ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Nina lives in Fairbanks with her two-year-old son. She seeks child care and comes across a newspaper ad for Thad's Kindercare, a Fairbanks nursery school. The ad boasts of the school's "exceptional program" and says that the children are read to three times a day and taken to museums and similar locales twice a week.

Nina meets with Thad, the school's owner, and decides to enroll her son in the school. Nina signs a three-year contract which says that in consideration of her advance payment of tuition, Thad's Kindercare will educate her son according to the terms set out in the ad.

In truth, Thad's program is more pedestrian, consisting mostly of supervised play. The children are only read to twice a day, and the museum and other outings only take place twice a month. Nina's son nonetheless thrives at Thad's Kindercare.

A few months after enrolling her son in the school, Nina finds out that the program is not as advertised and confronts Thad. Because her son is doing so well, she does not remove him from the school, but argues with Thad that his school is not worth the full tuition. Thad appears to agree and that same day returns to her one-third of the previously paid tuition.

Three years after the return of money, Thad's Kindercare sends Nina a bill for the remainder of the original tuition. When she refuses to pay, Thad's Kindercare posts her photo and name on its well-known list of deadbeat parents. A few months after that, Nina's attorney files suit against Thad's Kindercare in the superior court at Anchorage (though Nina still resides in Fairbanks). Her complaint seeks an injunction requiring Thad's Kindercare to remove her photo and name from its deadbeat parents list. She serves the complaint on Thad's Kindercare at the school's office in Fairbanks.

Thad's Kindercare timely answers, through counsel, denying Nina's allegations that they had modified the contract and asserting that the money was only temporarily returned to Nina because she had claimed to be experiencing financial troubles, and further asserting that Nina is thus appropriately on the deadbeat parents list, given her refusal to pay the bill it sent her.

Nine days later, Nina serves a written jury trial demand on Thad's Kindercare.

Three months later, but before a trial date has been scheduled, Thad's Kindercare moves to amend its answer, claiming that Nina's complaint is outside the applicable statute of limitations and that venue is improper.

1. Discuss whether (a) Nina's jury trial demand is timely, and (b) her claim is the type of claim that entitles her to a jury trial.

2. Discuss the relevant rules regarding the assertion of affirmative defenses and whether Thad's Kindercare can amend its answer to include the statute of limitations and improper-venue defenses. (Do not discuss the merits of these defenses, only whether they can be added by amendment.)

3. Discuss whether (a) venue is proper and (b) venue affects the court's ability to hear the case.

GRADERS GUIDE

***** QUESTION NO. 8 *****

SUBJECT: CIVIL PROCEDURE

1. Discuss whether (a) Nina's jury trial demand is timely, and (b) her claim is the type of claim that entitles her to a jury trial. (20 points)

The first question is whether Nina's jury trial demand was timely. A demand for jury trial is timely if served upon the other party in writing no later than 10 days after service of the last pleading directed to the issue. Civil Rule 38(b). Nina served a written jury trial demand on Thad's Kindercare nine days after it filed its answer, so her request is timely.

The second question is whether Nina's claim is the type of claim that is covered by the right to jury trial. Alaska Constitution article I, section 16 provides in relevant part that "In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent it existed at common law." At common law, equitable claims were not subject to jury trial. Nina's claim for injunctive relief requiring Thad's Kindercare to remove her name and photo from its list of deadbeat parents is an equitable claim. *See State v. First Nat'l Bank*, 660 P.2d 406, 424 (Alaska 1982) (claim seeking injunctive relief is an equitable claim). Thus, Nina is not entitled to a jury trial, even if her request was timely.

2. Discuss the relevant rules regarding the assertion of affirmative defenses and whether Thad's Kindercare can amend its answer to include the statute of limitations and improper-venue defenses. (Do not discuss the merits of these defenses, only whether they can be added by amendment.) (55 points)

This question tests knowledge regarding basic rules of pleading and amendment of pleadings.

a. Basic Rules of Pleading (10 Points)

Civil Rule 8(c) requires a defendant to plead in its answer any affirmative defenses, such as the statute of limitations. If an affirmative defense is not raised in a defendant's answer that defense may be considered waived. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 295 (Alaska 1976). Accordingly Thad's Kindercare should have pled the statute-of-limitations defense in its answer, if it has such a defense. Failure to comply with the statute of limitations does not affect a court's jurisdiction so the court may hear the case unless Thad's Kindercare raises this defense.

Civil Rule 12(b) similarly provides that the defense of improper venue may be raised via motion prior to the filing of an answer, and if not raised via motion must be raised in the defendant's answer or will be considered waived pursuant to Civil Rule 12(h)(1). Accordingly, Thad's Kindercare should have raised this defense in its original answer.

b. Amendment

1. Statute of Limitations (30 points)

As to the statute of limitations defense, Thad's Kindercare may nonetheless be able to amend its answer to include the defense. Civil Rule 15(a) provides that "if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served." Pursuant to Civil Rule 7(a), an answer that does not contain a counterclaim is a "pleading . . . to which no responsive pleading is permitted," *i.e.*, there is no reply pleading. Thad's Kindercare could therefore have amended its answer as of right by filing an amended answer within 20 days of filing its answer, but it did not do so within that time period and thus may not amend its answer as of right. Civil Rule 15(a) would also permit Thad's Kindercare to amend its answer with Nina's written consent, but there are no facts indicating that she has given such consent.

But although Thad's Kindercare is not entitled to amend its answer as of right, he may still move to amend. Civil Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires." A "'pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).'" *Miller v. Safeway, Inc.*, 102 P.3d 282, 294 (Alaska 2004) (quoting 3 *Moore's Federal Practice*, § 15.14[1] (3d ed. 2003)). When a party seeks leave to amend its pleading after the time for amendment as of right has passed, a court should balance the hardship to the party seeking amendment against the prejudice to the opposing party. *Betz v. Chena Hot Springs Group*, 742 P.2d 1346, 1348 (Alaska 1987). But where there is no "apparent or declared reason – such as bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Miller*, 102 P.3d at 294 (citing and quoting cases omitted). "[P]rejudice to the opposing party is the predominate factor in determining whether or not to grant leave to amend." *Id.* "[F]actors relevant to a finding of prejudice to the non-moving party include added expense and delay, a longer or more burdensome trial, or

'if the issues being raised in the amendment are remote from the scope of the original case.'" *O'Callaghan v. Rue*, 996 P.2d 88, 101 (Alaska 2000) (quoted case omitted).

The facts of this case do not indicate any real prejudice to Nina caused by Thad's Kindercare's proposed amendment (the fact that amendment may doom Nina's litigation is not the type of prejudice contemplated by the rule). Nor do they indicate any other reason to deny amendment. Given the relatively short amount of time that has passed since Thad's Kindercare filed its original answer, and the fact that trial has not yet been set, the court should grant Thad's Kindercare's motion to amend.

2. Improper Venue (15 points)

Thad's Kindercare should not be able to amend its answer to include a defense of improper venue. Civil Rule 12(h)(1) provides that the defense of improper venue is waived if not raised in either a motion to dismiss made under Rule 12(b), a responsive pleading, or "an amendment thereof permitted by Rule 15(a) to be made as a matter of course." This latter language makes clear that, for the specific defenses listed in Rule 12(h)(1), they are waived if not asserted in the specific methods set out in that rule, *i.e.*, they may not be raised via a Rule 15(a) motion to amend made after the time for amendment as of right has passed, nor may they be added pursuant to Rule 15(b). *See* 5C C. Wright & A. Miller, *Federal Practice and Procedure*, § 1391, at 514-15 (3d ed. 2004).

Some applicants may mention the possibility that, although Thad's Kindercare has forfeited its ability to seek dismissal based on improper venue, it may nonetheless seek to move to transfer venue. There is potential merit to such a suggestion. Civil Rule 3(f) provides that "Failure to make timely objection to improper venue waives the venue requirements of this rule." This provision derives from former AS 22.10.030(f), since repealed. There does not appear to be any published case law construing these provisions, but by their terms they appear to apply only to the very specific venue requirements set out in Civil Rule 3(b)-(c). In other words, a defendant who fails to timely object that the venue requirements of Civil Rule 3(b)-(c) have not been met has waived such an objection, and may not later file a motion to change venue based on those grounds. But Civil Rule 3(d) recognizes that a party may nonetheless seek venue change under AS 22.10.040, for reasons such as convenience of the witnesses or court, and thus Thad's Kindercare could probably seek to move to change venue if it could establish that the criteria for change of venue set out in AS 22.10.040 were met. Also, AS 22.10.040 gives the court power to take such action of its own initiative.

3. Discuss whether (a) venue is proper and (b) venue affects the court's ability to hear the case. (25 points)

Venue is improper. Civil Rule 3(c) provides that in a civil action not involving real property, venue is proper "either in: (1) the judicial district in which the claim arose; or (2) a judicial district where the defendant may be personally served; or (3) a venue district where the claim arose if the superior court in the district accepts such cases for filing." There are no facts indicating that Thad's Kindercare may be personally served in Anchorage (it in fact was served in Fairbanks), and the claim arose in Fairbanks, hence Nina's complaint should have been filed in the Fourth Judicial District, in Fairbanks. But venue is not jurisdictional and given Thad's Kindercare's failure to timely object to venue the Anchorage court may proceed to hear the case.

As noted in the discussion of the preceding question, some applicants may raise the possibility of a motion to change venue.