ESSAY QUESTION NO. 8

Answer this question in booklet No. 8

Dan lives in Alaskaville, a town located on the coast. Dan is the owner of a charter business that takes visitors to Alaskaville out on guided fishing tours. He hires several employees during the summer fishing season.

Ted is one of Dan's deckhands. Ted is also tasked with picking up customers from local hotels early in the morning and driving them to the town harbor to get on Dan's boat. Ted drives the customers back to their hotels at the end of the day. He drives a passenger van owned by Dan and used for the business to accomplish this task. Ted is an Alaskaville resident who lives approximately 10 miles away from the harbor.

Before the fishing season begins, Dan gathers all of his employees together for a meeting. Dan tells his employees at this meeting that they may not use business equipment for their personal use. But due to the early morning hour that the fishing boat leaves the harbor, Ted is allowed to drive the van to his home at the end of the day and keep it overnight. In the mornings, Ted drives into town and picks up customers along the way.

At the beginning of the fishing season, Dan and Ted were having a friendly conversation. During the conversation Ted tells Dan he has been having dizzy spells where he will temporarily lose his balance. Ted assures Dan that these dizzy spells are not affecting his work, but states they have become more frequent – including one time while he was driving the van to his home. Assured by Ted's promise to see a doctor about the dizzy spells, Dan does not ask any further questions. Ted continues to drive the van.

One afternoon, after dropping off his last customers, Ted starts back home, but decides to drive to a fishing spot 10 miles past his house in the van. He stops at his home on the way to pick up his fishing gear. Ted fishes at the spot for a few hours. On his way home in the van, Ted comes up behind a car driven by Polly. Polly applies her brakes and signals as she prepares to turn into her driveway from the road. At that precise moment, Ted starts to have a dizzy spell and is temporarily disoriented. Ted is unable to apply his brakes in time and crashes into the back of Polly's car – injuring Polly and damaging her car in the process.

Polly files a lawsuit within the appropriate statute of limitations against both Ted and Dan.

1. Discuss whether Polly will be able to succeed in a negligence claim against Ted.

2. Discuss whether Polly will be able to succeed in a claim of *respondeat superior* against Dan.

3. Discuss whether Polly will be able to succeed in a claim of negligent entrustment against Dan.

GRADERS' GUIDE
*** * * QUESTION NO. 8 * * ***
TORTS

1. Discuss whether Polly will be able to succeed in a negligence claim against Ted. (35%)

Polly should be able to successfully assert a claim of negligence against Ted. Negligence requires a plaintiff to establish four elements: (1) a duty owed by the defendant, (2) a breach of that duty, (3) a showing that the breach of the duty caused damages, and (4) damages. *Wickwire v. Arctic Circle Air Services*, 722 P.2d 930, 932 (Alaska 1986). "A fundamental tenet of negligence law is that a defendant owes a duty of due care to 'all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.'" *Winschel v. Brown*, 171 P.3d 142, 146 (Alaska 2007) (citing *Div. of Corr. v. Neakok,* 721 P.2d 1121, 1125-26 (Alaska 1986)). "[F]oreseeability is a broad concept and does not require that the precise harm in a given case be predictable." *Id.* (citing *P.G. & R.G. v. State, Dep't of Health & Human Servs.,* 4 P.3d 326, 332 n.11 (Alaska 2000)).

A driver of a vehicle owes a duty of care to all other drivers as it is foreseeable that an inherently dangerous activity like driving can lead to harm if caution is not exercised. In this case, however, an additional layer of foreseeability exists as to Ted's medical condition. Ted was aware that his medical condition caused him dizzy spells. Additionally, Ted was aware that a dizzy spell had occurred while he was previously driving the van and, thus, knew that his condition could lead to dangerous driving behavior on his part. It was foreseeable that Ted might have a dizzy spell rendering him unable to control the van and cause an accident with another driver like Polly. Given this, Ted clearly had a duty to drive in a safe manner – including taking precautions regarding his medical condition. Further, Ted breached this duty by driving the van and not applying his brakes.

The facts indicate that Ted told Dan that he would consult a doctor. Although it is unknown whether or not Ted actually met with a physician, one might argue that whether this occurred could have an impact on a factfinder's determination of whether a duty was breached. If Ted consulted a doctor and was told that nothing was wrong, he might be able to argue that he did not breach his duty to drive the van in a safe manner because he reasonably believed that he was not suffering from any significant medical problem. If Ted did not consult a doctor or continued to have dizzy spells after seeing a doctor, he was still on notice that he might become disoriented while driving and harm someone else.

Ted's inability to operate the brakes due to his temporary disorientation from dizziness clearly caused the accident with Polly. Polly was harmed by virtue of both her physical injuries and the damage done to her car. Those damages were caused by Ted's conduct – driving the van into her vehicle.

2. Discuss whether Polly will be able to succeed in a claim of *respondeat superior* against Dan. (45%)

Given Ted's use of Dan's van during the collision, Polly will likely seek damages from Dan by virtue of the doctrine of *respondeat superior*. Under this doctrine, "an employer is liable for the negligent acts or omissions of an employee only if the acts or omissions occur within the course and scope of employment." *Parnell v. Peak Oil Field*, 174 P.3d 757, 768 (Alaska 2007) (citing *Powell v. Tanner*, 59 P.3d 246, 248 (Alaska 2002) and PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 501-03 (W. Page Keeton et al. eds., 5th ed. 1984)). "For purposes of determining whether a particular act occurred in the course and scope of employment [Alaska courts] have customarily looked to the standards set out in sections 228 and 229 of the Restatement (Second) of Agency." *Parnell v. Peak Oil Field*, 174 P.3d at 768 (citing *Luth v. Rogers & Babler Constr. Co.,* 507 P.2d 761, 764-65 n.14 (Alaska 1973)).

Section 228 sets out the requirements for conduct that is considered to fall within, or outside, the scope of employment:

> (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 unexpectable by the master.
>
> (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.

Section 229, on the other hand, sets out the types of conduct that fall within the scope of employment:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) 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 not been entrusted to any 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.

Both the Restatement and Alaska law recognize that in order for conduct to be considered within the scope of the employment it must be actuated, at least in part, by a purpose to serve the employer. In this case, one might analyze whether or not the conduct was the kind that is within the scope of employment by utilizing the factors set out in Section 229. However, given that Ted was using the van to drive on a personal errand, the focus of this answer should be on whether the conduct actually fell within the scope of employment under Section 228. Under this analysis, Polly should not be able to succeed in her claim of *respondeat superior*.

When Ted drove the van home at night he did so within the scope of his employment. Dan employed Ted to drive the van to pick up customers and bring them to and from the town harbor. Dan also allowed Ted to drive the van home to keep it overnight in order to facilitate the early morning pickups of the customers. Dan's authorization for Ted's use of the van included driving it home. Thus, as Ted drove the van home he did so with the appropriate time and space limitations designated by his employment. Ted also drove the van home in order to fulfill a purpose for Dan.

When Ted drove to his home, picked up his fishing gear, and then drove another 10 miles to the fishing spot, his conduct arguably fell outside the scope of his employment. While he was allowed to drive the van home to fulfill a specific purpose for Dan, he was not authorized to use the van for his own personal outings. Dan would likely point to his meeting with his employees in which he specifically told them that they are not to use any business equipment for personal use as evidence that Ted was using the van outside the scope of his employment. Polly may counter by arguing that driving the van was still the type of conduct that Ted was employed to perform and, possibly, that the driving of the van occurred substantially within the time and space authorized by Dan. However, Dan will prevail because Ted's use of the van constituted a deviation from anything related to a purpose to serve Dan and the business.

Ted drove to his favorite fishing spot located a distance past his home after dropping off the last of the customers. While Polly may succeed in arguing that driving the van was conduct which Ted was employed to perform, she will not be able to show that Ted was doing anything to serve a purpose for Dan. Ted was doing a personal task on his own time with his own fishing gear, as he was done working for the day, with a van that he was not authorized to use for such a task. Again, Ted was not doing anything to serve a purpose for Dan when he drove to the fishing spot and was acting outside the scope of his employment. It follows that he was also working outside the scope of his employment when he was driving back from the fishing spot. Polly should not be able to succeed on a claim of *respondeat superior* as a result.

3. Discuss whether Polly will be able to succeed in a claim of negligent entrustment against Dan. (20%)

Negligent entrustment applies to "[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use..." *Nelson v. Progressive Cas. Ins. Co.*, 162 P.3d 1228, 1232 (Alaska 2007) (citing Restatement (Second) of Torts § 390 (1965)). A critical aspect of proving a negligent entrustment is proof of notice of the potential risk of harm. *See*

Kalenka v. Infinity Ins. Companies, 262 P.3d 602, 610-12 (Alaska 2011) (recognizing that negligent entrustment claims require proof of notice).

Dan was aware of Ted's untreated medical condition and was further aware that Ted had experienced a dizzy spell while driving the van. Even though Ted promised to see a doctor about the condition, Dan had no assurances that Ted would not have another dizzy spell while driving the van. Polly will be able to show that Dan was on notice of the Ted's medical condition and that the medical condition contributed to Ted's driving behavior that caused the accident. Given this notice, the trier of fact will need to decide whether Ted's medical condition created a situation in which he might use the van in a manner involving unreasonable risk of physical harm to himself and others – namely Polly.

Dan should have known that Ted's condition might affect many aspects of his life, including his employment. Ted was a deckhand and was responsible for driving the van to pick up customers. Dan supplied Ted with a van to complete this task. It is reasonable to believe that Dan knew that Ted's condition could have impacted his driving. Driving can become a dangerous endeavor if a driver is disoriented. Ted had explained that he became dizzy at times due to his condition and that this had occurred while he was driving.

Dan's knowledge of Ted's condition should have alerted him that he might, because of his condition, use the van in a manner that might involve a risk of physical harm to others. Polly should be able to succeed on a claim of negligent entrustment against Dan for supplying the van to Ted.