

## **ESSAY QUESTION NO. 7**

### **Answer this question in booklet No. 7**

Paul owned a snow blower that he normally used to clear sidewalks for pay. However, the snow blower needed some repair. Paul needed a widget to make the snow blower work, so he went to his neighbor David to see if David had a spare widget that he could sell him. Paul knew that David worked as a mechanic at a shop and routinely repaired snow blowers. Paul thought that David might have a spare widget because David tinkered with small engines in his spare time. Paul explained to David what he needed and asked him if he had a spare widget that he would sell. David knew that the manufacturer of the snow blower said that only metal widgets should be used as replacement parts, but David did not have the correct widget. Instead, David had a nylon widget that he wanted to get rid of. Although David thought the nylon widget might not work, he decided to sell it anyway and told Paul that it would work just fine as a replacement part. Paul bought the nylon widget and installed it on his snow blower. Two weeks later, the widget broke because it was only made of nylon and caused irreparable damage to the snow blower.

Paul went back to David and ranted about the nylon widget, demanding that David buy him a new snow blower. David knew that a friend was coming over to borrow some tools. David did not want the friend to see Paul ranting, so he invited Paul into his house to talk about the situation. Once they were in the house, David gestured for Paul to enter a room that David used as a home office. After Paul walked in, David shut and locked the door. David said through the door that he would let Paul out as soon as he was done meeting with his friend. Paul saw that the office had a large window that opened. The window was only a few feet off of the ground, but Paul saw a large slab of ice overhanging the roof just above the window. The slab was large enough to injure someone if it broke off and fell on the person. He decided to wait awhile before attempting to escape out of the window. After finishing with his friend about 15 minutes later, David let Paul out of the office. Paul pushed past David and ran out of the house.

- Discuss any tort causes of action that Paul has against David and the types of damages that Paul may recover.



## GRADER'S GUIDE

### \*\*\* QUESTION NO. 7 \*\*\*

#### SUBJECT: TORTS

##### **I. Fraud or Intentional Misrepresentation – 25%**

Paul probably has a claim for fraud or misrepresentation. According to the Alaska Supreme Court, the elements of intentional misrepresentation are a misrepresentation of fact, scienter, intent to induce reliance, reliance, causation, and damages. Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp., 129 P.3d 905, 914 (Alaska 2006). Scienter means that the maker of the statement (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies. Id. At 914.

David made a false statement when he told Paul that the nylon widget would work fine as a replacement part. The statement was false because the nylon widget would not work fine as a replacement part. It broke because it was made of nylon not metal.

Arguably, David also had the requisite scienter. He knew that the manufacturer of the snow blower said that only metal widgets should be used as replacement parts. Moreover, he thought that the nylon widget might not work. Paul could argue, as a result, that David knew that the nylon widget would not work fine. Paul could also argue that David knew that he did not have a basis for his representation. Since David knew that the manufacturer of the snow blower said that only metal widgets should be used as replacement parts, he knew that he did not have a basis for saying that the nylon widget would work fine, especially as he thought that nylon widget might not work.

David also had the requisite intent, for he made the statement because he wanted to get rid of the nylon widget. A jury could infer that he made the statement because he wanted to convince Paul to buy the nylon widget.

Paul can argue that he justifiably relied on David's expertise as a mechanic when making the purchase. This argument appears reasonable because David was a professional mechanic who routinely worked on snow blowers at his place of employment. On the other hand, the facts do not say whether Paul was aware of the snow blower manufacturer's statement that only metal widgets should be used as replacement parts. If Paul was aware of the manufacturer's statement, then his reliance was arguably not reasonable.

Assuming that Paul was justified in relying on David's statement, the false statement caused Paul to suffer damages. Paul bought and installed the nylon

widget on his snow blower. The nylon widget then broke causing the snow blower irreparable damage. As a general rule, Paul would be entitled to the lesser of the difference between the fair market value of the snow blower before and after the accident or the cost of repairing the snow blower plus the difference between the fair market value of the snow blower before the accident and its value after being repaired. See Era Helicopters, Inc. v. Digicon Alaska, Inc., 518 P.2d 1057, 1061 (Alaska 1974). Paul would also be entitled to special or consequential damages. Recoverable special damages are those "that are within the proximate cause limits, that can be proven with a reasonable degree of certainty, and that do not duplicate elements of damage awarded under the general damages headings." Alaska Const. Equipment, Inc. v. Star Trucking, Inc., 128 P.3d 164, 167 (Alaska 2006). "Generally, loss of use damages are available as a form of special or consequential damages for harm to or destruction of personal property. Id. Paul normally used the snow blower to earn money, but he lost the use of the snow blower when it suffered the irreparable damage. Potentially, Paul could also recover punitive damages. Punitive damages are recoverable for a knowing misrepresentation. Barber v. National Bank of Alaska, 815 P.2d 857, 864 n. 14 (Alaska 1991). To recover punitive damages, the "plaintiff must prove that the wrongdoer's conduct was 'outrageous, such as acts done with malice or bad motives or a reckless indifference to the interests of another.'" Id. at 864 (citation omitted). Actual malice need not be proved; instead, "[r]eckless indifference to the rights of others, and conscious action in deliberate disregard of them ... may provide the necessary state of mind to justify punitive damages." Id. (citation omitted). Arguably, David's conduct was reckless, for he told Paul that the nylon widget would work fine when he knew that the manufacturer said to use only metal widgets. Thus, a jury could conclude that David's conduct was sufficiently outrageous to support punitive damages. There are, however, not enough facts to determine the amount of the damages.

## **II. Negligence and Negligent Misrepresentation – 40%**

The facts raise the issue of negligence and negligent misrepresentation. The basic elements of negligence are duty, breach, proximate cause, and damages. Wickwire v. Arctic Circle Air Services, 722 P.2d 930, 932 (Alaska 1986). Negligent misrepresentation is a type of negligence.

The Alaska Supreme Court concluded in Howarth v. Pfeifer, 43 P.3d 39 (1968) that a plaintiff could pursue a claim for negligent misrepresentation. In reaching its decision, the supreme court considered the following factors: "the existence of knowledge, or its equivalent, on the defendant's part that the information is desired for a serious purpose and that the plaintiff intends to rely upon it, foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm." Id. at 42. The Alaska Supreme Court adopted a similar list of factors in D. S. W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555-

56 & n. 1 (Alaska 1981), to determine whether a school owed a duty of due care to a student regarding the student's dyslexia. The supreme court continues to use the D.S.W. factors to determine whether someone owes a duty in the absence of a statute, regulation, contract, undertaking, the parties' preexisting relationship, or existing case law. McGrew v. State, 106 P.3d 319 (Alaska 2005).

#### **A. Negligent Misrepresentation**

Paul would also most likely have a claim for negligent misrepresentation. The elements of negligent misrepresentation are (1) the party accused of the misrepresentation must have made the statement in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, (2) the representation must supply false information, (3) there must be justifiable reliance on the false information, and (4) the accused party must have failed to exercise reasonable care or competence in obtaining or communicating the information. Reeves v. Alyeska Pipeline Service Co., 56 P.3d 660, 670-71 (Alaska 2002); Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co., 45 P.3d 657, 671 (Alaska 2002).

David made a misrepresentation in the course of a transaction in which he had a pecuniary interest. David wanted to get rid of the nylon widget, so he sold it to Paul.

As noted above David misrepresented the efficacy of a nylon widget as a replacement part. David stated that the nylon widget would work just fine, but it did not. Thus, David's representation supplied false information.

Also as noted above, Paul may have been justified in relying on David's representation. Paul could argue that David was a professional mechanic who routinely worked on snow blowers. However, if Paul was aware of the snow blower manufacturer's statement that only metal widgets should be used as replacement parts, then his reliance on David's statement would not necessarily be justifiable. A jury could conclude that Paul was not justified because he knew that the manufacturer specified that only metal widgets should be used. However, it is also possible that the jury could conclude that Paul was justified in relying on David's expertise. David might have had some specific knowledge that indicated that a nylon widget would work regardless of the manufacturer's statement.

David does not appear to have taken reasonable care or exercised reasonable competence in making his representation. Under the general negligence standard, "reasonable care" is the care that a reasonably prudent person would have exercised for his own care under the same circumstances. National Bank of Alaska v. McHugh, 416 P.2d 239, 243-44 (Alaska 1966). Under the professional negligence standard, David would be held to the standard of care of the reasonable person in his trade or business: "[i]t is a general rule of law

that, when a person holds himself out to the public in any particular employment, work, or trade, there is an implied engagement with those who may employ him that he and his employees in that trade or business possess that reasonable degree of knowledge and skill which is ordinarily possessed by others engaged in the same business or trade.” John's Heating Service v. Lamb, 46 P.3d 1024, 1037 (Alaska 2002) *quoting* Pusey v. Webb, 47 A. 701, 702 (Del.Super.1900). David could arguably be held to the professional standard because he was a professional mechanic. On the other hand, David was not working as a mechanic when he sold the nylon widget to Paul. In any event, the facts suggest that David was negligent under either standard. He knew that the manufacturer stated that only metal widgets should be used as replacement parts, and he also thought that the nylon widget might not work. Yet, he told Paul that the nylon widget would work just fine. Arguably, both a reasonable person and a reasonable mechanic should have known that the statement was false. There is nothing in the facts to indicate that David had any basis for making the statement at all.

As with intentional misrepresentation, Paul would be able to recover both his general and special, or consequential, damages. The analysis would be the same. Paul might also be able to recover punitive damages, for the Alaska Supreme Court approved of Punitive damages in cases of negligent misrepresentation in Clary Ins. Agency v. Doyle, 620 P.2d 194, 201-02 (Alaska 1980). *See also* Barber v. National Bank of Alaska, 815 P.2d 857, 864 n. 14 (Alaska 1991). However, not all negligent misrepresentations will support punitive damages, for the misrepresentation must involve at least recklessness which is something more than mere negligence. *Id.* at 203. Recklessness involves the conscious, or heedless, disregard of the potential for injury. *Id.* Paul could be recover punitive damages if the jury concluded that David's conduct was reckless rather than merely negligent.

## **B. Negligence**

In the absence of the case law creating the tort of negligent misrepresentation, the court would apply the following D.S.W. factors to determine whether David owed Paul a duty of care:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved. D.S.W., 628 P.2d at 555.

The harm to Paul is arguably foreseeable because David sold him a nylon widget when the manufacturer specified that only metal widgets should be used as replacement parts. The facts imply that nylon was not as strong because the widget that David sold Paul failed because it was only made of nylon. Moreover, David told Paul that the nylon widget would work fine even though he thought that it might not work. Under these circumstances, one could foresee that the nylon widget would fail, resulting in the damage to the snow blower.

There is a very close connection between David's conduct and the injury. David sold Paul a nylon widget which failed because it was only made of nylon instead of metal. If David had not sold the nylon widget to Paul, then Paul's snow blower would not have suffered irreparable damage.

Moral blame should attach to David's conduct. David knew that the manufacturer specified that only metal widgets should be used as replacement parts and thought that the nylon widget would not work. Yet, David sold the nylon widget to Paul anyway. David had superior knowledge that he could have used to avoid the injury, but he chose to make the sale instead.

The policy of preventing future harm also favors the imposition of a duty. Requiring people to be truthful in business transactions like the one between David and Paul would result in fewer losses.

The burden to be truthful is not a very great burden and should not have any adverse impact on David. Although David might have lost the sale to Paul, he would likely have improved his reputation. Furthermore, on the assumption that a reputation for honesty would carry over to his job as a mechanic, imposing the duty would have a beneficial rather than a deleterious effect. Similarly, imposing a duty would not have an adverse impact on the community. It should, in fact, have a positive impact, for honest transactions would result in a decrease in the cost of doing business.

There is nothing in the facts regarding the availability of insurance.

The analysis of the D.S.W. factors above demonstrates that Paul would be able to show breach and causation. The discussion of damages in the section above on negligent misrepresentation also applies to a claim of general negligence.

### **III. Innocent Misrepresentation – 10%**

Paul may have a claim for innocent misrepresentation, but the facts are not clear as to whether he has suffered any damages compensable under a theory of innocent misrepresentation.

The Alaska Supreme Court adopted Restatement (Second) of Torts, Section 552C(1) as the definition of the tort of innocent misrepresentation. Bevins v.

Ballard, 655 P.2d 757, 761-62 (Alaska 1982). The elements of innocent misrepresentation are (1) misrepresentation of a material fact, (2) the misrepresentation occurs during a sale, lease, or exchange, (3) the misrepresentation is made with the purpose of inducing another to act in reliance on the statement, (4) justifiable reliance on the statement, and (5) pecuniary loss. Id. However, damages for innocent misrepresentation are limited to the difference between the value of the consideration given and the value of what was received. Restatement (Second) of Torts, Section 552C(2). Consequential damages are not recoverable. Comment f, Restatement (Second) of Torts, Section 552C(2). Similarly, punitive damages would not be recoverable. Innocent misrepresentation does not require proof of the requisite mental state. "[T]o recover punitive damages, 'the plaintiff must prove by clear and convincing evidence that the defendant's conduct was outrageous, such as acts done with malice, bad motives, or reckless indifference to the interests of another.'" Robles v. Shoreside Petroleum, Inc., 29 P.3d 838, 846 (Alaska 2001); AS 09.17.020(b). A misrepresentation would only support punitive damages if it were a negligent or intentional misrepresentation.

The discussions above apply equally well to an analysis of the first four elements of innocent misrepresentation. David misrepresented a material fact when he stated that the nylon widget would work fine as a replacement part. He made the statement during the course of a sale with the purpose of inducing Paul to buy the nylon widget. As noted above, Paul may or may not have justifiably relied on the statement. There are not sufficient facts to determine whether Paul suffered a compensable loss. Paul would only be allowed to recover the difference between what he paid for the widget and its value. Nothing in the facts suggests that Paul overpaid for the nylon widget. If he did not overpay for the widget, then he does not have a compensable claim. On the other hand, if he paid a premium for the widget because it allegedly would work fine as a replacement part, then he would have a claim for the amount of the premium.

#### **IV. False Imprisonment – 25%**

Paul also has a claim for false imprisonment. A person is subject to liability for false imprisonment if (1) the person acts with the intent to confine another person within boundaries fixed by the actor, (2) the act directly or indirectly results in a confinement of the other person, and (3) the other person is conscious of the confinement or harmed by it. Zok v. State, 903 P.2d 574, 577 n.4 (Alaska 1995); Helstrom v. North Slope Borough, 797 P.2d 1192, 1199 (Alaska 1990). A plaintiff is entitled to nominal damages as a matter of law for false imprisonment because injury in the sense of monetary loss is not an element of the tort. Zok, 903 P.2d at 577. Nominal damages are by definition minimal monetary damages, usually one dollar. Id. at 578. A plaintiff may also recover punitive damages for false imprisonment. Hash v. Hogan, 453 P.2d 468 (Alaska 1969).



David acted with the intent to confine Paul within boundaries fixed by him. He shut and locked Paul in the home office in order to keep Paul out of sight and sound of his friend. The boundaries were fixed because the office had only one door and one window. David's act confined Paul because David locked the door, preventing Paul from exiting through the door. Although the room had a window, it was not a reasonable exit given the overhanging ice slab. Thus, Paul was confined in the office. Paul was conscious of his confinement because David told him that he would let him out as soon as he was done with his important customer.

Paul can argue that he suffered damages because he was locked up for 15 minutes. The detention apparently bothered Paul because he pushed past David and ran out of the house. A jury could base an award of damages on David's conduct. On the other hand, a jury could conclude that Paul only suffered a *de minimus* monetary injury. He was only locked up for 15 minutes. If a jury concluded that Paul only suffered a *de minimus* injury, it would award nominal damages of one dollar. Paul could also request punitive damages. David's intentional conduct in locking Paul in the office is sufficient to support an award of punitive damages. David acted with malice when he intentionally locked Paul in the office to prevent him from creating a disturbance in front of his friend. However, a jury would still have to conclude that David's conduct was sufficiently "outrageous" to justify an award of punitive damages.