Instructor	**Professor Thaddeus Mason Pope**
Course Title	**Health Law: Quality & Liability**
Format	**Final Exam, Spring 2023**
Total Time	**Twenty-four (24) hours**
Total Pages	**20 pages**

Reference Materials Allowed

Open Book (all reference materials allowed)

Take-Home Exam Instructions

1. Please know your **correct Spring 2023 exam number** and include this number at the top of each page of your exam answer (for example, in a header).

2. Confirm that you are using and have typed the **correct exam number** on your exam document.

3. You may **download** the exam from the course Canvas site any time after 12:01 a.m. on Thursday, May 4, 2023, and before 11:59 p.m. on Wednesday, May 17, 2023.

4. You must **upload** (submit) your exam answer file to the Canvas site within twenty-four (24) hours of downloading the exam.

5. You must **upload** your exam answer file no later than 11:59 p.m. on Wednesday, May 17, 2023. Therefore, the latest time by which you will want to **download** the exam is at 11:59 p.m. on Tuesday, May 16, 2023. Otherwise, you will have less time to write your answers than the full permitted twenty-four (24) hours.

6. Write your answers to all parts of the exam in a word processor. Save your document as a **single PDF file** before uploading it to Canvas.

7. Use your exam number as the **file name** for the PDF file that you upload.

Instructions Specific to This Examination

GENERAL INSTRUCTIONS:

1. **Honor Code**: While you are taking this exam, you are subject to the Mitchell Hamline Code of Conduct. You may not discuss it with anyone until after the end of the entire

midterm exam period. It is a violation of the Code to share the exam questions. (There may be an accommodation student taking this exam at a different time.) Shred and delete the exam questions immediately upon completion of the exam. Professor Pope will repost the exam after the end of the midterm exam period.

2. **Competence**: By downloading and accepting this examination, you certify that can complete the examination. Once you have accepted (downloaded) the examination, you will be held responsible for completing the examination.

3. **Exam Packet**: This exam consists of twenty **(20) pages**, including these instructions. Please make sure that your exam is complete.

4. **Identification**: Write your exam number on the top of each page of your exam answer.

5. **Anonymity**: Professor Pope will grade the exams anonymously. Do **NOT** put your name or anything else that may identify you (except for your exam number) on the exam. **Failure to include your correct exam number will result in a 5-point deduction.**

6. **Total Time**: Your completed exam is due within twenty-four (24) hours of downloading it, but in no case later than 11:59 p.m. on Wednesday, May 17, 2023.

7. **Time Penalty**: If you upload your exam answer file more than twenty-four (24) hours after downloading the exam, then Professor Pope will lower your exam grade **by one point** for every minute over the 24 hours. If the timestamp on your uploaded exam indicates that you have exceeded the 24-hour limit by more than 20 minutes, then Professor Pope may refer the situation for a Code of Conduct investigation and potential discipline. Please save enough time after editing to upload your exam.

8. **Timing:** Professor Pope has designed this exam for completion in about three (3) hours. That means you should be able to write complete answers to all the questions in three (3) hours. Yet, since this is a take-home exam, you will want to take some extra time (perhaps 45 minutes) to outline your answers and consult your course materials. You will also want to take some extra time (perhaps 45 minutes) to revise, polish, and proofread your answers, such that you will not be submitting a "first draft."

9. **Scoring**: This Final Exam comprises 40% of your overall course grade. While the scoring includes 100 points, these points will be weighted.

10. **Open Book**: This is an OPEN book exam. You may use any written materials, including, but not limited to: (a) any required and recommended materials, (b) any handouts from class, (c) PowerPoint slides, class notes, and (d) your own personal or group outlines.

11. **Additional Research**: While you may use any materials that you have collected for this class, you are neither expected **nor are you permitted** to do any online or library research (e.g., on Lexis, Westlaw, Google, reference materials) to answer the exam questions unless specifically directed to do so.

12. **Format**: The exam consists of three main parts:

Part One 30 multiple choice questions
Worth 2 points each, for a combined total of 60 points
Estimated time = 60 minutes (2 minutes each)

Part Two 2 essay questions
Worth 25 and 15 points, for a combined total of 40 points
Estimated time = 120 minutes

That adds up to only 3 hours. Remember, you have twenty-four (24) hours to complete this exam. Therefore, you have time to revise, polish, and proofread.

13. **Grading**: All exams will receive a raw score from zero to 100. The raw score is meaningful only relative to the raw score of other students in the class. Professor Pope computes your course letter grade by summing the midterm, final, and quiz scores. Professor Pope will post an explanatory memo and a model answer to Canvas a few weeks after the exam.

SPECIAL INSTRUCTIONS FOR PART ONE

1. **Numbered List of Letters:** In your exam document create a vertical numbered list (1 to 25). Next to each number type the letter corresponding to the best answer choice for that problem. For example:

1. A
2. D

2. **Ambiguity**: If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why immediately after your answer choice. Your objection must both (a) Identify the ambiguity or problem in the question and (b) 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. **Submission**: Create clearly marked separate sections for each problem. You do not need to "complete" the exam in order. Still, structure your exam answer document in this order:

Essay Question 1
Essay Question 2
…

2. **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. 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.

3. **Answer Format**: This is very important. **Use headings and subheadings.** Use short single-idea paragraphs (leaving a blank line between paragraphs). Do not completely fill the page with text. Leave white space between sections and paragraphs.

4. **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.

5. **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?

6. **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.

7. **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.

8. **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. Do not invent facts out of whole cloth.

Exam Misconduct

The Code of Conduct prohibits dishonest acts in an examination setting. Unless specifically permitted by the exam or proctor, prohibited conduct includes:

- Discussing the exam with another student
- Giving, receiving, or soliciting aid
- Referencing unauthorized materials
- Reading the questions before the examination starts
- Exceeding the examination time limit
- Ignoring proctor instructions

MULTIPLE CHOICE QUESTIONS

- Below are 30 multiple choice questions.
- Each question is worth 2 points for a combined total of 60 points.
- Recommended time is 60 minutes (2 minutes each).
- Assume that generally applicable facts and rules apply unless otherwise specified.

1. Alarmingly, many women have filed lawsuits in 2023 against their male fertility clinicians for using their own sperm. One woman's attorney has just drafted a complaint accusing Physician of medical negligence, failing to obtain informed consent, fraud, battery, negligent infliction of emotional distress and breach of contract. According to the complaint, the woman's procedure took place in May 1998 at Central Hospital. Physician had told the woman that he would obtain the sperm from an unnamed medical student who resembled her husband.

The woman alleges that Physician instead used his own genetic material to inseminate her. That fact remained secret until November 2020 when the woman's daughter, then 22-years-old, used DNA testing to learn more information about her biological father. That research determined that Physician was her genetic father. If this jurisdiction has a three-year statute of limitations and a six-year statute of repose, then this complaint must be filed by:

A. November 2023
B. November 2026
C. November 2029
D. This claim is already barred

2. In 2023, a Florida appellate court ruled that caps on damages awarded in medical malpractice suits are unconstitutional. The court ruled that the caps violate the equal protection clause of the Florida Constitution. Before this appellate ruling, Florida has a $500,000 cap (financial limit) on non-economic damages. Before this appellate ruling and when the cap law was still in force, a jury awarded plaintiff $3.7 million in damages for lost income, lost earning capacity, and past and future medical care. The jury also awarded plaintiff $2.2 million in damages for disability, disfigurement, and pain and suffering. Under the still-in-force statutory cap, the trial court should issue judgment for:

A. $2.2 million
B. $3.7 million
C. $4.2 million
D. $5.9 million

3. WEHO Hank first went to the emergency department at Lawrence General Hospital. He had a long history of sciatica — back pain that often radiates down the leg — but was worried because the discomfort in his left foot felt different. Two nurses who saw WEHO Hank allegedly entered worrisome symptoms into his medical records, including that the foot was turning purple and was cool to the touch. Nonetheless, following standard protocols, the physician assistant diagnosed WEHO Hank, who was 33 at the time, with worsening sciatica.

Six days later, WEHO Hank returned to the emergency department complaining that the pain in his ankle had reached 9 on a scale of 1 to 10. He was seen by two nurses, one of whom had seen him the first time, and was then examined by a nurse practitioner. Nonetheless, using the ED checklist, the NP concluded that it was still just sciatica and sent WEHO Hank home.

Four days later, with the pain no better, WEHO Hank called his primary care physician. That doctor performed an ultrasound and diagnosed left leg deep vein thrombosis and arterial thrombosis and immediately took him to the emergency room. A vascular surgeon ordered a computerized tomography, or CT, scan that showed that tissue in his leg was dying. The next day, after concluding they had no choice, doctors amputated WEHO Hank's left leg above his knee. Lawrence General has likely violated its:

A. EMTALA screening duty
B. EMTALA stabilization duty
C. Both A and B
D. Neither A nor B

4. Suppose that a jury would award $10 million for pain and suffering and another $10 million to compensate WEHO Hank for having to live the rest of his life without the leg. In U.S. jurisdictions that have not adopted lost chance causation, in a medical malpractice case against the Lawrence General Hospital NP and PA, WEHO Hank must establish that had his leg been appropriately diagnosed:

A. His leg certainly could have been saved
B. His leg probably could have been saved
C. His leg might have been saved (so long as the chance was not de minimus)
D. His leg might have been saved

5. If the NP and PA in the previous Question were employees of Lawrence General, then the hospital would MOST likely be vicariously liable for their negligence under a theory of

A. Respondeat superior
B. Apparent agency
C. Non-delegable duty doctrine
D. Negligent credentialing

6. In January 2023, the *New England Journal of Medicine* published a retrospective study of patient harm in a random sample of admissions from 11 Massachusetts hospitals. It found negligent patient harm events in 23.6% of the 3,000 admissions sampled. One of those hospitals now has patients sign a release of liability on admission acknowledging the 1 in 4 risk of error. In a subsequent malpractice claim by the patient, this release is probably:

A. Enforceable under doctrine of assumption of risk
B. Enforceable under comparative negligence
C. Not enforceable because of EMTALA
D. Not enforceable

7. To assert a medical malpractice claim, the first element you must prove is the healthcare professional's legal responsibility to you. This criterion typically is easy to establish. Are you a patient of the doctor? If yes, then the doctor or medical professional owes you a duty to provide reasonable and prudent care. Going to see a doctor in a professional setting creates this duty. A healthcare professional must have had a provider-patient relationship with you to be liable for medical malpractice EXCEPT in:

A. Washington
B. Minnesota
C. Idaho
D. This is required everywhere in the United States

8. Suppose you live in Wisconsin and Google a medical condition. Up pops a video of a doctor espousing a particular home remedy for a condition from which you believe you suffer. You follow that advice, which turns out to be wrong, and you suffer a serious injury. The doctor who made the video likely would:

A. Not be liable for medical negligence because there can be no doctor-patient relationship without an in-person, face-to-face meeting.
B. Not be liable for medical negligence because the doctor did not owe you a duty of reasonable and prudent care.
C. Not be liable for medical negligence because this is only a curbside informal consult.
D. Be liable for medical negligence

9. A recent survey showed that almost 1 in 5 Americans now turn to TikTok before their doctor for health advice. For example, Dr. Leslie has almost 1 million followers to whom she gives daily recommendations. If Dr. Leslie gives bad medical advice and a follower is injured, to which of the following will Dr. Leslie be subject?

A. Malpractice lawsuit by injured follower
B. Board discipline by a medical board where Dr. Leslie is licensed
C. Both A and B
D. Neither A nor B

10. Patient presented to the ED registration desk and requested that Hospital staff perform an alleged sexual assault examination. The Registrar/Administrator A spoke with the clinical staff in the ED and informed Patient that the Hospital staff could not perform a sexual assault examination on Patient, due to the length of elapsed time between the alleged sexual assault and when Patient presented to the hospital. Has Hospital violated duties under EMTALA?

A. No, if the patient did not have an emergency medical condition.
B. No, because Hospital had a non-discriminatory, clinically relevant reason to refuse.
C. No, if Hospital was too busy with more critical life-threatening emergencies.
D. Yes

11. As the world rebounds from the COVID-19 pandemic, many health care providers are still taking advantage of the convenience of telehealth, which has grown substantially since 2020. Physician is licensed only in Kansas but through telehealth treats a patient in Missouri. Assuming that there is no interstate reciprocity or compact, to which of the following sanctions might Physician be subject?

A. Discipline from the Kansas medical board
B. Criminal prosecution in Missouri for practicing without a license
C. Both A and B
D. Neither A nor B

12. As of April 2023, at least 522 lawsuits have been filed against Ascension St. Vincent's Riverside Hospital and its former orthopedic surgeon, Dr. David Heekin. The suits allege that Heekin was allowed to operate on patients for years while he was impaired by a progressive neurological condition that caused him to lose his balance and slur his speech. Plaintiffs allege the surgeon caused devastating injuries including broken femurs, ruptured tendons, severe nerve damage and even death. According to the lawsuits, the doctor's impairment was obvious, yet the hospital didn't stop him from operating. If Dr. Heekin was employed by Ascension St. Vincent's, then the hospital is likely:

A. Vicariously liable
B. Directly liable
C. Either A or B
D. Neither A nor B

13. In April 2023, Mary Almanza sued Houston Methodist West Hospital. Mary had painful bone spurs in both feet, which were worse in her left foot. Hoping for some relief, she had surgery to repair them. "When I woke up, I was livid. I was so upset and all I could say was, they did the wrong foot." The surgeon agreed to do the left foot first, but her right one was operated on instead. Does Mary need an expert witness in this lawsuit (other than for damages)?

A. No because this is a battery
B. No, because of *res ipsa loquitor*
C. Both A and B
D. Yes

14. A physician has an 88% chance of facing a lawsuit during their career, especially in certain surgical specialties like obstetrics where the likelihood is even higher. If applicable, which defense would probably be most beneficial to the defendant physician?

A. Statute of repose
B. Comparative negligence
C. A and B would be equally beneficial
D. Enforcing a pre-dispute arbitration agreement

15. Billy is a nurse practitioner who was on shift at the Franklin County Hospital emergency department. Billy attempted to transfer a patient to Lawrence County Hospital because of specialized equipment at LCH. When preparing the patient's transfer to LCH, an LCH emergency room nurse contacted Billy and informed him that LCH would not be paid for the patient because he was a transfer. Billy then called LCH Director of Nursing who advised that the transfer should not go through because the hospital would not get paid for his patient. Has LCH violated EMTALA?

A. No, because the patient is at FCH and never arrived at LCH property.
B. No, because LCH never agreed to treat patient, so no treatment relationship was formed.
C. Yes, because talking to Billy about the patient was a formal consult and not a mere curbside consult.
D. Yes.

16. A radiologist read a patient's mammogram and negligently failed to diagnose a small early cancer. When this was later detected, the patient's cancer was at stage III with a tumor over 2 cm and four positive lymph nodes. The cancer would have been less advanced had the mammogram been properly read and patient would have had a 90% chance of surviving her cancer. Today, she instead has only a 10% chance. If patient dies and her estate proves $1,000,000 in damages, in most U.S. jurisdictions the estate can recover:

A. $1,000,000
B. $800,000
C. $100,000
D. $0

17. Another woman claimed that after years of "normal" breast cancer screens, or mammograms, she discovered a lump in her breast. She was then diagnosed with advanced stage breast cancer. Her condition quickly worsened, and she developed secondary malignant growths in her skull, spine, pelvis, and sternum. The negligently delayed diagnosis reduced the woman's five-year relative survival rate from 47 percent to 27 percent. If patient dies and her estate proves $1,000,000 in damages, in MOST U.S. jurisdictions the estate can recover:

A. $1,000,000
B. $800,000
C. $200,000
D. $0

18. Private equity-backed staffing companies manage one quarter of the nation's emergency rooms. The two largest are Envision Healthcare and TeamHealth. Many former EH and TH employees cite an emphasis on speed and high patient volume over safety; a preference for lesser-trained, cheaper medical providers; and treatment protocols unsuitable for certain patients. For example, at TeamHealth if a patient came in with abnormally high heart and respiratory rates — signs of sepsis — doctors were expected to give them large amounts of fluids and antibiotics within an hour. But those symptoms could also be caused by a panic attack or heart failure. An ED patient negligently injured by these protocols could probably successfully sue:

A. The ED physician
B. TeamHealth
C. The Hospital
D. A and B
E. A and C
F. B and C
G. A, B, and C

19. Patient arrived at the hospital with heart problems. Reached by phone, the on-call cardiologist directed the ED physician to begin transcutaneous pacing but asked that the patient be transferred to another hospital for emergent placement of the pacemaker. The patient died after transfer. If the original cardiologist could have placed the pacemaker, what EMTALA penalties?

A. DHHS OIG can fine the hospital
B. DHHS OIG can fine the cardiologist
C. Patient's family can sue the hospital
D. Patient's family can sue the cardiologist
E. Three of the above
F. All the above

20. In the previous problem, might the cardiologist be subject to malpractice liability?

A. Yes.
B. No, but the hospital would be vicariously liable for any malpractice by the cardiologist.
C. No, because that is preempted by EMTALA.
D. No, because that is preempted by ERISA.
E. No, because there was no treatment relationship.

21. A general physician was sued for negligence because she failed to administer a pregnancy test to a 15-year old girl, presenting with symptoms of dizziness, nausea, and missed menstrual periods. In this case, assuming they have the relevant education and experience, whose expert testimony can establish the standard of care?

A. General physician
B. Obstetrician
C. Internist
D. All the above

22. Dr. Sheran has recently been named in a malpractice suit. He consults with hospital lawyers and is upset by the false claims of negligence. The patient claims that Dr. Sheran, a family physician, performed an inappropriate surgical procedure (e.g., excision of a mole on the patient's back) that resulted in significant pain and scarring, when he should have given a referral to a general and/or plastic surgeon. Of the following, which evidence is MOST likely relevant in establishing the standard of care in this case?

A. What the reasonable physician in Dr. Sheran's locality would have done.
B. What the reasonable physician in the United States would have done,
C. What Dr. Sheran normally does in these cases.
D. What the reasonable patient thinks Dr. Sheran should have done.

23. A patient discovered that a surgical needle had been left in her abdomen during a procedure that took place 20 years earlier. This jurisdiction has a two-year statute of limitations and no statute of repose. What are the patient's options for receiving compensation for this negligent act?

A. She cannot seek damages because the needle did not cause any injury or treatment complication for 20 years.
B. She can sue for damages because the statute of limitations does not start running until the plaintiff has information necessary to discover the injury and its probable cause.
C. She cannot sue for damages because the surgeon who performed the procedure 20 years ago, no longer works at the same hospital.
D. She cannot seek damages because the statute of limitations expired two years after the procedure.

24. A radiologist practicing near Lake Tahoe at the border of Nevada and California missed 33 breast cancers over three years. Several of these cases resulted in malpractice settlements totaling $6.4 million. The Nevada medical board reprimanded the radiologist, fining her $500, and barred her from reading breast imaging. Which of the following is legally correct?

A. The radiologist may continue to practice radiology in Nevada
B. The radiologist may continue to practice radiology, including breast imaging, in California.
C. Both A and B
D. Neither A nor B

25. Fast forward two years later. The same Lake Tahoe radiologist from the previous question has continued to make abnormally high rate of errors. The American Board of Radiology has revoked her board certification. ABR refuses to certify that this physician demonstrates the requisite knowledge, skill, and understanding of the discipline. Which of the following is legally correct?

A. The radiologist may continue to practice radiology in Nevada
B. The radiologist may continue to practice radiology including breast imaging in California.
D. Both A and B
E. Neither A nor B

26. The Joint Commission recently published its Sentinel Event Data 2022 Annual Review. This tracks serious adverse events impacting safety. After falls, two leading types of sentinel events were unintended retention of a foreign object and surgeries performed at the wrong site or on the wrong patient. With what type of expert MUST a patient injured by a wrong surgery establish the standard of care?

A. Surgeon
B. Any physician who knows the standard.
C. Any clinician (APRN, physician…) who knows the standard.
D. No expert is necessary because this type of case is appropriate for res ipsa

27. Sixty-seven-year-old Rita had stage 3C ovarian cancer. When her physician diagnosed her, she had a 35% chance of survival. After Rita underwent various surgeries, her physician incorrectly reported that Rita no longer had cancer and cleared her to stop undergoing chemotherapy. A year later, another surgery revealed that Rita still had extensive cancer in most of her intestines. She died shortly thereafter. In a malpractice claim, the plaintiff can establish:

A. But for causation
B. Lost chance causation (if available in her jurisdiction)
C. Neither

28. Which of these plaintiffs CAN establish 'but for' causation? A plaintiff whose chance of survival before misdiagnosis was ___%

A. 49%
B. 50%
C. 51%
D. B and C
E. A and B and C
F. None of the above

29. [redacted]

A. Negligent credentialing
B. Vicarious liability
C. Both A and B
D. Neither A nor B

30. In late 2022, former Los Angeles Chargers quarterback Tyrod Taylor sued a team doctor who punctured his lung while giving a painkilling injection prior to a Week 2 game during the 2020 season. Which of the following is a valid defense?

A. "Even if I did not administer the injection as the reasonably prudent doctor, I used my best judgment in good faith.
B. "Even if I did not administer the injection as most reasonably prudent doctors, I administered in the way that a substantial minority of sports physicians consistent with guidelines from some professional societies."
C. Both A and B
D. Neither A nor B

Essay Question 1

- This question is worth 25 points.
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 60 minutes.
- All claims are governed by the law in the Statutory Appendix.

On the evening of May 25, 2022, Sarah started to feel sick. She had a high fever, her head and body ached, and she seemed disoriented. Sarah had a decision to make: (1) go to the hospital emergency room or (2) go to an urgent care clinic near her home in Des Moines, Iowa.

Sarah knew that ERs take five, six, seven hours before you're seen by a doctor, depending on how many people are there. She also knew that she could go to an urgent care clinic and be seen within an hour. Sarah went to the clinic where a physician assistant misdiagnosed her with the flu. This urgent care clinic is owned by two physicians who operate it as Now Care and employ physicians, physician assistants, and nurses to treat patients. They provide services such as wellness exams, physical exams, falls and injuries, minor cuts, and skin conditions.

Sarah's condition worsened. A few days later she was hospitalized for bacterial meningitis and was placed into a medically induced coma. She had multiple strokes, lost hearing in one ear, and now has trouble processing information.

During discovery in her subsequent lawsuit, Sarah learned that other patients had complained that this PA appeared drunk during their exams. Sarah recalled that the PA had dilated pupils, slurred speech, and wasn't making good eye contact with her. She also recalled that the PA was slurring his words and had a strong odor of an alcoholic beverage coming from his breath. Because she was focused on her symptoms, she did not pay attention to these red flags at the time.

Sarah first retained a San Francisco physician as her first expert witness on both the standard of care and causation. This expert, experienced in working with physician assistants in urgent care clinics, will testify that a reasonably prudent PA would have diagnosed bacterial meningitis. The expert will further testify that had such a diagnosis been made when Sarah went to the urgent care clinic, she probably could have been successfully treated and avoided her current injuries, though such injuries can and do occur even with timely treatment. Still, Sarah's first expert concedes that while the misdiagnosis harmed Sarah, the scope and extent of her injuries were exacerbated by her history of diabetes, hypertension, hyperlipidemia, and smoking. Sarah's second expert has decades of experience as a senior executive in urgent care clinic companies across the United States.

Now Care's expert testified (in deposition) that even without the PA's misdiagnosis, Sarah probably would still have suffered injuries from bacterial meningitis. Even if it had been treated right away with intravenous antibiotics and corticosteroids (to reduce the risk of complications, such as brain swelling and seizures), Sarah likely would have still suffered her injuries given how long she had already waited before coming into the urgent care clinic. Nevertheless, this expert concedes that the negligence increased the risk of those injuries.

Now Care's second expert testified (in deposition) that given the extreme shortage of licensed clinicians, healthcare facilities have had to adopt more flexible standards when recruiting. For example, McKinsey predicts the United States will see a shortfall of 200,000 to 450,000 registered nurses available for direct patient care by 2025. This means there is high demand for the available physicians, nurses, and PAs.

YOUR JOB: Sarah has fired her original lawyer and has hired you to represent her. Identify and assess the reasonable claims that Sarah has against any party.

Essay Question 2

- This question is worth 15 points.
- Limit your response to 1500 words. This is only a limit, not a target or suggested length.
- Recommended time is 60 minutes.
- All claims are governed by the law in the Statutory Appendix.

Arlene went into cardiac arrest at her home in February 2023 and was transported by ambulance and arrived comatose to Lakeside Medical Center (LMC). After several hours in the emergency department at LMC, Arlene's treating physician arranged to have her transferred to Methodist, a Level II trauma center, because of its higher-level ability to give appropriate care. In addition to making this certification, the physician sent Arlene's medical records to Methodist, obtained Methodist's consent to the transfer, and arranged for an ambulance.

Once Arlene arrived at Methodist (she was still comatose), the treating physician in the hospital's emergency department decided not to induce therapeutic hypothermia. This treatment omission was a breach of the prevailing standard of care and left Arlene with permanent brain damage and complete disability.

Arlene and her minor children have sued the Hospital alleging negligence and harm caused by the decision of its emergency department physician not to initiate therapeutic hypothermia. Methodist denied Arlene's allegations citing its independent contractor agreement with the company that operated its emergency department. The hospital's Emergency Services Agreement stated that South Dakota Emergency Physicians, LLC (SDEP) operated the Hospital's emergency department as an independent contractor with no employer/employee relationships created between Methodist and the physicians employed by SDEP. And so, according to the Hospital, only SDEP and its physicians could be held responsible for negligence arising from their treatment decisions in the emergency room.

Unfortunately for Arlene, Methodist is the only remaining viable defendant. SDEP has recently filed for bankruptcy after losing verdicts exceeding its insurance coverage. This happened because after SDEP had been acquired by a private equity firm in 2021, it infamously cut care quality and staffing levels to increase profits. In retrospect, the resulting series of public malpractice cases proved that was not an economically prudent plan.

Methodist Hospital's Emergency Services Agreement with SDEP to operate the emergency department states that SDEP is an independent contractor and that "[n]o relationship of employer and employee is created by this agreement." It provides that SDEP and not Methodist is "responsible for the acts of its agents, employees, and subcontractors while engaged in the performance of services herein."

On the other hand, the Agreement gave Methodist ultimate control over emergency department personnel and the methods and practices employed by emergency room physicians. Although the Agreement stated that physicians provide emergency services according to their own means and methods of work, it also provided that "overall authority and responsibility for policy, administration and executive control matters relating to the operation of the Emergency

Department and the Emergency Services shall remain with Methodist." Methodist had the right to set standards, schedules, personnel, regulations, and which physicians were eligible for their medical staff. And Methodist maintained all medical policies and protocols to decide whether to induce hypothermia for neurologically compromised patients.

YOUR JOB: Arlene has fired her original lawyer and has hired you to represent her. Identify and assess viable theories of liability that Arlene has against Methodist.

Statutory Appendix

Exam Stat. 100

This state rejects the existence of any "limited" treatment relationship as has been recognized in some jurisdictions, *e.g. Bazakos v. Lewis* (N.Y. 2009). Physicians either are in a treatment relationship with an individual, or they are not in a treatment relationship with that individual.

Exam Stat. 200

An action for health care liability must be brought within one year of when the cause of action accrues. Such action does not accrue until there has been either (a) discovery of the facts constituting the health care liability or (b) discovery of the facts that are sufficient to put a person of ordinary intelligence and prudence on an inquiry which would lead to such discovery.

Exam Stat. 300

A claimant must bring a health care liability claim not later than four years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within four years or they are time barred.

Exam Stat. 400

Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. The court shall specifically review the punitive damages award and shall make specific findings.

Exam Stat. 500

The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(a) Such failure was a proximate cause of the injury or death; or

(b) The health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient, the plaintiff must also prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived.

Exam Stat. 700

In a civil action for damages, the plaintiff's contributory negligence, if any, which is 50% or less of the total proximate cause of the injury or damage for which recovery is sought, does not bar his recovery. However, the total amount of damages to which he would otherwise be entitled is reduced in proportion to the amount of his negligence. This is known as comparative negligence. If the plaintiff's contributory negligence is more than 50% of the total proximate cause of the injury or damage for which recovery is sought, the defendant[s] shall be found not liable.

Exam Stat. 800

In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community or a community substantially similar to the one in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then and there belonged to and in which capacity he, she or it was functioning.