including the use of a therapist's testimony.[907] The supreme court found that the superior court did not abuse its discretion by allowing into evidence the testimony of a therapist regarding statements one of the children made to her during a therapy session.[908] Because the purpose of the therapy session was treatment and diagnosis, the court reasoned that the statements were

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[894] *Id.*
[895] 290 P.3d 1194 (Alaska 2012).
[896] *Id.* at 1206.
[897] *Id.* at 1197.
[898] *Id.* at 1198.
[899] *Id.* at 1199.
[900] *Id.*
[901] *Id.* at 1207.
[902] *Id.* at 1206.
[903] 268 P.3d 1066 (Alaska 2012).
[904] *Id.* at 1076–83.
[905] *Id.* at 1070.
[906] *Id.* at 1075.
[907] *Id.*
[908] *Id.* at 1079.

admissible under a medical treatment exception to the hearsay rule.[909] Affirming the lower court, the supreme court held that a therapist's testimony regarding statements made during a therapy session may be admissible under a medical treatment exception to the hearsay rule.[910]

McLaren v. McLaren

In *McLaren v. McLaren*,[911] the supreme court held that in a divorce proceeding, property acquired before marriage but during cohabitation may be included in the valuation of the marital estate.[912] Teresa and Darren McLaren first began living together in 1988, but they did not become legally married until 1999.[913] The superior court characterized the civil service retirement benefits that Teresa accrued during the ten years she lived with Darren before marriage as marital property.[914] Teresa appealed, arguing that courts can only divide property acquired during the actual marriage.[915] Affirming the lower court, the supreme court explained that as long as the parties ultimately do become married, courts may consider the entirety of the parties' relationships, including premarital cohabitation, in the division of property.[916] Reasoning that the couple acted as a single economic unit while they lived together before marriage, the supreme court allowed the superior court discretion in including premarital property in the marital estate.[917] Affirming the lower court, the supreme court held that in a divorce proceeding, property acquired before marriage but during cohabitation may be included in the valuation of the marital estate.[918]

Patrawke v. Liebes

In *Patrawke v. Liebes*,[919] the supreme court held that in the absence of a contrary reason, a parent with joint custody can be ordered to legally consent to their child obtaining a passport when the other parent presents compelling and timely arguments in favor of obtaining one.[920] Patrawke and Liebes were never married and never lived together, but shared joint legal and equal physical custody of Kyndle.[921] Patrawke sought consent from Liebes to execute a passport on Kyndle's behalf so Kyndle would be able to visit relatives out of state and participate in her elementary school's travel opportunities.[922] Liebes did not consent and Patrawke sought a court order requiring Liebes to legally do so.[923] The superior court denied Patrawke's motion, finding that the school's travel opportunities were too distant to necessitate a decision.[924] On appeal, the supreme court

[909] *Id.* at 1077–79.
[910] *Id.* at 1076–83.
[911] 268 P.3d 323 (Alaska 2012).
[912] *Id.* at 332.
[913] *Id.* at 327.
[914] *Id.* at 332.
[915] *Id.*
[916] *Id.*
[917] *Id.* at 333.
[918] *Id.* at 333, 342.
[919] 285 P.3d 268 (Alaska 2012).
[920] *Id.* at 272.
[921] *Id.* at 270.
[922] *Id.*
[923] *Id.*
[924] *Id.*

reasoned that the courts were required to account for the child's best interest in the situation, and that Liebes failed to offer any reason why it would not be in Kyndle's best interest to obtain a passport.[925] Reversing the superior court, the supreme court held that in the absence of a contrary reason, a parent with joint custody can be ordered to legally consent to their child obtaining a passport when the other parent presents compelling and timely arguments in favor of obtaining one.[926]

Paula E. v. State, Department of Health & Social Services

In *Paula E. v. State, Department of Health & Social Services*,[927] the supreme court held that while the State should notify a grandmother of permanency and placement hearings for her grandchildren, her due process rights are not violated by non-notification if she has the opportunity to participate in subsequent hearings.[928] Paula took care of her four grandchildren for approximately a year until she left to take care of her ill mother.[929] When Paula returned, the Office of Children's Services informed her that because of negative reports about her treatment of the children, they would be placed with another family.[930] Paula was not given notice of several hearings that took place regarding her grandchildren's status and placement.[931] Paula asserted several claims of a violation of her due process rights based on lack of notice, but the superior court disagreed.[932] Affirming, the supreme court found that any prejudice from lack of notice was fixed by her later opportunity to be heard and have her interests represented.[933] The court weighed three factors: (1) the private interest affected by official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and (3) the Government's interest.[934] Affirming the superior court's decision, the supreme court held that while the State should notify a grandmother of permanency and placement hearings for her grandchildren, her due process rights are not violated by non-notification if she has the opportunity to participate in subsequent hearings.[935]

Stephanie F. v. George C.

In *Stephanie F. v. George C.*,[936] the supreme court held that the statutory presumption against awarding child custody to a parent responsible for acts of domestic violence may be overcome by means other than the completion of the Batterers' Intervention Program.[937] George and Stephanie sought physical and legal custody of their children during divorce proceedings.[938] The record showed that on two occasions George had committed acts of domestic violence.[939] George sought private counseling following the incidents but did not complete the Batterer's Intervention Program.[940] The superior court held that, due to AS 25.24.150(h), completion of the Batterers' Intervention Program was

[925] *Id.* at 272.
[926] *Id.*
[927] 276 P.3d 422 (Alaska 2012).
[928] *Id.* at 435.
[929] *Id.* at 426–27.
[930] *Id.* at 427–28.
[931] *Id.* at 429.
[932] *Id.* at 431.
[933] *Id.*
[934] *Id.* at 434.
[935] *Id.* at 435.

the only way to overcome the statutory presumption.[941] Nevertheless, the superior court awarded George custody based on concern for the children's wellbeing.[942] The supreme court held that completion of the Batterer's Intervention program was not the only way to overcome AS 25.24.150(g)'s presumption.[943] The court reasoned that the plain meaning and legislative history of the statutes supported the conclusion that the legislature used the word "may" and included the phrase "where reasonably available" because it did not intend that there should be only one way to overcome the statutory presumption.[944] Remanding, the supreme court held that the statutory presumption against awarding child custody to a parent responsible for acts of domestic violence may be overcome by means other than the completion of the Batterers' Intervention Program.[945]

Stephanie W. v. Maxwell V.

In *Stephanie W. v. Maxwell V.*,[946] the supreme court held that in custody proceedings where a mother brings allegations of sexual abuse against a father in good faith, the mother should not be penalized for an unwillingness to foster a relationship between the child and the father.[947] Stephanie accused Maxwell, the father of her child, of sexually abusing the child.[948] Both parties sought legal and primary physical custody of the child.[949] The trial court found that Stephanie had not proven sexual abuse with preponderance of evidence, and that she had shown an unwillingness to foster a relationship between Maxwell and the child, which weighed against her receiving custody.[950] On appeal, the supreme court held that Stephanie had alleged sexual abuse in good faith, and as such she should not be penalized for an unwillingness to foster a relationship between father and child prior to the superior court's ruling on whether abuse occurred.[951] Remanding in part, the supreme court held that in custody proceedings where a mother brings allegations of sexual abuse against a father in good faith, the mother should not be penalized for an unwillingness to foster a relationship between the child and the father.[952]

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[936] 270 P.3d 737 (Alaska 2012).
[937] *Id.* at 753.
[938] *Id.* at 739.
[939] *Id.* at 739–40.
[940] *Id.* at 743.
[941] *Id.* at 745.
[942] *Id.*
[943] *Id.* at 751–54.
[944] *Id.*
[945] *Id.* at 753.
[946] 274 P.3d 1185 (Alaska 2012).
[947] *Id.* at 1191.
[948] *Id.* at 1187.
[949] *Id.* at 1188.
[950] *Id.*
[951] *Id.* at 1191.
[952] *Id.*

Tea* ex rel. *A.T.

In *Tea* ex rel. *A.T.*,[953] the supreme court held that a child's Permanent Fund Dividends ("dividends") may be claimed by redirecting a previously filed application even if the claiming party did not have custody of the child on December 31.[954] The Office of Children's Services (OCS) was granted custody of twins in early 2010.[955] After OCS notified the Department of Revenue of their custody, OCS was sent the children's' dividends.[956] Nevertheless, the mother of the twins, who relinquished parental rights voluntarily, filed suit claiming the dividends should be released to her because OCS did not have custody of the children on December 31.[957] On appeal, the twins' guardian ad litem argued that 15 AAC 23.223(i), the regulation at issue, provided two separate ways to obtain the children's dividends, including one that did not require custody on December 31 before applying for the dividends.[958] The supreme court agreed and reversed the lower court's decision, reasoning that the first two sentences of the regulation addressed different factual scenarios.[959] The court further concluded that the sentence addressing the redirection of existing applications could not have the same December 31 requirement since it would make the second sentence wholly superfluous.[960] Reversing the lower court's decision, the supreme court held that a child's dividends may be claimed by redirecting a previously filed application even if the claiming party did not have custody of the child on December 31.[961]

Tracy v. State, Department of Health and Human Services

In *Tracy v. State, Department of Health and Human Services*,[962] the supreme court held that a court should only award attorney's fees against a non-prevailing pro se litigant in a 42 U.S.C. § 1983 case if it can determine that a reasonable layperson would have known that his claims were without merit.[963] Richard and Durena Tracy were the legal guardians of their granddaughter, Annie.[964] After Annie's kindergarten teacher reported potential sexual abuse against Annie by Richard, the Office of Children's Services (OCS) initiated an investigation.[965] The investigation of the Tracys was drawn-out and inconvenient, and ultimately concluded that the charge against Richard was in error.[966] Acting pro se, the Tracys sued OCS in superior court for, among other things, a violation of their constitutional rights under § 1983.[967] The superior court granted summary judgment to OCS and awarded a percentage of its attorney's fees.[968] On appeal, the supreme court

[953] 278 P.3d 1262 (Alaska 2012).
[954] *Id.* at 1266.
[955] *Id.* at 1263.
[956] *Id.*
[957] *Id.* at 1263, 1265.
[958] *Id.* at 1265.
[959] *Id.*
[960] *Id.* at 1266.
[961] *Id.*
[962] 279 P.3d 613 (Alaska 2012).
[963] *Id.* at 618–19.
[964] *Id.* at 614.
[965] *Id.*
[966] *Id.* at 615.
[967] *Id.*
[968] *Id.* at 616.

affirmed the lower court's grant of summary judgment but vacated its award of attorney's fees as an abuse of discretion.[969] The court reasoned that courts are required to award attorney's fees against unsuccessful pro se litigants only if their claims were meritless and asserted in bad faith.[970] The supreme court held that a court should only award attorney's fees against a non-prevailing *pro se* litigant in a 42 U.S.C. § 1983 case if it can determine that a reasonable layperson would have known that his claims were without merit.[971]

Villars v. Villars

In *Villars v. Villars*,[972] the supreme court held that in the absence of contrary evidence, under an agreement about the distribution of military benefits between two divorcing spouses, distribution should begin from the moment of collection, not when the benefit-receiving spouse turns 60 years old.[973] Richard and Kathleen Villars filed for dissolution of marriage in superior court.[974] During the dissolution proceeding, they agreed that Richard's military retirement benefits would be divided equally between them.[975] When Kathleen learned that Richard had retired early and begun receiving retirement benefits at age 48, she sought and received an order from the superior court requiring half of Richard's military retirement benefits to be paid to her.[976] On appeal, Richard argued that the settlement agreement and the testimony in the superior court showed that both parties intended for his retirement benefits to be his separate property until he reached the age of 60.[977] The supreme court disagreed, reasoning that the qualified domestic relations order accepted by the court, which both parties signed, clearly demonstrated each party's intent to divide the benefits when Richard began receiving them, and that each party clearly demonstrated their intent to do the same during the dissolution proceedings.[978] Affirming, the supreme court held that in the absence of contrary evidence, under an agreement about the distribution of military benefits between two divorcing spouses, distribution should begin from the moment of collection, not when the benefit-receiving spouse turns 60 years old.[979]

Weinberger v. Weinmeister

In *Weinberger v. Weinmeister*,[980] the supreme court held that rebutting the presumption against awarding custody of a child to a parent with a history of perpetuating domestic violence, requires that parent to prove that each of the factors in AS § 25.24.150(h) have been satisfied.[981] Weinberger brought an action for child custody against Weinmeister in

[969] *Id.* at 619.
[970] *Id.* at 618–19.
[971] *Id.*
[972] 277 P.3d 763 (Alaska 2012).
[973] *Id.* at 770.
[974] *Id.* at 764.
[975] *Id.* at 765.
[976] *Id.* at 768.
[977] *Id.* at 764.
[978] *Id.* at 769–70.
[979] *Id.* at 770–71.
[980] 268 P.3d 305 (Alaska 2012).
[981] *Id.* at 309–10.

superior court after an instance of domestic violence led to the couple's separation.[982] Based on Weinberger's testimony that Weinmeister had physically abused him on multiple occasions, the superior court found that Weinmeister had a history of perpetuating domestic violence.[983] However, the court held that Weinmeister had rebutted the presumption in Alaska Statute § 25.24.150(g) and awarded her custody.[984] On appeal, Weinberger argued that the court improperly applied Alaska Statute § 25.24.150(h) by reading the statute to say "or" between each of the requisite factors rather than "and."[985] Reasoning that the legislature intended to require each of the factors to be satisfied before overcoming the presumption against awarding custody, the supreme court agreed with Weinmeister and reversed the superior court's custody determination.[986] The court note Weinmeister had failed to make the requisite showing because she had not completed an intervention program for batterers.[987] Reversing, the supreme court held that rebutting the presumption against awarding custody of a child to a parent with a history of perpetuating domestic violence, requires that parent to prove that each of the factors in AS § 25.24.150(h) have been satisfied.[988]

Wilson v. Wilson

In *Wilson v. Wilson*,[989] the supreme court held that the superior court has the authority to dismiss or stay a divorce action if there is a reasonable and adequate alternative forum to obtain a divorce decree, and issuing that decree may substantially impact property division or child custody proceedings in an alternative forum.[990] Irene Wilson left her husband Dennis in Ohio, where they had resided, moved to Alaska with their son, and filed for divorce.[991] Dennis moved for dismissal, asserting the superior court lacked jurisdiction.[992] The superior court dismissed, finding that it lacked both personal jurisdiction over Dennis and subject-matter jurisdiction over the child, and that Ohio courts would be the proper forum.[993] Affirming, the supreme court held that a party seeking divorce in Alaska, with simultaneous proceedings in another jurisdiction, must show good cause and lack of prejudice to obtain a divorce decree.[994] While the court reasoned that Alaska courts can have jurisdiction over divorce proceedings even when lacking personal jurisdiction over one party, Alaska courts would not have jurisdiction over other claims in this case, such as child custody and property division issues.[995] Affirming the superior court's decision, the court held that the superior court has the authority to dismiss or stay a divorce action if there is a reasonable and adequate

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[982] *Id.* at 308.
[983] *Id.*
[984] *Id.*
[985] *Id.* at 309.
[986] *Id.*
[987] *Id.* at 309–10.
[988] *Id.*
[989] 271 P.3d 1098 (Alaska 2012)
[990] *Id.* at 1102.
[991] *Id.* at 1099.
[992] *Id.*
[993] *Id.* at 1100.
[994] *Id.* at 1102.
[995] *Id.* at 1101.

alternative forum to obtain a divorce decree, and issuing that decree may substantially impact property division or child custody proceedings in an alternative forum. [996]

INSURANCE LAW

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Alaska Supreme Court

Ennen v. Integon Indemnity Corp.

In *Ennen v. Integon Indemnity Corp.*,[997] the supreme court held that an additional insured under an automobile insurance policy may bring a cause of action for bad faith against the insurer.[998] Ennen was seriously injured while a passenger in a car accident when Integon Indemnity Corp. ("Integon") policyholder Shanigan drove off the highway.[999] Integon paid Ennen under the bodily liability provision of the policy, but did not pay underinsured motorist (UIM) benefits to Ennen because of a provision limiting UIM.[1000] Learning later that this provision was in violation of two Alaska statutes, Integon paid Ennen UIM benefits plus prejudgment interest.[1001] Ennen brought suit against Integon for damages, alleging bad faith.[1002] The superior court held that Ennen did not have a cause of action for bad faith because he was an additional insured, as opposed to a "first-party insured," on Shanigan's policy.[1003] The supreme court, vacating the superior court's ruling, distinguished between intended third-party beneficiaries of a contract, who can enforce rights in an insurance contract, and incidental beneficiaries, such as tort victims, who cannot.[1004] The court found that whether an insured is a policy-holder or an additional insured is immaterial and that both are entitled to bring causes of action for bad faith.[1005] Accordingly, the supreme court reversed, holding that an additional insured is entitled to bring a cause of action against the insurer for bad faith.[1006]

Grace v. Peterson

In *Grace v. Peterson*,[1007] the supreme court held that, to the extent that parties do not provide sufficient evidence to make a reasonable allocation of a lawsuit settlement payment to a separate estate, the award should be classified as marital property.[1008] After Grace suffered brain injuries in a motorcycle crash, he and his wife sued the helmet retailer and manufacturer and brought a bad faith action against their insurance company.[1009] The couple separated after the accident, divorced for one month, but then

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[996] *Id.*
[997] 268 P.3d 277 (Alaska 2012).
[998] *Id.* at 286.
[999] *Id.* at 280.
[1000] *Id.* at 281.
[1001] *Id.* at 280–81.
[1002] *Id.* at 281.
[1003] *Id.*
[1004] *Id.* at 284.
[1005] *Id.* at 286.
[1006] *Id.* at 286.
[1007] 269 P.3d 663 (Alaska 2012).
[1008] *Id.* at 671.
[1009] *Id.* at 665.

remarried. [1010] An interpleader action was brought to the superior court to allocate the recovery proceeds. [1011] On appeal, the supreme court reversed the superior court's equal allocation of an insurance bad faith claim, holding that the classification of tort recoveries for purposes of marital property division depends on the loss the recovery was intended to replace, not the nature of the cause of action giving rise to recovery.[1012] The court reasoned that proceeds of the settlement were subject to classification as marital and separate property rather than divisible equally between husband and wife.[1013] The supreme court held that, to the extent that parties do not provide sufficient evidence to make a reasonable allocation of a lawsuit settlement payment to a separate estate, the award should be classified as marital property.[1014]

NATIVE LAW

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United States Court of Appeals for the Ninth Circuit

Native Village of Eyak v. Blank

In *Native Village of Eyak v. Blank*,[1015] the Ninth Circuit held that Alaskan Native villages do not have exclusive use of claimed portions of outer continental shelf ("OCS") of the Gulf of Alaska where other tribes have fished and hunted on the periphery of the claimed territory.[1016] The Secretary of Commerce promulgated regulations limiting access to certain fisheries, and the several Alaskan Native villages ("Villages") claimed the regulations failed to account for their non-exclusive aboriginal hunting and fishing rights.[1017] The lower court found the Villages did not have exclusive control, and the Villages appealed.[1018] Affirming, the Ninth Circuit held that evidence that other groups used land at periphery of OCS defeated the claim that the Villages exclusively used the land.[1019] The court further held that the OCS was such a vast area that the Villages' low population was incapable of controlling any part of the OCS.[1020] Affirming, the Ninth Circuit held that certain Villages do not have exclusive use of claimed portions of outer continental shelf of the Gulf of Alaska where other tribes have fished and hunted on the periphery of the claimed territory.[1021]

[1012] *Id.*
[1012] *Id.*
[1012] *Id.*
[1013] *Id.*
[1014] *Id.*
[1015] 688 F.3d 619 (9th Cir. 2012).
[1016] *Id.* at 625.
[1017] *Id.*
[1018] *Id.*
[1019] *Id.* at 624.
[1020] *Id.*
[1021] *Id.* at 625.

United States Court of Appeals for the Ninth Circuit

U.S. v. 300 Units of Rentable Housing

In *U.S. v. 300 Units of Rentable Housing*,[1022] the Ninth Circuit held that a renewal notice may be effective even when the amount of rent is undecided, so long as a method for determining the rent is disclosed.[1023] In a first-of-its-kind project, the United States Air Force retained ownership of certain real property on which houses were built, but the developer owned the houses and would lease them to the Air Force for a term of 20 years.[1024] After the initial lease ran, the Government had the option to purchase the houses, renew the lease, or have the houses removed.[1025] The question before the court was whether the amount of rent for a renewal term must be specified in the option to renew a government lease to make that renewal valid.[1026] The Ninth Circuit held that, because the lease included a method the court could apply to determine the rent, the option was enforceable.[1027] The court noted that the fact that the parties did not come to an agreement on rent prior to the renewal date did not render the option invalid since the option clause did not expressly require such agreement prior to renewal.[1028] The Ninth Circuit held that a renewal notice may be effective even when the amount of rent is undecided, so long as a method for determining the rent is disclosed.[1029]

Alaska Supreme Court

Albrecht v. Alaska Trustee, LLC

In *Albrecht v. Alaska Trustee, LLC*,[1030] the supreme court held that including foreclosure costs in homeowner reinstatement quotes does not violate Alaska's non-judicial foreclosure statute.[1031] Albrecht faced foreclosure on her home after defaulting on her promissory note, and requested a reinstatement quote. [1032] Alaska Trustee provided the reinstatement quote and included in it various foreclosure costs including late charges, inspection charges, and other fees and costs.[1033] Albrecht brought a class action lawsuit on behalf of similarly-situated homeowners, alleging that the inclusion of such fees violated their right to cure under Alaska's non-judicial foreclosure statute.[1034] The superior court concluded that Albrecht lacked standing to sue and that the inclusion of

[1022] 668 F.3d 1119 (9th Cir. 2012).
[1023] *Id.* at 1123.
[1024] *Id.* at 1121.
[1025] *Id.*
[1026] *Id.* at 1123.
[1027] *Id.*
[1028] *Id.*
[1029] *Id.* at 1123.
[1030] 286 P.3d 1059 (Alaska 2012).
[1031] *Id.* at 1061.
[1032] *Id.*
[1033] *Id.*
[1034] *Id.*

such costs in the reinstatement quote was permitted under the statute.[1035] The supreme court affirmed the superior court, holding that the inclusion of foreclosure costs in homeowner reinstatement quotes does not violate Alaska's non-judicial foreclosure statute.[1036]

Gold Country Estates Preservation Group, Inc. v. Fairbanks North Star Borough

In *Gold Country Estates Preservation Group, Inc. v. Fairbanks North Star Borough*,[1037] the supreme court held that a site visit is a meeting for the purposes of the Open Meeting Act when (1) information-gathering and discussion during the visit constitutes consideration of a matter on which a governmental body is empowered to act, and (2) the visit is a key step in the body's decision-making process.[1038] Gold Country Estates Preservation Group ("GCE") brought an action against Fairbanks North Star Borough ("Borough") after the Borough's platting board decided to allow a lot owner to build a road through GCE's subdivision.[1039] The superior court found that GCE's covenants prohibited the road, but that the Borough had not violated the Open Meeting Act during its decision-making process.[1040] On appeal, GCE argued that the site visit relied upon by the Borough's platting board was a meeting under the Act and that adequate notice of the visit had not been given because individual "Dear Property Owner" letters had not been sent to homeowners in the subdivision.[1041] The supreme court agreed with GCE that the site visit constituted a meeting under the Act, reasoning that the platting board members received evidence at the visit which would help in the decision-making process.[1042] However, the supreme court disagreed that "Dear Property Owner" letters were required because the site visit was not a meeting in which final resolution of the replatting issue would be made.[1043] The Borough was only required to provide reasonable public notice, which was accomplished through newspaper and online announcements.[1044] Affirming, the supreme court held that a site visit is a meeting for the purposes of the Open Meeting Act when (1) information-gathering and discussion during the visit constitutes consideration of a matter on which a governmental body is empowered to act, and (2) the visit is a key step in the body's decision-making process.[1045]

Gottstein v. Kraft

In *Gottstein v. Kraft*,[1046] the supreme court held that a home used during marriage but no longer occupied is not considered a "family home or homestead," thus both spouses do not need to sign off on its transfer.[1047] Jim and Terrie Gottstein lived in a home purchased

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[1035] *Id.*
[1036] *Id.* at 1063–64.
[1037] 270 P.3d 787 (Alaska 2012) (per curiam).
[1038] *Id.* at 796.
[1039] *Id.* at 789–90.
[1040] *Id.* at 790.
[1041] *Id.* at 795–96.
[1042] *Id.* at 796.
[1043] *Id.* at 796–97.
[1044] *Id.* at 796.
[1045] *Id.*
[1046] 274 P.3d 469 (Alaska 2012).
[1047] *Id.* at 471.

by Jim and deeded to Terrie during their marriage.[1048] After they moved out and later separated, Terrie sold the property for under its appraised value.[1049] Jim sought to assert an interest in the property, citing AS 34.15.010, which requires husband and wife join the deed together when conveying a family home.[1050] The lower court granted summary judgment against Jim.[1051] On appeal, the supreme court held that AS 34.15.010 does not apply to a vacant former marital home.[1052] The supreme court reasoned that since the home was not the family's residence when it was sold, the statute did not require Terrie to include Jim in the conveyance.[1053] Affirming the superior court's decision, the supreme court held that a home used during marriage but no longer occupied is not considered a "family home or homestead," thus both spouses do not need to sign off on its transfer.[1054]

HP Ltd. Partnership v. Kenai River Airpark

In *HP Ltd. Partnership v. Kenai River Airpark*,[1055] the supreme court held that a covenant that only permits single-family dwellings or recreational use of land does not regulate ownership of the property.[1056] After a homeowners association for a multi-family subdivision ("Airpark") assumed possession of a lot to be used for recreational purposes in a neighboring single-family subdivision, a developer for the property sued to prevent Airpark from using it, claiming Airpark's ownership violated covenants attached to the lot including a single-family restriction.[1057] On appeal, the supreme court held that while the single-family restriction was ambiguous in that it could either be a land use or a building use restriction, it placed no limitation on ownership of the lot.[1058] The supreme court reasoned that Airpark was permitted to own the land, so long as it did not violate other features of the covenant.[1059] Affirming the superior court's ruling on this particular issue, the supreme court held that a covenant that only permits single-family dwellings or recreational use of land does not regulate ownership of the property.[1060]

Kuretich v. Alaska Trustee, LLC

In *Kuretich v. Alaska Trustee, LLC*,[1061] the supreme court held that foreclosure fees may be included in a sum in default, and therefore a lender could add foreclosure fees to a reinstatement amount.[1062] Kuretich purchased a home in 2001, and when he fell behind on his mortgage payments in 2008, his mortgage company authorized Alaska Trustee, LLC to begin foreclosure proceedings.[1063] Kuretich paid a reinstatement fee that included

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[1048] *Id.* at 472.
[1049] *Id.*
[1050] *Id.* at 474.
[1051] *Id.* at 473.
[1052] *Id.* at 476.
[1053] *Id.*
[1054] *Id.*
[1055] 270 P.3d 719 (Alaska 2012).
[1056] *Id.* at 729.
[1057] *Id.*
[1058] *Id.*
[1059] *Id.* at 728–30.
[1060] *Id.* at 729.
[1061] 287 P.3d 87 (Alaska 2012).
[1062] *Id.* at 88–89.
[1063] *Id.* at 88.

foreclosure costs, but again fell behind on payments in 2009.[1064] This time, he refused to pay the foreclosure costs included in the reinstatement fee, arguing that they did not consist of "sums in default" under the Alaska statute detailing foreclosure proceedings.[1065] The court reasoned that including foreclosure fees and costs in a reinstatement fee was consistent with the statute, especially when the homeowner's deed of trust with the mortgage company specifically indicates that reinstatement fees include the costs incident to foreclosure.[1066] Affirming the superior court and adopting its decision, the supreme court held that foreclosure fees may be included in a sum in default, and therefore a lender could add foreclosure fees to a reinstatement amount.[1067]

Oakes v. Holly

In *Oakes v. Holly*,[1068] the supreme court held that the doctrine of mutual mistake does not apply to drafting errors in proposals for judicial partition of property.[1069] Oakes and Holly both owned interest in a twenty-acre parcel of land.[1070] Oakes filed a complaint for judicial partition and both parties agreed to partition the property with both parties submitting three proposals.[1071] The superior court selected one of Oakes' partition proposals; however upon completion of a survey, an error in the map proposed to the superior court was discovered, with more valuable albeit less land going to Holly.[1072] The superior court determined that since the proposal was not an accurate portrayal of the property, there was a material mutual mistake of fact related to a basic assumption of the contract.[1073] Oakes, the party requesting a revised partition, bore the risk of mistake and the superior court enforced Oakes' proposal as surveyed despite the error.[1074] The supreme court reasoned that the parties' agreement to submit three proposals to the court was analogous to a partial settlement contract; however, the drafting error in the proposals was not a mistake related to contract formation.[1075] The court stated that the parties agreed to a judicial partition, whereby the parties agreed to adopt procedures to resolve the litigation[1076] and the mistake in the proposals occurred three months after this agreement.[1077] Remanding on other grounds, the court held that the doctrine of mutual mistake does not apply to drafting errors in proposals for judicial partition of property.[1078]

[1064] *Id.*
[1065] *Id.*
[1066] *Id.* at 89.
[1067] *Id.* at 88–89.
[1068] 268 P.3d 1084 (Alaska 2012).
[1069] *Id.* at 1085.
[1070] *Id.*
[1071] *Id.*
[1072] *Id.* at 1086.
[1073] *Id.* at 1087.
[1074] *Id.*
[1075] *Id.* at 1088.
[1076] *Id.*
[1077] *Id.* at 1089.
[1078] *Id.* at 1085.

Reed v. Parrish

In *Reed v. Parrish*,[1079] the supreme court held that mortgage payments made pursuant to a domestic violence protection order are not credited to the paying party during property division post-separation of a domestic partnership.[1080] From 1998 to 2009, Reed and Parrish were in a romantic relationship.[1081] The couple had two children together but never married.[1082] In 2009, Parrish obtained a domestic violence protection order against Reed and was awarded possession of the house the two purchased together, while Reed was ordered to continue to make mortgage payments.[1083] On appeal, Reed argued that the lower court erred in not crediting him for the mortgage payments he made.[1084] The supreme court affirmed the lower court's decision to not credit Reed for the mortgage payments made pursuant to the domestic violence protection order.[1085] Since the domestic violence protection order awarded Parrish the house and ordered Reed to continue to make mortgage payments, the court reasoned that to credit the mortgage payments would disrupt the relief granted to Parrish in the order.[1086] Furthermore, the court found that the mortgage payments provided stability for the couple's children during the litigation because Parrish had always stayed home to care for them.[1087] Affirming the lower court's decision, the supreme court held that mortgage payments made pursuant to a domestic violence protection order are not credited to the paying party during property division post-separation of a domestic partnership.[1088]

Roberson v. Manning

In *Roberson v. Manning*,[1089] the supreme court held that, by itself, failure to transfer title does not necessarily mean a person's ownership in a vehicle has not been transferred to another person.[1090] Roberson and Manning purchased a motor home together.[1091] Later, at a hearing for protective order against Roberson, Manning promised that he was going to pay off what he owed and that Roberson could have his ownership share.[1092] However, Manning later titled the mobile home in only his name and sold it.[1093] Roberson sued for declatory and injunctive relief, but the superior court concluded that Manning did not give his share of the mobile home to Roberson since there was no title transferred to her.[1094] On appeal, Roberson argued that she owned the mobile home in its entirety because Manning gave her his share.[1095] The supreme court vacated and remanded the

[1079] 286 P.3d 1054 (Alaska 2012).
[1080] *Id.* at 1059.
[1081] *Id.* at 1055.
[1082] *Id.* .
[1083] *Id.* at 1056.
[1084] *Id.*.
[1085] *Id.* at 1059.
[1086] *Id.* at 1058.
[1087] *Id.* at 1058–59.
[1088] *Id.* at 1059.
[1089] 268 P.3d 1090 (Alaska 2012).
[1090] *Id.* at 1093.
[1091] *Id.* at 1092.
[1092] *Id.*
[1093] *Id.*
[1094] *Id.*
[1095] *Id.*

lower court's conclusion that a lack of title transfer was dispositive in proving Manning never gave his ownership in the mobile home to Roberson.[1096] The court reasoned that failure to transfer title creates a presumption that ownership had not been delivered, but other evidence, such as oral testimony, could outweigh the presumption.[1097] Vacating and remanding the lower court's decision, the supreme court held that failure to transfer title does not necessarily mean a person's ownership in a vehicle has not been transferred to another person.[1098]

Schweitzer v. Salamatof Air Park Subdivision Owners, Inc.

In *Schweitzer v. Salamatof Air Park Subdivision Owners, Inc.*,[1099] the supreme court held that the mootness exception for attorney's fees allows a plaintiff without ongoing standing to pursue an appeal if review of the main issue in the case could potentially relieve him of liability for attorney's fees.[1100] Conflict developed between Schweitzer and members of the Subdivision Association over a property easement.[1101] Each party filed suit, attempting to quiet title on certain lots and determine the reach of the easement.[1102] The superior court ruled against Schweitzer and assessed attorney's fees against him.[1103] Schweitzer subsequently lost title to his property through foreclosure, thus depriving him of standing upon appeal and rendering his appeal of the superior court's decision moot.[1104] Overruling objections by the Subdivision Association, the supreme court agreed to hear Schweitzer's appeal on the main issue in the case despite its mootness because such a review provides the only recourse for plaintiffs with extensive liability for attorney's fees.[1105] The supreme court reasoned that the mootness exception for attorney's fees seeks to recognize a party's continued interest in a claim based on liability for attorney's fees even when he otherwise lacks standing to pursue an appeal.[1106] Affirming, the supreme court held that the mootness exception for attorney's fees allows a plaintiff without ongoing standing to pursue an appeal if review of the main issue in the case could potentially relieve him of liability for attorney's fees.[1107]

[1096] *Id.* at 1093.
[1097] *Id.*
[1098] *Id.*
[1099] 278 P.3d 1267 (Alaska 2012).
[1100] *Id.* at 1272–73.
[1101] *Id.* at 1269.
[1102] *Id.* at 1270.
[1103] *Id.* at 1271.
[1104] *Id.* at 1272.
[1105] *Id.*
[1106] *Id.* at 1273.
[1107] *Id.* at 1272–73.

TORT LAW

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Alaska Supreme Court

Jones v. Bowie Industries, Inc.

In *Jones v. Bowie Industries, Inc.*,[1108] the supreme court held that manufacturers have a post-sale duty to inform consumers of potentially life-threatening dangers in their products that become apparent after the sale.[1109] Jones accidentally amputated his leg while working on a hydromulcher manufactured by Bowie Industries ("Bowie").[1110] He filed various tort claims against Bowie, and at trial the court instructed the jury that Bowie had a duty to warn Jones of life-threatening dangers associated with the hydromulcher.[1111] On appeal, Bowie argued there was no post-sale duty to warn.[1112] Affirming, the supreme court held that manufacturers have a post-sale duty to inform consumers of potentially life-threatening dangers in their products, even if these dangers do not become apparent until after the purchase.[1113] The court reasoned that where a manufacturer has reason to know of a potentially life-threatening risk, and can identify recipients of the sale, then the manufacturer should give notice to those consumers.[1114] Affirming, the supreme court held that manufacturers have a post-sale duty to inform consumers of potentially life-threatening dangers in their products that become apparent after the sale.[1115]

TRUSTS & ESTATES LAW

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Alaska Supreme Court

Dan v. Dan

In *Dan v. Dan*,[1116] the supreme court held that (1) the contents and execution of a will must be shown by clear and convincing evidence,[1117] and (2) the presumption that a lost will was destroyed for the purposes of revocation is a rebuttable presumption.[1118] Rose executed a will in 1987.[1119] Later, she executed a second will that revoked the first; however this revised will was lost before probate.[1120] During probate, one of Rose's three daughters produced an accurate copy of the second will but because the will was not signed, the court concluded that it must find that Rose destroyed the original will to

[1108] 282 P.3d 316 (Alaska 2012).
[1109] *Id.* at 335.
[1110] *Id.* at 321.
[1111] *Id.* at 324.
[1112] *Id.* at 340.
[1113] *Id.* at 335.
[1114] *Id.*
[1115] *Id.*
[1116] 288 P.3d 480 (Alaska 2012).
[1117] *Id.* at 483.
[1118] *Id.* at 484.
[1119] *Id.* at 481.
[1120] *Id.*

revoke it.[1121] The court then divided the estate according to intestate succession.[1122] The supreme court, relying on other jurisdictions and concerned that a low standard could lead to cases of fraud, held that the contents of a lost will must be proven by clear and convincing evidence.[1123] The supreme court also held that the presumption of revocation based upon destruction is rebuttable.[1124] Since the superior court did not announce whether Rose's proper execution of a second will met the clear and convincing standard and did not find whether the evidence presented at trial overcame the presumption that Rose revoked the will, the supreme court remanded to the superior court.[1125] Remanding for further inquiry, the supreme court held that (1) the contents and execution of a will must be shown by clear and convincing evidence,[1126] and (2) the presumption that a lost will was destroyed for the purposes of revocation is a rebuttable presumption.[1127]

Pestrikoff v. Hoff

In *Pestrikoff v. Hoff*,[1128] the supreme court held that the concept of equitable distribution used in divorce proceedings does not apply in probate proceedings.[1129] After Dorothy Morrison died intestate, her children from a previous marriage claimed that her property with her husband at death should be evaluated according to the principle of equitable distribution of marital property.[1130] Thus, a boat to which Morrison's husband had sole title, but which was purchased during their marriage, would become an undivided interest of the estate and ultimately passed to the children.[1131] However, there was strong evidence that the pair had intended for Hoff to individually preserve title to the boat.[1132] Affirming the lower court ruling that title to the boat be preserved, the supreme court held that equitable distribution as used in divorce proceedings should not be used in probate proceedings.[1133] The court reasoned that unlike in divorce proceedings, it was clear from legislative history and prior case law that Alaska's probate statute determined ownership based on title, and that the legislature did not intend for property to be retitled upon spousal death.[1134] Affirming the lower court, the supreme court held that the concept of equitable distribution used in divorce proceedings does not apply in probate proceedings.[1135]

[1121] *Id.* at 481–82.
[1122] *Id.* at 482.
[1123] *Id.* at 483–84.
[1124] *Id.* at 484.
[1125] *Id.* at 484–85.
[1126] *Id.* at 483.
[1127] *Id.* at 484.
[1128] 278 P.3d 281 (Alaska 2012).
[1129] *Id.* at 282.
[1130] *Id.* at 283.
[1131] *Id.*
[1132] *Id.*
[1133] *Id.* at 281.
[1134] *Id.* at 284–85.
[1135] *Id.* at 282.