THE MPT®

MULTISTATE PERFORMANCE TEST

February 2010 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and point sheets from the February 2010 MPT. Each test includes two items; jurisdictions that use the MPT select either one or both items for their applicants to complete. The instructions for the test appear on page v. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT point sheets describe the factual and legal points encompassed within the lawyering tasks to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. Point sheets are not official grading guides and are not intended to be "model answers." Examinees can receive a range of passing grades, including excellent grades, without covering all the points discussed in the point sheets. User jurisdictions are free to modify the point sheets. Grading of the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

Description of the MPT

The MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. Applicants are expected to spend 90 minutes completing each MPT item administered.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the applicant is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The applicant is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an applicant's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an applicant's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires applicants to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner

likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring applicants to perform one of a variety of lawyering tasks. For example, applicants might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test form contains the following instructions:

> You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
>
> The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
>
> You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
>
> The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
>
> Your response must be written in the answer book provided. If you are taking the examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
>
> Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

MPT-1: *State of Franklin v. McLain*

Selmer & Pierce, LLP
Attorneys at Law
412 Yahara Place
Centralia, Franklin 33703

M E M O R A N D U M

To: Applicant
From: Marcia Pierce
Date: February 23, 2010
Re: State v. Brian McLain

We have been appointed by the court to represent Brian McLain, who is indigent. The State of Franklin has charged McLain with three felony counts: possession of methamphetamine with intent to distribute, possession of equipment to manufacture methamphetamine, and manufacture of methamphetamine. The evidentiary hearing on our motion to suppress concluded yesterday. The judge wants our post-hearing brief before the end of the week.

I have attached the relevant portions of the transcript from the evidentiary hearing. Please draft the argument section of our brief. We need to make the case that Officer Simon had no reasonable suspicion that would justify the stop of McLain's vehicle on the night in question.

In addition to the motion to suppress, I've moved to dismiss Count Two of the criminal complaint, possession of equipment to manufacture methamphetamine, on the ground that it is a lesser-included offense of Count Three, manufacture of methamphetamine. Please draft that argument as well.

Do not prepare a separate statement of facts; I will draft it. However, for both of our arguments, be sure to provide detailed discussion and analysis, incorporating the relevant facts and addressing the applicable legal authorities. Be sure to anticipate and respond to the State's likely arguments.

STATE OF FRANKLIN
DISTRICT COURT FOR BARNES COUNTY

State of Franklin,	)	
Plaintiff,	)	**CRIMINAL COMPLAINT**
	)	
v.	)	**Case No. 09-CR-522**
	)	
Brian McLain,	)	
Defendant.	)	
	)	

The State of Franklin, County of Barnes, by District Attorney Sarah Russell, hereby alleges as follows:

1. Count One. That on October 5, 2009, the defendant, Brian McLain, did knowingly possess more than 15 grams but less than 100 grams of methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, with intent to distribute or deliver, in violation of the Franklin Criminal Code § 42.

2. Count Two. That on October 5, 2009, the defendant, Brian McLain, did possess equipment or supplies with the intent to manufacture methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, in violation of the Franklin Criminal Code § 43.

3. Count Three. That on October 5, 2009, the defendant, Brian McLain, was knowingly engaged in the manufacture of methamphetamine, a controlled substance, in the City of Centralia, County of Barnes, Franklin, in violation of the Franklin Criminal Code § 51.

November 17, 2009

Sarah Russell

Sarah Russell
Barnes County District Attorney
State of Franklin

STATE OF FRANKLIN
DISTRICT COURT FOR BARNES COUNTY

State of Franklin,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 09-CR-522**
	)	
Brian McLain,	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE
AND TO DISMISS COUNT TWO OF THE COMPLAINT

Defendant Brian McLain, by and through his attorney, Marcia Pierce of Selmer & Pierce, LLP, moves the Court as follows:

1. To suppress all evidence obtained as a result of the search of his vehicle and a shed located in an alley next to 1230 8th Street, Centralia, Franklin, on October 5, 2009, on the ground that the investigating officer lacked reasonable suspicion to stop the defendant's vehicle and, as a result, both the stop and the subsequent search violated the defendant's Fourth Amendment rights under the United States Constitution. *See State v. Montel* (Franklin Ct. App. 2003).

2. To dismiss Count Two of the criminal complaint as multiplicitous. The charge of "Possession of Equipment or Supplies with the Intent to Manufacture Methamphetamine," Fr. Crim. Code § 43, is a lesser-included offense of Count Three of the complaint, "Manufacture of Methamphetamine," Fr. Crim. Code § 51. Prosecution of both charges is, therefore, multiplicitous and violates the defendant's right not to be put in jeopardy of life and limb twice for the same offense as guaranteed by the double jeopardy and due process provisions of the United States Constitution. *See State v. Decker* (Franklin Sup. Ct. 2005).

Dated: February 2, 2010

Respectfully submitted,

Marcia Pierce

Marcia Pierce
Selmer & Pierce, LLP
Counsel for Defendant

Transcript of Call to Centralia Police Department CrimeStoppers Hotline

October 5, 2009, 10:22 p.m.

Operator: CrimeStoppers Hotline. How may I direct your call?

Caller: Um, I'd like to report some criminal activity.

Operator: What is your location, sir?

Caller: I'm at the Oxford Street Shop-Mart. There's a guy here, and he's gotta be a meth dealer. I mean, he just bought two boxes of Sudafed cold medicine and some coffee filters, and I heard him ask the cashier if Shop-Mart had quit selling engine-starter fluid.

Operator: Can you describe this individual?

Caller: Well, he's kinda scuzzy looking, if you know what I mean. You know, shifty looking. He's a white guy, maybe mid-20s, with dark hair and one of those goatees. He's wearing jeans and a dark hooded sweatshirt.

Operator: I'll notify the officer on call. What is your name, sir?

Caller: Hey, I don't want to get involved. I don't need any grief. I just called because this guy is clearly up to something. He just left the store and is walking toward a red Jeep Cherokee in the parking lot.

Operator: Is there any other person with this individual?

Caller: Hey, I gotta go. I told you what I saw. [phone disconnected]

Excerpts from Suppression Hearing Transcript
February 22, 2010

Direct Examination of Officer Ted Simon by Assistant District Attorney Lynn Ridley

Q: Please state your name and occupation for the record.

A: Officer Ted Simon. I have been a police officer with the Centralia Police Department for 12 years, the last five in the narcotics division.

Q: Describe your training and experience in dealing with narcotics.

A: In addition to my five years in the division, I've attended Federal Bureau of Investigation courses every two years and have done additional training sponsored by the State of Franklin crime laboratory. I've been involved in over 200 narcotics arrests, including over 50 arrests for possession and manufacture of methamphetamine.

Q: Were you on duty on October 5, 2009?

A: Yes. I worked second shift, from 3 p.m. to 11 p.m.

Q: Sometime after 10 p.m. did you receive a call from dispatch?

A: Yes, at approximately 10:25 p.m. on October 5, I received a dispatch call indicating that a suspicious man had been seen at the Oxford Street Shop-Mart purchasing items that the caller said were used to make methamphetamine—coffee filters, two boxes of Sudafed cold medicine—and that the individual had also asked if engine-starter fluid was sold at Shop-Mart. Based on my experience and training, I know that all of those items are frequently used to manufacture methamphetamine; in fact, because of the increase in methamphetamine use, some stores, including Shop-Mart, won't let you buy more than two boxes of a cold medicine containing pseudoephedrine, such as Sudafed, at a time.

Q: Did the caller describe this suspicious individual?

A: Yes, I was informed by dispatch that the individual was a white male in his mid-20s dressed in jeans and a dark hooded sweatshirt. The caller also stated that the individual had dark hair and a goatee, and that he had been seen leaving the store and walking to a red Jeep Cherokee in the Shop-Mart parking lot.

Q: Did you take any action in response to this call?

A: Yes, I drove my squad car to the Shop-Mart, arriving at 10:28 p.m.—I had been only a few blocks away when I received the call.

Q: Did you find an individual matching the description there?

A: Not in the Shop-Mart parking lot. However, across Oxford Street, I saw a red Jeep Cherokee parked in front of Cullen's Food Emporium. There was no one in the vehicle, but after a minute I observed a white male with dark hair and a small beard, wearing jeans and a dark hooded sweatshirt, come out of Cullen's with a small paper bag in his hand. He got into the driver's seat of the red Jeep Cherokee.

Q: What happened next?

A: The individual appeared to be reaching over into the backseat, moving something around. He then started the vehicle and drove away. I followed him for a mile or so, until he stopped in front of an apartment building at 1230 8th Street. A man who had been sitting on the stoop stood up, walked over to the Jeep, and appeared to have a brief conversation with the driver. The Jeep Cherokee then pulled away from the curb and turned into the alley that runs between number 1230 and the next apartment building.

Q: What is the neighborhood like around 8th Street?

A: Well, in the last year we've seen an increase in calls and reports of criminal activity on 8th Street and the surrounding area. Only two months before we had busted a guy who had been growing marijuana plants in the basement of his apartment building on 8th Street, just a few blocks north of where the Jeep Cherokee stopped.

Q: Okay. Now, what did you do after the vehicle entered the alley?

A: I activated the squad car's lights and turned into the alley behind the Jeep Cherokee. The Cherokee came to a complete stop. I got out of the squad car and approached the vehicle. There was only the driver in the vehicle. I asked him for his driver's license so I could identify him. He took his license out of his wallet and gave it to me.

Q: Did you then identify the driver by his driver's license?

A: Yes, the name on the license was Brian McLain and the photo matched the driver.

Q: Do you see the driver, Brian McLain, in the courtroom today?

A: Yes, he is seated at the near side of the defense table.

Q: Let the record indicate that the witness has identified the defendant, Brian McLain.

Court: So noted.

Q: What happened next?

A: He demanded to know why I had stopped his vehicle. I responded that I had reason to believe that he had been purchasing items used in the manufacture of methamphetamine and I requested consent to search his vehicle.

Q: How did the defendant respond to that request?

A: He was angry and said, "Go ahead, I don't have anything to hide." He then made some derogatory comments to the effect that the police should be out catching "the real criminals." A search of his vehicle revealed a paper bag in the backseat like the one I had seen him carrying when he left Cullen's Food Emporium. Inside it was a box containing 50 matchbooks. I also found a plastic Shop-Mart bag containing a receipt dated October 5, 2009, coffee filters, a package of coffee, and two boxes of Sudafed cold tablets. Each box contained 20 tablets. In the glove box I found a plastic baggie containing what appeared to be one marijuana cigarette.

Q: What did you do then?

A: I informed the defendant that I was placing him under arrest. I handcuffed him, read him the Miranda warnings, and transported him to the Centralia West Side Police Station for booking. I found $320 in cash in his wallet. During questioning, the defendant directed us to a shed behind the building at 1230 8th Street where we found what is commonly referred to as a "meth lab": apparatus used to remove the pseudoephedrine in cold tablets and produce methamphetamine for sale to drug users. The defendant's meth lab contained equipment and materials used in producing methamphetamine, some of which showed recent use. Also, we found a glass beaker holding 18 grams of a whitish powder. Testing by the Franklin Crime Lab found it to be street-grade methamphetamine.

Q: Do you have an opinion, based on your training and experience, as to the street value of 18 grams of methamphetamine?

A: Yes, based on my experience, about $2,500.

Q: Based on your experience, is this an amount that would be kept for personal use only?

A: Absolutely not. It's more than 150 sales.

Assistant District Attorney Ridley: Thank you. No further questions.

Cross-Examination by Attorney Marcia Pierce

Q: Officer, had you responded to reports of criminal activity at the Oxford Street Shop-Mart before?

A: Sure, it's a busy place. I respond to a call there about once a month.

Q: And hadn't all those calls, before the night of October 5, 2009, been reports of shoplifting and, let me see here, three reports of vandalism?

A: Yes, that sounds accurate.

Q: So this was the first time you'd had a report of someone purchasing items for the manufacture of methamphetamine at that Shop-Mart store?

A: Yes, it was.

Q: Those other calls, for shoplifting and vandalism, were all made by individuals identifying themselves as either a Shop-Mart manager or an employee, weren't they?

A: Yes, they were.

Q: But the individual making the call to CrimeStoppers on October 5th didn't leave his name or otherwise identify himself, did he?

A: No, he didn't.

Q: When you reached the Shop-Mart just five minutes after you were dispatched, did you look for the person who made the report?

A: No, I was looking for the red Jeep Cherokee.

Q: Buying coffee filters is not illegal, is it?

A: No.

Q: Nor is buying cold medicine?

A: No.

Q: What about asking a store employee if the store stocks engine-starter fluid?

A: No, that's not illegal.

Q: Did the anonymous CrimeStoppers caller mention that, in addition to the coffee filters, the defendant purchased a package of coffee at the same time?

A: No, that wasn't in the report I received.

Q: Does the Shop-Mart sell food?

A: Well, it sells some snack items.

Q: But it's not a grocery store that sells meat and fresh produce, is it?

A: No, it's mainly a convenience store.

Q: So there wouldn't be anything unusual about someone stopping by the Shop-Mart and then going to Cullen's Food Emporium to buy groceries, would there?

A: No, I suppose not.

Q: Franklin law doesn't prohibit an individual from buying more than two boxes of Sudafed cold medicine, does it?

A: No, it doesn't.

Q: So it's only a Shop-Mart policy to allow a maximum purchase of two boxes at a time, isn't it?

A: Yes, that's true.

Q: Isn't it true that two boxes, containing a total of 40 tablets, would not be enough to produce any significant quantity of methamphetamine?

A: By itself, maybe.

Q: Did the defendant ever exceed the speed limit or violate any motor vehicle law during the entire time that you followed him?

A: No, not that I could observe.

Q: You stated that two months before you arrested the defendant, your department arrested a man for growing marijuana in his apartment building on 8th Street, right?

A: Correct.

Q: But you had never arrested an individual on 8th Street for maintaining a meth lab before?

A: No, that was the first meth operation we discovered on 8th Street.

Q: You also arrested my client for possession of marijuana?

A: Yes.

Q: And you were wrong about that?

A: The Crime Lab tests came back negative for marijuana.

Atty. Pierce: Thank you. No further questions.

Redirect by Assistant District Attorney Ridley

Q: Have you had any reports of criminal activity that originated from the Oxford Street Shop-Mart that turned out to be erroneous?

A: No. Since I've been assigned to this beat, every report I've received in regard to that Shop-Mart has resulted in a criminal report being filed or an arrest.

Attorney Ridley: Thank you.

Court: The witness is excused.

LIBRARY

MPT-1: *State of Franklin v. McLain*

FRANKLIN CRIMINAL CODE

§ 42. Possession with intent to distribute or deliver methamphetamine

(1) Except as authorized by this chapter, it is unlawful for any person to knowingly possess, with intent to distribute, a controlled substance, to wit, methamphetamine. Intent under this subsection may be demonstrated by, *inter alia*, evidence of the quantity and monetary value of the substances possessed, the possession of paraphernalia used in the distribution of controlled substances, and the activities or statements of the person in possession of the controlled substance prior to and after the alleged violation.

(a) If a person knowingly possesses, with intent to distribute, 15 or more grams but less than 100 grams of methamphetamine, the person is guilty of a felony.

§ 43. Possession of equipment or supplies with intent to manufacture methamphetamine

(1) No person shall knowingly possess equipment or chemicals, or both, for the purpose of manufacturing a controlled substance, to wit, methamphetamine. . . .

(b) A person who commits an offense under this section is guilty of a felony.

§ 44. Possession of precursor chemicals for methamphetamine production

(1) It is unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, or their salts, isomers, or salts of isomers with intent to use the product to manufacture a controlled substance, to wit, methamphetamine. . . .

§ 51. Manufacture of methamphetamine

(1) It is unlawful for any person to knowingly manufacture methamphetamine. "Manufacture" means to produce, compound, convert, or process methamphetamine, including to package or repackage the substance, either directly or indirectly by extraction from substances of natural origin or by means of chemical synthesis. Any person who violates this subsection is subject to the following penalties: …

(b) A person who manufactures 15 or more grams but less than 100 grams of methamphetamine is guilty of a felony.

State v. Montel
Franklin Court of Appeal (2003)

We granted the state leave to appeal an interlocutory order granting the defendant's motion to suppress evidence obtained by police as the result of a *Terry* stop.

Responding to reports of gunfire at 220 North Street, Franklin City Police, led by Officer Tom Kane, spoke with Sam Barber, who told them that two men had shot at him through a fence while he was in his yard. He said he did not see the shooters, but a witness told police he had seen a white Mazda speed away shortly after the shots were fired. Officer Kane knew that Barber was a gang member and that his gang and a rival gang were involved in recent shootings.

Later that day, Officer Kane asked Barber if he had any further information about the shooting. Barber said that he had nothing to add about his own shooting, but that he did have information about another shooting that same day. Barber said that his cousin told him that she witnessed gunfire on Elm Street, in the same neighborhood, and that the shots came from two cars, a white Mazda and a blue Honda with license plate SAO905. Barber refused to give police his cousin's name or any information about her. Using the license number, Officer Kane learned that the Honda belonged to Ray Montel, who Kane knew had recently been arrested in a nearby town on a firearms charge, and who was also known to be a member of the rival gang. The police were unable to locate Montel that evening, and did not find any evidence of the Elm Street shooting, such as bullet damage or spent shell casings. Nor were there any calls to 911 to report the shooting. A week passed with no further investigation of the Elm Street shooting. Then, Officer Kane and his partner saw Montel drive by. They stopped the car and questioned Montel, who denied any knowledge of either shooting. The officers found two guns in the car, and Montel was charged with various firearms offenses.

Montel moved to suppress all evidence gathered in connection with the stop of the car. The trial court granted the motion, holding that "once the tip of the Elm Street shooting proved unreliable, the officers' mere hunch that Montel was involved in criminal activity was not enough to establish a reasonable and articulable suspicion of criminal activity adequate to stop his car."

The sole issue on appeal is whether the police acted reasonably in stopping Montel and his passengers. Our review is *de novo*.

The Fourth Amendment protects individuals from unreasonable searches and seizures. Police, however, have the right to stop and interrogate persons reasonably suspected of criminal conduct. Police may make a brief investigatory stop if they have a reasonable

suspicion that criminal activity may be afoot. Such stops by police are often called "*Terry* stops" after the leading case, *Terry v. Ohio*, 392 U.S. 1 (1968). The test is whether the officers have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity" at the time. *Id*. To determine whether the suspicion is reasonable, courts will look at the totality of the circumstances of each case.

A tip from a source known to police—especially one who has provided information in the past—may be sufficient, in and of itself, to warrant a *Terry* stop. But an anonymous tip is different; it must be corroborated, such as by investigation or independent police observation of unusually suspicious conduct, and must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.*, 529 U.S. 266, 272 (2000).

In *State v. Sneed* (Franklin Ct. App. 1999), the defendant was stopped after briefly visiting a house that police had under surveillance after receiving a tip from an untested confidential informant that heroin dealing was taking place there. We held that the police did not have reasonable suspicion to stop the defendant, noting that there was no testimony that the area was known for drug trafficking or that there had been short-term traffic to the house. The officers in *Sneed*, as here, based their stop solely on information received from an informant without having that information verified by independent investigation.

The state argues that the tip here was reliable because of the officers' interactions with Barber, and because Barber was able to report a crime supposedly witnessed by his cousin. But this is not a case involving a "personal observation" or "firsthand account" of a crime, as in those cases finding that the facts justified a *Terry* stop. The "tip" was hearsay. There was no way of knowing Barber's cousin's state of mind at the time she gave her information, or whether she could reliably and accurately relate events.

Most importantly, the police had specific reasons to doubt the veracity of the tip about the Elm Street shooting by the time they stopped Montel: no physical evidence of gunfire had been found, no 911 calls or other reports about the supposed shooting had been made, and the officers' investigation had not uncovered any other evidence that the shooting had occurred. In fact, the investigation undermined the tip's reliability. Officer Kane testified at the suppression hearing that it was "typical" for neighborhood shootings to be reported to 911, and for evidence such as "ballistics damage or shell casings" to be found in the area, or reported gunshot wounds. He said their investigation of the Elm Street shooting had found no such evidence.

As noted, when police stop someone in reliance on a tip, "reasonable suspicion" that a

crime has been or is about to be committed "requires that the tip be reliable in its assertion of illegality." *J.L.,* 529 U.S. at 272. The license plate number provided a solid means of identifying Montel, but it did not corroborate the tip's assertion that he had been involved in a shooting on Elm Street. The fact that the area of Franklin City where Montel's car was stopped is a high-crime area did not warrant the stop. *See State v. Washington* (Franklin Ct. App. 1988). A person's mere presence in a high-crime area known for drug activity does not, by itself, justify a stop.

Because the tip relating to the identification of the cars had a relatively low degree of reliability, more information was necessary to establish the requisite quantum of suspicion. The tip, standing alone, was insufficient to provide reasonable suspicion for the officers' stop of the Montel vehicle.

In the end, the police had little more reason to suspect Montel of specific criminal activity when they stopped him than they did before receiving the hearsay tip. They suspected him of being affiliated with a gang and knew of his recent arrest. And they knew that there had been gang violence in the neighborhood. But the government does not suggest that the police had information tying Montel personally to any of this violence. The only possible crime to which the police could tie Montel—the Elm Street shooting—was the one that appeared, in all likelihood, never to have occurred. The district court correctly suppressed the evidence derived from the stop.

Affirmed.

State v. Grayson
Franklin Court of Appeal (2007)

PER CURIAM. We granted Ron Grayson, the defendant in this drug-possession case, leave to appeal from an order denying his motion to suppress evidence obtained by police in the course of an investigatory stop. The facts are undisputed. An anonymous caller reported to police that Grayson would be leaving an apartment building at a particular time in a particular vehicle with a broken right taillight. The caller also said that Grayson would be traveling to a particular motel and would be carrying cocaine in a briefcase.

Police proceeded to the apartment complex where they observed a vehicle matching the caller's description. They saw a man leave the apartment, carrying a backpack, and enter the vehicle and drive off. The officers followed the car as it took the most direct route to the motel reported by the caller. Police stopped the vehicle "just short" of the motel and, during a weapons search, discovered illegal drugs on the driver.

The law on the subject of the sufficiency of anonymous tips as supporting the "reasonable suspicion" necessary to make a valid investigative stop is well-known and need not be repeated here. *See State v. Montel* (Franklin Ct. App. 2003). The sole question here is whether the anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make the stop. We consider it a close question. But we are satisfied that the stop was appropriate under the totality of the circumstances.

Although not every detail of the tipster's "story" was verified, the other information was sufficiently corroborated—in particular, the man left the apartment building described by the tipster, entered a vehicle matching the description provided by the tipster, and followed a route consistent with that predicted by the tipster. We believe these facts meet the "independent police corroboration" requirement and we therefore affirm the trial court's order.

Affirmed.

State v. Decker
Franklin Supreme Court (2005)

Defendant George Decker was charged with first-degree burglary and second-degree assault. He moved to dismiss the charges as multiplicitous, claiming that the latter charge is a lesser-included offense of the former. The court of appeal affirmed the district court's denial of Decker's motion to dismiss. We reverse.

The complaint charged that Decker entered a hotel room registered to his girlfriend, Mary Carls, through a locked door and without her permission. Once in the hotel room, Decker assaulted Carls. Hotel security caught Decker and detained him until he was arrested.

Where the same event or transaction gives rise to two statutory offenses, courts must determine if one constitutes a lesser-included offense of the other. This analysis begins with a comparison of the elements of both offenses, known as a "strict elements" test. If the elements of the "greater" crime necessarily include the elements of the "lesser" crime, then the latter offense is a lesser-included offense and prosecution of both crimes violates double jeopardy. *Blockburger v. United States*, 284 U.S. 299 (1932). This test is codified in Franklin Criminal Code § 5(2). A lesser-included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense.

If, however, each of the offenses contains at least one element that the other does not, the test is not satisfied. *Id.* For example, in *State v. Jackson* (Fr. Ct. App. 1992), a crack cocaine pipe containing cocaine residue was found on the defendant. He was tried for possessing the cocaine inside the pipe in an amount less than five grams. He moved the court for a jury instruction on the lesser-included offense of possessing drug paraphernalia, rather than cocaine. The court denied the motion and the defendant was convicted for possessing cocaine. Affirming the district court's ruling, the court of appeal stated:

> Allied offenses of similar import are offenses the elements of which correspond to such a degree that the commission of one will result in the commission of the other. The elements of drug possession and possession of paraphernalia do not so correspond. One may be in possession of drugs, but not paraphernalia. One may possess paraphernalia without possessing drugs. The offenses are not therefore allied offenses of similar import because one offense may be committed without the other.

Here, our comparison begins with the elements of first-degree burglary, a violation of Franklin Criminal Code § 23. To extract the elements, we determine what the statute requires. Section 23 specifies that a burglary is committed when "a defendant knowingly enters an occupied structure with the intent to remain therein unlawfully with the intent to commit a crime of violence . . . including assault and causes serious bodily injury to that person." Thus we can define the elements in this case as the defendant (1) knowingly, (2) entered and remained unlawfully, (3) in a building or occupied structure, (4) with intent to cause bodily injury, and (5) causing serious bodily injury to that person.

The elements of second-degree assault, a violation of Franklin Criminal Code § 12, are that the defendant (1) with intent to cause bodily injury to another person, (2) caused serious bodily injury to that person.

Therefore, under § 23, the elements of burglary include the elements of assault. Thus, assault is a lesser-included offense of first-degree burglary. *See State v. Astor* (Fr. Ct. App. 1996) (to satisfy first-degree burglary, "the State must prove each and every element of the offense of assault and the fact-finder must determine . . . an assault was committed during the burglary"; if so, the same assault cannot constitute a separate offense). Although the elements of first-degree burglary include, in almost identical form, the elements of assault, Franklin case law does not require a strict textual comparison such that only where *all* the elements of the compared offenses coincide *exactly* will one offense be deemed a lesser-included offense of the greater. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are multiplicitous.

Because the elements of first-degree burglary necessarily include the elements of assault, assault is a lesser-included offense of first-degree burglary. We therefore conclude that it was error to deny the motion to dismiss.

Reversed.

FILE

MPT-2: *Logan v. Rios*

Dowell, Brown & Pope
Attorneys at Law
944 Metro Square Plaza
Bedford, Franklin 38701

MEMORANDUM

To: Applicant
From: Norman Brown, Supervising Attorney
Re: Logan v. Rios
Date: February 23, 2010

We represent Trina Rios, owner of Trina's Toys, a business in Bedford, Franklin. She has been sued by Karen Logan. Logan claims to have been injured when she slipped and fell while shopping at Trina's Toys. I've attached the complaint. We answered the complaint, denied the key allegations, and raised the affirmative defense of contributory negligence. We have conducted some discovery and investigation.

Under the local rules, we must attend an early dispute resolution (EDR) conference, conducted by an EDR judge. Although we have not completed our discovery, these settlement conferences are conducted early. Local Rule 12 describes the purpose of this conference.

In preparation for the EDR conference, please draft Item 6 of the EDR statement. I will use your draft to prepare the final submission. Item 6 of the EDR statement requires us to candidly "discuss . . . the strengths and weaknesses of" our case in the statement. As directed in Item 6, use the jury instructions to organize your discussion of the claim and affirmative defense. You will need to carefully review the evidence gathered to date and identify and evaluate the proof available for each legal element of the claim and the affirmative defense. Where relevant, provide citations to case law that supports your analysis; you need not provide citations to the factual record.

Do not address the other items required by the statement and do not address Logan's damages; I will prepare the portion of the statement concerning her medical condition, including her pain and suffering and medical costs.

Green County Local Rule 12. Early Dispute Resolution

Before trial, the parties shall participate in Early Dispute Resolution (EDR). EDR promotes direct communication between parties about possible claims, defenses, and supporting evidence, under the supervision of the EDR judge, a neutral evaluator. The EDR conference gives the parties an opportunity to narrow the issues and possibly settle the case with the assistance of the EDR judge. During the conference, the EDR judge may require the parties to assess all claims and defenses with the aim of settling the case. The EDR judge may meet with the parties separately or together. The conference discussion is confidential and will not be admissible at trial.

Five days prior to the EDR conference, each party must submit an EDR statement using Form 12. The EDR statement assists the EDR judge in evaluating each party's case. It may be used solely by the EDR judge, and is confidential, and may not be used at trial or shared with the other party or parties.

Form 12: Early Dispute Resolution Statement

Each party must provide the following information concerning the case:

1. Name of party and trial counsel.
2. Short description of the case.
3. Legal theories presented by the case.
4. Evidentiary issues likely to be raised at trial.
5. Damages sought.
6. A candid discussion of the strengths and weaknesses of the party's claims, counterclaims, and/or defenses and affirmative defenses. Parties are advised to use the jury instructions to identify each element of the claims, counterclaims, and/or defenses and affirmative defenses stated. For each element that must be proven, parties should discuss the specific strengths and weaknesses of the evidence gathered to date relating to that element in light of the jury instructions and any commentary thereto.
7. The approximate number of witnesses to be called and the length of time that the party estimates will be needed for the trial.

STATE OF FRANKLIN

IN THE CIRCUIT COURT OF GREEN COUNTY

Karen Logan,	)	
Plaintiff,	)	
v.	)	
	)	**2009-CV-3420**
Trina Rios,	)	
doing business as Trina's Toys,	)	**COMPLAINT**
Defendant	)	

1. Plaintiff Karen Logan, a resident of Green County, Franklin, on January 27, 2009, entered the defendant's premises, Trina's Toys, located at 727 Mill Street, City of Bedford, County of Green, Franklin, during business hours, for the purposes of shopping in the store.
2. Defendant Trina Rios, a resident of Green County, Franklin, owns the building at 727 Mill Street, Bedford, Franklin, and conducts a business there under the name Trina's Toys.
3. On the date mentioned, the defendant had a duty to exercise ordinary care to see that her premises were reasonably safe for persons lawfully on the premises, including the plaintiff.
4. In violation of this duty, the defendant negligently permitted and maintained on the business premises the following unsafe conditions, creating an unreasonable risk of injury to persons lawfully on the premises, including the plaintiff: water accumulating on the floor where customers shopped and failure to warn that water had accumulated on the floor.
5. On January 27, 2009, the plaintiff was injured when she slipped and fell, owing to the unsafe conditions alleged in Paragraph 4.
6. As a proximate result of the negligence of the defendant, the plaintiff suffered an injury to her ankle, which has caused her great pain and suffering, lost wages, and a lost scholarship. The plaintiff has also incurred medical, hospital, and related expenses.

Wherefore the plaintiff requests judgment against the defendant in the sum of $30,000 or more, including costs of suit and such other and further relief as this court deems just and proper.

Dated: July 15, 2009

Barbara Santos

Barbara Santos, attorney for Karen Logan, Plaintiff

LING'S INVESTIGATIVE SERVICES
Suite 330
1800 Jenson Avenue
Bedford, Franklin 38701

I was asked to investigate certain aspects of an incident that occurred at Trina's Toys on January 27, 2009, on which date Karen Logan alleges she fell. Logan claims she hurt her ankle when she slipped and fell in a puddle of water in the store. Logan filed suit against Trina Rios on July 15, 2009. She claims the ankle injury caused her to lose her part-time job at Fresh Grocers and to lose her basketball scholarship at Franklin State University.

I contacted Joe Nguyen, who was Logan's supervisor at Fresh Grocers. Nguyen confirmed that Logan had worked part-time at the office of Fresh Grocers for the six months prior to her alleged fall, working about 15–20 hours a week, and earning $9/hour entering data into a computer. He confirmed that her employment was terminated February 2, 2009, after she failed to report to work for three days and failed to call in. Nguyen said he knew nothing about her falling or having hurt her ankle.

I tried to contact the women's basketball coach at Franklin State University (FSU), but he would not talk to me without a subpoena. However, I read back issues of the FSU student newspaper online. For the 2008–09 academic year, Logan was a second-year basketball player for FSU on scholarship. According to the articles I read, she did not get much playing time. I also found an article that reported that she was dropped from the team a couple of weeks before her visit to Trina's Toys due to "academic difficulties." I did confirm that Logan is currently enrolled at FSU.

Rios's employees Nick Patel and Naomi Feldman confirm that, on the date of the incident, Feldman called Green County Emergency Services and paramedics responded and took Logan to the emergency room. I cannot learn anything more about her medical condition without a medical release signed by Logan.

Patrick Ling

Patrick Ling
December 11, 2009

Excerpts from 1/14/10 Deposition of Karen Logan

EXAMINATION BY NORMAN BROWN, COUNSEL FOR TRINA'S TOYS

Attorney: Please state your name, address, occupation, and age.

Logan: Karen Logan, 2044 North Fifth Street, Apt. 23, Bedford, Franklin, student at Franklin State University. I am 20 years old.

Attorney: Were you at Trina's Toys on January 27, 2009?

Logan: Yes, my little sister had a birthday coming up and I wanted to get her a gift.

Attorney: Were there other customers there at the time?

Logan: A mom and her little boy, a toddler, who kept getting in and out of his stroller, and some other people.

Attorney: What time did you arrive at the store that day?

Logan: Around 11:30 in the morning. I was just looking around, walking up and down some aisles, and then I fell.

Attorney: Where were you when you fell?

Logan: I had just turned into the games and puzzles aisle and down I went.

Attorney: As you turned into the aisle, what were you doing?

Logan: Well, I had just been playing Wii bowling at a Wii display at the end of the aisle.

Attorney: Tell me more about that. What is a "Wii"?

Logan: A Wii is a video gaming system. You hold a controller and move as if you were really bowling; the action shows up on the video screen. There was a sign inviting people to "test your Wii bowling skills." So I did. When I finished, I started walking down the aisle where the games were so that I could check them out.

Attorney: Did you look at the floor as you proceeded down the aisle?

Logan: No, I was looking at the games on the shelves.

Attorney: Was there anything blocking your view of the floor?

Logan: No, but why would I look at the floor? I was looking at the games.

Attorney: Was there any problem with the lighting in the aisle where you fell?

Logan: I don't think so. The whole store was brightly lit.

Attorney: Had you been in this aisle prior to falling?

Logan: No, I was at the end of the aisle Wii bowling. I then walked down the game aisle, took a few steps, and fell.

Attorney: Tell me how you fell.

Logan: I took a few steps into the aisle, saw the games ahead, started toward them, and then I felt my right foot sort of slide, and then twist around, and then it just slipped out from under me, and that's when I landed in the puddle.

Attorney: Do you know what caused you to fall?

Logan: Yeah, there was water on the floor.

Attorney: How much water was there?

Logan: I fell into a puddle of water, a couple of feet long, just a trail of water.

Attorney: How wide was the trail of water?

Logan: Several inches, maybe a foot.

Attorney: How deep was the water?

Logan: Oh, pretty thin. The floor there was level. There was just a thin puddle of water.

Attorney: What happened after you fell?

Logan: I took a minute to catch my breath. I felt sort of jolted. Then my right ankle began to hurt, really badly. I had been sitting there for a minute or so, when a customer asked if I was okay. I said, "No, I fell and I'm hurt." I started to get up, but she said I should wait and she would get help. I took off my shoes while I sat there.

Attorney: Did she get help?

Logan: A store employee came up and asked if I was okay. I said, "No, I fell and I'm hurt." He helped me get up and get to a chair near the front of the store. He brought my shoes and backpack to me—I had taken off my pack after I fell.

Attorney: Describe the shoes you were wearing. Were they high heels?

Logan: They were backless sandals with heels not more than three inches high. I had just gotten them the week before the accident.

Attorney: What kind of sole and heel were on the sandals—leather, rubber, what?

Logan: Leather, I'm pretty sure.

Attorney: What do you mean by backless?

Logan: You just slide your feet into the sandals; there is no strap around the heel.

Attorney: Had you ever worn the shoes before?

Logan: Yes, at least three times. They're very comfortable. Everyone wears them.

Attorney: Had it been raining or snowing that day?

Logan: No. I remember it was mild. And it was sunny.

Attorney: Do you know how the water got on the floor?

Logan: No.

Attorney: Were you carrying a water bottle on the date you fell?

Logan: Yeah, I always carry one. I had it in the mesh pocket of my backpack.

Attorney: How much water did the bottle contain?

Logan: It was the size I usually buy at the grocery store, a 16-ounce bottle.

Attorney: When you left your apartment, was the water bottle full?

Logan: Yes. I just grabbed an unopened bottle as I left my apartment.

Attorney: Did you drink any water from the bottle before you arrived at Trina's Toys?

Logan: Maybe. I don't remember.

Attorney: Did you spill water on the floor in the aisle where you fell?

Logan: Of course not. The bottle was in a pocket in my backpack. I told you that.

Attorney: Do you know how the water got on the floor in the aisle where you fell?

Logan: Someone spilled something, but I don't really know. I know that the little boy who was in and out of the stroller had a sippy cup with him.

Attorney: A sippy cup?

Logan: You know, a cup with a lid for toddlers. It has a slot in the lid so the toddler can drink but won't spill all over. It's a step between a baby bottle and a regular cup.

Attorney: But you didn't see the little boy spill or drop the sippy cup?

Logan: I wasn't paying too much attention to him.

Attorney: Regarding your water bottle, was it still in your backpack after you fell?

Logan: Absolutely.

Attorney: Did you see anyone—including the little boy—spill where you fell?

Logan: Not that I saw, but I wasn't watching people to make sure they didn't spill.

Attorney: By the way, did you use your cell phone while in the store?

Logan: I called a friend right after I bowled on the Wii to tell him what my score was.

Attorney: Were you talking on the phone when you fell?

Logan: No; I hung up just as I started down the aisle.

* * * *

Attorney: You said you lost wages as a result of your ankle injury?

Logan: Yes, I had been working 20 hours a week at Fresh Grocers, entering data on the computer. I had been there for six months at the time of the accident.

Attorney: Do you still work there?

Logan: No, they told me I could not work anymore because I fell and was hurt.

Attorney: How did the fall affect your being able to work there?

Logan: I don't know. I missed a couple days of work and then I came with my ankle all wrapped up and I was on crutches. They said I could not work there anymore.

Attorney: Did your work at Fresh Grocers require you to stand?

Logan: No, I sat at a computer.

Attorney: You said you missed a couple days of work. Did you contact your supervisor at Fresh Grocers to let him know that you would be absent?

Logan: No, I was in pain and was overwhelmed by school and getting used to crutches.

* * * *

Attorney: Is it your claim that you lost your basketball scholarship because of this injury?

Logan: Yes, it is. The coach said I wasn't contributing to the team anymore. The season was well under way and I couldn't practice due to the injury, and that obviously affected my playing. So this fall and the injury made me lose my scholarship.

Attorney: When did you learn that you lost the scholarship?

Logan: I don't remember the exact day.

Attorney: Did the coach give any reason for your losing the scholarship other than that you weren't contributing to the team anymore?

Logan: Not that I recall. I was really upset.

Attorney: Didn't the coach tell you your grades were the reason you lost the scholarship?

Logan: I don't remember him saying anything about my grades.

Attorney: Well, how were your grades last year?

Logan: They were good until this injury caused me to miss a lot of my classes.

Excerpts from 1/15/10 Deposition of Nick Patel

EXAMINATION BY BARBARA SANTOS, COUNSEL FOR KAREN LOGAN

Attorney: Please tell me your name, address, and occupation.

Patel: Nicholas Patel, but I go by Nick. I live in Bedford, 835 Jefferson Street. I work part-time at Trina's Toys and I go to school at Franklin State University.

Attorney: Were you working at Trina's Toys on January 27, 2009, the day Ms. Logan fell?

Patel: Yes; I clean up, stock shelves, and wait on customers.

Attorney: What were your duties regarding cleaning the store at the time Ms. Logan fell?

Patel: Every evening after we close, I sweep and mop the entire floor. In the morning, before we open, I dust and wipe down the counter area. Then I clean anything else my boss tells me to. So, on the night of January 26, 2009, the night before Ms. Logan fell, I swept and mopped the floor.

Attorney: Did you see Ms. Logan fall?

Patel: No, I heard a customer say that someone had fallen and needed help, so I went to see what had happened.

Attorney: What did you see?

Patel: I saw a girl, about my age, sitting on the floor in aisle 3, with her shoes off, rubbing her right foot and saying she was hurt. I later found out she was Karen Logan. There was a water bottle next to her on the floor. Also, I saw her cell phone and her shoes on the floor right next to her.

Attorney: Did you see any water?

Patel: Yes, she was sitting in a puddle of water.

Attorney: Describe the water.

Patel: It was a thin puddle, about a couple feet long.

Attorney: Are you sure it was water?

Patel: Well, it certainly looked like it. I cleaned it up later, and it cleaned up just like water—no color or odor.

Attorney: When was the last time you were in aisle 3 before you saw Ms. Logan?

Patel: I was in aisle 3 a couple of times that morning, restocking games. She fell around noon; I guess I had been there just before we opened at 10 a.m. I don't remember being in aisle 3 after we opened. I mainly stayed at the counter. We had a steady stream of customers in and out of the store.

Attorney: How often are you supposed to patrol all the aisles?

Patel: Once every hour.

Attorney: Did you do so at 11 a.m.?

Patel: No.

Attorney: Why not?

Patel: My girlfriend called me and I guess I just forgot. And we were busy.

Attorney: Did you see any water on the floor when you were in aisle 3 around 10 a.m.?

Patel: No.

Attorney: Are there any sources of water in the store? Any squirt guns or water-related games?

Patel: No, not in the main part of the store where customers are. There's a bathroom in the back. And the squirt guns are not filled with water. Besides, we only sell them in summer.

Attorney: Any water leaks in the store's ceiling?

Patel: No.

Attorney: Do you know how the water got on the floor?

Patel: I think Ms. Logan spilled it. I saw a water bottle next to her on the floor. It was empty. I put it in her backpack when I helped her up—I could tell the bottle was empty.

Attorney: Did you or anyone else see her spill water?

Patel: I didn't see her spill, and I don't know of anyone else who saw her spill, either.

Attorney: So you have no reason to conclude that she spilled her water other than that you saw the water bottle?

Patel: No, I guess not.

Attorney: How many other customers were there in the store between 10 a.m. and noon?

Patel: I don't know; a handful. Only one, two or three at a time, but there was a constant flow of customers. One would leave and another come in. I stayed busy at the counter. Maybe 10 or 12 customers altogether.

Attorney: It's a toy store, so is it fair to say there were children in the store during that time?

Patel: Yes, there are always kids in the store.

Attorney: So it is possible that a child spilled something in the store?

Patel: I suppose so, but I doubt it.

Attorney: Was there any warning sign in aisle 3, indicating that there was water on the floor?

Patel: No. We didn't know there was any water there, so how could we put out a sign?

Attorney: Does the store have any warning cones or signs to put out?

Patel: No. We don't have spills like that.

Attorney: Had anyone told you or any employee that there was water on the floor?

Patel: No. If they had, I would have checked it out and cleaned it up.

Attorney: Are you aware of anyone else having fallen in the store?

Patel: No.

Attorney: Do you have any other knowledge of what might have caused Ms. Logan to fall other than the water on the floor?

Patel: Well, she had been wearing these shoes—sandals, sort of, with high heels—that looked pretty hard to walk on—not too steady. And she had a backpack and it weighed a ton—I had to pick it up and take it to her. So maybe she lost her balance because of the sandals and the backpack and then fell. Or maybe she just twisted her ankle on those sandals and then she spilled some water so we would think she fell on the water. Or maybe she spilled some water and fell on it.

Attorney: Did you see Ms. Logan fall?

Patel: No, I just saw her after she fell.

Attorney: Do you know if anyone saw her fall?

Patel: Not that I'm aware of.

Attorney: Did she tell you why she fell?

Patel: She said she slipped on the water and then she pointed to the water.

Attorney: Do you have any reason to believe she was lying?

Patel: No. I just don't know where the water came from.

Attorney: What products are displayed in aisle 3?

Patel: That's the aisle with puzzles, games, and video games.

Attorney: Are there any overhead displays?

Patel: No, but we try to display the puzzles and games so that they are attractive to customers. We had a computer-animated display of games right in the middle of the aisle near where I found Ms. Logan. At the head of the games aisle we had a Wii on display for customers to play some of the Wii sports video games.

Attorney: Were there any displays sticking out from the shelves?

Patel: No. Not that I remember—not in that aisle.

Attorney: What is the composition of the floor in aisle 3—carpet, tile, what?

Patel: It is tile. It is easy to clean up. I mop it up every evening and so I know it is real level there. We even make sure we use a cleaner that does not make the floor slippery. The boss, Trina, wants to be sure kids don't slip and fall.

Attorney: Is it fair to say that if wet, the tile floor would be slippery?

Patel: I suppose so.

Attorney: Describe the lighting in aisle 3.

Patel: Overhead lights. We want the customers to be able to see the toys without any trouble, so it is pretty bright.

Attorney: Were there any other employees on duty that day?

Patel: Yes, the boss, Trina, was in the back storeroom all morning checking inventory. Naomi Feldman and I were at the counter.

* * * *

LIBRARY

MPT-2: *Logan v. Rios*

FRANKLIN SUPREME COURT APPROVED JURY INSTRUCTIONS

Excerpts from Jury Instruction 35: Premises Liability with Contributory Negligence Claimed

The plaintiff seeks to recover damages for an injury that occurred while on the defendant's premises. In order to recover damages, the plaintiff has the burden of proving by a preponderance of the credible evidence that

1. There was a condition on the defendant's property which presented an unreasonable risk of harm to people on the property.
2. The defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.
3. The defendant could reasonably expect that people on the property would not discover such danger and the defendant failed to warn of the unreasonable risk of harm to people on the property.

If you find that the defendant had or should have had notice of a condition that presented an unreasonable risk of harm and failed to use ordinary care to prevent harm under the circumstances, then the defendant was negligent.

* * * *

If you find that the plaintiff has proved that the defendant was negligent, then you should consider the defendant's affirmative defense of contributory negligence. In order to defeat the plaintiff's claim, the defendant must prove by a preponderance of the credible evidence that

The plaintiff was guilty of negligence that was a direct and proximate cause of the occurrence and the resulting injuries and damages, if any, sustained by him or her, in that the plaintiff [*insert the ways in which the plaintiff was negligent here*].

If the defendant proves all of these items by a preponderance of the credible evidence, your verdict should be for the defendant.

* * * *

Commentary (Duty of Owner of Land): The Franklin Supreme Court has eliminated the distinction between licensees and invitees.

The Court has ruled that the owner of a premises, though not an insurer of his customers' safety, owes his customers the duty to exercise reasonable care to maintain his premises in a reasonably safe condition for use by his customers. In determining what constitutes reasonable care, one issue is the length of time an unsafe condition has existed. In *Owens v. Coffee Corner* (Fr. Ct. App. 2007), the premises owner was liable for coffee that had "just spilled" because it was reasonably foreseeable that coffee-shop customers would spill coffee. On the other hand, the owner of a camera shop was not liable for soda that had "just spilled," because it was not reasonably foreseeable that soda spills would occur in a camera shop, where no refreshments were available. *Chad v. Bill's Camera Shop* (Fr. Ct. App. 2006). In *Rollins v. Maryville Mini-Golf Park* (Fr. Ct. App. 2002), the owner of a mini golf and recreation park was liable when a ketchup spill went unnoticed for an hour because the park had a snack bar, the owner knew that children frequently spilled food items, and the owner had an hour to discover and remove the spill that created the unreasonable risk.

A business owner is not liable for harm caused by a condition on his premises that is open and obvious, nor must the owner warn of conditions that are open and obvious. *Townsend v. Upwater* (Fr. Sup. Ct. 2000). Whether a condition is open and obvious may present a question of fact for the trier of fact to determine. The test to determine if a condition is open and obvious is objective. The court does not consider whether the plaintiff actually saw the alleged condition and the risk posed but whether an average user with ordinary intelligence would have been able to discover the risk presented upon casual inspection. *Roth v. Fiedler* (Fr. Sup. Ct. 1987).

There is one exception to the "open and obvious" rule: the "distraction exception" set forth in *Ward v. ShopMart Corp.* (Fr. Sup. Ct. 1991). The distraction exception applies when the owner has reason to suspect that guests or workers may not appreciate the danger or obvious nature of the condition because they are distracted or preoccupied. In *Ward*, carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located in a doorway. Although ordinarily a post in the middle of a doorway would be an open and obvious condition, the distraction exception applied because it was foreseeable that customers would be leaving the store carrying large, unwieldy packages. In *Gardner v. Wendt* (Fr. Sup. Ct. 2000), the distraction exception applied when the plaintiff had failed to look at the floor he was walking on and fell

over a box left in the aisle because he was distracted by holiday decorations. The box in the aisle was an open and obvious condition. The Court reasoned, however, that where the owner has created a distraction, such as blinking lights or a mobile suspended from the ceiling, the owner has reason to suspect that individuals on the premises might not appreciate the danger or obvious nature of an unsafe condition. In such cases, the owner has a duty of reasonable care.

The distraction exception does not apply, however, where those claiming injury created the distraction. In *Brown v. City of De Forest* (Fr. Ct. App. 2005), the plaintiff could not recover where she had tripped on an uneven sidewalk while chasing after a runaway child. She admitted that her attention was diverted from the sidewalk by her concern for the child. The court held that the distraction exception did not apply because the distraction was the result of the plaintiff's concern for the child and her own inattentiveness to where she was going, and the city could not be held responsible.

Commentary (Contributory Negligence): If the jury determines that the plaintiff's contributory negligence is a proximate cause of the injury claimed, the jury must find for the defendant and against the plaintiff. The term "contributory negligence" means negligence on the part of the plaintiff that proximately caused the alleged injury. Contributory negligence is a complete bar to recovery.

Commentary (Burden of Proof): Proof by a preponderance of the credible evidence means that the jury must be persuaded, considering the evidence, that the proposition on which the party has the burden is more probable than not. The jury must evaluate the quality of the evidence, including witness testimony, and the weight to be given it.

Commentary (Proximate Cause): Proximate cause means a cause that, in the natural or ordinary course of events, was a substantial factor in producing the plaintiff's injury.

POINT SHEET

MPT-1: *State of Franklin v. McLain*

State of Franklin v. McLain

DRAFTERS' POINT SHEET

In this performance item, applicants' firm represents Brian McLain, who has been charged with violating various sections of the Franklin Criminal Code dealing with methamphetamine, a controlled substance. The charges are based on evidence seized from McLain after police, acting on an anonymous tip, stopped him for investigatory purposes. The tip was called in to the Franklin "CrimeStoppers Hotline" stating that a man had been seen at a convenience store purchasing items which, although innocent in themselves, are known ingredients of methamphetamine production, and leaving the scene in a red Jeep Cherokee. A Franklin police officer, responding to the tip, spotted McLain, who generally matched the personal description given by the tipster, and who was driving a red Jeep Cherokee in a relatively high-crime area. After brief questioning, McLain gave consent for the officer to search his car. The officer found the goods described in the tip, together with a small plastic bag containing what appeared to be a marijuana cigarette. McLain was arrested and booked, at which time police discovered $320 in cash in McLain's wallet. McLain then directed the police to a "meth lab" where they found chemicals and equipment that had been used to manufacture methamphetamine as well as 18 grams of the drug.

McLain was charged with three felony counts: possession of methamphetamine with intent to distribute, possession of equipment with intent to manufacture methamphetamine, and manufacture of methamphetamine—all in violation of the Franklin Criminal Code. He has moved to suppress all evidence seized by police on the ground that the officer lacked reasonable suspicion to stop him on the evening in question. He has also moved to dismiss the charge of possession of equipment with intent to manufacture methamphetamine on the ground that it is a lesser-included offense of manufacture of methamphetamine. Applicants' task is to draft the arguments in support of both motions.

The File consists of a memorandum from the supervising attorney describing the assignment (the task memo), the criminal complaint, the motion to suppress evidence and to dismiss Count Two, the transcript of the call to the Franklin CrimeStoppers Hotline, and portions of the transcript of the evidentiary hearing. The Library contains the relevant Franklin statutes and three cases—two relating to anonymous tips and investigatory stops, and one dealing with lesser-included offenses.

The following discussion covers all the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is left entirely to the discretion of the user jurisdictions.

I. Format and Overview

The task memo directs applicants not to prepare a separate statement of facts; however, applicants are expected to draft a detailed analysis in which they incorporate the relevant facts and address the applicable legal authorities. Applicants' work product should be written in persuasive "argument" form, pointing out (a) the legal standards governing the issues and (b) why, based on the relevant facts of record, those standards are or are not met in this case.

As stated in the task memo, applicants have two motions to discuss: a motion to suppress evidence on the ground that there was not reasonable suspicion for the officer to stop McLain and a motion to dismiss one of the three counts on multiplicity grounds.

II. Discussion

A. The Motion to Suppress

Applicants are asked to draft the argument portion of the brief in support of McLain's motion to suppress all evidence resulting from the stop. The legal standards applicable to investigatory stops by police (often called "*Terry* stops" after the leading case, *Terry v. Ohio*, 392 U.S. 1 (1968)) are described in *State v. Montel* (Franklin Ct. App. 2003). The Fourth Amendment protects individuals from unreasonable searches, but, under *Terry*, police officers have the right to stop and interrogate persons "reasonably suspected of criminal conduct"; the basic test is whether the officers have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity" at the time. To make that determination, courts will consider the totality of the circumstances of each case.

- Similar to the facts in *Montel*, the officer stopped McLain after an anonymous tip was called in to the Franklin CrimeStoppers Hotline. While a tip from a recognized (and familiar) police informant may be sufficient, in and of itself, to justify a *Terry* stop, where the tipster is anonymous, or unknown to the officers, there must be corroboration—usually by investigation or independent police observation of unusually suspicious conduct.
- Other important considerations in evaluating an anonymous tip are (a) whether the tipster's information is based on his or her personal observation or "firsthand account" of a crime (or, for example, whether it is hearsay); (b) the strength and reliability of the tip with respect to its assertion of illegal activity, not just its tendency

to identify a determinate person; and (c) the time that has elapsed between the reported crime and the stop.

- Here, the relevant facts are as follows:
  - The officer had information that an anonymous person had telephoned a report that a "scuzzy looking" white male, "maybe mid-20s," with dark hair and a goatee, wearing jeans and a dark hooded sweatshirt, was seen purchasing two packages of Sudafed cold medicine and some coffee filters at Shop-Mart, a convenience store, and asking the cashier whether the store had stopped selling automobile engine-starter fluid.
  - The tipster asserted that the man was "clearly up to something," and he told the hotline that the man was leaving the store and heading toward a red Jeep Cherokee in the parking lot.
  - Officer Simon, who took the report from the dispatcher, was aware, as a trained and experienced police officer, that cold medicine such as Sudafed can be processed to produce a key element of methamphetamine, and that coffee filters and engine-starter fluid are also used in the process.
  - Simon responded promptly to Shop-Mart and saw a man (McLain) matching the tipster's description come out of a grocery store across the street from the convenience store carrying a small paper bag.
  - McLain got into a red Jeep Cherokee parked in front of the store and drove off, with Simon following in his squad car. Simon saw McLain stop in front of an apartment building, talk briefly with a man there, and pull the Jeep into an adjoining alley, where Simon initiated the *Terry* stop.

After recognizing the general principles applicable to investigatory (*Terry*) stops, the argument should make the following points:

- There was no reason—other than the brief anonymous telephone call to the hotline—to suspect McLain of any criminal activity whatsoever.
- While information provided to police from known informants may be considered sufficiently reliable to justify a *Terry* stop, an anonymous tip must be corroborated by independent observation or investigation before police may reasonably execute an investigatory stop.
- Here, neither Simon nor any other officer undertook any independent investigation. Simon made no independent observations, other than to note, while following

McLain's car, that (a) he matched the tipster's description, (b) he was driving in an area Simon knew had been the subject of some unknown number of criminal activity reports in the past year (Simon himself had made a marijuana arrest there), and (c) McLain had had a brief conversation with a man in front of a building. These facts do not constitute sufficient corroboration.

- In support of their arguments, applicants should cite *State v. Washington* (quoted in *State v. Montel)*, which held that even where the officers knew that the neighborhood in which they encountered the defendant was a high-crime area known for drug activity, that fact alone did not provide police with reasonable suspicion to make an investigatory stop.
- Indeed, here, while there had been reports of criminal activity in the area, none of them related to large-scale drug operations.
    - And the only other "evidence" Simon had was the anonymous report that McLain had, perfectly legally, purchased two packages of cold medicine and some coffee filters, and had asked the store clerk about engine-starter fluid.

Further, applicants should recognize that an anonymous tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Florida v. J.L.* (cited in *State v. Montel*).

- The argument can be made that identifying McLain is really all the tip did in this case, because the only other information was that he had made a few purchases of concededly legal items at Shop-Mart.
- Other applicants may emphasize that the tip here was of such a "low degree of reliability" that "more information was necessary to establish the requisite quantum of suspicion" and that there is no such evidence or information in the record. *See Montel*.
    - Applicants might note that in contrast to the defendant in *Montel*, whom the arresting officer knew to be a gang member charged with a weapons offense, McLain was unknown to Officer Simon, who had no reason to suspect that he was involved in dealing methamphetamine or any other illegal activity.
- However, astute applicants should anticipate that the prosecution will likely argue that Officer Simon's training and experience may well constitute the type of "in-

dependent observation" that can provide the corroboration necessary to legitimize the stop. Applicants should argue that the cases make no mention of training and experience as a substitute for actual, situation-specific independent investigation and observation.

- In addition, it can be argued that there is scant evidence that the 8th Street area, where McLain was stopped, has a reputation for drug activity. In *State v. Sneed* (cited in *Montel*) the court, in granting the motion to suppress, emphasized that a tip about drug activity at a particular house in a particular neighborhood did not provide reasonable suspicion where there was no evidence at the hearing that the area "was known for drug trafficking." Again, applicants should point out that all the officer in this case knew was that there had been several reports of criminal activity in the area—one involving cultivation of marijuana—but nothing to indicate the production of methamphetamine as suggested by the tip in this case.
- Further, Officer Simon testified that the only arrests made at the Shop-Mart have been for vandalism and shoplifting. There is no evidence of suspicious meth-related activity or purchases.

- Applicants are instructed to anticipate the State's principal arguments and briefly challenge them. In particular, they should anticipate the State's likely reliance on the *per curiam* opinion in *State v. Grayson* (Franklin Ct. App. 2007). In *Grayson*, the court held that the tip was adequately corroborated by "independent police work" where the officers observed a man meeting the tipster's description driving a car that met the tipster's description to a destination predicted in the tip. This ties in with a likely argument by the State that the tip's accuracy is enhanced because it was the result of the tipster's "personal observation"—which the *Montel* court recognizes as sometimes being a significant factor in determining the reliability of an anonymous tip.
  - There is, however, a difference in the nature of the tips in *Grayson* and in the instant case. In *Grayson*, the tipster alleged knowledge of actual criminal activity—that the defendant was in possession of an illegal drug, which he was transporting to a specific address; and the police officers' observations corroborated most aspects of the tip. Here, the tip alleged only conduct that was perfectly legal—buying medicine, coffee filters, etc.—and better applicants should at least attempt to distinguish *Grayson* on that basis.

B. The Motion to Dismiss Count Two of the Complaint

The charges in counts one, two, and three of the complaint arise from the chemicals, drug-manufacturing apparatus, and 18 grams of methamphetamine found in McLain's "meth lab" after his arrest. The task memo instructs applicants to draft the argument in support of defendant's motion to dismiss the "manufacturing equipment" count (Count Two) on the ground that it is a lesser-included offense of manufacture of methamphetamine (Count Three), and that therefore the complaint contains multiplicitous counts. A multiplicitous complaint raises double jeopardy concerns due to the possibility that the defendant will receive more than one sentence for a single offense.

- *State v. Decker* (Franklin Sup. Ct. 2005) provides the legal framework for analyzing whether one charge is a lesser-included offense of another. *Decker* follows the "strict elements" test established by the leading case, *Blockburger v. United States*, 284 U.S. 299 (1932). Under the strict elements test, where two or more offenses arise from the same act or transaction and the elements of the "greater" crime necessarily include the elements of the "lesser" crime, the latter offense is a lesser-included offense. Under *Blockburger*, which is codified in Fr. Crim. Code § 5(2), the court compares the elements of both offenses. If the comparison establishes that the elements of one offense are subsumed within those of the other, the former is a lesser-included offense, and a prosecution for both offenses places the defendant in double jeopardy. As an introductory matter, applicants should argue that both counts arise from the same course of conduct: McLain's alleged operation of a meth lab. Following the court's approach in *Decker*, applicants should examine the criminal complaint against McLain and the relevant sections of the Franklin Criminal Code and then identify the distinct elements of each charged offense.
- Count Two charges McLain with possession of equipment with the intent to manufacture methamphetamine, a violation of Fr. Crim. Code § 43**.** The elements of that offense are that the defendant
  (a) knowingly
  (b) possessed equipment or chemicals, or both,
  (c) for the purpose of manufacturing a controlled substance, to wit, methamphetamine.

- Count Three charges a violation of § 51, manufacture of methamphetamine. The elements of that offense are that the defendant
  (a) knowingly
  (b) engaged in the manufacture of methamphetamine.
- The intent element is identical for both offenses. A textual comparison of the elements demonstrates that the lesser offense contains the same intent element as the greater offense. Both offenses require that the person who commits either crime do so "knowingly."
- Astute applicants will recognize that the elements of possession of equipment do not fall as neatly into the elements of the greater offense, manufacture of methamphetamine, as do the elements of the burglary and assault charges at issue in *Decker*.
- At first glance, it is the lesser offense, possession of equipment with the intent to manufacture methamphetamine, which requires an element not present in the greater offense—the possession of equipment and supplies; section 51 provides simply that "[i]t is unlawful for any person to knowingly manufacture methamphetamine."
- The question then becomes whether, under the statutes, a person is able to manufacture methamphetamine without possessing the laboratory equipment and supplies used to make it, and the answer is "no." Or, as stated in *Decker*, "it is impossible to commit the greater offense without first having committed the lesser offense."
- Applicants should take care to distinguish *State v. Jackson* (Fr. Ct. App. 1992), cited in *Decker*. In *Jackson*, the defendant was charged with possessing cocaine in the form of residue found inside a crack cocaine pipe. He appealed the trial court's denial of his motion for a jury instruction on the offense of possession of drug paraphernalia, arguing that it was a lesser-included offense of cocaine possession. In rejecting this argument, the court of appeal explained, "One may be in possession of drugs, but not paraphernalia. One may possess paraphernalia without possessing drugs." In short, one offense could be committed without also committing the other offense.
- By contrast, in McLain's case, the lesser offense is composed of some, but not all, of the elements of the greater offense, so that it is impossible to commit the greater offense, the manufacture of methamphetamine, without also first committing the

lesser, possession of equipment and supplies with the intent to manufacture methamphetamine.

Accordingly, there is a reasonable argument to be made that under the *Blockburger* test, the court should dismiss Count Two as multiplicitous.

POINT SHEET

MPT-2: *Logan v. Rios*

Logan v. Rios
DRAFTERS' POINT SHEET

The task for the applicants in this performance test item is to prepare the initial draft of one part of the Early Dispute Resolution (EDR) statement that the supervising attorney will submit to the EDR judge, on behalf of the firm's client, Trina Rios, the defendant in a slip-and-fall case. Plaintiff Karen Logan was shopping at Trina's Toys, the toy store owned by Trina Rios, when she slipped on a small puddle of water and fell in one of the aisles, injuring her ankle in the process. As a result, Logan sued Rios, claiming that Rios violated her duty as a premises owner. Rios pled an affirmative defense of contributory negligence, which, if proven, would be a complete bar to Logan's recovery under Franklin law.

The File contains the instructional memo from the supervising attorney, Local Rule 12 concerning EDR conferences, Form 12 (the form to be completed for the EDR statement), the plaintiff's complaint, the defendant's investigator's report, and excerpts of the depositions of the plaintiff, Karen Logan, and Nick Patel, an employee of the defendant.

The Library includes a Franklin Supreme Court Approved Jury Instruction concerning the premises liability of property owners. The Jury Instruction contains commentary on the duty of property owners and the affirmative defense of contributory negligence.

The following discussion covers all the points the drafters of the item intended to incorporate, but applicants may receive passing and even excellent grades without covering them all. Grading is left entirely to the discretion of user jurisdictions.

I. Overview

Applicants are expected to draft one component of the EDR statement in accord with the description set forth in Form 12, item 6:

> A candid discussion of the strengths and weaknesses of the party's claims, counterclaims, and/or defenses and affirmative defenses. For each element that must be proven, parties should discuss the specific strengths and weaknesses of the evidence gathered to date relating to that element in light of the jury instruction and any commentary thereto.

Applicants are told to carefully review the evidence gathered to date and identify and evaluate the proof available for each legal element of the claim and the affirmative defense. They

are told to organize the facts relating to each legal element as defined in the jury instruction, to address both strengths and weaknesses of the case, and to analyze the case in light of the evidence available to Logan and Rios. Note that applicants have been told not to discuss Logan's damages (e.g., pain and suffering and the costs of medical care, etc.). Except as described below, applicants who do discuss damages may receive less than full credit as a result of their failure to follow directions. Applicants have been told to limit themselves to the evidence gathered to date. Speculation regarding evidence that may come to light as discovery proceeds is beyond the scope of the call memo.

Applicants are expected to extract from the jury instruction the elements of proof of liability that the plaintiff must establish and each element of the defendant's affirmative defense. From the depositions and other evidence provided, applicants should identify the evidence that supports the elements. Using the law and facts, they should assess the strengths and weaknesses of the evidence in relation to their client's case. Applicants are told that the EDR statement is confidential and will not be shared with the other party. Thus, they should be candid. Applicants who ignore the weaknesses of Rios's case—both in terms of their assessment of Logan's case and in terms of Rios's affirmative defense of contributory negligence—should be penalized.

Although applicants are not given a specific organizational format, they are directed in the call memo to organize the facts relating to each element as set forth in the jury instruction and to assess the strengths and weaknesses of their case. The outline provided below is an example of an organizational structure that complies with that instruction. Applicants should include citations to the cases cited in the Commentary to Jury Instruction 35 where appropriate. They need not cite to the factual record; record references are provided for graders' convenience.

II. Arguments concerning the strengths and weaknesses of defendant Rios's case including any affirmative defenses

A. <u>There was a condition which presented an unreasonable risk of harm to people on the defendant's property: namely, the presence of water on the floor (Jury Instruction 35; Complaint ¶ 4)</u>

Strengths of Rios's case:

- Applicants might point out that an indisputably small and thin puddle of water on the middle of a floor in a well-lit store hardly constitutes an unreasonable risk of harm.

Weaknesses of Rios's case:

- Applicants should note that it is undisputed that there was water on the floor where there was customer traffic. (Patel Dep. Tr., Logan Dep. Tr.)
  - It is possible that a jury would find that *any* amount of water on a slippery tile floor constituted an unreasonable risk.
- It is also undisputed that there was no warning about the water on the floor—no employee saw it, and no signs or cones were posted. (Patel Dep. Tr.) Had there been some notice to customers that there was water on the floor, the condition would not have presented an unreasonable risk of harm.

B. <u>The defendant knew or in the exercise of reasonable care should have known of both the condition and the risk. (Jury Instruction 35; Complaint ¶ 4)</u>

Strengths of Rios's case:

- Patel, one of Rios's employees, was in the store at the time of the fall. Neither he nor Rios knew about the water and thus could not have prevented it or warned customers about it. (Patel Dep. Tr.)
- Further, it was not unreasonable that Rios and her employees were unaware of the water.
  - There are no sources of water in the area of the fall that would have caused water to accumulate there: no leaking ceiling, no squirt gun displays. In fact, aisle 3 was an area of puzzles and games. (Patel Dep. Tr.)
  - It was not raining or snowing on the day of the incident. (Logan Dep. Tr.)
  - Trina's Toys is not a store that sells refreshments or toys containing water, so it is arguably unexpected for there to be a spill on the floor.
  - Patel mops the floors at night, after the store closes, so the floors would presumably dry by the next morning.
  - No one reported to store employees that there was water in the aisle, even though the store had had a steady stream of customers that day. (Patel Dep. Tr.)
  - If a customer spilled the water, neither Rios nor Patel had knowledge of the spill. (Patel Dep. Tr.)
  - A key factor in determining whether a premises owner acted with reasonable care is the length of time an unsafe condition existed. (JI 35 Commentary) Here, even

if Logan relies on Patel's admission that no store employee had checked on the aisle for two hours (Patel was in the aisle just before the store opened at 10 a.m..; Logan fell before noon), there was no reason to anticipate spills in the toy store and thus no duty to periodically check for them. (Patel Dep. Tr.) (*Chad v. Bill's Camera Shop* (Fr. Ct. App. 2006))

- By contrast, the owner of a coffee shop was liable for a fall that occurred when coffee had "just spilled" because it was reasonably foreseeable that customers would spill coffee. *Owens v. Coffee Corner* (Fr. Ct. App. 2007).
- Unlike the mini-golf operator found liable for a fall caused by a liquid spill in *Rollins v. Maryville Mini-Golf Park* (Fr. Ct. App. 2002), Rios does not serve food in her establishment.

Weaknesses of Rios's case:

- There is no evidence to narrow the possible time period that the water was on the floor.
- It is undisputed that Patel failed to patrol the aisles each hour. (Patel Dep. Tr.)
  - Had he done so, he almost certainly would have found the water, as it was in plain view.
  - There were two other employees there—Rios herself and Naomi Feldman—who presumably were capable of checking the aisles themselves, but did not.
  - Trina's Toys is a store frequented by children, who, like the little boy in the store at the time of Logan's fall, could be expected to have various containers like baby bottles and sippy cups containing beverages that could spill.
  - Thus, a jury could conclude that two hours is too long for a puddle of water to be in a busy area of a toy store.

C. <u>The defendant could reasonably expect that people on the property would not discover the danger, and the defendant failed to warn that water had accumulated on the floor. (Jury Instruction 35) However, the defendant could not be liable for harm caused by a condition which was open and obvious, nor must the defendant warn of conditions on the premises that are open and obvious. (*Townsend v. Upwater*)</u>

Strengths of Rios's case:

- Water on the floor is usually an open and obvious condition.
  - Logan admitted that nothing blocked her view of the water. (Logan Dep. Tr.)
  - Logan admitted that she was not looking at the floor. (Logan Dep. Tr.)
- Logan also conceded that the store was brightly lit, so there is no evidence of a problem with the lighting that would have prevented a reasonable person from noticing the water. (Logan Dep. Tr., Patel Dep. Tr.)
- Logan had been on her cell phone just prior to the fall and may have been distracted by the call. (Logan Dep. Tr.)

Weaknesses of Rios's case:

- Rios failed to warn of the water. (Patel Dep. Tr.) In fact, the toy store is not equipped to warn of spills—it does not have warning signs or cones to put out on the floor. (*Id*.)
- The water, being odorless and colorless, may not have been readily apparent to customers. (*Id.*) Also, this was not a large spill but a thin "trail of water." (Logan Dep. Tr.)
- Rios's customers could not necessarily be expected to scour the store's floor searching for hazards. Many of Rios's customers are children who would be focusing on the toys displayed. Adults, too, would reasonably be expected to be looking at the toys on display, as Logan said she was doing just before the fall (e.g., Wii bowling game).

D. <u>If the defendant created a distraction in the area such that the defendant had reason to suspect that the plaintiff might not appreciate the obvious nature of the unsafe condition, the defendant had a duty to warn the plaintiff. (*Ward v. ShopMart)*</u>

Strengths of Rios's case:

- Had Logan been looking where she was walking, she would have seen the water, which was an open and obvious condition. (Logan Dep. Tr.)
- The store was well lit. (Logan Dep. Tr., Patel Dep. Tr.)
- The distraction exception should stay just that—an exception. If it is construed as applying to all stores that make an effort to attractively display merchandise, all retail stores will become insurers of their customers' safety.

Weaknesses of Rios's case:

- Although Rios has no duty to warn of open and obvious conditions, she does have a duty to warn if a customer is likely to be distracted and therefore fail to notice the dangerous condition. (*Ward v. ShopMart*)
  - Holiday decorations may constitute a distraction. If so, the "distraction exception" to the open and obvious rule applies and the defendant is not relieved of liability for the plaintiff's injury. (*Gardner v. Wendt*)
  - But *Gardner* is distinguishable—holiday decorations qualify as a distraction because they are not usually present.
  - In this case, the aisle where Logan fell—indeed, the entire store—is filled with merchandise that is meant to attract customers. (Patel Dep. Tr.)
    - The end of the aisle had a computer-animated display of games. (*Id.*) This display may have distracted Logan from noticing where she was walking.
    - She claims to have been looking at the merchandise ahead of her, further down the aisle. (Logan Dep. Tr.)
  - The store also had a Wii game available for play, which Logan had been playing just before her fall. (*Id.*) She may have been distracted by it.
  - If it was reasonable to expect that the store displays would distract Logan from watching for open and obvious conditions, Rios had a duty to warn of the puddle.
    - It is undisputed that there were no warnings about the water puddle that could have alerted Logan to it.
  - However, the distraction exception does not apply when those claiming injury created the distraction. In *Brown v. City of De Forest* (Fr. Ct. App. 2005), the plaintiff could not recover where she had tripped on an uneven sidewalk while chasing after a runaway child. She admitted that her attention was diverted from the sidewalk by her concern for the child. The court held that the distraction exception did not apply because the distraction was the result of the plaintiff's concern for the child and inattentiveness to where she was going, and the city could not be held responsible.
    - In light of Logan's questionable credibility as a witness (see below), a jury might find it more likely than not that she was still using her cell phone when she slipped and so, under *Brown*, the "distraction" was of her own making, and the exception would not apply.

E. Defendant's Affirmative Defense: Contributory Negligence. The plaintiff was negligent in spilling the water on which she slipped, and that negligence was the proximate cause of her injury. (Jury Instruction 35)

Strengths of Rios's affirmative defense:

- Franklin is a contributory negligence jurisdiction. Thus, any negligence by Logan that contributed to her fall is a complete bar to recovery.
- While Logan has denied that she spilled water on the floor, there is circumstantial evidence that she did so.
    - She admits that she had a water bottle with her in the store. (Logan Dep. Tr.)
    - The water bottle was on the floor next to her after she fell. (Patel Dep. Tr.)
    - According to Patel, the water bottle was empty when he put it in Logan's backpack after she fell. (*Id.*)
    - Logan claims the bottle was full when she left for the store. (Logan Dep. Tr.)
    - She is equivocal regarding how much water was in the bottle when she was in the store and whether she had consumed any of it. (*Id.*)
    - The fact that there was no reason for water to be in aisle 3 and that no other customer saw the water creates a strong circumstantial case that Logan herself spilled the water, fell, and then lied about it.
- Given the false and inconsistent statements that Logan has made about the impact her ankle injury had on her employment and her scholarship, the jury may well believe that Logan herself spilled the water that caused her fall.

Weaknesses of Rios's affirmative defense:

- No witness actually *saw* Logan spill the water.
    - Patel testified that he is unaware of any witnesses to Logan's fall who might be able to apportion some blame to her. (Patel Dep. Tr.)
    - Logan herself testified that she did not see anyone else spill any water, including the toddler using the sippy cup. (Logan Dep. Tr.)
- Nevertheless, while there were no witnesses, it cannot be ruled out that the toddler with the sippy cup or another customer with water caused the spill.

F. Defendant's Affirmative Defense: Contributory Negligence: The plaintiff was negligent in failing to exercise due care for her safety by wearing shoes that were unsafe, especially while carrying a heavy backpack, and that negligence was the proximate cause of her injury. (Jury Instruction 35)

Strengths of Rios's affirmative defense:

- Logan was wearing shoes with approximately three-inch heels and leather soles, which she was wearing for only the fourth time. The shoes were backless, high-heeled sandals. (Logan Dep. Tr.)
- The shoes looked like they were "not too steady." (Patel Dep. Tr.)
- It is likely that the leather soles were slippery and that the shoes, along with the weight of the backpack, caused Logan to fall. She could have expected that her relative inexperience in those particular shoes coupled with the heavy backpack could potentially lead to slipping and falling under any conditions.

Weaknesses of Rios's affirmative defense:

- No one saw how or why Logan fell.
- It is undisputed that she fell where the water puddle was.
- Stores like Trina's Toys can reasonably anticipate that customers will be wearing a variety of footwear.

G. Additional Strengths of Rios's Case

- Logan has the burden of proving by a preponderance of the *credible* evidence, including testimony, that she was injured as a result of Rios's negligence. (Jury Instruction 35)
- Logan is vulnerable to impeachment as a witness.
- Rios will present evidence that Logan has lied about some of her damages, and therefore Logan's account of how she fell is suspect.
    - Logan lied about her injury causing the loss of her job.
        - According to Joe Nyugen, Logan's supervisor at Fresh Grocers, Logan lost her job because she failed to report to work for three days and failed to call in. Nyugen may testify that Logan was absent for three days without notice to her

employer and that the employer had no knowledge of her injury when it fired her. (Ling's report)

- Logan lied about her injury causing the loss of her basketball scholarship.
  - Logan claimed that she lost the basketball scholarship after the fall because she could not practice with her injured ankle. Rios may call university officials to show that Logan lost the scholarship prior to the injury and that the reason was "academic difficulties." (Ling's report)

Being able to show that Logan has lied about these facts will undermine the credibility of her testimony about the fall itself.

NOTES