

UNIVERSITY OF MARYLAND
SCHOOL OF LAW

TORTS

THREE HOURS

Day Division
Professor Weiss

December 19, 2008
9:00 a.m. – 12:00 noon

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes _____ No _____

INSTRUCTIONS:

1. **Honor Code.** Student conduct, during exams and at all other times, is governed by the Student Honor Code.

2. **Your Name, Your Exam Number and Exam Submission.** Sign and print your name in the blanks above. Put the exam number, course title and instructor name on the examination envelope. Indicate whether you are submitting this exam electronically. Submit these examination questions at the conclusion of the examination; do not put the examination questions in the examination envelope.

3. **Time.** Submit your examination answers within the announced time for the examination. If you submit your answers late, you likely will be subject to penalty.

4. **Computer Exams.** Computers *may* be used on this exam.

- o Option 1 - Closed Mode – access to Exam4 only; no access to student computer-based notes or Internet

If you use a computer on this examination, you must use the Exam4 examination-taking software provided by the law school. You must provide your own computer and must have downloaded a copy of the Fall 2008 version of the Exam4 software to your computer. You should have completed this download, tested the software, and be sure the computer is in working order well before the date of this exam.

At the end of the examination, choose the "Submit Electronically" function on the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name on your answer as instructed in the handout, but do not put your name anywhere on your answer. Submit your answer within the time limits for the examination; no allowance for additional time will be given for equipment failure. After submitting your answer electronically, note on the envelope the name of the course, your exam number, check "Submitted Electronically," and turn in the exam envelope and your examination questions to the proctor. (The administration will print your Exam4 answers and insert them in the exam envelope.)

Technological Problems: If you experience a technological problem during the examination period, consider the amount of time remaining and decide whether you should continue (or restart) the examination in blue books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the number found above on each of your blue book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. Do not put your name anywhere on the envelope or on the blue book answers.

Upon completion of the examination, put your answers in the envelope and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope—you will be graded on only what is inside the envelope. Do not put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Exam Question Clarity. If in reading any of the questions you reasonably believe there is an ambiguity, error, or inconsistency, please identify this issue in your answer and specify any reasonable assumptions you are making in answering this question, and then proceed to answer the question. This approach should be used with caution. The mere assertion of an ambiguity, error, or inconsistency, if not well justified, particularly if it appears that such assertion might have been intended to justify your avoiding difficult and/or significant substantive issues in the examination, will not excuse your failure to address such issues.

7. Specific Instructions and Examination Materials. This examination is **OPEN BOOK, MODIFIED**. You may use your casebook and supplement, assigned course handout materials, hard copy versions of your classnotes, and any other non-commercial, hard copy materials you have prepared alone or with your classmates. In addition, you may bring with you any general usage English language dictionary (not including Black's or any other law dictionary). You may not have with you any hornbooks, commercial outlines or other commercially published materials, nor any published materials xerographically reproduced other than course handouts, nor any materials purchased from any source for money or any other form of consideration other than a mutual exchange between class members of study materials. If you choose to take this examination using a computer, you are not permitted to access on your hard drive, on floppy disk, or on any other electronic media, any classnotes, outlines, or other materials pertaining to this course. Such materials may be used during the examination only in printed out, hard copy versions.

For grading purposes, each question will be weighted approximately in proportion to the time allocated for the answer.

If your examination is handwritten, please write only on one side of the page, and only on every other line.

PLEASE NOTE: ALL EVENTS DESCRIBED IN THIS EXAMINATION TAKE PLACE IN THE STATE OF MERRYLANDE, THE NEWLY ADMITTED 51ST STATE OF THE UNION. WHENEVER DIFFERENT JURISDICTIONS TAKE DIVERGENT COMMON LAW APPROACHES TO A LEGAL SITUATION, ASSUME THAT THERE IS NO BINDING PRECEDENT ON POINT. IN SUCH CASES, YOU SHOULD ADDRESS THE ALTERNATIVE APPROACHES THE MERRYLANDE COURTS COULD ADOPT. ASSUME THROUGHOUT THE EXAM THAT CO-DEFENDENTS ARE JOINTLY AND SEVERALLY LIABLE FOR ALL INDIVISIBLE (I.E., NON-APPORTIONABLE) INJURIES TO WHICH THEY SUBSTANTIALLY CAUSALLY CONTRIBUTE. ALSO, YOU MAY IGNORE ALL ISSUES OF CONTRIBUTION AND INDEMNIFICATION AMONG JOINT TORTFEASORS.

Q. I
(50 minutes)

Alice Adams had returned home to Bawlmer, Merrylande from college in Western Merrylande for Thanksgiving weekend. She and Paula Paulson, a close friend of hers from high school, went to a carnival on Saturday night and then drove by the homecoming dance at their high school alma mater. Shortly before 11 p.m., Paulson, who was driving, hit a patch of water on Dumfries Drive, skidded across a median and collided with an oncoming car driven by David Davis.

Davis was driving just below the posted speed limit of 50 miles per hour (mph), but was talking on his cell phone when he observed Paulson's vehicle flying across the median into his lane. Davis had been driving in the left lane of the two lanes on his side of the road, having recently passed a slow-moving truck and having failed to return promptly to the right hand lane. Davis had no hands-free device and was holding the phone in one hand, next to his ear. Had Davis not been occupied with the cell phone, he would have had two hands on the steering wheel, and could have swerved into the right hand lane or partially onto the shoulder, in time to avoid colliding with Paulson's car.

Paulson told the police who arrived at the accident scene that she had been going 5 mph under the speed limit. According to the police investigators, however, given the conditions, even that speed might have been too fast in light of the heavy rain. The downpour had led the authorities to issue flash flood warnings for certain roads, although not, apparently, for Dumfries Drive. A state traffic statute prohibits motorists from crossing medians as well as unbroken double yellow lines, except to turn left at an intersection.

Davis was lucky – although his car was severely damaged, he escaped without personal injury except for a few bruises. Paulson and Adams, however, suffered major injuries. They

each were clutching their necks in pain when the police arrived. Emergency responders decided that they needed to be transported to a trauma center as quickly as possible and radioed for a helicopter. The helicopter landed at a nearby school playground.

By then, the rain had ceased, but soon after takeoff, heavy fog set in. About 11:55 p.m., air traffic controllers cleared the helicopter for landing at Exurban General Hospital. At 11:58 p.m., however, the controllers lost contact with the helicopter.

As Paulson later described the situation, on the helicopter, the emergency medical technician (EMT) had whispered into Paulson's ear, "The weather is too bad for the helicopter to land at Exurban General. We're changing course." However, the medical helicopter soon began to rock. The EMT and an onboard paramedic both were clinging to their seats. Suddenly, over the chop of blades, Paulson heard branches scraping the helicopter and she lost consciousness.

When Paulson opened her eyes, she was on the ground in what seemed like a forest, shivering. Next to her was the twisted wreckage of the helicopter, jet fuel pooling around it. Otherwise, everything was silent. She tried to move farther from the helicopter, but pain shot up from her feet and again she passed out.

An hour later, three rescuers, all members of the Merrylande State Police Aviation Command, located the downed helicopter. "The helicopter was totally crushed, killing everyone else aboard, and Paulson was lying next to it," said one of the rescuers. Jet fuel fumes filled the air. Her rescuers strapped her onto a stretcher and ran from the wreckage because they feared an explosion. They wrapped her in blankets and put her in an ambulance.

Subsequent investigation by the authorities confirmed the opinion of the rescuers upon their arrival at the scene of the crash: When the helicopter hit the trees, a door must have sprung open and Paulson must have slid out. She and the helicopter must have fallen to the ground separately.

The crash left Paulson with a broken cheekbone, nose and eye socket, a broken shoulder blade, a compound fracture in her left elbow, a bruised lung, as well as a dislodged disk in her neck. Everything below the knees was shattered in both legs. At Merrylande Shock Trauma Center in Bawlmerr City, where Paulson was transferred by ambulance almost immediately, surgeons pulled debris from her legs for days. Although the doctors tried for two weeks to save her legs, in the end, her right leg had to be amputated below the knee.

Paulson is the only survivor of the worst disaster in the Merrylande state Medevac program's history, a crash that led to new procedures for the approval of such flights in uncertain weather.

Paulson has filed suit against Davis and against the Merrylande Medevac Corporation, which operates the helicopter medical evacuation system under contract with the State of Merrylande. Discuss and decide all the issues.

Q. II
(70 minutes)

A stevedore, Sam Smith, alleges that he has contracted cancer from exposure to asbestos while unloading bags of asbestos fibers at the Port of Bawlmerr, Merrylande. CSR Corporation ("CSR"), a California corporation, is alleged to have shipped bags of asbestos fiber to the Port of Bawlmerr throughout the time Smith worked there as a stevedore. Smith was employed by Bawlmerr Port Stevedoring Company ("BPSC"), which, ever since the port was rebuilt in 1935, has held a contract with the Port of Bawlmerr as its exclusive provider of stevedoring services.

Smith worked at the Port unloading cargo from approximately 1943 through 1998. He testified in a deposition that over the years, he and his co-workers unloaded, among other various cargos, thousands of burlap bags containing loose asbestos, shipped to Bawlmerr from California. A co-worker, Gerald Gardner, has corroborated these facts in an affidavit. The testimony of both workers states that they unloaded shipments of asbestos from California about ten times a year throughout the 1950s, 1960s, 1970s, and 1980s, with the volume decreasing in the 1990s. Many of these bags had a diamond-shaped logo on them with the letters "CSR." Smith and Gardner also testified in their depositions that the offloading of the bags produced voluminous emissions of dust. Gardner remembers Smith being present when the dust-producing work took place. Bill Gardner, Gerald Gardner's brother and a stevedore who worked at the Port from 1961 until 1981, also indicated in deposition testimony that he recalled unloading CSR-labeled burlap bags containing asbestos. He testified that during unloading, dust would be "all over everyone and everything," with bags frequently breaking because their seams were of very poor quality. He testified that Smith regularly was present during these unloading jobs.

From 1943 to 1999, CSR had an ongoing contractual relationship with the ABC Company ("ABC"). ABC mined and packaged crocidolite asbestos in Southern California which was then transferred to various distributors including CSR. The packaging was stamped with the corporate logo of whichever company was handling the shipping or otherwise providing for distribution of the asbestos. During this time period, CSR functioned as ABC's sole shipping and distribution contractor for asbestos fiber sales to customers in the eastern United States. Bags of asbestos fibers mined by ABC for shipment and distribution by CSR were packaged by ABC under the CSR label. CSR also shipped many other products through the Port of Bawlmerr during those years, including large quantities of refined sugar, since CSR also had a contract for shipping and distribution on behalf of Dominex, a major sugar producer.

Exhibits to a CSR manager's deposition include several invoices, indicating CSR shipments of asbestos fiber from California to the Port of Bawlmerr during the period of time in which Smith worked as a stevedore. Karen Kramer, a maritime expert witness testifying on behalf of Smith, stated in her affidavit that three of the four invoiced shipments were made pursuant to Cost and Freight shipping contracts, in which CSR, as the "shipper/consignor" of the asbestos fiber, was obligated to package and mark the asbestos fiber, identifying the contents and port destination; prepare an invoice; contract for marine insurance; obtain necessary shipping documents, such as export licenses; pay all freight charges to the carrier, including costs

associated with hiring a stevedore company to unload the cargo; and remain responsible for the cargo until it arrived and was unloaded in Bawlmerr, at which time the buyer accepted the cargo. Thus, CSR, in shipping hazardous asbestos fiber to East Coast U.S. buyers, agreed to provide transport for the cargo from California to the Bawlmerr pier and contractually arranged, through their employer BPSC, for the services of the longshoreman who would unload the ships in Bawlmerr. The shipping invoices were addressed to Johns-Manville Corporation, which used the raw asbestos fibers in manufacturing processed asbestos products, and has since that time gone bankrupt, largely because of liability related to the handling and sale of asbestos materials.

The workers also provided the court with an affidavit of Dr. Cathy Casters, an environmental consultant with expertise regarding the history of the asbestos industry and the development of knowledge about asbestos disease and worker health. Casters testified that the risk of developing cancer is directly proportional to the amount of asbestos fibers and dust to which the individual has been exposed, along with the duration of exposure. Casters provided her opinion that from 1943 to 1996, CSR would have known that burlap bags containing asbestos fiber from ABC's mine in Southern California were handled and unloaded by stevedores at various ports and that the nature of the packaging was such that bags would often break, tear, or be punctured, thereby exposing stevedores and others to airborne asbestos. According to Casters, knowledge of the potential health hazards of crocidolite asbestos dust had become widespread among participants in the asbestos industry, including its shipping companies, in the 1940s. By that time, she stated, CSR knew or should have known of these risks. She also testified that in the early 1960s, several of ABC's mill workers had developed mesothelioma, and that articles soon appeared in trade publications to which CSR would have subscribed, outlining the causal connection between asbestos exposure and development of mesothelioma. She concluded by giving her expert opinion that CSR shipped the asbestos with the reasonable expectation that its cargo of asbestos would be unloaded by stevedores at the port, who could be exposed to the asbestos if the burlap bags were ripped.

ABC had 40% of the State of Maryland market for raw asbestos fibers throughout the 1940s, 1950s, and 1960s, and 70% of the Maryland market throughout the 1970s, 1980s and 1990s. ABC had 20% of the national U.S. market throughout the 1940s, 1950s, and 1960s; it had 60% of the U.S. market throughout the 1970s, 1980s and 1990s. Throughout the period in question, CSR was one of two companies shipping bags of loose asbestos fiber through the Bawlmerr port. The other was QED Company, which shipped from another asbestos producer, Absolite, which had several facilities located on the Great Lakes, to ports on the East Coast. CSR and QED shipped roughly equal volumes of asbestos fibers through the Port of Bawlmerr until 1995, when QED went bankrupt, as did many of the asbestos fiber manufacturers whose goods QED shipped.

Smith now has sued CSR and ABC, claiming that while working as a stevedore at the Port, he was exposed injuriously to asbestos fibers shipped by CSR, while off-loading bags containing asbestos. He contends that as a result of this off-loading, he has developed mesothelioma, a cancer almost exclusively caused by exposure to airborne asbestos fiber.

The stevedore has pled multiple tort causes of action, some of which the court has already ruled upon. The contract claims, including breach of warranty claims, already have been

dismissed with prejudice and should be disregarded for purposes of answering this question. The court also has already held that there is sufficient evidence to support a jury verdict that the asbestos fibers are a product whose dangerousness exceeds ordinary consumer expectations unless packaged in such a way as to preclude escape and airborne transmission of the particles. The court has held that this is sufficient to establish design defect under the Restatement (Second) of Torts, which the highest court in Maryland has already held is the binding standard in the state for strict liability based on product defects. The court has further held that as a matter of law, plaintiff Smith was neither negligent nor did he assume any risk which could be asserted as an affirmative defense to any of his claims. These holdings are binding for purposes of answering this question.

Both defendants have moved for summary judgment. You are the clerk to the trial court judge. Write a memo for the judge analyzing whether, as to each claim, there is sufficient evidence to support a reasonable jury in finding for plaintiff as to each of the elements of the tort claim.

Question III (60 minutes)

The eight families who live across the street from the Maryland Paving Corporation, Inc. regard themselves as "virtual prisoners in their own homes," because the smell and grit spewed forth by the asphalt manufacturer makes it impossible for them to spend time in their front or back yards, on their screened-in porches, or on the sidewalk. One neighbor has described the steam gushing from the plant as akin to "what soldiers might have seen in World War I during the first poison gas attacks." Another said that "the grotesque early morning odor and soot penetrates even through locked and shuttered windows, and produces a coating on floors, windowsills, and even the inside of their kitchen cabinets."

The neighbors complain that they are forced to keep their windows closed, and to race from their cars into their homes spending as little time as possible outdoors in their neighborhood. Susan and Steven, the two young children of the Smith family, whose home is located directly across from the main smokestack, have both developed severe asthma, which the Smiths attribute to their continued exposure to this air. However, allergies and a tendency toward asthma appear to be hereditary among Steven Smith's side of the family. Most of those living on the street, as a precautionary measure, now wear face masks whenever they must breathe the air in the vicinity.

The neighbors also contend that those not immediately across the street also are affected, although not as severely. They claim that the grit and the odors may be harming neighbors living farther away from the plant, as well as school children attending the elementary school located four blocks away.

The company has until now been operating from 5 a.m. until dusk. However, it has announced recently that it intends to expand its operations from producing 800,000 to delivering 2.2 million tons of asphalt per year. In order to do so, it expects to manufacture asphalt around

the clock, every year from April until October, *i.e.*, about 120 days a year, throughout the prime season for road resurfacing.

Merrylande Paving has become the primary provider of asphalt for the entire region in which the State of Merrylande is located. In earlier decades, most road resurfacing was done during daylight hours. Starting a few years ago, however, the major metropolitan areas within the state began to require all contractors repaving highways and major traffic arteries to perform their repaving work at night. This minimizes traffic disruption caused by lane closures. About 90% of highway repaving work in the state now is done between 8 p.m. and 5 a.m., precisely the hours when Merrylande Paving has been closed.

The Palmetto family, located on the corner of the street, have lived in their home for decades. The remainder of the residents on the street, however, along with those living on the five blocks directly behind it, all moved into new houses built on what had been undeveloped land until about ten years ago. Most of that land had been part of a military base, closed about fifteen years ago. As prime land located within the area of growth and expansion of urban development, it was rapidly developed for residential living after the base closure.

The other seven families bought their new homes on the street because of their reasonable commuting time into the city, and their relatively reasonable price in light of the quality and size of the home. Regina Queenston, the owner of another of the homes on the street, explained her perspective:

We knew the plant was here when we moved in. However, at that point, it only operated during the day. It has been tough enough to deal with it functioning only during daylight hours, because of the dust and the noise and the hideous smells. If it expands to seven days a week, twenty-four hours a day, it will become totally unbearable.

Within a few years after the last of the current owners had bought and moved into their homes, a businessman from California, who owned and operated several asphalt plants in that state, bought up the thirty-year old Merrylande Paving Co. plant, invested substantial sums in increasing its efficiency, and expanded its marketing and operations so that it could be developed into the state's leading highway asphalt producer.

The neighbors' protests and complaints have elicited only a limited response so far from the company. Merrylande Paving has pointed to the urgent needs of highway departments and drivers throughout the increasingly congested region to insist on its right to continue its present operations and expand them to a 24 hour-a-day process during the peak resurfacing season; this public purpose dictates the expansion of its operations. The company expects a massive infusion of federal economic stimulus funds devoted to infrastructure projects, and points to the many jobs its expansion will create. Its present central location is ideal in minimizing transportation time to get the fresh asphalt to most of the areas being resurfaced, which improves the quality and durability of the resurfacing itself, minimizing local municipal, county and state highway department budget outlays for further resurfacing in the future. Both the company's own experts and one selected by the neighbors have conducted tests which have uniformly concluded that the

operations, at least as currently conducted, do not violate federal or state regulations setting air quality standards, which are quite lax. The company has, however, offered voluntarily to cease operations on the handful of days every summer when the weather and humidity cause a "Code Red" air quality alert to be issued.

The eight families have formed a block club, and have retained your law firm as their legal counsel. You are the associate assigned to work on the case. Write a memo to the senior partner handling the matter, identifying and analyzing the merits of the families' possible causes of action. Make recommendations on how best to proceed. Be sure to take account of your clients' remedial interests as compared to the alternative remedies a court might offer assuming they are successful in litigation.

- End of Examination -