ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Late one evening in Snowy Town, Alaska, Patrick Patron left Snowy Town Mall just before the mall's closing. As Patrick walked across the mall's parking lot toward his car, he was suddenly confronted by Roger Robber. Roger raised his fist at Patrick and told him, "Give me all your money, or I'll teach you a lesson!" When Patrick refused, Roger punched Patrick, took the cash from Patrick's pockets, and ran away. Patrick suffered a black eye, and was extremely upset about what had happened, suffering regular nightmares and hand tremors for several months after the incident. Roger was subsequently apprehended, but only after spending Patrick's cash.

During the year prior to the incident, there had been a series of similar robberies outside Snowy Town Mall and in its parking lot. In response to the rash of robberies, Snowy Town Mall had installed additional lighting outside the mall and in the mall parking lot, and further hired an employee to act as a security guard and to monitor the parking lot during evening hours prior to the mall's closing. The measures initially appeared to help, as the complaints of incidents outside the mall became less and less frequent.

Two weeks prior to the incident involving Patrick Patron and Roger Robber, the mall's security guard – tired due to his late hours – began leaving his post in the parking lot half an hour early. The owners of Snowy Town Mall were aware of the guard's practice, as his employee time cards reflected the early departure, but they had not yet talked with the guard to remedy the problem when Roger's robbery of Patrick occurred. On that particular evening, the mall's security guard again left his post half an hour early, about twenty minutes before the robbery.

Within the relevant statute of limitations, Patrick Patron files a lawsuit against Roger Robber, the mall security guard, and Snowy Town Mall.

1) Identify and discuss the intentional tort claims that Patrick may establish against Roger.

2) Patrick brings a claim of negligence against the mall security guard. Discuss whether Patrick will succeed in establishing this negligence claim, and explain why or why not.

3) Patrick sues Snowy Town Mall under theories of negligence and respondeat superior. Discuss whether Patrick will succeed in pursuing each of those theories, and explain why or why not.

GRADERS' GUIDE
*** * * QUESTION NO. 2 * * ***
TORTS

1. Identify and discuss the intentional tort claims that Patrick Patron may establish against Roger Robber. (40%)

Patrick Patron may successfully pursue several intentional tort claims against Roger Robber.

A. <u>Assault and Battery</u> (15%)

First, Patrick can establish the intentional torts of both assault and battery. The tort of 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 the harmful or offensive contact, and the other person is put in immediate apprehension of the harmful or offensive contact. *Williams v. Alyeska Pipeline Serv. Co.*, 650 P.2d 343, 348 (Alaska 1982); *see also* Restatement (Second) Torts § 21 (1965).

A battery is the intentional unlawful touching of another person. A person is liable for battery if the person acts with intent to cause a 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) Torts § 13 (1965).

Here, there is no question that Roger intended to unlawfully punch Patrick. Additionally, particularly in light of Roger's verbal threat and gestures toward Patrick, there can be no question that Patrick apprehended the imminent conduct harm that was threatened and inflicted. With those elements met, Patrick can establish an assault claim against Roger. Further, there is no question that Roger's intended unlawful contact – punching Patrick – occurred. Given Roger's completion of the intended wrongful contact, Patrick can also establish the elements of battery. The amount of harm inflicted by Roger's punch is a factor for consideration in determination of damages. *See supra*; *see also* Alaska Pattern Civil Jury Instruction 12.09.

B. <u>Conversion</u> (15%)

In intentionally taking Patrick's money, Roger committed the tort of conversion. In order to establish conversion, a plaintiff must show that: 1) the plaintiff had a right to possess the item at issue at the time of the conversion; 2) the defendant deprived the plaintiff of his right of possession; 3) the

defendant's act was intentional; and 4) the defendant's act was a legal cause of the plaintiff's loss. *See McKibben v. Mohawk Oil*, 667 P.2d 1223, 1228 (Alaska 1983); *see also* Alaska Pattern Civil Jury Instruction 18.02. Conversion is "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *McKibben*, 667 P.2d at 1228 (quoting Restatement (Second) of Torts § 222A comment c (1965)). Money, as well as personal property, can be the subject of conversion. *See e.g., Dressel v. Weeks*, 779 P.2d 324, 327 (Alaska 1989); *In re Estate of Gregory*, 487 P.2d 59, 63 (Alaska 1971).

Patrick can fairly easily establish the elements of conversion. First, nothing in the facts of the question suggests that Patrick did not have the right to possess the money stolen by Roger Robber. Indeed, the facts indicate that the money came from Patrick's pockets. There is also no question that Roger intentionally took Patrick's money, depriving Patrick of his possessory interest in the money. Finally, Patrick's loss of the money was caused solely by Roger's act of taking it. With right of possession, deprivation of that right, intentional mental state, and legal causation established, Patrick is able to prove his conversion claim.

C. Intentional Infliction of Emotional Distress (10%)

Patrick can also likely establish a claim for intentional infliction of emotional distress. In order to prove a claim of intentional infliction of emotional distress ("IIED"), a plaintiff must show that: 1) the complained of conduct was extreme and outrageous; 2) the conduct was intentional or reckless; 3) the conduct caused emotional distress; and 4) the distress was severe. *Chizmar v. Mackie*, 896 P.2d 196, 208 (Alaska 1995); *Teamsters Local 959 v. Wells*, 749 P.2d 349, 357 (Alaska 1988). In particular, in order to establish a claim of IIED, "the conduct [complained of] [must have] been 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." *Chizmar*, 896 P.2d at 208 (quoting *Oaksmith v. Brusich*, 774 P.2d 191, 200 (Alaska 1989)). Additionally, as noted above, the emotional harm claimed as a result of the conduct at issue must be "severe" or "serious." *Chizmar*, 896 P.2d at 204-09; *Nome Commercial Co. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453-54 (Alaska 1997). Temporary anger, fright, disappointment, or regret do not constitute emotional distress supporting a claim for intentional infliction of emotional distress. *Id.* Rather, "[s]erious mental distress may be found where a reasonable man, normally constituted, would be unable to

adequately cope with the mental stress engendered by the circumstances of the case." *Chizmar*, 896 P.2d at 204.

Here, it is clear that Roger's conduct toward Patrick was intentional. It is also clear under the facts stated in the question that Roger's conduct caused Patrick emotional distress. Additionally, Patrick will at the very least be able to set forth a triable issue as to whether Roger Robber's conduct was "extreme and outrageous" and whether Patrick's resulting emotional distress was "severe." Although the "extreme and outrageous" standard is a very high one, a jury would likely find that Roger's intentional and violent criminal acts met that standard. Similarly, while it can be difficult to establish "severe" emotional distress, Patrick will likely be able to do so here, where the facts indicate that Patrick's upset was extreme, where such upset resulted from a violent robbery, and where Patrick continued to suffer nightmares and hand tremors for several months afterward. If Patrick is able to prove "extreme and outrageous" conduct and "severe" emotional distress, he will have established an IIED claim.

2. Patrick brings a claim of negligence against the mall security guard. Discuss whether Patrick will succeed in establishing this negligence claim, and explain why or why not. (30%)

Patrick's ability to claim negligence against the mall security guard will depend largely on whether he can show that the security guard owed him a relevant duty, and whether a breach of any such duty by the security guard can be deemed the legal cause of Patrick's harm. 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).

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 Pattern Civil 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.*

Given the nature of the security guard's job, meant to benefit patrons like Patrick, Patrick can most likely establish that the guard owed a duty to Patrick and to other patrons to perform his job reasonably. While the mall security guard may argue that he did not owe a duty to protect Patrick from unforeseeable actions of third parties, *see P.G. v. State*, 4 P.3d 326, 332-33 (Alaska 2000); *R.E. v. State*, 878 P.2d 1341, 1348 (Alaska 1994), the security guard here was hired and stationed in the mall parking lot during the evening hours prior to closing specifically to deter conduct like Roger Robber's. Patrick thus has a strong argument that the assault and robbery were a foreseeable result of the guard's decision to leave early, that the guard's work for the mall was essentially an undertaking of a duty to mall patrons to reasonably monitor the parking lot during assigned hours, and that the guard unreasonably breached his duty by leaving his post early. Patrick will at least be able to submit triable issues to a fact-finder on the point of duty and breach.

Where Patrick can clearly establish that he was harmed, the next major question is whether any action or inaction of the security guard can be deemed the legal cause of Patrick's harm. In order to demonstrate 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). In order to satisfy the substantial factor test, "it must be shown both that the [harm] 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.*

Whether Patrick will be able to establish causation is an arguable point. The mall security guard will argue that his leaving his post early cannot be deemed the legal cause of Patrick's harm, and that Roger's criminal acts constitute a superseding cause of that harm. *See e.g.*, *Sharp v. Fairbanks North Star Borough*, 569 P.2d 178 (Alaska 1977). The Alaska Supreme Court has explained that "the doctrine of superseding cause will relieve a negligent actor of liability only in exceptional cases." *Griffith v. Taylor*, 12 P.3d 1163, 1168 (Alaska 2000) (citing *Williford v. L.J. Carr Invs., Inc.*, 783 P.2d 235, 237 (Alaska 1989)). An "action of a third person which intervenes to injure the plaintiff will shield a negligent defendant only where after the event and looking back from the harm to the actor's negligent conduct, it appears . . . *highly extraordinary* that it should have brought about the harm." *Id.* The Court has further held that "a [third party's] criminal act will ordinarily break the chain of causation," *id.*; however, "this general rule does not excuse the factfinder from

examining the foreseeability of the intervening act." *Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 798 (Alaska 1999).

In order to establish causation, Patrick will argue that the very purpose for the security guard's job, and his undertaking of that job, support a finding of legal causation. The mall parking lot at issue had a recent known history of assaults and robberies like that committed by Roger Robber in this matter. Snowy Town Mall hired the mall security guard specifically for the purpose of deterring such incidents. Given the history of the mall parking lot, and the fact that the security guard performed his job specifically to deter incidents such as that involving Patrick and Roger, Patrick will argue that it cannot be "highly extraordinary" that such an incident would arise from the security guard's choice to leave his post early, prior to the mall's closing. The question of superseding cause can be argued either way by examinees, acknowledging the above factors, and would likely pose an issue for trial by a factfinder.

3. Patrick Patron sues Snowy Town Mall under theories of negligence and respondeat superior. Discuss whether Patrick will succeed in pursuing each of those theories, and explain why or why not. (30%)

A. <u>Negligence Theory</u> (15%)

Patrick's claim of negligence against Snowy Town Mall will rely on much of the same reasoning as his negligence claims against the mall security guard. The elements of the negligence claim remain the same: duty, breach, causation, and harm. *See supra.* There being no doubt that Patrick suffered a harm, the larger questions for determination will be whether Snowy Town Mall owed and breached a duty to protect Patrick from third-party criminal acts, and whether any action or inaction by the mall can be deemed the legal cause of Patrick's harm.

As owner of the land in question, Snowy Town Mall owes a duty "to use due care to guard against unreasonable risks created by dangerous conditions existing on the property." *Burnett v. Covell*, 191 P.3d 985, 989-90 (Alaska 2008). This landowner duty would not likely, in itself, create a duty in Snowy Town Mall to protect Patrick and/or other patrons from third-party criminal activity, as the Alaska Supreme Court has held that "the definition of 'conditions' that landowners may be required to protect against does not include the conduct of third parties." *Schumacher v. City and Borough of Yakutat*, 946 P.2d 1255, 1258 (Alaska 1997).

In this case, in light of the history of similar criminal incidents in the mall parking lot, as well as the mall's undertaking to provide security for patrons during evening hours prior to closing, Patrick has a strong argument that Snowy Town Mall assumed a duty to act reasonably in providing security to deter third-party criminal activity such as Roger Robber's in this case. *See e.g.*, *Gordon v. Alaska Pacific Bancorporation*, 753 P.2d 721, 722-25 (Alaska 1988). Patrick might also argue that by beginning and continuing a practice of providing a security guard in its parking lot, Snowy Town Mall created a situation in which its patrons came to rely upon the existence of that security measure, perhaps foregoing other measures that they might otherwise take in leaving the mall at night. *See id.* As an employer, Snowy Town Mall also owed a duty to reasonably supervise its employees, including the employee acting as security guard. *See e.g.*, *Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183 (Alaska 2009).

In arguing the question of breach of any duty, the mall would highlight the measures that it took to act reasonably in protecting its patrons, such as taking on the significant tasks of improving the lighting in the parking lot and hiring an additional employee to serve as a security guard in the parking lot. While it appears that these measures were working well for a time, though, the Mall's knowledge – two weeks prior to the incident at issue – that its security guard had begun to abandon his post early, and its failure to do anything to remedy that problem, may be its undoing with regard to the breach element.

Patrick's argument with regard to causation will be much like that described against the mall security guard. If the guard's actions in leaving his post early are deemed a legal cause of Patrick's harm, any breach found pursuant to the above arguments may also be deemed a legal cause of that harm. *See Vincent by Staton v. Fairbanks Memorial Hosp.*, 862 P.2d 847, 852 (Alaska 1993) (Where two forces operate to cause an asserted harm, and each force by itself was sufficient to cause the harm, each may be deemed a legal 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."). Snowy Town Mall, on the other hand, will contend that the connection between its action or inaction (the failure to remedy the guard's practice of leaving early) and Roger's assault on Patrick is too attenuated to establish legal causation. As with the claim made against the security guard, this question of causation presents triable issues for determination by a fact-finder.

B. Respondeat Superior (15%)

Snowy Town Mall's liability under a theory of respondeat superior will depend both on determination of the above questions about whether an actionable negligence claim lies against the employee security guard, and on whether the security guard's practice of leaving early is found to be within the scope of his employment with Snowy Town Mall. Under Alaska law, the acts of an employee are attributable to the employer if the employee's acts fall within his or her scope of employment. *Doe v. Samaritan Counseling Ctr.*, 791 P.2d 344, 346 (Alaska 1990); *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986). This is known as the doctrine of respondeat superior. *Id.*

Whether an employee like the security guard was acting within the scope of his employment "is a fact-specific issue requiring case-by-case determination." *Taranto v. North Slope Borough*, 909 P.2d 354, 359 (Alaska 1996). The Alaska Supreme Court has held that several factors can be applied in determining the question, including those factors provided in sections 228 and 229 of the Restatement (Second) of Agency. *See Ondrusek v. Murphy*, 120 P.3d 1053 (Alaska 2005). Section 228 provides:

> 1. Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
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> 2. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Further, section 229 of the Restatement (Second) of Agency provides in pertinent part:

> In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: (a) whether or not the act is one commonly done by such servants; (b) the time, place, and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the

> master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has been entrusted to another servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal.

If the security guard is found to have negligently breached a duty owed to Patrick, and if that breach is deemed a legal cause of Patrick's harm, the question of whether the guard – in repeatedly leaving his shift early – acted within the scope of his employment may once again be argued either way, with issues of fact to be determined through trial before a fact-finder. Snowy Town Mall would argue that the security guard's practice of leaving his shift early could not have been within the scope of his employment, in large part because that act of leaving his shift is exactly the opposite of what he was hired to do. The mall would further point out that the guard's practice of leaving early did not serve the interests of the mall, was not expressly authorized, was not similar in quality to any authorized act, and constituted a significant departure from any normal method for accomplishing the goal of the security guard's job, that of monitoring the parking lot.

Patrick, on the other hand, would argue that the act of leaving early is common to employees, and not such a major departure from the security guard's duties that the guard was acting outside the scope of his employment. Indeed, nothing about the act of leaving early was seriously criminal. Moreover, Patrick would point out that Snowy Town Mall not only had reason to expect that the security guard would leave early on the evening in question, but also that the guard's early departure was tacitly approved or authorized by the mall in that the employer was aware of the issue and did nothing to correct or remedy it. The "scope of employment" issue may be argued either way, but discussion should include analysis of the above criteria adopted through Alaska precedent.