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**510 Torts
Fall Semester 2005**

**UNM School of Law
Final Examination
Three Credits**

**Professor Schwartz
Friday, December 16, 2005
1:30-4:00 p.m. (2.5 hours)**

Examination Format

1. **Laptop** computer users: Start the Secureexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.

2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. DO NOT WRITE YOUR NAME ON BLUEBOOKS.

A five-minute warning will be given prior to the conclusion of the examination. When time is called, stop immediately. If you are handwriting, lay down your pen & close bluebook immediately. If using a laptop, save & exit the program.

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

Professor's Instructions

PART I - REQUIRED OF ALL STUDENTS

PROFESSOR'S INSTRUCTIONS

This part of the Torts examination consists of one fact pattern and one question with five subparts that depends upon that fact pattern. You will have two hours and thirty minutes to complete all five subparts. Assume that all of the events described here occurred in New Mexico, and all litigation takes place in New Mexico.

This is a closed book examination. **No materials of any type are permitted in the examination room.**

There is ample time to organize your answers. Please read each question carefully before you begin writing. You will be given full credit for good organization, careful writing and creativity.

Good luck, and have fun.

THE FACT PATTERN

Penny Plaintiff prepared to drive from Albuquerque to visit her mother in Santa Fe on a very cold December 4, 2004 morning. She wanted to leave just before the sun rose, but she was worried about road conditions on the interstate after a night of extremely cold weather and intermittent snow showers. She called the Auto Club of New Mexico (AC), a private membership organization that maintains a "New Mexico road hotline," and the operator on duty told her that the interstate between Albuquerque and Santa Fe was "perfectly clear and dry and expected to remain so all day." The operator obtained this information from his brother-in-law, Joe Brolaw, who had arrived in Albuquerque a half hour earlier, after a drive from Santa Fe. The operator knew that the brother-in-law had no special knowledge of the weather forecast, but the operator was too busy drinking coffee and reading the morning paper to consult the National Weather Service forecast, or to call the State Police, as he was supposed to under these circumstances. While Plaintiff was not a member of AC, they provided their road hotline information to anyone who called, and Plaintiff was happy to get the information they provided.

As Plaintiff reached the top of La Bajada Hill, just South of Santa Fe, a quick-moving and extremely powerful storm came from the Northeast, just as the National Weather Service had predicted for anyone who cared to check its easily accessible weather report. Carrying gale force winds and a heavy mix of ice and snow, it seemed to come out of nowhere. In the span of five minutes conditions became so terrible that the State Police decided to close the highway, but they delayed implementing their decision for another ten minutes to allow the Governor, who was returning from Las Cruces, to arrive home in Santa Fe. During that ten-minute period a pickup truck driven by 85-year old Andy Kelly slid across the median and struck Plaintiff's car. Mr. Kelly had only recently arrived from his home in Australia to visit his great grandchildren in Santa Fe. He had never driven in snow, and he had never driven a left-hand drive vehicle before. He meant to check the weather before he left in the truck that morning, but he had become very forgetful over the last few years and he forgot to do so. He also had a great deal of trouble seeing through his cataracts and the early morning windshield glare, and his control of the car was further limited by the fact that he was attempting to tune the radio (to hear about driving conditions) and he was drinking a cup of coffee as he drove.

Ms. Plaintiff was one of the few drivers then on the highway who had not pulled over to the shoulder to wait out the storm. After it was struck by Mr. Kelly, Plaintiff's car slid across the highway and then fell into a large hole on the shoulder. The hole had been dug the day before by Big K Construction, which was installing sewer drain pipe. While the construction company could have constructed a barrier around the hole, they did not because barriers are usually not constructed under these circumstances when the construction obstacle is short term and warnings can be posted in a way that will bring them to the attention of those drivers at risk. Such warnings were prominently posted.

Ms. Plaintiff suffered substantial injuries when her car hit the bottom of the hole, and she was taken to an emergency room in Santa Fe by an ambulance. She was treated, and, about 12 hours later, released from the hospital. She suffered some pain or discomfort for the next three weeks, lost two weeks of work, and was disabled as a result of an ankle injury which – now a year later – has never really completely healed. While she was at the emergency room her physician also discovered that she had been about five or six weeks pregnant, something that was unknown to her, at the time of the accident. She lost her pregnancy in the course of the accident.

Penny Plaintiff has now sued AC, Brolaw, the State Police, Kelly, and Big K for her physical injuries, lost income, pain and suffering, medical expenses, and other losses, including the loss of consortium with her then-fetus. She has also been appointed personal representative for the fetus and she has brought a wrongful death action on behalf of the fetus against the same defendants.

THE QUESTION

You are law clerk to the judge to whom this case has been assigned. To help her get ready to handle the case, the judge would like you to draft a memorandum that addresses the following issues:

1. AC and Brolaw have already moved for dismissal on the grounds that the actions fail to state a claim because, each of these defendants argues, that defendant did not owe a duty to Ms. Plaintiff or her fetus. Should any of these motions be granted? Why? (20 points, 40 minutes)
2. The defendants have already moved to dismiss all claims filed on behalf of the fetus, and all claims based on loss of consortium with the fetus, on the grounds that New Mexico law should not recognize damages (1) to a nonviable fetus who is not born alive, and (2) for loss of consortium with a nonviable fetus who was not born alive. Should these motions be granted? Why? (10 points, 20 minutes)
3. It is likely that AC and Brolaw will move for judgment as a matter of law on the grounds that the movant is not a legal cause of the injury under New Mexico law.

If AC's motion fails, AC will ask that the jury be given an instruction that they may find that the State Police, Kelly, the storm, and Big K were each an independent intervening cause.

Should either of the motions for judgment as a matter of law be granted? Should the jury instruction on independent intervening cause be given? (15 points, 30 minutes)

4. Big K is likely to move for judgment as a matter of law on the grounds that no contractors erect barriers to similar holes during this kind of construction on highways in New Mexico, at least where warnings are posted as they were here. Both sides will agree that such holes generally are not surrounded by barriers during short term construction projects anywhere in the United States (except in Oregon, where such barriers are required by statute). Is this sufficient information to grant Big K's motion? (10 points, 20 minutes)
5. The plaintiff will almost certainly ask for a jury instruction that says that AC is jointly and severally liable for all damages that arose out of the series of events described here. This may be especially important because Kelly is judgment proof, the State Police liability is limited by the Tort Claims Act, and both Brolaw and Big K may not have breached any duty (and thus might not be liable at all). On the other hand, each defendant may seek a jury instruction that says that damages must be apportioned among the plaintiff, the State Police, AC, Kelly, Brolaw, Big K and the storm. What kind of jury instruction would properly describe how the jury should apportion damages, and why? You need not write the jury instruction; just describe its substantive content. (20 points, 40 minutes)

FOR YOUR BACKGROUND INFORMATION, TWO CURRENT NEW MEXICO JURY INSTRUCTIONS ARE INCLUDED HERE:

13-305 Causation. (Proximate cause.)

An [act] [or] [omission] [or] [(condition)] is a "cause" of [injury] [harm] [(other)] if [, unbroken by an independent intervening cause,] it contributes to bringing about the [injury] [harm] [(other)] [, and if injury would not have occurred without it]. It need not be the only explanation for the [injury] [harm] [(other)], nor the reason that is nearest in time or place. It is sufficient

[REDACTED]

*with some other cause to produce the result. To be
mission] [or] [(condition)],
nably connected as a significant link to the*

[REDACTED]

*ening cause
ing cause interrupts and turns aside a course of events and produces tha
as a result of an earlier act or omission.*

End of Part I