

San Luis Obispo College of Law
Torts
Spring 2022
Prof. R. Allen

QUESTION 1

DeAndre was a restaurant critic for the local paper. He also published a blog that was read by tens of people.

DeAndre went to a French Bistro that had just opened. He ordered a glass of BLANK and the Coq au Vin. He took out a pad and pen and began to make notes.

DeAndre has a bad habit of talking out loud when he writes. During the meal the waiter heard him loudly say “your champagne tastes like toilet water.” The waiter looked around to see if anyone noticed the comment. None of the other patrons reacted, so the waiter was not sure if the comment was heard by others.

When the waiter took the empty plate, the waiter also heard DeAndre mutter, “this bread was obviously made with sawdust or the cheapest flour I have ever had the misfortune of putting in my mouth.”

When the waiter looked down he saw that DeAndre had notes on his pad that were equally critical. DeAndre criticized the wait-staff, the ambiance, and every dish that had been served to him. Looking over his shoulder, the waiter read the bottom note which showed the restaurant was going to receive two out of five stars. Heartbroken, the waiter told the chef/owner, Pierre.

Pierre has come to you to [1] sue for the statements DeAndre said out loud in the restaurant and heard by the waiter and [2] to stop the blog and newspaper publication of the review. Pierre fears such a bad review would destroy his restaurant before it had a chance. Please discuss with Pierre the legal issues, the probable defenses, and his likely success.

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TORTS QUESTION 2

Christopher drove his aunt, Stella Lubk, to a local drive-through restaurant. Christopher bought Stella a cup of coffee. After they received their food and drinks, Christopher pulled over so that Stella could put cream and sugar into her coffee. The car did not have any cup holders, so Stella placed the coffee between her knees. When Stella took the lid off of the coffee, the coffee spilled out and onto her inner thighs. She suffered third degree burns, required numerous surgeries, including skin grafts, and suffered unbelievable pain. Her family stated during a pre-trial deposition that Stella (79) has not been the same since the accident.

Turns out that the restaurant, McRounders, received 700 other complaints for this issue. McRounders heats their coffee to 180 degrees on purpose. At that temperature it was known by McRounders that it would cause severe injuries. However, they made no changes because they wanted the coffee to always be hot when customers received it.

McRounder's did not have a warning regarding the temperature of the coffee or the potential consequences if the hot coffee made contact at that temperature with human body parts. Instead, it imprinted its current slogan: "*You Deserve A Break Today.*"

Stella has come to you to discuss a possible law suit. She is interested in suing the restaurant for products liability only. Please discuss with Stella her possible causes of actions, the damages, and the defenses for ONLY strict products liability.

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TORTS QUESTION 3

Paula lives downwind from the Oceana Dunes State Vehicular Recreation Area (SVRA). The SVRA allows individuals to ride four-wheel vehicles, like trucks and dune buggies, on the beach.

A 2010 study, and several studies since, have shown that when the wind whips from the west/northwest the particulate matter kicked up from the vehicles is eight times greater than the areas of the beach not dedicated to vehicle use. No study has established the health effects of the particulate matter on humans.

Paula, however, believes that her lung problems are a direct result of the sand plume that she sees coming toward her home on windy days. Her doctor has diagnosed her with Chronic Obstructive Pulmonary Disease. COPD is made worse when, according to Paula's doctor, "the lungs react to infection or irritating substances by developing inflammation that makes the airways narrow from muscle tightness, swelling, and mucus." Paula believes the particulate matter from the SVRA is the irritant causing her medical condition to worsen. On windy days, she must remain indoors with an oxygen tank.

Some neighbors have also complained about the dust in the air, but most neighbors appreciate the enormous economic boon generated by tourists who come to ride vehicles on the dunes.

Although she has not complained in the past, Paula comes to you because she wants to force the state to stop vehicles from riding on the dunes. She thinks they are a nuisance. Please advise her as to possible causes of action, her possible remedies, and her likelihood of success.

SAN LUIS OBISPO COLLEGE OF LAW

TORTS

SPRING SEMESTER 2022

QUESTION 1

Issue	Rule	Analysis	Concl'n	Points Allotted
Defamation	False, defamatory statement; re plaintiff; published to third party; Causes damage to reputation	Statement or opinion; waiter connected to restaurant and Pierre; no affect yet and perhaps no reputation to sully		/20
Libel and Slander	Libel is permanent; slander is evanescent	Spoken out loud; written on note		/10
Slander Per Se	Re Serious crime, business or trade; loathsome disease; chastity	Bad champagne; bad food; 2/5 stars.		/10
Damages	Special/Pecuniary General compensation; Presumed; Punitives?	Presumed damages because related to business/trade		/20
Other Remedies	Prohibitive Injunction (Prior Restraint)	Unconstitutional (NY Times v. US)		/10
Defenses (2 points)	Truth;	It is possible the champagne		/20

	Qualified Privilege (<u>Mr. Chow's v. Ste. Jour of Azur</u>);	and food tasted terrible; Critics on matters of public interest have qualified privilege		
Other possible Torts: EXTRA CREDIT				
Intrusion Upon Seclusions	Intentional intrusion upon plaintiff's private seclusion	Not private area; P invites into the business	Not likely	/10
False Light	Majority: not available; Minority: malicious publication that portrays another in false light	D's opinion; no facts indicating D knew false or reckless	Not likely	/10
IIED	Intent or reckless, extreme and outrageous Causes severe emotional distress	not really extreme and outrageous; no facts re emotional distress		/10
Total points possible				/90

TORTS QUESTION 2

Issue	Rule	Analysis	Concl'n	Points Allotted
Strict Products Liability				

Proper P; Proper D	Proper P historically required privity, now any reasonably foreseeable end-user; Proper D is all in the chain of commerce, except service providers	Here, P has no privity, but is a reasonably foreseeable end-user; D is a business that sells food and drinks and placed the hot coffee into the stream of commerce	Yes	/10
Defect	Manufacturing Defect: product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product	Produced exactly as designed	No	/10
	Design Defect: Consumer Expectation Test: product is in an unreasonably dangerous defective condition when it is more dangerous than would be contemplated by the ordinary consumer with ordinary knowledge common to the community Danger-Utility Test: a product is defective if the danger is greater than the utility. Danger refers to likelihood, nature and	180 degrees is unreasonably dangerous; risk of serious injury from burns is greater than utility of being hot when delivered to every customer; available alternatives by simply lowering the temperature of the heaters	Yes	/30

	<p>severity of potential injuries; alternative designs</p> <p><u>Hindsight-Negligence Test:</u> assuming the defendant knew of the defect to the product at the time of distribution, would a reasonable prudent person have placed the product into the stream of commerce</p>			
	<p><u>Warning Defect:</u> fails to adequately describe the danger of the product; warnings were adequate if "clear and specific warning." <u>Hood v. Ryobi</u></p>	No warning re risk of extremely hot coffee	Yes	/10
Actual Cause	But For defect; But For lack of warning	Would Stella Lubk heeded the warning?		/10
Proximate Cause	Direct; Reasonably Foreseeable injury; Intervening act	Spilling coffee is reasonably foreseeable, happened to 700 others; Lubke spilled coffee on herself		/10
Damages	Specials; General;	Medical damages (Present and future); pain		/10

	Punitive Damage (<u>State Farm v. Cambell</u> ; <u>Gore v. BMW</u>)	and suffering; loss of consortium because "not been the same since"; McRouunders knew of risk and placed the hot coffee into the stream of commerce anyway		
Defenses	Unforeseeable Misuse	Luke spilled coffee on her legs; supposed to drink	No	/5
	CN	Not available in SPL cases	-	/5
	Comparative Fault: plaintiff's own negligence, misuse or abnormal use can limit his recovery in apportionment	Lubk spilled coffee on herself	Yes	/10
Total points possible				/110

TORTS QUESTION 3

Issue	Rule	Analysis		Points Allotted
Public Nuisance	That defendant action or failure to act created a condition which was harmful to	State failed to stop recreational vehicles from	Yes	/20

	<p>health, indecent or offensive to the senses, obstructed free use of property, obstructed free passage or use of public right of way, or was a fire hazard; That the condition affected a substantial number of people at the same time; That an ordinary person would be annoyed or disturbed by the condition; That the seriousness of the harm outweighed the social utility of the conduct or condition; That Plaintiff did not consent to the conduct or condition; That the harm suffered by Plaintiff was different from the type of harm suffered by the general public; and That the conduct caused plaintiff's harm</p>	<p>riding on the dunes; affected health and use; some neighbors complained; likely an ordinary person would be annoyed or disturbed; balancing health issues against economic boon; plaintiff did not complain; her health issues appear worse than others</p>		
<p>Private Nuisance</p>	<p>Plaintiff has property interest; Defendant acts or fails to act; Intentionally, recklessly, negligently, or through abnormally dangerous activity; Which causes; Substantial, unreasonable interference with Plaintiff's use and enjoyment of his land.</p>	<p>Paula owns a house upwind; defendant is allowing activity on dunes; affecting use and enjoyment of house; balance of interests seems to favor dunes</p>	<p>No</p>	<p>/20</p>

	Unreasonable interference determined by the balancing test (RST sec 826(a) and b)) or Significant or substantial harm determined by the objective ordinary prudent person test. (RST, sec. 821F)			
Defenses	Consent; Contributory Negligence; Assumption of Risk; Laches; Coming to the Nuisance; Statute, regulation or ordinance permitting land use	By failing to complain, did she consent; did she wait too long; who was their first?		/10
Remedies	Damages: legal remedy (money); Injunctive Relieve: equitable remedy requires the court to balance the hardships; Self-help or "abate the nuisance" An injunction is available when: There is no adequate remedy at law; It will prevent multiple lawsuits; Plaintiff will suffer irreparable harm, which money would not adequately compensate; Balance of hardships favors injunction; Public interest favors injunction.	Paula wants equitable remedy, but does the hardship lean in her favor?	No	/15

Trespass to Land	intentionally; enter upon the land of another, directly or indirectly; without consent; damage required only if an intangible trespass.	Intentional or literally the way the wind blows; Indirect Trespass; tangible or intangible; provable damages?	No	/10
Abnormally Dangerous Conditions	The defendant brought some res (thing) onto his land; Nonnatural/artificial use of the land; Res likely to do mischief; The res escapes and causes mischief.	Dunes is natural; vehicles are an activity	No	/10
Abnormally Dangerous Activity	Either RST or RTT rule is fine. <u>RTT sec. 20</u> : An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. An activity is abnormally dangerous if: 1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and 2) the activity is not one of common usage.	No studies link particulate matter to health issues, but P suffers from exacerbated COPD. Reasonable foreseeable harm? Only two SRVAs in state.	?	/10
Total Points Available				/95

1)

Defamation

Defamation is a false defamatory statement published to a third party that does damage to plaintiff's reputation. Defamation has to be balanced with the 1st Amendment protections for free speech. There are multiple types of defamation, the two main being libel and slander. Libel is more permanent statements, like a radio broadcast, book, or a newspaper while slander is more ephemeral and is generally just speech. Libel damages are presumed, but with slander damages need to be shown to collect on a suit (unless the slander imputes unchastity, a loathsome disease, does damage to ones business, or implicates a crime of moral turpitude - then damages are presumed as this would be slander per se).

Here, DeAndre (DA) who is a restaurant critic for the local newspaper visits a new French Bistro where Pierre (P) is the chef. While taking notes on what he was served DA made some statements out loud that the waiter overheard. The statements made claims that the "champagne tastes like toilet water" and that the bread "was obviously made with sawdust or the cheapest flour." DA was also writing on a notepad which the waiter saw was filled with negative comments about the restaurant and the food.

Thus, both slander and libel will be discussed below.

Slander

False

For a statement to be considered defamatory the statement needs to be false. The burden to prove falsity is on the plaintiff.

Here, DeAndre (DA) who is a restaurant critic for the local newspaper visits a new French Bistro where Pierre (P) is the chef. While taking notes on what he was served DA made some statements out loud that the waiter overheard. The statements made claims that the "champagne tastes like toilet water" and that the bread "was obviously made with sawdust or the cheapest flour." For P to bring a suit against DA for these statements P would have to prove that these statements were false. To prove that the champagne does not taste like toilet water P would likely have to get a blind taste test set-up where participants tried to determine the difference between the two without looking. This silly proof shows that very likely P could prove that his champagne does not in fact taste like toilet water and P could easily walk DA back to the kitchen to show that they do not use sawdust as an ingredient in bread.

Thus, it would easy for P to prove the falsity of these statements.

Defamatory

Defamatory is the harm to a reputation of a person in the eyes of the broader community as understood by an average citizen.

Here, people very likely would not come to a new restaurant if they knew the champagne and bread were awful. Though when DA made these statements it was loud enough for the waiter to hear, and the waiter did not notice that any other patrons even acknowledged the statements. If they truly agreed with DA then they likely would have spit out their drinks and walked out refusing to pay.

Thus, one can assume that since no patrons seemed to notice the statements, they either did not agree or maybe just thought DA was a weird guy talking to himself and continued to enjoy their meals.

Published to a 3rd party

Publishing has to be to at least one other person besides the parties to the suit.

Here, the only person that DA published this statements to, based on the facts, are the waiter. The waiter was not even necessarily meant to hear the statements as DA was simply talking out loud while DA wrote. As no patron acknowledged the statements and the waiter is an employee of the Bistro, he would not qualify as a 3rd party. A 3rd party would need to be someone else that is a disinterested party who is not an employee of the restaurant.

Thus, these slanderous statements would likely not qualify as being published to a 3rd party and it is unclear if anyone heard, acknowledged or acted on DA's statements.

Damage to reputation

Damage to reputation means that the party to which the statements were made about has a demonstrable loss to their reputation so much so that their reputation being thought of as lower is common community knowledge.

Here, if DA were to get his statements broadcast on the radio, or if he was streaming his statements live to YouTube from his table at the bistro, then there would proof that his statements were published to a 3rd party and more likely to show harm to the restuarant's reputation and success. But, there is no mention of any harm in the facts.

Thus, I would have to advise P that the statements were not slanderous and there is no proof that his business was harmed in any way (ruling out slander per se). P would have to

wait to see if DA published his statements online or if other customers said something relating DA's statements as to why they were not coming back to the bistro. P would need to show some harm to his business/reputation and based on the facts there is no harm.

Conclusion on slander:

There is not suit P could bring against DA for his statements made in the bistro.

#2 Blog/newspaper

✓ Libel

False

For a statement to be considered defamatory the statement needs to be false. The burden to prove falsity is on the plaintiff.

Here, the waiter could see negative statements written on DA's notepad and that the restaurant was going to receive 2 of 5 stars as a rating. Since these statements are written, this is a more permanent form of communication and subject to libel laws where damages are presumed.

Thus, the burden again is on P to prove that what DA is writing is false. A restaurant rating would likely be ruled as opinion and there is no practical way for P to absolutely prove that the restaurant does, or does not, deserve such a low rating. Likely a trier of fact would rule these statements and the rating simply an opinion.

Defamatory

Defamatory is the harm to a reputation of a person in the eyes of the broader community as understood by an average citizen.

Here, a rating of 2/5 would likely bring the reputation of the bistro down in the eyes of the community. Generally the average citizen understands a starred rating system and I doubt anyone looks for bistro reviews and intentionally goes to places with low ratings.

Thus, the rating of 2/5 could be considered defamatory.

Published to a 3rd party

Publishing has to be to at least one other person besides the parties to the suit.

Here, DA has yet to publish anything he has written. He has only written on a notepad. Though he does work for the newspaper and has a blog he has not published anything at the time P is seeking advisement. It is possible that DA chooses not to publish anything. A waiter looking over the shoulder of someone writing would not qualify as publishing.

Thus, if/when DA actually publishes anything he wrote on his notepad a trier of fact would not consider what DA has written as published to a 3rd party.

Damage to reputation

Damage to reputation means that the party to which the statements were made about has a demonstrable loss to their reputation so much so that their reputation being thought of as lower is common community knowledge.

Here, P is seeking advisement prior to any widespread publication or broadcast of the allegedly defamatory statements. Thus, there is no measurable way to see if P's reputation is damaged.

Thus, DA would likely not be liable for the tort of libel based on what DA wrote on his notepad.

Conclusion on libel:

At this point, I would advise P that DA has not committed libel based on the current facts. P would have to wait to see if DA broadcast or published his statements or notes. Based on what DA wrote that could change the analysis completely. But, at this point I would advise P that bringing a suit to petition the court to put some sort of injunction in place to stop DA from publishing would not be successful.

①

Defenses

Defamation has to be balance with the right to 1st Amendment free speech. There are 3 defenses to defamation: absolute privileged (AP), qualified privilege (QP), and truth. AP would not be a defense in this case as that is reserved for judges or witnesses during official proceedings. In this case though DA would be able to argue QP as he is employed by a local newspaper to review eateries. Assuming this is something DA does regularly and is qualified to do, he is exempted from a defamatory suit for making statements he believes to be truthful as long as he only says his truthful opinion and does not exceed the scope of his employment. If DA were to use his platform to publish knowingly false statements, he could be liable for defamation. As long as he is publishing his genuine opinion at the behest of the local newspaper, QP would be a valid defense.

②.

③.

DA could also argue truth as a defense. Likely the statements DA made out loud about a toilet and sawdust were a bit of exaggeration and puffery. If DA actually thought he was eating sawdust and drinking from a toilet, he likely would give the bistro a rating of lower than 2/5 stars. DA could argue that though he exaggerated a bit, he truthfully thought the champagne and bread were awful. Thus, truth would be a valid defense for DA.

END OF EXAM

fiction

Issue	Rule	Analysis	Concl'n	Points Allotted
Defamation	False, defamatory statement; re plaintiff; published to third party; Causes damage to reputation	Statement or opinion; waiter connected to restaurant and Pierre; no affect yet and perhaps no reputation to sully		19/20
Libel and Slander	Libel is permanent; slander is evanescent	Spoken out loud; written on note		10/10
Slander Per Se	Re Serious crime, business or trade; loathsome disease; chastity	Bad champagne; bad food; 2/5 stars.		9/10
Damages	Special/Pecuniary General compensation; Presumed; Punitives?	Presumed damages because related to business/trade		0/20
Other Remedies	Prohibitive Injunction (Prior Restraint)	Unconstitutional (<u>NY Times v. US</u>)		3/10
Defenses (2 points)	Truth; Qualified Privilege (<u>Mr. Chow's v. Ste. Jour of Azur</u>);	It is possible the champagne and food tasted terrible; Critics on matters of public interest have qualified privilege		18/20

Other possible Torts: EXTRA CREDIT				
Intrusion Upon Seclusions	Intentional intrusion upon plaintiff's private seclusion	Not private area; P invites into the business	Not likely	0/10
False Light	Majority: not available; Minority: malicious publication that portrays another in false light	D's opinion; no facts indicating D knew false or reckless	Not likely	0/10
IIED	Intent or reckless, extreme and outrageous Causes severe emotional distress	not really extreme and outrageous; no facts re emotional distress		0/10
Total points possible				59/90

Score 75

1. You did a pretty good job and hit upon most of the issues. Be sure however to follow the "call of the question." The call asks you to also discuss damages and the injunctive relief. You mentioned "some sort of injunction," but the question anticipated a more fulsome exploration of what an injunction does, who can get it, and why this would not likely succeed for Pierre. There was no analysis of possible damages to Pierre should the statements be published to third parties via article or blog; for example, special damages, general damages, presumed and punitive damages.
2. There are several more areas that would qualify for Absolute Privilege; however, none of them apply in this case.
3. The Qualified Privilege may be asserted by those commenting on matters of public interest, like food critics, movie critics, et cetera.

2)

Strict Products Liability

For a person to have a successful claim for strict products liability, a person must be a proper plaintiff, and the tortfeasor must be a proper defendant. Proper defendants may ^{sl.} be found liable for any harms caused as a result of the product having design defects, manufacture defects, or warning defects.

Proper plaintiff

1. A proper plaintiff is anyone who purchases or is one to be around or use the product for its intended purpose.

Here, Christopher and his aunt are both proper plaintiffs because they bought coffee with the intent to drink the coffee.

Proper defendant

A proper defendant is anyone in the stream of commerce who manufactures, produces, or sells the product to the consumer.

Here, McRounders produced the coffee that that heat, then sold the coffee to Stella. McRounders is a proper defendant.

Design defects

Design defects are defects where the product is produced how it was intended, but there is a defect in the design that makes it unsafe.

Here, McRounders purposely heats the coffee to 180 degrees so that the coffee is always hot when customers received it. This is a defect in the design, as the coffee is being produced as intended, but the defect or issue with the coffee is that the coffee is far too hot. This is easily fixable by not heating the coffee to that caliber, which will be discussed below.

2.
Manufacture defects

Manufacture defects are defects that are a rare occurrence usually within the assembly line. The product is not made to design, so the defect is in the making or producing of the product.

Here, McRounder's had received 700 other complaints about their coffee being far too hot. This is a clear indication that the company was aware of the issue, but continued to produce the product as they have been. Because of the volume of coffee complaints they have received, one could infer that the coffee Stella received was produced as intended, not the result of an employee cooking the coffee extra hot accidentally. This is not the case of a manufacture defect.

Warning defects

Warning defects are defects where the proper plaintiff is not adequately warned of the dangers of the product.

5.
Here, the only label on the cup stated "You Deserve A Break Today," but did not state anywhere on the cup that coffee may cause burns, or a series of other warnings. This cup did not even have a prop 65 label! There is a warning defect on the cup, as the plaintiff was not warned of the dangers of the cup.

Consumer Expectation Test

3.

The consumer expectation test is a test used to weigh the pros and cons of an item in the stream of commerce. This test focuses on what the consumer will do with the product as opposed to the expectation of the products use.

Here, the expectation is that the customer will drink the coffee, and the consumer does in fact drink coffee, meaning this test is satisfied.

Danger Utility Test

The danger utility test compares the danger of the product to the utility of the product.

Here, the danger of the product is the chance of 3rd degree burns, and the utility is that the coffee is always hot when the customer receives it. McRounders fails this test because the danger of someone spilling a drink on themselves is greater than the utility of someone always having hot coffee. This is something that can be resolved by serving coffee at a more reasonable temperature.

Reasonable Expectation Test

4. The reasonable expectation test is a hybrid of the two previous tests, weighing the reasonableness of the product versus the expectation and utility of the product. This test is used to discover defects and resolve them properly while weighing the cost of fixing the defect to the cost for the consumer.

Here, McRounders fails the reasonable expectation test because the cost of fixing the defect is less than the cost the consumer would have to pay. McRounders likely would save money by not heating their coffee to that degree, but they would be weighing the temperature against the amount of people who appreciate coffee at 180 degrees. The amount of complaints on the coffee would lead one to infer that adjusting the coffee temperature is reasonable.

Damages

General

General damages are damages that affect the individual in their everyday life, such as pain and suffering, loss of consortium, loss of enjoyment of life, and emotional damages.

Here, Stella, at age 79, has not been the same since the accident, suffering unbelievable pain. Her family stated that she had not been the same since the accident as well. Stella would likely have general damages awarded.

Special

Special damages are damages that are economic in nature, such as medical bills and lost wages.

Here, Stella at age 79 likely is not losing wages from the accident, but she did endure numerous surgeries as a result of the accident. Because of the medical costs, Stella would likely be awarded special damages.

Punitive

Punitive damages are damages intended to punish the tortfeasor and deter other businesses from doing similar things. To have successful punitive damage claims in strict liability, the plaintiff must show that the defendant acted with ^{SP}scandal or malice, which is where the defendant knows of the danger, but continues to do the act anyway.

Here, Stella was just one of 700 other complaints to McRounders, all regarding the the severity of the heat of the coffee, and how it could cause burns. There is evidence to support that McRounders knew that the coffee temperature at 180 degrees would cause

severe injuries, but continued to serve the coffee at that temperature anyway. Stella would likely be awarded punitive damages.

Defenses

Contributory negligence

Contributory negligence states that the plaintiff was negligent in their act, leading to the harm done. As long as the plaintiff was not the primary cause of the negligence, they can bring a cause of action

McRounders best argument would be to state that Stella was contributory negligent putting the hot coffee between her legs. McRounders would assert that a reasonably prudent person who knowingly orders a hot coffee should be aware of the dangers hot liquids can do. Additionally, Stella is nearly 80 years old, which could cause her to be more shakey, leading to the accident that occurred in the car. McRounders would likely not have a successful contributory negligence assertion.

END OF EXAM

6.

Issue	Rule	Analysis	Concl'n	Points Allotted
Strict Products Liability				
Proper P; Proper D	Proper P historically required privity, now any reasonably foreseeable end-user; Proper D is all in the chain of commerce, except service providers	Here, P has no privity, but is a reasonably foreseeable end-user; D is a business that sells food and drinks and placed the hot coffee into the stream of commerce	Yes	10/10
Defect	Manufacturing Defect: product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product	Produced exactly as designed	No	10/10
	Design Defect: Consumer Expectation Test: product is in an unreasonably dangerous defective condition when it is more dangerous than would be contemplated by the ordinary consumer with ordinary knowledge common to the community	180 degrees is unreasonably dangerous; risk of serious injury from burns is greater than utility of being hot when delivered to every customer; available alternatives by simply lowering the temperature of the heaters	Yes	22/30

	<p><u>Danger-Utility Test:</u> a product is defective if the danger is greater than the utility. Danger refers to likelihood, nature and severity of potential injuries; alternative designs</p> <p><u>Hindsight-Negligence Test:</u> assuming the defendant knew of the defect to the product at the time of distribution, would a reasonable prudent person have placed the product into the stream of commerce</p>			
	<p><u>Warning Defect:</u> fails to adequately describe the danger of the product; warnings were adequate if "clear and specific warning." <u>Hood v. Ryobi</u></p>	No warning re risk of extremely hot coffee	Yes	10/10
Actual Cause	But For defect; But For lack of warning	Would Stella Lubk heeded the warning?		0/10
Proximate Cause	Direct; Reasonably Foreseeable	Spilling coffee is reasonably foreseeable,		0/10

	injury; Intervening act	happened to 700 others; Lubke spilled coffee on herself		
Damages	Specials; General; Punitive Damage (<u>State Farm v. Cambell; Gore v. BMW</u>)	Medical damages (Present and future); pain and suffering; loss of consortium because "not been the same since"; McRounders knew of risk and placed the hot coffee into the stream of commerce anyway		10/10
Defenses	Unforeseeable Misuse	Lubke spilled coffee on her legs; supposed to drink	No	0/5
	CN	Not available in SPL cases	-	4/5
	Comparative Fault: plaintiff's own negligence, misuse or abnormal use can limit his recovery in apportionment	Lubk spilled coffee on herself	Yes	0/10
Total points possible				66/110

Scaled Score: 78

1. The fact that Christopher bought the coffee exists so you can explain that privity is no longer necessary. Any end-user, or reasonably foreseeable bystander, is sufficient.
2. Exploring the various tests after introducing Design Defect would have been a better organizational format.

3. Your Rule makes no sense to me. The Consumer Expectation Test states that the product is in an unreasonably dangerous defective condition when it is more dangerous than would be contemplated by the ordinary consumer with ordinary knowledge common to the community. You are right, however, in that the coffee was more dangerous than would be reasonably contemplated by the average consumer.
4. The third test is the Hindsight Negligence Test.
5. Is coffee a known carcinogen?
6. You failed to discuss causation and lost easy points. There are three defenses to discuss in a SPL essay: unforeseeable misuse of the product; assumption of risk, and comparative fault. You discussed Contributory Negligence, which is not available in an SPL cause of action.

3)

Nuisance

Nuisance comes in two varieties, public and private. A private nuisance is the unreasonable and substantial interference with the enjoyment and use of one's land/property. A public nuisance is a harm that affects the greater community, but to bring a suit a certain plaintiff must suffer greater harm than was experienced by the greater community.

Here, the facts mention that Paula (P) is wanting to bring a suit to stop the SVRA from operating because of her specific circumstances. The facts do not state that P is experiencing a high amount of air particulates than any of her neighbors, thus, I would advise P based on the theory of private nuisance. Also, a public nuisance suit cannot be brought by someone complaining because they have a particular sensibility to the occurrence. P claims the dust aggravates her COPD, and her doctor agrees. But, her COPD means she is particularly susceptible to the dust beyond that of her neighbors, thus, she would not be able to bring a suit.

Private nuisance

Rule stated *supra*.

1. Unreasonable

Unreasonable means that an average land owner in the community would experience the nuisance as not allowing them to enjoy their land if the nuisance were to cease.

P lives down wind from the SVRA. Windy days show that particulate levels are high around her home which aggravates her COPD forcing her to stay in door many days. P's neighbors do not like all the dust in the air, but the facts state they enjoy the SVRA tourist dollars even more than the dust bothers them. Living near the beach means there will be wind. And when wind and sand mix, there are going to be dust particles in the air. The 2010 study showed that the SRVA area has particulate levels 8x higher than areas without vehicles. Since P's neighbors do not complain enough to bring a lawsuit with P, it seems the majority of those in her neighborhood do not think this fact makes the experience unreasonably.

Thus, a trier of fact would likely not think that living down wind from a huge sand area would produce particulate free air on normally windy coastal days.

Substantial

Substantial means that the land owner is significantly inhibited in their enjoyment of their property.

Here, P is forced to remain in doors on windy days as the particulate levels are high as her COPD is aggravated and she must remain on oxygen. There are many windy days on the coast and this means that likely most days of the year, P is forced indoors.

Thus, a trier of fact would find this to be a substantial interference with the use of your land if you're not able to even go outside most days.

Use/Enjoyment

One buys property so that they have the exclusive right to the use of that piece of land.

Here, P is not able to go outside many days of the year as most afternoons on the coast are windy. One of the advantages of living on the coast is enjoying the weather. If one is not able to exit their home because they cannot breathe, it would be difficult to enjoy their land.

Thus, P do not have full use and enjoyment of her land as a result of the particulates.

Conclusion on private nuisance

I would advise P that a private nuisance suit would likely fail. I would advise her to file official complaints and talk to neighbors about what they could collectively do. Some remedies are discussed below.

Remedies

Non-monetary

3

A court could place an injunction on the SRVA and prohibit vehicles from driving for a period of time. A court could also try to limit the times vehicles could driving (such as if the average wind goes above 10 mph then vehicles have to cease). A court could also limit the number of vehicles allows per day. All these could reduce the particulates. Depending on who P could get involved, P could get the court involved in forcing the SRVA to commission a further study on particulates and how that affects humans.

Monetary Damages

If P were to win, the SRVA could owe P general damages for the pain and suffering she experienced due to the dust. She may also be able to collect on emotional distress as it would be distressing to be stuck in your house every day there is wind. Being stuck inside also would mean she is losing out on some enjoyment of life and possibly employment opportunities.

Defenses

Consent

Consent is a defense to a nuisance. The facts do not say how long P has lived downwind of SRVA or how long she has had COPD. If she did bring suit the attorneys for SRVA would likely say that P could easily see that the weather is windy each day, the vehicles drive each day, so by living down wind of the SRVA she is consenting to the dust. P would argue that the presence of the vehicles makes the dust worse than it needs to be based on the 2010 study.

4.

Laches

The SRVA would claim that P has simply waited too long to bring a suit. The facts state that P "has not complained in the past." If she has not had any past complaints then she may have simply waited too long to bring a suit.

Statute

SRVA would argue that there is a county statute that specifically authorizes certain types of vehicles to use that land for that purpose.

← Coming to the nuisance

SRVA would also try to argue (though the facts do not say when P moved to her current home) that P only moved to that location to bring a lawsuit. Though inferring from the facts that P never complained before so it seems she has been there a while and did not move there solely for the purpose of bringing a law suit.

END OF EXAM

Issue	Rule	Analysis		Points Allotted
Public Nuisance	That defendant action or failure to act created a condition which was harmful to health, indecent or offensive to the senses, obstructed free use of property, obstructed free passage or use of public right of way, or was a fire hazard; That the condition affected a substantial number of people at the same time; That an ordinary person would be annoyed or disturbed by the condition; That the seriousness of the harm outweighed the social utility of the conduct or condition; That Plaintiff did not consent to the conduct or condition; That the harm suffered by Plaintiff was different from the type of harm suffered by the general public; and That the conduct caused plaintiff's harm	State failed to stop recreational vehicles from riding on the dunes; affected health and use; some neighbors complained; likely an ordinary person would be annoyed or disturbed; balancing health issues against economic boon; plaintiff did not complain; her health issues appear worse than others	Yes	15/20
Private Nuisance	Plaintiff has property interest; Defendant acts or fails to act; Intentionally, recklessly, negligently, or through abnormally dangerous activity;	Paula owns a house upwind; defendant is allowing activity on dunes; affecting use and enjoyment of house; balance	No	15/20

	<p>Which causes; Substantial, unreasonable interference with Plaintiff's use and enjoyment of his land.</p> <p>Unreasonable interference determined by the balancing test (RST sec 826(a) and b)) or Significant or substantial harm determined by the objective ordinary prudent person test. (RST, sec. 821F)</p>	<p>of interests seems to favor dunes</p>		
Defenses	<p>Consent; Contributory Negligence; Assumption of Risk; Laches; Coming to the Nuisance; Statute, regulation or ordinance permitting land use</p>	<p>By failing to complain, did she consent; did she wait too long; who was there first?</p>		9/10
Remedies	<p>Damages: legal remedy (money); Injunctive Relieve: equitable remedy requires the court to balance the hardships; Self-help or "abate the nuisance"</p> <p>An injunction is available when: There is no adequate remedy at law; It will prevent multiple lawsuits; Plaintiff will suffer irreparable harm, which money would not</p>	<p>Paula wants equitable remedy, but does the hardship lean in her favor?</p>	No	8/15

	adequately compensate; Balance of hardships favors injunction; Public interest favors injunction.			
Trespass to Land	intentionally; enter upon the land of another, directly or indirectly; without consent; damage required only if an intangible trespass.	Intentional or literally the way the wind blows; Indirect Trespass; tangible or intangible; provable damages?	No	0/10
Abnormally Dangerous Conditions	The defendant brought some res (thing) onto his land; Nonnatural/artificial use of the land; Res likely to do mischief; The res escapes and causes mischief.	Dunes is natural; vehicles are an activity	No	0/10
Abnormally Dangerous Activity	Either RST or RTT rule is fine. <u>RTT sec. 20</u> : An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity. An activity is abnormally dangerous if: 1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and 2) the activity is not one of common usage.	No studies link particulate matter to health issues, but P suffers from exacerbated COPD. Reasonable foreseeable harm? Only two SRVAs in state.	?	0/10

Total Points Available				47/95

Scaled Score: 70

1. The differences between Public and Private are such that they should be separately analyzed. Private Nuisance requires the P to have a property interest. As you mentioned, the act of D must have a substantial and unreasonable harmful impact on the use and enjoyment of the P's property interest.
2. Is this the public nuisance analysis? A person suing because of a public nuisance needs to show harm different and greater than the ordinary person, for instance. Isn't that the case here? The sand effects P's pre-existing COPD. COPD is likely a serious health issue. Our P must live with an oxygen tank. In regards to the balancing issue, we balance that physical harm against the SVRA being a tourist attraction that brings in big bucks to the area. But it is after all, just entertainment.

Obviously, P can bring a suit, but will it likely be successful?
3. When is an injunction available to a party?
4. There are several more defenses you could have explored, including that the SVRA likely has permission to operate this activity by the state and local authorities.