ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

In November of 2002, Paul read a classified ad describing a remote Alaska riverfront parcel of land for sale. He contacted the owner, Chester, who showed him multiple pictures of the property. Paul explained to Chester that he was looking for a property on which to build a remote fly-in fishing lodge. Chester assured him that the property was perfect and that there were plenty of salmon in the river fronting the property. In December of 2002, Paul purchased the property.

In June of 2006, when Paul flew in to the property for the first time, he learned two disturbing pieces of information. First, he discovered that the river was contaminated. Second, he observed that there were virtually no salmon in the river.

Investigation quickly revealed that the source of the contamination was the adjacent property to the north. This property was owned by Mike who, when he bought this parcel in 2005, immediately discovered several mineral deposits and began to mine them. As a result of the mining operation, Mike contaminated the river which flowed across both his and Paul's properties, thereby leaching toxic substances onto both properties. (Mike shut down his mining operation in early 2006 after which no additional contamination occurred.)

Paul returned to Anchorage in early July of 2006. Paul immediately contacted the Department of Fish and Game and was told that there had always been very few salmon in this fork of the river because the spawning grounds are located up an alternate fork.

1. In May of 2009, Paul sued Mike. Paul alleged that Mike had a duty to operate his mine in a manner so as not to damage Paul's property and that Mike breached this duty. Paul alleged the facts set forth above in his complaint. Mike filed a timely Rule 12(b)(6) motion to dismiss on the grounds that Paul exceeded the statute of limitations for filing a tort action. Paul opposed the motion, arguing that the statute of limitations for trespass applied. Neither party filed any materials outside of the pleadings.

A. Discuss the merits of Mike's motion, Paul's opposition, and which party will prevail.

2. In May of 2009, Paul also sued Chester alleging various claims for breach of contract arising from Chester's representations to Paul, before or at the time of the sale, regarding the plenitude of salmon. Chester filed a timely Rule 12(b)(6) motion on grounds that Paul's action, although framed as a

contract claim, was actually a tort claim, and that Paul exceeded the statute of limitations for filing a tort action. Paul filed an opposition to the motion arguing that the statute of limitations for contract actions applied. Neither party filed any materials outside of the pleadings.

A. Discuss the merits of Chester's motion, Paul's opposition, and which party will prevail.

3. Now assume instead that Paul sued Chester for fraudulent misrepresentation, alleging that Chester had falsely assured Paul that there were plenty of salmon in the river fronting the property, and that the property was "perfect" for his plan to build a lodge. Chester moved to dismiss Paul's fraudulent misrepresentation claim on its merits. On this theory, he attached to his motion an Affidavit written and sworn by Prof. Salar, an Alaska wildlife biologist, attesting that there was actually a very strong salmon run in the river right up through the 2002 season, and that the very low numbers seen in 2006 were probably the result of some unknown cause, or perhaps Mike's mining.

A. How will the Court analyze Chester's motion?

B. What arguments can Paul raise to defeat the motion?

GRADERS' GUIDE
*** * * QUESTION NO. 3 * * ***
CIVIL PROCEDURE

1. Mike's Motion to Dismiss (30 points.)

A. General Principles Applicable to Rule 12(b)(6) Motions to Dismiss

When reviewing a Rule 12(b)(6) motion, the trial court's focus is on

> "whether the complaint sets forth 'allegations of fact consistent with and appropriate to some enforceable cause of action.' Linck v. Barokas & Martin, 667 P.2d 171, 173 (Alaska 1983). The Court 'must presume all factual allegations of the complaint to be true' and should deny the motion to dismiss if 'within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff.'"

Roach v. Caudle, 954 P.2d 1039, 1041 (Alaska 1998), quoting Kollodge v. State, 757 P.2d 1024, 1026 (Alaska 1988); and citing Linck, 667 P.2d at 173. Because complaints must be liberally construed, "[m]otions to dismiss are viewed with disfavor and should rarely be granted." Odom v. Fairbanks Memorial Hosp., 999 P.2d 123, 128 (Alaska 2000) (quoting Kollodge, 757 P.2d at 1026). To survive, the "complaint need only allege a set of facts 'consistent with and appropriate to some enforceable cause of action.'" Odom, 999 P.2d at 128 (quoting Linck, 667 P.2d at 173); see also Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250, 253-54 (Alaska 2000). As a result, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 6 P.3d at 254 (emphasis in original.)

Although Rule 12 does not mention the statute of limitations, a Rule 12(b)(6) motion for failure to state a claim on which relief may be granted is the ordinary and appropriate vehicle for litigating a statute of limitations defense. See, e.g., Hutton v. Realty Executives, Inc., 14 P.3d 977, 979 (Alaska 2000).

B. Applying Statutes of Limitations for Trespass and Tort.

Mike has moved to dismiss on grounds that Paul's complaint sounds in tort and that Paul has exceeded the statute of limitations for filing a tort action. Paul argues that the statute of limitations for trespass applies and that the motion should be denied. Paul's argument should prevail.

A two-year statute of limitations applies to torts.[1] A six-year statute of limitations applies to actions for "trespass upon real property."[2]

If the two-year tort statute of limitation were held to apply, Paul's claim would be time-barred. Under the "discovery rule," a cause of action accrues "when a person discovers, or reasonably should have discovered, the existence of all the elements essential to the cause of action." Roach v. Caudle, 954 P.2d at 1041, quoting Cameron v. State, 822 P.2d 1362, 1366 (Alaska 1991). In the instant case, presuming the assertions in Paul's complaint to be true, the cause of action accrued and the statute of limitations began to run when Paul discovered the contamination of his property in June of 2006. Since Paul did not file his complaint until May of 2009, he filed outside of the two-year tort statute of limitations. Paul's action would be timely, however, under the six-year trespass statute of limitations, which did not run until June of 2012.

In determining which statute of limitations applies, the court is required to look at the "nature of the injury alleged, rather than to the technical cause of action." McDowell v. State, 957 P.2d 965, 968 (Alaska 1998) (footnote omitted). Several policy considerations also guide the court in resolving statute of limitation questions. "First, the defense of the statute of limitations is a legitimate, but disfavored, defense." Id. at 971. The Alaska Supreme Court therefore has expressed a policy in favor of "applying the longer of two limitations periods if two limitations statutes apply to a claim." Id. Second, the court has expressed a policy preference for selecting a longer statute of limitations for actions alleging negligent damage to real property for the reason that such injuries are likely to involve documentary evidence which "remains reliable after the passage of time." Id. (Footnote omitted).

Applying this reasoning, the Alaska Supreme Court in McDowell concluded that a claim for "negligent contamination of property is an injury to land in the nature of trespass" and, therefore, subject to AS 09.10.050, the

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[1] The pertinent part of AS 09.10.070 states:

> (A) Except as otherwise provided by law, a person may not bring an action (1) for libel, slander, assault, battery, seduction, or false imprisonment[;] (2) for personal injury or death, or injury to the rights of another not arising on contract and not specifically provided otherwise; (3) for taking, detaining, or injuring personal property, including an action for its specific recovery. . . *unless the action is commenced within two years of the accrual of the cause of action.*

(Emphasis added).

[2] AS 09.10.050 reads in its entirety, "*Unless the action is commenced within six years*, a person may not bring an action for waste or *trespass upon real property.*" AS 09.10.050 (emphasis added).

statute of limitations for actions for trespass to real property. Here, the suit for Mike's contamination of Paul's property by his mining operation would likely produce the same result. The facts do not indicate Mike intentionally contaminated the river.

2. Chester's Motion to Dismiss: Tort vs. Contract (40 points)

Chester has moved to dismiss on grounds that Paul's complaint sounds in tort and that Paul has exceeded the statute of limitations for filing a tort action, two years. Paul argues that the statute of limitations for contracts applies and that his claim, filed just under the three-year deadline, is not time-barred. Paul's argument for the three-year contract statute should prevail; however, it is a closer question whether he gets the benefit of the "discovery rule," or whether his action filed nearly six years after the purchase will be barred.

A. Tort Statute of Limitations.

As discussed in the preceding section, the statute of limitations for a tort action is two years. It is important to note here the distinction between tort claims for fraud or misrepresentation, and claims arising on the contract. Fraud or misrepresentation claims are covered by the two-year tort statute of limitations. See, e.g., Lee Houston and Assoc. v. Racine, 806 P.2d 848 (Alaska 1991) and Alaska Tae Woong Venture, Inc. v. Westward Seafoods, Inc., 963 P.2d 1055 (Alaska 1998).

If the tort statute of limitations were held to apply, Paul's claim would be time-barred. Paul discovered the absence of salmon during the summer of 2006. Yet he did not file his complaint until May of 2009, one year after the tort statute of limitations expired.

B. Contract Statute of Limitations.

In determining when the cause of action accrued, examinees should discuss whether it accrued when the contract was entered into, or whether the discovery rule applies.

Generally, the statute of limitations for an action in contract starts to run at the time of the breach. Howarth v. First Nat'l Bank, 540 P.2d 486, 490-91 (Alaska 1975), aff'd on reh'g, 551 P.2d 934 (Alaska 1976). If the general rule applied here, the statute of limitations would have begun to run when Paul purchased the property in 2002. The three-year statute of limitations would bar Paul's claims which were not filed until 2009.

If the discovery rule applied instead, the three-year limitations period would have begun in the summer of 2006 when Paul acquired information about the absence of salmon, and his suit would be timely.

In Bauman v. Day, 892 P.2d 817 (Alaska 1995), the Alaska Supreme Court extended the discovery rule to a common-law contract case where it would have been difficult for the plaintiff to discover the defect or injury except through the passage of time. The contract in Bauman involved the sale of a piece of property that the seller had represented to the buyers to be free of permafrost. In fact, the land was not free of permafrost and the buyers did not discover this fact until they built on the property and began to experience shifting problems with the ground underlying the house. The court reasoned that the plaintiffs could not have known of the permafrost merely by observing the property. In finding the "policy reasons supporting application of the discovery rule to common law contract cases persuasive," the court reasoned that a

> defendant should not be allowed to profit from a plaintiff's ignorance merely because the plaintiff's cause of action is based on a common law contract theory rather than a tort theory. Therefore, we hold that in the absence of a statute directing a contrary rule, the discovery rule is applicable to common law contract causes of action.

Id. at 828. Accordingly, the court held that the cause of action accrued when the buyer discovered the permafrost – not when the buyer actually purchased the property.

An examinee may argue that the holding in Bauman should not be applied to this question because in reaching its decision the court placed an emphasis on construction cases:

> Many other states have extended a limited but broader discovery rule to contract claims, and especially to suits for breach of a construction contract, where the plaintiff neither knew nor reasonably should have known about the breach. 827 P.2d at 827.

Moreover, based on the facts, there seems to have been no reason for Paul not to have visited and discovered the absence of salmon sooner after the purchase; this case differs from Bauman, where the breach could not be seen merely by observing the property. Examinees can argue that Paul knew or should have known of the absence of salmon in plenty of time to file his action within the statute of limitations. They may point out that Paul's failure to travel to and inspect his property until four years after its purchase is inconsistent with the actions of a reasonable property owner.

In McCutcheon v. State, 746 P.2d 461 (Alaska 1987), a defamation action, the Supreme Court ruled the statute began to run on the date of original publication of the allegedly defamatory material. Because McCutcheon waited to file until two years after various re-publications, or the material's appearance in a newspaper, rather than after the original publication, his action was untimely. While this decision involved particular aspects of defamation law, the Court also pointed out that "no particular obstacles prevented McCutcheon from discovering" the publication, and the alleged libel was not "inherently undiscoverable," id. at 467. This is true in Paul's action against Chester as well.

After all, as the Supreme Court has said,

> a statute of limitation begins to run when the plaintiff's cause of action accrues or is discovered. It operates to prevent a plaintiff from sleeping on his or her rights. Turner Const. Co., Inc. v. Scales, 752 P.2d 467, 470, note 2 (Alaska 1988) (emphasis added). Roach, supra, was also a statute of limitations case. In it, the Court reiterated the "discovered or reasonably should have discovered" rule. Roach at 1041 (emphasis added.)

More recently, the Court has noted:

> We adopted the discovery rule to protect plaintiffs from losing their cause of action when they have an injury that remained undiscovered or reasonably undiscoverable for longer than the limitations period.

Sopko v. Dowell Schlumberger, Inc., 21 P.3d 1265, 1272 (Alaska 2001) (emphasis added) (citing Pedersen v. Zielski, 822 P.2d 903, 906 (Alaska 1991).

Chester has a good argument that Paul "slept on his rights;" that he "reasonably should have discovered" the shortage of salmon, and that the shortage was not "reasonably undiscoverable." On this basis, Chester can argue, Paul is not entitled to have the court apply the discovery rule to save his action from dismissal under Rule 12(b)(6).

Applying the rationale of Bauman and the policy preference articulated by the Alaska Supreme Court in McDowell regarding selection of the longer of two possible statutes of limitations, a court likely would find that the contract statute of limitations applies here instead of the two-year tort statute of limitations.

As for the matter of the discovery rule, examinees should get credit for capably arguing either that it does, or does not, apply.

3. Chester's Motion to Dismiss: Fraudulent Misrepresentation and Merits of Claim. (30 points)

This question requires examinees to address the effect of Chester including matters outside the pleading in his Rule 12 motion.

A. Conversion to Summary Judgment.

To support his motion to dismiss, Chester has presented matters outside the pleading, i.e., Prof. Salar's affidavit. The Rule requires therefore that the motion

> be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(b). The Court will therefore treat Chester's motion as a summary judgment motion.

Examinees should state that the Rule 12 motion will be converted to a Rule 56 motion. They should state the standards that the Court will apply to its grant or denial under Rule 56. Beyond that, they may address the procedures involved under Rule 56(c), (e) and (f).

Prof. Salar's affidavit may help Chester establish a prima facie case for summary judgment on Paul's fraudulent misrepresentation claim. If the affidavit is not contradicted by "such facts as would be admissible in evidence," it tends to show Chester told the truth about the prevalence of salmon before selling the property. Now that the Motion has been converted, the Court should let Chester supplement the affidavit with "a memorandum showing that there is no genuine issue as to any material fact and that [Chester] is entitled to judgment as a matter of law," Rule 56(c). Chester, as the movant, is obligated to point to undisputed facts or admissible evidence establishing a prima facie case entitling him to summary judgment. If Chester's showing is insufficient, he is not entitled to summary judgment, even if Paul files nothing. Capolicchio v. Levy, 194 P.3d 373, 380 (Alaska 2008.)

B. "Genuine Issues of Material Fact" Can Defeat the Motion.

To avoid summary judgment Paul must show there are genuine issues of fact, which are material to the issue of representation, and which remain to be decided by the jury at trial. His opposition brief should supply such affidavits, deposition testimony, answers to interrogatories, etc., as will make this showing. Paul may also decide to file a "statement of genuine issues," Rule 56(c).

If Paul can quickly come up with affidavits setting forth "such facts as would be admissible in evidence," Rule 56(e), and believes he can thus overcome Prof. Salar's affidavit by presenting genuine issues of material fact for trial, then he may prepare a simple opposition showing there is a "genuine issue." For example, Paul may obtain an affidavit of the Alaska Department of Fish and Game official with whom he spoke in July 2006, or a department biologist, confirming there were never many salmon in the river. This would tend to support Paul's contention that Chester misrepresented important facts when selling the property to Paul and his partner. With such support, Paul may be confident he can defeat summary judgment.

On the other hand, if Paul cannot quickly come up with admissible evidence to defeat summary judgment, he may move for extra time under Rule 56(f), "When Affidavits Are Unavailable," to conduct discovery or obtain affidavits before he files his opposition to summary judgment. The Court will likely grant the motion for extra time and for any needed discovery.

The Court may grant Chester's motion if Paul fails to "present a genuine issue of material fact as to the existence of" his misrepresentation claim. See, e.g., Capolicchio, 194 P.3d at 380. The burden is on Chester to show the absence of a genuine issue of material fact. Ransom v. Haner, 362 P.2d 282, 289-90 (Alaska 1961).

The Court may deny Chester's motion (regardless of whether or how Paul opposes it) if it finds there are genuine issues of material fact not suitable for summary disposition, issues which must be decided by the jury at trial.