

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Peter was driving down a two lane highway in Alaska in the winter in a small car. He was driving about 45 miles per hour because the road was curvy and icy, and he did not feel comfortable going any faster. David was traveling in the same direction on the same highway in a large sport utility vehicle. He was traveling faster than Peter and caught up with Peter. David became annoyed at Peter's slow speed, so he began tailgating Peter.

When a passing lane appeared, Peter pulled into the right lane. David pulled into the passing lane and moved even with Peter. David honked his horn, and when Peter glanced over, David began screaming at him. Peter shook his head and turned away. This infuriated David who honked again. When Peter glanced over, David swerved his car to the right to scare Peter.

David crossed into Peter's lane as he swerved, violating a city ordinance providing that "a driver shall remain in his or her lane of travel except as reasonably and prudently necessary."

Peter saw David swerving and thought that David was going to knock him off of the road. Peter slammed on his brakes. He lost control and began spinning. Peter spun in several complete circles before sliding into the guard rail. Peter's car was scraped and damaged, but he did not suffer any physical injury.

Peter was badly frightened by the incident. He began having panic attacks whenever he saw a large sport utility vehicle on the road. Peter's anxiety required counseling and medication. Peter sues David.

1. Discuss any causes of action that Peter would have against David.



GRADER'S GUIDE

*** QUESTION NO. 6 ***

SUBJECT: TORTS

I. Negligence– 45%

The elements of negligence are duty, breach, proximate cause, and damages. Wickwire v. Arctic Circle Air Services, 722 P.2d 930, 932 (Alaska 1986). The doctrine of negligence per se allows a plaintiff to establish duty and breach by proving that the defendant violated a statute or regulation. Ferrell v. Baxter, 484 P.2d 250, 256-57 (Alaska 1971). Peter may be able to make out a claim for negligence per se.

The ordinance in the question arguably meets the four foundational prerequisites for a claim of negligence per se. However, the standard of care set out in the ordinance may not be specific enough.

A court may adopt a traffic regulation as the standard of care if the purpose of the regulation is (1) to protect the class of people that includes the plaintiff, (2) to protect the particular interest which was invaded, (3) to protect that interest against the kind of harm which resulted, and (4) to protect that interest from the particular hazard from which the harm resulted. Ferrell v. Baxter, 484 P.2d 250 263 (Alaska 1971). The unexcused violation of a regulation adopted as the standard of care is negligence in itself. Id. at 264. The supreme court generally views traffic laws as prescribing the standard of care owed by a reasonable driver. Getchell v. Lodge, 65 P.3d 50, 53 n. 9 (Alaska 2003). However, substitution of a statute or regulation for the general standard of care is only appropriate when the statute or regulation prescribes specific conduct. Bailey v. Lenord, 625 P.2d 849, 856 (Alaska 1981). A regulation which sets out a general or abstract standard of care is not sufficient. Id. If the court does not adopt the regulation as the standard of care, an unexcused violation of the regulation may nonetheless be considered as evidence of negligence. Ferrell, 484 P.2d at 264. Generally, a violation of a regulation is excused when (1) the violation was reasonable because of the actor's incapacity, (2) the actor neither knew nor should have known of the occasion for compliance, (3) the actor is unable after reasonable diligence or care to comply (4) the actor is confronted by an emergency not of his own making, and (5) compliance would involve a greater risk of harm to the actor or others. Getchell v. Lodge, 65 P.3d 50, 53 n. 9 (Alaska 2003).

The trial court in Ferrell instructed the jury that a violation of the state regulation requiring drivers to remain in their lanes of travel was negligence. The regulation provided that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from said lane until the

driver has first ascertained that such movement can be made with safety.” Ferrell, 484 P.2d at 255. The supreme court upheld the trial court, concluding that the regulation met the four criteria. According to the court, the regulation was “designed to protect the motoring public against personal and property damage and non-driving vehicle owners against property damage from collisions” caused by violations of the regulation. Id. at 265.

Here, Peter was a member of the motoring public and the ordinance was intended to protect him from collisions caused by other drivers straying into his lane of travel. David’s action of swerving into Peter’s lane invaded Peter’s interest in driving safely. Moreover, Peter suffered the kind of personal and property damage that the ordinance was designed to protect against. Finally, the ordinance was intended to prohibit drivers like David from swerving into other lanes of traffic. The ordinance requiring a driver to remain in his or her lane meets the four criteria set out in Ferrell.

However, the ordinance at issue in the question requires drivers to remain in their lane “except as reasonably and prudently necessary.” The court will have to decide whether the reasonably and prudently necessary language merely incorporates the general duty of care. In Breitkreutz v. Baker, 514 P.2d 17, 20 - 21 (Alaska 1973), the supreme court held that a regulation which prohibited a driver from following more closely than was reasonable and prudent merely incorporated the general standard of care. The ordinance in the question is different because it contains an express and specific command: drivers must remain in their own lanes. The reasonably and prudently language in the ordinance is contained in the exception to the standard. Arguably, this makes the ordinance different from the “following to closely” regulation in Breitkruetz.

Assuming that the ordinance at issue does not provide a specific enough standard for negligence per se, Peter will have to establish that David breached some duty, causing Peter’s injuries. In the absence of a statute, regulation, contract, undertaking, the parties’ preexisting relationship, or existing case law, the Supreme Court of Alaska uses a multifactor test to determine whether someone owes a duty. D. S. W. v. Fairbanks North Star Borough School Dist., 628 P.2d 554, 555 (Alaska 1981); McGrew v. State, 106 P.3d 319 (Alaska 2005). Peter will not have to rely on D.S.W., however, for the supreme court has long applied the reasonable person standard to automobile drivers. Ferrell, 484 P.2d at 264-65.

Applying the reasonable person standard indicates that David breached his duty. It is foreseeable that someone will slam on the brakes if a car suddenly swerves into its lane. Similarly, it is foreseeable that the braking will result in a skid if it occurs on an icy road. A reasonable person in David’s position would have realized that swerving into Peter’s lane could cause an accident.

The facts also show that David's swerving caused the accident. "As a general rule, Alaska follows the "substantial factor test" of causation." Vincent by Staton v. Fairbanks Memorial Hosp., 862 P.2d 847, 851 (Alaska 1993). "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." State v. Abbott, 498 P.2d 712, 727 (Alaska 1972). The facts indicate that the accident would not have happened but for David's swerving. Peter slammed on the brakes and began skidding when David swerved into his lane. Peter then slid into the guard rail.

The facts also indicate that Peter suffered damages, for his car was scraped and damaged.

II. Assault – 30%

The tort of assault has three elements: intent to cause fear of harmful or offensive contact, conduct that causes an imminent apprehension of harmful or offensive contact, and damages. Merrill v. Faltin, 430 P.2d 913, 917 (Alaska 1967); Lowdermilk v. Lowdermilk, 825 P.2d 874, 879 (Alaska 1992). The facts support the conclusion that David assaulted Peter. The facts indicate that David was getting very angry. He began screaming at Peter. And when Peter shook his head, David became infuriated and began honking at Peter. He then swerved into Peter's lane when Peter looked over at him. These facts support an inference that David intentionally swerved into Peter's lane. Peter apprehended imminent harmful or offensive conduct. He was scared. He apparently thought that David was going to bump him off the road, so he slammed on the brakes. He suffered damages as a result of the assault because his evasive action led directly to a collision with the guardrail. Peter also suffered a psychological injury as a result of the assault. David was driving a big sport utility vehicle and Peter now suffers panic attacks whenever he sees a large sport utility vehicle on the road and has to go to counseling and take medication.

III. Intentional Infliction of Emotional Distress – 25%

"To plead a claim for [intentional infliction of emotional distress], a plaintiff must allege these necessary elements: (1) the conduct is extreme and outrageous, (2) the conduct is intentional or reckless, (3) the conduct causes emotional distress, and (4) the distress is severe." McGrew v. State, Dept. of Health and Social Services, 106 P.3d 319, 324 (Alaska 2005).

Arguably, David's conduct is extreme and outrageous. David became annoyed at Peter because Peter was only going 45 miles per hour. When a passing lane appeared, he pulled even with Peter and began honking his horn and

screaming at David. When Peter shook his head at this behavior, David became infuriated and swerved into Peter's lane in an attempt to scare Peter. David's conduct appeared geared to make Peter think that he was about to be in a car accident. Given the risk of serious injury or death attendant in a car accident, a court could reasonably conclude that causing Peter to think that he was going to be in an accident was extreme and outrageous.

David's conduct was intentional. As noted above, he swerved into Peter's lane in an attempt to scare Peter.

David's conduct caused Peter to suffer emotional distress, for Peter suffers panic attacks as a result of the incident. A court could reasonably find that Peter's distress was severe because it required counseling and treatment with medication.