ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Pam and Darwin were friends and neighbors living in Anytown, Alaska. One day, while Pam was visiting, Darwin announced that he was going to spend the day building a tree house in his backyard. Darwin showed Pam the materials and the ladder he had recently purchased to build the tree house. He also showed Pam where he wanted to build the tree house – in a large, tall tree at the far side of his yard.

Pam volunteered to help Darwin. She left, promising to come back in a half hour or so. Before she left, Pam specifically warned Darwin not to use his ladder to climb up into the tree without securing the ladder to the tree or having someone hold the ladder in place.

A half hour later, Pam came back and noticed to her alarm that Darwin had climbed nearly to the top of his ladder to inspect the tree at the far side of his yard, without anyone or anything holding the ladder in place. Afraid that the ladder was not stable and that Darwin would fall, Pam began to run across the backyard so that she could hold the ladder in place. As she was crossing the yard, Pam fell and broke her ankle.

A short time later (and within the appropriate statute of limitations), Pam brought suit against Darwin, specifically alleging that Darwin's decision to climb the ladder without properly securing it was negligent and led her to break her ankle.

1. Discuss which elements of negligence Darwin should address, and how he should address them, in opposing Pam's specific claim.

2. Now assume that Pam's fall resulted from her tripping over a stump that was hidden in the grass in Darwin's backyard. Does that fact impact the claim(s) that Pam may assert against Darwin, and if so, how?

February 2009 Tort's Grader's Guide

1. Discuss which elements of negligence Darwin should address, and how he should address them, in opposing Pam's specific claim. (75%)

Pam alleges that Darwin committed the tort of negligence – that is, that Darwin acted negligently, and in so doing, caused her harm. The elements of any cause of action for the tort of negligence are: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; (3) a proximate causal connection between the breach and the harm; and (4) actual harm. *See e.g.*, *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 667 (Alaska 2000); *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska 2000). The existence and extent of a duty are generally questions of law, *see e.g.*, *Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 841 (Alaska 2001), and breach of duty and causation are questions of fact, *see e.g.*, *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250, 255 (Alaska 2000); *Schumacher v. City & Borough of Yakutat*, 946 P.2d 1255, 1256 (Alaska 1997). *See also Williams v. Municipality of Anchorage*, 633 P.2d 248, 251 (Alaska 1981) ("The precise nature and extent of . . . duty, while a question of law, depends upon the nature and extent of the act undertaken, a question of fact.").

According to the facts provided in the question, Pam's specific allegation against Darwin is that he negligently climbed his ladder without properly securing it and that that action caused Pam to fall and break her ankle. In addressing Pam's suit, Darwin can and should make arguments related to the elements of duty, breach, and causation. Given Pam's ankle injury, Darwin cannot successfully argue that Pam did not suffer actual harm.

A. Duty and Breach – Darwin breached no duty owed to Pam, and owed Pam no duty to prevent the particular harm in this case.

As addressed above, before a defendant can be held liable for negligence, it must be established that the defendant owed a duty of care to the plaintiff. *Bolieu v. Sisters of Providence*, 953 P.2d 1233, 1235 (Alaska 1998). "Determining whether a duty exists in the type of case presented is the first analytical step in deciding whether a negligence action can be maintained." *Dore v. City of Fairbanks*, 31 P.3d 788, 791 (Alaska 2001) (citing *Kooly v. State*, 958 P.2d 1106, 1008 (Alaska 1998)).

Here, Darwin owed Pam a duty to act as a reasonable landowner, *Burnett v. Covell*, 191 P.3d 985, 989 (Alaska 2008), and he owed Pam a general duty to act reasonably under the circumstances, *Lyons v. Midnight Sun Transp. Serv.,*

Inc., 928 P.2d 1202, 1203 (Alaska 1996). With respect to his responsibilities as a landowner, Darwin had a duty to use due care to guard against unreasonable risks created by dangerous conditions existing on his property. *See e.g.*, *Burnett*, 191 P.3d at 989; *City of Seward v. Afognak Logging*, 31 P.3d 780, 784 (Alaska 2001). Darwin can and should argue that there is no evidence of any breach of this duty. Neither the facts of the question nor Pam's specific allegation make reference to any condition of the land – a rock, a stump, debris, or any sort of slick condition of the grass – that might constitute a dangerous condition causing Pam's fall. Pam might argue that Darwin's climbing of the ladder without securing it was itself a dangerous condition on the land; however, Darwin could respond that his simple climbing of a ladder did not represent "a condition" of the property – and certainly not a dangerous one presenting unreasonable risk to others.

With respect to Darwin's general duty to act reasonably under the circumstances, he could once again argue that he committed no breach of that duty. Here Darwin should assert that regardless of Pam's subjective perception, there was nothing unreasonable about his climbing a ladder in his own backyard. Moreover, nothing about that action was directed toward, or directly impacting, Pam.

The extent of the above-described duties essentially comes down to a particular question of whether Darwin owed Pam a duty not to climb an unsecured ladder in his backyard. Where no such duty is clearly set out by statute or by other legal precedent, Alaska courts look to the following public policy factors:

> 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. v. Fairbanks North Star Borough School District, 628 P.2d 554, 555 (Alaska 1981). Particularly where Darwin could not have foreseen that his climbing of a ladder in his backyard (secured or not) would have led to any harm to Pam, Darwin arguably owed Pam no duty to prevent the particular harm that she alleges. Alaska courts have found that where a defendant could

not reasonably have foreseen the harm alleged by a plaintiff, that defendant owed no duty to prevent the alleged harm. *Nicholson v. MGM Corp.*, 555 P.2d 39 (Alaska 1976) (affirming superior court's grant of summary judgment where "no duty was owed to plaintiff because this type of accident was not reasonably foreseeable"); *accord Dinsmore-Poff v. Alvord*, 972 P.2d 978 (Alaska 1999).

Here, Darwin should argue that because he could not reasonably have foreseen that any action on his part would somehow lead to Pam's accident, he owed no duty to prevent Pam's fall and/or injury. Another way to think about it in the context of Pam's allegation is that Darwin owed Pam no duty to refrain from climbing his own ladder in his own backyard, regardless of Pam's prior warning to him. To support this argument, Darwin would rely upon the remoteness of any action taken by him to Pam's slip and fall and broken ankle. He would point out that nothing about his climbing of the ladder exerted any force at all upon Pam. After all, no part of the ladder or the tree or Darwin himself ever even came into contact with Pam. Under the circumstances, Darwin could not reasonably have foreseen that his climbing the ladder in question would result in any harm to Pam, let alone her slip and fall and broken ankle. Just as the landowner in *Nicholson, supra*, could not have foreseen that shoppers using the sidewalks provided in front of his store would be harmed by an intoxicated driver operating an out-of-control vehicle, Darwin arguably could not have foreseen the events leading to Pam's fall and injury.

Addressing the remainder of the *D.S.W.* factors, Darwin could further argue that the connection between his conduct of climbing a ladder and Pam's harm of falling and breaking her ankle was extremely tenuous at best, and that there is no particular moral blame attached to the conduct of climbing a ladder. He may also assert that any finding of a duty to refrain from climbing unsecured ladders is unwarranted, would not significantly reduce the harm to others in Pam's situation in future cases, and would unreasonably regulate decisions and details of people's everyday lives and activities, making them increasingly subject to litigation.

B. <u>Causation - Darwin did not legally cause the alleged harm to Pam.</u>

Darwin should also argue that the negligent act alleged by Pam – his climbing of a ladder without securing it – was not a substantial factor in causing Pam's harm. *See Sharp v. Fairbanks North Star Borough*, 569 P.2d 178, 181 (Alaska 1977) ("[N]egligent conduct may properly be found to be a legal cause of a plaintiff's injury if the negligent act was more likely than not a

substantial factor in bringing about (the) injury." (internal quotations omitted)). Alaska applies a two-part test in determining legal causation:

> First, plaintiff must show that the accident would not have happened "but for" the defendant's negligence. Second, the negligent act must have been so important in bringing about the injury that a reasonable person would regard it as a cause and attach responsibility to it.

Robles v. Shoreside Petroleum, Inc., 29 P.3d 838, 841 (Alaska 2001) (quoting *Maddox v. River & Sea Marine, Inc.*, 925 P.2d 1033, 1039 (Alaska 1996)).

Darwin could argue both portions of the causation question. First, he could assert that his climbing of the ladder in question was not the but-for cause of Pam's fall and associated injury. He could point out that in helping him to build the treehouse on the day in question, Pam would inevitably have had to traverse the yard – back and forth – several times. During the course of that work – going back and forth across the yard – it is entirely possible that Pam could fall regardless of what Darwin was doing. According to this argument, Pam could not establish that her slip and fall would not have happened but for Darwin's allegedly "improper" climbing of the ladder. Darwin should recognize, however, that this argument is susceptible to the counterargument that Pam fell because she was rushing across the yard, and she would not have been rushing but for Darwin's allegedly improper climbing of the ladder.

Darwin should also assert that his climbing of the ladder – even if assumed to be negligent – was not so important in bringing about Pam's slip and fall that a reasonable person would regard it as a cause and attach responsibility to it. Indeed, nothing about Darwin's climbing of the ladder directly caused Pam to slip and hurt herself in any way. As noted previously, no part of the ladder, the tree, Darwin himself, or anything physically connected to Darwin, touched or impacted Pam in any way prior to her slip and fall. Moreover, nothing about Darwin's climbing of the ladder arguably controlled or created the forces leading to Plaintiff's fall and related injury. As the Alaska Supreme Court has recognized:

> The "substantial factor test" . . . is a test of legal causation encompassing both actual cause and policy considerations. . . . If the force [the defendant] set in motion, has become, so to speak, merged in the general forces that surround us, [or has] 'exhausted itself' like a spent cartridge, it can be followed no further. Any

> later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him.

Vincent v. Fairbanks Memorial Hosp., 862 P.2d 847, 851 n.7-8 (Alaska 1993) (quoting Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 106, 112 (1911)).

The fact that Pam's accident occurred while Darwin happened to be climbing a ladder across the yard does not mean that Darwin proximately caused the accident or that he is responsible for the accident. *See Alvey v. Pioneer Oilfield Serv., Inc.*, 648 P.2d 599, 600-01 (Alaska 1982) (where the plaintiff fell into a survey hole while removing a well cover constructed by the defendant, plaintiff had not established that anything about the design or construction of the well cover caused his fall and/or his injuries); *see also Sharp*, 569 P.2d at 181-82 (upholding summary judgment in favor of defendant school district where district's assumed negligent supervision of students was not sufficiently important in bringing about the plaintiff student's injury that a reasonable person would attach responsibility to it).

In addition to establishing a lack of proximate causation between his allegedly negligent act of climbing the ladder and Pam's slip and fall, Darwin might also argue that Pam's harm was actually caused by a subsequent, intervening cause – that being Pam's own arguably unreasonable reaction to Darwin's presence on the ladder and her decision to run across the yard. In *Sharp*, *supra*, the Alaska Supreme Court held that even assuming the defendant school district had been negligent in supervising its students, the plaintiff student's injuries were actually caused by the subsequent intervening acts of another student and his parent. 569 P.2d at 182-84. The *Sharp* Court recognized section 440 of the Restatement (Second) of Torts, which states:

> A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

569 P.2d at 183 (quoting Restatement (Second) of Torts s. 440 (1965)). Section 435 of the Restatement, also recognized by the *Sharp* Court, further qualifies what may be considered a superseding cause:

> The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to

> the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.

569 P.2d at 182 (quoting Restatement (Second) of Torts s. 435 (1965)). Whether Pam's actions constituted a superseding cause of her own harm, then, will depend upon whether the Court deems it "highly extraordinary" that Darwin's allegedly negligent act of climbing the unsecured ladder brought about Pam's fall and broken ankle. The Alaska Supreme Court has traditionally been hesitant to find the causal connection between a defendant's negligent conduct and a plaintiff's asserted harm broken by a superseding cause, emphasizing the heightened "highly extraordinary" standard contained in section 435 of the Restatement. *See e.g.*, *Williford v. L.J. Carr Investments, Inc.*, 783 P.2d 235 (Alaska 1989). Darwin can validly argue that Pam's own actions constituted a superseding cause of her fall and injury; however, the success of such an argument is uncertain.

In assessing the elements of duty, breach, and causation, examinees might characterize Pam's claim against Darwin as one under the rescue doctrine – i.e., that Darwin's negligence created the need for Pam to rescue him and the danger that would result in Pam's harm. *See e.g.*, *Oberson v. United States Dep't of Agriculture, Forest Service*, 514 F.3d 989, 1001 (9th Cir. 2008) ("Under [the rescue] doctrine, one who observing another in peril, voluntarily exposes himself to the same danger in order to protect him . . . may recover for any injury sustained in effecting the rescue, against the person through whose negligence the perilous condition has been brought about."); *see also Wagner v. Int'l Ry. Co.*, 232 N.Y. 176 (1921) (Cardozo, J) ("Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable."). Because Alaska does not specifically adopt the "rescue doctrine" and indeed has withdrawn pattern jury instructions on the specific doctrine, examinees should not be penalized for failure to mention the doctrine. Nor should examinees be penalized for mentioning the doctrine or so characterizing Pam's claim. Whether or not an examinee characterizes Pam's claim as one under the rescue doctrine, that examinee must ultimately address the duties of reasonable behavior owed by Darwin, whether or not Darwin breached any duty, and whether a sufficient causal link existed between any breach on Darwin's part and Pam's harm. *See Oberson*, 514 F.3d at 1001.

2. Now assume that Pam's fall resulted from her tripping over a stump that was hidden in the grass in Darwin's backyard. Does that fact impact the claim(s) that Pam may assert against Darwin, and if so, how? (25%)

If Pam tripped over a hidden stump in Darwin's backyard, that fact likely does impact the claims that Pam can make. That is, Pam may claim that Darwin's negligent failure to remove the stump or warn her of its presence caused her to fall and break her ankle. This negligence claim involves the same elements discussed above: 1) a duty owed by Darwin to Pam; 2) a breach of such duty; 3) a causal link between the alleged negligent act or failure to act, and the alleged harm; and 4) actual harm to Pam. Here, Darwin's duty to act as a reasonable landowner is implicated.

Again, as a landowner in Alaska, Darwin had a duty to use due care in guarding against unreasonable risks created by dangerous conditions existing on his property. *See e.g.*, *Burnett v. Covell*, 191 P.3d 985, 989 (Alaska 2008); *City of Seward v. Afognak Logging*, 31 P.3d 780, 784 (Alaska 2001). While the facts presented in the second question do not tell us much about the hidden stump in Darwin's grass yard, the stump is at least arguably a dangerous condition on Darwin's land. Moreover, the hidden stump arguably created a danger that Pam could not have appreciated without warning and that Darwin could or should reasonably have discovered and made safe had he used due care. Finally, assuming Pam tripped and fell over the stump, she will likely be able to establish that the stump – and Darwin's failure to remove it or warn her of it – legally caused her fall and broken ankle. The strength and outcome of Pam's claim will depend upon particular facts surrounding the nature of the stump, the degree to which the stump was hidden, and other such nuances; however, the involvement of the stump in Pam's fall at least arguably gives rise to an additional, and perhaps stronger, claim of negligence against Darwin.