ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Deena owns her own small accounting firm, with an office in AnyCity, Alaska. Always looking for opportunities to expand her business, Deena makes contact with a prospective client, Patrick, and invites him to her office to meet. At the appointed time, Patrick goes to Deena's office, where she escorts him into her conference room and invites him to have a seat while she retrieves some materials she wants to show him. In inviting Patrick to sit down, she points to the chair closest to him and says, "You may not want to sit in that one. We've been having some problems with it."

Patrick, who thinks the chair looks sturdy enough, disregards Deena's advice, and sits down in it. Just as he sits, he hears a resounding crack, upon which his chair tips suddenly backward. Patrick falls backward in the chair and hits his head on the floor. Pulling himself up and looking around him, Patrick sees that one of the legs of the chair he was sitting in has broken, causing the chair to fall.

When Deena comes back to the room, she is shocked to see what has happened. She had purchased her matching oak conference table and chairs when she opened her office ten years earlier. Although one of the chairs in the set had developed a large crack in its base a couple of years after purchase, Deena disposed of that chair. The remaining chairs appeared fine throughout the years, until recently, when clients and staff began complaining that one of the chairs – the one that would eventually break under Patrick – made creaking sounds when they sat in it. Believing the chair was still safe, albeit noisy, Deena left the chair in the room, but sometimes warned clients, as she did with Patrick, that they may not want to sit in it.

As a result of his fall, Patrick suffers a contusion and bruising to the back of his head, as well as a severe headache. Angry with what has happened, he leaves Deena's office immediately. Several months later, within the relevant statute of limitation, Patrick files suit against Deena, alleging negligence and products liability claims.

1. Please discuss whether or not Patrick will be able to establish the elements of his negligence claim against Deena.

2. In response to Patrick's negligence claim, Deena asserts an affirmative defense that Patrick's injuries were caused by his own comparative negligence. Please discuss whether or not Deena will be able to establish the elements of comparative negligence.

3. Please discuss whether or not Patrick can establish a products liability claim against Deena based upon the failure of her office chair.

GRADERS' GUIDE
*** * * QUESTION NO. 5 * * ***
TORTS

1. Please discuss whether or not Patrick will be able to establish the elements of his negligence claim against Deena. (55%)

Patrick may or may not be able to establish a claim for negligence against Deena. His ability to do so will depend upon whether he is able to establish facts demonstrating that Deena should reasonably have known of the danger presented by her office chair and should have done something more to remedy, protect against, or warn others of that danger.

A. Identification of Elements of Negligence (15%)

In order to prove negligence, a plaintiff must establish: 1) that the defendant owed him a duty; 2) that the defendant breached that duty; 3) that he, the plaintiff, suffered some harm; and 4) that the defendant's breach of duty legally caused his harm. *See Wickwire v. Arctic Circle Air Servs.*, 722 P.2d 930, 932 (Alaska 1986). Here, there is no question that Patrick suffered harm as a result of Deena's chair breaking beneath him. He suffered physical injury to his head as a result of his fall in the broken chair. The questions that Patrick will need to focus on in asserting any claim against Deena are what, if any, duty she owed to him, whether she breached that duty, and if so, whether that breach caused Patrick's harm.

B. Duty Owed by Deena to Patrick (15%)

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 (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.*

More specific to this situation, landowners – including owners of offices and other commercial spaces in Alaska – owe a duty of care to their clients and other guests. *See e.g.*, *Burnett v. Covell*, 191 P.3d 985, 989-90 (Alaska 2008). In Alaska, a landowner's – or in this case, office owner's – duty to act

reasonably includes "a duty to use due care to guard against unreasonable risks created by dangerous conditions existing on their property." *Id.* (quoting *Schumacher v. City & Borough of Yakutat*, 946 P.2d 1255, 1258 (Alaska 1997). Examinees should not attempt to distinguish Deena's duty as a landowner in terms of Patrick's status as an invitee, as Alaska law no longer recognizes distinctions between a landowner's duty to tresspassers, licensees, and/or invitees, but rather "impose[s] a general duty on landowners to exercise reasonable care in view of all the circumstances." *Widmyer v. Southeast Skyways, Inc.*, 584 P.2d 1, 5 (Alaska 1978) (citing *Webb v. City and Borough of Sitka*, 561 P.2d 731 (Alaska 1977), *abrogated in unrelated part by* AS 09.45.795).

Given that the duty of a landowner is specifically addressed by legal precedent, examinees also need not analyze the factors set out in *D.S.W. v. Fairbanks North Star Borough Sch. Dist.*, 628 P.2d 554 (Alaska 1981) in order to appropriately identify and describe that duty. Discussion of the *D.S.W.* factors is not so much incorrect as it is unnecessary where a landowner duty is already firmly established in the law. An examinee may reach the same conclusion regarding the duty owed by a landowner/office owner through analysis of those factors, which include (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) 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 (7) the availability, cost, and prevalence of insurance for the risk involved. *Id.* at 555. A superior answer will recognize that precedent establishes the duty of a landowner/office owner. Whether recognizing precedent or analyzing the *D.S.W.* factors, though, Deena, as a landowner, owed a general duty to others, including Patrick, to use reasonable care in guarding against dangerous conditions existing on her property.

B. Breach/Causation Element (25%)

With Deena's duty as a landowner in mind, the question then becomes whether Deena breached her duty, and whether such breach resulted in Patrick's asserted harm. Given that Deena's duty is one of using reasonable care, any showing of breach will depend upon evidence that Deena should reasonably have known about the danger posed by her chair and should have done something more or different than she did to remove the danger or warn others of it. *See e.g.*, *Burnett*, 191 P.2d at 990. If a reasonable person could

not have known or suspected of the danger, and thus could not have prevented or warned against the risk at issue, then there is no breach of landowner duty.

The breach inquiry is a fact-specific one. Examinees should focus here on the facts provided to determine whether, in light of those facts, Deena should reasonably have been aware of the "dangerous condition" of her chair and whether she should have done something more than telling Patrick that he may not want to sit in the chair.

On one hand, there are factors that arguably could – and perhaps should – have alerted Deena to the danger posed by her chair. For instance, she had had previous structural problems with one of the same set of chairs. Given that one of that same set of chairs had previously developed a large crack in it, examinees may contend that Deena was on notice of the potential development of similar problems in the other chairs in that set. One might also argue that the potential for development of such problems grew as Deena continued to use the remaining chairs over the ten year she was in her office. Finally, Deena had more recent notice of problems involving the specific chair that Patrick would eventually sit in. Other clients, as well as staff, who sat in the chair had recently begun complaining that the chair made creaking noises when they sat in it. Given the previous structural problems she had had with another of the same set of chairs, one could argue that Deena should have taken the recent complaints of "creaking" more seriously and either removed or disposed of the chair.

On the other hand, while acknowledging the above factors, an examinee could point out that after disposing of the first problematic, cracked chair, Deena went numerous years without experiencing any problems with her remaining chairs, including the one that Patrick sat in. Additionally, the recent issues surrounding the chair that Patrick sat in were arguably fairly minimal, limiting to "creaking" sounds. One could argue that given Deena's lack of any problems with her remaining chairs over the years, she could not reasonably be expected to foresee from the recent creaking of one chair that it was going to break. Indeed, the facts of the question indicate that Patrick thought the chair looked sturdy. Given the minimal sign of any recent issues with the chair, Deena's advisement to Patrick that he may want to avoid the creaky chair may have been more than sufficient. Examinees may decide the question either way, as long as they weigh and discuss the relevant facts.

Regarding causation, there is no question that Patrick's injury resulted from the chair breaking beneath him. If a jury found any breach of duty by

Deena in failing to ascertain or guard against the danger presented by her chair, that breach should also be deemed a legal cause of Patrick's harm. In order to establish legal causation, a party must show that the negligent act – or failure to 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.* If a jury found that Deena should reasonably have known about and further addressed the dangerous condition of her chair, her failure to sufficiently remedy or warn of the danger would be deemed a substantial factor, and thus a legal cause, of Patrick's harm.

2. In response to Patrick's negligence claim, Deena asserts an affirmative defense that Patrick's injuries were caused by his own comparative negligence. Please discuss whether or not Deena will be able to establish the elements of comparative negligence. (25%)

In order to establish a plaintiff's comparative negligence, a defendant must establish that: 1) the plaintiff was negligent; and 2) the plaintiff's negligence was a substantial factor in causing the plaintiff's harm. *See* Alaska Civil Pattern Jury Instruction 3.02 (citing *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217 (Alaska 1998); *Hiibschman v. City of Valdez*, 821 P.2d 1354, 1364 (Alaska 1991)). As stated in relation to Deena above, 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; *Guinn*, 555 P.2d at 536). Just as was true in the context of Patrick's negligence claim against Deena, the elements of "negligence" for purposes of establishing comparative negligence remain duty, breach, causation, and harm. *See id.*; *see also Wickwire*, 722 P.2d at 932. Comparative negligence, however, essentially examines those elements from a different angle.

Here, for example, Patrick's relevant duty was the duty to act reasonably to prevent harm to himself. *See supra.* The harm assessed is the harm that occurred to Patrick – the physical injury to his head. Given the rather straightforward mechanism causing Patrick's fall – the broken chair – the only

real question in terms of causation is whether any "breach," or unreasonable action on Patrick's part, played a role in his sitting in the chair.

The question at the heart of Deena's affirmative defense, then, is whether Patrick "breached" his duty to act reasonably and to prevent harm to himself. As with the assessment of breach with respect to Deena, examinees can argue this question either way, but should focus on the relevant facts in doing so. Weighing in Deena's favor is her warning to Patrick that she had been having problems with the chair in question and that he may not want to sit in it. In light of Deena's warning, and the availability of other chairs in the conference room, one could argue that it was unreasonable for Patrick to make the choice to sit in the problematic chair at issue. On the other hand, Patrick would point out that Deena nevertheless left the chair in the conference room, available for people – including himself – to sit in, and that Deena's advisement regarding the chair was not that he "shouldn't" use the chair, but that he "may" want to avoid it. Patrick may be able to establish that the vague nature of Deena's warning – conveying little information – was not enough to put him on notice of the nature and degree of the harm he could suffer as a result of sitting in the chair.

3. Please discuss whether or not Patrick can establish a products liability claim against Deena based upon the failure of her office chair. (20%)

Patrick will not be able to establish any products liability claim against Deena for the failure of her office chair. Recovery under this type of theory may be appealing to Patrick in that the theory imposes strict liability; however, Patrick is not able to meet the elements of such a claim. Strict liability recovery for a defective product requires not only that the product have a defect, and that the defect causes injury to a person, *see Butaud v. Suburban Marine & Sporting Goods, Inc.*, 543 P.2d 209, 214 (Alaska 1975), but also a showing that the defendant is a member of one of the groups subject to products liability. *See Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 787 (Alaska 1993) (citing *Restatement (Second) of Torts* § 402A cmt. F (1965)). Those subject to strict liability for injury caused by a defective product include product "seller[s], manufacturer[s], dealer[s], or distributor[s]." *See e.g.*, *Burnett*, 191 P.3d at 988.

In order to hold Deena strictly liable based upon the failure of her office chair, then, Patrick will have to prove not only that the chair was defective and that such defect resulted in his injury, but also that Deena functioned as a

seller, manufacturer, dealer, or distributor of the defective chair. While the facts of the question do tend to support allegations that the chair was defective and that Patrick was injured as a result, they lend no support to holding Deena responsible as a seller, manufacturer, dealer, or distributor of the chair in question. Indeed, the facts establish that Deena purchased the chair as part of a set, and that she has used the chair for the past ten years. There is no suggestion that she operates as one of the groups that may be subject to strict liability for defective products. Patrick's products liability claim will thus fail.