

**PRACTICE EXAMINATION - ESSAY**

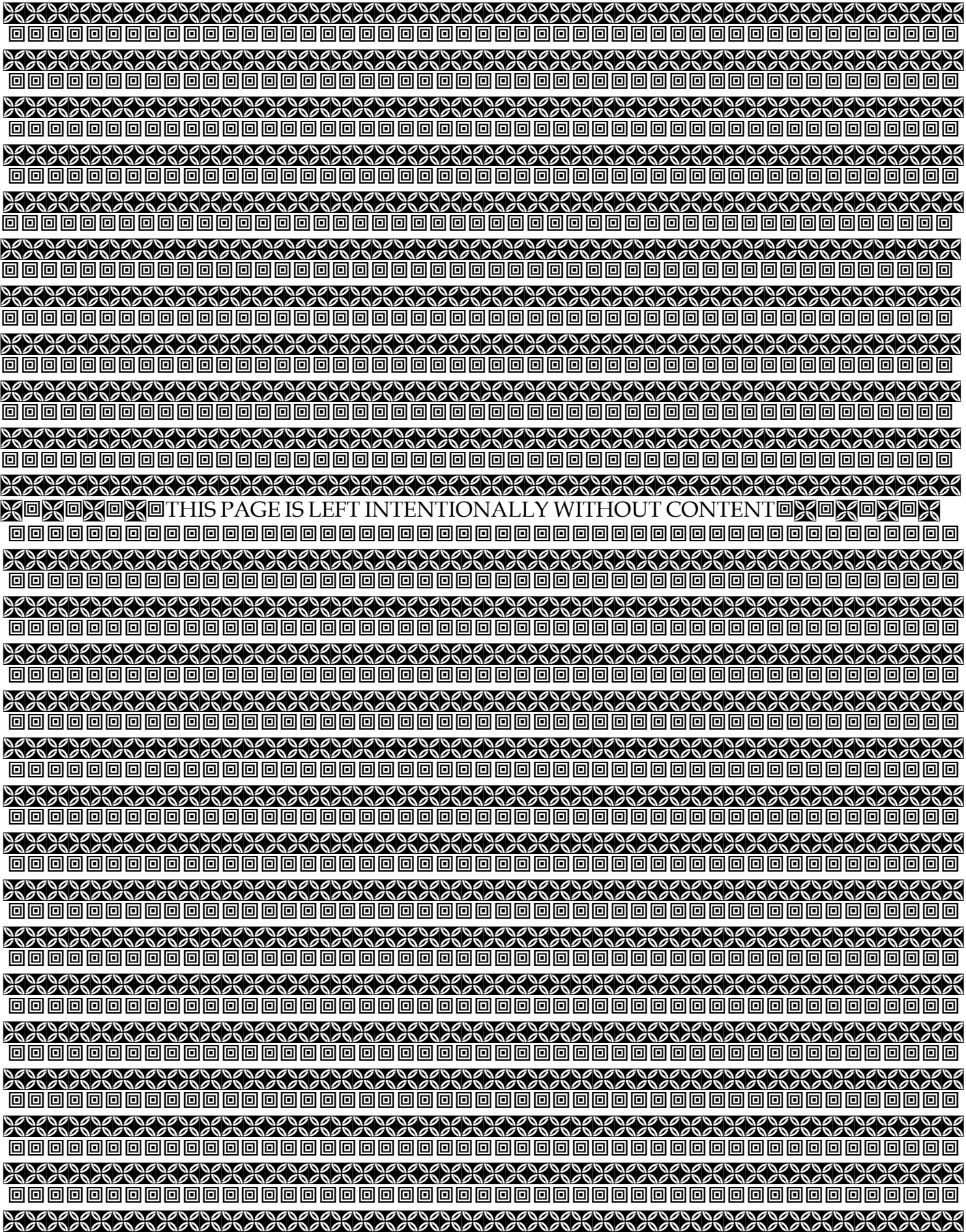
*[Below are instructions for a real exam. This practice exam, of course, is publicly released, and it's optional.]*

**GENERAL INSTRUCTIONS:**

1. Do not turn any page or flip over the booklet until instructed.
2. Failure to follow these instructions, including without limitation instructions 3 through 8, as well as matters of allowed materials, device usage, and time limits, are academic misconduct issues, and violations will be treated as such even if inadvertent.
3. All exam materials (including this booklet and your response) must be turned in at the end of the period **with your exam ID number written in the box above in the upper left. Do not disassemble this booklet, remove the staple, or tear pages.**
4. You may not waive anonymity. Use only your exam ID number on your response.
5. Copying the exam or any portion thereof is prohibited – including making a rough transcription from personal memory after the exam's administration.
6. During the exam: You may not consult with anyone – necessary communications with the administrators/proctors being the exception. You may not view or attempt to view materials other than your own.
7. After the exam: Communicate nothing about the exam, including even vague impressions or characterizations, to any member of the class who has not yet taken it.
8. You must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells with regard to food, drinks, and otherwise. No unwrapping of food or opening of cans or bottles after the exam period starts. No foods or drinks that smell, crunch, or otherwise make noise or omit odor. No essential oils, perfumes, or colognes. Chew with your mouth closed, and do not allow examination materials to be contaminated with food. Obey the remainder of the details spelled out in the syllabus.
9. You may write anywhere on the examination materials – e.g., for use as scratch paper. But only answers and material recorded in the proper places will be graded.
10. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. This is what you will be graded on.
11. Unless otherwise provided, base your legal analysis on the general common law and typical statutory law in the United States, including all rules, procedures, and cases from the course, plus any hypothetical laws presented in the facts.

**Do not turn any page until instructed.**

**When instructed turn over the entire booklet and read the remainder of the instructions on the back cover of the booklet.**



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# This Is How We Yodel, People

AS SHE DROVE AROUND THE LAST BEND, Jenny Jens could suddenly see the whole mountain – the spectacular granite peak and snow-clad slopes of Mount Zum Zucker, Wyorado’s most elite ski resort. “Zum Zucker” was derived from the German for “to the sugar,” and the place lived up to its name with some of the sweetest snow in the USA. At the mountain’s base, Jenny could see the glittery little hamlet of Vraka Valley – only 4,000 residents, but enough jewelry and watch boutiques to rival Beverly Hills.

Jenny was beyond psyched to be going skiing for the first time. Looking up at the mountain, she felt a little thrill of fear. Her natural inclination toward sports was mostly limited to playing her Nintendo Wii videogame console at home. But she was determined to give skiing a try. Tomorrow she would be joined by her Aunt Amy, a former Olympic ski athlete and now a hot-shot sports medicine doctor. She’d feel safe then. In the meantime, for today, she’d arranged to take a beginners lesson through the Zum Zucker resort. That seemed harmless enough.

The first stop for Jenny was Rodelberg Rentals, an equipment shop that was independent from the Zum Zucker resort. When Jenny got to the counter, she was asked to sign and initial an assumption of risk and waiver form.

“Can I rent the skis, boots, and poles without signing and initialing this?” she asked.

“Nope,” said the guy behind the counter, sunburned all over his face except right around the eyes. “And if you don’t, you won’t be skiing, because every other place in town is out of equipment except us.”

Hearing that, Jenny initialed and signed the form without reading it.

Already having pre-purchased her wildly expensive lift ticket, Jenny went to the Zum Zucker ticket kiosk to pick it up. She then took the aerial tramway up the mountain to meet her ski instructor.

THE SKI INSTRUCTOR ENDED UP BEING EASY TO SPOT, as he was waiving a huge purple and lime-green flag emblazoned with the Zum Zucker logo.

“Welcome new skiers!!!” he yelled. “I’m Ian Irvin, and I’m your instructor! AND I AM SO PUMPED TO BE HERE!!! Before we start skiing, we need to loosen up and start having fun. Anyone have any ideas?”

Everyone was quiet. Finally, a guy broke the awkward silence with, “We could yodel.”

“AWESOME! I LOVE IT! What’s your name?”

“Keung,” the guy said. “Keung Ko.”

“Awesome to meet you, Keung! Okay! Let’s yodel!”

Several people gave it a shot. And against all odds, Ian’s enthusiasm reached new heights. “THIS IS HOW WE YODEL, PEOPLE!!!! YEAH!!!!!! You know, this yodeling has given me an idea I never would have had otherwise! Let’s go down Yodeler’s Yaw!! Technically speaking, it’s for advanced skiers, but I think you guys have the enthusiasm to handle it!” Ian



## Zum Zucker

*FIG. 1: The resort’s logo. All the kids in Wyorado know that nothing beats coming back to school in January with a Zum Zucker lift ticket dangling from your ski jacket.*

## RODELBERG RENTALS ASSUMPTION OF RISK AND WAIVER

Rodelberg Rentals (RR) feels it is important that all customers understand and appreciate the inherent risks involved in skiing and using RR equipment. Those risks include, but are not limited to, collisions (including, without limitation, with trees, rocks, stumps, forest growth, debris, lift towers, fences, vehicles, signs, other artificial or natural obstacles, and with skiers and other people); falls; landing awkwardly; over-exertion; failure to successfully complete a movement; loss of control and injury-producing twisting, pulling, crushing, or other mechanical stress on one's body (due to snow/ice conditions, terrain features, variations in surface and/or terrain conditions, slope design, terrain modifications, and various other hazards, whether artificial or natural, marked or unmarked); failure of equipment; inclement weather and cold temperatures; and erratic or negligent behavior of others, including by RR staff (including, without limitation, errors in adjusting, providing, preparing, repairing, storing, and selecting equipment). These inherent risks can lead to injuries, including without limitation bruises, contusions, cuts, lacerations, abrasions, sprains, strains, broken bones, ligament and joint injuries, back and neck injuries, concussions, internal injuries, brain injuries, and even death.

ASSUMPTION OF RISKS: I have read the above, and I know that RR rentals are associated with these and other inherent risks, and I hereby attest that my rental and use of any and all RR equipment is purely voluntary, and I knowingly assume all risks.

JJ ← INITIAL HERE for assumption of risks.

WAIVER OF LIABILITY FOR NEGLIGENCE: I have read the above and I agree on behalf of myself and my spouse, heirs, personal representatives, assigns, and all others making a claim connected with me that I do hereby waive all claims and release and discharge RR, its owners, directors, officers, employees, volunteers, and agents. JJ ← INITIAL HERE for waiver of negligence.

CUSTOMER SIGNATURE: I have read and agree to the above: Jenny

FIG. 2: The form Jenny signed and initialed at Rodelberg Rentals.

took about one minute to show the beginning skiers how to hold their poles and point their skis. Without further ado, he led them straight to Yodeler's Yaw.

Jenny was determined to be brave as she started down the trail. Gravity started pulling her downhill at a moderate pace. Then a little faster. And faster. She tried to stay on the far right side of the trail, keeping out of the way of more experienced skiers. Whoa, she was really moving now! She was really scared, but the trail ahead looked smooth, albeit steep. Then all at once, she was sinking into the snow. It was as if one moment there was solid ground beneath her skis, and then there wasn't. She realized she had hit a hidden hollow filled with powdery snow – and she was now out of control. Inexperienced as she was, she couldn't get back her balance. In a flash, she was pinwheeling down the mountainside. CRACK! Something snapped in her left leg. It was the most horrible pain she'd ever felt. Mercifully, she quickly passed out.

THE AFTERNOON OF THE NEXT DAY, JENNY WAS IN A HOSPITAL ROOM with Aunt Amy at her bedside. After she had gotten into town, Aunt Amy went to work trying to figure out what went wrong for her niece. And now she was ready to explain it all.

"You ready for the lowdown?" Aunt Amy asked.

“You bet,” said Jenny.

“You fell into a small depression in the slope of the mountain. It’s part of the natural terrain. Normally, skiers could see it and avoid it, but as chance would have it, blowing snow had filled it in yesterday. It really makes me mad, because in my opinion they should have found this while inspecting the trails and should have marked it off. That’s just normal ski trail care and maintenance. But what do I know, I just managed a ski resort after the Olympics and before going to medical school,” Aunt Amy said, rolling her eyes.

“Now, your leg,” she continued. “You fractured your tibia, that’s the larger of the two bones of your lower leg. You’ve got a tibial shaft fracture, and that’s actually the most common fracture among skiers – about 63% of ski fractures. Now, you would not have broken it if your ski binding had released. The binding is what connects your boot to the ski, and it’s supposed to release in an accident to prevent your leg from being forced in a different direction than your body.

Over the past 30 years, since they’ve been introduced, releasable bindings have decreased the rate of leg fractures in skiing accidents by 90%. But yours didn’t release.

Why? Because Rodelberg Rentals improperly repaired this one on your left ski, disabling the safety function.” Aunt Amy held the ski up for Jenny to see. “I have no doubt that Rodelberg Rentals did this to save money. Anyone in the industry would regard this as an outrageous and reckless thing to do in terms of ski equipment maintenance. Unfortunately, these bindings were made by Selecta Skitech, which is the only bindings manufacturer who still uses a screw here instead of a spot weld.” Aunt Amy pointed to a place on the bindings. “The spot weld costs more, but it would be less than one percent of the price of the bindings, and with the spot weld, it makes it impossible to disable the safety function the way Rodelberg Rentals did. So that was two pieces of bad luck: If your bindings had the spot weld instead of the screw, or if



**FIG. 3: Yodeler’s Yaw.** *The trail is considered “advanced” level, a category above “intermediate.” Most people have many, many days of on-the-slopes experience before they are ready for an advanced trail.*

Rodelberg Rentals had not disabled the safety function, your bindings would have released and you wouldn't have broken your leg."

"Then, yet more bad luck for you," Aunt Amy said, lowering her voice. "Your doctor yesterday, Dr. Delinda Deland. She's a general practitioner, not a specialist in orthopedics<sup>1</sup> or sports medicine. But regardless, she should have been able to diagnose a broken bone. The quality of medical care up here in Vraka Valley is extremely good – despite it being a small town. Owing to the wealth up here and the amazing skiing, this place attracts highly excellent doctors and has a better minimum level of care than most medium-sized cities. Sadly, Dr. Deland is probably the only doctor in Vraka Valley who wouldn't have ordered an X-ray for you. You only got one this morning because I demanded it. And since Dr. Deland didn't know you had a tibial shaft fracture, she gave you the wrong treatment, making things worse and leaving you with additional bruising and tissue damage, plus a lot of additional, needless pain."

"Ugh. Well, I'm glad you're up here to look out for me, Aunt Amy," Jenny said with a grateful, if beleaguered smile. "I'm also glad you're here to keep me company, because I'd be super bored otherwise. Zum Zucker gathered up my phone after the accident, and they say they can't give it back to me until tomorrow when their risk management director gets back to the office. They say only he can release it to me under their safety and risk policy."

"Don't worry. I'm going to keep you entertained, Jenny. We are going to have quality aunt-niece bonding time! I insist! I got you an early Christmas present!" Aunt Amy said. She pulled a new Nintendo Switch videogame console out of a bag.

"Wow!" Jenny lit up. "Thanks!"

"Now, what should we play on it? I selected this." Aunt Amy held up a new videogame up for Jenny to see: *Mt. SteepFace Xtreme Winter Sportz – Ultimate Challenge Edition*.

Maybe it was the pain killers, but Jenny never laughed so hard in her life.

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<sup>1</sup> Orthopedics is a medical specialty concerned with muscles, bones, and joints.

## QUESTIONS

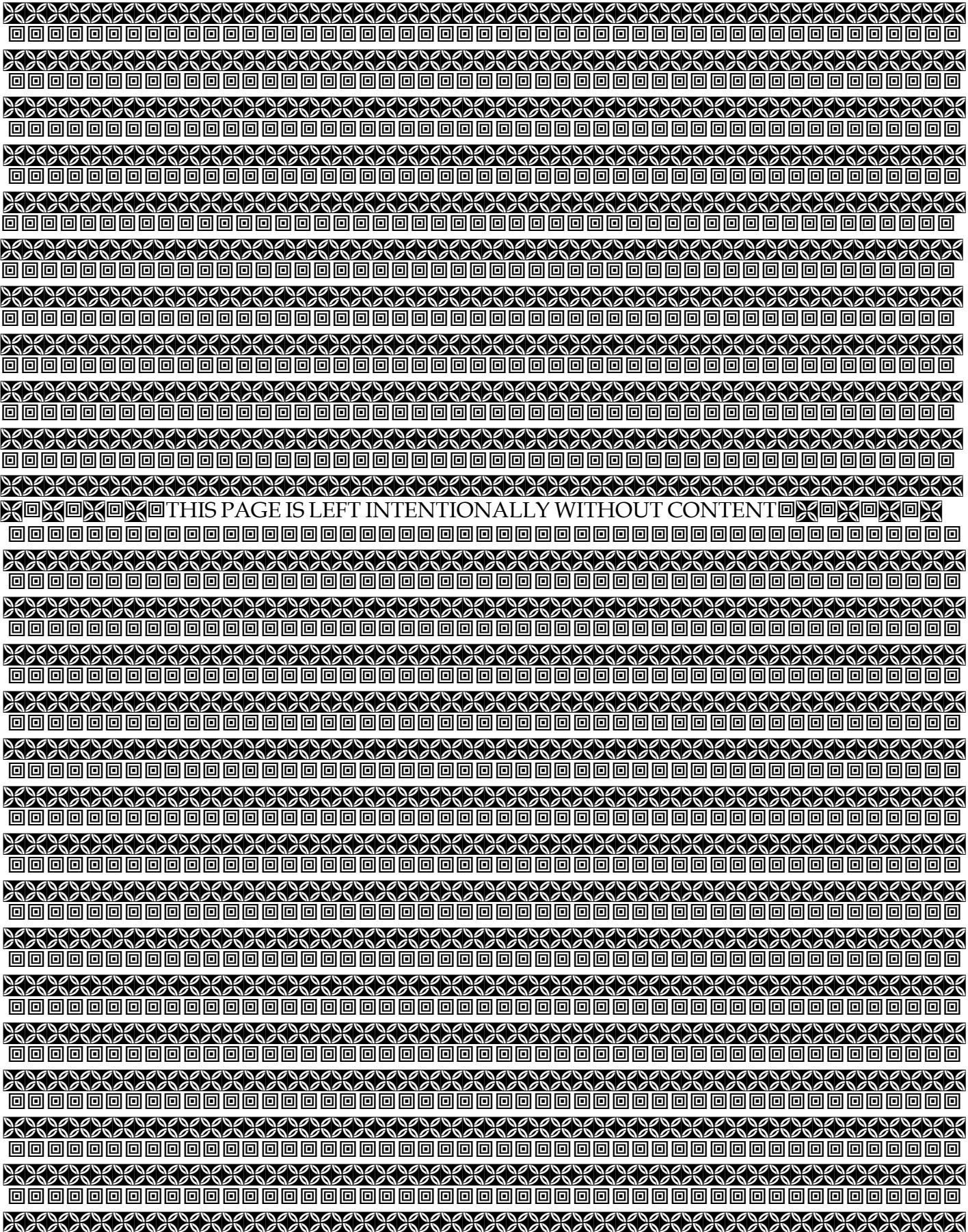
Provide analysis for the following. For all questions: **Omit all discussion of remedies. Omit any discussion of a claim based on informed consent or medical battery. Omit analysis and discussion of respondeat superior**; just treat an employee's actions as the employer's actions. **Omit any discussion of an affirmative defense based on comparative fault, except as indicated.**

1. **Discuss prospects for liability of Zum Zucker resort to Jenny Jens for negligence – including whether a defense of comparative negligence applies – and any intentional torts, if applicable.** In your discussion you should, of course, treat Ian Irvin's actions as Zum Zucker's. **Assume Wyorodo is a pure comparative negligence jurisdiction.**
2. **Discuss prospects for liability of Keung Ko to Jenny Jens for negligence.**
3. **Discuss prospects for liability of Rodelberg Rentals to Jenny Jens for negligence.** Be sure to include in your discussion what legal effect there is, if any, of Jenny's signing and initialing of the form.
4. **Discuss prospects for liability of Selecta Skitech to Jenny Jens for strict products liability.**
5. **Discuss prospects for liability of Dr. Delina Deland to Jenny Jens for negligence.** Do not discuss claims for informed consent or medical battery. **Analyze a regular professional negligence claim only.**

Important: **Limit your discussion to the questions posed.** Also: **Please do not repeat the exact same analysis when discussing a different party or answering a different question.** Instead, I strongly encourage you to incorporate previously stated analysis by reference. If analysis of an issue is similar to but not exactly the same as what you have written previously, then I suggest you refer to your prior analysis and go on to discuss any differences. **Note that the questions are not separately weighted; instead, they will be lumped together for assessment.** So divide your time among the questions according to what requires the most discussion and analysis. Plan ahead to put information where it belongs. And correspondingly: **Do not expect that each question calls for an equal share of your time or words. Consider that any given question might be appropriately answered with substantial brevity or might require in-depth treatment.**

Some suggested abbreviations for your answer:

Aunt Amy	AA
Dr. Delinda Deland	DD
Jenny Jens	JJ
Keung Ko	KK
Ian Irvin	II
Rodelberg Rentals	RR
Selecta Skitech	SS
Vraka Valley	VV
Yodeler's Yaw	YY
Zum Zucker	ZZ



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## SPECIFICS FOR THE ESSAY PORTION:

12. You have a total of 2 hours, including an initial 30-minute reading-outlining-only period, described below.

13. This portion of the examination is **“open book.”** You may use any paper-based notes and books you like. No materials may be shared during the exam. No electronic or interactive resources may be used or referenced. During the EW Period (described below) you may use a computer (including a keyboard-configured tablet) to write your exam, provided it is running the required exam-taking software and is used pursuant to applicable policies. But you may not reference files stored thereon during the examination session. You may wear a regular watch. Otherwise, any touching, using, accessing, wearing, viewing or listening to any electronic device is prohibited. No smart watches. No phones.

14. 30-MINUTE RO PERIOD: The first 30 minutes is a reading-outlining period (RO Period). This is your time to carefully read the exam booklet (that is, the facts and the questions), to take notes, to reference your outlines and books, and to outline your response on scratch paper. **During the 30-minute RO Period you may not begin recording the response upon which you will be graded and you may not use any computing device.** That is, if you are taking the exam on computer, you may not type any characters at all into the computer during the RO Period; and if you are taking the exam by handwriting, you may not make any mark in any blue book (that is, an exam-response booklet, sometimes labeled a “green book”) during the RO Period.

15. 90-MINUTE EW PERIOD: Next you will have a 90-minute exam-writing period (EW Period) during which you will write your response. For the avoidance of doubt, it is acknowledged that during the EW Period you may also continue to do what was allowed during the RO Period (e.g., refer back to the exam booklet, reference your books and notes – including any notes you created during the RO Period).

16. Organization counts. Read all exam questions before answering any of them – that way you can be sure to put all of your material in the right places.

17. Within the confines of the questions you are asked, note all issues you see. More difficult issues will require more analysis. Spend your time accordingly. As appropriate, you may, if you wish, note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.

18. Clarity counts. Clearly label each question separately in your answer. Be aware that there are no points to be won or lost for spelling, grammar, or stylistic aspects of writing—so long as I can understand what you are saying. Feel free to use abbreviations, but only if the meaning is entirely clear. **Blue books: Make sure your handwriting is legible. I cannot grade what I cannot read. Use a blue or black pen. Skip lines and write on only on one side of the page.**

*[NOTES: These notes are not part of the questions or hypothetical facts of the practice exam. This practice exam was derived from the Fall 2017 essay exam, available at [http://ericejohnson.com/exam\\_archive](http://ericejohnson.com/exam_archive). Images: Fig. 1 by Eric E. Johnson; Fig. 3 photo “Wipeout Chutes under Chair 23 with the Minarets of the Ritter Range” by Corsair1944. This exam: Konomark – most rights sharable. If you want to reuse any of the material in this document without charge, please e-mail me and ask. I’m usually fine with that.]*