ESSAY QUESTION NO. 5

Answer this question in booklet No. 5

Daphne owns Buttery Bites, a small bakery in Anywhere, Alaska. One morning, Penny walks through Buttery Bites' parking lot and is trampled by a moose. Daphne and her daughter Wendy see the incident through the bakery window. Wendy gasps and yells, "Mom, I knew this would happen if you didn't stop feeding those moose!" Daphne responds, "You were right!" Daphne then runs outside to help Penny. When Daphne sees Penny's injuries, she feels terrible and gives Penny $500 to help with her medical bills. Later that day, Daphne also posts several "moose warning" signs in the parking lot, hoping to prevent future attacks.

Penny sues Daphne to recover for her injuries. Prior to trial, Daphne sends Penny the following note:

> Penny,
>
> I am sorry that you were attacked by a moose on my property. I can't help but feel responsible. I would like to offer you $1000 in exchange for your agreement to dismiss this lawsuit.
>
> Daphne

Penny refuses the offer and the case proceeds to trial. Daphne's defense is that she is not responsible for the acts of wild animals and there is no precaution she could have taken to prevent the moose attack.

Penny calls Will to testify. Will intends to say that he was at the bakery during the incident and heard (1) Wendy say to Daphne, "Mom, I knew this would happen if you didn't stop feeding those moose!"; and (2) Daphne respond to Wendy, "You were right!" Daphne objects, asserting the statements are hearsay.

Penny also seeks to introduce evidence that Daphne posted moose warning signs in the parking lot following the attack; that Daphne sent Penny a note in which Daphne stated that she "fe[lt] responsible"; and that Daphne gave Penny $500 toward her medical expenses. With respect to the note, Penny promises that she will be very careful not to disclose any information regarding Daphne's settlement offer. Daphne objects to all of this proposed evidence.

1. Discuss whether the trial court should allow Will to testify regarding Wendy's and Daphne's statements.

2. Discuss whether the trial court should allow Penny to introduce evidence that Daphne posted moose warning signs following the incident.

3. Discuss whether the trial court should allow Penny to introduce evidence of Daphne's statement in her note that she "fe[lt] responsible." (Do not discuss hearsay.)

4. Discuss whether the trial court should allow Penny to introduce evidence that Daphne gave Penny $500 toward her medical expenses.

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

1. Discuss whether the trial court should allow Will to testify regarding Wendy's and Daphne's statements. (45 points)

Daphne has objected to Will's testimony on the basis that the statements are hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Alaska R. Evid. 801(c). Generally speaking, both statements appear to fall within this definition. However, the statements may nonetheless be admissible if they are considered either non-hearsay or fall within an exception to the hearsay rule. *See* Alaska R. Evid. 801 (non-hearsay); Alaska R. Evid. 803-804 (hearsay exceptions).

Both Daphne's and Wendy's statements will be admissible as non-hearsay because they both constitute admissions by Daphne, a party opponent. Alaska Rule of Evidence 801(d)(2) defines as non-hearsay:

> [a] statement [that] is offered against a party and is (A) the party's own statement, in either an individual or representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth . . .

Daphne is a party to the lawsuit and the statement Penny seeks to admit against her through Will is Daphne's own statement. Therefore, the trial court will likely admit Daphne's statement under Evidence Rule 801(d)(2)(A). Wendy's statement is likely to be admitted under Rule 801(d)(2)(B) as an adoptive admission. In response to Wendy's statement "Mom, I knew this would happen if you didn't stop feeding those Moose," Daphne immediately responded with "You were right!" This is a pretty clear manifestation by Daphne of a belief in the truth of Wendy's statement and will likely be admitted as such.

Even if Wendy's statement is not admissible under the "adoptive admission" rule, the statement could separately be admissible as non-hearsay because Penny can offer the statement for a non-hearsay purpose. Out-of-court statements offered for a purpose other than their truth are not hearsay and may be admissible if relevant for another reason. Here, Daphne's statement "You were right!" has no relevant significance without Wendy's statement. Therefore, Penny may argue that the statement is necessary to put Daphne's admission in context. *See Christian v. State*, 276 P.3d 479, 488 (Alaska App. 2012) (recognizing that statements offered for the purpose of providing the context for understanding a party-opponent's statements are admissible as non-hearsay).

Although Wendy's statement is likely admissible as non-hearsay for either of the reasons discussed above, the statement would also be admissible, even if it was hearsay, under the excited utterance exception to the hearsay rule. *See* Alaska R. Evid. 803(1). An excited utterance is "a statement relating to a startling event or conditions made while the declarant was under stress or excitement caused by the event or condition." Alaska R. Evid. 803(2). The justification behind this exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." *See* Commentary to Evidence Rules 803(1) and (2) at paragraph 3. Here, Wendy's statement to Daphne as she watched the moose attack Penny may qualify as an excited utterance and the trial court might allow Will's testimony regarding the statement even if the statement was not admissible for the reasons previously discussed.

2. Discuss whether the trial court should allow Penny to introduce evidence that Daphne posted moose warning signs following the incident. (25 points)

Daphne's moose warning signs constitute a "subsequent remedial measure" under Alaska Evidence Rule 407. Under Rule 407, evidence of subsequent remedial measures "which, if taken previously, would have made the event less likely to occur" are "not admissible to prove negligence or culpable conduct in connection with the event." The rationale behind Rule 407 includes: (1) the recognition that evidence of a person's subsequent remedial measures is not necessarily an admission of liability; (2) the social policy of encouraging people to take remedial steps in furtherance of safety; and (3) the belief that "people who err on the side of caution and take measures to protect fellow citizens from even the possibility of injury should not bear the risk that the jury . . . will read more into a repair than is warranted." Commentary to Alaska R. Evid. 407 at paragraph 2.

Although Rule 407 bars evidence of subsequent remedial measures if offered to prove culpable conduct, the rule does not require exclusion of this evidence "when offered for another purpose, such as impeachment or, if controverted, proving ownership, control, feasibility of precautionary measures, or defective condition in a products liability action." *See* Commentary to Alaska R. Evid. 407 at paragraph 6. Here, Daphne's defense at trial is that there was nothing she could have done to prevent the attack. Under these circumstances, the trial court may allow Penny to introduce evidence of the warning signs to show that there were, in fact, feasible precautionary measures available to Daphne.

However, even if the evidence is relevant to show that Daphne could have taken feasible precautionary measures, the trial court should still determine whether the probative value of the moose warning signs is outweighed by the

danger of unfair prejudice. *See* Alaska R. Evid. 403. An examinee's discussion of "unfair prejudice" should reflect an understanding that the term "unfair prejudice" does not mean that the information is harmful to Penny's case against Daphne. Rather, a party seeking to demonstrate "unfair prejudice" must show that the evidence is likely to be used for an improper purpose. *See, e.g., Liimatta v. Vest*, 45 P.3d 310, 315 (Alaska 2002) ("undue prejudice connotes not merely evidence that is harmful to the other party, but evidence that will result in a decision being reached by the trier of fact on an improper basis") (internal quotations and citation omitted); *see also Borchgrevink v. State*, 239 P.3d 410, 422 (Alaska App. 2010).

3. Discuss whether the trial court should allow Penny to introduce evidence of Daphne's statement in her note that she "fe[lt] responsible." (Do not discuss hearsay.) (20 points)

The statement Penny seeks to introduce was made by Daphne in a note in which Daphne offered Penny $1000 in exchange for her agreement to dismiss the case. Alaska Rule of Evidence 408 provides that:

> [e]vidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The rule encompasses all "[e]vidence of conduct or statements made in compromise negotiation" and applies whether or not a settlement or compromise is actually reached or carried out. *See* Alaska R. Evid. 408 and Commentary to Alaska R. Evid. 408 at paragraph 5. However, like many other rules of evidence, Rule 408 "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Alaska R. Evid. 408.

Here, Daphne's note constitutes an offer to compromise and is therefore covered by Rule 408. The fact that Penny has promised not to discuss the fact of or the details of the offer itself is irrelevant because Rule 408 protects *all* statements made by Daphne in her settlement proposal. *See* Commentary to Alaska R. Evid. 408 at paragraph 2. Therefore, unless Penny can offer a purpose other than proving Daphne's liability (and there is not an obvious one on these facts), the trial court will likely not allow Penny to testify regarding Daphne's statement in the letter.

Examinees should also mention that, even if the statement were otherwise admissible, the danger of unfair prejudice may outweigh any

probative value the statement might have. *See* Alaska R. Evid. 403. Specifically, examinees could argue that the letter has no probative value because Daphne's statement that "[she] can't help but feel responsible" is not an admission that she actually *is* responsible as much as it is an expression of sympathy or a statement made out of a sense of politeness.

4. Discuss whether the trial court should allow Penny to introduce evidence that Daphne gave Penny $500 toward her medical expenses. (10 points)

Alaska Rule of Evidence 409 provides that "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." However, evidence of payment or an offer to pay medical expenses may be admissible if offered for a purpose other than proving liability or amount. *See* Commentary to Alaska R. Evid. 409 at paragraph 5.

Here, it does not appear that Penny has any reason to offer the evidence other than to prove Daphne's liability. The evidence will therefore likely be excluded by Rule 409.