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Exam ID 18560

Professor Pope, Health Law: Quality & Liability
Final Exam Scoring Sheet (Fall 2012)

Multiple Choice (2 points each = 40 points)

1. C B	5. D	9. C A	13. C	17. C B
2. F A	6. E C	10. D C	14. C A	18. C
3. F	7. A B	11. B A	15. E	19. D
4. C	8. A	12. F	16. C	20. E A

20

Short Essay 1 (25 points)

Duty		
DEF had an informed consent duty, because he was in a **treatment relationship** with PTF. He actually treated her.	2	2
DEF had a duty to disclose the information that a **reasonable patient** in PTF's circumstances would consider material to a decision about how to treat her breast cancer.	2	2
A reasonable patient would consider the PtDA's more effective **format and presentation** of risks and alternatives to be important and material. Alternatively, the reasonable patient would want to know about the alternative of learning her options with a PtDA.	3	2
The reasonable patient not only wants the underlying **data and statistics** but also wants to understand them. She needs her physician to disclose information in a way that it is **meaningful.**	3	2
Breach		1
If DEF had a duty to use a PtDA, then failure to use it was breach.	2	2
Still, the breach argument seems **strained** where DEF actually and accurately disclosed all the risk and alternative information a reasonable patient would consider material. The PTF seems to be complaining not about the **content** of the DEF's disclosures but only about the **manner.**	2	2
Injury		
PTF lost her breasts.	2	2
Causation		
Had DEF used the PtDA, a **reasonable patient would have declined** the procedure. Statistically, this seems probable. Patients viewing PtDAs generally choose less aggressive procedures. On the other hand, it is unclear how a jury would tradeoff/balance breasts and a higher risk or recurrence.	3	1
Had DEF used the PtDA, PTF would **herself have declined** the procedure.	1	1
Had PTF declined the procedure because of the PtDA, then PTF would not have lost her breasts. The **procedure necessarily entailed** the claimed injury (removal of the breasts).	2	2
TOTAL	**25**	19

Short Essay 2 (15 points)

Duty		2
DEF had a duty to disclose what a **reasonable physician** customarily would/does disclose under the circumstances.	2	2
PTF must establish this duty with an **expert witness.**	2	4
PTF will probably be unable to establish this duty, because **most physicians do not use PtDAs.**	4	-
In some malpractice standard jurisdictions where the DEF is measured only against the reasonable physician in the state (e.g. VA, WA, AZ) or in a similar locality (e.g. MN), then PTF might be able to establish a duty to use PtDAs. While they are not generally used in the USA, their use might be the **standard where DEF practices**.	4	3
Breach, Injury, Causation		
The remaining elements are the same as in Short Essay 1	3	
TOTAL	**15**	11

20
19

Short Essay 3 (25 points)

11

Creativity	10	
Cogency of argument	10	
Use of cases and materials	5	
TOTAL	**25**	

20

65

135

Exam ID _____

Long Essay (80 points)

Treatment Relationship (Hutt)		3
Yes, because DEF actually treated PTF.	3	3
Medical Malpractice (Hutt)		
Duty		3
PTF must establish what the reasonable physician in Minnoza would do.	2	4
PTF expert Kurt is from New York, and may not know the Minnoza **statewide** standard of care.	4	3
Moreover, it appears that Kurt is prepared to testify only as to causation, not to the standard of care. If so, then PTF most probably has no COA against Hutt, MDC, or St. Matthew.	4	–
Even if Kurt establishes a SOC, Hutt may be able to establish a **school of thought** regarding examining one's own specimens. Many respected clinicians do this. But note that the existence of a national school of thought does not mean there is a statewide SOT.	4	
Breach		3
If PTF establishes a duty to have specimens examined by a third party, then Hutt breached.	3	2
Kurt also suggests that Hutt misdiagnosed the 2005 specimen. Gunderson also indicated that this specimen was misdiagnosed. This misdiagnosis may be a negligent error separate from the failure to consult.	2	2
Injury		3
PTF is dead.	2	4
Causation		4
PTF must establish "but for" causation, that DEF's negligence is the most likely cause of the injury.	3	4
PTF can only establish that DEF's negligence is just as likely as an alternative cause (20% v. 20%)	4	
Statute of Repose		4
Hutt may have misdiagnosed PTF in August 2005. That event is more than **four years** before PTF filed her lawsuit (in August 2010).	4	4
But PTF saw Hutt for the same condition. Therefore, she and Hutt were in a **continuous treatment** relationship that did not end until June 2007 (within four years of filing).	4	
Statute of Limitations		2
PTF did not **discover** her injury until January 2010. This was within one year of filing.	2	
Informed Consent (Hutt)		--
Hutt arguably had a duty to disclose his malpractice history and the financial incentives under which he was operating.	--	
Minnoza Dermatology Clinic		4
MDC is **vicariously liable** in respondeat superior for Dr. Hutt's negligence, if any, since he is their **employee.**	4	4
MDC may also be **directly liable** for **negligently retaining** Hutt despite his extensive malpractice record.	4	
St. Paul Pathology Associates		3
Hutt's sending the specimen to the SPPA pathologist was a formal consult. Thus, the pathologist was in a **treatment relationship** with PTF and owed her a duty to comply with the SOC.	3	– 1
It appears that the August 2005 specimen was misdiagnosed. But it is unclear whether PTF can establish the SOC for the pathologist through Kurt.	3	3
The claimed SPPA negligence occurred in August 2005, more than 4 years prior to filing. In contrast to the case against Hutt, there is no continuing treatment relationship. Therefore, this claim is **barred by the SOR.**	3	
St Matthew Hospital		--
Hutt took the last three specimens at the hospital, and examined them himself.	--	4
The hospital may be **directly** liable for **negligently retaining** Hutt in light of his extensive malpractice record.	4	2
The hospital may be **directly** liable for **not supervising** Hutt and assuring that he had the specimens reviewed consistent with the prevailing standard of care.	4	–
It is unclear that PTF can establish causation between these breaches and her injury. But non breach likely would have led to an **earlier** correct diagnosis. In that case, PTF would have had a better chance of recovery.	4	--
It is unlikely that PTF can establish any actual or ostensible agency for vicarious liability. She had an established treatment relationship with Hutt before and separate from the hospital.	--	
Kno-Care		2
The insurer denied PTF coverage that arguably should have been provided.	2	4
The plan was employer-provided, and this is a dispute over coverage. Therefore, any state-based claims (like breach of contract) would be **preempted by ERISA.**	4	2
PTF paid for and received the desired treatment. Therefore, all she wants is **reimbursement**. This is probably all that she would be able to recovery anyway under ERISA.	4	--
It is unclear whether Kno-Care can be vicariously liable for Hutt's negligence. There are insufficient facts to establish ostensible agency.	--	
TOTAL	**80**	65

Part 1

1. B
2. A
3. F
4. C
5. D
6. C
7. B
8. A
9. A
10. C
11. A
12. F
13. C
14. A
15. E
16. C
17. B
18. C
19. D
20. A

Part 2

Short Answer 1

Betty's Informed Consent Action

In order to prevail on an informed consent claim, Betty must prove several things. First, that because of a treatment relationship, Physician had a duty to disclose the alternatives and the risks of treating Betty's breast cancer. Once the duty to disclose is established, Betty must establish breach of the duty, injury, and causation.

Duty

If there is a treatment relationship, which there seems to be, because Physician formally treated Betty, the physician must disclose the alternatives and risks of Betty's treatment options for breast cancer. There are three possible standards to determine what information must be disclosed to Betty, which are the material risk standard, the reasonable physician standard, and the subjective standard. Since Betty is in a jurisdiction like Minnesota, the material risk standard

applies. The material risk standard is that a doctor has a duty to disclose information, if a reasonable patient in the circumstances would have considered the information important. Or what would a reasonable patient consider important in making a treatment decision. Therefore, the question is whether a reasonable patient would have considered it important to have the decision aid in order to make the decision of what treatment to pursue. It is not the subjective standard of whether Betty would have considered it important. The use of the decision aid could be deemed important by the reasonable patient, because it provides for improved knowledge, more accurate expectations, and better choices. On the other hand, only the format of the information is changing and the patient is still getting the same information, so it may not be important to provide the patient decision aid. Considering the improvement in knowledge and the ability to make a more informed decision it is very possible that using a patient decision aid would be important to a reasonable patient.

However, even if a reasonable patient would have found it important to use the patient decision aid, Physician can still argue that they did not have a duty to do so. The first argument they could make is that it would not be important, because the patient is getting the same information, only orally. Also, they could show an exception to the duty, that the information was already known. Since Physician gave an accurate oral presentation of the risks and benefits of each option, Betty knew this information. Since, she knew the information it would be unnecessary for the physician to also provide the patient decision aid. Physician did disclose the information, just not in the format Betty would have liked. This is a fairly strong argument, but it is still possible for a jury to determine that Physician had a duty to provide the patient decision aid.

Breach

The next element that Betty must prove is breach or that the doctor actually failed to disclose what they had a duty to disclose. On one hand, Physician did not breach, because they did disclose the information, just not via a patient decision aid. However, if the duty was to use a patient decision aid, then Physician did breach, because they did not use a patient decision aid.

Injury

If duty and breach are established, the next element Betty must establish is injury. Informed consent is not a dignitary tort and Betty must have actually suffered an injury. Since Betty underwent a Mastectomy and lost her breasts, and this would not have occurred using radiation, Betty probably has an injury.

Causation

The final element is causation or that had disclosure been made, a reasonable person in the patient's circumstances would not have consented. This is three parts:

injury is from procedure, disclosure would have led reasonable person in plaintiff's position to decline, and disclosure would have led plaintiff to decline. For the first part, the injury is from the procedure, she lost her breasts due to the mastectomy and had she had radiation she would not have. Second, a reasonable person would have chose differently. This is not as clear as the first part of causation. There is a slightly higher rate of tumor recurrence when using radiation versus mastectomy. There is a good chance that at least some people would still have mastectomy knowing that they will lose their breasts, in order to prevent the reoccurrence of a tumor. Whether or not a reasonable person would choose mastectomy over radiation is a close call. The final piece is whether the patient would decline the mastectomy and had radiation if she had received the disclosure via decision aid, and according to her statement, she would have.

Conclusion

Betty's informed consent claim has some hurdles. The first is that a reasonable patient would find the patient decision aid for disclosure important with the accurate oral presentation by the doctor. Second, the doctor can argue Betty knew the information from the decision aid and therefore Physician can argue there was no duty to disclose the decision aid. She may also have a problem with breach, because the information was disclosed only not in the decision aid format. Her final obstacle is whether the reasonable patient would have chose radiation over the mastectomy. Overall, Betty does have a possible claim for informed consent, but it is not an open and shut case.

Short Answer 2

Betty's informed consent claim in a jurisdiction like Indiana, Virginia, or New York would be very similar to her above claim in short answer 1. There are the same requirements of informed consent, however there is a different standard used to determine whether or not a duty existed.

Duty

The applicable standard is the malpractice standard or what the reasonable physician would have disclosed. This standard would require an expert witness to testify as to what a reasonable physician would disclose and whether the patient decision aid should have been used. There are three additional standards to determine which reasonable physician applies: a reasonable physician in the USA, a reasonable physician in the state, or a reasonable physician in a same or similar community. Most jurisdictions follow the reasonable physician in the USA standard and so that is how the question will be analyzed here. Under this approach, Physician more than likely would not have a duty to disclose using a decision aid, because that is not what a reasonable physician in the USA would do. Decision aids are not in widespread use and are even one of the "most underused interventions in

American medicine." Therefore, it is not what the reasonable physician would use and so Physician would not have a duty to use the decision aid.

Conclusion

Betty's informed consent action against Physician is much weaker in a reasonable physician jurisdiction, because patient decision aids are not widely used and so the reasonable physician would probably not use them. Therefore, Physician did not have a duty to use the patient decision aid and so Betty's informed consent action would probably fail.

Short Answer 3

In order to overcome Betty's obstacles to the informed consent claim, the court could change the informed consent law to require that physicians use patient decision aids as part of the duty of disclosure. This would mean that Physician definitely breached a duty by not using the decision aid with Betty.

One reason for a court to require the use of decision aids is because the positives of doing so outweigh the burden. The use of decision aids is proven to empower patients. They better understand their options and better know what to expect. This allows them to make choices that better align with their values and what they want. Which leads to less regret surrounding the choices that they have made, and could prevent the anger and pain that is suffered by patients like Betty.

Another reason to use patient decision aids is because the number of patient's who choose elective surgery goes down and instead they choose more conservative options. Evidence shows that patients learn from the decision aids and appreciate them.

Even though something is not a standard or duty of a physician does not mean it is not something that could be judicially set. When it is so clear that something should be done a certain way and just is not, it makes sense for the judges to impose a new requirement. For instance, in the case of Helling v. Carey, it was not the standard of care to check for glaucoma, but the test was easy and very beneficial, because it helped with early diagnosis. By the time the symptoms of glaucoma arise, it is already too late. There was much evidence that glaucoma screening was both beneficial and easy to do. However, it just wasn't being done. This is similar to patient decision aids. They are very beneficial to patients and there does not seem to be a high burden for using them, so it would make sense to begin. Therefore, like the Helling court, the Supreme Court could require patient decision aids as a new duty for informed consent.

On the other hand, it may not be the place of the judiciary to decide how physicians best inform their patients. It might be better left to the medical field to decide if and when to use decision aids. There maybe more to consider that the

judiciary just is not aware of and they must simply be overstepping their bounds. The Helling decision mentioned above is not only a very rare occurrence, but was also much criticized.

An additional possible problem is that patient decision aids are actually preventing patients from getting much needed medical procedures. When patients used decision aids they were four times more likely to chose the conservative approach. Is this because they were actually weighing the benefits and the risks or was it because of fear? The radical approach may actually be better in the long run if it prevents additional procedures, because of reoccurrence. For instance, in Betty's case, if she would have gone with radiation after using a decision aid, there is a chance that the cancer would have returned, then she would have to choose another option, creating an additional procedure, and that could happen several times. However, if she goes with the mastectomy immediately, then she has a better chance of not having to choose another procedure later. This is not easy and there is probably not a perfect answer, because you can't predict the future and know if the cancer is going to come back. If she gets the radical mastectomy there is a chance the cancer would have never come back and it would have been better to go with radiation. But there is also the chance that she goes with radiation and then ends up needing a mastectomy too.

In conclusion, the court could judicially set the duty that physicians use patient decision aids. This would eliminate a huge hurdle for Betty. Also, there are many positive characteristics and outcomes of decision aids. However, it is important to also consider whether or not this is the job of the judiciary. And if it is, then is the more that they do not know that would cause them to reconsider adding this duty.

Part 3

Essay 1

Tina's estate may have several claims against several different parties, including Dr. Hutt, Minnoza Dermatology Clinic, St. Matthew Hospital, Saint Paul Pathology Associates, and the Managed Care Organization.

Dr. Hutt

Medical Malpractice

In order to have a claim for medical malpractice, Tina must establish a treatment relationship between her and Dr. Hutt. She must also establish a standard of care before establishing breach of said standard, which caused an injury.

Treatment Relationship

Dr. Hutt formally took on Tina as a patient and actually treated her. Therefore, there is an established treatment relationship and the first part of the medical malpractice claim is met.

Standard of Care

The standard of care for Minnoza is what a reasonably prudent physician in the specialty or field of medicine in the state of Minnoza would have done. The standard of care must be established by an expert witness who is licensed in Minnoza or is familiar with the standard of care in Minnoza. The expert witness retained by Tina's estate is a Dr. Kurt from New York's prestigious Memorial Sloan Kettering. Based on the information given, Dr. Kurt may not be qualified to provide testimony on the standard of care, because there is no evidence that he is familiar with the Minnoza statewide standard of care or licensed in the state of Minnoza. However, if he was familiar with the Minnoza standard of care, he could testify regarding the standard of care. The next problem is that even if Dr. Kurt were qualified as an expert witness, he is not testifying as to the standard of care. This means that Tina's estate has no expert witness, unless they can use the defendant as an expert or if *res ipsa* applies. It seems unlikely that the defendant will provide what Tina's estate needs, so all that is left is *res ipsa*. This will probably not work either, because it is not obvious that this could not happen absent negligence. It would take an expert to determine what the reasonable physician would do in these circumstances; it is not like a sponge was left inside Tina's body after an operation and that would be an example of when *res ipsa* was appropriate. Without an expert witness to establish the standard of care, Tina's estate will lose the medical malpractice claim.

Breach

Without first establishing a standard of care, it is difficult to establish a breach. However, they are trying to argue that diagnosing the cancer was the standard and since Dr. Hutt did not diagnose the melanoma, Tina's estate could probably establish a breach if they could establish a standard of care. Possible breaches would be evaluating the samples of tissue himself instead of sending them out to a lab for evaluation due to the managed care reimbursement incentives, but in order to know if this is a breach, an expert is needed to say what the standard is. It seems that the standard could be that many physicians in the United States personally review the samples rather than send them out. However, this is a national standard and would not be applicable in this case, because the statewide standard applies. There is also evidence that some places, such as Gunderson Clinic have two pathologists check skin samples to check the difference between colored moles and melanoma. However, it is not obvious that this standard would apply either, because it is not clear that it is a statewide standard. Either way, Tina's estate would need an expert witness to confirm either standard to prove breach.

Injury

There will be no issue proving injury as Tina died from the cancer.

Causation

Tina's estate must also establish causation, using an expert witness. They have an expert witness and he will testify fast the Tina's chance of death increased from 20% to 40% after the negligence. In order to prove causation, there are two theories but-for and loss of chance. However, loss of chance is not applicable in Minnoza, so Tina's estate must prove but-for causation. But-for causation requires not only that the defendant increased the risk of death, but also that his negligence was the most probable cause. This means that more than 50% of Tina's chance of death had to be attributed to Dr. Hutt. This is not the case for Tina, because exactly 50% of the risk was caused by Dr. Hutt's negligence and therefore it is not the most probable cause. (40-20/40=50% from negligence.) Therefore, Tina's estate cannot prove causation. If lost cause causation applied in Minnoza, which it does not, Tina's estate would have causation and could recover 50% of damages.

Punitive Damages

In a medical malpractice case, a plaintiff may be entitled to punitive damages if the negligence was willful or especially bad. However, because Tina's estate cannot prove medical malpractice, and even if the could, it is not apparent from the facts that this was willful; they probably cannot receive punitive damages.

Statute of Limitations

A medical malpractice suit cannot go forward if it is time-barred. A suit is time-barred by the statute of limitations in Minnoza if it is filed more than one year after the injury is discovered. Tina was diagnosed in January 2010 and so the statute of limitations was triggered then, and runs until January of 2011. Tina filed suit in May 2010, so her suit is not time-barred by the statute of limitations.

Statute of Repose

A medical malpractice suit also cannot go forward if it is time-barred by the statute of repose. A suit in Minnoza is time-barred by the statute of repose if it is filed more than fours years from the date of the injury. This means that the injury had to occur after May 2007 or it is time-barred. If each time Tina saw Dr. Hutt were a separate injury then all but the June 6, 2007 visit would be time-barred by the statute of repose. However, if you apply the course of treatment rule all of the earlier treatments would become part an entire course of treatment that ended on June 6, 2007 and therefore no dates of service would be time-barred by the statute of repose.

Conclusion

Tina's estate probably does not have a medical malpractice claim against Dr. Hutt, because they cannot prove the standard of care without an expert, and because there is not causation.

Minnoza Dermatology Clinic

Vicarious Liability

Minnoza Dermatology Clinic may be vicariously liable for Dr. Hutt's negligence. A clinic is vicariously liable for the negligent acts of their agents or employees when they are acting within the scope of employment. This is because they have control over how they work and the power to delegate. Since Dr. Hutt is an employee of Minnoza Dermatology Clinic, they are vicariously liable under actual agency or respondeat superior. Even if Dr. Hutt was not an employee, and only an independent contractor, the clinic may be liable under the theory of ostensible agency if Tina had a reasonable belief that Dr. Hutt was an employee of the clinic.

Direct Liability

Negligent Selection

Minnoza Dermatology Clinic may also be directly liable under a theory negligent selection and/or negligent retention. In order to have a claim for negligent selection, Tina's estate must prove duty, breach, injury, and causation. In order to prove duty, they must prove what a reasonable clinic would have done in hiring Dr. Hutt. The plaintiff would have to have an expert witness to establish this, because it is not common knowledge among all people, how clinics check the qualifications of a physician. So they will probably not succeed on this claim, but generally clinics hiring physicians will check for medical malpractice actions, that the physicians have a license, if they have lost privileges else where, etc. If they had proved the duty to check for medical malpractice actions, they would have probably been able to establish a breach seeing as Dr. Hutt had 23 malpractice actions against him. Tina's estate could then establish the injury of Tina's death. Then they would just need to prove causation, that if they had not breached their duty that the injury would not have occurred. Since he was hired sometime before the first visit with him, this action would more than likely be time barred if the medical statute of repose applies. However, if the any other tort claim statute of limitations would apply, then it would probably not be time barred, because Tina discovered the injury less than two years from when the suit was filed.

Negligent Retention

Negligent Retention has very similar analysis to the above negligent selection section. However, instead of proving a duty that the clinic to check into the

background of the physician before hiring, the plaintiff must prove a duty to regularly review the qualifications of those physicians already on staff, usually something like every two years. Again, Tina's estate would want an expert to testify to what a clinic's duty is to do so. This suit would probably not be time-barred by either the statute of repose or the statute of limitations.

Negligent Supervision

Tina's estate may also have a claim if they can prove negligent supervision or that the clinic had a duty to supervise Dr. Hutt, that they failed to do so, and it caused an injury to Tina. There is probably not enough evidence to thoroughly analyze this. The same statute of limitations and statute of repose analysis would apply as the negligent retention claim.

St. Matthew Hospital

Vicarious Liability

St. Matthew Hospital may be vicariously liable for Dr. Hutt's actions if they are negligent. The first way is if he is an employee, then they are liable under actual agency or respondeat superior. Actual agency applies if Dr. Hutt was an employee of the hospital. However, there is no evidence that he is an employee of the hospital; only that he has staff privileges. Therefore, the hospital is probably not liable under respondeat superior. The next question then is if they are liable under the theory of ostensible agency, because the patient reasonably believed that Dr. Hutt was employed by the hospital. This is probably not the case, because the patient did not seek treatment directly from the hospital. Instead the patient sought treatment from Dr. Hutt at the clinic and only later did he perform a procedure there, so she should have known he was not an employee of the hospital, but only an independent contractor that could perform certain services there. On the other hand, a normal patient may believe that a physician is employed by each place he works, but that is probably not enough to find ostensible agency, because it is usually reserved for when patients seek treatment directly from the hospital. The final option for vicarious liability if the nondelegable duty doctrine, however this also probably will not be successful, because it is more for emergency room physicians. Statutes and regulations are evidence of some important public policies, such as having an ER and therefore, those things cannot be delegated to independent contractors. Biopsies are probably not something that would fall under this category. Therefore, there is probably not a theory of vicarious liability that Tina's estate could use against St. Matthew Hospital.

Direct Liability

St. Matthew Hospital may be directly liable for Dr. Hutt's possible negligent actions using very similar analysis to Minnoza Dermatology Clinic's direct liability section. Tina's estate would need an expert witness to establish what the

hospital's duty was regarding checking into Dr. Hutt's background prior to giving him staff privileges at the hospital as well as their duty to reevaluate his staff privileges once he was already on the staff. Without an expert though, they probably cannot succeed on these claims. Tina's estate may also have a claim if they can prove negligent supervision or that the hospital had a duty to supervise Dr. Hutt, that they failed to do so, and it caused an injury to Tina. There is probably not enough evidence to thoroughly analyze this. The negligent selection claim would be time-barred by the statute of repose because he was given staff privileges in 1998, which is more than four years from the time the suit was filed. However, if the any other tort claim statute of limitations would apply, then it would probably not be time barred, because Tina discovered the injury less than two years from when the suit was filed. The negligent retention and negligent supervision claims probably not be time-barred by either the statute of limitations or statute of repose.

Saint Paul Pathology Associates

Tina's estate may be able to recover against Saint Paul Pathology Associates for medical malpractice. However, in order to do so there must be a treatment relationship. There is probably some form of treatment relationship between Tina and Saint Paul Pathology Associates, because they contributed to her medical file with the test results, probably billed for their services, and the results contributed to her treatment and created reliance. However, even if it is not a formal treatment relationship, Tina's estate can still sue for negligence. However, there is not enough information to thoroughly evaluate their claims for medical malpractice or negligence, because it is not clear that it was an error on their part and not Dr. Hutt's error in reading the results.

Even if there were a viable claim, it would be barred by the statute of repose, because the occurrence of the act occurred more than four years ago.

Managed Care Organization – Kno-Care

Negligent Utilization Review

Tina's estate may have a claim against Kno-Care for failing to the treatment she needed and appeared to be covered. However, this action may be preempted by ERISA and then ERISA would be their exclusive remedy. In order to determine if a claim is preempted, you must first determine if an employer provides the insurance. If it is not, then ERISA does not apply, however, in this case, the insurance is provided by an employer and ERISA applies. The next step is to determine if this claim could have been brought under 502. It could have been brought under 502 if the gravamen of the complaint is about being denied benefits or getting what you are owed. That is exactly what this claim is about, the fact that Tina was denied coverage, and so the claim is preempted by 502. Under ERISA, the only remedies available are contractual, injunctive, and declaratory. Since, Tina has already died,

the only remedy they will receive from ERISA is contractual or the amount of the benefits owed.

In conclusion, Tina's estate may have a medical malpractice claim against Dr. Hutt, as well as various claims against St. Matthew Hospital, Saint Paul Pathology Associates, the Managed Care Organization, and Minnoza Dermatology Clinic.