

FINAL EXAMINATION—FALL 2016
TORTS
HOUSE OF RUSSELL

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 12 pm on Sunday, December 11, 2016. You must submit your answers by 3 pm on Wednesday, December 14, 2016. If you turn in your answers after 3 pm on December 14, then you will receive an F for your grade. **NO EXCUSES.**

2. **TURNING IN YOUR ANSWER:** Turn in your answer your answer by uploading the file to the registrar's online exam portal using the instructions below.
 - A. Go to the Law Registrar's online exam [portal](https://www.exam4.com/org/600). (<https://www.exam4.com/org/600>)
 - B. Select "Torts-Russell" under the Available Takehome Exams section (the class will appear in the upper right corner of the webpage – in this section – starting after 12:00 pm on December 11.)
 - C. Enter your exam ID and select "Continue"
 - D. Follow the prompts and upload your answers into the online portal by the final deadline.

DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL. If you have technical problems turning in your answer, please contact the registrar. **Do NOT contact Professor Russell with difficulties related to submitting the exam.**

3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 3 pm on Wednesday, December 14, 2016. Avoid, for example, posting anything on Facebook that looks like a request for assistance. Avoid, too, appearing to work with other people in study rooms or the library. Once the examination starts, you may not discuss it with anyone at all before the examination ends.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. Do not put your name anywhere on the exam. You should name the file Russell-Torts-[Exam Number]

5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. Please include the word count at the end of your answer.
6. **FORMATTING:** Please double-space your answers. Avoid miniature fonts, okay? Avoid putting bullet points in front of every paragraph as this is oddly distracting to Professor Russell. Note, too, when the registrar rechecks the word count, bullet points are sometimes counted as words. This generates needless confusion.
7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid waste of time by avoiding lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.
8. **JURISDICTION:** The laws of Newstate, the 51st state of the union, apply to all the issues in this examination. Newstate is NOT Colorado. New City is the name of a city within Newstate. Any resemblance to events or law in other states is pure coincidence.
9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.
10. **KEEP A COPY:** You should retain a copy of your exam answer. You should feel free, of course, to keep a copy of the exam.
11. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Student Conduct Office in Driscoll Center North (303-871-4504) immediately after this examination ends.
12. **GOOD LUCK:** Good luck and have an excellent break.

Leviathan: It could have been any one of us.

Looking back nearly two years after the devastating Christmas Eve 2014 New City Leviathan fire, an artist who had lived at Leviathan posted to his blog: “There are no words to convey the heartbreak felt by those closest to the New City Leviathan warehouse fire.” In the immediate aftermath of the fire, as the police and firefighters were finding victims and the death toll rose to 35, the blogger recounted that as thousands awaited news of missing loved ones, a phrase kept coming up: “It could have been any one of us.”

The New City Leviathan was a shared workspace and living space—a collective of artists and musicians—inside a warehouse. Other American cities have or had similar spaces: Denver has Rhinocropolis; Oakland had Ghost Ship; and Los Angeles has Werk LA. Leviathan was pretty much the polar opposite of the sterile, expensive apartment buildings popping up in American cities to house millennials. The blogger brought the difference into sharp relief on his blog:

They don't understand why we don't just live in a \$3,000/mo. apartment where everything is safe and sterile and clean; why we live in a warehouse, or a garage, or an attic or shed or laundry room; why there is a mattress on the floor with a space heater where there normally would be a Queen size bed with a duvet and a nightstand and central heating.

They don't understand why we congregate here at night, pushing salvaged furnishings out of the way to make room for the drum set and amps, packing our friends' bodies in like sardines, moving as one to music that never gets played on the radio. Why we play music here for each other when we could be trying to get booked at “real” clubs. Why we avoid conventional nightclubs and their bookers, bouncers, security, soundmen.

For many of us, these spaces are what have kept us alive. In a world that demands its inhabitants to be a certain way, think a certain way, or live a certain way, we gravitate to the spaces that say: Welcome. Be yourself. For the tormented queer, the bullied punk, the beaten trans, the spat-upon white trash, the disenfranchised immigrants, and young people of color, these spaces are a haven of understanding in a world that doesn't understand — or can't, or doesn't seem to want to try.

Located at 1631 Elm St. in the warehouse district of New City, Leviathan was dilapidated and in disrepair with a cracked and rusting façade. About two dozen artists and musicians lived in the warehouse in cramped spaces that doubled as studios. These live-and-work spaces, like the warehouse itself, had no running water, plumbing, or sprinkler system. Neal Bohr, an electrician who had done some work at Leviathan and stayed there occasionally explained that the building's electricity came from an electrical wire that ran from a neighboring business and from gasoline-powered generators set up outside the building for use on party nights. When he first stayed at Leviathan more than three years ago, Bohr said that there was only one electrical outlet and only one exit until he cut a fire door in the building's south wall.

The first floor of Leviathan was a maze of couches, pianos, carpets, beds, large- and small-scale sculptures, couches, paintings,



Photo: First floor of Leviathan before the fire. (2014).

speakers, furniture, workbenches, easels, mannequins, futons, wood and fabric partitions, and even recreational vehicles all organized by the artist inhabitants who lived and worked in Leviathan.

The second floor was the site for dance parties and music performances including the final party, which had just begun when tragedy struck.

Like the first floor, the second floor was jammed with

wooden furniture, carpets,

artwork, musical instruments, and various found objects.



Photo: Second floor Leviathan dance and performance space (2014).

A long staircase made mostly of scrap wood from wooden pallets connected the first floor to the second floor. Pallets, the low, moveable platforms on which goods sit for moving or storage within warehouses, were plentiful in New City's warehouse district.



Photo: Leviathan staircase (2014)

Denizens of Leviathan collected them from around the neighborhood (technically, stole them) and then assembled them into a long, wooden staircase from the first floor to the second. The staircase had one landing where the pallets made a leftward, 90-degree turn as one ascended.

The federal Bureau of Alcohol, Tobacco, and Firearms and the New City fire marshal investigated the cause of the fire. The fire investigators later determined that the fire started beneath the staircase after a cat—there were several cats that lived in or visited the building—knocked over a lit candle that was part of the party decorations. The candle tumbled over, and the fire marshals believe that the flame ignited a rag that contained solvent one of the residents

had used to clean oil paints from brushes. The fire marshals are uncertain whether the burning rag ignited the wooden staircase directly or whether the burning rag damaged overloaded electrical extension cords that were connected to holiday lights for the party, which cords may then have ignited a fire.

The fire marshals determined that the pallet staircase quickly caught fire and created an impassable, chimneyed vortex of smoke and fire on the night of the tragedy as partiers tried to escape from the second floor the second floor on the staircase. The inspectors also concluded that the staircase collapsed quickly after the fire began. No inspector found evidence of arson, that is, no evidence that someone intentionally set the fire.

A second, back staircase connected Leviathan's second floor to the first, but that exit was unmarked and unknown to nearly every one at the party. Some but not all of the Leviathan residents knew about the second staircase connecting the two floors. Neither the pallet staircase nor the back staircase were building exits; that is, both stairways terminated on the first floor at places that were some distance from the building's exits. However, soon after the blaze started, most of those who died on the second floor were overcome by smoke. There is not good evidence that finding the second staircase would have saved many lives, because the smoke overcame people so quickly, and also because those exiting would have had to navigate through the west side of the maze-like warehouse and then through the area of the warehouse with the burning staircase in order to reach the doors on the east side of the building. The only illumination for this escape would have been firelight or mobile phones, as what little electricity there was in the building failed soon after the first started, and, of course, there was no backup, emergency lighting.

There were fire extinguishers at Leviathan, but none worked. The fire marshals found fire

extinguishers under the staircase discarded near the origin of fire. The inspectors interviewed survivors and learned that some had tried to use the extinguishers, but that the extinguishers were too old to work. There was no sprinkler system, which the zoning code required for housing though not for warehouses.

The artists and musicians who lived in Leviathan were not squatters. Most of them had day jobs, which they balanced with their artistic and musical endeavors. They each paid a monthly fee to Leviathan founder and manager Derick Ion Almena. Almena was Leviathan's leader. Immediately after the blaze, which Almena escaped because he, his wife, and two children had gone to a hotel for the evening to avoid the party's noise, Almena posted to Facebook that "Everything I worked so hard for is gone. Blessed that my children and Micah were at a hotel safe and sound. . . it's as if I have awoken from a dream filled with opulence and hope. . . to be standing now in poverty of self-worth." The next day, Almena appeared on The Today Show and commented that "I'm incredibly sorry and everything that I did was to make this a stronger and more beautiful community and to bring people together." Almena's statements on television and social media reflected his pride in Leviathan, but as many people noted, he showed no concern for those who died. He claimed not to have known, when he posted to Facebook, that there had been fatalities. The New City police charged Almena with 34 counts of homicide. His criminal prosecution is ongoing.

When a Leviathan resident was short of cash—common enough with artists and musicians—he or she could sometimes substitute work for Almena on the building or grounds of Leviathan. For example, residents of Leviathan designed, decorated, and constructed the pallet staircase from the first to second floor of the building. They completed the staircase project during the last months of 2013. Many of the residents who worked on the steps were substituting

work for their monthly payment to Almena. Others worked simply to participate in an important, community-strengthening project that also enhanced the building. The construction of the stairway took about six weeks. During that time, 12 different residents worked on the project. After each day of construction, the staircase workers cooked a communal meal typically of rice, vegetables, and, spices. Often, the construction turned into dinner and then a party with music and dancing.

Bob Gemello, a mixed-media artist who lived at Leviathan contributed design ideas and his skills as an expert carpenter to the staircase project. He was, informally, the lead designer of the staircase, and Bob did a lot of the actual construction work: sawing and fastening boards together with nails and screws. Bob started working on the staircase project because he was short on cash to pay Almena, but once he started working on the project, he realized that he enjoyed working on it so much that he would have done so even without the money obligation to Almena.

Nothing about the staircase complied with the New City building code. The flammable, wooden construction and gaps in the treads violated the code. The open risers—the back part of the step closest to the toe of anyone walking up the stairs—violated the code for being the wrong height and also for being too open. The lighting, slope, and width of the staircase did not meet the New City building code's specifications. The handrails, where they existed, were the wrong heights. The landing was too small. The stairway did not lead to an exit. And, the stairway was inadequately supported.

Bob's twin-brother Steve died in the Leviathan fire. Though they were identical twins, the 31-year-old brothers were very different. Bob, the artist, had not finished college and never had a full-time job. Steven, the first-born, was an attorney making \$180,000 per year and on

track to make partner within two years at New City's biggest corporate law firm. Steven loved his brother but did not admire his living arrangement and life choices. He had agreed, reluctantly, to come to the party at Leviathan because it was Christmas Eve.

The Leviathan Party, though it took place on Christmas Eve, was more than a holiday party. Almena charged \$50 per person to attend the party. He did not charge residents, but he did encourage or even pressure Leviathan residents to invite others to attend the party. The pressure from Bob was another reason that Steve attended the party.

Almena had a lease for the Leviathan warehouse. Almena had signed the original lease in 2011. The warehouse property owner was a woman named Rent Ng (pronounced Ing). Ms. Ng is a substantial New City and Newstate property owner. Ms. Ng initially claimed to have had no knowledge that there were people living in the warehouse that she rented to Almena, but evidence in the time since the fire shows she was probably lying when she made that claim. Before the fire, New City Planning and Building Department had investigated the building for "blight" and "illegal interior construction." New City had received numerous complaints about the property including complaints on December 13 and 14 of 2014. New City building inspectors visited the warehouse on December 17 but left when no one answered the door. (Inspectors must obtain permission or a court order to gain entry.) From time to time, the Police Department had received noise complaints about Leviathan. The director of the Planning and Building Department noted that an event like the Christmas 2014 party would have required a special permit in order to be legal, but there had been no application for such a permit. The Planning director revealed that the building, which was zoned as a warehouse and not for habitation, had not received an inspection for three decades. The vice president of the local firefighters' union said that the fire marshal's office had been understaffed for years, and that a fire inspector seeing

the conditions of the Leviathan "would have shut the place down."

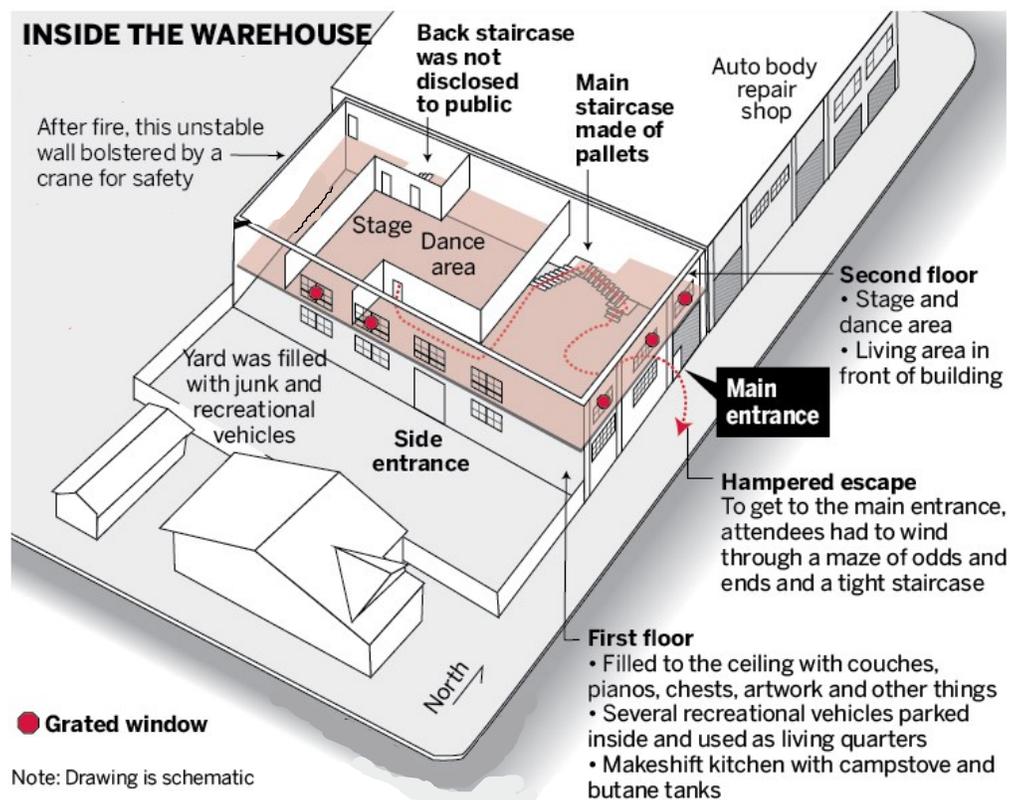
Almena, who leased the property from Ms. Ng, had Leviathan parties two or three times per month. Sometimes, in the summer, he had weekly parties. He used the money from the parties along with the payments from the residents, to pay the monthly rent on the warehouse to Ms. Ng. Almena used a sophisticated digital ticketing system to collect payments from his party guests. Whether he made a profit from these parties in excess of the rent amount is unknown.

When the fire started at about 11:30 pm on Christmas Eve, Bob and Steve were toward the back, eastern side of the party room on the second floor. With Bob leading, they made their way toward the staircase, which became quickly engulfed in flames. The smoke was thick, and like others, they got onto the floor and tried to breathe. As he lay on the Leviathan floor, Steve tried to call his girlfriend; they'd been together for five years. She was on another call, and he could only text her the words "Fire. I love you." Though it was hard to breathe, he speed-dialed a video Face Time call to his mother. "Mama," he said as she answered. He then passed out and soon thereafter died of smoke inhalation. Steve and Bob's mother could hear screaming and the sounds of flames for another ten seconds before her screen went dark. Three days later, the New City Fire Department confirmed what she already knew. She had lost her son Steve—her first-born child—to the Leviathan fire.

Steve's girlfriend is devastated. In an interview, she spoke between sobs as she described him as a wonderful person who was open and vulnerable and goofy and generous. "I feel like my future has been ripped from me," she said. The two moved together from New York City several years ago after Steve got a job as a clerk for the New City-based 13th U.S. Circuit Court of Appeals. District Judge Jane Tigar said in a statement that Steve was an "exceptional" law clerk in his chambers. Steve's ultimate goal was to work for the American Civil Liberties Union,

according to his girlfriend. Helping people is what drove him. "He could really step outside of himself and care and listen to other people and feel their struggles, and want to help," she said.

Bob survived. After he and Steve faced the burning staircase, Bob turned around and crawled to the second, back stairway, which he knew about because of the time he spent constructing the pallet stairway. Bob thought that Steve was right behind him. Bob crawled to the back staircase and tumbled headlong down the steps to the first floor. Leviathan's first floor always reminded Bob of the Room of Requirement in the Harry Potter books. With that literary reference in mind, Bob thought to himself that what he really needed—required—was a way out of the terrifying, burning building. He crawled and climbed and dug his way generally south-southeast and found the exit door that Neal Bohr had cut into the south wall of the building. Bob was one of two people to escape through that door. He collapsed onto the ground in the yard where firefighters found him early the next morning.



Bob did not escape injury. He is now blind. Burns to 15 percent of his body included third-degree burns to 5 percent of his body. He lost his right leg beneath the knee.

Since the fire, journalists and other have focused attention on the failure of New City officials and inspectors to take action that might have prevented the loss of life at Leviathan. As the following news story makes clear, New City government had many opportunities to avert the tragedy.

Authorities missed signs of looming disaster at Leviathan

New City — City officials missed at least 10 chances to flag dangers at the Leviathan art collective that might have led to Friday night's inferno in which 35 people died, according to documents and interviews.

Officials also declined to say Monday when the building last underwent a fire inspection. Most cities have routine yearly fire inspections of commercial properties, said Eric Dutton, executive director of the Newstate Fire Chiefs Association. And many departments in the state do them more frequently.

A Newstate News Group analysis of city, police, and court records and police documents, along with interviews with investigative experts, strongly indicates that glaring dangers at the warehouse were either tacitly or willfully ignored by the building owner and the people running the artist collective, and by city employees often called there for everything from fistfights to garbage outside.

Officials from various agencies were no strangers to the Leviathan over the years, leaving plenty of opportunities for the fire and safety dangers to be detected. Police responded to fights and reports of stolen property; code inspectors cited everything from tall weeds to mounds of garbage to structures being built inside the warehouse; and state workers temporarily took the three children of the couple running the collective away because of fears for their safety.

The warehouse — with little separate dwelling units on the first floor and a staircase made of scrap wood leading to a cluttered, furniture filled second floor where dance parties were held — was roundly called a deathtrap by some survivors and others familiar with the building.

Farzaneh Farsoudi, a relative of Sara Hoda, 30, a teacher at the Urban Montessori Charter School in New City who died in the blaze, said it was tragic that the fire department didn't act.

It seemed apparent the fire department hadn't been to the Leviathan recently, he said, "because otherwise they would have advised them to have (a) fire extinguisher." Several fire extinguishers found in the building wreckage were inoperative, officials have said. "If (they) had worked, it may have saved a lot of lives. ... It's very sad," Farsoudi said.

The city's fire department boasts on its website of "an excellent program" in which firefighters do surprise "field inspections, on a block-by-block basis. Inspections occur at least one time annually. In some instances, high-hazard (buildings) may require additional inspections."

Warehouse owner Rent Ng was well known to the New City Code Enforcement office.

Records also show city taxes on the property were often not paid. Ng could not be reached for comment. A lawyer who has represented her in real estate matters did not return messages.

A month before the fire, an unidentified code enforcement officer went to the building in response to complaints about piles of garbage. No one came to the door of the collective. The next day, the city started an investigation about apparent illegal structures being built inside the warehouse. But no inspectors returned to follow up before the fire.

It was far from the only chance for someone to notice the hazardous conditions.

- In August of 2014, police responded to a report of a dance party at the warehouse where attendees were paying \$25 a head to get in. An officer was reportedly denied entry by a doorman claiming that the location was a private club with members paying monthly dues, records show. The officer left because there was no evidence of a crime.
- A tenant dispute in February 2014 also drew the attention of police. Almena was reportedly cited for battery, and another man was arrested, but no charges came out of the encounter. Officers didn't enter the building.
- In February 2013, the New City Child and Family Services Department was called to the warehouse and took custody of Almena's three children out of safety concerns about them living there, according to a court document. Almena also later posted on Facebook that it had happened but blamed a tenant for "fake accusations." The children were later returned to Almena and his wife.

Sara Huntley, who lost a friend in the fire, and whose partner left the collective earlier this year, said the conditions there were frightening.

"I begged my partner to move out to find some other place," she said. "I just knew that if things didn't change that place would have a terrible thing happen as a result of neglect and people looking the other way."

[end of news story]

Your job: Bob has had long conversations with his mother and with Steve's girlfriend about his brother Steve's death, about his own injuries, and about his future. His mother and Steve's girlfriend want to make claims but are themselves reluctant to sue anyone, so they would like Bob to make a claim for his own injuries and for Steve's death. Bob's mom and Steve's girlfriend want Bob to make a claim for Steve's death for himself and also on their behalf. **Your job** is to analyze the possible tort claims that can be made against New City, Almena, and anyone else regarding the death of Steve and injuries to Bob. Criminal law, contracts, and products liability are issues that **you should not** address.

STATUTORY APPENDIX

Statute 1. Survival of Actions; Death of Injured Person During Pendency Of Action.

All actions and claims survive death. Actions on claims for injuries that result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next statute. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

Statute 2. Wrongful Death

(1) Whenever the death of a person, injuries resulting in death, or death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(A) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(B) The children of the deceased's spouse.

(C) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated New State law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

(4) The notice required in subsection (2) shall contain the following:

(A) The name and address of the personal representative and the personal representative's attorney.

(B) A statement that the attorney for the personal representative shall be advised within 60 days after the mailing of the notice of any material fact that may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to

any claim at a hearing to distribute proceeds.

(C) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after the adjudication or settlement of the claim for damages.

(D) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(5) If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(A) The personal representative shall file with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(B) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(C) If any interested person is a minor, a disappeared person, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.

(D) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(E) If none of the persons entitled to the proceeds is a minor, a disappeared

person, or a legally incapacitated individual and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(8) A person who may be entitled to damages under this section shall advise the attorney for the personal representative within 60 days after service of the complaint and notice as provided for under subsection (2) of any material fact of which the person has knowledge and that may constitute evidence of any claim for damages. The person's right to claim at a hearing any proceeds may be barred by the court if the person fails to advise the personal representative as prescribed in this subsection.

Statute 3. Immunity of Governmental Entity or Employee

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

- (1) The natural condition of unimproved property.
- (2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.
- (3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.
- (4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.
- (5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:
 - (A) a set of rules governing the use of the extreme sport area;
 - (B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and
 - (C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

- (6) The initiation of a judicial or an administrative proceeding.
- (7) The performance of a discretionary function; however, the provision of medical or optical care shall be considered as a ministerial act.
- (8) The adoption and enforcement of or failure to adopt or enforce:
 - (A) a law (including rules and regulations); or
 - (B) in the case of a public school or charter school, a policy; unless the act of enforcement constitutes false arrest or false imprisonment.
- (9) An act or omission performed in good faith and without malice under the apparent authority of a statute that is invalid if the employee would not have been liable had the

statute been valid.

(10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

(11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

(13) Entry upon any property where the entry is expressly or impliedly authorized by law.

(14) Misrepresentation if unintentional.

(15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.

(16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the available administrative remedies and procedures.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is:

(A) on probation; or

(B) assigned to an alcohol and drug services program or a community corrections program.

(18) Design of a highway, toll road, or project if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a:

(A) discipline policy or

(B) restraint and seclusion plan.

(21) An act or omission performed in good faith under the apparent authority of a court order that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield unless:

(A) the loss is a result of reckless conduct; or

(B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(A) gross negligence;

- (B) willful or wanton misconduct; or
- (C) intentional misconduct.

Statute 4. Modified comparative fault standard established

- (1) For purposes of this article, “comparative fault” means the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage. Fault shall be determined according to Statute 5.
- (2) In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.
- (3) The total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.

Statute 5. Liability to be several; amount of judgment; allocation of fault

- (1) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.
- (2) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and, subject to subsection (4) of this section, that amount shall be the maximum recoverable against that defendant.
- (3) Any fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded. If the plaintiff's fault is equal to or less than the combined fault of all other persons, the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault.
- (4) Notwithstanding subsection (2) of this section, if a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties found to be liable.
 - (A) Upon the filing of the motion, the court shall determine whether all or part of a defendant's proportionate share of the verdict is uncollectible from that defendant and shall reallocate the uncollectible amount among the other parties found to be

liable, including a plaintiff at fault, according to their percentages at fault: *Provided*, That the court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount: *Provided, however*, That there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

(B) If the motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on the motion.

(5) A party whose liability is reallocated under subsection (4) of this section is nonetheless subject to contribution and to any continuing liability to the plaintiff on the judgment.

(6) This section does not affect, impair or abrogate any right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law.

(7) The fault allocated under this section to an immune defendant or a defendant whose liability is limited by law may not be allocated to any other defendant.

Statute 6. Premises liability. Actions against landowners

(1) For the purposes of this section, "landowner" includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted on real property.

(2) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, the landowner shall be liable only as follows:

A) A trespasser may recover only for damages willfully or deliberately caused by the landowner.

(B) A licensee may recover only for damages caused:

(I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

(C) An invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.

(3) It is the intent of the general assembly in enacting the provisions of subsection (2) of this section that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover.

(4) In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to

the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

(5) As used in this section:

(A) “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.

(B) “Licensee” means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. “Licensee” includes a social guest.

(C) “Trespasser” means a person who enters or remains on the land of another without the landowner's consent.

(7) A landowner owes a duty of reasonable care under the circumstances with regard to activities conducted on the land.

Statute 7. Action for wrongful taking of personal property.

(1) An action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

Statute 8. Action for damages for injury to property.

(1) Except as provided in section (2) and in any other case where a different period is expressly prescribed, an action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred.

(2) An action, not arising on contract, to recover damages for an injury to real or personal property that are caused or sustained by, or that arise from, an accident involving a motor vehicle shall be commenced within 3 years after the cause of action accrues or be barred.

Statute 9. Injury to the person.

(1) Except as provided in section (2), the following actions shall be commenced within 3 years or be barred:

(A) An action to recover damages for injuries to the person, including an action to recover damages for injuries to the person caused or sustained by or arising from an accident involving a motor vehicle.

(B) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.

(2) An action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle

shall be commenced within 2 years after the cause of action accrues or be barred.

**END OF
EXAMINATION**

Memorandum

To: Torts Students
From: Professor Russell
Re: Fall 2016 Torts Exam—Leviathan Fire
Date: January 18, 2017

The fall Torts exam was based, of course, on the Ghost Ship fire that claimed 36 lives in Oakland, California on December 2, 2016. The exam incorporated elements of news stories but also departed from these stories and incorporated fictional elements.

The statutory appendix incorporated statutes from several different states not including California. The premises liability statute was modeled on the Colorado Act, but for the exam, I changed the Act to make clear that activities, as opposed to conditions, are subject to the reasonably prudent person standard. This is a change that the Colorado General Assembly ought to adopt.

More so than any other exam that I have written, I found this exam to be frightening. In the classroom, I do not like to injure students in hypotheticals, and I found, after I was too far to turn back, that writing this exam question about young people killed and injured in a fire caused me to imagine my students being in the same position. This disturbed me. I have come to hope that this exam may cause my students to be a bit more cautious about putting themselves in the same situation as those who lost their lives at Ghost Ship.

Attached to this exam are three-high scoring student answers. I have also recorded a podcast of about 35 minutes in which I discuss the exam. You can find that discussion in the Torts section of the House of Russell exam archive. The faculty assistants have copies of the exam answers, but I did not write much on them, so you may just wish to compare your saved answer to the attached answers while listening to the podcast.

The best answers identified the comparative fault of Bob and carried that through to the other elements of the exam. Most importantly, the estate of Bob's brother Steve has a claim against Bob for Bob's negligence in constructing the staircase and perhaps as well for negligence with regard to the rescue of Bob. Far too many students noticed Bob's comparative fault when addressing defenses to his own claim but then failed to carry the analysis of Bob's fault into the claim by Steve's estate. Many students also failed to notice and analyze Bob's comparative fault.

Another distinguishing trait of the strongest answers was discussion of the allocation of fault among the various defendants. Allocation is always an important issue when there are multiple defendants. With regard to this problem, the statutory immunity of New City and the likely judgment-proof nature of some defendants made allocation a particularly important issue.

The distribution of grades was as follows:

A	3
A-	4
B+	9
B	32
B-	14
C+	3
C	3
C-	1
D+	0
D	1
F	0

Steve Gemello's Estate v. Almena, Ng, New City, Bob Gemello

Claimants:

Steve's Estate (wrongful death)

Bob (negligence)

Mother (negligence)¹

Girlfriend (negligence)²

v. Almena

Duty

Be reasonable when active (RWA). Almena was active as the leader of Leviathan.

Landlord-tenant

Duty to rescue: creating the peril

Standard of Care (SoC)

Act as a reasonably prudent person (RPP) under the circumstances.

Maintain and repair defects in common areas and premises leased for admission to the public.

To rescue the victim when the defendant's negligence was a cause of the peril.

¹ May have to argue that watching her son die on Face Time satisfies the proximity prong for this claim; though she was not in any immediate danger herself, Steve's mother would have had a close-up view of her son suffocating to death and heard the screams around him.

² More information is needed. Generally, the girlfriend will have no claim, unless she is listed in Steve's will as a beneficiary (Statute 2(3)(C)). The couple also lived together for at least a few years, so there is a possibility that they are married under either New York or New State common law.

Breach

Created an unreasonable risk of bodily injury & death to foreseeable victims. Even having created dangerous conditions, risk could have been mitigated by ensuring fire extinguishers worked and were up to date; an extremely inexpensive precaution in comparison to the huge cost of property damage and lost lives.

As above breach, unsafe circumstances and lack of repair, defects in common areas such as faulty stairs, maze-like conditions downstairs, inability for public to escape, failure to supply working fire extinguishers.

Almena was not on the premises when the fire began, though he played a role in creating the danger, and was the leading force behind inviting the guests to the party.

Negligence per se (NPS)

As the lessor in possession of the warehouse, Almena had a statutory duty as landowner to invitees (Statute 6(2)(B)(I-II) & (C)). Because Steve paid a ticket price and was there engaged in an activity, he was an invitee. Steve's death was caused by conditions which Almena helped create, during an activity on Almena's property.

Cause In Fact (CiF)

But for the dangerous conditions which Almena created in an unsafe building, Steve would not have been trapped on the second floor of Leviathan to suffocate from smoke inhalation.

Proximate Cause

As the leader of Leviathan, Almena organized the warehouse. He knew that the building had no running water for a sprinkler system and one outlet for electricity. Under his leadership, the lower floor became a maze of wood and cloth stacked to the ceiling, with accelerants such as paintbrush cleaning fluid stored among the furniture, essentially kindling. The second floor was equally difficult to navigate for escape, and the guests were trapped when the shoddy wooden staircase caught fire and collapsed. Finally, fire extinguishers on premises were inoperable and old. Guests and residents had no way to stop the fire once it started.

Damages

Appendix

Defenses

Comparative fault – Defense will say Steve was conscious of some of the conditions of the warehouse, but he could not have been aware of them all. Steve may bear some allocated fault, but the Estate will suggest it is less than 5%.

Statute of Limitations – estate has three years to file suit unless accident involving motor vehicle; vehicles downstairs, but not cause of fire or death.

Whodathunk? Defense will say that the mechanism of the fire was not foreseeable, but it need not be. Rat flambé, or in this case, *cat* flambé.

No landlord-tenant duty. Defense will point out that there was no lease between Almena and the residents of Leviathan. It can be argued however that he held himself forth as such, and the warehouse was represented to the party guests as a residential location.

Direct action not the cause: will depend on jurisdiction whether Almena's actions created a duty to rescue

v. Ng

Duty

RWA. Active as landowner.

SoC

Act as an RPP under circumstances.

Breach

It was unreasonable to continue to rent to Almena, after she knew or should have known that people were living in her warehouse which was not zoned for human habitation.

NPS

As the actual landowner, Ng bears the same duty as Almena to invitees and licensees.

CiF

But for Ng allowing people to live in and enter property not safe for habitation, Steve would not have been at the warehouse when it caught fire.

Proximate Cause

Ng knew or should have known of the Leviathan residents and their parties, because of the repeat complaints about noise, fights, and illegal construction. There is evidence that she knew people lived there before the fire. By continuing to rent to Almena despite this knowledge, Ng implied that members of the public (the Leviathan community) were expected to enter or remain in the warehouse. The Leviathan community was allowed to remain and hold their parties, which resulted Steve's death.

Damages

Appendix

Defenses

Comparative fault as above

SoL as above

Whodathunk; cat flambé

Defense will say that Steve was a trespasser, but there is evidence Ng knew of the parties and implied invitation

v. New City

Duty

RWA. Duty to perform reasonable inspections.

SoC

Act as an RPP.

Breach

Unreasonable failure to annually inspect, pursue court order for entry, for thirty years

CiF

Without an inspection, which would have “shut the place down,” the extreme risk of bodily injury and death continued.

Proximate Cause

The fire marshal’s office stated that had a fire inspector seen the building they would have “shut the place down.” For thirty years the Planning and Building Department failed to adequately pursue the inspections, despite ongoing complaints and investigations for “blight” and “illegal interior construction” during the last few years. The residents of Leviathan continued to live there and hold their parties in extremely hazardous conditions.

Damages

Appendix

Defenses

Immunity of Governmental Entity or Employee. Statute 3(12) protects the governmental entity from liability for failing to make adequate inspections of property, including negligent inspection. Defense will claim these decisions were discretionary.

However, knowing of actual risk to residents and failing to inspect for 30 years is grossly negligent. Estate will argue decision was ministerial.

v. Bob Gemello³

Duty

RWA. Acted as lead on stair construction, and living at warehouse

Duty to Rescue: creating the peril and undertaking to act and reliance

SoC

Act as an RPP

To rescue victims when the defendant helped create the danger, and when undertaking rescue.

Breach

Bob was unreasonable and negligent in his construction of the stairs and role he played in creating the pile of kindling and maze in the warehouse

Bob failed to rescue Steve from unsafe conditions which he helped create

³ Bob's availability as a defendant will depend on the standards in New State. This may be allowed, or it may represent a conflict of interest because Bob is the personal representative of Steve's estate.

Bob terminated his attempt to rescue Steve after he started

CiF

But for Bob constructing shoddy stairs, Steve would not have been trapped on the second floor

But for Bob's failure to rescue and bring Steve out the back staircase, Steve would have survived

Proximate Cause

Bob designed and build the stairs. The stairs failed all building code specs, and were extremely susceptible to fire. Because the stairs collapsed during the blaze, guests were stuck upstairs to suffocate like Steve. Because he created this danger, Bob had a duty to rescue Steve. Bob did attempt to undertake this duty, but then did not check to see if Steve was behind him as he fled out the back stairs which Steve could not have known about.

Damages

Appendix

Defenses

Bob's duty to rescue did not extend to further risk his own life.

The estate will need to prove that with further intervention from Bob, Steve would have survived.

Bob Gemello v. Almena, Ng, New City

Claimants:

Bob (injury to the person)

Mom (negligence)

v. Almena

Duty

RWA: leader of Leviathan

Landlord-tenant

SoC

Act as an RPP

Maintain and repair defects in common areas

Breach

Created an unreasonable risk of bodily injury & death to foreseeable victims.

Even having created dangerous conditions, risk could have been mitigated by ensuring fire extinguishers worked and were up to date; an extremely inexpensive precaution in comparison to the huge cost of property damage and lost lives.

As above breach, unsafe circumstances and lack of repair, defects in common areas such as faulty stairs, maze-like conditions downstairs, inability for public to escape, failure to supply working fire extinguishers.

NPS

Bob was also an invitee because he paid Almena a monthly fee for access to the warehouse

CiF

But for Almena creating dangerous conditions in the Leviathan warehouse, Bob would not have been injured.

Proximate Cause

As the leader of Leviathan, Almena organized the warehouse. He knew that the building had no running water for a sprinkler system and one outlet for electricity. Under his leadership, the lower floor became a maze of wood and cloth stacked to the ceiling, with accelerants such as paintbrush cleaning fluid stored among the furniture, essentially kindling. The second floor was equally difficult to navigate for escape, and the guests were trapped when the shoddy wooden staircase caught fire and collapsed. Finally, fire extinguishers on premises were inoperable and old. Guests and residents had no way to stop the fire once it started.

Damages

Appendix.

Defenses

Comparative fault: will be relatively high, defense will try to convince the fact finder that it is 51% or greater so he doesn't recover, because he built the staircase that was not up to code and contributed negligently to the state of the warehouse.

SOL: Action should be brought within 3 years

Whodathunk – Cat flambé.

Landlord-tenant rule – generally no duty where landlord ceded control.

Includes exceptions however, such as staircases and common areas.

Also, there was no lease between Almena and the Leviathan residents. They paid a monthly fee, but in at least one case claimed that was for membership to a private club. Almena did not (and could not) provide leases for residents.

Counterclaim – professional negligence, using the standard for expert carpenters. Claim will depend on whether jurisdiction uses the Second Restatement professional standards including skilled tradesmen, or narrowly defines professionals to post-graduate education. Bob is an expert carpenter and represented himself as such, giving Almena reason to believe that Bob would take reasonable care in the construction of the staircase, use appropriate materials and adhere to building codes. Because he didn't, Bob was negligent. A reasonably prudent person knows that there are standards for construction.

v. Ng

Duty

RWA: landowner

SoC

Act as an RPP.

Breach

Ng took unreasonable action when she continued to rent to Almena, knowing that people were living in her warehouse which was not zoned for human habitation.

NPS

As the actual landowner, Ng bears the same duty as Almena to invitees and licensees.

CiF

But for Ng allowing members of the public to live in and enter property not safe for habitation, Steve would not have been at the warehouse when it caught fire.

Proximate Cause

Ng knew or should have known of the members of Leviathan living at the warehouse, and about the parties they held, because of the repeat complaints about noise, fights, and illegal construction. There is evidence that she knew people lived

there before the fire. By continuing to rent to Almena despite this knowledge, Ng implied that members of the public (the Leviathan community) were expected to enter or remain in the warehouse. Because they were allowed to remain, the Leviathan community continued to have their parties, which resulted in the fire which injured Bob.

Damages

Appendix

Defenses

Comparative fault – as above

SoL: as above

Whodathunk: cat flambé

Trespass to property: but see implied permission to invitees.

Counterclaim: Ng has a counterclaim against Bob for conversion and damages to property, because of his role in creating the conditions at Leviathan. Bob may expect to be joined with Almena as a defendant in a suit against Ng, as the two consciously conspired to build the staircase. The general duty is not to destroy others' property. Bob may be partly liable for the value of the warehouse.

v. New City

Duty

RWA: inspections

SoC

Act as an RPP.

Breach

Not inspecting the warehouse for thirty years was unreasonable.

Failing to pursue a court order to gain entry for an inspection was unreasonable, given that the warehouse had not been inspected for thirty years and inspections are usually performed at least annually.

CiF

Without an inspection, which would have “shut the place down,” the extreme risk of fire, and bodily injury and death, continued.

Proximate Cause

The fire marshal’s office stated that had a fire inspector seen the building they would have “shut the place down.” Because for thirty years the Planning and Building Department failed to adequately pursue the inspections, despite ongoing investigations for “blight” and “illegal interior construction,” the residents of Leviathan continued to live there and hold their parties in extremely hazardous conditions.

Damages

Appendix

Defenses

Immunity of Governmental Entity or Employee. Statute 3(12) protects the governmental entity from liability for failing to make adequate inspections of property, including negligent inspection. Defense will claim these decisions were discretionary.

However, knowing of actual risk to residents and failing to inspect for 30 years is grossly negligent. Estate will argue decision was ministerial.

Comparative fault. As above, Bob's role in creating hazardous conditions allocates to him some portion of fault.

Damages Appendix⁴
 Subject to allocation of fault adjustments

Steve Gemello's Estate Damages	Past	Future
Special	N/A	Loss of earning capacity – \$180,000/yr + what Steve could have earned as a promising lawyer going forward Loss of support
General	Pain & Suffering while Steve was conscious Emotional P&S for mother's witnessing harm claim	Wrongful death Hedonic/potential – loss of enjoyment of life Loss of society Loss of consortium Witnessing the harm

Bob Gemello's Damages	Past	Future
Special	Medical expenses ⁵ Lost wages Assisted living	Diminished earning capacity Assisted living going forward Future medical expenses
General	Physical Pain & Suffering Bob was conscious until he collapsed outside Emotional P&S	Hedonic/loss of enjoyment/potential Bob's blindness will prevent him from creating art Future physical P&S Future emotional P&S

⁴ There may be statutory caps on damages, include as many conceptually distinct categories as possible. Some damage categories may not be allowed in New State, eg recovery for Bob's allocation of fault in Steve's death, or the girlfriend's claims.

⁵ Anything covered already by insurance (arguably within the scope of policy) should not mentioned in claim. Possibly subject to subrogation.

I. STEVE'S "ESTATE" VERSUS NG/ALMENA/BOB/"RESIDENTS"/"NEWCITY"

a. DUTY

Ng, Almena, Bob, and the other sub-lessees ("Residents") of the subject property all have 'Landowner' liability because each of them were in possession of the property and/or legally responsible for the activities conducted thereon. Statute 6(1).

i. Condition Liability

Steve was an Invitee in that: 1) he entered and remained upon the property in response to a Landowner's (Bob/Almena) representation that the party was open to the public, and that the public was specifically requested/expected to attend, Statute 6(5)(A); and, 2) he "enter[ed] ... on the land ... to transact business" in the form of paying Almena \$50 to attend the party, Statute 6(5)(A). Thus, Landowners each owed Steve a duty to exercise reasonable care to protect him from perils of which Landowners knew or should have known. Statute 6(2)(C).

Alternatively, Steve was a Licensee/Social-Guest by statute in that he entered the property in response to the permission and consent of a Landowner (Bob/Almena). Statute 6(5)(B). Thus, each Landowner owed Steve a duty to prevent those dangers he/she caused (e.g. their 'stuff' being in the way of a safe exit), Statute 6(2)(B)(I), and warn him of those dangers that they knew about but did not personally create, Statute 6(2)(B)(II). Almena/Bob/Residents lived/worked on the premises and therefore likely knew of *all* of the conditions, and none warned Steve of any perils, so only Ng arguably benefits from Steve being a Licensee for condition liability purposes.

All Landowners, except arguably Ng, owed Steve a common-law duty to rescue since each Landowner materially contributed to his peril. Almena likely had an independent duty to rescue because he had a business (special) relationship with Steve.

ii. Activity Liability

Each Landowner owed a duty of reasonable care to Steve with regard to activities (i.e. the party) conducted on the property, *regardless* of Steve's status. Statute 6(7).

b. STANDARD OF CARE (“SOC”)

All parties are required to behave as a reasonably prudent person would in carrying out each prescribed duty, such as keeping the property up to code (e.g. maintaining required safety features), ensuring that persons can swiftly exit in an emergency, warning of known perils, and rescuing persons from perils when safely possible.

c. BREACH OF THE STANDARD OF CARE (“BREACH”)

i. Negligence

Landowners each breached their duties to Steve by failing to act as a reasonable person and ensure:

1) clear paths to an adequate number of up-to-code staircases each leading directly to sufficiently marked exits (note: 5/7 upper level windows were grated and, therefore, impassable), and from such exits to safety;* 2) fire extinguishers were not expired and operable;** 3) hazardous substances (e.g. solvent rag(s), butane tanks) were stored/disposed of properly;** 4) open flames (the candle) were properly contained;** 5) animals (the cat) were controlled; 6) electrical outlets were not overloaded;** 7) public patrons were aware of the second staircase (a material omission/substantial factor in Steve’s death because Bob’s escape proves that Steve could have escaped from the same location via the back staircase had he been aware of it); 8) proper emergency lighting;* 9) a fire sprinkler system;* 10) a permit for the party (which would likely have triggered an inspection by NewCity);* 11) the property was properly zoned for inhabitation;* and, 12) Steve was rescued from the fire [note: violations of the Newstate/“NewCity” fire/municipal/building codes given to us in the facts are marked by “*” and probable violations are marked by “**”].

ii. Negligence *Per Se*

Negligence due to the violation of laws meant to protect the public, such as building codes, is negligence *per se*; thus, eliminating the need to prove that a reasonable person should have acted differently since the conduct is considered negligent as a matter of law. This doctrine applies to Landowners’ failure to comply with the NewCity codes (other than the zoning/permit issues which are

'licensing' violations) that directly contributed to Steve's death. Ng and Almena, as owner and primary lessee respectively, are clearly liable for the violations, and the Residents are arguably liable due to their being in possession and control of the property. Thus, the codes become the standard of care, and the violations of the codes become breaches without the need for further evidence.

iii. *Res Ipsa Loquitur*

Res ipsa loquitur provides that one is presumed to be negligent if he/she/it had exclusive control of whatever caused an injury, when such injuries do not ordinarily result without negligence, even though there is no direct evidence of negligence. Thus, Estate could argue that it need not show a breach of duty because members of the public do not usually burn to death at parties absent negligence. However, meeting the requirement to show that a respective Landowner had exclusive control of the property/premises could be problematic, and this doctrine does not appear to add much benefit to the case since there is overwhelming evidence of negligence already available.

iv. Intentional Torts/Criminal Acts

The disadvantage of a claim for intentional torts such as assault/battery is that Landowners' insurance policies are likely to exclude such acts from coverage. The advantages include the ability to use any criminal convictions to estop a Landowner from arguing lack of intentionality. Further, under the majority view, one cannot consent to a criminal act. Proof of knowledge/intent will also impact the case for punitive damages as discussed below.

v. Burden of Avoidance

Landowners were obligated to protect Steve by eliminating the perils since the probability of danger and magnitude of loss were high, and the cost of correcting the physical defects on the premises were comparatively low.

d. CAUSE IN FACT (“CIF”)

But for Landowners’ negligent acts/omissions:

- i. The fire would likely not have occurred, or at least would not have spread so rapidly;
- ii. Any fire could have been contained and/or extinguished by a fire sprinkler system and extinguishers; and/or,
- iii. Steve would likely have escaped safely/unharmed via unobstructed stairs/paths to an adequate number of marked emergency exits.

e. PROXIMATE CAUSE (“PC”)

Steve’s death was reasonably foreseeable based upon the existence of the perils. None of the perils appear difficult to ascertain (i.e. all were reasonably foreseeable as dangers, contributors to the fire/delays/panic/chaos, and ultimately to Steve’s injuries/death).

f. DAMAGES

Newstate has a modified comparative fault regime. Statute 4. A party may recover damages even if he/she/it be at fault provided that his/her/its percentage of fault does not *exceed* 50%. Statute 5(3).

Newstate’s wrongful-death law is both a wrongful-death and a survival statute, which requires that all claims related to Steve’s death be brought by the personal representative of Estate in his/her name. Statute 2(1)-(2).

Steve’s “Girlfriend” may only recover if she is a devisee under Steve’s will (if any) or a beneficiary of a trust that is a devisee under such will, and their relationship did not violate Newstate law. Statute 2(3)(C). Bob and Steve’s mother may recover for Steve’s death through Estate regardless of whether they are beneficiaries/devisees. Statute 2(A).

Damages are all those Steve would have been able to recover had he lived, plus any damages to a party entitled to recovery (Bob/Mother/Girlfriend, or others not mentioned in the facts). Statutes 1, 2(1).

The damages sections are *inclusive*, not exclusive, so common law damages are likely available in addition to statutory damages. Statute 2(6).

Note that personal insurance policies likely exclude the business use of the premises, and most business policies likely exclude activities outside of the scope of the covered business; thus, there appears to be a low likelihood of coverage for Steve’s damages under any policies held by Landowners.

i. Compensatory

Compensatory damages must be allocated to each defendant individually. Statute 5(1). However, if it is proven that Almena and Ng conspired to operate Leviathan negligently (i.e. as an illegal residence/party-house), then they may be jointly and severally liable. Punitive damages are not allocated as they stem from bad behavior by a particular party. Additionally, compensatory damages may be reallocated among any liable parties if they cannot be collected from one of more defendants. Statute 5(4). This makes recovery possible if *any* of the defendants have available funds *and* are more at fault than the recovering plaintiff. Statute 5(4)(A).

	Past	Future
General/Economic/Pecuniary	Funeral/burial expenses (Statute 2(6)). Any property destroyed (phone/clothes).	Loss of earnings.
Special/Non-Economic/Non-Pecuniary	Pain/suffering before unconsciousness/death (<i>id.</i>).	Loss of consortium (financial support, society, and companionship) (<i>id.</i>). Emotional distress (Bob/Mother/Girlfriend?/Others?).

Future earnings may be limited because Steve intended to work for the ACLU (which likely pays substantially less than \$180k/yr).

Loss of consortium *may* be available to Bob/Mother/Girlfriend based on Statute 2(6). Girlfriend could benefit from a loss of financial support based upon the facts of the relationship.

Emotional distress damages may or may not be available to Mother, Girlfriend and/or Bob depending on Newstate common-law. Bob was in the ‘zone of danger’, but Mother and Girlfriend were not. Both Mom/Girlfriend witnessed his death remotely (which may not be compensable under Newstate law), and the text message was likely less traumatizing than the video call received by Mother. Also, since emotional distress is a common-law damage, Girlfriend may be barred from recovery entirely based upon the nature of her relationship with Steve (e.g. she was not a spouse).

ii. Punitive

The repeated, systematic, and apparently knowing violations of law as described above support a finding of extreme recklessness towards the rights of others and/or intentionality on the part of Ng/Almena (and possibly all Landowners) sufficient to support punitive damages. There are good public policy reasons to award punitive damages here to deter future misconduct (there are similar situations in many cities, “[i]t could have been any one of us,” and these circumstances should be discouraged). Punitive damages are fixed by the magnitude of the willful misfeasance/malfeasance and the means of the tortfeasor. Thus, punitive damages against Ng, who has deep pockets and significant prior misconduct of a similar nature on record, are likely to be *substantial* (unless capped by law). Punitive damages also cannot ordinarily be discharged in bankruptcy.

g. DEFENSES

i. Implied-Assumption-of-Risk/Comparative Fault

Defendants may argue that the dangers of the premises were so obvious that Steve assumed the risks of remaining on the premises. However, Estate can likely argue successfully that Steve acted reasonably in presuming that the premises were not unreasonably dangerous

ii. No Duty to Rescue

Landowners will argue that they had no duty to rescue because they could not rescue Steve without endangering themselves. However, at minimum, Bob had a duty to rescue because he was likely in no

more danger by attempting to rescue Steve than he was in already, and having started a rescue, he was obliged to complete it.

iii. Lack of Knowledge

Ng may argue lack of knowledge of the use of the premises for residency/parties as a defense. She is unlikely to prevail because she apparently knew and, at least tacitly, approved of the use of the premises. Evidence of her lying about her knowledge is also likely to weigh against her for punitive damages purposes.

iv. Sovereign Immunity

NewCity and its employees are immune from suit for breaching its statutory duties to enforce its building and fire codes, Statute 3(8), and failing to perform inspections, Statute 3(12). Nevertheless, NewCity must be allocated a percentage of fault, and that fault cannot be allocated to any other defendant. Statute 5(7). Thus, there will be no recovery for the damages apportioned to NewCity, including any under the reallocation provisions.

Estate should attempt to limit NewCity's percentage of fault, while defendants will want to maximize it (Bob, as both plaintiff and co-defendant, is stuck in a 'Catch 22' on this issue). The evidence suggests that Almena/Ng actively interfered with and lied to NewCity agents (e.g. by claiming the premises was being used as a members-only club, zoning it as a warehouse), which increases their fault relative to NewCity. Nevertheless, NewCity was at least partially at fault (e.g. for failing to follow-up to previous tips/information).

v. Statute of Limitations

A suit for damages for injury or wrongful death to a person must be brought within three years, Statute 9(1), and within two years for property, Statute 8(1). Although motor vehicles were present in the yard, they were likely not "involved" sufficiently to make the shorter periods of limitation relevant. Neither period has run as of this date.

II. BOB VERSUS NG/ALMENA/RESIDENTS/NEWCITY

a. DUTY

See I(a). Bob was a Licensee when he was attending the party, he was also a (business) Invitee as sub-lessee to Almena and through him to Ng since he paid rent (money/services) to Almena for use of the premises, who then paid the money to Ng.

Landowners also owed him a duty to protect regardless of his status for activity liability purposes.

b. SOC

See I(b).

c. BREACH

See I(c), but Bob likely already knew of the perils/second staircase.

d. CIF

See I(d).

e. PC

See I(e), Bob's injuries were equally foreseeable.

f. DAMAGES

See I(f), exclusive of the table/succeeding notes. Bob may sue and recover directly for his own injuries.

	Past	Future
General/Economic/Pecuniary	<p>Medical costs (transport, burn unit/amputation, etc.).</p> <p>Loss of earnings during treatment.</p> <p>Any personal property damaged/destroyed.</p>	<p>Future medical expenses (likely to be <i>substantial</i>).</p> <p>Loss of earnings (hard to be a blind artist).</p>

<p>Special/Non-Economic/Non-Pecuniary</p>	<p>Pain and suffering while conscious during fire, and during medical treatment (burns <i>hurt</i>).</p>	<p>Loss of enjoyment of life (burns, blindness, loss of right leg).</p> <p>Future pain and suffering (burns, phantom-limb-syndrome, etc.).</p> <p>Emotional distress (embarrassment at disfiguring).</p>
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Bob’s punitive damages case is significantly weaker because he has unclean hands.

g. DEFENSES

See I(g). Negligent assumption of risk/comparative fault defenses are much stronger because Bob lived on the premises and had knowledge of the conditions (thus arguably assuming the risk by living there) and directly/materially contributed to the perils. Bob may argue that the vast majority of the perils were the fault of Almena/Ng’s failure to keep the premises up to code. Proving recklessness and/or intentionality by Almena/Ng would be particularly helpful to Bob because of the majority no-consent-to-criminal-acts rule.

III. REPRESENTATION

Bob cannot be personal representative for Steve’s “Estate” as he has a conflict of interest in the outcome of any litigation (he would be impleaded as a co-defendant into any suit by Estate).

IV. CONCLUSION

The facts support a finding apportioning the majority of the fault to Ng and Almena with the rest to NewCity, and roughly equally between the Residents (including Bob). Estate likely has a very strong case against Ng/Almena and should have a significant recovery (especially if uncapped punitive damages are available).

Bob has a weaker case; his recovery is likely to be reduced under comparative fault principles, and any recovery could be problematic under the reallocation scheme (particularly if there is a lack of insurance coverage and/or financial means by the Residents).

The most significant defendant is Ng, who appears to have substantial assets and is vulnerable to a punitive damages claim. Finally, the reallocation provision in Statute 5(4) can be used, at least by Estate, to collect any judgment in the case, which will be particularly important if other defendants are insolvent, uninsured, or of little future financial worth.

Word Count: 2500/2500

Bob v. Almena, Rent Ng (Rent), and New City (New) (1 of 2)

Duty:

Almena, Rent, and New were all active therefore, they had a duty to act reasonably. Additionally, because Almena and Rent are landowners of the Leviathan they owed the highest duty among entrants to Bob as he was an invitee.

Further, Almena is liable under the theory of misfeasance because he took affirmative actions that contributed to the foreseeable and unreasonable dangers that lead to Bob injuries and Steve's death.

From the evidence, it is unclear if Rent took any affirmative steps to contribute to the harm, but she meets an exemption to parties liable for nonfeasance (an inactive party) and is liable due to her special relationship as a landowner.

Standard of Care (SOC):

Bob was an invitee to the Leviathan, he was there for "business," and his presence mutually benefited he, Almena, and Rent. Landowners SOC to invitees is to not willfully or deliberately harm and to warn of dangers: known; should have known; not ordinarily present; not created by the landowner, and; those created by the landowner.

The main staircase was a known danger it didn't meet building codes because it was constructed of flammable materials, there were gaps in treads, riser openings were not the correct height and exposed, handrails were insufficient where they existed, the landing was too small, it failed to lead to an exit, the foundation was inadequate, it was insufficiently lit, inadequately sloped, and the width was improper. The stairs were a "known danger, not ordinarily present, and created by Almena." He had a responsibility to warn people about such a hazard.

Rent arguably did not create the danger, but she “should have known” such dangers were present in this building. Rent was a substantial property owner familiar to building and planning, since she was known to building and planning it can be inferred that she was active regarding her properties, and had a duty to act reasonably.

Breach:

Almena’s negligence can be inferred from his failure to take precautions that may have prevented the fire, the burden of installing battery powered lighting and reflective signs that gave notice of exits was much lower than the probability of such an event multiplied by the expected loss. (B<PL).

Almena created the danger, he did something bad, and he prevented inspections by having doormen that knew to tell police the building was a private club. Constructive knowledge can be inferred that there was a system in place to not open the door to authorities. But, to collect the proceeds from Almena’s endeavor a sophisticated ticket system was placed in a structure that’s main power source was an extension cord from a neighboring business and was nicknamed the “deathtrap” by residents and guests.

Rent was an absentee owner who failed to exercise reasonable care when active. She should have taken steps to ensure the property was inspected, or demanded that an inspection took place. She failed to warn invitees of dangers she should have known of. Thus, she breached her duty as a landowner. Rent benefited from Bob and Steve’s presence, which allowed Almena to pay rent and to have leased the warehouse for nearly six-years. That provided incentive for her to act unreasonably, if the property value goes up because the Leviathan gentrifies the area she benefits the most.

The efforts that New exhausted to inspect the Leviathan are unreasonable, from the evidence it appears there may have been grounds for the inspectors to get a court order to access the property. While New boasts about having a policy to inspect commercial properties once a year if not more, it seemed to act unreasonably in failing to inspect the Leviathan warehouse in over thirty-years.

Negligence Per Se (NPS):

Both Almena and Rent violated New's premises liability statute. The parties breached the SOC described above that was owed to invitees. Statute six is designed to protect harm from occurring upon entrants to land, and Bob and Steve were invitees on the land.

If a recreational-vehicle qualifies as an off-road vehicle, then evidence supports the city would not have immunity from liability. Statute 3 § 23.

Cause in Fact (CIF):

But for Almena's unreasonable actions to sustain the Leviathan Bob wouldn't have been injured and Steve wouldn't have been killed. Generally, the plaintiff has the burden of proof but in this scenario, the burden shifts to the defendants because they breached statute six. (Lone Palm Hotel). Because there is more than one negligent and culpable actor that violated statutory law shifting the burden to them will ease plaintiff's difficulty of proving a prima facie case. (Summers v. Tice).

Proximate Cause (PC):

Almena may argue the events were unforeseeable, but it doesn't matter that a cat knocked over the candle that place was a "deathtrap," it was foreseeable that some incident where people would be injured would happen. (Rat-flambay). It was unreasonable to have people live at the Leviathan, it was unreasonable to use the second floor as an event venue when the main staircase

being utilized was made of “stolen pallets,” and it was unreasonable to rely on an extension cord of a neighboring business to serve as the primary power. It was unreasonable that New hadn’t inspected the warehouse in over thirty-years.

Damages:

If the burden is shifted to the defendants, because it is too difficult to determine the exact negligence that caused the harm Almena and Rent will be jointly and severally liable, which would leave them both on the hook for total damages.

Economic:

After accident - medical bills, ambulance, clothing, loss of earnings, and renovations to home to accommodate for his disability.

After Trial- travel, rehab, loss of earnings.

General and Hedonic:

After accident - pain & suffering, emotional distress, damage to reputation (expert carpenter), and humiliation.

After Trial- pain & suffering, emotional distress, damage to reputation, humiliation, loss of society (he lost his brother), and any other loss of enjoyment that can be evidenced.

Defenses:

Who’d a thunk? Sorry, mechanism doesn’t matter.

Comparative fault, but that will come into the damages calculation and damages will be reduced by Bob’s own percentage of fault.

Assumption of the risk, Bob is an expert carpenter, and if New holds skilled tradesmen to a higher SOC by statute then Bob may be further liable, but I don’t have enough information.

Authorized agent- Bob is an authorized agent, stepping into the shoes of the Landowner and is no longer owed a duty of his own. Unlikely because Almena is probably the lessee.

Pushing off liability to the Neighboring auto shop because it doesn't appear an extension cord could be run from any other business. Serve to reduce liability of other negligent actors.

If New's statutes hold skilled craftsmen to a higher SOC, Neal Bohr may have potentially contributed to the harm by expanding the power.

Almena will try and push liability off to Rent, and Rent may try to push it off on New. If it can be demonstrated that it appears New had a policy of inspecting commercial buildings, then the failure is protected by statute. Generally, if evidence supports that inspections were not policy but rather administrative then the immunity may be breached.

Insurance/Strategy:

New is the biggest pot of money, but the cloak of sovereign immunity is hefty and Rent seems to be the next biggest pot unless you could bring in the neighboring Auto Shop. Neal Bohr is most likely judgment proof. It is best to frame this as a concerted action by demonstrating Almena, Rent, and possibly the neighboring Auto Shop worked together. Providing encouragement or assistance to Almena. Almena would need an absentee if not complicit property owner to get away with such behavior, and the Auto Shop may have provided the power cord that acted as the main power supply for the Leviathan. The statute of limitations (SOL) to bring a claim is three-years

In Re Steve v. Bob, Almena, Rent, and New (2 of 2)**Duty:**

Anytime one is active there is a duty to act reasonably. Bob was active, he built the staircase and was leading Steve as they attempted to escape. Almena and Rent were active. Regardless, as landowners whether active or not they are liable for certain harm upon entrants of their land. Landowners owe the greatest duty to invitees. New was active it undertook the act of investigating.

SOC:

Depending on Bob's status his duties will vary. If New is part of the minority of jurisdictions that recognizes skilled tradesmen as having a higher "professional" SOC, Bob, could be attributed a percentage of fault for that night's events. If he was an agent of the landowner, or, a landowner himself then he owed the same SOC to his brother as Almena and Rent. The facts are not dispositive of Bob's status, but Almena employed doormen in some capacity for his parties. Therefore, he may have had employees acting as agents, not Bob.

Almena and Rent owed a duty to not willfully or deliberately harm invitees on their land and to warn of dangers: known; should've known; not ordinarily present; not created by the landowner, and; those created by the landowner.

Breach:

Based off the "Learned Hand" doctrine, Almena acted negligently here. He was the mastermind of these events, and it was unreasonable for him to not even take the most basic of precautions considering that the burden was much less than the probability of the loss ($B < PL$). Reflective exit signs, battery powered lights, or simply informing people of how to quickly escape in the event of a fire were all actions that imposed minimal burdens. Yet, none of these

protective measures were taken. The same logic applies to New and Rent, for a minimal burden they could have littered the place with danger signs or party at your own risk, something that did a better job to inform entrants of the risk.

Because the landowners violated the premises liability statute, they must prove by a preponderance of the evidence that they were not negligent. Generally, the plaintiff's burden. (Lone Palm Hotel).

NPS:

Almena and Rent violated New's premises liability statute by breaching the SOC described above that was owed to invitees. Statute six is designed to protect harm from occurring upon entrants to land, and Bob and Steve were invitees on the land. They were there for "business."

And, unless a recreational vehicle qualifies as an off-road vehicle the government will have the protections of sovereign immunity.

CIF:

But for Almena's failure to warn Steve and every other ticket paying entrant on his land (invitee, there for business) of known dangers he created by taking affirmative steps the entrants may not have been exposed to an unreasonable harm. A faulty staircase, a maze of furniture, recreational vehicles, instruments, and art up to the ceiling all contributed to the death of Steve and the others who perished that night.

Here the gold standard of "but for" causation with the burden of proof shifted to the presumed negligent tortfeasor(s) is most appropriate. Dependent on whether this is brought as concerted action. Because of the negligent tortfeasor(s) actions it may be difficult to separate the

specific cause that triggered the tragedies at the Leviathan and therefore the burden of proof is correctly shifted to them.

PC:

If New is a minority jurisdiction that has an expansive view of professionals, Bob may share some liability because a reasonably competent and skilled carpenter would seemingly know building and planning codes, and know that a staircase that is flammable and poorly footed is unreasonable per the custom of the profession.

If Rent had taken steps to ensure that the warehouse was being utilized within New's codes, then this tragedy wouldn't have occurred.

If New had acted reasonably once it undertook steps to investigate the warehouse this tragedy may have been prevented. Further, if New lived up to the practice of routinely inspecting commercial buildings, as it boasts that it does maybe the tragedy or harm could have been mitigated.

Damages:

There is no survival claim for Steve, he was only conscious for a matter of seconds after he made the call and before it was disconnected, so it is unlikely that he experienced any pain and suffering that is recoverable. (no survival claim).

If Bob is apportioned a percentage of fault, he is likely judgment proof. Therefore, if this is a concerted action the other liable parties are liable for an amount that equals Bob's uncollectable judgment multiplied by that party's own percentage of fault. (Statute 5). Bob has no grounds for recovery in this suit, a plaintiff may not receive double recovery (Bob needs to bring his own suit considering his substantial damages), and it is likely that Bob will be named as a defendant in the suit brought on behalf of Steve's estate.

If Steve and girlfriend were common law married (if New recognizes common law marriage & (outward manifestations and/or shacked up), or if she is a beneficiary or devisee of Steve's will, she would be eligible to recover damages.

No emotional distress for Mother (not zone of danger) lacking proximity element.

Economic:

Funeral and burial expenses.

Any loss of financial support for Steve's mother, and if Steve was married any loss of support to his wife (based off what he brought home after gambling, boozing, and whoring).

General and Hedonic:

Loss of society for Steve's mother, and loss of consortium for his wife based on the quality of husband he was.

Defenses:

If Steve didn't pay admission he would be a licensee, the evidence supports the notion that Steve attended not only to see Bob, but because of Almerna's pressure for Leviathan regulars to invite paying guests.

Assumption of the Risk: Steve didn't agree with Bob's lifestyle, which included living at the Leviathan. It was unreasonable to attend in the first place, and he voluntarily and knowingly took the risk of attending a party at the inherently dangerous "deathtrap."

If New courts recognize that an "expert carpenter" is held to the standard of his profession then Bob would be liable for a percentage of the fault, and the other parties would argue they trusted him as a professional. Generally, the professional standard is limited to true professionals.

Bob was a landowner or authorized agent and because he was the only landowner there that night, he owed the elevated level of care to his brother. No valid lease.

Insurance/Strategy:

Attempt to pierce sovereign immunity (most likely unsuccessful), and aim to bring as concerted action. Rent is the largest pot of money that is likely attainable, and therefore showing that she encouraged if not aided in the Leviathan's events is essential to this case. Aside from the auto shop that may have provided the Leviathan with power the other potential defendants Neal Bohr and Bob appear to be judgment proof. Unless Almena has third party insurance coverage that would not exclude such events he too is probably judgment proof. SOL is three-years.

Word Count: 2500