

ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

June 1, 2010 finds a group of 18-year-olds, Xavier, Yani, and Zack, engaging in skateboard horseplay on a Fairbanks sidewalk. Polly, 16, is walking by on her way home from school. Pursued by his companions, Xavier careens into Polly, with most of the force impacting the side of her knee. Polly feels a pop. With a couple of days of rest and ice the knee seems to recover and she feels normal. The following year, Xavier and Polly move to Anchorage to attend the university there; Yani moves to California and Zack to Australia.

In the spring of 2012, Polly begins to have swelling and lameness in her knee. Her doctor diagnoses an old tear to a key ligament in the knee. He concludes that it was likely torn in the 2010 event. He recommends expensive surgery to slow any further deterioration, and opines that, even with the surgery, arthritis will likely plague her from her late twenties onward.

Polly consults an attorney in May of 2012. Concerned that the statute of limitations is about to run, he hastily files a tort action in Anchorage against Xavier on May 30, 2012. On June 10, 2012, after talking further with Polly, he files an amended complaint without leave of the court, adding Yani as a second defendant. He then sends the amended complaint to an Alaska peace officer for service; the peace officer obtains service of a summons and complaint on Xavier on June 20, 2012. After the peace officer is unable to find Yani in Alaska, Polly's counsel locates him in California and faxes him the summons and complaint on September 15, 2012.

Meanwhile, in early July Xavier files a third-party complaint against Zack, alleging that if Xavier was at fault, so was Zack. Xavier succeeds in having Zack lawfully served in Australia the following month. Zack does not answer or otherwise appear in the case.

Assuming current law remains in effect, answer the following questions:

1. Yani moves to dismiss for lack of personal jurisdiction, and improper venue, and improper service. How should the court rule?
2. Analyze whether any of the defendants (Xavier, Yani, or Zack) has a viable statute of limitations defense. Would the answer be different if Polly were 18 at the time of the skateboard incident?

3. Assume the case goes to trial. The jury decides that the defendants were grossly negligent and Polly herself was negligent, with Zack 25% responsible, Xavier 55% responsible, and Yani and Polly each 10% responsible for total economic and noneconomic damages of \$100,000. Against whom and in favor of whom should the court enter judgment, and in what amounts? Disregard costs and attorney fees in answering this question.
4. The jury assesses punitive damages of \$1,000,000 against Xavier. Against whom and in favor of whom should the court enter judgment for punitive damages, and in what amounts? Again, disregard costs and attorney fees in answering this question.

GRADERS GUIDE

*** QUESTION NO. 3 ***

SUBJECT: CIVIL PROCEDURE

1. Yani's Motion to Dismiss (35 points)

a. Personal Jurisdiction

Yani's request for dismissal for lack of personal jurisdiction must be denied.

Personal jurisdiction is "the power to subject a particular defendant to the decisions of the court." *Rocky Mountain Claim Staking v. Frandsen*, 884 P.2d 1299, 1301 (Utah App. 1994) (quoting *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113 (Colo.1991)). Alaska has a "long-arm" personal jurisdiction statute that is "an assertion of jurisdiction to the maximum extent permitted by due process." *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 293 (Alaska 1976). Hence the evaluation of personal jurisdiction is always a matter of analyzing the constitutional limits of jurisdiction. It is notable, however, that Alaska's long-arm statute lists a category of jurisdiction that precisely fits the circumstances of this case: "an action claiming injury to person or property in or out of this state arising out of an act or omission in this state by the defendant." AS 09.05.015(a)(3).

The due process clause of the fourteenth amendment to the United States Constitution limits the power of courts in one state to exercise personal jurisdiction over a defendant who is a resident of another state. *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1878). The Alaska Supreme Court has held that "due process requires that the defendant have fair warning that particular activities may foreseeably subject them to jurisdiction in that forum," which in turn is a function of the defendant's contacts with the state. *Washington Ins. Guar. Ass'n v. Ramsey*, 922 P.2d 237, 240 (Alaska 1996). The contacts must be such that the defendant "could reasonably anticipate being haled into court" in Alaska. *Id.* (citing prior federal authority). "To reasonably anticipate being haled into court, the defendant must have purposefully conducted activities in the forum state." *Id.*

It is generally considered black-letter law that the alleged commission of a tort while present in the forum state is enough to establish personal jurisdiction, without further analysis. *E.g., Goettman v. North Fork Valley Rest.*, 176 P.3d 60, 69 (Colo. 2007) (noting that "the commission of a tort, in itself, creates a sufficient nexus between a defendant and the forum state that satisfies the due process inquiry and establishes specific jurisdiction," and that "[i]n such cases, there is no

need for further minimum contacts analysis because the defendant is so connected with the forum state that traditional notions of fair play and substantial justice are not offended by the forum state's exercise of personal jurisdiction over the defendant"). In *Jonz v. Garrett/Airesearch Corp.*, 490 P.2d 1197 (Alaska 1971), the Alaska Supreme Court addressed a more attenuated set of contacts, and held that the mere occurrence of *an injury* in Alaska allegedly caused by an act or omission by a defendant who was in *another* state is itself a contact with Alaska, but is not sufficient, taken alone, to establish minimum contacts with Alaska. The *Jonz* court went on to declare, however, that "very little by way of additional contacts need be shown to satisfy due process." 490 P.2d at 1199. Here, there are extensive additional contacts: Yani, unlike the defendant in *Jonz*, was present for the physical commission of the alleged tort; moreover, he lived in the state at the time and availed himself of the public sidewalk where the tort occurred.

Exercise of personal jurisdiction in Alaska therefore easily meets the due process threshold.

b. Venue

Yani's request for dismissal on venue grounds is governed in the first instance by Alaska R. Civ. P. 3. Alaska is divided into four judicial districts, with Fairbanks falling in the fourth district and Anchorage in the third. In general, provided a defendant can be personally served somewhere in the State of Alaska, Rule 3 provides that venue is proper in both the judicial district "in which the claim arose" and the judicial district "where the defendant may be personally served." Thus, venue was proper when this suit was first filed in Anchorage and Xavier was the only defendant, because Xavier lived in Anchorage, even though the claim had arisen in Fairbanks.

When Yani was added as a defendant, venue needed to be proper as to Yani as well. Yani now lives outside the state. For a defendant who can no longer be served within the state, Rule 3(e) establishes that venue is proper "in any judicial district of the state" (there are a couple of exceptions, in the real estate and domestic violence context, that do not apply here). Since Polly could sue Yani in any district, her choice of the third judicial district is proper, and Yani's motion must be denied.

If venue were not properly laid, the proper remedy would ordinarily be to transfer the case to the judicial district with proper venue rather than to dismiss the case outright. Rule 3 itself does not address this principle, but it has been established by case law. *Ketchikan Gen. Hosp. v. Dunnagan*, 757 P.2d 57, 59 (Alaska 1988).

The call of the question does not invite examinees to discuss the criteria for motions to change venue, which are set forth in AS 22.10.030.

c. Service

Yani received the summons and complaint only by fax, which is not one of the methods for valid service under Alaska R. Civ. P. 4. For an out-of-state defendant, those methods are personal service by an authorized officer (Rule 4(d)(12)) or serviced by certified or registered mail (Rule 4(h)). Although a court has discretion to approve an alternative means of service such as faxing, approval is available only if sought and received beforehand, not after the fact. See Rule 4(e)(3).

If Yani establishes that he has not been properly served, it will probably be too late for Polly to serve him within the time limit for service, which is ordinarily 120 days from the filing of the complaint. See Rule 4(j). The facts indicate that about 105 days had already elapsed when Yani was faxed the summons and complaint; the remaining time will likely have elapsed before Yani's motion to dismiss becomes ripe.

Rule 4(j) provides that if service has not been made within 120 days, the Clerk of Court must send a notice to the plaintiff to show good cause why service is not complete. If good cause is not shown within 30 days after the notice is distributed, the court must "dismiss without prejudice the action as to that defendant." *Id.* Polly can attempt to show good cause for the delay, and thereby defeat dismissal, by showing diligence in trying to locate Yani.

2. Statute of Limitations (35 points)

a. Xavier

The statute of limitations for a personal injury tort action bars the claim unless it is "commenced within two years of the accrual of the cause of action." AS 09.10.070(a). This claim arises from an event on June 1, 2010, and the claim against Xavier was filed just prior to the second anniversary of the event. Therefore, even if the claim accrued on the date of the skateboarding incident and the statute ran steadily thereafter, Xavier would not prevail on a statute of limitations defense because less than two years has elapsed.

It does not matter that Xavier was not served until somewhat after the second anniversary of the claim. A civil action is "commenced" by filing a complaint in court. Alaska R. Civ. P. 3(a). The statute requires only that the action be "commenced" within the time limit. AS 09.10.070(a); see also *Hamilton v. Seattle Marine & Fish Supply Co.*, 562 P.2d 333 (Alaska 1977). A separate time limit (120 days after commencing the suit) applies to service. Alaska R. Civ. P. 4(j).

Because Xavier has been sued within the limitations period regardless of any tolling, it does not make any difference with respect to Xavier whether Polly was 16 or 18 at the time of the incident.

3. Yani

With respect to Yani, the action has been *commenced* more than two years after the event that gave rise to it. It is nonetheless timely, however.

Polly was 16 at the time of the incident, which is under the age of majority. She reached the age of majority on her 18th birthday. AS 25.20.010. The exact date of her 18th birthday is not provided in the question, but it clearly falls more than one year after the incident, *i.e.*, sometime after June 1, 2011.

In general, if a person is under the age of majority at the time a cause of action accrues, the limitations period does not begin to run until the age of majority is reached. AS 09.10.140(a). If this rule applies, Polly's suit would be timely because, even if the cause of action accrued the day of the Fairbanks incident (that is, even if the discovery rule, discussed below, provided no assistance), the limitations period would have been running only a little over a year when she filed suit against Yani.

With respect to personal injury actions, the legislature has modified the general rule. Under AS 09.10.140(c), the limitations period is tolled only up to the plaintiff's eighth birthday. This would mean Polly would remain subject to the regular limitations period of two years from accrual. However, the Alaska Supreme Court has held AS 09.10.140(c) unconstitutional because of the concern that it would cause a minor's personal injury action to be extinguished because a parent or guardian failed to file suit, that subsection is unconstitutional. *Sands v. Green*, 156 P.3d 1130, 1136 (Alaska 2007). Accordingly, the general rule under AS 09.10.140(a) still applies, and the suit is timely.

The question asks if the answer would be any different if Polly were 18 at the time of the incident. With respect to Yani, the answer might be different. Polly would not benefit from any tolling as a result of her age. She would therefore need assistance from some other doctrine to bridge the gap between the two-year statute and the two years and nine days that elapsed between the incident and the filing of her complaint. The doctrine that may help to bridge this gap is the discovery rule.

The statute of limitations, by its own terms, counts time from the date "of accrual of the cause of action." The Alaska Supreme Court has held that a cause of action does not accrue until

the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. Thus we have said the relevant inquiry is the date when the claimant reasonably should have known of the facts supporting her cause of action. We look to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights.

John's Heating Serv. v. Lamb, 46 P.3d 1024, 1031 (Alaska 2002) (quoting prior authority). This is generally known as the "discovery rule." Ordinarily, there are two possible accrual dates under this rule: "the

date when [the] plaintiff reasonably should have discovered the existence of all essential elements of the cause of action” or “the date when the plaintiff has information which is sufficient to alert a reasonable person to begin an inquiry to protect his rights.” *Id.* (quoting prior authority). Typically, these dates coincide with the plaintiff’s injury, *Pederson v. Zielski*, 822 P.2d 903, 906 (Alaska 1991), but if they do not, the discovery rule can effectively extend the statute of limitations by delaying the “accrual” referred to in the statute.

Yani will certainly argue that Polly, at the time of her injury, knew of all of the elements of the cause of action (the defendants’ alleged conduct, the existence of some harm, and the causal connection between them). He will argue that a reasonable person would have obtained medical attention to determine the significance of her injuries. Polly has a more difficult argument: she must contend that while some harm was apparent at the time of the accident, it appeared resolve so quickly and so completely that it was reasonable for her to think she had only trivial damages, unworthy of further investigation or a lawsuit. She will argue that the point at which a reasonable person would begin an inquiry would be when the symptoms returned in 2012. If she is successful with this argument, her suit is timely because it would not even have “accrued” until the same year it was brought.

Yani may improve his chances of establishing a viable limitations defense through his motion to dismiss on the ground of improper service. If Yani establishes that he has not been properly served and Polly is not able to show good cause for the delay, the complaint will be subject to dismissal without prejudice. This would necessitate a re-filing that would increase the gap between the accrual date and the commencement of the action.

Finally, note that Polly’s complaint against Yani does not “relate back” to the date she filed against Xavier. A complaint against a different defendant only relates back to the date of the original complaint if, among other things, it arose out of a mistake concerning the identity of the proper party. *See* Alaska R. Civ. P. 15(c)(2).

4. Zack

Xavier’s third-party action against Zack is a claim for apportionment under Rule 14(c), as will be discussed more fully below. The Alaska Supreme Court has held that the statute of limitations does not apply to third-party actions, including apportionment claims, that are brought under Rule 14(c). *Alaska Gen. Alarm v. Grinnell*, 1 P.3d 98, 106 (Alaska 2000). This approach accords with third-party practice in most jurisdictions, including those that use traditional contribution in place of Alaska’s apportionment procedure. *See id.* at 105.

5. Apportionment of Compensatory Damages (15 points)

Alaska has abolished joint and several liability and traditional contribution, and replaced these approaches with a system of

apportionment of fault among tortfeasors and the plaintiff. The apportionment system is governed by a statute, AS 09.17.080. Under that statute, liability is apportioned according to the shares of fault the factfinder assigns, with no required distinction between levels of misconduct such as negligence and gross negligence. See AS 09.17.900. An assessment of a percentage of fault against the plaintiff reduces the overall recovery. See *John's Heating Serv., supra*.

Significantly, judgment against third-party defendants is entered directly in favor of the plaintiff, not the third-party plaintiff. Alaska R. Civ. P. 14(c). This means that for compensatory damages, the judgment in this case will be solely in favor of Polly and will award her damages of \$55,000 from Xavier, \$10,000 from Yani, and \$25,000 from Zack. It does not alter the result that Zack did not defend the case.

6. Handling of Punitive Damages (15 points)

Punitive damages, if assessed, are assessed with consideration of factors beyond fault alone, see AS 09.17.020(c), and therefore these damages are not part of the apportionment procedure. The damages will be awarded against Xavier alone.

The punitive award against Xavier must be reduced because it exceeds the cap on such awards. That cap is three times the total compensatory damages awarded the plaintiff in the case or \$500,000, whichever is greater. AS 09.17.020(f). In this case, \$500,000 is the greater of those two amounts, and therefore it represents the cap.

Under Alaska law, the court must direct 50% of a punitive damages award to the state. AS 09.17.020(j). Accordingly, with respect to punitive damages the court should enter judgment for Polly in the amount of \$250,000, and for the state in a like amount.