GRADER'S GUIDE

***** QUESTION NO. 3 *****

SUBJECT: CIVIL PROCEDURE

Question 1: Improper Venue 30 %

Able could file a motion with the Fairbanks court to dismiss the lawsuit for improper venue, or could file a motion for a change of venue to move the case to the Anchorage court. If the Fairbanks court did dismiss the case, it would probably do so without prejudice to refiling the case within a certain amount of time in the Anchorage court. *North Slope Borough v. Green International*, 969 P.2d 1161 (Alaska 1999).

Able could file a motion to dismiss the lawsuit under Alaska Rule of Civil Procedure 12(b)(3) for improper venue. Under Rule 3, the lawsuit should have been filed in Anchorage, which is in a different judicial district than Fairbanks. Rule 3(c) provides that a lawsuit should be filed in the judicial district in which the claim arose or where the defendant may be personally served. Since the claim of improper excavation work arose in Anchorage, and Able is located and may be served in Anchorage, the lawsuit should have been commenced in Anchorage. Rule 3(b) also provides that actions in ejectment, for recovery of possession, for quieting title, for partition, or for the enforcement of liens upon real property shall be commenced in the superior court in the judicial district in which the real property is located. Although this case does not involve a claim relating to the title of the building lots or the other types of claims listed in Rule 3(b), the fact that the lots are located in Anchorage is an additional reason the lawsuit should be brought in Anchorage.

The Fairbanks court would not have the discretion to relax the venue requirements and consider the case under the facts of this case since the factors in Rule 3 all point to venue in Anchorage. *Ketchikan General Hospital v. Dunnagan*, 757 P.2d 57 (Alaska 1988). The complaint must be filed in the proper judicial district, and then, if that forum is inconvenient, the plaintiff can move for a change of venue. This ensures that the court in the proper venue, rather than the court in the venue of plaintiff's choosing, makes the initial determination as to which forum is inconvenient. *Id.* Nothing in the facts justifies filing the case in Fairbanks, even if it would be more convenient for Homes, Inc. or the judges in Fairbanks are more knowledgeable with respect to construction law. Homes, Inc. should have filed the case in Anchorage, and then moved for a change of venue if it believed that Fairbanks would be more convenient.

Thus, Able should prevail on its motion to eject the case from the Fairbanks court. However, it is possible that the Fairbanks court would transfer the case to Anchorage rather than dismiss it. *North Slope Borough v. Green International*, 969 P.2d 1161 (Alaska 1999)(noting that improper venue may be cured by transferring venue rather than dismissing a case without prejudice to allow refiling in the proper venue, especially where there is a close jurisdictional question and there is no vexatious action by either party).

In the alternative, Able could waive its right to seek dismissal for improper venue under Rule 3(f) and file a motion in the Fairbanks court under Alaska Statute 22.10.040 and Rule 3 to seek a change of venue, to move the case to Anchorage. Able could argue, under AS 22.10.040, that a change of venue was proper because otherwise it would be put to unnecessary expense and inconvenience, as Able's office and employees are located in Anchorage and the building lots are also in Anchorage. As noted above in part, courts grant a transfer of venue, rather than dismissal, as a preferred remedy especially where there are close jurisdictional issues and no party has acted vexatiously. *North Slope Borough v. Green International*, 969 P.2d 1161 (Alaska 1999); *Ko-Am Enters. v. Davis*, 657 P.2d 399, 400 (Alaska 1983).

Question 2: Failure to Respond to Discovery Requests 40 %

(a) Able's failure to respond to the request for admission within the time allowed by Rule 36 would mean that the request was deemed admitted and conclusively established. Thus, Able's failure to respond to the request for admission that an inadequate amount of gravel was used to prevent settling would be deemed admitted under Rule 36(b). Able could move the court to withdraw the admission, which the court would probably grant since such admission would prevent a presentation of the merits of the dispute, unless Homes, Inc. could show that it would be prejudiced by a withdrawal. *Hughes v. Bobich*, 875 P.2d 749 (Alaska 1994); Rule 36(b).

Homes, Inc. could seek a motion to compel discovery under Rule 37(a) relating to Able's failure to respond to the requests for admission, interrogatories and document requests, which the court would probably grant under the facts provided. Homes, Inc. would have to provide a certification to the court that it "in good faith conferred or attempted to confer" with the party not making the disclosure in an effort to secure the disclosure without court action under Civil Rule 37(a). Homes, Inc. could also request its attorney's fees and other costs incurred to bring the motion under Rule 37(a)(4)(A) against both Able and possibly against Able's counsel if counsel advised Able not to respond. The court's order would require Able to respond to the discovery requests enumerated in the order.

(b) If the court granted Homes, Inc.'s motion to compel discovery, and Able still did not respond, the court could treat such failure to respond as contempt of a court order under Rule 37(b). The court could order sanctions after considering the following: (a) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose; (b) the prejudice to the opposing party; (c) the relationship between the information the party failed to disclose and the proposed sanction; (d) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and (e) other factors deemed appropriate by the court or required by law. Rule 37(b).

After considering such factors, the court could enter an order establishing certain designated facts as to which Homes, Inc. sought discovery, or refuse to allow Able to support or oppose designated claims or defenses. These sanctions could effectively preclude Able from defending itself in the lawsuit. Rule 37(b) states that the court shall not make an order that has the effect of establishing or dismissing a claim or defense or determining a central issue in the litigation unless the court finds that the party acted willfully. The facts do not indicate whether Able willfully refused to respond to the discovery requests or merely failed to respond.

Question 3: Summary Judgment Motion 30 %

Homes, Inc. could bring a motion for summary judgment against Able under Rule 56. Homes, Inc. would need to establish a prima facie case, using admissible evidence that proved "the absence of genuine factual disputes" and its "entitlement to judgment as a matter of law." *Preblich v. Zorea*, 996 P.2d 730, 733 (Alaska 2000). The nonmoving party may rebut this prima facie case by setting forth specific facts showing that it could produce admissible evidence to demonstrate that a material issue of fact exists. *Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265, 1269 (Alaska 2001).

Homes, Inc. will submit evidence that the houses settled because of improper site preparation, including the use of inadequate amounts of gravel, through the testimony of its expert and other evidence relating to the house repairs. Homes, Inc. will probably be able to establish a prima facie case against Able for negligence. However, Able will submit the testimony of its general manager to rebut the prima facie case. The general manager claimed in his deposition that the building sites were properly prepared. Deposition transcripts, other discovery responses, and affidavits are proper materials for the court to consider in ruling on a summary judgment motion. Rule 56(c). Since the court must draw inferences of fact in favor of Able, as the nonmoving party, and against Homes, Inc., the court will probably deny Homes, Inc.'s summary judgment motion. *Nizinski v. Golden Valley Electric Association*, 509 P.2d 280 (Alaska 1973).

Able does not need to show that it will ultimately prevail at trial to defeat Homes, Inc.'s summary judgment motion. Able only has to show that there is a genuine issue of material fact to be litigated. Homes, Inc. arguably has more persuasive evidence that Able was negligent than Able has that it was not negligent. For example, Homes, Inc.'s international construction expert has opined that Able did not adequately prepare the house sites, while Able's general manager has experience mostly in Florida, a warm weather state without the freezing and thawing of the ground that occurs in Alaska. However, the court will not weigh the evidence in considering a summary judgment motion. *Gablick v. Wolfe*, 469 P.2d 391 (Alaska 1970); *Alaska Rent-A-Car, Inc. v. Ford Motor Co.*, 526 P.2d 1136 (Alaska 1974). Thus, Homes, Inc. is unlikely to prevail with respect to its summary judgment motion.