

THE YEAR IN REVIEW 2022

SELECTED CASES FROM THE ALASKA SUPREME COURT AND THE ALASKA COURT OF APPEALS

ADMINISTRATIVE LAW	2
BUSINESS LAW	3
CIVIL PROCEDURE.....	4
CONSTITUTIONAL LAW	8
CONTRACT LAW.....	12
CRIMINAL LAW	13
CRIMINAL PROCEDURE	21
ELECTION LAW	29
EMPLOYMENT LAW	31
ENVIRONMENTAL LAW.....	34
ETHICS & PROFESSIONAL RESPONSIBILITY	36
EVIDENCE LAW	36
FAMILY LAW	37
HEALTH LAW	47
INSURANCE LAW	48
INTERNATIONAL LAW.....	49
MARITIME LAW.....	50
NATIVE LAW	52
PROPERTY LAW	54
TAX LAW.....	58
TORT LAW.....	59
TRUSTS & ESTATES	61

INTRODUCTION

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

ADMINISTRATIVE LAW

Inter-Cooperative Exchange v. United States Department of Commerce

In *Inter-Cooperative Exchange v. United States Department of Commerce*, 36 F.4th 905 (9th Cir. 2022), the Ninth Circuit held that an agency's response to a Freedom of Information Act (FOIA) request is inadequate where it chooses only three search terms which together are not reasonably calculated to uncover all responsive documents. (*Id.* at 908). A cooperative of Alaskan crab fishers filed a FOIA request with the National Oceanic and Atmospheric Administration (NOAA) seeking an explanation about the North Pacific Fishery Management Council's (NPFMC) decision to not allow arbitrators in its crab price negotiation arbitration system to consider a 2014 Alaskan minimum wage hike. (*Id.* at 909). Before the request was filed, a voting member of the NPFMC indicated in an email to an arbitrator that, contrary to the NPFMC's official decision, arbitrators could take the effect of minimum wage into account. (*Id.*). As a result, the cooperative specified in its FOIA request that it sought communications and documents concerning (1) interpreting or applying the arbitration system and (2) the 2014 minimum wage increase. (*Id.*). In response, the government produced documents, but its search log indicated the only search terms it used were "binding arbitration," "arbitration," and "crab." (*Id.*). On appeal, the cooperative argued that the search terms were inadequate because they did not cover the piece of the FOIA request about the Alaska minimum wage hike, and the terms were not even sufficiently broad to uncover all documents relevant to the crab arbitration system. (*Id.* at 912). The Ninth Circuit reversed the lower court's decision to grant the government summary judgment, reasoning that the NOAA's chosen search terms were not reasonably calculated to uncover all responsive documents, as NOAA presented no evidence that the three search terms the government employed had anything to do with the Alaska minimum wage increase. (*Id.*). The court further reasoned that the search was inadequate even with respect to the other half of the FOIA request, as the NPFMC member neglected to use any of the chosen search terms in his substantive response to the arbitrator's query about arbitration standards. (*Id.* at 913). Reversing the lower court's decision, the Ninth Circuit held that an agency's response to a FOIA request is inadequate where it chooses only three search terms which together are not reasonably calculated to uncover all responsive documents. (*Id.* at 908).

Worker's Compensation Benefits Guaranty Fund v. Adams

In *Worker's Compensation Benefits Guaranty Fund v. Adams*, 518 P.3d 280 (Alaska 2022), the supreme court held that a worker's compensation fund seeking to find an injury non-compensable due to intoxication must show that the worker was intoxicated at the time of the incident, and that the intoxication was the proximate cause of the injury. (*Id.* at 285). A worker fell 30 feet off a roof after the cribbing under his ladder gave way, leaving him permanently disabled. (*Id.* at 282). The worker admitted to drinking beer and using cocaine before the accident, and to not inspecting the cribbing. (*Id.*). The paramedic on the scene testified that the worker admitted to drinking but did not appear intoxicated; hospital tests indicated that the worker had alcohol on his breath and cocaine in his system. (*Id.*). The worker filed a workers' compensation claim, and the fund denied benefits based on his intoxication. (*Id.*). The fund presented as an expert witness a doctor who testified that alcohol and cocaine would likely alter the worker's judgment, but who could not determine the worker's level of intoxication or possible substance tolerance. (*Id.* at 282–83). The Alaska Worker's Compensation Board rejected the fund's defenses and held for the worker, and the Worker's Compensation Appeals

Commission affirmed. (*Id.* at 284). On appeal, the supreme court affirmed the Appeals Commission’s decision, reasoning that there was sufficient evidence to support the Board’s finding. (*Id.* at 289). The court explained that, while Alaska law prohibits compensation for an injury “proximately caused by intoxication of the injured employee,” the burden was on the fund to show that the employee’s mental or physical faculties were impaired by the use of drugs, and that the impairment was the “but-for” proximate cause of the injury. (*Id.* at 285). The fund did not show the worker’s level of impairment, whether the cribbing would have collapsed on its own, or whether the worker would have inspected the cribbing had he not ingested alcohol and cocaine. (*Id.* at 286–87). Thus, the fund did not meet its burden of showing that the worker’s impairment was the cause of his injury. (*Id.* at 289). Affirming the Commission’s decision, the supreme court held that a worker’s compensation fund seeking to find an injury non-compensable due to intoxication must show that the worker was intoxicated, and that the intoxication was the proximate cause of the injury. (*Id.* at 285).

BUSINESS LAW

Duffus v. Baker

In *Duffus v. Baker*, 513 P.3d 264 (Alaska 2022), the supreme court held that an attorney’s lien may be asserted against settlement funds despite a standard clause making each party responsible for their own fees, attorney participation in settlement negotiation, and a provision in the settlement agreement for payment of attorneys’ fees. (*Id.* at 274–75). Duffus and Baker were former business partners whose business ventures failed, resulting in extended litigation. (*Id.* at 267). Duffus had previously obtained a charging order against distributions from Baker’s 50% membership interest in an LLC. (*Id.* at 267–68). In a suit involving the LLC, the parties ultimately settled without including Duffus, and Duffus attempted to intervene, arguing that the charging order applied to settlement funds. (*Id.* at 268–69). The settlement involved a payment to the law firm that represented Baker, for which the firm filed an attorney’s lien. (*Id.* at 269–70). The superior court below granted Duffus’s charging order, but enforced the law firm’s lien priority over the charging order, resulting in partial recovery for Duffus. (*Id.* at 273). On appeal, Duffus argued that the lien was invalid. (*Id.* at 270). The supreme court upheld the validity of the lien, reasoning that a clause in the settlement agreement making each party responsible for its own fees did not by itself obviate the law firm’s right to an attorney’s lien on Baker’s settlement funds, and that the law firm’s participation in settlement negotiations did not make it a “party” in itself. (*Id.* at 274–75). The court further reasoned that the fact that the law firm’s fees were included in the settlement agreement did not preclude it from seeking a lien, because the attorney’s lien statute is construed liberally. (*Id.*). The supreme court vacated and remanded for an evidentiary hearing, declining to address priority of the lien over the charging order. (*Id.* at 270–71, 273, 275–76). However, the supreme court held that an attorney’s lien may be asserted against settlement funds despite a standard clause making each party responsible for their own fees, attorney participation in settlement negotiation, and a provision in the settlement agreement for payment of attorneys’ fees. (*Id.* at 274–75).

Pederson v. Arctic Slope Regional Corp.

In *Pederson v. Arctic Slope Regional Corp.*, 517 P.3d 606 (Alaska 2022), the supreme court held that the stated purpose of an inspection request by a shareholder should be determined based on the totality of the written request. (*Id.* at 611). In this case, a shareholder sought to exercise his

right to inspect a corporation's books and records to ensure that the information in them was accurate. (*Id.* at 608). The shareholder and corporation negotiated informally, but could not come to an agreement as to the scope of the shareholder's inspection right, and the shareholder filed suit for a violation of his right to inspection. (*Id.*). The lower court held that the shareholder did not adequately state that he "suspected shenanigans" in his request for inspection, and held for the corporation. (*Id.* at 610). The supreme court reversed in part the lower court's decision, reasoning that all of a written request must be considered when determining if a stated purpose is sufficient for approving an inspection request. (*Id.* at 611). The supreme court affirmed in part the lower court's decision, reasoning that sanctions against the shareholder for failing to appear at scheduled deposition and failure to respond to discovery requests should stand. (*Id.* at 612). Reversing in part and affirming in part the lower court's decision, the supreme court held that the stated purpose of an inspection request by a shareholder should be determined based on the totality of the written request. (*Id.* at 611).

Small Creek, Inc. v. Build Alaska General Contracting, L.L.C.

In *Small Creek, Inc. v. Build Alaska General Contracting, L.L.C.*, 513 P.3d 253 (Alaska 2022), the Alaska Supreme Court held that for purposes of accord and satisfaction, (1) printing "full payment" on a check could be evidence of bad faith tender, and (2) disagreement over calculation of payment could be a bona fide dispute. (*Id.* at 261–262). A general contractor entered into a subcontracting agreement with subcontractor. (*Id.* at 256). The general contractor paid the subcontractor periodically, and on its final check, the general contractor inscribed the words "Chena River Trail Improvements Final Payment." (*Id.*). Although the parties disputed how to calculate the subcontractor's compensation, an employee of the subcontractor cashed the final check. (*Id.* at 257). The subcontractor later attempted to return the payment, but the general contractor refused to accept it. (*Id.*). The lower court ruled for the general contractor on summary judgment, finding the final check to be an accord and satisfaction accepted by the subcontractor when cashed. (*Id.* at 257–58). The supreme court overturned the lower court, finding that issues of material fact existed as to whether the general contractor tendered the check in good faith and whether the parties had a "bona fide" dispute over price. (*Id.* at 260–61). First, the court explained that the text "Final Payment" could be construed as bath faith tender in light of the parties' communications. (*Id.* at 260). Second, the court concluded that the parties' disagreement over how to calculate the subcontractor's payment was not frivolous as a matter of law. (*Id.* at 261). Overturning the lower court, the supreme court held that for purposes of determining the existence of an accord and satisfaction, (1) printing words like "full payment" on a check could be bad faith tender, and (2) disagreement over calculation of payment could be a bona fide dispute. (*Id.* 261–262).

CIVIL PROCEDURE

Anniskett v. Tracey

In *Anniskett v. Tracey*, No. S-17398, 2022 WL 2717712 (Alaska July 13, 2022) (unpublished), the supreme court affirmed the superior court's rulings declining to set aside a probate settlement agreement and dismissing, for failure to state a claim for relief, a separate lawsuit alleging conversion of estate property filed by the personal representative of the probate estates. (*Id.* at *1). Anniskett, the personal representative of her parents' estates, agreed in a probate settlement agreement that certain estate property gifted to her sister, Tracey, was to be excluded from

probate. (*Id.*). At a hearing, Anniskett once again agreed to the probate settlement agreement's treatment of the estate property gifted to Tracey, and the court signed an order accepting the agreement. (*Id.* at *1–2). Years later, Anniskett filed a motion to set aside the probate settlement agreement, alleging that Anniskett was fraudulently induced into agreeing to the probate settlement agreement. (*Id.* at *3–4). Additionally, Anniskett filed a separate civil complaint alleging conversion of the estate property gifted to Tracey. (*Id.* at *4). The superior court denied Anniskett's motion to set aside the probate settlement agreement and dismissed Anniskett's conversion lawsuit. (*Id.* at *4–5). Anniskett appealed both rulings. (*Id.* at *5). The supreme court held that the motion to set aside the probate settlement agreement was time-barred under the Alaska Rules of Civil Procedure. (*Id.* at *6). Further, the supreme court held that the conversion lawsuit failed because of claim preclusion and Anniskett's failure to allege any nonconclusory facts that could support the action. (*Id.* at *8–9). The supreme court affirmed the superior court's rulings declining to set aside the probate settlement agreement and dismissing the conversion lawsuit for failure to state a claim for relief. (*Id.* at *11).

Aspen American Insurance Co. v. Morrow

In *Aspen American Insurance Co. v. Morrow*, 2022 WL 17337913 (D. Alaska 2022), the district court applied the Ninth Circuit's seven-factor test to partially grant a motion for default judgment against a non-participating party. (*Id.* at *1). The Lyons were a couple who sold a ship to defendant Morrow, who entered a promissory note to pay \$116,000 for the vessel. (*Id.*). Morrow also entered a mortgage agreement which included a lay-up provision, requiring the ship to stay in port from October 2021 through May 2022. (*Id.*). Even so, Morrow took the ship out commercial fishing in November 2021, and the boat sank. (*Id.*). Morrow's insurance company, Aspen, filed suit against him and the Lyons (as assureds) in the district court for a judgment decreeing that there was no coverage under the insurance policy. (*Id.*). The Lyons cross-claimed against Morrow, who had stopped payments on the sunken vessel, for breach of the promissory note. (*Id.* at *2). However, despite being served with the pleadings and summons, Morrow refused to answer or otherwise participate in the action; both the Lyons and Aspen moved for default judgement. (*Id.*). Upon their motion, the district court noted that it retained discretion to determine whether or not to grant the motion. (*Id.*). The district court then stated that it must also consider seven factors identified by the Ninth Circuit upon consideration of a motion for default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy of favoring decisions on the merits. (*Id.*). After considering these factors, the district court chose to grant the Lyons's motion but to deny the motion made by Aspen without prejudice. (*Id.* *3–12). With that, the district court applied the seven factors identified by the Ninth Circuit to partially grant a motion for default judgment against a non-participating party. (*Id.* at *1).

Fairbanks North Star Borough v. Victory Ministries of Alaska, Inc.

In *Fairbanks North Star Borough v. Victory Ministries of Alaska, Inc.*, 515 P.3d 111 (Alaska 2022), the supreme court held that a court no longer has subject matter jurisdiction when the court closes the initial case and another case based on the same underlying controversy begins. (*Id.* at 115–116). A borough revoked a ministry's tax-exempt status after discovering that it leased its extensive camp properties to the public, operating a retreat center and vacation rental

business. (*Id.* at 113–114). The ministry appealed this revocation to superior court, and the superior court dismissed the case, determining the case should be before an administrative board. (*Id.* at 114). The superior court later reconsidered this dismissal, remanding the case to the borough tax assessor. (*Id.*). The parties also settled, agreeing to let the assessor take new evidence and make detailed findings, but leaving open the option to appeal the assessor’s determination. (*Id.*). When the borough assessor released its findings, the ministry appealed this new determination, and the appeal received a new case number. (*Id.*). Yet the court, of its own accord, ruled on the old, remanded and settled case, finding the borough did not support the tax exemption revocation with sufficient evidence. (*Id.* at 115). The borough appealed this decision to the supreme court, which applied the subject matter jurisdiction doctrine, a rule stating that courts can only hear certain types of cases. (*Id.* at 115). After a court “enters its judgement,” the court’s jurisdiction ends; the court cannot “retain it in perpetuity.” (*Id.*). Rejecting the ministry’s argument that a motion to enforce the superior court’s final order allowed the court to recover its jurisdiction, the supreme court determined that jurisdiction ended when the court remanded the case, noting that a court can only recover its jurisdiction if “mistake, inadvertence, fraud, prematurity, or misapprehension” occurred, as all litigants have a great interest in “repose.” (*Id.* at 116). Additionally, by ignoring the new facts the assessor discovered in its later investigation, the court may have violated the borough’s due process right. (*Id.* at 116–117). Vacating the lower court’s decision, the supreme court held that a court no longer has subject matter jurisdiction when the court closes the initial case and another case based on the same underlying controversy is ongoing. (*Id.* at 115–117).

Mulligan v. State, Department of Law

In *Mulligan v. State, Department of Law*, No. S-18019, 2022 WL 2066044 (Alaska June 8, 2022) (unpublished), the supreme court held that although self-represented litigants are held to a less stringent standard, they must provide more than a cursory statement of the argument(s) on appeal in their appellate brief or else the argument(s) will be considered waived. (*Id.* at *3). Mulligan, a self-represented litigant, filed a complaint alleging personal injury, false arrest, malicious prosecution, and defamation relating to her arrest a year earlier. (*Id.* at *1). The superior court dismissed Mulligan’s complaint for failure to state a claim upon which relief could be granted. (*Id.*). On appeal, the supreme court affirmed the dismissal of Mulligan’s complaint, reasoning that Mulligan had waived any argument that might allow her to succeed in overturning the superior court’s dismissal. (*Id.*). The court reasoned that Mulligan’s arguments on appeal were considered waived because her appellate brief only made factual arguments which were unrelated to the reasons the superior court dismissed the complaint. (*Id.*). Affirming the lower court’s decision, the supreme court held that although self-represented litigants are held to a less stringent standard, they must provide more than a cursory statement of the argument(s) on appeal in their appellate brief or else the argument(s) will be considered waived. (*Id.* at *3).

National Union Fire Insurance Co. of Pittsburgh v. Aspen Custom Trailers, Inc.

In *National Union Fire Insurance Co. of Pittsburgh v. Aspen Custom Trailers, Inc.*, 587 F.Supp.3d 904 (D. Alaska 2022), the district court held that a non-Alaska company cannot be sued in an Alaska court when its only connection to the state is a contract with an Alaska company that it executed outside of Alaska. (*Id.* at 910–11). An Alaska company bought a trailer assembly from a Canadian company and completed the entire transaction in Alberta, Canada. (*Id.* at 907, 910–11). The trailer assembly broke five years later and the Alaska company filed an

insurance claim with a Pennsylvania company, which sued the Canadian company in Alaska district court. (*Id.* at 907). The Canadian company moved to dismiss the case, arguing that it was not subject to personal jurisdiction in Alaska even though it knew its customer would use the assembly in the state. (*Id.* at 907, 912). The district court agreed, reasoning that the Canadian company did not purposefully avail itself of the benefits of Alaska's laws as required by the Due Process Clause of the Constitution. (*Id.* at 910). The court noted that the Canadian company completed the entire transaction outside of Alaska and that the United States Supreme Court had barred personal jurisdiction in a state based on either a contract alone, foreseeability that the product would end up in that state, or the foreign company's history of targeting the United States as a whole. (*Id.* at 911–13). Thus, the district court dismissed the case, holding that a non-Alaska company cannot be sued in an Alaska court when its only connection to the state is a contract with an Alaska company that it executed outside of Alaska. (*Id.* at 910–11).

Park v. Spayd

In *Park v. Spayd*, 509 P.3d 1014 (Alaska 2022), the supreme court held that, according to the discovery rule, the statute of limitations begins to run as soon as a reasonable person would have discovered the elements of the cause of action. (*Id.* at 1019). Beginning in 2003, a nurse had been prescribing opioids to a man who became reliant on the drugs. (*Id.* at 1017). The man's substance abuse led to trouble in his finances and marriage. (*Id.*). In 2011, his wife filed for divorce. (*Id.*). Six years later, the former husband died of a drug overdose. (*Id.*). In 2019, following the nurse's arrest for unlawful distribution of opioids, the former wife sued the nurse for negligence and professional malpractice. (*Id.* at 1017). The superior court granted the nurse's motion for summary judgment, on the grounds that the claim was time-barred by the statute of limitations. (*Id.*). The supreme court affirmed the lower court's decision, rejecting the wife's argument that the statute of limitations did not begin to run until her former husband's death in 2018. (*Id.* at 1020). The court reasoned that the discovery rule dictates that the cause of action begins to accrue when sufficient information exists to prompt a reasonable person to investigate a cause of action. (*Id.*). The timing of the final injury is not relevant to inquiry. (*Id.*). Accordingly, by 2010 the wife had enough information about the nurse's role in her husband's addiction to investigate a cause of action. (*Id.*). Affirming the lower court's decision, the supreme court held that the statute of limitations had run and that the wife's claims were time-barred because the statute of limitations begins to run as soon as a reasonable person would have discovered the elements of the cause of action. (*Id.*).

Ray v. State

In *Ray v. State*, 517 P.3d 613 (Alaska Ct. App. 2022), the court of appeals held that the superior court did not err when it ordered a released prisoner who violated his probation to serve additional probation, although the released prisoner explicitly rejected such measures. (*Id.* at 613–14). Criminal defendant Ray entered a plea deal with the State to serve a sentence of active and suspended imprisonment followed by probation. (*Id.*). After Ray's release, he violated his probation. (*Id.*). In his hearing, Ray rejected further probation and requested to serve his earlier suspended sentence, but the superior court ordered Ray to serve his suspended sentence and imposed an additional five years of probation. (*Id.*). Ray appealed, arguing that the superior court could not add further probation after he rejected it. (*Id.*). Unable to reach an interpretation of the relevant sentencing law that satisfied two of the three appeals judges, the court of appeals certified the question of the statute's interpretation to the Alaska Supreme Court. (*Id.*). The

supreme court resolved the question and remanded the case back to the court of appeals. (*Id.* at 613–14). However, before the supreme court, Ray had made an alternative argument which he had not raised at any earlier stage in his appeal. (*Id.* at 614). Because that argument did not pertain to the question certified by the court of appeals, the supreme court did not answer it. (*Id.*). On remand, a concurring judge opined as to whether the court of appeals was required to address Ray’s argument made—but not answered—before the supreme court. (*Id.*). The concurring judge concluded that it was not, divining a rule from prior precedent that a party cannot raise a new argument at a later point in an appeal if he could have raised it at an earlier stage. (*Id.* at 615). Accordingly, with no further questions to answer, the court of appeals affirmed the lower court’s imposition of an additional five years of probation on Ray, even though Ray explicitly rejected such measures. (*Id.* at 614).

Triem v. Kake Tribal Corp.

In *Triem v. Kake Tribal Corp.*, 513 P.3d 994 (Alaska 2022), the supreme court held that a former class action representative and former class attorney did not have standing to appeal debt forgiveness motions in a separate but related class action. (*Id.* at 996). In the first class action case, the superior court awarded damages, costs, and attorneys’ fees to the Hanson class. (*Id.* at 995–96). In a second class action against the same corporation, the Martin class agreed to a settlement including payments to class members, attorneys’ fees, and costs. (*Id.* at 996). In 2001, the defendant corporation filed for Chapter 11 bankruptcy. (*Id.*). In 2017, the attorney and class representative for the Hanson class were replaced with new representatives and counsel. (*Id.*). In light of the bankruptcy filing, both the Hanson and the Martin classes voted to relieve the corporation of any outstanding debt owed to the classes. (*Id.*). In response, the former attorney for the Hanson class moved to enforce the judgment in favor of the Hanson class, instead of forgiving the debt. (*Id.*). The superior court denied this motion and approved the vote for debt forgiveness for both classes. (*Id.*). Both the former attorney and former class plaintiff for the Hanson class appealed the orders in both cases. (*Id.*). The former Hanson class representative lacked standing, because he could not point to any personal adverse effect from the Martin class’s settlement. (*Id.* at 997). Notably, the former Hanson class representative was never a member of the Martin class, and he could not assert injury on behalf of a class of which he was not a member. (*Id.*). Additionally, the former Hanson attorney could not establish any personal adverse effects from the outcome of the Martin class settlement. (*Id.*). However, the court invited additional briefings on whether the Hanson class’s vote to relieve the debt was properly conducted. (*Id.* at 998–99). Accordingly, the supreme court held that the former class action representative and former class attorney did not have standing to appeal debt forgiveness motions in a separate but related class action. (*Id.* at 996).

CONSTITUTIONAL LAW

Howell v. Municipality of Anchorage

In *Howell v. Municipality of Anchorage*, 2022 WL 17736788 (D. Alaska 2022), the district court held that a genuine issue of material fact existed as to whether a SWAT team’s use of projectiles and chemical agents against a mentally ill man was reasonable, precluding a grant a summary judgment in favor of the SWAT team members on a Fourth Amendment excessive force claim. (*Id.* at *9–22). The daughter of a diagnosed mentally ill man called 911 to report her father’s violent behavior one night, telling 911 that her father needed to go to a psychiatric facility. (*Id.* at

*1). The daughter and her child were able to exit the residence in which her father remained, however, another man remained in the residence her father. (*Id.* at *1). After a SWAT team deployed chemical agents, the other man exited the residence and told police that the mentally ill man was experiencing Vietnam flashbacks and was going into the crawlspace. (*Id.* at *2). Over the next few hours, the SWAT team made additional announcements, deployed projectiles, and continued to deploy more chemical agents, some of which were directly deployed into the crawlspace. (*Id.* at *3). Approximately two hours after entering the residence, the SWAT team found the mentally ill man deceased in the crawlspace. (*Id.*). The autopsy report identified hypothermia and drowning as potential causes of death. (*Id.*). The daughter of the man brought action against the SWAT team members and the Municipality of Anchorage. (*Id.*). To determine, for qualified immunity purposes, whether a reasonable officer would have known that the SWAT team’s tactics against the mentally ill man could constitute a Fourth Amendment violation, the district court examined decisional law existing at the time of the SWAT team’s actions. (*Id.* at *15–16). The court determined that it was “clearly established then that ‘where no immediate threat to the safety of others exists, law enforcement officers are required to consider less intrusive tactics’ before using ‘aggressive tactics to subdue a mentally unstable individual who is resisting arrest.’” (*Id.* at *16). Denying a grant of summary judgement in favor of the SWAT team members on a Fourth Amendment excessive force claim, the district court held that a genuine issue of material fact existed as to whether the SWAT team’s use of projectiles and chemical agents against a mentally ill man was reasonable. (*Id.* at *9–22).

Knolmayer v. McCollum

In *Knolmayer v. McCollum*, 520 P.3d 634 (Alaska 2022), the supreme court held, as a matter of first impression, that the state statute limiting medical malpractice damages awards violated the state constitution’s Equal Protection Clause as applied to a claimant who received compensation from an insurer exercising a right of subrogation against the claimant’s damages award. (*Id.* at 663). The claimant in this case successfully sued her doctor for medical malpractice. (*Id.* at 638). An Alaska statute limited her damages award to only those funds in excess of any amount received from a collateral source, such as health insurance coverage. (*Id.* at 638–39). The claimant’s insurance plan gave the insurance provider an equitable right of subrogation contractual right on the claimant’s damages award. (*Id.* at 638). The right functionally placed an equitable lien for reimbursement of insurance payouts on any damages received by the claimant in her malpractice suit. (*Id.*). The claimant challenged the application of the statute’s damages award limitation as applied to her because the statute included an exception for claimants who received coverage from a federal program with a right of subrogation, but not for claimants who received coverage from other collateral sources with rights of subrogation. (*Id.* at 637). The supreme court considered whether the disparate treatment of claimants based solely on the nature of the subrogating collateral source violated the state constitution’s Equal Protection Clause. (*Id.* at 656). In analyzing the state law, the Court adopted a minimum scrutiny standard to consider whether the classifications created under state law bore a fair and substantial connection to the relevant government goal in enacting the law. (*Id.* at 658). In applying this means–ends scrutiny, the court concluded that the law limiting the damages award of this claimant whose insurance plan included a right of subrogation for the insurance provider did not bear a significant enough relationship to the government’s aim in eliminating “double recovery” for medical malpractice claimants. (*Id.* at 661). The court emphasized that the statute was meant to limit claimants who had historically recovered twice, once from their insurance providers and a second time from the

defendant in the tort litigation. (*Id.* at 658). However, the court reasoned that, in fact, claimants often have insurance policies that give the insurance company a right of subrogation amounting to an equitable lien on any damages award received by the claimant with the result that, far from recovering double, the claimant comes up short. (*Id.* at 661–62). Vacating the superior court’s order and remanding the case, the supreme court concluded that the Alaska state law limiting damages awards violated the state constitution’s Equal Protection Clause as applied to the claimant. (*Id.* at 663).

Short v. State, Office of Management & Budget

In *Short v. State, Office of Management & Budget*, 520 P.3d 142 (Alaska 2022), the supreme court held that unappropriated funds from the Higher Education Investment Fund (HEIF) may be swept annually into the Constitutional Budget Reserve (CBR). (*Id.* at 144). Alaska’s HEIF provides grants and scholarships for post–secondary education programs. (*Id.*). In 2021, unappropriated funds from the HEIF were designated as part of that year’s sweep pursuant to the Alaska Constitution. (*Id.* at 148–49). Subsequently, a group of students sued, arguing that the HEIF is not eligible to be swept. (*Id.* at 149). Under relevant state supreme court precedent, funds “available for appropriation,” and thus eligible to be swept, include funds that (1) the legislature holds power to appropriate and (2) that require additional appropriation before ultimately being expended. (*Id.* at 150). HEIF is funded by continuous appropriations. (*Id.* at 150–51). The legislature then appropriates HEIF funds into award accounts. (*Id.* at 151). It is only after this second appropriation that the programs can expend the funds. (*Id.*). The students argued that the initial funding into HEIF constituted expenditure, and thus, that the funds were not sweepable. (*Id.*). However, the supreme court reasoned that since the executive branch cannot spend HEIF funds without additional legislative action, the HEIF funds are available for the annual sweep. (*Id.*). Affirming the lower court’s decision, the supreme court held that HEIF funds may be swept into Alaska’s CBR under article IX, subsection 17(b) of the Alaska Constitution. (*Id.* at 152).

State v. Alaska Legislative Council

In *State v. Alaska Legislative Council*, 515 P.3d 117 (Alaska 2022), the supreme court held that the Alaska state legislature could not appropriate future education funds from a future fiscal year’s budget. (*Id.* at 119). In 2018, the legislature passed and the governor signed a law appropriating education funds for both the 2019 fiscal year and the 2020 fiscal year. (*Id.* at 120). But the 2020 spending bill became effective in 2019, and a new governor took office in December 2018. (*Id.* at 119). The new governor refused to spend the funds due to his belief that the appropriation was unconstitutional. (*Id.*). The legislature’s representative sued to force the governor to spend the money, and the legislature won summary judgment and attorneys’ fees in superior court. (*Id.* at 122–23). When the governor appealed, the legislature’s representative argued to the supreme court that the constitution’s strict text did not limit the timing of legislative spending, and that the legislature’s constitutional duty to establish schools provided flexibility in education spending. (*Id.* at 123–24, 128). The supreme court reversed the superior court’s decision, reasoning that the constitution’s budgetary clauses require the governor to submit a budget annually. (*Id.* at 126–27). The supreme court perceived this as an implicit requirement that the legislature also determine budgets annually, because the framers envisioned the legislature and governor working together to establish a budget. (*Id.* at 126). The supreme court cited precedent to support its conclusion that the legislature’s constitutional duty to fund public

schools did not alter standard spending rules. (*Id.* at 127–28). As a result, the supreme court reversed the superior court’s decision to grant summary judgment and vacated the award of attorneys’ fees, holding that the legislature could not appropriate future education funds from a future fiscal year’s budget. (*Id.* at 119–20).

State v. Jouppi

In *State v. Jouppi*, 519 P.3d 653 (Alaska Ct. App. 2022), the court of appeals held that, to determine if a forfeiture in a criminal case is unconstitutionally excessive, courts must consider how harsh the legislature intended to make the crime’s punishment, whether the defendant’s conduct was part of a broader pattern of illegal activity, and if the defendant still can earn an income after the property is forfeited. (*Id.* at 659–665). Jouppi was convicted of attempting to transport alcohol via airplane into a village that had banned alcohol imports. (*Id.* at 656). After his conviction, the State attempted to forfeit Jouppi’s airplane, as Alaska law requires, but the district court ruled that the forfeiture violated the Eighth Amendment’s ban on excessive fines. (*Id.* at 657). The State appealed, arguing that forfeiting the plane was not “grossly disproportionate” to the severity of Jouppi’s offense. (*Id.* at 659). To assess this claim, the court of appeals applied a four-factor test developed by the U.S. Supreme Court, weighing “(1) the nature and extent of the defendant’s crime and its relation to other criminal activity, (2) whether the defendant falls among the class of persons for whom the statute was principally designed, (3) the other penalties that might be imposed on the defendant under the applicable provisions of law, and (4) the nature and extent of the harm caused by the defendant’s offense.” (*Id.* at 660–61). Applying this test, the court of appeals found that the lower court had failed to allow the State to offer evidence of Jouppi’s other bootlegging activities. (*Id.* at 662). The lower court also should have considered the forfeiture act’s legislative history, to better determine the harm the legislature intended to prevent. (*Id.* at 662–63). Further, the lower court should have considered whether the forfeiture would deprive Jouppi of his livelihood or his ability to provide for his family because of the amount of the monetary loss. (*Id.* at 665). Vacating the lower court’s decision and remanding for further proceedings, the court of appeals held that, to determine if forfeiting Jouppi’s airplane would be excessive, the court must consider how harsh the legislature intended to make a punishment, whether the defendant’s conduct was part of a broader pattern of illegal activity, and if the defendant still can earn an income after the property is forfeited. (*Id.* at 659–665).

United States v. Delpriore

In *United States v. Delpriore*, 2022 WL 17490771 (D. Alaska Oct. 4, 2022), the district court held that prohibitions on the possession of firearms by felons continue to be valid after the Supreme Court’s ruling in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). (*Delpriore*, 2022 WL 17490771 at *3). Felony defendant Delpriore filed a motion to dismiss a charge under a federal felon in possession statute, arguing that the statute burdened his right to keep and bear arms under the Second Amendment. (*Id.* at *1). The district court reasoned that although *Bruen* altered the Second Amendment analytical framework, *Bruen* did not indicate a change to the Supreme Court’s earlier decisions holding that Second Amendment protections do not extend to felons. (*Id.* at *2). As such, the district court denied the motion to dismiss and held that prohibitions on the possession of firearms by felons do not violate the Second Amendment. (*Id.* at *3).

United States v. Wells

In *United States v. Wells*, 55 F.4th 784 (9th Cir. 2022), the Ninth Circuit held that a Coast Guard employee was not implicitly coerced by threat of loss of employment to make self-incriminatory statements in a manner that would have violated the Fifth Amendment. (*Id.* at 788, 799). In relation to two murders at a Coast Guard communication station on Kodiak Island, Alaska, a Coast Guard employee was interviewed by federal law enforcement agents. (*Id.* at 789). While on trial for the murders, the employee moved to suppress statements made during the interviews on grounds that he was implicitly coerced to incriminate himself under threat of loss of his government employment. (*Id.* at 790, 794). The district court denied the motion to suppress. (*Id.* at 790). A jury found that the employee had committed the murders, and he appealed his convictions. (*Id.* at 791). The Ninth Circuit affirmed the convictions, reasoning that for threats of loss of government employment to constitute implicit coercion in violation of the Fifth Amendment, the employee must be not only objectively threatened with loss of employment for refusing to self-incriminate but also subjectively aware of that threat. (*Id.* at 797). The court further reasoned that the employee did not subjectively believe that he was required to make the statements under threat of job loss, relying on observations that the employee never expressed such a belief, manifested an affirmative intent to cooperate, declined to answer certain questions about his employment during one of the interviews, terminated the final interview by invoking his Miranda rights, and offered no evidence that he was familiar with one of two Coast Guard materials presented in support of his theory of implicit coercion. (*Id.* at 794, 798–99). Affirming the employee’s convictions, the Ninth Circuit held that a Coast Guard employee was not implicitly coerced to make self-incriminatory statements in a manner that would have violated the Fifth Amendment. (*Id.* at 799).

CONTRACT LAW

Borgman v. Yamaha Motor Corp., USA

In *Borgman v. Yamaha Motor Corp., USA*, 2022 WL 13918852 (D. Alaska 2022), the district court held that a boat manufacturer’s alleged failure to comply with a limited warranty, while potentially a breach of contract, did not constitute an unfair trade practice under the Alaska Unfair Trade Practices Act (UTPA). (*Id.* at *15). Plaintiff boat owners purchased a new boat from an authorized Yamaha dealer in Washington which came with a limited warranty providing that boat owners must notify an authorized Yamaha dealer within ten days of discovery of an issue. (*Id.* at *1). When the boat leaked and cavitated heavily upon use back in Alaska, the boat owners sought repair from Anchorage Yamaha. (*Id.* at *2). Anchorage Yamaha was not an authorized Yamaha dealer under the Marine Products and Motorized Recreational Products Act (MPA), but nevertheless it unsuccessfully attempted to repair the boat over the course of a year. (*Id.* at *4–7). The boat owners sued, alleging that Yamaha Motor Corp. violated the UTPA in breaching its limited warranty by failing to repair the owners’ boat. (*Id.* at *4). Both parties moved for summary judgment. (*Id.*). The court found that, while there were genuine issues of material fact as to whether Yamaha’s failure to comply with its limited warranty amounted to a breach of contract, no reasonable jury would find Yamaha’s conduct sufficient for a violation of the UTPA. (*Id.* at *11). Because Alaskan courts have held that the UTPA requires a breach of contract to involve inequitable assertion of power or egregious conduct to amount to an unfair trade practice, the court reasoned that failing to repair a boat, without more, involved neither of those conditions and thus is not an unfair trade practice. (*Id.*). Granting Yamaha’s motion for summary

judgment on the boat owners' UTPA claim, the district court held that a boat manufacturer's alleged failure to comply with a limited warranty was not an unfair trade practice under the UTPA. (*Id.* at *15).

Sycks v. Transamerica Life Insurance Co.

In *Sycks v. Transamerica Life Insurance Co.*, 2022 WL 17403784 (D. Alaska 2022), the district court held that a court may not look to the terms of a contract for purposes of a Rule 12(b)(6) motion to dismiss if the parties dispute whether the certified copy of the contract has been submitted to the court. (*Id.* at *5). Vernon and Lila Sycks brought suit against their insurer, Transamerica, bringing claims of breach of contract, breach of the implied covenant of good faith, and fraudulent misrepresentation. (*Id.* at *1). The Sycks bought their life insurance policy for \$50,000 paid upfront in 1993, but in a 2021 letter Transamerica notified them the policy would lapse if an additional \$21,683.12 was not paid. (*Id.* at *1–2). Transamerica included a copy of the policy in the 2021 letter. (*Id.* at *2). However, in March 2022, Transamerica filed its first motion to dismiss the Sycks' complaint with an attached copy of the policy that differed slightly from the 2021 copy. (*Id.* at *3). In their amended complaint filed after the first motion to dismiss, the Sycks alleged the differing policies indicated Transamerica had failed to provide the court with the true policy. (*Id.* at *4). The district court partially granted Transamerica's second motion to dismiss, only dismissing the Sycks' fraudulent misrepresentation claim. (*Id.* at *10). The court first addressed the question of whether it was permitted to look to the terms of the parties' contract, finding that it could not. (*Id.* at *5). The court reasoned that, absent evidence presented from Transamerica to the contrary, it was compelled to accept as true the Sycks' allegations that the certified policy had still yet to be presented. (*Id.*). Because the Sycks disputed the legitimacy of both the 2021 and 2022 copies of the policy, the court found it irrelevant that the material terms of both copies were identical. (*Id.*). Accordingly, the district court held that it may not look to the terms of a contract for the purposes of a Rule 12(b)(6) motion to dismiss if the legitimacy of the contract was in dispute. (*Id.*).

CRIMINAL LAW

Ambacher v. State

In *Ambacher v. State*, 521 P.3d 604 (Alaska Ct. App. 2022), the court of appeals held that driving twenty to thirty miles per hour above the speed limit and briefly crossing the median did not constitute a gross deviation from the standard of care a reasonable driver would observe, and, therefore, that it could not support a finding of reckless driving. (*Id.* at 606). A driver did not pull over after a state trooper turned on his lights and sirens indicating that the driver should stop. (*Id.* at 605). The driver was driving between seventy and eighty miles per hour on a stretch of road with a speed limit of fifty–five miles per hour, on a clear day with limited traffic and few pedestrians on the street. (*Id.*). The trooper followed the driver for 1.8 miles and observed the driver navigate an S–curve before the driver finally pulled over, and the trooper's camera footage captured the driver crossing the double–yellow median and the fog line briefly at different points. (*Id.*). A trial court entered a verdict of guilty of first–degree failure to stop at the discretion of a peace officer, a felony. (*Id.* at 606). The driver challenged the conviction, arguing that the evidence did not support a finding of reckless driving as required for the first–degree conviction. (*Id.*). The statute defining reckless driving provides that a driver is guilty of reckless driving when they drive in such a way that poses a “substantial and unjustifiable risk of harm to a person

or to property.” (*Id.*). The court of appeals explained that the relevant inquiry was whether the driver’s behavior constituted a gross deviation from the standard of care that a reasonable driver would observe. (*Id.*). Here, the court reasoned that the clear day, limited traffic, relatively insignificant deviation from the speed limit, and absence of pedestrians foreclosed a finding that the driver’s actions constituted reckless driving based on the evidence at trial. (*Id.* at 610). Reversing the trial court and remanding the case for entry of a conviction of failure to stop at the discretion of a peace officer in the second degree, the court of appeals concluded that driving twenty to thirty miles per hour above the speed limit and briefly crossing the median did not constitute a gross deviation from the standard of care, and therefore could not support a finding of reckless driving. (*Id.* at 612).

Foy v. State

In *Foy v. State*, 513 P.3d 1085 (Alaska Ct. App. 2022), the Court of Appeals held that, to sustain a first-degree assault conviction, the State must prove beyond a reasonable doubt that an offender used a dangerous weapon to cause a serious physical injury, which required creating a substantial risk of death. (*Id.* at 1093). The victim offered the offender, Foy, a ride. (*Id.* at 1087). With the car stopped in an “isolated” area, Foy slapped the victim when she declined to give him a return ride home. (*Id.*). The two left the car, and Foy put his arm around the victim’s throat for over a minute, threatening to kill her. (*Id.*). The victim later told a state trooper she had a hard time breathing and that Foy cut off her air flow, but that the episode passed quickly. (*Id.*). To prove that Foy committed first-degree assault, the State had to prove beyond a reasonable doubt that he “recklessly caused serious physical injury to the victim by means of a dangerous instrument.” (*Id.* at 1090). Because prosecutors had previously experienced difficulty establishing that hands could be dangerous instruments in strangulation cases, the Alaska legislature expanded dangerous instruments to include “hands or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth.” (*Id.* at 1091). However, Foy argued that even though his hands were dangerous instruments, they had not caused the victim “serious physical injury.” (*Id.* at 1091). A serious physical injury must “create a substantial risk of death.” (*Id.*). Since the victim never felt like she would black out, was “still able to breathe,” and claimed that Foy applied pressure “intermittently,” the Court of Appeals determined that Foy never used his hands to cause physical injury. (*Id.* at 1092). Therefore, the Court of Appeals lowered the first-degree assault conviction to a third-degree assault conviction, holding that because Foy did not create a substantial risk of death, he did not cause a serious physical injury using a dangerous weapon. (*Id.* at 1092–94).

Foy v. State

In *Foy v. State*, 515 P.3d 659 (Alaska Ct. App. 2022), the court of appeals held that a defendant cannot raise a claim of prosecutorial vindictiveness after entering a guilty plea, unless the vindictiveness of the prosecution was apparent on the record at the time the defendant entered his plea. (*Id.* at 663). Foy was charged with assaulting two women and pled guilty to lesser charges. (*Id.* at 659). After Foy was sentenced on his guilty plea, he raised a post-conviction claim of prosecutorial vindictiveness, alleging that the prosecuting attorney brought the assault charges against him because Foy had filed a complaint against the prosecutor in another case. (*Id.*). The state argued that Foy’s prosecutorial vindictiveness claim was invalid because he did not raise the claim prior to pleading guilty. (*Id.* at 660). Foy argued that prosecutorial vindictiveness is a

jurisdictional claim, and therefore any requirement to bring the claim before pleading guilty did not apply. (*Id.* at 661). The appeals court held that the post-conviction claim was invalid because the prosecutorial vindictiveness alleged in this case was not apparent on the record at the time the plea was raised. (*Id.* at 662–63). Affirming the lower court, the court of appeals held that a defendant cannot raise a claim of prosecutorial vindictiveness after entering a guilty plea, unless the vindictiveness of the prosecution was apparent on the record at the time the defendant entered his plea. (*Id.* at 663).

Frankson v. State

In *Frankson v. State*, 518 P.3d 743 (Alaska Ct. App. 2022), the court of appeals held that a trial court may consider an aggravating factor based on a defendant’s prior conviction when deciding whether to reject a sentencing agreement as too lenient. (*Id.* at 746). Felony defendant Frankson and the State came to a plea agreement, but it was objected to as too lenient. (*Id.* at 747). The Alaska legislature defines two classes of aggravating factors: “non-Blakely aggravators,” which include those relating to a defendant’s prior convictions and may be proved to a judge by clear and convincing evidence, and “Blakely aggravators,” which must be proved to a jury beyond a reasonable doubt. (*Id.* at 751). Trial courts do not have authority to consider Blakely aggravators in deciding whether to reject a sentencing agreement as too lenient. (*Id.* at 754). The superior court ruled that it had the authority to consider sua sponte a non-Blakely aggravator regarding Frankson’s prior convictions in deciding whether to accept the agreement, and ultimately rejected the agreement. (*Id.* at 748). On a petition for interlocutory review, Frankson argued that trial courts do not have authority to consider non-Blakely aggravators when evaluating a sentencing agreement. (*Id.* at 748, 752). The court of appeals held that a trial court may consider a non-Blakely aggravator when deciding whether to reject a sentencing agreement as too lenient. (*Id.* at 746). The court reasoned that Blakely aggravators were akin to charging decisions, an executive function under the principles of separation of powers, but non-Blakely aggravators were historically treated as sentencing matters, a judicial function. (*Id.* at 754). Affirming the lower court’s decision, the court of appeals held that a trial court may consider an aggravating factor based on a defendant’s prior conviction when deciding whether to reject a sentencing agreement as too lenient. (*Id.* at 746, 755).

Jones-Nelson v. State

In *Jones-Nelson v. State*, 512 P.3d 665 (Alaska 2022), the supreme court held that an inaccurate jury instruction was not harmless error when it incorrectly described the reasonableness requirement for self-defense and improperly distinguished between different degrees of deadly force. (*Id.* at 676–78). The suspect, Jones-Nelson, was at a party and confronted a man who had allegedly spread rumors about him. (*Id.* at 668). Later, the man approached Jones-Nelson aggressively but witnesses disputed whether he reached for his gun. (*Id.*). Jones-Nelson pulled out his own gun and shot the man several times, discarded the gun, then sought to escape the state. (*Id.*). After Jones-Nelson was arrested and charged, he argued that he acted in self-defense. (*Id.*). But the court instructed the jury (over Jones-Nelson’s objection) that a person could be permitted to use deadly force in self-defense but still not be allowed to use all-out deadly force. (*Id.* at 668–69). And the prosecutor suggested to the jury that they consider whether Jones-Nelson’s actions were reasonable from their own points of view. (*Id.* at 669). The jury convicted Jones-Nelson of murder and the court of appeals held that although the jury instruction was legally incorrect, it was harmless error because context would prevent the instructions from

misleading the jury. (*Id.* at 669–70). On appeal to the supreme court, Jones–Nelson argued that the court of appeals incorrectly considered the error harmless, and the supreme court agreed. (*Id.* at 670). The supreme court reasoned that the jury instruction incorrectly suggested that reasonableness of self–defense could be assessed retroactively. (*Id.* at 672–73). And the court further reasoned that both the text of the relevant statute and legislative history clarify there is no legal distinction between deadly force and all–out deadly force in self–defense. (*Id.* at 673–76). Further, the court pointed out that the prosecutor’s statements to the jury actually increased the harm from the incorrect jury instructions. (*Id.* at 678). As a result, the supreme court held that an inaccurate jury instruction was not harmless error when it incorrectly described the reasonableness requirement for self–defense and improperly distinguished between different degrees of deadly force. (*Id.* at 676–78).

Matter of A.S.

In *Matter of A.S.*, 2022 WL 2965545 (Alaska 2022) (unpublished), the supreme court held that the testimony of a psychiatrist concerning a criminal defendant’s previous acts of violence and psychotic disorder provided adequate evidence that the defendant posed a harm to themselves or others, and could be the basis for involuntary commitment. (*Id.* at 2–3). Criminal defendant A.S. was hospitalized and underwent a psychiatric evaluation after being arrested on suspicion of physically assaulting a family member. (*Id.* at 1). After A.S. spent a week in psychiatric care at the Alaska Psychiatric Institute (API), API petitioned the superior court for an order authorizing commitment of A.S. for 30 days. (*Id.*). API called one of its psychiatrists as the only witness in support of commitment. (*Id.*). The psychiatrist testified that A.S. had a psychotic disorder: he rambled in conversation, threatened API staff, had delusions about death, and suffered auditory hallucinations. (*Id.*). The psychiatrist also spoke of an incident in which A.S. attacked API staff, punching one staff member three times and putting another in a chokehold. (*Id.*). The psychiatrist believed that this violence stemmed from A.S.’s mental illness, as he was unable to respond to de–escalation attempts. (*Id.*). The superior court ordered that A.S. be committed to API for up to 30 days. (*Id.*). A.S. appealed, arguing that the psychiatrist’s statements did not provide enough detail for the court to make the decision to commit him to API on the basis that he was likely to cause harm and gravely disabled. (*Id.* at 2). The supreme court affirmed the lower court’s decision, reasoning that the psychiatrist provided testimony specific enough to justify commitment. (*Id.* at 3). The supreme court explained that a violent assault on API staff members alone meets the threshold of substantial risk of harm to others that a court must find before committing an individual to a psychiatric institution. (*Id.*). Affirming the lower court’s decision, the supreme court held that the testimony of a psychiatrist concerning a criminal defendant’s previous acts of violence and psychotic disorder provided adequate evidence that the defendant was a harm to himself or others, and could be the basis for involuntary commitment. (*Id.* at 2–3).

McDonald v. State, Department of Corrections

In *McDonald v. State, Department of Corrections*, 519 P.3d 345 (Alaska 2022), the supreme court held that an inmate’s request for a court order that the Parole Board reconsider denying discretionary parole should be brought as an application for post–conviction relief, not a civil lawsuit. (*Id.* at 345). However, the court also held that, instead of dismissing the inmate’s case, the superior court should convert the lawsuit to the proper application form. (*Id.*). An inmate became eligible for discretionary parole, but the Parole Board denied parole for what were, in the inmate’s view, factors ungrounded in the law. (*Id.* at 347). After the Board denied parole

reconsideration and after the period for filing an application for post-conviction relief had expired, the inmate filed a civil lawsuit. (*Id.*). The superior court dismissed the case, agreeing with the Department of Corrections that, since the inmate argued he was “unlawfully held in custody,” he should have filed an application for post-conviction relief; the inmate was not challenging his “treatment as a prisoner” as he had alleged. (*Id.* at 348). On appeal to the supreme court, the inmate argued that a state statute includes actions “related to a person’s status or treatment as a prisoner” within the definition of correctional facility litigation, and that the Board’s incomplete consideration of his case was similar to physical maltreatment of prisoners. (*Id.* at 348–49). The supreme court disagreed that the Board’s decision was like physical mistreatment, which can be the basis for a separate civil lawsuit. (*Id.* at 350). Instead, the court determined that a challenge to the Parole Board’s decision must be brought under an application for postconviction relief; otherwise, an inmate could utilize looser civil lawsuit rules to circumvent the more stringent post-conviction relief rules. (*Id.* at 351). Therefore, the supreme court affirmed the superior court’s decision that an inmate should bring a request to reconsider discretionary parole denial as a post-conviction relief application, not a civil lawsuit. (*Id.* at 345). However, the court also held that, instead of dismissing the inmate’s case, the superior court should convert the lawsuit to the proper application form. (*Id.*).

McGraw v. State

In *McGraw v. State*, 512 P.3d 994 (Alaska Ct. App. 2022), the court of appeals held that when analyzing the validity of search under the probation search exception, a court may only consider information known to the probation officer at the time he or she directed the search. (*Id.* at 996–97). McGraw was on probation for felony drug charges when his probation officer, acting on an unsubstantiated tip, directed state troopers to conduct a search of his residence. (*Id.* at 995). The search was directed pursuant to a probation condition that allowed for warrantless searches of McGraw’s person or property upon his probation officer’s reasonable suspicion of his possession, use, or distribution of marijuana or alcohol. (*Id.*). When troopers arrived at McGraw’s home, they claimed that McGraw was in an agitated state, leading to a reasonable suspicion he was under the influence of stimulants. (*Id.*). Upon a search of his property, law enforcement discovered drug paraphernalia and methamphetamine. (*Id.*). The superior court denied a motion to suppress this evidence and McGraw was convicted of second-degree misconduct involving a controlled substance. (*Id.* at 995–96). On appeal, McGraw claimed that his probation officer did not have reasonable suspicion at the time she directed law enforcement to search McGraw’s property, and that the search was therefore unconstitutional under the federal and state constitutions. (*Id.* at 996). The court of appeals reversed the superior court, holding that the lower court erred in its evaluation of reasonable suspicion when it considered the troopers’ independent observations. (*Id.*). The court found that the tip was insufficient basis for the probation officer to form reasonable suspicion, and that later observations by the troopers could not rehabilitate the invalid search order. (*Id.* at 997). Reversing the lower court’s decision, the court of appeals held that when considering reasonable suspicion under the probation search exception, a court may not consider information unknown to the probation officer at the time the search was directed. (*Id.* at 996–97).

Nelson v. State

In *Nelson v. State*, 512 P.3d 86 (Alaska Ct. App. 2022), the court of appeals held that when the State fails to notify a person accused of driving under the influence of their right to an

independent chemical test and no state-conducted test exists, the state must presume that a breath test would have yielded a result of .04 or less (not under the influence of intoxicating liquor). (*Id.* at 90–91). A driver was arrested for driving under the influence and when asked whether she would submit a breath test, she remained silent and no breath test was administered. (*Id.* at 88). The arresting officer did not notify the driver of her right to an independent chemical test, in violation of her due process rights. (*Id.*). At trial, the State did not dispute that the driver’s due process rights had been violated but argued that the proper remedy for violation was to presume that the independent test would have revealed a blood alcohol level below .08 percent, a level which provides no presumption as to whether the defendant was or was not under the influence of alcohol. (*Id.* at 88, 90–91). The district court agreed with the State, and at trial the driver was found guilty of driving under the influence. (*Id.* at 88). On appeal, the driver argued that the district court was required to presume that the result of an independent chemical test would have been below .04 percent. (*Id.* at 89). The court of appeals held that when there is no state-administered breath test and the state has violated a defendant’s due process right to an independent test, it must be presumed that the results of an independent test, had one been conducted, would have been favorable to the defendant. (*Id.* at 90). The court then held that a blood alcohol level of .08 was an insufficiently favorable presumption, and that trial court should have presumed that the driver’s independent breath test would have yielded a result of .04 percent or less. (*Id.* at 91). Vacating the lower court’s conviction, the court of appeals remanded the case for a new trial, holding that when the State fails to notify a person accused of driving under the influence of their right to an independent chemical test and no state-conducted test exists, the state must presume that a breath test would have yielded a result of .04 or less. (*Id.* at 90–91)

Nordlund v. State, Department of Corrections

In *Nordlund v. State, Department of Corrections*, 520 P.3d 1178 (Alaska 2022), the supreme court held that disciplinary decisions by the Department of Corrections will not be set aside unless the prisoner can show that his procedural due process rights were prejudiced by the proceedings against him. (*Id.* at 1180). A prisoner faced disciplinary action after he allegedly violated a rule of prisoner conduct and subsequently argued with responding guards. (*Id.*) After being cited for misconduct, the prisoner requested a disciplinary hearing, at which the hearing officer reviewed incident reports, witness statements, and surveillance video from the incident. (*Id.*) The hearing officer concluded that the prisoner had violated prisoner conduct and imposed 10 days of punitive segregation, all suspended should the prisoner go 180 days without another guilty finding. (*Id.* at 1181). The prisoner appealed to the superior court, which reviewed the witness statements but not the surveillance video. (*Id.*) Nonetheless, the superior court, citing the standard of review imposed by state statute, affirmed the disciplinary hearing’s decision because it was supported by some evidence. (*Id.*) On appeal to the supreme court, the prisoner argued that the superior court (1) had erred by applying the “some evidence” standard of review, (2) violated his due process rights by not permitting in-person testimony, and (3) violated his due process rights by not reviewing the surveillance footage. (*Id.* at 1180–82). The supreme court, however, rejected these arguments because the prisoner failed to show that he was either prejudiced by the refusal to accept in-person testimony or that he was prejudiced by the choice not to review the video footage. (*Id.* at 1182– 84). Furthermore, the supreme court held that the superior court applied the proper standard of review mandated by statute. (*Id.* at 1183). Affirming the lower court’s decision, the supreme court held that disciplinary decisions by the Department

of Corrections will not be set aside unless the prisoner can show that his procedural due process rights were prejudiced by the proceedings against him. (*Id.* at 1180).

Ray v. State

In *Ray v. State*, 513 P.3d 1026 (Alaska 2022), the supreme court held that a defendant who has violated probation set out in a plea agreement does not have the right to reject further probation and serve a sentence of active imprisonment only. (*Id.* at 1029). Following his arrest, Ray entered a plea agreement calling for both a period of imprisonment and of probation. (*Id.*). Months later, the state alleged that Ray violated his probation, and at the probation hearing, Ray announced his intention to reject further probation and serve the rest of his sentence in prison. (*Id.*). The superior court rejected Ray's request, sentencing him to additional probation time. (*Id.*). Ray appealed, citing a previous state supreme court decision which declared that a defendant in the same position as Ray may elect to serve only active imprisonment. (*Id.*). The court of appeals did not reach a conclusion on the case, disagreeing on how to interpret a recently passed state statute which states that, absent a defendant and prosecutor agreement, a judge may not reduce a sentence of probation created by a plea agreement. (*Id.* at 1029–30). The supreme court determined that under the new statute, Ray did not have a right to reject further probation in favor of imprisonment. (*Id.* at 1043). The Court recognized that under the case cited by Ray, a defendant previously had the right to reject probation provided for in a plea agreement. (*Id.* at 1031). However, the plain language of the new state statute abrogated this right. (*Id.* at 1033). The court reasoned that if a judge could not reduce the period of probation under the statute, it would not be logical for a defendant to be able to, even if electing for further imprisonment. (*Id.* at 1034). The court further reasoned that the legislative history was susceptible to different interpretations, and therefore could not refute the plain meaning analysis. (*Id.* at 1036). Moreover, testimony in the legislative history specifically mentioned an intention to overturn prior precedent. (*Id.* at 1042–43). Ray also argued that abolishing a defendant's right to reject probation was an implausible legislative purpose, since a defendant could always immediately violate their probation and be sent back to prison, functionally rejecting their probation. (*Id.* at 1043). The court rejected this argument, noting that systems of parole and probation serve a rehabilitative and reintegrative purpose, and that the legislature could plausibly wish to ensure probation be served rather than further imprisonment. (*Id.*). Therefore the supreme court held that a defendant who has violated probation set out in a plea agreement does not have the right to reject further probation in favor of active imprisonment. (*Id.*).

Skupa v. State

In *Skupa v. State*, 520 P.3d 1184 (Alaska Ct. App. 2022), the court held that restitution may be imposed by a court upon a preponderance of the evidence and need not be found by a jury beyond a reasonable doubt. (*Id.* at 1191). Skupa was a criminal defendant charged with seven counts in a scheme to defraud her employer. (*Id.* at 1186). She waived her right to a jury trial and pled guilty to one count of first-degree theft, a crime that involves theft of \$25,000 or more. (*Id.* at 1186–87). At her sentencing hearing, without a jury, the court ordered her to pay over \$400,000 in restitution based on facts found by a preponderance of the evidence. (*Id.* at 1186). Skupa argued on appeal that since she had only pled guilty to a stealing \$25,000 or more, the Sixth Amendment of the United States Constitution required any restitution beyond \$25,000 to be based on facts found by a jury beyond a reasonable doubt. (*Id.* at 1187). The court of appeals affirmed the judgment. (*Id.* at 1191). The court reasoned that the Alaska restitution statute uses

an indeterminate model, which allows courts to impose restitution up to the actual damages resulting from the actions for which the defendant was convicted. (*Id.* at 1190–91). Because this model determines restitution based on a jury’s finding of guilt, and does not increase punishment based on new facts, the facts underlying restitution need not be found by a jury beyond a reasonable doubt. (*Id.* at 1190). Further, even if the Sixth Amendment did require a jury determine the proper amount in restitution, Skupa waived that right when she waived her right to jury trial. (*Id.*). Affirming the trial court’s sentence, the court of appeals held that restitution may be imposed by a court upon a preponderance of the evidence and need not be found by a jury beyond a reasonable doubt. (*Id.* at 1191).

State v. Graham

In *State v. Graham*, 513 P.3d 1046 (Alaska 2022), the supreme court held that a drunk driver’s sentence should be vacated because the court failed to preview and edit tribute videos before playing them at the sentencing hearing. (*Id.* at 1071). A drunk driver lost control of his truck and killed two teenage girls who were walking on the sidewalk. (*Id.* at 1051). The driver pleaded guilty to two counts of second-degree murder, and at the sentencing hearing the girls’ families were allowed to show tribute videos for the victims. (*Id.* at 1050). The driver had a family, steady job, and a negligible criminal history at the time of the accident. (*Id.* at 1051). The driver was sentenced to a total of 32 years in prison, the highest sentence imposed in Alaska for an unintentional vehicular homicide. (*Id.* at 1050). The supreme court set out several factors that should be considered in whether tribute videos should be admitted as evidence and stated that there is no bright-line rule for admissibility of victim tribute evidence. (*Id.* at 1066). A video cannot be so prejudicial that the trial becomes fundamentally unfair. (*Id.*). Short, unedited videos of the victim near the time of loss tend to be admissible while heavy edits, dramatization, enhanced sound, visual effects, or a failure to focus on the victim at the time of the loss weigh against admissibility. (*Id.* at 1067). Further, the trial court must review video evidence before it is shown at trial so the court can exclude irrelevant, cumulative, or overly prejudicial content. (*Id.* at 1069). The supreme court assumed that judges who review potentially prejudicial material well before a public proceeding will be better able to compartmentalize their emotional response than if they see it for the first time in open court. (*Id.* at 1070). Holding that it was an abuse of discretion to admit the tribute videos without viewing them beforehand, the supreme court vacated the drunk driver’s sentence and instructed the sentencing judge on remand to consider the factors it laid out. (*Id.* at 1070–71).

State, Department of Corrections. v. Stefano

In *State, Department of Corrections. v. Stefano*, 516 P.3d 486 (Alaska 2022), the supreme court held that, even though being removed from electronic monitoring does not implicate the constitutional right to rehabilitation, an inmate released on electronic monitoring has a liberty interest protected by the due process guarantee of the Alaska constitution before being remanded to jail. (*Id.* at 488). Electronic monitoring allows some inmates to serve a portion of their sentence outside a prison while still being monitored and limited by the Department of Corrections (DOC). (*Id.*). A prisoner was convicted of second-degree murder and, after serving roughly 12 years in prison, was released to serve the rest of his sentence via electronic monitoring. (*Id.*). While being electronically monitored, police responded to a domestic dispute call at the prisoner and his wife’s apartment; police discovered additional violations of the prisoner’s electronic monitoring conditions. (*Id.* at 489). For these violations, the state revoked

the prisoner's electronic monitoring privileges and moved to send him back to jail. (*Id.* at 490). After losing his appeal before the DOC administrative court, the prisoner successfully challenged the state's decision to revoke electronic monitoring in the district court. (*Id.* at 491). The DOC moved to appeal. (*Id.*). On appeal, the supreme court sought to determine whether the district court had appellate jurisdiction over the prisoner's request for judicial review. (*Id.*). For the district court to have jurisdiction, the DOC's decision to remove the prisoner from electronic monitoring would have to implicate either (1) the constitutional right to rehabilitation or (2) the right to liberty. (*Id.*). But the supreme court held that neither precedent nor legislative history supported the view that electronic monitoring constitutes a rehabilitative program. (*Id.* 491–99). However, the supreme court did hold that prisoners retain a right to due process before the state can revoke electronic monitoring because suspension necessarily represents a reduction in liberty. (*Id.* 499–505). Thus, the supreme court held that, even though being removed from electronic monitoring does not implicate the constitutional right to rehabilitation, an inmate released on electronic monitoring has a liberty interest protected by the due process guarantee of the Alaska constitution before being remanded to jail. (*Id.* at 488).

United States v. Kirst

In *United States v. Kirst*, 54 F.4th 610 (9th Cir. 2022), the Ninth Circuit held that an agency investigation is a “proceeding” within the definition of a federal criminal statute even when the investigating agency does not have the authority to enforce the law. (*Id.* at 621). A pilot crashed his plane while flying passengers who hired him for a photography flight. (*Id.* at 612). The National Transportation Safety Board (NTSB) conducted an investigation into the crash, but it did not have the authority to take any legal action against the pilot. (*Id.* at 614). During the investigation, the pilot stated that he was at a certain altitude and that his propellor broke. (*Id.* at 616). But GPS data and physical evidence from the crash site contradicted the pilot's statements. (*Id.* at 614–16). The government charged the pilot with obstructing the “due and proper administration of the law” in a “pending proceeding” under 28 U.S.C. § 1505, and the jury convicted him under that statute. (*Id.* at 617–19). On appeal, the pilot argued that the NTSB's investigation could not be a “proceeding” because the agency lacked the power to impose sanctions. (*Id.* at 619). The Ninth Circuit affirmed the conviction, reasoning that settled circuit precedent considered an administrative investigation a proceeding under this statute. (*Id.* at 620). Additionally, the court pointed to a district court case where an NTSB investigation was a proceeding based on the agency's ability to issue subpoenas and administer oaths. (*Id.*). Affirming the conviction, the Ninth Circuit held that an agency investigation is a “proceeding” within the definition of a federal criminal statute even when the investigating agency lacks the authority to enforce the law. (*Id.* at 621).

CRIMINAL PROCEDURE

Gomez v. State

In *Gomez v. State*, 516 P.3d 879 (Alaska Ct. App. 2022), the court of appeals held that (1) statements made by a victim during the initial portion of a 911 call were not testimonial in nature, so their admission at trial did not violate defendant's constitutional confrontation rights, (2) statements made by the victim to an officer who arrived on scene were testimonial in nature, so their admission at trial violated defendant's constitutional right to confrontation, and (3) the admission of the victim's statements to the officer who arrived on scene was not harmless

beyond a reasonable doubt. (*Id.* at 880). After Gomez removed portions of a victim's clothing and held a knife to the victim's neck in Gomez's apartment, the victim was able to escape to another apartment and called 911. (*Id.* at 881). Several police officers arrived at the scene and went to the Gomez's apartment. (*Id.*). Another police officer arrived on the scene a short time later, went to the apartment where the victim had retreated, and interviewed the victim. (*Id.*). The victim did not testify at trial; however, the trial court allowed the State to introduce recordings of victim's prior statements. (*Id.* at 880). The first recording introduced at trial was the initial portion of the victim's 911 call, and the second recording was a portion of the victim's interview with the police officer. (*Id.*). Following a jury trial, defendant was convicted of attempted first-degree sexual assault. (*Id.*). While holding that the introduction of the 911 call at trial was allowed, the court of appeals held that the introduction of the victim's interview with police violated the defendant's constitutional confrontation rights because the interview was testimonial in nature, the victim did not testify at trial, and the defendant had no prior opportunity to cross-examine the victim. (*Id.* at 886–88). The court of appeals reasoned that the statements made in the interview recording were testimonial because the primary purpose of the interview was to establish past events, not to resolve an ongoing emergency. (*Id.* at 886). Reversing defendant's conviction and remanding for a new trial, the court of appeals held that (1) statements made by a victim during the initial portion of a 911 call were not testimonial in nature, so their admission at trial did not violate defendant's constitutional confrontation rights, (2) statements made by the victim to an officer who arrived on scene were testimonial in nature, so their admission at trial violated defendant's constitutional right to confrontation, and (3) the admission of the victim's statements to the officer who arrived on scene was not harmless beyond a reasonable doubt. (*Id.* at 880).

Hinshaw v. State

In *Hinshaw v. State*, 515 P.3d 129 (Alaska Ct. App. 2022), the court of appeals held that a criminal defendant must be allowed to knowingly and intelligently waive his or her right to counsel for any reason, regardless of the trial court's own opinion. (*Id.* at 139–41). After unsuccessfully attempting to have his attorney dismissed, Hinshaw filed a motion to proceed pro se in a first-degree murder charge. (*Id.* at 131). At his representation hearing, Hinshaw acknowledged the difficulties of pro se representation and acknowledged that his attorney would be much more capable of successfully trying his case. (*Id.* at 132–33). He expressed a desire to represent himself because he did not trust his attorney and wanted to have control over the direction of his legal strategy. (*Id.* at 133). When asked if he understood that pro se representation likely meant he would lose the case, Hinshaw stated he did not understand that because he disagreed with the opinion. (*Id.*). In denying his request, the trial court stated that it was not convinced Hinshaw knew what he was doing or that the decision to proceed pro se was made with his eyes open. (*Id.* at 135). Hinshaw was convicted at trial and, after an unsuccessful direct appeal, filed an application for post-conviction relief alleging that his appellate counsel was ineffective for failing to challenge the pro se denial. (*Id.* at 136). The court of appeals found that Hinshaw's disagreement with the trial court's opinion that pro se representation was ill-advised was not conclusive proof that his waiver of counsel was not knowing or intelligent. (*Id.* at 138). The court reasoned that since the right to self-representation is entrenched in the federal constitution, binding Supreme Court precedent required Hinshaw to be able to execute his right even if it was to his detriment. (*Id.*). The court reversed and remanded the case, ruling that a

criminal defendant must be allowed to waive his or her right to counsel, so long as that waiver is knowing and intentional, regardless of any disagreement from the court. (*Id.* at 139–41).

Lee v. State

In *Lee v. State*, 507 P.3d 483 (Alaska Ct. App. 2022), as revised on reh’g (Apr. 25, 2022), the court of appeals held that (1) a witness’s lack of memory does not make him unavailable for purposes of the Confrontation Clause, and (2) voluntary felony guilty pleas made in military courts, regardless of whether those courts would have afforded a unanimous jury verdict, may be used as prior felony convictions for enhancing sentences under Alaska law. (*Id.* at 495, 499). Lee was a criminal defendant convicted of sexual abuse of a minor, assault, and possession of child pornography. (*Id.* at 486). At trial, the State introduced recorded interviews of the minor victims taken soon after the abuse. (*Id.* at 487). During cross examination, one victim testified that she no longer remembered the incidents with Lee or her interview with the police, which had occurred five years earlier. (*Id.* at 493–94). At sentencing, the trial court relied on a prior military adjudication to sentence Lee as a second felony offender. (*Id.* at 495). Lee raised multiple theories on appeal, including an argument that the video interview and subsequent cross examination of the victim violated his constitutional right to confrontation based on the witness’s lack of memory of the events in question. (*Id.* at 494). Lee also argued that the trial court erred in considering his prior military adjudication in sentencing, because the court-martial system did not protect his fundamental right to a unanimous jury verdict and therefore his felony guilty plea in a military court should not be considered a prior felony under Alaska law. (*Id.* at 495). First, the court reasoned that since the victim was available in the courtroom for cross examination, her lack of memory did not make her unavailable for purposes of the Confrontation Clause. (*Id.*). Second, the court reasoned that Lee’s guilty plea in military court had been made voluntarily and with advice from counsel. (*Id.* at 498). The court ruled that because the military conviction was not tainted by a non-unanimous jury verdict, it did not violate Lee’s fundamental right to a unanimous jury verdict under Alaska law. (*Id.* at 498–99). Affirming the lower court’s decision, the court of appeals held that (1) availability under the Confrontation Clause does not require that a witness remember the events in question, and (2) voluntary felony guilty pleas in military courts may be used as prior felonies to enhance criminal sentences. (*Id.* at 495, 499).

Mosquito v. State

In *Mosquito v. State*, 504 P.3d 918 (Alaska Ct. App. 2022), the court of appeals held that a parole compliance law only applied to compliance on or after the law took effect. (*Id.* at 922–23). The legislature amended the initial version of a law which provided 30 days of parole credit for 30 days of compliance so that it would apply to parolees who began parole before 2017, but it did not clarify whether the parole credit applied to compliance before 2017 as well. (*Id.* at 920). A parolee argued that the law required pre-2017 compliance credit, and the court of appeals agreed to decide the case even though the parolee had already served his time because a definitive decision would be in the public interest. (*Id.* at 919). The parolee relied on the retroactive language in the law which applied the law to people who began parole before 2017, as well as the fact that a similar law for probation explicitly applied only to probation time on or after the effective date. (*Id.* at 921). The court disagreed, reasoning that one aspect of the law could be retroactive without making the entire law retroactive. (*Id.*). The court also noted that the state legislature later passed a law clarifying that this law did not apply retroactively and the purpose of this law was to incentivize good behavior, so it would not make sense to apply it to past

compliance. (*Id.* at 922). Thus, the court of appeals held that the parole compliance law providing 30 days of parole credit for 30 days of compliance applied only to compliance on or after the law took effect on January 1, 2017. (*Id.* at 922–23).

Perez v. State

In *Perez v. State*, 521 P.3d 592 (Alaska Ct. App. 2022), the court of appeals held that a trial court has an affirmative duty to act when it becomes clear that a criminal defendant has not been assigned an attorney, but that a defendant may consent to a pause on his right to a speedy trial. (*Id.* at 603). Perez was indicted on 83 counts of property crimes, and the trial court appointed the Alaska Public Defender Agency (Agency) to represent him. (*Id.* at 596). While the Agency represented multiple of the co-defendants, an attorney was not assigned to Perez for over five months, with the Agency citing unidentified conflicts of interest. (*Id.* at 597). While Perez was not represented by an attorney, he attended multiple pretrial conferences. (*Id.* at 596–97). In an exchange with the judge, Perez appeared to consent to time being tolled on his case, a pause on the time limit for a speedy trial created by Alaskan criminal procedure. (*Id.* at 597–98). Nearly six months after the initial indictment, a contract attorney with the Officer of Public Advocacy entered an appearance for Perez. (*Id.* at 597). The attorney filed a motion to dismiss Perez’s case, arguing that the court was obligated at the first pretrial conference to directly address the Agency’s failure to assign an attorney. (*Id.*). The motion argued that Perez was unrepresented, and thus could not consent to the tolling of his case, violating his right to a speedy trial. (*Id.*). The trial court denied the motion, and Perez petitioned for review. (*Id.* at 597–98). The court of appeals agreed with Perez that the trial court had an affirmative duty to act when it became clear that Perez had no attorney assigned. (*Id.* at 598). The court reasoned that the initial appointment of the Agency to Perez’s case did not constitute assistance of counsel, and more was required of the trial court to satisfy Perez’s rights. (*Id.* at 598–99). The court ruled that the trial court should have taken immediate action, which might have included setting firm deadlines for an entry of appearance, or setting status hearings where a supervisor from the Agency was required to appear. (*Id.* at 599). However, the court did not agree with Perez that his case should be dismissed, reasoning that the record showed that Perez was aware of his right to a speedy trial, and properly consented to the tolling of his case. (*Id.* at 602). Thus, while the lower court erred in failing to take affirmative action regarding Perez’s lack of representation, the court of appeals nevertheless affirmed the denial of the motion to dismiss, holding that a trial court has an affirmative duty to act when it becomes clear that a criminal defendant has not been assigned an attorney, but that a defendant may consent to a pause on his right to a speedy trial. (*Id.* at 603).

Riley v. State

In *Riley v. State*, 515 P.3d 1259 (Alaska Ct. App. 2022), the Alaska Court of Appeals held that the superior court prejudiced a criminal defendant by modifying its jury instructions after closing arguments without a compelling reason, after the defendant had relied on the prior instructions. (*Id.* at 1261). Among other charges, criminal defendant Riley was indicted for two counts of attempted second-degree sexual abuse of a minor. (*Id.* at 1262). The State and Riley agreed to a packet of jury instructions requiring the State to prove that Riley attempted “penis to genitals” contact (for Count I) and “hand to genitals” contact (for Count II). (*Id.*). Despite this agreement, the State requested a bench conference with the judge just prior to jury deliberations, requesting removal of the “penis to genitals” and “hand to genitals” language from the jury instructions in favor of the language “sexual contact.” (*Id.*). Although Riley’s counsel objected, arguing he had

relied on the prior instructions during closing arguments, the court agreed to modify its instructions. (*Id.*). During jury deliberation, the court received a note from the jury detailing its confusion over the revised instructions. (*Id.*). Riley was convicted on all counts and appealed, alleging that the trial court prejudiced his defense by revising its jury instructions. (*Id.* at 1264). The court of appeals agreed, noting that absent a compelling reason, a judge may not revise jury instructions after closing arguments. (*Id.* at 1265–66). The court further found that the revision prejudiced Riley as to Count I because his counsel has specifically relied on the “penis to genitals” language to argue that Riley had not intended any sexual contact. (*Id.* at 1267–1268). Accordingly, the court overturned Riley’s conviction under Count I, finding that the trial court prejudiced his defense by revising its jury instructions without a compelling reason, after Riley relied on the prior instructions during closing arguments. (*Id.* at 1268, 1269).

Sackett v. State

In *Sackett v. State*, 518 P.3d 289 (Alaska Ct. App. 2022), the court of appeals held that the mere assignment of a public defense agency does not satisfy a defendant’s right to counsel. (*Id.* at 292). Following conviction and sentencing, criminal defendant Sackett filed a pro se motion to correct an illegal sentence. (*Id.* at 290). In addition, Sackett filed a motion for court-appointed counsel to represent him in his claim. (*Id.*). Ultimately, Sackett’s case was transferred to the Office of Public Advocacy. (*Id.*). Before any staff attorney was assigned, reviewed the case, or made an appearance, the trial judge agreed to hear the district attorney on the illegal sentence motion in an ex parte hearing. (*Id.*). Neither Sackett nor his assigned counsel attended that hearing. (*Id.* at 290–91). The court subsequently denied the illegal sentence motion, with a note that Sackett would have leave to litigate the issue in a post-conviction relief action. (*Id.* at 291). The court of appeals reversed the trial court’s denial of the motion and criticized the decision to hold an ex parte hearing on the issue. (*Id.*). The court reasoned that the mere assignment of an agency did not satisfy a defendant’s constitutional right to counsel. (*Id.*). Because no staff attorney formally met with Sackett, reviewed the case, or attended the ex parte hearing, the appointment of counsel in this case amounted to formal rather than actual representation. (*Id.* at 292). Vacating and remanding, the court of appeals concluded that the trial court had deprived Sackett of his right to counsel, holding that the mere assignment of a public defense agency does not satisfy a defendant’s right to counsel. (*Id.*).

Strong v. State

In *Strong v. State*, 508 P.3d 1127 (Alaska App. 2022), the court of appeals held that risk of harm to property can constitute a “significant evil” when establishing a common law defense of necessity in a criminal case. (*Id.* at 1132). A fishing boat with permits for drift net salmon fishing was fishing in legal waters in the Ugashik fishing district of Bristol Bay when the vessel’s hydraulic system failed. (*Id.* at 1129). The operators of the boat cut the engine to prevent spillage of hydraulic fluid, fearing that a leak would contaminate thousands of pounds of fish aboard. (*Id.*). Without a running engine, the boat drifted into closed waters where it was illegal to fish. (*Id.*). After a few minutes, the operators were able to resolve the mechanical failure, restart the engine, and return to legal waters. (*Id.*). As a result of the brief excursion into closed waters, the boat captured in its net a handful of fish against the law. (*Id.* at 1130). At trial, the boat operators admitted to taking fish illegally in closed water but asserted an affirmative defense of necessity. (*Id.*). To prove the common law defense of necessity in a criminal case in Alaska, the boat operators had to show they committed the charged offense to prevent a “significant evil.” (*Id.* at

1131). The trial court rejected the necessity defense, holding that risk of damage to property — the contamination of fish on board — could not constitute a significant evil as a matter of law and, as such, the fishing boat operators failed to prove their affirmative defense. (*Id.*) On appeal, the court of appeals held that the fishing boat operators satisfied the “significant evil” prong of the necessity defense as a matter of law. (*Id.* at 1134). The court reasoned that nothing in Alaska state law barred risk of property damage from constituting a significant evil. (*Id.* at 1132–33). Vacating the lower court’s decision, the court of appeals concluded that a risk of property damage could constitute a significant evil, the prevention of which could support a defense of necessity in a criminal case. (*Id.* at 1134).

Torrence v. State, Department of Corrections

In *Torrence v. State, Department of Corrections*, 2022 WL 2093196 (Alaska 2022) (unpublished), the supreme court held that a court may dismiss an appeal if an inmate has failed to exhaust the available administrative remedies. (*Id.* at *1). A riot broke out at Spring Creek Correctional Center and an inmate was suspected of being involved. (*Id.*) The Department of Corrections (DOC) put the inmate in administrative segregation because it considered him a threat to the facility’s security. (*Id.*) He did not object to the segregation at a classification hearing, but stated that he had no part in the riot. (*Id.*) The inmate was kept in segregation for thirty days. (*Id.*) Seven months later, the inmate filed a grievance against the segregation and claimed that his rights to due process and equal protection had been violated. (*Id.*) The lower court rejected the inmate’s appeal because he had failed to exhaust his administrative remedies or file a grievance in a timely manner. (*Id.*) The supreme court affirmed the lower court’s decision. (*Id.*) First, it reasoned that the lower court did not have jurisdiction to review the DOC’s denial of the inmate’s grievance. (*Id.* at *2). Second, it reasoned that even if the lower court had jurisdiction, the inmate had failed to exhaust his administrative remedies before bringing the action in court to challenge an agency decision. (*Id.*) DOC regulations state that classifications should be appealed by submitting a form to an institutional probation officer within five days of the classification decision. (*Id.* at *3). The inmate in this case did not follow those procedures, waiting seven months to file his grievance in court. (*Id.*) Affirming the lower court’s decision, the supreme court held that if an inmate has not exhausted his available administrative remedies before bringing suit, a court may dismiss the claim. (*Id.*)

United States v. Spayd

In *United States v. Spayd*, 2022 WL 4220192 (D. Alaska Sept. 13, 2022), the district court held that an indictment sufficiently alleges an element of a crime when it applies the relevant mens rea (state of mind) requirement to the definition of the element. (*Id.* at *3). Prosecutors charged Spayd, a former nurse practitioner, with distributing and dispensing controlled substances along with other related crimes. (*Id.* at *1). But following the indictment, the United States Supreme Court held that one of the relevant provisions required that a defendant knowingly or intentionally acted in an unauthorized manner. (*Id.*) As a result, Spayd moved to dismiss the indictment, arguing that the indictment was flawed following the Supreme Court’s decision. (*Id.*) The district court held that the indictment properly alleged that element of the crime, and the state of mind requirement, because it applied that requirement to the definition of the element. (*Id.* at *3). The court assumed that the government must allege the intentional lack of authorization because it is a key part of the statute, despite other courts not treating it as an element. (*Id.* at *2–3). With this assumption, the court reasoned that the indictment successfully

alleged that Spayd acted intentionally and met the regulatory definition of the unauthorized manner requirement. (*Id.* at *3). Further, the court noted that the Supreme Court had limited the requirement to the regulatory definition. (*Id.* at *4). Denying the motion to dismiss the indictment, the district court held that an indictment sufficiently alleges an element of a crime when it applies the relevant mens rea (state of mind) requirement to the definition of the element. (*Id.* at *3, *5).

Victor v. State

In *Victor v. State*, 516 P.3d 506 (Alaska Ct. App. 2022), the court of appeals held that the State is not required to show a criminal defendant is competent before re-instating charges which were previously dismissed without prejudice because of a finding that the defendant lacked competency. (*Id.* at 509). Victor was a criminal defendant whose charges were dismissed without prejudice based on the superior court's finding that he lacked competency to stand trial. (*Id.* at 510–11). Victor was civilly committed. (*Id.* at 511). Fourteen months after the commitment, the State filed a motion asking the superior court to order the Alaska Psychiatric Institute to disclose Victor's treatment records for purposes of evaluating Victor's competency. (*Id.* at 511–12). When Victor's attorney claimed the superior court no longer had subject matter or personal jurisdiction over the case, the State altered its position and opened a new criminal case against Victor instead. (*Id.*). Victor's attorney argued that re-initiating the charges was unlawful without first presenting the court with proof that Victor was competent to stand trial. (*Id.*). The superior court ruled that the State was empowered to re-initiate the charges without any prior judicial screening, and that any issue of competency must be raised after the re-filing. (*Id.*). The court of appeals affirmed, finding that the relevant statutory procedures applied both to the initial and any subsequent challenges to a criminal defendant's competency to stand trial. (*Id.* at 514). The court reasoned that the dismissal without prejudice due to a lack of competency functioned as a stay rather than a dismissal, and that the superior court retained subject matter and personal jurisdiction over the case. (*Id.* at 519). Because the State did not need to re-assert jurisdiction, all it had to do to revive the charges was to file notice with the court; in Victor's case, the filing of new criminal charges was enough to signal to the court that the State planned to resume litigation. (*Id.* at 522). The court declined to create a rule that the State must show proof of competency after re-instating previous charges but before litigation ensues, because the State in this case would have met any hypothetical burden. (*Id.* at 525). Affirming the lower court's decision, the supreme court held that, when re-instating criminal charges previously dismissed without prejudice based on the defendant's lack of competency to stand trial, the State need not prove competency prior to litigation. (*Id.* at 509).

Whisenhunt v. State

In *Whisenhunt v. State*, 504 P.3d 268 (Alaska Ct. App. 2022), the court of appeals held that its standard for remanding a case to a trial court to reconsider a criminal defendant's motion for a new trial was not a new rule. (*Id.* at 270). At trial, Whisenhunt was convicted of evidence tampering and second-degree murder. (*Id.*). The trial court also denied Whisenhunt's motion for a new trial. (*Id.* at 275). On appeal, the court of appeals affirmed Whisenhunt's conviction. (*Id.* at 270). The court of appeals also partially remanded the case, instructing the trial court to reconsider and/or clarify its ruling denying Whisenhunt's motion for a new trial. (*Id.*). In its remand holding, the court relied on precedent holding that Alaska's trial judges have the authority to grant new trials given "the weight of the evidence" to prevent any miscarriage of

justice. (*Id.*). Specifically, the court relied on a recent case which held that trial courts should only grant new trials when the court is concerned that the defendant is innocent after independently weighing the evidence. (*Id.* at 271). The State argued that the standard in the recent case stood for a wholly new rule, and therefore could not be applied retroactively to Whisenhunt’s case. (*Id.* at 270). The appellate court recognized that older precedent had not clearly articulated the standard, causing some confusion. (*Id.* at 271). However, the recent case merely clarified the rule, it did not establish a new rule. (*Id.* at 274). Moreover, even if the recent case did establish a new rule, the court asserted that it satisfied the necessary factors for retroactive application of a new rule. (*Id.* at 276). In conclusion, the court of appeals affirmed its earlier decision remanding the case back to the trial court to reconsider and/or clarify its ruling on the defendant’s motion for a new trial. (*Id.*).

Wright v. State

In *Wright v. State*, 47 F.4th 954 (9th Cir. 2022), the Ninth Circuit held that an individual may not assert a conviction predicated on a previous conviction in another state as the basis for a habeas corpus petition for the original conviction. (*Id.* at 961). In 1999, Wright fled his home in Alaska after his wife informed police that he had sexually assaulted two minors. (*Id.* at 956). Wright avoided arrest for years, but was eventually convicted and sentenced in Alaska in 2009 to twelve years in prison for sexual abuse of a minor, in addition to mandatory sex offender registration for the rest of his life. (*Id.* at 956–57). Wright completed his prison sentence in 2016, but was indicted in 2017 in Tennessee for failing to register as a sex offender, and ultimately sentenced to five years of supervised release. (*Id.* at 957). In 2018, Wright filed a habeas petition, challenging his first conviction in Alaska as a violation of his Sixth Amendment right to a speedy trial because of Alaska’s delay in apprehending and indicting him after he fled. (*Id.* at 955). For a habeas petition under the federal statute, the person seeking relief must show they were “in custody” pursuant to a judgment of a state court. (*Id.* at 958). Wright’s case rose to Supreme Court of the United States, where the Court determined that Wright’s Tennessee conviction, though it would not have occurred but for his Alaska conviction, did not constitute him being “in custody” pursuant to an Alaska state court judgment. (*Id.*). On remand, Wright argued that, although his Tennessee conviction could not form the basis of a habeas petition, his subjection to Tennessee’s sex offender registration requirements restrained his liberty to a point where he was “in custody” pursuant to the Alaska judgment. (*Id.* at 958). The district court dismissed this claim, and the Ninth Circuit affirmed, reasoning that if the Tennessee conviction did not satisfy the statutory requirement of “in custody,” Wright’s later subjection to the state’s registration requirements could not as well. (*Id.* at 960). Further, the court reasoned that even if the registration requirement could be considered “custody,” the connection between Wright’s subjection to Tennessee law was not connected enough to his original Alaska conviction for a habeas petition. (*Id.*). Affirming the district court’s dismissal of the claim, the court of appeals held that an individual may not assert a conviction predicated on a previous conviction in another state as the basis for a habeas petition for his original conviction. (*Id.* at 961).

Zurlo v. State

In *Zurlo v. State*, 506 P.3d 777 (Alaska Ct. App. 2022), the Court of Appeals held that, when a prosecutor violates the duty of making a “reasonably complete and fair” presentation to a grand jury, the prosecutor then “subvert[s] the integrity” of that grand jury, so that a conviction from that grand jury’s indictment must be reversed. (*Id.* at 788). A worker’s employer would often

enter the worker’s living space unannounced, intoxicated, and angry. (*Id.*). One night, the employer, drunk, entered the worker’s bedroom as he lay in bed with his girlfriend, began making threats, and reached behind himself as if grabbing a gun. (*Id.*). In response, the worker shot the employer dead. (*Id.*). The worker was arrested, waived his Miranda rights, and told one State Trooper that he knew the employer owned guns, was certain the employer had a gun in that instance, and that the employer had threatened to kill him. (*Id.* at 779–80). The worker’s girlfriend corroborated this story, adding that the employer had made previous threats and kept a handgun in his back waistband. (*Id.* at 780). However, while presenting to the grand jury, the prosecutor omitted information that could support the worker’s self-defense claim. (*Id.* at 780–81). Moreover, the prosecutor presented a different State Trooper’s testimony, under a hearsay exception, and that trooper inaccurately portrayed the worker’s statements. (*Id.* at 780–81). Although the trial court was “particularly disturbed” by the prosecutor’s choice to keep evidence of self-defense from the grand jury, it refused to throw out the indictment. (*Id.* at 781). A jury convicted the worker of second-degree murder. (*Id.*). Alaska’s Constitution requires that before bringing a prosecution, prosecutors must obtain a grand jury indictment. (*Id.* at 781–82). Thus, to ensure the grand jury can effectively check government abuses, prosecutors have an affirmative duty to present exculpatory evidence to the grand jury, which includes evidence that “tends, in and of itself, to negate the defendant’s guilt.” (*Id.* at 782–83). The prosecutor must guarantee that any hearsay evidence is accurate and not misleading. (*Id.* at 784). Here, however, the prosecutor phrased his questioning to the testifying trooper so that the grand jury would not hear exculpatory evidence, which the Court of Appeals called collusion against the defendant worker because the prosecutor intentionally presented “a highly misleading version of facts.” (*Id.* at 787). Under Alaska law, a conviction cannot stand if the underlying indictment is seriously flawed. (*Id.* at 788). Reversing the conviction, the Court of Appeals determined that the prosecutor violated his duty to make a “reasonably complete and fair” presentation to the grand jury, thereby “subvert[ing] the integrity” of the grand jury. (*Id.* at 788).

ELECTION LAW

Kohlhaas v. State

In *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022), the supreme court upheld the constitutionality of both open primaries and ranked choice voting for general elections approved by a ballot initiative, Initiative 2. (*Id.* at 1100–01). Kohlhaas argued that Initiative 2 violated free speech rights by allowing candidates to identify with a party on the primary and general election ballot without nomination or endorsement from that party. (*Id.* at 1103). The court held that political parties do not have a right to a state–run candidate nomination process, and the burden that Initiative 2 places on the parties’ rights to associate is both limited and supported by important regulatory interests. (*Id.* at 1108, 1111). Further, there is a disclaimer on each ballot and in each polling place stating that a candidate’s statement of party affiliation does not indicate the party’s approval or disapproval of the candidate. (*Id.* at 1110). The court also held that the nonpartisan open primary did not violate the constitutional requirements for electing a lieutenant governor, because the open primary process satisfied the constitutional requirement that the process for nominating the lieutenant governor proceed in the same way as for all other elected offices. (*Id.* at 1118). Additionally, Kohlhaas argued that ranked choice voting may deny victory to the candidate who received the most votes in the election. (*Id.* at 1120). The court disagreed, holding that a ranked choice election is not complete until each vote has been fully tallied at

which point the candidate with the most votes wins the election. (*Id.* at 1122). Finally, the court held that ranked choice voting does not place an unconstitutional burden on citizens' right to vote. (*Id.* at 1123). Specifically, the additional burden ranked choice voting places on voters is justified because of the legitimate regulatory interests in allowing voters to express more nuanced candidate preferences through ranked choice voting. (*Id.* 1124). In summary, the supreme court upheld the constitutionality of the nonpartisan open primary and ranked choice voting components of Initiative 2. (*Id.* at 1100–01).

Smith v. Helzer

In *Smith v. Helzer*, 2022 WL 2757421 (D. Alaska 2022), the district court denied a request to enjoin the enforcement provisions requiring disclosures for political donations. (*Id.* at *14). In 2020, Alaskans enacted changes to the election system by ballot measure, including additional campaign finance disclosures. (*Id.* at *1). These provisions mandated disclosure of donors contributing more than \$2,000 per year to any person or organization that makes election expenditures, required disclaimers for political communications, and disallowed “dark money” contributions over \$2,000. (*Id.* at *1–2). The plaintiffs argued that these donor disclosure requirements were unconstitutional because they required donors to report donations even when recipients were also required to report them, and even when the recipients were not actively engaged in qualifying expenditures. (*Id.* at *4). The district court held that the disclosure requirements withstood exacting scrutiny, because there was a substantial relation between the disclosure and the sufficiently important government interest. (*Id.* at *4–5). Providing voters with the source of election funds was a sufficiently important governmental interest, and requiring disclosure was not unduly burdensome or duplicative. (*Id.*). Therefore the district court denied the request to enjoin the enforcement provisions requiring disclosures for political donations. (*Id.* at *14).

State, Office of the Lieutenant Governor v. Corbisier

In *State, Office of the Lieutenant Governor v. Corbisier*, 522 P.3d 174 (Alaska 2022), the supreme court reversed the lower court's grant of a preliminary injunction preventing the Alaska Division of Elections from certifying election results, holding that the lower court erred in failing to consider the general public's interest in an orderly and timely election when conducting the balance of hardships test. (*Id.* at 180). The state sought to conduct a special primary election to fill the vacant seat for its sole representative in the U.S. House of Representatives. (*Id.* at 176). Due to time constraints, the Division of Elections (Division) decided to conduct the special election almost entirely by mail. (*Id.*). After failed attempts to reach a compromise regarding the election's accessibility for visually impaired voters, the Alaska State Commission for Human Rights sued the Division, seeking a preliminary injunction to prevent the Division from certifying the election results until visually impaired voter accessibility improved. (*Id.* at 176–78). The lower court granted the injunction, reasoning that the balance of hardships test supported the grant. (*Id.* at 178). On appeal, the supreme court, citing precedent, held that the lower court erred in applying the balance of the hardships test because it failed to consider that the general public, not just the Division, has an interest in orderly and timely elections. (*Id.* at 179–80). As such, the supreme court reversed the lower court's grant of a preliminary injunction preventing the Alaska Division of Elections from certifying the special primary election results. (*Id.* at 180).

EMPLOYMENT LAW

Bakalar v. Dunleavy

In *Bakalar v. Dunleavy*, 580 F.Supp.3d 66 (D. Alaska 2022), the district court held that an assistant attorney general’s free speech and associational rights were violated when she was terminated by the state government. (*Id.* at 691). The assistant attorney general (AAG) held her position for more than twelve years before she was terminated in 2018. (*Id.* at 672, 673). Since 2014, the AAG had maintained a blog on which she wrote about her lifestyle, parenting, and politics. (*Id.* at 673). After the 2016 presidential election, the blog focused more on politics, mocking and criticizing President Trump frequently. (*Id.*). After being prompted by an Alaska attorney, the Department of Law began an investigation into the AAG’s blogging and concluded that she had not violated ethics rules. (*Id.* at 674). In November 2018, Governor Dunleavy was elected and instructed most of Alaska’s at-will employees to resign and submit a statement of interest in remaining employed with his new administration if they wished to keep their jobs, which the AAG did. (*Id.* at 675). Twenty minutes after Governor Dunleavy was sworn in, the AAG was terminated; the only other attorney from her department who was terminated had also been critical of President Trump. (*Id.* at 676). The AAG sued, claiming a violation of her First Amendment rights. (*Id.*). Both parties filed motions for summary judgment. (*Id.* at 677). The district court applied a five-factor test to determine whether there was a First Amendment violation: “(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.” (*Id.* at 684). The court reasoned that the AAG’s opinions were on matters of public concern, that she did speak as a private citizen, and that her speech was a motivating factor in her termination. (*Id.*). The court further reasoned that although state officials may have had legitimate reasons to consider the AAG’s speech disruptive to the mission of her department and so warranting termination, they failed to raise any concerns about her blogging or public opinions affecting the integrity and credibility of the state government when they terminated her. (*Id.* at 686). Granting the assistant attorney general’s motion for summary judgment, the district court held that her First Amendment rights were violated when she was terminated by the state government. (*Id.* at 691).

Beach v. United States

In *Beach v. United States*, 602 F. Supp. 3d 1192 (D. Alaska 2022), the district court held that the United States met the statutory definition of a “project owner” and thus was immune from negligence claims brought by a worker electrocuted while working in a housing unit on a military base. (*Id.* at 1204). In 2013, the United States and contractor Corvais Air Force Living (CAFL) entered a lease for the revitalization of military housing on Eielson Air Force Base. (*Id.* at 1195). Pursuant to the lease, the United States conveyed title to the housing units to be improved by quitclaim deed to CAFL. (*Id.* at 1195–96.) Beach, a construction company employee, was allegedly electrocuted while working in one of these housing units, and thus brought negligence claims against the United States. (*Id.* at 1194). The United States responded with a motion to dismiss, arguing that Beach’s claims were barred by the exclusive remedy provision of the Alaska Workers’ Compensation Act (AWCA). (*Id.* at 1198). The district court

concluded that the United States was a “project owner” potentially liable for providing workers’ compensation for contractor employees under the ACWA. (*Id.* at 1204). Finding that the United States’ contract with CAFL obliged CAFL to maintain the housing units on Eielson Air Force Base in good condition was a sufficient nexus between the work Beach was doing and the parties’ contract, the district court found that the United States engaged the services of a contractor for purposes of the ACWA. (*Id.* at 1202–03). Finally, the court agreed that the United States met the remaining elements of the statutory definition of a project owner, as it procured the services of a contractor, did so for government business, and enjoyed beneficial use of the work CAFL contracted to do. (*Id.*). As a result, the district court held that the United States was a project owner for ACWA purposes, rendering it immune from Beach’s negligence claims under the exclusive remedy provision of the ACWA. (*Id.* at 1204).

Patterson v. Matanuska-Susitna Borough School District

In *Patterson v. Matanuska–Susitna Borough School District*, 523 P.3d 945 (Alaska 2022), the supreme court found that the Alaska Workers’ Compensation Board (Board) and the Alaska Workers’ Compensation Appeals Commission (Commission) committed harmless error by (1) failing to recognize the link between bodily fluids and mental distress, and (2) failing to consider the details of a traumatic incident in determining whether the incident merited compensation for mental injury. (*Id.* at 949). Patterson was a school nurse who responded to a choking emergency at school. (*Id.*). Patterson tried to clear the child’s airway, exposing herself to the child’s bodily fluids, and performed CPR until medical professionals took the child to the hospital. (*Id.*). The child died as a result of the choking. (*Id.*). Patterson was paid disability benefits for three months, but the school district denied her request to extend the payments. (*Id.*). At a hearing appealing her denial, Patterson presented testimony that she suffered PTSD from both the contact with bodily fluids, from which she feared she may have contracted a serious disease, as well as the stress of the overall incident. (*Id.* at 951). The school district presented testimony that Patterson’s mental injuries were not caused by the choking incident. (*Id.*). The Board found, and the Commission later affirmed, that (1) the contact with bodily fluids was not sufficient to cause mental injury, (2) the choking incident was not extraordinary or unusually stressful, and (3) Patterson did not show that the bodily fluids or the stress of the choking event were the causes of the mental injury for which she was seeking compensation. (*Id.* at 952). The supreme court found that the Board and Commission erred on the first finding because contact with bodily fluids can cause mental injury due to fear of becoming ill with a serious disease. (*Id.* at 954). The court also found error on the second point because the Board considered only the extraordinary and unusual nature of choking incidents in general, when it should have considered the specifics of this extreme incident. (*Id.* at 955–56). However, the court upheld the Board’s finding that that Patterson’s mental injury was not caused by either the bodily fluids or the severity of the choking incident. (*Id.* at 957). Because Patterson’s contact with bodily fluids and the uniquely stressful choking situation did not cause her mental injury, the supreme court affirmed the Commission’s decision to deny Patterson benefits, despite its harmless error of (1) failing to recognize the link between bodily fluids and mental distress, and (2) failing to consider the details of a traumatic incident in determining whether the incident merited compensation for mental injury. (*Id.* at 959).

Rusch v. Southeast Alaska Regional Health Consortium

In *Rusch v. Southeast Alaska Regional Health Consortium*, S-18038, 2022 WL 4588776 (Alaska Sept. 30, 2022), the supreme court held that the Alaska Workers' Compensation Act (the Act) authorizes the Alaska Workers' Compensation Appeals Commission (the Commission) to award successful workers' compensation claimants enhanced attorneys' fees. (*Id.* at *1). One attorney represented two claimants, Rusch and Dockter, in workers' compensation proceedings before the Alaska Workers' Compensation Board (the Board). (*Id.*). Both claimants experienced separate injuries, but the claims were against the same employer. (*Id.*). The Board awarded much less in attorneys' fees than the claimants requested, and the Commission affirmed that ruling. (*Id.*). The claimants appealed the Commission's holding, and the supreme court reversed the Commission's determinations and remanded with instructions for the Board to consider factors outlined in the Alaska Rules of Professional Conduct to assess reasonable fees. (*Id.*). Additionally, the claimants requested enhanced attorneys' fees for the work conducted in pursuant of the initial appeal to the Commission at an hourly rate of \$600. (*Id.* at *1, *2). On remand, the Commission declined to apply a fee enhancement because the supreme court did not require them to do so and because enhanced fees would go against the Act, which mandates resolution of workers' compensation claims imposing only reasonable costs to the employer. (*Id.* at *3). Again, claimants appealed to the supreme court. (*Id.*). The supreme court disagreed with the Commission's interpretation of the Act and determined that the Act authorizes enhanced attorneys' fees, in part, due to the need for claimants to access competent representation. (*Id.* at *6). The supreme court also relied on precedent which laid out four factors to evaluate when determining whether fee enhancement is appropriate: (1) the attorney's time spent on the case, (2) the matter's complexity and novelty, (3) the benefit conferred to client, and (4) the contingent structure of attorneys' fees and need for attorney compensation. (*Id.* at *7). Remanding to the Commission, the supreme court held that the Alaska Workers' Compensation Act authorizes the Alaska Workers' Compensation Appeals Commission to award successful workers' compensation claimants enhanced attorneys' fees. (*Id.* at *10).

Workers' Compensation Benefits Guarantee Fund v. Adams

In *Workers' Compensation Benefits Guarantee Fund v. Adams*, 518 P.3d 280 (Alaska 2022), the supreme court upheld the Alaska Workers' Compensation Board's (Board) determination that a carpenter's intoxication while on the job was not a proximate cause of his fall from a ladder. (*Id.* at 281, 287). While repairing a roof, a carpenter fell 30 feet from a ladder when the cribbing beneath the ladder gave way. (*Id.* at 282). Prior to the accident, the carpenter admitted to using cocaine and drinking alcohol at the worksite. (*Id.*). The Alaska Workers Compensation Act denies workers' compensation for injuries proximately caused by an employee's alcohol or drug use. (*Id.* at 285). For a court to find proximate cause, the employer has the burden of proof to show that but for the worker's intoxication, the accident would not have happened, and that reasonable people would regard the worker's intoxication as responsible for the accident. (*Id.* at 285). On appeal, the Workers' Compensation Benefits Fund argued that the Board's finding that the drugs and alcohol were not a but-for cause of the injury was "arbitrary and unreasonable," because it relied heavily on the carpenter's testimony. (*Id.* 287–88). The court held that the Board had the sole authority to determine the credibility of a witness, and that the conclusion the Board reached based on the information before it was reasonable, even if it could have reached a different conclusion based on different inferences gleaned from the facts. (*Id.* at 288). Affirming the Board's finding and the Workers' Compensation Appeals Commission's decision upholding

the Board's finding, the supreme court held that because a carpenter's intoxication was not a proximate cause of his fall from a ladder, the carpenter was entitled to workers' compensation. (*Id.* at 281).

ENVIRONMENTAL LAW

Alaska Wildlife Alliance v. Haaland

In *Alaska Wildlife Alliance v. Haaland*, 2022 WL 17422412 (D. Alaska 2022), the district court held unlawful a National Park Service (NPS) rule permitting certain hunting practices on National Preserve land in Alaska on the grounds that it was an arbitrary and capricious abuse of NPS's power. (*Id.* at *20). In 2015, NPS issued a rule prohibiting non-subsistence hunting of predators on National Preserves in Alaska. (*Id.* at *1). NPS explained that Alaskan law permitted non-subsistence hunting of predators in order to increase populations of prey species for human harvest. (*Id.* at *2). This ran contrary to NPS's mission to preserve natural wildlife populations, and thus required a rule explicitly preempting state hunting law on National Reserve land. (*Id.*). Following the 2016 election, the NPS sought to return hunting and fishing regulating authority to the states, culminating in a 2020 rule allowing state predator hunting practices on National Preserve land in Alaska. (*Id.* at *3). NPS reasoned that new data (which had not been available during the 2015 rule-making process) showed that allowing predator hunting results in minimal impacts on prey species population, and that NPS only held authority relating to hunting regulations in specific emergency situations. (*Id.*). Several environmental groups sued, arguing the 2020 rule was contrary to federal law, that NPS failed to provide good reasons for its determination, and that NPS acted in an arbitrary and capricious manner in promulgating the rule. (*Id.* at *6). The court held that NPS's position did not violate federal law, as the plain text of the applicable statutes did not prohibit predator reduction efforts. (*Id.* at *9). Further, NPS provided sufficient data to justify its position. (*Id.* at *14). However, the court held that NPS's position limiting its own authority to regulate hunting practices to emergency situations ran contrary to federal law, which grants NPS wide authority over National Preserve land that necessarily preempts state law. (*Id.* at *14). Further, NPS improperly equated Alaska's sustained yield management laws with its own policy requiring self-sustaining wildlife populations. (*Id.* at *15). When an agency claims to comply with its own policy, but does not in fact comply with that standard, the action is necessarily an arbitrary and capricious use of power. (*Id.*). Finally, a specific provision of the 2020 rule regarding use of bear-baiting was deemed unlawful, as NPS did not provide sufficient justification for its change in policy. (*Id.* at *20). The court remanded the 2020 rule to NPS, rather than vacating it, since NPS informed the court that it would soon readdress the rule. (*Id.* at *21). Therefore the district court held that an NPS rule allowing certain predator hunting on National Preserve land was contrary to federal law, and an arbitrary and capricious use of the agency's authority. (*Id.* at *22).

Cook Inlet Fisherman's Fund v. Department of Fish and Game

In *Cook Inlet Fisherman's Fund v. Department of Fish and Game*, 514 P.3d 1259 (Alaska 2022), the supreme court held that (1) the Alaska Statehood Act did not impose specific ongoing federal requirements on fishery management in state waters, (*Id.* at 1255-56), and (2) Alaska was not required to follow national fishery standards in the federal waters of Cook Inlet during the years of 2019 and 2020, (*Id.* at 1259-60). In 2019, the salmon run on Kenai River was unusually low, and the State predicted that additional fishing restrictions would be necessary. (*Id.* at 1253).

Therefore, the Alaska Department of Fish and Game notified fishermen that the State would be implementing gear restrictions for various types of fishing. (*Id.*). The Cook Inlet Fisherman’s Fund (CIFF) filed a complaint seeking injunctive relief against the State. (*Id.*). CIFF argued that federal law required fishery management to comply with the Magnuson-Stevens Act, and that the State had impermissibly deviated from national standards. (*Id.* at 1253–54). The court held that Alaska was not required under the Alaska Statehood Act to manage state waters according to national interests. (*Id.* at 1257). Rather, Alaska has possessed independent management of state waters since 1960. (*Id.* at 1256). The court noted that the Magnuson-Stevens Act does allow for the federal government to delegate management authority for the federal portions of the Cook Inlet, but it had not done so during 2019 and 2020. (*Id.* at 1259). Affirming the lower court, the supreme court held that (1) the Alaska Statehood Act did not impose specific ongoing federal requirements on fishery management in state waters, (*Id.* at 1255–56), and (2) Alaska was not required to follow national fishery standards in the federal waters of Cook Inlet during the years of 2019 and 2020, (*Id.* at 1259–60).

Safari Club International v. Haaland

In *Safari Club International v. Haaland*, 31 F.4th 1157 (9th Cir. 2022), the court held that the Alaska National Interest Lands Conservation Act (ANILCA) preserves the federal government’s authority over Alaska’s public lands. (*Id.* at 1165). In 2013, Alaska expanded access to brown bear hunting. (*Id.* at 1166). The United States Fish and Wildlife Service (FWS) published the Kenai Rule in 2016 blocking many of the extensions. (*Id.*). Safari Club International and the State of Alaska sued the federal government, arguing that the Kenai Rule bans violated ANILCA and other statutory authorities. (*Id.* at 1167). They asserted that Alaska has ultimate regulatory authority over hunting laws on federal lands in Alaska. (*Id.* at 1165). The district court entered summary judgment in favor of the federal government. (*Id.*). Affirming the judgment, the Ninth Circuit reasoned that ANILCA and the Alaska Statehood Act did not restrict the authority of FWS to regulate state– approved hunting on federal lands. (*Id.* at 1167). The court also clarified that Congress’ decision to cancel a related FWS rule did not invalidate the Kenai Rule. (*Id.* at 1169). Affirming the lower court, the court held that the Alaska National Interest Lands Conservation Act (ANILCA) preserves the federal government’s authority over Alaska’s public lands. (*Id.* at 1165).

United States v. Alaska

In *United States v. Alaska*, 608 F. Supp. 3d 802 (D. Alaska 2022), the court granted the United States’ motion for preliminary injunction of an Alaskan state order allowing any Alaskan to gillnet fish in the Kuskokwim River. (*Id.* at 814). The federal Alaska National Interest Lands Conservation Act (ANILCA) holds that rural subsistence users be given priority to fish on federal lands and waters within Alaska, including the Kuskokwim. (*Id.* at 806). Alaska passed an Emergency Order (the Order) which opened gillnet fishing along the Kuskokwim to all Alaskans, not just those federally authorized under ANILCA. (*Id.* at 805). The United States, along with intervenor Kuskokwim River Inter–Tribal Fish Commission (the Commission), claimed that the Order was preempted by ANILCA under the Supremacy Clause and sought a preliminary injunction. (*Id.*). The court granted the motion, finding that the United States and the Commission met all four elements in favor of preliminary injunction: likelihood of success on the merits, irreparable harm, balance of equities, and public interest. (*Id.* at 806). First, the court found the claim was likely to succeed on the merits because Alaska did not make any argument as to how

the Order did not conflict with federal policy under the Supremacy Clause, instead arguing insufficiently that ANILCA was invalid under the Appointments Clause and the Administrative Procedure Act. (*Id.* at 806). The court also found irreparable harm based on both 1) the federal government's ability to enforce its rural subsistence policy on the Kuskokwim, and 2) uncertainty and confusion that could dissuade rural subsistence users from legal fishing opportunities. (*Id.* at 811). Finally, the court found that allowing a state to enforce the Order in violation of the Supremacy Clause was neither equitable nor in the public interest. (*Id.* at 812–13). The district court therefore granted the preliminary injunction of an Alaskan state order allowing any Alaskan to gillnet fish in the Kuskokwim River, based on finding for the United States and the Commission on all four relevant factors. (*Id.* at 814).

ETHICS & PROFESSIONAL RESPONSIBILITY

Disciplinary Matter Involving Merdes

In *Disciplinary Matter Involving Merdes*, 518 P.3d 727 (Alaska 2022), the supreme court held that a four-year suspension from the practice of law is an appropriate sanction for an attorney's misconduct when the attorney intentionally defrauded a former client. (*Id.* at 743). An Alaska Native corporation hired the attorney on a contingency fee basis to represent it in a land title dispute. (*Id.* at 729). The land title dispute was resolved in favor of the Alaska Native corporation, and the corporation challenged the validity of the contingency fee agreement with the attorney. (*Id.* at 729–30). Through arbitration, the corporation was ordered to pay an amount to the attorney, and the superior court affirmed the award. (*Id.* at 730). The corporation paid the amount to the attorney and appealed the superior court's ruling. (*Id.*). In the meantime, the attorney created a new law firm and transferred most of the old firm's assets to the new firm. (*Id.*). The supreme court reversed the superior court's ruling and ordered the attorney to repay the original award amount to the Alaska Native corporation. (*Id.*). The attorney told the corporation that the firm with which the corporation entered into a contingency fee agreement did not have sufficient assets to repay the corporation. (*Id.*). The Alaska Bar implemented a disciplinary hearing against the attorney and recommended that the attorney be suspended from the practice of law for one year. (*Id.* at 732–37). The attorney appealed the recommendation. (*Id.* at 737). The supreme court weighed the duties violated, the lawyer's mental state, the extent of the actual or potential injury, and the existence of any aggravating or mitigating factors. (*Id.* at 739–43). The court determined that suspension from the practice of law for four years was the appropriate discipline for the attorney's failure to pay the judgement awarded to his former client when the attorney transferred millions of dollars from his old firm to defraud the former client. (*Id.* at 743). The supreme court held that a four-year suspension from the practice of law is an appropriate sanction for an attorney's misconduct when the attorney intentionally defrauded a former client. (*Id.*).

EVIDENCE LAW

Garcia v. Vitus Energy, L.L.C. (Garcia I)

In *Garcia v. Vitus Energy, L.L.C.*, 600 F. Supp. 3d 975 (D. Alaska 2022), the court held that a party cannot engage in spoliation by failing to collect relevant evidence, because one cannot spoliates evidence that never existed. (*Id.* at 982). After suffering injuries while being transported on the skiff of a tugboat owned and operated by Vitus, a passenger sued for negligence per se.

(*Id.* at 979–80). The passenger then filed a motion for spoliation (destruction) of evidence, alleging that Vitus’s failure to test the captain of the skiff for intoxication in violation of applicable Coast Guard regulations constituted spoliation of evidence. (*Id.* at 980–81). The passenger contended that, absent the test, it was impossible for her to establish the captain’s level of intoxication at the time of the accident, harming her ability to prove a case for negligence per se for operating a boat under the influence of alcohol. (*Id.* at 980). The court denied the passenger’s motion for sanctions, finding that she failed to prove that Vitus destroyed, altered, or failed to preserve evidence. (*Id.* at 983). The court reasoned that there was no jurisprudential support for the assertion that failure to collect relevant evidence could constitute spoliation. (*Id.* at 982). The court also noted in dicta that, even if failure to collect evidence could constitute spoliation, the passenger failed to prove that her requested sanctions were appropriate in this case. (*Id.* at 982). The court explained that both of the passenger’s requested remedies would effectively result in preventing Vitus from denying that the skiff captain was intoxicated at the time of the incident, resulting in strong evidence of negligence per se. (*Id.* at 984, 987). Accordingly, the district court denied the passenger’s motion for spoliation, holding that it was impossible to spoliolate evidence by failing to collect evidence in the first place. (*Id.* at 982).

Garcia v. Vitus Energy, L.L.C. (Garcia II)

In *Garcia v. Vitus Energy, L.L.C.*, 605 F. Supp. 3d 1179 (D. Alaska 2022), the court held that an expert makes an impermissible legal conclusion in violation of the federal rules of evidence when he comments on an employee’s negligence in a case concerning the employer’s liability for negligence per se. (*Id.* at 1184–85). After suffering injuries while being transported on the skiff of a tugboat owned and operated by Vitus, a passenger sued for negligence per se. Vitus filed a motion in limine to exclude certain opinions of one of the passenger’s experts, a retired Coast Guard captain and purported expert on maritime safety. (*Id.* at 1182). In particular, Vitus sought to exclude the expert’s opinions on (1) the captain’s level of intoxication, (2) the captain’s negligence, (3) the condition of the skiff, (4) the sufficiency of Vitus’s training, and (5) the captain’s decision–making process at the time of the incident. (*Id.* at 1183). The court granted the motion in part, excluding the expert’s opinions on (1) the captain’s level of intoxication, (2) the captain’s negligence, and (3) the captain’s decision–making processes. (*Id.* at 1184, 1185, 1188). Excluding the expert’s comments on the captain’s alleged negligence, the court distinguished the expert’s testimony from prior circuit precedent. (*Id.* at 1184). Precedent had established that experts may comment on the relevant law if their conclusion is merely ancillary to the ultimate issues of law in the case. (*Id.*). The court reasoned here that the issue of the captain’s negligence was not ancillary, but central to the question of Vitus’s liability for negligence per se. (*Id.*). After reviewing the rest of Vitus’s proposed exclusions, the district court granted its motion in part, finding that the passenger’s expert made an impermissible legal conclusion when he commented on the captain’s alleged negligence in a case concerning the employer’s liability for negligence per se. (*Id.* at 1184, 1188).

FAMILY LAW

Angelica C. v. Jonathan C.

In *Angelica C. v. Jonathan C.*, 519 P.3d 334 (Alaska 2022), the supreme court held that the superior court did not abuse its discretion by finding that a child’s best interests in preserving the father’s parental rights outweighed the mother’s rights as a victim of sexual abuse by the child’s

father. (*Id.* at 344). An illegal sexual relationship, beginning when the mother was thirteen and the father was nineteen, led to the birth of a child. (*Id.* at 335, 343). The mother filed a petition to terminate the father’s parental rights based on an Alaska statute authorizing termination in situations where conception resulted from sexual abuse of a minor. (*Id.* at 336). The superior court denied the petition, finding that termination would not have been in the child’s best interests. (*Id.* at 339). The mother appealed. (*Id.*). Affirming the denial of the termination petition, the supreme court reasoned that a central purpose of the statute was to eliminate the need for day-to-day interaction between the victim parent and abuser parent. (*Id.* at 343–345). The supreme court also reasoned that the superior court had appropriately considered the nature of the custody dispute, specifically that the father did not seem to be pestering the mother over custody and that there was almost no day-to-day interaction between the parents because the father saw the child only when the child was at the home of his paternal grandparents. (*Id.* at 343–344). The supreme court affirmed the order denying termination of parental rights, holding that the superior court did not abuse its discretion by finding that the child’s best interests outweighed the mother’s rights as a victim. (*Id.* at 344–345).

Aparezuk v. Schlosser

In *Aparezuk v. Schlosser*, 514 P.3d 283 (Alaska 2022), the supreme court held that a husband’s duty to pay past due child support was precluded by him financially supporting the children in a shared household with his wife during the period at issue. (*Id.* at 290–91). In 2013, a married couple separated with a mutual agreement that required the husband to pay \$564 per month in child support. (*Id.* at 284). But following separation, the pair continued to live together in their marital home and the husband provided about two thirds of financial support for the household purely from his own income. (*Id.* at 284–85). The husband did not pay the \$564 per month in child support during this time. (*Id.* at 285). The wife moved out in 2017 and the couple divorced in 2018. (*Id.* at 286). The following year, the Child Support Services Division told the husband that he owed a substantial amount of past due child support and garnished his wages, despite his protests that the past due child support covered a time when he lived with his ex-wife and children. (*Id.*). The husband sought relief in the superior court, which held that an equitable reading of Alaska Civil Rule 90.3(h)(3) precluded collection of the past due child support because the husband provided more than his court-mandated payments. (*Id.* at 286–87). The wife then appealed to the supreme court and argued that the plain text of Rule 90.3(h)(3) barred the superior court’s holding. (*Id.* at 287). But the supreme court affirmed the superior court, reasoning that courts could consider what result would be most equitable when a plain text reading would produce an absurd result. (*Id.* at 288). The court also noted its prior holdings that Rule 90.3(h)(3) could preclude collection when the children still received the requisite support and collection would produce a windfall for the recipient partner. (*Id.*) Thus, the supreme court held that a husband’s duty to pay past due child support was precluded by him financially supporting the children while still living with his wife during the relevant time period. (*Id.* at 290–91).

Ariel P. v. State, Department of Health & Social Services

In *Ariel P. v. State, Department of Health & Social Services*, 2022 WL 2093357 (Alaska 2022) (unpublished), the supreme court held that a court may consider the potential permanency of a child’s foster placement when conducting a best interests assessment. (*Id.* at *1). The Office of Children’s Services (OCS) took emergency custody of a mother’s newborn child when the child

tested positive for amphetamine and opiates. (*Id.*). OCS referred the mother to a variety of services for substance abuse, addiction treatment, and parenting support, which she attended inconsistently. (*Id.*). The child was placed with her paternal aunt and uncle from birth, and they expressed an interest in adopting her. (*Id.*). A little over a year after the child's birth, OCS filed a petition to terminate the mother's parental rights and the court found that termination was in the child's best interests. (*Id.* at *2–3). The mother appealed and argued that the court should not have considered the potential permanency of the child's placement with her aunt and uncle in its analysis. (*Id.* at *3). The supreme court affirmed the lower court's decision, reasoning that the decision to terminate parental rights must be based on a case's specific facts. (*Id.*). While the existence of a pre-adoptive placement is not determinative, it can be considered as part of a holistic evaluation of a child's best interests. (*Id.*). Affirming the lower court's decision, the supreme court held that a court may consider the potential permanency of a child's foster placement when conducting a best interests assessment. (*Id.*).

Daum v. Daum

In *Daum v. Daum*, 518 P.3d 718 (Alaska 2022), the supreme court held that the superior court had jurisdiction and authority to award support for an adult child covering the entirety of the child's living expenses. (*Id.* at 720). After a father filed for divorce following years of separation, the mother counterclaimed for child support for the prior three years after the couple's son had turned 19. (*Id.*). The mother argued that their son needed significant support due to a number of diagnosed mental conditions. (*Id.*). The superior court found that the son could not fully take care of himself and was dependent on care provided by his mother, so it ordered the father to pay about \$1,000 per month, which would fully cover the son's living expenses. (*Id.* at 721). The father argued on appeal that Alaska lost jurisdiction to order child support when the son turned 19 and the original order for child support expired. (*Id.* at 722). He also claimed that the court could not modify an order to require post-majority support after the child had already reached majority. (*Id.* at 723). The supreme court held that the lapsing of the child support order was a modification that did not terminate jurisdiction and that allowing post-majority modification was consistent with precedent. (*Id.*). The court held that a 100% support order could be appropriate, but remanded the case to determine if the son's earnings should decrease the father's amount owed. (*Id.* at 725). Affirming in part and remanding in part, the supreme court held that the superior court had jurisdiction and authority to award support for an adult child covering the entirety of the child's living expenses. (*Id.* at 720).

Grubb v. State

In *Grubb v. State*, 506 P.3d 791 (Alaska Ct. App. 2022), the court of appeals held that Alaska law permits restitution only where lost wages and benefits are not too attenuated from the charged criminal conduct. (*Id.* at 792). Grubb pleaded guilty to second-degree sexual abuse of a minor, M.M. (*Id.* at 793). In addition to prison time, Grubb also agreed to pay restitution to the mother of the nine-year-old victim. (*Id.*). The State sought a total of \$216,307.55 in restitution, \$197,038 of which related to the mother's lost future wages and benefits. (*Id.*). At a hearing on the matter, the mother testified that this figure represented the amount she would lose as the result of resigning from her teaching position to care for M.M., who was suffering from PTSD. (*Id.*). The mother testified that she had planned to teach for four more years and then would have qualified for the school system's basic retirement plan. (*Id.* at 793–94). Thus, the mother calculated her loss as \$197,038, an amount that incorporated four more years of work and retirement benefits

beginning at the age of 42. (*Id.* at 794). The trial court granted the amount. (*Id.*). On appeal, Grubb asserted that the losses were too speculative to be compensable. (*Id.*). The court of appeals held that in order to obtain a restitution order for particular losses or damages, the State must establish that (1) a defendant’s criminal conduct was the “but-for” cause of the losses incurred, and (2) the losses were a natural and proximate result of the criminal conduct to which liability should attach. (*Id.* at 795). The court of appeals highlighted its hesitation to grant restitution for wages lost as a result of an individual’s decision to resign from work to provide emotional care for a victim family member. (*Id.* at 798). The court also pointed out that the mother’s asserted losses hinged on factors unconnected to Grubb’s criminal conduct, such as the flexibility of her job, her supervisor’s diminished willingness to accommodate her scheduling needs, and her decision to resign rather than take a leave of absence (*Id.*). Thus, the court of appeals found the asserted future losses too speculative to allow for compensation for lost financial benefits in this case. (*Id.* at 799). Reversing and remanding the lower court’s restitution order, the court of appeals held that Alaska law permits restitution only where lost wages and benefits are not too attenuated from the charged criminal conduct. (*Id.* at 792).

Husby v. Monegan

In *Husby v. Monegan*, 517 P.3d 20 (Alaska 2022), the supreme court held that a statute allowing modification of visitation orders applies to grandparents and that the parental preference rule does not apply when a grandparent has already been granted visitation. (*Id.* at 23). After a mother gave birth to her child, the child’s maternal grandparents provided childcare and were highly involved with the child for two and a half years. (*Id.*). The mother married, and the grandparents came to a mediated agreement with the newly married couple that the grandparents would receive visitation one weekend each month and could contact the child by phone and mail as much as they wished. (*Id.*). The couple and child moved to Alaska from Oregon five years later. (*Id.*). The grandparents continued to visit for about a year and a half, until the couple filed to terminate the grandparents’ visitation rights. (*Id.*). The superior court granted the request, finding that the grandfather’s alleged history of abuse and patterns of manipulative behavior were detrimental to the child. (*Id.* at 25). On review, the supreme court held that its courts should apply the state statute which sets standards for modification of visitation orders to grandparents, even though the statutory text only mentions parents. (*Id.* at 26). Under this statute, those filing to terminate visitation must show a substantial change in circumstances. (*Id.*). An out-of-state move may qualify as a substantial change, but here the superior court relied on allegations of abuse and did not hold an evidentiary hearing to determine the veracity of the claims. (*Id.* at 29–30). The court also held that deference to parental preference does not apply when modifying grandparents’ rights if the preference was applied to the initial visitation order. (*Id.* at 28). Reversing and remanding to the superior court for an evidentiary hearing, the supreme court held that the statute allowing modification of visitation orders applies to grandparents, and that the parental preference rule does not apply when a grandparent has already been granted visitation. (*Id.* at 23, 30).

Layton v. O’Dea

In *Layton v. O’Dea*, 515 P.3d 92 (Alaska 2022), the supreme court held that the lower court erred when it (1) declined to consider whether a wife’s separate property transmuted to marital property through contract; and (2) found that no portion of a wife’s earnings on separate investments was marital when the taxes on those earnings were paid with marital funds. (*Id.* at

97). A husband appealed the superior court's order dividing property upon divorce from his wife of 38 years. (*Id.*). The husband contended that he paid the taxes on the earnings from two investment accounts that his wife had opened with money inherited during the marriage, but the wife contested that claim. (*Id.* at 99). Following a lengthy divorce proceeding, the trial judge issued a 50/50 split of the marital estate, but ruled that the wife's investment accounts were her separate property and dismissed the husband's argument that the investments accounts had been transmuted to marital property by contract. (*Id.* at 100). Further, the court found no active appreciation in the investment accounts, despite finding that the husband had paid taxes on the accounts. (*Id.*). The husband appealed, challenging both the court's refusal to apply a contract analysis to determine whether the inheritance had transmuted to marital property and the finding that there had been no active appreciation in the investment accounts. (*Id.* at 100). The supreme court held that under Alaska law, a spouse's separate property may transmute to marital property if the owner acts by express or implied contract to transmute the property. (*Id.* at 105). The nature of the transaction depends on the facts; thus, the trial court erred when it failed to evaluate the facts of the alleged contract. (*Id.*). Next, the supreme court held that separate property can become marital property through active appreciation. (*Id.* at 106). For the doctrine of active appreciation to apply, a party must show (1) appreciation of the separate property during the marriage, (2) marital contributions to the property, and (3) a causal connection between the marital contributions and the appreciation. (*Id.*). The parties agreed that the value of the accounts appreciated during the marriage, and the supreme court held that the trial court erred when it found no causal connection between the husband's payment of taxes and the account's appreciation. (*Id.*). Because the trial court recognized the husband's past payment of taxes, the husband deserved a presumption that his contribution caused the appreciation. (*Id.* at 107). Reversing and remanding, the supreme court held that the lower court erred when it (1) declined to consider whether a wife's separate property transmuted to marital property through contract; and (2) found that no portion of a wife's earnings on separate investments was marital when the taxes on those earnings were paid with marital funds. (*Id.* at 97).

Matter of Office of Public Advocacy

In *Matter of Office of Public Advocacy*, 514 P.3d 1281 (Alaska 2022), the supreme court held that when a party in a child custody case is represented by a pro bono volunteer attorney through Alaska Legal Services Corporation (ALSC), that attorney is "provided by a public agency," entitling an indigent opposing party to an appointed attorney through the Office of Public Advocacy (OPA). (*Id.* at 1288). In 2019, a wife sought a divorce from her husband, and contacted ALSC for legal help. (*Id.* at 1283). ALSC's pro bono program matches eligible clients with private volunteer attorneys; the wife was matched with one of these attorneys. (*Id.*). The court informed the husband of his right to an attorney, and he proceeded to file a motion for assistance of counsel, given his indigent status. (*Id.* at 1284). Alaskan statute and prior supreme court precedent held that, in a child custody case, where one parent's counsel is "provided by" a public agency, OPA is to provide counsel for an indigent opposing party. (*See id.* at 1285). The superior court ordered OPA to designate an attorney for the husband. (*Id.*). OPA challenged the order, arguing that the wife's attorney was a private attorney volunteering through ALSC, and therefore not an attorney "provided by" a public agency. (*Id.*). The argument followed that OPA should not be required to provide an attorney for the husband. (*Id.*). The superior court denied the motion, and OPA reiterated this argument on appeal before the supreme court. (*Id.*). The supreme court affirmed the lower court's denial of OPA's motion, holding that an attorney assigned

through ALSC, an organization receiving public funding, was “provided by a public agency,” regardless of whether the attorney is a volunteer or paid member of the ALSC staff. (*Id.* at 1288). The court reasoned that the right to counsel for parties like the husband in the instant case arises from the government’s one-sided support of the opposing party through a public agency. (*Id.* at 1286). Given the purpose of the rule to alleviate fairness concerns, it would be improper for a divorcing spouse to receive an attorney when the opposing party’s attorney is paid by ALSC, but not when said attorney is a volunteer through ALSC. (*Id.* at 1288). Affirming the superior court’s decision, the supreme court held that an attorney assigned through ALSC’s pro bono program should be considered “provided by a public agency,” thereby triggering the right to OPA-provided counsel for an opposing indigent party. (*Id.*).

Notti v. Hoffman

In *Notti v. Hoffman*, 513 P.3d 245 (Alaska 2022), the supreme court held that “rape by fraud” wherein one person induces another to sex through fraudulent assurances is not an actionable tort claim. (*Id.* at 249). An estranged couple was in the process of divorcing when the husband reached out to the wife seeking sexual relations. (*Id.* at 247). The wife refused and told the husband that she would not agree to a sexual relationship unless he was fully committed to the marriage. (*Id.*). They later had sexual relations after the husband assured his wife that he was “all in” on their marriage and put his wedding ring back on. (*Id.*). A month later, the husband informed his wife that he did not intend to stay in the marriage and their recent sexual encounter had been “just sex.” (*Id.*). Following the conclusion of their divorce proceedings, the wife filed a complaint alleging sexual assault in the form of “rape by fraud.” (*Id.*). The superior court granted the husband’s motion to dismiss the “rape by fraud” claim for failure to state a claim. (*Id.* at 248). The supreme court affirmed the lower court’s decision because “rape by fraud” is not a recognized tort in Alaska. (*Id.* at 249). The court reasoned that there is no viable battery claim when sexual intercourse results from fraud in the inducement because fraud in the inducement does not vitiate consent. (*Id.* at 250–51). The court further distinguished this case from those involving fraud in fact—such as when someone misrepresents their own identity in a sexual encounter. (*Id.*). Fraud in fact, unlike fraud in the inducement, can vitiate consent. (*Id.* at 250). Affirming the lower court’s decision, the supreme court held that “rape by fraud” is not a recognized tort in Alaska. (*Id.* at 252).

Rainer v. Poole

In *Rainer v. Poole*, 510 P.3d 476 (Alaska 2022), the supreme court held that a court cannot modify a custody order without a substantial change in circumstances. (*Id.* at 481). The parents in this case had a child in June 2013 and their relationship ended in late 2013. (*Id.* at 478). The mother was awarded primary physical custody in March 2015, while the father was awarded some unsupervised visitation time. (*Id.*). The parents were awarded joint legal custody. (*Id.*). In December 2018, the parties updated the agreement after a motion by the father to modify the 2015 order. (*Id.* at 479). In June 2020, the father requested full custody of their child, claiming that he would provide a better environment for the child. (*Id.*). The lower court found that there was a substantial change in circumstances and granted the father full physical custody of the child, noting that its decision came down to credibility. (*Id.* at 481). The mother appealed, arguing that there was not a substantial change in circumstances. (*Id.*). The supreme court reversed the lower court’s decision and remanded for a new trial, reasoning that the lower court had not made sufficient factual findings to determine if there had been a substantial change in

circumstances. (*Id.* at 478). The supreme court stated that three principles should have guided the lower court’s analysis in determining if there was a substantial change in circumstances. (*Id.* at 481). First, present circumstances should be compared to those that existed at the time of the most recent custody proceedings to determine if there was a substantial change. (*Id.*). Second, conduct interfering with a parent’s custody rights could establish a substantial change in circumstances even if similar conduct occurred in the past. (*Id.* at 482). Third, courts must consider lesser sanctions for noncompliance with a custody order before modifying custody. (*Id.* at 483). Here, the lower court did not make sufficient factual findings on these principles as to whether there was a substantial change in circumstances and so should not have granted a motion to modify a child custody order. (*Id.* at 484). Reversing and remanding the lower court, the supreme court held that a court cannot modify a custody order without a substantial change in circumstances. (*Id.* at 481).

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

In *Reed S. v. State, Department of Health & Social Services*, 522 P.3d 182 (Alaska 2022), the supreme court held that collateral consequences allowed it to review an otherwise–moot appeal of a lower court’s child–in–need–of–aid (CINA) adjudication, and found no clear error in the lower court’s ruling that both parents’ conduct necessitated a CINA adjudication for their son. (*Id.* at 184). While in his father’s care, a child suffered a severe leg injury for which his father gave conflicting explanations. (*Id.*). The superior court issued a CINA adjudication for the child, granted custody to his mother, and limited the father’s contact with the family, only for authorities to arrest the father a few months later outside the family’s home. (*Id.*). The lower court then adjudicated the child as a CINA for both parents’ actions. (*Id.*). However, after both parents appealed, the Office of Children’s Services advised the lower court that the child would be safe returning to his parents’ care, leading the lower court to close the case. (*Id.*). The supreme court denied the parents’ motion to vacate the CINA order and dismiss their appeals, finding that while the appeals were moot, the CINA adjudication imposed burdensome restrictions on the parents, and these “collateral consequences” empowered the supreme court to review the case on the merits. (*Id.* at 188). The court then reviewed the superior court’s CINA adjudication for clear error and found none, explaining that the severity of the child’s leg injury, the conflicting stories presented to authorities about the injury, the father’s failure to seek immediate medical attention for the injury, and the mother’s allowing contact between the child and his father in violation of no–contact orders were sufficient justification for upholding a CINA designation. (*Id.* at 192). Affirming the lower court’s CINA adjudication on the merits, the supreme court held that collateral consequences allowed it to review an otherwise moot appeal, and found no clear error in the superior court’s ruling that both parents’ conduct necessitated a CINA adjudication. (*Id.* at 184).

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

In *Rock H. v. State, Department of Health & Social Services*, 2022 WL 2236187 (Alaska 2022) (unpublished), the supreme court held that the superior court did not err in finding that a child was in need of aid, and that the Office of Children’s Services (OCS) made reasonable efforts overall to reunite the child and her father. (*Id.* at *4–6). After the child tested positive at birth for several controlled substances, OCS placed her in a foster home and set up a family contact plan for the father. (*Id.* at *1). He failed to attend five scheduled visits the next month, and his visitation rights were suspended. (*Id.*). Over the next year, the father made some efforts to see his

child, but he did not visit consistently due to his incarceration, the COVID-19 pandemic, and required drug testing in a different city from his daughter. (*Id.* at *2). On petition by OCS, the superior court terminated the father’s parental rights, finding that the child was a child in need and that OCS made reasonable efforts to return the child to her family home. (*Id.* at *3). The father appealed. (*Id.*). The supreme court affirmed the superior court’s decision, reasoning that the father’s occasional visits amounted to only “minimal efforts” and met the criteria for child abandonment. (*Id.* at *4). The court acknowledged that OCS did not document reasonable efforts to reunify the child and her father for a three-month period, but held that OCS made reasonable efforts in the case overall. (*Id.* at *6). Affirming the superior court’s decision, the supreme court held that the superior court did not err in finding that a child was in need of aid due to abandonment, and that OCS made reasonable efforts overall to reunite the child and her father. (*Id.* at *4–6).

Sockpick v. Magby

In *Sockpick v. Magby*, 2022 WL 2825388 (Alaska 2022) (unpublished), the supreme court held that a release of liability in a settlement agreement cannot be a defense to a lawsuit when a court has previously struck down that portion of the settlement agreement. (*Id.* at 4). A wife filed for divorce and her husband proposed a settlement through his attorney. (*Id.* at 1). In addition to settling property claims, this settlement contained a clause releasing liability for all assault, battery, or domestic violence lawsuits. (*Id.*). A separate agreement released liability for all lawsuits in general. (*Id.*). Shortly after agreeing to the settlement, the wife sued to invalidate it. (*Id.* at 2). The divorce court upheld the property settlement but invalidated the separate release of liability, and noted in a footnote that the domestic violence liability release in the property settlement was also unenforceable. (*Id.*). The wife then sued the husband for assault, but the court did not notice the footnote about the unenforceability of the domestic violence liability release, and neither the wife nor the husband explicitly pointed it out. (*Id.*). The court held that the prior case upheld the settlement and granted summary judgment to the husband. (*Id.*). On appeal, the supreme court reversed the lower court, reasoning that the divorce court did not uphold the relevant portion of the settlement. (*Id.* at 3–4). The supreme court pointed out that the lower court overlooked the footnote which invalidated the release of liability in the settlement. (*Id.* at 3). The supreme court also reasoned that the divorce court’s decision barred any future arguments about the enforceability of the liability release. (*Id.* at 4). Reversing the lower court’s decision, the supreme court held that a release of liability in a settlement agreement cannot be a defense to a lawsuit when a court has previously struck down that portion of the settlement agreement. (*Id.*).

Sternquist v. Sternquist

In *Sternquist v. Sternquist*, No. S-17594, 2022 WL 2137285 (Alaska June 15, 2022) (unpublished), the supreme court held that a version of a settlement agreement between a divorcing couple that was drafted by the husband and adopted by the court did not reflect the couple’s actual agreement. (*Id.* at *1). A divorcing couple settled their property disputes through mediation, memorialized in a handwritten list of terms and a recording in which the husband and wife orally consented to each term. (*Id.*). The couple agreed to a qualified domestic relation order (QDRO) regarding marital portions of retirement accounts and divided personal property according to a spreadsheet. (*Id.*). When the court refused to enforce the settlement because of disagreement about the meaning of the QDRO term, the husband submitted a set of “non-

stipulated pleadings” that included his version of the settlement agreement and a property division spreadsheet. (*Id.* at *1–2). Over the wife’s objections, the court signed the divorce decree and incorporated the husband’s version of the settlement agreement. (*Id.* at *2). On appeal, the wife argued that the settlement agreement adopted by the court did not reflect the couple’s actual agreement as to the QDRO term and the personal property division. (*Id.*). The supreme court reasoned that there was no meeting of the minds as to the QDRO term because the adopted agreement provided that documentation other than QDROs could be used, but the handwritten list and recording did not. (*Id.* at *2–3). Further, the court reasoned that the couple reasonably expected that the agreement incorporated a specific property division spreadsheet with yellow highlighting, referenced in the recording, and the spreadsheet adopted did not contain yellow highlighting. (*Id.* at *3–4). Remanding to the superior court for further consideration of the QDRO term and personal property division, the supreme court held that a version of a settlement agreement between a divorcing couple that was drafted by the husband and adopted by the court did not properly reflect the couple’s actual agreement. (*Id.* at *1).

Tiffany B. v. State, Department of Health & Social Services

In *Tiffany B. v. State, Department of Health & Social Services*, No. S-18111, 2022 WL 2066045 (Alaska June 8, 2022) (unpublished), the supreme court reversed the lower court’s order to terminate a mother’s parental rights, holding that the Office of Children’s Services (OCS) had not made sufficiently active efforts in providing services to prevent the breakup of the children’s family, as required by the Indian Child Welfare Act (ICWA). (*Id.* at *1). OCS petitioned to terminate a mother’s parental rights because of her domestic violence and aggressive behavior, among other reasons. (*Id.* at *4). The lower court terminated her rights, and the mother appealed, arguing that the lower court incorrectly found that OCS had met its “active efforts” burden. (*Id.*). The supreme court defined “active efforts” as a state caseworker taking the parent through the steps of the case plan, rather than requiring that the parent perform the plan’s requirements on their own. (*Id.* at *5). The supreme court noted that while a parent’s unwillingness to participate in their case plan may influence the rehabilitative efforts OCS pursues, a parent’s lack of effort does not excuse OCS’s failure to make and demonstrate its efforts. (*Id.* at *8). The supreme court found that OCS did not make active efforts to help the mother access mental health counseling or parenting classes, even though the mother was unwilling or expressed disinterest in undertaking the tasks in the plan. (*Id.* at *7–8). Because OCS did not meet its active efforts burden as required by the ICWA, the supreme court reversed the lower court’s order to terminate the mother’s parental rights. (*Id.* at *1).

Walsh v. Singleton

In *Walsh v. Singleton*, No. S-18155, 2022 WL 2092566 (Alaska June 8, 2022) (unpublished), the supreme court upheld the superior court’s decision to modify an existing custody agreement in light of a mother’s decision to move from Anchorage to Wasilla. (*Id.* at *1–2). A separated mother and father engaged in a long custody dispute over their two children. (*Id.* at *1). In 2016, the couple agreed to a joint legal and shared physical custody agreement, but the superior court later modified the arrangement to a week on/week off shared physical custody schedule. (*Id.* *1–2). In 2021, the mother filed a “Motion for Permanent Change of School” after she bought a house in Wasilla with her new husband. (*Id.* at *2). However, the superior court, citing the distance from Anchorage and Wasilla, found that the motion essentially amounted to a request to modify the week on/week off arrangement. (*Id.*). After hearing from both parties, the superior

court modified the arrangement to give the mother primary physical custody during the school year. (*Id.*). The father appealed the court's modification on the grounds that he believed (1) the move to Wasilla was not a substantial change in circumstances; (2) the mother had no legitimate reason for moving; and (3) the modifications did not reflect the children's best interests. (*Id.* at *3). On appeal, the supreme court noted that it would only overturn the lower court for clear error or abuse of discretion because the superior court possessed broad discretion in child custody decisions. (*Id.*). The court noted that modifying custody arrangements is a two-step process: a superior court must first determine (1) if there has been a substantial change in circumstances, and if so (2) that a modification would be in the children's best interest. (*Id.*). The court then found that the lower court reasonably determined that the distance between Wasilla and Anchorage constituted a substantial change in circumstances. (*Id.*). Furthermore, the court noted that a superior court may not restrict a parent's decision to relocate but may only ask whether the relocation was motivated by spite. (*Id.* at *4). Because the parties presented no evidence of spite, the supreme court held that the superior court did not err in finding the move legitimate. (*Id.*). Finally, the supreme court held that the lower court did not err when it decided that a new arrangement would benefit the children because the mother provided un rebutted testimony that the father had stopped communicating with the children. (*Id.* at *5). Thus, the supreme court affirmed the superior court's decision to modify an existing custody agreement in light of the mother's decision to move from Anchorage to Wasilla. (*Id.* at *1–2).

Womack v. Jones

In *Womack v. Jones*, 2022 WL 1565679 (Alaska May 18, 2022), reh'g denied (June 23, 2022) (unpublished), the supreme court affirmed the superior court's interpretation of a settlement agreement in a divorce decree dividing the profits of the sale of the marital home based on cost-of-sale, less the husband's renovation expenses for materials but not for labor. (*Id.* at *1). A divorcing couple entered a settlement agreement which stated the husband would sell the couple's marital home, after which the two would split the proceeds evenly. (*Id.*). They agreed that the husband would make repairs necessary to sell the home and would be reimbursed "off the top" of the proceeds, after which the two would split the rest. (*Id.*) During the parties' settlement hearing, they agreed that the husband would renovate the home and be reimbursed for materials, but did not agree that the husband's own labor costs would be reimbursed. (*Id.* at *3). The superior court issued an order awarding the wife slightly less than half of the remainder from the sale price, less materials and supply costs. (*Id.*). On appeal, the husband argued that the settlement agreement dictated that distribution of profits from the home sale ought to be determined by the pre-renovation value of the home, from which renovation costs, including labor, should be subtracted before the remainder was split between the parties. (*Id.*). The supreme court affirmed the lower court's order, reasoning that the plain language of the settlement agreement unambiguously provided that calculation of profit from the sale of the marital home is to be the "cost of sale," not its pre-renovation value. (*Id.*). The court further reasoned that, as the parties expressly contemplated and agreed upon the payment of third parties for any labor spent renovating the home but only agreed that the husband would be reimbursed for materials and supplies, the husband's labor was not reimbursable. (*Id.*). Affirming the superior court's decision, the supreme court held that the plain language of a divorcing couple's settlement agreement detailing the process for sale of the marital home provided for distribution of profits based on cost-of-sale, less the husband's renovation expenses for materials but not for labor. (*Id.*).

Wright v. Dropik

In *Wright v. Dropik*, 514 P.3d 655 (Alaska 2022), the supreme court held that when there is a dispute as to whether two people were in a domestic partnership, the court must consider various factors to determine if the people lived together in a marriage-like relationship. (*Id.* at 660). Wright and Dropik lived together as girlfriend and boyfriend from 2015 to 2018, split various expenses, and purchased property together. (*Id.* at 658). When Wright and Dropik broke up, each claimed that the other owed them money for credit card charges and loans for the purchase of property incurred while they were together. (*Id.*) The trial court held that Wright and Dropik were in a domestic partnership but, according to the supreme court, failed to make factual findings to support the existence of the domestic partnership. (*Id.* at 660). The supreme court held that a domestic partnership exists when there is an agreement between two people to live together indefinitely and to share resources as if they were married. (*Id.*). If two people dispute whether or not a domestic partnership existed, the court should consider factors including whether the parties have made joint financial arrangements and filed joint tax returns, held themselves out as husband and wife, raised children together, or incurred joint debts. (*Id.*). If the court finds that a domestic partnership existed, the court must classify all property as either partnership property or separate property. (*Id.*). Unless a contract or statute says otherwise, classification of property as joint or separate should be done according to the domestic partners' intent. (*Id.*). Remanding to the trial court to make factual findings, the supreme court held that when there is a dispute as to whether two people were in a domestic partnership, the court must consider various factors to determine if the people lived together in a marriage-like relationship. (*Id.* at 665).

HEALTH LAW

In re Jonas H.

In *In re Jonas H.*, 513 P.3d 1019 (Alaska 2022), the supreme court held that the superior court must explicitly make or incorporate findings relevant to every contested Myers factor to grant an order for the involuntary administration of psychotropic medication. (*Id.* at 1026). Jonas's schizophrenia began to worsen to the point his family feared he was unable to take care of himself. (*Id.*). The State motioned the superior court for orders authorizing the thirty-day involuntary commitment of Jonas and administration of psychotropic medication. (*Id.*). In the medication hearing, the State's independent investigator stated that Jonas had reasonable objections (feeling side-effects) and unreasonable objections (being "spiritually threatened") to his medication. (*Id.* at 1021–22). Jonas also testified that he preferred other treatment methods, including exercise, a good diet, and a lot of sunlight. (*Id.* at 1025). The superior court granted both of the State's orders. (*Id.* at 1022). However, the court did not address Jonas's objections to side-effects and alternative treatment in its order or on the record. (*Id.* at 1025). On appeal, Jonas argued that the superior court insufficiently addressed the Myers factors, all of which must be met for a court to order involuntary administration of psychotropic medication. (*Id.* at 1024). The supreme court found for Jonas, noting that the superior court had only addressed one of the five Myers factors, leaving the factors related to side-effects and alternative treatment unanswered. (*Id.* at 1025). While the supreme court agreed with the State that the superior court only needed to address contested factors, it concluded that the lower court had insufficiently addressed the three factors contested by Jonas. (*Id.* at 1025–26). Accordingly, the supreme court vacated the superior court's order, holding that the superior court must explicitly address each contested

Myers factor to grant an order for the involuntary administration of psychotropic medication. (*Id.* at 1026).

Matter of Carl S.

In the *Matter of Carl S.*, 510 P.3d 486 (Alaska 2022), the supreme court held that a man's due process rights were violated when he was civilly committed based on an unpled claim of grave disability. (*Id.* at 488). On August 28, 2020, the man was brought to the Anchorage jail for booking. (*Id.*) He spoke nonsensically, was disoriented as to the date and where he was, and ate an ointment provided for lesions on his skin. (*Id.*) He also had a past schizophrenia diagnosis. (*Id.* at 489). On September 8, mental health professionals filed a petition for 30-day civil commitment of the man. (*Id.*) At a September 14 commitment hearing, his treating psychiatrist testified that she was concerned the man was gravely disabled and would harm himself. (*Id.* at 490). The lower court found that the man was gravely disabled based on extreme neglect and ordered him to be civilly committed. (*Id.*) On appeal, the supreme court reversed the lower court's decision, reasoning that the man did not receive adequate notice and opportunity to be heard because he was not notified that the theory of grave disability was being considered. (*Id.* at 493, 495). The court further reasoned that fundamental constitutional issues of liberty and privacy were involved in commitment cases, which added to the importance of proper notice of arguments being presented. (*Id.* at 493, 494). Reversing the lower court's decision, the supreme court held that a man's due process rights were violated when he was civilly committed without being notified of the theories argued for his commitment. (*Id.* at 495).

INSURANCE LAW

City of Unalaska v. National Union Fire Insurance Co.

In *City of Unalaska v. National Union Fire Insurance Co.*, 591 F. Supp. 3d 440 (D. Alaska 2022), the district court held that under Alaska state law, a Computer Fraud Insuring Agreement in an insurance policy covered financial losses due to fraud perpetrated over email. (*Id.* at 453.) A fraudster defrauded the city government out of over \$2 million by impersonating a vendor over email. (*Id.* at 442). The fraudster had the city reroute payments from the real vendor to the fraudster. (*Id.* at 442–43). The city was able to recover most of the stolen funds but had over half a million dollars outstanding, for which it sought insurance coverage from National Union. (*Id.* at 443). The city argued that the Computer Fraud Insuring Agreement (CFIA) in its policy covered fraud perpetrated over email and should, therefore, cover the remaining unrecovered losses. (*Id.*) The district court decided this case using Alaska state law principles for interpreting insurance standards. (*Id.* at 445). The court explained that a reasonable insured party would have expected the CFIA to cover losses of money from a fraudster's illegal email conduct, such as in this case. (*Id.* at 451). The plain language of the CFIA, specifically its coverage of fraud that resulted directly from the use of a computer, supported the city's understanding that money lost due to fraud perpetrated over email would be covered under the policy. (*Id.*) The district court granted the city's motion for summary judgment, concluding as a matter of first impression that the CFIA did cover financial losses from fraud perpetrated over email. (*Id.* at 453).

Estate of Wheeler v. Garrison Property & Casualty Insurance Co.

In *Estate of Wheeler v. Garrison Property & Casualty Insurance Co.*, 604 F. Supp. 3d 844 (D. Alaska 2022), the court held that pollution exclusion clauses of homeowner insurance policies are subject to literal interpretation. (*Id.* at 850–51). In 2019, while at a vacation rental property, a couple’s son died from acute carbon monoxide poisoning caused by a water heater with inadequate ventilation. (*Id.* at 846). In a “Confession of Judgment,” the rental property owners assigned rights to the parents to pursue insurance coverage claims against the insurance company for their son’s death. (*Id.*). The insurance company denied coverage, citing a pollution exclusion clause in the property owners’ insurance policy, which prevented liability coverage should injury arise out of the discharge or escape of pollutants. (*Id.*). Under the policy, pollutants included any solid, liquid, or gas that could cause harm. (*Id.*). Under Alaska law, courts interpret insurance contracts according to the “reasonable expectations” of a layperson, with any ambiguity being resolved in favor of the insured. (*Id.* at 848–49). However, a coverage restriction will be recognized if the plain language of the policy indicates so. (*Id.* at 848). The parents pointed to other state courts that determined pollution exclusion clauses to be ambiguous when applied to carbon monoxide, while the insurance company argued that the plain language clearly included carbon monoxide leaks. (*Id.* at 848–49). Looking to Alaska precedent in similar contaminant–leak cases, the district court held that Alaska law directs pollution exclusion clauses to be read literally, and that the clause in this policy unambiguously included carbon monoxide. (*Id.* at 850–51). Further, the court held that an objectively reasonable person would expect the clause to include carbon monoxide. (*Id.* at 851). Since the plain language of the pollution exclusion clause unambiguously included carbon monoxide, and a layperson could not reasonably expect otherwise, the court held that the parents’ interpretation was unreasonable. (*Id.* at 852). Accordingly, the district court held that pollution exclusion clauses will be read literally, avoiding ambiguities that would lead to favorable conclusions for the insured. (*Id.* at 850–51).

INTERNATIONAL LAW

Malin v. Osprey Underwriting Agency Ltd.

In *Malin v. Osprey Underwriting Agency Ltd.*, 595 F. Supp. 3d 861 (D. Alaska 2022), the district court held that a dispute between crewmembers of a vessel involved in an incident and the underwriters of the vessel’s insurance policy had to be arbitrated in England as stated in the policy. (*Id.* at 868). The vessel had a maritime protection and indemnity policy, which was underwritten by another company. (*Id.* at 863). In an incident on the vessel, the captain allegedly assaulted the crewmembers who then brought suit. (*Id.*). The suit was settled and the parties agreed that the underwriters would be assigned any other claims related to the incident under the policy. (*Id.*). The crewmembers then filed this lawsuit, despite there being an arbitration clause in the policy, claiming that the underwriters had wrongfully refused to pay for their claims in the original lawsuit. (*Id.*). The underwriters filed a motion to compel the crewmembers to pursue their claims through arbitration. (*Id.*). To determine whether to grant a motion to compel arbitration, a court must consider four factors: (1) there must be a written arbitration agreement, (2) the agreement must allow for arbitration in a signatory country to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (3) the agreement must arise from a legal relationship, and (4) one of the parties to the agreement must not be a U.S. citizen, or the commercial relationship underpinning the agreement must have some reasonable relation with a foreign state. (*Id.* at 864). The crewmembers argued that the arbitration clause was unenforceable

and their suit should be allowed to proceed. (*Id.*). The district court rejected the crewmembers' argument, reasoning that all of the factors were met. (*Id.* at 865). It stated that the underwriters were not U.S. citizens and that the policy was written, commercial, and contained an arbitration provision. (*Id.*). The court further reasoned that under the general principles of the Federal Arbitration Act, any ambiguities as to the scope of whether issues can go to arbitration should be resolved in favor of arbitration. (*Id.* at 866). Dismissing the case, the district court held that arbitration of the issues was compelled under the insurance policy's arbitration clause, and referred all issues to arbitration. (*Id.* at 868).

MARITIME LAW

In re Cargo of the SS Islander

In *In re Cargo of the SS Islander*, 22 WL 2757372 (D. Alaska 2022), the court held that a third party may intervene in civil cases to access documents when there is a nexus between the case in which the third party seeks to intervene and a case in which the third party itself is involved, so long as doing so will not prejudice or delay the case subject to the intervention. (*Id.* at *2). In this case, Pacific Survey Group (PSG) sought to intervene in a case, recently reopened in this court, between Tyche High Seas Capital Corp, a company with salvage rights to the cargo of the SS Islander, and Royal Sun Alliance (RSA), the owner of the gold shipment onboard the Islander. (*Id.* at *1). PSG sought to intervene in this matter to gain access to a sealed status report filed by Tyche in its action against RSA, and to then use that report as part of PSG's separate litigation against Tyche over payment of monies pending in Washington. (*Id.* at *1–2). The court permitted PSG's intervention in the case between Tyche and RSA because there existed a nexus between that action and the Washington case between PSG and Tyche. (*Id.* at *2–3). The court found a nexus between the two cases because both cases dealt with the cargo of the Islander. (*Id.* at *3). Additionally, PSG's intervention did not prejudice or delay the proceedings between Tyche and RSA. (*Id.*). The intervention did not prejudice either of the parties, because, although Tyche claimed that its competitor PSG might use the reports to create its own salvage plans, the court could prevent that through a protective order. (*Id.*). Likewise, PSG's intervention did not cause any delay because nothing would happen in the case between Tyche and RSA other than the filing of yearly status reports until and if any Islander cargo is found. (*Id.*). Granting PSG's motion for permissive intervention, the district court held that a third party may intervene in civil cases to access documents when there is a nexus between the case in which the third party seeks to intervene and a case in which the third party itself is involved, so long as doing so will not prejudice or delay the case subject to the intervention. (*Id.* at *2, 4).

Maritech Marine Services, LLC v. Bay Welding Services, Inc.

In *Maritech Marine Services, LLC v. Bay Welding Services, Inc.*, 593 F. Supp. 3d 902 (D. Alaska 2022), the court held that genuine issues of material fact as to the scope of a maritime contract between a vessel owner and a custom boat manufacturer precluded summary judgment. (*Id.* at 909). Vessel chartering company Maritech approached custom boat manufacturer Bay Weld for a remodel and upgrade of its Lightning catamaran. (*Id.* at 905). The parties' contract provided for an upgrade of the boat's jets, a full internal inspection, and addition of a new control system. (*Id.* at 906). After multiple issues with the new control system on the Lightning, the owner of Maritech, while in control of the boat, ran into a fuel dock and damaged the vessel. (*Id.* at 907). Maritech brought claims against Bay Weld for breach of contract, negligence, breach of implied

warranty of workmanlike performance, and violation of Alaska’s Unfair Trade Practices Act (UTPA), alleging the Lightning’s collision with the fuel dock was a result of Bay Weld’s negligence in providing the Lightning’s new control system. (*Id.* at 908). Maritech filed motions for summary judgment on all claims, but the district court concluded that Bay Weld met its burden in demonstrating numerous genuine disputes of material fact for each claim. (*Id.* at 908–09). Specifically, on the breach of contract claim the court found that provisions of the contract in dispute were ambiguous, and the parties’ extrinsic evidence meant that a reasonable factfinder could find for either party. (*Id.* at 911). Denying Maritech’s motion for summary judgment, the district court held that genuine issues of material fact as to the scope of a maritime contract between Maritech and Bay Weld precluded summary judgment. (*Id.* at 909).

Martz v. Horazdovsky

In *Martz v. Horazdovsky*, 33 F.4th 1157 (9th Cir. 2022), the court held that a federal maritime statute of limitations constitutes a question on the merits and that a written notice of claim sufficient to start the running of the limitations period contains three elements: the notice must (1) be in writing, (2) clearly state that the victim intends to bring a claim or claims against the owner, and (3) include at least one claim that is reasonably likely to be covered by the Limitation Act. (*Id.* at 1161). Here, the court consolidated two cases stemming from fatal boating accidents in Alaska and Hawaii. (*Id.* at 1160). Both actions were dismissed as untimely on motions for summary judgment (*Id.* at 1162). On appeal, the Ninth Circuit addressed two questions: (1) whether 46 U.S.C. § 30511(a)’s statute of limitations connotes a jurisdictional inquiry and (2) whether letters sent from the decedent’s family’s attorneys seeking information in the days after the accidents were sufficient to commence the running of the statutory period. (*Id.* at 1160–1161). The court began by analyzing the text of the statute of limitations and found that it contained no express jurisdictional language. (*Id.* at 1163). Because the Supreme Court has held that a threshold limitation on a statute’s scope should only be considered jurisdictional when the statute says so explicitly, the court held that this statute of limitations presented a consideration on the merits of a limitation-of-liability action. (*Id.*). Thus, the court should entertain a challenge to timeliness at the summary judgement stage. (*Id.*). Looking again to the text of the statute, the court noted that the statute requires a vessel owner to file a limitation-of-liability action within 6 months of written notice of a claim. (*Id.* at 1164). The court held that in order to satisfy the statutorily required written notice, a claimant must notify a vessel owner with a notice (1) in writing, (2) that clearly states that the victim intends to bring a claim or claims against the owner, and (3) includes at least one claim that is reasonably likely to be covered by the Limitation Act. (*Id.*). The court then analyzed whether the letters from the respondents were sufficient to begin the running of the statutory period, and found they were not. (*Id.* at 1167). Therefore, the court reversed and remanded after finding that the relevant federal maritime statute of limitations constitutes a merits question and that written notice of a claim sufficient to start the running of the limitations period contains three elements: the notice must (1) be in writing, (2) clearly state that the victim intends to bring a claim or claims against the owner, and (3) include at least one claim that is reasonably likely to be covered by the Limitation Act. (*Id.* at 1161).

NATIVE LAW

Metlakatla Indian Community v. Dunleavy

In *Metlakatla Indian Community v. Dunleavy*, 48 F.4th 963 (9th Cir. 2022), the Ninth Circuit held that Alaskan fishing regulations limiting fishers from entering a fishery are inapplicable to the Metlakatla Indian Community, because these regulations would violate the community’s right to fish traditional off-reservation fishing grounds. (*Id.* at 976). In 1891, Congress established a reservation for the community; community members fished the surrounding waters for subsistence and commercial purposes, even establishing a cannery. (*Id.* at 968). In 2020, Alaska tried to apply its limited entry program, which restricts new participant access to saturated fisheries, to community members. (*Id.* at 970). Although community members sought a legal declaration that the original 1891 Act guaranteed their right to fish nearby waters, the lower court dismissed the case. (*Id.*). The community then appealed. (*Id.*). On appeal, the State of Alaska argued that the 1891 Act’s text is silent on fishing rights, and that no implied rights should be read into a statute. (*Id.* at 973–74). However, the Ninth Circuit rejected this argument, applying the Indian Canon of Construction, which dictates that statutes applying to “Indians” should be liberally construed in their favor. (*Id.* at 970–71). Applying this canon, the court then determined, in light of the community’s historical economic, cultural, and subsistence reliance on fishing, that the 1891 Act implied an off-reservation right to fish nearby waters. (*Id.* at 976). Therefore, the Ninth Circuit reversed the lower court’s decision, holding that Alaskan fishing regulations limiting fishers from entering a fishery are inapplicable to the Metlakatla Indian Community, because these regulations would violate the community’s implied right to fish nearby waters. (*Id.* at 976).

Mona J. v. State, Department of Health & Social Services

In *Mona J. v. State, Department of Health & Social Services*, 511 P.3d 553 (Alaska 2022), the supreme court held that while a lack of parental cooperation with the Office of Children’s Services (OCS) does not justify making only passive efforts to provide remedial services to prevent Native family breakup, OCS proved by clear and convincing evidence that it made active efforts to reunite the family. (*Id.* at 564–65). A mother of two “Indian children” as defined by the Indian Child Welfare Act sought OCS intervention for support in raising her children, as the children had been acting aggressively and the mother had been suffering from substance abuse. (*Id.* at 556–57). OCS eventually assigned the children to temporary caregivers, but the mother refused to cooperate consistently with OCS’ repeated offers to provide substance abuse and mental health evaluations to attempt to get her children back. (*Id.* at 557). The situation deteriorated further as the mother became combative toward OCS caseworkers, began dating and moved in with a registered sex offender from whom she refused to separate, and attempted to skirt OCS’ imposed visitation rules. (*Id.* at 565). Despite this behavior, OCS continued encouraging the mother to restart case planning with OCS and complied with her request to communicate solely through her attorney. (*Id.* at 566). On appeal of the superior court’s decision to grant OCS’ termination petition, the mother argued that the court overemphasized her own behavior in its analysis of whether OCS made active efforts, and that OCS did not make adequately active efforts to reunite her with her children. (*Id.* at 562, 566). The supreme court agreed with the mother that OCS overemphasized her actions in its active efforts analysis, clarifying that while a parent’s willingness to engage may be considered, a finding of active efforts must turn on OCS’ actions and not the parent’s response thereto. (*Id.* at 562). However,

the court held that OCS did prove by clear and convincing evidence that it made active efforts, listing dozens of steps OCS took to reunite the family, including coordinating with the children's temporary caretakers, scheduling multiple mental health and substance abuse assessments, facilitating visitation between the mother and her children, and refusing to halt its efforts even when the mother became abusive toward OCS caseworkers. (*Id.* at 565). Affirming the lower court's decision to terminate the mother's parental rights, the supreme court held that while a lack of parental cooperation with OCS does not justify making only passive efforts to provide remedial services to prevent Native family breakup, in the case at bar OCS proved by clear and convincing evidence that it made active efforts to reunite the family. (*Id.* at 564–65).

Native Village of Chignik Lagoon v. State, Department of Health & Social Services

In *Native Village of Chignik Lagoon v. State, Department of Health & Social Services*, 518 P.3d 708 (Alaska 2022), the supreme court held that a child's tribe for the purposes of the Indian Child Welfare Act (ICWA) is either a tribe of which the child is a member, or a tribe in which the child is eligible for membership because a biological parent is a member. (*Id.* at 716). The parental rights of a child's biological parents were terminated under ICWA. (*Id.* at 710). The Native Village of Wales, of which the child's biological mother and biological maternal grandmother were tribal members, moved to transfer further proceedings to its tribal court. (*Id.*). After the transfer was granted, the child's foster father enrolled as a member of the Native Village of Chignik Lagoon. (*Id.* at 711). Chignik Lagoon then filed a petition to invalidate the transfer order, arguing that it, rather than Wales, was the child's tribe for ICWA purposes. (*Id.*). The superior court deferred to the tribes' determinations that the child was a member of Wales and eligible for membership in Chignik Lagoon. (*Id.* at 712). It denied Chignik Lagoon's petition and found that Wales was the child's tribe for ICWA purposes. (*Id.* at 711–12). Chignik Lagoon appealed. (*Id.* at 712). The supreme court reasoned that ICWA's definition of "Indian child" requires either that the child be a member of a tribe or that the child be eligible for membership in a tribe of which a biological parent is a member. (*Id.* at 713–16). The court further reasoned that because neither the child nor either of the child's biological parents were tribal members of Chignik Lagoon, the child was not an "Indian child" of Chignik Lagoon for ICWA purposes. (*Id.* at 716). Because the child was a Wales tribal member, the supreme court held that Wales, and not Chignik Lagoon, was the child's tribe for ICWA purposes. (*Id.*) Affirming the lower court's finding, the supreme court held that a child's tribe for the purposes of ICWA is either a tribe of which the child is a member, or a tribe in which the child is eligible for membership because a biological parent is a member. (*Id.*).

Southcentral Foundation v. Alaska Native Tribal Health Consortium

In *Southcentral Foundation v. Alaska Native Tribal Health Consortium*, 2022 WL 2834283 (D. Alaska 2022), the district court held that a tribal healthcare organization was entitled to privileged documents relating to its governance and participation rights in Alaska Native Tribal Health Consortium (ANTHC). (*Id.* at *14). ANTHC is a consortium of regional tribal health organizations that share governance and participation rights. (*Id.* at *2). Thirteen of the tribal health organizations have a seat on the Board of Directors, including Southcentral Foundation (the Foundation). (*Id.*). The Foundation sought a court order to access documents and information, including privileged information, that it deemed necessary for it to exercise its rights in ANTHC. (*Id.* at *1). The Foundation argued that ANTHC had violated the consortium agreement by withholding information, restricting organization representatives to the Board of

Directors from broadly sharing information, and creating an overly restrictive disclosure policy. (*Id.* at *3). The district court reasoned that the Foundation had fully established its right to some relief and that ANTHC’s claims of procedural defects were not compelling. (*Id.* at *8). The court held that the Foundation was entitled to information needed to effectively exercise its governance and participation rights, which could include privileged information and attorney work product. (*Id.* at *14). The court also held that the Foundation’s Board of Directors appointee must be able to share relevant documents with the Foundation. (*Id.*). But the court disagreed that the Foundation needed access to all of ANTHC’s privileged information. (*Id.* at *13). Granting in part and denying in part the motion for summary judgment, the district court held that a tribal healthcare organization was entitled to privileged documents relating to its governance and participation rights in Alaska Native Tribal Health Consortium. (*Id.* at *14).

State, Department of Health & Social Services v. Cissy A.

In *State, Department of Health & Social Services v. Cissy A.*, 513 P.3d 999 (Alaska 2022), the supreme court found that although the Indian Child Welfare Act (ICWA) does not require cultural expert testimony in every case, the lower court did not err by finding specific cultural testimony insufficient in two cases. (*Id.* at 1004). This case consolidated two decisions by the superior court to deny parental termination. (*Id.*). In both cases, the Office of Children’s Services (OCS) petitioned the superior court to terminate parental rights of Alaska Native children. (*Id.*). Both petitions were based on findings of substance abuse, neglect, and a failure of the parents to comply with OCS reunification efforts. (*Id.* at 1004, 1006). At both trials OCS presented expert testimony from an expert in child welfare, who testified to the likelihood of physical or psychological harm to the children if they were to stay with their parents. (*Id.* at 1005–07). OCS also offered brief, generic expert testimony with regards to the cultural practices of the relevant tribes. (*Id.* at 1006–07). The superior court denied the petitions, reasoning that ICWA required cultural expert testimony, and that the expert testimony in both cases was insufficiently applied to the particular families. (*Id.* at 1008). The supreme court upheld the determination, but it made clear that ICWA did not require cultural expert testimony in every termination proceeding. (*Id.* at 1012). Rather, the court explained that because the statute only stated that testifying experts “should” be qualified to testify to tribes’ cultural norms, there would be extreme cases in which cultural practices are irrelevant to the particular facts. (*Id.*). The court still found, however, that the superior court did not err in finding that the cultural testimony in these cases was inadequate to terminate parental rights under ICWA. (*Id.* at 1015). Therefore the supreme court held that, while not every ICWA case requires cultural expert testimony, the superior court still properly found the testimony in these cases insufficient to terminate parental rights under the statute. (*Id.* at 1004).

PROPERTY LAW

Ahtna, Inc. v. State, Department of Natural Resources

In *Ahtna, Inc. v. State, Department of Natural Resources*, 520 P.3d 131 (Alaska 2022), the supreme court held that certain statutory rights of way were limited to uses reasonably necessary for “highway” purposes as the word was defined in 1969. (*Id.* at 138, 141). Under a statute governing construction of highways over public lands, the State claimed a 100-foot-wide right of way centered on a road running over land belonging to an Alaska Native corporation. (*Id.* at 133–34). The State claimed that the right of way included in its scope recreational activities such

as boat launching, camping, and day use. (*Id.* at 133). However, the superior court granted a partial summary judgment order declaring that the statutory right of way conveyed only the right to ingress and egress. (*Id.* at 135). Vacating the superior court’s grant of partial summary judgment regarding the scope of the statutory right of way use and remanding for further proceedings, the supreme court held that these statutory rights of way are limited to uses reasonably necessary for and within the scope of “highway” purposes as the term was used when authorization for such statutory rights of way ended in 1969. (*Id.* at 138, 141–42). The court reasoned that “highway” purposes encompass more than mere ingress and egress, but that right of way use relying on the statute at issue must relate to facilitating highway transportation. (*Id.* at 142). Vacating the superior court’s grant of partial summary judgment regarding the scope of the relevant statutory right of way, the supreme court held that rights of way under the statute were limited to uses reasonably necessary for “highway” purposes as defined in 1969. (*Id.* at 138, 141).

Caswell v. Ahtna, Inc.

In *Caswell v. Ahtna, Inc.*, 511 P.3d 193 (Alaska 2022), the supreme court held that a miner’s conflict with his corporate landowner fell within the scope of forcible entry and detainer (FED) proceedings, despite the miner’s asserted claims to property and a disputed lease. (*Id.* at 198). At the conclusion of the miner’s 20-year lease with the landowner, he sent a check prepaying the following year but without express notice to extend as required by the lease. (*Id.* at 195). The landowner accepted the check, but five months later sued for breach of lease and made a FED claim. (*Id.*). The court granted the landowner’s FED claim at its hearing almost a year later. (*Id.*). The miner argued on appeal, among other claims, that FED was not appropriate because the dispute was too complex, and he needed discovery. (*Id.*). The supreme court explained that Alaska’s FED rule allows parties to raise “substantial rights and significant issues,” despite the expedited timeline. (*Id.* at 197). Under this timeline, normal discovery cannot be conducted. (*Id.* at 199). Therefore, the lower court did not abuse its discretion by denying discovery, and the miner could have requested reconsideration on the discovery issue when the hearing was scheduled for almost a year away. (*Id.*). Affirming the lower court’s decision, the supreme court held that a miner’s conflict with his corporate landowner fell within the scope of forcible entry and detainer (FED) proceedings, despite the miner’s asserted claims to property and a disputed lease. (*Id.* at 198).

Evertson v. Sibley

In *Evertson v. Sibley*, 520 P.3d 157 (Alaska 2022), the supreme court held that because a bank lacked actual and constructive notice of any adverse interest to a contested property, it was a bona fide lender with priority over other claimants to the property. (*Id.* at 161–62). In 2004, a son conveyed property to his mother via a quitclaim deed. (*Id.* at 159–60). A few months later, the mother conveyed it back to the son; however, they did not record the deed until October 2011. (*Id.* at 160). In 2008, the mother conveyed the property to her daughter (the son’s sister) via quitclaim deed. (*Id.*). Subsequently, the daughter used this property as collateral in securing a loan with the bank. (*Id.*). Shortly thereafter, the son created a fictional trust to which he transferred the property, supposedly to protect his mother. (*Id.*). In 2010, the daughter again used the property to secure a second loan with the bank, and in 2018, she defaulted on this loan. (*Id.*). The supreme court held that the bank was a bona fide lender because it lacked notice of the son’s interest in the property. (*Id.* at 161–62). Notably, the daughter’s first loan was secured before the

son transferred the property to the trust. (*Id.* at 162). Also, because the deed from the son to the trust was outside the property’s chain of title, the bank did not find this deed in its title search prior to the second loan. (*Id.*). Affirming the lower court’s grant of summary judgment to the bank, the supreme court held that because the bank lacked actual and constructive notice of any adverse interest to the contested property, it was a bona fide lender with priority over other claimants to the property, including the son. (*Id.* at 161–62).

Griffith v. Hemphill

In *Griffith v. Hemphill*, 521 P.3d 584 (Alaska 2022), the supreme court held that tenants’ breach of contract claim against their landlord was timely filed and thus not barred by the statute of limitations. (*Id.* at 588). Starting in 2008, two tenants leased commercial property from a landlord in order to operate an automotive repair business. (*Id.* at 586). The lease required the landlord to reasonably maintain the condition of the property. (*Id.*). In 2010, when the roof leaked, the landlord refused to repair the roof or pay for the repair. (*Id.*). Separately in 2016, the tenants found that parts of the roof’s drainage system had issues, and again the landlord refused to repair. (*Id.*). In 2018, when the lease concluded, the tenants held over and remained on the property. (*Id.*). Soon after, the landlord commenced eviction proceedings. (*Id.*). The tenants filed a counterclaim alleging breach of contract, among other claims. (*Id.*). The landlord argued that the three–year statute of limitations barred the breach of contract claim, since the breach occurred in 2010 and the tenants’ counterclaim was filed in 2019. (*Id.* at 588). However, the supreme court explained that the landlord’s promise in the lease to maintain the property was an ongoing obligation. (*Id.* at 589). Thus, the 2016 incident constituted a distinct breach and separate cause of action from the 2010 incident. (*Id.*). The supreme court affirmed the superior court’s ruling that the tenants’ 2019 breach of contract counterclaim against their landlord, arising from the 2016 incident, was timely filed. (*Id.*).

Kloosterboer International Forwarding LLC v. United States, Department of Homeland Security

In *Kloosterboer International Forwarding LLC v. United States, Department of Homeland Security*, 604 F.3d 853 (D. Alaska 2022), the district court held that a transporter of frozen seafood products from Alaska to the east coast of the United States did not qualify for the Third Proviso exception to the Jones Act. (*Id.* at 859, 869). The transportation route in question began in Dutch Harbor, Alaska, after which products were moved to New Brunswick, Canada. (*Id.* at 859). There, a trucking company would pick up the products and drive onto a rail car that would carry the products about 100 feet from point A to point B and back. (*Id.*). Finally, the trucks would drive to Maine, where the products would enter the United States. (*Id.*). In 2017, after investigation, United States Customs and Border Protection found that this transportation route violated the Jones Act as it did not qualify for the Third Proviso exception. (*Id.* at 860). The Jones Act requires transporters to use coastwise–qualified vessels (those that are U.S. built and owned). (*Id.* at 861). In the transportation process at issue here, the company used a non–coastwise–qualified vessel. (*Id.* at 859). However, the Third Proviso grants an exception to the coastwise–qualified vessel requirement so long as transporters meet the following: (1) the transportation includes “through routes in part over Canadian rail lines,” (2) routes must have been recognized by the Surface Transportation Board, and (3) rate tariffs were filed with the Surface Transportation Board. (*Id.* at 862). As an initial matter, the district court determined that, since the Jones Act is regulatory in nature rather than penal, it should be construed broadly and

thus its exceptions, including the Third Proviso, should be construed narrowly. (*Id.* at 863). Next, the court held that simple out-and-back movement along the rail car did not constitute transportation via a Canadian rail line as required by the Third Proviso, because it did not make actual progress on the through route. (*Id.* at 867). Further, the transportation company's filing of a tariff for another transportation route did not satisfy the tariff requirement for the transportation route in question. (*Id.* at 869). Accordingly, the district court held that the transporter of frozen seafood products from Alaska to the east coast of the United States did not qualify for the Third Proviso exception to the Jones Act. (*Id.* at 859, 869).

Reeves v. Goodspeed Properties, LLC

In *Reeves v. Goodspeed Properties, LLC*, 517 P.3d 31 (Alaska 2022), the supreme court held that improvements in an easement were not necessarily unreasonable simply because they were permanent. (*Id.* at 40). An LLC owned a parcel of land, adjacent to a parcel owned by an individual who had rights to an easement allowing him to cross the LLC's parcel. (*Id.* at 34). The LLC built a railway that encroached on the easement. (*Id.*). Then, the easement holder was granted approval to subdivide his land and dedicate part of his easement to serve as a public right-of-way. (*Id.* at 35). After that road was constructed, the LLC constructed berms on the easement that blocked access. (*Id.*). The superior court issued an order requiring reasonable accommodation from both parties, including that the LLC remove the berms and railway from the easement. (*Id.* at 36). After road construction was completed, however, the LLC would be permitted to reinstall the berms and railway in a manner that reduced interference with use of the road. (*Id.*). On appeal, the easement holder argued that the accommodations granted to the LLC were unreasonable because they were permanent. (*Id.* at 39). The supreme court affirmed the lower court's decision, reasoning that permanent improvements are not necessarily incompatible with an easement holder's enjoyment of the easement. (*Id.* at 40). Further, the supreme court reasoned that although the permanent nature of an improvement was relevant to the issue of notice, it was not determinative in the inquiry of balancing party interests to strike a reasonable accommodation. (*Id.*). Affirming the decision of the superior court, the supreme court held that improvements in an easement were not necessarily unreasonable simply because they were permanent. (*Id.*).

Wayson v. Stevenson

In *Wayson v. Stevenson*, 514 P.3d 1263 (Alaska 2022), the supreme court held that if a deed of easement allows for a right to use a roadway for any means that the landowner may deem "necessary or appropriate" without further restriction, the landowner may use the roadway easement for commercial use and make reasonable improvements to that roadway. (*Id.* at 1272, 1275–76). This case involves two neighbors: Wayson, whose property was subject to an easement road bisecting his land for ingress and egress, and Stevenson, who leased property and was entitled to use the roadway easement across Wayson's property. (*Id.* at 1269). Stevenson used the easement road for commercial activity, including for glacier access and other aspects of his tourism business. (*Id.*) Wayson argued that the easement did not allow for Stevenson to use the easement for commercial activities. (*Id.* at 1272). Further, Wayson claimed that Stevenson's road maintenance activities were widening the easement road impermissibly and damaging his property. (*Id.* at 1274). The supreme court affirmed the lower court, finding that Stevenson's commercial activity and road maintenance were permitted within the scope of the easement. (*Id.* at 1273–75). The deed granted to the original owner of Stevenson's property the right to use the

roadway easement “without restriction” to ingress and egress as may be deemed “necessary and appropriate.” (*Id.* at 1272). The court held that the broad language in the deed meant it could not be reasonably read to allow only non-commercial use. (*Id.*). As for the road maintenance that marginally increased the width of the easement road, the court considered whether the deed specified the width of the easement road and whether Stevenson’s maintenance activities were reasonable and necessary to his enjoyment of the easement. (*Id.* at 1274). The court held that because the deed was silent regarding the width of the roadway, the court could supply “reasonable terms” and that the expansion of the roadway was acceptable and necessary for Stevenson’s enjoyment of the easement. (*Id.* at 1275). Similarly, the court held that Stevenson’s maintenance activities were reasonable for his enjoyment of the easement and were not harmful to Wayson. (*Id.*). Affirming the lower court’s decision, the supreme court held that if a deed of easement allows for the landowner to use that easement for any “necessary or appropriate means,” the landowner may use the land for commercial activities and make reasonable improvements to the land. (*Id.* at 1272, 1275–76).

TAX LAW

State, Department of Revenue v. Nabors International Finance, Inc.

In *State, Department of Revenue v. Nabors International Finance, Inc.*, 514 P.3d 893 (Alaska 2022), the supreme court upheld an Alaska tax statute requiring corporate taxpayers to report affiliated corporations incorporated or doing business in low-tax countries. (*Id.* at 898). The Department of Revenue (Department) audited Nabors International Finance, Inc. (NIF), an oil field service provider with foreign-affiliated corporations in low-tax countries. (*Id.* at 897). The Department sought information about these affiliated corporations which NIF originally neglected to include in its tax return pursuant to an Alaska corporate tax statute. (*Id.*). There are two statutory conditions under which corporations must name any affiliated corporations in low-tax countries in their tax returns, but it is unclear whether the conditions are conjunctive or disjunctive: (1) where the affiliated corporation engages in substantial self-dealing with affiliates, and (2) where the corporation conducts insignificant economic activity. (*Id.* at 898). On appeal of the Department’s application of the statute to NIF, NIF argued for the statute’s unconstitutionality on three grounds: (1) it violated the Due Process Clause because the lack of a conjunction between two subparts made the statute void for vagueness, (2) it violated the dormant Commerce Clause by impermissibly discriminating against foreign commerce, and (3) it violated the Due Process Clause for irrationality and arbitrariness. (*Id.* at 897–98.). The supreme court reversed the lower court’s decision that the statute was unconstitutionally vague, reasoning that the subparts may be construed through the adjudication process, that a conjunctive reading is most tenable, and thus taxpayers are given appropriate notice of what affiliates to include in their tax returns. (*Id.* at 901). The supreme court affirmed the lower court’s decision that the statute is not an impermissible discrimination against foreign commerce, explaining that merely requiring foreign corporations to file an Alaskan tax return is not a sizeable enough burden to trigger strict scrutiny. (*Id.* at 907). Finally, the supreme court found that Alaska has a legitimate interest in preventing the exportation of Alaska value and requiring only corporations incorporated in countries with lower than a ninety percent tax rate to be included on a corporate tax return as affiliates is reasonably related thereto. (*Id.* at 911). Reversing the lower court’s holding, the supreme court upheld an Alaska tax statute requiring corporate taxpayers to report affiliated corporations incorporated or doing business in low-tax countries. (*Id.* at 898).

TORT LAW

Estate of Vinberg v. United States

In *Estate of Vinberg v. United States*, 2022 WL 11753090 (D. Alaska 2022), the district court held that a widow's claim regarding her husband's death was not barred by the intentional tort exception of the Federal Tort Claims Act (FTCA). (*Id.* at 6). Through his widow, a diseased civilian's estate sued the United States, the U.S. Navy, and the Naval officer who shot the civilian. (*Id.* at 1). The Naval officer was a watchman on duty when the civilian entered a fenced-off area, knocked on a door, began to leave, returned when the door was opened, and then was shot and killed by the Naval officer. (*Id.*). The civilian's widow sued under the FTCA, asserting a wrongful death claim and a negligence claim. (*Id.* at 2). The FTCA gives federal district courts exclusive jurisdiction over certain claims against the United States, seeking to remove the sovereign immunity of the United States in tort cases. (*Id.* at 3). The United States argued that the widow's claim was barred by the intentional tort exception to the FTCA because her claims were actually assault and battery claims. (*Id.* at 4). The court rejected this argument, reasoning that the widow's amended complaint never alleged that the Naval officer acted intentionally or assaulted her husband. (*Id.* at 6). The court further stated that if the United States had presented more evidence of what happened leading up to the shooting, the court might have been able to conclude that the widow's claim was for assault and battery. (*Id.*). But, with the limited evidence before the court, it could not conclude that the widow's amended complaint was for assault and battery. (*Id.*). Rejecting the United States' argument, the district court held that a widow's claim regarding her husband's death was not barred by the intentional tort exception to the FTCA and that the United States did not establish the applicability of the intentional tort exception. (*Id.*).

Garcia v. Vitus Energy, L.L.C. (Garcia III)

In *Garcia v. Vitus Energy, L.L.C.*, 605 F. Supp. 3d 1188 (D. Alaska 2022), the court held that a reasonable jury could find that a principal granted an agent apparent authority by designating him as captain of the principal's ship. (*Id.* at 1217). After suffering injuries while being transported on the skiff of a tugboat owned and operated by Vitus, a passenger sued for negligence and negligence per se, claiming that Vitus should be held vicariously liable for the actions of its employee, the tugboat's captain. (*Id.* at 1197). The tugboat captain was driving the skiff at the time of the accident. (*Id.* at 1195). He violated company policy by using the skiff for personal reasons while transporting the passenger, who was not employed by Vitus. (*Id.* at 1196). Vitus moved for summary judgment on all claims except negligence. (*Id.* at 1196, 1197). The court granted the motion on all claims except for the claim of vicarious liability for negligence based on apparent authority. (*Id.* at 1218). The court explained that an agent (the employee) is granted apparent authority when the agent's manifestations would make a third party reasonably believe he has authority to act on behalf of the principal (the employer). (*Id.* at 1215). Reasoning that a reasonable belief of authority could derive from the employee's position and the authority reasonably associated with it, the court found that the passenger could have reasonably concluded that the captain had authority to transport her on the skiff due to the nature of his title as captain of the tugboat. (*Id.* at 1216). Accordingly, after granting partial summary judgment in favor of Vitus, the district court held that a principal may grant its agent apparent authority by designating him captain of its ship. (*Id.* at 1217).

James v. General Dynamics

In *James v. General Dynamics*, 582 F.Supp.3d 673 (D. Alaska 2022), the district court held that, under Alaska tort law, a manufacturer and on-demand maintenance-service provider did not owe a duty of care to inspect an U.S. Army-owned Stryker armored vehicle that struck and killed a longshoreman in an unloading accident. (*Id.* at 679). In an incident at the Port of Anchorage, a longshoreman died when an Army-owned Stryker ran him over—allegedly due to brake failure—as he was guiding the Stryker off of a vessel. (*Id.* at 676). A representative of the longshoreman’s estate sued General Dynamics, the manufacturer and on-demand maintenance-service provider for the Army-owned Stryker. (*Id.* at 679). The court reasoned that because there was no common law pre-existing relationship, statutory, regulatory, or contractual basis for General Dynamics having a duty, the company did not have any obligation to inspect or supervise inspection of the Stryker. (*Id.* at 678). The fact that General Dynamics manufactured the Stryker and had historically shared maintenance obligations with the Army did not support a continuing duty to maintain the Stryker once it was fully the responsibility of the Army. (*Id.*). The fact that the Army contracted with General Dynamics to provide on-demand maintenance for the Stryker fleet did not support a finding of general duty. (*Id.*). The court also rejected the estate’s *res ipsa loquitur* and product liability arguments for failure to provide sufficient supporting evidence. (*Id.* at 681). Therefore the district court granted General Dynamics’ motion for summary judgment and concluded that General Dynamics did not owe a duty of care to inspect an U.S. Army-owned Stryker armored vehicle that struck and killed a longshoreman in an unloading accident. (*Id.* at 682).

Sulzbach v. City & Borough of Sitka

In *Sulzbach v. City & Borough of Sitka*, 517 P.3d 7 (Alaska 2022), the supreme court held that the City and a nonprofit volunteer were not liable for an accident that injured an event dancer. (*Id.* at 10). An independent nonprofit organization planned to host an event at a City-owned facility. (*Id.*). A volunteer for the nonprofit organization hung decorations for the event while dancers rehearsed. (*Id.* at 10–11). While the volunteer was on break, a lantern decoration fell and struck a dancer, who was diagnosed with a concussion. (*Id.* at 11). The dancer sued the City for negligence, and the City filed a third-party complaint against the volunteer arguing that his negligence was the cause of injury. (*Id.*). The trial court granted summary judgment in part in favor of the City, holding as a matter of law that (1) federal law protected the volunteer from ordinary negligence as a volunteer and (2) the City was not vicariously liable for the volunteer’s negligence because there was no legal relationship between the City and the volunteer. (*Id.*). The remaining issues went to a jury trial, and the jury concluded that neither the volunteer nor the City were negligent. (*Id.* at 12). On appeal, the supreme court affirmed all of the trial court’s holdings. (*Id.* at 10). Specifically, the supreme court held that City could not be vicariously liable for the volunteer’s alleged negligence because the two parties did not have a formal relationship: he was a volunteer for an independent nonprofit organization, not the City. (*Id.* at 16). Also, the jury’s decision was not contrary to “the clear weight of the evidence.” (*Id.* at 17–18). Indeed, evidence supported the jury’s verdict that neither the volunteer nor the City were negligent. (*Id.* at 18, 19). The supreme court affirmed the trial court’s holdings that both the volunteer and City were not liable for negligence for the dancer’s injury. (*Id.* at 10).

TRUSTS & ESTATES

Snead v. Wright

In *Snead v. Wright*, 2022 WL 4095907 (D. Alaska 2022), the district court held that an expert witness's testimony becomes excludable when it draws legal conclusions that should only be drawn by the jury, or when the expert is shown to be unqualified to testify on a matter. (*Id.* at *2). A decedent's children claimed that Merrill Lynch engaged in negligence, fraudulent nondisclosure, and breach of fiduciary duties in managing their deceased father's trust account. (*Id.*). To support these claims, the decedents wished to present the testimony of an expert in the financial industry. (*Id.*). Merrill Lynch wished to exclude the expert from testifying at trial. (*Id.*). Merrill Lynch alleged that the expert's testimony should be entirely excluded because his expert report contained opinions that were conclusory and without supporting explanation; for example, his testimony included an opinion about how Merrill Lynch breached its fiduciary duty. (*Id.* at *2). The court held that the expert could not speculate on Merrill Lynch's motive or intent in his testimony, nor could he offer the opinion that Merrill Lynch breached its fiduciary duties. (*Id.* at *3–4). However, the expert could testify as to how Merrill Lynch's conduct fell short of industry standards, so long as his testimony identified and explained the relevant industry standard. (*Id.*). Further, the court noted that excluding expert testimony should be the exception and not the rule. (*Id.* at *2). Therefore, the court denied Merrill Lynch's motion to exclude the testimony, but reserved the right to exclude any part of the testimony at trial, holding that an expert witness's testimony becomes excludable when it draws legal conclusions that should only be drawn by the jury, or when the expert is shown to be unqualified to testify on a matter. (*Id.* at *3–4).