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TORTS I
FALL 2008

PROFESSOR DEWOLF
December 9, 2008

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 concepts and doctrines in Chapters 1-3 of the casebook. DO NOT address any issues beyond that point, such as contributory fault, governmental liability, etc.

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!!! HAPPY HOLIDAYS!!!

QUESTION 1 (85 points)

Darrin Dickson, aged 35, and Brian Boeckel, aged 22, were employed as by Creative Office Solutions, a company that sold office equipment and related services to small businesses in Evergreen and neighboring states. While calling on customers and prospective customers in Springfield, Evergreen, Dickson and Boeckel stayed at Custer's Inn in Springfield, Evergreen.

On August 2, 2007, Boeckel left their motel room shortly after 2:00 p.m. to go swimming at the motel's pool. Dickson remained in the room making business phone calls. At approximately 2:40 p.m. Dickson left the room to join Boeckel at the pool. At first, he was unable to locate Boeckel, and called for and looked for him around the pool area and in the bathrooms adjacent to the pool. He observed Boeckel's clothing, shoes, glasses, and a towel located near the pool. He then discovered Boeckel face down at the bottom of the deep end, which was between seven and nine feet deep.

Dickson grabbed a nearby "shepherd's crook," a rescue device located near the pool, and managed to pull Boeckel from the water onto the edge of the pool. At that time Dickson observed that Boeckel's face was blue. Dickson did not observe any physical signs that Boeckel was alive. Dickson rushed to the front desk and a motel employee summoned emergency assistance at 2:48 p.m. Also at that time, the front desk clerk attempted to connect the 9-1-1 line to a pool-side phone so that a 9-1-1 dispatcher could give Dickson instructions on how to perform CPR. The clerk was unable to make this connection. No employee of Custer's Inn on duty that day was certified in CPR.

Emergency personnel arrived at 2:51 p.m., and attempted to resuscitate Boeckel, who showed no pulse or signs of breathing. Monitors showed no signs of any life-sustaining heart activity. Boeckel was taken to an emergency room in Springfield by ambulance, and arrived at 2:59 p.m. There, emergency room personnel continued to attempt resuscitation. No life-sustaining signs were detected. Brian Boeckel was pronounced dead at the hospital at 3:35 p.m.

The insurance company representing Custer's Inn has hired your law firm to represent Custer's Inn, and the senior partner in the firm has asked for your analysis and evaluation of the potential claims against Custer's Inn. Here is some additional information supplied by an investigator:

(1) No one knows precisely how Brian Boeckel initially got into distress in the pool, how he drowned, and how long he was at the bottom of the pool. The evidence shows that Boeckel had eaten prior to swimming; that he had poor eyesight and had removed his glasses prior to entering the pool, and that he was not a good swimmer. Boeckel suffered no injury to his head or neck from diving into the pool. Expert testimony also indicates that a person can drown in approximately three to five minutes, and that irreversible brain damage occurs within ten minutes or less of underwater submersion. Evidence also indicates that Boeckel's body temperature was similar to the pool temperature.

(2) Boeckel is survived by his mother, Janice Renville, who has been appointed the personal representative of Boeckel's estate. Boeckel was her only child. Renville learned of her son's death when a sheriff arrived at her home in the late afternoon of August 2, 2007, and notified her that Boeckel had drowned. The sheriff took Renville to the hospital, where she reacted very emotionally. She began to scream and her body shook. She was admitted to the hospital and was given tranquilizing medicine for several days. For six months after Boeckel's death, she had no interest in her home and suffered repeated crying spells.

QUESTION 2 (50 points)

Daniel Pivarnik owned a 117 acre farm in Porter County, Evergreen, which he purchased from his father. The farm included an easement in favor of the North Evergreen Public Service Company ("NEPSCO"), granting NEPSCO a "right-of-way to lay, install, maintain, operate, repair,

replace, and renew gas mains, and a line or lines of pipe for the transportation ... of gas ... in, upon, along and over a strip of land ... three (3) rods wide." NEPSCO had installed a sixteen-inch buried natural gas main along its easement.

Sometime in 2006, a biologist began working with Pivarnik to develop a wetland restoration project with the U.S. Fish and Wildlife Service (the Agency). Pivarnik arranged to have a twenty-acre portion of the farm developed for wetlands in exchange for certain tax benefits and the government's payment of \$3,000 for improvements to the property.

On Friday, April 17, 2006, the biologist, who was acting on the Agency's behalf, telephoned NEPSCO's "800" number to learn of utility locations on Pivarnik's farm. In response to the request, a NEPSCO gas pipeline locator went to the Pivarnik farm where he placed a row of yellow flags over NEPSCO's active gas transmission line, which was situated near the water. As no one was home at the time, the locator assumed that the excavation was going to occur at that location. The NEPSCO employee also discovered an inactive ten foot pipe farther away from the pond. At the time, the locator did not know that there were actually four NEPSCO pipelines buried on the property.

Several days later, Pivarnik telephoned the "800" number to also request utility locales for the project. The operator at NEPSCO informed him that the line had already been marked and instructed him to drive along the property to check for the flag markings. Thereafter, Pivarnik discovered the single row of flags that had been placed by the NEPSCO employee.

In late July, 2006, Pivarnik met with Dave Van Keppel, an excavating contractor. Additionally, Robert Cauffman, a conservation officer with the Department Of Natural Resources, and friend of Pivarnik's, walked the project area to assess the scope of the bulldozing work to be performed. As they examined the flag row that NEPSCO had marked, Pivarnik admonished Van Keppel not to bulldoze the area where the pipe was buried.

On August 2, 2006, Andy Systma, an employee of Van Keppel's, met Cauffman at the farm at approximately 10:00 a.m., with a bulldozer and backhoe. Cauffman had been earning extra compensation by assisting Pivarnik build a deck at the farm during his off-duty hours. Cauffman briefed Systma on the work that was to be performed, and specifically pointed to the gas line markings that were to be avoided. Cauffman informed Systma that he had prior experience operating heavy equipment, including bulldozers. Thus, Cauffman agreed to assist Systma by operating the bulldozer to push the piles of trees that had been pulled from the ground so that Systma would not have to alternate between machines. As the project commenced, Cauffman made three or four passes through the area with the bulldozer. At one point, however, he struck the sixteen-inch, high pressure gas line, which was covered by approximately six to eight inches of soil. As a result of the impact, Cauffman and the bulldozer immediately became engulfed in flames. Systma assisted Cauffman and drove him back to Pivarnik's home until the paramedics arrived.

The Porter Township Fire Department responded to the explosion, where two members of the department recalled seeing one row of yellow flags on the property. When department personnel returned the following day, however, the firefighters observed a second row of flags that had not been there the day before. Moreover, they observed that the row of flags had been moved to correspond with the location of the gas line that had been ruptured. Additionally, the original row of flags that had been at the scene since April had been removed. NEPSCO personnel had also arrived shortly after the explosion to isolate the gas valves on either side of the inferno. Two employees who typically located and marked gas lines on a daily basis remained at the scene.

On the morning after the fire, Van Keppel and Systma visited the accident site to take videos and photographs. Upon their arrival, both men noticed that the flags had been moved to the edge of the pond. They also observed that a new row of flags had been added marking the active gas transmission line which the bulldozer had struck. Van Keppel and Systma proceeded to locate a second pipe buried only four inches underground, and it was subsequently discovered that the bulldozer did not hit the gas transmission line that had been marked by the original row of flags. Systma eventually uncovered a total of four underground NEPSCO pipelines.

Cauffman was in the hospital for 29 days, and has had numerous skin grafts. He has approached your law firm seeking an evaluation of his prospects for recovery against NEPSCO. Another associate in the law firm has determined that Cauffman's compensatory damages, if liability were established, would be approximately \$500,000. Please evaluate Cauffman's prospects for a tort recovery from NEPSCO.

SELECTED STATUTES OF THE STATE OF EVERGREEN

ANNOTATED EVERGREEN CODES

TITLE 25. CIVIL PROCEDURE

CHAPTER 9. JUDGMENT

PART 4. PERIODIC PAYMENT OF DAMAGES -- MEDICAL MALPRACTICE DAMAGE LIMITATIONS

§ 25-9-402. Findings by trier of fact -- civil actions

In any action for personal injury, property damage, or wrongful death where liability is found after trial and in which \$100,000 or more in future damages is awarded to the claimant, the trier of fact shall make a separate finding as to the amount of any future damages so awarded and state whether the amount of future damages has been reduced to present value.

§ 25-9-403. Request for periodic payment of future damages -- nonmalpractice claims

(1) A party to an action for personal injury, property damage, or wrongful death in which \$100,000 or more of future damages is awarded may, prior to the entry of judgment, request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. Upon a request, the court may enter an order for periodic payment of future damages if the court finds that periodic payment is in the best interests of the claimant. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future damages without a reduction to present value.

(2) A court ordering the payment of future damages by periodic payments shall make specific findings as to the dollar amount of periodic payments needed to compensate the judgment creditor for future damages and as to whether an order for periodic payment of future damages is in the best interests of the claimant.

(3) The judgment order must specify the recipient or recipients of periodic payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments must be made.

(4) A court ordering periodic payment of future damages shall order that the payments be made, during the life of the judgment creditor or during the continuance of the compensable injury or disability of the judgment creditor, through the purchase of an inflation-indexed annuity approved by the court. The annuity must be in the form of an inflation-indexed annuity contract purchased from a qualified insurer that, in the most recent edition of A.M. Best, has an "A" (excellent) or higher rating and is in a class 7 or higher classification. The annuity also serves as any required supersedeas bond. Upon purchase of a court-approved annuity, the court may order that the judgment is satisfied and that the judgment debtor is discharged. If the judgment creditor dies before all periodic payments have been made, the remaining payments become the property of the creditor's estate.

TITLE 27. CIVIL LIABILITY, REMEDIES, AND LIMITATIONS
CHAPTER 1. AVAILABILITY OF REMEDIES -- LIABILITY
PART 3. MEASURE OF DAMAGES

§ 27-1-323. Wrongful death

In every action under § 27-1-513, such damages may be given as under all the circumstances of the case may be just.

PART 5. RIGHT TO BRING ACTION OR ASSERT DEFENSE

§ 27-1-501. Survival of cause of action or defense -- death or disability or transfer of interest

(1) An action, cause of action, or defense does not abate because of the death or disability of a party or the transfer of any interest therein, but whenever the cause of action or defense arose in favor of such party prior to his death or disability or transfer of interest therein, it survives and may be maintained by his representatives or successors in interest. If the action has not been begun or defense interposed, the action may be begun or defense interposed in the name of his representatives or successors in interest.

(2) Actions brought under this section and § 27-1-513 must be combined in one legal action, and any element of damages may be recovered only once.

§ 27-1-513. Action for wrongful death

When injuries to and the death of one person are caused by the wrongful act or neglect of another, the personal representative of the decedent's estate may maintain an action for damages against the person causing the death or, if such person be employed by another person who is responsible for his conduct, then also against such other person.

TITLE 50. HEALTH AND SAFETY
CHAPTER 53. PUBLIC SWIMMING POOLS AND SWIMMING AREAS
PART 1. GENERAL PROVISIONS

§ 50-53-107. Pool operation to be sanitary, healthful, and safe—when lifeguard not required

(1) Public swimming pools and public bathing places, including pool structures, methods of operation, source of water supply, methods of water purification, lifesaving apparatus, safety measures for bathers, and personal cleanliness measures for bathers, must be sanitary, healthful, and safe.

(2) A lifeguard is not required for a privately owned public swimming pool if:

- (a) a sign is prominently displayed on the swimming pool premises with the words "No lifeguard is on duty" or words of substantially the same meaning; and
- (b) one individual per shift is on the premises, accessible to the pool, and currently certified as competent in cardiopulmonary resuscitation by either the American Red Cross or the American Heart Association.

(3) Tourist homes providing spa facilities to their guests shall prominently display a sign on the spa premises with the words "No lifeguard is on duty" or words of substantially the same meaning. Tourist homes providing spa facilities to their guests are exempt from the requirements of subsection (2)(b).

§ 50-53-108. Unauthorized construction or operation a public nuisance

The construction or operation of a public swimming pool or public bathing place contrary to the provisions of this chapter or rules adopted by the department under the provisions of this chapter is a public nuisance and dangerous to public health and safety.