

## **ESSAY QUESTION NO. 4**

### **Answer this question in booklet No. 4**

Pam and Don, a married couple living in Juneau, were involved in a three car accident there in February, 2010. The accident occurred when Don ran a red light. There were several witnesses to the crash. Pam was hospitalized for over a week and was unable to work for three months. The accident affected their marriage and the couple separated in late 2010.

Pam relocated to Anchorage in the spring of 2011 to be near her parents. Don's employer transferred him to Fairbanks in July, 2011.

Pam, representing herself, filed a complaint against Don in Anchorage Superior Court on December 1, 2011. Her first cause of action was for a divorce. The second count of the complaint alleged Don's negligence caused the auto accident and asked for damages in excess of \$100,000.

Don was properly served by a process server at his Fairbanks home on December 4, 2011. He filed his answer on December 24, 2011 but alleged no affirmative defenses. Pam filed a demand for a jury trial on Jan. 2, 2012.

On February 1, 2012, Don moved for a change of venue to Fairbanks on two grounds: (1), Anchorage is an improper venue and (2), it is inconvenient for him to appear in Anchorage. Pam has opposed his motion. Pam's treating doctor for the accident is undergoing kidney dialysis and isn't permitted to travel. Another witness is the sole caretaker of an elderly parent.

1. Discuss whether Pam is entitled to a jury trial on either of her claims.
2. Explain how the court might resolve Don's venue motion.

**GRADERS' GUIDE**  
**\*\*\* QUESTION NO. 4 \*\*\***  
**CIVIL PROCEDURE**

1. Discuss whether Pam is entitled to a jury trial (50 points)

The first issue is whether Pam is entitled to a jury trial. Pam has alleged two causes of action in her complaint – a divorce and personal injury stemming from Don’s negligence while driving.

Article 1, Section 16 of the Alaska Constitution states “In civil cases where the amount in controversy exceeds two hundred and fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and in courts not of record, may provide for a jury of not less than six or more than twelve.” See State v. First National Bank of Anchorage, 660 P. 2d 406, 423-24 (Alaska 1982), McGill v. Wahl, 839 P.2d 393 (Alaska 1992).

Pam is not entitled to a jury trial on her divorce claim because a person is not entitled to a jury trial on equitable claims. Divorce is an equitable claim. See Vinson v. Hamilton, 854 P.2d 733 (Alaska 1993).

As for her second claim, personal injury, Pam is entitled to a jury trial. See McGill, supra. Although the facts do not indicate the amount of damages she is seeking, given the length of her hospitalization and being out of work for three months, her damages would far exceed \$250.00.

Under Civil Rule of Procedure 38(b), a demand for a jury trial must be served in writing no later than ten days after service of the last pleading directed to such an issue. Don filed his answer on December 24. Pam’s jury demand was filed on January 2, nine days after the answer was filed. Pam’s jury demand was timely as to her personal injury claims.

The trial court may bifurcate the divorce and the personal injury claims into two separate trials. See AS 22.10.040.

2. Explain how the court could resolve Don’s venue motion. (50 points)

Civil Rule 3(c) provides “ If in a civil action other than one specified in (b) of this rule, a defendant can be personally served within a judicial district of the State of Alaska, the action may be commenced in either (1) the judicial district in which the claim arose; or (2) a judicial district where the defendant may be personally served; or (3) a venue district where the claim arose if the superior court in the district accepts such cases for filing.”

Pam's action against Don is not one of the actions cited in Civil Rule 3(b). Actions addressed in Civil Rule 3 (b) are "ejectment, for recovery of possession, for quieting title, for partition, or for enforcement of liens upon real property" . These must be commenced in the judicial district where the real property is situated.

Pam could commence her lawsuit in the judicial district in which the claim arose. Juneau was the site of both the auto accident and the couple's marriage. Juneau (the First Judicial District) was a proper venue for the action's commencement.

Pam could have also filed her case in the judicial district where Don could be personally served. Don lives and works in Fairbanks. Pam could have brought her action in Fairbanks ( Fourth Judicial District).

Pam filed her action in Anchorage (Third Judicial District). Since Don was not personally served in the Third Judicial District and the claims did not arise in the Third Judicial District, venue was improper.

Civil Rule 3 (f) states "Failure to make timely objection to improper venue waives the venue requirements of this rule."

The superior court in the location where the action is filed does not have discretion to relax the venue requirements when the complaint is filed in the wrong judicial district; the complaint must be filed in the proper judicial district. Only the trial court in the proper venue has the authority to decide whether the forum is inconvenient. See Ketchikan General Hospital v. Dunnagan, 757 P.2d 57 (Alaska 1988).

Civil Rule 8 (c) requires a defendant to plead any and all affirmative defenses in the answer. When an affirmative defense is not pled in an answer, that affirmative defense may be considered waived.

Under Civil Rule 12(b), a party has the option to present a defense in the responsive pleading or certain defenses can be made by motion including improper venue. The motion can be made before the responsive pleading is filed or contemporaneously with the responsive pleading.

Civil Rule 12 (h) (1) deems the defense of improper venue waived if not made in the responsive pleading or by motion under subdivision (g) of Civil Rule 12. Aguchak v. Montgomery Ward Co. Inc., 520 P.2d 1352 (Alaska 1974).

Don's failure to object to Anchorage being an improper venue was waived by his failure to argue improper venue as an affirmative defense in his answer and his failure to file a motion pursuant to Civil Rule 12.

As for Don's claim that Anchorage is inconvenient for him, that argument would also fail. Absent unusual circumstances, the convenience of the parties is not to be considered in weighing the merits of a motion to change venue. Coughlin v. Coughlin , 423 P.2d 1010 ( Alaska 1967).

The trial court has the authority to move the matter to Juneau where the parties' marriage and the car accident occurred. In Ko-Am Enterprises v. Davis, 657 P.2d 399, 400 (Alaska 1983), the Supreme Court held that the appropriate remedy when an action is commenced in the wrong judicial district is to transfer the action to the judicial district where venue is proper. If the trial court finds that the plaintiff acted in bad faith in commencing the action in the wrong judicial district, then the trial court may dismiss the action.

There is nothing in the facts to suggest that Pam had acted in bad faith when she started her case. As a pro se party, Pam would not be held to as stringent a standard as an attorney by being expected to know the venue requirements.

Although Dan's motion to move the action to Fairbanks would fail, the likely result of Dan's motion is that the Anchorage court would transfer the case to the proper venue, Juneau Superior Court. AS 22.10.040 (2) allows a court to change venue "when the convenience of witnesses and the ends of justice would be promoted by the change".

The evidence for a majority of Pam's personal injury claims would be located in Juneau – the accident witnesses, her treating medical personnel, hospital records, Pam's employer, co-workers and the investigating officers. Two of the witnesses have living situations that make travel from Juneau impossible. The superior court on its own has the power to order the case transferred to Juneau for the convenience of the witnesses.