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Question 1.

Strict Liability under Product Liability and Defenses:

DuraTires is a manufacturer of tires, which are goods. Manufacturers of products are subject to product liability, which may be based on strict liability. Strict liability occurs when a product does not perform at the level that has been claimed by the manufacturer, so long as it have been (i) used in its intended use, (ii) without any alteration. In such case, a party which claims defect of the product based on the malfunction of the product can request indemnification from any party within the chain of distribution of said good, starting from raw material/parts manufacturer to the final reseller from whom the end consumer/user purchase the product. In other words, all parties in the chain of distribution of said product are jointly and strictly liable towards the demanding party. Any internal liability or negligence claims between said parties in chain of distribution must be handled said parties amongst themselves and are not a defense towards the plaintiff.

Joinder:

There are cases in which a third party must be added to the case, namely joinder. Joinder may be compulsory or permissive. In permissive joinder, a defendant may claim that another party is also a co-defendant and should be joined to the case. In such cases, a third party may be joined, but it is not mandatory, and the case may proceed without them.

Pam has the right to be indemnified in full by any party in the distribution chain and is filing a suit against the manufacturer, DuraTires as the tires have gone flat. Here, DureTires is a defendant of a case of strict liability. Since one of the defenses to strict liability is alteration by a third party, DureTires may claim that Maurice, who installed the tires for Pam, had conducted an alteration of the tire and therefore must be joined to the case. But this is merely DuraTires defense, and therefore Maurice being joined is not compulsory joinder, it is permissive joinder. The fact that Maurice did not join is not a reason to dismiss and therefore the court properly denied DuraTires' motion.

Question 2A.

Discovery and Witness Statements

Here the issue is whether the court can compel production of Wynne's statements. As per FRE 36b, parties to a lawsuit are required to gather before the trial, and exchange information regarding their basis of trial (in addition to the pleadings), facts, documents, electronic data that pertain to the case. During discovery, the parties are permitted to compel the other party to provide information, documents or evidence that would be relevant to the case at hand. There are a limited number of exceptions to such requirements, meaning if compelled parties must hand over the requested information to the adverse party.

Here, Wynnee is a witness to the incident, as driver of the car which Pam had an accident

with due to the tire going flat. Wynne's statement is a witness statement obtained in the preparation of litigation. Since it is a statement, it is not privileged, even if it is prepared in anticipation of litigation. DureTires may compel the production of said statement and they may also compel Wynne to provide testimony in court as a witness.

Question 2B.

Negligent Infliction of Emotional Distress

Pam has not suffered any physical injury in the accident, but is claiming property damage and emotional distress. Emotional distress can either be intentional or negligent, and in this case it is clear that Pam is claiming negligent infliction of emotional distress (NIED). For negligent infliction of emotional distress to be granted, a party must have been (i) a foreseeable plaintiff, (ii) within the zone of danger, and (iii) suffering some physical effect. There is only one exception where physical injury is not sought, and this is when a person sees injury inflicted to their close family member while the injury is occurring. There are two views regarding who is deemed a foreseeable plaintiff. The majority view sees plaintiffs who are in the zone of danger to be foreseeable, whereas the minority view states that all plaintiffs are foreseeable, and there is no need to be in the zone of danger.

As to the tort of NIED, Pam was in the accident itself and clearly in the zone of danger. If she has suffered some physical effects, the court will grant her the remedies for NIED.

Physical Examination

To establish physical injury, Pam is required go through a physical examination. A party claiming physical injury can be compelled to submit a physical examination from their own physician. In addition a party may be compelled to be examined by a court appointed physician as well. A party who does not submit to a physical examination as appointed by court will be unable to prove their physical injury and their case may be dismissed on merits.

Here, Pam may be compelled to make herself available to a physical examination.

Question 3.

Attorney Work Product:

Disclosure during discovery: The issue is whether the court properly ordered DuraTires to product its scientific report. As per FRE 36b, parties to a lawsuit are required to gather before the trial, and exchange information regarding their basis of trial (in addition to the pleadings), facts, documents, electronic data that pertain to the case. During discovery, the parties are permitted to compel the other party to provide information, documents or evidence that would be relevant to the case at hand. There are a limited number of exceptions to such requirements, meaning if compelled parties must hand over the requested information to the adverse party.

Exceptions to disclosure - Privileges: These exceptions, when parties may not be required to product said documents are referred to as privileges. Privileges provide a safe haven to communication or documents, and when the requested within scope of a discovery, can be exempted from sharing.

Attorney work product: Attorney work product is a privilege whereby any work product created at the direction of counsel in anticipation of litigation is protected from disclosure. Attorney work product is not an absolute privilege, meaning that a party may be compelled to produce parts of a work product during a trial based on certain conditions. A work product consists of two different types of contents, namely opinions, which are legal evaluations made by an attorney or a third party directed by an attorney with regard to the anticipated litigation. Opinions are strictly privileged and a party may not be compelled to disclose any opinions that are contained within the work product. A party compelled to provide facts within a work product has the right to redact said parts containing opinions within scope of its absolute privilege.

Additionally, work products are deemed privilege as long as they are not disclosed to third parties. In other words, disclosure to third parties may be deemed a waiver. If a work product is disclosed to a third party, privilege is deemed waived and the party may not claim privilege to not disclose said work product to a party demanding production.

Facts exception to work product privilege in case of unreasonable burden: On the other hand, a work product is likely to contain facts as well. These facts themselves are not subject to absolute privilege in the way that opinions are. Therefore, a party may be compelled to produce parts of a privileged work product which pertain strictly to facts, prepared at the direction of counsel, if the party demanding production can show that it is unreasonably burdensome for such party to gain access to or obtain such facts in any other manner.

Here, Pam has conferred with DuraTires and requested production of the scientific report DuraTires has used in its advertisement stating that tires will not go flat for the first 7000 miles. The report was created at the direction of counsel in anticipation of litigation, as it contained research for flat tire incidents involving DuraTires and therefore privileged work product. Pam will argue that the facts contained in the report are directly related to the claim of DuraTires and it is unreasonably burdensome for her to be able to find the facts that are contained in the report without unreasonable burden. In addition Pam will state that the work product has been referred to in the advertisement, and therefore DuraTires should be deemed to have waived privilege of the report and therefore must be compelled to produce the document. DuraTires will claim the work product is privileged, that they have not waived privilege. In so far as DuraTires did not disclose any other contents of the report other than factual statements such as the fact that its tires do not go flat for the first 7000 miles, DuraTires' claim that privilege to the work product has not been waived should be accepted.

Based on the above, the court may properly order DuraTires to produce the scientific report, while DuraTires bears the right to redact the parts of the work product containing opinions within scope of its absolute privilege, and must produce the parts which pertain to facts.

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