ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

One evening, having finished a long day of work, Danielle began her commute home from downtown Anytown, Alaska. As was typical, traffic that evening was heavy with commuters. Danielle followed closely behind the car ahead of her, urging traffic to move faster so that she could get home and rest. Fatigued from her day at work, Danielle failed to notice traffic slowing ahead of her, and she accidentally collided with the car in front of her, driven by Paul. Anytown, Alaska has a traffic regulation directing that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent."

Danielle and Paul both pulled over into a nearby parking lot and assessed the damage to their vehicles. There was minor damage to the rear portion of Paul's car. The two exchanged contact and insurance information, and returned to their cars to continue their respective commutes home.

As Danielle started to pull out of the parking lot, Paul decided that Danielle had not been nearly apologetic enough for the damage she had caused to his car. Paul got out of his vehicle, approached Danielle's car, picked up a nearby rock, and waved it menacingly in Danielle's direction. He hurled the rock at Danielle, and after missing, picked up several more rocks and threw them one by one in Danielle's direction. Afraid that she would be hit, Danielle pulled out onto the road and started to drive away. One of the rocks thrown by Paul hit and broke the right rear tail light of Danielle's car.

Danielle suffered no physical injuries as a result of Paul's behavior; however, she was extremely upset and afraid during and following her encounter with him. Danielle continued to suffer nightmares about the encounter, as well as extreme anxiousness while driving, for several months afterward.

1. Discuss the elements of negligence per se, and explain whether Paul can establish a claim against Danielle pursuant to that theory.

2. Discuss each cause of action that Danielle may establish against Paul. Do not discuss damages.

GRADER'S GUIDE

*****QUESTION NO. 3*****

SUBJECT: TORTS

1. Discuss the elements of negligence per se, and explain whether Paul can establish a claim against Danielle pursuant to that theory. (40 points)

Given the broad standard of care imposed by the quoted traffic regulation, Paul likely cannot establish a claim against Danielle under the theory of negligence per se.

The elements for establishing a claim of negligence consist of duty, breach of duty, causation, and harm. *Wickwire v. Arctic Circle Air Servs.*, 722 P.2d 930, 932 (Alaska 1986). The doctrine of negligence per se allows a plaintiff to establish the negligence elements of duty and breach by proving that the defendant violated a specific statute or regulation. *Ferrell v. Baxter*, 484 P.2d 250, 256-57 (Alaska 1971). A court may adopt a statute or regulation as the standard of care if the purpose of that statute or regulation is meant to: (1) protect the class of people that includes the plaintiff; (2) protect the particular interest which was invaded; (3) protect that interest against the kind of harm asserted; and (4) protect that interest from the particular hazard which caused the asserted harm. *Ferrell*, 484 P.2d at 263. The unexcused violation of a regulation adopted as the standard of care is negligence in itself. *Id.* at 264. The Alaska Supreme Court generally views traffic laws as prescribing the standard of care owed by a reasonable driver. *Getchell v. Lodge*, 65 P.3d 50, 53 n.9 (Alaska 2003).

Here, Danielle certainly appears to have violated the Anytown's regulation that she, as a driver of a motor vehicle, "not follow another vehicle more closely than is reasonable and prudent," as she actually collided with the vehicle in front of her. Moreover, it can be inferred that the traffic regulation in question is meant to protect drivers like Paul from exactly the sort of accident and harm caused by Danielle in this case.

Paul's difficulty in establishing a claim under the negligence per se theory lies in the broad, non-specific standard imposed by the regulation in question. The Alaska Supreme Court has held that the substitution of a statute or regulation for the general negligence standard of care is only appropriate when the statute or regulation prescribes or forbids specific conduct. *Bailey v. Lenord*, 625 P.2d 849, 856 (Alaska 1981) (holding that Alaska statutes defining reckless and negligent driving could not support a negligence per se theory because those statutes "[did] not prescribe specific conduct, but rather state that a person shall not drive a motor vehicle in a manner which creates an unjustifiable risk"). In *Breitkreutz v. Baker*, 514 P.2d 17, 20-21 (Alaska 1973), the Court held that an almost identical traffic regulation to that of Anytown in this case – prohibiting a driver from following more closely than was reasonable and

prudent – merely incorporated the general "reasonable person's" standard of care into a regulation and thus could not support a claim of negligence per se. Similarly, here, Anytown's quoted traffic regulation simply incorporates the general negligence standard of care into a regulation, and that regulation cannot support a theory of negligence per se. While there may exist other statutes or regulations that Danielle violated in rear-ending Paul and that do support a negligence per se theory, the regulation provided under the facts does not. This, of course, does not prevent Paul from establishing a standard negligence claim.

Examinees may raise the issue of whether Danielle's violation of Anytown's traffic regulation was excused. Those who raise the issue should conclude that Danielle's violation of the regulation was not excused. Generally, a violation of a regulation is only excused where: (1) the violation was reasonable because of the actor's incapacity; (2) the actor neither knew nor should have known of the occasion for compliance with the regulation; (3) the actor is unable after reasonable diligence or care to comply with the regulation; (4) the actor is confronted by an emergency not of his own making; or (5) compliance with the regulation would involve a greater risk of harm to the actor or others than non-compliance. *Id.* Given the facts provided, Danielle cannot establish any of the above excuses for her violation of Anytown's traffic regulation. While she was fatigued and distracted after a long day of work when she collided with Paul's vehicle, the facts do not suggest that she was fatigued to such a degree that she was rendered incapacitated or unable to comply with Anytown's regulation. Indeed, if Danielle was so fatigued that she was driving in an incapacitated state, such behavior would likely give rise to an additional claim of negligence against her. Given the lack of support for any legal excuse here, examinees that do not raise the issue should not lose points. Rather, this grader's guide discussion of legal excuse is provided for completeness, in order to assess those answers that do discuss the issue.

2. Discuss each cause of action that Danielle may establish against Paul. Do not discuss damages. (60 points)

a. Assault (30 points)

Danielle can establish a claim for assault. Assault occurs when a person intends to cause a harmful or offensive contact with another person or intends to create in another person the immediate apprehension of such a contact, and the other person is put in immediate apprehension of the harmful or offensive contact. *Williams v. Alyeska Pipeline Service Co.*, 650 P.2d 343, 348 (Alaska 1982); *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); *see also* Restatement (Second) of Torts § 21 (1965). The intent that the contact be harmful or offensive is material only where the assault is committed in performance of an act not otherwise unlawful. If the intended contact is

unlawful or inherently wrongful, the actor need not mean for the contact to be harmful or offensive; the only intent required is to cause the unlawful or inherently wrongful contact, or the apprehension of such contact, to occur. *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967).

Here, the facts arguably demonstrate that Paul intended either to cause an offensive contact with Danielle or to create an immediate impression in Danielle that such offensive contact was about to occur. First, Paul intentionally threw rocks at Danielle and/or her car. Danielle can argue that even if Paul did not intend for the rocks he threw to hit her, he intended for her to fear that she was about to be struck by one of the rocks or at least believed that his throwing of the rocks would create that impression in her. Under the law, a person acts intentionally if he desires the results of his actions or if he believes the results are substantially certain to follow from his actions. *See* Alaska Pattern Civil Jury Instruction 12.03C (citing Restatment (Second) of Torts § 8A (1965) and *Merrill v. Faltin*, 430 P.2d 913, 917 (Alaska 1967)). Danielle is thus likely to establish that Paul acted with the requisite intent to at least cause her to fear she was about to be hit by a rock. Further, in throwing rocks at Danielle's car, Paul successfully caused Danielle to believe that she was about to be hit by a rock, meeting the elements of an assault.

Note that Danielle probably cannot establish a claim against Paul for battery under the facts of this question. Battery is the completed intentional unlawful touching of another person. A person is liable for battery if the person acts with intent to cause harmful or offensive contact, or the imminent apprehension of such a contact, and the contact occurs. *Lowdermilk v. Lowdermilk*, 825 P.2d 874 (Alaska 1992); *see also* Restatement (Second) of Torts § 13 (1965).

Here, while Danielle can establish that Paul either intended to commit a harmful or offensive contact or intended to create in her the immediate apprehension of such harmful or offensive contact (in the form of a rock hitting her), it does not appear that the intended offensive contact actually occurred. Under the facts provided, none of the rocks thrown by Paul hit or arguably "touched" Danielle. In Alaska, a "touching" for purposes of battery is "contact with any part of the plaintiff's body, contact with anything physically attached to the plaintiff's body, or contact with anything held by the plaintiff." *See* Alaska Pattern Civil Jury Instruction 12.03A (citing Prosser & Keeton, The Law of Torts § 10 (5th ed. 1984)). While one might argue that Danielle was physically attached to her car, and that an offensive touching was completed when one of the rocks thrown by Paul hit and damaged Danielle's car tail light, contact with that part of Danielle car – which was not in physical contact with Danielle's person – was probably too attenuated to form the basis for a battery claim. Given the lack of clarity as to the definition of "touching," though, examinees should not be penalized for identifying battery if they set forth the

above correct definition of touching. *See id.* (noting the lack of Alaska cases defining "touching" for purposes of battery).

b. Intentional Infliction of Emotional Distress (20 points)

Danielle arguably has a claim against Paul for intentional infliction of emotional distress. In order to establish a claim for intentional infliction of emotional distress, a plaintiff must prove: 1) that the defendant's conduct at issue was extreme and outrageous; 2) that the conduct was intentional or reckless; 3) that the conduct caused emotional distress; and 4) that the distress was severe. *McGrew v. State, Dept. of Health & Social Servs.*, 106 P.3d 319, 324 (Alaska 2005). Behavior is extreme and outrageous if it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *State v. Carpenter*, 171 P.3d 41, 58 (Alaska 2007) (quoting *Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1289 (Alaska 2001)). "Mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" do not support an IIED claim. *Id.* Here, Paul's conduct at issue – hurling several rocks at Danielle and/or her car – would likely be found extreme and outrageous. Moreover, Danielle should not have difficulty establishing that Paul's conduct was intentional – or at the very least reckless – and that the conduct at issue caused her emotional distress.

The question in addressing Danielle's claim is whether the emotional distress she suffered as a result of Paul's conduct was "severe." In order to establish an IIED claim, a plaintiff must establish that she suffered "distress of such substantial quality or enduring quantity that no reasonable person in a civilized society should be expected to endure it." *Id.* at 59 (quoting *Fyffe v. Wright*, 93 P.3d 444, 456 (Alaska 2004)). Where Danielle suffered anxiety and nightmares for several months following Paul's conduct, the merits of this element of her IIED claim may be argued either way.

Note that Danielle cannot establish a claim for negligent infliction of emotional distress, because she was not physically injured by Paul's conduct. In order to establish such a claim in Alaska, one must generally prove some sort of physical injury occurred as a result of the conduct at issue. *See e.g.*, *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002). There are two established exceptions to that rule: the "bystander" exception and the pre-existing duty exception. *Id.* at 165-66. The bystander exception applies to accident bystanders who: 1) are located near the scene of the accident; 2) experience shock resulting from a direct emotional impact from the sensory and contemporaneous observance of the accident, and 3) have a close relationship with the victim of the accident. *Id.* at 165. The pre-existing duty exception arises where the defendant owed the plaintiff a pre-existing duty. *Id.* at 166. A defendant "must stand in either a fiduciary or contractual relationship with the plaintiff in order to create such a preexisting duty." *Id.* Here, neither of the above exceptions to the physical injury element of an NIED claim applies.

Because neither exception applies, and because Danielle suffered no physical injury as a result of Paul's conduct, Danielle cannot establish an NIED claim against Paul.

c. Conversion and Trespass to Chattels (10 points)

Danielle will also be able to establish the tort of trespass to chattels. The tort of trespass to chattels has three elements: 1) the plaintiff must have a possessory interest in the property at issue; 2) the defendant intentionally damaged the property at issue or interfered with the plaintiff's possession of it; and 3) the defendant's actions were the legal cause of the plaintiff's loss. *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003); *McKibben v. Mohawk Oil*, 667 P.2d 1223, 1228 (Alaska 1983) (quoting Restatement (Second) of Torts § 222A comment c); *see also Mitchell v. Heinrichs*, 27 P.3d 309, 311 n.1 (Alaska 2001).

Danielle clearly had a possessory interest in her vehicle. Further, Paul intentionally interfered with that interest when he threw rocks at Danielle's car and broke the right rear tail light of the vehicle. As discussed above, where Paul threw several rocks at or toward Danielle's car, she will likely be able to establish an intent to impact and/or damage the car. Finally, there is no question that Paul's actions caused Danielle's broken taillight. The facts do not indicate that Paul damaged Danielle's car sufficiently to cause its destruction (or full conversion), but a jury should conclude that Paul committed a trespress to chattels in damaging Danielle's car.