

In the Supreme Court of the State of Alaska

**Marianne E. Burke,
Personal Representative
of the Estate of Abigail
Caudle, Appellant,**

v.

**Criterion General, Inc.;
Alaska USA Federal Credit
Union; and State of Alaska,
Appellees.**

Supreme Court No.
S-17766

Order
Petition for Rehearing

Date of Order:
12/20/2021

Trial Court Case No. 3AN-18-09109CI

Before: Winfree, Chief Justice, Maassen, and Carney,
Justices, and Bolger and Eastaugh, Senior
Justices. *[Borghesan, Justice, not participat-
ing.]

On consideration of the Petition for Rehearing filed
by Marianne Burke on 11/22/2021, the opposition filed by
State of Alaska on 12/02/2021, the joinders to the State's
opposition filed by Criterion General and Alaska USA on
12/06/2021, and the reply filed by Ms. Burke on
12/09/2021,

IT IS ORDERED: The Petition for Rehearing is
DENIED.

Entered at the direction of the court.

*Sitting by assignments made under article IV, section
11 of the Alaska Constitution and Alaska Administra-

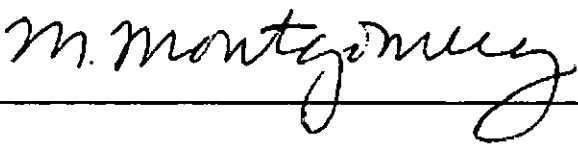
tive Rule 23(a).

Burke v. Criterion General, Inc., et al.

Supreme Court No. S-17766 Order of 12/20/2021

Page 2

Clerk of the Appellate Courts



cc: Judge Guidi
Trial Court Clerk
Publishers (Op. No. 7464, 11/05/2021)

Distribution: Email:
Burke, Marianne E
Peterson, Matthew K.
Lindemuth, Jahna M.
Gottstein, Samuel ekler
Wolff, Laura Emily

In the Supreme Court of the State of Alaska

**Marianne E Burke,
Personal
Representative of
the Estate of Abigail
Caudle, Appellant,**

v.

**Criterion General, Inc.;
Alaska USA Federal Credit
Union; and State of Alaska,
Appellees.**

**Supreme Court No.
S-17766**

**Order Regarding
Fees and Costs**

**Date of Order:
11/5/2021**

Trial Court Case No. 3AN-18-09109CI

Under Appellate Rules 508(d) and (f)(1), allowable costs are awarded to Appellees Criterion General, Inc., Alaska USA Federal Credit Union, and State of Alaska. On or before 11/15/2021, Appellees shall serve and file with this court an itemized and verified bill of costs. Each party is to bear its own attorney's fees. Entered at the direction of an individual justice.

Clerk of the Appellate Courts


Julie Kentch, Deputy Clerk

Distribution:

Mail:
Burke, Marianne E

Email:

Burke, Marianne E
Clapp Peterson Tiemessen
Thorsness, LLC
Lindemuth, Jahna M.
Gottstein, Samuel Gekler
Wolff, Laura Emily

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, email corrections@akcourts.gov.

THE SUPREME
COURT
OF THE STATE OF ALASKA

MARIANNE E. BURKE,)	
Personal Representative	)	Supreme Court
of the Estate of	)	No. S-11766
ABIGAIL CAUDLE,)	
	)	Superior Court
Appellant,	)	No. 3AN--18-09109
v.)	
	)	<u>OPINION</u>
CRITERION GENERAL,	)	No. 7564
INC.; ALASKA USA	)	November 5, 2021
FEDERAL CREDIT UNION))	
And STATE OF ALASKA,)	
<u>Appellees.</u>)	

Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage, Andrew Guidi,
Judge.

Appearances: Marianne E. Burke, pro se, Wasilla,
Appellant. John B. Thorsness, Clapp, Peterson,
Tiemessen, Thorsness LLC, Anchorage, for Appellee
Criterion General, Inc. Jahna M. Lindemuth and
Samuel G. Gottstein, Holmes Weddle & Barcott, PC,
Anchorage, for Appellee Alaska USA Federal Credit
Union. Laura Wolff, Assistant Attorney General,
Anchorage, and Clyde "Ed" Sniffen, Jr., Acting Attorney
General, Juneau, for Appellee State of Alaska.

Before: Bolger, Chief Justice, Winfree,
Maassen, and Carney, Justices, and Eastaugh,
Senior Justice.* [Borghesan, Justice, not participating.]

WINFREE, Justice.

I. INTRODUCTION

An apprentice electrician, who was unmarried and had no dependents, was working for a construction project subcontractor when she died in an accident. Her direct employer paid funeral benefits required by the Alaska Workers' Compensation Act; no other benefits were required under the Act. The employee's estate brought a wrongful death action against the general contractor and the building owner; they asked the superior court to dismiss the action based on the Act's exclusive liability provisions, which were expanded in 2004 to include contractors and project owners. The estate moved for summary judgment, arguing that the 2004 exclusive liability expansion violated due process because it left the estate without an effective remedy. The court rejected the estate's argument and dismissed the wrongful death action, entering judgment against the estate. We affirm the superior court's judgment.

II. FACTS AND PROCEEDINGS

This is the second appeal involving Abigail Caudle's work-related death; we derive the facts from our opinion in *Burke v. Raven Electric, Inc.*¹ Caudle was working as an apprentice electrician for Raven Electric, Inc. in connection with

¹Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).420 P.3d 1196 (Alaska 2018).

remodeling an Alaska USA Federal Credit Union building; it was her first day on that particular job.² The general contractor, Criterion General, Inc.,

“changed the scope of work after Raven Electric’s crew arrived”; rather than roughing in three offices as originally planned, the Raven workers were told to remove existing light fixtures.³ No one disconnected the power to the lights that were being removed, although the light switch of the fixture Caudle worked on was turned off and “a noncontact voltage meter” she was using did not indicate the fixture was energized.⁴ Caudle nevertheless was electrocuted and died; electricians interviewed during the subsequent occupational safety investigation suggested that the circuit had been wired incorrectly in the past.⁵

After Alaska’s Occupational Safety and Health Division investigated the incident, it cited Raven “for several safety violations and ultimately agreed through an informal settlement to fine [Raven] a total of \$11,200.”⁶ Raven also paid \$10,000 for Caudle’s funeral expenses,⁷ the only workers’ compensation death benefit available to the estate of an employee who dies without a spouse or other dependents.⁸

² *Id.* at 1199 & n.2.

³ *Id.*

⁴ *Id.* at 1199.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1200.

⁸ *See* AS 23.30.215.

Caudle’s mother, Marianne Burke, filed a claim with the Alaska Workers’ Compensation Board.⁹ After a hearing at which the Board clarified that Burke was not the personal representative of Caudle’s estate, the Board rejected Burke’s claim because Burke had not shown she met the eligibility requirements for dependent benefits under the Act.¹⁰ Burke appealed to

the Alaska Workers' Compensation Appeals Commission, which affirmed the Board's decision; she then appealed to this court.¹¹ We declined to address any arguments Burke made on behalf of Caudle's estate because Burke had not been appointed personal representative.¹² Considering Burke's possible claim as a parent, we decided that the Act did not violate her rights to due process or equal protection.¹³ The United States Supreme Court denied certiorari.¹⁴

Burke was appointed personal representative of Caudle's estate (Estate) in August 2018, and in September the Estate filed a wrongful death action against Criterion and Alaska USA. The Estate alleged that the 2004 amendments to the Act violated the Estate's constitutional right to due process, citing both a footnote from *Schiel v. Union Oil Co. of California*¹⁵ regarding the possibility that very low workers' compensation for

9 Burke, 420 P.3d at 1200.

10 Id. at 1201.

11 Id. at 1201-02.

12 Id. at 1203.

13 Id. at 1203-06.

14 Burke v. Raven Elec., Inc., 140 S. Ct. 135 (2019).

15 219 P.3d 1025, 1036 n.63 (Alaska 2009) (noting employer's agreement to question whether inadequate benefits might violate due process), overruled on other grounds by Buntin v. Schlumberger Tech. Corp., 487 P.3d 595, 598 & n.4 (Alaska 2021). (continued...)

an injury might violate an employee's due process rights and the "inadequate benefits of zero compensation and a funeral expense" for the death.

Relying on *Schiel* the Estate moved for summary judgment, focusing on the right to procedural due

process in light of our prior decisions and arguing that the lack of an adequate remedy deprived the Estate of its due process rights.¹⁶ The Estate distinguished *Schiel* because the worker in *Schiel* received workers' compensation benefits and therefore still had a "substantial and efficient remedy" for his loss.¹⁷ The Estate argued that the low level of funeral benefit compensation from Raven coupled with the inability to bring a wrongful death action against Criterion and Alaska USA effectively deprived the Estate of any remedy, violating the right to due process under the Alaska and United States Constitutions. The Estate contended that legislative policies underlying the 2004 amendments "wholly fail[ed] to apply" as there was no risk of "double-dipping" because no workers' compensation benefits had been paid, yet the Estate was unable "to access the courts for any compensatory damages whatsoever

¹⁵ (...continued)

Schiel involved a certified question from federal district court asking us whether the 2004 amendments violated due process or equal protection under the Alaska Constitution. *Id.* at 1029. We held that the amendments did not violate the employee's rights under those Alaska Constitution provisions. *Id.* at 1037.

¹⁶ See Alaska R. Civ. P. 56(c) (setting out summary judgment procedure and providing that judgment may be entered for a party if undisputed facts demonstrate that party is entitled to judgment as matter of law). In its summary judgment motion the Estate expressly said it was not raising an equal protection argument, so any equal protection argument the Estate may be making on appeal is waived. *Brandon v. Corr. Corp. of Am.*, 28 P.3d 269, 280 (Alaska 2001) ("A party may not raise an issue for the first time on appeal.").

17 See Schiel, 219 P.3d at 1035 (holding that claimant “still has a substantial and efficient remedy available”).

concerning other responsible tortfeasors.” The Estate also contended the 2004 amendments undercut the policy we recognized in *Parker*

Drilling Co. v. O'Neill favoring workplace safety.¹⁸

Alaska USA responded that the Estate was raising a substantive due process challenge rather than a procedural due process challenge and that there was no substantive due process violation because a fair and substantial relationship existed between the 2004 amendments and a legitimate government purpose.¹⁹ Alaska USA asserted the Estate had not met its burden, required in substantive due process challenges, of showing there was no rational basis for the law. It also argued that the Estate’s inability to bring a wrongful death action “does not constitute a deprivation of property that would trigger a procedural due process analysis under the Takings Clause” because the Estate’s claim accrued after the 2004 amendments. Alaska USA asked the court to notify the State that the Estate had challenged the 2004 amendments’ constitutionality.²⁰ The court provided notice to the State and gave it 60 days to intervene.

After intervening, the State asked the court to determine that the 2004 amendments did not violate due process. The State agreed with Alaska USA’s argument that the Estate had “no separate legal right to sue in tort because the legislature eliminated and replaced the wrongful death statute with the Workers’ Compensation Act.” Consequently, the State argued, there could be no procedural due process violation. The

State maintained

¹⁸ 674 P.2d 770, 775-76 (Alaska 1983) (affirming “that there is a common law duty to provide a safe worksite . . . [and] protect[] all workers on the site” and that “[t]he duty is not dependent upon the existence of any particular combination of contractual relationships”).

¹⁹ See *Schiel*, 219 P.3d at 1034-36 (holding 2004 amendments did not violate equal protection and thus did not violate substantive due process).

²⁰ See Alaska R. Civ. P. 24.

that the amendments did not violate the Estate’s substantive due process rights because the compensation, while limited to a “modest sum of burial costs,” was rationally related to the purpose of the Act, identified as “to provide relatively quick compensation regardless of fault such that a person and her dependents will not be impoverished by a workplace injury.”

Criterion raised arguments similar to those made by the State and Alaska USA about the Estate’s due process rights. It additionally argued that Burke was not a “statutorily defined dependent” of the decedent and thus the Estate had suffered no pecuniary loss.

Alaska USA filed a cross-motion for summary judgment, asking the court to determine that it was a “project owner” as defined in the Act and thus protected by the exclusive liability provision. The Estate opposed, arguing that material factual disputes precluded summary judgment.

The court held argument on the summary judgment motions and denied the Estate’s motion “for the reasons stated in the State’s briefing.” The court invited the parties to submit additional briefing addressing whether there were material factual disputes about

the applicability of the 2004 amendments to both Criterion and Alaska USA. The Estate identified two possible factual disputes.

The court ultimately decided no material factual disputes existed and that both Alaska USA and Criterion "qualif[ied] as 'employers' under the statute as the project owner and general contractor, respectively." The court granted Alaska USA's cross-motion for summary judgment and "applie[d] the same reasoning to . . . Criterion." It dismissed the Estate's case and later entered final judgment against the Estate. The Estate appeals.

III. STANDARD OF REVIEW

We review the grant of summary judgment de novo.²¹ "We apply our independent judgment to questions of constitutional law as well as 'to questions of "statutory interpretation requiring the application and analysis of various canons of statutory construction." ' "²²

IV. DISCUSSION

In *Burke* we set out the general terms of the "grand bargain" underlying the workers' compensation system: Employees give up their right to sue in tort for work-related injuries and death in exchange for certain but limited compensation without regard to fault; employers give up the right to raise certain defenses in exchange for limited liability for work-related injuries.²³ This basic bargain is set out in AS 23.30.045 and .055. Alaska Statute 23.30.045 requires an employer to "secure the payment" of compensation under the Act, and AS 23.30.055 makes the compensation set out in section .045 the exclusive liability of an employer for a work-related injury or death.

In 2004 the legislature amended the Act, extending “up the chain of contracts” the mandate to secure payment of compensation for work injuries and expanding the exclusive liability provision to those contracting entities now potentially liable for payment of compensation.²⁴ Under the amendments a project owner is

21 Christensen v. Alaska Sales & Serv., Inc., 335 P.3d 514, 516 (Alaska 2014).

22 Murphy v. Fairbanks North Star Borough, 494 P.3d 556, 562 (Alaska 2021) (quoting Burke v. Raven Elec., Inc., 420 P.3d 1196, 1202 (Alaska 2018)).

23 420 P.3d at 1202-03.

24 See Lovely v. Baker Hughes, Inc., 459 P.3d 1162, 1169 (Alaska 2020) (emphasis omitted) (quoting Minutes, Sen. Labor & Commerce Comm., Hearing on S.B. 323, 23d Leg., 2d Sess., 20-21 (Mar. 4, 2004) (statement of Sen. Ralph Seekins, Sponsor

(continued...)

potentially liable for compensation for the work-related injuries of its contractor’s and any subcontractor’s employees and also is protected from tort liability for those work-related injuries if compensation is paid.²⁵ In *Schiel* we considered the constitutionality of the amendments in the context of a personal injury suit against a contractor and held that the amendments did not violate the employee’s equal protection or due process rights.²⁶ We noted that, in response to questioning at oral argument before us, the contractor had “agreed . . . that at a certain level, inadequate benefits could violate a worker’s due process rights.”²⁷ The Estate cited this footnote as the basis for its lawsuit against Criterion and Alaska USA, contending that the limited amount of funeral expenses paid under the Act coupled with the Estate’s inability to sue others it considered liable for Caudle’s

death effectively left it with no compensation.

A. Procedural Due Process

We first consider whether the project owner amendments deprive the Estate of due process by denying it access to the court. We previously have related the right of access to the court to procedural due process, recognizing in *Bush v. Reid* that a claim for personal injuries is a form of property subject to due process protection.²⁸ The State argues that the project owner amendments had no effect on the Estate's procedural due process rights because the Estate had no property interest. After observing that wrongful

²⁴ (..continued) of S.B. 323)).

²⁵ AS 23.30.045, .055.

²⁶ 219 P.3d 1025, 1028-29, 1034-36 (Alaska 2009),
overruled on other grounds by *Buntin v. Schlumberger*
Tech. Corp., 487 P.3d 595, 598 & n.4 (Alaska 2021).

²⁷ Id. at 1036 n.63.

²⁸ 516 P.2d 1215, 1219 (Alaska 1973).

death actions are creatures of statute and did not exist at common law, and noting that the legislature can modify or eliminate unaccrued property interests that it has created, the State maintains that the legislature did precisely that with the 2004 amendments: it "abrogated [the Estate's] right to sue for workplace injuries and death." The State concludes that the Estate had no "property interest in a wrongful death suit to which procedural due process attaches."

But the legislature did not abrogate an employee's right to sue for workplace injuries and death when it enacted either the Alaska Workers' Compensation Act or the 2004 amendments to the Act. To the contrary, the Act explicitly permits lawsuits against uninsured employers²⁹ and any third party

who may be liable for a compensable injury or death.³⁰ Rather than extinguishing an employee's right to bring suit, the Act's exclusive liability provision creates an affirmative defense that shields an employer complying with the Act from further liability. And when an employer does not comply with the Act, it loses not only the exclusive liability defense but also several other defenses that employers relied on before workers' compensation programs existed – the fellow-servant rule, assumption of risk, and contributory negligence of the employee.³¹ Exclusive liability thus is one way to ensure compliance with the Act's

²⁹ AS 23.30.055; *Seal v. Welty*, 477 P.3d 613, 618-19 (Alaska 2020) (observing that AS 23.30.055 allows suits against uninsured employers).

³⁰ AS 23.30.015. An employee who recovers damages from a third party must reimburse the employer for any compensation received. AS 23.30.015(g).

³¹ AS 23.30.055; see 1 ARTHUR LARSON ET AL., *LARSON'S WORKERS' COMPENSATION LAW* § 2.03 (Matthew Bender, Rev. Ed. 2015) (describing limitations on employee's common law remedies through use of these three defenses); cf. *N.Y. Cent.R.R. Co. v. White*, 243 U.S. 188, 198-200 (1917) (discussing history of these three defenses).

grand bargain; employers who do not keep their end of the bargain lose common law defenses in addition to the Act's protection against limited damages.

Similarly, the project owner amendments did not abrogate an employee's right to bring a personal injury or wrongful death action; they instead expanded the applicability of both AS 23.30.045 and AS 23.30.055, extending the grand bargain to general contractors and project owners by redefining "employer" in those sections to encompass them in the statutorily defined chain of contracts with a direct employer.³² The

exclusive liability defense is now available to project owners and contractors when they or the direct employers comply with the grand bargain by securing compensation coverage. But the amendments did not extinguish an estate's right to bring a wrongful death action for a work-related death.

In arguing that the Estate's rights had been extinguished, the State relies on two takings cases. But we have distinguished property for purposes of due process protection from property for a takings analysis.³³ In *Vanek v. State, Board of Fisheries* we recognized that a commercial fishing permit may be property subject to due process protections but that it does "not necessarily follow that a [fishing] permit is property that requires just compensation when its value decreases due to a valid state regulation."³⁴ 193 P.3d 1162, 1169 (Alaska 2020).

³³ *Vanek v. State, Bd. of Fisheries*, 193 P.3d 283, 289, 293 (Alaska 2008). The U.S. Supreme Court has also distinguished takings analysis from due process analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-43 (2005).

³⁴ 193 P.3d at 293.

The question presented here is not unlike the one raised in *Arctic Structures, Inc. v. Wedmore*.³⁵ In *Wedmore* a subcontractor's injured employee sued companies that were not his direct employers but were involved in the construction project.³⁶ As in the appeal before us, a change in the law altered the defenses available in litigation stemming from a work injury: The companies argued they had been deprived of access to the courts "to raise the defense of the employer's negligence" because of the combination of several doctrines, including exclusive liability.³⁷ We

rejected their procedural due process argument after first determining the companies had “not been deprived of any ‘available’ defenses.”³⁸ In this context we said: “While it is manifest that no one has a vested right in any particular mode of procedure such that legislative change is prohibited, due process does require that a substantial and efficient remedy remains available or that one be provided when a preexisting defense is statutorily limited.”³⁹ We recognized that rejecting the companies’ argument might produce inequities because a direct employer whose negligence contributed to the harm would be protected by exclusive liability yet be reimbursed for compensation payments

³⁵ 605 P.2d 426 (Alaska 1979).

³⁶ *Id.* at 427-28.

³⁷ *Id.* at 435-37.

³⁸ *Id.* at 437.

³⁹ *Id.* at 436.

under a different section of the Act.⁴⁰ We nonetheless determined that the legislature and not this court needed to address the issue.⁴¹

The State questions the applicability of our *Wedmore* statement that due process requires “that a substantial and efficient remedy remain[] available or that one be provided.”⁴² Yet *New York Central Railroad Co. v. White*, the U.S. Supreme Court’s 1917 decision upholding New York’s workers’ compensation statute against a constitutional challenge, acknowledged a similar concern.⁴³ *White* involved a due process challenge to New York’s workers’ compensation law, including an argument that the statute deprived employers of due process by imposing liability without

regard to fault.⁴⁴ The Court observed that it did not need to consider “whether the state could abolish all rights of action, on the one hand, or all defenses on the other, without setting up something adequate in their stead” because the workers’ compensation system at issue “set[] aside one body of rules only to establish another system in its place.”⁴⁵ The Court looked at the nature of the system as a whole to consider whether it was a “just settlement” of the problem the legislature sought to address in adopting a no-fault system of compensation with limited recovery for work-related injuries.⁴⁶ The Court expressly

⁴⁰ See *id.* at 438-40; see also *id.* at 441-42 (Boochever, C.J., dissenting) (setting out example of application and calling result of holding “glaringly inequitable”).

⁴¹ *Id.* at 440 (majority opinion).

⁴² *Id.* at 436.

⁴³ 243 U.S. 188 (1917).

⁴⁴ *Id.* at 196.

⁴⁵ *Id.* at 201.

⁴⁶ *Id.* at 202.

left for future adjudication whether “the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case.”⁴⁷

Although decided many years ago, *White* has never been overruled. As reflected by our decisions and by federal law, whether and to what extent the constitution protects common law rights is not settled.⁴⁸ The U.S. Supreme Court has long held the view that “[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”⁴⁹ But the Court has not decided whether due process places limits on the legislature’s power to modify or eliminate common law rights, as demonstrated by the questions expressly left open in *White*.⁵⁰ In *Duke*

Power Co. v. Carolina Environmental Study Group, Inc. the Court more recently said it was “not at all clear” that due process “requires that a legislatively enacted compensation

⁴⁷ *Id.* At 205-06.

⁴⁸ See *Fein v. Permanente Med. Grp.*, 474 U.S. 892, 894-85 (1985) (White, J., dissenting from dismissal of certiorari) (questioning whether due process requires compensation scheme with adequate remedy as quid pro quo “for the common-law or state-law remedy it replaces”); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1057 (Alaska 2002) (plurality opinion) (“Moreover, the damages caps do not violate the right of access because they are not so drastic so as to eliminate the tort remedies that they modify.”); cf. *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 391 (Alaska 2013) (explaining that *Fein* dissent noted constitutional protection of common law rights was unsettled and that federal cases considering challenges to Protection of Lawful Commerce in Arms Act interpreted it as limiting common law remedies, not “depriv[ing] injured persons of all potential remedies”(quoting *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 177 n.8 (D.C. Cir. 2008)).

⁴⁹ *White*, 243 U.S. at 198 (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

⁵⁰ *Id.* at 201; cf. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (“Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.”).

scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.”⁵¹ The Court cited *White* and upheld the Price-Anderson Act, which provided limited compensation in the event of a nuclear accident, because that statute “provide[s] a reasonably just substitute for the common-law or state tort law remedies it replaces.”⁵² We thus reject the State’s contention that *Wedmore* introduced a court-access right into the workers’ compensation framework “seemingly by error.” Limits on the right to bring actions

and assert defenses have been an underlying question in workers' compensation since its inception, and the balance of the benefits and burdens of the grand bargain remains an issue subject to our review. But *White* also shows that consideration of the entire system, not simply the result in one case, is important when evaluating changes to the workers' compensation scheme. Considering the Act as whole, we hold that the 2004 amendments do not violate the Estate's procedural due process rights because the remedy the Act provides, while small, is consistent with the purpose of workers' compensation and affords the Estate some remedy.

The purpose of the Act is to provide employees and their dependents adequate income to replace that lost through a work-related injury or death while encouraging a return to work.⁵³ We have previously recognized that the Act provides

⁵¹ 438 U.S. 59, 88 (1978).

⁵² *Id.* at 64, 88 (citing *White*, 243 U.S. 188; *Crowell v. Benson*, 285 U.S. 22 (1932)).

⁵³ See *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1124-25 (Alaska 2017) (interpreting statute consistently with balancing goals of providing both adequate replacement income and incentive to return to work); see also AS 23.30.001(1) (requiring Act to "be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of . . . benefits . . . at a reasonable cost"); *Burke v. Raven Elec., Inc.*, 420 P.3d 1196, 1202-03 (Alaska 2018) (summarizing purposes of workers' compensation).

uneven benefits.⁵⁴ Caudle had no dependents suffering economic loss by her death; providing funeral expenses as workers' compensation — thus eliminating the Estate's potential economic loss for Caudle's death — and allowing Criterion and Alaska USA to use exclusive liability as an affirmative defense does not deprive the

Estate of all remedies or all possible access to courts. Caudle's family members may feel they have been wronged by a system that, in this particular case, provided minimal compensation, imposed only a small work-safety-violation fine, and offered no other means to hold accountable those whom the Estate considers responsible for her death. But considering the Act as a whole, extension of the exclusive remedy defense does not so diminish the Estate's economic recovery as to deprive it of all access to the courts.

C. Substantive Due Process

The Estate also raises a substantive due process challenge to the Act. Relying on the substantive due process goal we have identified — “guard[ing] against unfair, irrational, or arbitrary state conduct that ‘shock[s] the universal sense of justice’ ”⁵⁴ — the Estate contends that the limited recovery available to it under the 2004 amendments fails to meet this substantive due process standard because the remedy available to it “is the exact definition” (emphasis omitted) of unfair and arbitrary state conduct.

Relying on our precedent, Alaska USA asserts that the Estate received a substantial remedy because Raven paid funeral expenses and that in a similar case we

⁵⁴ See *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 381 (Alaska 2006) (“Workers whose wages are low, who have been the victims of blatantly negligent conduct, or who suffer exceptional noneconomic injuries bear the brunt of a system that may benefit their co-workers or employers but certainly does not benefit them.”).

⁵⁵ *Doe v. State, Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019) (second alteration in original) (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).

decided payment of funeral expenses as the sole workers'

compensation remedy did not violate equal protection.⁵⁶ The State contends that the Estate's substantive due process claim is controlled by *Schiel*. The State acknowledges that the compensation afforded the Estate was "modest" and that "\$10,000 in burial expenses is nowhere near proportionate to the loss of a life." But the State points out, as does Criterion, that the purpose of workers' compensation is not the same as that of tort law, even though the workers' compensation system replaces that system for many work-related injuries. Criterion also argues that the Estate failed to make the showing required under our test for substantive due process: A person challenging a statute on substantive due process grounds must show that the statute bears "no reasonable relationship to a legitimate governmental purpose."⁵⁷

Our "inquiry into arbitrariness" starts with the presumption that the legislative action is proper, and the party challenging the statute on substantive due process grounds must "demonstrat[e] that no rational basis for the challenged legislation exists."⁵⁸ "If any conceivable legitimate public policy for the enactment is either apparent or offered by those defending the enactment, the party challenging it must disprove the factual basis for the justification."⁵⁹ In *Schiel* we identified the following legitimate purposes of the 2004 amendments: "to ensure or expand workers'

⁵⁶ Taylor v. Se.-Harrison W. Corp., 694 P.2d 1160, 1162-63 (Alaska 1985).

⁵⁷ *Schiel v. Union Oil Co. of Cal.*, 219 P.3d 1025, 1036 (Alaska 2009) (quoting *Premiera Blue Cross v. State, Dep't of Com., Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1124 (Alaska 2007)), overruled on other grounds by *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595, 598 & n.4 (Alaska 2021).

⁵⁸ Concerned Citizens of S. Kenai Peninsula. Kenai Peninsula Borough, 527 P.2d 447, 452 (Alaska 1974).

⁵⁹ Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 352 (Alaska 1988).

compensation coverage for workers, to increase workplace safety, to prevent 'double dipping,' and to provide protection from tort liability to those who are potentially liable for securing workers' compensation coverage."⁶⁰

To succeed on its claim the Estate was required to provide factual information that generally disproved the justifications for the amendments. The standard does not require that the legislation meet its stated goals or objectives in every individual case. For example, the Estate argues that the 2004 amendments did not fulfill their purpose of increasing workplace safety because safety violations, for which the State fined Raven, caused Caudle's death.⁶¹ We recognize that work-safety violations contributed to her death, but Raven's failure to follow safety standards in this instance does not demonstrate that the legislature's expansion of the exclusive liability defense will not further workplace safety more generally. The Estate also argues that "double-dipping" was not an issue because of the minimal compensation the Estate received, but this argument does not address the overall costs of a business paying for both workers' compensation and (through indemnification agreements) tort damages for the same injury, which was the problem the legislature sought to address.⁶²

The Estate's arguments misapprehend the heavy burden a party bears when challenging a statute on substantive due process grounds. The Estate did not and does not argue that the 2004 amendments' purposes were not legitimate, and it provided no

evidence that would disprove the factual basis for the legislature's justifications. In addition to the stated purpose of enhancing workplace safety, the legislature enacted the amendments for the asserted purposes of increasing access to compensation coverage for

⁶⁰ 219 P.3d at 1032.

⁶¹ *Burke v. Raven Elec., Inc.*, 420 P.3d 1196, 1999 (AK 2018).

⁶² *Schiel*, 219 P.3d at 1032-33.

Workers and preventing some employers or contractors from having to pay both compensation and damages because of indemnity agreements.⁶³ In light of these purposes and the lack of evidence undercutting the legislative justifications for them, the Estate has not shown that the 2004 amendments violate substantive due process.

We again acknowledge that the result in this case will seem harsh to Caudle's family. Some courts have expressed concern with similarly low levels of compensation for the estates of workers who die without dependents.⁶⁴ As the Montana Supreme Court wrote: "It is easy to opine that the Legislature could have done better in providing for family members after a worker's death, even those who are non-dependents of the worker. Work-related death is traumatic, final, and adversely impacts a family forever."⁶⁵ But we agree with that court that the appropriate amount of compensation is subject to debate and that the legislature could rationally decide to provide a minimal payment to the estates of employees who die without dependents while providing more to injured employees and the dependent survivors of employees who die in work-related accidents.⁶⁶

⁶³ *Id.*

⁶⁴ *Walters v. Flathead Concrete Prods., Inc.*, 249 P.3d 913, 921 (Mont. 2011); *Park v. Rockwell Int'l Corp.*, 436 A.2d 1136, 1139 (N.H. 1981), *overruled by Alonzi v. Ne. Generation Servs. Co.*, 940 A.2d 1153, 1162-63 (N.H. 2008).

⁶⁵ *Walters*, 249 P.3d at 921.

⁶⁶ *Id.* at 921-22.

Considering the entire Act, including the 2004 amendments, we conclude, consistent with *Schiel*, that the Act does not violate the Estate's substantive due process rights.⁶⁷

V. CONCLUSION

We AFFIRM the superior court's judgment.

⁶⁷ We agree with the superior court that no material factual disputes precluded summary judgment.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT ANCHORAGE

Marianne E Burke,
Estate of Abigail
Caudle by its Personal
Representative,
Plaintiff,

Date of Order:
12/12/19

v.

Criterion General, Inc. and
Alaska Corporation and
Alaska USA Federal Credit
Union, an unincorporated
association.

Case No. 3AN-18-09109 CI

ORDER

The court denied Plaintiffs motion for summary judgment based on her due process rights on November 12, 2019. In the November 2019 order, the court invited additional briefing as to whether both defendants would be considered "employers" under the Alaska Worker's Compensation Act. On

September 30, 2019, Defendant Alaska USA Federal Credit Union ("Alaska USA") filed a cross motion for summary judgment claiming immunity under Alaska Worker's Compensation Act. The court now considers the parties' briefs as to the question of whether both defendants, Alaska USA and Criterion General, are barred by the exclusive liability provision of the Alaska Worker's Compensation Act, Alaska Stat. § 23.30.055.

Having reviewing the parties' filings on the matter and for the reasons stated in the State's brief on September 9, 2019 as well as this court's order on November 12, 2019, the court finds that the exclusive liability provision of the Alaska Worker's Compensation Act applies. In 2004, the Alaska State Legislature amended the statute to "expand[] the definition of 'employer' for purposes of the exclusive liability provision of the workers' compensation act to include any person who is potentially liable for securing payment of compensation."¹ After the amendments, both project owners and general contractors were granted immunity under the Alaska Worker's Compensation Act.

Here, based on the facts provided in the record, the court finds that both Alaska USA and Criterion General qualify as "employers" under the statute as the project owner and general contractor, respectively.² This is consistent with the Alaska Supreme Court's statements about the parties in the plaintiffs related case, *Burke v. Raven Electric*.³

Accordingly, this court GRANTS Defendant Alaska USA's cross motion for summary judgment. The court applies the same reasoning to Defendant Criterion General's status in this case. The court

finds that dismissal of the claims against both defendants is proper as the plaintiffs claims are barred by the exclusive liability provision of the Alaska Worker's Compensation Act. It is hereby ordered that the case against Alaska USA and Criterion General be DIMISSED with prejudice.

ORDERED this 12 day of December, 2019, at Anchorage, Alaska.

.... I certify that on 12/12/19
a copy of the above was mailed to
each of the following at their
addresses of record:

K. Dougherty
B. Maddern J. Wolff
A. Floyd
Chris McNeese
Chris McNeese, Judicial Assistant

Andrew Guidi
ANDREW
GUIDI
Superior Court
Judge

¹ Alaska 2007

19 P.3d 1025, 1029

² AS § 23.30.395(20), 23.30.045.

³ *Burke v. Raven Elec., Inc.*, 420 P.3d 1196, 1199 n.2 (Alaska 2018) (noting that the "general contractor" for the project was Criterion General and that "Alaska USA Federal Credit Union was the building owner and thus potentially a 'project owner'").

Page 2 of 2

ORDER Case No. 3AN-18-09109 CI, December 12, 2019.

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, email corrections@akcourts.us.

THE SUPREME COURT OF THE STATE OF ALASKA

MARIANNE E. BURKE,)	
mother of	)	Supreme Court
ABIGAIL E. CAUDLE	)	No. S-16137
(deceased),)	
	)	Alaska Workers'
Appellant,	)	Compensation
)	
v.	)	Appeals
	)	Commission
	)	No. 14-0222
RAVEN ELECTRIC, INC.)	
and LIBERTY MUTUAL	)	<u>OPINION</u>
INSURANCE COMPANY,)	
)	
Appellees	)	7241 - May 11
	)	May 11, 2018

Appeal from the Alaska Workers' Compensation Appeals Commission.

Appearances: Marianne E. Burke, pro se, Anchorage, Appellant. Nora Barlow and Constance Livsey, Burr, Pease & Kurtz, Anchorage, for Appellees. Dario Borghesan, Assistant Attorney General, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for Amicus Curiae State of Alaska. Eric Croft, The Croft Law Office, Anchorage, for Amicus Curiae Eric Croft.

Before: Stowers, Chief Justice, Winfree, Maassen, Bolger, and Carney, Justices.

STOWERS, Chief Justice.

I. INTRODUCTION

After an apprentice electrician was killed on the job, her

mother sought workers' compensation death benefits or other damages related to her daughter's death. Acting on the advice of attorneys but representing herself, she brought a claim before the Alaska Workers' Compensation Board. She argued in part that the Alaska Workers' Compensation Act was unconstitutional because it inadequately compensated for her daughter's life, particularly given the circumstances of her daughter's death, and because it failed to consider her future dependency on her daughter. The Board denied her claim, and the Alaska Workers' Compensation Appeals Commission affirmed the Board's decision. The Commission also ordered the mother to pay the employer's attorney's fees and costs. We hold that the mother's constitutional rights are not violated by the Act. We reverse the Commission's award of attorney's fees but otherwise affirm the Commission's decision.

II. FACTS AND PROCEEDINGS

Abigail Caudle was a 26-year-old apprentice electrician when she was electrocuted on the job while working for Raven Electric, Inc. According to a "Fatalgram" by the Alaska Department of Labor & Workforce Development, Division of Labor & Safety Standards, Occupational Safety & Health (AKOSH), it was Caudle's first day on that particular job, which involved the remodel of an Anchorage building.¹

¹ *Fatalgram 11-07, ALASKA DEPT OF LABOR & WORK FORCE DEV.*, http://labor.state.ak.us/lss/forms/Fatalgram_11-07.pdf. A "Fatalgram" is a short report of a work-related fatality, which AKOSH has evidently adopted from the U.S. Mine Safety & Health Administration. See 4 HARRY M. PHILO & HARRY M. PHILO, JR., *LAWYERS DESK REFERENCE* § 29:13 (10th ed. 2014) (defining "fatalgrams" in mine safety context). In mine safety the documents "include a description of the circumstances of the incident and recommendations for preventing the death."

Id.

On the day of the accident Raven Electric initially planned to "rough[] in three offices as far as outlets and switches," but the general contractor² changed the scope of work after Raven Electric's crew arrived, asking the electricians to tear out old light fixtures instead because the contractors "had already taken out the grid ceiling" and could not proceed with their work while the old fixtures were in place. Raven Electric did not have temporary lights set up, so the crew was "using some of the lights that were on while the construction was going on." The light switches for the light fixture Caudle was working on had been turned off, but no one had turned off the power at the electrical panel or otherwise disconnected power to the lights. Caudle used a noncontact voltage meter to check for power, and witnesses told AKOSH the meter showed a green signal, indicating no voltage.

Caudle began to remove the wire nuts and then "disconnected the neutral wire and was electrocuted between the load side neutral conductor and either the grounded conduit junction box, or the conduit to the left side of the neutral conductor." Coworkers heard her cry out, rushed to her aid, called emergency services, and began CPR. The efforts to assist her were unsuccessful, and Caudle was pronounced dead at the hospital less than an hour later. The electricians interviewed during the AKOSH investigation thought there had been a "back feed on the neutral" wire and suggested that the circuit had been wired incorrectly at some time in the past. AKOSH cited Raven Electric for several safety violations and ultimately agreed through an informal settlement to fine Raven Electric a total of \$11,200 for those safety violations.

Raven Electric filed a report of injury with the

Board and paid funeral expenses required by the Alaska Workers' Compensation Act (Act). Because Caudle was unmarried and had no dependents

2 Raven Electric was a subcontractor on the job; Criterion General, Inc. was the project's general contractor, and Alaska USA Federal Credit Union was the building owner and thus potentially a "project owner" under AS 23.30.045.

at the time of her death, the Act limited Raven Electric's liability to funeral expenses up to \$10,000 and a \$10,000 payment to the Second Injury Fund.³

Two years after Caudle's death, her mother Marianne Burke filed a written workers' compensation claim seeking death benefits. Burke was listed as a beneficiary on the claim form, and she attached a two-page addendum setting out some of her concerns about safety at the work site. She alleged that following Caudle's death she had "gotten the run around from all the lawyers on this," had "not been able to work," and had "been sick often due to [her] daughter's death."

Raven Electric filed an answer saying it had paid all workers' compensation benefits due and denying further benefits were owed. It also raised two affirmative defenses. Burke's claim was untimely under AS 23.30.105(a), and she was not a beneficiary because she was not dependent on Caudle at the time of Caudle's death as required by the Act.⁴ Raven Electric later petitioned the Board to dismiss Burke's claim on those grounds.

In the course of pleadings and proceedings before the Board, Burke clarified that she was trying "to get justice for [her] daughter" and said the Board was "the only place that been allowed to get any source of justice." She did not want to produce tax records to show dependence on Caudle, and she asserted that she would

have depended on Caudle for care in the future, even if she did not do so at the time of Caudle's death. Burke argued that simply because Caudle "was single [did] not make

3 AS 23.30.040(c), .215(a). The Second Injury Fund is a fund designed to provide partial reimbursement to employers who hire workers with certain preexisting conditions in the event those workers later become disabled due to a work-related injury. AS 23.30.205.

4 AS 23.30.215(a), (c).

her life worth nothing, as the current laws imply" from the low amount of compensation benefits. Burke contended that both her own and Caudle's constitutional rights were violated by the limited compensation available for Caudle's death, particularly because of what Burke called Raven Electric's gross negligence. Burke filed a document entitled "Notice of Intent to Rely" which contained a copy of the AKOSH file on which Burke had made written comments.

The parties stipulated to a limited hearing in February 2014 to resolve disputes about procedure. Burke raised constitutional arguments about the Act at the hearing and explained her position on the procedural questions. The Board issued an interlocutory order resolving the procedural disputes and informing Burke that it did not have jurisdiction to decide constitutional issues. In its interlocutory order the Board "excluded" Burke's "Notice of Intent to Rely" as not relevant to the issue of Burke's entitlement to additional death benefits.

Raven Electric then requested a hearing on its petition to dismiss the claim; Burke opposed setting a hearing because she wanted more time to research the law and prepare her case. Burke's understanding was that she

would have two years from the date she filed the claim to prepare for a hearing. Burke also argued in opposing the substance of Raven Electric's petition to dismiss that workers' compensation was the only legal remedy available to her and that the purpose of workers' compensation was "to protect workers, give value to their lives, [and] create safer work conditions, none of which occurred for [her] daughter." (Emphasis omitted.) She did not think the death benefits available for Caudle's death achieved these ends.

The Board set a hearing in July on the petition to dismiss. About 20 days before this hearing, Burke filed a clean copy of the AKOSH file along with a notarized statement from an agency representative that the copy was "from [the] State of Alaska Occupational Safety & Health records." Raven Electric objected to this evidence because it had been "excluded" in the Board's interlocutory order.

At the beginning of the July hearing, Raven Electric again sought to exclude the AKOSH file as irrelevant; Burke contended that it should be part of the record for purposes of appeal. The Board hearing chair told Burke the Board was "not going to stop [her] from filing anything," that the AKOSH file was "not being stricken from the record," and that it was "part of the record of the case no matter what." The Board panel decided to "exclude[] [the file] for the purpose of [the July] hearing." The hearing consisted mainly of argument. As relevant to this appeal,

Raven Electric argued that Burke was seeking some type of compensatory or punitive damages that were not authorized under the Act because workers' compensation was the exclusive remedy available for a work-related death. Raven Electric pointed out that the workers' compensation system had been in existence even in

territorial days and that the Act represented a trade-off. It cited precedent holding that the low level of death benefits for single workers with no dependents did not violate equal protection. Burke reiterated her position that the Act provided inadequate compensation for her daughter's death, especially in light of what she considered Raven Electric's negligence and its failure to provide a safe workplace. She asked the Board to consider awarding the full amount of permanent partial impairment benefits under the Act, stating that something beyond funeral expenses should be paid to families of single workers who die on the job. Burke explained that she had suffered emotional harm and financial hardship due to Caudle's death because she had difficulties working after the death, and that Caudle's aunt Betty, from whom Caudle rented living quarters, had also suffered hardship. Burke again explained that she had brought the claim to the Board because it was "the only place [she could] get justice": the case had been "pigeonholed into workers' comp," and the family "couldn't go through civil court." And she restated her arguments that the compensation scheme violated her constitutional rights.

At the end of the July hearing, the hearing chair clarified Burke's status in asserting the claim:

CHAIR SLODOWY: Thank you. Ms. Burke, are you representing the estate of Abigail? Have you ever been appointed, like, an executor of the estate or —

MS. BURKE: Betty was taking care of the estate to begin with.

[BETTY]: Oh, Nate was.

BURKE: The father [Burke's ex-husband].

CHAIR: Okay. So you're appearing on behalf of — individually —

BURKE: Yes.

CHAIR: — on yourself, not on behalf of the estate, as

like an executor.

BURKE: On behalf of the estate, I suppose. I mean, that's how I think it started. But I'm not —

CHAIR: I'm understanding —

BURKE: I'm in no contact with my ex.

CHAIR: Okay. So you're appearing individually.

BURKE: I guess you're right, individually —

CHAIR: Okay.

BURKE: — not as a mother [sic].

In its written decision the Board affirmed its oral order excluding the evidence and determined that Burke's claim was not untimely. It agreed with Raven Electric that Burke did not qualify for any compensation benefits, writing that she "simply has no remedy under the Act." Accordingly the Board dismissed her claim "for lack of a statutory remedy."

Burke appealed to the Commission. She again made constitutional claims but also argued she should be able to sue Raven Electric under the Defective Machinery Act⁵ because Raven Electric had supplied Caudle with a voltage meter that was inadequate to accurately detect the presence of electric current. She noted amendments to the Workers' Compensation Act in 2004, which she said "took away a death victim's family's right to sue in civil court [for] a wrongful death in the work place." Burke contended that the Act effectively gave her and other family members nothing for Caudle's life, observing that the funeral home, not the family, received the only benefits available under the Act. Burke emphasized the impact of Caudle's death on her own earning capacity and questioned the Act's dependency definition.

The Commission, like the Board, concluded it had no jurisdiction over constitutional questions. The Commission cited cases in which this court had decided

that (1) the Act did not violate the equal protection rights of the estates of unmarried workers who died on the job leaving no dependents⁶ and (2) the Defective Machinery Act did not apply to cases in which the Act also applied.⁷ The Commission upheld the Board's decision that Burke was not entitled to further benefits under the Act.

After the Commission affirmed the Board's decision, Raven Electric asked the Commission to order Burke to pay its attorney's fees. Raven Electric argued that Burke was not an injured worker and was thus not covered by the statutory provision shielding injured workers from having to pay attorney's fees in Commission appeals. The Commission agreed and ordered Burke to pay \$11,203.20 in attorney's fees and costs. Burke appeals.

⁵ AS 23.25.010-.040.

⁶ *Taylor v. Se. Harrison W. Corp.*, 694 P.2d 1160, 1162-63 (Alaska 1985).

⁷ *Gordon v. Burgess Constr. Co.*, 425 P.2d 602, 605 (Alaska 1967).

III. STANDARD OF REVIEW

In an appeal from the Alaska Workers' Compensation Appeals Commission, we review the Commission's decision.⁸ We apply our independent judgment to questions of "statutory interpretation requiring the application and analysis of various canons of statutory construction."⁹ We also apply our independent judgment to questions of constitutional law.¹⁰

IV. DISCUSSION

The workers' compensation system consists of a trade-off, sometimes called the "grand bargain,"¹¹ in which workers give up their right to sue in tort for damages for a work-related injury or death in exchange for limited but certain

benefits, and employers agree to pay the limited benefits regardless of their own fault in causing the injury or death.¹² This system has been in place in the United States for over a century and has

⁸ *Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, 337 P.3d 1174, 1178 (Alaska 2014) (citing *Shehata v. Salvation Army*, 225 P.3d 1106, 1113 (Alaska 2010)).

⁹ *ARCTEC Servs. v. Cummings*, 295 P.3d 916, 920 (Alaska 2013) (quoting *Tesoro Alaska Petrol. Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903-04 (Alaska 1987)).

¹⁰ *Fraternal Order of Eagles v. City & Borough of Juneau*, 254 P.3d 348, 352 (Alaska 2011).

¹¹ See *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 676 (Iowa 2015) (describing "grand bargain removing workers' compensation matters from the civil justice system").

¹² *Taylor v. Se. Harrison W. Corp.*, 694 P.2d 1160, 1162 (Alaska 1985) ("[T]he Act serves 'the goal of securing adequate compensation for injured employees without the expense and delay inherent in [ordinary civil litigation requiring] a determination of fault as between the employee and employer.'" (second alteration in original) (quoting *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426, 437 (Alaska

withstood constitutional challenge.¹³ New York's workers' compensation statute was found constitutional under the United States Constitution in 1917.¹⁴ New York's compensation law became the model for the federal Longshore and Harbor Workers' Compensation Act,¹⁵ which in turn served as the model for Alaska's Act.¹⁶

As *Larson's Workers' Compensation Law* observes, workers' compensation in the United States is similar to "social insurance" because "the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame," even though the

funding mechanism for the system is “unilateral employer liability.”¹⁷ *Larson’s* observes that “[a] compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost.”¹⁸ Instead, the goal of workers’ compensation is to “give[] claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable claimant to exist without being a burden to others.”¹⁹

¹² (...continued) 1979).

¹³ See 1 ARTHUR LARSON ET AL., *LARSON’S WORKERS’ COMPENSATION LAW* § 2.07 (Matthew Bender, Rev. Ed. 2015) (describing history of workers’ compensation in the United States).

¹⁴ *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 208 (1917).

¹⁵ *Bell v. O’Hearne*, 284 F.2d 777, 779 (4th Cir. 1960).

¹⁶ *McCarter v. Alaska Nat’l Ins. Co.*, 883 P.2d 986, 990 n.5 (Alaska 1994).

¹⁷ 1 ARTHUR LARSON ET AL., *supra* note 13, § 1.02.

¹⁸ *Id.* § 1.03[5].

The basic provisions of this bargain in Alaska’s Act are contained in AS 23.30.045 and .055. Under AS 23.30.045 an employer is required to provide workers’ compensation coverage for employees, and in return, AS 23.30.055 makes workers’ compensation the employee’s exclusive remedy. Most Alaska employers are required to provide workers’ compensation.²⁰ The only exceptions to the exclusive remedy provision are failure to insure²¹ and intentional torts.²² To encourage employers to keep their part of the “grand bargain” the Act allows employees to sue in tort those employers who do not “secure payment of compensation” under the Act and takes from noncompliant employers certain tort defenses.²³ The exclusive remedy sections of the Act were amended in 2004 to expand potential liability for workers’

compensation “up the chain of contracts”²⁴ to project owners and general contractors²⁵ and at the same time to extend the exclusive remedy shield to all those “up the chain” who are now potentially

¹⁹ *Id.*

²⁰ *Alaska Statute 23.30.230 sets out a list of jobs that are not covered by the Act. The Act has additional provisions governing sole proprietors, partners, corporate officers, and members of limited liability companies. AS 23.30.239-.240.*

²¹ *AS 23.30.055.*

²² *Elliott v. Brown, 569 P.2d 1323, 1327 (Alaska 1977) (holding that when coworker commits an intentional tort, exclusive liability does not foreclose an action against the coworker).*

²³ *AS 23.30.055.*

²⁴ *Minutes, Sen. Labor & Commerce Comm. Hearing on S.B. 323, 23d Leg., 2d Sess. 20-21 (Mar. 4, 2004) (statement of Sen. Ralph Seekins, sponsor),*
<http://www.legis.state.ak.us/pdf/23/M/SL/C2004-03-041332.PDF>.

²⁵ *AS 23.30.045.*

liable for workers' compensation.²⁶ We held in 2009 that the 2004 amendments were constitutional, reasoning that the amendments furthered the goal of providing workers' compensation at a reasonable cost to employers by expanding those entities who are required to secure coverage and giving those who are now potentially liable the protection of the exclusive remedy.²⁷

Burke, representing herself, has raised constitutional arguments about both the 2004 amendments and the underlying exclusive remedy provisions of the Act. Some of her arguments are related to her own potential status as a beneficiary while others would more properly be asserted by Caudle's estate. Burke's briefing also suggests at times that she was the personal representative of the estate. But because further review of the record demonstrates that Burke was not a personal

representative of the estate, we decline to reach the merits of those issues, and we address the merits of only those claims that Burke asserted on her own behalf.²⁶

A. The Exclusive Remedy Provision Does Not Violate Burke's Constitutional Rights.

Burke argues that the exclusive remedy provision of the Act violates her rights to due process and equal protection under the Alaska and U.S. Constitutions and also violates her right to privacy under the Alaska Constitution. She contends that by failing to provide more compensation for Caudle's death, the Act "treat[s] [Caudle's] life as if she was

²⁶ AS 23.30.055.

²⁷ *Schiel v. Union Oil Co. of Cal.*, 219 P.3d 1025, 1034-35 (Alaska 2009).

²⁸ We asked the State of Alaska and Eric Croft, who had earlier requested permission to file an amicus brief, to brief as amici constitutional and procedural issues related to the 2004 amendments due to Burke's self-represented status. While we do not reach the merits of the constitutional issues addressed in their briefing, we thank them for their participation.

worth a piece of dirt" and violates Burke's due process rights because, through the Act, the State "has taken away [her] right for justice and compensation" for her daughter's death and left no means for her to redress it. In her view this is a deprivation of life, liberty, or property without due process of law.

In *Wright v. Action Vending Co.* we considered challenges to the exclusive remedy provision brought by the spouse of an injured worker when the superior court determined that provision barred a spouse's loss of consortium action against the employer.

²⁹ We construed the Act as barring not only actions by the injured worker individually but also actions that "arise] out of, and cannot exist without, the core of

activity" covered by the Act.

³⁰ In *Wright*, quoting a federal court, we observed that "the keystone" of the workers' compensation system "was the exclusiveness of the remedy."

³¹ The bargain underlying workers' compensation is a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuari[ally] measured and accurately predicted.

³² "[A]nything that tends to erode the exclusiveness of either the liability or the recovery

²⁹ 544 P.2d 82 (Alaska 1975).

³⁰ *Id.* at 86.

³¹ *Id.* at 84 (quoting *Smither & Co. v. Coles*, 242 F.2d 220, 222 (D.C. Cir. 1957)).

³² *Id.* at 85 (quoting *Smither & Co.*, 242 F.2d at 222). *strikes at the very foundation of" the bargain underlying workers' compensation.*

³³ *Like the loss of consortium claim in Wright, Burke's personal claims arise "on account of the injury or death"*

³⁴ *covered by the Act and are barred by the exclusive remedy provision. Parents are listed, along with spouses, "dependents," and "next of kin," as those whose actions against an employer are barred by the Act.*

³⁵ *To be entitled to workers' compensation death benefits, a parent must show dependency at the time of the child's death.*

³⁶ Burke argues that the Act's failure to provide for her potential future dependency on Caudle violates her right to equal protection. She also contends that requiring her to show financial dependency violates her right to privacy by requiring production of income tax returns and deprives her of due process by failing to

compensate her and other family members for their emotional, as opposed to financial, dependence on Caudle. The Board did not require Burke to produce her income tax information, and Burke did not try to prove that she was economically dependent on Caudle at the time of Caudle's death, so questions related to privacy are not at issue on appeal. Damage to emotional ties is a type of noneconomic damages,³⁷ and the Act does not provide

³³ *Id.* (quoting *Smither & Co.*, 242 F.2d at 222).

³⁴ See AS 23.30.055 (providing that workers' compensation is "exclusive and in place of all other liability of the employer on account of the injury or death").

³⁵ *Id.*

³⁶ AS 23.30.215(a)(4), (c).

³⁷ Cf. *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 994 (Alaska 1987) (recognizing that minor children have independent claim for loss of consortium when parent is injured). *not provide noneconomic damages to either injured workers or their families.*

noneconomic damages to either injured workers or their families. ³⁸ Before there can be a violation of due process, a person must have a substantive right that entitles her to a certain level of process in order to protect that right.

³⁹But Burke does not have such a right. The legislature has limited the substantive rights available to nondependent family members of workers who die in work-related accidents, and the claims processing mechanism in the Act provided Burke an opportunity to challenge the constitutionality of the Act with respect to her own rights. Her argument that the Act violates her due process rights is misplaced. With regard to Burke's argument about future dependency, we rejected a similar argument in the wrongful death context in *In re Estate of Pushruk*. ⁴⁰ There we held that a mother

needed to show dependency at the time of her adult child's death to be considered a beneficiary under the wrongful death statute.⁴¹ We observed that to hold otherwise would require undue speculation because a fact finder would have to speculate twice: "first, as to the facts and circumstances which might create a relationship of dependency in the future; and, second, as to the amount of damages which would flow

³⁸ See *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 381 (Alaska 2006) (observing that the workers' compensation system "essentially eliminat[es]" noneconomic damages). Additionally, the wrongful death statute does not allow recovery of noneconomic damages when a decedent has no dependents at the time of death. AS 09.55.580(a); *Sowinski v. Walker*, 198 P.3d 1134, 1161 (Alaska 2008).

³⁹ See *Alex H. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 389 P.3d 35, 50 (Alaska 2017).

⁴⁰ 562 P.2d 329 (Alaska 1977).

⁴¹ *Id.* at 331-32. from the loss of this hypothesized relationship."

⁴² Unlike the wrongful death statute, the Act explicitly limits statutory benefits to parents who are "dependent upon" their child at the time of the child's death.⁴³ Basing statutory compensation benefits on dependency at the time of a child's death does not violate the equal protection rights of parents who may in the future depend financially on their children. For a viable equal protection claim to exist, similarly situated groups must be treated differently: "[w]here there is no unequal treatment, there can be no violation of the right to equal protection of the law."⁴⁴ The legal conclusion that "two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."⁴⁵ We reach this legal conclusion through application "in shorthand"

of our traditional equal protection analysis to the legislature's creation of the classification.⁴⁶ We consider "whether a legitimate reason for disparate treatment exists, and, given a legitimate reason, whether the enactment creating the classification bears a fair and substantial relationship to that

⁴² *Id.* at 332.

⁴³ AS 23.30.215(a)(4), (c).

⁴⁴ *Glover v. State, Dep't of Transp., Alaska Marine Highway Sys.*, 175 P.3d 1240, 1257 (Alaska 2008) (quoting *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 397 (Alaska 1997)).

⁴⁵ *Lauth v. State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance*, 12 P.3d 181, 187 (Alaska 2000) (quoting *Shepherd v. Dep't of Fish & Game*, 897 P.2d 33, 44 n.12 (Alaska 1995)).

⁴⁶ See *id.* (quoting *Shepherd*, 897 P.2d at 44 n.12); see also *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994) (explaining shorthand analysis and application to legislative classifications).reason."

⁴⁷ As applied to the classification here, parents who depend financially on their child at the time of the child's death lose a present source of income, which workers' compensation is designed to replace in part.⁴⁸ Parents who may depend on their child in the future do not lose the present source of income workers' compensation replaces, and they might never have become dependent on the child in any event. Because the two groups of parents are not similarly situated, the different treatment Burke questions is not constitutionally impermissible.

Burke also argues that because of the 2004 amendments to the Act, which expanded the entities deemed to be "employers" for purposes of the exclusive remedy provision, she is now barred from bringing a lawsuit against anyone who might be liable for Caudle's death. The list of those she views as responsible for Caudle's death includes not only Raven Electric but also some of Caudle's co-employees, the general contractor, and the building owner. She contends the amendments

violate her right to due process because the amendments to the Act “took away [her] right to sue in [c]ivil [c]ourt for justice.” But Burke did not have a right to bring such an action even before the 2004 amendments. Both the Act and the wrongful death statute require the parent of an adult child to be dependent on the child in order to be a beneficiary.⁴⁹ Because Burke was not dependent on Caudle, Burke is not a beneficiary. When there is no statutory beneficiary, a wrongful death action is brought for the benefit of the estate

⁴⁷ *Gonzales*, 882 P.2d at 396 (citing *State, Dep’t of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993)).

⁴⁸ See *Taylor v. Se-Harrison W. Corp.*, 694 P.2d 1160, 1162 (Alaska 1985) (explaining that legislature recognized “the need to replace the income that provided support for those dependent upon the deceased worker” in giving more benefits to estates of deceased workers with dependents).

⁴⁹ AS 09.55.580(a); AS 23.30.215(a).

⁵⁰ Thus in this case, the real party in interest in both claims is Caudle’s estate.

⁵¹ Because Burke is not the personal representative of Caudle’s estate and is not the real party in interest in asserting any rights with regard to the estate, we decline to reach any questions about the effect of the 2004 amendments on the rights of the estates of injured workers who die without dependents.

⁵² Burke argues that the Defective Machinery Act should apply to her case because Raven Electric supplied Caudle with the wrong type of equipment, a noncontact voltage meter. She contends that the voltage meter was defective in the sense that it did not work for its intended purpose because it did not show that a wire was energized when in fact it was. The Commission addressed this argument in a footnote, citing our precedent about the

interaction between the Workers' Compensation Act and the Defective Machinery Act and observing that "a claim against the employer that is not based on the Act must be addressed to the courts rather than the Board." We considered the interaction of the Defective Machinery Act and the exclusive remedy provision of the Act in two cases: *Gordon v. Burgess Construction*

⁵⁰ *Kulawik v. ERA Jet Alaska*, 820 P.2d 627, 635 (Alaska 1991) (noting "mutually exclusive dichotomy between estate recovery and beneficiary recovery" (citing *In re Estate of Pushruk*, 562 P.2d 329, 331 (Alaska 1977))).

⁵¹ *In re Pushruk*, 562 P.2d at 331 ("[I]f the deceased is not survived by the beneficiaries named in the [wrongful death] statute, the personal representative is the real party in interest in the wrongful death action.").

⁵² AS 23.25.010-.040. Unlike the Workers' Compensation Act and the wrongful death statute, the Defective Machinery Act does not require a parent to show dependency on an adult child to be a statutory beneficiary. AS 23.25.010.

*Co.*⁵³ and *Haman v. Allied Concrete Products, Inc.*⁵⁴ We harmonized the Defective Machinery Act and the exclusive remedy provision by applying the Defective Machinery Act only to those occupations that are exempt from the coverage of the Act, such as "part time baby sitters, cleaning persons, harvest help, and similar part time or transient help."⁵⁵ In *Gordon* we rejected an argument that "the Alaska Legislature, by continuing the Defective Machinery Act in existence after enactment of the Act, evidenced its intent to exclude defective, dangerous machinery from the coverage of the Act in order to coerce employers to furnish safe machinery."⁵⁶ And in *Haman* we observed that permitting an exception to the exclusive remedy provision when an accident was caused by inadequate or defective machinery "would seriously

undermine, if not engulf, the comprehensiveness” of the workers’ compensation system.⁵⁷

Burke has not shown that the rule we adopted in *Gordon* “was originally erroneous or is no longer sound because of changed conditions.”⁵⁸ We decline to overrule our precedent, and because it is uncontested that Caudle’s occupation was covered by the Act, the exclusive remedy provision bars a suit against Raven Electric under the Defective Machinery Act.

⁵³ 425 P.2d 602 (Alaska 1967).

⁵⁴ 495 P.2d 531 (Alaska 1972).

⁵⁵ *Gordon*, 425 P.2d at 605. Those exemptions (and others) remain in place. See AS 23.30.230.

⁵⁶ 425 P.2d at 605.

⁵⁷ 495 P.2d at 535.

⁵⁸ See *State v. Carlin*, 249 P.3d 752, 757-58 (Alaska 2011) (setting out tests for overruling precedent).

As noted earlier, Burke submitted a copy of the AKOSH report with a Board form prior to the hearing. Burke’s purpose in proffering the AKOSH report was in part to support her argument that Raven Electric had been grossly negligent. The Board panel who heard the case excluded it “for purposes of [the July] hearing,” but the Board hearing chair, recognizing that Burke was making a constitutional challenge, told her the AKOSH file was “not being stricken from the record” and was “part of the record of the case no matter what.” Raven Electric argues the Board’s exclusion of the file was correct, while Burke maintains the documents were relevant to her Defective Machinery Act claim.

A Board regulation gives the Board the authority to determine which documents it will consider when making its decision.⁵⁹ Because the Board does not have jurisdiction to decide constitutional issues and because benefits

under the Act are awarded regardless of fault, the Board appropriately declined to consider the AKOSH file in making its decision related to the Act but not striking it from the record.

Burke also contends the Board erred in denying her request for more time to prepare for the hearing. According to Burke, Board staff told her she would have two years from the time she filed the workers' compensation claim to prepare for a hearing. She argues that had she been given more time to prepare, she would have been able to subpoena witnesses to testify about worker safety and could have gathered more evidence from state agencies about the accident. She also asserts that she "[w]ould have had more time to read and research more legal information."

Raven Electric filed an affidavit of readiness for hearing on its petition to dismiss shortly after the Board's March 2014 interlocutory order and about nine months after Burke filed her claim. Burke opposed

⁵⁹ 8 *Alaska Administrative Code (AAC) 45.120(f) (2011)*.

setting a hearing, but the Board set a July 2014 hearing date.

The Board can set a hearing on a claim or petition either on its own motion or after receipt of an affidavit of readiness for hearing.⁶⁰ Because Burke filed an opposition, the Board was required to hold a prehearing conference,⁶¹ which it did. Regulations give the Board some discretion in scheduling the hearing.⁶² We review an administrative agency's application of its own regulations to a particular case to determine "whether the agency's decision was arbitrary, unreasonable, or an abuse of discretion."⁶³

We conclude that scheduling the hearing over

Burke's objection was not improper. The evidence Burke wanted to admit was not relevant to the issues the Board could decide. Burke sought to admit evidence related to negligent conduct that she said led to Caudle's death, but the Act creates a system of payment without regard to fault. Absent the possibility of a deliberate intent to injure a worker — and Burke agrees that Raven Electric did not intend to hurt Caudle — an employer's negligence is irrelevant to a workers' compensation proceeding.⁶⁴ And Burke had more than three months after

⁶⁰ 8 AAC 45.060(e) (2017). *The two-year deadline Burke alludes to is most likely related to AS 23.30.110(c), which authorizes denial of a claim when the claimant does not file an affidavit of readiness for hearing within two years of an employer's controversion. This statute does not prohibit an earlier hearing on a claim.*

⁶¹ 8 AAC 45.070(c) (2011).

⁶² 8 AAC 45.070(a), (c).

⁶³ *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007).

⁶⁴ *See Fenner v. Municipality of Anchorage*, 53 P.3d 573, 576-77 (Alaska 2002) (reaffirming precedent holding that employer must have specific intent to injure
(continued...)

the prehearing conference to prepare for a late-July hearing. In sum the Board did not abuse its discretion in its procedural decisions.⁶⁵

After winning the Commission appeal Raven Electric asked for an award of full reasonable attorney's fees as the successful party, arguing that Burke did not qualify for the protection for injured workers set out in the Act. The Commission agreed and ordered Burke to pay \$11,203.20 in costs and fees to Raven Electric.

On appeal Burke asserts she should not have to pay attorney's fees because the injured worker in this case is

dead and unable to fight for justice on her own behalf. Raven Electric responds that the Commission correctly determined Burke was not entitled to the protection against attorney's fees the statute gives to injured workers. Raven Electric contends that because Burke disavowed any financial dependence on Caudle at the time of Caudle's death, the Commission correctly awarded it fees. Raven Electric relies on *State, Division of Workers' Compensation v. Titan Enterprises, LLC*⁶⁶ in making its argument.

This issue is one of statutory construction. Alaska Statute 23.30.008(d) provides that the Commission should award attorney's fees and costs to the prevailing party in a Commission appeal but "may not make an award of attorney[s] fees against an injured worker" absent a finding "that the worker's position on appeal was frivolous.

⁶⁴ (...continued)

employee to be within intentional tort exception to exclusive remedy provision).

⁶⁵ Burke makes several other arguments related to the Act. We do not find them persuasive and do not address them here.

⁶⁶ 338 P.3d 316 (Alaska 2014).or unreasonable or the appeal was taken in bad faith."⁶⁷

Although we have construed AS 23.30.008(d) several times,⁶⁸ we have not addressed the meaning of *injured worker*.⁶⁹ When interpreting a statute, we consider the meaning of the statutory language, the legislative history, and the purpose of the statute, adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."⁷⁰ We consider all parts of a statute together and presume the legislature is aware of other statutory sections on the same subject as well as prior cases when

enacting legislation.⁷¹

There is no legislative definition of *injured worker*, and the term is only used sporadically in the Act.⁷² At times *injured worker* is used in the same sentence as

⁶⁷ AS 23.30.008(d).

⁶⁸ See *Titan Enters., LLC*, 338 P.3d at 321-23 (interpreting statute when two nonclaimants were involved in appeal); *Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, 337 P.3d 1174, 1181-82 (Alaska 2014) (reversing refusal to award fees when claimant's attorney prevailed on some issues); *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1068 (Alaska 2011) (holding that "a claimant is a successful party in an appeal to the Commission when the claimant prevails on a significant issue in the appeal"); *Shehata v. Salvation Army*, 225 P.3d 1106, 1119-20 (Alaska 2010) (reversing fee award for Commission appeal because claimant's appeal was not frivolous).

⁶⁹ In *Shehata v. Salvation Army*, the only case in which we considered the shield against paying fees for a Commission appeal, the employer conceded *Shehata* "was an injured worker because he had a compensable injury." 225 P.3d at 1119.

⁷⁰ *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1133 (Alaska 2009) (citing *Enders v. Parker*, 66 P.3d 11, 13-14 (Alaska 2003)).

⁷¹ *Young v. Embley*, 143 P.3d 936, 947 (Alaska 2006).

⁷² See, e.g., AS 23.30.001, .008, .041, .225.

employee to refer to the same person.⁷³ We observed in *Lewis-Walunga v. Municipality of Anchorage* that "[t]here is little legislative history about AS 23.30.008(d), but what there is suggests that the legislature intended Commission attorney's fees awards to follow the same rules as appellate attorney's fees awards in the courts."⁷⁴ Appellate attorney's fees in the courts were governed by former Alaska Appellate Rule 508(g) in 2005 when the Commission was created.⁷⁵ Former Rule 508(g)(1) prohibited a court from awarding costs or attorney's fees against a "claimant" unless "the claimant's position was frivolous, unreasonable, or

taken in bad faith.”⁷⁶

The key difference between former Rule 508(g)(1) and AS 23.30.008(d) is that the statute uses the term *injured worker* rather than *claimant*. Nothing in the legislative history manifests an intent to narrow those who are shielded from an award of attorney’s fees; to the contrary, the scant legislative history “suggests that the legislature intended Commission attorney’s fees awards to follow the same rules as appellate attorney’s fees awards in the courts.”⁷⁷

⁷³ See, e.g., AS 23.30.225(c) (“If employer contributions to a qualified pension plan have been included in the determination of gross earnings and the employee is receiving pension payments, weekly compensation benefits payable under this chapter shall be reduced by the amount paid or payable to the injured worker under the plan ” (emphasis added)).

⁷⁴ 249 P.3d 1063, 1067 (Alaska 2011) (citing STATE OF ALASKA, DEPT’ OF LAW, SECTION BY SECTION ANALYSIS OF SB 130 at 7 (Mar. 3, 2005)).

⁷⁵ Ch. 10, § 8, FSSLA 2005; former Alaska R. App. P. 508(g)(1) (2005).

⁷⁶ Former Alaska R. App. P. 508(g)(1). The language of AS 23.30.008(d) is similar to former Rule 508(g)(2) in that the statute, like our former rule, allows an award of full reasonable attorney’s fees.

⁷⁷ Lewis-Walunga, 249 P.3d at 1067 (citing STATE OF ALASKA, DEPT’ OF
(continued)

Furthermore, when the legislature created the Commission, it did not change the restrictions it had placed on payment of attorney’s fees for legal services “with respect to a *claim*.”⁷⁸ As we discussed in *Titan Enterprises*, “[a]ttorneys are prohibited from receiving fees for representing *claimants* unless the Board awards them fees when claimants are successful.”⁷⁹ But

claimants can include others in addition to injured workers: Alaska Statute 23.30.030(4) requires a workers' compensation insurer to "promptly pay to the person entitled to them the benefits conferred by [the Act]," and we have construed this subsection as meaning that an employer is directly liable to those persons.⁸⁰ A Board regulation permits "person[s] other than the employee" to file a claim; with some exceptions, those who file their own claims must join the employee as a party.⁸¹ But because the statutory restrictions on fee arrangements do not distinguish between injured workers and others to whom payment may be required, claimants, not just injured workers, are entitled to the protection of the shield against an award of attorney's fees.

Titan Enterprises is not to the contrary. There we construed

⁷⁷ (...continued)

LAW, SECTION BY SECTION ANALYSIS OF SB 130 at 7 (Mar. 3, 2005)).

⁷⁸ *AS 23.30.145, .260 (emphasis added).*

⁷⁹ *State, Div. of Workers' Comp. v. Titan Enters., LLC, 338 P.3d 316, 323 (Alaska 2014) (emphasis added).*

⁸⁰ *See Barrington v. Alaska Commc'ns Sys. Grp., Inc., 198 P.3d 1122, 1128 (Alaska 2008) (quoting Sherrod v. Municipality of Anchorage, 803 P.2d 874, 875 (Alaska 1990)).*

⁸¹ *8 AAC 45.040(a) (2011).*

AS 23.30.008(d) as permitting an award of attorney's fees to either party in an appeal.⁸² But in allowing the Commission to consider the relative success of two nonclaimants when it awarded fees, we observed that AS 23.30.008(d) provided no shield to "non-claimants who lose a significant issue in a Commission appeal."⁸³ We also considered the Act's restrictions on fee arrangements to explain the difference in treatment of nonclaimants and claimants.⁸⁴

Burke asserted constitutional claims as a possible beneficiary of a deceased worker as well as claims more properly made by Caudle's estate.⁸⁵ She was thus a claimant under the Act. As such, she is entitled to the protection afforded other claimants against having to pay attorney's fees to Raven Electric unless her position on appeal was frivolous, unreasonable, or the appeal was taken in bad faith. We hold that it was not.

To be frivolous or unreasonable a workers' compensation claimant's appeal must have no basis in law or fact.⁸⁶ In its Commission brief Raven Electric contended

⁸² *Titan Enters., LLC*, 338 P.3d at 321.

⁸³ *Id.* at 321-22.

⁸⁴ *Id.* at 322-23.

⁸⁵ *It was only at the end of the July 2014 hearing that the Board chair clarified Burke's status.*

⁸⁶ *See Shehata v. Salvation Army*, 225 P.3d 1106, 1119 (Alaska 2010) (holding that legal issue raised in appeal "had a basis in law and fact" and was not frivolous or unreasonable). This standard is similar to one used in federal civil rights litigation. *See Okopu v. Cty. of Suffolk*, 123 F. Supp. 3d 404, 411 (E.D.N.Y. 2015) (holding in federal civil rights suit that "[a] claim is frivolous where it lacks an arguable basis either in law or in fact" (alteration in original) (quoting *Shakur v. Selsky*, 391 F.3d 106, 113 (2d Cir. 2004))).

(continued...)

that Burke's appeal was frivolous and unreasonable because the positions she advocated came within our precedent.⁸⁷ Because precedent can be, and sometimes is, overruled,⁸⁸ asserting a position that is contrary to controlling precedent is not per se unreasonable or frivolous.

Pleadings of self-represented litigants are held to less stringent standards than those of attorneys.⁸⁹ The Board and the Commission clearly understood Burke was raising

constitutional claims, and both administrative bodies told her they lacked jurisdiction to decide those issues. Raven Electric acknowledged at oral argument before us that Burke used an appropriate process to assert claims related to the constitutionality

Raven Electric has never asserted that Burke filed her claim in bad faith. In fact it acknowledges that “Burke is acting as the personal representative of Caudle’s memory and seeking justice.”

⁸⁶ (...continued)

⁸⁷ Raven Electric relied only on *DeNardo v. Cutler*, 167 P.3d 674 (Alaska 2007), to support this argument. But *DeNardo* did not hold that advocating a position contrary to precedent was unreasonable and frivolous: there we upheld an award of fees against an experienced self-represented litigant who had, after losing several similar lawsuits in the past, “persisted in [suing a judge] despite [the litigant’s] apparent understanding of the law.” *Id.* at 680.

⁸⁸ See, e.g., *State v. Carlin*, 249 P.3d 752, 759-60 (Alaska 2011), overruling *Hartwell v. State*, 423 P.2d 282 (Alaska 1967).

⁸⁹ *DeNardo v. Calista Corp.*, 111 P.3d 326, 330-31 (Alaska 2005).

of the Act. Here, the core position Burke advanced — that the Act violates the constitutional rights of estates of workers who have no dependents when they die in work-related accidents — was adopted at one point by the New Hampshire Supreme Court⁹⁰ and was endorsed more recently by dissenting justices in Montana.⁹¹

Given Burke’s self-represented status and the acknowledgment of both the administrative agencies and the employer that only this court had jurisdiction to decide Burke’s constitutional arguments, we cannot say that her appeal to the Commission — a prerequisite for review by this court — was unreasonable or frivolous.

V. CONCLUSION

We HOLD that the Alaska Workers' Compensation Act does not violate Burke's rights to equal protection or due process. We AFFIRM the Commission's decision that Burke is not entitled to benefits under the Act. We REVERSE the Commission's award of attorney's fees to Raven Electric.

⁹⁰ *Park v. Rockwell Int'l Corp.*, 436 A.2d 1136, 1139 (N.H. 1981), overruled by *Alonzi v. Ne. Generation Servs. Co.*, 940 A.2d 1153, 1162-63 (N.H. 2008).

⁹¹ *Walters v. Flathead Concrete Prods., Inc.*, 249 P.3d 913, 922 (Mont. 2011) (Wheat, J., dissenting); *id.* at 923 (Nelson, J., dissenting).

IN THE SUPREME COURT OF
THE STATE OF ALASKA

Marianne E Burke,
mother of Abigail E. Caudle (deceased),
Appellant

vs.

John Thorsness; Clapp Peterson, Tiemessen
Thorsness & Johnson, LLC (for Criterion Gen)
and
Jahna M. Lindermuth & Samuel G. Gottstein
(for AK USA Fed CU),
Appellees

Supreme Court Case No. S-17766
Superior Court Case No.3AN-18-09109

**MOTION FOR: The Court's Permission to Reply to
Appellee's Joint Response to my Petition of
Rehearing.**

I, Marianne E Burke, beg the court to allow me to
respond to the state's and then the other
appellees joining with the state's Response to my
Petition of Rehearing.

BECAUSE

- 1) The appellees have a few things wrong or misapplied in their Response.
- 2) I am *pro se*, still traumatized by my daughter's death and this fight for the value of her life in the courts, I get confused, and yet want to try to get *some kind of decent worth and thus, justice*, for her untimely

and wrongful death.

3) This is a Very important case that, if decided by the court in the favor of the value of human life wrongly taken or injured, could affect many, many more lives in the future workplaces of America.

- ☐ More pages are attached and incorporated by reference

I have filed the following documents with this Motion:

- ☒ My *Affidavit and Memorandum* (3 pp)
- ☒ My proposed *Order* for the Justice to sign
- ☐ Other:

Date.....Justice

.....
I certify that on December 9, 2021 a copy of this Order was Xmailed hand delivered to:

- ☐ Opposing Party.....
- ☒ Opposing Atty: John Thorsness (Criterion) ☒
- Opposing Atty: Lindermuth & Gottstein (Bank)
- ☒ AAG Laura Wolff

My Signature:.....(signed) SHS-

AP 400 (12/04) MOTION AR 503 Page 1 of 5

1 of 5

IN THE SUPREME COURT OF
THE STATE OF ALASKA

Marianne E Burke,
mother of Abigail E. Caudle (deceased),
Appellant

vs.

John Thorsness; Clapp Peterson, Tiemessen
Thorsness & Johnson, LLC (for Criterion Gen)
and
Jahna M. Lindermuth & Samuel G. Gottstein
(for AK USA Fed CU),
Appellees

Supreme Court Case No. S-17766
Superior Court Case No.3AN-18-09109

AFFIDAVIT AND MEMORANDUM

supporting MOTION for: The
Court's Permission to Reply to
Appellee's Joint Response to my
Petition of Rehearing.

I, Marianne E Burke swear or affirm that the
following facts are true to the best of my knowledge:

1. The appellees' footnote of their Response (p.1
bottom) says that my words of "life, liberty,
and the pursuit of happiness" are from the
Declaration of Independence and not the
Constitution that I wrote above those words.

Yet Alaska's Article I - Declaration of
Rights, § 1. Inherent Rights states the same:
"This constitution is dedicated to the

principles that all persons have a **natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry**; that all persons are equal and entitled to equal rights, opportunities, and protection under the law... " so why did the state say this? It seemed to diminish my argument.

2. Responding to the appellee's 2nd par, p.1, a person's *right to life* as guaranteed by our constitutions should have protected Abigail's life in the workplace.

But because there is NO CONSEQUENCE to a grossly negligent employer in the workplace, the employer and 3rd parties/appellees of this case did not have to be careful enough to protect her. (Continue to Memorandum, p.2-3)

☒:1 More pages are attached and incorporated by reference, 5 pages total

(signed) *Marianne E Burke*

Subscribed and sworn to or affirmed before me at Anchorage, Alaska On (Date).

[not needed- Pro se']

Notary Public or other person authorized to administer oaths.

My commission expires on (date)

Page_of *(p. 1 of Memorandum)* 2 of 5

[Next page] (Continued from Memorandum, p.1)

Compensation is only part of *justice* in our laws. But **Workers' Comp protects the employer and 3rd parties** from, not only jail time, but also No compensation whatsoever to the family for their loved one's life taken in gross negligence.

To protect life is to have *some kind of justice to protect that life.*

With the current Workers' Comp system, there is no consequence, no justice, no compensation, so Life is NOT Protected!! This is Totally Unconstitutional.

1. Responding to appellee's 3rd par, p.1, Appellees state that the only justice for me would be if Abigail's employer did *not* pay for Workers' Comp insurance (thereby breaking the state employer laws, with fines).

[Most employment is by larger companies who are required to carry Workers' Comp insurance, not very small businesses who may not be required to pay WC.]

Should an employee, therefore, seek out a "law breaking" employer (of a large business) in order to possibly get justice in tort law if they were to be injured or killed? How REDICULOUS is this legal concept?

2. Appellee's statement of p.2, par 1, emphasizes the wrongdoing of Workers' Comp- that it protects the "whole" rather than the individual. If the individual is not

protected, is the "whole" *really* better protected?

Do you think that employees as a "whole" feel safer knowing that people like Abigail who were wrongly killed and not given any justice in Workers' Comp, somehow better protects them? No! Workers' Comp really only protects the employer.

3. In Appellee's par 2, p.2, the obvious question/conclusion is, How is a dead person supposed to be "encourage(ed) to return to work"??!
4. Responding to appellee's 3rd par of p.2, The Defective Machinery Act was only *one* of the disputes that I had with that Opinion (S-16137). [The court took away the employee's rights of that Defective Machinery Act over the years in their statutory "melt down"; it's original law and protection for the innocent employee should still be upheld.]

Other disputes I had were that I as the parent, had Full Rights to fight for my daughter's justice, yet the previous court case against the employer greatly diminished that right with words of "estate" and "representative" which were not even in (or barely in) Worker Comp laws, as I stated in my Petition of Rehearing. *This was not disputed in the appellee's response.*

With that previous decision, Meredith Montgomery, the head clerk (who was wonderful toward me) told me "You are done with this court", that my only appeal would

be ifl could bring up to the court where they were wrong in matters of law (paraphrased).

I was still too traumatized in fighting for justice of my own daughter's death, did not know statutory law, and not as confident as I am now that Workers' Comp is unconstitutional. The Sovereign make the law. Anyone can take pieces of different puzzles (court cases) and come up with whatever law that motivates them; the greedy take pieces of case law and create laws that protect the greedy. The good and wise, as our founding fathers, come up with laws/ "pieces" of each court case based on the

(p. 2 of Memorandum) 3 of 5

constitution, which protect the innocent. These Worker Comp laws in No way protect the innocent, as my daughter.

5. Lastly, p.3, par 1 of the appellee's arguments state that the legislature makes laws. Then why do all the lawyers quote the Opinions in creating arguments which then, make new Decisions and new case law?

The legislature is transitory. Many Representatives are in state congress for only two yrs; many Senators for one term. They don't understand all of this convolutedness of Worker Comp law (by design, I believe). They are also being insulated from understanding Workers' Comp by politics in Juneau.

I observed this when I went to Workers' Comp hearings in Juneau while working with Representative Andy

Josephson to create new law that would protect employees like Abigail. We were "shut down" in various ways, like expert witnesses were not allowed to testify. Additionally, one of the Senators said right at the end of the hearing, "Is there really no liability for a death (in the workplace)?" No one answered her. This was stated in my previous briefs.

The Court still has power in the state to create new law and I ask that they make new law in honor of my daughter's life; law that better protects the innocent in the workplace. *This would be justice for me, for my daughters untimely death! I*

Maureen E. Burke
Dec 9, 2021

(p 3 of Memorandum) 4 of 5

IN THE SUPREME COURT OF
THE STATE OF ALASKA

Marianne E Burke, mother of)
Abigail E. Caudle (deceased), Appellant)

vs.

John Thorsness; Clapp Peterson,)
 Tiemessen Thorsness & Johnson,)
 LLC (for Criterion Gen) and)
 Jahna M.)
 Lindermuth & Samuel G. Gottstein)

**Supreme Court Case No. S-17766 (for
AK USA Fed CU), Appellees)**
**Superior Court Case No.3AN-18-
09109**

ORDER

On @Appellant's □Appellee's Motion for The Court's Permission to Reply to Appellee's Joint Response to my Petition of Rehearing.

Having Considered the @Appellant's □Appellee's *Motion* and any *Opposition* filed, and finding good cause, the Court ORDERS:

Date _____

Justice

I certify that on

December 9, 2021 a

copy of this Order was K emailed hand

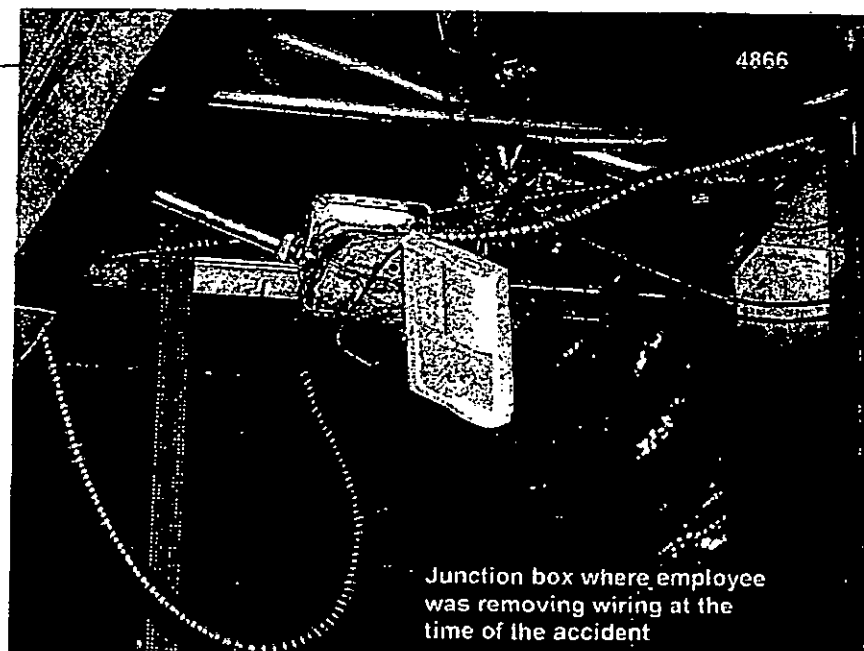
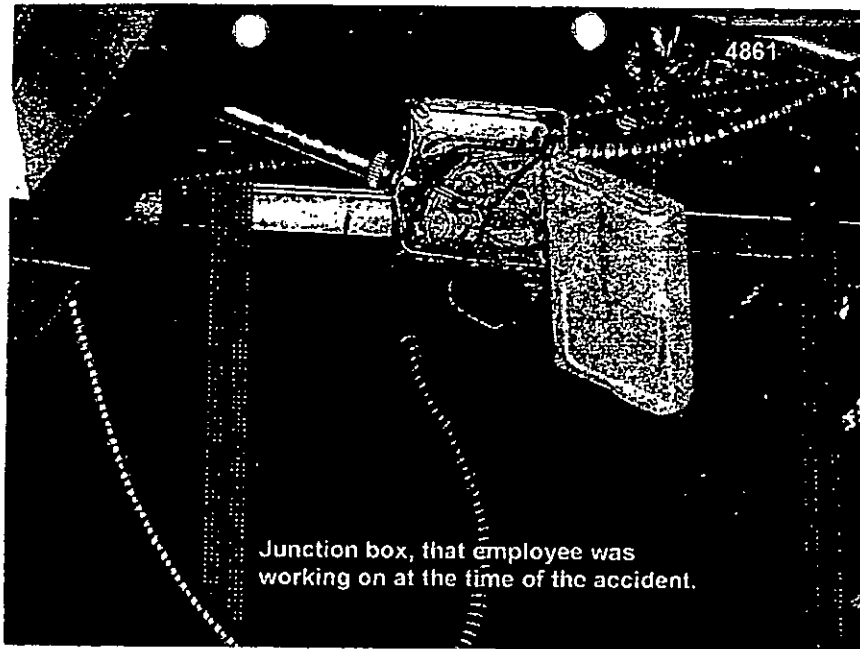
delivered to:

☐ Appellant _____ ☐ Appellant's attorney:
☒ Appellee Atty John Thorsness (Criterion)
☒ Appellee's Atty: Lindermuth & Gottstein (AK
USA Fed CID
☒ Other- AAG Laura Wolff
signed

SHS-AP 420 (08/06)

Deputy clerk/secretary: Marianne Burke (and)
ORDER ON MOTION Page 5 of 5

5 of 5





Abigail Elizabeth Caudle, Age 14 (Died at age 26)