

WIDENER UNIVERSITY SCHOOL OF LAW

HEALTH LAW I

FINAL EXAM

Professor Pope

Fall 2010

GENERAL INSTRUCTIONS:

1. **Read Instructions:** You may read these instructions (the first three pages of this exam packet) *before* the official time begins.
2. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.
3. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.
4. **Exam Packet:** This exam consists of **twenty (20) pages**, including this cover page. Please make sure that your exam is complete.
5. **Identification:** Write your exam number in four places: (1) Write it in the space provided in the upper-right hand corner of this page. (2) Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Part Two. (3) Write your exam number (*and* fill in the corresponding ovals) on the Scantron form. (4) Write your exam number on the upper-right-hand corner of your envelope.
6. **Anonymity:** The exams are graded anonymously. Do *not* put your name or anything else that may identify you (except for your exam number) on the exam.
7. **Timing:** This exam must be completed within three hours.
8. **Scoring:** There are 180 points on the exam, approximately one point per minute.
9. **Open Book:** This is an OPEN book exam. You may use *any* written materials, including, but not limited to: any required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.
10. **Format:** The exam consists of two parts which count toward your grade in proportion to the amount of time allocated.

PART ONE comprises 25 multiple choice questions worth three points each, for a *combined* total of 75 points. The suggested total completion time is **75 minutes**.

PART TWO comprises two essay questions worth a combined total of 105 points. The suggested completion time is **105 minutes**.

- 11 **Grading:** All exams will receive a raw score from zero to 180. The raw score is meaningful only relative to the raw score of other students in the class. Your raw score will be added to your quiz score (of 60) and midterm score (of 60). That sum will be converted into a scaled score, based on the class curve. (There are two separate curves: one for M.J. students and one for J.D. and LL.M. students.) For example, if the highest raw score in the class were 220 of 300, then that student would typically receive an “A.” I will post an explanatory memo and a model answer both to TWEN and to the library exam archive a few weeks after the exam.
- 12 **Special Instructions:** Instructions specific to each exam section are printed immediately below.

SPECIAL INSTRUCTIONS FOR PART ONE:

1. **Format:** This Part contains 25 multiple choice questions, worth three points each, for a combined total of 75 points. This part has a suggested completion time of 75 minutes. Please note that the questions vary in both length and complexity. You might answer some in 20 seconds and others in three minutes.
2. **Identification:** Write your Student ID *both* on the first page of this exam booklet. *and* on the Scantron form. Fill in the corresponding ovals.
3. **Fill the Oval on the Scantron:** For each question, *fill in* the oval on the Scantron corresponding to the *best* answer choice.
4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in a separately marked section of your Bluebook or ExamSoft file. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do *not* expect this to be necessary.

SPECIAL INSTRUCTIONS FOR PART TWO:

1. **Format:** This Part contains two essay questions. The first is worth 80 points (80 minutes). The second essay is worth 25 points (25 minutes).
2. **Submission:** Write your *essay* answers in your Bluebook examination booklets or ExamSoft file. I *will not* read any material which appears only on scrap paper.

3. **Legibility:** Write legibly. I will do my best to read your handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible. *I am serious; write neatly.*
4. **Outlining Your Answer:** I strongly encourage you to use *at least* one-fourth of the allotted time per question to outline your answers on scrap paper *before* beginning to write in your exam booklet or ExamSoft file.

Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues *will* negatively affect your grade.

5. **Answer Format:** This is important. *Use headings and subheadings.* Use short single-idea paragraphs (leaving a blank line between paragraphs).
6. **Answer Content:** Address *all* relevant issues that arise from and are implicated by the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, *apply* the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
7. **Citing Cases:** You are welcome but *not* required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a complete substitute for legal analysis. For example, do *not* write: “Plaintiff should be able to recover under *A v. B.*” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
8. **Cross-Referencing:** You may reference your own previous analysis (*e.g.* B’s claim against C is identical to A’s claim against C, because ___.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
9. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
10. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (reasonably implied by, suggested by, or at least consistent with, the fact pattern) that you believe to be necessary to answer the question.

STOP !

**Do NOT turn this page
until the proctor signals**

PART ONE

25 questions worth three points each = 75 points
Suggested Time = 75 minutes

1. **A nurse employed by a hospital gives an inappropriate dose of medication to a patient. Which theory BEST describes the potential liability of the hospital based on this fact?**
 - A. Ostensible Agency
 - B. Direct Liability
 - C. Vicarious Liability
 - D. *Res ipsa loquitur*

2. **Which of the following is best described as the unlawful touching of another individual without the individual's consent?**
 - A. Assault
 - B. Negligence
 - C. Malpractice
 - D. Battery

3. **EMT Brandon came to work feeling very tired and decided to nap before doing his equipment and vehicle checklist. After about 45 minutes, the alarms went off, and Brandon and his EMT partner were dispatched for a seizure. Brandon and his partner's patient was still actively seizing when they arrived at the scene. Brandon discovered that the previous shift had used all the Valium and failed to replace it. As a result, Brandon could administer no medication to stop the seizure. Ultimately, the patient stopped seizing and suffered no apparent adverse consequences.**

If patient sues Brandon for medical malpractice:

 - A. Patient will probably lose, because Brandon owed the patient no duty.
 - B. Patient will probably lose, because of implied consent in an emergency.
 - C. Patient will probably lose, because the patient suffered no actual damages.
 - D. Patient will probably win.

4. The termination of a provider-patient relationship without assurance that an equal or greater level of care will continue is known as:

- A. Assault
- B. Battery
- C. Abandonment
- D. Mifeasance

5. Which of the following situations MOST clearly involves the patient's consent?

- A. Mr. Kronstadt shouts, "No! No! No!" when you try to move him to the cot, but his wife says that "No" is the only thing he can say after his stroke and that he really doesn't mean it.
- B. Mr. Stagg, who is drowsy but quite pleasant, has been drinking wine for "2 or 3 days," and cannot remember if he is in Philadelphia or Paris, does not object when Paramedic performs a finger stick to check his blood glucose level.
- C. Ms. Cross, who was at first quite agitated, allows Paramedic to examine her after she was placed in four-point restraints.
- D. Mrs. Alban offers Paramedic her left arm after he explains to Mrs. Alban that he needs to start an IV to give her medication to relieve the pain from her fractured right humerus.

5. A patient needing ankle surgery signs standard consent forms covering the surgeon scheduled to perform the surgery. Two hours before the operation was scheduled to be performed, one of the surgeon's other patients was brought into the emergency department with numerous orthopedic injuries that required immediate attention. The surgeon requested the head of orthopedic surgery, who was the leading authority on ankle surgery, to perform the ankle surgery for him so that he could go to the ED. By the time the head surgeon arrived in the operating room, the patient was already sedated. Head surgeon performed the ankle operation with his usual skill and the operation was a complete success.

If the patient sues the head surgeon for battery, she will:

- A. Win, but may be entitled to only nominal damages.
- B. Win, because the head surgeon is vicariously liable for the original surgeon's obtaining a replacement without the patient's consent.
- C. Lose, because the head surgeon performed the operation competently and the patient suffered no harm.
- D. Lose, because a reasonable person, similarly situated, would have consented to the operation.

7. **A dentist filling a child's cavities used a newly developed anesthetic that was more effective than Novocain. However, it carried a 1% risk of causing a serious seizure when administered to children, which the dentist did not mention to the child's mother. The child's dental work was completed without any problem, but the mother looked up the anesthetic on the Internet and learned about the risk. She loudly complained to the dentist that she never would have consented to use of the anesthetic had she known of the risk. But the dentist argued that the new anesthetic was justified in the child's case because otherwise the child would not have been willing to sit for the dental work.**

Does the mother have a cause of action against the dentist?

- A. Yes, because the reasonable person would have considered information about the risk important or material.
- B. Yes, because the mother would not have consented to the use of the anesthetic if she had known of the risk of seizure.
- C. No, because the dentist used his best judgment in deciding that the benefits of using the anesthetic outweighed the risk.
- D. No, because the child suffered no harm from use of the anesthetic.

Use this fact pattern for BOTH problems 8 AND 9.

On July 23, 2003, Robert underwent surgery to have an ulcer repaired. The surgery appeared to have been successfully completed. However, Robert soon developed a fever and his white blood cell count became elevated, suggesting an infection. On August 8, 2003, it was determined that a sponge had been left inside Robert's abdominal cavity. On August 11, 2003, Robert died from sepsis. On August 9, 2006, Robert's estate filed suit against the doctors involved in the surgery.

8. **Assuming a 1-year statute of limitations and a 3-year statute of repose, the defendant doctors can successfully move to dismiss the lawsuit as barred by:**
- A. Statute of limitations
 - B. Statute of repose
 - C. Both statute of limitations AND statute of repose
 - D. Neither statute of limitations NOR statute of repose
9. **Assuming a 3-year statute of limitations and a 3-year statute of repose, the defendant doctors can successfully move to dismiss the lawsuit as barred by:**
- A. Statute of limitations
 - B. Statute of repose
 - C. Both statute of limitations AND statute of repose
 - D. Neither statute of limitations NOR statute of repose

10. **Mr. Lord, upon experiencing blurred vision, visited an ophthalmologist, who ordered an MRI. The radiologist who read the MRI found (erroneously) no abnormalities or irregularities. But Lord’s vision continued to deteriorate until he was later correctly diagnosed with a debilitating ocular disease. Lord filed a malpractice case against the radiologist. Lord’s expert was able to produce evidence that it was “possible” but not “probable” that the delay in diagnosis cost him his vision.**

Under which of the following doctrines could Lord recover?

- A. “But for” causation
 - B. *Res ipsa loquitur*
 - C. Either A or B
 - D. Neither A nor B
11. **Around 20 states allow some form of “lost chance” causation. Ohio is one of those states. In Ohio, Dr. Cox misread an MRI that showed Geesaman had suffered a small stroke. Several days after being released from the hospital based in this mistaken reading, Geesaman suffered, as a certain consequence of the release, a much more severe stroke that left him permanently disabled. Plaintiff and defense experts agreed that even had Geesaman been properly diagnosed and treated, there was a 60% chance he still would have had the second stroke. Geesaman can recover:**
- A. Nothing
 - B. 40% of his damages
 - C. 60% of his damages
 - D. 100% of his damages

Use the following fact pattern for problems 12, 13, AND 14.

Cynthia Hernandez was admitted to Hospital for a planned, elective inducement of labor. She was 41 weeks and 4 days pregnant and was overdue for delivery. The labor progressed slowly, with complications, and, at 9:45 p.m., Dr. Piegari made the decision to perform a caesarean section. A baby girl weighing 10 pounds was delivered. After the surgery, Hernandez was transferred to the Post Anesthesia Care Unit ("PACU"). While Hernandez was in the PACU nurse Price documented 200 milliliters of blood tinged urine in Hernandez's Foley catheter bag. Additionally, Hernandez's pre-surgery blood pressure was 118/74 with a pulse of 84, while her PACU blood pressure and pulse were 98/52 and 100. These were indications of internal bleeding. Price did not notify Dr. Piegari of these indications.

Hernandez was later transferred from the PACU to a regular floor room and was assigned to the care of another nurse, Clemado. On the floor, Hernandez’s blood pressure at 1:20 a.m. was 98/52 with a pulse of 102. Clemado, like Price, did not notify Dr. Piegari about this hemodynamic instability. By 2:10 a.m., Mrs. Hernandez's vital signs were continuing to

deteriorate, with a blood pressure of 75/50 and a pulse of 111. Finally, at 2:20 a.m., when blood pressure was 68/48, Clemado called Dr. Piegari. Hernandez was transferred back to the operating room for emergency exploratory laparotomy surgery. Surgery began at 4:20 a.m. and was completed at 5:20 a.m. Four liters of blood were found in the abdominal cavity. Hernandez was stable when she left the operating room and was transferred to the Intensive Care Unit. But within 30 minutes of arriving in the ICU, Hernandez was in full cardiac arrest and died.

12. In his lawsuit against the hospital Mrs. Hernandez's husband could rely upon the following theories:

- A. Direct liability, for not adequately training the nurses on when to report dangerous symptoms
- B. Vicarious liability for nurse negligence
- C. Both A and B
- D. Neither A nor B

13. In establishing the negligence of the nurses, Mr. Hernandez used only a single expert, Dr. Ron Miller. The following testimony was elicited from Dr. Miller:

I am familiar with the appropriate standards of care pertaining to the nursing care and medical care and treatment of patients at risk for and who are experiencing post partum hemorrhage.

Given my hospital practice, I am familiar with the appropriate standard of care for nurses as it relates to the proper and timely communication of critical vital signs information by the hospital nurses, nurse anesthesiologists, and/or non-physician health care providers to the treating physician.

I am also familiar with, have undertaken on numerous occasions, and have taught physicians, nurses and students in the methods for preventing and alleviating through surgery and otherwise, postpartum hemorrhage, including, but not limited to intra abdominal bleeding following a caesarean section.

All defendants moved to dismiss the lawsuit. The court should:

- A. Grant the motion, on the basis that Dr. Miller was not qualified to opine on the standard of care owed by nurses, since he was not a nurse.
- B. Grant the motion, because even if he were qualified to opine on the standard of care owed by nurses, his testimony would not be as credible as that of an experienced nurse.
- C. Deny the motion, because Dr. Miller had the relevant training and experience, even if not the same credentials as the defendant nurses.
- D. Deny the motion, because both the qualifications and credibility of an expert is are issues left wholly to the discretion of the jury.

14. **If Dr. Miller became unavailable and plaintiff had no other expert, the court should:**
- A. Grant defendant's motion for summary judgment, because an expert witness is needed to establish the standard of care for defendants.
 - B. Grant defendant's motion for summary judgment, because an expert witness is needed to establish causation.
 - C. Both A and B
 - D. Deny defendant's motion for summary judgment, because expert witnesses are desirable, but not strictly necessary in this medical malpractice litigation.
 - E. Deny defendant's motion for summary judgment, because the jury could determine liability on the basis of *res ipsa loquitur*, as the layperson surely knows what constitutes hemodynamic instability.
15. **Paula sued Physician, alleging that in an elective cosmetic procedure, Physician injected Restylane in an incorrect area above her lip, causing scarring and discoloration. Paula failed to serve the requisite expert affidavits for a medical-malpractice claim, so physician moved for summary judgment. Paula contends that her lawsuit should NOT be dismissed, because the actual location of the injection was a very substantial departure from the location to which she consented. The court should:**
- A. Grant Physician's motion for summary judgment, because Paula cannot establish a breach of the standard of care without expert testimony.
 - B. Grant Physician's motion for summary judgment, because Paula cannot establish liability on any legal theory without expert testimony.
 - C. Deny Physician's motion for summary judgment, because a battery claim does not require expert testimony.
 - D. Deny Physician's motion for summary judgment, because Paula can establish liability on any legal theory without expert testimony.

16. Baby Tamara was vomiting, diarrhea, and choking, so her parents took her to the ED where she was examined by Dr. White, an internist and emergency care doctor. In a subsequent malpractice action against White, the parents called only one expert, a board certified pediatrician. Defendants move to dismiss the lawsuit. The Court should:

- A. Grant the motion, because plaintiff's expert is a board certified pediatrician, and neither an internist nor an emergency care physician as defendant Dr. White is.
- B. Grant the motion, because Dr. White is an internist and emergency medicine doctor, and the pediatrician is not. It is irrelevant that each physician is qualified by her specialty and training to perform the procedure at issue, examination of a child who has fallen ill.
- C. Deny the motion, because an expert witness who does not practice the same specialty as a medical malpractice defendant nevertheless is qualified to testify as to the standard of care: (i) if the procedure at issue is common to the two specialties, (ii) if the expert witness has experience in performing the procedure, and (iii) if the standard of care applicable to the procedure is common to both.

17. Patient died from complications stemming from the surgical removal of a pelvic mass by defendant Dr. Yang. During the surgery, the decedent's bladder was torn and her bowel was perforated. Patient filed an action against Yang for medical malpractice. Arkansas adheres to the "same or similar" locality rule. Plaintiff called Dr. Tenhoopen, an obstetrician/gynecologist who practices in Rochester, N.Y., as an expert witness. Tenhoopen testified that Yang should have performed more tests, obtained a detailed medical history, and not attempted to perform the surgery laparoscopically. Tenhoopen admitted he knew nothing about Hot Springs, Ark., where the surgery in question was performed, or the standard of care that prevailed there. Defendant moved for a directed verdict at the close of the plaintiff's case. The Court should:

- A. Grant the motion, because plaintiff's evidence is insufficient to establish an element of plaintiff's medical malpractice claim.
- B. Grant the motion, because expert witnesses must come from the same state as the defendant.
- C. Deny the motion, because the standard of care in a medical malpractice case may be established through analogy to the standard of care in a similar location. It was irrelevant that Tenhoopen testified that he did not know how large Hot Springs is, that he was unfamiliar with the physicians and medical community in Hot Springs, that he did not know how many ob/gyns practice in Hot Springs, and that he did not know how many hospitals there are in Hot Springs.
- D. Deny the motion, if Tenhoopen was familiar with the national standard of care, because all ob/gyns are held to the same national standard of care.

18. **Loraine, who was sixteen-weeks pregnant and experiencing contractions, arrived at Medical Center Emergency Room seeking treatment. Medical Center performed diagnostic tests which determined that Loraine's fetus was dead. Against her wishes and while she was still in contractions, it discharged her home. Later that evening, Loraine delivered her dead fetus in her bathroom. In an EMTALA action against Medical Center, Loraine will:**
- A. Lose, because her fetus was nonviable and there was no emergency medical condition.
 - B. Lose, because although Medical Center knew that she was a pregnant woman with contractions, it made no specific determination that Loraine was at risk of hemorrhage, ruptured uterus, or any other complications, if discharged.
 - C. Win, because Medical Center discharged her without stabilizing an emergency medical condition that it knew she had.
 - D. Win, because hospitals are strictly liable for injuries resulting from premature emergency room discharges.
19. **Texas has a two-year statute of limitations and a ten-year statute of repose. Tangie had a tubal ligation at CRMC after giving birth in December 1995. She suffered cramping and other pain after the surgery, but was told by a nurse and her doctor that the pain was related to normal factors. She continued to experience pain, and sought treatment with no success. In April 2005, she consulted a gynecologist, who discovered an unusual lump and sent her for exploratory surgery, in which a sponge was found in her small intestine. In August 2005, she sued the CRMC and the doctor who performed the ligation.**
- A. Tangie's action is barred by the statute of limitations.
 - B. Tangie's action is barred by the statute of repose.
 - C. Both A and B
 - D. Neither A nor B.
20. **Jason was admitted to the emergency department after he attempted suicide by hanging. He was transferred to a mental health facility and later discharged home. A few days later, city police brought Jason back to the ED, believing that he was a threat to himself and others. Jason was released and committed suicide a few hours later. The best and most relevant evidence for an EMTALA claim against the hospital would be:**
- A. The hospital advised Jason to go home and return after he made financial arrangements for treatment.
 - B. Hospital has a policy requiring a psychiatric consultation for any ED patient known or suspected to be suicidal, and Jason did not get such a consult.
 - C. The ED physician who examined Jason admitted that she made a mistake in diagnosing acute anxiety rather than a credible suicide threat.

21. **Upon returning home from having a subclavian bypass, plaintiff experienced significant bloating, discomfort, and shortness of breath. After two days, she went to the emergency room where it was discovered that chylothorax was leaking into her pleural cavity and her diaphragm was not functioning properly. The following is an excerpt from the trial testimony of plaintiff in a subsequent informed consent case:**

Q. Okay. Now, had you known the risks or had you known what has occurred to you now and the risk of that, would have had this surgery?

A. No, I wouldn't have. There was – why put myself through something that wasn't even a guarantee that it was going to stay fixed? I mean, less than a year later, I was back seeing Dr. Elliott for a very similar reason. I still have that artery problem under my arm, and I guess I will die with it because I certainly am not going to put myself under the knife again. It's just everything that I have been through since I had that surgery did not make it worthwhile. Had I known that there was no guarantee that it was a fix-it, and if I had been told what happens to a phrenic nerve and all these other things, I wouldn't – I would not have been willing to take that, risk.

Together with evidence showing that the subclavian bypass medically caused plaintiff's injuries, this testimony is:

- A. Determinative on the causation element
- B. Not determinative or even relevant on the causation element
- C. Not determinative on the causation element, but is some evidence that proceeding with the surgery was unreasonable in light of the risks and potential outcome. The jurors could weigh this evidence against their own experiences to arrive at a conclusion concerning what a reasonable person would have done under the circumstances.

Use the following fact pattern for Questions 22 AND 23.

1. On November 11, 2008, at Sanford Hospital, Dr. Glatt performed abdominal surgery upon Julie Ann.
2. Following her surgery performed by Dr. Glatt on November 11, 2008, Julie Ann continued to be hospitalized at Sanford Hospital.
3. Following the November 11, 2008 surgery performed by Dr. Glatt, Julie Ann developed infection within the surgical wound, and a CAT Scan revealed the presence of pockets of bacterial infection within the wound site.
4. Late on the afternoon of November 20, 2008, Dr. Glatt went to Julie Ann's patient room at Sanford Hospital where he examined her surgical wound site, and without properly scrubbing for the procedure, without administering pain medication or anesthesia, and while not wearing a surgical mask or gown or even gloves, he reopened the wound site at Julie Ann's bedside.

5. Throughout the time Dr. Glatt announced his intention to re-open Julie Ann's surgical wound in her patient room without anesthesia or proper preparation, Julie Ann asked Dr. Glatt not to reopen her surgical wound in her room, and that he not perform that procedure without administering anesthesia to her.
 6. As Dr. Glatt re-opened Julie Ann's surgical wound, Julie Ann experienced extreme pain, yelled out in pain, and was noted by staff to have gripped her bed handrail so tightly during the procedure as to cause bruising to her hands.
 7. The nursing staff witnessed Dr. Glatt re-open Julie Ann's surgical wound at her bedside in her patient room at Sanford Hospital and expressed to him their concern about the manner, location, and risk to her created by his actions.
- 22. Without an expert witness, Julie Ann might still be able to bring an informed consent action against Dr. Glatt:**
- A. In any U.S. jurisdiction
 - B. In jurisdictions like DC, CA, NJ, that follow the reasonable patient standard
 - C. In jurisdictions like DE and IN, that follow the prudent physician standard
 - D. In no U.S. jurisdiction
- 23. Apart from informed consent, without an expert witness, Julie Ann might still be able to bring the following causes of action against Dr. Glatt:**
- A. Abandonment
 - B. Battery
 - C. EMTALA
 - D. A and B
 - E. All of the above
- 24. In 2010, plaintiff was injured by medical malpractice and received a jury verdict of \$500,000 (\$200,000 for medical care costs, \$200,000 for lost income, and \$100,000 for pain and suffering). All the medical care costs had been paid by plaintiff's health insurance company, but the submission of such evidence was barred at trial. In 1984, this jurisdiction, in response to a perceived crisis in medical malpractice insurance, made several changes to the law of torts: (i) it abolished the collateral source rule and (ii) it imposed a \$250,000 cap on non-economic damages. In post-trial motions in the instant case, the Court should:**
- A. Reduce the judgment to \$300,000.
 - B. Reduce the judgment to \$250,000.
 - C. Reduce the judgment to \$50,000
 - D. Not reduce the judgment.

25. In which of the following circumstances would the plaintiff have the **STRONGEST** claim for breach of contract against a physician?
- A. An express agreement to give patient “beautiful feet”
 - B. An express agreement to “see that all would be well”
 - C. An express agreement to “return patient’s vision to 20/25 within two months”
 - D. An oral agreement to “cure certain polyps within 2 days”

----- END OF PART ONE -----

PART TWO

2 essay questions worth a combined 105 points (105 minutes)

Essay 1 – 80 points (80 minutes)

In April 2003, Somora, A 33-year-old college-educated woman, was diagnosed with breast cancer. She consulted a surgeon who recommended a radical mastectomy. She sought a second opinion from another surgeon in early May 2003, who also recommended a mastectomy. Subsequently, Somora was referred to an oncologist. The oncologist diagnosed inflammatory invasive duct carcinoma, a type of cancer that spreads rapidly, and that if left untreated will result in the death of the patient in 6 to 12 months. The oncologist recommended that Somora undergo chemotherapy, followed by surgery, followed by radiation therapy. Somora's medical insurance paid for all three of these physician visits.

At some point after visiting the oncologist, but before July 2003, Somora became aware of Dr. Tree's company, Kansir-Be-Gone, through a radio program announcing that Dr. Tree had developed a new "cancer vaccine" that was available at the University Hospital. A Kansir-Be-Gone commercial touted Kansir-Be-Gone as a "novel alternative to cancer patients." The commercial explained that the procedure was "comfortable" and "effective" and that it was an "FDA approved protocol." Kansir-Be-Gone, while not formally affiliated, had rented office space in the first floor of the University Hospital, a well-regarded hospital.

In July 2003, Somora visited Kansir-Be-Gone and met Dr. Tree who told her that his treatment could "cure" her. After hearing this, Somora made the decision to go with the Kansir-Be-Gone treatment and forego other treatments. Somora signed an informed consent form that stated forty percent of patients experienced improved quality and length of life, and that some experienced up to a one-hundred percent improvement. Kansir-Be-Gone personnel told Somora that her medical plan would eventually cover the treatments, but that she first had to make payments up front. Somora paid around \$20,000 out-of-pocket for the Kansir-Be-Gone treatments.

In June 2004, after almost one year of regular treatments with Kansir-Be-Gone, Somora was hospitalized since she was having difficulty breathing. Expert testimony at the subsequent malpractice trial revealed that, at this point in time, her cancer had progressed so far that all Somora could receive was palliative chemotherapy, to extend her life but not to attempt to cure her. The chemotherapy failed to work; Somora continued to deteriorate, and eventually died in July 2004, "with her lungs full of tumors."

At trial, Somora's qualified expert, Dr. Kmat, testified that Kansir-Be-Gone treatments were never approved by the Food and Drug Administration ("FDA"), and that this was not mentioned in any of the Kansir-Be-Gone literature. Dr. Kmat also testified regarding Somora's medical records from the Kansir-Be-Gone Center. He testified that it appeared Dr. Tree did not do a physical examination of Somora because there were no notes of such an examination in the records, something which Dr. Kmat testified was surprising because he

would have expected it of a doctor.

Dr. Kmat also testified that as part of her treatment, Dr. Tree gave Somora two chemotherapy drugs. However, according to Dr. Kmat, those drugs were administered at such low doses that they could not have helped to decrease Somora's cancer, and that the particular drug combination used was abandoned decades ago. Somora was also given a third drug at Kansir-Be-Gone: Tamoxifen. According to Dr. Kmat's testimony, Tamoxifen was a drug that in the past had been thought to help a patient in Somora's condition. However, according to Dr. Tree, a 2001 medical study showed that this drug would have no effect on a patient such as Somora and should not have been used on her.

Finally, Dr. Kmat testified that if Somora had been given traditional treatment, she would have had a sixty percent chance of being alive for five years or longer. Instead, Somora died just about one year after beginning the Kansir-Be-Gone treatments.

Please assess Somora's claims against all parties against whom she has a colorable claim.

All claims are governed by the law of the U.S. state of Ridley. Ridley follows general U.S. health law rules and doctrines, as modified by the Ridley statutes on pages 19-20 of this exam packet.

Essay 2 – 25 points (25 minutes)

SickAway Hospital, one of five hospitals in the state of Ridley, operates the largest emergency room in Ridley. SickAway advertises extensively about the quality of care provided in its emergency room. It has billboards strategically placed throughout Ridley urging local citizens to come to SickAway “because SickAway’s emergency room doctors are the absolute best and will really care for you.” In fact, SickAway employs no doctors; instead it contracts with seven doctors in Ridley to staff the emergency room on a 7-day, 24-hour basis. These contracts provide:

1. Each doctor is an “independent contractor,” not an “agent/employee,” and may conduct a private practice but may not work in any other emergency room.
2. Each doctor is responsible for the manner in which he or she provides medical care and for the purchase of malpractice insurance.
3. Each doctor is authorized to purchase supplies and equipment for SickAway’s emergency room from a list of approved vendors located in Ridley and within SickAway’s price guidelines.
4. Each doctor is periodically reviewed by SickAway’s governing board to assure that each doctor provides quality care.
5. Each doctor independently bills patients for services provided.
6. All emergency services are performed in the SickAway emergency room using supplies and equipment provided by SickAway.

Last month, Regina was hit by a bus. When the ambulance arrived, Regina asked the ambulance driver to take her to SickAway, quoting the billboard claim that “SickAway’s emergency room doctors are the absolute best.” When Regina arrived at the emergency room, she was treated by Dr. Greg. Greg correctly told Regina that she needed immediate surgery. During the operation, Greg negligently severed one of Regina’s arteries, and she bled to death. Recognizing that the evidence of his malpractice was overwhelming, Greg quickly settled with Regina’s estate.

Regina’s estate has now filed a wrongful death action against SickAway. Assume that SickAway will stipulate as to Greg’s negligence. Analyze Regina’s claim(s) against ONLY SickAway.

All claims are governed by the law of the U.S. state of Ridley. Ridley follows general U.S. health law rules and doctrines, as modified by the Ridley statutes on pages 19-20 of this exam packet.

STATUTES FROM THE STATE OF RIDLEY POTENTIALLY APPLICABLE TO THE ESSAY PROBLEMS

Ridley Stat. 101

- (a) Every action for an injury to the person caused by the wrongful act, neglect or default of any person within this State shall be commenced within two years after the cause of any such action shall have accrued.
- (b) A cause of action does not accrue so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault of an identifiable person.

Ridley Stat. 102

- (a) An “action for medical malpractice” is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care.
- (b) Any action for medical malpractice must be commenced within seven years from the date the incident giving rise to the injury occurred.

Ridley Stat. 200

A plaintiff who cannot establish that probably (more likely than not) she would have suffered the same harm had proper medical treatment been rendered, is entitled to no recovery for the increase in the risk of harm or for the loss of a chance of obtaining a more favorable medical result.

Ridley Stat. 300

No recovery of damages based upon a lack of informed consent shall be allowed in any action for medical negligence, unless the injured party proved by a preponderance of evidence that the health care provider did not supply information regarding such treatment, procedure or surgery that, if disclosed to a reasonably prudent person in the patient's position, could reasonably be expected to cause such prudent person to decline such proposed medical procedure.

Ridley Stat. 400

When a person’s death is caused by the wrongful act or omission of any person, a decedent’s “personal representative” may maintain an action for the injuries caused to decedent by the wrongful act or omission to the decedent.

Ridley Stat. 500

In an action for medical malpractice, a healthcare provider is held only to that degree of skill and care which is usually possessed and exercised by practitioners of their profession in the United States.

Ridley Stat. 600

- (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary damage.

- (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

----- END OF PART TWO -----

Multiple Choice Questions

Question	Correct								
1	C	6	A	11	B	16	C	21	C
2	D	7	D	12	C	17	A	22	B
3	C	8	C	13	C	18	C	23	B
4	C	9	C	14	C	19	D	24	A
5	D	10	D	15	C	20	B	25	C

____ of 75 (25 x 3)

Short Essay Question

NOTE: This problem was adapted from the July 2004 NCBE Multistate Essay Examination.

	Issue	P	E
Vicarious Liability			
Ostensible Agency	The physician appeared to be an employee of the hospital because he worked there; he was provided upon Regina’s arrival; and he used hospital resources.	5	
	The hospital held out the ED physicians as its own – advertising, billboards	5	
	Regina asked to go to hospital specifically because of the representations.	5	
Nondelegable Duty	The physician was an ED physician. Even if the physician is an independent contractor, the hospital remains liable for ED malpractice.	4	
Employee Agency	The hospital may have had sufficient control over the physician such that he was actually an employee and not an independent contractor.	2	
	If the physician is an employee, then the hospital is liable for his malpractice under respondeat superior.	2	
Direct Liability			
	There really are no facts to support the theory. But a prudent plaintiff’s attorney would want to investigate bases for negligent selection, retention, or supervision claims.	2	
Total		25	

Long Essay Question

NOTE: This problem was adapted from *Anaya-Burgos v. Lasalvia-Priscos*, No. 07-1053-JAF (D.P.R. Nov. 13, 2008) (JMOL), *reversed*, 607 F.3d 269 (1st Cir. 2010).

	Issue	P	E
Somora v. Tree (Malpractice)			
Treatment Relationship	Dr. Tree formally and actually undertook to treat Somora.	2	
Standard of Care	The standard of care was established through plaintiff expert Dr. Kmat.	2	
	Dr. Tree apparently was following an alternative school of thought standard. But there is no evidence to support such a standard. There is also no evidence he offered his treatment as an experimental approach	3	
Breach	Dr. Tree failed to conduct a physical exam.	2	
	Dr. Tree administered drugs that were in useless dosages.	2	
	Dr. Tree used a drug that has been proven ineffective.	2	
Causation	But for Somora undergoing Dr. Tree’s treatment, she would have had a 60% chance of surviving five years.	4	
Injury	Somora died within one year.	2	
Punitive Damages	Given the willful deception, Somora may be entitled not only to compensatory damages but also to punitive damages.	3	

Assumption of risk	Somora was told by three separate physicians that she needed aggressive treatment.	2	
	Somora was college educated.	2	
	Her insurance refused to pay for this treatment.	2	
SOL	The claim is barred two years from discovery. It is unclear when that was.	3	
SOR	The claim is not barred. It is not barred until seven years after the end of the course of treatment (June 2004) = June 2011.	3	
Somora v. Tree (Informed Consent)			
Treatment Relationship	Dr. Tree formally and actually undertook to treat Somora.	2	
Duty	Dr. Tree had a duty to disclose that information that a reasonable patient would find material: (1) the treatment was not FDA approved	2	
	(2) the drugs had been proven ineffective	2	
	(3) The use of some of the drugs had been abandoned.		
	(4) There were alternatives (surgery, radiation) with proven effectiveness.		
	Fiduciary duty: Dr. Tree also had a duty to disclose financial interests that could corrupt his medical judgment, i.e. his investment in .	2	
Breach	Dr. Tree did not disclose any of the above information.	2	
Injury	Same as malpractice above	2	
Causation	Given the probability of success of conventional treatment, Somora's death is probably due to undergoing Dr. Tree's regimen.	4	
	The reasonably prudent person, knowing of the information that was not disclosed, would not have consented to Dr. Tree's treatment instead of conventional treatment.	4	
Actual Knowledge Assumption of Risk	Same as malpractice above, though she really only knew about the alternatives. She did not know about the problems with the CAM treatment.	2	
SOL	Same as malpractice above	3	
SOR	Same as malpractice above	3	
Somora v. Tree (Other Theories)			
Breach of Contract	A guarantee was made, though it was only oral.	2	
Fraud	The misrepresentations made to Somora appear to be intentional.	2	
Somora v. KBG			
Vicarious Liability	Tree appears to be an agent of KBG.	3	
Somora v. University Hospital			
Vicarious Liability	Dr. Tree and the hospital had no real, formal relationship other than lessor-lessee.	--	
	It appeared that Dr. Tree was affiliated with and worked for the hospital – (1) due to the advertisement,	3	
	(2) due to the location of the clinic	3	
	Unlike ostensible/apparent agency, the impression of agency was not created by the hospital but by Dr. Tree. This is more akin to agency by estoppel which is very similar.	3	
Organization			
Global		4	
Total		80	

Total _____ of 180