

CIVIL PROCEDURE

Section W2

Fall 2001

Professor McManamon

Anonymous # \_\_\_\_\_

**Final Examination**  
**Thursday, December 13, 2001**

GENERAL INSTRUCTIONS:

1. Be sure to write your anonymous number in the place provided at the top of this page. You are required to turn these test questions in at the end of the examination.
2. This is a limited open book examination. You are permitted to have your Federal Rules book with you.
3. There are two parts to this examination:  
  
PART I - Essay (50%)  
PART II - Multiple Choice (50%)
4. Specific instructions for each part are located with that part. Read them carefully!
5. You have three hours to complete this examination.
6. If you wish to leave the room during the examination, you may do so. You must, however, leave your test questions and answer sheet in the classroom. Moreover, you may not speak with any member of the class while outside the room.
7. All the examinations at the law school are conducted under the Student Code of Conduct, which forbids cheating or collaborating on examinations. If you witness anyone cheating in any form, it is your responsibility to report this to the Registrar or the Dean of Students. You are required to sign the form indicating compliance with the Student Code of Conduct at the completion of your examination.
8. All students are required to have a Widener University School of Law picture ID card with a validation sticker for fall 2001 on the desk in front of them during the examination.

9. At the conclusion of the examination, sign the Code of Conduct form and include your social security number. (Keep the yellow copy of the Code of Conduct form for your records.) Place your exam and your multiple choice answer sheet in your "blue" book(s). If you typed your exam answer place the exam, the answer sheet, and the typed answer in a "blue" book. Put the exam, answer sheet, and "blue" book(s) in the manilla envelope provided. Then place the Code of Conduct form in the box marked "Code of Conduct Forms" and place the filled manilla envelope in the box marked "Exams." Failure to turn in **BOTH** the exam **AND** your answers will result in a grade of **F** for the course. Do not turn in any scrap paper.

## PART I

### ESSAY

(Suggested time: 1 hour 30 minutes)

#### IMPORTANT

Read the following instructions CAREFULLY:

1. Use the "blue" books provided to write your answer. Be sure to put your anonymous number on each "blue" book. In addition, you **MUST** number each book, e.g., "1 of 3," "2 of 3," "3 of 3."
2. Write only on one side of each sheet of paper. And remember, a legible exam makes a happy professor!
3. There is 1 essay question in this part.
4. If there are any facts you need to know to analyze the problem, indicate what they are and how they would affect your conclusion.
5. Address only the issues of procedural law. Do not address the substantive law involved.
6. Use the law you learned in Civil Procedure and any law described in the exam question. Assume for the purpose of the exam that such law is as described.

You are the law clerk for a new federal judge in the U.S. District Court for the Southern District of Mississippi, which sits in Jackson. She has just held a pretrial conference in a case transferred to her docket from another judge on the court. (Before they accumulate dockets of their own, new judges are assigned old cases from other judges' dockets.) The case, a wrongful death action, is *Phillips v. Danvers*.

In April of this year, Lilah Phillips, a Mississippi citizen, filed a wrongful death action in state court in Pascagoula, Mississippi (about 200 miles from Jackson – see map at end of question), seeking one million dollars for the death of her husband, Louis Phillips. Even before your judge was assigned this case, she had been aware of it. Mr. Phillips was a very wealthy member of Pascagoula society and was well-known throughout southern Mississippi. She remembers reading his obituary at the time he died, in May of 1999, which discussed the cause of his death. She also noted a subsequent item in the Jackson *Clarion-Ledger* telling about this suit, published the day after Mrs. Phillips filed it.

The original state court complaint listed several defendants. The only one actually named was Dr. Danny Danvers. Plaintiff claimed that Dr. Danvers was negligent in failing to discover an aneurysm while reviewing an MRI of her husband in late 1998. Mr. Phillips died of complications arising from the aneurysm. In addition to Dr. Danvers, the original complaint listed as defendants “John Does A, B, C, and D,” identified as follows:

parties to this action whose identities are unknown at this time, who are other health care providers or persons which at any time undertook or had a duty to provide medical care or services to the Plaintiff's Decedent and whose negligence caused or contributed to the damages and injuries as alleged in this complaint.

(The use of John Doe defendants is permissible under the Mississippi Rules of Civil Procedure.)

Dr. Danvers is a citizen of Idaho. He is an expert who consults in cases like that of Mr. Phillips. He advertises his services in various national medical journals. Gulf Coast Imaging, P.A. (GCI), a Mississippi citizen located in Pascagoula, performed the MRI on Mr. Phillips. The GCI doctor wanted a second opinion and, seeing Dr. Danvers's ad in the nationally-known *New England Journal of Medicine*, hired him on behalf of GCI to consult. The MRI results were sent to Dr. Danvers in Idaho, where he reviewed them, wrote his report, and sent it back to GCI. As Mr. Phillips had signed one of those ubiquitous releases (“just so we can bill your insurance company”), Dr. Danvers sent his bill to the Phillipses' insurer, located in Connecticut, and was paid in full. This is the only case on which he has consulted in the State of Mississippi.

In May, Dr. Danvers filed a timely petition for removal to the U.S. District Court for the Southern District of Mississippi, which is the federal district that includes Pascagoula. He also filed a timely answer containing, among other things, a defense of lack of personal jurisdiction over him.

The day after removal, the federal judge originally assigned to this case issued the following order concerning the John Doe parties:

A question appears regarding subject matter jurisdiction. Plaintiff shall file a remand motion bringing jurisdictional concerns to issue or identify, if possible, some of the John Doe medical defendants, most of whom would seem to be residents of this state. A case must be remanded to state court when a defendant sued under a fictitious name is identified to be non-diverse even though John Doe defendants are disregarded for original removal purposes pursuant to the removal statute.

In June, the plaintiff moved to remand, asserting that removal was improper "due to the existence of as yet unidentified John Doe defendants, who are, upon information and belief, citizens of Mississippi." It was not until five months later, however, in November, that plaintiff moved to amend her complaint to substitute GCI for "John Doe A." She alleged that Dr. Danvers had acted under GCI's direction and supervision and that its employees assisted him in reading the films at issue and in completing the report.

At the pretrial this morning, Dr. Danvers's lawyer urged your judge to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(2). Failing that, he asked the judge to deny plaintiff's motion to amend, which, if granted, would require the judge to remand the case to state court.

In addition, Dr. Danvers's lawyer spoke for GCI. Although it is not formally a party to the suit yet, as the judge has not granted plaintiff's motion to amend the complaint, plaintiff's lawyer had sent GCI a courtesy copy of the motion to amend with the proposed amended complaint attached. Dr. Danvers's lawyer is a partner in a large southern Mississippi medical malpractice defense firm (with offices in Jackson, Hattiesburg, and Biloxi) that has done work for GCI in the past. When GCI received the motion and complaint, it called the attorney and asked him to represent to the judge at the pretrial that, if she granted the plaintiff's motion, GCI would file a motion for summary judgment, arguing that the statute of limitations had run on the claim against it.

Not surprisingly, plaintiff's attorney, a partner in a well-respected Pascagoula plaintiff's personal injury firm, opposed each of the positions taken by defense counsel.

Your judge has handed you two pertinent Mississippi statutes (see below). She would like a memorandum from you on the following questions:

1. What are the arguments of the parties on the 12(b)(2) defense? How should she rule and why?
2. Your judge is convinced that the claims against Dr. Danvers and GCI arise from the same transaction or occurrence, whatever test is used. Other than a possible argument on that basis, what are the arguments of plaintiff, defendant, and GCI on the motion to amend? How should she rule?

Be sure to answer these questions in light of plaintiff's motion to remand. If there are any facts you need to know, indicate what they are and how they would affect your conclusions. The judge is considering holding a hearing on these motions and would like your advice on any issues she should direct the parties to address.

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**Miss. Code § 13-3-57. Service on nonresidents; generally**

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

**Miss. Code § 15-1-36. Actions for medical malpractice**

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(2) For any claim accruing on or after July 1, 1998, . . . no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor, including an individual or professional association, for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and . . . in no event more than seven (7) years after the alleged act, omission or neglect occurred . . . .



**PART II**

**MULTIPLE CHOICE**  
(Suggested time: 1 hour 30 minutes)

**IMPORTANT**

Read the following instructions CAREFULLY:

1. Using a #2 pencil, write your anonymous number on the answer sheet in the first six columns for I.D. number and fully darken the rectangles that correspond with your number. Do not put a sticker with your anonymous number on the computer form. If you do, the computer will reject your form and you will receive no credit for your answers.
2. To be scored, your answers must be recorded on the answer sheet using side 1, numbers 1-18. Do not use the "E" rectangle on the answer sheet. Choose only rectangles "A" through "D."
3. You must use only a #2 pencil in answering the questions. Fully darken the rectangle for the answer you wish to give.
4. There are 18 questions in this part.
5. Unless otherwise indicated, assume suit is in federal court.
6. For each question, choose the best answer.