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**TORTS FINAL EXAMINATION
PROFESSOR MONTOYA**

SPRING 2002

EXAM NO. _____

Part I: Essay Questions

INSTRUCTIONS

- 1. ENTER YOUR EXAM NO. IN THE SPACE PROVIDED ABOVE AND ON ALL BLUE BOOKS USED FOR THE EXAM.**
2. Please write legibly.
3. You are to turn in your outlines and notes at the end of the exam. In other words, you are to leave everything you used for the exam in the exam room.
4. You will have one hour to work with your firm on the excerpt from the essay question. Then you will have an additional four hours to write the exam. Please notice that I have divided the exam into three parts: the first essay is worth 25%; the second essay is worth 50% and the short answers are worth 25% of the grade. You should allocate your time accordingly.

Good luck.

ESSAY QUESTION NO. 1
WORTH 25% OF EXAM GRADE

Padilla & Palermo, P.C.
A Personal Injury Law Firm

MEMORANDUM

TO: Summer Associate
FROM: Alejandra Padilla, Senior Partner, Litigation Dept.

Please prepare an office memorandum responding to the summary judgment motion that has been filed by the attorneys representing Mrs. Defendant in the Claudia Yazzie case (file # 1099-02). We are representing her in a case involving a car accident with Dan and Monica Defendant. Ms. Yazzie has suffered permanent and disfiguring injuries. The firm's investigation revealed that Dan is a lawyer who is in a long-term cohabiting relationship with Monica, a prominent local lawyer and media personality. The two are partners in the same law firm and have two small children. Dan and Monica had apparently been to court just before the accident occurred. Dan has a history of drinking problems and has been involved in at least one other car accident in the past and has been cited for DUI. Dan and his wife also attend Alcoholics Anonymous meetings together and have done so for about 2 years now. The police report indicates that on the day of the accident Dan failed a field sobriety test, smelled of alcohol and was belligerent. The blood alcohol content test, however, was inconclusive. The report notes that Dan claimed he had not had a drink in over 8 months.

Please incorporate *Hermosillo v. Leadingham*, the opinion attached hereto, into your analysis. I'll add two sets of facts. First, a recent study from a research group ranked New Mexico as the state with the second highest per capita rate of accidents involving alcohol. You can assume that the findings of this study will be in a form that can be used as support for our response to this motion. Second, the legislature recently engaged in a heated debate about the outcome in the *Hermosillo* case. Unfortunately, the legislative session ended before any action was taken.

LISA HERMOSILLO, Plaintiff-Appellant, v. LIN S. LEADINGHAM and GREG LEADINGHAM, Defendants-Appellees.

COURT OF APPEALS OF NEW MEXICO

129 N.M. 721;
October 12, 2000, Filed

BUSTAMANTE, Judge.

[**1] Plaintiff appeals from a district court order granting summary judgment dismissing several claims against Defendant Greg Leadingham (Greg) for personal injuries arising out of an automobile collision involving a vehicle driven by Defendant Lin Leadingham [***81] [*723] (Lin). At the time of the accident, Greg and Lin were married but had been living separately for approximately two months. Their divorce action was pending. In the district court and on appeal, Plaintiff has attempted to predicate Greg's independent liability for the collision on three grounds: (1) common law negligence principles, (2) negligent entrustment, and (3) the family purpose doctrine. We affirm.

FACTS

[**2] Greg and Lin were married in November 1993. Prior to the marriage Lin owned a 1989 Toyota automobile. She retained ownership of this vehicle throughout the marriage, although community funds were used to pay for a single insurance policy that covered the Toyota and Greg's vehicle. The Leadinghams separated in July 1996, and Lin filed a petition for divorce on August 20, 1996. On September 23, 1996, Lin was driving with the couple's young daughter in the car when Lin's vehicle struck Plaintiff's vehicle. A police investigation at the scene revealed a half empty bottle of wine in Lin's vehicle; she was arrested for driving while intoxicated. Lin's blood alcohol content after the crash measured .25%, which is more than three times the legal limit. See NMSA 1978, § 66-8-102(C) (1999).

[**3] Plaintiff filed a complaint for personal injuries against both Lin and Greg, claiming that Lin's negligence constituted a community tort. Plaintiff's complaint also alleged that Greg "negligently permitted Defendant Lin Leadingham to drive the 1989 Toyota while knowing

that Lin Leadingham would drink alcoholic beverages and then drive." Plaintiff attempted to establish Greg's independent liability in several different ways, including his own negligence in either facilitating Lin's past drinking or failing to prevent her from drinking and driving once they were separated. Plaintiff also claimed that Greg had negligently entrusted the Toyota to Lin, and that the Toyota was a "family purpose vehicle."

[**4] Greg filed a motion for summary judgment relying on his own affidavit, which sets forth several of the undisputed facts described above. Specifically, Greg noted that the Toyota was Lin's separate property before the marriage, that he was never on the title of the vehicle, and that he had not even seen his wife from the end of July 1996 until after the September 23, 1996, accident.

[**5] Plaintiff's initial response to the summary judgment motion focused on the fact that Greg and Lin were still married at the time of the accident. In her supplemental response, however, Plaintiff focused on Greg's deposition in an effort to establish that there were grounds for holding Greg liable independent of the community tort claim. In his deposition, Greg described Lin's drinking pattern during the course of their marriage. Greg would purchase wine for Lin "pretty much all the time because she wanted it." Lin would start drinking in the morning and would drink approximately a half gallon of wine over a six to twelve hour period. Lin had apparently admitted to having a drinking problem and had briefly attended Alcoholics Anonymous. Notwithstanding Lin's drinking, Greg stated that he was not concerned that Lin would be involved in an automobile accident during their marriage because it was very rare for her to drive in the afternoon or evening.

[**6] After considering the parties' briefs and arguments, the district court entered an order dismissing Plaintiff's claims against Greg for common law negligence, negligent entrustment, and family purpose.

In a letter decision to the parties, and at a later presentment hearing, the district court indicated that Plaintiff's community debt claim could await resolution until the collection stage, if necessary. This appeal followed.

DISCUSSION

A. Jurisdiction and Standard of Review (omitted)

C. Common Law Negligence

[**9] In her brief, Plaintiff states the essential question in this appeal as follows: "Does the husband of an alcoholic wife who knows that her driving poses a danger to herself, to their daughter and to others using the highways have a duty of reasonable care to prevent the foreseeable harm from occurring?" Plaintiff answers this question in the affirmative by referring us to well-established New Mexico case law discussing duty. See, e.g., *Torres v. State*, 119 N.M. 609, 612-13, 894 P.2d 386, 389-90 (1995); *Calkins v. Cox Estates*, 110 N.M. 59, 61-62, 792 P.2d 36, 38-39 (1990).

[**10] Plaintiff's approach might be viable were we restricted to a consideration of any facts provable under the broadly worded language in the complaint. Such was the case in *Torres*, 119 N.M. at 612-13, 894 P.2d at 390-91, analyzing duty in the context of a motion to dismiss for failure to state a claim. However, analyzing a complaint in light of a motion for summary judgment rather than a motion to dismiss, "can eliminate scenarios consistent with the pleadings but inconsistent with uncontradicted facts presented to the court for consideration of the summary judgment motion." *Dunn v. McFeeley*, 1999 NMCA 84, P13, 127 N.M. 513, 984 P.2d 760. Such is the case here. Applying New Mexico case law to the undisputed facts developed in this case, we hold that the district court properly granted the motion for summary judgment.

[**11] In *Davis v. Board of County Commissioners*, 1999 NMCA 110, PP14-15, 127 N.M. 785, 987 P.2d 1172, this Court recently had the opportunity to discuss the current state of "duty" analysis as articulated by our Supreme Court. As noted in *Davis*, we are guided by our Supreme Court's pronouncement that "policy determines duty." *Torres*, 119 N.M. at 612, 894 P.2d at 389. The general rule is that an individual does not have a duty to control the acts of a third party in the absence of a duty imposed by statute or recognized as a result of a special relationship that exists between a defendant and the tortfeasor. See *Davis*, 1999 NMCA 110, P15, 127 N.M. at 790-791, 987 P.2d at 1177-1178; Restatement

(Second) of Torts § 315 (1965). Unlike the situation considered in *Torres*, there is no statute applicable in the present case. See *Torres*, 119 N.M. at 612, 894 P.2d at 389. Thus, our focus is whether there is a "special relationship" which supports imposition of a duty.

[**12] There are several examples of "special relationships" that give rise to an exception to the general rule that a person has no duty to control the actions of a third party. See Restatement (Second) of Torts § 314A, 316-319 (1965); see also, e.g., *Chavez v. Torres*, 1999 NMCA 133, P20, 128 N.M. 171, 991 P.2d 1 (discussing landowner exception). None of the recognized "special relationships" is applicable in this case. The Restatement does include a caveat indicating that the authors express no opinion as to whether other relations may impose a duty where it might otherwise not exist, but it also indicates that, while there had apparently not yet, at the time of publication, been any cases [***83] [*725] imposing a heightened "special relationship" duty on husbands and wives, the law was moving toward recognizing a duty where there is a dependence or mutual dependence. See Restatement, supra, § 314A caveat, cmt. b, at 119. The general trend, however, appears to be that the marital relationship, without more, does not trigger an independent duty to control the behavior of one's spouse. See, e.g., *Wise v. Superior Court*, 222 Cal. App. 3d 1008, 272 Cal. Rptr. 222, 224-25 (Ct. App. 1990); *Touchette v. Ganal*, 82 Haw. 293, 922 P.2d 347, 355 (Haw. 1996).

[**13] We do not deem it necessary to consider whether or under what circumstances the marital relationship might constitute a "special relationship" to trigger a duty under Sections 314A or 315 of the Restatement. The undisputed facts here are that, by the time of the accident, Greg's and Lin's estrangement was permanent and the dissolution of their marriage was imminent. Under the circumstances, it would be inappropriate to impose a "special relationship" duty upon them simply because they were technically still married. Any duty on the part of Greg must be predicated on conduct independent of his marital status at the time of the accident. We note, however, that Greg's and Lin's relationship is not irrelevant to our duty analysis. It simply does not, in and of itself, trigger a duty in this case.

[**14] As we discussed in *Davis*, duty may also exist under the following circumstances:

Assuming other policy considerations are satisfied, a duty to exercise ordinary care, where one otherwise would not exist, may arise when a person voluntarily undertakes a course of conduct which, in the absence of

due care, may foreseeably injure others as a natural and probable consequence of the person's conduct.

1999 NMCA 110, P15, 127 N.M. at 790-791, 987 P.2d at 1172-1173; see also Restatement (Second) of Torts § 876 (1979).

[**15] We believe that Plaintiff may be attempting to establish duty on this latter theory. Specifically, Plaintiff maintains that Greg's conduct led to a foreseeable result, and that public policy considerations not only permit but compel recognition of Greg's duty to her under the facts of this case. She begins with foreseeability. She claims that Greg should have foreseen that a member of the driving public could have been injured as a result of his failure to (1) exercise reasonable care in controlling Lin's drinking, (2) assist Lin in finding programs for problem drinkers, (3) persuade her to stop drinking, and (4) preclude her from driving by canceling her insurance. In her reply brief, however, Plaintiff essentially concedes that Greg is correct in arguing that cancellation of insurance should not be considered as part of this analysis. We agree. Plaintiff presented no evidence to suggest that Lin would have stopped driving if Greg had cut off the insurance. More importantly, it does not make sense as a matter of policy to expose the public to an uninsured driver.

[**16] Turning to Plaintiff's other grounds, we agree with Plaintiff that it is foreseeable that an individual with a drinking problem could injure a member of the public as a result of the drinking. The focus here, however, is on Greg's conduct. Although Plaintiff is correct that time and place factors are generally left to the jury, see Torres, 119 N.M. at 614, 894 P.2d at 391, we believe that Greg's conduct is simply too attenuated from the date of the accident to impose liability. It is undisputed that Greg neither had contemporaneous knowledge of nor provided contemporaneous assistance for the drinking which resulted in the collision. Cf. GCM, Inc. v. Kentucky Cent. Life Ins. Co., 1997 NMSC 52, P15, 124 N.M. 186, 947 P.2d 143 (discussing duty to refrain from causing or assisting another to violate a duty owed to a third person); Rael v. Cadena, 93 N.M. 684, 685, 604 P.2d

822, 823 (Ct. App. 1979) (affirming finding of-tort liability for defendant who yelled encouragement while battery was being committed).

[**17] Plaintiff's position would require us to impose a duty with open-ended time and place limits on anyone who might be able, as Plaintiff says, to "prevent the driver from getting drunk or from freely driving while in an intoxicated state." That is, by imposing an independent duty on Greg to correct or prevent the potentially tortious behavior of his estranged spouse after two months of [***84] [*726] complete separation and upon imminent divorce, we could open up an arena of limitless potential for liability. We find no basis to do so.

[**18] In light of what we believe are clear public policy considerations against creating or expanding a duty under the circumstances in this case, we agree with the district court that summary judgment was properly granted on Plaintiff's negligence claim.

D. Negligent Entrustment and Family Purpose Doctrine (omitted).

CONCLUSION

[**23] For the reasons discussed above, we conclude that the district court properly granted summary judgment on Plaintiff's claims alleging common law negligence, negligent entrustment, and liability under the family purpose doctrine.

[**24] **IT IS SO ORDERED.**

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge

ESSAY QUESTION 2
WORTH 50% OF EXAM GRADE

Paula Plaintiff and her two children were walking downtown in front of the new Century Theatre one Monday afternoon in January. They were late to a dentist appointment. At the time, a City of Albuquerque crew was working on the sidewalks directly in front of the theatre area. In order to get to the front of the building, Paula and her children had two options. They could either backtrack around the block and stay on the sidewalks all the way around or move past the blocked off sidewalk area, enter the street for about a hundred and fifty feet, and then re-enter the sidewalk area. Most construction crews re-cementing sidewalks normally created a makeshift sidewalk area allowing travelers to safely get around the construction area. The City crew elected not to construct one because they believed they would only be working on the sidewalk for a day or so and that, since it was on a Monday, there wouldn't be much foot traffic through that area. One statute located in the Buildings Code chapter requires "makeshift sidewalks" when constructing a building over three stories tall.

Paula and her children elected to go around the cordoned off area by walking on Central Avenue to get around the construction. When they were about mid-way, they heard a loud screeching noise behind them. Although they could not see it, a white moving truck was desperately trying to avoid hitting them. Unfortunately, the truck driver was unable to stop in time and a terrible collision occurred. The driver of the truck was employed by the Movers R Us Company and had recently been hired by the company to shuttle office furniture around town. Although the driver was licensed at the time of the wreck, the company knew when they hired the driver that his license had been suspended for reckless driving. At the time that the driver was traveling on Central, he was returning from a stop at Tia Juana's, his favorite lunch spot that was directly on the way to his delivery stop. His new girlfriend works at Tia Juana's.

Although no one died from the collision, the family members suffered serious injuries. Paula was hurt the least from the car accident. She suffered bones in her leg and her ribs and her hands were broken. She is currently a data processor at Tech/firm and spends much of her time writing computer codes on a keyboard. Paula is also the primary breadwinner in her family because her husband Guillermo lost his job at K-Mart. Unfortunately for Paula, while being transported to the hospital, the ambulance rear-ended a car that failed to move out of the way. Paula was not properly strapped in and suffered additional injuries to her hands and also to her head.

David, the younger child, 15, suffered the most serious injuries. He was unable to avoid the moving truck and was hit directly from behind. According to the chief neurologist at the hospital, David arrived at the hospital in a coma, though he could not determine for sure whether David was immediately unconscious after being hit or a short time thereafter. Unfortunately, the

prognosis for David at this stage is not particularly good. It is unclear whether David will ever recover from his injuries.

Maria, the older child, 17, suffered injuries to her arms and hands, legs, and back. Maria is currently a junior in high school. She loves music and has played the violin for ten years. She was hoping to study music in college and had just received information from a number of music schools back east. Unfortunately for Maria, when she arrived at the hospital, the orthopedic surgeon did not properly diagnose the nature or the extent of the breaks in the bones of her hand and fingers. The unique way in which her fingers were shattered made it difficult for any surgeon to treat, but this surgeon's failure to timely set the fingers made it almost a certainty that her fingers will not have the full range of motion. The doctors have advised Maria that she will not be able to play the violin ever again. Otherwise, she is expected to recover.

Please discuss the elements of the negligence claims available to Paula Plaintiff and her children. WORK THROUGH the elements, discussing what proof you will need to provide, what experts you might need, where you foresee problems, and how those problems might be resolved. Also discuss any immunities or defenses available to the defendants. Estimate, using percentages, how a jury is likely to divide the fault among the plaintiffs and defendants.

Part II: Short Answers (60 minutes)
This portion is worth 25% of the exam grade.

Exam No. _____

INSTRUCTIONS

- 1. ENTER YOUR EXAM NO. IN THE SPACE PROVIDED ABOVE AND ON ALL BLUE BOOKS USED FOR THE EXAM.**
2. You should allocate approximately 60 minutes for this portion of the exam.
3. You are to write the answers to the following 12 questions directly on the lines provided in the exam. Use the reverse side when necessary.
4. Write legibly. I will not struggle to decode your writing.
5. Typists: Answer each of the questions requiring short answers under paragraphs numbered to correspond to the number of the question.