THE YEAR-IN-REVIEW 2002: SELECTED CASES FROM ALASKA SUPREME COURT, ALASKA COURTS OF APPEALS, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, AND U.S. DISTRICT COURT FOR THE DISTRICT OF ALASKA

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I. INTRODUCTION

The Year-in-Review contains brief summaries of selected decisions handed down in 2002 by the Alaska Supreme Court, Alaska Courts of Appeals, the U.S. Court of Appeals for the Ninth Circuit, and the U.S. District Court for the District of Alaska. The summaries focus on the substantive areas of the law addressed, the statutes or common law principles interpreted, and the essence of the primary holdings. Attorneys are advised not to rely upon the information contained in this review without further reference to the cases cited. *The Year in Review* is also available online at http://www.law.duke.edu/journals/20ALRYearinReview.

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

II. ADMINISTRATIVE LAW

In *Chugach Electric Ass'n v. Regulatory Commission of Alaska*,[1] the supreme court held that Alaska law required Chugach to obtain commission approval before selling electricity outside the geographic region to which it had previously been assigned to supply electric service.[2] Chugach had been granted a certificate of public convenience and necessity from the commission which allowed it to provide electric service within a specific geographic area, but it wished to provide electricity to two customers outside of that area.[3] The Regulatory Commission found that it had power to regulate competition and denied Chugach the opportunity to serve customers outside its area.[4] The superior court affirmed that Chugach needed commission approval to sell electricity outside its geographic area.[5] The supreme court also agreed that Alaska Statutes section 42.05.221(a) gives the Commission the general power

1. 49 P.3d 246 (Alaska 2002).
2. *Id*. at 254.
3. *Id*. at 248.
4. *Id.* at 249.
5. *Id.*

to limit competition through the issuance of certificates.[6] Further, the supreme court rejected Chugach's argument that there was a distinction between selling electricity as a commodity and providing electric utility services.[7]

In *Cook Inlet Keeper v. State, Office of Management and Budget, Division of Governmental Coordination*,[8] the supreme court held that the State could not exclude any permitted uses or activities from a Coastal Program consistency review of a specific project, regardless of whether a general permit for the activity had been previously granted.[9] The Forest Oil Corporation filed permit applications seeking to install an oil exploration platform over the Redoubt Shoals in Cook Inlet.[10] Under the Alaska Coastal Management Act[11], the platform could only be authorized if the State determined that its use was consistent with the applicable Coastal Program standards.[12] Before the close of the public comment period on the permit, the U.S. EPA issued a general permit authorizing specified wastewater discharges for existing and future exploratory drilling projects in the upper Cook Inlet.[13] After the close of the public comment period, the State made a final consistency determination approving the platform but specifically excluding wastewater discharge activities because the EPA's permit already covered those activities.[14] Cook Inlet Keeper, an environmental group, appealed the matter to the superior court, which affirmed the consistency determination.[15] On appeal, the supreme court held that the various statutory provisions relating to consistency reviews unequivocally established that consistency review must be a project-specific process and that each consistency review determination must encompass the entire project.[16] The supreme court also held that the mere existence of an earlier consistency determination for the EPA's general permit could not justify the exclusion of the wastewater discharge activities from the project's consistency review.[17] Accordingly, the oil exploration project was

6. *Id*. at 252.
7. *Id*. at 253-54.
8. 46 P.3d 957 (Alaska 2002).
9. *Id.* at 965.
10. *Id.* at 959.
11. ALASKA STAT. §§ 46.40.010-.220 (Michie 2002).
12. *Cook Inlet*, 46 P.3d at 959.
13. *Id.* at 960.
14. *Id.*
15. *Id.*
16. *Id.* at 963.
17. *Id.* at 965.

remanded for a full consistency review that included the wastewater discharge activities.[18]

In *Hayes v. Municipality of Anchorage*,[19] the supreme court held that a candidate living within a newly redrawn assembly district met the residency requirement to run for office in that district.[20] After Anchorage's assembly districts were redrawn in September of 2001, candidate Whittle's home of twenty years fell within a new district.[21] Candidate Hayes filed a petition in superior court to disqualify Whittle from appearing on the ballot because Anchorage law required a candidate to have lived in the district he is running in for at least one year prior to the election.[22] The superior court denied Hayes's petition.[23] The supreme court affirmed, holding that Whittle, having lived in the same residence for over twenty years, fulfilled the requirements of the Charter and was eligible to run for election.[24] The court reasoned that the residency requirement can only be reasonably intereted to require residency for at least one year before the election within the geographical boundaries of an election district as it is drawn at the time of election.[25]

In *In re Curda*,[26] the supreme court held that legal errors committed by a district judge did not amount to ethical violations because they were not willful or part of a pattern of judicial misconduct.[27] Judge Curda imprisoned a state's witness at a criminal hearing because she showed up drunk on the day she was scheduled to testify.[28] Judge Curda reasoned that it was the only way to secure her protection, her children's protection, and her testimony.[29] The Judicial Conduct Committee investigated Judge Curda's action and recommended that he be given a private repri-

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18. *Id.* at 967.

19. 46 P.3d 971 (Alaska 2002).

20. *Id*. at 974.

21. *Id*. at 973.

22. ANCHORAGE, AK., MUNICIPAL CHARTER, CODE AND REGULATIONS § 4.02(b)(2) (1996); *Hayes*, 46 P.3d at 972.

23. *Hayes*, 46 P.3d at 972.

24. *Id*. at 973.

25. *Id*. at 974.

26. 49 P.3d 255 (Alaska 2002).

27. *Id.* at 261.

28. *Id.* at 255. In an ex parte meeting with Judge Curda, the Assistant District Attorney expressed the concern that the witness would either fail to appear a second time or at least not be able to stay sober. Judge Curda held a short contempt proceeding with the witness and the District Attorney before imprisoning the witness for contempt. *Id.*

29. *Id.* at 257.

mand by the supreme court.[30] Reviewing the alleged judicial conduct de novo and by a standard of clear and convincing evidence,[31] the supreme court declined to reprimand Judge Curda.[32] The supreme court concluded that although Judge Curda had committed legal errors by depriving the witness of fundamental due process rights,[33] the errors did not amount to ethical violations because they were not willful or part of a pattern of misconduct.[34]

In *Lakosh v. Alaska Department of Environmental Conservation*,[35] the supreme court declared an oil-spill contingency plan regulation invalid as contrary to the enabling statute.[36] The Oil Pollution Control Act, as modified by the legislature following the Exxon Valdez oil spill, required persons involved in oil-related activities to obtain approval from the Department of Environmental Conservation (DEC) for oil spill contingency plans.[37] These plans required such persons to "provide for use . . . of the best available technology that was available at the time the contingency plan was submitted or renewed."[38] The DEC adopted a three-tiered approach for determining if a contingency plan provided for the use of the "best available" technology.[39] On plaintiff's motion for declaratory judgment that the regulation was invalid, the supreme court found that, for technologies covered in the first two tiers of the DEC's approach, compliance with applicable standards essentially served as a proxy for the best available technology determination.[40] The court found that the DEC's approach defied the plain meaning of the term "best" and that the legislative history showed that the legislature intended best available technology to be an additional requirement beyond meeting certain standards.[41] Because the DEC's definition did not include any "winnowing" process, the court reversed the superior court and declared the DEC regulation to be invalid.[42]

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30. *Id.*
31. *Id.*
32. *Id*. at 261.
33. *Id.* at 258.
34. *Id.* at 261.
35. 49 P.3d 1111 (Alaska 2002).
36. *Id.* at 1120.
37. *Id.* at 1113; ALASKA STAT. § 46.04.30 (Michie 2002).
38. § 46.04.030(e) (Michie 2002).
39. ALASKA ADMIN. CODE tit. 18, § 75.445(k) (2001).
40. *Lakosh*, 49 P.3d at 1115-16.
41. *Id.* at 1117-19.
42. *Id.* at 1120.

In *Matanuska Electric Ass'n v. Chugach Electric Ass'n*,[43] the supreme court held that the Regulatory Commission of Alaska's order compelling the Chugach Electric Association to refund miscalculated payments[44] was in fact retroactive ratemaking by a utility, which is prohibited in Alaska.[45] In 1997, plaintiff and Chugach noticed that the estimate Chugach used to calculate its surcharge was substantially higher than the actual amount.[46] Chugach refused to refund the overcharged amount, relying on Alaska law that prohibits retroactive ratemaking.[47] In administrative proceedings, the Regulatory Commission ordered Chugach to refund the difference, noting that the rule against retroactive ratemaking does not apply to fuel adjustment surcharges.[48] Chugach argued, and the supreme court agreed, that the fuel surcharge is a commission-made rate, distinguishable from other surcharges outside the scope of the rule against retroactive ratemaking, as the Commission had extensively reviewed and approved the rates before enactment.[49] This was in accordance with the "essential principal" of the rule against retroactive ratemaking: when the estimates are inaccurate, the Commission may not correct previous rates, but may only "prospectively revise rates in an effort to set more appropriate ones."[50] Further, "the commission had full power to review additional data" concerning the appropriateness of the surcharge structure then in place, yet chose not to do so.[51] Accordingly, the court affirmed the decision of the superior court overruling the Commission and held that the surcharge fell under the rule against retroactive ratemaking.[52]

In *Matanuska Electric Ass'n v. Chugach Electric Ass'n*,[53] the supreme court affirmed the trial court's grant of summary judgment in favor of Chugach because (1) the Regulatory Commission of Alaska had jurisdiction to hear the contract dispute between

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43. 53 P.3d 578 (Alaska 2002).

44. The miscalculated payment refers to an overestimated surcharge for "generation and transmission system energy loss." *Id*. at 581.

45. *Id*. at 580.

46. *Id*. at 582.

47. *Id*. The purposes of this prohibition are to protect the integrity of the ratemaking process and to aid a utility in planning its finances. *Id*. at 583.

48. *Id*. at 582.

49. *Id*. at 584. The court found the commission's review of the surcharge to be substantial enough to constitute a rate. *Id*. at 585.

50. *Id*. (quoting Detroit Edison Co. v. Michigan Pub. Serv. Comm'n, 331 N.W.2d 159, 164 (Mich. 1982)).

51. *Id*. at 586.

52. *Id*. at 587.

53. 58 P.3d 491 (Alaska 2002).

Chugach and Matanuska, and (2) Matanuska could have filed a timely appeal from the Commission's decision in favor of Chugach if it felt that such decision was in error.[54] Matanuska and Chugach entered into a purchase and sale agreement (PSA) in 1989 by which Matanuska agreed to purchase electricity from Chugach and pay a pro rata portion of Chugach's actual costs incurred in generating and transmitting electricity.[55] A dispute arose between Chugach and Matanuska about how to charge Matanuska a portion of additional taxes and interest on gas Chugach had purchased from another oil company.[56] The Regulatory Commission of Alaska ruled in favor of Chugach, allowing Chugach to pass the charges on to Matanuska; Matanuska objected to the ruling and subsequent tariff advice letters.[57] Chugach eventually filed for declaratory and injunctive relief against Matanuska in the trial court, and Matanuska counterclaimed for declaratory relief for breach of contract.[58] Affirming the trial court's grant of summary judgment in favor of Chugach,[59] the supreme court ruled that because the PSA expressly deals with matters within the Commission's core area of jurisdiction and evinces the parties' intent to submit to the Commission all rate-related disputes arising under the PSA, the dispute was within the Commission's jurisdiction.[60] The supreme court further held that the Commission's interpretation of the PSA was within the scope of the Commission's power to set rates.[61]

In *Samissa Anchorage, Inc. v. Department of Health and Social Services*,[62] the supreme court held that the State was not required to pay "prejudgment interest."[63] In 1999, Samissa Anchorage, Inc. (North Star), challenged the Department of Health and Social Service's Medicaid reimbursement rates from 1993 to 1995.[64] The department agreed to recalculate the rate, but refused to pay the prejudgment interest.[65] North Star appealed the decision regarding the prejudgment interest, claiming that it was entitled to the pay-

54. *Id*.
55. *Id*. at 492.
56. *Id*.
57. *Id*. at 492-93.
58. *Id*. at 493.
59. *Id*.
60. *Id*. at 494-95.
61. *Id*. at 495.
62. 57 P.3d 676 (Alaska 2002).
63. *Id*. at 676-77.
64. *Id.* at 677.
65. *Id*.

ment under Alaska Statutes sections 09.50.250[66] and 09.50.280[67] because the claim arose from a contract with the State and therefore the State had waived sovereign immunity.[68] The superior court accepted this argument and reversed the administrative denial of the interest.[69] Upon rehearing the issue, however, the superior court vacated the previous decision and held that North Star was not entitled to prejudgment interest.[70] The supreme court affirmed, holding that an award of prejudgment interest can only be authorized if the legislature waives the State's sovereign immunity.[71] The court reasoned that while section 09.50.250[72] waives sovereign immunity for contract claims, North Star's claim was not governed by section 09.50.250, but rather by administrative procedures.[73]

In *Snyder v. State, Department of Public Safety, Division of Motor Vehicles*,[74] the supreme court held that Snyder was denied his right to due process where (1) the reassignment of his administrative case on remand to a new hearing officer was unannounced, and (2) where the officer reversed the original hearing officer's credibility findings without forewarning.[75] In 1996, Snyder was charged with DWI after driving his car into a snow bank and failing repeated sobriety tests.[76] At his DMV hearing, Snyder testified before a hearing officer that he was sober at the time of the accident but that he had consumed three to five beers within the two hour gap between the time of the accident and the arrival of a state trooper.[77] The hearing officer found Snyder's testimony about his post-accident drinking credible, but reasoned that the alcohol Snyder consumed after the accident could not account for the result of his breath test.[78] Accordingly, she concluded that Snyder had failed to prove that his blood alcohol level was within the legal limit at the time of the accident.[79] Snyder appealed to the superior court, which remanded for reconsideration because the State had misap-

66. ALASKA STAT. § 09.50.250 (Michie 2002).
67. § 09.50.280.
68. *Samissa*, 57 P.3d at 677-78.
69. *Id*. at 678.
70. *Id*.
71. *Id*.
72. § 09.50.250.
73. *Samissa*, 57 P.3d at 679-80.
74. 43 P.3d 157 (Alaska 2002).
75. *Id.* at 160.
76. *Id.* at 158.
77. *Id.*
78. *Id.* at 159.
79. *Id.*

plied the burden of proof by placing it upon Snyder.[80] By that time, a new hearing officer was assigned because the original hearing officer had retired.[81] The new hearing officer affirmed the original revocation but based her ruling on a new factual theory—modifying the prior hearing officer's conclusion about the credibility of Snyder's testimony and finding that his claim of post-alcohol consumption was not credible.[82] The superior court affirmed,[83] but the supreme court vacated and remanded.[84] First, the court ruled that where a witness's truthfulness is disputed, denying an in-person hearing prevents a defendant from presenting evidence in front of a trier of fact who can observe the defendant's demeanor.[85] Second, the court concluded that because Snyder was not notified of the reassignment of hearing officers, he was unable to provide any meaningful consent to her participation.[86] Finally, the court concluded that in an administrative revocation proceeding where a new hearing officer reverses the original officer's credibility findings, advance notice of the reassignment would have provided a reasonable opportunity for the accused to respond to the concerns of the new hearing officer.[87]

III. BUSINESS LAW

In *Alakayak v. British Columbia Packers, Ltd.*,[88] the supreme court held that it is improper to grant a motion for summary judgment in antitrust litigation where the plaintiff presented evidence that raised material issues of fact as to the existence of an antitrust conspiracy.[89] A number of commercial sockeye salmon fishers brought an antitrust action under the Alaska Antitrust Act[90] alleging that certain salmon processors and importers conspired to depress the prices paid to fishers for raw salmon. The superior court granted summary judgment for the defendants.[91] On appeal, the supreme court noted that Alaska courts use federal antitrust law as

80. *Id*.
81. *Id*.
82. *Id.* at 160.
83. *Id.*
84. *Id.* at 162.
85. *Id.* at 160.
86. *Id.* at 161 (citing Moffitt v. Moffitt, 749 P.2d 343, 345 (Alaska 1998)).
87. *Id.* at 161.
88. 48 P.3d 432 (Alaska 2002).
89. *Id.* at 463.
90. ALASKA STAT. § 45.50.562 (Michie 2002).
91. *Alakayak*, 48 P.3d at 437.

a guide when considering claims under the Alaska Antitrust Act.[92] There is a two-part test for summary judgment in antitrust litigation where the plaintiff's theory of conspiracy relies entirely on circumstantial evidence.[93] The court first determines if the evidence of the defendant's conduct appears to be as consistent with permissible competition as with illegal conspiracy.[94] If the evidence is "ambiguous," the plaintiff can only avoid summary judgment if there is evidence that "tends to exclude the possibility that the alleged conspirators acted independently."[95] When plaintiff's theory is based on conscious parallelism, the plaintiff must present evidence of one or more of five "plus factors," including: "(a) actions contrary to the defendants' economic interest; (b) motive to enter the conspiracy; (c) a traditional conspiracy agreement; (d) interdefendant conspiratorial communications; or (e) attempts to control or influence the behavior of other nondefendant sellers or buyers who could thwart the conspiracy."[96] Because the plaintiffs presented evidence of (1) a collective agreement to end a former strike, (2) future pricing discussions among processors, (3) collective pressure applied on nonparty processors and importers, and (4) ovations of "mutual cooperation," the supreme court reversed the superior court's grant of summary judgment to all defendants.[97] Finally, the court found that "suit for a continuing violation may take place at any time during which the violation was ongoing but that recovery is limited to the period prior to the filing of suit prescribed by the applicable statute of limitations."[98]

In *Collins v. Blair*,[99] the supreme court affirmed an order dissolving a corporation formed to settle a dispute over fishing shares allocated by the federal government and affirmed the equitable distribution established by the trial court.[100] In 1989, Blair purchased the vessel F/V Milky Way from Collins.[101] The purchase agreement included an option to purchase that provided for the transfer of fishing right shares for halibut and sablefish to the corporation should the National Marine Fisheries Service (NMFS) implement a

92. *Id.* at 450.
93. *Id.* at 451.
94. *Id.*
95. *Id.*
96. *Id.* at 452.
97. *Id.* at 456-58.
98. *Id.* at 463.
99. No. S-9810, No. 5606, 2002 Alas. LEXIS 111, at *1 (Alaska Aug. 9, 2002).
100. *Id*. at *1-2.
101. *Id*. at *2.

permit system.[102] In 1995, NMFS implemented a permit system, and Blair was awarded fishing shares based on his Milky Way catch from 1988-1990, while Collins was awarded shares based on his Milky Way catch from 1984-87.[103] Under the option to purchase agreement, Collins's shares should have been transferred to Blair.[104] Instead of litigating the issue, Blair and Collins entered into a joint venture.[105] Blair never transferred his fishing shares into the joint venture because of a dispute with NMFS.[106] Collins transferred his shares from another vessel to the corporation, but when he did, he became ineligible to receive other shares to which he was entitled (the "lost shares").[107] He therefore transferred his shares back to himself, and NMFS allocated the "lost shares" to him.[108] Blair filed suit claiming that Collins had breached his fiduciary duty when he transferred his shares out of the corporation.[109] Collins counterclaimed, arguing that Blair had violated his fiduciary duty because he never transferred his Milky Way shares into the corporation.[110] The trial court ordered the corporation to dissolve and held that, under the option to purchase, any fishing shares allotted to the Milky Way should have been transferred to Blair.[111] Accordingly, the trial court ordered an equitable distribution of the corporate assets,[112] whereby the corporation would distribute to Blair the F/V Milky Way and all of its fishing shares and Collins would retain 100% of the corporation's stock.[113] On appeal, the supreme court found: (1) that the option to purchase agreement reflected a settlement between Blair and Collins,[114] (2) that Collins had agreed to contribute his additional Predator shares on starting the joint venture with Blair,[115] (3) that Blair had not agreed to contribute ap-

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102. *Id*.
103. *Id*. at *3.
104. *Id*.
105. *Id*. at *4.
106. *Id*. at *5.
107. *Id*.
108. *Id*. Blair eventually forced Collins to transfer his shares back into the corporation, at which time the NMFS revoked Collins' lost shares. *Id.* at *6.
109. *Id*.
110. *Id*.
111. *Id*. at *8. Further, the court found that Blair had not acted improperly by forcing Collins to return the shares to the corporation and held that the corporation should therefore pay his legal bills. *Id.* at *10.
112. *Id*. at *9-10.
113. *Id*. at *8.
114. *Id*. at *15-16.
115. *Id*. at *17.

proximately 50,000 pounds of halibut shares to the joint venture,[116] and (4) that therefore Collins was wrong to remove his shares.[117] Accordingly, the supreme court affirmed the trial court's decision regarding dissolution and distribution of the assets.[118]

In *Demmert v. Kootznoowoo, Inc.*,[119] the supreme court ruled that Kootznoowoo, the Native village corporation for the village of Angoon, did not distribute corporate wealth in a discriminatory manner.[120] Kootznoowoo, which established a shareholder hiring preference, paid for about half of its workers' transportation costs for flights originating in Angoon.[121] About sixty-three percent of Kootznoowoo's shareholders lived outside of Angoon.[122] The court held that such payment of transportation costs did not constitute discriminatory treatment among shareholders because the subsidization of flights from Angoon was necessary to maximize efficiency and productivity.[123] Thus, the hiring and subsidization program ensured a "coordinated team[] of workers," increased shareholder employment, increased Kootznoowoo's profits to the benefit of all the shareholders, and did not distribute corporate wealth in a discriminatory manner.[124]

In *D.H. Blattner & Sons, Inc. v. Rothschild & Sons, Ltd.*,[125] Blattner and Rothschild each separately brought a lien enforcement and foreclosure action against USMX of Alaska each claiming priority for payment over the other.[126] The superior court held that Blattner's liens had priority over Rothschild's liens, "to the extent that Blattner's liens were valid."[127] However, the superior court limited Blattner's lien to its dump lien labor and interest charges and refused to include non-labor charges or work completed after mining work ceased.[128] As a result, the superior court awarded Blattner substantially less than it requested and ordered that Rothschild was entitled to the remainder of the liquidated assets plus attorney's fees.[129] On appeal, the supreme court found

116. *Id*. at *18.
117. *Id*. at *19-21.
118. *Id*. at *28.
119. 45 P.3d 1208 (Alaska 2002).
120. *Id.* at 1209-10.
121. *Id.*
122. *Id.* at 1211.
123. *Id.* at 1212.
124. *Id*. at 1211-12.
125. 55 P.3d 37 (Alaska 2002).
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

that "work" under Alaska Statutes section 34.35.140(a) included both human labor and equipment costs.[130] However, equipment costs do not include material costs, and it is the service contract that determines the compensation for equipment usage.[131] The court noted that Blattner failed to mitigate its damages, and thus its recovery was limited to the quantum meruit value of the equipment costs, and not the residual equipment value.[132] Also, recovery for a dump lien is limited to work performed nine months before cessation.[133] Standby charges are only recoverable when they concern the future development of the mine, and Blattner's additional liens did not meet that standard.[134] Accordingly, the court remanded the case to the superior court.[135]

In *Lake and Peninsula Borough v. Norquest Seafoods, Inc.*,[136] the supreme court held that a borough could not assess a sales tax on proceeds from the settlement of an antitrust class action lawsuit settlement between fishers and fish processors.[137] In 1995, Bristol Bay fishers filed a class action lawsuit against numerous fish processors alleging that the processors violated Alaska antitrust laws by conspiring to set below-market prices for sockeye salmon.[138] In 1997, the fishers reached a settlement with two of the defendants, Norquest Seafoods, Inc. and Lafayette Fisheries, Inc.[139] The Lake and Peninsula Borough then determined that the settlement proceeds were subject to its tax on sales of raw fish, characterizing the tax as a post-season adjustment.[140] The fishers and the processors filed written protests to the borough, which the borough manager denied.[141] The fishers and processors then appealed the decision to the superior court which held that the settlement was not a taxable event.[142] The borough appealed to the supreme court[143] which affirmed the court's decision, reasoning that the settlement money was not taxable "because neither the basic allegations of the antitrust action nor the actual provisions of the disputed settlement

130. *Id.* at 48.
131. *Id.* at 48-49.
132. *Id.* at 49.
133. *Id.*
134. *Id.* at 50-51.
135. *Id.*
136. 42 P.3d 521 (Alaska 2002).
137. *Id*. at 523-24.
138. *Id*. at 521.
139. *Id*. at 522.
140. *Id*.
141. *Id*.
142. *Id*.
143. *Id*.

correspond to any particular sale, or set of sales, within the borough."[144]

In *Nerox Power Systems v. M-B Contracting Co.*,[145] the supreme court affirmed the superior court holding that two deeds of trust should be equitably subordinated to the claims of other creditors of Nerox Power, and that the controlling shareholder should be personally liable for the debts of the company.[146] Nerox Power, controlled by Nicholas Ross, recorded two deeds of trust on its only asset, a coal mine, while the company was in financial peril.[147] The beneficiaries of the first deed of trust were Nerox Power's president and a company the court found was a standard contractor hired by the company.[148] The beneficiaries of the second deed of trust were individuals who had contributed money to the corporation to purchase the coal mine.[149] The court held that the first deed of trust should be subject to equitable subordination based on the presence of fraud.[150] As to the company's president, the deed of trust was fraudulent, and therefore subject to equitable subordination, because the debt had already been satisfied by the issuance of stock,[151] the deed of trust was a fraudulent conveyance representing a breach of fiduciary duty,[152] and the corporation was "grossly undercapitalized."[153] As to the additional beneficiary to the first deed of trust, the court found that a lack of substantiation on either side of the amount of the debt owed to the contractor warranted the equitable subordination of the claim.[154] The court also held that the second deed of trust should be subject to equitable subordination because it would be inequitable to compensate those investors over the rights of bona fide creditors.[155] Finally, the court found that Nerox Power was a mere instrumentality of its controlling stockholder Ross, and therefore Ross was liable to the appellees for the debts of the company.[156] Accordingly, the judgment of the trial court was affirmed in all respects.[157]

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144. *Id*. at 523-24.
145. 54 P.3d 791 (Alaska 2002).
146. *Id*. at 792-93.
147. *Id*. at 794, 796.
148. *Id*. at 793-94.
149. *Id*. at 799.
150. *Id.* at 794.
151. *Id*. at 796.
152. *Id*.
153. *Id*.
154. *Id*. at 798-99.
155. *Id*. at 799-800.
156. *Id*.
157. *Id*. at 793.

In *Reeves v. Alyeska Pipeline Service Co.*,[158] the supreme court held that the special verdict correctly established Alyeska's liability for breach of implied contract, but that the superior court's damage award required modification.[159] Reeves developed an idea to build a visitor center near the Trans-Alaska Pipeline.[160] After receiving assurance from Alyeska's Fairbanks manager to keep the idea private, Reeves orally disclosed this idea to him.[161] Despite receiving assurances that Alyeska would work with Reeves to build the center, Alyeska implemented the plan without Reeves.[162] Reeves filed suit, and the jury returned a verdict finding Alyeska liable for breach of an implied contract and a special verdict addressing damages and Reeves's claim for negligent misrepresentation.[163] Reeves appealed the trial court's denial of punitive damages and its limited award of compensatory damages.[164] The supreme court found that the proper measure of Reeves's compensatory damages was the profit Alyeska actually realized from the center rather than the amount Aleyska might have realized.[165] Additionally, the supreme court agreed that punitive damages were improper because there was no finding of negligent misrepresentation.[166] Accordingly, the supreme court affirmed the order striking punitive damages, vacated the compensatory damage award, and remanded for an entry of modified judgment.[167]

In *Valdez Fisheries Development Ass'n v. Alyeska Pipeline Service Co.*,[168] the supreme court upheld the dismissal of contract and promissory estoppel claims against a prospective purchaser of a seafood plant when a letter and oral promises were not an unequivocal acceptance.[169] In 1993, Alyeska began looking for a wildlife rehabilitation facility for use in case of an oil spill.[170] Sea Hawk Seafoods, Inc. was interested in selling its plant to Valdez Fisheries so that Valdez could lease it to Alyeska for the rehabilitation center.[171] Alyeska informed Sea Hawk that Valdez would get the Aly-

158. 56 P.3d 660 (Alaska 2002).
159. *Id.* at 662-63.
160. *Id.* at 663.
161. *Id.*
162. *Id.*
163. *Id.* at 664-65.
164. *Id.* at 665.
165. *Id.* at 666-67.
166. *Id.* at 671.
167. *Id.* at 672.
168. 45 P.3d 657 (Alaska 2002).
169. *Id.* at 665-70.
170. *Id.* at 662.
171. *Id.* at 662-63.

eska contract and, therefore, utilize the Sea Hawk plant.[172] Alyeska allegedly further promised that it would lease the plant directly from Sea Hawk if Valdez was unable to buy it.[173] Valdez and Sea Hawk then signed an agreement for the sale of the plant to Valdez, contingent on Alyeska awarding the contract to Valdez.[174] In 1994, Alyeska informed Valdez that it was selected as the "winning bidder" and that Alyeska intended to begin negotiating a contract as soon as possible.[175] Valdez and Sea Hawk implemented their contract for the sale of the plant.[176] Alyeska subsequently broke off negotiations with Valdez.[177] Sea Hawk and Valdez both filed complaints against Alyeska, asserting breach of contract and promissory estoppel. [178] The trial court dismissed Valdez's claims under Rule 12(b)(6) and awarded Alyeska summary judgment on Sea Hawk's claims.[179] On appeal, the supreme court affirmed the dismissal of the contract claims, finding that Alyeska's statement that Valdez was the "winning bidder" did not constitute an unequivocal acceptance.[180] The court also found that Alyeska's letter was not a binding agreement to negotiate because it did not contain a specific way to resolve differences.[181] Regarding Valdez's promissory estoppel claim, the court held that the "actual promise" requirement was analytically identical to the "acceptance" required for a contract.[182] Because the court found that Alyeska's letter did not constitute acceptance, it necessarily followed that the "actual promise" element of promissory estoppel was not met.[183] Regarding Sea Hawk's promissory estoppel claim, the court found that Alyeska's promises to Sea Hawk were ambiguous as to duration and price and held that promissory estoppel cannot be used to defeat the statute of frauds when the oral agreement contained substantial ambiguity as to key terms.[184]

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172. *Id.* at 663.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 663-64.
177. *Id.* at 664.
178. *Id.*
179. *Id.*
180. *Id.* at 665.
181. *Id.* at 667-68.
182. *Id.* at 668.
183. *Id.*
184. *Id.* at 670.

IV. CIVIL PROCEDURE

A. Claim and Issue Preclusion

In *DeNardo v. Barrans*,[185] the supreme court held that federal law required Denardo's claims in state court be barred under res judicata after a punitive dismissal of the claims in federal court.[186] Denardo's federal court claims against nine state employees for wrongful discharge were all dismissed by the federal court.[187] Actions against eight of the defendants were dismissed with prejudice on summary judgment, and the remaining claim against DeNardo's supervisor was dismissed with prejudice under Rule 41(b)[188] for Denardo's failure to abide by court orders.[189] In this subsequent state action involving identical claims against the same defendants, the court held that all nine of the dismissals represented judgment on the merits warranting claim preclusion and that federal common law dictated that a punitive dismissal with prejudice was also on the merits, warranting the preclusive effect.[190] Finally, the court ruled that the claim preclusion extended to the state agencies even though the agencies were not included in the original federal suit, as res judicata may preclude an action against a party not included in a prior action where the newly included party is "in privity" with a party to the prior action.[191] The court found that sufficient privity exists between a state agency and its employees for claim preclusion to apply, where the employees were sued "for actions taken in the course of their employment."[192] Accordingly, Denardo's claims against state employees, previously dismissed in a prior federal action, as well as against the non-party state agencies for which the employees worked, were all barred under the doctrine of res judicata.[193]

In *Tru-Line Metal Products, Inc. v. United States Fabrication and Erection*,[194] the supreme court reversed a summary judgment order that was granted on res judicata grounds.[195] Tru-Line, a third tier subcontractor, sued United States Fabrication and Erection

185. 59 P.3d 366 (Alaska 2002).
186. *Id*. at 267.
187. *Id*.
188. FED. R. CIV. P. 41(b).
189. *Denardo*, 50 P.3d at 267.
190. *Id*. at 269.
191. *Id*. at 270.
192. *Id*.
193. *Id*.
194. 52 P.3d 150 (Alaska 2002).
195. *Id.* at 151.

(USF&E), a second-tier subcontractor, for breach of contract in federal court.[196] The district court dismissed the case due to lack of subject matter jurisdiction.[197] Tru-Line subsequently brought suit in state superior court, alleging fraud, negligent misrepresentation, and conversion.[198] USF&E moved for and was granted summary judgment on res judicata grounds.[199] The supreme court reversed, holding that the federal court judgment did not constitute a final judgment on the merits of the case and that therefore res judicata did not apply.[200]

In *Van Deusen v. Seavey*,[201] the supreme court held that a prior final judgment denying the Van Deusens' request for injunctive relief barred a subsequent claim for injunctive relief under the doctrine of collateral estoppel.[202] The Van Deusens requested injunctive relief for the removal of sled dogs which were being kept in their neighbors' yard and which the superior court had found to be a nuisance due to their barking.[203] In an earlier claim, a final judgment had been issued denying the Van Deusens' request for injunctive relief while awarding money damages for the nuisance.[204] In this second action for injunctive relief, the supreme court found that the Van Deusens failed to demonstrate that conditions had changed, and therefore collateral estoppel barred the claim.[205] The court did note, however, that res judicada did not bar the claim because the nuisance was classified as a temporary instead of a permanent nuisance.[206]

B. Costs and Attorney's Fees

In *Fleegel v. Estate of Boyles*,[207] the supreme court ruled that both Fleegel and Boyles were entitled to an award of attorney's fees.[208] Fleegel sued Boyles for damages resulting from an automobile accident.[209] The jury awarded compensatory damages to Flee-

196. *Id.* at 152.
197. *Id.*
198. *Id.* at 153.
199. *Id.*
200. *Id.* at 154-55.
201. 53 P.3d 596 (Alaska 2002).
202. *Id*. at 599.
203. *Id*.
204. *Id*.
205. *Id*. at 601.
206. *Id*. at 600.
207. 61 P.3d 1267 (Alaska 2002).
208. *Id.* at 1278.
209. *Id.* at 1269.

gel and determined that he was entitled to punitive damages, but awarded zero dollars in punitive damages.[210] The trial court then determined that Boyles, as the prevailing party under Rule 68,[211] was entitled to attorney's fees.[212] Fleegel then moved for an award of attorney's fees under Alaska Statutes section 09.60.070,[213] which awards "full reasonable attorney fees" to victims of certain crimes.[214] The supreme court affirmed both awards of attorney's fees.[215] The court determined that a crime victim does not need to be a prevailing party as defined in Rule 68 to be awarded attorney's fees because Rule 68 did not address the crime victim's statute that was enacted six years earlier.[216] Additionally, the court found that the laws were intended to operate independently.[217]

In *Native Village of Quinhagak v. United States*,[218] the 9th Circuit held that plaintiffs were entitled to attorney's fees under the Alaska National Interest Lands Conservation Act[219] (ANILCA) for fees incurred during required administrative proceedings.[220] The Village of Quinhagak (the Village) sued the federal government and the State of Alaska, arguing that the federal government erroneously ruled that navigable waters were not protected under ANILCA (the "where" issue) and that Alaska had no jurisdiction to regulate such waters (the "who" issue).[221] After ten years of litigation, the district court entered a final judgment on the merits in favor of the Village.[222] The Village then filed a motion for attorney's fees.[223] The district court granted the motion only in part, holding that ANILCA did not authorize recovery of costs incurred exhausting administrative remedies.[224] The State appealed the fee award, arguing that the Village did not raise the "who" issue in its case and should not be entitled to costs on that issue.[225] The Ninth Circuit held that the district court properly required fee payment

210. *Id.* at 1269-70.
211. ALASKA R. CIV. P. 68.
212. *Fleegel*, 61 P.3d at 1270.
213. ALASKA STAT. § 09.60.070 (Michie 2002).
214. *Fleegel*, 61 P.3d at 1270.
215. *Id.* at 1278.
216. *Id.* at 1277.
217. *Id.*
218. 307 F.3d 1075 (9th Cir. 2002).
219. 16 U.S.C. §§ 3101-233 (2000).
220. *Quinhagak*, 307 F.3d. at 1076.
221. *Id*.
222. *Id.* at 1078.
223. *Id.*
224. *Id*. at 1079.
225. *Id*.

for the "who" issue as the plaintiffs properly "addressed that issue as required for resolution of their own case."[226] The Village cross-appealed, arguing that the district court erred in determining that ANILCA did not authorize pre-litigation fee recovery.[227] The Ninth Circuit held that pre-litigation fees were recoverable under ANILCA, determining that "providing for recovery of fees promotes Congress's expressed purpose in enacting" ANILCA.[228]

C. Miscellaneous

In *Cook v. Rowland*,[229] the supreme court held that a $7,000,000 default judgment against Kim Michael Cook should be set aside and remanded for a redetermination of damages before a different judge.[230] The default judgment was the result of a wrongful death suit filed by Rowland for the death of her husband.[231] While Cook was served with the complaint the following day, he failed to respond within the required twenty days, and Rowland filed for and was granted a default judgment.[232] Cook responded, moving to set aside the default judgment and made a peremptory challenge to the assigned judge pursuant to Alaska Civil Rule 42(c).[233] The peremptory challenge was denied as untimely and the motion to set aside the judgment was subsequently denied.[234] In setting aside the default judgment, the supreme court found that Cook's failure to respond was justified by excusable neglect because of Cook's particular circumstances: severe injuries, confinement in a maximum security facility, lack of familiarity with court rules, and focus on his criminal defense.[235] Additionally, the court found "good cause" to set aside the default judgment based on: (1) the potential meritorious defense to the amount of damages; (2) the magnitude of the judgment itself; (3) the insignificant amount of culpability in Cook's conduct relating to the entry of default; and (4) the minimal duration of the default and lack of prejudice to the plaintiff.[236] For these reasons, the court held that the default judg-

226. *Id*. at 1081.
227. *Id*. at 1079.
228. *Id*. at 1083.
229. 49 P.3d 262 (Alaska 2002).
230. *Id*. at 263.
231. *Id*.
232. *Id*.
233. ALASKA R. CIV. P. 42(c); *Rowland*, 49 P.3d at 263.
234. *Rowland*, 49 P.3d at 263-64.
235. *Id*. at 264.
236. *Id*. at 265-67.

ment should be vacated and remanded for a new determination of damages.[237]

In *DeNardo v. ABC Inc. RVS Motorhomes*,[238] the supreme court held that the trial court was within its discretion in dismissing DeNardo's complaint under Alaska Rule of Civil Procedure 37,[239] and that the dismissal of DeNardo's complaint did not deny DeNardo his constitutional rights.[240] ABC fired DeNardo shortly after he was hired for failure to provide a valid driver's license and hostile behavior.[241] After DeNardo refused to comply with two orders compelling discovery, the trial court dismissed DeNardo's lawsuit under Alaska Rule of Civil Procedure 37(b)(2)(C).[242] The supreme court found that DeNardo's failure to comply with the trial court's discovery order was willful and that ABC suffered prejudice as a result of DeNardo's failure to comply.[243] Further, the supreme court found that the dismissal was sufficiently related to DeNardo's violation of the discovery order because the dismissed claims were related to the information DeNardo refused to supply.[244] The supreme court held that the dismissal of DeNardo's lawsuit did not deny his due process rights or his right to a jury trial and that the information requested by ABC did not violate DeNardo's constitutional right to privacy.[245]

In *Kaiser v. Sakata*,[246] the supreme court held that a pro se litigant cannot defeat a motion for summary judgment where he or she does not make a good faith effort to comply with judicial rules and procedures and the court makes adequate allowances for the litigant's pro se status.[247] After being injured in a work-related accident, Kaiser alleged that his physical therapy treatments were negligently administered by Sakata and caused him additional injuries.[248] In granting summary judgment for the defendants, the superior court noted that Kaiser failed to respond adequately to discovery requests and did not produce an expert to present countervailing testimony as to whether Sakata had met the appro-

237. *Id*. at 267.
238. 51 P.3d 919 (Alaska 2002).
239. ALASKA R. CIV. P. 37; *DeNardo*, 51 P.3d at 922.
240. *DeNardo*, 51 P.3d at 927.
241. *Id*.
242. ALASKA R. CIV. P. 37(b)(2)(C); *DeNardo*, 51 P.3d at 922.
243. *Denardo*, 51 P.3d at 923-25.
244. *Id*. at 926.
245. *Id*. at 927-28.
246. 40 P.3d 800 (Alaska 2002).
247. *Id.* at 801.
248. *Id.* at 802.

priate standard of care.[249] On appeal, the supreme court ruled that where courts relax the procedural requirements for a pro se litigant, such a litigant is expected to make a good faith effort to comply with judicial rules and procedures, and absent this effort, such leniency properly may be denied.[250] The supreme court held that summary judgment had been properly granted for the defendants because Kaiser failed to fulfill the Rule 56(e)[251] requirement that the party opposed to the motion respond with affidavits or specific facts to demonstrate that there is a genuine issue of material fact.[252]

In *Kessey v. Frontier Lodge, Inc.*,[253] the supreme court held that requests for continuances based on Alaska Rule of Civil Procedure 56(f)[254] should be "freely granted" if a party has substantively complied with the rule.[255] The superior court denied Kessey's Rule 56(f) request because he failed to provide the necessary affidavit in support of the request.[256] Kessey requested a continuance in order to perform the depositions necessary to counter Frontier Lodge's summary judgment motion.[257] In a memorandum opposing summary judgment, Kessey's attorney stated that he was out of town when Frontier Lodge filed its summary judgment motion and was unable to conduct the depositions when he returned due to trial preparations for a complex medical malpractice case.[258] Because such requests should not be denied based on a technical ruling, the supreme court found Kessey had substantively satisfied Rule 56(f).[259] Additionally, the court found that Kessey was not "dilatory" as Frontier alleged, but that Kessey's counsel had been actively involved in the litigation.[260] Accordingly, the supreme court reversed the superior court decision granting summary judgment for Frontier Lodge as an abuse of discretion.[261]

In *McCoy v. State*,[262] the court of appeals, in interpreting Alaska Appellate Rule 214,[263] declared that unpublished opinions

249. *Id.*
250. *Id.* at 803.
251. ALASKA R. CIV. P. 56(e).
252. *Kaiser*, 40 P.3d at 805.
253. 42 P.3d 1060 (Alaska 2002).
254. ALASKA R. CIV. P. 56(f).
255. *Kessey*, 42 P.3d at 1063.
256. *Id.*
257. *Id.* at 1062.
258. *Id.* at 1063.
259. *Id.*
260. *Id.* at 1064.
261. *Id.*
262. 59 P.3d 747 (Alaska Ct. App. 2002).
263. ALASKA R. APP. P. 214.

may not be given precedential value, but may be brought to the court's attention and given persuasive value.[264] The court rejected the argument that Rule 214 should forbid courts or attorneys from referring to any unpublished decision.[265] The supreme court had previously issued a standing order[266] calling for the distribution of unpublished opinions among judges, lawyers, and members of the general public.[267] The court of appeals found this standing order inconsistent with the assertion that unpublished opinions should not be referred to again in the Alaska courts.[268] Accordingly, the court affirmed its prior decision that Rule 214 permitted judges and lawyers to rely on unpublished opinions for "whatever persuasive power those decisions might have."[269]

In *Reich v. Cominco Alaska, Inc.*,[270] the supreme court held that Alaska Rule of Civil Procedure 47(c)(12),[271] which excludes prospective jurors who have a financial interest in the litigation, may also exclude stockholders of a corporation who are not a party to the lawsuit but who may be affected financially by the verdict.[272] The plaintiff filed a lawsuit against the defendant in 1997 alleging various discrimination claims.[273] The defendant operated a mine under an agreement sharing costs and profits with the owners of the mine (NANA).[274] The agreement allowed the defendant to subtract from gross revenue its costs of defendant lawsuits and any judgment against it, unless the judgment was based on gross negligence or willful misconduct.[275] At trial, the superior court excluded for cause all prospective jurors who owned stock in NANA even though NANA was not a party to the lawsuit.[276] The court's ruling relied on Civil Rule 47(c)(12) and found that any verdict other than one holding the defendant liable for gross negligence or willful misconduct would reduce NANA's share of the mine's profits because the defendant could deduct its defense costs.[277] On appeal, the supreme court affirmed the superior court's decision regarding

264. *McCoy*, 59 P.3d at 754.
265. *Id*. at 759-60.
266. Alaska Supreme Court, Standing Order No.3 (March 1981).
267. *McCoy*, 59 P.3d at 760.
268. *Id*.
269. *Id*.
270. 56 P.3d 18 (Alaska 2002).
271. ALASKA R. CIV. P. 47(c)(12).
272. *Reich*, 56 P.3d at 20.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*

the NANA shareholders and held that the per se rule that excludes stockholders in a company which is a party to a litigation from being jurors in that litigation also applied to stockholders in a corporation which is not a party to the litigation but which is financially interested in the outcome.[278] Additionally, the supreme court held that the superior court did not abuse its discretion by finding that NANA shareholders were financially interested in the outcome of the litigation.[279]

In *Shook v. Alyeska Pipeline Service Co.*,[280] the supreme court held that Shook had standing to appeal the decertification of the class and that the superior court erred in decertifying the class without specifying its reasons.[281] Shook was a former Alyeska employee who filed a class-action complaint against Alyeska alleging violations of the Alaska Wage and Hour Act.[282] Originally, the superior court granted certification, but it later decertified the class following the United States Supreme Court opinion in *Auer v. Robbins*.[283] Shook moved for an entry of final judgment to allow him to appeal the order vacating class certification.[284] On appeal, the supreme court agreed that Shook had standing to appeal the decertification of the class.[285] However, the court stated that because Shook is no longer a member of the class, a new class representative should be appointed on remand.[286] The supreme court then remanded the issue of decertification because the superior court "made no mention of Civil Rule 23, or any of its requirements, and instead gave merit-related grounds for its order."[287] The supreme court ruled that it was an abuse of discretion for the superior court to reach the merits of the class action in deciding to decertify the class.[288]

In *Tesoro Petroleum Corp. v. State*,[289] the supreme court held that the civil investigative demand (CID) served on Tesoro was not overbroad, nor were the responsive documents wrongly disclosed

278. *Id.* at 23.
279. *Id.*
280. 51 P.3d 935 (Alaska 2002).
281. *Id.* at 937.
282. *Id.* at 936.
283. 519 U.S. 452 (1997); *Shook*, 51 P.3d at 936.
284. *Shook*, 51 P.3d at 936.
285. *Id.* at 937.
286. *Id.*
287. *Id.* at 938.
288. *See id.*
289. 42 P.3d 531 (Alaska 2002).

to outside counsel.[290] In the course of investigating Tesoro's alleged antitrust violations, the Alaska Attorney General served upon the company a CID for the production of forty-six documents[291] pursuant to Alaska Statutes section 45.50.592.[292] The State retained outside counsel to review documents and assist the investigation.[293] Tesoro petitioned the superior court to modify the CID, arguing that the demand was overbroad and that disclosure to outside counsel was impermissible.[294] The superior court held that the outside counsel was an employee of the State for the purposes of assisting the investigation, and that the CID was not overbroad, but it did modify the CID slightly to cover only employees with decision-making authority.[295] Reviewing the superior court decision for abuse of discretion, the supreme court held that the outside counsel and his firm were authorized employees or designees of the State and thus permitted to review the responsive documents.[296] The court affirmed the superior court's decision, reasoning that the Attorney General is granted broad investigative powers and may use these powers to the extent he deems necessary, and that the term "designee" in section 45.50.592 includes employees other than those directly employed by the government.[297] Further, the supreme court held that under the general policy of allowing "liberal discovery in antirust cases" the CID, while broad, was not oppressive.[298]

In *Willoya v. State, Department of Corrections*,[299] the supreme court affirmed the trial court's grant of summary judgment.[300] Willoya was incarcerated at Spring Creek Correctional Center when he was diagnosed with ulcerative colitis that required surgery.[301] After his operation, Willoya brought a negligence claim against the State of Alaska and the individuals who treated him.[302] Willoya's attorney later requested the trial court to allow him to withdraw from the case because "attorney/client communication

290. *Id*. at 533.
291. *Id*. at 534.
292. ALASKA STAT. § 45.50.592 (Michie 2000).
293. *Tesoro*, 42 P.3d at 534.
294. *Id*.
295. *Id*. at 534-35.
296. *Id*. at 535.
297. *Id*. at 538.
298. *Id*. at 541-42.
299. 53 P.3d 1115 (Alaska 2002).
300. *Id*. at 1117.
301. *Id*.
302. *Id*.

had broken down."[303] First, the supreme court held that the trial court did not err in granting the attorney's request to withdraw because Willoya was present at the withdrawal hearing and did not offer any support for his claim that the trial court abused its discretion.[304] Second, the supreme court held that the trial court did not err in denying Willoya's request for appointment of a discovery master because Willoya failed to assert any of the five factors laid out in *Peter v. Progressive Corp*.[305] Third, the supreme court held that the trial court did not err in denying Willoya's request for the appointment of counsel because there is no right to appointed counsel in tort cases.[306] Fourth, the supreme court also held that the trial court did not err in denying Willoya's request for appointment of an expert because appointment of an expert is discretionary and the issues in the case were not unusually complex.[307] Fifth, the supreme court held that it was not error to deny Willoya's request for appointment of a medical expert advisory panel because Willoya had earlier waived his right to such an expert advisory panel.[308] Sixth, the supreme court held that the trial court did not err in granting summary judgment for the State because Willoya received proper notice of the requirements of submitting affidavits with his opposition to the State's motion for summary judgment, and he offered no medical expert opinion testimony contrary to the expert medical opinions offered by the State to establish a triable case of medical negligence.[309] Lastly, the supreme court denied other various claims raised by Willoya because he failed to raise the claims in the trial court or in his opening brief on appeal.[310]

V. CONSTITUTIONAL LAW

In *Evans v. State*,[311] the supreme court held seven tort reform provisions—"(1)the cap on noneconomic and punitive damages under Alaska Statutes sections 09.17.010 and .020;[312] (2) the requirement that half of all punitive damage awards be paid to the State under section 09.17.020(j);[313] (3) the comparative apportion-

303. *Id*. at 1118.
304. *Id*. at 1120.
305. 996 P.2d 865, 870 (Alaska 1999); *Willoya*, 53 P.3d at 1121.
306. *Willoya*, 53 P.3d at 1121.
307. *Id*. at 1122.
308. *Id*.
309. *Id*. at 1122-24.
310. *Id*. at 1125-26.
311. 56 P.3d 1046 (Alaska 2002).
312. ALASKA STAT. §§ 09.17.010, .020 (Michie 2002).
313. § 09.17.020(j).

ment of damages under section 09.17.080;[314] (4) the revised offer of judgment procedure under section 09.30.065;[315] (5) the limitations tolling procedure under section 09.10.070(a)(2) and .140;[316] (6) the partial tort immunity for hospitals under section 09.65.096;[317] and (7) the 'statute of repose' under section 09.10.055"[318]—to be facially constitutional under the Alaska Constitution.[319]

First, the court ruled that damages caps do not violate the constitutional right to a trial by jury, because "the decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury."[320] In addition, the damages caps do not violate equal protection because the plaintiff's interests in unlimited damages were merely economic and the State's interest in tort reform was legitimate—thus, the nexus between the legislative objectives and the damages caps was adequate to survive an equal protection challenge.[321] The court also ruled that damages caps do not infringe on the plaintiffs' substantive due process rights[322] and that the damages cap did not violate the separation of powers.[323] Moreover, the court ruled that damages caps do not infringe on the right of access to the courts because they are not so drastic as to eliminate the tort remedies that they modify.[324] Second, following its own precedent, the court ruled that Alaska Statutes section 09.17.020, which requires plaintiffs to surrender half of a punitive damages award to the State does not violate substantive due process rights,[325] does not effect a taking without just compensation under the United States and Alaska Constitutions,[326] and does not violate the right to a jury trial.[327] Third, the court ruled that the allocation of fault to non-parties provision is not void for vagueness, because although there are some ambiguities in the statute, they are "not so conflicting and confused that it cannot be given meaning in the adjudication proc-

314. § 09.17.080.
315. § 09.30.065.
316. § 09.10.070(a)(2), .140.
317. § 09.65.096.
318. § 09.10.055; *Evans*, 56 P.3d at 1049.
319. *Evans*, 56 P.3d at 1048.
320. *Id.* at 1051.
321. *Id.* at 1054.
322. *Id.* at 1055.
323. *Id.* at 1055-56.
324. *Id.*at 1057.
325. *Id.* at 1058.
326. *Id.*
327. *Id.* at 1059.

ess."[328] Also, the allocation of fault to non-parties provision does not violate the plaintiffs' substantive due process rights, because the statute reasonably relates to a legitimate governmental purpose by providing three procedural safeguards to preclude failure to join responsible parties.[329] Fourth, the court held that section 09.30.065 does not violate the right of access to the courts or the right to a jury trial, and is thus facially constitutional.[330] Fifth, inspecting the plain language of the statute, the court held that the disparate treatment for minors in the limitations tolling procedure is facially constitutional because it is rationally based on legitimate state interests of limiting stale tort claims.[331] Sixth, the court held that section 09.65.096, granting partial tort immunity to hospitals, is facially constitutional because "the legislature has the power to modify common law."[332] Seventh, the court held the statute of repose to be facially constitutional because there is no differential treatment and the legislature is free to modify or abolish the common law.[333] Finally, the court held that the entire act promulgating these provisions does not violate the "one subject" rule of article II, section 13 of the Alaska Constitution because although the act concerns many different matters, "they are all within the single subject of 'civil actions.'"[334]

In *Fraiman v. State, Department of Administration, of Motor Vehicles* [sic],[335] the supreme court affirmed that Fraiman did not have standing to allege a Fourth Amendment violation.[336] Alaska State Trooper Tracy attempted to pull over Fraiman after noticing that Fraiman's taillights were not functioning properly, but Fraiman continued driving to a friend's house.[337] Without the owner's explicit permission, Tracy searched and found Fraiman in the loft of his friend's cabin.[338] Fraiman challenged the suspension of his license at an administrative hearing, claiming an illegal search under the Fourth Amendment.[339] The supreme court affirmed that

328. *Id.* at 1062 (quoting Williams v. State, Dep't of Revenue, 895 P.2d 99, 105 (Alaska 1995)).
329. *Id.* at 1063.
330. *Id.* at 1063-64.
331. *Id.* at 1064-66.
332. *Id.* at 1066-67.
333. *Id.* at 1068.
334. *Id.* at 1069-70.
335. 49 P.3d 241 (Alaska 2002).
336. *Id.* at 242.
337. *Id.*
338. *Id.* at 243.
339. *Id.*

Fraiman had no standing to allege a Fourth Amendment violation because he was not an overnight guest and could not have had a "legitimate expectation of privacy" in the cabin.[340] In addition, the court ruled that Tracy's conduct did not fall under either the "gross or shocking" or "deliberate violation" standing exceptions of *Waring v. State*.[341]

In *Midgett v. Cook Inlet Pre-Trial Facility*,[342] the supreme court held that Midgett's claims that his constitutional rights were violated by an officer's actions to stop a fight between Midgett and another prisoner were barred by collateral estoppel.[343] Midgett claimed that failure of the officer to follow standard operating procedures, resulting in the other prisoner not being handcuffed, violated his Eighth and Fourteenth Amendment rights.[344] The court upheld the lower court's summary judgment determining that these constitutional claims were barred by collateral estoppel, as they have been adjudicated and dismissed in federal court.[345] Midgett also claimed a violation of due process because he was not appointed counsel; the court determined there was no violation of due process because no right to counsel exists for a civil trial and Midgett does not satisfy any of the exceptions to this general rule.[346] Requiring Midgett to participate telephonically also did not violate his due process rights because such participation did not bar reasonable access to the court, such participation did not prejudice his claim, and the costs for his transportation would have been substantial.[347] Further, Midgett failed to meet the burden of proof that the defendants were negligent and that this negligence was the legal cause of Midgett's harm.[348] Midgett's claim of breach of contract for failing to comply with the Standard Operating Procedures (SOPs) was also dismissed, as the court found that the SOPs did not constitute a contract between Cook Inlet and Midgett.[349] Additionally, the court found no medical malpractice for treatment of

340. *Id.* at 245.

341. Waring v. State, 670 P.2d 357, 363 (Alaska 1983); *Fraiman*, 49 P.3d at 245.

342. 53 P.3d 1105 (Alaska 2002).

343. *Id.* at 1108.

344. *Id.* at 1108-09.

345. *Id.* at 1110. The federal judge held that there was no deliberate indifference with respect to Midgett's medical needs, the force taken by the officers to break up the fight was applied in good faith, and there was no "conscious indifference." *Id.*

346. *Id.* at 1111-12.

347. *Id.* at 1113.

348. *Id.* at 1113-14.

349. *Id.* at 1114.

the injury Midgett incurred while fighting with the other prisoner;[350] Midgett failed to follow his doctor's advice in caring for his ankle, and surgery became necessary as a result.[351]

In *Valdez v. Rosenbaum*,[352] the Ninth Circuit held that the constitutional rights of a federal detainee in the Alaska Cook Inlet Pretrial Facility were not violated by imposing restrictions on his telephone access during his four-and-a-half months of pretrial detention.[353] After being convicted for drug trafficking and sentenced to thirty years in prison, Valdez filed a pro se civil rights action against certain state officials alleging that his pretrial telephone restrictions violated a number of his constitutional rights.[354] On appeal, the Ninth Circuit held that Valdez's procedural due process claims failed because Alaska law did not create a liberty interest in using a telephone during his pretrial confinement.[355] Similarly, Valdez's substantive due process claims failed because the restriction did not constitute punishment as it was intended to prevent Valdez from tipping off his co-conspirators about the recently issued indictments, ensuring their capture with minimal danger to the arresting officers, and thus did not constitute punishment.[356] Additionally, the court held that the telephone restriction did not violate Valdez's rights to freedom of speech because a prisoner's First Amendment right to telephone access is subject to reasonable security limitations.[357] Finally, the court held that Valdez's Sixth Amendment claim was not cognizable in non-habeas corpus litigation and that his equal protection challenge was waived because he did not raise it on appeal.[358]

VI. CRIMINAL LAW

A. Constitutional Protections

In *Beaudoin v. State*,[359] the court of appeals affirmed the defendant's murder conviction. Beaudoin was found "guilty but mentally ill" for the murder of his mother in September 1997.[360] On the

350. *Id.* at 1114-15.
351. *Id.* at 1109.
352. 302 F.3d 1039 (9th Cir. 2002).
353. *Id.*
354. *Id.* at 1043.
355. *Id.* at 1045.
356. *Id.* at 1046-47.
357. *Id.* at 1047.
358. *Id.* at 1049.
359. 57 P.3d 703 (Alaska Ct. App. 2002).
360. *Id*. at 705.

night of the murder, Beaudoin confessed to a number of people that he was responsible for stabbing his mother.[361] On appeal, Beaudoin argued that his confessions should have been suppressed because the first confession he made to an Alaska State Trooper was made before he was given his *Miranda* warnings.[362] The court found that Beaudoin's un-Mirandized confession was a "minor interruption in what was otherwise a stream of legally obtained confessions" and therefore the subsequent confessions were not tainted and should not have been suppressed.[363]

In *Hamilton v. State*,[364] the court of appeals rejected a murder defendant's claim that a traffic stop leading to his arrest was illegal.[365] Rebecca Dixon awoke one night to find someone stabbing her husband.[366] News of the stabbing was quickly broadcast to the police.[367] Upon hearing the news, a state trooper stopped a car traveling in the opposite direction and radioed Fairbanks officers, asking them to record the license plate number so that the driver could later be contacted.[368] One of the officers followed the car, but the license plate was covered in snow.[369] Stopping the car on the officer's supervisor's order, the police officer discovered that it was Hamilton and found evidence that was used against him in his conviction for first-degree murder.[370] On appeal, the court of appeals declined to consider whether it violated the Alaska Constitution for the police to use a minor violation, an obstructed license place, as a pretext for making a traffic stop.[371] Instead, the court held that stopping Hamilton's car was justified because "a prompt investigation" was required "as a matter of practical necessity."[372]

In *Paul v. State*,[373] the court affirmed a denial of a motion to suppress evidence procured by a private party and used by the police to obtain a search warrant.[374] P.B. and his minor cousin C.P. broke into Alfred Paul's, P.B.'s uncle's, room and viewed a portion

361. *Id.*
362. *Id*.
363. *Id*. at 707.
364. 59 P.3d 760 (Alaska Ct. App. 2002).
365. *Id.* at 762.
366. *Id.*
367. *Id.* at 763.
368. *Id.* at 763-64.
369. *Id.* at 764.
370. *Id.*
371. *Id.* at 765-66.
372. *Id.* at 767 (quoting Coleman v. State, 553 P.2d 40, 46 (Alaska 1976)).
373. 57 P.3d 698 (Alaska Ct. App. 2002)
374. *Id.* at 703.

of a videotape depicting Paul having sex with C.P.[375] P.B. gave the videotape to the police.[376] The police viewed this videotape in its entirety and obtained a search warrant on this basis.[377] Paul claimed that the viewing of the videotape by the police violated his Fourth Amendment rights and moved to suppress the evidence.[378] The court determined that the test for a "warrantless government search following a private search," as established in *Walter v. United States*[379] and *United States v. Jacobsen*,[380] "is the degree to which the government's invasion of the privacy interest exceeds the scope of the private search."[381] The court ruled that Paul's privacy interest had been destroyed by P.B.'s viewing of the videotape, even though P.B. did not view the entire tape and the police did, because the portion P.B. viewed was sufficient to find evidence of wrongdoing.[382] Furthermore, Alfred Paul claimed that the illegal procurement of the tape by a private party prevented the police from being able to use it as evidence.[383] In rejecting this argument, the court stated that "it has . . . been settled . . . that a wrongful search or seizure conducted by a private party does not . . . deprive the government of the right to use evidence that it has acquired lawfully."[384]

In *State v. Boceski*,[385] the court of appeals found that a cocaine dealer had a diminished expectation of privacy when conducting a drug deal in another person's home such that a police officer's eavesdropping did not violate the cocaine dealer's Fourth Amendment expectation of privacy.[386] Confidential informant L.H. informed the police that Boceski was a cocaine dealer.[387] Sergeant Rayme Grubbs arranged for a drug sale between L.H. and Boceski at L.H.'s residence.[388] Grubbs eavesdropped and recorded the conversation and arrested Boceski once the deal had taken place.[389] After being arrested, Boceski sought suppression of "Grubb's ob-

375. *Id.* at 699.
376. *Id.*
377. *Id.*
378. *Id.* at 700.
379. 447 U.S. 649 (1980).
380. 466 U.S. 109 (1984).
381. *Paul*, 57 P.3d at 702.
382. *Id.*
383. *Id.*
384. *Id.* at 703 (citing *Walter*, 447 U.S. at 656 (citations omitted)).
385. 53 P.3d 622 (Alaska Ct. App. 2002)
386. *Id.* at 625.
387. *Id.* at 623.
388. *Id.*
389. *Id.*

servations, the audiotape recording and all of the evidence seized following Boceski's arrest, including Boceski's *Mirandized* statements."[390] The trial court suppressed the evidence and granted Boceski's motion to dismiss.[391] On appeal, the court of appeals found that although Boceski had an expectation of privacy for a private conversation, this expectation was not reasonable in the circumstances.[392] The court found Boceski had a diminished expectation of privacy that is not protected by the Fourth Amendment because Grubbs overheard the conversation from a place where he had a right to be, used his unaided, natural senses and did not rely on the tape recorder, and was in a place where Boceski would anticipate someone might be.[393] The court reversed the order suppressing the evidence and remanded the case to the superior court for a determination of evidence to be suppressed for illegal tape recording.[394]

In *State v. Smith*,[395] the supreme court held that Smith was not in custody for *Miranda* purposes during police questioning, and thus his confession during questioning could not be suppressed.[396] Smith had contacted the police when his friends told him he resembled a police sketch of a rapist published in a local newspaper.[397] Because Smith sounded suspicious, the police tracked Smith down and questioned him in a police car.[398] After making some incriminating statements, Smith left the car only to be arrested two hours later.[399] At trial, Smith was convicted of kidnapping, sexual assault, and sexual abuse of a minor, but the court of appeals reversed, finding that Smith was in *Miranda* custody once the police questioning had become accusatory.[400] Examining the details of the interrogation and events before and after the interrogation, the supreme court ruled that the questioning was noncustodial based on the fact that (1) Smith had initiated contact with the police, (2) Smith voluntarily talked with the police in the police car, (3) the questioning was by a single police officer occurring in the middle of the day and lasting only thirty minutes, (4) one of Smith's friends passed by during questioning, (5) the tone of the interview was

390. *Id.*
391. *Id.*
392. *Id.* at 624-25.
393. *Id.* at 625.
394. *Id.* at 625-26.
395. 38 P.3d 1149 (Alaska 2002).
396. *Id.* at 1161.
397. *Id.* at 1151.
398. *Id.* at 1151-52.
399. *Id.* at 1152.
400. *Id.*

noncustodial, and (6) Smith was informed that he was free to leave.[401] The supreme court concluded, on balance, that a reasonable person would have felt free to leave even though some of questions were accusatory, the interview took place in a police car, and Smith was arrested shortly after the interview.[402] Accordingly, Smith's conviction was reinstated.[403]

B. General Criminal Law

In *Beatty v. State*,[404] the court of appeals concluded it was proper for the trial judge to exclude Beatty's proposed jury instruction of a lesser included offense because Beatty failed to present sufficient evidence for its inclusion.[405] Beatty was convicted of first-degree robbery and conspiracy to commit first degree robbery.[406] He argued that the jury should have been instructed on the lesser included offense of attempted first degree robbery.[407] While agreeing with the final result, the court of appeals rejected the trial court's reasoning that attempted robbery did not exist separately under Alaska law.[408] Instead, the court of appeals found that the first degree robbery statute was intended to "criminalize unsuccessful takings of property to the same extent as successful takings of property," and not include "anticipatory acts in preparation of a robbery."[409] Therefore, attempted robbery did exist in the Alaska statutes through the general attempts statute when a person takes a "substantial step towards the commission of that crime."[410] The court found this could have been shown if Beatty intended to rob the victim but did not use force or threaten the use of force.[411] However, Beatty failed to produce any such evidence; therefore, the trial judge was correct in excluding the proposed instruction.[412] Accordingly, the lower court's decision was affirmed.[413]

401. *Id.* at 1159.
402. *Id.*
403. *Id.* at 1161.
404. 52 P.3d 752 (Alaska Ct. App. 2002).
405. *Id*. at 753.
406. *Id.* at 754.
407. *Id*. at 753.
408. ALASKA STAT. § 11.41.500(a) (Michie 2002).
409. *Beatty*, 52 P.3d at 755.
410. § 11.31.100(a).
411. *Beatty*, 52 P.3d at 757.
412. *Id*. at 757-58.
413. *Id*.

In *Blair v. State*,[414] the court of appeals held that Blair had the right to be present during the playback of audiotape testimony during jury deliberations, and that allowing the playback to proceed in Blair's attorney's absence was an error requiring the reversal of his conviction and a new trial.[415] Blair was tried for assaulting his wife.[416] His attorney requested that he be present for playbacks of testimony during jury deliberations.[417] Blair's attorney was out of his office at the time the judge called to inform him of the jury's request, and was not present at the playback.[418] Blair was convicted, and his attorney moved for a new trial; the trial court denied the motion.[419] The court of appeals reversed the conviction and granted a new trial.[420] The court held that the State had not met the burden of proving that the error was harmless beyond a reasonable doubt, as it was possible that the verdict was affected by holding the playback in counsel's absence.[421] Accordingly, the court of appeals reversed Blair's conviction and granted him a new trial.[422]

In *Brewer v. State*,[423] the court of appeals held that the trial judge properly denied the defendant's eleventh-hour request for self-representation and compelled the defendant to proceed with a revocation hearing with the counsel of a public defender.[424] Analogizing to *Gottschalk v. State*[425] and following the Second Circuit's holding in *United States, ex rel. Maldonado v. Denno*,[426] the court held that "a trial judge may deny a defendant's last-minute request for self-representation when granting the request would necessarily delay the trial and the tardiness of the request is due to the defendant's lack of diligence in pursuing the issue of self-representation."[427] The court also rejected the defendant's argument that the State should be estopped from seeking to revoke his probation because of its failure to grant him a "speedy petition" reasoning that the defendant never raised the issue at trial, and the

414. 42 P.3d 1152 (Alaska Ct. App. 2002).
415. *Id*. at 1153-54.
416. *Id*. at 1153.
417. *Id*.
418. *Id*.
419. *Id*.
420. *Id*. at 1153-54.
421. *Id*. at 1154.
422. *Id*. at 1156.
423. 55 P.3d 749 (Alaska Ct. App. 2002).
424. *Id.* at 749-50.
425. 602 P.2d 448 (Alaska 1979).
426. 348 F.2d 12 (2nd Cir. 1965)
427. *Brewer*, 55 P.3d at 753.

defendant's argument was moot since the defendant failed to prove that he was prejudiced by the delay.[428] Accordingly, the court affirmed the superior court's judgment.[429]

In *Busby v. State*,[430] the court of appeals upheld a conviction for driving with a revoked license.[431] After having his license revoked in Alaska, Busby moved to Nicaragua, where he obtained an international driving permit under the provisions of the United Nations Convention on Road Traffic.[432] Upon his return to Alaska, he was stopped for a traffic violation and subsequently charged with, and later convicted of, driving with a revoked license.[433] On appeal, Busby claimed that even though his license was revoked, he was still entitled to drive in Alaska under the terms of his international driving permit.[434] The court of appeals held that Busby's pre-existing license revocation was a sufficient reason for the State of Alaska to deny Busby the right to use his international driving permit on Alaska's roads.[435] Additionally, the court of appeals held that the State's authority to prohibit a driver with a pre-existing license revocation from driving on Alaska's roads does not depend on whether the State has initiated new proceedings against the driver or the international driving permit, nor does it depend on whether the State has required the driver to physically surrender the permit.[436]

In *Butts v. State*,[437] the court of appeals interpreted the phrase "bodily impact" in Alaska's robbery statute[438] to include indirect contacts where the defendant does not actually touch the victim but, instead, exerts impact on property that is attached to the victim or that the victim is holding onto.[439] Butts accosted a woman in a parking lot and attempted to snatch her purse.[440] The woman resisted and during the ensuing struggle the woman fell to the ground before relenting and allowing Butts to pull the purse from her grasp.[441] In affirming the trial court's conclusion that Butts had

428. *Id.* at 755.
429. *Id.*
430. 40 P.3d 807 (Alaska Ct. App. 2002).
431. *Id.* at 818.
432. *Id.* at 808; Convention on Road Traffic, Sept. 19, 1949, 3 U.S.T. 3008.
433. *Id.* at 809.
434. *Id.*
435. *Id.* at 812.
436. *Id.* at 815.
437. 53 P.3d 609 (Alaska Ct. App. 2002)
438. ALASKA STAT. § 11.81.900(b)(26) (Michie 2002).
439. *Butts*, 53 P.3d. at 613-14.
440. *Id*. at 611.
441. *Id.*

forcibly taken the purse, the court of appeals reasoned that "bodily impact" includes indirect contact—impact upon property attached to the victim rather than impact directly upon the person.[442] Additionally, the court held that in order to count as prior felony convictions for purposes of presumptive sentencing under Alaska's repeat offender provisions,[443] prior out-of-state convictions need only be pursuant to laws similar, and not identical, to an Alaska counterpart.[444] Thus, the court held that Butts's previous convictions in Oklahoma for burglary and assault were under statutes sufficiently similar to Alaska laws to justify their use in presumptive sentencing even though the Oklahoma statutes were more narrowly defined than their Alaska counterparts.[445]

In *Carpentino v. State*,[446] the court of appeals overruled Carpentino's conviction for sexual abuse because testimony of the victim's siblings was improperly admitted into evidence.[447] The victim's brother had testified that Carpentino had climbed into bed with him and fondled his genitals, and the victim's mother testified that the victim's younger sister had said that Carpentino had climbed into bed with her.[448] The superior court judge allowed this evidence to show Carpentino's "plan" or "scheme" to get into bed with young children.[449] The court of appeals concluded that under Rule 404(b)(1)[450] Carpentino's prior actions were only relevant if they were seen as precursors to sexual abuse, so the testimony was inadmissible because its only purpose would have been to "prove that [Carpentino] is a person who . . . engages in such wrongful acts" and is therefore likely to have acted in the same way towards the victim.[451] In addition, the "lewd disposition" exception recognized in *Soper v. State*[452] does not apply to Carpentino because his behavior consisted of one or two instances of abuse, not the "continued pattern of sexual abuse" present in *Soper*.[453]

442. *Id*. at 613.
443. ALASKA STAT. § 12.55.145 (Michie 2002).
444. *Butts*, 53 P.3d. at 614-15.
445. *Id.* at 615-17.
446. 38 P.3d 547 (Alaska Ct. App. 2002).
447. *Id*. at 549.
448. *Id.*
449. *Id.*
450. ALASKA R. EVID. 404(b)(1).
451. *Carpentino*, 38 P.3d at 550.
452. 731 P.2d 587 (Alaska Ct. App. 1987).
453. *Carpentino*, 38 P.3d at 552.

In *Cathey v. State*,[454] the court of appeals held that the fact that an armed robbery victim did not expressly tell the 911 dispatcher that the defendant was armed did not constitute exculpatory evidence that the prosecution was required to disclose to a grand jury.[455] Defendant Cathey and an accomplice broke into an apartment and robbed the two residents at gunpoint; Cathey was convicted of first-degree burglary, first-degree robbery, and two counts of third-degree assault.[456] Cathey asserted on appeal that because the victim did not expressly mention to the 911 dispatcher that the robbers were armed, that constituted exculpatory evidence that should have been presented to the grand jury.[457] The court of appeals rejected this argument because the victim's exact words during the 911 call were unclear.[458] Moreover, the court held that regardless of what the victim told the 911 dispatcher, the 911 tape did not rise to the level of exculpatory evidence, that is, "evidence that tends, in and of itself, to negate the defendant's guilt," and thus the prosecution was not required to present the 911 tape to the grand jury.[459] Additionally, the court of appeals held that the trial court properly denied Cathey's motion for a new trial because it found that Cathey's newly discovered evidence was dubious, and further, was not likely to produce a different verdict.[460] Thus, the judgment of the trial court was affirmed.[461]

In *Dayton v. State*,[462] the court of appeals remanded the case to the superior court to resolve whether the Athabascan database was the type of data reasonably relied upon by experts who analyze the frequency of genetic profiles.[463] Dayton, an Athabascan Indian, allegedly sexually assaulted a sixty-seven-year-old woman.[464] The police obtained a DNA sample from the victim and test results showed that Dayton's DNA matched the DNA from the sperm sample taken from the victim.[465] However, the forensic serologist could not calculate a DNA profile frequency for Athabascan Indi-

454. 60 P.3d 192 (Alaska Ct. App. 2002).
455. *Id*. at 195.
456. *Id*. at 193.
457. *Id*. at 194.
458. *Id*.
459. *Id*. at 195.
460. *Id*. at 198-99.
461. *Id*.
462. 54 P.3d 817 (Alaska Ct. App. 2002).
463. *Id.* at 820-21.
464. *Id.* at 818.
465. *Id.*

ans necessary to validate the results of the DNA test.[466] Dayton received a mistrial and the crime lab created an Athabascan database before the second trial.[467] Dayton objected to the use of the Athabascan database because the State had not established its reliability.[468] Dayton further asserted that the State had to disclose the donors' individual names so that he could make sure they were not related to him.[469] The court of appeals agreed with Dayton's first contention because the trial judge made no findings as to whether the Athascaban database had been collected and analyzed in such a manner that experts would reasonably rely on it.[470] However, the court of appeals did not grant Dayton's motion to disclose the donors' individual names because this did nothing to help Dayton's case.[471]

In *Dobberke v. State*,[472] the court of appeals reversed the conviction of a man who retained a rental car after the written and oral agreement had lapsed.[473] In August 1998, Dobberke rented a car for three days from VanZee, owner of a Hertz Rent-A-Car franchise.[474] He kept the car beyond the initial rental period, but was allowed to extend the rental agreement on several occasions.[475] Dobberke informed VanZee that he intended to buy the car after he obtained financing.[476] VanZee prepared a purchase order agreement to assist Dobberke in receiving financing,[477] but Dobberke never paid for the car.[478] On February 6, 1999, the police located Dobberke, and VanZee repossessed the car.[479] Dobberke was convicted of first-degree vehicle theft after a jury trial.[480] On appeal, the court of appeals held that first-degree vehicle theft must involve an initial trespassory taking; otherwise, first-degree vehicle theft would completely subsume second-degree theft, which

466. *Id.*
467. *Id.*
468. *Id.* at 819.
469. *Id.*
470. *Id.* at 820.
471. *Id.* at 820-21.
472. 40 P.3d 1244 (Alaska Ct. App. 2002).
473. *Id*. at 1248.
474. *Id*. at 1245.
475. *Id*.
476. *Id*.
477. *Id*.
478. *Id*.
479. *Id*. at 1245-46.
480. *Id*. at 1246.

makes it illegal to retain a vehicle beyond the time specified in a written contract.[481]

In *Garay v. State*,[482] the court of appeals reversed a superior court decision and allowed a criminal defendant to withdraw his plea.[483] The defendant had been indicted for first-degree sexual assault and accepted a plea bargain in the face of strong evidence.[484] Before officially entering the plea, however, the district attorney's office received an additional police report and witness interviews suggesting that the victim of the assault may not have been trustworthy.[485] This information was sent to the defense attorney, who neglected to read it.[486] The defendant subsequently entered his negotiated plea.[487] Later that year, the defendant's new attorney discovered the documents and asked the superior court to allow the defendant to withdraw his plea.[488] The superior court agreed that the original attorney's failure to review the documents amounted to ineffective assistance of counsel but denied the motion because the defendant failed to show any prejudice that resulted thereby.[489] The court of appeals reversed, holding that if an attorney is to represent a criminal defendant competently during plea negotiations, the attorney must know the facts of the case.[490] In this case, the attorney's failure to read documents placed directly in his inbox amounted to ineffective assistance of counsel.[491] Furthermore, there was at least a reasonable possibility that the new information either would have changed the attorney's advice to the defendant or would have changed the defendant's decision to accept the plea bargain.[492] Accordingly, the court of appeals allowed the defendant to withdraw the plea.[493]

In *Hammock v. State*,[494] the court of appeals upheld a trespass conviction despite the defendant's arguments that the trial court failed to dismiss prejudicial jurors.[495] Defendant Hammock was re-

481. *Id*.
482. 53 P.3d 626 (Alaska Ct. App. 2002).
483. *Id.* at 629.
484. *Id.* at 627.
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.*
491. *Id.* at 628.
492. *Id.* at 629.
493. *Id.*
494. 52 P.3d 746 (Alaska Ct. App. 2002).
495. *Id.* at 747.

peatedly asked to leave a bar because he was with an underage person and had a conflict with another patron.[496] He left each time, only to return soon thereafter.[497] Before his trial for second-degree trespass, he challenged two prospective jurors for cause on the grounds that they were predisposed to infer his guilt if he refused to testify at trial.[498] The court of appeals upheld the trial court's decision to deny the challenge of one of the jurors as a valid recognition of the juror's change of heart on inferring Hammock's guilt.[499] The court of appeals held that the lower court abused its discretion, however, in denying Hammock's challenge of the other juror, Blankenship, who had repeatedly stated that he might disregard the court's instructions to apply the law impartially because no one would know he had done so.[500] Nonetheless, the court of appeals found that Hammock was not prejudiced by the trial court's refusal to dismiss Blankenship because Hammock ultimately used a peremptory challenge to dismiss the juror.[501]

In *Johnson v. State*,[502] the court of appeals held that denial of a rehabilitated convict's motion to seal his criminal records is proper where the court reasonably determines that the public policy of allowing public access to criminal records outweighs the individual's reasons for sealing his records.[503] Nine years after the completion of his sentence for a conviction for kidnapping and rape, Johnson moved to have the record of his criminal convictions sealed.[504] Johnson argued that he was fully rehabilitated and that public access to his files had adversely affected his life in many ways (e.g., harassing phone calls, vandalism of his shed and truck, false accusations of threats, and negative attitudes towards him.)[505] The court of appeals ruled that open access to criminal records is an important and long-standing public policy which can only be overridden in exceptional circumstances.[506] The court of appeals thus applied a balancing test, weighing the public's interest in disclosure against the privacy and reputation interests of the rehabilitated convicts, while keeping in mind the legislature's bias in favor of public dis-

496. *Id.* at 748.
497. *Id.*
498. *Id.*
499. *Id.* at 749.
500. *Id.*
501. *Id.* at 750.
502. 50 P.3d 404 (Alaska Ct. App. 2002).
503. *Id.*
504. *Id.* at 405.
505. *Id.*
506. *Id.* at 405-06.

closure.[507] Affirming the superior court's denial of his motion, the court of appeals held that the superior court could reasonably have concluded that Johnson had not presented such extraordinary circumstances.[508]

In *McGee v. State*,[509] police discovered evidence against McGee by intercepting a Federal Express package addressed to him and testing it with an ion mobility spectrometer ("Itemiser").[510] The Itemiser revealed traces of a controlled substance and led the officers to obtain a search warrant.[511] The package revealed seven ounces of cocaine and prompted further investigation of McGee and his eventual arrest.[512] At trial, McGee pleaded no contest to drug charges in order to preserve his right to appeal the superior court's denial of his motion to suppress evidence.[513] On appeal, the court of appeals held that the police must have reasonable suspicion of criminal activity before they can temporarily detain a package for the purpose of subjecting it to the Itemiser.[514] The court of appeals subsequently remanded the case to the superior court in order to address the reasonable suspicion question.[515]

In *Miller v. State*,[516] the court of appeals affirmed the superior court's decision that Miller failed to prove that his conviction of attempted second-degree sexual abuse of a minor was mitigated.[517] Miller pled no contest to a reduced charge of attempted second-degree sexual abuse of a minor.[518] During sentencing, he argued that his sentence should be mitigated because his conduct was among the least serious within the offense, but the superior court ruled that Miller failed to prove this by clear and convincing evidence.[519] On appeal, Miller first argued that he engaged in only minimal misconduct.[520] However, the supreme court found that under the offense of attempted sexual contact, even minimal touching fell within the offense's core definition.[521] Second, Miller

507. *Id.* at 406.
508. *Id.*
509. 51 P.3d 970 (Alaska Ct. App. 2002).
510. *Id.* at 970.
511. *Id.*
512. *Id.*
513. *Id.*
514. *Id.* at 971.
515. *Id.*
516. 44 P.3d 157 (Alaska Ct. App. 2002).
517. *Id.* at 160.
518. *Id.* at 158.
519. *Id.*
520. *Id.*
521. *Id*.

argued that his conduct was factually closer to attempted third-degree sexual assault, so therefore, his conduct was among the least serious of attempted second-degree sexual abuse.[522] The supreme court rejected this argument because of the differences between the actus reus of sexual assault and the actus reus of sexual abuse of a minor.[523] The court found that Miller's belief that the victim was asleep only led to the possibility of his committing the additional crime of attempted third-degree sexual assault (a charge designed for "insensible" victims) and did not mitigate the crime of attempted second-degree sexual assault of a minor.[524] Accordingly, the supreme court affirmed the superior court's decision that Miller did not prove the mitigating factor.[525]

In *Morgan v. State*,[526] the court of appeals clarified the conditions under which a defendant charged with sexual assault can present evidence of prior false accusations by the accuser.[527] Frederick Morgan, Jr., was charged with engaging in sexual penetration with a woman while she was intoxicated so as to be incapacitated or unaware that a sex act was occurring.[528] The trial judge, relying on *Covington v. State*,[529] denied Morgan's request to be allowed to present testimony that the woman had previously accused men of sexual assault only to admit later that these accusations were false.[530] Clarifying *Covington*, the court held that (1) if a defendant proves that a complaining witness has made prior false accusations of sexual assault, the defendant can both cross-examine the witness and present extrinsic evidence on this point,[531] and (2) the defendant need not show that the prior accusations had been adjudicated false by a court, but rather can rely on normal evidentiary methods to prove the prior false accusations by a preponderance of the evidence to the judge at a foundational hearing.[532] The court then remanded the case to the superior court so that the foundational hearing could be held.[533]

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522. *Id.*
523. *Id.* at 158-59.
524. *Id.* at 159.
525. *Id.* at 160.
526. 54 P.3d 332 (Alaska Ct. App. 2002).
527. *Id.* at 336-39.
528. *Id.* at 333-34.
529. 703 P.2d 436 (Alaska Ct. App. 1985).
530. *Morgan*, 54 P.3d at 334.
531. *Id.* at 336.
532. *Id.* at 334, 338-39.
533. *Id.* at 340.

In *Murray v. State*,[534] the court of appeals ruled that the physical proximity between a firearm and drugs is not evidence alone of a nexus sufficient to find second-degree weapons misconduct.[535] Murray was convicted of second-degree weapons misconduct after police found a gun in his bedroom and drugs in his living room.[536] Vacating Murray's conviction, the court held that the required nexus between gun possession and a drug offense is that the firearm must aid, advance, or further the commission of the drug offense.[537]

In *Ostlund v. State*,[538] the court of appeals held that the trial court's decision not to bifurcate defendant's trial for driving while intoxicated (DWI) was an abuse of discretion.[539] William Ostlund was charged with felony DWI for driving while intoxicated while having two prior DWI convictions within the past year.[540] Before the trial, Ostlund argued that evidence of his prior convictions would be prejudicial and agreed to stipulate to the prior convictions for sentencing purposes if convicted.[541] The trial court denied Ostlund's request and instructed the jury regarding the prior convictions.[542] The jury convicted Ostlund.[543] On appeal, Ostlund argued that the trial court erred in refusing to let the jury first decide on Ostlund's guilt in the current offense, and then decide the issue of his prior convictions.[544] The court of appeals noted that it had previously recommended bifurcation of DWI trials in order to "preserve both parties' right to a jury determination of all issues, while at the same time avoiding potential for unfair prejudice" against the defendant.[545] Because the trial court failed to adopt the recommended procedures, the court of appeals determined that it abused its discretion.[546] Accordingly, the court of appeals reversed Ostlund's conviction.[547]

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534. 54 P.3d 821 (Alaska Ct. App. 2002).
535. *Id.* at 824.
536. *Id.* at 823.
537. *Id.* at 824-25.
538. 51 P.3d 938 (Alaska Ct. App. 2002).
539. *Id*. at 939.
540. *Id.*
541. *Id*.
542. *Id*.
543. *Id*.
544. *Id*. at 941.
545. *Id*. (citing Ross v. State, 950 P.2d 587 (Alaska Ct. App. 1997)).
546. *Id*. at 942.
547. *Id*. at 943.

In *Pearce v. State*,[548] the court of appeals held that the trial court judge was not clearly erroneous in ruling that the defendant had no subjective expectation of privacy with respect to his handwritten suicide note.[549] Pearce attempted to abduct a woman as she rollerbladed down the highway.[550] During the investigation of the crime, the police obtained a search warrant for Pearce's boat to search for guns and related accoutrements.[551] During the search, the police lifted a duffel bag off a table and saw a suicide note that Pearce had written, which first addressed Pearce's family and then went on to ask whomever found the note to contact his family.[552] Before the trial, Pearce asked the superior court to suppress the note because it was not included in the search warrant.[553] The superior court concluded that Pearce had no expectation of privacy as the note was intended to be read by third persons.[554] On appeal, the court of appeals deferred to the superior court's findings of fact,[555] and held that Pearce's subjective expectation of privacy was not reasonable.[556] Pearce's plea that the reader of the note call his family, and the fact that he purposely left the note on the table of his boat strongly suggested that he wanted the note read by third parties.[557]

In *Richardson v. State*,[558] the court of appeals held that felony defendants who receive unsuspended terms of imprisonment exceeding two years can appeal any aspect of their sentences, including the revocation of a driver's license.[559] Richardson was convicted of murder after a drunk-driving incident in which he killed two people and seriously injured two others.[560] Richardson disobeyed a warning from a park service employee not to drive and struck another vehicle head on.[561] The trial judge sentenced Richardson to twenty-eight years of imprisonment and revoked his license for twenty years.[562] Richardson appealed the license revocation and

548. 45 P.3d 679 (Alaska Ct. App. 2002).
549. *Id*. at 684.
550. *Id*. at 680.
551. *Id*. at 681.
552. *Id*.
553. *Id*.
554. *Id*.
555. *Id*. at 682.
556. *Id*. at 684.
557. *Id*. at 683.
558. 47 P.3d 660 (Alaska Ct. App. 2002).
559. *Id.* at 664.
560. *Id.* at 660.
561. *Id.* at 661.
562. *Id.*

the State contended that Richardson did not have the right to appeal this aspect of his sentence because of Alaska Statutes section 12.55.120(a), which the State contended allows only an appeal of the term-of-imprisonment aspect of a sentence.[563] The court held that the State's interpretation of the statute would present many difficulties, and that the legislature did not intend to make the decision of a sentence appeal so difficult.[564] The court of appeals affirmed the license revocation as a reasonable exercise of judicial authority in light of the seriousness of Richardson's offense.[565]

In *Riley v. State*,[566] the court of appeals affirmed Riley's two convictions for first-degree assault.[567] Richard Riley and Edward Portalla seriously wounded two people when they opened fire on a crowd.[568] The State was unable to determine which of the defendants wounded the two people.[569] The jurors found Riley guilty as an accomplice after being instructed that "they should decide whether Riley acted as a principal . . . or, if they could not decide beyond a reasonable doubt which man fired the shots, they should decide whether Riley acted as an accomplice . . . ."[570] In *Echols v. State*,[571] however, the court of appeals had held that accomplice liability was established only if the State proved that the defendant "acted intentionally with respect to the prohibited result."[572] In *Riley*, the court of appeals overturned *Echols* because hypothetically it would preclude a finding of manslaughter for both Riley and Portalla as the State could not prove that either party acted as the principal.[573] Accordingly, the court provided the following new rule: "[w]hen a defendant solicits, encourages, or assists another to engage in conduct, and does so with the intent to promote or facilitate that conduct, the defendant becomes accountable under Alaska Statutes section 11.16.110(2)[574] for that conduct."[575] Thus,

563. *Id.* at 661-62.
564. *Id.* at 664.
565. *Id.* at 664-65.
566. 60 P.3d 204 (Alaska Ct. App. 2002).
567. *Id.* at 223.
568. *Id.* at 205.
569. *Id.* at 206.
570. *Id.*
571. 818 P.2d 691 (Alaska Ct. App. 1991).
572. *Riley*, 60 P.3d at 206.
573. *Id.* at 209.
574. ALASKA STAT. § 11.16.110(2) (Michie 2002) (stating that "[a] person is legally accountable for the conduct of another constituting an offense if with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense").

the State was required to prove that Riley "acted recklessly with respect to the possibility that serious physical injury would be inflicted on another person" either through his conduct or that of Portalla.[576] The court also found that the jury instruction under the *Echols* rule did not constitute plain error because Riley's attorney "clarified and corrected" the ambiguity in the jury instruction during his summation.[577] The court affirmed Riley's conviction because the jury found that Riley "intended to inflict serious physical injury" which met the "reckless" requirement of section 11.81.610(c).[578] The court also affirmed Riley's ten-year sentence despite the fact that Portalla received a lesser sentence because Portalla had admitted to his participation and assisted the state troopers in the investigation.[579] Additionally, the judge had determined that Riley was the leader in the action.[580]

In *State v. District Court (In re Phillips)*,[581] the court of appeals held that a trial judge could not reject a plea agreement between the State and a defendant because the judge felt "the State could have proved a more serious charge."[582] Thomas Phillips was charged with first-degree failure to register as a sex offender, a felony.[583] The failure to register was first-degree because Phillips had a prior conviction for failing to register.[584] Nevertheless, the State enetered into a plea agreement on second-degree failure to register, a misdemeanor of which a prior conviction is not a component.[585] The district court rejected the plea agreement on the grounds that the legislature had determined that the defendant's conduct constituted a felony, not a misdemeanor.[586] Reversing, the court of appeals held that the executive branch has the authority to exercise its discretion in determining what criminal charges will be levied against a defendant as long as such discretion is "exercised within constitutional bounds."[587] Additionally, the executive branch has the discretion to reduce charges to lesser offenses.[588]

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575. *Riley*, 60 P.3d at 207.
576. *Id.*
577. *Id.* at 208.
578. *Id.* at 221.
579. *Id.* at 222.
580. *Id.*
581. 53 P.3d 629 (Alaska Ct. App. 2002).
582. *Id*. at 634.
583. *Id.* at 630.
584. *Id.*
585. *Id.*
586. *Id.*
587. *Id*. at 631.
588. *Id*. at 634.

Therefore, the court held that the trial judge had no authority to reject the plea on this basis.[589]

In *State v. Felix*,[590] the court of appeals held that Criminal Rule 35(a)[591] which allows judges to grant "periodic imprisonment" does not permit judges to grant furloughs, which are solely within the authority of the executive branch.[592] Felix was granted two short releases by the trial court as well as a release from custody so she could serve the rest of her sentence in a treatment facility.[593] Two other prisoners, Fain and Buchanan, were granted short-term releases from the trial court so that they could attend to personal matters.[594] On appeal, the court of appeals concluded that the legislature intended Criminal Rule 35(b) to deprive courts of ongoing authority to monitor Department of Corrections treatment and placement decisions throughout a defendant's term of imprisonment.[595] The court of appeals therefore held that a judge's modification of a sentence is proper if premised on codified sentencing goals, rather than a defendant's short-term needs.[596] The court of appeals reasoned that once a defendant has been sentenced and committed to the custody of the executive branch, the executive branch assumes primary responsibility for the custody and care of the defendant.[597] The court of appeals concluded that the trial court exceeded its authority in all three instances.[598] Therefore, the court of appeals reversed the sentence modifications ordered by all three trial courts.[599]

In *State v. Hawkins*,[600] the court of appeals held that the Alaska Sex Offender Registration Act (ASORA)[601] imposes a continuing obligation to register upon certain sex offenders physically present within the State, that Hawkins was under a duty to so register, and that the imposition of criminal sanctions for failure to comply would not violate the federal Ex Post Facto Clause.[602] After being charged with failure to register as a sex offender, Hawkins moved

589. *Id*.
590. 50 P.3d 807 (Alaska Ct. App. 2002).
591. ALASKA R. CRIM. P. 35(b).
592. *Felix*, 50 P.3d at 816.
593. *Id*. at 809-10.
594. *Id*. at 809.
595. *Id*. at 814.
596. *Id.* at 816.
597. *Id*. at 815.
598. *Id*. at 818.
599. *Id*.
600. 39 P.3d 1126 (Alaska Ct. App. 2002).
601. ALASKA STAT. §§ 12.63.010-.100 (Michie 2002).
602. *Hawkins*, 39 P.3d at 1128-29 (citing U.S. Const., art. 1, § 10).

to dismiss asserting that ASORA violated the Ex Post Facto Clause.[603] The magistrate judge agreed and granted the motion.[604] The court of appeals reversed and remanded, except as to the conclusion that Hawkins had a duty to register under ASORA.[605] First, the court of appeals found that the magistrate's interpretation was based on ASORA as it was originally enacted, not as it had been amended.[606] Second, the court concluded that the magistrate's narrow interpretation defeated the legislative intent to ensure compliance by imposing criminal penalties on certain sex offenders failing to register in order.[607]

In *State v. Judson*,[608] the court of appeals ruled that Judson was entitled to "*Nygren* credit"[609] for time spent in court-ordered treatment even though Judson himself had requested the treatment.[610] Judson pled guilty to driving while intoxicated and asked the court to order him to a residential treatment facility as a condition of his release.[611] Judson subsequently received twenty-one days of credit to his sentence for the time spent at the facility.[612] The court ruled that such credit was properly applied because the facility subjected Judson to jail-like conditions and Judson was under court order to undergo the treatment and therefore could not leave.[613] In addition, the court affirmed that the time spent in the facility could be used to satisfy the minimum jail time requirements of the DWI statute, as it imposed both inpatient treatment and confinement beyond the twenty-day statutory minimum if circumstances re-

603. *Id.* at 1128.

604. *Id.* The magistrate concluded that failing to register was not a continuing offense under ASORA and that although Hawkins had a duty to register, he could not be punished for failing to register by July 1, 1994, consistent with the federal Ex Post Facto Clause. *Id*. The court of appeals observed that the magistrate premised his decision on the conclusion that the Department of Public Safety had exceeded its authority in passing a regulation extending, for certain sex offenders, the deadline for initial registration. *Id.*

605. *Id.* 1129-30.

606. *Id.* at 1128.

607. *Id.* at 1128-29. The court concluded that since ASORA had been amended to extend the registration deadline for certain sex offenders to January 31, 1996, and because Hawkins was charged with failure to register on January 28, 1998, there was no Ex Post Facto violation. *Id.*

608. 45 P.3d 329 (Alaska Ct. App. 2002).

609. *See* Nygren v. State, 658 P.2d 141, 146 (Alaska Ct. App. 1983).

610. *Judson*, 45 P.3d at 333.

611. *Id*. at 330.

612. *Id*. at 331.

613. *Id*. at 332.

quired.[614] Lastly, the court ruled that Alaska's bail release statute[615] is aimed at preventing needless detention, and thus does not mandate that courts consider flight risk and potential danger of the defendant "before imposing a rehabilitative condition that the defendant requests."[616]

In *State v. Malloy*,[617] the supreme court held that Alaska Statute section 12.55.125(a)(3),[618] which requires, under a clear and convincing evidence standard, that a defendant be sentenced to ninety-nine years without eligibility for parole for first-degree murder if the defendant was found to have substantially physically tortured the murder victim, was not unconstitutional.[619] The State gave notice of intent to seek such sentencing under section 12.55.125(a)(3) after Malloy was convicted by a jury of first-degree murder, kidnapping, and tampering with evidence.[620] Malloy challenged the constitutionality of the statute on the grounds that the State had not been required to prove the aggravating element of torture beyond a reasonable doubt and torture was not an element of the offense.[621] The superior court rejected Malloy's claim and stated that Malloy would have been sentenced to the maximum term even without the mandatory statutory requirement.[622] Under section 12.55.115,[623] judges have "authority to deny eligibility for discretionary parole regardless of whether the court finds one of the aggravating circumstances that trigger a mandatory maximum term under [section] 12.55.125(a)(1)-(3)."[624] The court of appeals vacated the sentencing requirement denying parole eligibility because the court found section 12.55.125(a) to be unconstitutional.[625] Relying on *Donlun v. State*,[626] the court of appeals found that Malloy had not been charged or convicted for the substantial physical torture claim and as such was being subject to "a new, harsher penalty" than the usual "maximum" penalty, which was defined as a ninety-nine year prison term, regardless of parole eligibility.[627]

614. *Id*. at 333.
615. ALASKA STAT. § 12.30.020 (Michie 2002).
616. *Judson*, 45 P.3d at 334.
617. 46 P.3d 949 (Alaska 2002).
618. ALASKA STAT. § 12.55.125(a)(3) (Michie 2002).
619. *Malloy*, 46 P.3d at 950.
620. *Id.*
621. *Id.*
622. *Id.*
623. ALASKA STAT. § 12.55.115 (Michie 2002).
624. *Id.* at 951.
625. *Id.*
626. 527 P.2d 472 (Alaska 1974).
627. *Malloy*, 46 P.3d at 953.

Since the court of appeals decision, the U.S. Supreme Court had addressed this issue in *Apprendi v. New Jersey*[628] and held that, under the Fourteenth Amendment, in order to increase a sentence beyond the maximum statutory requirement, the aggravating factor must be proven beyond a reasonable doubt and given to the jury.[629] The supreme court noted that *Apprendi* validated the court of appeals' view that *Donlun* is grounded on constitutional principles.[630] However, the supreme court found that *Donlun* was incorrectly applied to *Malloy*. The court held that because the sentencing judge had the discretion to sentence Malloy to ninety-nine years without eligibility for parole without the torture finding, sentencing Malloy to the same sentence with the substantial physical torture finding did not exceed the maximum sentence.[631] The court held that under both *Donlun* and *Apprendi*, a sentence must fall "outside the outer limits of the range of sentences that the court could otherwise impose" to exceed the maximum sentence.[632] The court also rejected Malloy's claim that the aggravating factor must be charged as an element of the offense and given to the jury as having no basis in the Alaska Constitution and contradicting *Donlun*.[633] Under *Donlun*, when the sentence with the aggravating factor is within the maximum sentence for the original crime, then the aggravating factor does not need to be included in the charge.[634] Accordingly, the court of appeals decision was vacated and the case was remanded to the superior court for resentencing.[635]

In *State v. Prince*,[636] the court of appeals reversed the superior court's dismissal of Prince's indictment and remanded the case for further proceedings.[637] Police found two men asleep or passed out in a boat that was partially beached on land within the municipality of St. Mary's and partially in the Andreafsky River. The officers found over 100 bottles of alcohol in the boat.[638] Prince and a co-defendant were charged for importing and intending to sell alcohol in a municipality that had banned alcoholic beverages within the

628. 530 U.S. 466 (2000).
629. *Malloy*, 46 P.3d at 953 (citing *Apprendi*, 530 U.S. at 490).
630. *Id.* at 954.
631. *Id*.
632. *Id.* at 955.
633. *Id.* at 956-57.
634. *Id.* at 957.
635. *Id.*
636. 53 P.3d 157 (Alaska Ct. App. 2002).
637. *Id*. at 165.
638. *Id*. at 159.

community pursuant to state law.[639] The superior court dismissed the indictment, finding that the municipality did not have jurisdiction over the land where the boat was found because the land was owned by the State.[640] The court of appeals reversed, holding that because the State had not limited municipal authority to enforce ordinances on state-owned land, the land could be subject to municipal authority.[641] Further, the court held that the municipal ban in question did not conflict with state law, so it could be enforced by state law.[642] Accordingly, the judgment of the superior court was reversed.[643]

In *Tuttle v. State*,[644] the court of appeals held: (1) that the defendant's possession of a firearm in a robbery is not an element of the offense to be proved to the jury at trial, but is rather a factor to be proven to the court at sentencing; (2) that the judge was entitled to rely on out-of-court statements made by co-defendants because the defendant did not offer testimonial denial of the State's assertion that he possessed a firearm; and (3) that the State is obliged to prove the fact of the defendant's possession of a firearm beyond a reasonable doubt.[645] Under *Malloy v. State*,[646] the court ruled that although "any factor which increases the maximum punishment for an offense is an element of the offense that must be proved [*sic*] to a jury[,] . . . this rule does *not* apply to the factors that trigger the various presumptive terms specified in Alaska Statutes section 12.55.125."[647] Then, following the Court of Appeals of Maryland's decision in *Boyd v. State*,[648] the court ruled that the judge can properly rely on the content of co-defendants' out-of-court statements, but he must decide each case on its own merits; he cannot rely on personal knowledge of matters outside the judicial record.[649] The question remained open whether the judge in this case violated this rule when he relied on a co-defendant's demeanor from a different trial to resolve an evidentiary dispute at Tuttle's sentencing hear-

639. *Id*. at 158.
640. *Id*. at 161.
641. *Id*. at 162-63.
642. *Id*. at 164.
643. *Id*. at 165.
644. No. A-8077, No. 1801, 2002 Alas. App. LEXIS 90, at *1 (Alaska Ct. App. May 3, 2002).
645. *Id.* at *10-*11.
646. 1 P.3d 1266 (Alaska Ct. App. 2000).
647. *Tuttle*, 2002 Alas. App. LEXIS 90, at *9.
648. 581 A.2d 1 (Md. 1990).
649. *Tuttle*, 2002 Alas. App. LEXIS 90, at *6.

ing.[650] The court declined to resolve this issue of law because it vacated the judge's ruling for failing to apply the beyond-a-reasonable-doubt standard when determining the factual issue of whether Tuttle possessed a firearm.[651] For these reasons, the court vacated the judge's ruling and remanded the case to determine whether Tuttle possessed a firearm beyond a reasonable doubt and, if so, to re-sentence Tuttle using a seven-year presumptive term as the starting point.[652]

In *Wassilie v. State*,[653] the court of appeals held that where a witness claims not to remember the substance of a prior statement at trial, the witness' trial testimony is considered inconsistent with the prior statement for purposes of Evidence Rule 801(d)(1)(A), regardless of whether the claimed memory loss is genuine or feigned, as the lack of memory at trial is inconsistent with the witness' earlier claim to remember.[654] One of the victims of the alleged assault could not remember key details about the assault, details which he had previously testified about.[655] First, the court ruled that the superior court did not abuse its discretion when it admitted a witness' prior inconsistent statement without meeting the full foundational requirements of *McMaster v. State*.[656] Ultimately, following *Richards v. State*,[657] *Van Hatten v. State*,[658] and several federal cases, the court ruled that regardless of whether memory loss is feigned or genuine, it is nevertheless inconsistent with a prior statement of remembrance.[659] Therefore, the court affirmed the judgment of the superior court.[660]

In *Wright v. State*,[661] the court of appeals held that the tardiness of a peremptory challenge may not be excused where, once the defendant has counsel, the defendant and counsel fail to diligently pursue the potential peremptory challenge.[662] After being arrested for DWI and refusing to submit to a breath test, Wright was arraigned and his case was assigned to a trial judge.[663] Three months

650. *Id.* at *7.
651. *Id.* at *8-9.
652. *Id.* at *11.
653. 57 P.3d 719 (Alaska Ct. App. 2002).
654. *Id.*
655. *Id.* at 720-21.
656. *Id.* at 722; s*ee* 512 P.2d 879 (Alaska 1973).
657. 616 P.2d 870 (Alaska 1980).
658. 666 P.2d 1047 (Alaska Ct. App. 1983).
659. *Wassilie*, 57 P.3d at 722-23.
660. *Id.* at 723.
661. 38 P.3d 545 (Alaska Ct. App. 2002).
662. *Id*. at 547.
663. *Id.* at 546

after the arraignment, Wright's attorney filed a peremptory challenge of the assigned trial judge.[664] The trial judge ruled that the challenge was untimely.[665] While the court of appeals recognized that *Riley v. State*[666] excuses tardy peremptory challenges where the defendant has not had a chance to consult with counsel, it concluded that the defendant did not qualify for the exception.[667] The record showed that Wright had received notice of the trial judge assigned to his case nearly two months prior to contacting his lawyer and that the lawyer had filed an entry of appearance on August 8, 2001.[668] Nevertheless, Wright argued that his lawyer did not become aware of the trial judge's assignment until August 30, 2001, and that, therefore, the five-day filing clock should have been deemed to have begun on that date.[669] The appellate court rejected this argument as a basis upon which to excuse the tardy peremptory challenge, noting that either Wright did not tell his lawyer about the trial judge assignment or that the attorney failed to ask.[670] In either case, neither Wright nor his attorney acted diligently, a circumstance which *Riley* does not excuse.[671]

VII. EMPLOYMENT LAW

A. Labor Law

In *Barnica v. Kenai Peninsula Borough School District*,[672] the supreme court held that Barnica was not entitled to a judicial remedy because his claim was subject to an agreement to arbitrate.[673] The dispute began when Barnica resigned from his position as a custodian for the school district in August 1995; he sued the district eight months later pursuant to the Human Rights Act, Alaska Statutes section 18.80.220,[674] alleging sex discrimination.[675] The school district requested summary judgment, claiming that Barnica had failed to exhaust the administrative remedies that were con-

664. *Id.*
665. *Id.*
666. 608 P.2d 27 (Alaska 1980).
667. *Wright*, 38 P.3d at 546-47.
668. *Id.* at 546.
669. *Id.* If the clock were deemed to begin running on August 30, 2001, then the filing of the challenge on September 7, 2001, would have been timely. *Id.*
670. *Id.* at 547.
671. *Id.*
672. 46 P.3d 974 (Alaska 2002).
673. *Id*. at 977.
674. ALASKA STAT. § 18.80.220 (Michie 2002).
675. *Barnica*, 46 P.3d at 975.

tained in his collective bargaining agreement.[676] The superior court granted summary judgment in favor of the district.[677] The supreme court affirmed.[678] First, the court found that by enacting the Public Employment Relations Act,[679] the Alaska legislature had specifically provided for certain grievance procedures to be followed with arbitration as the final step.[680] Next, the court found that both common law and state statutes suggest a "strong public policy in favor of arbitration" and "support[] giving primacy to contractual grievance/arbitration clauses."[681] Furthermore, the court found that nothing in the Human Rights Act[682] prohibits the waiver of judicial remedies.[683] The court also compared state law with federal law to provide history and context to the issue and concluded that the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*.[684] "more accurately reflects Alaska policy favoring arbitration" than its decision in *Alexander v. Gardner-Denver Co*.[685] Accordingly, the supreme court affirmed the summary judgment.[686]

In *DeSalvo v. Bryant*,[687] the supreme court held that claims implicating the Alaska Wage and Hour Act[688] (AWHA) are precluded from private settlement.[689] In 1997, a year after being hired, five mining operation employees sued their employers claiming damages for, among other things, failure to pay overtime.[690] Two years later, the employees, without notifying their attorney, entered into a settlement agreement claiming to release all involved from any liability arising from employment at the mine.[691] The superior court

676. *Id*.
677. *Id*.
678. *Id.* at 977.
679. ALASKA STAT. § 23.40.210(a) (Michie 2002).
680. *Barnica*, 46 P.3d at 977-78.
681. *Id*.
682. ALASKA STAT. § 18.80.220 (Michie 2002).
683. *Barnica*, 46 P.3d at 978.
684. 500 U.S. 20 (1991) (establishing a rule that unless Congress showed an intent to preclude a waiver of judicial remedies, then agreements to arbitrate would supercede statutory judicial remedies).
685. 415 U.S. 36 (1974) (holding that an employee was not barred from bringing a discrimination suit under the Civil Rights Act after an unfavorable arbitration decision); *Barnica*, 46 P.3d at 980.
686. *Barnica*, 46 P.3d at 981.
687. 42 P.3d 525 (Alaska 2002).
688. ALASKA STAT. §§ 23.10.050-.150 (Michie 2002).
689. *DeSalvo*, 46 P.3d at 526.
690. *Id.* at 527.
691. *Id*.

later dismissed the action with prejudice while simultaneously denying the plaintiffs' attorney's request for fees.[692] The attorney appealed the judgment and the denial of fees.[693] Reviewing for abuse of discretion, the supreme court remanded.[694] First, it concluded that, because the legislature required court supervision in cases involving overtime claims made under AWHA, the trial court was required to make factual findings regarding whether, under the facts, the AWHA applied.[695] Second, it held that even if the AWHA did not apply, the superior court should nevertheless have deployed the catalyst approach[696] in order to determine whether, under that theory, plaintiffs' attorney was entitled to fees.[697]

In *Fairbanks Fire Association, Local 1324 v. Fairbanks*,[698] the supreme court, after determining that it could consider the merits of the moot dispute under the public interest exception to the mootness doctrine, found that the Alaska Labor Relations Agency (ALRA) had jurisdiction to determine if an issue is subject to arbitration.[699] The union filed grievances against the city on behalf of two ex-firefighters, claiming that the city "improperly refused to rehire [the men] for positions that were open in the fire department."[700] The trial court found that the ALRA did not have jurisdiction to hear the case.[701] The union appealed.[702] Because only the reasoning behind the trial court decision was being challenged and the relief requested by the appealing party had already been granted by the trial court, the supreme court held that the appeal was moot.[703] However, the court found the appeal met the public interest exception to the mootness doctrine: "[T]he issue [was] likely to repeat itself,"[704] "the issue [would] continually evade court review,"[705] and "the issues [were] sufficiently important to the pub-

692. *Id.*
693. *Id.*
694. *Id.* at 528.
695. *Id*. at 528-29.
696. The catalyst approach is a two step inquiry requiring a plaintiff to show a causal connection between the filing of the suit and defendant's action and that the defendant's action was required by law. *Id.* at 530.
697. *Id.* at 530-31 (stating that if a plaintiff prevails under the catalyst theory, the court should award attorneys fees under ALASKA R. CIV. P. 82(b)(2)).
698. 48 P.3d 1165 (Alaska 2002).
699. *Id*. at 1170.
700. *Id.* at 1166.
701. *Id.*
702. *Id.*
703. *Id*. at 1167-68.
704. *Id*. at 1168.
705. *Id*. at 1168-69.

lic interest to merit consideration."[706] The supreme court held that Alaska Statutes section 23.40.210(a)[707] gave the ALRA the power to decide if an issue was arbitrable.[708] The agency was subject to much greater review of its jurisdiction decisions and therefore had greater power than individual arbitrators in determining when issues are subject to arbitration.[709] Accordingly, the supreme court reversed the holding of the trial court.[710]

In *Nunez v American Seafoods*,[711] the supreme court held that an employment contract forum selection clause was invalid because it denied Nunez his right, as provided by the Jones Act,[712] to sue in any eligible forum.[713] Nunez was employed by American Seafoods on a fishing boat.[714] He severely injured himself as a result of a fall on the job and brought suit against his employer alleging admiralty jurisdiction under the federal saving to suitors clause[715] and the Jones Act.[716] American Seafoods moved to dismiss on the basis of a forum selection clause in Nunez's contract.[717] The superior court upheld American Seafoods's motion and dismissed the claim.[718] Reviewing the validity of the forum selection clause and the decision to dismiss de novo, the supreme court reversed.[719] First, the supreme court drew a distinction between general maritime law, on one hand, and the saving to suitors clause and the Jones Act on the other.[720] Only in general maritime law is there a strong presumption in favor of the validity of forum selection clauses.[721] The Jones Act and the saving to suitors clause modify the general maritime law, conferring distinct rights upon injured seamen.[722] After examining the history of the Jones Act, the supreme court concluded that under its provisions Congress intended to restrict an employer's ability to contractually limit a worker's substantive

706. *Id*. at 1169.
707. ALASKA STAT. § 23.40.210(a) (Michie 2002).
708. *Fairbanks Fire Association,* 48 P.3d. at 1169-70.
709. *Id*. at 1170.
710. *Id*.
711. 52 P.3d 720 (Alaska 2002).
712. Jones Act, 46 U.S.C. § 688 (2000).
713. *Nunez*, 52 P.3d at 721.
714. *Id.*
715. 28 U.S.C. § 1333 (2000).
716. 46 U.S.C. § 688(a) (2000).
717. *Nunez*, 52 P.3d at 721.
718. *Id.*
719. *Id.* at 721, 724.
720. *Id.* at 721-22.
721. *Id.* at 721.
722. *Id.* at 722.

rights.[723] Accordingly, the supreme court held that the forum selection clause violated Nunez's rights and reversed the lower court.[724]

B. Workers' Compensation

In a per curiam opinion in *Bauder v. Alaska Airlines, Inc.*,[725] the supreme court affirmed the superior court's affirmation of the Alaska Workers' Compensation Board for the reasons contained in the superior court's opinion.[726] Brock Bauder injured his back while working for Alaska Airlines in 1993.[727] He filed a workers' compensation claim that was eventually reduced by the Alaska Workers' Compensation Board and controverted by Alaska Airlines.[728] Bauder subsequently filed suit in superior court, claiming that he was entitled to increased benefits, penalties, and attorney's fees; he also alleged that Alaska Airlines' controversion of his workers' compensation claim was frivolous or unfair.[729] The superior court affirmed the decisions of the Workers' Compensation Board, holding that the Board's conclusions (reducing Bauder's benefits, denying penalties and attorney's fees, and finding that the controversion was not frivolous or unfair) were supported by substantial evidence.[730]

In *Bustamante v. Alaska Workers' Compensation Board*,[731] the supreme court held that a trial court has discretion to waive costs associated with the preparation of transcriptions on an administrative appeal.[732] Bustamante filed a complaint with the Alaska Workers' Compensation Board claiming that he was injured while working at Space Mark.[733] The Board held that Bustamante did not suffer a compensable injury in the course and scope of his employment.[734] Bustamante appealed the decision to the superior court and requested a court-appointed attorney.[735] The trial court refused his request for an attorney and eventually dismissed Bustamante's claim because he failed to pay for the preparation of the

723. *See id.* at 723.
724. *Id.* at 724.
725. 53 P.3d 166 (Alaska 2002).
726. *Id.* at 168.
727. *Id.* at 169.
728. *Id.* at 171-73.
729. *Id.* at 173-74.
730. *Id.* at 180-82.
731. 59 P.3d 270 (Alaska 2002).
732. *Id*. at 272-73.
733. *Id*. at 271.
734. *Id*.
735. *Id*. at 272.

transcripts from the compensation board hearings.[736] Bustamante appealed and the supreme court held that the trial court erred because it did have discretion to waive the costs of preparing a transcript on administrative appeals as "financial hardship should not preclude access to the courts."[737] However, the court held that Bustamante was not entitled to a court-appointed attorney because "the private interest of a litigant to have counsel in a worker's compensation case is not nearly as strong as the interest in cases where litigants are already afforded appointed counsel."[738] Accordingly, the supreme court affirmed the trial court's denial of Bustamante's request for appointed counsel, reversed the order of dismissal, and remanded the case for the trial court to "exercise its discretion regarding the preparation of a transcript."[739]

In *Dougan v. Aurora Electric Inc.,*[740] the supreme court affirmed the superior court's finding that the Alaska Worker's Compensation Board properly denied penalties and interest on compensation payments to Randy Dougan.[741] Dougan injured his lower back while working as an electrician for Aurora Electric.[742] Dougan saw multiple doctors, was placed on disability, and received pay from Aurora.[743] Dougan filed a petition to the Alaska Workers' Compensation Board alleging misconduct in handling his claims.[744] After adverse rulings at the board level and on appeal in superior court, Dougan appealed to the supreme court.[745] The supreme court affirmed the superior court's ruling about the penalties and interest, finding that Aurora controverted the claims in good faith and that Dougan was not entitled to penalties or interest.[746] The supreme court also found that although the superior court erred in dismissing thirteen of his fifteen claims, eleven of the claims were without merit.[747] Thus, the supreme court remanded the remaining two claims to the superior court for factual determination.[748] Finally, the supreme court reversed the superior court's

736. *Id*.
737. *Id*. at 273.
738. *Id*. at 274.
739. *Id*. at 275.
740. 50 P.3d 789 (Alaska 2002).
741. *Id.* at 794.
742. *Id.* at 791.
743. *Id.* at 791-92.
744. *Id.* at 792.
745. *Id.* at 793.
746. *Id.* at 794-95.
747. *Id.* at 795.
748. *Id.* at 791.

remand of the compensation rate adjustment and held that the *Gilmore* test is no longer necessary when the Board's initial determination of compensation is based on the amended version of Alaska Statutes section 23.20.220.[749]

In *Gaede v. Saunders*,[750] the supreme court held that private common law employees may not recover under the Worker's Compensation Act[751] because such employees are not employed "'in connection with a business or industry.'"[752] The supreme court affirmed the Worker's Compensation Board's denial of Gaede's claim for worker's compensation benefits, because Gaede was merely hired by the Saunders to build an addition to their home when he fell off the ladder and was injured.[753] The supreme court ruled that the Worker's Compensation Act[754] entitles employees to recover benefits in the event of work-related disability or death only where the employer is "the state or its political subdivision or a person employing one or more persons in connection with a business or industry."[755] Following the court's earlier decisions in *Kroll v. Reeser*[756] and *Nickels v. Napolilli*,[757] the court further ruled that the Saunders' building project was not "a business or industry" because it was not a profit-making enterprise "with a view toward producing goods,"[758] but instead was merely intended for their personal consumption. Thus the Saunders were not employers, and Gaede was not an employee entitled to recovery under the Act.[759]

In *Justice v. RMH Aero Logging, Inc.*,[760] the supreme court held that the Alaska Workers' Compensation Board properly adjusted an employee's compensation rate after he applied for a retroactive adjustment.[761] Dan Justice began working at RMH Aero Logging, Inc. ("RMH") in February 1993.[762] On June 3, 1993, Justice injured his foot while on the job and—because the injury did not heal—was unable to work after June 30.[763] Following the in-

749. *Id.* at 797; ALASKA STAT. § 23.20.220 (Michie 2002).
750. 53 P.3d 1126 (Alaska 2002).
751. ALASKA STAT. § 23.30.395 (Michie 2002).
752. *Gaede*, 53 P.3d at 1127 (quoting § 23.30.395(13)).
753. *Id.* at 1126.
754. ALASKA STAT. § 23.30.395 (Michie 2002).
755. *Gaede*, 53 P.3d at 1127 (quoting § 23.30.395(13)).
756. 655 P.2d 753 (Alaska 1982).
757. 29 P.3d 242 (Alaska 2001).
758. *Gaede*, 53 P.3d at 1127.
759. *Id.*
760. 42 P.3d 549 (Alaska 2002).
761. *Id*. at 551.
762. *Id.*
763. *Id*.

jury, Justice received temporary total disability (TTD) payments[764] from July 10, 1993, until August 9, 1994, at which point he reached "medical stability" and began receiving only payments for his permanent partial impairment (PPI).[765] On October 13, 1997, Justice was injured again after his injured foot spasmed while he was working on the roof of his house and caused him to fall.[766] RHM responded by reinstating his TTD benefits, effective September 1, 1997.[767] In December 1997, Justice filed a workers' compensation claim with the Workers' Compensation Board.[768] He amended the complaint in May 1998 to seek a retroactive adjustment of the original TTD payments, claiming that the calculation of his payment was incorrect because his income in 1992 was "aberrationally low and did not accurately predict his future lost wages."[769] The Compensation Board granted the adjustment, based on *Gilmore v. Alaska Workers' Compensation Board*,[770] and RMH appealed to the superior court which affirmed the Compensation Board's retroactive adjustment.[771] In reviewing the decision of the Compensation Board,[772] the supreme court analyzed the application of *Gilmore* to Justice's claim.[773] First, the court applied the four *Byayuk*[774] factors to decide whether the *Gilmore* decision should apply to Justice's claim since *Gilmore* was decided after Justice's original injury.[775] The court concluded that *Gilmore* did apply to claims like

764. The payment amount was $153 per week which was calculated based on Justice's gross income from the two previous years; his tax returns indicated that he made $16,589 in 1992 and $4,305 in 1991. *Id*.

765. *Id*.

766. *Id*. at 552.

767. *Id*.

768. *Id.*

769. *Id*.

770. 882 P.2d 992 (Alaska 1994) (holding that former Alaska Statutes section 23.30.220(a) violated the equal protection clause of the state constitution as it was applied to Gilmore).

771. *Justice*, 42 P.3d at 552.

772. *Id*. ("[The supreme court] independently review[s] the merits of an agency determination when a superior court acts as an intermediate court of appeal.")

773. *Id*.

774. *Commercial Fisheries Entry Comm'n v. Byayuk*, 684 P.2d 114 (Alaska 1984). The four factors are: (1) whether the holding either overrules prior law or decides an issue of first impression; (2) whether the purpose and intended effect of the new rule of law is best accomplished by a retroactive or prospective application; (3) the extent of reasonable reliance upon the old rule of law; and (4) the effect on the administration of justice of a retroactive application of the new rule of law. *Justice*, 42 P.3d at 554.

775. *Justice*, 42 P.3d at 554.

Justice's so long as the claim was "open to adjudication" and the issue had been preserved for appeal.[776] As to Justice's claim, the court held that the claim was open for adjudication because RMH waived its statute of limitations defense since it had received notice of the claim but failed to object at the initial hearing.[777] Finally, the court found the Compensation Board properly granted the rate adjustment because it focused its inquiry on whether Justice's past earnings were an "accurate predictor of his future lost earnings" and had substantial evidence to support its determination that Justice's past employment history was not an accurate predictor.[778] Accordingly, the supreme court affirmed the portion of the superior court decision that affirmed the Compensation Board's decision and reversed and remanded—with instructions to affirm—the portions which did not affirm the Compensation Board.[779]

In *Robertson v. American Mechanical, Inc.*,[780] the supreme court held that Robertson's amended workers' compensation claim was unlawful claim-splitting barred by the doctrine of res judicata.[781] The Alaska Workers' Compensation Board dismissed Robertson's initial report of occupational injury based upon his lower back condition.[782] Robertson then filed an amended report of occupational injury that was functionally identical to his first report but signified an earlier injury date.[783] The Board dismissed this claim on the basis of res judicata.[784] The supreme court affirmed, finding Robertson's amended claim was based upon the same injury and the same "core set of facts" as his initial claim, and thus both claims should have been brought at the same time.[785]

In *Williams v. Abood*,[786] the supreme court affirmed the Workers' Compensation Board's disposition of a workers' compensation claim.[787] The plaintiff injured his knee while working for the defendant.[788] He received workers' compensation and medical benefits during his treatment and recovery.[789] He later developed an addic-

776. *Id*. at 556.
777. *Id*. at 557.
778. *Id*. at 557-58.
779. *Id*. at 558.
780. 54 P.3d 777 (Alaska 2002).
781. *Id*. at 780.
782. *Id*. at 778.
783. *Id*.
784. *Id*.
785. *Id*. at 780.
786. 53 F.3d 134 (Alaska 2002).
787. *Id.* at 136.
788. *Id.*
789. *Id.* at 136-37.

tion to painkillers and various psychological problems following his procedure.[790] He eventually brought a variety of claims against the defendant and reached a compromise and release of virtually all of his workers' compensation claims originating prior to July 1, 1997.[791] However, in 1998, the plaintiff sued again and requested a number of additional workers' compensation benefits.[792] The Workers' Compensation Board denied most of the plaintiff's claims.[793] The Board also severely limited the plaintiff's request for attorney's fees for both his new attorney and his previous attorney.[794] The previous attorney submitted an affidavit regarding his services to the plaintiff and had attempted to supplement his initial affidavit with oral testimony and two late-filed, supplemental affidavits.[795] The Board refused to consider the late-filed affidavits and awarded the statutory minimum for the attorney's services.[796] The plaintiff subsequently appealed to the supreme court, which affirmed the Board in all respects.[797] Specifically, the supreme court held that a majority of the plaintiff's claims were disposed of by the compromise and release, that the compromise and release was valid, that the plaintiff was not entitled to any penalties or claims for unfair or frivolous controversion of benefits against the defendant, that there was no misconduct by the Board's panel during the hearing, and that the Board's denial of the plaintiff's motion for reconsideration was valid.[798] Additionally, the supreme court reversed the superior court and held that the Board had the right to punish the prior attorney for late filing and thus to exclude the late-filed affidavits.[799] Finally, the supreme court held that the plaintiff's new attorney was entitled to only one-half of his fees in recognition of the fact that most of the plaintiff's claims were denied.[800]

In *Wollaston v. Schroeder Cutting, Inc.*,[801] the supreme court overturned a decision by the Workers' Compensation Board that there was substantial evidence to overcome the presumption of

790. *Id.* at 137.
791. *Id.*
792. *Id.* at 138.
793. *Id.*
794. *Id.*
795. *Id.*
796. *Id.*
797. *Id.* at 136, 139.
798. *Id.* at 139-48.
799. *Id.* at 140.
800. *Id.* at 148.
801. 42 P.3d 1065 (Alaska 2002).

compensability for a logger's ankle injury.[802] Plaintiff Wollaston was working as a logger for defendant Schroeder Cutting, Inc., when he injured his ankle after stepping in a hole.[803] Wollaston was diagnosed with a mild ankle sprain that would need seven to ten days to heal.[804] Over six months later, Wollaston obtained a second opinion that he was still unable to work and had suffered a permanent partial impairment of four percent.[805] A year before the injury, Wollaston had injured that same ankle while playing basketball, and co-workers had noticed that he subsequently walked with a limp.[806] In a workers' compensation action brought by Wollaston, the Board, relying on the original diagnosis, found that for the ten day period immediately following the injury there was substantial evidence to overcome the presumption of compensability.[807] On appeal, the supreme court noted that the statutory presumption of compensability[808] may be rebutted by presenting a qualified expert who testifies that, in his opinion, the claimant's work was probably not a substantial cause of the disability.[809] The court held that the testimony of the original diagnosis did not satisfy this burden because it did not (1) exclude the work-related injury as a cause of Wollaston's continuing problems, (2) directly eliminate the possibility that the work-related injury had consequences beyond the ten days following the injury, and (3) contain the doctor's opinion that Wollaston's disability was probably not substantially attributable to the work-related injury.[810]

C. Miscellaneous

In *Charles v. Interior Regional Housing Authority*,[811] the supreme court reversed the trial court in holding that the plaintiff had alleged sufficient facts to survive defendant's summary judgment motion.[812] Charles, after resigning from Interior Regional Housing Authority, sued for constructive discharge and breach of the im-

802. *Id.* at 1066, 1068-69.
803. *Id.* at 1065.
804. *Id.*
805. *Id.*
806. *Id.* at 1066.
807. *Id.*
808. ALASKA STAT. § 23.30.120(a) (Michie 2002).
809. *Wollaston*, 42 P.3d at 1067 (citing Big K Grocery v. Gibson, 836 P.2d 941, 942 (Alaska 1992)).
810. *Id.* at 1067-68.
811. 55 P.3d 57 (Alaska 2002).
812. *Id*. at 63.

plied covenant of good faith and fair dealing.[813] Charles claimed he was threatened by a co-worker, was subjected to unwarranted criticism, had responsibilities reassigned, was excluded from meetings, had his travel plans canceled, and was falsely accused of nepotism.[814] Charles was forced to clean out his desk six days after he had given thirty days notice of his resignation.[815] The trial court granted summary judgment in favor of the Housing Authority, holding that Charles had not presented sufficient evidence to create an issue of fact as to whether to impute these actions to the Housing Authority.[816] On appeal, the supreme court held that Charles had alleged facts sufficient to impute the harassment to the Housing Authority.[817] Charles's allegation that his supervisor knew or should have known about the harassment and failed to take reasonable steps to prevent it raised an issue of fact as to whether Charles was constructively discharged.[818] Further, because Charles alleged that the Housing Authority "failed to treat similarly situated employees alike" regarding the nepotism policy, the supreme court held that there was a sufficient issue of fact as to whether the Housing Authority breached the covenant of good faith and fair dealing.[819]

In *Pitka v. Interior Regional Housing Authority*,[820] the supreme court ruled that Pitka's complaint for wrongful discharge was unable to withstand a motion for summary judgment.[821] After the successful resolution of her grievance, Pitka alleged that IRHA had demoted her from a Grade 4 to a Grade 3 position, even though she had previously been paid at the Grade 3 level.[822] After the superior court granted summary judgment in favor of IRHA, Pitka appealed the decision and raised new issues of procedural impropriety by IRHA.[823] After dismissing the new procedural issues,[824] the supreme court affirmed the holding of the superior court.[825] No breach of the implied duty of good faith and fair dealing was found

813. *Id*. at 59-60.
814. *Id.*
815. *Id*.
816. *Id*. at 59.
817. *Id*. at 63.
818. *Id*. at 61-62.
819. *Id*. at 62-63.
820. 54 P.3d 785 (Alaska 2002).
821. *Id.* at 790.
822. *Id.* at 787.
823. *Id.* at 788.
824. *Id.* at 788-89.
825. *Id.* at 790.

because Pitka left on her own volition, she was not, in fact, demoted, and IRHA "went out of its way to accommodate Pitka."[826] The court also denied Pitka's claims of constructive discharge, stating that mere criticism of job performance does not create intolerable working conditions, and pointing to the absence of any campaign forcing Pitka to resign.[827]

VIII. FAMILY LAW

A. Child Support

In *Fernau v. Rowdon*,[828] the supreme court affirmed the trial court's calculation of income for former spouses used to determine the proper amount of child support payments.[829] First, the supreme court held that an individual's income calculation should not be reduced due to temporary changes in income.[830] The supreme court found that Fernau's "historical ability to earn well over $100,000 annually" as a physician justified his inclusion in the highest possible income category even though his income had been reduced in recent months due to the costs of setting up a private medical practice.[831] Next, the supreme court held that Rowdon's income should not include alimony from Fernau.[832] However, rent payments or proceeds from the lease or sale of property she received in the divorce must be included in her income for child support purposes, even though the payments were characterized as "uncertain" or "sporadic."[833] The supreme court also found it was proper to calculate only a part-time income for Rowdon because she was currently seeking job-training.[834] The supreme court also affirmed the trial court's decision to vary the amount of child support upward pursuant to Alaska Rule of Civil Procedure 90.3(c)[835] Under Rule 90.3(c), a court may vary a child support award "for good cause upon proof by clear and convincing evidence that manifest injustice would result if the support award were not varied."[836] The court found that "the nature of [the] hybrid custody situation, including

826. *Id.* at 789-90.
827. *Id.* at 790.
828. 42 P.3d 1047 (Alaska 2002).
829. *Id*. at 1053-57.
830. *Id*. at 1053-54.
831. *Id*.
832. *Id*. at 1054.
833. *Id*. at 1055.
834. *Id*.
835. ALASKA R. CIV. P. 90.3(c); *Fernau*, 42 P.3d at 1057-58.
836. ALASKA R. CIV. P. 90.3(c)(1).

the additional time the children were to spend with the mother, . . . the disparity in earning potential, and [Rowdon]'s need to pursue a career opportunity while caring for three children" made this an unusual case in which variance was proper.[837] Additionally, the supreme court found that awarding Rowdon rehabilitative alimony to help pay for her education was proper, given that she met the requirements set out by the court.[838] Rowdon had met these requirements by identifying "her choice to become a teacher, the costs, and the time required for her education" while Fernau had largely accepted the need for the education.[839] Finally, the supreme court held that given the disparity in the economic situation between the two parties, as well as the small size of the marital estate, the awarding of attorney's fees to Rowdon was not an abuse of the trial court's discretion.[840]

In *Hubbard v. Hubbard*,[841] the supreme court held that the stepfather of a child was equitably estopped from having his paternity disestablished because the financial harm element of estoppel had been satisfied.[842] The supreme court found that the custodial parent of the child had proven that the stepfather, in urging the natural mother of the child to terminate child support proceedings against the child's natural father, had taken positive action in removing the obligation of the natural father to support the child.[843] With the child and his natural mother facing the uncertain cost and success of reestablishing child support obligations against the natural father, the supreme court found the financial harm element of estoppel had been satisfied.[844] Accordingly, the judgment of the trial court holding that the stepfather was equitably estopped from disestablishing paternity was affirmed.[845]

In *Laybourn v. Powell*,[846] the supreme court affirmed the superior court's decision to impute income to Laybourn for purposes of determining the amount of his child support payments.[847] The court held it was proper to impute income to Laybourn in the amount of an estimation as to his earning capacity and not based on an actual

837. *Fernau*, 42 P.3d at 1057.
838. *Id*. at 1058.
839. *Id*.
840. *Id*. at 1060.
841. 44 P.3d 153 (Alaska 2002).
842. *Id*. at 154-55.
843. *Id*. at 157.
844. *Id*.
845. *Id*.
846. 55 P.3d 745 (Alaska 2002).
847. *Id*. at 746.

accounting of his income because the court found that Laybourn had underreported his income and was actively concealing his actual earnings.[848] The court also held that the trial judge was not biased against Laybourn in warning him of the compelling nature of Powell's evidence prior to Laybourn presenting his case.[849] The trial judge instead was proper in warning Laybourn prior to the presentation of his case of the possible consequences of presenting false testimony and evidence to the court.[850] Finally, the awarding of enhanced attorney's fees was not manifestly unreasonable where the trial judge made a finding, supported by the record, of bad faith or vexatious conduct by a party.[851]

In *Olmstead v. Ziegler*,[852] the supreme court held that modification of child support was not warranted where the responsible party was voluntarily and unreasonably underemployed and where his earning capacity was unchanged.[853] Olmstead and Ziegler, both attorneys, were divorced in 1994, and Olmstead agreed to pay their daughter's daycare and education expenses.[854] However, in 1996, Olmstead's legal partner left and forced him to become a solo practitioner.[855] Although he actively sought other employment, Olmstead's earnings decreased, leading him to choose to return to school to become a teacher.[856] In 1999, Olmstead filed a motion for an order modifying child support which was subsequently denied.[857] On appeal, the supreme court held that the trial court had not abused its broad discretion in denying Olmstead's motion and agreed with the trial court that Olmstead had voluntarily reduced his workload as an attorney even before he changed careers.[858] The supreme court also held that the trial court properly considered factors other than Olmstead's decreased earnings such as the reason for the lower earnings and the impact of Olmstead's career choice on the child.[859] Finally, the supreme court held that the trial

848. *Id*. at 747.
849. *Id*. at 748.
850. *Id*.
851. *Id*.
852. 42 P.3d 1102 (Alaska 2002).
853. *Id.* at 1103.
854. *Id.*
855. *Id.* at 1103-04.
856. *Id.* at 1104.
857. *Id.*
858. *Id.* at 1105.
859. *Id.* at 1106.

court had adequately supported its findings that Olmstead's earning capacity had not decreased.[860]

In *Osmar v. Mahan*,[861] the supreme court held that children's insurance benefits should not be included in a mother's income when calculating child support. Mindy Lynn Osmar and Chris Osmar married and had one child, Ashley.[862] Chris became disabled and later died.[863] Mindy received Social Security children's insurance benefits (CIB) because of Chris's disability and death.[864] Mindy later married Gary Mahan, with whom she had one son, Steele Mahan, before getting a divorce.[865] In determining the amount of child support Mindy would receive from Gary, the superior court included in Mindy's income the CIB payments that Mindy received on Ashley's behalf.[866] The supreme court reversed, finding that Mindy was constrained by federal law from using the CIB payments for anything other than Ashley's maintenance and care.[867] Because the money was not available to Mindy to support Steele while Mindy and Gary were still married, the court held that it should not be included in Mindy's income for purposes of calculating child support.[868] Additionally, the court cited Alaska Civil Rule 90.3[869] for the proposition that child support is not income.[870] The court found that the CIB payments were a substitute for Ashley's father's child support and thus were more appropriately characterized as child support than as income for Ashley.[871]

B. Child Custody

In *Atkins v. Vigil*,[872] the supreme court held that Alaska was a child's home state, thus giving Alaska jurisdiction to hear the child custody dispute.[873] Julian Atkins was born to Veronica Vigil and Tracy Atkins in 1996.[874] In 2001, Julian went to stay with Veron-

860. *Id.* at 1107.
861. 53 P.3d 149 (Alaska 2002).
862. *Id.* at 149.
863. *Id.*
864. *Id.*
865. *Id.*
866. *Id.* at 150.
867. *Id.* at 151.
868. *Id.*
869. ALASKA R. CIV. P. 90.3.
870. *Id.*
871. *Osmar*, 53 P.3d at 151.
872. 59 P.3d 255 (Alaska 2002).
873. *Id.* at 258.
874. *Id.* at 256.

ica's mother, Julie Roby, who resided in California. Less than six months after Julian went to stay with her, Roby filed a petition in California to be Julian's guardian.[875] Tracy Atkins objected to Roby's petition in Alaska.[876] The Alaska superior court held that it did not have jurisdiction to hear the case because California was Julian's home state. Alternatively, it held that even if there was jurisdiction, California's proceeding still preempted Alaska's jurisdiction.[877] The supreme court reversed the superior court's decision. The supreme court held that Julian's home state was Alaska because Roby commenced the California proceeding less than six months after Julian came to stay with her.[878] Since a child must reside in a state for at least six months for it to be the child's home state, Julian's stay with Roby did not satisfy this requirement.[879] Furthermore, the supreme court held that Alaska had jurisdiction to hear the dispute because a child's home state has exclusive jurisdiction in child custody cases.[880]

In *Fardig v. Fardig*,[881] the supreme court held that a modification of custody order was properly granted in favor of the minor's father, because (1) evidence of the mother's drug abuse was not precluded by res judicata or collateral estoppel, (2) her move to another state was a substantial change in circumstances,[882] and (3) a grant of custody to the father was in the child's best interests.[883] Owen (the mother) and Fardig (the father) were divorced in 1995, and custody was granted to Owen.[884] One year later, Fardig moved for modification of custody, claiming that Owen's drug usage impaired her ability to properly parent her child.[885] His motion was granted, and the judge held that Owen's recent move to California constituted a "substantial change in circumstances."[886] The supreme court held that evidence of Owen's drug use was not barred by earlier custody litigation regarding domestic violence, as a "motion to modify custody does not relitigate a past decision."[887] Al-

875. *Id.*
876. *Id.*
877. *Id.* at 257.
878. *Id.*
879. *Id.*
880. *Id.* at 258.
881. 56 P.3d 9 (Alaska 2002).
882. *Id*. at 11.
883. *Id*. at 12.
884. *Id*. at 11.
885. *Id*.
886. *Id*.
887. *Id*. at 12.

though Owen claimed that her move to California was temporary, enough evidence was presented that this move constituted a substantial change in circumstances.[888] Finally, Owen's drug use was among several factors upon which it was reasonable to conclude that custody by Fardig would be in the best interests of the child.[889] Pursuant to Alaska law, a nine-factor test is used to determine what is in the best interests of the child, and includes accounting for the physical and emotional needs of the child and the capability of each parent.[890] In this case custody was properly awarded to Fardig.[891]

In *Hamilton v. Hamilton.*,[892] the supreme court held that the trial court did not err in making its factual findings nor did it abuse its discretion by transferring primary physical custody from the mother to the father.[893] Initially, each parent was awarded joint legal custody with primary physical custody being awarded to the mother.[894] However, the father moved to change primary physical custody because his ex-wife prevented him from visiting the children according to the child custody agreement and then moved out-of-state without notice to the father.[895] The trial court, in granting the father's motion to modify the custody, held that "the desire and ability of each parent to allow an open and loving frequent relationship between the child and the other parent" was the most important statutory factor in determining the best interests of the children.[896] The supreme court found that the factual findings behind this decision satisfied the applicable standard of review and were not clearly erroneous.[897] The supreme court also affirmed the trial court decision, finding the trial court did not abuse its discretion in modifying the custody order to award custody to the father because the ex-wife's move out-of-state constituted a substantial change in circumstances,[898] and a change in custody was in the best interests of the children.[899] Additionally, the supreme court found

888. *Id*. The evidence suggested that her move might potentially be long-term. *Id.*

889. *Id*. at 12-13.

890. ALASKA STAT. § 25.24.150(c) (Michie 2002).

891. *Fardig*, 56 P.3d at 14.

892. 42 P.3d 1107 (Alaska 2002).

893. *Id.* at 1110.

894. *Id.*

895. *Id.* at 1111.

896. *Id.*

897. *Id.*

898. *Id.* at 1114-15.

899. *Id.* at 1115.

the trial court did not abuse its discretion in finding the need for the children to have a more open and loving relationship with their father outweighed the need for stability in their relationship with their mother, finding that the father was acting to pull the children to himself rather than away from their mother.[900] Finally, the supreme court affirmed the trial court's discretion in addressing both the religious and cultural needs of the children.[901]

In *Kelly v. Joseph*,[902] the supreme court held that a modification of a child custody order was appropriate because there was sufficient evidence of "changed circumstances" to meet the statutory requirements of Alaska Statutes section 25.20.110(a),[903] and the evidence showed that the change would be in the best interests of the children under Alaska Statutes section 25.24.150(c).[904] The custody agreement for the three children was first established in October 1999.[905] In December 2000, Kelly moved to modify the custody and visitation provisions of the agreement that were intended to give Kelly contact with the children via telephone and during holidays.[906] The superior court modified the custody agreement and granted primary physical custody of two of the children to Kelly in early 2001.[907] The supreme court upheld the decision of the superior court regarding the modifications of the custody agreement.[908] The court found that evidence of Joseph's interference with Kelly's custodial visitation rights was sufficient to show "changed circumstances" required by section 25.20.110(a) for the modification of a child custody agreement.[909] The court found that the superior court had adequately conducted a "best interest analysis" because it had considered the children's need for professional mental health care and how relocating might affect their educational opportunities.[910]

In *Moeller-Prokosch v. Prokosch*,[911] the supreme court held that the superior court failed to comply adequately with the remand instructions included in the supreme court's prior opinion re-

900. *Id.* at 1116.
901. *Id.* at 1116-18.
902. 46 P.3d 1017 (Alaska 2002).
903. *Id.* at 1017 (citing ALASKA STAT. § 25.20.110(a) (Michie 2002)).
904. *Id.* at 1018-19 (citing ALASKA STAT. § 25.24.150(c) (Michie 2002)).
905. *Id.* at 1016.
906. *Id.*
907. *Id*. at 1016-17.
908. *Id*. at 1019.
909. *Id.* at 1017-18.
910. *Id*. at 1018.
911. 53 P.3d 152 (Alaska 2002).

garding the parents' custody dispute.[912] In the initial proceeding, the superior court awarded both parents legal custody of their son, awarding the mother primary physical custody with the caveat that she was not allowed to relocate the son more than sixty-five miles from the father's residence.[913] Wishing to relocate to Florida, the mother appealed.[914] In its remand instructions, the supreme court instructed the superior court to determine what would be in the best interests of the son, assuming that the mother would move to Florida, and whether the mother's proposed move was motivated by a desire to make visitation more difficult for the father.[915] On remand, the superior court modified the joint custody order, giving the father sole legal authority to decide where the son attended school.[916] The superior court maintained the mother's primary physical custody as long as she resided within a reasonable distance of the father's choice of schools, but giving the father primary physical custody if she should move beyond that distance.[917] On appeal, the mother argued that the modified joint legal custody award had the same effect of preventing her from moving to Florida, and that ordering an automatic shift in custody if she should move to Florida failed to assume that such a move would take place and precluded any determination as to her motives for moving.[918] However, the supreme court ruled that because the superior court's decision was primarily motivated by an attempt to give the son frequent contact with both parents, it was clear that the superior court had failed to assume that the mother would move to Florida and had not determined the mother's motives for moving.[919] For that reason, the supreme court vacated the superior court's order and remanded for further proceedings.[920]

In *Potter v. Potter*[921] the supreme court affirmed the superior court's modification of child support, yet reversed the modification of visitation privileges.[922] David Potter and Shelly Brewster received a divorce in 1990 which allowed for shared physical custody

912. *Id.* at 153.
913. *Id.*
914. *Id.*
915. *Id.*
916. *Id.* at 154.
917. *Id.*
918. *Id.*
919. *Id.* at 156-57.
920. *Id.* at 157.
921. 55 P.3d 726 (Alaska 2002).
922. *Id.* at 730.

of their daughter and for David to pay child support.[923] Over the years, the parties amicably shared custody and visitation, yet as time went on, Potter saw less of his daughter as she primarily lived with Brewster.[924] As a result, Brewster filed a motion to increase child support and to modify visitation.[925] However, the court stated that the trial would be confined to the child support issue.[926] At trial, the superior court increased child support payments and modified the visitation agreement.[927] On appeal, the supreme court reversed the modification of visitation because Potter was not given notice that it would be an issue in the evidentiary proceedings and thus the superior court's order did not satisfy due process.[928] At a minimum, due process under the Alaska Constitution requires that the parties be notified of the subject of proceedings so that they will have a reasonable opportunity to be heard.[929] Accordingly, the notice requirement was not satisfied and the visitation modification was reversed.

In *Velasquez v. Velasquez*,[930] the supreme court held that it was proper to consider the manner in which the mother left the marriage in determining whom to award custody of the couple's three minor children.[931] In 1998, Cindy Velasquez abruptly left her marital home without notifying the family of her whereabouts and failed to maintain contact with her children afterwards.[932] The trial court awarded custody of the minor children to Joe Velasquez, concluding that the manner in which Cindy left the residence and her lack of contact with her children was indefensible.[933] Reviewing the trial court's holding for abuse of discretion, the supreme court concluded that the trial court properly considered Cindy's departure without notice, her avoidance of the children and the effect her conduct had upon the children in making its custody determination.[934] Such consideration was in accordance with Alaska Statutes section 25.24.150(c),[935] which requires the court to consider the

923. *Id.* at 727.
924. *Id.*
925. *Id.*
926. *Id.* at 728.
927. *Id.*
928. *Id.*
929. *Id.*
930. 38 P.3d 1143 (Alaska 2002).
931. *Id*. at 1149.
932. *Id*. at 1145.
933. *Id*.
934. *Id*. at 1146-47.
935. ALASKA STAT. § 25.24.250(c) (Michie 2002).

best interests of the children when awarding custody.[936] The court found that the effect of Cindy's abandonment upon the emotional welfare of her children goes directly to the issue of the children's best interests.[937] Accordingly the award of custody of the minor children to Joe was affirmed.[938]

C. Adoption and Termination of Parental Rights

In *E.A. v. State, Division of Family & Youth Services*,[939] the supreme court held that the State proved by a preponderance of the evidence that it made "active efforts" to prevent the breakup of the child's family,[940] and that the State proved beyond a reasonable doubt that the child would likely suffer serious emotional harm if he was returned to his mother's custody.[941] E.A., a mother of five children,[942] had a history of substance abuse.[943] She relinquished her parental rights to her eldest three children as well as her youngest.[944] Her fourth child, H.O., an Indian child, was removed from E.A.'s custody, and the trial court later terminated E.A.'s parental rights to H.O. upon findings under 25 U.S.C. § 1912(d)[945] and § 1912(f).[946] E.A. argued on appeal that the State did not make "active efforts" because it failed to obtain an updated psychological evaluation of E.A and failed to make active remedial efforts for a period of seven months.[947] E.A. also challenged the trial court's holding that her custody of H.O. would likely cause him serious emotional harm.[948] The supreme court held that the trial court did not err in finding that an additional psychological evaluation of E.A. would have been of "marginal value."[949] In reaching its decision, the supreme court specifically cited E.A.'s inability to overcome her substance abuse problems[950] and her "demonstrated lack

936. *Velasquez*, 38 P.3d at 1147.
937. *Id*.
938. *Id*. at 1149.
939. 46 P.3d 986 (Alaska 2002).
940. *Id*. at 988.
941. *Id*.
942. *Id*. at 988 n.1.
943. *Id*. at 988.
944. *Id*. at 988 n.1.
945. 25 U.S.C. § 1912(d) (2000).
946. 25 U.S.C. § 1912(f) (2000).
947. *E.A.*, 46 P.3d at 990.
948. *Id*. at 991.
949. *Id*. at 990.
950. *Id*.

of willingness to participate in treatment."[951] The supreme court further held that the State's failure to make active efforts to prevent a breakup of the family was insignificant in light of the extensive remedial efforts the State had provided throughout its involvement with E.A.'s children apart from the seven-month period.[952] Additionally, the supreme court held that the expert testimony of H.O.'s therapist and a clinical psychologist, in combination with "substantial evidence in the record," supported the trial court's finding that H.O. would likely suffer serious emotional harm if returned to E.A.'s custody.[953]

In *J.A. v. State, Division of Family & Youth Services*,[954] the supreme court held that expert testimony as to the serious degree of harm J.A.'s children would likely suffer if they were returned to J.A.'s custody was sufficiently related to the facts and issues of the case, despite the fact that the experts based their opinions on hypothetical situations and a limited review of the family's case file.[955] In response to reports of sexual abuse and neglect, the Alaska Department of Health and Social Services, Division of Family and Youth Services (DFYS) obtained temporary legal custody of each of J.A.'s three children.[956] Subsequently, DFYS filed, and the superior court granted, a petition to terminate both parents' parental rights.[957] On appeal, J.A. asserted three arguments under the Indian Child Welfare Act:[958] (1) that the experts' testimony was improperly based on hearsay reports of sexual abuse;[959] (2) that the experts' testimony that the children would likely suffer serious harm if returned to J.A. was insufficiently related to the facts of the case;[960] and (3) that the superior court over-relied on the experts' testimony in reaching its ultimate verdict that the children would suffer serious harm if returned to J.A.'s custody.[961] The supreme court ruled that each of J.A.'s arguments failed. First, the supreme court ruled that Alaska Rule of Evidence 703[962] and Alaska case law explicitly allow experts to rely on otherwise inadmissible evi-

951. *Id*. at 991.
952. *Id*. at 990.
953. *Id*. at 991.
954. 50 P.3d 395 (Alaska 2002).
955. *Id.*
956. *Id.* at 398.
957. *Id.*
958. 25 U.S.C. §§ 1901-23, 1951 (2000).
959. *J.A.*, 50 P.3d at 399.
960. *Id.* at 400.
961. *Id.* at 402.
962. ALASKA R. EVID. 703.

dence as long as the experts reasonably rely upon evidence that experts in their particular field typically rely upon in forming opinions or inferences upon such a subject.[963] Second, the court ruled that each expert's testimony was sufficiently grounded in the facts and issues of the case because the experts were apprised of the facts by their review of selected DFYS records and DFYS summaries of relevant facts and the testimony of other witnesses.[964] Third, the court ruled that the trial court did not over-rely on the expert testimony because there was substantial evidence in addition to the experts' testimony that supported the trial court's ultimate conclusion that J.A.'s substance abuse and resulting neglect placed his children at significant risk of emotional and physical harm.[965] For these reasons the supreme court affirmed the superior court's termination of J.A.'s parental rights.[966]

In *J.S. v. State*,[967] the supreme court held that "active efforts" to rehabilitate J.S. and prevent the breakup of an Indian family were not required under the Indian Child Welfare Act (ICWA),[968] and therefore upheld the termination of J.S.'s parental rights.[969] The Division of Family and Youth Services (DFYS) removed J.S.'s sons from his care due to reports of sexual abuse.[970] J.S. was subsequently tried and convicted of sexual abuse and sentenced to nineteen years, and DFYS petitioned to terminate J.S.'s parental rights.[971] The superior court found that termination was appropriate, but allowed the State to develop a treatment plan for J.S., which he had to accept in order to retain his parental rights.[972] J.S. rejected the proposal and his parental rights were terminated.[973] J.S. appealed, arguing that the treatment plan did not comply with the ICWA requirement that the State take "active efforts" to prevent the breakup of an Indian family."[974] The supreme court concluded that the State's duty was properly discharged by Jack's conviction for sexual abuse.[975] The supreme court further held that

963. *J.A.*, 50 P.3d at 399-400 (citing Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1217 (Alaska 1991)).

964. *Id.* at 401.

965. *Id.* at 403.

966. *Id.* at 404.

967. 50 P.3d 388 (Alaska 2002).

968. 25 U.S.C. § 1912(d) (2000).

969. *J.S.*, 50 P.3d at 389.

970. *Id*. at 389-90.

971. *Id*. at 390.

972. *Id*.

973. *Id*. at 390-91.

974. *Id*. at 391 (*quoting* 25 U.S.C. § 1912(d) (2000)).

975. *Id.* at 392.

DFYS did take all measures required under the ICWA[976] to place the children with one of J.S.'s relatives or other family, and did not err by placing the children outside of these guidelines.[977] Finally, the supreme court held that placement with J.S. would likely cause the children physical or emotional damage because J.S. was criminally convicted of sexually abusing them.[978] Accordingly, J.S.'s parental rights were terminated.[979]

In *M.J.S. v. State, Department of Health & Social Services, Division of Family & Youth Services*,[980] the supreme court held (1) that a child's godfather did not meet the statutory definition of a guardian for the purposes of determining child abandonment,[981] and (2) that a parent's habitual substance abuse resulted in substantial risk of emotional harm to the child.[982] Spencer, a mother of four children, had a criminal history and was a habitual substance abuser.[983] She had named Martin Shultz, a friend, as the godfather of her third child, Janet, and would often place Janet in Shultz's care during Spencer's substance abuse relapses.[984] The trial court subsequently terminated Spencer's parental rights to Janet.[985] Spencer argued on appeal that she had implemented a plan to have Shultz named Janet's legal guardian, thereby precluding the trial court from finding that Spencer had abandoned Janet under Alaska Statutes section 47.10.013(a)(4),[986] which required proof that Spencer failed to participate in a plan to reunite the child with a parent or guardian.[987] Spencer also challenged the trial court's holding that her habitual substance abuse exposed Janet to a "substantial risk of harm."[988] The supreme court affirmed the trial court's finding that Shultz, although Janet's godfather, did not meet the statutory definition of a guardian because he had not been legally appointed as Janet's guardian by the court.[989] The supreme court also upheld the trial court's finding that Spencer's habitual substance abuse exposed Janet to a substantial risk of harm be-

976. 25 U.S.C. § 1915(b)(2000).
977. *J.S.*, 50 P.3d at 393-94.
978. *Id*. at 394.
979. *Id*. at 395.
980. 39 P.3d 1123 (Alaska 2002).
981. *Id.* at 1125.
982. *Id*. at 1126.
983. *Id*. at 1124.
984. *Id*.
985. *Id.* at 1124-25.
986. ALASKA STAT. § 47.10.013(a)(4) (Michie 2002).
987. *M.J.S.*, 39 P.3d at 1125.
988. *Id*. at 1126.
989. *Id*. at 1125-26.

cause Spencer's substance abuse prevented Janet from forming a stable bond with her mother.[990] The supreme court explained that the risk of harm to the child need not necessarily be a risk of physical danger, but that emotional harm may also justify termination of parental rights.[991]

In *P.M. v. State, Department of Health & Human Services, Division of Family & Youth Services*,[992] the supreme court held that the superior court did not err in refusing to grant new counsel, terminating a father's parental rights, or refusing to place the child with the father's parents.[993] In 1996, the superior court adjudicated J.M.H. and his half brother children in need of aid after they were found with their mother in a wooded area.[994] The Division of Family and Youth Services (DFYS) placed them in the home of J.M.H.'s half-brother's father, who later expressed a desire to adopt J.M.H.[995] P.M., J.M.H.'s father, had a history of criminal activity and anger management problems.[996] In 1999, DFYS prepared case plans for P.M. to integrate him into his son's life, but P.M. did not comply and DFYS filed for termination of parental rights.[997] P.M. was appointed counsel by the court twice, but both attorneys were allowed to step down after P.M. harassed them and refused to cooperate.[998] P.M. continued pro se and the superior court subsequently terminated his parental rights.[999] On appeal, P.M. argued that he was denied effective assistance of counsel[1000] and that his due process rights were therefore violated.[1001] The supreme court held that he was not denied effective assistance of counsel because his counsels' decisions were within the range of reasonable actions.[1002] Further, given P.M.'s prior behavior towards his counsel, the supreme court held that P.M.'s due process rights were not violated by the superior court's decision to forego appointing new counsel.[1003] The supreme court affirmed the superior court's termi-

990. *Id*. at 1126.
991. *Id*. at 1126 n.12.
992. 42 P.3d 1127 (Alaska 2002).
993. *Id*. at 1137.
994. *Id*. at 1129.
995. *Id*.
996. *Id*.
997. *Id*. at 1130.
998. *Id*.
999. *Id*.
1000. *Id*. at 1131.
1001. *Id*. at 1132-33.
1002. *Id*. at 1131.
1003. *Id*. at 1133.

nation of P.M.'s parental rights[1004] because P.M. made no attempt to locate his son for three years[1005] and failed to comply with the DFYS case plans.[1006] The supreme court also affirmed the superior court's decision to refuse to grant custody to P.M.'s parents because the court's obligation to place the child with a blood relative did not apply to placement for adoptive purposes.[1007]

In *R.G. v. State, Department of Health & Social Services, Division of Family & Youth Services*,[1008] the supreme court held that the termination of R.G.'s parental rights was appropriate because the evidence showed that her child, E.G., was a child in need of aid under Alaska Statutes section 47.10.011(11).[1009] R.G. had a history of difficulty raising E.G., originally due to physical ailments.[1010] Beginning in late 1997, the Division of Family and Youth Services (DFYS) intervened by making several petitions for temporary or emergency custody of E.G.[1011] Finally, in September 2000, DFYS petitioned to terminate R.G.'s parental rights; this petition was granted by the superior court in March 2001.[1012] On appeal, the supreme court noted that to terminate parental rights there must be clear and convincing evidence that (1) the child is in need of aid under section 47.10.011 and (2) the parent did not change the conditions or conduct that placed the child at a substantial risk of harm within a reasonable time.[1013] While R.G. testified that she had remedied her physical ailment, obtained stable housing and successfully participated in an anger management program, R.G. was unable to dispute the superior court's finding that her emotional disturbance hindered her ability to care for E.G.—making E.G. a child in need of aid.[1014] The supreme court held that there was sufficient evidence supporting the superior court's finding that termination was proper under section 47.10.011(11).[1015] Accordingly, the superior court's order was affirmed.[1016]

1004. *Id*. at 1136.
1005. *Id*. at 1134.
1006. *Id*. at 1136.
1007. *Id*.
1008. 43 P.3d 145 (Alaska 2002).
1009. ALASKA STAT. § 47.10.011(11) (Michie 2002); *R.G.*, 43 P.3d at 146.
1010. *R.G.*, 43 P.3d at 146-47.
1011. *Id.* at 147.
1012. *Id*. at 148.
1013. *Id*.
1014. *Id.* at 148-49.
1015. *Id*. at 149.
1016. *Id*. at 150.

In *S.B. v. State, Department of Health & Social Services, Division of Family & Youth Services*,[1017] the supreme court upheld the superior court's termination of parental rights.[1018] A child was removed from his mother and placed with his paternal grandmother.[1019] In 1992, the Superior Court of California appointed the grandmother to be the child's guardian.[1020] When the grandmother's health declined, the child was sent to Alaska to live with the mother of his half-siblings.[1021] The grandmother sent a notarized letter purporting to transfer guardianship.[1022] In 2000, the superior court terminated the parental rights of the child's natural mother.[1023] The natural mother appealed, claiming that the superior court had neither subject matter jurisdiction to hear the case nor personal jurisdiction over her.[1024] The supreme court held that the superior court had subject matter jurisdiction, finding that the superior court's order did not modify a California child custody determination because the California determination terminated with the death of the paternal grandmother.[1025] Further, Alaska had properly exercised child custody jurisdiction over the case because Alaska was the child's home state.[1026] Additionally, the supreme court held that the superior court exercised proper personal jurisdiction over the natural mother because Alaska had more than "minimum contacts" with her child.[1027]

In *S.H. v. State, Department of Health & Human Services, Division of Family & Youth Services*,[1028] the supreme court held that the trial court did not err in terminating the parental rights of S.H. and R.H. because the parents failed to remedy conduct that put their children at risk of physical and emotional injury.[1029] R.H. and S.H. are the parents of four children who each have serious psychological and emotional problems.[1030] Starting in 1987, ten reports of child abuse, including physical, verbal, and sexual abuse were

1017. 61 P.3d 6 (Alaska 2002).
1018. *Id.* at 9.
1019. *Id.*
1020. *Id.*
1021. *Id.*
1022. *Id.*
1023. *Id.*
1024. *Id.* at 8.
1025. *Id.* at 11.
1026. *Id.* at 13-14.
1027. *Id.* at 22.
1028. 42 P.3d 1119 (Alaska 2002).
1029. *Id.* at 1127.
1030. *Id.* at 1120-21.

made to DFYS.[1031] The parents failed to respond to any of DFYS's efforts to help them and were also reported to be using crack-cocaine.[1032] The supreme court affirmed the holding of the trial court because S.H. failed to remedy her substance abuse problem within a reasonable time,[1033] termination of their parental rights was in the children's best interests,[1034] and R.H.'s efforts to remedy his conduct were too little, too late.[1035] Further, the trial court did not err in holding that DFYS made reasonable efforts to prevent the break-up of the family.[1036]

In *State, Department of Health & Social Services, Division of Family and Youth Services v. M.L.L.*,[1037] the supreme court upheld the superior court's decision not to terminate M.L.L.'s parental rights to her two daughters.[1038] A 1999 proceeding had resulted in the termination of the children's father's parental rights, and the children were placed in foster care.[1039] The state subsequently sought to terminate M.L.L.'s parental rights, but the superior court ruled that the state did not prove its case beyond a reasonable doubt.[1040] On appeal, the supreme court held that while the showing was sufficient to terminate parental rights under Children in Need of Aid requirements,[1041] it failed the reasonable doubt standard under the Indian Child Welfare Act.[1042] The State claimed that the superior court did not consider the harm to the children by breaking the bonds with the foster mother and returning the children to M.L.L.'s care.[1043] The supreme court ruled that proper consideration had been given to the bonds between the children and the foster mother.[1044]

In *V.S.B. v. State, Department of Health & Social Services, Division of Family & Youth Services*,[1045] the supreme court upheld a termination of parental rights.[1046] Vivian, the children's mother,

1031. *Id.* at 1121.
1032. *Id.* at 1122.
1033. *Id.* at 1124.
1034. *Id.* at 1124-25.
1035. *Id.* at 1126.
1036. *Id.* at 1127.
1037. 61 P.3d 438 (Alaska 2002).
1038. *Id.* at 439.
1039. *Id.* at 440-41.
1040. *Id.* at 441-42.
1041. ALASKA STAT. § 47.10.019 (Michie 2002).
1042. 25 U.S.C. § 1912(f) (2000).
1043. *M.L.L.*, 61 P.3d at 439.
1044. *Id.* at 443.
1045. 45 P.3d 1198 (Alaska 2002).
1046. *Id.* at 1208.

suffered from a long history of mental disease and had been hospitalized several times.[1047] In 1998, the Alaska Division of Family and Youth Services (DFYS) took emergency custody of the children, placed them in foster care, and filed petitions for adjudication of a child in need of aid on behalf of each child.[1048] Although Vivian agreed to the DFYS program to regain custody, DFYS filed a petition for termination of parental rights in May 1999.[1049] The trial court terminated Vivian's parental rights and Vivian appealed the decision.[1050] The supreme court held that the trial court correctly found that the children were children in need of aid because they had suffered mental injury, sexual abuse, and substantial risk of physical harm through Vivian's actions and inactions.[1051] The supreme court also held that under the Indian Child Welfare Act,[1052] DFYS had proven beyond a reasonable doubt that continued parental custody was likely to result in serious emotional or physical damage to the child[1053] and had proven by a preponderance of the evidence that reasonable and active efforts had been made to provide appropriate remedial services to Vivian and had been unsuccessful.[1054]

D. Dissolution of Marriage and Distribution of Property

In *Edelman v. Edelman*,[1055] the supreme court affirmed the lower court's decision to retain jurisdiction over the husband's claims from the Exxon Valdez oil spill and to deny the wife's attorney's fees and costs for the divorce.[1056] First, the wife argued that the trial court's decision to retain jurisdiction over the Exxon claims instead of assigning them to her was incorrect.[1057] However, the court found that the lower court did not abuse its discretion in retaining jurisdiction because the exact amount and payout of the Exxon claims was unknown.[1058] Second, the wife argued that the

1047. *Id.* at 1200.
1048. *Id.* at 1202.
1049. *Id.*
1050. *Id.* at 1203.
1051. *Id.* at 1204.
1052. 25 U.S.C. § 1912 (2000).
1053. *V.S.B.*, 45 P.3d at 1205-06.
1054. *Id.* at 1206-07 (finding that though Vivian did actively participate in the DFYS program, her parenting skills improved only marginally and were not sufficient to make her an adequate parent).
1055. 61 P.3d 1 (Alaska 2002).
1056. *Id.* at 2.
1057. *Id.* at 4.
1058. *Id.*

trial court erred in denying her attorney's fees and costs because it did not base its decision on the relative economic situations and earning powers of the parties and her ex-husband's vexatious conduct.[1059] The court found that the trial court did not abuse its discretion because the husband's economic situation was not significantly better than the wife's, and there was no evidence that his alleged delay tactics rose to the level of vexatious conduct.[1060]

In *Juelfs v. Gough*,[1061] the supreme court held modification of a joint sharing agreement for a dog was proper because, as the trial court noted, the parties were unable to share custody of the dog without severe contention.[1062] The trial court had modified the agreement after one incident where Juelfs and Gough argued about Juelfs's allotted time with Coho, the dog, and another where Juelfs's boyfriend dislocated Coho's leg while pulling Coho away from a dog fight.[1063] The supreme court affirmed the trial court's modification, holding that as circumstances changed, it was in the best interest to review and modify the joint sharing agreement under Alaska Rule of Civil Procedure 60(b)(6).[1064] The supreme court also affirmed the trial court's denial of Juelfs's request for a change of judge as untimely and "little more than an expression of [her] dissatisfaction with the superior court's ruling."[1065]

In *Kinnard v. Kinnard*,[1066] the supreme court ruled that coverage under a health insurance policy is a marital asset and that Bernard Kinnard was responsible for either reinstating his wife Debra's coverage or paying for her medical bills.[1067] Bernard unilaterally removed Debra from his health insurance policy after the judge presiding over the divorce proceedings ordered him not to dispose of any marital property.[1068] The supreme court ruled that the trial court acted within the scope of its authority in holding Bernard liable because it placed Debra in the position she would have occupied had Bernard not violated the order.[1069] The supreme court also affirmed the trial court's holding that Bernard must share custody of his biological daughter Kristine with Debra, who

1059. *Id.* at 4-5.
1060. *Id.* at 5-6.
1061. 41 P.3d 593 (Alaska 2002).
1062. *Id.* at 597.
1063. *Id.* at 594-95.
1064. *Id.* at 597; ALASKA R. CIV. P. 60(b)(6).
1065. *Juelfs*, 41 P.3d at 598 (alteration in original).
1066. 43 P.3d 150 (Alaska 2002).
1067. *Id.* at 156.
1068. *Id.* at 155.
1069. *Id.* at 156-57.

was Kristine's stepmother.[1070] Using the standard from *Turner v. Pannick*,[1071] the supreme court agreed with the trial court's determination that separating Debra and Kristine would be detrimental to the child's welfare.[1072]

In *Korn v. Korn*,[1073] the supreme court held that neither interim spousal support nor imputed rental value are marital assets.[1074] After filing for divorce and separating from her husband, Paula Korn resided in the marital residence rent-free and received interim spousal payments for one year.[1075] In deciding disputed property questions, the superior court counted among Paula's assets the interim spousal payments and an estimated rental value for living at the marital residence for one year, but provided no factual findings for including imputed rental value and interim spousal support as marital assets.[1076] The supreme court observed that spousal support is not marital property.[1077] The court also held that a marital residence is not a marital asset until the trial court divided the property, and thus no rental value could be imputed.[1078] Therefore, the supreme court vacated the decision and remanded for reconsideration and appropriate findings.[1079]

In *Nelson-Lizardi v. Lizardi*,[1080] the supreme court held that the superior court abused it discretion in ruling on pension rights despite notice that the wife needed additional information to file a formal acounting.[1081] During the Lizardis' divorce proceedings, the superior court did not address the issue of Bob's pension because the pension had not vested.[1082] Upon retiring, Bob began to receive pension benefits and filed a motion to modify child support claiming a fifteen percent reduction in income.[1083] The superior court ordered Jackie to file a request for formal acounting;[1084] Jackie instead filed an "Advice of Counsel" notifying the superior court that she required additional information in order to determine if a formal

1070. *Id.* at 154.
1071. 540 P.2d 1051 (Alaska 1975).
1072. *Kinnard*, 43 P.3d at 155.
1073. 46 P.3d 1021 (Alaska 2002).
1074. *Id*. at 1022.
1075. *Id.*
1076. *Id.* at 1022, 1023-24.
1077. *Id.* at 1023.
1078. *Id.*
1079. *Id.* at 1024.
1080. 49 P.3d 236 (Alaska 2002).
1081. *Id.* at 241.
1082. *Id.* at 236.
1083. *Id.* at 237.
1084. *Id.* at 236.

accounting was necessary.[1085] The superior court determined that Jackie was not entitled to any portion of the interest in the pension because she failed to file the request for formal accounting.[1086] Under the abuse of discretion standard, the supreme court determined that the superior court erred because it failed to make a ruling on the merits of the division of the pension when the court and opposing counsel had notice that Jackie needed further information to comply with the court's order.[1087] Accordingly, the case was remanded to the superior court to determine the valuation and the division of the pension.[1088]

In *Manelick v. Manelick*,[1089] the supreme court held that in the property division order, the superior court (1) erred by improperly valuing the goodwill of the wife's medical practice, (2) failed to include a debt the parties owed on a piano, and (3) correctly assigned zero value to a marital car.[1090] Reviewing the superior court's factual and legal determinations under the clearly erroneous and abuse of discretion standards, respectively, the supreme court reevaluated the valuation of the couple's assets and liabilities.[1091] The court ruled that the superior court erred in undervaluing the tangible assets of the medical practice because it did not attempt to obtain accurate financial statements.[1092] Further, the court ruled that the superior court erred in valuing the goodwill of the wife's practice because, where no market exists for goodwill, it should be considered to have no value.[1093] Second, the court ruled that the superior court erred by failing to include all assets acquired during the marriage[1094] including the loan for the piano.[1095] Third, the court ruled that the superior court did not clearly err in valuing a marital car at zero value instead of a negative value.[1096]

In *Martin v. Martin*,[1097] the supreme court held that the trial court in a divorce proceeding did not err in holding that the husband's food store was marital property.[1098] Don Martin bought an

1085. *Id.* at 238.
1086. *Id.*
1087. *Id.* at 240.
1088. *Id.* at 241.
1089. 59 P.3d 259 (Alaska 2002).
1090. *Id.* at 260.
1091. *Id.*
1092. *Id.* at 263.
1093. *Id.* at 263-65.
1094. *Id.* at 265.
1095. *Id.*
1096. *Id.* at 265-66.
1097. 52 P.3d 724 (Alaska 2002).
1098. *Id.* at 726.

Anchorage health food store, Roy's Health Foods, before marrying Melinda.[1099] The trial court held that the store was marital property and divided it evenly between Don and Melinda.[1100] On appeal, the supreme court affirmed the trial court's judgment applying the doctrine of transmutation, which states that separate property can become marital property if the parties so intend.[1101] Here, the supreme court found that the Martins intended for Roy's Health Foods to become a family business because Don used marital funds to finance the business and because Melinda worked at the store for many years without pay.[1102]

E. Miscellaneous

In *H.C.S. v. Community Advocacy Project of Alaska ex rel. H.L.S.*,[1103] the supreme court held an adult son was entitled to a new hearing for a determination whether it would be in his father's best interests to remove a corporation as his father's guardian and conservator and to appoint the adult son because the son had demonstrated that circumstances had materially changed since the corporation's appointment.[1104] In 1999, the Community Advocacy Project of Alaska (CAPA) was appointed by the trial court as the guardian and conservator of H.L.S. due to his Alzheimer's Disease and dementia which caused him to suffer lapses in memory and judgment.[1105] At the time the appointment was uncontested by H.L.S.'s family.[1106] In 2000, H.C.S., H.L.S.'s adult son, filed a petition asking the trial court to modify and terminate the appointment of CAPA and to appoint H.C.S. as guardian and conservator.[1107] H.C.S. alleged several grounds, in particular that CAPA had caused H.L.S. to be institutionalized away from his family and that CAPA had mismanaged H.L.S.'s modest assets.[1108] The trial court held a hearing and denied H.C.S.'s petition.[1109] H.C.S. argued on appeal that it was an abuse of discretion to deny his petition without making fact findings to justify deviating from Alaska Statutes

1099. *Id.*
1100. *Id.*
1101. *Id.* at 727.
1102. *Id.* at 729-30.
1103. 42 P.3d 1093 (Alaska 2002).
1104. *Id*. at 1094.
1105. *Id*. at 1095.
1106. *Id*.
1107. *Id*.
1108. *Id*.
1109. *Id*.

sections 13.26.145[1110] and 13.26.210.[1111] The supreme court held that the standard of review for an order denying or granting a request to remove a guardian or conservator was an abuse of discretion, the same standard as for initial selection of a guardian or conservator.[1112] After finding existing statutes regarding modification of appointments of guardians and conservators to be inapplicable,[1113] the supreme court held that a two-part analysis should apply to petitions to remove or replace guardians or conservators using the procedure for modifying child custody awards as a model.[1114] First, the petitioner must "show that the circumstances of the ward, guardian, or conservator have changed materially since the guardian or conservator was appointed."[1115] Second, the court must decide "whether the existing appointment is in the ward's best interests."[1116] The supreme court held that H.C.S. had demonstrated a material change of circumstances and that it was therefore necessary to hold a hearing to consider whether it was in H.L.S.'s best interests to remove CAPA as guardian and conservator and replace it with H.C.S.[1117] The supreme court found that the trial court's hearing failed to address several unresolved factual disputes about CAPA's treatment of H.L.S. and his assets and remanded the case for further fact findings with the burden for proving best interests on H.C.S, the party seeking the modification.[1118]

In *Trapp v. State*,[1119] the supreme court held that conservators are not shielded by absolute quasi-judicial immunity from claims asserted by their wards.[1120] Trapp was found to be partially incapacitated, and the Office of Public Advocacy (OPA) was appointed as her conservator.[1121] She brought suit against OPA for a variety of

1110. ALASKA STAT. § 13.26.145 (Michie 2002) (stating an adult child of an incapacitated person has greater priority for appointment as guardian than a nonprofit corporation but that the court shall select the person or nonprofit corporation "that is best qualified and willing to serve").

1111. § 13.26.210 (stating a conservator appointed by the court is entitled to consideration before an adult child of the protected person but that the "court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority"); *H.C.S.*, 42 P.3d at 1095-96.

1112. *H.C.S.*, 42 P.3d at 1096.

1113. *Id*. at 1097-98.

1114. *Id*. at 1099.

1115. *Id*.

1116. *Id*.

1117. *Id*. at 1100-01.

1118. *Id*. at 1101.

1119. 53 P.3d 1128 (Alaska 2002).

1120. *Id.* at 1128.

1121. *Id.*

claims, and OPA moved to dismiss the suit under absolute quasi-judicial immunity.[1122] The supreme court found that while no consensus exists among jurisdictions about whether conservators possess absolute quasi-judicial immunity, the conservatorship statute in Alaska Statutes section 13.26.305[1123] precludes such immunity.[1124] Accordingly, the case was remanded for further proceedings.[1125]

IX. INSURANCE LAW

In *United Airlines, Inc., v. State Farm Fire & Casualty Company*,[1126] the supreme court determined that indemnification was properly transferred to United Airlines through a sublease.[1127] The insurance suit arose out of an accident involving Adrian Sanders, who hit a United Airlines baggage cart train from the rear with his motorcycle.[1128] The accident occurred on property leased from the State by a husband and wife, the Krogstads, and then subleased to United Airlines.[1129] Because Sanders had threatened litigation against the State, the State expected the Krogstads to indemnify it under the terms of the lease.[1130] The Krogstads in turn informed United Airlines of United's indemnification under the terms of the sublease.[1131] However, this tender was rejected by United Airlines.[1132] After settling the State's third-party claim for indemnity against the Krogstads, State Farm (the Krogstads's insurer) was permitted to substitute for the Krogstads in an indemnification suit against United Airlines and was also permitted to add its own claim for indemnity.[1133] The superior court granted State Farm's cross-motion for summary judgment and denied United Airlines' motion for summary judgment on the indemnification issues.[1134] The supreme court found that because the claim arose out of United Airlines' operation of the baggage cart, in accordance with the terms of the sublease, and did not arise out of the Krogstads' negligence, "the plain language of the indemnity clause in the . . . sublease re-

1122. *Id.* at 1128-29.
1123. ALASKA STAT. § 13.26.305 (Michie 2002).
1124. *Id.* at 1130.
1125. *Id.* at 1132.
1126. 51 P.3d 928 (Alaska 2002).
1127. *Id.* at 929.
1128. *Id.* at 930.
1129. *Id.*
1130. *Id.*
1131. *Id.*
1132. *Id.*
1133. *Id.* at 931.
1134. *Id.*

quires [United Airlines] to indemnify and defend the Krogstads against the state's third-party claim."[1135] The supreme court did not address the issue of treating non-insurers as insurers.[1136]

In *Wold v. Progressive Preferred Insurance Co.*,[1137] the supreme court held that unidentified vehicles are considered uninsured only when there is a collision, and that Wold's estate used up all of the driver's liability insurance and thus could recover underinsured/uninsured (UM/UIM) benefits from Progressive.[1138] In 1995, Smith swerved to avoid an oncoming car, but, in the process, accidentally killed Wold, his passenger.[1139] The driver of the oncoming car was never identified.[1140] Smith's insurance provided both liability and UM/UIM coverage, and Wold's mother had her own UM/UIM policy through Progressive.[1141] Wold's mother sued both Smith and the unknown driver for claims of wrongful death and negligent infliction of emotional distress (NIED), and both Wold's mother and father sued for loss of consortium.[1142] Wold settled with Smith's insurer for both Smith's liability and the unknown driver's negligence, and then sought further reimbursement under Wold's UM/UIM policy.[1143] Progressive argued that it had no duty to reimburse Wold because (1) the unknown motorist was not considered uninsured under Alaska law[1144] and (2) Wold had not yet exhausted the policy limits of Smith's insurance policy.[1145] The supreme court found that both Progressive's policy and Alaska law required physical contact with an unknown driver in order for the unknown driver to be considered uninsured.[1146] Therefore, Wold's argument that this requirement should not be enforced because it was undisputed that the accident was caused by a "phantom vehicle" was not persuasive.[1147] The supreme court then held that Wold

1135. *Id.* at 932.
1136. *Id.* at 934.
1137. 52 P.3d 155 (Alaska 2002).
1138. *Id*. at 157.
1139. *Id*.
1140. *Id*.
1141. *Id*.
1142. *Id*.
1143. *Id*. at 158.
1144. Alaska Motor Vehicle Safety Responsibility Act, ALASKA STAT. § 28.20.445(f) (Michie 2002) ("payment . . . shall be made only where direct physical contact . . . has occurred"); Alaska Mandatory Automobile Insurance Act, ALASKA STAT. § 28.22.201(b) (Michie 2002) ("only where direct contact . . . has occurred").
1145. *Wold*, 52 P.3d at 158.
1146. *Id.* at 159.
1147. *Id*. at 159-61.

had exhausted the limits of Smith's insurance policy, as "it was error for the trial court to conclude the settlement used up a portion of a separate 'per person' liability policy limit."[1148] The settlement with Smith's insurer covered both Wold's mother and father pursuant to their loss of consortium claims, categorizing this claim as a derivative action, not with separate "per person" triggers.[1149] As such the supreme court affirmed the superior court's ruling on the physical contact issue, but reversed its ruling on the exhaustion of Smith's insurance policy.[1150]

X. PROPERTY LAW

In *Alaska Railroad Corp. v. Native Village of Eklutna*,[1151] the supreme court ruled that Damco Paving Corporation (Damco) could not operate a quarry leased from the state-owned Alaska Railroad Corporation (the Railroad) under Anchorage zoning regulations.[1152] In 1989, the Railroad acquired the quarry from the federal government, which had operated the quarry from the mid-1940s until 1985.[1153] Eklutna successfully enjoined the operation of the quarry pursuant to Anchorage zoning regulations.[1154] The supreme court affirmed, declaring that when mineral resource operations are at issue, Anchorage Municipal Code 21.55.090[1155] overrides more general sections of the code.[1156] In addition, the court held that the federal government's continued operation of the quarry after the enactment of the AMC did not confer conditional-use status on the quarry because the AMC could not be enforced against the federal government due to supremacy immunity.[1157] Furthermore, after the transfer of the quarry to the Railroad, there was no transfer of conditional-use rights, since the federal government never followed the proper procedures to establish the rights.[1158] The court also ruled that the supremacy immunity from zoning did not transfer from the Railroad to Damco because the Railroad's supremacy immunity is not a transferable property

1148. *Id*. at 165.
1149. *Id*. at 165-66.
1150. *Id*. at 166.
1151. 43 P.3d 588 (Alaska 2002).
1152. *Id*. at 589.
1153. *Id*. at 590.
1154. *Id*.
1155. ANCHORAGE, AK., MUNICIPAL CHARTER, CODE AND REGULATIONS § 21.55.090 (1996).
1156. *Alaska Railroad*, 43 P.3d at 593.
1157. *Id*. at 596.
1158. *Id*.

right.[1159] In addition, the court found that no unconstitutional taking occurred because Damco was a state agency, not a private landholder.[1160] Accordingly, the supreme court affirmed the superior court's summary judgment and order enjoining the quarrying activities.[1161]

In *AVCP Regional Housing Authority v. R.A. Vranckaert Co.*,[1162] the supreme court held that a claim for indemnity for passive negligence was barred by res judicata and collateral estoppel and that the landlord's claims for express and implied contract indemnity, breach of contract, and negligence were properly dismissed.[1163] In 1991, Vranckaert installed gas kitchen ranges in twelve apartments for the Association of Village Council Presidents Regional Housing Authority (AVCP).[1164] From 1992 to 1995, numerous tenants complained that the ranges did not work properly and later called the fire department complaining of nausea, headaches, gas odors, and warnings from carbon monoxide alarms.[1165] A group of tenants, the Nilsson plaintiffs, sued ACVP and Vranckaert, claiming injury as a result of exposure to carbon monoxide.[1166] AVCP filed a cross-claim against Vranckaert seeking equitable apportionment of damages.[1167] Both AVCP and Vranckaert settled.[1168] AVCP then sought to amend its complaint against Vranckaert to include a claim of equitable indemnity.[1169] Judge Curda denied the motion and dismissed the complaint reasoning that AVCP had not stated a viable cause of action.[1170] Rather than appeal, AVCP filed a new lawsuit against Vranckaert, asserting express and implied contractual indemnity, indemnity for passive negligence, breach of contract, and negligence.[1171] Judge Hunt granted Vranckaert's summary judgment motion on the ground that the new claims were barred by res judicata.[1172]

Shortly thereafter, a second group of tenants, the Engler plaintiffs, sued AVCP and Vranckaert for the same grounds as the Nils-

1159. *Id*. at 597.
1160. *Id.*
1161. *Id*. at 598.
1162. 47 P.3d 650 (Alaska 2002).
1163. *Id*. at 660.
1164. *Id*. at 652.
1165. *Id*.
1166. *Id*. at 653.
1167. *Id*.
1168. *Id*.
1169. *Id*.
1170. *Id*.
1171. *Id*.
1172. *Id*.

son plaintiffs.[1173] AVCP again filed a cross-claim against Vranckaert.[1174] Both AVCP and Vranckaert settled with the Engler plaintiffs.[1175] In ruling on Vranckaert's summary judgment motion, Judge Steinkruger allowed AVCP's claims of implied contractual indemnity, breach of contract, and negligence, but dismissed its claims of passive negligence and express contractual indemnity.[1176]

On appeal, AVCP's Nilsson and Engler cross-claims were consolidated.[1177] First, the supreme court affirmed both dismissals of AVCP's passive negligence claim, reasoning that the claim was barred by res judicata and collateral estoppel.[1178] The supreme court then affirmed Judge Steinkruger's ruling for Vranckaert on AVCP's claim of express contractual indemnity because the contract between AVCP and Vranckaert did not indemnify AVCP from AVCP's own negligence.[1179] The supreme court reversed Judge Steinkruger's ruling allowing AVCP's claim of implied contractual indemnity because to hold that Vranckaert must indemnify AVCP while Vranckaert was still liable to the plaintiffs "would lead to the unjust result that the indemnitor would face double liability."[1180] The court also reversed Judge Steinkruger's ruling allowing AVCP's claims for breach of contract and negligence "because they are, in essence, implied contractual indemnity claims."[1181] Finally, the supreme court affirmed Judge Hunt's dismissal of all five claims.[1182]

In *Barr v. Goldome Realty Credit Corp.*,[1183] the supreme court held that the trial court's grant of summary judgment to the mortgagee and its dismissal of the mortgagor's counterclaim were erroneous because there were factual disputes with regard to whether the mortgagor's loan was current and whether an overpayment was available to apply to the mortgagor's account.[1184] Mortgagee Donna Barr had assumed ownership of property subject to a deed of trust.[1185] Nationsbanc, as beneficiary, initiated foreclosure pro-

1173. *Id*.
1174. *Id*.
1175. *Id*.
1176. *Id*. at 654.
1177. *Id.* at 653.
1178. *Id*. at 655.
1179. *Id*. at 656.
1180. *Id*. at 658.
1181. *Id*. at 659.
1182. *Id*. at 660.
1183. 46 P.3d 1004 (Alaska 2002).
1184. *Id*. at 1006-08.
1185. *Id*. at 1005.

ceedings in January 1998 because it believed the underlying note was in default as no loan payments had been made after October 1997.[1186] Barr counterclaimed, claiming that Nationsbanc failed to credit surplus funds in her escrow account.[1187] The trial court granted partial summary judgment to Nationsbanc and dismissed Barr's counterclaim with prejudice.[1188] The supreme court held on appeal that the evidence presented by Barr could be admissible for the purposes of summary judgment,[1189] and further created a genuine issue of material fact as to whether the loan was current in October 1997, the month of the last loan payment.[1190] The supreme court also held that there was a genuine issue of material fact as to whether Nationsbanc could have applied any escrow surplus to Barr's monthly payments in November and December 1997 and January 1998.[1191] Lastly, the supreme court held that the trial court's dismissal of Barr's counterclaim was erroneous because Nationsbanc did not conclusively show that an escrow surplus did not exist and that therefore "the genuine factual dispute that requires us to reverse Nationsbanc's summary judgment motion also requires us to reverse the dismissal of Barr's counterclaim."[1192] The supreme court reversed the partial summary judgment, vacated the findings of fact and law, and remanded.[1193]

In *Cabana v. Kenai Peninsula Borough*,[1194] the Alaska Supreme Court affirmed the grant of summary judgment in favor of Kenai Peninsula Borough, and ruled that a transfer of land under the Kanai Peninsula Borough Code[1195] (the Code) may be at less than fair market value if the transfer is "in the best public interest."[1196] The Kenai Peninsula Borough Assembly (Assembly) had exchanged a forty-acre parcel of land appraised at $33,700 for a twenty-acre parcel appraised at $24,500. Neighbors of the forty-acre parcel sued, claiming that the parcel was not exchanged at fair market value and therefore was exchanged in violation of the Code.[1197] The

1186. *Id*.
1187. *Id*. at 1006
1188. *Id*.
1189. *Id* at 1007-08.
1190. *Id*. at 1008.
1191. *Id.*
1192. *Id*. at 1009.
1193. *Id*.
1194. 50 P.3d 798 (Alaska 2002).
1195. KENAI PENINSULA BOROUGH, AK., CODE OF ORDINANCES § 17.10.100. (1998).
1196. *Cabana*, 50 P.3d at 803.
1197. *Id.* at 801.

court found that the Assembly acted properly in approving the transfer and ruled that the Assembly was in the best position to determine whether the transfer was in the Borough's best interest.[1198] In addition, the court stated that the plaintiffs must do more than "point[ ] out anomalies" in the land transaction to overcome the strong presumption of government propriety.[1199] The court also ruled that the plaintiffs' substantive due process rights were not violated because there is a "fair and substantial relationship between . . . the land exchange and the legitimate governmental goals of reducing land use conflicts and protecting public health and safety."[1200]

In *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*,[1201] the supreme court affirmed the enjoinment of the use of an airstrip.[1202] The property's continual suitability for use as an airstrip and its sporadic unauthorized use did not maintain its status as a continuing nonconforming use under Anchorage zoning laws.[1203] The airstrip originated when the land was an unrestricted zoning area.[1204] Although the land was rezoned to prohibit the airstrip, the airstrip owner continued to allow two of his friends to use the airstrip infrequently.[1205] Following the sale of adjacent land, the new owners petitioned for and were granted a conditional use of the airstrip.[1206] When the Cizeks then purchased the adjacent land, they planned to build a home with an attached hangar and to use the airstrip.[1207] The Concerned Citizens of Eagle River Valley claimed that the nonconforming use right had lapsed and sought to enjoin the use of the airstrip.[1208] The supreme court rejected the Cizek's argument that the land's usability as an airstrip sufficed to continue an existing nonconforming use.[1209] The court held that actual use is required to continue nonconforming uses and that the intermittent, unauthorized use by the friends of the airstrip owner was insufficient to continue the nonconforming use.[1210] The court also rejected

1198. *Id.* at 804.
1199. *Id.* at 803.
1200. *Id.* at 805.
1201. 49 P.3d 228 (Alaska 2002).
1202. *Id.* at 229.
1203. *Id.*
1204. *Id.*
1205. *Id.* at 230.
1206. *Id.*
1207. *Id.*
1208. *Id.*
1209. *Id.* at 232.
1210. *Id.*

the Cizek's statute of limitations argument, finding that a cause of action "accrued each day that the property violated the zoning laws."[1211] The supreme court held that neither estoppel nor laches barred the action.[1212] The supreme court also held that the Cizeks waived their claim for Rule 37 sanctions because they never requested a hearing.[1213] The supreme court additionally ruled that the trial court did not abuse its discretion by denying the Cizek's motion for a new trial because it was the Cizek's tactical miscalculation that prejudiced them and not the trial court's ruling.[1214] Lastly, the supreme court found that the Cizeks should not be enjoined from storing airplanes on the property because such storage is permitted under zoning laws.[1215] Accordingly, the supreme court affirmed the superior court's enjoinment of the use of the airstrip, but directed the superior court to amend the injunction to allow the Cizeks to store airplanes on their property.[1216]

In *Griswold v. City of Homer*,[1217] the supreme court affirmed the superior court's holding that COB, Inc. could continue to use its property for vehicle maintenance and repair as lawful nonconforming uses.[1218] COB owned property located within an area subject to Homer's zoning regulations.[1219] These zoning regulations prohibited COB from using its property for automobile repair and maintenance unless those uses were "grandfathered in."[1220] These types of uses are "grandfathered in" if they have not been discontinued for more than a year.[1221] COB petitioned the Homer Advisory Planning Commission to approve of its nonconforming uses on its property.[1222] Griswold, one of COB's competitors, objected to the petition.[1223] The Commission concluded that COB lost the right to use the property for a public garage but sustained the right to use of the property for vehicle maintenance and repair.[1224] The supreme court affirmed this holding because COB documented many instances of vehicle repair and maintenance on its property since

1211. *Id.* at 233.
1212. *Id.* at 233-34.
1213. *Id.* at 234.
1214. *Id.* at 235.
1215. *Id.*
1216. *Id.*
1217. 55 P.3d 64 (Alaska 2002).
1218. *Id.* at 67.
1219. *Id.* at 66.
1220. *Id.*
1221. *Id.*
1222. *Id.*
1223. *Id.*
1224. *Id.* at 67.

1991.[1225] The supreme court further held that the nonconforming use was for "commercial" automotive service and repair and also that members of the Commission were not biased.[1226]

In *Guttchen v. Gabriel*,[1227] the supreme court held (1) that the trial court erred in nullifying the Guttchens' judgment lien based upon the discharge of the underlying debt in the Gabriels' bankruptcy,[1228] and (2) that the record established "just and sufficient reasons" for execution of the Guttchens' judgment lien more than five years after the judgment.[1229] In July 1989, the Guttchens were awarded $7,526 in attorney's fees and costs against the Gabriels.[1230] The Guttchens recorded the judgment in July 1989 and perfected a lien on a 1.5 acre parcel of land owned by the Gabriels.[1231] While an appeal was pending, the Gabriels filed for personal bankruptcy.[1232] The bankruptcy court discharged the Gabriels' debts in September 1990.[1233] The supreme court first held, following *Johnson v. Home State Bank*,[1234] that a bankruptcy discharge does not extinguish a valid lien on real property.[1235] Thus, the supreme court held that it was error for the trial court to deny the Guttchens' motion for leave to execute the judgment lien on the ground that the Gabriels' bankruptcy extinguished both the underlying debt and the lien.[1236] The supreme court next held that the record established "just and sufficient reasons" for late execution of the Guttchens' judgment lien.[1237] The supreme court considered that the 1.5 acre parcel was the only property of the Gabriels subject to execution, the Gabriels controlled the process of subdividing the property, and the Gabriels did not timely act upon the trial court's order to subdivide.[1238] Additionally, the supreme court considered that as soon as an application was filed by the Gabriel family in 1999 to obtain permission to subdivide, the Guttchens promptly filed their motion for leave to execute.[1239] Accordingly, the supreme court vacated the

1225. *Id.* at 68.
1226. *Id.* at 69-73.
1227. 49 P.3d 223 (Alaska 2002).
1228. *Id*. at 226.
1229. *Id*. at 227.
1230. *Id*. at 224.
1231. *Id*.
1232. *Id*.
1233. *Id*.
1234. 501 U.S. 78, 82-84 (1991).
1235. *Guttchen*, 49 P.3d at 225.
1236. *Id*. at 226.
1237. *Id*. at 227.
1238. *Id*.
1239. *Id*.

trial court's judgment and remanded with directions to enter a judgment granting the motion for late execution of the judgment lien.[1240]

In *Holta v. Certified Financial Services, Inc.*,[1241] the supreme court held that the statute of limitations did not bar Holta from bringing a non-judicial foreclosure action against Certified Financial's property.[1242] Holta acquired an interest in a note originally calling for payment on November 15, 1989, secured by the property known as the Essex Square subdivision now owned by Certified Financial.[1243] The recorded deed of trust referred to the underlying, unrecorded note but did not contain in itself a maturity date.[1244] Alaska law establishes a ten year statute of limitations for actions relating to notes that contain no maturity date.[1245] The supreme court found that because the instrument that contained the November 1989 maturity date was unrecorded, the ten year statute of limitations must be followed in accordance with the purpose of the Alaska statute to "provide subsequent purchasers with record knowledge and reasonable certainty regarding the vitality of liens recorded against the property."[1246] The supreme court also held that Holta's deed of trust was not extinguished by the municipal tax foreclosure proceedings that occurred.[1247] In the municipal tax proceedings, only the right of redemption of the then-current owner, was sold.[1248] Therefore federal law extinguishing liens on property deeds after a IRS tax foreclosure sale[1249] was not applicable.[1250] Accordingly, the judgment of the superior court was reversed, and the case was remanded for further proceedings.[1251]

In *Hurst v. Victoria Park Subdivision Addition No. 1 Homeowners' Ass'n*,[1252] the supreme court affirmed the summary judgment decision of the court below regarding a dispute about a restrictive covenant.[1253] On September 14, 1998, the Victoria Park Subdivision Addition Number 1 Homeowners' Association (Asso-

1240. *Id*.
1241. 49 P.3d 1104 (Alaska 2002).
1242. *Id*. at 1105.
1243. *Id*. at 1105-06.
1244. *Id*. at 1107.
1245. ALASKA STAT. § 34.20.150(a) (Michie 2002).
1246. *Holta*, 49 P.3d at 1107.
1247. *Id*. at 1110.
1248. *Id*.
1249. 26 U.S.C. § 6339(c) (2000).
1250. *Holta*, 49 P.3d at 1110.
1251. *Id*. at 1111.
1252. 59 P.3d 275 (Alaska 2002).
1253. *Id*. at 276.

ciation) notified the Hursts that it intended to build a split rail fence along the border of the Hurst's property.[1254] The Hursts filed a complaint alleging that the fence violated the terms of a restrictive covenant because it was a permanent structure.[1255] The superior court granted summary judgment in favor of the Association, finding that the fence did not violate the covenant because the purpose for the fence was in line with the purpose of the covenant to set aside land for "non-intensive recreational and park purposes . . . ."[1256] On appeal, the supreme court affirmed the superior court's decision. The court did not rely on case law from other jurisdictions to determine whether the fence was a permanent structure.[1257] Instead, the court focused on how to construe the restriction to effectuate the intent of the parties; thus, it considered what the purpose of the restriction was and the nature of the fence.[1258] It concluded that the purpose of the covenant was to protect the lot owned by the Association, not to protect the view of the lot for the Hursts.[1259] Accordingly, the supreme court held that the fence was not in violation of the restrictive covenants and affirmed the decision of the court below.[1260]

In *Joseph M. Jackovich Revocable Trust v. State*,[1261] the supreme court held that because the State did not announce a concrete intention to use or condemn specific parcels of the plaintiffs' property, no de facto taking occurred.[1262] The plaintiffs owned property which was projected to be part of a right-of-way acquisition planned by the Department of Transportation (DOT).[1263] In 1997, plaintiffs instituted an inverse condemnation suit against the State, arguing that a de facto taking of property occurs when precondemnation public announcements of a proposed acquisition reduces the economic values of the property, even if the property is never actually condemned.[1264] The supreme court affirmed the lower court's decision and concluded that the "concrete intention"

1254. *Id*. at 277. The adjoining property, Lot 43, was owned by the Association. Covenants on that property required that the lot be used for non-intensive recreational and park purposes. The Association wanted to erect the fence to help manage access to and use of the lot. *Id*.

1255. *Id*.

1256. *Id*.

1257. *Id*. at 277-78.

1258. *Id*. at 278.

1259. *Id*. at 279.

1260. *Id*. at 280.

1261. 54 P.3d 294 (Alaska 2002).

1262. *Id*. at 295.

1263. *Id*.

1264. *Id*. at 296-97.

test, whereby the State must show a present and certain intent to condemn the specific property, was the appropriate test, and that the DOT's announcements did not demonstrate such intent.[1265] Although in some cases the court has required compensation to homeowners because of the government's pre-condemnation activities by finding that a temporary taking had occurred,[1266] a present concrete indication of intent to condemn that property is required.[1267] At the time the parties sought summary judgment, it was still undetermined whether the project would proceed or which parcels would be acquired if it did proceed.[1268] Further, the property owner must prove that the State acted improperly in delaying the actual condemnation following an announcement of such intent and that as a result the property value diminished.[1269] Here, the State did not interfere with the landowner's economic or physical use and enjoyment of the property.[1270]

In *Leisnoi, Inc., v. United States*,[1271] the Ninth Circuit held that it had jurisdiction over the district court's denial of Stratman's motion to intervene and that Stratman's motion was moot.[1272] This dispute began when Leisnoi, an Alaska Native Village corporation, received land pursuant to the Alaska Native Claims Settlement Act.[1273] However, an action was filed by Stratman, a rancher, claiming that Leisnoi never properly qualified as a Native Village and that the land should be returned to the government.[1274] To quiet the title, Leisnoi brought an action against the United States.[1275] Stratman sought to intervene, however, the United States filed a disclaimer and the district court quieted title in Leisnoi and dismissed Stratman's motion as moot.[1276] The Ninth Circuit affirmed the district court's holding because the plain terms of

1265. *Id*. at 297-98.

1266. *E.g.*, Homeward Bound, Inc. v. Anchorage Sch. Dist., 791 P.2d 610, 614 (Alaska 1990) (allowing recovery to the owners of a parcel of land designated as a *potential* school site).

1267. *Jackovich Revocable Trust*, 54 P.3d at 298.

1268. *Id*. at 297.

1269. *Id*. at 298.

1270. *Id*. at 303.

1271. 313 F.3d 1181 (9th Cir. 2002).

1272. *Id.* at 1184.

1273. *Id.* at 1182.

1274. *Id.* at 1183.

1275. *Id.*

1276. *Id.*

U.S.C. § 2409a(e)[1277] deprived the district court of jurisdiction once the United States filed its disclaimer.[1278]

In *Madden v. Alaska Mortgage Group*,[1279] the supreme court held that a new payment on a promissory note extended a lender's right to recover its entire debt through foreclosure, even though the debtor had lost title to the property.[1280] Additionally, the supreme court held that fees expended in suing to establish the amount of a debt were not recoverable under a deed because they were not expenses of foreclosure.[1281] A debtor gave Alaska Mortgage a promissory note and secured the note by granting a second deed of trust on two lots (the Iliaska Subdivision).[1282] Three years later, the debtor defaulted on his first deed of trust and lost title to the Iliaska Subdivision;[1283] he continued, however, to make payments on the second deed of trust.[1284] Subsequently, the Maddens were granted a third deed of trust (subject to Alaska Mortgage's deed) in order to secure a loan.[1285] Within a year, the original debtor stopped making payments on his note and made no payments for nine years,[1286] causing Alaska Mortgage to commence foreclosure proceedings.[1287] The Maddens attempted to block the foreclosure sale, stating that Alaska Mortgage had overstated the amount due on its deed because many of the original debtor's late payments were barred by a six-year statute of limitations.[1288] Alaska Mortgage responded by filing suit and seeking to establish the amount due under its deed.[1289] Before a court could rule on the matter, however, the original debtor sent another payment on the note.[1290] Alaska Mortgage then moved for summary judgment, claiming that the new payment had revived any portion of the debt barred by the statute of limitations.[1291] Entering judgment in favor of Alaska Mortgage, the superior court ruled that the new payment had revived all installments under the promissory note and the

1277. 28 U.S.C. § 2409a(e) (2000).
1278. *Leisnoi*, 313 F.3d at 1184.
1279. 54 P.3d 265 (Alaska 2002).
1280. *Id.* at 266.
1281. *Id.*
1282. *Id.*
1283. *Id.*
1284. *Id.*
1285. *Id.* at 267.
1286. *Id.*
1287. *Id.*
1288. *Id.*
1289. *Id.*
1290. *Id.*
1291. *Id.*

deed of trust.[1292] On appeal, the supreme court held that, even though the debtor was technically out of possession of the Iliaska Subdivision at the time he made his new payment, he maintained an interest in the mortgaged property to the extent that the mortgage secured the non-time-barred installments.[1293] Furthermore, the court held that a subsequent grantee who has notice of a valid and enforceable prior lien assumes the risk of an extension.[1294] Accordingly, the supreme court held that allowing the debtor to revive the time-barred installments simply returned the Maddens to holding subsequent to Alaska Mortgage's deed,[1295] and remanded the case for reduction of attorney's fees to reflect only the fees incurred in performing the actual foreclosure sale.[1296]

In *Miller v. Matanuska-Susitna Borough*[1297] the supreme court held (1) that a borough ordinance which allocated paving special assessments to residential lots on a per lot basis did not conflict with state law, and (2) a borough ordinance limiting special assessments to twenty-five percent of the lots' tax-appraised value did not apply to the local improvement district in question.[1298] The Matanuska-Susitna Borough Assembly enacted an ordinance which assessed the cost of road improvements equally to each lot within the scope of the newly created improvement district.[1299] The Millers owned nine lots within the improvement district and argued that the borough acted contrary to state law by assessing the cost of improvement equally on a per-lot basis.[1300] State law provides a default method of assessing improvement costs "against property in proportion to the benefit received."[1301] However, Alaska law also authorizes municipalities to prescribe special assessment procedures if they so choose.[1302] Noting that the per-lot method of assessing improvement costs was presumptively valid, the court held that since the Millers had not shown that the benefit to their property was grossly disproportionate compared to the benefit conferred upon other assessed properties, the per-lot method was not

1292. *Id.*
1293. *Id.* at 269.
1294. *Id.*
1295. *Id.* at 270.
1296. *Id.* at 271.
1297. 54 P.3d 285 (Alaska 2002).
1298. *Id.* at 287.
1299. *Id.* at 288.
1300. *Id.*
1301. *Id.* at 289; ALASKA STAT. § 29.46.060 (Michie 2002).
1302. *Id.* at 289-90.

irrational and therefore valid.[1303] Finally, the court held that the ordinance at issue supplanted older procedures for improvement assessments and that, consequently, a twenty-five percent limit on assessments did not apply.[1304]

In *Municipality of Anchorage v. Suzuki*,[1305] the supreme court held that Alaska Statutes section 09.55.275[1306] requires municipalities to seek replat approval when the municipality seeks an easement which results in a "boundary change."[1307] The municipality sought easements for the properties of Dong Joon Lim and Lisa Suzuki which required the destruction of a part of Lim's property and either the destruction or movement of part of Suzuki's property.[1308] The superior court consolidated the cases and found that the requests for easements on both properties constituted a boundary change in accordance with section 09.55.275.[1309] The supreme court held that "an easement that is not coextensive with the property owner's property line and that functionally interferes with the landowner's exclusive use is a boundary change under section 09.55.275."[1310] The court first concluded that excluding easements from "boundary change" would render sections of the statute meaningless.[1311] The court then concluded that the legislative intent favored a broader interpretation of "boundary change" in order to require coordination between state and local governments.[1312] Because the two easements constituted a "boundary change," the supreme court affirmed the superior court decision to require replatting for both easements.[1313]

In *Ogar v. City of Haines*,[1314] the supreme court affirmed the superior court's summary judgment decision that the city was not equitably estopped from requiring Ogar to remove structures that were in violation of the city right-of-way.[1315] In 1990, the previous owners of the Ogars' property requested an appropriate vacation, but failed to complete the vacation process and built a residential

1303. *Id.* at 291-92.
1304. *Id.* at 292.
1305. 41 P.3d 147 (Alaska 2002).
1306. ALASKA STAT. § 09.55.275 (Michie 2002).
1307. *Suzuki* at 149.
1308. *Id.*
1309. *Id.* at 149-50.
1310. *Id.* at 150.
1311. *Id.* at 151-52.
1312. *Id.* at 153.
1313. *Id.* at 154.
1314. 51 P.3d 333 (Alaska 2002).
1315. *Id*. at 333.

garage which encroached on the city's right-of-way.[1316] The encroachment did not come to the attention of the Ogars until 1997.[1317] At that point, Ogar applied for a thirty-foot vacation for the garage, a ten-foot overhang extension, and an adjacent fuel tank. The city planning commission approved a fifteen-foot vacation for the original garage but required Ogar to remove the overhang, remove the fuel tank, and have the property surveyed, replatted, and paid at the current value.[1318] Ogar complied with most of the city's conditions but never removed the overhang or the tank.[1319] Instead, Ogar filed suit against the previous owners and the city. Ogar's amended complaint alleged that the city negligently failed to correct the encroachment by failing to inspect the property and requested that the city be equitably estopped from requiring her to remove the overhang and fuel tank.[1320] In reviewing the grant of summary judgment, the supreme court noted that four elements must be proven to make out a claim for equitable estoppel: (1) "[A]n assertion of position by conduct or word"; (2) "reasonable reliance thereon"; (3) resulting prejudice; and (4) enforcement of the estoppel to the extent that justice requires.[1321] The court held, however, that the city never made any assertions either to Ogar or the previous property owner which would satisfy this requirement.[1322] Nor did the court find that the city's failure to "prevent or cure the encroachment" was sufficient to show equitable estoppel.[1323] As the first of the four elements was not met, the court found that there was no basis for the equitable estoppel and affirmed the summary judgment.[1324]

In *Rockstad v. Global Finance & Investment Co.*,[1325] the supreme court held that a renewed default provision was not triggered when the lessee attempted to pay late rent before he received written notice of default.[1326] Rockstad operated a dry cleaning business on commercial property leased from Global Finance and Investment Company (Global).[1327] Although the lease

1316. *Id.* at 334.
1317. *Id*.
1318. *Id*.
1319. *Id*.
1320. *Id*. at 335.
1321. *Id*.
1322. *Id*.
1323. *Id*. at 336.
1324. *Id*.
1325. 41 P.3d 583 (Alaska 2002).
1326. *Id*. at 589.
1327. *Id*. at 584.

provided that rent was due on the first day of each month, Global commonly accepted payments on the tenth.[1328] In August 1999, Rockstad failed to tender the amount due for more than ten days after Global had sent written notice.[1329] In September 1999, Rockstad went to pay the rent on the tenth day of the month, but arrived at the office at 5:10 PM after the office closed.[1330] Rockstad left a message explaining that he attempted to pay the rent.[1331] Global returned the call refusing late payment and sent Rockstad notice to vacate the premise immediately.[1332] The notice stated that Rockstad's failure to pay timely rent was his second default in two months and that Global was exercising its power under the Renewed Default provision of the lease to terminate the lease.[1333] When Rockstad refused to vacate, Global filed suit.[1334] The superior court concluded that Rockstad had breached the lease, but that the breach was not material as Rockstad had attempted delivery within minutes of the deadline.[1335] The superior court declined to evict Rockstad if he paid the late rent, interest, and the reasonable costs of the proceeding.[1336] Rockstad appealed.[1337] The supreme court reversed the superior court's decision holding that the Renewed Default provision had not been triggered as Global did not send written notice of the second default before Rockstad attempted to cure.[1338] The supreme court determined that the provision was ambiguous as to whether written notice was required.[1339] The court reasoned that the provision did require written notice in order to effectuate the reasonable expectations of the contracting parties, to render none of the disputed provisions superfluous, to favor continuing the lease, and to disfavor the lessor and drafting party.[1340]

1328. *Id*.
1329. *Id*.
1330. *Id*.
1331. *Id*.
1332. *Id*.
1333. *Id*.
1334. *Id*.
1335. *Id*. at 584-85.
1336. *Id*. at 585.
1337. *Id*. at 584.
1338. *Id*. at 589.
1339. *Id*. at 587.
1340. *Id*. at 588-89.

XI. TORT LAW

In *Central Bering Sea Fishermen's Ass'n v. Anderson*,[1341] the supreme court reduced the jury's award for lost earnings but affirmed the punitive damage award for claims involving constructive retaliatory discharge, promissory estoppel and defamation.[1342] Anderson's suit alleged that Central Bering Sea Fishermen's Association ("Association") and its president had wrongfully discharged her in retaliation for her investigation of misappropriation of Association funds and that both the president and the Association made defamatory statements regarding Anderson's reason for discharge.[1343] At trial, the jury returned a verdict for Anderson on two theories of wrongful termination and awarded money for back pay and lost future wages. The jury also awarded her money for emotional distress and loss of reputation resulting from the deprivation. It then awarded punitive damages against the Association's president and the Association itself.[1344] On appeal, the Association argued that the economic damages award was in error and the punitive damages award was excessive.[1345] Regarding the economic damages, the supreme court found that the jury's verdict was incorrect because it failed to rely on the amount and duration of the contract that Anderson actually expected.[1346] Accordingly, the court recalculated the award to reflect only a one-year loss of earnings.[1347] As to the punitive damages, however, the court was unwilling to reverse the jury's finding. First, the court concluded that the discussion of corruption in Anderson's closing argument was appropriate.[1348] Next, it determined that while the trial court should not have instructed the jury about the statutory cap on punitive damages, the instruction was harmless error, particularly since the court instructed the jury not to use the cap as a gauge for the award and because the award was much less than the statutory cap.[1349] Finally, the court held that the trial court properly refused to remit the jury's punitive damages award.[1350] The court determined that the jury properly considered both common law factors

1341. 54 P.3d 271 (Alaska 2002).
1342. *Id*. at 275.
1343. *Id*. at 275-76.
1344. *Id*. at 276-77.
1345. *Id*. at 277.
1346. *Id*. at 278. In this case, she only expected a one year contract for $60,000-$65,000 a year. *Id*.
1347. *Id*.
1348. *Id*. at 279-80.
1349. *Id*. at 281-82.
1350. *Id*. at 282.

and statutory factors in calculating the award,[1351] and it concluded that the jury's award also met the guidelines suggested by the United States Supreme Court.[1352] Accordingly, the decision of the court below was reversed in part and affirmed in part.[1353]

In *Fenner v. Municipality of Anchorage*,[1354] the supreme court declined to adopt a "substantial certainty" standard for intentional tort actions involving the workers' compensation system.[1355] Fenner was injured while driving a plow truck for the city.[1356] Fenner received workers' compensation but sued the city alleging that a combination of its actions rose to the level of an intentional tort.[1357] The supreme court recognized that although the workers' compensation system is generally the exclusive remedy for employees injured in the workplace, it does not apply in cases of intentional torts.[1358] Fenner argued that the court had adopted the substantial certainty standard for intentional torts in an earlier case, but the supreme court dismissed his argument, reasoning that where the claim arises in the workers' compensation environment, specific intent is required.[1359] On this basis, the court held that Fenner had failed to submit any evidence that the municipality specifically intended to injure him and affirmed the trial court's entry of summary judgment.[1360]

In *Fernandes v. Portwine*,[1361] the supreme court affirmed the superior court's decision of a nuisance case under Alaska Statutes section 09.10.050[1362]: (1) requiring the plaintiffs to prove nuisance by a preponderance of the evidence; (2) applying a six-year statute of limitations; (3) denying defendant's request for a jury view; (4) refusing to enjoin plaintiffs' plumbing business; and (5) denying both parties' attorney's fees.[1363] The Portwines's brought suit against Joaquim Fernandes claiming that he created a nuisance and sought to enjoin him from the disputed activities.[1364] Fernandes counterclaimed that the Portwines defamed him and that they used

1351. *Id*. at 282-83.
1352. *Id*. at 284.
1353. *Id*. at 285.
1354. 53 P.3d 573 (Alaska 2002).
1355. *Id.* at 577.
1356. *Id*. at 574.
1357. *Id.*
1358. *Id.* at 575.
1359. *Id.* at 576-77.
1360. *Id.* at 577-78.
1361. 56 P.3d 1 (Alaska 2002).
1362. ALASKA STAT. § 09.10.050 (Michie 2002).
1363. *Id.* at 3.
1364. *Id.*

their land for non-permitted industrial uses.[1365] First, the court held that because the plaintiffs were suing under standard nuisance statutes, the superior court correctly used the preponderance of the evidence standard.[1366] Second, the court upheld the superior court's determination that a six-year statute of limitations governs this case.[1367] The court ruled that in a statute of limitations context, the meaning of trespass in the statute is interpreted broadly to encompass any unlawful interference with one's person, property, or rights.[1368] Third, reviewing the trial court's denial of defendant's request for a jury view, the court held that the trial judge did not abuse his broad discretion under this permissive rule.[1369] Fourth, the court held that given the scant testimony presented at trial, the superior court did not err in finding defendant's cross-claim "was not established at trial."[1370] Finally, reviewing the application for attorney's fees, the court upheld the superior court's judgment that where there is no prevailing party, each party should bear its own costs and attorney's fees.[1371] For these reasons, the court affirmed the superior court's decision in its entirety.[1372]

In *Hinsberger v. State*,[1373] the supreme court held that the plaintiff would be unable to demonstrate breach of preexisting duty and therefore had no claim for negligent infliction of emotional distress (NIED).[1374] Hinsberger sued the State, alleging negligence based on the delay of medical treatment while he was incarcerated and NIED.[1375] The State subsequently moved for summary judgment on both claims and the superior court granted the State's motions.[1376] Hinsberger appealed the NIED judgment.[1377] While he conceded that he did not have a physical injury as a result of the NIED, he claimed that the preexisting duty exception applied.[1378] The supreme court rejected this argument, reasoning that because Hinsberger did appeal the superior court's judgment regarding negligence, then as a matter of law the State did not breach its

1365. *Id.* at 3-4.
1366. *Id.* at 5.
1367. *Id.* at 6.
1368. *Id.*
1369. *Id.* at 7.
1370. *Id.*
1371. *Id.* at 8-9.
1372. *Id.* at 9.
1373. 53 P.3d 568 (Alaska 2002).
1374. *Id*. at 569.
1375. *Id*. at 570.
1376. *Id*.
1377. *Id.*
1378. *Id* at 571.

duty, and Hinsberger would be unable to establish the breach of duty required for the NIED claim.[1379] For these reasons, the court affirmed the superior court's grant of summary judgment.[1380]

In *Kallstrom v. United States*,[1381] the supreme court held that a cause of action for NIED does not exist for an "unwitting instrument" - a plaintiff who becomes a participant in the infliction of another's injuries through the negligence of the defendant.[1382] At a public dance hall, Kallstrom retrieved a drink for a nine-year-old girl from a pitcher sitting next to the sink, which she believed to contain fruit juice.[1383] "In fact, the pitcher contained a lye-based caustic detergent that caused severe, permanent internal injuries to [the girl] when she drank it."[1384] After the federal district court granted the government's motion to dismiss on Kallstrom's claim for NIED, Kallstrom appealed to the Ninth Circuit Court of Appeals.[1385] In turn, the circuit court certified the case to the Alaska Supreme Court pursuant to Rule 407(a) of the Alaska Rules of Appellate Procedure[1386] because the facts of the case were not adequately covered by Alaska case law.[1387] The supreme court ruled that "[g]enerally, damages are not awarded for NIED in the absence of physical injury"[1388] and identified two exceptions to this rule: "the bystander exception" and "the preexisting duty exception."[1389] Kallstrom was precluded from recovering under "the bystander exception" because she had no blood relation to the victim and had only passing involvement with her prior to the injury.[1390] She was precluded from recovering under "the preexisting duty exception" because she did not have a contractual or fiduciary duty with the government.[1391] The court also declined to recognize a duty of care to protect "unwitting instruments" from emotional harm because the harm to such plaintiffs is not reasonably foreseeable and plaintiffs in the "unwitting instrument" scenario vary too

1379. *Id* at 572.
1380. *Id*. at 573.
1381. 43 P.3d 162 (Alaska 2002).
1382. *Id.* at 163.
1383. *Id.* at 164.
1384. *Id.*
1385. *Id.*
1386. ALASKA R. APP. P. 407(a).
1387. *Kallstrom*, 43 P.3d at 164.
1388. *Id.* at 165.
1389. *Id.* at 165-66.
1390. *Id.* at 165.
1391. *Id.* at 166.

widely to allow a court to meaningfully distinguish legitimate claims.[1392]

In *Kava v. American Honda Motor Co., Inc.*,[1393] the supreme court held that: (1) a manufacturer's evidence of comparative risk was admissible; (2) the plaintiff was entitled to a new trial on issues not already litigated when the superior court sua sponte declared a mistrial as to one claim; (3) determination of a new trial was in the superior court's discretion; and (4) evidence of an indemnification agreement was properly excluded.[1394] Abner Gologergen died after losing control of his Honda three-wheel ATV.[1395] His estate filed a wrongful death action against Honda and Sitasuak, Honda's local distributor, on behalf of the estate's dependants.[1396] On appeal, the estate first argued that the superior court erred in admitting Honda's evidence of comparative risk.[1397] The supreme court held that the evidence was admissible and revelvant because it went to the issue of punitive damages.[1398] The estate also argued that it should have been granted a new trial because the superior court sua sponte declared a mistrial on the negligence claim.[1399] Though the supreme court agreed that the superior court had acted sua sponte, it held that the estate was not entitled to a new trial on all claims because it would relitigate issues that the jury had already decided.[1400] However, the court held that a new trial was necessary for the issue of comparative fault because, had the jury found Honda negligent, they could have assessed greater comparative fault.[1401] The supreme court also remanded the issue to be determined under the correct standard: whether, in the superior court's discretion, the verdict was against the weight of the evidence.[1402] Finally, the supreme court held that the superior court properly excluded evidence of Honda's indemnity agreement as the there was no deceptive appearance of adversity between Honda and Sitasuak which might cause an appearance of bias.[1403]

1392. *Id.* at 167-68.
1393. 48 P.3d 1170 (Alaska 2002).
1394. *Id*. at 1174, 1176, 1177, 1179.
1395. *Id*. at 1172.
1396. *Id*.
1397. *Id*. at 1174.
1398. *Id*.
1399. *Id*. at 1175.
1400. *Id*. at 1176.
1401. *Id*.
1402. *Id*. at 1177.
1403. *Id*. at 1179.

In *Laidlaw Transit, Inc., v. Crouse*,[1404] the supreme court held that Laidlaw, a school bus company, was vicariously liable for a bus driver's actions because she was acting within the course and scope of employment.[1405] Shawn Crouse was injured when the bus on which he was riding slid off the road and rolled over.[1406] A post-accident drug test revealed marijuana in the driver's blood.[1407] After trial, the jury awarded Crouse compensatory damages as well as $3.5 million in punitive damages.[1408] The trial court modified the punitive damages award to $500,000.[1409] On appeal, the supreme court affirmed the trial court's finding that the bus driver's outrageous conduct occurred in the course and scope of her employment, rendering Laidlaw vicariously liable.[1410] Additionally, the supreme court held that evidence of Laidlaw's financial resources was relevant to a punitive damages award and the remittitur of punitive damages award was warranted based on the difference between punitive and compensatory damages, the relatively minor injuries sustained by Crouse, and the low annual revenues of Laidlaw from its Alaska operations.[1411]

In *Liimatta v. Vest*,[1412] the supreme court held that exclusion of evidence regarding Vest's documented pre-accident drug seeking behavior was an abuse of discretion.[1413] In 1997, Liimatta struck Vest with her truck while Vest was riding a bicycle.[1414] Vest suffered broken bones, trauma to her teeth and face, as well as bruises and abrasions.[1415] At trial, the superior court excluded evidence of Vest's pre-accident drug seeking behavior, concluding that, although relevant, it was redundant and highly prejudicial.[1416] A jury later awarded Vest $97,287.26 in damages.[1417] Liimatta appealed

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1404. 53 P.3d 1093 (Alaska 2002).
1405. *Id.* at 1096.
1406. *Id.*
1407. *Id.*
1408. *Id.* at 1097.
1409. *Id.*
1410. *Id.* at 1099.
1411. *Id.* at 1103-04.
1412. 45 P.3d 310 (Alaska 2002).
1413. *Id.* at 312-13. Drug seeking behavior is "a pattern of seeking narcotic pain medication or tranquilizers with . . . complaints of severe pain without an organic basis." *Id*. at 313 (citations omitted).
1414. *Id.* at 312.
1415. *Id.*
1416. *Id*. at 313 (noting that the trial court applied Alaska Evidence Rule 403 which may allow evidence to be excluded if the probative value is outweighed by the prejudicial effect).
1417. *Id.* at 312. The superior court set final damages at $119,219.91. *Id.*

and Vest cross appealed.[1418] Reviewing the trial court's decision for abuse of discretion, the supreme court reversed and remanded.[1419] First, the court concluded that the evidence of Vest's pre-accident drug seeking behavior was highly relevant to Vest's claim for loss of enjoyment of life, to the issue of causation, and to Vest's credibility, and therefore, its probative value was not outweighed by the danger of unfair prejudice.[1420] Second, recognizing that *Wasserman v. Bartholomew*[1421] permits evidence to be excluded as cumulative, the court held that the standard set forth in *Wasserman* had not been satisfied and, therefore, afforded no basis upon which to exclude the evidence.[1422] Third, the court stated that the medical testimony provided at trial established an adequate foundation upon which to admit the evidence.[1423] Concluding, therefore, that exclusion of the evidence was an abuse of discretion, the court further ruled that it could not, as required by Alaska Civil Rule 61,[1424] say with fair assurance that the exclusion of evidence did not sway or affect the jury.[1425] Consistent with this ruling, the court reversed and remanded for a new trial.[1426]

In *Moody v. Delta Western, Inc.*,[1427] the supreme court held that the Firefighter's Rule applies in Alaska.[1428] The Firefighter's Rule bars firefighters and police officers from recovering from injuries caused by the negligence of others in situations that required their presence.[1429] An employee of Delta Western left a fuel truck unlocked and with the keys in the ignition.[1430] An intoxicated man entered the truck and drove recklessly around the town.[1431] Moody, the police chief, responded to reports of the recklessly driven fuel

1418. *Id.*
1419. *Id.*
1420. *Id.* at 313-15.
1421. 923 P.2d 806 (Alaska 1996).
1422. *Liimatta*, 45 P.3d at 315 (citing *Wasserman*, 923 P.2d at 813 (stating that evidence is excludable as cumulative where it supports uncontested or established facts or repeats a point made by previous evidence)).
1423. *Id.* at 316.
1424. ALASKA R. CIV. P. 61.
1425. *Liimatta*, 45 P.3d at 317 (citing Korean Air Lines Co. v. State, 779 P.2d 333, 339 (Alaska 1989)).
1426. *Id.* The supreme court also held the superior court abused its discretion on several other evidentiary rulings but did not base its reversal on those grounds. *Id.* at 318-19.
1427. 38 P.3d 1139 (Alaska 2002).
1428. *Id.* at 1139-40.
1429. *Id.* at 1139.
1430. *Id.* at 1140.
1431. *Id.*

truck.[1432] When Moody's car attempted to stop the fuel truck, the truck hit the car causing Moody permanent injuries.[1433] Moody filed suit against Delta Western, alleging that the company negligently failed to remove the keys from the truck's ignition.[1434] Delta Western was granted summary judgment by the superior court based on the Firefighter's Rule.[1435] The supreme court examined the public policy reasons noted by a majority of other courts considering this issue—namely, that the public, through salaries, already compensates public safety officials to respond to dangerous situations often caused by negligence.[1436] Therefore, requiring the public to also pay for injuries incurred by officers in such responses imposes a double payment on the community for services already purchased.[1437] Accordingly, the supreme court affirmed the superior court's grant of summary judgment to Delta Western.[1438]

In *Powell v. Tanner*,[1439] the supreme court held that a genuine issue of material fact remained as to whether Harcourt was vicariously liable for Tanner's accident.[1440] Tanner was hired by Harcourt as an Independent Contractor to sell its educational materials.[1441] She came to Anchorage to demonstrate the materials at a teacher in-service.[1442] After picking up the rental car, she attempted to change lanes and collided with Powell's vehicle.[1443] Powell sued Harcourt under multiple theories, including respondeat superior liability.[1444] The superior court granted summary judgment for Harcourt finding that Harcourt could not be liable under the "independent contractor rule."[1445] The supreme court reviewed this determination de novo to find that a genuine issue of material fact remained as to whether Tanner was an independent contractor or an employee.[1446] The court used factors from the Restatement (Second) of Agency § 220(2) (1958) to determine that factual disputes remain for many of the factors, making a grant of summary

1432. *Id.*
1433. *Id.*
1434. *Id.*
1435. *Id.*
1436. *Id.* at 1141-42.
1437. *Id.* at 1142.
1438. *Id.* at 1143.
1439. 59 P.3d 246 (Alaska 2002).
1440. *Id.* at 255.
1441. *Id.* at 247.
1442. *Id.*
1443. *Id.* at 248.
1444. *Id.*
1445. *Id.*
1446. *Id.*

judgment inappropriate.[1447] Further, the court found that the superior court's striking of witnesses did not need to be decided because by reversing the grant of summary judgment, it was likely that discovery would be re-opened and no prejudice would exist by excluding the witnesses.[1448]

In *Prentzel v. State, Department of Public Safety*,[1449] the supreme court reinstated Prentzel's negligence and civil rights claims.[1450] Prentzel was arrested, but released without being charged, for violating his DWI release conditions.[1451] Prentzel sued, alleging false arrest, negligence in training the officers, and violation of his civil rights.[1452] The trial court dismissed all claims on the pleadings.[1453] The supreme court reinstated Prentzel's claim against the arresting officers, because the allegation of malice created a factual question that could not be disposed of on the pleadings.[1454] Additionally, the supreme court found it was error to dismiss Prentzel's negligence claims, because the legal question of whether or not the State owed Prentzel a duty to supervise and train state troopers so they do not make the mistakes made in this case is best decided in a factual context.[1455] The court also ruled that the superior court erred in not construing the civil rights claim to cover the actions of the state troopers and their supervisors acting in their personal capacities.[1456] However, the court affirmed the dismissal of Prentzel's *Bivens*[1457] claim because the issue was inadequately briefed.[1458]

In *Wasserman v. Bartholomew*,[1459] the supreme court held (1) that the trial court's factual findings were not clearly erroneous, (2) the trial court did not misapply the test to determine whether the police had used excessive force, and (3) the trial court did not abuse its discretion by denying a motion to disqualify the trial court judge.[1460] In 1990, Wasserman was grocery shopping when he was

1447. *Id.* at 249.
1448. *Id*. at 254.
1449. 53 P.3d 587 (Alaska 2002).
1450. *Id.* at 596.
1451. *Id.* at 589.
1452. *Id.*
1453. *Id.* at 590.
1454. *Id.* at 591.
1455. *Id.* at 592.
1456. *Id.* at 595-96.
1457. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).
1458. *Prentzel*, 53 P.3d at 596.
1459. 38 P.3d 1162 (Alaska 2002).
1460. *Id*. at 1165.

mistaken for a dangerous fugitive by police officers.[1461] The officers wrestled Wasserman to the ground and handcuffed him.[1462] When they realized their mistake, the officers released him.[1463] Wasserman subsequently sued officers for injuries allegedly sustained during the incident.[1464] The trial court ruled in favor of the officers, and Wasserman appealed.[1465] The supreme court affirmed.[1466] The trial court's rulings were not erroneous because it had made detailed findings, indicated the evidentiary support, evaluated the credibility of the witnesses, and explained its weighing of the evidence.[1467] The trial court did not misapply the test to determine whether the police used excessive force against Wasserman because the court used the well-established objective reasonableness test and applied the facts accordingly.[1468] Finally, the trial court did not abuse its discretion by denying Wasserman's motion to disqualify the trial court judge because mere evidence that a judge has exercised his judicial discretion in a particular way is not sufficient to require disqualification.[1469]

In *Wells v. State*,[1470] the supreme court held that the State was immune from liability under Alaska law[1471] for failing to install a guardrail because such an act was discretionary.[1472] Wells was injured in a car accident and claimed that his injuries were due to the failure of the State to install a guardrail on the road where the accident occurred.[1473] By statute, the State was immune from liability from tort suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency."[1474] The court held that the installation of guardrails was discretionary and thus the State was immune from liability.[1475] The supreme court also held that state standards and requirements for the construction of roads do not apply to the maintenance of roads constructed prior to the issuance of the stan-

1461. *Id.*
1462. *Id.*
1463. *Id*.
1464. *Id.* at 1166.
1465. *Id.*
1466. *Id*. at 1165.
1467. *Id*. at 1167.
1468. *Id*. at 1169-70 (applying Graham v. Connor, 490 U.S. 386 (1989)).
1469. *Id.* at 1170-71.
1470. 46 P.3d 967 (Alaska 2002).
1471. ALASKA STAT. § 09.50.250 (Michie 2002).
1472. *Wells*, 46 P.3d at 969.
1473. *Id*. at 968-69.
1474. ALASKA STAT. § 09.50.250.
1475. *Wells*, 46 P.3d at 969-70.

dards.[1476] The court affirmed the denial of Wells' motion for summary judgment and held the State had no duty to adhere to "clear zone" standards in the maintenance of the road in question because such standards were not in place when the road was designed and built.[1477] Finally, the court held that the trial court was within its discretion in allowing the State and Chugach Construction Company, who constructed the road, to amend their expert witness lists, as the State and the construction company had a plausible claim of surprise to the Wells' expert witness's testimony claiming Wells was injured by striking the boulders on the side of the road, which had not been asserted earlier.[1478] Accordingly, the supreme court affirmed the trial court's decisions on summary judgment.[1479]

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1476. *Id.* at 970.
1477. *Id*. at 971.
1478. *Id*.
1479. *Id*.

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