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FINAL EXAMINATION – PART TWO

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**Limited open-book. Two-and-a-half hours.**

Write your exam number here: \_\_\_\_\_

**All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.**

**General Notes and Instructions**

1. Assume that today's date is December 12, 2007, unless indicated otherwise.
  2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
  3. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
  4. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing student examinations or from viewing materials other than your own.
  5. After the exam: You may discuss the exam with anyone, except that you may not discuss the exam, at all, with any enrolled member of the class who has not yet taken the exam.
- b. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
  - c. Organization counts.
  - d. Read all exam question subparts before answering any of them – that way you can be sure to put all of your material in the right place.
  - e. Feel free to use abbreviations, but only if the meaning is entirely clear.
  - f. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please use a separate bluebook for each subpart.
  - g. **Computers:** Please clearly label each subpart of your answer.
  - h. This portion of the exam is “limited open book.” The only material to which you may refer during the exam, other than this exam booklet and any special references specifically authorized by the Dean of Students office, is the authorized copy of the Torts Wypadki, which will be distributed to you during the exam session. You may not consult or access any other piece of paper, including, but not limited to, a copy of the Torts Wypadki that you have printed out yourself. No materials may be shared during the exam.

**Specific Notes and Instructions For PART TWO :**

- a. Unless expressly stated otherwise, assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
- i. Do not write your name on any part of the exam response or identify yourself in anyway, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
- j. This Part Two is worth approximately 2/3 of your exam grade.

**PART TWO**  
*(worth approximately 2/3 of exam grade)*

**“Cray’s Oncotomy”**

Tomorrow is Dr. Maribeth Cray’s first day as a surgical intern at Landattle Grace Hospital. Tonight, she is hanging out at the Sapphire City Bar. Before she knows it, people’s lives will be her hands. But for the next few hours, she can relax. As she sips a microbrew from a pint glass, she stares vacantly ahead, pursing her lips while listening to the internal monologue in her head. *Responsibility. Sometimes we want it. Sometimes we don’t. Sometimes we get it whether we’re ready for it or not.*

A handsome man sidles up and breaks Maribeth’s reverie by offering to buy her a drink. The stranger has dark, luxurious waves of hair and impossibly beautiful eyes of kaleidoscopic blue and green. Maribeth doesn’t learn his name, but, inside her head, she decides to give the gorgeous guy a nickname. She figures the nickname should pay homage to the man’s dreamy good looks, but eventually she settles on “McShakey.” Why? Maribeth can’t help but notice that the man’s hands tremble constantly.

McShakey’s not only good looking, he’s a good listener. As Maribeth spins a pressured narrative about her fears, desires, and self-doubts, McShakey tosses back in quick succession several glasses of scotch. As she continues to talk, Maribeth notices that McShakey’s hand tremors lessen as the liquor hits his bloodstream. The bartender keeps the drinks coming for them both, and Maribeth finds herself increasingly attracted. She especially loves the way McShakey smiles attentively throughout Maribeth’s ceaseless self-assessment rant. Finally, quite intoxicated, Maribeth invites McShakey to come back to her house. They stumble out the door and into McShakey’s newly leased BMW 7-Series sedan. As McShakey heads out of the parking lot, he slams into Vicky Vuckovich, a jogger.

“That woman came out of nowhere!” McShakey exclaims. Maribeth hops out of the Beamer and runs to Vicky. She whips out a penlight and holds open Vicky’s eyes with her thumb and forefinger, shining the light into them.



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**The BMW 7-Series sedan.**

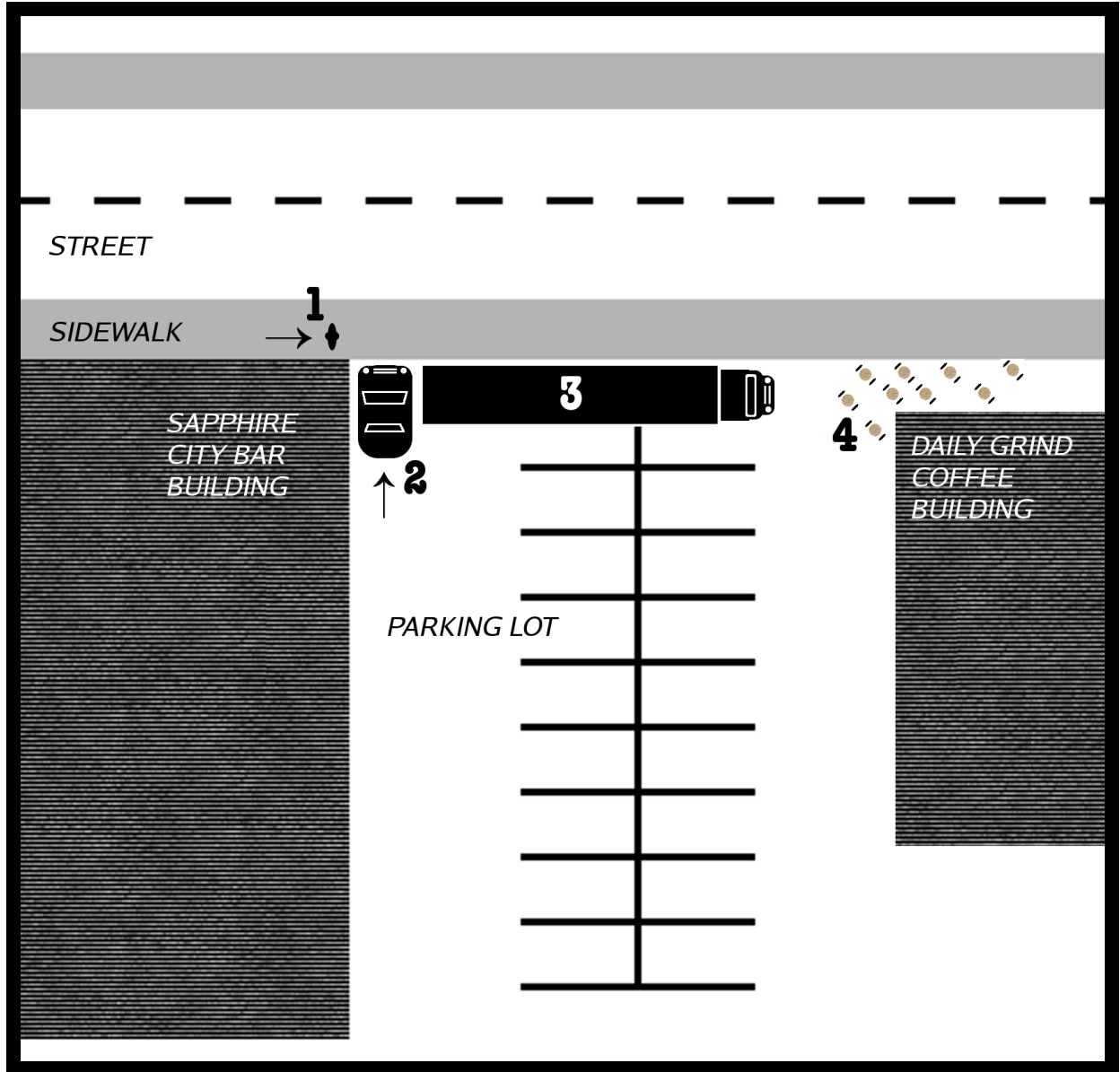
“Stop that! Stop touching me!” Vicky shrieks.

“Can you wiggle your toes?” Maribeth asks.

“Yes. Who the heck are you? A doctor or something?”

Maribeth smiles. “Yes, I’m a doctor. It looks like you got hit pretty hard, but you’re lucky – you’ll be fine. Just take some tylenol and a good helping of aspirin. And then try to get some sleep.”

As Maribeth’s internal monologue registers her satisfaction at having helped someone, she returns to McShakey in the Beamer. “I’m a doctor,” she repeats brightly to McShakey.



**Top-view map of the scene of the Vicky Vuckovich accident.** Numerical references are as follows: (1) Jogger Vicky Vuckovich, with arrow indicating direction of movement. (2) McShakey’s BMW, with arrow indicating direction of movement. (3) Tractor-trailer truck parked to make deliveries to the Sapphire City Bar. (4) Tables and chairs for the Daily Grind.

The next morning, Maribeth arrives on the job, white-coated and coffee in hand. She assembles with her fellow interns, Cassandra and Austin, in the hallway. Dr. Fernanda Folgers, the hard-nosed tough-talking chief resident, soon arrives to take the rookies on their first rounds as doctors and to give them their assignments. But before they can head off to the first patient, they witness a middle-aged pharmaceutical rep, Piers Palmquist, slip and fall as he walks swiftly across the shiny granite flooring.

"Hmmm. I forgot to put out this yellow warning cone," says the nearby blue-jumpsuited janitor who had just mopped the floor. "Oh well." He places the cone near the man's prone body.

Cassandra runs to help. As she helps Piers up, he hands her fistfuls of pens and post-it pads carrying the logos of his company's drugs. "If there are any questions I can answer," he winces as he tries to straighten himself up, "let me know - that's what I'm here for." Cassandra hands the grimacing drug rep off to an orderly who takes him to the ER for a check up.

The interns then race to catch up with the fast-walking Fernanda, who is off to visit the morning's first patient. Wheeling into the room, Maribeth stops dead in her tracks. The patient in the bed is the woman hit by McShakey's BMW last night.

Fernanda turns to Austin. "Please tell us about Ms. Vicky Vuckovich."

"The patient is a 25-year-old female victim of a hit-and-run," Austin recites. "Well, it was not exactly a hit-and-run. Some idiot got out of the car, pretending to be a doctor, and told her she was okay, and that she should go home, take a bunch of aspirin, and sleep. Unfortunately, the patient didn't get a good look at the 'doctor.' As anyone would suspect in a car-versus-pedestrian collision, it turns out that Ms. Vuckovich was bleeding internally. The aspirin, which, as we all know, has antiplatelet effects, contributed to the bleeding. Because of the amount of blood she's lost and the fact that she didn't seek immediate medical treatment, she now will likely have permanent brain and kidney damage. She's been sedated, and they are prepping OR 3 for her right now. No surgical history other than one abdominal operation - a laparoscopic appendectomy performed by our own Dr. Ned Neilsen three years ago."

"Excellent assessment," Fernanda says. Rewarding Austin, she assigns him to help with Vicky's surgery. Austin stays behind as Fernanda, Cassandra, and Maribeth go on.

The next patient for consideration is Imogene Ignasiak, who has a tumor on her brain. The procedure to remove it, an oncotomy, will be performed by Dr. Detrick Shempsey, Landattle Grace's head of neurosurgery. "Dr. Cray, I want you to work with Dr. Shempsey on this tricky surgery." Maribeth is happy to have something to think about other than Vicky Vuckovich. "And Cassandra, since I'm out of good patients, you take care of Piers."

Maribeth gets on the elevator as she heads off to track down Dr. Shempsey. At the next floor, the doors spring open for more passengers. Maribeth is not prepared for what she sees next. Her mouth drops open as she sees none other than McShakey, from last night, dressed in a white lab coat. He joins Maribeth on the elevator, flashing his disarming smile. Maribeth's eyes drift downward to the embroidered blue lettering on his jacket. "McShakey" is none other than Dr. Detrick Shempsey, star neurosurgeon.

While Maribeth makes awkward small talk, she picks up the scent of scotch on McShakey's breath. They arrive at their floor. "Let's see the patient," he says, walking briskly off the elevator.

*Should I say something?* Maribeth wonders in her internal monologue. *He's been drinking. Clearly, that's very bad. Very bad. And someone with shaky hands definitely should not be performing brain surgery. Definitely not. One slip and the patient could suffer irreversible brain damage. Or worse. But I'm just an intern. It's not my responsibility.*

At Imogene Ignasiak's bedside, Maribeth looks on as McShakey describes the procedure. "Right now, Ms. Ignasiak, there is a 30-percent chance that the tumor could, if left untreated, lead to a life-threatening condition. If that happens, you could die without warning. That's why I recommend that we go ahead with surgery to remove the tumor today," says McShakey.

"What's the down side to having surgery?" Imogene asks.

"Really nothing," McShakey assures her. "There is some risk, as there is with any surgery, that you could suffer some permanent disability from the anesthesia. But you'll be awake during the surgery, so the risk is minimized. We need to keep you awake during brain surgery so we can map your cerebral cortex. The side benefit is that you avoid general anesthesia and its attendant risks."

"Then I will go ahead with the operation. Thanks, doc," Imogene says with feigned courage.

As they walk away, Maribeth ventures a question to McShakey. "Shouldn't you have told her that there is a risk of major loss of brain function?"

"Well, I decided it was best not to. Since she'll be awake during the surgery, I think she should be as worry-free as possible," McShakey says. "Besides, I am sure the surgery is in her best interests, and I wouldn't do it if that weren't the case."

Within an hour, Imogene is under the knife. McShakey saws through the skull. He is assisted by Dr. Ned Neilsen, a fourth-year surgical resident. Maribeth looks on. McShakey painstakingly maps Imogene's brain by stimulating the cerebral cortex in various places and measuring her responses. While he is clearly brilliant, Maribeth can't stop worrying about McShakey's hands. They continue to exhibit minor tremors as McShakey works the scalpel. Maribeth also notices that McShakey is slurring a few words. He is quite obviously under the influence.

"Dang it!" McShakey yells, reacting to something he has done with the scalpel. "Oh, man. This is bad!"

Maribeth can see that McShakey has severed a large section of Imogene's cerebral cortex. Worried about the effect McShakey's outburst will have on the still-awake Imogene, Maribeth tries to reassure her. "Don't let Dr. Shempsey's yelling disconcert you, Ms. Ignasiak. He's very animated. Is everything still fine, Ms. Ignasiak?"

Imogene smiles brightly and replies, "Of course! I'm in the basket of strawberries that left the office!"

With that, it's obvious that the slip of the scalpel has had a disastrous effect. As nonsense continues pouring out of Imogene's mouth, blood suddenly starts spurting out of her head. "What luck!" McShakey exclaims. "Now I've nicked an artery! Hmmm. Well, I've got the tumor - and then some. You two go ahead and close," McShakey says, gesturing to Maribeth and Ned. "I'm done for the day."

All the nurses are aghast as McShakey walks away from the table and out of the OR. Simultaneously, Imogene begins to go into cardiac arrest. Ned quickly determines he must crack open Imogene's chest to revive her heart. "Maribeth, I know it's your first day, but

you've got to get in there and repair that artery," he says, gesturing to Imogene's head with his chin.

Summoning up all her courage and textbook knowledge, Maribeth begins to work. She stops the bleeding and re-establishes circulation through the artery. When Ned is relieved by a cardiothoracic attending surgeon, he draws back to survey Maribeth's work.

"This is excellent work for a first-day intern," he assesses. "But you missed some things that any bona fide neurosurgeon would have been able to do to preserve more brain function. But you'll learn. But in the meantime, she'll live, and you deserve credit for that, Dr. Cray."

Meanwhile, several floors above the OR, the hospital's chief of medicine is meeting with the janitor involved in the day's earlier slip-and-fall.

"Look chief, I understand my responsibility in this, and I'm sorry," the janitor says. "And I'll try harder. But this is the fifth slip-and-fall this month. That granite flooring you got the foundation to pay for - I think that's a big factor here. We should be looking for a technological fix."

The chief rolls his eyes. The janitor is always trying to convince him to lay out wads of cash for cutting-edge janitorial technology.

"I've found a product that will help," the janitor continues, jabbing his finger into an ad in *Sanitation Technology Weekly*. "See this FloorShine3000? It's an innovative quick-drying floor cleaner. They are using it at three different places across the country, including the Farapolis Clinic. That's one of the most prestigious hospitals in the nation, isn't it? I know you want to stay competitive. Look, I know this stuff's expensive, but it's the wave of the future." The janitor pauses for effect before making his big argument: "And if it prevents people from slipping and falling, it might even save the hospital money."

"Not a chance," the chief says gruffly. "It's cheaper to let the occasional person slip and fall, and then just treat their injuries here at the hospital. I've actually given this a lot of thought. Most of these people never call up a lawyer. And since we treat them here, as long as they are insured, we're actually making money off of them. And when someone is uninsured, we just call them a cab and send them to County General."

Disappointed, the janitor moves on, tucking the magazine into his coveralls, mulling over how to frame his argument for a robotic vacuum.

Back downstairs, in the interns' locker room, the new doctors are excitedly recounting the day's experiences.

"My patient broke his arm, and I helped make the cast!" Cassandra exclaims.

"We found an old surgical sponge in our patient!" Austin says. "Beat that!"

"Well, I did unassisted brain surgery today," Maribeth says slyly.

A gasp escapes the interns as they gather closer to hear Maribeth's story. Maribeth smiles. She'll have a lot of great material for her internal monologue tonight.

## QUESTION

Please clearly label the subparts of your response. The subparts will not all be given equal weight. You should divide your time proportionately among the subparts according to which ones require the most discussion and analysis. Read them all right now, and plan ahead to put information where it belongs.

**Subpart A:** Analyze Vicky Vuckovich's prospects for recovery in tort.

**Subpart B:** Analyze Piers Palmquist's prospects for recovery in tort.

**Subpart C:** Analyze Imogene Ignasiak's prospects for recovery in tort.

**Subpart D:** If you identify any additional persons who have colorable tort claims, whether or not likely to be ultimately successful, identify such persons and analyze their prospects.