

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 2 \*\*\*

#### SUBJECT: TORTS

#### I. Defamation 50%

To prevail on his defamation claims, Carl must establish, with respect to each alleged defamatory statement: (1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) the existence of either "per se" actionability or special harm. French v. Jadon, Inc., 911 P.2d 20, 32 (Alaska 1996).

#### 1. The Violent Person Statement to LPD

##### a. False and Defamatory Statement

The first element of the tort of defamation is the existence of a false and defamatory statement. A statement is defamatory if it "tends to harm the reputation of another so as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her]." French, 911 P.2d at 32 (citations omitted). The statement that Pat made to the LPD regarding Carl's alleged violent tendencies tends to harm Carl's reputation.

However, Carl may have difficulty proving that the statement is actionable because it may be characterized as a statement of opinion, not fact. Statements of opinion generally are not actionable as false statements for purposes of a defamation claim. Restatement of Torts (Second) §566; see also Sands v. Living Word Fellowship, 34 P.3d 955, 960 (Alaska 2001). The Alaska Supreme Court has explained that a statement of fact is one which is capable of being proven true or false. Sands, 34 P.3d at 960. To ascertain whether a statement is factual, courts consider "the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." Id. (citations omitted). In Sands, the court held that it was not possible to verify, as a matter of fact, whether the subject church was a "cult" or whether the church members were "cult recruiters" as had been asserted by the defendant. Thus, the court held, the alleged defamatory statements were statements only of religious belief and opinion, not of fact. Id. While examinees are not expected to explain the considerations in determining whether a statement is one of fact, examinees should grasp that the statements arguably are non-actionable statements of opinion. Here, it is a close call. Pat would have a good argument that the statement was a statement of opinion rather than of fact because

whether a person is a violent person or may cause damage to persons or property is not easily verifiable or capable of being proven true or false. See Speck v. Federal Land Bank, 494 N.W.2d 628, 632 (S.D. 1993) (statement that a person was “dangerous” or “could be dangerous” were non-actionable statements of opinion rather than of fact). Also, the statement was made in a circumstance, a request for police assistance, where the listener likely expects to hear statements of opinion offered in order to secure assistance. Finally, Pat would argue that the meaning of the statement in context was that Pat perceived a risk that warranted police assistance.

#### **b. Unprivileged Publication**

Pat’s statement to the LPD constitutes a publication of the alleged false and defamatory statement. The more difficult question is whether the publication was privileged. The Alaska Supreme Court has recognized conditional privileges for communications made when a person “having a common interest in a particular subject matter believes that there is information that another sharing the common interest is entitled to know.” Briggs v. Newton, 984 P.2d 1113, 1121 (Alaska 1999). A statement made for the protection of a lawful business, professional, property or other pecuniary interest falls within this rule if it is called for by a legal or moral duty or by generally accepted standards of decent conduct. Schneider v. Pay’N Save Corp., 723 P.2d 619, 624 (Alaska 1986). The Alaska Supreme Court specifically has recognized privileges for speech that is made for the protection of public safety and welfare, Taranto v. North Slope Bor., 992 P.2d 1111, 1115 (Alaska 1999), and for statements made in the employment relationship, Schneider, 723 P.2d at 624.

The statement made to the LPD likely would be found to be a privileged publication. ACI had lawful business and property interests to protect. Pat’s statements to LPD were made based on his belief that LPD needed to know the reasons for the civil standby request in order to provide assistance and to protect the employees of ACI. Given the circumstances, the statement was likely within generally accepted standards of decent conduct. The privileges recognized by the Alaska Supreme Court for public safety matters and relating to the employment relationship, while in different contexts, confirm that a court likely would find that Pat’s statement was conditionally privileged.

After it is determined that a statement is conditionally privileged, the issue is whether the privilege was abused. Conditional privileges may be deemed abused because of:

the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter ...; because the defamatory matter is published for some purpose other than that for which the particular privilege is given ...; because the publication is made to

some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege ...; or because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.

Schneider, 723 P.2d at 624-25 (citation omitted). The facts explain that Pat requested the LPD's assistance in order to protect the safety of ACI's employees, given his observation of Carl's unpredictable mood and the reports Pat had received regarding Carl's abusive and threatening conduct. Based on the facts, Carl would have difficulty establishing that Pat abused the privilege in any way. All of the information indicates that Pat had reason to believe, and did subjectively believe, that Carl was potentially a violent person who may cause harm to persons or property upon notice of his discharge. Also, Pat's explanation of the reasons for requesting police assistance reasonably fall within the purpose of the privilege.

### **c. Fault Amounting At Least To Negligence**

Pat never directly observed Carl acting in a violent manner. Thus, assuming Carl demonstrated that the statement was false and defamatory, Carl then would argue that Pat was at least negligent in failing to ascertain the truth or falsity of the statement before publishing it. The facts indicate that Pat had received reports of Carl's conduct from several sources, both employees and outside contractors. They do not indicate whether Pat made any effort to investigate the veracity of the reports or the basis for the reports, however.

### **d. "Per Se" Actionability Or Special Harm**

For a publication to be defamatory *per se*, the "words must be so unambiguous as to be reasonably susceptible of only one interpretation—that is, one which has a natural tendency to injure another's reputation." French, 911 P.2d at 32. A *per se* actionable statement is one that imputes to the plaintiff: a criminal offense; a loathsome disease; a matter incompatible with his business, trade, profession, or office; or serious sexual misconduct. Restatement (Second) of Torts §570; see also French, 911 P.2d at 32-33 (discussing statements alleging sexual misconduct and criminal activity).

Examinees should conclude that the statement made to the LPD is not sufficiently unambiguous to constitute a *per se* actionable statement. It is not enough merely to suggest that someone is capable of committing a crime or that he would commit one if sufficient opportunity were presented. Restatement (Second) of Torts §571, cmt. c. This is the sort of statement made by Pat. Pat merely suggested that Carl may act in a manner that would cause

damage to persons or property. Thus, the statement to the LPD is not actionable *per se*.

Finally, examinees should recognize that Carl may be able to prove that he suffered pecuniary loss, special damages, as a result of the alleged defamatory statements. The facts state that Carl was unable to obtain a new job for over one year and suggest that some prospective employers may have heard about Carl's poor record as an employee. However, Carl would have to prove that the damage to his reputation, and resulting impairment of his ability to get a new job, was caused by the publication of the alleged defamatory statements. It is entirely possible that other employers in the industry received their information from persons/firms that had worked with Carl on project sites when Carl was employed by ACI.

## **2. The Statement to Employees of ACI that Carl Had Been Fired**

### **a. False and Defamatory Statement**

Pat's statement to ACI employees that Carl had been fired is defamatory because it had the natural tendency to injure Carl's reputation. The question then is whether the statement was false. Carl would argue that while it was true that his employment was terminated, Pat used the term fired in order to communicate to the employees that Carl was fired for some reason not supported by fact. Also, when Pat made the statement, the employees had just witnessed Pat meeting with Carl while the LPD officers were present in the shop and a patrol car was parked outside. Carl would argue that these extrinsic circumstances gave the later statement a false and defamatory meaning, by inference or innuendo, because the employees reasonably would understand that Carl was terminated for committing some unlawful act or for some other grievous reason. See Restatement (Second) of Torts §563. Why else would the police be present? Carl's arguments would be undermined by the fact that no employees could see or overhear the meeting that took place in Pat's office. In addition, the police officers left while Carl was still in the shop and Carl was allowed to spend time in his office prior to leaving ACI's premises. Under these circumstances, Pat would argue, the presence of the police officers did not infer that Carl had done anything wrong. Pat may even argue that the employees had little reason to believe that the presence of the police officers and Carl's termination were even related since the employees had no information as to the reason for the officers' presence. If Carl were successful in his assertion that the statement to the employees was false by inference or imputation, it also would be clear that the statement was injurious to Carl's reputation.

### **b. Unprivileged Publication**

Pat's explanation to ACI employees that Carl had been fired, even if defamatory, would be conditionally privileged because such advice to employees touches a common interest of the employer and its employees. As noted above, the Alaska Supreme Court has expressly recognized that a privilege exists in the employment relationship. Pat would argue that the privilege covers advising other company employees that Carl had been fired. Pat may have a problem on the issue of abuse of the privilege. Pat certainly could have described Carl's termination of employment in a way that would have minimized the risk that employees might attribute false and defamatory meaning to the statements. Also, Carl would have a strong argument that Pat was reckless in making the statement given the earlier presence of the police officers and the alleged inference that Carl was fired for doing something grievous, such as committing a crime. If Carl were to prove that Pat made a defamatory statement by imputation, Carl would have a strong argument that Pat abused the privilege. Considering all of the facts, a court may find that Pat's recklessness exceeded the bounds of decent conduct.

### **c. Fault Amounting At Least To Negligence**

If Carl were to prevail in his assertion that Pat's statement to the ACI employees was false and defamatory, by virtue of the presence of police officers at the time of termination, Carl also may be able to prove that Pat was at least negligent by failing to take reasonable precautions to avoid any false imputation of reasons for Carl's termination. That the statement was made almost immediately after Carl left the building, after police officers had been present, raises the risk that employees would understand that Carl had been fired for some unlawful act or other grievous reason.

### **d. "Per Se" Actionability Or Special Harm**

Examinees should conclude that the statement made to the ACI employees regarding Carl's termination is not sufficiently unambiguous to constitute a *per se* actionable statement. The statement is not within the generally recognized categories of *per se* actionable statements. Also, the very fact that Carl likely would need to rely on imputation or inference to establish the making of a false and defamatory statement means that the statement was not sufficiently unambiguous for purposes of *per se* actionability. The considerations with regard to Carl's proof of special damages are the same as those discussed above in connection with the prior statements.

## **II. Invasion of Privacy 25%**

The Alaska Supreme Court has recognized that all persons are entitled to the common-law "right to be free from harassment and constant intrusion into one's daily affairs." Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 632 (Alaska 1999)(citations omitted). The tort of invasion of privacy recognizes that:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. (citation omitted). An intrusion is offensive if it is made either in an unreasonable manner or for an unwarranted purpose. Id. A search to which a plaintiff voluntarily consents cannot be considered an offensive intrusion. Id. at 633 (citation omitted).

Pat's decision to pack Carl's personal belongings and, thereby, to review what items in Carl's office may be company property or Carl's personal belongings, likely does not constitute an intrusion upon Carl's private affairs or concerns, because Carl maintained his personal belongings in his workplace. However, this result may depend on what expectation employees of ACI had in their separate office spaces and their desks based on company policy and practice. Carl likely would argue that company offices were treated as private spaces and that is why he kept personal files at work. In any event, the facts do not provide sufficient information to conclude whether Carl had a reasonable expectation of privacy in his office space.

Carl also would have difficulty proving that Pat's conduct would be highly offensive to a reasonable person for the same reasons and subject to the same caveat. Nonetheless, a court or jury may find it offensive that Pat would review personal files, including medical records. Finally, based on Pat's concerns for the safety and security of the workplace, and ACI's interest in retaining all company property, ACI would have a strong argument that its conduct was for a proper purpose.

### **III. Conversion 25%**

"Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Silvers v. Silvers, 999 P.2d 786, 793 (Alaska 2000). To establish a claim for conversion, a plaintiff must prove (1) that he had a possessory interest in the property; (2) that the defendant interfered with the plaintiff's right to possess the property; (3) that the defendant intended to interfere with plaintiff's possession; and (4) that the defendant's act was the legal cause of the plaintiff's loss of the property. Id.

Assuming that Carl could establish that the fifty dollars was his (Pat would be unable to testify otherwise), he could establish that he had a possessory interest in the cash, that Pat interfered with Carl's right to possession, and that Pat's act was the legal cause of Carl's loss of the fifty dollars. However, Carl may have difficulty proving that Pat intended to interfere with Carl's right to possess the money. The facts indicate that Pat assumed that the money was company money and, therefore, simply returned the money to the ACI petty cash drawer. Nonetheless, given the circumstances of the location of the cash in Carl's desk and no facts indicating that Pat made any effort to confirm whether the company had any claim to the money, Carl may successfully demonstrate that Pat was intentionally dispossessing Carl of the money.

The dispositive issue with respect to Carl's medical evaluation is whether ACI or Carl had the right to possess the evaluation. Given that Carl had obtained the physical to meet the requirements of the company's insurers and that ACI had paid for the evaluation, ACI would have a strong argument that it had a right to maintain possession of the evaluation. Indeed, ACI's maintenance of the record may be required by its insurer. Confidentiality of the record is beyond the scope of the call and the subject tort.