ESSAY QUESTION NO. 2

Answer this question in booklet No. 2

Paula lives and works in Snow Town, Alaska. At the end of one work day in December, Paula left her office building and began her drive home. The roads were extremely snowy and slick, due to a heavy winter storm that had set in just a couple of hours earlier. Snow Town features hilly terrain, and Paula saw numerous drivers lose control of their vehicles as she proceeded up and down the roads toward home. As she approached an intersection at the top of one of the town's steepest hills, she saw a police officer responding to a car accident that had occurred at that location. The officer waved her around the accident, and Paula proceeded through the intersection, and started downhill toward her home.

As she drove down the steep grade, Paula lost control of her vehicle and got stuck on the right shoulder of the road. She got out of her car, uninjured, and walked out into the road to assess the situation. As Paula stepped out into the road, another car, driven by Denny, was proceeding down the hill. Denny was driving cautiously in light of the snowy conditions, but was unable to maintain control down this hill. When he saw Paula and her car ahead, he tried to stop and to maneuver around Paula, but he was unable to avoid hitting Paula.

Paula suffered a broken leg and arm, and several cuts and bruises, as a result of the accident, and was hospitalized for treatment of those injuries. At Paula's request, hospital staff notified her mother, Molly, that Paula had been injured in a serious accident. In a panic, Molly took the soonest possible flight from her home in Colorado to Snow Town, and was able to see Paula in the hospital the next morning. Paula was shortly thereafter discharged from the hospital; however, Molly continued to be extremely shaken by the sight of her daughter's injuries, and she suffered nightmares related to her daughter's accident for several months.

1. Within the applicable statute of limitations, Paula filed a lawsuit against Denny for negligence. Discuss whether Paula will be able to establish the elements of her negligence claim against Denny.

2. Paula also timely filed suit against the Snow Town police officer she had seen working near the site of her accident for negligently allowing her to drive down the hill in question and failing to close that road. Without discussing comparative negligence, please describe any defenses the town police officer has to Paula's negligence claim.

3. Molly also timely filed a lawsuit against Denny, alleging negligent infliction of emotional distress. Discuss whether Molly will be able to establish the elements of her claim against Denny.

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

1. Within the applicable statute of limitations, Paula filed a lawsuit against Denny for negligence. Discuss whether Paula will be able to establish the elements of her negligence claim against Denny. (35%)

Depending upon a fact-finder's assessment of Denny's conduct while driving, Paula may be able to establish her claim of negligence against Denny.

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). There is no question in this case that Paula suffered a harm. According to the facts provided, she broke an arm and a leg, and suffered cuts and bruising as well. The larger question is whether Paula's harm resulted from Denny's breach of any legal duty.

Here, Denny owed Paula, as well as others potentially impacted, a general duty to operate his vehicle in a reasonable manner. In Alaska, a person's duties and behavior are normally 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.* In particular, a driver of a motor vehicle is expected to "use reasonable care 1) to keep a lookout for other travelers or obstacles within or approaching the vehicle's line of travel and 2) to control the speed and movement of the vehicle." Alaska Civil Pattern Jury Instruction 5.01 (citing *Patterson v. Cushman*, 394 P.2d 657, 662-63 (Alaska 1964)). Under the facts of this question, Denny owed a duty to exercise reasonable care while driving so as to avoid harm to others, including Penny. *Id.*

Whether Denny breached his general legal duty to operate his vehicle reasonably may be debated by fact-finders. A fact-finder might emphasize that reasonable operation of one's vehicle includes driving at a speed and in a manner such that one always maintains control over the vehicle. Although Denny was driving cautiously, he nonetheless lost control of his vehicle. A fact-finder might suggest that Denny should have taken greater precautions in

light of the extreme conditions, and that those greater precautions would have kept him from losing control and prevented the accident.

On the other hand, a fact-finder might determine that Denny acted as any reasonable person would have under the circumstances, and despite the accident, fulfilled his duty to drive in a reasonable manner. An accident in itself, after all, does not establish negligence. Rather, negligence is established by the failure to exercise reasonable care. *See supra.* Alaska courts have made it clear that "[t]he law does not require exceptional caution or skill [on a person's part], only reasonable care." Alaska Civil Pattern Jury Instruction 3.03A (citing *Lyons*, 928 P.2d at 1203). Here, the facts indicate that Denny was driving cautiously given the weather conditions. Moreover, there are no facts suggesting that Denny was not paying attention to the road ahead of him. Rather, he attempted to stop and to maneuver around Paula when he saw her. Given those facts, a reasonable fact-finder might determine that Denny did not breach his duty of care to Paula.

Under the circumstances described in the question, the question of breach of duty is closely linked to the question of causation. This is because the scope of a duty, in itself, is defined at least in part by the foreseeability of harm as a result of one's action or inaction. *See e.g.*, *Dinsmore-Poff v. Alvord*, 972 P.2d 978 (Alaska 1999); *Nicholson v. MGM Corp.*, 555 P.2d 39 (Alaska 1976) (upholding summary judgment where accident at issue was not foreseeable result of defendant's actions). In examining the scope of Denny's duty, and whether he breached that duty, an examinee necessarily considers the link – or lack thereof – between Denny's actions and potential resulting harm. *Id.*

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.* Similar to the determination of scope of duty, then, analysis of causation asks whether an action is sufficiently linked to a result to be deemed the cause of that result. *Id.*; *see also Vincent v. Fairbanks Memorial Hosp.*, 862 P.2d 847, 851 (Alaska 1993).

Here, an examinee may argue the question of causation either way. One could assert that the accident would have occurred regardless of Denny's driving behavior, and/or that Denny's driving behavior was not an important, blameworthy factor in bringing about Paula's harm, especially given the conditions of the roadway in question and Paula's action of stepping out into

the roadway. Alternatively, particularly where an examinee has determined that Denny breached his duty as a driver and was driving unreasonably under the circumstances, that examinee could argue that the unreasonable driving was both a but-for, and a proximate, cause of Paula's harm. Again, the examinee's analysis of the duty, breach, and causation elements are closely linked in their focus on what is reasonable and foreseeable under the circumstances. (Note that examinees are not asked to, and need not, discuss comparative negligence on Paula's part, *see e.g.*, Alaska Civil Pattern Jury Instruction 5.03 (duty of care as a pedestrian); however, should examinees discuss negligence on Paula's part, they should not assume that such comparative negligence in itself bars a finding that Denny was negligent.)

2. Paula also timely filed suit against the Snow Town police officer she had seen working near the site of her accident for negligently allowing her to drive down the hill in question and failing to close that road. Without discussing comparative negligence, please describe any defenses the town police officer has to Paula's negligence claim. (35%)

The town police officer's primary defense against Paula's negligence claim lies in the qualified immunity afforded to a municipality's and its officials' decisions regarding discretionary functions. Given this defense, Paula will not prevail in her claim against the Snow Town police officer.

As a preliminary matter, examinees may identify as a defense to Paula's negligence claim an arguable inability on her part to establish the elements of that claim. While that does not constitute an affirmative defense on the police officer's part, it is a potentially viable argument by the police office in defense against Paula's claim. As with her claim against Denny, in order to establish a claim of negligence against the town police officer at issue, Paula would need to establish the elements of duty, breach, causation, and harm. Again, there is no question here that Paula suffered a harm – she was clearly physically injured upon getting stuck and being hit by Denny's car. Examinees may point out, however, that Paula's ability establish the elements of duty, breach, and causation is questionable.

Based upon the claim stated in the question against the Snow Town police officer, Paula must argue that the officer owed her a duty to close, or keep herself and others from driving on, what she would allege to be an unreasonably dangerous road. The police officer could argue in defense against Paula's claim that he did not know the road in question posed an unreasonable danger to cautious drivers, if it did, and that he therefore could owe no duty to close the road or to prevent Paula from driving down the road. According to the facts stated in the question, the police officer was responding to an accident at the top of the hill at issue. Prior to Paula getting stuck while going down the hill, there is no mention of additional accidents or other problems on the hill. Those facts, in themselves, hardly demonstrate that the

road down the hill posed an unreasonable danger. The officer may also argue that given the quick onset of the storm, and the passing of just two hours between the start of the storm and Paula's accident, he could not have been expected to know that the road in question posed an unreasonable danger, if it did, and thus could not have been expected to close the road or warn Paula about the road. One of the police officer's arguments in defense against Paula's negligence claim, then, may be that he breached no duty owed to Paula – i.e., there was no breach of duty by the officer causing and/or contributing to Paula's harm.

The police officer's primary defense to Paula's negligence claim, however, lies in his discretionary function immunity. A municipality's (and municipal officers') immunity for discretionary acts or functions is provided for in Alaska Statute and further interpreted and reinforced in case law. Alaska Statute 09.65.070 provides: "An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused." AS 09.65.070(d)(2); *compare* AS 09.50.250(1) (similar provision for state government holding that "an action may not be brought if the claim . . . is an action for tort, and is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.").

The Alaska Supreme Court has further defined what a "discretionary function" is. In *Kiokun v. State, Dep't of Pub. Safety*, 74 P.3d 209 (Alaska 2003), where the Court held that a State Trooper's decision to delay the launch of a search and rescue effort was protected by discretionary function immunity, the Court explained that discretionary acts or functions are identified by "examining whether the act or function can be described as 'planning' or 'operational.'" *Id.* at 215 (citing *Dep't of Transp. & Pub. Facilities v. Sanders*, 944 P.2d 453, 456 (Alaska 1997)). Governmental planning decisions involve the formation of basic policy, whereas operational decisions are "ministerial," involving only the implementation or execution of a given policy. *Id.*; *see also Estate of Arrowwood v. State*, 894 P.2d 642, 644-45 (Alaska 1995). The Alaska Supreme Court has echoed the United States Supreme Court in holding that "if the policies and programs formulated by [a governmental agency] allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion." *Kiokun*, 74 P.3d at 215 (quoting *Berkowitz v. United States*, 486 U.S. 531, 546 (1988)). Discretionary function immunity thus "ensures that courts avoid the re-examination of decisions which lie outside the realm of their institutional competence" and "gives members of the

executive and legislative branches latitude to perform their policy-making functions without the fear of incurring liability." *Arrowwood*, 894 P.2d at 645.

Here, the town police officer's response and assessment of the conditions in the area, and allowance for the road to remain open, are likely to be deemed discretionary functions. Deciding how to respond to road conditions and/or deciding to close a road would, after all, involve the officer's evaluation of the severity of the road conditions in the area; determination whether those road conditions warranted and/or were susceptible to some type of warning; analysis of the potential impact of closing the road at issue, particularly during the post-work commuting hour; evaluation of whether resources should be utilized to accomplish a road closure; and ultimate decision of whether the conditions at issue warranted the road closure. Such decisions require the officials and entities making them to go beyond the ministerial carrying out of orders and to exercise their discretion. The Alaska Supreme Court held similarly on the issue of road closures in *Arrowwood*, *supra*, where it determined that the State's failure to close a highway due to icy conditions was a planning level function entitled to discretionary immunity. 894 P.2d at 644-46; *see also Kiokun*, 74 P.3d at 216-17 (holding that the decision whether to launch a search and rescue effort is sufficiently based on resource allocation and public policy considerations that it is immune to suit); *Earth Movers of Fairbanks, Inc. v. State*, 691 P.2d 281, 284 (Alaska 1984) (holding that police officer's reduction of authorized speed limit and enforcement of that limit was a planning decision entitled to discretionary function immunity).

Given the discretion called for in making the decision implicated by Paula's claim, that claim is likely defeated by the qualified immunity protecting the Snow Town police officer.

3. Molly also timely filed a lawsuit against Denny, alleging negligent infliction of emotional distress. Discuss whether Molly will be able to establish the elements of her claim against Denny. (30%)

In light of the distance separating Paula and Molly when Molly learned of Paula's accident and injuries, and the amount of time Molly had to absorb the fact of the accident and her daughter's injuries before actually seeing her in the hospital, Molly will have a difficult time establishing a claim for negligent infliction of emotional distress ("NIED") against Denny.

As a general rule, "damages are not awarded for NIED claims in the absence of physical injury." *Kallstrom v. United States*, 43 P.3d 162, 165 (Alaska 2002). Here, Molly suffered no physical injuries. Under the general rule, then, she would be precluded from bringing an NIED claim. Alaska law, however, allows for two established exceptions to the requirement of physical injury. *Id.* One exception to the requirement of physical injury lies where the

defendant owed the plaintiff a preexisting duty. *Id.* at 166. In order to meet the elements of the preexisting duty exception, "a defendant must stand in either a fiduciary or contractual relationship with the plaintiff." *Id.* Because there are no facts here indicating that Denny stood in any such relationship with Molly at the time of the accident, the "preexisting duty" exception to the physical injury requirement does not apply.

Another exception to the requirement of physical injury arises in the case of "bystanders." *Id.* at 165; *Sowinski v. Walker*, 198 P.3d 1134, 1162 (Alaska 2008) According to Alaska law, "a negligent defendant breaches the standard of care owed to a plaintiff who suffers emotional harm after witnessing physical harm to [his or] her loved ones if three conditions are met: (1) the plaintiff was located near the scene of the accident; (2) the emotional harm resulted directly from observing the scene of the accident, rather than learning of it later; and (3) the plaintiff and victim were closely related." *Sowinski*, 198 P.3d at 1162 (citing *Beck v. State Dep't of Transp. & Pub. Facilities*, 837 P.2d 105, 109 (Alaska 1992); *Tommy's Elbow Room v. Kavorkian*, 727 P.2d1038, 1041 (Alaska 1986)).

Additionally, in order to recover damages on such an NIED claim, "the harm suffered by the plaintiff as a result of the shock must be severe, but it does not necessarily need to result in physical illness or injury." *Id.* (citing *Chizmar v. Mackie*, 896 P.2d 196, 201-04 (Alaska 1995)). While the requirement of "severe emotional distress" is somewhat subjective, and calls for fact-specific analysis, the Alaska Supreme Court has provided guidance regarding the minimum threshold that must be met to establish this element. Temporary anger, fright, disappointment, and/or regret do not constitute "severe emotional distress" for purposes of proving an NIED claim. *Chizmar*, 896 P.2d at 204-09; *Nome Commercial Co. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453-54 (Alaska 1997). 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, Molly can clearly establish that she and "the victim," Paula, are closely related, in that they are mother and daughter. *See e.g.*, *Sowinski*, 198 P.3d at 1162. Molly may also be able to prove that she suffered "severe emotional distress." Resolution of this point would likely call for further facts and/or testimony; however, where she suffered "extreme" stress and months of nightmares as a result of learning of her daughter's accident and later witnessing her injuries, she may be able to prove the requisite emotional distress for an NIED claim.

Molly's difficulty with her claim lies in the requirements that she be located near the scene of the accident at issue when it occurred, and that her

emotional harm must have resulted directly from observing the scene of the accident, rather than learning of it later. First, Molly was nowhere near the scene of the accident when it occurred. The accident occurred in Alaska, and Molly was at her home in Colorado. Molly therefore fails to meet that element of a bystander NIED claim. *See e.g.*, *Mattingly v. Sheldon Jackson Coll.*, 743 P.2d 356, 365-66 (Alaska 1987) (affirming the rejection of an NIED claim where plaintiff was 150 miles away when he learned of the accident injuring his son and had no "sudden sensory observation" of his injured son). Moreover, Molly did not suffer her emotional harm as a result of observing the scene of the accident, because she was never at the scene of this accident. Although Alaska courts have broadened the scope of bystander NIED claims, by allowing for claims brought by close relatives for emotional distress caused by observation of accident victims in the hospital shortly after the accident in question, *see e.g.*, *Beck*, 837 P.2d at 109-10 (Alaska 1992), Molly likely still cannot meet this element of her NIED claim, as she did not observe her daughter until the day following her accident. As stressful as the event was for Molly, she did not confront the immediate sensory shock and/or injury contemplated by Alaska's bystander NIED cause of action, and she will be unable to establish the elements necessary to prove that claim.