CAPITAL UNIVERSITY
LAW AND GRADUATE CENTER

TORTS II — PROFESSOR STRASSER
SPRING SEMESTER, 1998 — FINAL EXAMINATION

INSTRUCTIONS

1. **THIS IS A *THREE-HOUR* (3-HOUR), OPEN-BOOK EXAM. YOU ARE WELCOME TO LOOK AT YOUR NOTES, YOUR OUTLINES, AND YOUR TEXT, BUT YOU ARE NOT PERMITTED TO MAKE USE OF ANY COMMERCIAL MATERIALS (EXCEPT AS NOTED ABOVE). FAILURE TO ABIDE BY THESE RULES IS AN HONOR CODE VIOLATION.**

2. **BEGIN EACH ANSWER IN A NEW BLUE BOOK. NUMBER EACH BLUE BOOK, E.G., ON THE FIRST, #1 OF 3, ON THE SECOND, #2 OF 3, AND ON THE THIRD, #3 OF 3. THE SECOND NUMBER SHOULD CORRESPOND TO THE TOTAL NUMBER OF BLUE BOOKS THAT YOU ARE USING. FOR EXAMPLE, IF YOU USE TWO BLUE BOOKS FOR THE ENTIRE EXAM, YOU SHOULD HAVE "#1 OF 2" WRITTEN ON THE FIRST BLUE BOOK AND "#2 OF 2" WRITTEN ON THE SECOND BLUE BOOK. YOU SHOULD BE ABLE TO DO THIS EXAM USING ONLY TWO BLUE BOOKS BUT YOU ARE WELCOME TO USE MORE IF YOU SO DESIRE.**

3. The questions are of **EQUAL WEIGHT**.

4. **AMBIGUITIES**: If you find the facts given to be insufficient to answer a question, state any additional factual assumptions you deem necessary and answer the questions as though your assumptions were part of it. **DO NOT MAKE THE MISTAKE OF CHANGING THE QUESTION BY CHANGING THE FACTS.**

5. **IDENTIFICATION: Write your exam number on the FRONT COVER OF EACH BLUE BOOK.**

6. **TAKE TIME TO THINK ABOUT THE QUESTION**. Organize your answers, which should be concise and to the point. You should discuss **ALL RELEVANT ISSUES** even if one issue might dispose of the case. This exam requires you to do **ISSUE-SPOTTING and ANALYSIS**.

7. REPETITION. When I grade these, I will look at Question One in **ALL** of the exams and then look at Question Two in **ALL** of the exams. Merely because you have said something in Question One does not mean that you will get credit for it in Question Two should the same point be relevant in both questions. **DO NOT CROSS-REFERENCE**. (I do not want my judgment of how you are doing in Question Two to be affected by my judgment of how well you did on Question One.)

8. **CITATION** When citing to a case we discussed in class, it will suffice to use the name of the case, e.g., the Hill Court or the Hoven court.

9. If dates are offered in the questions below, they are just there to facilitate the sequencing of events.

10. You need not turn in the copy of the exam. You are welcome to frame, recycle, or otherwise dispose of it as you see fit.

11. **WRITE LEGIBLY. IF I CANNOT UNDERSTAND WHAT IS WRITTEN, I CANNOT GIVE CREDIT FOR THE ANSWER.**

12. **PLEASE DO NOT TURN THE PAGE UNTIL INSTRUCTED TO DO SO.**

QUESTION 1

The Safelawn Corp. makes Lazymower, an electrically powered lawn mower. Because other mowers have been involved in numerous accidents, Safelawn has included certain protective features within the design of its product:

1. The mower will not work unless the removable attachment which collects the leaves, grass, etc., is installed.
2. The insulation on the electric cord is double the thickness of the insulation on competitors' cords.

In large letters on the frame of the mower is written:

CAUTION: DANGER! KEEPS HANDS AND FEET AWAY FROM BLADE.
DO NOT USE IF GRASS IS WET. POTENTIAL FOR ELECTRIC SHOCK

On April 10, John James bought his Lazymower from the local Safelawn distributor in Capania, Capitania where he lived. On April 24, he went back to the retailer to have the mower modified -- he wanted to be able to cut his lawn without using the grasscatching attachment. The retailer made the necessary modification. In fact, ninety percent (90%) of the consumers nationwide who had bought the Lazymower with this new safety feature had asked to have the mower altered. Retailers all over the country had been quite busy accommodating their requests.

On June 1, while his parents (John and Jane James) were away for the weekend, Will James used the modified mower. Will had been asked by his father for weeks to mow the lawn. Because it had rained for the past several days, the grass was rather high. In fact, it had rained that very morning and the grass was also rather slippery.

Will was seventeen years old. On the day in question, he had had six beers on an empty stomach

when he had suddenly decided that it was time to do the lawn. While he was mowing, he slipped and fell. His foot went through the opening where the grasscatcher would have been attached and was severely cut by the moving blade. Further, when he fell, he caused the mower to run over and cut the electric cord. Will somehow received a severe electric shock, which defendant's experts testified must have killed him instantaneously and even before his foot had been cut and which plaintiff"s experts testified must have killed him a few seconds after his foot had been cut.

In their suit against Safelawn Corp., the James family argued that the mower suffered from design defects. It was foreseeable that hands or feet might go through the opening for the grasscatcher, and the mower should have been built to prevent these kinds of injuries.

At trial, it was established that Safelawn Corp. had had numerous complaints about the dangers posed by the modified mower -- numerous individuals had lost hands and feet. Plaintiff's experts had explained that had the opening for the grasscatcher been smaller, it would have been less likely for hands or feet to have gone through the opening. The experts also suggested that Safelawn could have made it more difficult to modify the mower to enable it to start without the grasscatching attachment in place.

On cross-examination, the experts admitted that had the opening been smaller, it would have been more likely that the opening would have gotten plugged up by leaves and grass, making it more likely that the consumer would have needed to turn off the mower to clean it even though, for example, half of the lawn would not yet have been cut. The experts further admitted that everyone in the industry had the same width opening for the grasscatching attachment. The experts also admitted that no one else in the industry had a system whereby it was impossible to start the mower without the grasscatching attachment in place. Finally, the experts admitted that there had been fewer injuries associated with the Lazymower than with other electrically powered mowers.

Plaintiff's experts testified that the insulation on the cord could have been made of durafiber, a very expensive insulation material which would have been much less likely to have been cut by mower blades.

Defendant's experts testified that use of durafiber would have added $50 to the cost of the $100 mower, making it much less competitive in the electrically powered mower market.

Market analysts for Safelawn Corp. explained that they had made it possible to modify the safety feature involving the grasscatching attachment after numerous consumer complaints. Had they made the feature impossible to modify, their sales of the mower might have decreased up to 85%.

The James family also argued that the mower suffered from instructions/warning defects. The severity of the danger from electric shock should have been made clearer. Further, the warning did not include the danger posed by the slipperiness of wet grass, since the warning only spoke of the danger of electric shock.

On cross-examination, the expert admitted that any reasonable adult would have known that grass is slippery when wet.

The jury awarded:

$500,000 for Will's pain and suffering before his death and for his lost enjoyment of life, and $5,000,000 in punitive damages.

Cap. Stat. 300.1 reads in relevant part:
In all negligence and strict liability actions in which the question of liability is in dispute, the trier of fact shall make the following as findings of fact:

1. The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages, and

2. The extent, in the form of a percentage, of each party's negligence of fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all the parties to a suit shall be 100%.

On appeal, Safelawn argues:
The design and the instructions/warnings were not defective as a matter of law.
There was no basis for punitive damages.
The trial court erred by refusing to give an instruction on comparative fault, given the negligence or recklessness of Will James.
The trial court erred by allowing the jury to consider damages for the lost enjoyment of life, since (1) no court in Capitania had yet held (or even addressed) whether damages could be awarded for that, and (2) it was too easy to conflate lost enjoyment of life with pain and suffering.

Discuss all relevant issues.

However, you should NOT address in your answer:

express or implied warranty
wrongful death damages
defendant's possible negligence

In your analysis of whether there is a design defect, use a risk/utility analysis ONLY (do NOT use a consumer expectations test).

QUESTION 2

The following appeared in a column in the Daytown Dispatch written by political commentator, Larry Leff. Daytown is the capital of the state of Osu. Osu law is very protective of individuals' reputations and provides no greater protections to the press than are required by the United States Constitution. The article is printed below in its entirety.

POLITICAL COMMENTARY

by Larry Bleedin'-Heart Leff

> Walter Wainwright, nationally known pro-family advocate, is at it again. Notwithstanding his having divorced his first wife while she was in her hospital bed dying of cancer, Wainwright is proposing that Congress prohibit no-fault divorce. Notwithstanding his first wife's having put him through graduate school, he is proposing that Congress abolish all federally-backed student aid.
>
> Reportedly, when asked how he could have been so heartless as to divorce his wife while she was dying, Walter replied, "If I had known that she was dying, I wouldn't have divorced her. I would have shacked up with my current wife and waited for the inheritance."
>
> Perhaps it should not be surprising that Wainwright is so cynical and has so little real respect for the family. His mother, Ethel, seduced him in an outhouse (or was that someone else?). His father, Dudley, was drunk half the time. In fact, a brief look at police records during the period that Walter was growing up reveals that Dudley Wainwright was arrested for public drunkenness hundreds of times. Those same records reveal that a Dudley Wainwright was arrested for defrauding a client of thousands of dollars.
>
> Nonetheless, no one in his or her right mind should accept the drivel that Walter offers. He is an embarrassment to his party and his country.

Walter is suing Larry Leff and the Daytown Dispatch for defamation. Dudley and Ethel Wainwright are suing Larry Leff and the Daytown Dispatch for defamation and intentional infliction of emotional distress. Further, they are seeking punitive damages.

Walter denies ever having said, "If I had known that she was dying, I wouldn't have divorced her. I would have shacked up with my current wife and waited for the inheritance," although he admits he might have joked that it wouldn't seem worth foregoing an inheritance just to marry a little sooner.

Larry Leff argues that no one could have reasonably believed that he was actually quoting Walter. He further argues that no damage could have been done to Walter's reputation as a hardhearted man, given the truth of his having divorced his wife on her death bed. Finally, Larry argues that there was no actual malice, since it had been reported to him that Walter had said something like what was quoted, even if in fact those exact words had not been used.

Dudley and Ethel are also suing. Ethel claims never to have seduced her son or anyone else in an outhouse and that the column suggests that she had seduced someone in an outhouse, even if it had not been her son. Dudley claims to have been arrested for public drunkenness no more than fifty times. He further suggests that he had never been arrested for defrauding anyone of anything.

Larry claims that his statement about Ethel could not be taken literally -- instead, it was a twist on

a parody that had once appeared in a magazine. He argues that no reasonable person could infer that he was claiming that Ethel had seduced anyone, much less her son. Larry admits not having checked to see if anyone had ever claimed to have been seduced by Ethel.

Larry had had someone check the local police records and a Dudley Wainwright had indeed been arrested for fraud during the relevant period. Even if in fact the person arrested had been a different Dudley Wainwright, there had been no actual malice. Further, the article had merely stated that someone named Dudley Wainwright had been arrested for fraud; it had not said that Walter's father had been arrested for fraud.

Discuss all relevant issues.