ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Statutory Background:
Assume that an Alaska Statute prohibits the discharge of untreated sewage from commercial passenger vessels into Alaska waters. The statute makes any person who violates this prohibition strictly liable for a civil penalty in a fixed amount of $10,000. A citizen of Alaska may bring a suit against the vessel's owner for this penalty.

A different statute creates an exemption to the above liability for any commercial passenger vessel that "operates in the maritime waters of the state solely in innocent passage." For purposes of this question, assume that "innocent passage" is a narrow doctrine of international law that applies to ships passing through in transit between ports outside Alaska.

Facts:
The *M.V. Marvelous* is a commercial passenger vessel owned by Mega Corporation. The *Marvelous* suffers a malfunction while sailing in Alaska waters that causes a sewage discharge. Passenger Dan Green, an Alaska citizen, is out for a stroll on the promenade deck and observes the discharge. Green's attorney files a complaint against Mega Corporation in Alaska Superior Court, alleging a violation and seeking the mandated $10,000 civil penalty.

Mega files a timely answer denying that a violation occurred. The answer lists no affirmative defenses. At the same time as the answer, Mega files a demand for jury trial.

During the ensuing discovery period, Green serves Mega with an interrogatory asking, "Did the *Marvelous* discharge untreated sewage into Alaska waters during Mr. Green's cruise?" Mega responds, "Yes."

Green moves for summary judgment, attaching a duly authenticated copy of the interrogatory answer. Mega files an opposition brief without affidavits in response to Green's motion, arguing that the *Marvelous* was "in innocent passage" when the discharge occurred, and therefore exempt under the statute. Mega also points out that it has denied a violation in its timely-filed answer and has demanded a jury trial. Mega asserts that a summary judgment by the judge would wrongly deprive it of the opportunity to present the case to a jury. Finally, Mega asserts that the motion is not supported by appropriate, uncontroverted evidence.

1. What arguments should Green make in his reply brief responding to Mega's brief in opposition to summary judgment? How is the court likely to rule on those arguments?

2. If the court grants the summary judgment motion, what monetary awards can Green seek to have added to the final judgment in addition to the civil penalty requested in the motion?

Note: In answering, do not discuss environmental or maritime law beyond the partly fictitious statutory provisions the question asks you to assume.

GRADER'S GUIDE

*** QUESTION NO. 6 ***

SUBJECT: CIVIL PROCEDURE

This question tests knowledge of pleading affirmative defenses under Alaska Civil Rule 8, the basic mechanics of summary judgment under Rule 56, and simple awards of costs, fees, and interest under Rules 79 and 82 and the Code of Civil Procedure. A simplified version of real environmental statutes provides a framework for the civil action in the question, but independent knowledge of these statutes is not necessary.[1]

1. Reply Arguments for Summary Judgment (70 points)

Alaska Rule of Civil Procedure 56(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

a. Assertions unsupported by evidence

Green's principal argument should be that Mega has failed to support its contentions in the opposition brief with any evidence. Rule 56 provides that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading." Mega seeks to rest on two items: the denial contained in its answer, and the contention regarding innocent passage contained in its brief. Neither will suffice to overcome a properly supported motion for summary judgment. As the Alaska Supreme Court has held, when presented with such a motion

> the respondent can avoid summary judgment only by producing competent evidence to show that there are issues of material fact to be tried. The respondent must set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute the movant's evidence. Assertions of fact in pleadings and memoranda are not admissible evidence and cannot be relied upon for the purposes of summary judgment.

Brock v. Rogers & Babler, Inc., 536 P.2d 778, 782-83 (Alaska 1975). The court should sustain this argument and disregard Mega's unsupported assertions.

[1] The discharge prohibition in the question is loosely modeled on AS 46.03.463(a), part of the recent Cruise Ship Initiative. The penalty provision alluded to in the question is a greatly simplified version of 46.03.760(e). The citizen suit provision alluded to in the question is a simplified version of AS 46.03.481.

b. Waiver

Green should also argue that the "innocent passage" contention has been waived. When answering a complaint, Civil Rule 8(c) requires a defendant to "set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." The exemption in AS 46.03.487 is an avoidance of the general rule regarding liability—an exception that the defendant must show that it falls within to avoid liability—and as such it should have been pleaded specifically in the answer. *See generally Rollins v. Leibold,* 512 P.2d 937, 940-41 (Alaska 1973). When an affirmative defense or avoidance is omitted from an answer, it may ordinarily be treated as waived and no longer part of the case. *E.g., Stanton v. Fuchs,* 660 P.2d 1197, 1198 n.2 (Alaska 1983).

The failure to plead an affirmative defense is often curable through amendment of the answer under Civil Rule 15(a). Since more than 20 days has presumably passed since the filing of the original answer, the right to amend would not be automatic and would require a motion. The rule provides that "leave shall be freely given if justice so requires," and it is unlikely that, if it asked to do so, Mega would be denied leave to amend its answer unless Green could show significant prejudice from the late assertion of the innocent passage issue. *See, e.g., Leibold,* 512 P.2d at 941 n.8 ("Our procedural rules should be interpreted liberally in order to avoid determination based on technicalities.").
Alternatively, the policy against determining a case on technicalities can be invoked to permit a party to raise an unpleaded defense in motion practice, even without amendment. The Alaska Supreme Court has made it clear that the defense ought to be considered unless the party wishing to bar it—in this case, Green—can show genuine prejudice that cannot be cured through a less drastic means than preclusion, such as through a continuance to allow investigation of the new defense. *Gamble v. Northstore Partnership,* 907 P.2d 477 (Alaska 1995). All in all, the court is unlikely to rely on waiver as an alternative ground in granting summary judgment to Green.

c. Jury Trial

To obtain a jury trial, a party must file a demand not more than ten days after the last pleading directed to the issue (in this case, the answer), and the issue must be one for which the amount in controversy exceeds $250 and for which a jury trial existed at common law. Civil Rule 38; Alaska Const. Art. I, § 16. Mega's jury trial demand is certainly timely, the amount in controversy exceeds $250, and it may be that the civil penalty claim Green has asserted--if it presents a factual dispute--is within the scope of the constitutional jury trial right. *See Tull v. United States,* 481 U.S. 412, 422-25 (1987) (applying parallel federal jury trial right to liability for civil penalty in a Clean Water Act case).

Nonetheless, Green should argue, and the court should hold, that an award of summary judgment will not wrongly deprive Mega of a jury trial. Juries exist to try issues of fact. As the Alaska Supreme Court has explained:

> The Alaska Constitution . . . preserves the right to a jury trial in civil cases only to the "same extent as it existed at common law." Alaska Const. art. I, § 16. At common law--as under current Alaska law--a court had the power to remove factual issues from the jury's consideration "where the court decide[d] there [was] insufficient evidence to raise a question of fact to be presented to the jury." *Taylor v. Interior Enters., Inc.,* 471 P.2d 405, 407 (Alaska 1970) (citing *Galloway v. United States,* 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943) (upholding a directed verdict)). Thus, a party's right to a jury trial will be violated by a summary judgment order only when summary judgment is improperly granted--that is, when a genuine issue of material fact exists.

Christensen v. NCH Corp., 956 P.2d 468, 477 (Alaska 1998). Provided the prerequisites for summary judgment have been met appropriately, there is no improper deprivation of a jury trial.

d. Support for the motion

In response to Mega's assertion that the summary judgment motion has not been supported by appropriate, uncontroverted evidence, Green should point out that the motion is supported by a single item of evidence: the interrogatory response of Mega acknowledging each element of the statute required to give rise to liability. The question recites that the copy of the interrogatory response was "duly authenticated." The response itself is a sworn document (*see* Civil Rule 33(b)(1)), and it is usable in support of summary judgment. The Alaska Supreme Court has explained:

> While Civil Rule 56(c) does not expressly provide for a trial court's consideration of answers to interrogatories in deciding a motion for summary judgment, a central policy of Civil Rule 56(c)—assuring that a summary judgment is based upon facts admissible in evidence—is consistent with relying upon sworn answers to interrogatories along with any other materials otherwise admissible in evidence.

Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough, 527 P.2d 447, 454 (Alaska 1974) (footnotes omitted); *see also, e.g., Palzer v. Serv-U-Meat Co.,* 419 P.2d 201 (Alaska 1966). As noted in part 1a above, the interrogatory evidence is not controverted by any admissible evidence.

2. Additional Amounts (30 points)

a. Fees

Alaska Civil Rule 82 provides that "the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule." The rule sets up a table of presumptive percentages that set the fee to be awarded in connection with money judgments. For a judgment that, including prejudgment interest, amounts to less than $25,000, the presumptive fee award is 20% if the matter was contested through trial, 18% if the matter was contested but not tried, and 10% if the matter was not contested. This case was contested but not tried, and accordingly the presumptive award Green should seek is 18% of the sum of $10,000 plus prejudgment interest.

A court may vary a fee award based on consideration of a set of factors listed in subpart (b)(3) of Rule 82.[2] By the terms of the rule, an adjustment based on these factors is left to the court's discretion, but the court has to explain its reasons for the adjustment. The question provides little material from which to develop an argument under these factors, but a superior answer may note their availability to alter an 18% calculation made under Rule 82(b)(1). Green could argue for an enhanced fee award, or Mega for a reduced award, by referring to these factors.

A few examinees may be aware that, in the past, a litigant such as Green might have been able to seek an award of full attorney's fees under the "public

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[2] The factors are:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

interest litigant doctrine." Since 2003, this kind of fee award has no longer been available to a statutory claimant such as Green.[3]

b. Costs

As the prevailing party, Green is entitled to have the judgment augmented by certain costs if they were "necessarily incurred in the action." Civil Rule 79(a). The list of recoverable costs appears in Rule 79(f) and is quite limited. In a case such as this one resolved on summary judgment after written discovery, it encompasses the court's filing fee, costs of serving the defendant with the summons and complaint, and some photocopying costs. If depositions were taken in discovery, some costs for taking and transcribing them can be recovered.

c. Prejudgment interest

Green should seek prejudgment interest under AS 09.30.070. On the facts given in this question, interest on the principle amount of the judgment runs from the date Mega was served with the complaint through the date of judgment. The rate is three points above a federal discount rate that is designated in the statute.[4]

d. Postjudgment interest

Postjudgment interest is not an amount added to a judgment (since it accrues later), but judgments often include a provision establishing that it will accrue. The rate is the same as that for prejudgment interest. AS 09.30.070(a).

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[3] *See* AS 09.60.010(b) – (e) (enacted in 2003); *State v. Native Village of Nunapitchuk,* 156 P.3d 389 (Alaska 2007). Under the 2003 revision, special fee awards remain available for certain constitutional claims, but no such claim is presented here.

[4] AS 09.30.070 applies to all judgments except those for "future economic damages, future noneconomic damages, or punitive damages." An examinee may plausibly argue that the exclusion for punitive might be construed by a court to bar prejudgment interest on civil penalties, arguing that civil penalties are punitive damages under another name. While there is no caselaw support for this argument, an examinee who makes it should be given credit if the basis is well articulated.