

Exam # _____

Professor DeWolf
Torts

Fall 2015
October 21, 2015

MID-TERM EXAM

Instructions

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

FOLLOW the instructions of the proctor for initiating the ExamSoft software. If you are using a BLUEBOOK instead of ExamSoft, be sure that you have written your MIDTERM exam number on the bluebook(s) and that you are otherwise ready to begin.

This exam will last 70 minutes. Plan on spending at least 5 MINUTES reading the question and outlining your answer. REREAD the question to be sure you haven't missed anything.

Please discuss only the kinds of issues that would be raised as a result of what you have learned through the first section of Chapter 3(B)(1) (*i.e.*, up to page 164). Please **OMIT** from your analysis any discussion of issues that are covered beyond that point; DO NOT discuss, for example, governmental immunity, multi-party liability, comparative fault, product liability, premises liability, medical malpractice, or any other issue beyond those that we have already covered in class.

The events described in this question occur in the hypothetical state of Evergreen. Please apply any statutes from the state of Evergreen that are supplied with the question.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, "Andropov (A) would sue Brezhnev (B). B would be liable to A if"

Plan on spending at least 5 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

REMEMBER THE HONOR CODE: DO NOT IDENTIFY YOURSELF

GOOD LUCK!

Question

Hemlock Construction, Inc. was a homebuilding contractor in Springfield, Evergreen. Robert Spencer contracted with Hemlock to remodel a 7,000 square foot home; the home had previously been owned by Spencer's mother; when she died, Spencer inherited the home, but before occupying the home he wanted Hemlock to perform substantial renovation.

Construction commenced and was near completion when the home caught fire and was engulfed on October 31, 2014. The fire resulted in the total loss of the home except for the foundation. The home included an attached garage and an exterior deck, which structures were located in close proximity to one another. A steep incline was located behind the house. Two video surveillance cameras positioned on a neighbor's adjoining property recorded footage of activity in portions of the home's backyard. At the time of the fire, one of the few remaining construction tasks was the staining of the wood floors throughout the home.

Sometime prior to the fire loss, Spencer had begun moving his personal property into the home. To facilitate the process, Spencer retained a key for access. Although Spencer had visited the home the day before the fire, he was out of state on the day of the catastrophe. Various subcontractors had been working at the home on the date of the fire, including Julian Luu, who was finishing the staining of the hardwood floors. Mr. Luu completed his work and was the last to leave the property at roughly 6:10 p.m. According to the video surveillance footage, the fire began at 7:50 p.m. The back door of the garage was subsequently blown off by an explosion at 7:58 p.m. The explosion caused the death of Margaret Peters, who was walking her dog just as the explosion occurred.

Margaret Peters was survived by her husband Jim and their two children, Francie and Benjamin, who were 8 and 6 respectively.

Jim Peters has come to your office to ask about the likelihood that he would be able to recover tort compensation from Hemlock Construction. In the course of your investigation, you have learned that Hemlock has accused Flooring Subcontractors of allowing flammable rags to remain on or near the exterior deck and also smoked cigarettes in the area. Hemlock employees also claim that numerous workmen, including Mr. Luu, smoked cigarettes repeatedly on the job site and that problems had arisen from the improper disposal of cigarette butts prior to the time of the fire. Several witnesses testified that they often observed the workmen smoking in the backyard. Although no work rags survived the fire, Spencer states that buckets containing staining rags and cigarette butts had been improperly placed in a dumpster on the property and were discovered by him sometime following the fire.

Please provide your analysis of Jim's prospects for recovery.

SELECTED STATUTES OF THE STATE OF EVERGREEN

Title 20. Remedies; Special Actions and Proceedings

§ 20-5-103. Survival of actions; tortfeasors; death

(a) In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is

instituted to recover damages, the death of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against the personal representative of the tortfeasor or wrongdoer.

(b) The common law rule abating such actions upon the death of the wrongdoer and before suit is commenced is abrogated.

(c) This section shall not apply to actions for wrongs affecting the character of the plaintiff.

§ 20-5-106. Wrongful death; beneficiaries

(a) The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; to the person's personal representative, for the benefit of the person's surviving spouse or next of kin; to the person's natural parents or parent or next of kin if at the time of death decedent was in the custody of the natural parents or parent and had not been legally surrendered or abandoned by them pursuant to any court order removing such person from the custody of such parents or parent; or otherwise to the person's legally adoptive parents or parent, or to the administrator for the use and benefit of the adoptive parents or parent; the funds recovered in either case to be free from the claims of creditors.

(b) In any case involving a beneficiary who is a minor or who is legally incompetent, if the court finds it is in the best interest of the beneficiary, the court in its discretion may authorize all or any portion of the funds recovered for the beneficiary to be added to any trust or trusts established for the benefit of the beneficiary, wherever situated, whether the trust was created by the person whose death was caused by the wrongful action or omission or by any other person. The funds recovered shall be for the benefit of the beneficiary and shall be free from the claims of creditors.

(c)(1) Notwithstanding any other law to the contrary, the right to institute and the right to collect any proceeds from a wrongful death action granted by this section to a surviving spouse shall be waived, if the children or next of kin establish the surviving spouse has abandoned the deceased spouse or otherwise willfully withdrawn for a period of two (2) years.

(2) If the period of two (2) years has passed since the time of abandonment or willful withdrawal, then there is created a rebuttable presumption that the surviving spouse abandoned the deceased spouse for purposes of this section.

(3) In an action under this section, the child or next of kin shall serve the surviving spouse with process as provided in the rules of civil procedure or by constructive service as may otherwise be provided by law.

(d) As used in this section, "person" includes a fetus that was viable at the time of injury. A fetus shall be considered viable if it had achieved a stage of development wherein it could reasonably be expected to be capable of living outside the uterus.

§ 20-5-107. Wrongful death; parties instituting action

(a) The action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin; also, without the consent of the personal representative, either may use the personal representative's name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless the personal representative

signs the prosecution bond in an individual capacity.

(b) In no event shall a parent be permitted to recover through an action commenced pursuant to subsection (a) until all child support arrearages, together with interest on the child support arrearages, at the legal rate of interest computed from the date each payment was due, have been paid in full to the parent ordered to receive the support or to the parent's estate if deceased.

(c) Notwithstanding any law to the contrary, a parent who has intentionally refused or neglected to pay any support for a child for a two-year period, or for the life of the child, whichever is less, when subject to a court order requiring the payment of child support and who has intentionally refused or neglected to contact the child or exercise visitation during such period, shall not be permitted to recover through an action commenced pursuant to subsection (a) and § 20-5-106.

(d) Nothing in this section shall be construed to prevent the institution of an action by a child with respect to the death of a parent.

(e)(1) Notwithstanding any other law to the contrary, the right to institute and the right to collect any proceeds from a wrongful death action granted by this section to a surviving spouse shall be waived, if the children or next of kin establish the surviving spouse has abandoned the deceased spouse or otherwise willfully withdrawn for a period of two (2) years.

(2) If the period of two (2) years has passed since the time of abandonment or willful withdrawal then there is created a rebuttable presumption that the surviving spouse abandoned the deceased spouse for purposes of this section.

(3) In an action under this section, the child or next of kin shall serve the surviving spouse with process as provided in the Evergreen Rules of Civil Procedure or by constructive service as may otherwise be provided by law.

(4) In no event shall any action for wrongful death abate, or the statute of limitations bar, an action solely as a result of a finding the surviving spouse's rights are waived. Instead the court shall substitute the proper party.

§ 20-5-113. Wrongful death; damages

Where a person's death is caused by the wrongful act, fault or omission of another and suit is brought for damages, as provided for by §§ 20-5-106 and 20-5-107, the party suing shall, if entitled to damages, have the right to recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.