

MID-TERM EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS. THIS IS A CLOSED BOOK EXAM!

While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER and "TORTS—FALL '91—MIDTERM EXAM" on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

IMPORTANT: 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.

DOUBLE-SPACE your answers in the 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. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

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 ... '!

In answering the questions, please DO NOT DISCUSS ANY of the following ISSUES:

- Contributory negligence on the part of any plaintiff;
- Comparative fault as between defendants;
- Claims against governmental bodies;
- Any affirmative claims or defenses that would be raised by any defendant.

In other words, you should concentrate on the evaluation of the *prima facie* case that would be presented by your client(s) (if you represent plaintiff(s)) or against your client(s) (if you represent the defendant(s)).

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 Cumulus, 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.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

HAPPY HOLIDAYS—GOOD LUCK!!!

QUESTION 1 (65 points)

Michael Midyette owned approximately 28 acres of land in rural Platte County. The eastern boundary of his property bordered a fenced right-of-way owned by the State of Cumulus along Interstate 715, one of the state's most heavily traveled highways. Midyette wanted the land cleared, and hired Richard Reaves to do so. The contract between Midyette and Reaves specified a fee and a completion date. However, Midyette provided no tools, equipment, or labor. After securing a burn permit as required by law, Reaves began clearing the land on December 10, 1990, creating several piles of brush and small trees ("slash"), which were set on fire. When he left the job site that evening several piles of slash were still smoldering.

Early the following day, Larry Lentil and Graham Greene were traveling in separate cars north on Interstate 715. Patches of fog occasionally obscured visibility, but the traffic, rather heavy, was moving at a normal pace. When they reached Mile 214, however, visibility worsened considerably. Lentil thought he saw brake lights in front of him, and applied his brakes, decelerating rapidly. Greene swerved to avoid Lentil and struck a guard rail. Greene suffered a severe hip fracture and multiple bruises to his face, chest and abdomen. After four weeks in the hospital and a five-month convalescence at home, Greene has finally returned to work. He saw an ad in the yellow pages and is now represented by a lawyer who has written your firm a letter suggesting a meeting to discuss possible settlement of the case. Your firm has been hired by the Good Learned Hands Insurance Company (GLHIC) to represent Midyette. In your review of the information contained in the file you learn the following things:

- (1) At the accident scene there was fog, but several witnesses stated to a state police officer investigating the accident that visibility was further reduced by haze from the burning slash, and there was also a strong smell of smoke in the air.
- (2) While Greene was at home recuperating, his wife Julie went to see Dr. Downey. Dr. Downey took some x-rays and believes that she is afflicted with a rare form of cancer; her prognosis is that she will probably live another two years. Prior to the injury one of their favorite activities was walking along the beach; but Graham's hip pain now makes that impossible.

GLHIC would like an assessment as to whether Midyette faces any exposure, and if so, how much. Please write a memo to be used as the background for preliminary discussions with Greene's lawyer.

QUESTION 2 (70 points)

On February 5, 1990 a man and a woman approached the reservation counter at Hirt's Rent-a-Car and stated that they wanted to rent a car. The woman presented Hirt's with a Visa credit card issued in the name of Pat Perry. The man presented a driver's license issued to Owen Olsen. The reservations clerk for Hirt's, following established company policy, entered Olsen's driver's license

number, the expiration date, the issuing state, and Olsen's age on the additional authorized operator attachment of the rental agreement. They were also entered on the front of the Hirt's rental agreement. However, no separate driver's license information was written on the rental agreement for the woman identifying herself as Pat Perry. Before relinquishing possession of the vehicle, Hirt's ran a credit check on the Visa card presented. Upon receipt of a favorable credit check, Hirt's released the vehicle to Olsen and his companion.

On February 17, 1990 the Metro-Orange Police informed Hirt's that the vehicle had been fraudulently leased with a stolen credit card and that the woman who gave her name as Pat Perry was an imposter. Thereafter, on February 26 Hirt's sent certified letters¹ to both renters demanding the return of the automobile. On March 31, 1990 both letters were returned to Hirt's as undeliverable. On April 5, 1990, Hirt's reported the vehicle as stolen to the police.

Eleven days after the theft was reported, on April 16, 1990, the car, driven by Christopher Cross, an alleged participant in the fraud, struck and killed Junior Jackson. Junior was riding his bicycle home from his job at Park'n'Shop, where he worked as the assistant to the produce manager. Junior was survived by his mother, Visalia Jackson. Junior didn't support Visalia economically, but he was an important source of emotional support since there were no other members of their immediate family. Visalia has scheduled an appointment at your office to seek advice as to what sorts of remedies she might have against Hirt's for her son's death. What would you tell her?

CUMULUS STATUTES ANNOTATED (SELECTED SECTIONS)

TITLE XXIII. MOTOR VEHICLES CHAPTER 322. DRIVERS' LICENSES

§ 322.38. Renting motor vehicle to another

- (1) No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed, or if a nonresident he shall be licensed under the laws of the state or country of his residence, except a nonresident whose home state or country does not require that an operator be licensed.
- (2) No person shall rent a motor vehicle to another until he has inspected the operator's or chauffeur's license of the person to whom the vehicle is to be rented, and compared and verified the signature thereon with the signature of such person written in his presence.
- (3) Every person renting a motor vehicle to another shall keep a record of the registration number of the motor vehicle so rented, the name and address of the person to whom the vehicle is rented, the number of the license of said latter person, and the date and place when

¹The Metro-Orange Police Department Auto Theft Division requires that rental companies send a certified letter to the renter of each vehicle before any vehicle can be reported as stolen.

and where the said license was issued. Such record shall be open to inspection by any police officer, or officer or employee of the department.

TITLE XLV. TORTS
CHAPTER 768. NEGLIGENCE
PART I. NEGLIGENCE; GENERAL PROVISIONS

§ 768.043. Remittitur and additur actions arising out of operation of motor vehicles

- (1) In any action for the recovery of damages based on personal injury or wrongful death arising out of the operation of a motor vehicle, whether in tort or in contract, wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is clearly excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact. If the court finds that the amount awarded is clearly excessive or inadequate, it shall order a remittitur or additur, as the case may be. If the party adversely affected by such remittitur or additur does not agree, the court shall order a new trial in the cause on the issue of damages only.
- (2) In determining whether an award is clearly excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
 - (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact.
 - (b) Whether it clearly appears that the trier of fact ignored the evidence in reaching the verdict or misconceived the merits of the case relating to the amounts of damages recoverable.
 - (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation or conjecture.
 - (d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered.
 - (e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.
- (3) It is the intent of the Legislature to vest the trial courts of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact, in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a jury are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified only with caution and discretion. However, it is further recognized that a review by the courts in accordance with the standards set forth in this section provides an additional element of soundness and logic to our judicial system and is in the best interests of the citizens of Cumulus.

§ 768.16. Wrongful Death Act

Sections 768.16-768.27 may be cited as the "Cumulus Wrongful Death Act."

§ 768.17. Legislative intent

It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-768.27 are remedial and shall be liberally construed.

§ 768.18. Definitions

As used in §§ 768.16-768.27:

- (1) "Survivors" means the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.
- (2) "Minor children" means children under 25 years of age, notwithstanding the age of majority.
- (3) "Support" includes contributions in kind as well as money.
- (4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.
- (5) "Net accumulations" means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. "Net business or salary income" is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind.

§ 768.19. Right of action

When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

§ 768.20. Parties

The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if he were the plaintiff may be asserted against him, but shall not affect the recovery of any other survivor.

§ 768.21. Damages

All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

- (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.
- (2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.
- (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.
- (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.
- (5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.
- (6) The decedent's personal representative may recover for the decedent's estate the following:
 - (a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:
 1. If the decedent's survivors include a surviving spouse or lineal descendants;
or
 2. If the decedent is not a minor child as defined in § 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.
 - (b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).
 - (c) Evidence of remarriage of the decedent's spouse is admissible.
- (7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.
- (8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice.

§ 768.24. Death of a survivor before judgment

A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

TITLE XXXV. AGRICULTURE, HORTICULTURE, AND ANIMAL INDUSTRY
CHAPTER 590. FOREST PROTECTION

§ 590.026. Prescribed burning; requirements; liability

- (1) Short title.—This section may be cited as the "Cumulus Prescribed Burning Act."
- (2) Legislative findings and purpose.—
 - (a) The application of prescribed burning is a land management tool that benefits the safety of the public, the environment, and the economy of Cumulus.
 - (b) It is the purpose of this section to authorize and promote the continued use of prescribed burning for ecological, silvicultural, wildlife management, and range management purposes.
- (3) Rules.—The Division of Forestry of the Department of Agriculture and Consumer Services shall promulgate rules for the use of prescribed burning.
- (4) Requirements; liability.—
 - (a) Prescribed burning conducted under the provisions of this section shall:
 1. Be accomplished only when at least one certified prescribed burn manager is present on site while the burn is being conducted.
 2. Require that a written prescription be prepared prior to receiving authorization to burn from the Division of Forestry.
 3. Be considered in the public interest and shall not constitute a public or private nuisance when conducted pursuant to state air pollution statutes and rules applicable to prescribed burning.
 4. Be considered a property right of the property owner if naturally occurring vegetative fuels are used and when conducted pursuant to the requirements of this subsection.
 - (b) No property owner or his agent, conducting a prescribed burn pursuant to the requirements of this subsection, shall be liable for damage or injury caused by fire or resulting smoke, unless negligence is proven.