

FINAL 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 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 ... '!

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

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 Commonwealth of Arcadia, 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!

GOOD LUCK!!!

QUESTION 1 (55 points)

On July 10, 1995, Timothy Benjamin, then age 15, was swimming with three other persons at a pool located in an apartment complex owned by Deffet Rentals, Inc. ("DRI"). Eventually, Benjamin and a friend began jumping and diving off a seven-foot plastic sliding board located at the deepest end of the pool, where the water level was from five to five-and-a-half feet deep. Michael Fleisher, the resident manager of the pool, had recently replaced the sliding board after it had been in storage for two years. (The board was originally supplied with the pool, but some adult residents had complained that the pool had been monopolized by raucus children and so the board was removed.)

Benjamin initially jumped off the platform at the top of the sliding board. He, thereafter, successfully executed a dive into the pool. However, in attempting a third dive, Benjamin's feet slipped as he pushed off the slide platform. Because of this, he inadvertently propelled himself into the pool at an acute vertical angle. His head struck the bottom of the pool, breaking his neck. Benjamin is now a quadriplegic, paralyzed from the chest down.

Benjamin was an experienced swimmer, having had two or three years of swimming lessons. He had also had prior diving experience, and had even dived off similar slides before. He knew the approximate depth of the water and height of the slide platform. Having successfully negotiated one dive, Benjamin knew that he had to enter the water on a somewhat horizontal plane to avoid hitting the bottom of the pool. In response to the question of whether a vertical dive could cause him to hit bottom, Benjamin admitted, "[y]es, that dive, I knew if I went in completely wrong, I would have to get hurt, yes."

Benjamin claims that he was not aware of how slippery the plastic surface of the sliding board was. In response to a question as to what he slipped on, Benjamin stated, "[o]n the top of the slide, just slipped. My feet slipped and I didn't get a good push off." An expert witness consulted on the design of pool slides has stated that the smooth fiberglass surface of the typical pool slide is desirable because of the ease of maintenance of a smooth surface, which will attract less dirt and residue. Also, the primary use of the slide is to sit on the slide and then push off. The slippery surface facilitates sliding down in one smooth motion. However, the expert also noted that some designers suggested the use of a non-slip surface (similar to what is used on stairs or other surfaces) at the top of the slide, where the diver climbs from the ladder onto the slide. The disadvantage is that the rough surface would potentially scratch the skin of the diver or the nylon bathing suits that most swimmers wear.

You have been asked by Benjamin's guardian ad litem whether Benjamin can recover compensation for his injuries. Please prepare a report containing your analysis.

QUESTION 2 (80 points)

On the evening of July 25, 1994, Matt Morgan was playing cards with his parents, Jerry and Marlene Morgan, and sister, Marla Morgan. Matt excused himself from the table, went upstairs, and obtained a gun. He came back downstairs and shot and killed his parents and seriously injured his sister. During the previous year, Matt had been examined by or received counseling from various mental health professionals who were either employed by or served as consultants to the Columbia Family Counseling Center ("CFCC"), a mental health clinic operated by the State Department of Social and Health Services.

During his senior year of high school, Matt began to have difficulties at school, work, and home. His grades and attendance at school had fallen, and he was required to attend summer school. He had problems keeping jobs, and became disrespectful and verbally abusive toward his parents,

to the point where his parents had grown afraid of him. These problems continued after high school until January 1993, when Matt was removed from his parents' home in Lancaster, Columbia, by police after wanting to fight his father.

Matt then drifted, homeless, until he presented himself at the Emergency Room at Columbia State University Hospital in Lincoln City, Columbia, on March 26, 1993. There, he was diagnosed as suffering from schizophreniform disorder and transported to C.A.T.C.H. Emergency Evaluation Center ("EEC"), a mental health facility operated by the State of Columbia. Matt was further evaluated at C.A.T.C.H. EEC between March 26, 1993 and March 29, 1993. It was noted that Matt had "recent drifting, travel and homelessness," and "[n]eeded to be put out of [his] parents' home by police." Various symptoms were noted suggestive of either schizophreniform disorder or schizophrenia, including Matt's belief that the government was affecting his body and the air waves, such that he was unable to watch television or listen to tapes or the radio, delusions of persecution and ideas of reference and thought broadcasting. Matt was prescribed Navane, an antipsychotic or neuroleptic drug, and on March 29, 1993, was admitted to the C.A.T.C.H. Respite.

At the C.A.T.C.H. Respite, Matt came under the care of Miles C. Ladenheim, M.D., who, at that time, was in his third year of psychiatric residency. Dr. Ladenheim first saw Matt on April 2, 1993, at which time he rendered a primary diagnosis of "schizophreniform disorder, rule out schizophrenia, chronic paranoid type." The essential features of schizophreniform disorder are identical to those of schizophrenia, with the exception that the duration is less than six months. Once the signs and symptoms persist for a continuous period of six months, the diagnosis becomes schizophrenia. Schizophrenia is an inability to recognize reality in some way, marked by delusions and perceptual distortions. There is no cure for schizophrenia, but the symptoms can be controlled by medication such as Navane. It was Dr. Ladenheim's opinion that "it was only going to be a matter of time before the six-month period elapsed, and he [Matt] would likely then have schizophrenia."

Dr. Ladenheim determined that Matt had developed a fixed paranoid delusional system involving his family, the government, unspecified industry and others, including the delusion that he had a "big lawsuit case in both Columbia and Florida, suing his family, aunts, uncles, and some other people," and somatic delusions regarding his legs. Dr. Ladenheim also noted that Matt had an unformed paranoid ideation, ideas of reference from the television and feelings of thought control by others. He noted that Matt also "had feelings of thought manipulation, meaning his thoughts were being manipulated by outside forces or people, and thought withdrawal, meaning that people were able to take thoughts out of his head, and thought reading, meaning that people were able to read his thoughts." Dr. Ladenheim also made a note on April 30, 1993, that prior to leaving Columbia, Matt was becoming increasingly agitated at home and was put out of his parents' home after threatening them.

Matt's art therapist at the Respite noted that Matt had an increased feeling of stress when feelings of anger were discussed. After referring to a particular example of anger in a drawing of a gun made by Matt on or about April 20, 1993, she stated that "[t]his, coupled with aggressive line quality, indicates possible anger toward self and others."

During his twelve-week admission at the Respite, Matt was treated with intensive therapy, Navane, and other medications to aid in sleeping and to offset the potential side effects of the Navane. Eventually, Matt's paranoia regarding his family decreased and he developed improved insight into his mental illness. Dr. Ladenheim explained that Matt's illness could be controlled by medication, and Matt agreed that the medication was helping him and that his symptoms of mental illness may have contributed to his conflicts, especially with his father. Matt began to make contacts

with his family and they expressed a willingness to help him. It was Dr. Ladenheim's opinion that Matt should return to his parents' home, but that the treatments and medication must continue in order for Matt to safely return to Columbia. Accordingly, the staff at the Respite contacted CFCC, and Matt was picked up by his parents on June 22, 1993.

Matt initially presented himself to CFCC on July 16, 1993. After an intake evaluation was conducted by Ronald Gussett, Ph.D., Matt was referred for consultation with Harold T. Brown, M.D., a consultant contract psychiatrist to CFCC. Dr. Brown first saw Matt at CFCC on July 19, 1993. From his thirty-minute evaluation of Matt, Dr. Brown noted that Matt was "recently discharged from a mental health unit of some sort in Lincoln City, Columbia, on Elavil and Navane. He is out of medication. He comes to the mental health clinic for his medication, continued care and help in completing a Social Security Disability form." Dr. Brown also noted that "[h]is [Matt's] experience in Lincoln City sounds like some sort of acute atypical psychosis. He does not present indicators of thought disorder or schizophrenia at this point."

Dr. Brown did not make any final determination as to Matt's condition at that time, but did make a notation to "rule out malingering" because of a discrepancy between Matt's complaint that his legs are of different lengths and Dr. Brown's observation that Matt's gait and movements were normal, "and that there was a disability form in the works somewhere." Dr. Brown testified that he sees "a lot of people that show up with SSI in mind with a history very similar to Mr. Morgan's. And I think to give it to someone who doesn't qualify for it is a real disservice to them." However, Dr. Brown thought it wise to defer his diagnosis, continue the medication, obtain Matt's records from Lincoln City, and schedule another appointment for a month later.

On August 16, 1993, Matt kept his scheduled appointment with Dr. Brown. Dr. Brown was now in possession of the C.A.T.C.H. records, but it is clear from his testimony that he never read them and never attempted to contact Dr. Ladenheim. Instead, during this fifteen-minute session, Dr. Brown began to focus more on there being "a strong factor of malingering here or at least overstating symptoms to gain the SSI," and reduced Matt's Navane medication by half.

The next and last time Dr. Brown saw Matt was for fifteen minutes on October 11, 1993. Dr. Brown noted as follows:

"We discussed his migration from Lancaster to Florida to Lincoln City and back to Lancaster. He now chooses to view it as his extended vacation. No further insight as to just what happened to get him into the mental hospital in Lincoln City or why they may have prescribed neuroleptic [medication] for him.

"We discussed a plan to further taper the Navane. He is now taking only one 10 milligram capsule a day for the last five to six weeks. When this present supply is gone, he is to take a 5 milligram capsule once a day for a month and then discontinue. He will continue with Dr. Gussett in psychotherapy as Dr. Gussett and he both deem it useful.

"He is referred to job counselor, Nancy Lambert, for what help this may be in finding employment.

"Diagnosis for the record will be that of atypical psychosis, not further specified, in remission."

Dr. Brown testified that "[t]he diagnosis of atypical psychosis is kind of a waste basket diagnosis when you think there's been a psychotic episode, but the information is not sufficient to make a clear specific diagnosis. And I didn't feel the information that I had or my observations of Matt were sufficient to make a specific diagnosis at that time."

According to Dr. Brown, he had no "line of authority or control" at CFCC. The "style of practice" there did not allow him to "do the supportive cycle therapy, the verbal communication

treatment modalities." He felt, therefore, that the responsibility of monitoring Matt's condition after October 11, 1993, fell on CFCC. He assumed that if "the counselor notices something going bad, they'll refer [the patient] back to me, something that they think medication will help with." Otherwise, Dr. Brown would not follow up on a patient's progress, even though he had terminated the patient's medication.

Between October 1993 and January 1994, Matt continued psychotherapy and vocational counseling at CFCC. He received psychotherapy from Dr. Gussett and vocational counseling from Nancy J. Lambert, LPC. During this time, however, Matt's medication ran out and his mother informed Lambert that Matt's condition was beginning to deteriorate. Mrs. Morgan reported that Matt was pacing, that he was quiet, withdrawn and moody, that his eating habits had changed, that he was becoming sick like he was before being hospitalized, and that he was regressing and needed to go back on medication. Mrs. Morgan also reported that Matt had made a deposit on the purchase of a gun.

Lambert, however, "thought that she [Marlene] was somewhat of an overprotective and controlling mother," "that she was worrisome, \* \* \* seemed to be overly involved and overly concerned with Matt \* \* \* and also \* \* \* I had some question as to whether maybe she exaggerated." When Matt failed to appear for an appointment scheduled with Dr. Gussett in January 1994, Dr. Gussett and Lambert decided that Matt would continue to see only Lambert.

After January, Lambert continued as Matt's vocational counselor, and Matt's condition deteriorated further. He again became verbally abusive toward his parents, called them names, insulted them, and wanted to fight his father. On one occasion, Matt was getting ready to punch his father in the back of the head, but his father turned around in time to avoid it. Matt would throw food away after indicating he was hungry, saying it wasn't fit to eat, complained of his legs hurting when nothing was wrong with them, talked to himself, and was observed telling someone to be quiet when no one was in the room with him. On one occasion he began striking a telephone pole repeatedly with a baseball bat. His parents were again becoming afraid of him. He began to lose a lot of weight, complained of an aerial attack on his head, and exhibited signs of paranoia. His parents felt threatened by him.

Mrs. Morgan contacted Lambert several times during May 1994 to report these symptoms. Lambert scheduled Matt for an appointment with Dr. Brown, but Matt, by now apparently resistant to taking medication and therapy, failed to keep the appointment. Also, in a phone conversation on May 29, Matt's employer reported to Lambert that Matt was too weak to push a lawnmower, was on the verge of passing out, and did not seem to be totally in touch with reality.

On May 30, 1994, Lambert conducted an emergency assessment, and apparently concluded that Matt was not a candidate for involuntary hospitalization. This assessment and the decision were made entirely by Lambert without the assistance of a psychiatrist.

On June 14, Mrs. Morgan sent a letter to CFCC seeking further help regarding her son's deteriorating condition. She specifically stated that she was concerned that Matt may become violent. Matt was again evaluated for involuntary hospitalization on July 3 and again it was determined that he did not satisfy the requirements for hospitalization. This time the assessment was conducted by Lambert and William C. Reid, a licensed social worker. This was the last time Matt was seen at CFCC.

At the time of this assessment and the one conducted on May 30, CFCC had an unwritten policy that it would not initiate involuntary hospitalization proceedings, but would become involved only after such proceedings were initiated by the family of the patient. However, Matt's parents had

attempted to initiate involuntary commitment proceedings, but the probate court informed them that it would need Lambert's approval.

On July 20, 1994, Mr. and Mrs. Morgan sent a letter to L. Patrick McGovern, Ph.D., a psychologist employed by CFCC at the time, again asking for help. Dr. McGovern reviewed Matt's chart, spoke briefly with Lambert and Reid, and concluded that Matt could not be hospitalized or given medication against his will. Dr. McGovern then spoke with Matt's parents on July 23 and July 25 and informed them of his conclusion. The last entry in Matt's chart at CFCC was made by Barbara K. Sharp, a licensed social worker employed by CFCC who, after speaking with Dr. McGovern on July 25, noted that "it is apparent that Matt is losing weight and decompensating. CFCC is unable to assist since he refuses medication or psychiatric care." It was that evening that Matt shot his parents and sister.

In June 1995, Matt Morgan was found not guilty by reason of insanity of two counts of aggravated murder with specification, one count of felonious assault with specification, and one count of attempted murder with specification.

You represent Marla Morgan. Please evaluate the potential claims that she might pursue for the injuries she has suffered. Assume that her brother has no assets and no insurance coverage.

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## SELECTED STATUTES OF THE STATE OF COLUMBIA

### COLUMBIA STATUTES ANNOTATED

#### TITLE XLV. TORTS

#### CHAPTER 768. NEGLIGENCE

#### PART II. DAMAGES

### § 768.81. Comparative fault

(1) Definition.--As used in this section, "economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss which would not have occurred but for the injury giving rise to the cause of action.

(2) Effect of contributory fault.--In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) Apportionment of damages.--In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(4) Applicability.--

(a) This section applies to negligence cases. For purposes of this section, "negligence cases" includes, but is not limited to, civil actions for damages based upon theories of negligence, strict

liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.

(b) This section does not apply to any action brought by any person to recover actual economic damages resulting from pollution, to any action based upon an intentional tort, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(5) Applicability of joint and several liability.--Notwithstanding the provisions of this section, the doctrine of joint and several liability applies to all actions in which the total amount of damages does not exceed \$25,000.

(6) Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, when an apportionment of damages pursuant to this section is attributed to a teaching hospital as defined in § 408.07, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

#### **§ 768.041. Release or covenant not to sue**

(1) A release or covenant not to sue as to one (1) tortfeasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort or death.

(2) At trial, if any defendant shows the court that the plaintiff, or any person lawfully on his behalf, has delivered a release or covenant not to sue to any person, firm, or corporation in partial satisfaction of the damages sued for, the court shall set off this amount from the amount of any judgment to which the plaintiff would be otherwise entitled at the time of rendering judgment and enter judgment accordingly.

(3) The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury.

### TITLE XLV. TORTS CHAPTER 768. NEGLIGENCE PART I. NEGLIGENCE; WRONGFUL DEATH

#### **§ 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 §§ 768.17-768.27:

(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 as defined by § 766.106(1).

### **§ 768.22. Form of verdict**

The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

### **§ 768.23. Protection of minors and incompetents**

The court shall provide protection for any amount awarded for the benefit of a minor child or an incompetent pursuant to the Columbia guardianship law.

### **§ 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.

#### **§ 768.25. Court approval of settlements**

While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

#### **§ 768.26. Litigation expenses**

Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

#### **§ 768.27. Effective date**

Sections 768.16-768.27 shall take effect on July 1, 1972, and shall not apply to deaths occurring before that date.

### CHAPTER 768. NEGLIGENCE PART I. NEGLIGENCE; SOVEREIGN IMMUNITY

#### **§ 768.28. Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs**

(1) In accordance with § 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Columbia Authority.

(3) No liability shall be imposed upon the state or any agency or subdivision of the state for the exercise of a discretionary function.

(4) Subject to the provisions of this section, any state agency or subdivision shall have the right to appeal any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$100,000 or \$200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the \$100,000 or \$200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

(6) [omitted]

(7) [omitted]

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9) [omitted]

(10) [omitted]

(11)(a) Providers or vendors, or any of their employees or agents, that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders are, solely with respect to such services, agents of the state for purposes of this section while acting within the scope of and pursuant to guidelines established in the contract or by rule. A contract must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection does not designate a person who provides contracted services to juvenile offenders as an employee or agent of the state for purposes of chapter 440.

(12) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(13) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues.

(14) [omitted]

(15) [omitted]