## ESSAY QUESTION NO. 2

### Answer this question in booklet No. 2

One winter afternoon, Danielle leaves her home just outside Snowy Town, Alaska, and drives her car into the city to meet her friends at the movie theater. Because it is a winter weekend, and because the area has recently received a great deal of snow, many people are out skiing and snowmachining through the countryside surrounding Snowy Town. Danielle sees that people are out recreating; however, she is concerned about being late for the movie, and drives slightly faster than the 45-mile-per-hour speed limit as she makes her way along the single rural road toward the town.

Meanwhile, Penny is out enjoying the day on her snowmachine. In order to get to the prime snowmachine trails from her home, she has to cross the single road that runs into Snowy Town. A local ordinance that applies to Snowy Town, as well as to surrounding roadways, provides that: "Individuals are not permitted to operate, ride, or drive their snowmachines on the roads in and surrounding Snowy Town except to cross those roads. In the event a snowmachiner wishes to cross a road, he or she must stop before entering the road, look for vehicle traffic, and yield to any vehicle traffic." Another local ordinance provides that whenever a snowmachiner is within 50 feet of a roadway, he or she must proceed with caution and ride "at a speed that is safe in light of his or her surroundings." Penny rides away from her home and toward the road, so that she can cross into the best snowmachine trails. As she gets closer to the road, she becomes preoccupied with thoughts of the ride ahead, and she speeds faster and faster, enjoying the feeling of the fresh air rushing past.

Danielle, still slightly rushed, continues to drive toward town, when suddenly she sees Penny's snowmachine enter the road just ahead of her. Penny does not stop, and does not notice Danielle's car, as she starts to speed across the road. Danielle brakes and swerves, trying her best to miss Penny, but she is unable to keep from hitting Penny and her snowmachine. Penny suffers a broken leg in the collision, and her snowmachine is badly damaged. Danielle, meanwhile, suffers contusions to her head and shoulder, and her car is scratched and dented.

1. Within the relevant statute of limitations, Penny files suit against Danielle for negligence. Discuss whether Penny is able to meet the elements necessary to establish negligence, including whether Penny can establish a claim for negligence per se.

2. Consistent with applicable procedural rules, Danielle files a counterclaim against Penny, alleging that Penny's negligence caused the accident. Discuss whether Danielle is able to meet the elements necessary to establish her counterclaim for negligence,

including whether Danielle can establish a claim for negligence per se.

3. Discuss whether Danielle's and/or Penny's conduct meets Alaska's standards for imposition of punitive damages.

**GRADERS' GUIDE**

*****QUESTION NO. 2*****

**SUBJECT: TORTS**

**1. Within the relevant statute of limitations, Penny files suit against Danielle for negligence. Discuss whether Penny is able to meet the elements necessary to establish negligence, including whether Penny can establish a claim of negligence per se. (40 points)**

Depending largely on the fact-finder's determination as to causation, Penny may or may not be able to establish her negligence claim against Danielle. In order to prove negligence, a plaintiff must establish: 1) that the defendant owed her a duty; 2) that the defendant breached that duty; 3) that she, the plaintiff, suffered some harm; and 4) that the defendant's breach of duty legally caused her harm. *See Wickwire v. Arctic Circle Air Servs.*, 722 P.2d 930, 932 (Alaska 1986). Here, there is no question that Penny suffered harm as a result of her accident with Danielle. She suffered a broken leg, as well as property damage to her snowmachine, as a result of the accident. The questions underlying Penny's claim are really what duty Danielle owed to her; whether she breached that duty; and whether any such breach caused Penny's harm.

**A. Duty and Breach Elements Under Negligence and Negligence Per Se Theories**

In Alaska, a person's duties and behavior are generally defined according to a "reasonable person" standard. *Lyons v. Midnight Sun Transp. Servs., Inc.*, 928 P.2d 1202, 1203-04 (Alaska 1996). Negligence is "the failure to use reasonable care to prevent harm to oneself or others." *See* Alaska Civil Pattern Jury Instruction 3.03A (citing *Lyons*, 928 P.2d at 1203; *State v. Guinn*, 555 P.2d 530, 536 (Alaska 1976)). A person "is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation." *Id.* Under the facts of this question, Danielle owed a duty to exercise reasonable care while driving so as to avoid harm to others, including Penny. *Id.*

Moreover, under a theory of negligence per se, Danielle's general duty to drive with reasonable care is more specifically defined by a relevant traffic regulation. Under Alaska law, the theory 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. *See Ferrell v. Baxter*, 484 P.2d 250, 256-58 (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. Here, Penny can assert that the applicable regulation – the 45-mile-per-hour speed limit for drivers on the road into Snowy Town – was meant to protect others on the road, such as herself, from the hazards, such as the collision at issue, created by people who drive at excessive speeds. Penny's assertion is further supported by the fact that 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). Examinees may point out that Penny's driving of her snowmachine contributed to the collision at issue; however, this factor really addresses the questions of causation and comparative negligence, rather than defining Danielle's duty. A court is likely to find that Danielle owed a duty to Penny to abide by the 45-mile-per-hour speed limit.

A fact-finder is likely to find that Danielle breached her duty to drive with reasonable care, including following the applicable speed limit. With respect to the general "reasonable person" standard of care, some facts suggest that Danielle should reasonably have been driving with greater caution. For instance, the question tells us that the conditions in and around Snowy town were very snowy, likely making the road conditions less than ideal. Additionally, Danielle knew that people were out enjoying the snow on their skis and snowmachines that day. In light of those facts, Danielle should arguably have been driving with greater care.

In regard to Penny's claim of negligence per se, while the facts do not suggest that Danielle's violation of the speed limit was egregious, she was indeed driving faster than deemed safe according to the town's regulation. Additionally, Danielle cannot prove that any valid exception excuses her violation of the speed limit. Generally, a violation of 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 or her own making; or (5) compliance with the regulation would involve a greater risk of harm to the actor or others than non-compliance. *See Ferrell* and *Getchell*, *supra*. Although examinees might argue that the accident itself was caused by an emergency not of Danielle's own making, there is actually no emergency that caused Danielle to breach her duty of abiding by the speed limit. That breach is not excused by any of the legally recognized exceptions above. Penny is therefore likely able to establish duty and breach under theories of negligence and negligence per se.

### B. Causation Element

Penny's difficulty will lie in establishing that her harm – the personal injury and property damage arising from the accident – was legally caused by Danielle's breach of duty. In order to establish legal causation, a party must

show that the negligent act at issue "was more likely than not a substantial factor in bringing about [the alleged] injury." *Gonzales v. Krueger*, 799 P.2d 1318, 1320 (Alaska 1990) (internal citations omitted). Normally, in order to satisfy the substantial factor test, "it must be shown both that the accident would not have happened 'but for' the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it." *Id.* Where two forces operate to cause an asserted harm, one because of the defendant and the other not, and each force by itself was sufficient to cause the harm, the defendant's act or failure to act is a cause of the harm if it was so important in bringing about the harm that a reasonable person would regard it as a cause and attach responsibility to it. *See Vincent by Staton v. Fairbanks Memorial Hosp.*, 862 P.2d 847, 852-53 (Alaska 1993); *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1972).

The facts provided in the question suggest that although Danielle was speeding while driving the road into Snowy Town, her speed may not have legally caused the collision with Penny. Danielle was, after all, driving only "slightly over" the speed limit. Given Penny's behavior of driving her snowmachine suddenly out onto the street, without stopping or looking, when Danielle actually had the right of way, one could find that the accident would have occurred regardless of Danielle's only slightly excessive speed. One could also find that in light of Penny's conduct, Danielle's breach of duty was not so important in bringing about the accident that it should be deemed a cause of that accident. While examinees can present arguments either way on this point, they should recognize the general problem of causation, and the above standards for determining causation, in doing so. Examinees may also note that a fact-finder could determine both Danielle's and Penny's conduct to be legal causes of Penny's harm, assigning a percentage of responsibility to each for their comparative negligence.

**2. Consistent with applicable procedural rules, Danielle files a counterclaim against Penny, alleging that Penny's negligence caused the accident. Discuss whether Danielle is able to meet the elements necessary to establish her counterclaim for negligence, including whether Danielle can establish a claim for negligence per se. (40 points)**

**A. Danielle's Counterclaim for Negligence**

Danielle will likely be able to establish her counterclaim against Penny. As discussed above, the elements necessary to prove a claim of negligence include proof of duty, breach, causation, and harm. *See e.g.*, *Wickwire*, 722 P.2d at 932. Here, as above, it is clear that Danielle suffered harm as a result of the accident at issue, in that she suffered physical contusions, as well as some property damage to her car. The fact that Danielle's physical injury and property damage may have been less severe than that suffered by Penny does

not eliminate Danielle's own established harm. With harm established, a fact-finder must turn to the questions of duty, breach, and causation.

While Danielle's duty to Penny was discussed in the context of the above question, Penny also owed a duty of reasonable care – *i.e.*, a duty to operate her snowmachine reasonably in order to avoid harm to other drivers on the road that she was crossing. *See e.g.*, *Lyons*, 928 P.2d at 1203-04; *Guinn*, 555 P.2d at 536. Even setting aside the Snowy Town regulations regarding snowmachining, and Penny's violation of one or both of those regulations, it is clear that Penny did not exercise reasonable care when she drove her snowmachine across the road in front of Danielle's approaching vehicle. First, the facts suggest that Penny herself was speeding, driving too fast to react to any traffic as she came upon the road into Snowy Town. Additionally, Penny did not stop to check for traffic, and appears not to have even looked for approaching traffic, in suddenly crossing the road. Penny's riding thus presented a great risk of harm, both to herself and to other drivers such as Danielle, and she clearly breached her duty of reasonable care.

A fact-finder is also likely to find that Penny's breach legally caused, at least in part, Danielle's harm. Whereas Danielle's own breach of duty was arguably minor, and may not have contributed significantly to the accident at issue, Penny's breaches – including her speeding, failure to look for traffic, and failure to stop and yield the right of way – were more extreme and arguably presented a danger that oncoming drivers such as Danielle would be unable to avoid. In light of the nature of Penny's breaches, a fact-finder would likely find those breaches to be a but-for cause of Danielle's harm, as well as a factor to which responsibility should attach. *See Gonzales*, 799 P.2d at 1320; *see also Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 841 (Alaska 2001). Again, while examinees may argue this element either way, and may also assign Danielle comparative negligence for her own asserted harm, they must recognize Alaska's standards for determining causation in arguing the point.

### B. Negligence Per Se

Snowy Town's ordinance mandating that snowmachiners stop, look for traffic, and yield to traffic prior to crossing any road does support a claim of negligence per se against Penny. Meanwhile, the ordinance requiring that snowmachiners proceed with caution and ride at a safe speed while within 50 feet of any roadway likely lacks a specific enough mandate or prohibition to support a claim of negligence per se.

As a preliminary matter, both of Snowy Town's snowmachining-related ordinances are comparable to traffic regulations. Both are also arguably meant to protect against exactly the type of accident and resulting harm that occurred in this case. Danielle can present a strong argument that she is among the group that these ordinances were meant to protect, and that her interests and

harm are among those that the ordinances were meant to address. *See Ferrell*, 484 P.2d at 263; *Getchell*, 65 P.3d at 53 n.9.

Additionally, it appears that Penny violated both of the ordinances, committing one or more breaches that would seem to support claims of negligence per se. With respect to the first ordinance, there can be no question under the applicable facts that Penny did not stop before entering the road, and did not yield to oncoming traffic, as she was commanded to do. Moreover, the evidence suggests that Penny also failed to look for oncoming traffic, violating another affirmative requirement of the ordinance. With respect to the second ordinance, as well, the evidence suggests that Penny was not riding her snowmachine with reasonable caution, or at a reasonably safe speed, as she approached the road in question, and certainly not as she "start[ed] to speed across the road" in front of Danielle.

Further, Penny can present no valid excuse for violation of either of the snowmachining ordinances. The facts of the question do not support any legally recognized incapacitation that would excuse her breaches. Nor do they suggest any reason that Penny should not reasonably have known of the ordinances' requirements. There is no evidence that Penny was unable to comply with the requirements, and compliance with the ordinances involved no greater risk than she inflicted by violating those ordinances. Finally, although a fact-finder might conclude that Danielle contributed to the occurrence of the accident, there was no emergency that confronted Penny and forced her to ride in the way that she did. *See e.g.*, *Ferrell* and *Getchell*, *supra*. Penny's violations of the ordinances were thus unexcused, also tending to support claims of negligence per se.

The distinguishing factor between the two ordinances, and the decisive factor for purposes of determining whether each can support claims of negligence per se, is the nature of the mandate or prohibition contained in each. The Alaska Supreme Court has held that the substitution of a statute or regulation for the general negligence standard of care, and thus the application of negligence per se, is only appropriate when the statute or regulation prescribes or forbids specific conduct. *See Bailey v. Lenord*, 625 P.2d 849, 856 (Alaska 1981) (holding that Alaska statutes prohibiting 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"); *Breitkreutz v. Baker*, 514 P.2d 17, 20-21 (Alaska 1973) (holding that traffic regulation prohibiting driver from following another vehicle more closely than was reasonable and prudent merely incorporated the general "reasonable person" standard of care and thus could not support a claim of negligence per se).

Snowy Town's ordinance mandating that snowmachiners stop, look for traffic, and yield to oncoming traffic before entering and crossing a road meets

the standard necessary to support a theory of negligence per se exactly because of the specific commands contained in the ordinance. This regulation goes beyond requiring that snowmachiners such as Penny act "reasonably" and more specifically defines the applicable standard of care as including stopping, looking for traffic, and yielding to traffic. Given the very specific requirements of Snowy Town's first snowmachining-related ordinance, Danielle will be able to use that ordinance in support of negligence per se claims against Penny.

She will not, however, be able to rely upon Snowy Town's other snowmachining ordinance in establishing negligence per se. Rather than requiring or prohibiting any specific conduct, that second ordinance generally prescribes that snowmachiners such as Penny should "proceed with caution" and ride "at a speed that is safe in light of his or her surroundings" when within 50 feet of any roadway. Although the reference to being within 50 feet of any roadway is specific, the behavior required or prohibited is not. In effect, the ordinance requires that snowmachiners ride their machines with reasonable caution and at a reasonable speed. The regulation does no more than to require snowmachiners to abide by the general "reasonable person" standard. Because the standard contained in the second Snowy Town ordinance essentially utilizes the normal negligence standard of care, that second ordinance cannot support a claim of negligence per se. This, of course, does not prevent Danielle from pursuing an ordinary negligence claim against Penny, or from relying upon the first ordinance in establishing a claim of negligence per se.

**3. Discuss whether Danielle's and/or Penny's conduct meets Alaska's standard for imposition of punitive damages. (20 points)**

In Alaska, an award of punitive damages must be based on clear and convincing evidence that the conduct: (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person. AS 09.17.020(b); *see also Robles v. Shoreside Petroleum, Inc.*, 29 P.3d 838, 846 (Alaska 2001). The Alaska Supreme Court has explained that reckless misconduct:

> differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man.

*Leavitt v. Gillaspie*, 443 P.2d 61, 65 (Alaska 1968) (quoting Restatement (Second) of Torts § 500, comment g, at 590 (1965)). Further, in order to be considered reckless, the actor "must recognize that his conduct involves a risk

substantially greater in amount than that which is necessary to make his conduct negligent." *Id.*

Here, a court or fact-finder is not likely to find Danielle's conduct sufficiently blameworthy to warrant punitive damages. In driving slightly over the speed limit, an activity fairly common to the driving population, Danielle arguably acted neither outrageously nor recklessly. The facts do not suggest that Danielle was aware, or should have been aware, that her driving engendered any substantial risk of harm to others. Rather, if anything, Danielle's speeding is a classic example of plain negligence. *Id.* While examinees may argue that Danielle's slight speeding was made more dangerous by road conditions and/or the presence of skiers and snowmachiners in the area, her behavior will not be deemed egregious enough to warrant punitive damages.

Penny's behavior, meanwhile, presents a closer question. The facts suggest that Penny was riding her snowmachine at an increasingly fast speed as she approached the only road into Snowy Town. Moreover, rather than stop, look for traffic, and yield to any traffic – as required by law – Penny maintained her speed and simply started to "speed across the road" in front of Danielle, apparently without even looking to see if any vehicles were approaching. Based on those facts, a court or fact-finder might determine that Penny should reasonably have been aware that her chosen course of conduct presented great danger to drivers such as Danielle. Although Penny's conduct likely would not be found malicious or even ill-intentioned under the facts presented, it could be deemed sufficiently reckless to warrant punitive damages. On the other hand, a fact-finder might decide that Penny was not sufficiently aware of her speed and of other factors contributing to the dangerousness of her conduct – such as Danielle's presence – to call for an award of punitive damages. Regardless of the ultimate determination, the examinee should recognize the requirement of outrageous behavior or reckless indifference in order to support any award of punitive damages.