

ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Philip visits Daniel's Woodworking (a sole proprietorship) in a Fairbanks strip mall. While leaving the shop, Philip slips and falls on the icy curb as he approaches his car that is parked in front of the shop.

Two years later, Philip sues Daniel in Fairbanks Superior Court for damages for personal injury. Daniel answers the complaint, discovery begins, and the Court sets a jury trial in one year.

A few weeks before trial, after discovery has closed, Daniel moves to amend the pleadings and assert a complaint against his landlord, Blue-Roof Malls, Inc., for apportionment of fault. Daniel attaches to his motion a proposed third-party complaint which alleges Blue-Roof negligently maintained the sidewalk, curb and parking lot where Philip fell, and that Blue-Roof's negligence, in whole or in part, caused Philip's injury.

Philip files an opposition, arguing (1) it is too late to amend; (2) joinder of a new party now would prejudice Philip; (3) the Statute of Limitations bars Daniel from adding Blue-Roof, and (4) if Daniel is found liable in the present action, he can then seek contribution from Blue-Roof in a separate action.

1. Will the Superior Court grant Daniel's motion? Why or why not? Explain.

2. Assume *for purposes of this question only* that Daniel is permitted to join Blue-Roof. Explain how the Superior Court will instruct the jury to determine the respective liability of the parties? Why?

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CIVIL PROCEDURE

1. The Court will probably grant Daniel's motion. (50%)

A. Rule 14 allows it. It states,

At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or maybe (sic) liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

If amendment is sought after the case has advanced beyond the initial pleadings,

the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

Id.

B. Rule 15 allows it. Although the two-year statute of limitations for personal injury has run (AS 09.10.070), the Alaska Supreme Court permits liberal amendment. Amendment may even be permitted at a late stage of the litigation. Rule 15, generally concerning amendments to pleadings, states ". . . leave shall be freely given when justice so requires." While the trial courts have discretion and may deny leave to amend, for reasons including lateness, prejudice, and causing delay, *Ross Laboratories v. Thies*, 725 P.2d 1076, 1082 (1986), leave is indeed liberally granted.

The Alaska Supreme Court has ruled that the Statute of Limitations does not apply to claims for equitable apportionment in such a scenario. In *Alaska General Alarm, Inc., v. Grinnell*, 1 P.3d 98 (2000), the Court held that a third-party defendant who was sued for apportionment of fault under AS 09.10.080, after the Statute of Limitations had run on the plaintiff's injury claim, could still be held liable to plaintiff for damages.

C. The old statutory action for contribution has been abolished. Former Chapter 16 (Contribution Among Joint Tortfeasors) in Code of Civil Procedure (Title 9) was repealed by 1987 Initiative Proposal No. 2, §2. It is true that the common-law action for contribution still exists, see *McLaughlin v. Lougee*, 137 P.3d 267 (2006), so that Daniel, if found liable at trial in the instant case, could proceed separately against Blue-Roof after judgment in the original action. However, equitable apportionment is available as a means of bringing a third-party tortfeasor into the instant case. *Benner v. Wichman*, 874 P.2d 949

(1994). Daniel can argue the third-party approach to resolving all of the claims in this action is more efficient for the court and the original parties. For example, only one jury will need to hear evidence of the various parties' acts and failures to act.

D. Blue-Roof is a proper party but not an indispensable party. Some examinees may address whether Rule 19 requires the Court to let Daniel join Blue-Roof. Rule 19 would require joinder if, in Blue-Roof's absence, "complete relief cannot be accorded among" the existing parties. Rule 19(a)(1). Arguably "complete relief" *in this action* would require Blue-Roof as a defendant. However, the common-law action for contribution is available to Daniel, and it only accrues *after* judgment in this action. *McLaughlin, supra*. Clearly, there is the judicial economy argument for immediate joinder. Also, Blue-Roof's joinder appears "feasible," as far as the facts show (unlike a party which cannot be located for service of process.) But Blue-Roof is not "indispensable," Rule 19(b), and the Court has discretion on whether to allow joinder at this time.

E. Philip will probably not suffer significant prejudice through the joinder of Blue-Roof. The joinder may expose Philip to additional costs and fees for trial preparation, and may necessitate a longer trial. It is possible the Court may deny the joinder for these reasons. On the other hand, if Philip believes the addition of a new party complicates his case, and he needs additional time to conduct discovery, retain expert witnesses, or otherwise prepare his case for trial, he may request a continuance, which the Court will most likely grant.

2. The Court will instruct the jury to apportion the liability of each party that is at fault, and will give the jury specific questions to answer as to each party. (50%)

A. The jury's role in apportionment is set forth by statute. AS 09.17.080, Apportionment of Damages.

1. If the jury finds any party at fault, it must determine a percent of fault by considering both the nature of the party's negligent conduct, and the causal connection between the conduct and the injury. AS 09.17.080(b).

2. Separately, the Court will instruct the jury on the applicable principles of Alaska tort law for determining each party's fault.

3. The Court will most likely have the parties propose a special verdict form with specific questions for the jury to answer as to each party. On the facts of this case, the parties will probably use Alaska Civil Pattern Jury Instruction No. 03.21(B) as a starting point for their special verdict form.

(a) The Special Verdict is suggested at AS 09.17.080(a), which states that the Court "shall instruct the jury to answer special interrogatories." The Alaska

Supreme Court has addressed the use of such forms in *Manes v. Coats*, 941 P.2d 120 (1997), and *Shields v. Cape Fox Corp.*, 42 P.3d 1083 (2002).

(b) Typically the parties and Court will work together to finalize the form and accompanying jury instructions, assuring they accurately reflect the law and the relations of the parties.

(c) Alaska is a “pure” comparative negligence and several liability state. *Sowinski v. Walker*, 198 P.3d 1134 (2008). Accordingly, the Special Verdict will treat Blue-Roof just like the original plaintiff and defendant in determining their respective fault and the causation of the injury. See AS 09.17.080(a.) (“ . . . actions involving fault of more than one person, including third-party defendants . . .”)

(d) The jury’s apportionment of percentages of fault to one or more of the parties must add up to 100 percent.