

THE YEAR IN REVIEW 2019

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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

Alaska Public Defender Agency v. Superior Court

In *Alaska Public Defender Agency v. Superior Court*, 450 P.3d 246 (Alaska 2019), the supreme court held that neither the Public Defender Agency (Agency) nor the Division of Juvenile Justice (DJJ) were statutorily required to pay the costs of an indigent juvenile who is unable to afford the travel expenses to his adjudication trial. J.B., a juvenile facing delinquency charges for a third-degree assault, was unable to pay for travel expenses from his location in Marshall to his adjudication trial in Bethel. His Agency attorney subsequently moved for an order requiring DJJ or the court to pay the travel-related expenses. The superior court denied the motion. On appeal, the court of appeals interpreted the Agency's authorizing statute as requiring the cost of transporting the defendant to the site of their trial among necessary services for which the Agency must pay, and subsequently affirmed the denial of the motion. The supreme court reversed. The court concluded that neither the language, legislative history, nor legislative purpose of the Agency's authorizing statute require it to pay expenses of an indigent juvenile to travel to the site of an adjudication hearing. Further, the court held that the Attorney General opinions and OPA regulations on the matter were not particularly relevant. Finally, the court held that the DJJ was likewise not required by statute to pay the indigent juvenile's travel expenses. Reversing the court of appeals' denial of the motion, the court held that neither the Agency nor the DJJ were required to pay the juvenile's travel expenses, and left the task of determining payment responsibility to the legislative or executive branches.

Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC

In *Alaska Spine Center, LLC v. Mat-Su Valley Medical Center, LLC*, 440 P.3d 176 (Alaska 2019), the supreme court held that the common usage of the term "same community" applies for the purposes of the statutory exemption allowing ambulatory surgical facilities to relocate within the same community without obtaining a certificate of need from the Alaska Department of Health and Social Services. The Department of Health and Social Services granted Alaska Spine Center a statutory exemption from filing the certificate of need (CON) typically required to begin construction of a new ambulatory surgical facility. It found that the relocation from Anchorage to Wasilla would be a relocation within the "same community" as required in the exemption. Mat-Su Medical filed suit in superior court, and the superior court granted Mat-Su Medical's motion for summary judgment, holding that Anchorage and Wasilla are not the same community. Alaska Spine Center appealed, arguing that community should be defined as the service area of the facility based on the CON program. The supreme court affirmed the lower court's decision, holding that Anchorage and Wasilla are not in the "same community" under the common usage of the term. The court reasoned that the phrase did not require any statutory definition or construction, and that the legislative history and purpose did not suggest any meaning other than the plain language. The court noted distinctions between Anchorage and the Matanuska-Susitna Borough in finding that they are different communities, including geographic distance and separate government entities. Additionally, the court reasoned that prior eligible exemptions were for relocations in the same municipality. Affirming the lower court's decision, the supreme court held the common usage of "same community" applies in the context of the CON exemption for relocation within the same community.

D&D Services v. Cavitt

In *D&D Services v. Cavitt*, 444 P.3d 165 (Alaska 2019), the supreme court held that a decision remanded to the Alaska Workers' Compensation Board (Board) by the Alaska Workers' Compensation Appeals Commission (Commission) is not final for purposes of appeal to the supreme court, but nevertheless affirmed the Commission's attorneys' fees award. In 2017, Cavitt sought workers compensation from his previous employer D&D Services after needing new medical treatment for a 2015 workplace injury. The Alaska Workers' Compensation Board largely denied Cavitt's claim, but awarded him \$500 in attorneys' fees for success on two issues. Cavitt appealed to the Alaska Workers' Compensation Appeals Commission, which remanded the decision to the Board for a determination of the time involved by Cavitt's counsel on the successful issues and awarded Cavitt \$6,000 in attorneys' fees for the appeal. D&D Services appealed the Commission's decision to the supreme court, arguing that the Commission erred in awarding Cavitt attorneys' fees. The Court first found that under the Alaska Appellate Rules and Court precedent, Commission decisions remanding issues to the Board are not final for purposes of appeal, and therefore not appealable as a matter of right. The Court nevertheless continued to consider the petition's merits under Alaska Appellate Rule 402(b)(1), since the attorneys' fees award was a discrete issue that had already been briefed by the parties. In considering the Commission's decision, the Court found that the Commission did not err by awarding Cavitt attorneys' fees because a significant issue had been decided in his favor. Further, the Court held that the Commission's \$6,000 attorneys' fees award was not manifestly unreasonable, given the Commission's broad discretion to determine an appropriate fee based on the facts. The supreme court therefore affirmed the Commission's attorneys' fees decision, despite ruling that a decision remanded to the Alaska Workers' Compensation Board by the Alaska Workers' Compensation Appeals Commission is not final for purposes of appeal.

Fantasies on 5th Avenue, LLC v. State

In *Fantasies on 5th Avenue, LLC v. State*, 446 P.3d 360 (Alaska 2019), the supreme court held that the Alcohol and Beverage Control Board (Board) did not abuse its discretion in denying a strip club's liquor license renewal application where there was ample evidence of safety, management, and employment concerns and the club received adequate due process. *Fantasies On 5th Avenue, LLC* (the club), a strip club business, applied to the Board for a liquor license renewal in 2015. After numerous "red flags" prompted further investigation of the club, the Board and Department of Labor discovered several severe and ongoing employment, management, and safety violations. The Board subsequently found that renewal of the club's license was not in the public interest, subsequently denying renewal. The club appealed the Board's decision to an administrative law judge and then to the superior court, both of which upheld the Board's decision. The club then appealed to the supreme court, arguing that the Board violated its due process rights and acted unreasonably by finding that its license renewal would not be in the public interest, and that the licensing law was unconstitutionally vague. First, the Court found that the Board did not abuse its discretion in denying the club's license renewal application because the substantial evidence of safety, management, and employment issues supported its finding that renewal was not in the public interest. Next, the Court found that the club received due process throughout its hearing based on its opportunity to be heard, adequate notice, and lack of unconstitutional vagueness in the licensing laws. Accordingly, the Court wholeheartedly affirmed the superior's court ruling upholding the Board's denial of the club's license renewal application, and held that the Board did not abuse its discretion in denying a strip

club's liquor license renewal application where there was ample evidence of safety, management, and employment concerns and the club received adequate due process.

Jones v. State, Department of Revenue

In *Jones v. State, Department of Revenue*, 441 P.3d 966 (Alaska 2019), the supreme court held that the requirement for Public Fund Dividends (PFD) eligibility that a person be physically present in Alaska for a cumulative 30 days in the preceding five years (the "30 days/5 years requirement") is unambiguous and constitutional when applied to exclude PFD eligibility for a couple absent for military service. Jones and his wife left Alaska during Jones' military service and, while maintaining significant ties to the state (e.g. Alaskan drivers' licenses, vehicle registrations, and property), were not physically present for more than 30 days in over five years. Under the statute imposing the 30 days/5 years requirement, the Department of Revenue denied PFD eligibility for some of the years of Jones' absence. Jones argued on appeal that the legislative intent included assisting Alaska's career military personnel and that his ties to the state should be considered. He also argued that the statute violates the Fourteenth Amendment's due process clause by creating an irrebuttable presumption of nonresidence and that it infringes upon the right to travel under the privileges and immunities clause. The supreme court held that the statute unambiguously imposes a physical presence requirement that cannot be overcome by other connections to the state. They held that the 30 days/5 years requirement's presumption of nonresidence is not invalidly irrebuttable because it does not prohibit Alaskans from becoming eligible for future years. The court also held that the state has a legitimate interest in imposing a physical-presence requirement for PFD eligibility and that the 30 days/5 year requirement is not onerous enough to infringe upon the right to travel. The supreme court affirmed the Department's denial of Jones' PFD and held that the 30 days/5 years requirement is constitutional under the Fourteenth Amendment.

Penetac v. Municipality of Anchorage

In *Penetac v. Municipality of Anchorage*, 436 P.3d 1089 (Alaska Ct. App. 2019), the court of appeals held that the trial court did not err in sentencing Eric Scott Penetac under the Anchorage Municipal Code rather than under state law where municipal code authority was not prohibited. Penetac was found guilty of two counts of child neglect under the Anchorage Municipal Code (AMC), and subsequently sentenced to 365 days in jail with 290 days suspended. On appeal, Penetac argued that his AMC sentence was illegal because it exceeded the 30-day presumptive maximum sentence that he likely would have faced if convicted and sentenced under state law. Penetac further contended that the court's failure to apply the state sentencing scheme violated the Equal Protection Clause of the Alaska Constitution. The court of appeals disagreed. First, the court of appeals held that Anchorage's broad legislative powers as a "home rule" city allow it to rightly charge and sentence Penetac under the AMC where such action is not expressly or impliedly prohibited by state law. The court of appeals further concluded that the AMC did not, as Penetac asserted, incorporate state law into its sentencing scheme, because such an interpretation would lead to absurd results. Finally, the Court of Appeals found Penetac's Equal Protection Clause claim to be without merit because he did not show that he was similarly situated to persons convicted of Class A misdemeanors under state law simply because he was convicted of a Class A misdemeanor under the AMC. Accordingly, the court of appeals held that the trial court did not err in sentencing Penetac under the AMC rather than under state law, and affirmed Penetac's sentence.

Smith v. Department. of Corrections

In *Smith v. Department. of Corrections*, 447 P.3d 769 (Alaska 2019), the supreme court held that administrative hearings satisfied any due process requirements prior to ending prisoner employment. The Alaskan Department of Corrections placed two prisoners in administrative segregation after finding potential escape instruments allegedly belonging to the prisoners. The prisoners lost their jobs within the prison as a result of this administrative process. Though the following administrative hearing found that the escape instruments belonged to the prisoners, an appeal to the superior court overturned the decision but found that claims about lost wages without due process would require a separate claim. The prisoners brought a separate claim claiming that termination without a separate administrative proceeding violated their due process rights but the lower court granted summary judgment for the Department of Corrections. The supreme court affirmed the lower court's ruling because there was not a constitutional interest in retaining the jobs so the administrative hearing was sufficient process. If the prison job served a rehabilitative function, it would have been protected by a higher standard for process, but the jobs were not rehabilitative. Further, the hearings for administrative segregation implemented a higher standard than those for rehabilitative program removals so due process was satisfied. Thus, the supreme court held that using the administrative segregation process to remove prisoners from their jobs did not violate the prisoners due process rights.

State, Regulatory Commission v. Matanuska Electric Ass'n., Inc.

In *State, Regulatory Commission v. Matanuska Electric Ass'n., Inc.*, 436 P.3d 1015 (Alaska 2019), the supreme court held that the superior court has proper appellate jurisdiction in cases reviewing interconnected agency actions when at least one action is considered a "final order," and when the issue on appeal is whether the agency had the authority to address the subject in question. An agreement between utility providers on a hydroelectric project laid out that disputes which arose from the project would be handled by a private committee rather than by the Regulatory Commission of Alaska (RCA). This exemption was codified into law in 1988. In 2014, a lease to a substation expired, and one party to the agreement, the Homer Electric Association (HEA), attempted to go through the RCA, rather than through the contractually formed committee, to seek approval for a change in transmission rates. Over the objections of the other utilities, the RCA produced an order that contained both final rulings and interim rulings on several issues. Reviewing a consolidated challenge by the impacted utility providers to the agency's authority to make such a ruling, the superior court held that the language and intent of both the agreement and the subsequent legislation precluded review by the RCA on any of the issues included in its order. On appeal to the supreme court, the RCA and HEA argued, among other things, that the RCA's order did not constitute a judicially reviewable "final order" because it contained interim rulings that were still subject to further agency proceedings. The supreme court found that although certain rulings contained within the order may have been interim rulings, there were several rulings that were final. The court then reasoned that because the question of authority was one that was foundational to all the rulings at issue in the consolidated case, rather than on the merits of any individual ruling, the question was "ripe" for review by the superior court. Affirming the superior court's conclusion, the supreme court held that the superior court has proper appellate jurisdiction in cases reviewing interconnected agency actions when at least one action is considered a "final order," and when the issue on appeal is whether the agency had the authority to address the subject in question.

Tobar v. Remington Holdings LP

In *Tobar v. Remington Holdings LP*, 447 P.3d 747 (Alaska 2019), the supreme court held there was not substantial evidence to support Alaska Worker's Compensation Appeals Commission's affirmation of a revocation of disability payments. Tobar worked as a housekeeper for Remington Holdings at a hotel. While working in July 2013, she injured her back lifting bed linens and was referred to the Alaska Spine Institute for care. After undergoing treatment and care at the Institute that summer and fall, Tobar did not return for the final three months of 2013. After returning in January, 2014, Tobar resumed physical therapy. Her treatment was stopped when Remington performed an employer's medical evaluation through Dr. Youngblood. Using only Tobar's medical records through October, 2013, Dr. Youngblood concluded the accident caused a strain, but was not the cause of her current need for medical treatment. The Alaska Workers' Compensation Board relied on Dr. Youngblood's report to revoke her disability payments. The Alaska Worker's Compensation Appeals Commission affirmed the Board's conclusion that Tobar was unable to prove the work injury was the substantial cause of her need for treatment. On appeal, the court emphasized the lack of weight the Commission granted to the medical evidence it mentioned, as well as the medical records from Tobar's physical therapy it ignored. The Commission pointed towards Tobar not attending physical therapy as evidence her pains were not related to the accident, but the court noted Tobar stopped attending because her benefits were revoked and she could not afford the treatment. The supreme court held that the Commission erred in finding the Board's decision was supported by substantial evidence.

BUSINESS LAW

Farthest North Girl Scout Council v. Girl Scouts of the United States

In *Farthest North Girl Scout Council v. Girl Scouts of the United States*, 454 P.3d 974 (Alaska 2019), the supreme court held that the corporate governance documents vested exclusive right to establish membership dues in the National Council of the Girl Scouts of the United States of America. The Girl Scouts of North America (GSUSA) is a congressionally chartered nonprofit corporation. The Farthest North Girl Scout Council (Farthest North) promotes and organizes Girl Scouts programs in northern Alaska as a chartered Girl Scout Council. The governing body of GSUSA is the National Council, which meets triennially and elects the Board of Directors. In 2012 and 2016, the Board increased membership dues without approaching the National Council for approval. Farthest North refused to pay the increased membership fees to GSUSA. The Board contended that the increase in membership dues was pursuant to Congressional Charter, which did not restrict the Board's authority with regards to membership dues. The supreme court held that the Congressional Charter granted the Board the powers of the National Council only so far as they were enumerated in the GSUSA Constitution and Bylaws, which did not include setting membership dues. The court found that a plain reading of the GSUSA Constitution granted the power to establish membership dues with the National Council and that an alternate reading would render provisions of the Constitution superfluous. The supreme court reversed, holding that the corporate governance documents vested exclusive right to establish membership dues in the National Council of the Girl Scouts of the United States of America.

Parlier v. CAN-ADA Crushing – Gravel Co.

In *Parlier v. CAN-ADA Crushing & Gravel Co.*, 441 P.3d 422 (Alaska 2019), the supreme court held that limited liability companies must hire counsel for court litigation. In superior court, Parlier attempted to represent his co-defendants Parlier Investments, LLC, McHenry Detective Agency, LLC, and Shares #1 and #17 of Sockeye Salmon, Inc., on the grounds that he was the sole owner and member of the two LLC's and that McHenry owns the stock certificates. Although Parlier is not an attorney, he argued that AS 22.20.040(a)(2), which requires corporations to appear by an attorney in court cases, did not apply to limited liability companies because limited liability companies are not corporations. The superior court entered a default judgment against Parlier and dismissed the counterclaims of his co-defendants. On petition for review, the supreme court noted that it has interpreted AS 0.08.210(a) to bar non-attorneys from representing another person in court, and agreed with recent cases from other jurisdictions requiring limited liability companies to hire counsel for representation. The supreme court granted the petition for review and affirmed the superior court's order entering default and dismissing the counterclaims of the co-defendants, holding that limited liability companies must hire counsel for court litigation.

SMJ General Construction, Inc. v. Jet Commercial Construction, LLC

In *SMJ General Construction, Inc. v. Jet Commercial Construction, LLC*, 440 P.3d 210 (Alaska 2019), the supreme court held that parties which agree to release each other from preexisting contractual obligations in a settlement are not subsequently obligated to abide by those same contractual obligations. SMJ was contracted by Jet to support a construction project. Disputes arose between SMJ and Jet, leading to a mediation as mandated by the contract's dispute resolution clause. The mediation resulted in a settlement that, inter alia, absolutely released the parties from any and all claims, demands, and obligations arising from the initial contract. In a suit that SMJ subsequently brought against Jet, the latter argued that the former's claims were not properly before the court because of the initial contract's dispute resolution clause. The supreme court reversed the lower court's decision, holding that the direct and unambiguous language of the settlement released the parties from obligations incurred under the initial contract. The court reasoned that, in the absence of obligations under the initial contract, the parties had no duty to arbitrate their claims. The supreme court reversed, holding that parties which agree to release each other from preexisting contractual obligations in a settlement are not subsequently obligated to abide by those same contractual obligations.

Williams v. Baker

In *Williams v. Baker*, 446 P.3d 336 (Alaska 2019), the supreme court held that an individual did not have an indirect fiduciary duty and thus the superior court erred when it shifted the burden to her to prove that she had not committed fraud under Alaska's Unfair Trade Practice and Consumer Protection Act (UTPA). Johnny Williams provided financial services, such as payroll services and tax preparation, to plaintiff Violeta Baker for over five years. Johnny had full access to Baker's checking account and had the power to write checks in her name. During this time, defendant Deverette Williams, Johnny's wife who was not employed by Johnny, would occasionally record messages from Baker and deliver them to Johnny. Following an audit which revealed major discrepancies in her records, Baker filed a suit against both Johnny and Deverette, claiming that they both owed her a fiduciary duty and had committed fraud under the UTPA. After shifting the burden of proof to the Williams based on a finding that Johnny had a

direct fiduciary duty and Deverette had an indirect fiduciary duty, the superior court found in favor of Baker and awarded her trebled damages under the UTPA. On appeal from Deverette after the death of Johnny, the supreme court found that Deverette did not owe an indirect fiduciary duty to Baker. Because she was not an “agent” of Johnny’s and in the absence of any special circumstances that would typically indicate a fiduciary relationship, the superior court erred in shifting the burden of proof to Deverette. Reversing the superior court’s conclusion of fraud under the UTPA and holding that Deverette is not subject to the UTPA, the supreme court remanded the case back to the superior court with the burden of proof back on Baker.

CIVIL PROCEDURE

Allstate Insurance Co. v. Kenick

In *Allstate Insurance Co. v. Kenick*, 435 P.3d 938 (Alaska 2019), the Supreme Court held that where a federal declaratory judgment determined the absence of a necessary element of a different state court claim, those bringing the state claim were precluded from relitigating the issue. After an automobile accident in which Angelina Trailov was injured as a passenger, she and her mother filed claims against the driver with the driver’s insurer, Allstate. For several months Allstate communicated with Trailov and her mother’s lawyer, attempted to gather information, and to settle the claim. Trailov and her mother won a state court suit against the driver which included assignment of the insured driver’s rights against Allstate. Allstate filed in federal court for a declaratory judgment that its attempt to settle the claim satisfied its obligation to the insured driver and that it was not liable for any amount of a judgment against the driver beyond the policy limits. The driver answered the declaratory judgment action, to which Trailov and her mother were not parties. Trailov and her mother, as assignees of the driver’s rights, sued Allstate in state court for negligent adjustment of their claims. Allstate moved to dismiss the state court case on the grounds that the issue had been decided in the federal proceedings, but the lower court found for Trailov and her mother and granted their motion for summary judgment on their negligent adjustment claim. However, on appeal, the Supreme Court found that issue preclusion did apply, reasoning that Trailov and her mother were in privity with the driver who was a party to the declaratory judgment, and that, because the jury instruction in the federal action indicated a determination of reasonableness, that decision foreclosed finding negligent adjustment. It reasoned that because a negligent adjustment claim requires that the adjuster violated her duty of reasonable or ordinary care it is inconsistent with the federal jury’s determination that Allstate, which had ratified its adjuster’s conduct, had acted reasonably. The Court found that despite the differences in the legal theories and elements of the federal and state claims, the evidence and arguments overlapped significantly. An issue of fact, the reasonableness of the insurance company’s behavior, was already litigated to conclusion on its merits in the federal declaratory action, rejecting Trailov and her mother’s contention that the issue had not been decided because the declaratory judgment was a contract claim and the state action was a tort claim. Vacating the jury’s judgment, reversing the lower court order, and remanding to the lower court, the Supreme Court held that where a federal declaratory judgment determined an issue of fact that was an essential element of a different claim in state court, the litigants were precluded from relitigating that issue.

Anderson v. State, Department of Administration

In *Anderson v. State, Department of Administration*, 440 P.3d 217 (Alaska 2019), the supreme court upheld the superior court's finding that a suit was barred by the doctrine of laches as it was brought after an unreasonable delay that would cause the Department of Motor Vehicles (DMV) undue prejudice. In 1992, Anderson replaced his California driver's license, which contained a motorcycle endorsement, with an Alaska driver's license. Fifteen years later in 2007, Anderson discovered that contrary to his belief, his motorcycle endorsement had not transferred from his California license to his Alaska license. Although Anderson claimed that this was an error on the DMV's part, the DMV refused to issue him a new motorcycle endorsement until he completed the necessary procedures. Anderson refused to take the necessary steps, and instead brought this suit in 2017, requesting that the court mandate that the DMV automatically restore his motorcycle endorsement. The superior court dismissed the case on multiple grounds, including that the claim was barred by the doctrine of laches. On appeal, the supreme court stated that the equitable defense of laches requires both an unreasonable delay by the party bringing the claim and an undue burden or prejudice caused by that unreasonable delay. The court found that while it could be possible that the initial fifteen year delay was reasonable, waiting to file the suit ten years after the discovery undoubtedly constituted an unreasonable delay. The court further held that this unreasonable delay would unduly prejudice the DMV, which, as directed by statute, destroys inactive records after fifteen years, and thus would have no evidence regarding the issue. The supreme court upheld the superior court's finding that a suit was barred by the doctrine of laches as it was brought after an unreasonable delay that would cause the DMV undue prejudice.

Baker v. Duffus

In *Baker v. Duffus*, 441 P.3d 432 (Alaska 2019), the supreme court found that the superior court erred in granting partial summary judgment by not considering whether counterclaims brought were compulsory to an amended cross-complaint, rather than the original cross-complaint, and therefore whether they related back to the original cross-complaint. Baker and Duffus were business partners in a limited liability corporation. In response to a suit filed against the LLC and the partners individually, Duffus filed an answer and cross-complaint against Baker in 2007. Baker answered the cross-complaint in 2008. In 2013, Duffus amended his cross-complaint. Baker answered the amended cross-complaint in 2015 and added new counterclaims. On a motion for summary judgment, the superior court dismissed Baker's counterclaims finding that they did not relate back to the original suit filed against the LLC nor the 2007 cross-complaint and were therefore outside of the statute of limitations. The supreme court found that the operative pleading for consideration on the summary judgment motion was not the Duffus' 2007 cross-complaint, but Duffus' 2013 amended cross-complaint. The court found that Baker's 2015 counterclaims were compulsory as they logically related to Duffus' 2013 amended cross-complaint. Further, the court found that because Baker's counterclaims were compulsory, they related back to Duffus' 2013 amended cross-complaint under the self-executing Alaska Civil Rule 15(c). Duffus' 2013 amended cross-complaint related back to his original 2007 cross-complaint because it incorporated the original claim and added additional claims. The court held that because Baker's 2015 counterclaims relate back to Duffus' 2013 amended cross-complaint, and that related back to his original 2007 cross-complaint, Baker's counterclaims also relate back to the original 2007 cross-complaint. The supreme court held that the superior court erred by not considering whether the amended counterclaims brought were compulsory to an amended cross-

complaint, rather than the original cross-complaint, and therefore whether they related back to the original cross-complaint.

Department of Health and Human Services v. Planned Parenthood

In *Department of Health and Human Services v. Planned Parenthood*, 448 P.3d 261 (Alaska 2019), the supreme court held that reasonable travel expenses were recoverable as attorney's fees. As the prevailing party, Planned Parenthood was entitled to have the Department of Health and Human Services pay for the cost to litigate the case. The supreme court held that the state's appellate rules did not limit the costs which could be included if ordered by the court due to particular needs of the case. Thus, the reasonable travel expenses to oral arguments was recoverable from the opposing party as attorney's fees.

DeRemer v. State

In *DeRemer v. State*, 453 P.3d 193 (Alaska 2019), the supreme court held that dismissal of a claim absent acknowledgement of that claim was improper. DeRemer was charged with an infraction while in the custody of the Alaska Department of Correction (DOC), leading to a hearing at which DeRemer challenged the credibility of the disciplinary process and was ultimately punished. Following an unsuccessful challenges to the punishment, DeRemer, representing himself, brought suit against DOC employees Turnbull and Morris, alleging, *inter alia*, that his punishment had violated his First Amendment rights as it was implemented in retaliation against him. Turnbull and Morris filed a motion for dismissal that addressed DeRemer's First Amendment claim by concluding only that he had not stated such a claim. The superior court granted the motion, citing Turnbull and Morris' motion as its sole rationale. On appeal, the supreme court noted that dismissal is disfavored and should not be affected unless there is no doubt that a plaintiff cannot prove a set of facts entitling them to relief, a rule bolstered by the less stringent standard pro se pleadings are held to. Because the court below relied on Turnbull and Morris' rationale, which failed to address DeRemer's First Amendment claim, the court insufficiently acknowledged the claim and thus it was improperly dismissed. The supreme court reversed and remanded, holding that dismissal of a claim absent acknowledgement of that claim was improper.

Diamond v. Platinum Jaxx, Inc.

In *Diamond v. Platinum Jaxx, Inc.*, 446 P.3d 341 (Alaska 2019), the supreme court held that because a plaintiff failed to plead a piercing the veil theory and the individual owners were never joined to the suit or otherwise put on notice, that the plaintiff was correctly precluded from submitting evidence related to piercing the corporate veil. After being assaulted a bar patron sued the his assailant and the bar. The patron wanted to pursue a piercing the veil theory against the bar at trial but was precluded from doing so because, despite sending a letter to the defendant corporation about the piercing the veil theory, the patron had not pled or amended his complaint to include piercing the corporate veil. After winning a 1.85 million dollar judgment against the bar and assailant, allocated on a percentage basis, the patron appealed the pre-trial order that excluded his argument for piecing the corporate veil. On appeal the patron argued that the lower court failed to consider the veil piercing factors in the record. Affirming the lower court, the supreme court reasoned that the correct standard was whether there had been appropriate notice of the veil piercing theory and that the patron had failed to meet that standard. The court further reasoned that while actual notice to the individuals the plaintiff seeks to hold liable under a

piercing the veil theory can overcome failure to plead, the patron failed to provide such notice. Affirming the lower court, the supreme court held that because a plaintiff failed to plead a piercing the veil theory and the individual owners were never joined to the suit or otherwise put on notice, that the plaintiff was correctly precluded from submitting evidence related to piercing the corporate veil.

In re Hospitalization of Connor J.

In *In re Hospitalization of Connor J.*, 440 P.3d 159 (Alaska 2019), the supreme court held that the superior court did not commit “plain error” by relying on a committee’s attorney’s assertion that the committee was waiving his right to appear at a commitment hearing. The committee, Connor, was not present at a hearing before a standing master to determine whether he would be involuntarily committed to an in-patient psychiatric hospital. Connor’s attorney did not raise any objections when the master stated on several occasions that Connor was waiving his right under AS 47.30.735(b)(1) to be present at the hearing. After testimony from the treating physician, who stated that no suitable alternatives to involuntary commitment existed here, the master recommended that Connor be involuntarily committed for thirty days. The superior court, noting that Connor had waived his right to appear, adopted the master’s recommendation and issued an order of involuntary commitment. On appeal to the supreme court, Connor argued that it was a plain error that neither the master nor the superior court made findings regarding Connor’s ability to give his “informed consent” before waiving his right to appear, as required by AS 47.30.735(b)(1). Because no objection was raised as to Connor waiving his right to appear during either the initial commitment hearing or the subsequent hearing before the superior court, the supreme court reviewed the decision under the “plain error” standard. The “plain error” standard requires an obvious mistake that is obviously prejudicial. Given that neither the master nor the superior court had been made aware of contradictory evidence, the supreme court found that it was not an obvious or obviously prejudicial error to assume that the defense attorney had received informed consent from her client to waive his right to appear. Rejecting the committee’s argument, the supreme court held that the superior court was justified in relying on the defense attorney’s assertion that the committee had properly waived his right to appear.

Leahy v. Conant

In *Leahy v. Conant*, 436 P.3d 1039 (Alaska 2019), the supreme court held that public officials have qualified immunity from civil liability when there is no showing that they act unreasonably in following a government directive. An Alaska Department of Corrections (DOC) directive prohibited mail from being sent between prisoners. Leahy, a Muslim inmate, filed suit against two correctional facility superintendents, Conant and Sullivan, alleging the DOC directive placed a substantial burden on his religious rights. Leahy’s motion for summary judgment, which again contended the directive had violated his religious rights, was denied and Leahy appealed. The court affirmed the lower court’s decision, holding that public officials have qualified immunity from civil liability insofar as their conduct does not clearly violate statutory or constitutional rights which a reasonable person would be aware of. The court reasoned that because regulations similar to the restriction on prisoner mail had been found constitutional, it would be inappropriate to find that Conant and Sullivan’s conduct pursuant to the restriction clearly violated constitutional rights which a reasonable person would be aware of. The supreme court affirmed, holding that public officials have qualified immunity from civil liability when there is no showing that they act unreasonably in following a government directive.

Leahy v. Conant

In *Leahy v. Conant*, 447 P.3d 737 (Alaska 2019), the supreme court found the trial court's failure to provide a pro se litigant support in filing summary judgment affidavits was not harmless. Leahy is a Muslim inmate at the Goose Creek correctional facility in Wasilla who observes *halal* dietary restrictions and uses scented oils in his daily prayers. Goose Creek served vegetarian or vegan meals to Leahy due to the costs of *halal* preparation and also prohibited the use of scented oils for health concerns. Leahy, representing himself pro se, sued under the Religious Land Use and Institutionalized Persons Act and the Equal Protection clause of the 14th Amendment. The superior court granted the prison official's motion for summary judgment citing the fact that Leahy had not raised a genuine dispute of material fact. Leahy argued on appeal that he received insufficient advice from the superior court as to how to properly file an affidavit or a motion to compel discovery, and consequently could not find enough evidence to support his opposition to the summary judgment motion. The supreme court found the trial court had erred by not giving Leahy more substantive advice about how to properly file affidavits, and that this error was not harmless because introducing facts about the nutritional inadequacy of Goose Creek's *halal* meals would have created an issue of material fact sufficient for "Alaska's lenient standard" to overcome summary judgment motions.

Matter of Linda M.

In *Matter of Linda M.*, 440 P.3d 168 (Alaska 2019), the supreme court held that civil commitment proceedings to treat mental illness may be held sequentially or concurrently with criminal commitment proceedings to treat incompetency to stand trial. Linda M. was found incompetent to stand trial for criminal charges and committed to Alaska Psychiatric Institute (API) for restoration of competency, but API was not given the authority to involuntarily medicate Linda. After determining medication was necessary and Linda would not accept it, API brought civil commitment proceedings to receive authorization to administer crisis medication. Linda moved to dismiss the proceedings, arguing that the district court overseeing her criminal proceedings which first committed her should oversee these proceedings, not the superior court. The supreme court affirmed the lower court's decision to deny Linda's motion to dismiss. The court reasoned that a state may seek to involuntarily medicate a committed defendant for purposes other than those related to the defendant's competency. Competency for trial does not play a factor in determining whether a person may be civilly committed and forcing the two proceedings to run sequentially, rather than concurrently, may lead to a gap in the necessary authority to treat an individual. Thus, civil commitment proceedings to treat mental illness may be held sequentially or concurrently with criminal commitment proceedings to treat incompetency to stand trial.

Mitchell v. Mitchell

In *Mitchell v. Mitchell*, 445 P.3d 660 (Alaska 2019), the supreme court held that a wife's challenge to a long-term protective order that had been later dissolved as unlawfully granted was dismissed as moot and neither the public interest nor the collateral consequences exceptions to the mootness doctrine applied. During the course of a short term domestic violence protective order against her, a wife sent a text message to her husband regarding the couple's dog, violating the no contact provision of the order. At the long-term protective order hearing the court granted the husband a long-term protective order on the basis that of the text message violation. The wife appealed the grant of the long-term order, which the appellate court affirmed. The next year the

husband asked the court to renew the year-long protective order, which it did on the same grounds as the previous order. The wife appealed the second order and also filed a motion asking the court to dissolve the protective order. The court dissolved the order, finding, under *Whalen v. Whalen* the second order was unlawfully issued. The supreme court reasoned that, because the second order had already been dissolved by the lower court, the wife's appeal was moot and that the public interest exception to the mootness doctrine did not apply because the issue had been settled by the court in *Whalen* and subsequently clarified by the legislature. The court further reasoned that the requested expungement relief to allay the consequences to the wife's reputational interest did not fit with the scope of expungement under Alaska Rule of Administration 40(a)(9) and therefore the wife's situation did not satisfy the collateral consequences exception to the mootness doctrine. Dismissing the appeal, the supreme court found that the wife's appeal of an already dissolved protective order did not qualify for the public interest or collateral consequences exceptions to the mootness doctrine because the court and legislature had already clarified the question at issue and the rules do not permit the expungement relief sought.

Reynolds-Rogers v. Department of Health & Social Services

In *Reynolds-Rogers v. Department of Health & Social Services*, 436 P.3d 469 (Alaska 2019), the supreme court held that an employee is precluded from bringing a wrongful termination claim against her employer after a union settles her grievances with that employer. The Department of Health & Human Services (DHHS) employed Rogers for seven years, during which time Rogers filed five grievances against DHHS for her two Letters of Warning, two suspensions and ultimate termination with her union. The union settled all of these grievances with DHHS; in exchange for withdrawing the grievances, DHHS paid Rogers \$3800 and removed a negative performance evaluation. Rogers sued DHHS for wrongful termination based on a breach of implied covenant of good faith and fair dealing, arguing on appeal that the union's settlement was flawed. The supreme court affirmed the superior court's decision, reasoning that her claim was precluded from re-litigation by the union's settlement agreement with DHHS. Rogers could not argue that the settlement agreement was inherently flawed because that issue was not presented below. The supreme court reasoned that Rogers had accepted the union and DHHS settlement agreement withdrawing her grievances. There was no reason to set aside this agreement so the supreme court found Rogers' contractual claim barred. Because Rogers' contractual claims had been settled by the agreement and a wrongful termination claim must have a basis in either tort or contract law, the supreme court held that Rogers could not sue, and that that an employee is precluded from bringing a wrongful termination claim against her employer after a union settles her grievances with that employer.

Robinson v. Alaska Housing Finance Corporation

In *Robinson v. Alaska Housing Finance Corporation*, 442 P.3d 763 (Alaska 2019), the supreme court held that claims for wrongful termination of a lease are barred by res judicata if parties have agreed to dismiss an earlier claim with prejudice. The Robinsons participated in a federal housing voucher program through the Alaska Housing Finance Corporation (AHFC) which paid for part of their rent. This voucher was terminated per AHFC guidelines after the landlord was awarded a judgment against the Robinsons for damaging the apartment. The Robinsons appealed this termination in superior court but both parties agreed to dismiss the claim with prejudice. As a result of the voucher's termination, the Robinsons were evicted from their housing and brought

a claim against AHFC for wrongful termination of the voucher and failure to provide due process. The supreme court held that both of these claims were barred by res judicata. Res judicata is meant to prevent re-litigation of claims that have reached a proper final judgment. The claim of wrongful termination reached a final conclusion when the Robinsons first brought the claim and agreed with AHFC to dismiss the claim with prejudice. This settlement fulfills the final judgment on the merits requirement and thus, Robinsons had waived their claims. Affirming the lower court's decision, the supreme court held that claims for wrongful termination of a lease are barred by res judicata if parties have agreed to dismiss an earlier claim with prejudice.

CONSTITUTIONAL LAW

Amy S. v. State

In *Amy S. v. State*, 440 P.3d 273 (Alaska 2019), the supreme court held that when a party's due process rights are violated, a failure by that party to make a plausible claim of prejudice resulting from that violation requires a finding of harmless error. The Department of Health and Social Services, Office of Children's Services (OCS) filed an emergency petition for a child in need of aid (CINA) adjudication regarding Ms. S.'s child. After the CINA hearing, the superior court found in favor of OCS. Subsequently, Ms. S. filed a motion requesting findings of fact and conclusions of law in support of the superior court's decision. The superior court issued a summary of factual findings which did not cite facts discussed at the CINA hearing, but did recount facts from previous proceedings involving Ms. S.'s child. Ms. S. appealed, arguing the superior court's consideration of facts from previous proceedings violated her due process rights. The supreme court affirmed the lower court's decision, holding that, even assuming that the consideration of facts from previous proceedings violated Ms. S.'s due process rights, any error was harmless because Ms. S. failed to make a plausible claim of prejudice. The court found fatal to a plausible claim Ms. S.'s failure to explain how the outcome of the case might have changed if the lower court had respected her due process rights. The supreme court affirmed, holding that when a party's due process rights are violated, a failure by that party to make a plausible claim of prejudice resulting from that violation requires a finding of harmless error.

Club SinRock, LLC v. Municipality of Anchorage

In *Club SinRock, LLC v. Municipality of Anchorage*, 445 P.3d 1031 (Alaska 2019), the supreme court held that a municipal closing-hours restriction applies to adult cabarets, but, under strict scrutiny, violates the Alaska Constitution's free speech clause. Although a municipal ordinance required adult-oriented establishments to be closed between 2:00 a.m. and 6:00 a.m., Club SinRock, an adult cabaret featuring nude dancing, stayed open until 4:00 a.m. The municipal clerk held that the closing-hours restriction applied to adult cabarets and that Club SinRock violated this restriction. The superior court affirmed and further held that the restriction did not violate Club SinRock's free speech rights. On appeal, the supreme court held that the ordinance's plain language and legislative history indicate that the restriction applied to adult cabarets. However, the supreme court determined that the restriction was a content-based speech restriction, triggering strict scrutiny under the Alaska Constitution. The supreme court held that the ordinance's restriction was not narrowly tailored to meet the municipality's interests in reducing harmful secondary effects like prostitution, but that a similar ordinance bolstered by

solid evidence may be constitutional. The supreme court reversed the decision of the superior court, holding that a municipal closing-hours restriction applying to adult cabarets is unconstitutional under the Alaska Constitution's free speech clause.

Ebli v. State

In *Ebli v. State*, 451 P.3d 382 (Alaska 2019), the supreme court affirmed a lower court's decision to dismiss an incarcerated individual's complaint that a restriction placed on his visitation rights by the Department of Corrections (DOC) violated his constitutional right to rehabilitation. While incarcerated, Keilan Ebli began a romantic relationship with a DOC substance abuse counselor, which continued even after the counselor had been moved to another facility. The counselor and the counselor's parents regularly visited and called Ebli. DOC has rules that prohibit relationships between DOC employees and prison inmates. DOC eventually became aware of this relationship and sent letters to all parties involved informing them that neither the counselor nor her parents would be allowed to visit Ebli again. After going through the internal appeals process, Ebli sued DOC, claiming, amongst other things, that the restrictions violated his "fundamental right to rehabilitation," which is protected under Article 1, §12 of the Alaska Constitution. Although the superior court recognized that the right to rehabilitation did include visitation privileges, it found that this restriction did not violate his constitutional right. The Alaskan supreme court applied the test established by the U.S. Supreme Court in *Turner v. Safley*, which considers four factors in determining whether a prison rule is "reasonably related to legitimate penological interests." The court found that the DOC had a legitimate penological interest in prohibiting future visitations on the grounds that the counselor's loss of objectivity and her willingness to violate ethics policies could potentially be a security concern and that the restrictions would discourage others from violating the relationship policy in the future. Finding that the superior court had correctly deferred to DOC's judgment, the Supreme Court affirmed the dismissal of Ebli's constitutional claim.

Markham v. Kodiak Island Borough Board of Equalization

In *Markham v. Kodiak Island Borough Board of Equalization*, 441 P.3d 943 (Alaska 2019), the supreme court held the eligibility requirements for a senior citizen property tax exemption did not violate equal protection. Markham applied for a senior citizen tax exemption on his property in Kodiak, and the assessor denied his applications due to prolonged absences. The Borough Board of Equalization affirmed the denials. Markham appealed the superior court's dismissal of his 2013 appeal and denial of his 2014 appeal. The supreme court affirmed, reasoning the eligibility requirements for the senior citizen property tax exemption—which were based on the Permanent Fund Dividend (PFD) requirements—did not violate equal protection. In order to be eligible for the exemption, Markham had to prove that his absence from Alaska was allowed by statute, as he was not present during the qualifying year, and he did not offer evidence to do so. Markham argued that the eligibility requirements violated his right to equal protection. The court previously decided that restricting the PFD to bona fide residents does not violate equal protection because the requirements furthered a legitimate state interest, and applied the same analysis for the tax exemption. The court held that Alaska has a legitimate interest in requiring "sufficiently close connections" with Alaska before conferring an economic benefit. Affirming the lower court's decision, the supreme court held the eligibility requirements for the property tax exemption, like the PFD requirements, did not violate equal protection.

Meyer v. Stand for Salmon

In *Meyer v. Stand for Salmon*, 450 P.3d 689 (Alaska 2019), the supreme court held that in a claim with multiple constitutional issues, the constitutional claimant was entitled to recover attorneys' fees for the issues on which it prevailed. The preceding action addressed four constitutional issues that arose after the Lieutenant Governor did not certify Stand for Salmon's ballot initiative. Stand for Salmon prevailed on three of the constitutional issues. The supreme court ordered each party to pay their own costs and attorneys' fees. Stand for Salmon moved for reconsideration of the attorneys' fees. The Lieutenant Governor argued that Stand for Salmon did not prevail on the main issue, and therefore was not entitled to attorneys' fees. The supreme court held that Stand for Salmon was entitled to full attorneys' fees for those constitutional issues in which prevailed. However, Stand for Salmon was not entitled to any attorneys' fees for work completed solely for the constitutional claim on which it did not prevail. The supreme court granted Stand for Salmon's motion for reconsideration, holding that in a claim with multiple constitutional issues, the constitutional claimant was entitled to recover attorneys' fees for the issues on which it prevailed.

Pohland v. State

In *Pohland v. State*, 436 P.3d 1093 (Alaska Ct. App. 2019), the court of appeals held the general search of an individual's laptop to be unconstitutional when conducted under a warrant authorizing the search of another individual's digital records related to that second individual's suspected crimes. Alaska state troopers investigating McRoberts obtained a search warrant authorizing search and seizure of all digital storage devices in McRoberts' house for review of digital financial records to the extent that the records related to her suspected crimes. Pohland, a state employee and friend of McRoberts, rented a suite within McRobert's home. During the search of McRoberts' house, Pohland's laptop was seized and searched, leading to the state to charge her with official misconduct. The district court found the state troopers had probable cause to believe that McRoberts, as Pohland's close friend, might have concealed evidence within the latter's living area. On appeal, the state argued the search of Pohland's laptop to be proper as McRoberts' might have hidden evidence of her suspected crimes on the laptop. The court of appeals held that the fact that Pohland's laptop was in a rented space within McRoberts' house and Pohland was McRoberts' friend did not merit the inference that there was evidence of the suspected crimes on the laptop, nor did it allow for a search unrestricted to financial records that may have been hidden on the computer. The court of appeals reversed, holding the general search of an individual's laptop to be unconstitutional when conducted under a warrant authorizing the search of another individual's digital records related to that second individual's suspected crimes.

State v. Planned Parenthood of the Great Northwest

In *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019), the Alaska Supreme Court held that AS 47.07.068 (the statute) and Alaska Administrative Code Title 7 § 160.900(d)(30) (the regulation) violated the Equal Protection Clause of the Alaska Constitution by restricting Medicaid funding of abortions with insufficiently narrow tailoring. In 2013, the Alaska Department of Health and Social Services (DHSS) amended the regulation by raising the requirements for Medicaid funding for abortions by necessitating a more strenuous certificate from a doctor for a patient to obtain state Medicaid funding for an abortion. In 2014, the state legislature passed the statute, similarly requiring that DHSS not pay for an abortion with state

Medicaid funding unless it is “medically necessary” or the pregnancy was the result of rape or incest. Planned Parenthood of the Great Northwest brought suit alleging that the regulation and statute both violated Alaska’s Equal Protection Clause by singling out abortion services for a restrictive definition of “medically necessary.” The superior court ruled that both provisions violated the state Equal Protection Clause by impermissibly discriminating against indigent women seeking abortions. The State appealed, arguing the constitutionality of the provisions based on a broad and inclusive definition of an abortion’s medical necessity.

First, the supreme court found that the statute’s language is ambiguous because “threat of a serious risk” is not properly defined and its catch-all provision does not meaningfully expand its permissive scope. Next, the court found that the statute’s legislative history supports a restrictive reading, and that the statute therefore means neither that suffering from a listed condition is sufficient to obtain funding nor that mental health and lethal fetal anomalies are covered. Considering the regulation, the court found that although it was less restrictive than the statute, it is not sufficiently less restrictive to meaningfully differentiate its coverage from that of the statute. Based on these interpretations, the court applied strict scrutiny to evaluate the particular means here employed by the state to further a compelling state interest. The court concluded that the statute and regulation are not narrowly tailored to meet the State’s goal of preserving Medicaid funds, and that the State failed to sufficiently prove that the differences between the affected classes justify the discriminatory treatment. The court therefore affirmed the ruling of the superior court finding that the regulation and the statute violate the state constitution’s Equal Protection Clause.

CONTRACT LAW

Graham v. Municipality of Anchorage

In *Graham v. Municipality of Anchorage*, 446 P.3d 349 (Alaska 2019), the supreme court held that a collective bargaining agreement (CBA) provision governing an award of expenses did not apply to firefighter’s request for reimbursement of full attorneys’ fees and costs. Graham is a firefighter employed by the Anchorage Fire Department (AFD). After failing the interview portion of AFD’s engineer promotional exam, Graham alleged discrimination on the basis of race and age. Graham petitioned his union to file a grievance against the municipality on his behalf under the union’s CBA with the municipality, but it declined to do so. The union’s counsel later informed Graham that he had exhausted his contractual remedies under the CBA and was free, at his own cost, to pursue litigation independently. Graham sued the municipality and ultimately received a damages award. Graham then moved for an award of full attorneys’ fees under section 7.4.1 of the CBA, which provides that when the “prevailing party must seek enforcement in court of the arbitrator’s decision” the losing party must bear the expenses of such efforts. The superior court denied Graham’s theory of recovery under the CBA, ruling that the plain language of the agreement only allows full fees to enforce an arbitrator’s decision. On appeal, Graham argued that the CBA provision should be broadly construed to encourage efficient litigation and give relief to employees who must enforce CBA rights in court after being denied arbitration. Rejecting Graham’s proposed interpretation, the supreme court held that the plain language of the CBA provision was inapplicable to Graham’s case, as an arbitrator was never involved and an arbitrator’s decision was never made. Furthermore, contrary to Graham’s assertion that the letter from the union’s counsel authorized him to enforce the rights in the CBA, the supreme court held that this was simply false. Finally, the court noted that its case law does not support prioritizing a

broad construction of contractual attorneys' fee provisions to the exclusion of all other rules of contract interpretation, such as the plain meaning rule. Affirming the lower court, the supreme court held that the CBA fee provision did not apply to Graham's case.

CRIMINAL LAW

Adams v. State

In *Adams v. State*, 440 P.3d 337 (Alaska Ct. App. 2019), the court of appeals held that the prosecutor's closing argument was improper because she incorrectly led the jury to believe that the judge could fix an errant verdict. During closing argument of Adams' murder trial, the defense attorney compared the "reasonable doubt" standard to the level of confidence in making the decision to terminate a loved one's life support. The prosecutor responded that the jury's verdict was not as "permanent and irrevocable" as that analogy because there were procedures after the trial to protect a defendant's rights. The jury convicted Adams and he appealed, arguing that the prosecutor's closing argument regarding "reasonable doubt" was improper because it misstated the law. The appellate court held that the prosecutor's argument was almost certain to mislead jurors on the importance and finality of the verdict. Though there are venues to challenge a jury's verdict, those methods are limited in scope and ability to overturn a wrongful conviction. The prosecutor's comments did not convey this nuance and may have led a jury to return a verdict in hopes that the judiciary would determine if it was correct or not. These improper comments were not cured by an instruction from the judge regarding the proper law governing verdicts. Thus, the court of appeals reversed Adams' conviction due to the prosecutor's improper closing argument.

Allison v. State

In *Allison v. State*, 448 P.3d 266 (Alaska Ct. App. 2019), the court of appeals held that the trial court committed prejudicial error in excluding evidence regarding the alleged victim's potential Ehlers-Danlos Syndrome (EDS) in defendant's second-degree murder trial. Clayton Allison was charged with manslaughter, criminally negligent homicide, and second-degree murder after his 15-month old daughter, J.A., suffered a fatal injury while in his care. At trial, Allison claimed that J.A.'s injuries resulted from a fall down a staircase, not from homicide. J.A. had multiple known but undiagnosed health problems before her death. After J.A.'s death, J.A.'s mother and her relatives were diagnosed with EDS, a genetic disorder associated with excessive bleeding. At a pre-trial evidentiary hearing, the trial court denied Allison's request to present any evidence regarding EDS after finding the evidence to be too speculative. On appeal, Allison argued that the trial court erred in excluding this evidence. The court of appeals agreed. The court of appeals first ruled that Alaska Evidence Rule 702 did not require Allison to present an expert on EDS in order to present information about the syndrome. Next, the court of appeals ruled that Allison was not required to present an expert who could diagnose J.A. with EDS "to a reasonable degree of medical certainty" in order to present evidence about the syndrome. Finally, the court of appeals held that the trial court's exclusion of the EDS evidence was not harmless because it severely limited Allison's ability to present favorable evidence. Accordingly, court of appeals held that the trial court committed prejudicial error in excluding the EDS evidence and reversed Allison's conviction.

Alvarado v. State

In *Alvarado v. State*, 440 P.3d 329 (Alaska Ct. App. 2019), the court of appeals held that an erroneous instruction regarding a judicially noticed fact was not grounds for an automatic reversal of a conviction. Alvarado was charged with three criminal offenses for which age was a necessary element. At trial, the prosecutor requested the judge take judicial notice of Alvarado's date of birth as noted on the indictment. Defense counsel agreed to this. The court subsequently instructed the jury that it was to take Alvarado's date of birth as a proven fact. Alvarado was convicted. On appeal, Alvarado argued that the structural error of taking conclusive judicial notice in a criminal trial required automatic reversal of his convictions. The court of appeals found that the harmless error analysis should be applied and affirmed the conviction. The court reasoned that the judicial notice of Alvarado's date of birth was not necessary to the jury's determination of that element. The court differentiated *Smallwood*, *Fielding*, and *Rae*, noting that, here, defense counsel stipulated to the accuracy of the judicially noticed fact. Therefore, the error was in describing the fact as judicially noticed, rather than stipulated. The court of appeals affirmed the conviction, holding that an erroneous instruction regarding a judicially noticed fact was not grounds for an automatic reversal of a conviction where the error was harmless.

Clifton v. State

In *Clifton v. State*, 440 P.3d 300 (Alaska Ct. App. 2019), the court of appeals held that probation conditions requiring medication, cooperation with guardianship, and compliance with warrantless searches were decided under and improper standard of review, insufficiently supported, and determined to far out from the release date. After being convicted of attempted murder and aggravated assault related to delusional incident, Clifton challenged several conditions of probation. The lower court imposed a number of special probation conditions at the time of sentencing. The appeals court reaffirmed that probation orders that require ingestion of medication are subject to special scrutiny and, even interpreted narrowly in light of the defendant's case, cannot be imposed without a hearing including medically expert testimony, and that determinations should be made closer to the defendant's date of release. Reasoning that divesting an individual of ordinary control of her life demands substantial procedural protections, the court also found the imposition of this condition both insufficiently supported and premature. Regarding the conditions requiring submission to warrantless searches, the court determined that the lower court had not found sufficient relationship between the conditions and the defendant's criminal behavior to justify their imposition. Vacating multiple probation conditions, the court of appeals held that the conditions were imposed under improper standard of review, without the required supporting evidence, and too far out from the release date.

Dere v. State

In *Dere v. State*, 444 P.3d 204 (Alaska Ct. App. 2019), the court of appeals held that it was not a violation of the double jeopardy clause to be retried on a greater charge, even if already found guilty of a lesser included charge. Dere was charged with robbery, assault, and theft. During deliberations, the foreman indicated the jury was deadlocked as to the robbery charge. The judge declared a mistrial on the robbery charge, but allowed the jury to continue deliberations on the two remaining charges. The jury convicted Dere on the assault and theft charges. Dere was retried for robbery and found guilty. On appeal, Dere argued that it was a violation of the double jeopardy clause for the State to retry him on the robbery charge because he had already been found guilty of the lesser included charges of assault and theft. The court of appeals upheld

the conviction, explaining that its holding in *Hughes* stood for the rule that where a criminal trial ends before the jury has reached a verdict, such as when the jury is hung, a retrial is a continuation of the defendant's initial jeopardy and is not a successive prosecution. The court found that the double jeopardy clause and statutory rule protect only against successive prosecutions for a greater or lesser offense. The court declined to overrule the holding set out in *Hughes*. The court affirmed the conviction, holding that it was not a violation of the double jeopardy clause to be retried on a greater charge, as this was a continuation of the initial prosecution, not a successive prosecution.

Doe v. State, Department of Public Safety

In *Doe v. State, Department of Public Safety*, 444 P.3d 116 (Alaska 2019), the supreme court held that part of Alaska's sex offender registration law unconstitutionally violated an offender's due process right to privacy by not providing the offender the opportunity to prove that they are not likely to re-offend and should no longer be required to register. Doe moved from Virginia, where he had been convicted of aggravated sexual battery, to Alaska, where he was required to register as a sex offender under the Alaska Sexual Offender Registration Act (ASORA). Doe stopped re-registering after the state increased how frequently he had to register. After the state brought charges against him for failing to register, Doe challenged the law by arguing that 1) the state lacked jurisdiction to require him to register because ASORA is a punitive rule that shouldn't apply to an out-of-state conviction, and 2) that ASORA violated his due process right to privacy under the "least restrictive means" test. The superior court ruled for the state on both arguments and Doe appealed. The state argues that 1) ASORA has non-punitive purposes and effects that represent an important state policy interest, and 2) ASORA should be reviewed under a "rational basis" analysis and thus doesn't violate his substantive due process rights. On appeal, the supreme court first found that the state does have jurisdiction over this issue, holding that the state has a legitimate public safety concern and that requiring registration did not constitute an ex post facto punishment. Second, the court held that the law did substantially burden offenders' constitutional right to privacy due to concerns of substantial economic or physical harm that could come to offenders, and thus should be reviewed under strict scrutiny. Under strict scrutiny analysis, the court found that requiring anyone convicted of a qualifying crime to register with no opportunity to prove rehabilitation was not the least restrictive means of achieving the state's policy goal of protecting the public from an offender re-offending. Rather than invalidating ASORA completely, the court ruled that offenders must now have the opportunity to be heard by a superior court to prove that they are no longer a threat and that they should no longer be required to register. However, finding that the question of process was not before them, the court declined to specify what standard or test superior courts should use to review these cases going forward.

Dulier v. State

In *Dulier v. State*, 451 P.3d 790 (Alaska Ct. App. 2019), the court of appeals held that there was sufficient evidence for a jury to find that a flare gun fired at the victim by the defendant was a dangerous instrument capable of causing death or serious physical injury. After an altercation, defendant Dulier pressed a flare gun into the victim's neck and fired. A bystander grabbed the victim's shoulder just as the gun went off, causing the flare to hit the front of the victim's neck, apparently reducing the damage caused by the device. Dulier was convicted of second- and third-degree assault, both of which include the element that the defendant caused physical injury by

means of a “dangerous instrument,” defined as anything that, under the circumstances it was used, was capable of causing death or serious physical injury. On appeal, Dulier argued that the evidence was insufficient to establish that the flare gun was used in a manner capable of causing death or serious injury. Further, Dulier argued that the trial court erred by not *sua sponte* instructing the jury to only consider whether the use of the flare gun actually—not hypothetically—risked death or serious injury. Dulier claims this error was compounded by the prosecutor’s hypothetical framing of the issue in closing argument. The court of appeals affirmed the convictions, finding that the evidence of the victim’s injuries in addition testimony about the similarity between a flare gun shell and a shotgun shell were sufficient for a reasonable juror to find that the flare gun was a dangerous instrument. Further, the court of appeals held that, although a jury instruction focusing the issue on actual rather than hypothetical use of the device would have been appropriate and the prosecutor should not have used a hypothetical framing of the issue during closing argument, these errors did not rise to the level of plain error. At trial, the parties were primarily focused on other issues, and during the brief discussions of the “dangerous instrument” element, the parties appropriately focused on the manner in which the flare gun had actually been used. The prosecutor’s sole misstep in framing the issue hypothetically was addressed and corrected in the defense’s closing argument. The court of appeals held that there was sufficient evidence to affirm the jury’s finding that Dulier’s flare gun was dangerous instrument.

Fedolfi v. State

In *Fedolfi v. State*, 456 P.3d 999 (Alaska Ct. App. 2019), the supreme court ruled a police officer’s convictions for attempted third-degree sexual assault and official misconduct were the same offense for double jeopardy purposes. The police officer offered to drive a drunk woman home, but instead he drove her to another location, exposed himself to her, and tried to sexually assault her. The officer was charged with attempted third-degree sexual assault for attempting to engage in sexual penetration with someone in the officer’s custody. He was also charged with official misconduct for attempting to sexually assault someone in his custody. The district court rejected the officer’s argument that the charges should merge into a single conviction because it found the sexual assault and misconduct statutes protected different societal interests. After pleading no contest on both counts, the officer renewed his argument to merge the convictions on appeal. The supreme court reversed, reasoning that the two criminal charges against the officer protected the same societal interest. Specifically, the supreme court found that the legislature in both instances banned police officers from having sexual activity with a person in their custody. The supreme court also noted the legislature classified both of the officer’s offenses with the same degree of seriousness. Reversing the lower court’s decision, the supreme court ruled a police officer’s convictions for attempted third-degree sexual assault and official misconduct were the same offense for double jeopardy purposes.

Fox v. State

In *Fox v. State*, 436 P.3d 1101 (Alaska Ct. App. 2019), the court of appeals held that a criminal defendant is not entitled to credit against his sentence for voluntary placement at a community residential center. Fox appealed from a superior court decision upholding the Alaska Parole Board’s decision to deny credit against his sentence for time spent in a community residential center (CRC). Fox was given a choice between residing at a CRC or having a report filed by a parole officer after testing positive for marijuana while on mandatory parole. He argued that he

was not residing in the CRC voluntarily, and in 2013 asked the parole board to grant him credit against his sentence for the 18 days spent at the CRC. The parole board denied credit, and the superior court affirmed, concluding that a voluntary stay at a CRC was not equivalent to the conditions approximating incarceration needed to obtain credit. The court of appeals found that the court's evidentiary hearing and the record suggested that Fox knew he could refuse to be placed at the CRC and that the stay was voluntary. Affirming the lower court's decision, the court of appeals held that voluntary placement at a community residential center does not necessarily meet the qualifications for credit against a defendant's sentence.

Good v. Municipality of Anchorage

In *Good v. Municipality of Anchorage*, 450 P.3d 693 (Alaska Ct. App. 2019), the court of appeals held that AS 29.25.070(g) did not repeal the exceptions against municipal impounding of motor vehicles previously created by the legislature in AS 28.01.015. Under AS 28.01.010(a), municipalities are restricted from enacting ordinances that are inconsistent with Alaska's state motor vehicle laws in Title 28. The legislature created an exception from this provision that allowed municipalities to adopt ordinances providing for impoundment or forfeiture of vehicles when defendants commit certain offenses, even if stricter than their state counterparts. In 2016, the legislature enacted a new provision, AS 29.25.070(g), which precludes municipalities from imposing greater punishment for violations of municipal law than those enacted by comparable state crimes. Good drove under the influence and had her car impounded for 30 days under the Anchorage Municipal Code. Good pled no-contest to the driving under the influence charges, but did challenge the impoundment under AS 29.25.070(g). The comparable state offense contained no mandatory impoundment provision for a first time offender, which Good argued meant the municipal code's requirement that her car be impounded violated AS 29.25.070(g). The court of appeals focused on the legislative intent behind AS 29.25.070(g) in analyzing whether it had impliedly repealed the earlier exception. They found the statute was enacted on recommendation from the Alaska Criminal Justice Commission as part of an effort to reduce recidivism in the state. The court held that the new statute did not impliedly repeal the earlier exception because it was directed broadly, and not at the specific area of impoundments and forfeitures that had already existed as a carve-out to uniformity requirements.

Graham v. State

In *Graham v. State*, 440 P.3d 309 (Alaska Ct. App. 2019), the court of appeals held that a drunk driver's sentence may have been driven by principles of retribution and that the trial court had erred in its determination of the proper sentencing benchmark, its conclusion on aggravating factors, and its interpretation of the proper basis of the community condemnation standard. The driver pled guilty to two counts of second degree murder after causing a vehicle accident that killed two teenage girls, while intoxicated. The lower court sentenced the driver to the highest ever sentence in Alaska for that type of misconduct under the terms of a plea deal that required at least twenty-six years to serve. The court emphasized that in sentencing, the judge must take account of both the statutory factors and the past sentences imposed in comparable cases. The appeals court reasoned that the lower court applied an improper sentencing benchmark because it failed to distinguish between prior sentences resulting from intentional and nonintentional assaults, improperly applied an aggravating factor, and improperly employed a community condemnation standard to express community outrage in this particular case and not general assessment of the type of crime. The appeals court also concluded that the concept of general

deterrence did not justify the sentencing disparity. Vacating and remanding for resentencing by a different judge, the appeals court determined that the driver's sentence may have been driven by principles of retribution that are inconsistent with the Alaska Constitution and that the trial court had erred in its determination of the proper sentencing benchmark, conclusion on aggravating factors, and interpretation of the proper basis of the community condemnation standard.

Hall v. State

In *Hall v. State*, 446 P.3d 373 (Alaska Ct. App. 2019), the appellate court held that due process prohibits application of a statutory bar on successive petitions when a defendant is raising a post-conviction relief claim based on newly discovered evidence of innocence that was not previously available to the defendant. Defendant Brian Hall was convicted in 1993 of first- and second-degree murder for shooting occupants of another car. Hall claimed self-defense and testified that Monica Shelton, witness to the events, warned him that the victims had a gun, but his defense failed after she equivocated at trial on whether she had in fact said any such thing to Hall. Seventeen years later, an investigator interviewed Shelton who expressed that she did warn Hall and was willing to set the record straight. Hall, who had previously and unsuccessfully applied twice for post-conviction relief on ineffective assistance of counsel claims, filed his third application for post-conviction relief, this time based on newly discovered evidence. The superior court dismissed his application because of an absolute statutory bar on successive petitions for post-conviction relief. On appeal, the appellate court held that a defendant is entitled under due process to bring a post-conviction claim for relief in what would otherwise qualify as a successive petition if the defendant is able to establish that the claim is based on newly discovered evidence. However, because the State had argued that Hall failed to establish a claim of newly discovered evidence, the case was remanded to determine that issue. The appellate court held that due process prohibits application of a statutory bar on successive petitions for post-conviction relief based on newly discovered evidence.

Inga v. State

In *Inga v. State*, 440 P.3d 345 (Alaska Ct. App. 2019), the appellate court held that there was sufficient evidence to find that the defendant's act of grabbing victim's breasts immediately before beating her was coercion by force and not among the least serious conduct included in the definition of second-degree sexual assault. Defendant Inga, who had been violent toward the victim in the past, propositioned the victim for sex in an isolated location. After she declined, Inga grabbed the victim's breasts and then beat her. Second-degree sexual assault requires unwanted sexual contact "without consent," defined as coerced by the use or threat of force beyond the bodily impact or restraint inherent in the sexual contact. Inga argued that the act of grabbing the victim's breasts was separate from the ensuing physical attack, so that there was insufficient evidence to support the jury's finding that the sexual touching was coerced by the use of force. The appellate court upheld the jury's finding, holding that a lack of consent may reasonably be inferred by sexual contact in an isolated location by a man who the victim had good reason to be afraid of, immediately after a refusal to have sex, and followed by physical attacks. Inga also argued that the touching underlying the second-degree sexual assault conviction—separate from the subsequent attack underlying the third-degree assault conviction—should be mitigated in sentencing because the touching was among the least serious conduct within the charge's definition. The appellate court, however, upheld the sentencing judge's rejection of the proposed mitigator, finding that the subsequent physical attack was an

integral facet of Inga's sexual assault on the victim, not a separate and discrete incident. The appellate court upheld the sexual assault conviction and sentencing from the defendant's act of grabbing the victim's breasts immediately before beating her.

Jones-Nelson v. State

In *Jones-Nelson v. State*, 446 P.3d 797 (Alaska 2019), the supreme court ruled the defendant is not required to introduce evidence of each element of self-defense before the defendant can introduce evidence of the victim's prior acts of and reputation for violence. The defendant and the victim were attending the same party, and they got into an argument after the defendant accused the victim of being a snitch. The defendant later shot and killed the victim after a confrontation, although evidence conflicted as to whether the victim was acting aggressively toward the defendant before the shooting. At trial, the defendant sought to introduce evidence of the victim's prior acts of and reputation for violence, but the trial court excluded the evidence because the defendant had yet to offer evidence of every element of self-defense. The defendant was convicted and, on appeal, argued he should have been allowed to introduce the victim's prior acts of and reputation for violence through cross before supporting every element of self-defense. The supreme court ruled the trial court erred in not admitting the testimony about the victim's prior acts of and reputation for violence even though the defendant had not yet provided evidence for each element of self-defense. In so ruling, the supreme court noted other foundational requirements still applied that could prevent the admission of this type of evidence. Additionally, when there are significant questions about whether the defendant will receive a self-defense instruction at the end of the trial, the trial judge can still regulate the order of proof in order to avoid prejudicing the jury. Before ultimately finding the error harmless and affirming the conviction, the supreme court ruled the defendant is not required to first introduce evidence of each element of self-defense before the defendant can introduce evidence of the victim's prior acts of and reputation for violence.

Kasgnoc v. State

In *Kasgnoc v. State*, 448 P.3d 883 (Alaska Ct. App. 2019), the court of appeals found that the trial court had erred in admitting evidence of a prior sexual assault under the consent defense exemption outlined in Alaska Evidence Rule 404(b)(3), but affirmed the admission under Alaska Evidence Rule 404(b)(4) on the grounds that both the current and previous conduct qualified as crimes involving domestic violence. Adam Kasgnoc Sr., who had previously been convicted of sexually abusing one daughter, was indicted on the charge of second-degree sexual assault and incest for sexually penetrating his twenty-year-old daughter. Kasgnoc argued that no sexual penetration had occurred, instead arguing that his daughter had made sexual advances on him and that he had rejected them. At trial, the prosecutor moved to admit the evidence of the prior conviction under either 404(b)(3), which allowed for the admission of previous crimes of sexual assault when the defendant raises a consent defense against a current charge of sexual assault, or 404(b)(4), which allows for the admission of previous crimes involving domestic violence in a current trial alleging a crime involving domestic violence (which includes incest). The judge initially ruled that since the defendant was not raising a defense of consent, 404(b)(3) was both inapplicable and precluded the use of the more lenient 404(b)(4) admission. However, Kasgnoc was convicted after the judge eventually allowed the prior conviction to come in under 404(b)(3) after deciding that Kasgnoc's testimony did classify as using consent as a defense. On appeal, Kasgnoc argues: 1) that the trial court improperly labeled his defense as using consent as a

defense and thus 404(b)(3) shouldn't have applied; and 2) that when 404(b)(3) does not apply in a sexual assault case, 404(b)(4) also cannot apply. The court of appeals agreed with Kasgnoc that his defense, which was that no sexual penetration had occurred, did not qualify as a defense of consent, and thus the trial court erred by admitting the evidence under 404(b)(3). However, the court found that the two statutes were not mutually exclusive in cases of sexual assault involving "household members," as that was a crime that met the statutory definition of "domestic violence" included in 404(b)(4). After further finding that the trial court had not abused its discretion when it found that the prior crime was both relevant and more probative than prejudicial, the court of appeals held that the prior crime had been properly admitted and thus affirmed the conviction.

Kinmon v. State

In *Kinmon v. State*, 451 P.3d 392 (Alaska Ct. App. 2019), the court of appeals held that a district court has a duty to resolve disputed questions of law related to statutory interpretation and to instruct the jury as to the proper interpretation at issue. Kinmon was a licensed big game guide and tag vendor. On two alleged occasions, Kinmon led hunts on which hunters filled out the appropriate big game tag paperwork prior to the hunt, but did not pay for the tags until after the hunt. Kinmon was charged with, *inter alia*, charges stemming from allegations that his clients had hunted big game without "previously purchasing" big game tags. There was a dispute as to the meaning of "previously purchasing," which the trial court declined to weigh in on, instead allowing both sides to present their chosen definition of the phrase before the jury, which ultimately convicted Kinmon. On appeal, the court of appeals noted the potential complexity of determining when a purchase takes place absent statutory guidance. Accordingly, the court determined that the jury should have received instruction as to what the term "previously purchased" meant in the present context and what types of actions could satisfy the requirement set by the term. The court of appeals reversed, holding that a district court has a duty to resolve disputed questions of law related to statutory interpretation and to instruct the jury as to the proper statutory interpretation at issue.

Ray v. State

In *Ray v. State*, 452 P.3d 668 (Alaska Ct. App. 2019), the court of appeals 1) affirmed the superior court's decision to revoke defendant's probation, 2) held that criminal defendants do not have a *constitutional* right to refuse further probation, and 3) certified to the supreme court the question of whether criminal defendants have a *statutory* right to refuse further probation under AS 12.55.090(f). In the summer of 2014, defendant Jason Ray violated the terms of his existing probation by failing to stay at an agreed-upon residence and drinking in excess while visiting Anchorage. At his disposition hearing, defendant elected to reject further probation, instead requesting a flat imprisonment sentence without probation. Instead, the judge decided to keep defendant on unsupervised probation for five years after he finished serving his active sentence of imprisonment. On appeal, defendant asserted that the superior court erred both in initially finding him in violation of his probation and in refusing to accept his rejection of further probation. Regarding defendant's first assignment of error, the court of appeals ruled that the superior court had sufficient grounds on which to find that defendant violated the conditions of his probation. Next, the court of appeals rejected defendant's contention that he had a constitutional right to refuse further probation, holding that although that right exists, it is not grounded in the Constitution. The court of appeals panel could not, however, agree on a uniform

interpretation of defendant's *statutory* right to refuse probation under AS 12.55.090(f). On this issue, each judge came to a different statutory interpretation. Accordingly, after affirming the superior court's decision to revoke defendant's probation and holding that criminal defendants have no *constitutional* right to refuse further probation, the court of appeals certified to the supreme court the question of whether criminal defendants have a statutory right to refuse further probation under AS 12.55.090(f).

Redding v. State

In *Redding v. State*, 451 P.3d 1193 (Alaska Ct. App. 2019), the court of appeals upheld the state's concession that the jury instruction regarding the burden of proof was error. Redding was charged with second degree vehicle theft and argued a defense of necessity. The trial court instructed the jury that Redding had the burden to prove this defense by a preponderance of the evidence. Redding appealed this instruction by arguing that the prosecutor had the burden to disprove the defense beyond a reasonable doubt and the state conceded that the trial court's instruction was incorrect. The offense requires that person act without any right to do so. Because lacking the right is integral to the offense, it is the prosecutor's duty to prove the element and must do so beyond a reasonable doubt. Thus, the court of appeals reversed the conviction because the jury instruction should have required the defense of necessity to be disproved beyond a reasonable doubt.

State v. Mayfield

In *State v. Mayfield*, 442 P.3d 794 (Alaska Ct. App. 2019), the court of appeals affirmed a decision to grant the defendant's motion to dismiss a charge of attempted second-degree sexual assault on the grounds that the state had failed to prove intent to use or threaten force to achieve sexual contact. While at a movie, twenty-one-year-old Thomas Mayfield touched a fourteen-year-old girl, who he did not know, on her hip by putting his fingertips in between her pants and her leggings. The young girl shouted and left the theater, alerting a manager who called the police and had Mayfield arrested. Among other charges, a grand jury found enough evidence to support a charge of attempted second-degree sexual assault. Granting Mayfield's motion to dismiss that charge, the superior court found that the state had not presented sufficient evidence to the grand jury to establish that Mayfield had attempted to coerce sexual contact through the use or threat of force. The state appealed this ruling, arguing that the charge does not require the active use or threat of force; instead arguing that it only requires that Mayfield intended to engage in sexual contact and that he acted in reckless disregard of the lack of consent. After walking through the elements of a completed second-degree sexual assault, the court clarified earlier precedent by explaining that attempted second-degree sexual assault required that Mayfield 1) intended to make sexual contact, 2) "recklessly disregarded a substantial and unjustified risk" that the victim did not consent, 3) intended to use or threaten force if necessary, and 4) took a "substantial step" toward completing the crime. Focusing on the last two elements, the court held that while active use of force or explicit threat of force is not necessary, the conduct in question must be "strongly corroborative" of a willingness to use or threaten force beyond the force of the sexual contact itself. The court found that there was insufficient indication of either use or threatened use of force or restraint, that contact to the hip did not qualify as sexual contact in terms of this charge, and that it would be impossible to prove Mayfield's goal was sexual contact. Holding that the indictment could not be based on "mere

conjecture or speculation,” the court found that the state had failed to present evidence sufficient to show that Mayfield had taken a “substantial step” towards the commission of the crime.

State v. Thompson

In *State v. Thompson*, 435 P.3d 947 (Alaska 2019), the supreme court held that in sexual abuse and assault cases, distinct acts of penetration may support separate convictions when the penetrating body part or object changes, or when the penetrated orifice changes. Thompson was convicted of multiple counts of sexual abuse of a minor. The court of appeals merged separate convictions against Thompson for digital penetration, penile penetration, and penetration with an object, all of which took place over the same time period and involved the same orifice. The supreme court reversed the court of appeals’ decision to merge the three convictions. In determining whether the double jeopardy clause in the federal constitution required the convictions to merge, the court looked to legislative intent, and found that the statutory language demonstrated an intent to separately punish each distinct type of penetration. In determining whether the state double jeopardy clause required the convictions to merge, the court looked to the societal interests at stake in punishing the defendant. The sexual abuse and sexual assault statutes are aimed at punishing perpetrators for the harm inflicted on victims through unwanted sexual contact. Since each distinct type of penetration inflicts additional harm on the victim, each can support a separate conviction. In overturning the lower court’s holding that the three convictions merged, the court held that distinct acts of penetration can support separate convictions when either separate orifices are penetrated, or the same orifice is penetrated with different body parts or objects.

State v. Tofelogo

In *State v. Tofelogo*, 44 P.3d 151 (Alaska 2019), the supreme court held that the domestic violence aggravating factor has broad applicability in determining the sentencing of a guilty individual. Teila Tofelogo accidentally stabbed his sober living group home roommate, Dennis Fathke, after horse-playing with a knife. Tofelogo pled guilty to negligent homicide and stipulated to the applicability of the aggravating factor that the offence “was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant.” Tofelogo was sentenced to six years imprisonment, a sentence that was longer than presumptive range for a first felony negligent homicide due to the aggravating factor. Tofelogo appealed this sentence claiming the aggravator was inappropriate and the court of appeals reversed reasoning that the aggravator was intended to apply to domestic violence situations where the relationship between the victim and defendant is a component behind the offence. The supreme court held that this aggravator has broad applicability beyond just relationship-based domestic violence. The aggravator’s plain language clearly applies to offenses against roommates because a roommate is “a member of the social unit made up of those living together in the same dwelling.” This meaning was not contradicted by the legislative purpose of the statute. Thus, the supreme court held that the superior court did not err in giving the aggravator some weight in determining Tofelogo’s sentence because the domestic violence aggravator has broad applicability.

Swartz v. Municipality of Anchorage

In *Swartz v. Municipality of Anchorage*, 436 P.3d 1104 (Alaska Ct. App. 2019), the court of appeals held that the district court erred in imposing jail time for an offender's uncompleted hours of community work service. Swartz pled guilty to driving with her license suspended or revoked. Her sentence included eighty hours of mandatory community work service to be completed within six months. Her plea agreement stipulated that the uncompleted portion of community work service would convert to jail time if not completed by the deadline. There was no conversion rate for uncompleted community service work hours to jail time provided in the plea agreement. Swartz completed only eight hours of the eighty sentenced. The Municipality petitioned the court to revoke probation and convert the remaining hours into jail time. The district court imposed nine days of jail time for the uncompleted community work service. Swartz appealed, arguing the jail time was imposed unlawfully due to the Alaska legislature having amended state law to prevent such conversions. The court of appeals held that the district court erred in converting the uncompleted community work service hours into jail time because the plea agreement did not define what conversion rate should apply for the unserved hours. The court found it unnecessary to determine whether the amended state statute applied retroactively to Swartz's sentence because the plea deal lacked a material term. The conversion provision was therefore struck as unenforceable. The court of appeals vacated the district court's imposition of jail time for an offender's uncompleted hours of community work service.

Williams v. State

In *Williams v. State*, 440 P.3d 391 (Alaska Ct. App. 2019), the court of appeals held that it was not plain error for the trial judge to give a jury instruction that did not require factual unanimity on the specific way in which Williams violated a protective order. Williams was convicted of two counts of violating protective orders that prohibited her from communicating with or stalking Kathleen, Robert or Israel Lansdale. The state argued that Williams violated the protective order at a football jamboree by photographing Kathleen and calling out to Israel. At Williams's trial, the jury was instructed that Williams should be found guilty if the state proved either of these two allegations beyond a reasonable doubt, and that the jurors did not have to unanimously agree on which of the two things had been proved, as long as they all agreed that at least one was proved. On appeal, Williams argued that the jury instruction was constitutionally deficient because it did not require the jurors to reach unanimous agreement as to which of the two things had been proved. Affirming the judgment of the district court, the court of appeals rejected this argument. First, the court noted that Williams's defense attorney did not object to the content of the jury instruction, but the way it was worded. As such, the court viewed Williams's case as an instance of invited error, in which case reversal of Williams's conviction would be appropriate only in exceptional circumstances, which Williams's case did not present. However, the court explained that even if it viewed Williams's claim as an assertion of plain error, there were two reasons why it would not find plain error. First, the court reasoned that there was no reasonable possibility that the jurors would have reached a different verdict if they had received Williams's preferred jury instruction because her attorney never cross-examined Robert and Kathleen about the details of what happened at the jamboree, instead arguing that their testimony, taken as a whole, should not be trusted. Second, the court noted that Alaska law does not provide a clear answer to whether factual unanimity was required in Williams's case. The court explained that the requirement of factual unanimity only applies when the state presents evidence that a defendant committed different acts that could each separately support a criminal conviction. The

court concluded that Williams's photographing and calling out to her son could be conceived as different aspects of one transaction between Williams and the Lansdale family, in which case it would be unclear whether these acts would support separate convictions for violating the protective order. Thus, the court held that it was not plain error for the jury instruction to not require factual unanimity in Williams's case.

CRIMINAL PROCEDURE

Alvarez-Perdomo v. State

In *Alvarez-Perdomo v. State*, 454 P.3d 998 (Alaska 2019), the supreme court held that a violation of the constitutional right against self-incrimination is structural error warranting automatic reversal. During his criminal trial, defendant Alvarez-Perdomo gave indirect, equivocal, and confused answers in response to the court's repeated attempts to personally confirm that he intended to waive his right to testify. After numerous unclear exchanges, Alvarez-Perdomo was brought to the stand and examined. Subsequently, Alvarez-Perdomo was convicted and appealed. The court of appeals held that, although the superior court committed constitutional error by pressuring Alvarez-Perdomo to explicitly waive his right to testify, the error was harmless beyond a reasonable doubt due to the overwhelming evidence against Alvarez-Perdomo. On appeal, the supreme court reversed, holding that a violation of the Fifth Amendment right against self-incrimination is a structural error that is intrinsically harmful without regard for its effect on the outcome of the case. The supreme court reasoned that the right against self-incrimination is a matter of the defendant's personal dignity, not just a procedural trial right; therefore, the likelihood that the error would change the outcome at trial is irrelevant. The supreme court concluded that the violation of Alvarez-Perdomo's right against self-incrimination warranted automatic reversal and remand for new trial.

Anderson v. State

In *Anderson v. State*, 444 P.3d 239 (Alaska 2019), the supreme court held a police officer validly seized the defendant's clothing without a warrant because the officer saw the clothing in open view and had probable cause to believe the clothing was evidence of a crime. In the course of breaking into a home, Anderson injured the home's occupants, and one of them also shot him. At a local hospital where Anderson went for treatment, a police officer, who was there to interview victims of the crime, stayed with Anderson as doctors treated him because of the blood on his shirt from his gunshot wound. After being informed by another officer that Anderson was a suspect, the first officer seized Anderson's clothing. The superior court found the plain view doctrine justified the seizure, and a jury convicted Anderson of assault, for which he was sentenced to 20 years in prison. On appeal, Anderson argued the superior court erred by failing to suppress the warrantless seizure of his clothing. The supreme court affirmed the no-suppression ruling after reviewing the two types of plain view doctrines. Focusing on the second type of plain view doctrine, which the supreme court distinguished by calling it open view, the supreme court explained probable cause that an object is evidence of a crime justifies a warrantless seizure if no other Fourth Amendment intrusion is required. Given the blood stains on Anderson's clothes provided probable cause to believe they were connected to the home invasion, the officer was justified in seizing the clothes from a hospital room where she was lawfully present. Affirming the lower court, the supreme court held a police officer validly seized the defendant's clothing

without a warrant because the officer saw the clothing in open view and had probable cause to believe the clothing was evidence of a crime.

Blalock v. State

In *Blalock v. State*, P.3d 675 (Alaska Ct. App. 2019), the appeals court held that due to absence of clear legislative intent for it to have retroactive effect the “Stand Your Ground” amendment’s changes to self-defense law did not apply retroactively. After conviction for second degree murder, Blalock challenged, *inter alia*, the refusal of the lower court to instruct the jury on the “Stand Your Ground” amendment as a part his self-defense defense. The trial court found that the “Stand Your Ground” changes from the 2013 law did not apply retroactively to the 2011 crime. The appeals court reasoned that the 2013 “stand your ground” enactment was a change to the law on the use of deadly force in self-defense, not a clarification, and that such changes apply retroactively only if retroactivity was the clear intent of the legislature. Therefore, the appeals court affirmed the lower court, explaining that the legislature did not set out an applicability provision and, therefore did not make an explicit statement that the legislation was to apply retroactively. Affirming the lower court, the appeals court held that due to absence of clear legislative intent for it to have retroactive effect the “Stand Your Ground” amendment’s changes to self-defense law did not apply retroactively.

Jackson v. Borough of Haines

In *Jackson v. Borough of Haines*, 441 P.3d 925 (Alaska 2019), the supreme court held that the trial court did not abuse its discretion when it awarded attorney’s fees in the defendant’s malicious prosecution action. Jackson was charged with disorderly conduct, assault, and resisting arrest in 2012. After a first mistrial, Jackson was convicted of all charges, although the conviction for disorderly conduct was reversed by the superior court on appeal in 2016. In 2014, Jackson initiated a civil complaint against the prosecutors of his case, as well as several police officers, alleging false testimony and malicious prosecution. The superior court granted a motion to dismiss the complaints against the prosecutors as they were entitled to prosecutorial immunity. As part of their ruling, the superior court awarded “an attorney’s fee award of \$4,311.87 calculated under Alaska Civil Rule 82(b)(2).” The supreme court reviews awards for attorney’s fees on an abuse of discretion standard. The superior court hesitated applying the firm 20 percent standard from Rule 82(b)(2) to Jackson, a *pro se* litigant. Ultimately, the superior court found Jackson “had presented no evidence to prove his indigence.” The superior court also disagreed the award of attorney’s fees would deter future litigants since he stood to win a large financial payment if his claims had been successful. The supreme court also notes that Jackson’s arguments under Rule 82(b)(3)(J) were unfounded since there was no evidence the prosecutors inflated their attorney’s fees to deter future litigation. The supreme court also refused to decide on Jackson’s argument that forcing indigent clients to pay attorney’s fees violated AS 09.60.010(c)(2) as it was not properly raised and lacked authority to support it. The supreme court affirmed the lower court’s award and held the trial court did not abuse its discretion when it awarded attorney’s fees in the defendant’s malicious prosecution action.

Nelson v. State

In *Nelson v. State*, 440 P.3d 240 (Alaska 2019), the supreme court held that a public defender has a conflict of interest disqualifying him from representation when the petitioner raises a claim of ineffective assistance of counsel against another public defender in the same office, and held that

a defendant is entitled to conflict counsel immediately after raising such a claim in the context of attempting to withdraw a plea. Represented by attorneys Douglass and Foote in the Dillingham public defender office, Nelson pled guilty to attempted sexual abuse of a minor. Later alleging ineffective counsel, Nelson sought to withdraw his plea and requested that the Public Defender Agency be allowed to withdraw from representation. Attorney Meachum, also from the Dillingham office, subsequently took over representation of Nelson, but the court denied both of Nelson's requests. Affirming the lower court's decision, the court of appeals held that deference to the superior court's discretion was appropriate given Nelson's inability to assert specifically how he had been incompetently represented. Reversing, the supreme court first noted that Douglass and Foote would have been prohibited from representing Nelson on his withdrawal motion because they would have been required to argue their own ineffectiveness, against their personal interest. Even though Meachum represented Nelson on that motion, the supreme court nevertheless held that there was a significant risk that Meachum's representation would be materially limited by the interests of Foote and Douglass. Rejecting the case-by-case approach of determining whether one public defender's conflict is imputed to others in the same office, the court noted that trial judges would have difficulty deciding whether public defenders were detached enough from their colleagues to pursue ineffective counsel claims zealously. Additionally, the court noted that public defenders may feel strong loyalty to individual colleagues, and may fear social or bureaucratic consequences from arguing that a coworker acted incompetently. Thus, the court adopted the per se rule that a mere allegation of ineffective counsel is sufficient to create a conflict of interest, and held that a defendant is entitled to conflict counsel immediately after raising such a claim in the context of attempting to withdraw a plea.

Smith v. State

In *Smith v. State*, 440 P.3d 355 (Alaska Ct. App. 2019), the court of appeals held that not all eligible jurors within a venue district are awarded an equal chance of serving as jurors under the Alaska constitution. The superior court judge in the defendant's trial for alleged crimes that occurred in the predominately Alaska Native rural village of Kiana held proceedings in the urban city of Kotzebue, which is also where the prospective juror pool was derived from. To avoid prohibitively expensive costs, the trial court restricted the applicable pool to the five-mile radius surrounding Kotzebue opposed to the standard 50-mile radius, which restricted the jury pool from including residents of two rural villages comprised nearly of only Alaskan Natives. The defendant raised several issues with the restriction of the applicable jury pool, including: (1) that the jury pool did not adequately represent a cross-section of the community where the crime took place, (2) that Alaskan citizens have a constitutional right to serve on juries and have equal chance to serve on juries, and (3) that he was entitled to an evidentiary hearing to determine the appropriateness of the superior court's ruling that the jury selection could be restricted to a five-mile radius of Kotzebue to avoid unreasonable costs. The superior court rejected all three of these issues raised by the defendant, which were subsequently appealed following his conviction. The court of appeals held that the defendant failed to provide adequate evidence that a jury pool derived from the residents of Kotzebue would not adequately represent a cross-section of Kiana, where the crime took place. Additionally, the court of appeals upheld the constitutionality of the administrative rule allowing a restricted jury pool to be within a 50-mile radius of where the trial took place. Finally, the court ruled that the trial court did err by not providing the defendant an evidentiary hearing to assert that it would not be prohibitively expensive to expand the jury pool to a 50-mile radius of where the trial took place, opposed to the five-mile radius proscribed by

the trial court. The court of appeals held that restricting an applicable jury pool to avoid unreasonably prohibitive costs is constitutional.

State v. Carlson

In *State v. Carlson*, 440 P.3d 364 (Alaska Ct. App. 2019), the court of appeals held that in order to prevail on a post-conviction claim based on an attorney's conflict of interest, the defendant must show that his attorney had (1) loyalty to someone else, or a personal interest, that conflicted with defendant's interests, and (2) the conflict negatively impacted the attorney's representation in a manner adverse to the defendant's interests. Jason Carlson was convicted of second-degree murder for shooting and killing George Featherly. Although he initially claimed that the true culprit was a man named "B," he later told his attorney, Allen Dayan, that he had accidentally shot Featherly. Dayan arranged a recorded interview with police in which Carlson, in the presence of Dayan, confessed to the accidental shooting. Carlson later repudiated the confession and testified at trial that B killed Featherly. Carlson filed a petition for post-conviction relief, arguing that Dayan's involvement in the confession created an "actual conflict of interest" which affected Dayan's performance at trial and required a presumption of prejudice and a reversal of the convictions. The superior court agreed and reversed the convictions. The State appealed, and the court of appeals reversed. The court of appeals explained that to meet the legal standard for a conflict of interest claim, Carlson had to show that Dayan had a conflicting loyalty to someone else, or to his own personal interest, which adversely affected his ability represent Carlson's interests. While Dayan may have acted incompetently in not recognizing the tension between his initial promotion of the confession as the truth, and his later promotion of the alternative perpetrator theory at trial, there was no evidence that Dayan ever acted based on loyalty to anyone but Carlson. As such, Carlson did not prove that there was an actual conflict of interest. Vacating the superior court's ruling and remanding for further proceedings, the court of appeals held that to prevail on a conflict of interest claim, the defendant must show by clear and convincing evidence that (1) the attorney had a loyalty to another person, or to his own self-interest, which conflicted with his loyalty to the defendant, and (2) the conflict of loyalty negatively impacted the attorney's ability to represent the defendant's interests.

State v. Simile

In *State v. Simile*, 440 P.3d 306 (Alaska Ct. App. 2019), the court of appeals held that a court's sentencing authority is not limited when a court revokes a defendant's probation for a fourth or subsequent technical violation even if the State's petition to revoke the probation contains an allegation of absconding. The State petitioned to revoke Simile's probation based on one allegation of absconding and one allegation of a separate technical violation of probation, which was Simile's fourth. Judges sentencing authority was limited for absconding violations of probation, but this authority was not limited in the case of a fourth or subsequent technical violation of probation. This seeming statutory conflict led the court below to rule that its sentencing authority was restricted by the limitation for sentences related to absconding violations. On appeal, the court of appeals determined that the policy underlying the statutory scheme would be defeated if a petition for revocation of probation for a fourth or subsequent technical violation was limited by the presence of an absconding violation. The court noted that absconding violations carry a higher sentence limit than that imposed on a defendant's first, second, and third technical violation, indicating the legislature's view that absconding is an aggravated type of technical violation. It then reasoned that the unlimited sentencing authority

granted courts in cases of a defendant's fourth technical violation could not be restricted by a sentencing limit placed on aggravated violations. The court of appeals reversed, holding that a court's sentencing authority is not limited when a court revokes a defendant's probation for a fourth or subsequent technical violation even if the State's petition to revoke the probation contains an allegation of absconding.

Torgerson v. State

In *Torgerson v. State*, 444 P.3d 235 (Alaska Ct. App. 2019), the court of appeals held that a judicial officer must assess a defendant's conditions of relief at a first bail review hearing. Torgerson was charged with sexual abuse of a minor in the district court. The judge imposed non-monetary conditions agreed to by the parties, but also set a higher monetary bail than requested by the prosecutor. The prosecutor asked the court to set the bail at \$25,000 cash or corporate appearance bond and a \$25,000 cash performance bond. Without explanation, the court imposed \$50,000 cash or corporate appearance and a \$50,000 cash performance bond. Torgerson's attorney requested a bail hearing, and the superior court denied Torgerson's proposal for lowered bail. The court of appeals remanded the case for a new bail hearing, holding that the state statute that sets out the right to a first bail hearing requires an independent assessment of bail conditions. The court reasoned that the requirement allows the court an opportunity to explain its decision, so it is required to conduct an independent assessment. Because the superior court did not conduct the required assessment and did not set forth an explanation for the bail conditions, the case was remanded for independent review. The court of appeals held the court was required to independently assess a defendant's bail conditions at a first bail review hearing.

ELECTION LAW

Dodge v. Meyer

In *Dodge v. Meyer*, 444 P.3d 159 (Alaska 2019), the supreme court held it proper to not count an election ballot with filled-in ovals next to both candidates' names and an 'X' over one of the filled-in ovals. The initial vote count of the 2018 race for the District 1 seat in the Alaska House of Representatives gave candidates Dodge and LeBon 2,661 votes each. An automatic recount was conducted, resulting in two additional votes for LeBon and one additional vote for Dodge. Both parties appealed, resulting in a report recommending that the recount be upheld. On appeal, Dodge argued that it was more probable that, on a ballot where the ovals next to both candidates' names were filled-in and an 'X' was written over LeBon's oval, it was more probable that the 'X' was intended to cancel the vote for LeBon. The supreme court upheld the recount, holding that the ballot with filled-in ovals next to both candidates' names and an 'X' over LeBon's oval was properly not counted. The court based its reasoning on a statutory requirement that ballots with marks next to multiple candidates are to, without exception, not be counted. The court noted that voter intent is a crucial question in determining the validity of ballot markings, but the voter's intent was ambiguous on the relevant ballot. The supreme court affirmed, holding it proper to not count an election ballot with filled-in ovals next to both candidates' names and an 'X' over one of the filled-in ovals.

EMPLOYMENT LAW

Buckley v. American Fast Freight, Inc.

In *Buckley v. American Fast Freight, Inc.*, 444 P.3d 139 (Alaska 2019), the supreme court held that expressly prohibited activities do not fall within the Alaska Workers' Compensation Act's definition of "arising out of and in the course of employment." Buckley worked for Labor Ready, Inc., a temporary employment service. Through Labor Ready, he sometimes worked for American Fast Freight, Inc. While working at American Fast Freight, Buckley attempted to help other employees dislodge a truck that was stuck in snow. In doing so, he got caught in a wheel and ultimately lost his arm. He brought a negligence action against American Fast Freight. The superior court granted summary judgment, finding that the exclusive liability provision of the Alaska Workers' Compensation Act barred the action. The finding was based in part on the conclusion that Buckley's injury arose out of and in the course of employment. In its analysis of the issue, the court found that the injury was reasonably foreseeable, and there was a strong nexus between Buckley's actions and the employment. The court deemed immaterial several facts showing that Buckley's actions resulting in the accident were prohibited by the employer, including a contract between American Fast Freight and Labor Ready. The supreme court reversed the summary judgment ruling and found that, based on facts conceded for the purposes of the summary judgment motion, the actions leading to the accident were outside the scope of employment. The statutory definition of "arising out of and in the course of employment" includes activities performed at the direction or under the control of the employer and activities sanctioned by the employer. As such, the supreme court reasoned that activities expressly prohibited by an employer are not within the scope of employment. The fact that Buckley's actions violated the contract between Labor Ready and American Fast Freight was material to determining whether his actions arose out of the course of employment. Reversing and remanding the lower court's grant of summary judgment, the supreme court held that expressly prohibited activities are not within the course and scope of employment as a matter of law.

Morrison v. Alaska Interstate Construction Inc.

In *Morrison v. Alaska Interstate Construction Inc.*, 440 P.3d 224 (Alaska 2019), the supreme court held that the substantial cause test under the 2005 amendments to the Alaska Workers' Compensation Act requires the Alaska Workers' Compensation Board to compare the causes of the need for medical treatment and decide compensation issues based on the most important or material cause. Morrison injured his knee at work for SKW Eskimos, Inc. in 2004, and he returned to work without issue for the next ten years. In 2014, while working for Alaska Interstate Construction, Inc., Morrison again injured his knee at work. When Alaska Interstate Construction contested its liability for medical care, the Alaska Workers' Compensation Board ruled the 2014 work injury was the substantial cause of Morrison's current need for medical care, so Alaska Interstate Construction—not SKW Eskimos—was responsible for continued care. On appeal, Alaska Interstate Construction argued the Board failed to adequately consider the extent to which the 2014 injury contributed to the need for medical care following the 2014 injury. Affirming the Board's interpretation of the causation requirement, the supreme court held that the Board must identify one cause as the substantial cause. The supreme court reasoned, based on legislative history, that the 2005 amendments narrowed the compensability standard for workers' compensation benefits by replacing the substantial factors test with the substantial cause test. In determining which cause was substantial, the Board retained flexibility because all its

determinations were fact-dependent. Affirming the Board's weighing of the relevant causes and ruling that the 2014 work injury was the substantial cause, the supreme court held the Board properly decided the compensation issue based on the most important or material cause.

Ross v. Alaska State Commission for Human Rights

In *Ross v. Alaska State Commission for Human Rights*, 447 P.3d 757 (Alaska 2019), the supreme court held an administrative agency's determination to be without error when, despite evidence detracting from its ultimate decision, the agency concluded there was insufficient evidence to support a claim of discrimination. Ross applied for the position of train master with the Alaska Railroad Corporation (the Railroad). After Ross was not selected for the position, he filed a complaint with the Alaska State Commission for Human Rights (the Commission) claiming he had been discriminated against by the Railroad based on race. After a series of proceedings, a superior court affirmed the Commission's final order concluding that Ross's complaint failed to prove discrimination. On appeal, Ross argued that the Railroad's stated reason for not selecting him was pretextual. The supreme court affirmed the lower court's decision, holding that there was not error in the Commission's determination that the Railroad's reasoning for not hiring Ross were not pretextual. The court reviewed the Commission's decision using the highly deferential substantial evidence test, but noted that the test ensures that evidence detracting from the agency finding is not dramatically disproportionate to the evidence supporting it. The supreme court affirmed, holding an administrative agency's determination to be without error when, despite evidence detracting from its ultimate decision, the agency concluded there was insufficient evidence to support a claim of discrimination.

Rusch v. Southeast Alaska Regional Health Consortium

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the supreme court held when there is a dispute over the issues on which an employee prevailed for determining attorneys' fees, the employer in a worker's compensation settlement has the burden to show lack of merit in the employee's claims. An attorney represented two injured employees of the Southeast Alaska Regional Health Consortium (SEARHC) who eventually resolved their claims and received substantial settlements. When they were unable to resolve the question of their attorneys' fees, the Alaska Workers' Compensation Board held hearings and awarded significantly reduced attorneys' fees, based on findings that the employees had not prevailed on certain claims and thus should not be awarded fees for related work. The Alaska Workers' Compensation Appeals Commission affirmed the decision, and the claimants appealed. The supreme court reversed and remanded, reasoning that the decisions contained multiple errors and awarded attorneys' fees that were "manifestly unreasonable." The court noted that fees must be adequate so that injured workers are able to access competent counsel. Additionally, the court held that the Board abused its discretion and denied due process when it failed to allow the claimants to call witnesses in determining reasonable attorneys' fees. The court held that in determining worker's compensation claimant's success for awarding attorneys' fees when other claims were settled, the employer has the burden of proving the worthlessness of a claim if it contends its conduct was a gratuitous response to a meritless claim.

Unisea, Inc. v. Morales de Lopez

In *Unisea, Inc. v. Morales de Lopez*, 435 P.3d 961 (Alaska 2019), the supreme court held that an employer must pay job dislocation benefits after receiving a Permanent Partial Impairment (PPI) rating and must pay PPI compensation after each employer's medical evaluation (EME) rating. Claimant Morales sustained on-the-job injuries, causing her orthopedic and psychiatric problems. In November 2014, Morales received her first EME, which indicated a 5% whole person permanent impairment from her orthopedic problems; one year later, Morales received a second EME from a psychiatrist who rated her as having a 10% impairment. Unisea did not pay Morales her job dislocation benefit or PPI compensation until February 2016, when it received, upon its request, an addendum from the psychiatrist. The addendum clarified that the 10% impairment rating was a whole person rating that, when combined with the orthopedic impairment, would be a 15% whole person impairment rating. On appeal, Unisea contended that it was not required to pay the job dislocation benefit until February 2016, when it received the addendum, because Morales did not have a combined whole person rating until then. It similarly contended that PPI compensation is due only after all conditions receive a maximum medical improvement (MMI) rating and a combined impairment is calculated, in part because Alaska law says that PPI compensation is "payable in a single lump sum." The supreme court rejected these arguments. Regarding the job dislocation benefit, the court held that Alaska law conditions payment on receiving a PPI rating, not a final, combined rating. Regarding the PPI compensation, the court held that Alaska law did not require all conditions to be at MMI before any condition can be rated. Furthermore, the court rejected Unisea's "single lump sum" argument, holding that this language merely distinguishes PPI compensation as a payment for impairment, rather than disability. Affirming the decision of the Workers' Compensation Appeals Commission, the supreme court held that job dislocation benefit and PPI compensation is due upon notice of the first impairment rating and further compensation is due upon notice of subsequent impairment ratings.

Warnke-Green v. Pro-West Contractors, LLC

In *Warnke-Green v. Pro-West Contractors, LLC*, 440 P.3d 283 (Alaska 2019), the supreme court held the Alaska Worker's Compensation Appeals Commission has the necessary incidental authority to reconsider its own non-final decisions. A worker injured in a work related accident won his appeal of the decision of the Alaska Worker Compensation Board on the compensability of a modifiable van. After his successful appeal to the Alaska Worker's Compensation Appeals Commission, the injured worker requested attorney's fees. The Appeals Commission awarded him less than half of what he had requested in attorney's fees. The Commission declined the worker's request to reconsider the award on the grounds that in its view the Alaska Worker's Compensation Act ("Act") only allowed them to reconsider the final decision on the merits of an appeal. The Court reversed the Commission's position that it could not reconsider, reasoning that, though the Alaska Worker's Compensation Act's relevant appeals section does not explicitly address any appeals other than those on the final merits, the power to reconsider its own non-final orders is included by implication. The court further reasoned that interpreting the Act consistent with the Commission having this implicit authority was consistent with the purpose of the Act, its own precedents in *Monzulla v. Voorhees Concrete Cutting*, and considerations of judicial efficiency in light of the requirement of exhaustion of administrative remedies. The Court also noted that procedurally reconsideration may be the only opportunity a party has to respond since the Commission's regulations governing motions do not allow replies to

opposition. Reversing the Alaska Worker's Compensation Appeals Commission, the supreme court held that the Act does not prohibit the Commission from reconsidering orders other than final decisions specifically described in the Act because that authority is necessarily incident in the Commission's express authority to "issue orders as appropriate."

EVIDENCE LAW

McDaniels v. State

In *McDaniels v. State*, 451 P.3d 403 (Alaska Ct. App. 2019), the court of appeals held that when determining if the government had good cause to deny a probationer's right to confront adverse witnesses against him, courts should weigh the probationer's interest in confrontation against the government's good cause for denying it. At Norman McDaniels' parole revocation hearing, a police officer testified that he had violated a protective order by contacting L.G., but L.G. did not testify at the hearing. The superior court revoked McDaniels' probation. McDaniels appealed, arguing his due process right to confront adverse witnesses was violated. The State contended that the hearsay evidence was sufficiently reliable to satisfy McDaniels' confrontation right. The court of appeals reversed, explaining that there is a due process right to confront adverse witnesses in a probation revocation hearing unless the government shows good cause to deny the right. The lower court erred in denying McDaniels' confrontation right without making a specific good cause finding. Furthermore, the court adopted the balancing test used in federal courts to determine if there is good cause. Courts must weigh the probationer's interest in confrontation, including the importance and reliability of the hearsay evidence, against the government's explanation as to why the witness cannot testify. Vacating and remanding the lower court's decision, the court of appeals held that when determining if there is good cause to deny a probationer's due process right to confront adverse witnesses, courts should weigh a probationer's interest in confrontation against the State's reasoning for not calling the witness.

Robbins v. State

In *Robbins v. State*, 449 P.3d 1111 (Alaska Ct. App. 2019), the appeals court held that where a testifying toxicologist personally reviewed, agreed with, certified, and was authorized to perform the kind of test that yielded results at issue, his testimony about those results did not violate the defendant's confrontation right. After a visibly impaired driver tested negative for alcohol in a breath test, his blood test results were processed by the Washington State Toxicology Laboratory which revealed several controlled substances in the driver's system. At trial, the State presented the blood results through the testimony of a toxicologist at the lab who was assigned to the defendant's case and who had certified the results but who did not perform all of the testing himself. On appeal, the driver argued that the toxicologist's testimony about the test that he certified but did not perform was impermissible hearsay testimony that violated the confrontation clause. Based on its reading of *Vann v. State* and Justice Sotomayor's concurrence in *Bullcoming v. New Mexico*, the appeals court reasoned that while not officially the actual tester's supervisor, the testifying toxicologist was responsible for reviewing and certifying the results and therefore was personally connected to the scientific test at issue. Affirming the lower court, the appeals court held that because the testifying toxicologist personally reviewed, agreed with, certified, and was authorized to perform the kind of test that yielded the disputed results, his testimony about those results did not violate the defendant's confrontation right.

State v. Cole

In *State v. Cole*, 452 P.3d 704 (Alaska Ct. App. 2019), the court of appeals held the superior court did not err in allowing the introduction of a videotaped statement under Alaska Rule of Evidence 801(d)(3). A 12 year old girl (“LP”) alleged she was sexually abused by Cole on two occasions. LP gave a videotaped statement describing the abuse to the police. At trial, Cole argued the videotaped statement was inadmissible hearsay as the foundational requirements under Alaska Rule of Evidence 801(d)(3) were not met. Specifically, Cole argued the State failed to identify each person participating in the taking of the statement as required by Rule 801(d)(3)(E) because the observers in the adjoining room were not identified. The Court of Appeals emphasized the legislative rationale for the hearsay exception as providing child victims a safe venue to testify. They also stressed that while the observers were not identified on the tape, their names were identified on the front page of the transcript given to the defense. The court of appeals held the State had not violated Rule 801(d)(3) by not identifying the observers on the tape, and consequently, the superior court did not err in allowing its introduction.

State v. Sharpe

In *State v. Sharpe*, 435 P.3d 887 (Alaska 2019), the supreme court held that *Daubert/Coon* determinations on the admissibility of scientific evidence should be subject to the independent judgment of the appellate court as to whether the underlying scientific theory or technique is scientifically valid under the first prong of the *Daubert* analysis.^[1] The case consolidated three cases in which the defendants, Thomas Alexander, Jzyk Sharpe, and Jeffery Holt, sought to admit a comparison question technique polygraph examination into evidence. A two-day evidentiary hearing was held on the admissibility of Alexander’s polygraph examination where it was determined that the evidence met the *Daubert/Coon* requirements for scientific validity. Subsequently, the State moved in Sharpe’s case to exclude his polygraph examination. No new evidentiary hearing was held as to Sharpe’s evidence; the superior court relied on the record and evidence presented in Alexander’s evidentiary hearing. The superior court held the examination admissible on the same reasoning. A third superior court examined the same record and order in Alexander’s evidentiary hearing to determine the admissibility of Holt’s polygraph examination. The court determined that the evidence was not sufficiently reliable to be admitted. Parties filed appeals in all three cases. The court of appeals urged the supreme court to reconsider the prior standard of review established in *State v. Coon*, abuse of discretion. The supreme court held that the prior standard of review understated the potential for inconsistent rulings on the admissibility of scientific evidence to a level that undermined the integrity of the court. The court determined that the dissent in *Coon* correctly identified that the abuse of discretion standard would likely lead to inconsistent application in similar situations. The court reasoned that the posture of these three cases, which relied on the same evidentiary hearing but arrived at different results, demonstrated this inconsistency. The supreme court held that *Daubert/Coon* determinations on the admissibility of scientific evidence should be subject to the independent judgment of the appellate court as to whether the underlying scientific theory or technique is scientifically valid.

Wahl v. State

In *Wahl v. State*, 441 P.3d 424 (Alaska 2019), the supreme court held that the former-testimony exception to the hearsay rule does not require the opposing party to have had an identical motive to develop the testimony during the previous proceeding; it further held that the superior court did not abuse its discretion in ruling that Wahl did not use reasonable means to procure

Hardwick's testimony merely because Wahl did not seek out the state's or court's resources for help. In 2013, Wahl went to trial for the murder of Orcutt. Wahl's primary defense was that Hardwick was likely responsible for Orcutt's murder. After a defense investigator conducted a thorough search for Hardwick to no avail, Wahl sought to introduce Hardwick's grand jury testimony under Alaska Evidence Rule 804(b)(1), which provides that the hearsay rule does not exclude certain former testimony of an unavailable declarant. The superior court denied Wahl's request on three grounds, two of which are discussed below. First, the court ruled that the defense did not use reasonable means to secure Hardwick's attendance, emphasizing that Wahl did not ask the state or the court for help. Second, the court noted that the former-testimony rule did not apply because the State did not have a similar motive to develop Hardwick's testimony. Affirming the superior court's ruling, the supreme court held that the lower court did not abuse its discretion in determining that Hardwick was not unavailable solely because Wahl did not ask the state for help, even when such a request might have been futile. However, the supreme court rejected the lower court's second rationale: that the State did not have a similar motive. In so holding, the court adopted a broad interpretation of the "similar motive" language in Rule 804(b)(1) and rejected the "similar intensity of motive" test. The court held that the latter test is contrary to the rule's plain language, which requires a similar but not identical motivation. Applying the rule to Wahl's case, the court concluded that the State had the same motive during the trial and grand jury proceedings: to establish that Wahl committed murder. Affirming in part and reversing in part the superior court, the supreme court held that the former-testimony exception to the hearsay rule does not require the opposing party to have had an identical motive to develop the testimony during the previous proceeding; it further held that the superior court did not abuse its discretion in ruling that Wahl did not use reasonable means to procure Hardwick's testimony merely because Wahl did not seek out the state's or court's resources for help.

FAMILY LAW

Berry v. Coulman

In *Berry v. Coulman*, 440 P.3d 264 (Alaska 2019), the supreme court held that the definition of "residence of the obligor," as that term is used in the Uniform Interstate Family Support Act (UIFSA), means domicile. Following a 2011 court order, Berry was required to pay child support to Coulman monthly for their daughter. After Berry filed suit requesting sole legal and physical custody of their daughter, Coulman filed a motion to modify child support. In response, Berry claimed, *inter alia*, that the superior court did not have jurisdiction. However, the superior court found it had jurisdiction and increased Berry's child support payments. On appeal, Berry again raised his jurisdictional argument, claiming the superior court did not have jurisdiction because neither he nor Coulman nor their daughter lived in Alaska. In finding jurisdiction under UIFSA, the supreme court held that the definition of "residence of the obligor" means domicile. First, the supreme court noted Alaska's general residency statute focuses on an individual's intent to remain in the state, which is key to the concept of domicile. Second, the court found a narrow definition of residence was necessary to achieve the purpose of UIFSA, i.e. to ensure only one child support order would be valid at one time; since a person can only have one domicile, residence meant domicile. Affirming the superior court's jurisdiction, the supreme court held that residence of obligor under UIFSA means domicile.

Brett M. v. Amanda M.

In *Brett M. v. Amanda M.*, 445 P.3d 1005 (Alaska 2019), the supreme court upheld the superior court's custody decision, finding that decision did not violate the law governing custody decisions. Amanda filed for divorce from her husband, Brett. During the marriage, Amanda was the primary caregiver while Brett provided financial support. Amanda wanted to move from Juneau to Oregon for work, and sought primary physical custody of the children. The superior court granted Amanda physical custody. On appeal, Brett argued that the court impermissibly based its decision on Amanda's primary caregiver status, and failed to engage in proper symmetrical analysis regarding the effect of Amanda's planned relocation on the children. The supreme court affirmed the lower court's decision. The supreme court found that the lower court did engage in symmetrical analysis by considering the effect on the children of living with each parent and away from the other parent, and properly considered the impact of the move on both the geographic and emotional stability of the children. While status as primary caregiver is not determinative in a custody decision, a parent's primary caregiver role is a relevant social and emotional factor that should be considered. Upholding the superior court's custody decision, the supreme court held that the superior court properly applied the law governing custody decisions.

Charles S. v. State

In *Charles S. v. State*, 442 P.3d 780 (Alaska 2019), the supreme court held a father's successful completion of substance abuse treatment and two years of sobriety remedied his substance abuse issues and thus reversed the trial court's termination of parental rights order. In 2015, the Office of Child Services ("OCS") took Charles and Marian S.'s three children into custody. After ten reports of neglect and parental substance abuse from 2010 to 2014, OCS removed the children from Charles' home and assumed emergency custody. Over the next three years, the parents worked through therapy and counseling while the OCS monitored their visits with the children. The superior court issued a termination order of their parental rights citing they had not "exhibited an ability to implement the necessary skills so that the children can be safely returned to their care." Charles appealed the ruling arguing that his completion of all case plan requirements, recommended services, and success in stopping his continued drug use remedied his conduct sufficiently for his parental rights to not be terminated. OCS argued his long history of methamphetamine use meant his two-year sobriety would be instable and its continuity would be too speculative to grant parental rights. The supreme court noted however that Charles had been clean for two years, has no history of relapses, and acknowledged his issues and demonstrated a commitment to stay sober. Citing it would be difficult for any parent to show they had remedied their conduct if they ruled otherwise, the supreme court held the superior court clearly erred when it found Charles failed to remedy his substance abuse issues.

Dapo v. State, Office of Children's Services

In *Dapo v. State, Office of Children's Services*, 454 P.3d 171 (Alaska 2019), the supreme court held that although the statute of repose applied to a claim for apportionment of fault, the claim may be covered by the statute's exceptions for gross negligence and breach of fiduciary duty. In 2000, Office of Children's Services (OCS) placed Dapo in Lucas's foster home. Several years later, according to Dapo, Lucas began sexually abusing him; however, according to Lucas, Dapo was sexually abusing her. In 2015, Dapo filed a claim against Lucas alleging that she had sexually abused him when he was a minor. Lucas subsequently filed a third-party claim against OCS for apportionment of fault, claiming that OCS had a duty to protect Dapo and negligently

failed to protect him. Lucas later assigned to Dapo any rights she would have to recover on the apportionment claim in exchange for a complete release from liability for his sexual abuse claim against her. After analyzing relevant legislative history and the statute governing apportionment of damages, the supreme court concluded that the legislature intended the statute of repose to apply to apportionment claims based on personal injury, death and property damage. The court further noted that, unlike the statute of limitations, the statute of repose is intended to completely extinguish a defendant's liability after a fixed period of time and is meant to act as an absolute bar to recovery. However, the court noted that exceptions in the statute of repose might apply, depending on unresolved issues of fact. Discussing the gross negligence exception, the court held that OCS had a duty to exercise reasonable care when placing Dapo in foster care with the Lucases. Moreover, the court held that if OCS breached this duty, it would be irrelevant that the harm did not occur until after OCS did not have that duty. Additionally, the court held that for the purposes of the breach of fiduciary duty exception, the relationship between OCS and children in its legal custody is a fiduciary relationship. Reversing the superior court, the supreme court held that the statute of repose applied to the claim of apportionment assigned to Dapo, but that the claim might fall within the gross negligence or breach of fiduciary duty exceptions.

Dena M. v. State, Department of Health – Social Services

In *Dena M. v. State, Department of Health & Social Services*, 442 P.3d 755 (Alaska 2019), the supreme court held it is not error to order termination of parental rights rather than guardianship if termination is in the child's best interest. After the Office of Children's Services (OCS) filed a petition to terminate parental rights, the superior court terminated the parental rights of a mother and father, based on a risk of harm and parental alcohol addiction, finding "no other realistic option." Both parents appealed and argued that the court erred by holding termination of parental rights was in the children's best interests without considering guardianship first. The supreme court held that the superior court implicitly considered guardianship because it heard testimony about whether guardianship was in the children's best interests and actively questioned it. Additionally, the court reasoned that agreeing with the testimony supporting termination did not mean the superior court erred. The supreme court held it was not error to find that termination of parental rights was in the children's best interests rather than guardianship.

Downs v. Downs

In *Downs v. Downs*, 440 P.3d 294 (Alaska 2019), the supreme court held that a spouse's contributions to the marital estate may be considered when determining property division in a divorce proceeding. In the divorce proceeding between Errol and Deborah Downs, the superior court ordered an unequal property division in favor of Deborah. On appeal, Errol challenged the court's property division, arguing that the court improperly considered Deborah's and her parents' contributions to the marriage. He contended that the contributions were marital property, and so should have been divided equally between the parties. The supreme court affirmed the lower court's decision, explaining that the lower court did not improperly view the contributions as separate property to be returned to Deborah. Rather, it considered Deborah and her family's contributions to the marital estate as a relevant factor in deciding how to divide the property. Such consideration was within the bounds of the trial court's discretion. Affirming the lower court's decision, the supreme court held that a trial court may consider a party's contributions to the marital estate as a relevant factor when deciding how to divide marital property.

Dunn v. Jones

In *Dunn v. Jones*, 451 P.3d 375 (Alaska 2019), the supreme court held it was not an abuse of discretion to calculate a parent's annual income based on a single paystub in order to determine child support. Nicholas Ryan Dunn filed a motion to modify child support because his income had decreased. The trial court calculated his income based on the second highest of the four paystubs he submitted to the court. On appeal, Dunn argued that the trial court abused its discretion by using only one paystub to calculate his annual income rather than averaging all of the paystubs together. The supreme court affirmed the lower court's calculation, reasoning that child support amounts are meant to accurately reflect a parent's economic reality. The trial court could have reasonably determined that the lesser paystubs, the first Dunn received from a new job, were not accurate indicators of his economic reality. Affirming the lower court's decision, the supreme court held that it was not an abuse of discretion to calculate an annual income based on one paystub for child support purposes.

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

In *Eva H. v. State, Department of Health & Social Services*, 436 P.3d 1050 (Alaska 2019), the supreme court held a guardian ad litem with no formal training in social work did not satisfy the heightened standard required by the Indian Child Welfare Act to qualify as an expert witness. The Office of Children's Services (OCS) petitioned to terminate the parental rights of the mother and father of two Indian children subject to the Indian Child Welfare Act (ICWA). The superior court issued an order terminating the parental rights of both parents. On appeal, the father challenged the court's finding that expert witness Deborah Reichard was a qualified expert witness under ICWA. The supreme court reversed the termination order, finding that Reichard's testimony did not satisfy the heightened standard under ICWA because she had no formal training or professional tools, other than experience as an attorney and guardian ad litem, to recognize mental health issues. ICWA requires an expert to be qualified to address whether the conditions of custody were a threat to a specific child's well-being through a showing of causation. Additionally, the expert witness must have expertise beyond the qualifications of a "normal" social worker. The court found that Reichard's testimony did not support a finding that she was qualified under ICWA to testify about the key issue of whether returning the children to their parents was likely to result in serious emotional or physical damage. The supreme court reversed the superior court's termination order, holding a guardian ad litem required more formal training than experience as an attorney in order to meet the heightened standard for qualification as an expert witness under ICWA.

Faris v. Taylor

In *Faris v. Taylor*, 444 P.3d 180 (Alaska 2019), the supreme court held the trial court did not abuse its discretion when it held the date of the parties' separation was the date the court issued the divorce decree. Taylor and Faris were married in 1973, but after a promotion Faris moved to Hawaii and then Oregon while Taylor remained in Alaska. In 2013, Taylor filed for divorce. The superior court issued an order dividing the marital estate and held the couple had not separated until the divorce in 2014. Faris appealed alleging the superior court incorrectly decided when the date of separation had been. The superior court relied on evidence, such as letters from Faris explicitly stating she "did not want a divorce", to argue that while physically separated in 2004, the couple did not have the intent to separate until 2014. The supreme court held that there was

sufficient evidence, including filing joint taxes until 2014, to support the superior court's decision in determining the date of separation was in 2014.

Gambini v. Hamilton

In *Gambini v. Hamilton*, 440 P.3d 184 (Alaska 2019), a divorce case with a variety of issues, the supreme court held that a loan to the ex-husband secured by the ex-wife's property and taken out prior to the marriage was a marital obligation. To pay off Hamilton's financial obligations from his dissolving prior marriage and speed along those divorce proceedings so that he could marry Gambini, the couple took out a home equity line of credit (HELOC) secured by Gambini's cabin. Gambini argued that the HELOC was a personal loan to Hamilton: it was made prior to their marriage and used to assist Hamilton with expenses related to his prior marriage. The superior court recognized a presumption that property is separate if acquired before the marriage, but nevertheless held that the couple's shared use of the funds to begin their marriage made the HELOC a marital obligation. On appeal, the supreme court noted that the superior court's reasoning was partly flawed because the mere intent to share property is distinct from the intent to make that property marital. However, additional evidence in the record supported the superior court's finding of marital intent. The couple made post-marital payments on the HELOC from a joint account, failed to document any separate debts within the loan, and eventually "roll[ed]" the loan into a second, post-marital withdrawal. The supreme court affirmed the superior court's holding that the loan to the ex-husband secured by the ex-wife's property and taken out prior to the marriage was a marital obligation.

Hall v. Hall

In *Hall v. Hall*, 446 F.3d 781 (Alaska 2019), the supreme court held that an ex-husband was not entitled to a *Ramsey* credit for his post-divorce mortgage payments because he had been living rent-free in the marital home; however, because the trial court did not sufficiently explain its ruling on that issue, a meaningful review of the order allocating the sale proceeds from the home was impossible. During their divorce, Bertha Hall moved out while Adolph Hall continued living rent-free in the marital home. Until the property sold two years later, Adolph paid the mortgage. The superior court denied reimbursement to Adolph for those mortgage payments, citing Bertha's argument that any reimbursement would be in the form of a *Ramsey* credit and would therefore need to be offset by Adolph's imputed rent. On appeal, the supreme court held that *Ramsey* applies to payments made to maintain marital property from post-divorce until the time of sale, and that the superior court was required to conduct a *Ramsey* analysis, complete with written findings explaining its decision. However, the supreme court vacated the superior court's order and remanded, noting that the ruling below did not explain whether Adolph was denied a *Ramsey* credit or instead whether *Ramsey* was inapplicable in this case because the parties had divorced more than two years prior. The supreme court held that Adolph was not entitled to a *Ramsey* credit for his post-divorce mortgage payments because he had been living rent-free in the marital home; however, because the superior court did not sufficiently explain its ruling, the order allocating the sale proceeds from the home was vacated and remanded for additional written explanation.

Jessica J. v. State

In *Jessica J. v. State*, 442 P.3d 771 (Alaska 2019), the supreme court held that the superior court was correct in not considering the best interest of the child as part of an Interstate Compact for Juveniles (ICJ) requisition proceeding. Fifteen year-old Jessica traveled from Iowa to Alaska to spend the summer with family friends with her mother's permission. Her mother subsequently changed her mind and told Jessica to return to Iowa, but she refused. Jessica's mother filed a petition and supporting documents under ICJ Rules in the Iowa courts to seek Jessica's forced return. Upon receipt of the paperwork, Alaska's attorney general requested a hearing in the Alaska superior court. The superior court determine that there was no authority to conduct a best-interests hearing in Alaska, determined the requisition paperwork was in order, and ordered Jessica's forced return to Iowa. On appeal, Jessica argues that the superior court erred in not conducting a best-interests analysis before ordering her return to Iowa. The supreme court held that the superior court was correct in not considering the best interest of the child as part of the ICJ requisition proceeding. The supreme court found that the home state was the correct forum to address the best-interests determination of the child, including suspicions of abuse or neglect. The supreme court determined that a plain language reading of the applicable ICJ rule places this responsibility in the home state. The supreme court further reasoned that the legislative history of the ICJ demonstrated a need for uniformity among states. Finally, the supreme court notes that other states have come out on either side of this issue, but that the reasoning it found more persuasive was that the home court is in a better position to make the determination given that it has the more significant, established, and longer-term contacts with the child. The supreme court affirmed the superior court, holding that a best-interest inquiry was not part of the ICJ requisition proceeding and ordering the return of Jessica to Iowa.

John E. v. Andrea E.

In *John E. v. Andrea E.*, 445 P.3d 649 (Alaska 2019), the supreme court ruled the trial court abused its discretion in a child custody modification action when it excluded testimony by the child's psychologist. A couple of years after the mother was granted primary physical and sole legal custody of their 12 year old daughter, the mother repeatedly hit her daughter as punishment. After the assault, the father took custody of the daughter pending the outcome of the custody modification action. A couple of months after the incident and shortly before a hearing on custody modification, the father took the daughter to see a psychologist. The psychologist was scheduled to testify at the hearing, but the trial court excluded the evidence because the visit was driven by litigation and overstepped the father's legal authority. The supreme court reversed, holding the trial court had abused its discretion by excluding the psychologist's testimony. The supreme court found the trial court excluded the psychologist's testimony as a sanction for the father overstepping his legal authority. Instead, the trial court should have primarily been concerned with the with the daughter's best interest. Reversing the trial court, the supreme court held the trial court abused its discretion in a child custody modification action when it excluded testimony by the child's psychologist.

Joy B. v. Everett B.

In *Joy B. v. Everett B.*, 451 P.3d 365 (Alaska 2019), the supreme court held that the lower court could consider evidence other than the completion of a batterer's program in determining whether a parent with a history of domestic violence overcame the rebuttable statutory presumption against his being awarded child custody. After a hearing on temporary orders, the

trial court found that Everett B. had a history of domestic violence, giving rise to a rebuttable presumption that he should not be awarded custody. Everett attempted to enroll in an intervention program, but was rejected because a social worker determined that he had been the victim, not the perpetrator, of domestic violence. The trial court, relying on testimony from the social worker and a custody investigator, found that Everett had overcome the statutory presumption against him, and awarded him full custody. On appeal, Joy argued that the trial court erred, because Everett did not complete a batterer's program, which is one of the three elements that must be satisfied in order to overcome the presumption. The supreme court affirmed the lower court's decision, explaining that while the first element "may" be satisfied by completing a batterer's program, it also may be satisfied by other means. Everett satisfied the first element because the court found, based on expert testimony, that he would not benefit from the program and did not pose a future threat of domestic violence. The supreme court additionally found that the lower court did not err in also considering the nature and seriousness of the domestic violence. Affirming the lower court's decision, the supreme court held that a parent with a history of domestic violence may overcome the rebuttable presumption against him in a custody dispute by means other than the completion of a batterer's program.

Oliver N. v. State, Department of Health & Social Services

In *Oliver N. v. State, Department of Health & Social Services*, 444 P.3d 171 (Alaska 2019), the supreme court held new federal regulations issued by the Bureau of Indian Affairs (BIA) materially changed the qualifications required of an expert testifying in a child in need of aid case under the Indian Child Welfare Act (ICWA). The BIA issued formal regulations in December 2016 to ensure consistency in the application of ICWA. The regulations required experts that could formerly qualify to give testimony about cultural and social standards in a tribe to also be qualified to testify about the causal relationship between the child's conditions and the likelihood those conditions would result in serious emotional or physical damage. Two parents separately appealed orders terminating parental rights under the new regulations, arguing that the expert witnesses at their respective trials were not qualified to testify as witnesses about whether returning to the parent's care would result in serious harm to their children. Both expert witnesses were qualified to testify about tribal customs and values. The supreme court reversed the orders, finding that under the new regulations, neither expert witness qualified under ICWA. The court reasoned the requirements of the new regulations apply to experts on tribal customs if they are the only expert to testify in the case. Because the experts in the consolidated orders were the only experts to testify, they were required to have sufficient expertise to testify whether returning the child to the parent's care would be likely to result in serious emotional or physical damage. The supreme court held they did not have sufficient expertise as required by the new federal regulations and reversed the order terminating parental rights.

Perry v. Perry

In *Perry v. Perry*, 449 P.3d 700 (Alaska 2019), the supreme court held that a court must presume that debt incurred during marriage is marital when equitably dividing marital assets upon divorce, and that a court may not rely solely on W-2s to determine income for child support purposes without considering other contrary and more recent evidence before it. Adam and Kyoko Perry married in November 2005 and have two children. Kyoko continued her education while married, incurring roughly \$84,000 in debt to obtain her bachelor's and master's degrees. In 2017, Adam filed for divorce and moved for interim child support. During the property

division proceedings, the superior court determined that not all of Kyoko's student loans were marital after judging the credibility of the parties. Additionally, in calculating child support, the court stated that it would rely solely on the parties' W-2s. Vacating the superior court's property distribution order, the supreme court held that the lower court reversed the presumption that all debt is marital by concluding that because Adam had expressly agreed only to incur debt toward Kyoko's bachelor's degree, they had not intended to make the master's degree debt marital. The court also vacated the lower court's child support determination, holding that a court must examine all available evidence to make the best possible calculation and take all evidence necessary to accurately reflect the parties' economic reality. It was thus error for the superior court to rely on the parties' W-2s to the exclusion of other and more recent evidence. Reversing the lower court, the supreme court reiterated the presumption that all debt incurred during marriage is marital and that, in determining child support, a court should consider all relevant evidence before it to make the best calculation.

Regina C. v. Michael C.

In *Regina C. v. Michael C.*, 440 P.3d 199 (Alaska 2019), the supreme court held that a mother committing the crime of custodial interference was a solid foundation for the superior court to modify the physical custody of her children. Regina and Michael C. were married in 2000 and had two children. In 2014, the couple divorced and in the proceedings, the superior court granted Regina temporary custody of the children after finding Michael had engaged in domestic violence against her. Regina left Alaska with the children before the court ruled in 2016 that she would have sole legal and primary physical custody of the children. Michael was granted substantial periods of visitation, including the children's summer vacations. In July 2016, Regina failed to place the children on a flight to Alaska to visit Michael. Michael responded by moving for an order to make Regina show cause for the failure and to entertain a change in custody. After another hearing, the superior court found Regina committed first-degree custodial interference and ordered an immediate transfer of custody of the children to Michael. Because Michael was a "lawful custodian" of the children during the summer visitations, Regina had a legal obligation under AS 11.41.330(a)(1) to not keep the children from her. The court investigator found that Regina "brainwashed the children into believing Michael is a monster[]" and had in fact intentionally kept the children with her for the summer. The supreme court affirmed the lower court's order and held that a mother committing the crime of custodial interference was a sufficient foundation for the superior court to modify the physical custody of her children.

Sabrina V. v. State, Department of Health and Social Services

In *Sabrina V. v. State, Department of Health and Social Services*, 442 P.3d 717 (Alaska 2019), the supreme court held that it was not an abuse of discretion for the superior court to decline to allow Sabrina V.'s untimely withdrawal of her voluntary relinquishment of parental rights. Sabrina V. signed a relinquishment of her parental rights to her son Kaleb D., which provided that she could withdraw it for any reason within ten days after signing it. When the agreement was signed, the Office of Children's Services was considering Kaleb D.'s paternal grandmother as a possible adoptive parent. However, due to the grandmother's poor health, the adoption fell through. After receiving notice of the failed adoption, Sabrina V. signed a notice that she was withdrawing her relinquishment agreement, which had been filed fifteen days earlier. Affirming the lower court's decision to not allow Sabrina V. to terminate her relinquishment agreement, the supreme court assumed, without deciding, that the court had the

discretion to accept her late withdrawal notice. But it nevertheless held that the lower court did not abuse its discretion. First, the supreme court noted that the lower court's rejection of Sabrina V.'s withdrawal notice as untimely was not unreasonable because the ten-day withdrawal deadline of the agreement applied. Second, the court held that it was not unreasonable for the court to conclude that the failed adoption did not provide grounds to reconsider termination because the agreement expressly acknowledged that the adoption might fail for some reason. Even though Sabrina V. had the statutory right to consent only to the grandmother's adoption, the relinquishment agreement that she signed was unconditional. Thus, the supreme court held that it was not arbitrary for the lower court to deny to terminate Sabrina V.'s relinquishment agreement.

Saffir v. Wheeler

In *Saffir v. Wheeler*, 436 P.3d 1009 (Alaska 2019), the supreme court held that the superior court erred by failing to engage in proper symmetrical analysis of childcare stability and continuity in a child custody dispute, but did not abuse its discretion in not ordering protective measures to ensure the father's sobriety while caring for the child. Saffir sought primary custody of her daughter and expressed desire to move with the child to New York because Wheeler's drinking habit and work schedule allegedly interfered with his ability to parent. Because Saffir planned to leave the state, the superior court considered the eight factors necessary to determine the child's best interest under AS 25.24.150(c), notably including maintaining the child's continuity in a stable living environment. The superior court awarded primary custody to Wheeler if Saffir moved to New York and split custody if Saffir remained in Alaska, in part for the purpose of maintaining the child's stability and continuity in Alaska. The superior court further declined to impose conditions requiring Wheeler to demonstrate sobriety while parenting. Saffir appealed six of the superior court's best-interest findings based on unfair weighing, and argued that the superior court abused its discretion in declining to impose sobriety tests. On appeal, the supreme court found that the superior court had not applied the proper symmetric considerations when it analyzed the stability and continuity factor. Specifically, superior court did not properly consider the impact that being separated from Saffir would have on the child if Saffir moved to New York, despite finding that Saffir was the child's primary care giver. The supreme court ruled that this failure to engage in proper symmetrical analysis constituted error. Secondarily, the supreme court found that the superior court's decision to not impose parental sobriety tests on Wheeler was within its discretion when considering conflicting evidence, and therefore did not constitute clear error. Vacating and remanding in part and affirming in part, the supreme court held that the superior court erred by failing to engage in proper symmetrical analysis in the child custody dispute, but did not abuse its discretion in not ordering protective measures to ensure the father's sobriety while caring for the child.

Schwier v. Schwier

In *Schwier v. Schwier*, 446 P.3d 354 (Alaska 2019), the supreme court found that a father made a sufficient prima facie showing of changed circumstances which warranted an evidentiary hearing on a possible modification to an existing child support order. After being indicted on federal charges, Matthew Schwier was placed on house arrest and resigned from his job. Schwier filed a motion to have his existing child support obligation modified based on a substantial reduction in income due to involuntary unemployment. Under Alaska Civil Rule 90.3, a parent may be granted a modification of child support based on a "material change of circumstances," which will be presumed if there is a change in income of over 15%. After the court initially denied his

motion on the grounds that he had failed to provide sufficient evidence of the reduction of income and the permanency of his unemployment, he refiled, attaching an income affidavit and arguing that his house arrest qualified as involuntary unemployment. The superior court again denied his motion without a hearing and without any extended findings of fact. On appeal, the supreme court reviews de novo the decision of a lower court to not hold an evidentiary hearing on a motion for a child support modification. The supreme court found that a court could only decline to hold an evidentiary hearing if the allegations contained within the motion are conclusory and raise no genuine issue of material fact. Finding that Schwier had met his prima facie burden through the submission of his income affidavit and explanation of his changed circumstances, the supreme court held that the superior court had erred by denying him an evidentiary hearing.

Steve H. v. State

In *Steve H. v. State*, 444 P.3d 109 (Alaska 2019), the supreme court held that the superior court did not clearly err in finding that a father had abandoned his child and terminating parental rights without consideration of the two-part common law test applied in other abandonment cases. Steve's son was taken into emergency custody by the Office of Children's Services (OCS) due to his mother's substance abuse. Over the course of two years, Steve had had prolonged absences from his son during which he failed to regularly visit or communicate with his son's mother or OCS. He failed to meaningfully participate in OCS's case plan requiring him to submit drug tests, regularly visit his son, and maintain communication with OCS. As a result, the superior court concluded that Steve abandoned his son and terminated parental rights. On appeal, Steve argued that the court failed to find that his conduct satisfied the two-part common-law test that had been applied in previous child abandonment cases. The supreme court held that the supreme court did not clearly err in finding that Steve had abandoned his son and terminating parental rights. The supreme court found that because the termination of parental rights is a statutory procedure, the court properly applied the statutory rule governing abandonment and not the common-law test. The supreme court affirmed, holding that the superior court did not clearly err in finding that a father had abandoned his child and terminating parental rights without consideration of the two-part common law test applied in other abandonment cases.

Thompson v. Thompson

In *Thompson v. Thompson*, 454 P.3d 981 (Alaska 2019), the supreme court held a 70/30 division of a fishing boat to be an inequitable split of marital property when the rest of the marital estate was divided 55/45. At some point during the marriage of Everett Thompson, a commercial fisherman, and Sharon Thompson, the couple purchased the fishing vessel F/V NORTHERN FLYER. Sharon subsequently filed for divorce. In dividing the marital estate, the trial court determined that the overall estate would be divided 55/45 in Sharon's favor, but the F/V NORTHERN FLYER would be divided 70/30 in Everett's favor due to his perceived disproportionate contribution to the boat's operation and upkeep. On appeal, Everett argued that the decision to award him more of the equity in the F/V NORTHERN FLYER than in the rest of the marital estate was justified by the minimal involvement of Sharon in the fishing business. The supreme court vacated the lower court's decision regarding the division of the F/V NORTHERN FLYER, holding that the split was unjust in light of Everett's inability to demonstrate that statutory factors allowing for unequal division of marital property favored him. The court noted that the fact that one spouse's qualifications allow the couple to acquire an asset

does not alter the marital character of an asset. The supreme court vacated and remanded, holding a 70/30 division of a fishing boat to be an inequitable split of marital property when the rest of the marital estate was divided 55/45.

Violet C. v. State, Department of Health & Social Services

In *Violet C. v. State, Department of Health & Social Service*, 436 P.3d 1032 (Alaska 2019), the supreme court held that the Office of Child Services (OCS) must make reasonable efforts to provide services to parents who face permanent termination of their parental rights, but its efforts need not be perfect. Following concerns over the mother's substance abuse and the father's incarceration in another state, OCS assumed custody of the children. After the mother notified OCS of her hearing disabilities and transportation issues, OCS provided her with accommodations, including transportation services. Although the transportation services were sometimes unavailable, the mother sometimes failed to take advantage of services arranged by OCS even when she had transportation available. OCS also tried to contact the father and set up services for him in Texas but was often unable to reach him through the contact information he provided, his attorney, or the jail. On appeal, both parents argued OCS's efforts were not reasonable, as required by law. The supreme court ruled OCS's efforts were reasonable even though they were not perfect. The court emphasized that a parent's willful failure to participate in treatment could be considered when determining if OCS's efforts were reasonable. Affirming the trial court's permanent termination of parental rights, the supreme court held that OCS's efforts to provide services to parents who face termination of their parental rights must be reasonable but need not be perfect.

Wilkins v. Wilkins

In *Wilkins v. Wilkins*, 440 P.3d 194 (Alaska 2019), the supreme court held that failure to value a party's post-retirement health benefits for purposes of property division in legal separation or divorce proceedings is a reversible error. A key issue in the legal separation proceeding between Paul and Yvette Wilkins was ensuring that Ms. Wilkins' was left with sufficient medical insurance due to her serious medical condition. In the lower court's property division order, the court ordered Ms. Wilkins to refinance the marital home in her own name to free Mr. Wilkins from mortgage obligations. In exchange, Mr. Wilkins was to pay spousal support and pay for Ms. Wilkins' COBRA coverage. The superior court reasoned that this exchange eliminated the need to put a value on Mr. Wilkins' post-retirement health benefits. On appeal, the supreme court reversed the lower court's ruling, explaining that in equitably dividing marital assets courts must (1) decide what property must be divided, (2) value that property, and (3) divide the property equitably. An "equalization payment" does not constitute a valuation of assets. Without a valuation, there is no way to review whether the property division was equitable. Additionally, while in an earlier case the supreme court had endorsed a premium subsidy approach to valuing post-retirement health benefits, in *Wilkins* it recognized that there are other means of valuation, and a trial court may exercise its own discretion regarding expert witness methods of valuation. Reversing the lower court's decision, supreme court held that failure to value a party's post-retirement health benefits for purposes of property division in legal separation or divorce proceedings is a reversible error.

HEALTH LAW

In re Hospitalization of Danielle B.

In *In re Hospitalization of Danielle B.*, 453 P.3d 200 (Alaska 2019), the supreme court found, upon review of an involuntary commitment petition, that sufficient evidence supported a finding that involuntary hospitalization was the least restrictive treatment option. When Danielle was evicted from a motel, she assaulted a police officer at the scene and then threatened to assault staff when she arrived at a hospital. During an involuntary commitment hearing, an Alaska Psychiatric Institute (API) psychiatrist testified that Danielle had schizoaffective disorder. He also testified that involuntary commitment was the least restrictive treatment option because Danielle's history showed she would not do well in outpatient treatment. The special master and superior court both credited the psychiatrist's testimony and discounted Danielle's vague testimony that she could find an alternative outpatient treatment program, so the superior court ordered Danielle committed for up to 30 days. On appeal, Danielle argued the state did not show involuntary commitment was the least restrictive treatment option because the state did not prove community-based treatment options were inadequate to protect her and the public. The supreme court affirmed the commitment order holding the finding that involuntary commitment was the least restrictive treatment option was supported by sufficient evidence. The supreme court noted the API psychiatrist and Danielle both testified that she would not participate in the one outpatient treatment option both parties had identified. The supreme court also stated the special master and superior court both adequately weighed the testimony. Affirming the lower court, the supreme court held sufficient evidence supported a finding that involuntary hospitalization was the least restrictive treatment option.

In re Hospitalization of Luciano G.

In *In re Hospitalization of Luciano G.*, 450 P.3d 1258 (Alaska 2019), the supreme court held the evidence in an involuntary commitment order sufficiently supported a finding that the detainee was likely to cause harm to himself or others. After becoming belligerent with an airport ticketing agent, Luciano G. balled his fists and refused to cooperate with an airport security agent. Airport police also found Luciano had unlocked bags with him that contained multiple guns, many of which were loaded, in violation of regulations. A psychiatrist at Alaska Psychiatric Institute (API) also testified that after being involuntarily committed, Luciano would make intense, intimidating stares at him during their sessions. A magistrate found Luciano threatening and likely to cause harm to others, and the superior court affirmed those factual findings and signed a 30-day commitment order. On appeal, Luciano argued he was not likely to cause harm to others because he had not assaulted anyone or made verbal threats. The supreme court affirmed the commitment order holding the superior court's finding that Luciano was likely to cause harm to himself or others was supported by clear and convincing evidence. The court reasoned that threatening harm could include threatening nonverbal actions based on the plain language of the statute and common usage of the word "threat." The court then noted the incident at the airport with the unlocked guns and balled fists as well as the menacing stares at API all supported the finding that Luciano was a threat to himself or others. Affirming the lower court, the supreme court held the evidence in the involuntary commitment order sufficiently supported a finding that the detainee was likely to cause harm to himself or others.

In re Naomi B.

In *In re Naomi B.*, 435 P.3d 918 (Alaska 2019), the supreme court held that all appeals of involuntary admission and compulsory taking of medication fall under the public interest exception to mootness. The two consolidated cases before the supreme court concerned the Alaska Adult Protective Services (APS) petitions for an ex parte order that would commit Naomi B. to the Alaska Psychiatric Institute and force Naomi B. to take prescribed medication, and also APS's petition for an ex parte order involuntarily commit Linda M. Naomi B. and Linda M. appealed their trial court rulings, despite their claims now being moot and not falling under the public interest exception to mootness put forth in *Wetherton*. The supreme court overruled *Wetherton*, noting that litigation concerning involuntary admissions and forced medication is overrun with mootness claims, opposed to "merits-based briefing." Here, the court applied the public interest exception to mootness, citing factors such as pressing legal questions that are "repeatedly circumvented" where litigants have been robbed of "judicial guidance" and replicability, noting that identical facts are not necessary to constitute being "replicable." In dicta, the supreme court also commented on the importance of applying the public interest exception to these two sensitive issues because the injury of wrongful forced admission and medication are with litigants for the rest of their lives. The supreme court reversed the trial court decisions, overruling its *Wetherton* precedent, and holding that involuntary admissions and forced medication fall under the public interest exception to mootness.

In re Necessity for the Hospitalization of G.L.

In *In re Necessity for the Hospitalization of G.L.*, 449 P.3d 694 (Alaska 2019), the supreme court held that in involuntary commitment hearings the superior court must consider the condition of the patient at the time of the hearing for commitment, which can include evidence of past behavior or conditions likely to impact the patient's mental or health or likelihood to cause harm. In 2015 G.L. was arrested following his alleged shooting of a loaded gun at people and buildings within his village. G.L. was ruled by the superior court mentally incompetent for any criminal proceedings, committing him to the Alaska Psychiatric Institute (API) for his competence restoration. Following his diagnosis for schizophrenia, a petition for a 30-day involuntary commitment, and another petition for a 90-day involuntary commitment, API petitioned for a 180-day involuntary commitment because of concerns G.L. was unlikely to take medication if released, which would quickly make him a danger to himself and/or others. After the superior court granted the 180-day involuntary commitment petition G.L. appealed, arguing that the trial court improperly relied on outdated information not current at the time of the commitment hearing. The supreme court affirmed the superior court's decision, holding that while the trial court must consider the likelihood of harm from releasing the individual experiencing involuntary commitment proceedings at the time of the hearing, the trial court may consider recent behaviors, conditions, and treatment history which can influence the chances of harm during the time of the proceedings. While the lower court considered testimony of those who have previously treated G.L. several months in the past, it correctly factored this information into its ultimate decision that G.L. was likely to not continue his medication upon discharge, which would quickly lead to a degradation in his mental state, likely leading him to cause harm to himself or others. Affirming the superior court's decision, the supreme court held in involuntary commitment proceedings the trial court must consider whether the patient is mentally ill or likely to harm himself or others at the time of the hearing, but may consider evidence of recent behavior and treatment in making its conclusion.

Matter of Lucy G.

In *Matter of Lucy G.*, 448 P.3d 868 (Alaska 2019), the supreme court held that there was clear and convincing evidence that involuntary electroconvulsive therapy (“ECT”) was in catatonic patient’s best interest and that ECT was least intrusive available treatment. Lucy G., a patient diagnosed with schizophrenia, was hospitalized due to her catatonic behavior and her psychiatrist petitioned the superior court to order involuntary ECT to treat her condition. Lucy G. objected to the ECT, arguing it was not in her best interest because of possible negative side-effects and it was not the least intrusive therapy available because ECT is categorically more intrusive than psychotropic medication. The supreme court affirmed the superior court’s decision and held the court did not make an “obvious mistake” in weighing the factors to determine the ECT was the least restrictive means to protecting Lucy. While the superior court’s decisions based on factual determinations is reviewed *de novo*, the underlying factual determinations regarding whether ECT was in Lucy’s best interests and was the least intrusive available treatment is reviewed for clear error. The superior court’s findings under the necessary tests were dispositive and those findings adequately supported the finding that the treatment was appropriately ordered. So, the supreme court held that the superior court did not clearly err in its underlying findings regarding the intrusiveness of ECT and those findings, by clear and convincing evidence, support the court’s finding that ECT is the least intrusive treatment in the patient’s best interest.

NATIVE LAW

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

In *Bill S. v. State, Department of Health & Social Services*, 436 P.3d 976 (Alaska 2019), the Supreme Court held that clear and convincing evidence of active efforts to prevent the breakup of an Indian Family under the Indian Child Welfare Act (ICWA) must include documented efforts to provide specific assistance rather than vague and overgeneralized testimony. The Office of Children’s Services (OCS) sought to terminate Bill’s and Clara’s parental rights to their children. In accordance with ICWA, OCS attempted to demonstrate by clear and convincing evidence active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family. The superior court granted the termination order, finding that termination was in the children’s best interests and agreeing with OCS that the parents had demonstrated an unwillingness to change or engage in rehabilitative efforts to address their alcohol use and domestic violence. The Supreme Court found that the parents’ lack of effort did not excuse OCS’s failure to make and demonstrate its efforts. It expressed that active efforts required OCS’s caseworker to take Bill and Clara through the steps of remedial and rehabilitative plans rather than letting them perform plans on their own. Further, the Supreme Court found that OCS, by entirely relying on a single caseworker’s testimony, did not meet ICWA’s documentation standards for active efforts. The Supreme Court reversed the superior court’s active efforts finding, vacated the termination order, and remanded, holding that clear and convincing evidence of active efforts under ICWA requires documented and specific assistance rather than vague and overgeneralized testimony.

Sam M. v. State, Department of Health & Social Services

In *Sam M. v. State, Department of Health & Social Services*, 442 P.3d 731 (Alaska 2019), the supreme court reiterated that courts must look to the Office of Children Services’ (OCS) efforts during the entirety of a case to assess whether it made active efforts to keep Indian children with

their parents. Sam M. sought custody of his biological daughter – who is affiliated with the Native Village of Kluti-Kaah through her mother – who was then in the custody of OCS. While Sam was taking steps to treat his post-traumatic stress disorder, substance abuse issues, and depression and working with OCS to assess the possibility of reuniting with his daughter, OCS caseworkers became aware of Sam’s history of inappropriate sexual behavior. After reviewing Sam’s history of sexual misconduct and a psychological evaluation of his ongoing inappropriate sexual behavior which led to concerns of him being a possible danger to the child, OCS petitioned for termination of parental rights. After balancing the need for the daughter’s permanency against the time needed for Sam to address his ongoing issues, the superior court terminated Sam’s parental rights. He appealed and argued that OCS failed to make active efforts to reunify him with his daughter. The supreme court reaffirmed prior case law, requiring OCS’s efforts to be evaluated across the entirety of its work with a parent, while making note of the importance for permanence and stability of a child which cannot be indefinitely postponed for his/her parent to correct issues caused by his/her own wrongdoing. Here, the court looked to OCS’s active efforts to reunify Sam with his Indian child, but noted the circumstances were materially changed after caseworkers learned of Sam’s history of sexual misconduct, leading them to pay for a psychological evaluation which alerted caseworkers to continued issues of sexual inappropriateness, and the psychologist’s determination that Sam was a possible danger to the child. The supreme court affirmed the superior court’s termination of Sam’s parental rights, holding that courts look to OCS’s actions throughout its time working with parents to determine if active efforts have been made to reunify and preserve parents’ custody of Indian children.

PROPERTY LAW

All Am. Oilfield, LLC v. Cook Inlet Energy, LLC

In *All Am. Oilfield, LLC v. Cook Inlet Energy, LLC*, 446 P.3d 767 (Alaska 2019), the supreme court ruled that a contractor was not entitled to a mineral dump lien on natural gas that had not been extracted, hoisted, and raised from its natural reservoir. Cook Inlet controlled oil and gas wells in southcentral Alaska and contracted with All American to “drill, complete, engineer, and/or explore three wells.” All American established the wells, but it never extracted any of the natural gas. When Cook Inlet was unable to pay for the work, All American asserted both mine and mineral dump liens in order to secure payment. After an appeal from the federal bankruptcy proceeding against Cook Inlet in which the bankruptcy court only found All Americans had a mine lien, the federal district court certified a question to the supreme court about whether a mineral dump lien could exist if the gas was stored in its natural reservoir. The supreme court answered no to the certified question; a mineral dump lien did not exist if the gas was stored in its natural reservoir. First, the plain language of the statute establishing mineral dump liens excluded from the liens’ coverage gas in its natural reservoir that had never been extracted. Second, the legislative history and policy underlying the statute did not counsel a result contrary to the plain language. Answering “no” to the certified question, the supreme court ruled a contractor was not entitled to a mineral dump lien on natural gas that had not been extracted, hoisted, and raised from its natural reservoir.

Black v. Whitestone Estates Condo. Homeowners' Ass'n

In *Black v. Whitestone Estates Condo. Homeowners' Ass'n*, 446 P.3d 786 (Alaska 2019), the supreme court held that a condominium had the authority to disregard payment directives concerning the back-payment of unpaid fees when it was provided for in the governing declaration. Craig Black and Camille Brill (Blacks) claimed that the arrangement for monthly dues for the maintenance of driveways on the property violated the condominium's governing declaration. They proposed a new approach which was rejected in a vote of the unit owners. They then began to withhold a portion of the monthly dues in protest. After some years, the Blacks sent a letter to the unit owners that announced the end of the dues protest. They enclosed a check for the previous fifty months and clarified that the payment was to cover the fees that had been assessed beginning January 2010. The owners voted to disregard the directive to apply the payment to the most recent debts and instead apply it to the oldest debts first. The Blacks did not object. The condominium subsequently sought to recover the remaining unpaid assessments and fees. The Blacks asserted that their payment directive dictated that their lump sum payment covered the most recent debts and the older debts were outside the statute of limitations. The superior court found for the condominium and awarded damages. On appeal, the Blacks argued that the superior court erred in determining that their payment directives were ineffective. The supreme court affirmed the superior court's finding that the payment directives could not override the provision in the governing declaration that granted the right to apply payments to the oldest debts first. The supreme court found that the express term of the declaration controls. Further, the court found that the plain text of the directive meant that the condominium's discretion extended over all payments, regardless of whether payment directives are given or not. The supreme court held that the condominium therefore had the authority to disregard the Blacks' payment directives concerning the back-payment of unpaid fees because it was provided for in the governing declaration.

Collins v. Hall

In *Collins v. Hall*, 453 P.3d 178 (Alaska 2019), the supreme court held that in a property dispute between adjoining landowners, the lower court did not clearly err in concluding that no boundary had been established by acquiescence and in finding that the restrictive covenants had been abandoned. The Collinses and Halls disputed the boundary dividing their land in a recreational subdivision on an island near Juneau. The Collinses alleged that structures on the Halls' property encroached on to the Collinses' property and violated the subdivision's covenants governing setbacks and sewage disposal. Applying a clear and convincing standard, the lower court concluded that no boundary had been established by acquiescence. Further, the lower court found that the restrictive covenants had effectively been abandoned, as other property owners had also been violating those covenants. Affirming the lower court's ruling on boundary by acquiescence, the supreme court held that a boundary line is established by acquiescence where adjoining landowners whose property is separated by some reasonably marked boundary line mutually recognize and accept that boundary line for seven years or more. But the supreme court noted that here the parties did not agree on the boundary line and fewer than seven years had passed between the alleged creation of the new boundary line and the start of the lawsuit. The supreme court also affirmed the lower court's ruling on the abandonment of the covenants, holding that although failure to enforce a covenant against a single party is insufficient to establish abandonment, more widespread lack of enforcement may be. The court noted that here multiple property owners had violated the covenants and that a homeowner's association was entrusted

with enforcement of the covenants, no homeowner's association was ever established. For the reasons detailed above, the supreme court held that the lower court did not clearly err in concluding that no boundary had been established by acquiescence and finding that the restrictive covenants had been abandoned.

Griswold v. Homer Board of Adjustment

In *Griswold v. Homer Board of Adjustment*, 440 P.3d 428 (Alaska 2019), the supreme court held that standing determinations concerning an "aggrieved person" is interpreted broadly, despite the legislature limiting standing in similarly related land-use decisions. Griswold appealed the Homer Advisory Planning Commission's decision to grant a conditional use permit to another property within his zoning district to the Homer Board of Adjustment (Board), which was rejected for lack of standing. The Board ruled that because Griswold was unable to show how he was confronted with adverse effects different than his neighbors, Griswold was not an "aggrieved person" under Homer City Code, warning otherwise that any person in a zoning district would have standing to appeal zoning decisions. The Board's decision was upheld by the superior court, who awarded Attorneys' fees to the Board. The supreme court noted that standing doctrine is typically interpreted broadly, while acknowledging that the inquiry has been limited by statute for land-use decisions. However, the court held that an "aggrieved person" within land-use decisions still falls under the traditionally broad inquiry in favor of increased accessibility to courts. Because the Homer City Code holds no requirement of evidentiary burdens on those making claims as an aggrieved person and even allows claims that a decision "could have" changed a property-owner's value or enjoyment of property, the causation chain that must be shown to prove standing is "minimal." The supreme court reversed the superior court, holding that standing determinations for an "aggrieved person" warrant the traditionally broad interpretation.

In re Estate of Hatten

In *In re Estate of Hatten*, 440 P.3d 256 (Alaska 2019), the supreme court held surviving domestic partners do not inherit any of the intestate's property as a testamentary matter. A man and woman lived together for twenty years in a domestic partnership before the man died intestate. The surviving domestic partner filed a claim against the man's estate seeking a fair division of property based on the intestate's promise to provide for her for the rest of her life. The woman's claim against the estate was denied because the state's intestate succession laws did not contemplate domestic partnerships and the evidence indicated the intestate's failure to create a will was intentional. On appeal, she argued the superior court erred in failing to recognize her property rights via a domestic partnership. The supreme court affirmed the lower court's decision, reasoning that, under the probate code, property interests from a domestic partner do not vest if the partners never separate during lifetime. Still, the surviving partner could contest particular property in the estate under courts' equitable and property principles. Because the woman was a domestic partner, she did not inherit property via intestacy. Affirming the lower court's decision, the supreme court held surviving domestic partners do not inherit any of the intestate's property as a testamentary matter.

Keeton v. State

In *Keeton v. State*, 441 P.3d 933 (Alaska 2019), the supreme court held that attorney's fees and costs are excluded from awards of prejudgment interest in cases of eminent domain. In 2014, the Alaska Department of Transportation (DOT) sought to condemn a portion Keeton's land for a highway-widening project. After a superior court-appointed master settled a dispute regarding the value of the parcel, the superior court awarded Keeton a final judgment of \$24,740 in land value and prejudgment interest, \$47,453.12 in attorney's fees, and \$32,276.50 in costs, with a post-judgment interest rate of 4.25%. On appeal, Keeton argued that his attorney's fees and costs should be *included* in the determination of prejudgment interest, and that the superior court acted erroneously in awarding the 4.25% interest rate, quashing his subpoena for DOT's attorneys' billing records, and excluding certain activities from the attorney's fees award. On appeal, the supreme court found that neither the plain language, context, legislative history, nor policy purpose of the eminent domain statutes, namely AS 09.55.440, support including attorney's fees and costs in the amount finally awarded for purposes of prejudgment interest. The court found that Alaska Civil Rule 72 also reflects this interpretation. The court then found that the superior court's awarding of post-judgment interest at the 4.25% rate was pursuant to AS 09.30.070(a) and therefore not erroneous, and that Keeton's argument regarding the superior court's quashing of his subpoena request was moot because the basis of the request had no bearing on the court's analysis. Finally, the supreme court found that the superior court erroneously failed to state its reasons for not awarding Keeton's full attorney's fees, as is the norm. On this issue exclusively, therefore, the court remanded the case to the superior court. Affirming all but this issue, the court held primarily that attorney's fees and costs are excluded from awards of prejudgment interest in cases of eminent domain.

Kelley v. Municipality of Anchorage, Board of Equalization

In *Kelley v. Municipality of Anchorage, Board of Equalization*, 442 P.3d 725 (Alaska 2019), the supreme court held that a board of equalization does not abuse its discretion by not considering evidence offered past assigned deadlines and also does not abuse its discretion by not finding a landowner's sale of a nearby lot in the same subdivision or the landowner's purchase price for the lot-at-dispute as definitive evidence of its value. Kelley sought review of the municipality's tax valuation for his property after the city assessor valued his lot at \$318,900, despite his purchase price of \$160,000. Kelley appealed the valuation to the Municipality of Anchorage Board of Equalization, where he requested additional time to gather evidence; Kelley did not meet the Board's deadline for proffering evidence. After the Board ultimately revaluated the property at \$259,800 and allowed further hearings, Kelley again contested the valuation which was ultimately affirmed by the Board of Equalization and the superior court. Kelley claimed the Board should have allowed his proffered evidence submitted past the assigned deadline and that the Board misapplied valuation tools to assess his property's value. The supreme court held that the Board did not abuse its discretion in prohibiting consideration of evidence offered past the announced deadline. Additionally, the Court held that the Board was not required to assign definitive evidence of value on the sale of a nearby lot or on the purchase price of the property in dispute, particularly a property purchased at an estate sale where sale values are less reliable than at-market sales. The supreme court affirmed the superior court's decision to affirm the Board of Equalization, holding that a board of equalization does not abuse its discretion by forbidding evidence offered past assigned deadlines and by not accepting as the definitive value of a property the sale of nearby lots or purchase price for the property-in-dispute at an estate sale.

Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC.

In *Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC.*, 441 P.3d 954 (Alaska 2019), the supreme court held that an oil and gas lessor does not have the right to compensation for gas developed in pressuring a gas storage facility. Cook Inlet Natural Gas Storage Alaska (CINGSA) leases the Sterling C Reservoir and must maintain a certain level of pressure within the reservoir to store gas for higher demand periods. Owning the land above the reservoir, Kenai Landing, Inc. sought compensation for newly discovered gas within the reservoir and CINGSA sought a condemnation action for an easement to the reservoir. While both parties agreed Kenai Landing, Inc. was due compensation for storage of gas, Kenai Landing Inc. sought compensation for the new gas discovered as the owner of the land above the lease. The supreme court affirmed the superior court's conclusion that Kenai Landing, Inc. was not entitled to compensation for the newly discovered native gas. A landowner is only entitled to the value of the land at the time it is taken. The gas was not present under the lease at the time it was conveyed, it developed after CINGSA began the project. Thus, the supreme court affirmed the lower court's decision that a lessor does not have the right to compensation for newly discovered gas which develops from the use of the land.

McCavit v. Lacher

In *McCavit v. Lacher*, 447 P.3d 726 (Alaska 2019), the supreme court extended the rule of reasonable use for non-consumptive waters to rights of access and rights to use. The Lachers brought an action against upland neighboring landowners McCavits for extending their dock on Wasilla Lake towards their property, claiming it was an unreasonable interference with their riparian rights and constituted a private nuisance. Because the Alaska Department of Fish and Game would not enforce its Notice of Violation against the McCavits – due to concerns of unclear and vague regulatory language leading the agency to question its legal authority – the Lachers brought suit against the McCavits. The superior court determined the McCavits' dock was unreasonably interfering with the Lachers' riparian rights and was a private nuisance, leading the court to grant an injunction against the McCavits' dock extension and awarded partial Attorneys' Fees to the Lachers. The McCavits claimed on appeal that the superior court erred in both its determination that its dock extension unreasonably interfered with the Lachers' riparian rights and for determining it constituted a private nuisance. The supreme court began its analysis by recognizing the constitutional right to free access and use of navigable or public waters and also a state common law tradition of riparian and littoral rights of access to deep and navigable waters for navigation. The court goes on to expand the reasonable use test used for other non-consumptive uses of water here for rights of access and rights of use. This inquiry is inherently fact-intensive and requires two steps of analysis for the trial court: (1) whether the neighboring landowner's use of public waters an unreasonable interference with a riparian or littoral right and (2) whether that unreasonable interference constitutes a private nuisance. The supreme court vacated the superior court's findings of fact and conclusions of law and order granting injunctive relief and nuisance abatement and vacated the award of Attorneys' Fees and costs because of its new rule of reasonableness and remands the claim to the superior court to conduct a legal analysis under the new rule.

Pasley v. Pasley

In *Pasley v. Pasley*, 442 P.3d 738 (Alaska 2019), the supreme court affirmed that a wife's separate property in the marital home had not transmuted to marital property where she had intended or demonstrated an intent to donate the property to the marital estate. A husband and wife divorced and contested the characterization of the marital home as marital or separate property in their divorce proceedings. The wife owned the home before the marriage and retained the sole title but the husband argued that it had transmuted to marital property by virtue of his contributions. The lower court found that the wife paid the husband for labor done on the house and that despite the husband's understanding his contribution to marital expenses was not used for the mortgage payments. Therefore the home was characterized as separate property; the husband appealed. On appeal the husband argued that the house transmuted to marital property because the couple lived in the house during the marriage and because of the contributions he argued below. The court emphasized that the correct test for transmutation is when one spouse intends to donate separate property to the marital estate and engages in conduct demonstrating that intent. In affirming the lower court's decision that transmutation did not occur, the court determined that the lower court had incorrectly employed a different test, but its result was correct through largely correct analysis and correct factual findings with no clear error.

Rosauer v. Manos

In *Rosauer v. Manos*, 440 P.3d 145 (Alaska 2019), the supreme court held that a retroactively granted municipal permit conferred lawful authority for the removal of trees from a municipal right-of-way when lawful authority was required for their removal. Chris and Jeanne Rosauer owned property across a municipal roadway from the property of Manos and Liddicoat ("Manos"). The Municipality of Anchorage owned the roadway and a right-of-way that ran from the Rosauer's property to the municipal road. Manos hired Greatland Tree Services, LLC to remove several cottonwood trees from the municipal right-of-way in front of the Rosauer's property. The Anchorage Municipality Code required private entities to obtain a permit for tree removal from municipal rights-of-way. Greatland obtained a permit after having already removed the trees. The Rosauers sued under the timber-trespass statute. They argued that Manos and Greatland did not have lawful authority to cut down the trees, as required by the statute. The superior court granted summary judgment for Manos and Greatland, finding lawful authority was granted by the retroactive permit. The Rosauers appealed. The supreme court found that municipalities had broad discretion to delegate powers to municipal agencies or officers. The supreme court reasoned that the authority to grant retroactive permits was consistent with the policy of delegating significant authority over public-use permits and decisions regarding the safe and efficient use of public spaces. The supreme court affirmed the superior court, holding that a retroactively granted municipal permit conferred lawful authority for the removal of trees from a municipal right-of-way when lawful authority was required for their removal.

Schacht v. Kunimune

In *Schacht v. Kunimune*, 440 P.3d 149 (Alaska 2019), the Supreme Court held AS 13.33.211 applied to a dispute between a joint account owner and the creditor of his co-owner, and therefore absent clear contrary intent of the owners, that, for the purpose of third party creditors, an account's fund's belong to each co-owner in proportion to the net contribution of each one. A son challenged a creditor's levy of his joint account with his father, where essentially the entire contents of the account levied were contributed by the son. The son brought AS 13.33.211 to the

lower court's attention after oral argument through a letter citing supplemental authorities sent pursuant to Alaska Civil Rule 77(l), however the lower court ruled in favor of the creditor and the son appealed. On appeal the creditor argued that the son's statutory argument was not preserved and that the son had waived his rights under the statute by signing the agreement with his bank which contained different terms. Reasoning that the clear language of AS 13.33.211 applied to the situation and noting that the State had already interpreted the statute to apply to Department of Revenue and Child Support Services Division actions seizing joint bank accounts, the Supreme Court decided that where a joint account owner challenges a creditor's levy of the account's funds, each joint-owners' net contribution of to the account is the presumptive measure to be applied in determining the appropriate amount of funds to levy unless the creditor rebuts the presumption by clear and convincing evidence. Surveying other authority in support, the Court further reasoned that the son did not knowingly waive any statutory rights in signing the bank agreement and therefore maintained his rights under the statute. Vacating the lower court's decision and remanding for findings of fact under the correct standard of proof, the Supreme Court held that where a third party creditor levies a joint bank account AS 13.33.211 governs, requiring a determination by clear and convincing evidence of each joint account owner's contributions to the account to determine which funds in the account are subject to levy.

TORT LAW

Adkins v. Collens

In *Adkins v. Collens*, 444 P.3d 187 (Alaska 2019), the supreme court held that conduct is exempt from Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA) when it is the subject of ongoing, careful regulation and such regulation prohibits the conduct in question. Collens, a quadriplegic, contracted with Maxim, a healthcare corporation, to provide his in-home nursing care. Several years later, Maxim discharged Collens, providing him a letter that falsely stated that the discharge had been discussed with his physician and care coordinator and that they agreed with the discharge decision. Collens sued Maxim for breach of contract and fraudulent misrepresentation; he also raised claims under the UTPA. The superior court ruled, among other things, that Maxim's failure to follow its own policies and procedures and its misrepresentations to Collens about his discharge violated the UTPA. On appeal, Maxim argued that this conduct was exempt from the UTPA because it was already prohibited by regulation. Regarding Maxim's failure to follow its own policies and procedures, the supreme court agreed that this conduct was regulated by Alaska law. However, the court noted that while state regulations require home health agencies to *adopt* a set of policies and procedures, they do not explicitly require *compliance*. Thus, Maxim's failure to follow its own procedures was not exempt. Additionally, regarding Maxim's misrepresentations, the court agreed that this conduct was regulated by an Alaska statute that gives a patient receiving home health services the right to be informed of the reason for discharge. But the court noted that it was unclear whether this right translates, in practice, to a prohibition on misrepresentations like Maxim's. Moreover, the court found it significant that the regulations emphasize the *existence* of policies and procedures, rather than *compliance with them*. The court also noted that it was uncertain whether the Department of Health and Social Services devotes enforcement resources to policing individual acts of misrepresentation. Thus, the court found that Maxim's misrepresentations were also not exempt from the UTPA. Affirming the superior court, the supreme court emphasized that for the UTPA's

statutory exemption to apply, the conduct must be the subject of ongoing, careful regulation and actually be prohibited by such regulation.

Bravo v. Aker

In *Bravo v. Aker*, 435 P.3d 908 (Alaska 2019), the supreme court held that a next friend cannot represent a presumed incompetent individual without counsel. Almost 20 years before the present litigation concerning a personal injury claim, appellant Helen Bravo was hurt in a boating accident. Bravo claimed this accident – which was allegedly due to appellees’ conduct – caused her daughter’s attention-deficit/hyperactivity disorder, rendering her incompetent. The Bravos – daughter Ashley and mother Helen as next friend – retained Jeffrey Barber as counsel. Because Barber believed Helen’s insistence on trial strategy was against the best interest of Ashley, Barber successfully received a motion to withdraw from the superior court due to a conflict of interest among his clients. Upon the trial court’s granting of the appellees’ unopposed motion for summary judgment, the counsel-less Bravos appealed. The supreme court held that it could not rule on appellants’ appeal because Ashley Bravo required counsel, which could not be her next friend Helen. Turning to precedent and Alaska Civil Rule 17(c), the supreme court held that “a next friend cannot generally represent a minor [here an incompetent 20-year-old], even as a plaintiff, without counsel.” Because Ashley did not have an attorney representing her, the supreme court held that the superior court must have either (1) ordered a competency evaluation to determine if Ashley was in fact competent and would not be required to obtain an attorney as counsel, or (2) not have ruled on appellees’ summary judgment motion without providing Ashley counsel. Reversing the superior court, the supreme court held that the trial court has a duty to protect incompetent litigants who are unable to represent themselves, are unable to be represented by next friends who are not attorneys, and must be provided a guardian ad litem or other proper legal representation.

Doan v. Banner Health, Inc.

In *Doan v. Banner Health, Inc.*, 442 P.3d 706 (Alaska 2019), the supreme court held that a viable bystander claim for negligent infliction of emotional distress (NIED) does not require the plaintiff’s contemporaneous realization that the injuries they observed were negligently caused. Doan accompanied her ill daughter to the hospital. While at the hospital, Doan was directed to leave her daughter’s room and only returned to the room after her daughter had died, at which point Doan saw her daughter’s body. Doan brought a claim for NIED against the medical care providers, which the superior court dismissed after granting summary judgment for the defendants. On Doan’s appeal, the doctors argued that an NIED bystander claim cannot be made unless the plaintiff contemporaneously comprehended that the conduct causing injury was negligent. The supreme court reversed the lower court’s grant of summary judgment, holding that a viable bystander claim for NIED does not depend upon the plaintiff’s contemporaneous realization that the injuries they observed were negligently caused. The court reasoned that the relevant inquiry in an NIED claim is whether the plaintiff had a sudden sensory observation of traumatic injuries of a close relative in the immediate aftermath of the event which produced such injuries, not the plaintiff’s ability to discern the presence of negligence in the injurious conduct. The supreme court reversed, holding that a viable bystander claim for NIED does not require the plaintiff’s contemporaneous realization that the injuries they observed were negligently caused.

Haight v. City & Borough of Juneau

In *Haight v. City & Borough of Juneau*, 448 P.3d 254 (Alaska 2019), the supreme court held that the municipal's decision not to regulate safety requirement for a lake was not a waiver of sovereign immunity. Haight sued the City of Juneau for the wrongful death of her daughter after she died from a boating accident that occurred on Auke Lake. The city shares management of the lake with the state of Alaska and had passed an ordinance governing use of watercraft on the lake and constructed a boat launch into the lake but did not enact safety regulations for use of the lake. Alaskan municipalities have sovereign immunity from claims involving discretionary functions, but Haight argued that this immunity did not apply because safety regulations were an operational decision in implementing the boat launch, not a planning decision regarding the lake. The supreme court rejected this argument, holding that the decision not to regulate the lake was a discretionary planning decision and thus, protected from suit. Regulating the lake was not dependent on the construction of the new boat launch so it cannot be an operational decision based on implementing the boat launch. A report recommended the implementation of safety regulations but the city rejected several safety proposals when passing the lake's watercraft governing ordinance. Thus, the decision to not to implement safety regulations on Auke Lake was a discretionary planning decision and the city may not be sued for claims arising from this decision.

Taffe v. First National Bank of Alaska

In *Taffe v. First National Bank of Alaska*, 450 P.3d 239 (Alaska 2019), the supreme court held the statute of limitations for a misrepresentation begins to run when the plaintiffs should reasonably have discovered an appreciable injury from the misrepresentation. Taffe and Lehner borrowed money in the form of two loans from First National Bank of Alaska in 2006 to develop a community subdivision. Taffe and Lehner executed a change in terms agreement in 2010, and collateral remained the same. When they were unable to pay the loan, First National foreclosed and acquired the unsold land. In 2013, Taffee and Lehner filed a complaint, later amending it to state a variety of fraud claims. In 2016, the bank sought to extinguish remaining claims, including a fraud claim of misrepresentation, as barred by statutes of limitations. The superior court ruled in First National's favor, finding that Taffe and Lehner knew enough to pursue a claim in 2009. Taffe and Lehner appealed. The supreme court affirmed, holding that the statute of limitations on the fraud claims began to run no later than the date when Taffe and Lehner executed a change in terms that did not alter the collateral. The court reasoned that the date of appreciable injury and the date they should have discovered the appreciable injury were the same. Taffe and Lehner were aware of and complaining to First National in early 2009, and their 2010 agreement constituted appreciable injury. Because their misrepresentation claim was complete by 2010, the statute of limitations had begun to run no later than February 2010. The supreme court affirmed the lower court's ruling, holding that the court appropriately looked to the date of appreciable injury from the fraud and when the plaintiffs had inquiry notice.

Weston v. AKHappytime

In *Weston v. AKHappytime, LLC*, 445 P.3d 1015 (Alaska 2019), the Alaskan Supreme court held undiscounted medical bills are admissible at trial. Weston slipped and fell on ice in the parking lot of a hotel owned by AKHappytime, fracturing her right wrist and leg in the process. Her hospital bills totaled up to over \$135,000, but Medicare settled the bills in full by paying \$24,247.45. At trial, AKHappytime moved to exclude the original medical bills arguing they

were inflated and did not represent the reasonable value of medical services rendered. The Superior Court granted the motion and held that Weston could only recover the adjusted rates accepted by her provider. On appeal, the Supreme Court considered two primary questions; first, whether it was an error to exclude evidence of the undiscounted medical bills, and second, whether the difference between the bills and what Medicare paid be viewed as a benefit to Weston from a collateral source. For the first question, the Supreme Court held that an injured party is allowed to introduce the full, undiscounted medical bills at trial. Since both the amounts actually paid and the amount written off are relevant in determining the reasonable value of the medical services, the complete medical bills are necessary evidence. For the second question, the Court held the negotiated rate differential would fall under the collateral source rule, and consequently, is subject to the post-verdict procedures of AS09.17.070.

TRUSTS & ESTATES LAW

Bjorn-Roli v. Mulligan

In *Bjorn-Roli v. Mulligan*, 436 P.3d 962 (Alaska 2019), the supreme court held that a trustee using trust funds to maintain trust property her son was staying on free of rent did not require removal even though it was a breach of fiduciary duty. After the death of her parents, Bjorn-Roli was appointed as sole trustee of two trusts with a responsibility for dividing the trust assets into two new trusts, one for her, and another for her sister Mulligan. After three failed attempts to distribute the trust assets, Mulligan sued her sister, alleging a breach of fiduciary duty and fraud. During this period, Bjorn-Roli allowed her son to stay without rent at a trust property and paid for the maintenance of the property with trust funds. Mulligan argued this was a breach of Bjorn-Roli's fiduciary duty, and consequently that Bjorn-Roli should be removed as trustee. The superior court agreed it was a breach of fiduciary duty, but refrained from removing Bjorn-Roli from being the trustee. The superior court found Bjorn-Roli trustworthy, and emphasized the finding that Bjorn-Roli's actions were made openly and gave Mulligan notice. The supreme court affirmed the superior court's decision to not remove Bjorn-Roli's trustee position in spite of the breach of fiduciary duty, holding that a trustee using trust funds to maintain trust property her son was staying on free of rent did not require removal even though it was a breach of fiduciary duty.