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**TORTS
FINAL EXAMINATION
PROFESSOR MONTOYA
SPRING 2000**

INSTRUCTIONS

- 1. ENTER YOUR EXAM NUMBER ON ALL BLUE BOOKS USED FOR THIS EXAM.**
2. You should allocate approximately 90 minutes for this part of the exam.
3. Please do not leave the examination areas with any of the examination materials.
4. The final exam is worth 50% of your grade in the course. Each part is worth 25%.

Good luck.

Part I: Problem Solving Exercise (90 minutes)

Stephanie Martinez , Larry Johnson and Matthew Monett, juniors at Espanola High School, were classmates in horticulture. On November 9, 1999, the three students went to the greenhouse to water the plants. On the way to the greenhouse, the three students began some gentle horseplay, tagging each other on the arm. The incident that injured Matthew occurred during the next break between classes. Most of the horticulture students were standing around outside the classroom and some were engaged in horseplay. While Larry was talking to another student, Matthew came up behind Larry, put both his hands on his shoulders, shook him a little, and said "hey" or the like. Matthew then turned and started walking to class. Not willing to leave it at that, Larry grabbed Matthew from behind and picked him up by putting his legs under Larry's right arm and his head under Larry's left arm. Larry then spun Matthew around once or twice, walked to a chain link fence and pushed him into the fence. When Matthew complained that his back hurt, Larry put him down.

Although his back was asymptomatic at the time of the incident, Matthew suffered from a preexisting back condition and had even worn a back brace to school. Larry testified he was unaware that Matthew had a back problem.

An ambulance was called to take Matthew to the Espanola Hospital. Larry and Stephanie decided to accompany Matthew to the hospital and asked Juana Martinez, Stephanie's cousin, for a lift. Stephanie rode in the bed of Juana's pickup truck. On route, Juana, speeding to get to the hospital, failed to make a turn, and the truck overturned, pinning Stephanie underneath. Although she was

thrown out of the pickup, Stephanie was not seriously injured, but she did suffer an injury to her right elbow. Her parents, now on the scene, took her to Espanola Hospital where she was treated by Dr. Alkire, a licensed orthopedic specialist.

Stephanie told Dr. Alkire that she had been injured when she fell off her bicycle. Dr. Alkire ordered x-rays and determined that Stephanie had suffered a simple dislocation with no fracture. The doctor attempted to reduce the dislocation by "popping" the bones of the elbow back into place. Dr. Alkire ordered additional x-rays. He did not order x-rays prior to casting Stephanie's arm in order to insure that the manipulation had been successful; nor did he order x-rays four weeks later when he removed Stephanie's cast.

Stephanie continued to have pain. At all times, Dr. Alkire assured Stephanie and her parents that the arm was healing well. Uncertain of that prognosis, Stephanie's parents took her to see Dr. Michael Rothman. Dr. Rothman examined Stephanie and took additional x-rays. He requested the x-rays taken at Dr. Alkire's request, which readily indicated that the dislocation reduction (the "popping") had not been successful. The x-rays also showed three fractured bones, as well as torn muscles and ligaments.

Dr. Rothman's professional opinion is that the time delay in repairing the fractures was responsible for extensive damage to the joint surfaces in the elbow. Neither subsequent surgery, therapy nor a custom-made splint have been successful in returning Stephanie the full use of her arm.

Stephanie's parents have incurred \$50,000 in medical expenses to date. In addition, Stephanie is unable to continue with her horticulture studies, has lost

her part-time job at the local nursery and is in continual pain and discomfort. The surgeries have left disfiguring scars on her arm that cause Stephanie severe embarrassment.

Some months later Matthew Monett's parents retain your firm to represent them in their tort claims arising out of these incidents. Once you commence the action against Larry Johnson for the injuries to Matthew, the attorneys for Johnson file a motion for summary judgment arguing that minors who engage in horseplay have no duty of reasonable care to one another. How will you oppose the motion? (This part of the essay is worth 1/3 of the points for this section of the exam.)

You also represent Stephanie who has asked you to file a lawsuit on her behalf. Against which persons or entities are there potential claims? What difficulties will arise in attempting to prove the elements of each claim. What defenses exist? (Attached is NM UJI on Proximate Cause.) (This part of the essay is worth 2/3 of the points for this section of the exam.)

COMPILER'S ANNOTATIONS

The 1991 amendment, effective for cases filed on or after November 1, 1991, made substitutions to make references gender neutral throughout the instruction.

Uncontradicted but equivocal evidence. — Uncontradicted evidence is not required to be accepted as true if the evidence is equivocal. Evidence may be considered equivocal if the circumstances cast doubt on the accuracy of the evidence. *Strickland v. Roosevelt County Rural Elec. Coop.*, 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

"Clear and convincing evidence" defined. — The word "instantly" is not essential in the definition of "clear and convincing evidence": "For evidence to be clear and convincing, it must [instantly] tilt the scales in the affirmative when weighed against the evidence in opposition and leave your mind with a conviction that such evidence is true." *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Applicability to cases arising under Probate Code. — Under 45-1-304 NMSA 1978, this instruction is properly given in district court cases arising under the Probate Code. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Use in proceeding to invalidate will for undue influence. — Although proof of undue influence to

invalidate a will must be by clear and convincing evidence, this instruction is proper in such a case when an instruction is also given that the evidence must be clear and convincing. *Thorp v. Cash*, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Burden of persuading jury as to the amount of damages is upon the plaintiff; the defendant has no such burden. *Strickland v. Roosevelt County Rural Elec. Coop.*, 99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), cert. denied, 463 U.S. 1209, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Standard of proof. — Issues of punitive damages are to be determined according to the preponderance of evidence. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985); *Gallegos v. Citizens Ins. Agency*, 108 N.M. 722, 779 P.2d 99 (1989).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial §§ 754 to 757.

Instructions defining term "preponderance or weight of evidence," 93 A.L.R. 155.

Error as to instructions on burden of proof under doctrine of *res ipsa loquitur* as prejudicial, 29 A.L.R.2d 1390.

PART C. CAUSATION

13-305. Proximate cause.

A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

DIRECTIONS FOR USE

This instruction should be used in all cases in which negligence is an issue and ties to UJI 13-302.

[As amended, effective January 1, 1987.]

Committee comment. — The definition of proximate cause in the instruction is taken from various New Mexico cases, e.g., *Bouldin v. Sategna*, 71 N.M. 329, 378 P.2d 370 (1963); *Ortega v. Texas-New Mexico Ry.*, 70 N.M. 58, 370 P.2d 201 (1962); *Thompson v. Anderman*, 59 N.M. 400, 285 P.2d 507 (1955); *Rix v. Town of Alamogordo*, 42 N.M. 325, 77 P.2d 765 (1938).

Even in a case where negligence is admitted or found as a matter of law, proximate cause generally remains an issue in the case. *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P.2d 655 (1967); *Martin v. Gomez*, 69 N.M. 1, 363 P.2d 365 (1961).

This instruction (formerly UJI Civ. 12.10) has been cited in the following cases: *Barbieri v. Jennings*, 90 N.M. 83, 559 P.2d 1210 (Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1977); *Galvan v. City of Albuquerque*, 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973); *Edison v. Atchison, T. & S.F. Ry.*, 80 N.M. 183, 453 P.2d 204 (1969).

The applicability of the doctrine in comparative negligence cases was discussed in *Armstrong v. Industrial Elec. & Equip. Serv.*, 97 N.M. 272, 639 P.2d 81 (Ct. App. 1981).