

Exam # _____

TORTS
FALL 2024

PROFESSOR DEWOLF
December 9, 2024

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS. THIS IS A CLOSED BOOK EXAM! Follow all of the directions of the proctor.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 15 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

POINTS are assigned to each section of the exam based on the rough number of minutes it is expected you will need to complete each portion.

(1) *Multiple Choice* (20 points). Please select the best answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read all the answers thoroughly and select the one that comes closest to a correct statement of the law. Enter your answers on the Answer Sheet provided..

(2) *Essays*: You will have two essay questions. The division is as follows:

Question 1: **80** points

Question 2: **50** points

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury. DO NOT cross-refer from one essay answer to the other; make sure that each essay answer stands on its own.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Everglade, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

REMEMBER THE HONOR CODE! Don't identify yourself.

MERRY CHRISTMAS! / HAPPY HOLIDAYS!

MULTIPLE CHOICE QUESTIONS

1. Ben Burger was a famous football player. Many people wanted to get his signature, or pose for a selfie with him. Burger wanted to be left alone, but he knew that in order for him to continue to get lucrative endorsement deals, he couldn't get a reputation for being rude to his fans. One day he had just come back from an intense workout with his team and stopped for a gelato at his favorite ice cream store. He put on sunglasses and an old hat to reduce the likelihood of being recognized, but a fan, Julie Jefferson, spotted him and ran up to him, grabbing his coat so he couldn't get away. "Oh, Ben, Ben!" she gushed, "will you pose for a selfie with me?" It turned out that during the team workout he had injured his shoulder, and by pulling on his coat Jefferson had made the injury worse.

If Burger sued Jefferson for battery, would he prevail?

- (a) Yes, because Burger was actually harmed;
- (b) Yes, because Jefferson was substantially certain the contact would be harmful or offensive;
- (c) No, because Jefferson did not intend to cause harm;
- (d) No, because Jefferson's contact would not be harmful or offensive to a person of ordinary sensibility.

2. Dr. Shaun Murphy, an OB-GYN, devoted most of his practice to delivering babies. When one of his patients, Sharon Sheridan, showed up at the hospital in labor, he was called to supervise the delivery. All the usual tests were done to monitor the progress of the baby, but as it got closer to the point where the birth was expected, the baby's heartbeat suddenly spiked, indicating that the baby was in distress. Murphy and his team did the best they could to effect a successful delivery, but despite their best efforts, the baby died. Sheridan was crying uncontrollably, and Murphy and Nurse Spreckel tried to calm her down. Murphy said, "You know, sometimes things like this just happen." Spreckel thought that Murphy wasn't being helpful, and so she signaled to him with a motion across her mouth, suggesting he should "zip it." Murphy reacted angrily, "You know, Spreckel, when you've delivered thousands of babies, like I have, I will listen to your advice. In the meantime, shut the *!@\$ up."

If Spreckel sued Murphy for the intentional infliction of emotional distress, what result?

- (a) Spreckel would win, because Murphy's conduct was outrageous;
- (b) Spreckel would win, but only if she could prove severe emotional distress;
- (c) Murphy would win, because Spreckel wasn't the one who had just lost a baby;
- (d) Murphy would win, so long as he didn't intend to cause emotional distress.

3. Ray Richards liked scary movies. One day he saw a local theater whose marquee said "Rocky Horror Picture Show." Ray couldn't recall having seen that one, so he checked the show times, and saw that the movie was about to start in 5 minutes. Ray bought a ticket, walked in and, to his surprise, discovered that there were lots of people in costumes who appeared to be ready for a party. As Ray sat down in an empty seat on the aisle, he was showered with rice that was being thrown by what appeared to be a man dressed in women's underwear. Not at all happy with the turn of events, Ray got up from his seat, and would have left the theater except for Joe and Carl, who were standing in the aisle blocking his path. Afraid that he would again be showered with rice, Ray elbowed his way past Joe. Joe lost his footing and fell, sustaining a bruise. If Joe sued Ray for battery, what result?

- (a) Joe would win, unless Ray's behavior was reasonable;
- (b) Joe would win, because Ray could have asked him to step aside rather than use physical

force;

- (c) Ray would win, even if it wasn't necessary to use force to protect himself;
- (d) Ray would win because Joe's injuries were not reasonably foreseeable.

4. Meredith was in a hurry to get to her job. She had to cross a busy street, and instead of waiting for the light to turn green, she jaywalked across the busy street. She had plenty of time to get across before oncoming traffic would reach her, but she dropped her keys and stopped to pick them up. By the time she retrieved her keys and stood back up, she saw a car barreling toward her. The car was driven by Wesley Washington, who was sick of people ignoring traffic rules. He deliberately waited until the last minute to slam on his brakes, and wound up barely missing Meredith, who jumped out of the way of the car. Meredith said, "You jerk!" Washington replied, "Next time I won't stop!"

If Meredith sued Washington for assault, what result?

- (a) Meredith would win, but only if she thought she was in imminent danger of a harmful or offensive contact;
- (b) Meredith would win because Washington threatened to repeat his conduct;
- (c) Washington would win, because Meredith was not actually touched;
- (d) Washington would win, if Meredith were unable to prove damage other than fright.

ESSAY QUESTIONS

QUESTION 1 (80 points)

West Hills Country Club ("WHCC") was a membership club for the residents of West Hill Estates, a large subdivision in Springfield, Everglade. The pool at WHCC was equipped with a 3 meter diving platform manufactured by Swimquip, installed in 2001. It contained a railing that was a single semi-circle bar that left a three-foot-high space between the board and the bar. In 2003 Swimquip changed the design of the railing to include a vertical bar bisecting the space between the board and the bar. Some parents had complained to WHCC about the potential danger from the open area in the railing, but when the management of WHCC looked up Swimquip on the Internet they were unable to find any evidence that Swimquip was still in business.

On March 24, 2023, James Nichols, aged 7, was spending the day, as he often did, with his friend Greg Griswold, aged 9. Greg's parents had a membership at WHCC, and each family member had an ID card to use at the entrance of the Club. Greg had a younger brother who often went with Greg to swim at the pool. Because James was not a member, Greg gave him his brother's ID card to use at the entrance. As they entered the country club, both boys held their ID card next to the card reader, which recorded both boys as being members. In the locker room the boys changed into their swimsuits and went to the pool.

James had never been on a diving platform but wanted to jump off. After he climbed up the ladder and walked out onto the diving platform, he slipped on the wet surface of the diving platform, slipped through the opening in the railing, and fell. He suffered serious injury.

Your firm has been hired by the Nichols family to bring a claim on James' behalf to recover compensation for his injuries. The medical bills alone for his injuries have totaled \$450,000; assume for purposes of analysis that his damages would be assessed at \$3,000,000. Please prepare an analysis of the prospects of recovering tort compensation for his injuries.

QUESTION 2 (50 points)

On June 12, 2024, Eve Marie Wildt took her son Thomas Wildt, 14 years old, to Oakland State Park, owned and operated by the State of Everglade, for an afternoon of swimming. On the same day Thomas's sister June also brought her son Frank, 10 years old, to Oakland State Park. Eve Marie Wildt paid the daily fee at the entrance to the State Park and found a parking spot within walking distance of the beach. Thomas and his mother carried a blanket and lawn chairs and found a spot on the beach near the swimming area. June and Frank arrived shortly thereafter and the two boys swam in the lake. At one point a lifeguard called all of the swimmers out of the lake, and Thomas decided to go to his mother's car to retrieve refreshments. While Thomas was closing up his mother's car, the lifeguard gave a signal that the swimmers could return to the lake. A stampede ensued, and Frank was either pushed into the water or fell into it, and did not resurface. As a result, when Thomas was walking back to the beach he heard people, including his mother and his sister, calling Frank's name and indicating that he was in trouble. In response, Thomas ran down the embankment from the parking lot, took two running steps, and dove to search for his nephew. Thomas assumed that Frank was in the area where people were congregating, standing waist deep in the water, but he chose to enter the water on a diagonal path where no one else was standing, and he assumed that the water depth was similar to the rest of the lake. However, the area where Thomas dove in was not nearly as deep and Thomas's head immediately struck the bottom, resulting in his suffering a broken neck. The area where Thomas dove in was within the area marked off by buoys for swimming.

Your firm has been asked to evaluate a potential claim against the State of Everglade. Assume that, based on a medical evaluation of Thomas's condition, a jury would assess his damages at \$2,00,000. Please evaluate the strengths and weaknesses of Thomas' tort claim against the State of Everglade.

EVERGLADE REVISED STATUTES**Title 34. Civil Law and Procedure****Article 13. Causes of Action. Claims Against the Government****Chapter 3. Tort Claims Against Governmental Entities and Public Employees****§ 34-13-3-1. Liability of the state and state agencies**

Subject to the limitations of §§ 34-13-3-2 and 34-13-3-3, the State of Everglade hereby permits the courts of this state to impose liability upon the State for tort claims under circumstances where a private person or entity would be liable to the claimant.

§ 34-13-3-2. Limitation on aggregate liability; punitive damages prohibited

(a) The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed:

(1) for injury to or death of one (1) person in any one (1) occurrence:

(A) three hundred thousand dollars (\$300,000) for a cause of action that accrues before January 1, 2006;

(B) five hundred thousand dollars (\$500,000) for a cause of action that accrues on or after January 1, 2006, and before January 1, 2008; or

(C) seven hundred thousand dollars (\$700,000) for a cause of action that accrues on or after January 1, 2008; and

(2) for injury to or death of all persons in that occurrence, five million dollars (\$5,000,000).

(b) A governmental entity or an employee of a governmental entity acting within the scope of employment is not liable for punitive damages.

§ 34-13-3.3. Immunity of governmental entity or employee

(a) A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

(1) The natural condition of unimproved property.

(2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.

(3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.

(4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.

(5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:

(A) a set of rules governing the use of the extreme sport area;

(B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and

(C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

(6) The initiation of a judicial or an administrative proceeding.

(7) The performance of a discretionary function; however, the provision of medical or optical care shall be considered as a ministerial act.

(8) The adoption and enforcement of or failure to adopt or enforce:

(A) a law (including rules and regulations); or

(B) in the case of a public school or charter school, a policy;

unless the act of enforcement constitutes false arrest or false imprisonment.

(9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid if the employee would not have been liable had the statute been valid.

(10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

(11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

(13) Entry upon any property where the entry is expressly or impliedly authorized by law.

(14) Misrepresentation if unintentional.

(15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.

(16) Injury to the property of a person under the jurisdiction and control of the department of

correction if the person has not exhausted the administrative remedies and procedures provided by this chapter.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is:

(A) on probation;

(B) assigned to an alcohol and drug services program, a minimum security release program, a pretrial conditional release program, or a community corrections program; or

(C) subject to a court order requiring the person to be escorted by a county police officer while on or in a government building owned by a county building authority, unless the injury is the result of an act or omission amounting to:

(i) gross negligence;

(ii) willful or wanton misconduct; or

(iii) intentional misconduct.

(18) Design of a highway, toll road project, tollway, or project if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a:

(A) discipline policy; or

(B) restraint and seclusion plan adopted.

(21) An act or omission performed in good faith under the apparent authority of a court order that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield unless:

(A) the loss is a result of reckless conduct; or

(B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(A) gross negligence;

(B) willful or wanton misconduct; or

(C) intentional misconduct.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain highways in a reasonably safe condition for the operation of motor vehicles licensed by the bureau of motor vehicles for operation on public highways.

(b) This subsection applies to a cause of action that accrues during a period of a state disaster emergency declared to respond to COVID-19, if the state of disaster emergency was declared after February 29, 2020, and before April 1, 2022. A governmental entity or an employee acting within the scope of the employee's employment is not liable for an act or omission arising from COVID-19 unless

the act or omission constitutes gross negligence, willful or wanton misconduct, or intentional misrepresentation.

Article 51. Damages

Chapter 2. Compensatory Damages: Comparative Fault

§ 34-51-2-3. Causation

In an action brought under this chapter, legal requirements of causal relation apply to:

- (1) fault as the basis for liability; and
- (2) contributory fault.

§ 34-51-2-5. Effect of contributory fault

In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 6 of this chapter.

§ 34-51-2-6. Barring of recovery; degree of contributory fault

(a) In an action based on fault that is brought against:

- (1) one (1) defendant; or
- (2) two (2) or more defendants who may be treated as a single party;

the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

(b) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

§ 34-51-2-8. Jury instructions; multiple defendants

(a) This section applies to an action based on fault that:

- (1) is brought against two (2) or more defendants; and
- (2) is tried to a jury.

(b) The court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The jury may not be informed of any immunity defense that might be available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property, tangible or intangible, regardless of whether the person was or could have been named as a party. The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the

total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each defendant (and such other defendants as are liable with the defendant by reason of their relationship to a defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

§ 34-51-2-10. Intentional torts; full recovery of damages from convicted defendant.

In the case of an intentional tort, the plaintiff may recover one hundred percent (100%) of the compensatory damages in a civil action for intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

§ 34-51-2-14. Nonparty defense; assertion

In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. This defense is referred to in this chapter as a nonparty defense.