

EXAM # _____

TORTS I
FALL 2006

PROFESSOR DEWOLF
December 5, 2006

FALL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM! This exam will last THREE HOURS. You should plan on spending AT LEAST 20 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.

Bluebook Users: DOUBLE-SPACE your answers in the bluebook. Make sure you write your exam number on the cover of each bluebook. Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc.

Examsoft Users: Follow the proctor's instructions.

You are welcome to use abbreviations, but indicate what they are, e.g., 'Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... !'

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

The exam covers the subjects covered in Chapters 1-3 of the casebook. Do not address any issues beyond that point, such as contributory fault, governmental liability, or other issues.

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

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

The exams will be COLLECTED but a copy will be posted on the web.

REMEMBER THE HONOR CODE! Don't identify yourself.

MERRY CHRISTMAS!!!

QUESTION 1 (50 points)

Philip Hoy owns Philip's Welding Services, Inc., which is located adjacent to his residence on the outskirts of Gilmore, Evergreen. Beginning in the fall of 2003, Hoy began experiencing problems with the septic system that serviced both his home and his business. The essence of the problem was that wastewater was not flowing from the septic tank into the drain field connected to the septic tank, apparently because the drain field was so saturated with water that it could not absorb wastewater from the septic system. Hoy hired an expert, Walter Mersch, to investigate the problems from his septic tank. Mersch concluded that excessive water from a nearby stock reservoir had raised the groundwater level in and around Hoy's property. The reservoir is located south and east of Hoy's property owned and operated by K.E. Miller. The reservoir is an on-channel reservoir filled by Little Rawhide Creek. Little Rawhide Creek flows generally south to north, through Miller's property and then through Hoy's property. Hoy's property is down gradient from the reservoir.

Little Rawhide Creek is a seasonal creek, usually drying up in the summer or fall. Miller's stock reservoir also historically dried up on occasion during the summer. In 2001, Miller had the reservoir reworked, primarily desilted, to improve its capacity to hold water. After the reservoir was reworked, the reservoir held water better and no longer dried up, even when Little Rawhide Creek dried up.

Mersch does not believe that the dam for the reservoir actually leaks. Instead, he concluded that water seeps through the bottom of the reservoir and runs down to Hoy's property, thereby creating a high groundwater problem for him. Mersch based his conclusion on a series of observations: 1) Hoy's property is down gradient from Miller's reservoir; 2) the bottom of the reservoir is comprised of porous sand; 3) more water goes into the reservoir than comes out of it; and 4) there is a correlation between high water levels in the reservoir and high groundwater levels at his property. Mersch summed up his investigation as follows: "Water flows downhill and it goes through porous sediments. That's all you need to know."

When confronted with this information, Miller sought advice from his own experts. He has found three experts who examined Mersch's report and criticize it for the following reasons: Mersch did not conduct a thorough enough investigation to allow for Mersch to conclude that there was any correlation between water in the reservoir and Hoy's high groundwater. Specifically, Mersch failed to adequately account for seasonal and annual groundwater level fluctuations, which could be as high as six feet; he ignored inspection reports from the Department of Environmental Quality relating to the Hoy property; and failed to conduct appropriate sub-surface testing. One of Miller's experts expert stated that Mersch's ultimate conclusion was based on "poor science." In addition, Miller's expert alleged that Hoy's property, as well as some of the surrounding property, had been subject to high groundwater conditions dating back to at least 1985.

You represent Hoy. Please advise him as to the potential tort remedies he might seek against Miller and the likelihood that he would be successful.

QUESTION 2 (85 points)

In 1998, Biesecker Road Commercial, Inc. ("BRC") acquired property located at 305 Biesecker Road in Lexington, North Carolina. The property contained a commercial building and an above-ground tank used to store gasoline. On 15 April, 2002 BRC leased the property to Basyooni. Basyooni operated a convenience store which marketed gasoline pumped from the tank located on the property.

When Basyooni leased the property, he also purchased the prior lessee's inventory. Basyooni also continued the prior lessee's consignment relationship with Pace Oil Co., Inc. ("Pace Oil").

Basyooni orally agreed to market gasoline owned and provided by Pace Oil to his customers. Pace Oil agreed to pay Basyooni one-cent for each gallon of gasoline sold. Pace Oil was solely responsible for servicing the gasoline pumps, the delivery apparatus, and supplying the gasoline.

On 31 May 2002, Roger Page, president of Pace Oil, decided to exchange winter gasoline stored in the tank with summer gasoline. John Morgan and Troy Taylor, employees of Pace Oil Co., traveled to the property and began transferring gasoline from and to the storage tank. The gasoline transfer was conducted solely by Morgan and Taylor with a pump owned by Pace Oil. Two hours after the transfer began, the gasoline ignited and a fire occurred. The exact cause of the fire is unknown. Taylor stated he saw gasoline spraying from the area near the pump when the fire began. Morgan also gave a similar statement. After Taylor and Morgan unsuccessfully attempted to extinguish the fire, a significant explosion occurred.

An ordinance in Evergreen provides as follows:

1. Automobile Service Stations shall be a permitted use in the B-2 Districts provided the following conditions are met:

(g) The Service Station shall have a minimum lot area of ten thousand (10,000) square feet, with frontage of not less than one hundred and fifty feet. No service station shall be located within two hundred (200) feet of any pre-existing school, playground, church, library or community center as measured from any point on the property.

It turns out that BRC's property is located within 200 feet of a church.

You represent Ronald Jackson and Kalesha Jackson. Kalesha's biological mother Nichole Cochran (Ronald's sister) was killed in the explosion. It turns out that Kalesha came to live with her uncle Ronald in 1997, when Nichole Cochran was having difficulty staying off drugs. Nichole's parental rights were terminated in 1999; Kalesha was adopted in 2000 by Ronald Jackson.

By a strange fortuity Ronald was coming (by himself) to visit his sister to see how she was doing. They had stopped at the convenience store to get a snack. Ronald was going to the restroom while Nichole was going outside to look for a pay phone from which to make a telephone call. She was close enough to the blast to suffer fatal injuries. Ronald rushed out after the explosion and tried to save his sister but was unsuccessful.

Please analyze Ronald and Kalesha's prospects for recovering tort compensation.

SELECTED STATUTES OF THE STATE OF EVERGREEN

ANNOTATED EVERGREEN CODES
CODE OF CIVIL PROCEDURE
PART 2. OF CIVIL ACTIONS
TITLE 3. OF THE PARTIES TO CIVIL ACTIONS
CHAPTER 4. EFFECT OF DEATH
ARTICLE 3. DECEDENT'S CAUSE OF ACTION

§ 377.10. Beneficiary of the decedent's estate

For the purposes of this chapter, "beneficiary of the decedent's estate" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under the decedent's will.

(b) If the decedent died without leaving a will, the sole person or all of the persons who succeed to a cause of action, or to a particular item of property that is the subject of a cause of action, under § Sections 6401 and § 6402 of the Probate Code or, if the law of a sister state or foreign nation governs succession to the cause of action or particular item of property, under the law of the sister state or foreign nation.

§ 377.11. Decedent's successor in interest

For the purposes of this chapter, "decedent's successor in interest" means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.

§ 377.20. Cause of action survives; limitations; loss or damage simultaneous with death

(a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

§ 377.30. Surviving cause of action; person to whom passes; commencement of action

A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.

§ 377.31. Pending action or proceeding; continuance

On motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest.

§ 377.34. Damages recoverable

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

§ 377.60. Persons with standing

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f)(1) For the purpose of this section, "domestic partner" means a person who, at the time of the decedent's death, was the domestic partner of the decedent in a registered domestic partnership established in accordance with subdivision (b) of Section 297 of the Family Code.

(2) Notwithstanding paragraph (1), for a death occurring prior to January 1, 2002, a person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of Section 297 of the Family Code, as it read pursuant to Section 3 of Chapter 893 of the Statutes of 2001, prior to its becoming inoperative on January 1, 2005.

§ 377.61. Damages recoverable

In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.