THE MPT®
MULTISTATE PERFORMANCE TEST

February 2016
MPTs and Point Sheets

National Conference of Bar Examiners
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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 2016 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www .ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

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 examinee 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. Examinees 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 examinee 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 examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills arise. The MPT requires examinees 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 examinees to perform one or more of a variety of lawyering tasks. For example, examinees 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 booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This 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 using a laptop computer to answer the questions, 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 allocate approximately half your time 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.
>
> Do not include your actual name anywhere in the work product required by the task memorandum.
>
> 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.

February 2016
MPT-1 File:
In re Anderson

CALVETTI, LAWRENCE & MASTERSON
Attorneys at Law
84 Richmond Avenue, Suite 1300
Lafayette, Franklin 33526

MEMORANDUM

To: Examinee
From: David Lawrence
Date: February 23, 2016
Re: Workers' Compensation Claim

Our client Nicole Anderson seeks legal advice regarding a workers' compensation claim that is being filed against her by Rick Greer, a handyman hired by Anderson to perform general maintenance and repair work for her residential rental properties. Greer was injured while painting the exterior of one of Anderson's rental houses.

Under the Franklin Workers' Compensation Act, codified in the Franklin Labor Code § 200 *et seq*., employers are required to maintain insurance coverage for employees who may sustain injuries arising out of and in the course of their employment. When employees are injured on the job, they can submit workers' compensation claims and be paid for their lost wages during the period in which their injuries prevent them from returning to work, as well as their medical costs.

Workers' compensation applies only to employees; it does not apply to independent contractors. Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, Anderson could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage.

Please draft a memorandum to me in which you analyze whether Greer would be considered an employee of Anderson under the applicable statutory provisions and case law. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis and conclusion.

Transcript of client interview: Nicole Anderson
February 19, 2016

Attorney Lawrence: Ms. Anderson, it's a pleasure to meet you. I understand that you're seeking our assistance with regard to a workers' compensation claim that is being asserted against you. Why don't you tell me a little more about your business and then we can talk about the claim.

Nicole Anderson: Well, about five years ago, I got involved in the rental property business when I couldn't sell the house that I owned and lived in. I couldn't afford two mortgages, so I ended up renting out my old house. I had such a positive experience as a first-time landlord that I decided to invest in additional rental properties. Over the past five years, my rental property business has steadily grown, and I now own 11 rental properties, all of them single-family houses, here in Lafayette.

Initially, when I had only a couple of rental properties, I personally handled most of the basic maintenance work like painting and replacing trim, basic plumbing problems, and the like. If a particular project was too complicated or time-consuming, I'd recruit family members to help me or hire out the work to various handymen as needed. About three years ago, I reached the point where I had too many rental properties to keep up with as far as basic maintenance and repair work, and I was tired of dealing with different handymen, some of whom were less reliable than others. So I decided to find someone who could perform all of the maintenance and repair work on my rental properties. That's when I found Rick Greer.

Atty: And is Mr. Greer the person who was injured and who is attempting to assert a workers' compensation claim against you?

Client: Yes, I just received this claim form. [Workers' compensation claim form attached.]

Atty: How did you come to find him?

Client: I saw an ad in the online Yellow Pages for "Greer's Fix-Its." After speaking with him and checking his references, I felt confident that he would do a good job at a reasonable price.

Atty: How long has Mr. Greer provided handyman services for you?

Client: Since June of 2013.

Atty: Did the two of you enter into any kind of written agreement?

Client: Not anything formal, but we did discuss the parameters of his work by email. I've brought a copy of the emails in which we discussed what he was going to do, how he was going to be paid, and what the general arrangement would be.

Atty: Great. Let me take a look at it . . . . The email says Mr. Greer was going to perform general maintenance and repair work. What specific kinds of services has he provided?

Client: He does a lot of stuff—everything from cleaning and repairing rental houses between occupancies to minor renovations and upgrades, in addition to basic maintenance and general upkeep such as painting, cleaning gutters, simple plumbing and electrical work, hauling debris to the dump, and other odds and ends. I also require him to inspect the exterior of each of the properties monthly, using a checklist that I've provided to him.

Atty: And how is he paid?

Client: We negotiate the payment amount for each project. I always pay him by check when the work is done. Sometimes I pay him on an hourly basis at a rate of $25 per hour, and other times I pay him a flat rate by the project. For instance, I pay him a flat fee of $200 per room to paint standard interior rooms. If a room is large or the ceiling or trim needs to be painted in addition to the walls, then we negotiate a higher fee. For plumbing and electrical projects, I pay him by the hour. I also reimburse him for any materials that he may need to purchase in connection with each project, such as paint, wiring, and lumber. I've agreed to pay him a minimum of $250 per month, even if he doesn't do 10 hours of work in that month, to be sure that he is always available to me.

Atty: Do you withhold any taxes from the money you pay him?

Client: No, I always thought he was responsible for paying his own taxes.

Atty: How often does he perform handyman services for your rental properties, and how many hours a week or a month would you say that it works out to?

Client: Typically, he handles around five projects a month, sometimes more, sometimes less. Each project is different, and some take more time than others, but I'd estimate that on average he spends about 10 hours a month working on projects at my rental properties. When a tenant moves out, which happens about once every 18 months or so, he can spend as little as 5 hours or as much as 15 to 20 hours getting the place ready to re-rent, depending on how well the tenant took care of the house. With 11 rental properties,

there's a pretty steady flow of necessary maintenance and repair work. When something comes up, I call him and then he works me into his schedule and gets the project done.

Atty: What was Mr. Greer doing on the day he was injured?

Client: He was painting the front exterior of my rental house on Clover Circle.

Atty: What happened that day?

Client: Well, on February 11, I was at the rental house on Clover, telling him what I wanted him to do. I told him to be sure to mask the windows, that I didn't want rollers but a narrow brush to paint the trim, and to apply three coats of paint.

Atty: Do you always give him detailed directions like that?

Client: Not always, but I'm pretty particular. I want my properties to look nice, so I want the job done right. This was an expensive rental, and I wanted it to look really nice.

Atty: Okay, what happened next?

Client: I walked around the corner of the house, and a few minutes later I heard Rick yell. I ran back and found that he had fallen off a ladder and was hurt. He had broken his right arm and was in a lot of pain. I got him into my car and drove him to the hospital. The hospital took him into the emergency room right away.

Atty: What happened next?

Client: I called his wife from the hospital, and when I knew she was coming, I went home. Later on I tried to reach Rick and his wife by phone. They never answered and didn't return the messages I left. The next day, I called Jim, a friend of mine who owns an eight-unit apartment complex and uses Rick on repair and maintenance projects for that complex. Jim told me that he had spoken with Rick, who had said that his arm would be in a cast for at least four weeks and that he probably wouldn't be able to work for another two to four weeks after the cast came off, while he underwent physical therapy.

Atty: Who owns the ladder?

Client: As far as I know, Rick does.

Atty: Do you ever provide him with any tools for the work he performs for your rental houses?

Client: Sometimes on paint jobs, when there's a particular color that I want Rick to use, I've bought the paint from the hardware store to make sure that it's the right color, instead of having Rick buy it and then reimbursing him. I've also picked out ceiling fans, faucets, and other fixtures for rental properties on occasion, but that's about it. Rick usually

provides everything else. He has one of those big built-in toolboxes on the bed of his pickup truck with all kinds of tools, everything from power drills and big saws to wrenches and screwdrivers. I think he keeps a lot of tools on hand for bigger projects that come up, like the remodel that he completed at Jim's apartment complex last year.

Atty: You mentioned that you sometimes select the paint color and fixtures such as ceiling fans and faucets on some of Mr. Greer's projects. Do you also get involved in other aspects of his work?

Client: It really depends. When it comes to paint color, the installation of a ceiling fan, or the way I want something to look when it's finished, I usually get involved in the process to make sure the project turns out the way I want it to, but I don't micromanage him or anything like that. He's very good at what he does and he knows what he's doing. If I tell him that a toilet is leaking, he figures out what the problem is and then fixes it. I work full-time as an accountant, and my job keeps me very busy, so most of the time I just swing by the property after Rick's done to make sure the work got done right before paying him for the work.

Atty: When did you find out that he was going to file a workers' comp claim against you?

Client: Not until yesterday, when he faxed over a workers' compensation claim form and asked me to fill out the "Employer" section. I was really shocked when I received the form because it never occurred to me that Rick might consider himself to be an employee of mine. I haven't withheld taxes or obtained any insurance coverage for Rick, and I don't even want to think about what it would cost to pay his medical bills or lost wages.

Atty: I understand your concerns. I think I have a pretty good idea of the professional arrangement between you and Mr. Greer. I'm going to need to research the legal issues surrounding his workers' compensation claim. I will give you a call next week to let you know what I think the next steps are.

Client: Okay. I look forward to hearing from you. And thanks so much for your help with this.

Email Correspondence Between Anderson and Greer

From: Nicole Anderson<nicorentals@cmail.com>
Date: 17 June 2013, 9:00 a.m.
To: Rick Greer <Rick@Greersfixits.com>
Subject: Handyman Work

Hi, Rick. Great talking with you earlier this week! I called your references, and they had nothing but good things to say about you. So I'd like to go ahead and have you help me with general repair and maintenance projects at my rental properties. I think I already told you this, but all are single-family houses with the usual ongoing maintenance and repair needs. I'm not sure how often I'll need your help, but I look forward to working with you.

Nicole

From: Rick Greer <Rick@Greersfixits.com>
Date: 17 June 2013, 11:15 a.m.
To: Nicole Anderson<nicorentals@cmail.com>
Subject: Handyman Work

Sounds good. Just let me know when you need my services, and I will make sure to get out to the property and get the problem handled. As I told you, I charge all my customers $25/hour for electrical and plumbing work and routine maintenance and repairs. We can discuss the price of other projects as they come up.

Rick

From: Nicole Anderson<nicorentals@cmail.com>
Date: 18 June 2013 8:15 a.m.
To: Rick Greer <Rick@Greersfixits.com>
Subject: Handyman Work

Okay. If you need to do any work on the inside of a rental house, I'll need to coordinate with my tenant to make sure that someone is there to let you in and that it's a convenient time for the tenant and for you. Exterior projects like gutter work can be done basically at your convenience. If the tenant has a dog, I just need to give the tenant a heads-up so that we can make sure the dog is secured before you show up. Will call you as soon as I need your help. Thanks!

Nicole

STATE OF FRANKLIN
DEPARTMENT OF LABOR RELATIONS
DIVISION OF WORKERS' COMPENSATION

WORKERS' COMPENSATION CLAIM FORM (DWC 1)

Employee: Complete the **"Employee"** section and give the form to your employer. Keep a copy and mark it **"Employee's Temporary Receipt"** until you receive the signed and dated copy from your employer.

Employee—complete this section and see note above.

1. Name Rick Greer Today's date February 18, 2016
2. Home address 13269 Cabot Road, Lafayette, Franklin 33527
3. Date of injury February 11, 2016 Time of injury 9:00 a.m. _____ p.m.
4. Address and description of where injury happened I fell from a ladder at 3025 Clover Circle, Lafayette, Franklin 33529, while painting a house for my employer, Nicole Anderson.
5. Describe injury and part of body affected broken right arm

6. Signature of employee Rick Green

Employer—complete this section and see note below.

7. Name and address of employer _____
8. Date employer first knew of injury _____
9. Date claim form was provided to employee _____
10. Date employer received claim form _____
11. Name and address of insurance carrier _____
12. Insurance policy number _____
13. Signature of employer representative _____
14. Title _____ 15. Telephone _____

Employer: You are required to date this form and provide copies to your insurer or claims administrator and to the employee, dependent, or representative who filed the claim within **five working days** of receipt of the form from the employee.

SIGNING THIS FORM IS NOT AN ADMISSION OF LIABILITY.

❑ Employer copy ❑ Employee copy ❑ Claims administrator ❑ Temporary receipt

February 2016

MPT-1 Library:

In re Anderson

Excerpts from the Franklin Workers' Compensation Act

Franklin Labor Code § 200 *et seq*.

Article 2. Employers and Employees

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§ 251. "Employee" means every person in the service of an employer under any appointment or contract of hire, whether express or implied, oral or written . . . .

***

§ 253. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

***

§ 257. Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.

***

§ 280. The provisions of this statute shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

Article 7. Workers' Compensation Proceedings

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§ 705. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer.

. . .

Robbins v. Workers' Compensation Appeals Board

Franklin Court of Appeal (2007)

This is an appeal from a decision of the Franklin District Court affirming an order of the Workers' Compensation Appeals Board. The Board held that appellant Matthew Robbins was an "independent contractor" and not an "employee" for purposes of the Franklin Workers' Compensation Act (Franklin Labor Code § 200 *et seq*.) and thus was not eligible for workers' compensation benefits. We affirm.

Background

Robbins injured his head and lower back when he fell from a roof while trimming bushes at the Maple Leaf Diner in the Town of Jefferson. Robbins filed a workers' compensation claim against the diner's owner, Alana Parker.

Parker called no witnesses at the workers' compensation hearing. Robbins testified that he has been gardening, painting, fixing pipes, and doing graffiti removal for 25 years. His clients are people who either know him or are referred to him by word of mouth. He charges by the hour, but sometimes he contracts for an entire job. He usually does the same type of work but for different people each day. Robbins does not have a roofer's license or a general contractor's license. He has no office and no employees, and he does not advertise.

Parker arranged for Robbins to trim the bushes along the roofline of the diner on two occasions. The first time was in August 2004, and the second, July 15, 2005, was the day he fell.

In 2004, Parker paid Robbins by the hour, although they did not discuss the number of hours he would work. Nor did they discuss the hourly rate until he was finished. On the 2004 visit, Parker paid Robbins $150. She did not deduct taxes from his pay. He pays his own taxes. Parker and Robbins did not discuss at that time when he would provide services in the future, agreeing only that Parker would contact him when his services were needed. On the second visit, in July 2005, Parker and Robbins did not discuss either the number of hours to be worked or the rate. As it turned out, Robbins was not paid for that visit because, after his fall, he did not complete the work and never sent a bill. Robbins had no plans to do additional work at the diner in the future, other than to trim bushes whenever Parker asked.

On the day he fell, Robbins brought all the equipment he needed to do the job, including a trimmer, a rake, a broom, a leaf blower, and a ladder. He arrived in his own truck. Parker did

not tell him to bring an assistant that day, how to do the job, or how long it would take. She did not tell him to arrive at any given time, only that he should arrive before the diner opened.

Discussion

The question before us is whether Robbins was an employee or an independent contractor when he was injured. The Board's decision that Robbins was an independent contractor (and therefore not entitled to workers' compensation benefits) will be upheld if it is supported by substantial evidence in the record.

Workers' compensation laws protect individuals who are injured on the job by awarding prompt compensation, regardless of fault, for work injuries. *Raleigh v. Juneau Enterprises, Inc*. (Fr. Ct. App. 1992). The principal test of an employment relationship is whether the person to whom service is rendered has the "right to control" the manner and means of accomplishing the result desired. Franklin Labor Code § 253. The existence of such right of control, not the extent of its exercise, gives rise to the employer-employee relationship. However, this test is not exclusive. Several secondary factors, the "*Doyle* factors," *infra*, also are relevant to one's status as an employee or an independent contractor.

Franklin courts have liberally construed the Workers' Compensation Act to extend benefits to persons injured in their employment. *Id*. § 280. Because workers' compensation statutes are remedial, public policy considerations also influence the determination of whether an individual is entitled to workers' compensation protections.

Right-of-Control Test

We begin with the right-of-control test set forth in *Doyle v. Workers' Compensation Appeals Board* (Fr. Sup. Ct. 1991). *Doyle* involved unskilled harvesters who worked for the defendant grower. *Doyle* held that, because all meaningful aspects of the relationship (e.g., price, crop cultivation, fertilization and insect prevention, payment, and the right to deal with buyers) were controlled by the defendant grower, the grower exercised "pervasive control over the operation as a whole," and the unskilled harvesters were its employees. The harvesters' only decisions were which plants were ready to pick and which needed weeding. The harvesters' work was an integral component of the grower's operations, over which the grower exercised pervasive control, and the purported "independence" of the harvesters from the grower's

supervision was not a result of superior skills but was rather a function of the unskilled nature of the labor, which required little supervision.

Here, Robbins was engaged to produce *the result* of trimming the bushes. Neither party presented evidence that Parker had the power to control the manner or means of accomplishing the trimming. Indeed, it is Parker's inability to control the means and manner by which Robbins provided the trimming service that puts the facts here in stark contrast to those in *Doyle*. Robbins testified that in general, no one tells him how to do his work on the jobs he accepts and that Parker did not tell him how to do the trimming at the diner. Once he accepted a job, he testified, he completed it without direction from the person for whom he was rendering the service. Thus, the lack of supervision here was not a function of the unskilled nature of the job, as in *Doyle*. Nor does the fact that Parker asked Robbins to arrive early suggest that Parker controlled any aspect of the trimming. It was Robbins who chose both the date and time to perform the service. In short, under the principal test of the employment relationship, Parker did not have the right to control Robbins's work.

Doyle Factors

In addition to the right-of-control test set forth in *Doyle*, we also must analyze the secondary factors identified in that case to determine whether Robbins was an independent contractor or an employee. These "*Doyle* factors" are derived largely from the Restatement (Second) of Agency and from other jurisdictions.

They are (1) whether the worker is engaged in a distinct occupation or an independently established business; (2) whether the worker or the principal supplies the tools or instrumentalities used in the work, other than those customarily supplied by employees; (3) the method of payment, whether by time or by the job; (4) whether the work is part of the regular business of the principal; (5) whether the worker has a substantial investment in the worker's business other than personal services; (6) whether the worker hires employees to assist him; (7) whether the parties believe they are creating an employer-employee relationship; and (8) the degree of permanence of the working relationship. The *Doyle* factors are not to be applied mechanically as separate tests but are intertwined, and their weight often depends on particular combinations of the factors. The process of distinguishing employees from independent contractors is fact-specific and qualitative rather than quantitative.

In applying the *Doyle* factors to the facts at hand, we note that, first, Robbins performed his work for Parker as part of his gardening services, which he has been doing independently for approximately 25 years. Although Robbins does not advertise, he has several different clients who telephone or email him to perform specific jobs. Not only does he have many other clients, but Parker did not ask him to perform any service other than trimming the bushes.

Second, Robbins supplied the equipment he used for the job; and they were not tools a restaurant would commonly have.

Third, he was not hired by the day or hour, or even on a regular basis. Payment was only discussed after the work was complete. Sometimes Robbins charged by the hour and sometimes by the job, and he was paid on a job-by-job basis, with no obligation on the part of either party for work in the future. Taxes were not deducted from his payment. Robbins estimates and pays his own taxes.

Fourth, in concluding that the harvesters in *Doyle* were employees, the court found that their work constituted "a regular and integrated portion of [the grower's] business operation, in that [its] entire business was the production and sale of agricultural crops." Although seasonal, the work in *Doyle* was a permanent part of the agricultural process, and many harvesters returned to work for Doyle each year—all of which led the court to conclude that the "permanent integration of the workers into the heart of Doyle's business is a strong indicator that Doyle functions as an employer." By contrast, Robbins is a gardener whose work is wholly unrelated to the restaurant business; it constitutes only occasional, discrete maintenance. Robbins, for example, was asked to work when the diner was closed so that his work would not interfere with the diner's *regular business*.

We note that Robbins has 25 years' experience in his gardening business and a substantial investment in equipment and other aspects of the business, satisfying the fifth factor.

Although Robbins did not hire employees to assist him (the sixth *Doyle* factor), this alone does not negate the overwhelming evidence satisfying the other *Doyle* factors.

Neither Robbins nor anyone else testified that the parties believed they were creating an employer-employee relationship (the seventh *Doyle* factor). This factor is neutral.

With regard to the eighth and final *Doyle* factor, the degree of permanence in the working relationship, no date for Robbins's return was specified after the first time he trimmed bushes at the diner. Robbins understood that he would be contacted only when his services were needed,

with the result that he worked for a circumscribed period of time with no permanence whatsoever in his working relationship with Parker. Indeed, Robbins had done trimming work for Parker only twice in the space of nearly a year, and there were no plans for him to return to the diner. Thus, Robbins's profit or loss depended on his scheduling, the time taken to perform the services, and his investment in tools and equipment.

Altogether, six of the *Doyle* factors support the Board's conclusion that Robbins was an independent contractor because he "render[ed] service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result [was] accomplished." Franklin Labor Code § 253.

Policy Consideration

Finally, in deciding whether a worker is an employee or an independent contractor, the court must consider the remedial purpose of workers' compensation laws, the class of persons intended to be protected, and the relative bargaining positions of the parties. The policy underlying Franklin's workers' compensation law indicates that the exclusion of independent contractors from the law's benefits should apply to those situations where the worker had control over how the work was done and, in particular, had primary power over work safety and could distribute the risk and cost of injury as an expense of his own business.

Thus the *Doyle* court, in its analysis of the harvesters' employment status, considered that if the grower were not the employer, the harvesters themselves and the public at large would have to assume the entire financial burden when injuries occur. Accordingly, the harvesters were in the class of workers for which the protections of workers' compensation law were intended.

Robbins, by contrast, was in a distinctly different position from the harvesters in *Doyle*—he was free to take or reject the jobs that Parker offered. He negotiated payment with Parker and was not in a weak bargaining position. These facts support the conclusion that Robbins does not fall under the protections of the workers' compensation act but is an independent contractor.

Conclusion

Here, no amount of liberal construction can change the balance of evidence. Robbins was an independent contractor. This conclusion does not defeat the policy behind the workers' compensation system. The decision of the Board is affirmed.

Harris v. Workers' Compensation Appeals Board

Franklin Court of Appeal (2003)

This is an appeal from the Workers' Compensation Appeals Board. The Board held, and the trial court affirmed, that a golf caddie was an independent contractor rather than an employee and was not entitled to workers' compensation for injuries sustained on the job. We reverse.

Appellant Jordan Harris claimed that he sustained various orthopedic injuries in October 2001, while employed by Lamar Country Club as a golf caddie. The Club argued that Harris was an independent contractor. At the hearing before the Board, Harris testified that he had had continuous employment with the Club since May 2000, working from 7:00 a.m. to 3:00 p.m. daily. He said he was required to wear special clothing: he was issued a cap and had to buy a Club shirt. The Club maintains a caddie assignment and locker room, and has adopted rules of conduct for caddies—including one requiring them to get permission to go to other areas of the Club. According to Harris, his duties were greeting Club members, giving advice about the course, retrieving balls, carrying and cleaning golf clubs, getting carts, and changing shoe spikes. Harris received his assignments from the Club, but members would instruct him while he accompanied them on the course, which is where he was injured. There were no written contracts or tax forms, and Harris had no other caddie business.

Kim Day, the Club's office manager, testified that Harris was not on the Club's payroll, and was paid in cash through various members' accounts. She added that the Club provides caddies for its members, but that there is no set schedule and they are free to work elsewhere.

Andrew Schaefer, the Club's caddie master, testified that he considers the caddies' abilities and personalities when assigning them to members. Members can request certain caddies, but assignments can be refused and caddies may work elsewhere without repercussion. According to Schaefer, once on the course, the members supervise the caddies, although the caddies sometimes advise and serve as guides on the course. Among other things, caddies search for and clean balls and remove flags on the greens. Schaefer also testified that caddies have no set days or hours: they normally sign in and inform him when they are leaving. It is Schaefer's job to pay the caddies cash and charge the members' accounts.

On appeal, Harris notes that employment is presumed under the law when services are provided, and he argues that the Club failed to meet its burden of proving independent contractor

status under the Franklin Labor Code § 705(a). Harris also contends that when the matter is analyzed under *Doyle v. Workers' Compensation Appeals Board* (Fr. Sup. Ct. 1991), the conclusion is inescapable that he was an employee.

Both sides agree that the Club and the caddie master have absolute authority over the premises, while the members direct the caddies on the golf course. But this does not mean that the Club's control does not extend to caddying. It is undisputed that the Club supervised Harris's dress, his behavior, and the types of services he rendered, and it administered the payment process.

A person who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the nature of the independent contractor relationship or the duties arising from that relationship.

Under Franklin Labor Code § 253, employer/employee status exists when the employer controls the manner and means of the work and not just the results. We believe that is the case here. The Club primarily determines assignments based on caddies' abilities and personalities, and keeps track of attendance if not hours. The ability to reject assignments seems of small import considering the effect on income and the Club's clearly superior bargaining position.

The *Doyle* factors also support the conclusion that Harris was an employee. Since Day testified that the Club provides caddies for its members, it is apparent that caddying is an integral part of the Club's business. Thus, Harris provided services which also benefited the Club, and employment is presumed in such situations. Franklin Labor Code § 257. In addition, Harris did not have his own business, and the fact that the Club allows caddies to work elsewhere does not negate a finding of employment. Although some items of equipment such as golf clubs are supplied by the members, the Club provides a caddie room and lockers.

Considering the totality of circumstances, and § 280 of the Labor Code, which provides that the statute be liberally construed with the purpose of extending benefits to those injured in the course of employment, we conclude that Harris was an employee. The decision of the Workers' Compensation Appeals Board denying workers' compensation benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

February 2016
MPT-2 File:
Miller v. Trapp

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

MEMORANDUM

To: Examinee
From: Timothy Howard, Partner
Date: February 23, 2016
Re: Katie Miller

We have been retained by Katie Miller to pursue civil assault and battery claims against Steve Trapp, guitarist and lead vocalist for the band the Revengers, for an incident that occurred at a concert two weeks ago. I have met with Miller and reviewed the evidence. Our firm has agreed to take the case because Miller has meritorious claims for assault and battery, and because her uncle is a valued client of the firm.

Yesterday, I called Trapp's lawyer, Saul Leffler, and told him that we are preparing to sue Trapp for his assault and battery of Miller. I asked Leffler if his client would be interested in resolving the matter short of litigation. Leffler was dismissive and said that Miller does not have a case. I have attached a memo summarizing our phone conversation.

Please draft both of the following:
(1) A demand letter addressed to Attorney Leffler, written for my signature
Your letter should persuasively state the basis for Miller's assault and battery claims against Trapp and argue that Miller will be able to recover compensatory and punitive damages. Follow our firm's guidelines on drafting demand letters (attached). Leave blank the specific amounts that we will request for each category of damages. I will fill in the amounts later.

(2) A brief memo to me
Your memo should set forth your recommendation of the specific amounts along with the rationale for these amounts for each category of damages that we could reasonably expect to recover at trial. Use the attached cases and summaries of recent Franklin civil jury verdicts as guidance on what a jury might award for Miller's damages. Refer to these jury verdicts in your memo to me, but do not cite them in the demand letter. I will fill in the amounts in the demand letter after I have reviewed your memo.

Stuart, Parks & Howard LLC

OFFICE MEMORANDUM

To: All Attorneys
From: Managing Partner
Date: September 5, 2013
Re: Guidelines for Drafting Demand Letters

A demand letter states our client's legal claims and demands that the opposing party pay damages and/or take or cease taking a certain action. A demand letter is designed to advocate a position and to persuade the recipient.

A demand letter typically includes (1) a brief statement indicating that we represent our client in this matter; (2) a brief statement of the purpose of the letter; (3) a succinct but persuasive statement of facts; (4) a thorough analysis of the bases for our client's claims; (5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner; (6) a deadline by which the opposing party must comply (usually one or two weeks); and (7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

When discussing the bases for our client's claims, you should thoroughly analyze and integrate both the facts and the applicable law and respond to arguments that have been made against the claims.

A well-written demand letter can promote a favorable settlement. It should set forth the strongest credible arguments on behalf of our client so that there is room for negotiation.

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 3, 2016

Rock fans, I have some exciting news. Through my gig reporting for my college newspaper, I got a press pass for the Revengers concert next week at the Franklin City Arena. I am going to find Revengers guitarist and lead vocalist Steve Trapp backstage after the show and interview him. I promise I will provide the details of that interview here. Wish me luck!! I'm really psyched to talk to Steve Trapp. He's super hot and famous.

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 16, 2016

Readers, I am very disappointed to tell you that I can't provide an account of an interview with Steve Trapp of the Revengers as promised. I had planned to interview him after the Revengers concert at the Franklin City Arena last week. Instead of giving me an interview, Steve gave me a dislocated shoulder!

After the concert, I was eagerly waiting offstage to speak to Steve. It was a long wait, rock fans, because the Revengers played two encores, which were awesome. After the final song, the band walked offstage. I was hoping to stop Steve for a quick impromptu interview. I had my smartphone out, set to record. A bunch of other photographers and journalists were waiting too. I was about half of the way back in the group. Nina Pender, a photographer from *Celebrity* magazine, was in the very front. When Steve walked offstage, Nina moved in to take a picture of him. Steve punched her in the nose, wrested the camera out of her hands, and smashed it on the ground. I stood there frozen, mouth agape. Steve continued toward us. He looked at me and yelled, "Get out of my way, you little punk, or I'll beat the hell out of you." He raised his arm as if to hit me. I was freaking out. Instead of hitting me, he grabbed my phone out of my hand and smashed it on the ground. I was holding the phone tightly because of the crowd. When he

grabbed my phone, he pulled so hard that he dislocated my shoulder, and I had to go to the hospital.

I have been a wreck since this happened. The pain was unbelievable for almost four hours until the doctor popped my shoulder back in place. I have $5,000 in medical bills; I had my arm in a sling for three days; I missed a week of my part-time work in the school cafeteria, which cost me $100; and I had to pay $500 to replace my phone.

This is all devastating. Steve has been my idol since he started playing with the Revengers. I have everything the Revengers ever recorded, and I have followed every piece of news about Steve's music and personal life. I think Steve should have to pay for what he did, don't you? My blog will no longer celebrate the Revengers as the best rock-and-roll band. I now rate Palindrome as the top living rock-and-roll band!

Reeling Rock **February 13, 2016**

The Online Magazine about Rock and Roll

Steve Trapp Allegedly Punches Photographer in Post-concert Melee

FRANKLIN CITY — Musician Steve Trapp, lead vocalist and guitarist for the Revengers, was involved in an alleged assault on a photographer last Tuesday, February 9, as he left the stage after a Revengers concert. The Franklin City Police Department is conducting a criminal investigation into the incident, which occurred at approximately 11:00 p.m.

Trapp became upset at *Celebrity* magazine photographer Nina Pender as she was trying to take his photograph. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the face, and slammed her camera on the ground. Other photographers at the scene captured the incident. Paramedics were called, and Pender was taken to a hospital where she was treated for serious injuries.

The day after the incident, Trapp left Franklin City to stay at his 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. Trapp could not be reached for comment.

Pender has filed a criminal complaint against the musician, and Franklin City Police Department Detective Kevin Park said that an investigation is ongoing. He said that the case will be presented to the District Attorney's office as early as today. "With the photographs and videos, it's pretty solid evidence," reported Park.

Pender's lawyer, Russ Smalls, told *Reeling Rock* that Pender intends to file a civil lawsuit against Trapp seeking $5 million in damages.

Others were injured during the incident. After Trapp assaulted Pender, the musician stormed through the crowd of dozens of paparazzi and journalists. Witnesses report that Trapp yelled obscenities and pushed individuals out of his way. One newspaper reporter was taken to the hospital with a shoulder injury.

Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs, but the charges were later dropped. In 2012, Trapp pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard, Alex Peel.

The Revengers' latest album, *Jab*, has received universal acclaim. *Reeling Rock* awarded *Jab* four out of five stars. *Jab* was also named 2015 Album of the Year at the Franklin City Music Awards.

[Photographs of Trapp punching Pender and a link to amateur YouTube video of the encounter, both of which were included with the article, are omitted.]

Stuart, Parks & Howard LLC

MEMORANDUM TO FILE

From: Timothy Howard
Date: February 22, 2016
Re: Katie Miller matter; phone conversation with Saul Leffler

Today I spoke with Saul Leffler, Steve Trapp's lawyer. We discussed Katie Miller's claims for assault and battery against Trapp. Leffler was dismissive and said that we would be "crazy" to pursue them.

Leffler denied that Trapp had committed a battery. According to Leffler, Trapp had just finished performing a two-and-a-half-hour high-energy rock concert, and he was exhausted from the performance and eager to get to his dressing room. According to Leffler, Trapp does not recall even touching Katie Miller as he passed the crowd of journalists. Leffler also claimed that even if Trapp had made any contact with Miller, it would have been accidental. Assuming that there was some contact, Leffler said that Miller had consented to a certain amount of jostling by attending the concert and going backstage. Leffler said that Trapp did not intend to harm her, and therefore did not have the requisite intent for battery.

Leffler also said that Miller lacks a meritorious claim for assault. In response to my statement that Trapp's conduct caused Miller to have an imminent apprehension of a battery, he said, "Baloney." Leffler conceded that Trapp was annoyed that so many journalists were crowded in his path; however, Leffler stated that Trapp did nothing that would cause Miller to fear that he would harm her. Leffler denied that Trapp singled out Miller or attempted to frighten her in any way.

Leffler got very upset when I mentioned punitive damages, and he accused Miller of attempting to capitalize on Trapp's fame and fortune. Leffler insisted that a jury will never find that Trapp had any injurious intent toward Miller. He emphasized that Trapp is a famous, well-respected musician, who generously donates to a wide variety of charities, including shelters for homeless women. Leffler said that Trapp does not even know Miller, and he has no evil motives toward young women generally or Miller in particular. I responded that the last thing Trapp needed now was more bad publicity. Leffler had no comment.

Leffler concluded by saying that if our firm pursues Miller's claims, we will lose.

FRANKLIN JURY VERDICT SUMMARIES

$360,000—Cook v. Matthews Garage (March 2015)

Plaintiff went into defendant's automobile repair shop to complain about the way his wife, a customer, had been treated by one of defendant's employees. That employee then pushed plaintiff to the floor and screamed and cursed at him. Plaintiff's arm was broken. Defendant knew that the employee had been terminated from prior jobs because of his tendency to use violence to settle work-related disputes.

Medical expenses—$10,000
Pain and suffering—$50,000
Punitive damages—$300,000

$1,500,000—Alma v. Burgess (April 2015)

Defendant attacked plaintiff, a 35-year-old teacher, when plaintiff was leaving her house at night. Defendant stabbed plaintiff in the torso and upper leg. Plaintiff was taken by ambulance to the hospital, where she received treatment and remained for four days.

Medical expenses—$100,000
Pain and suffering—$400,000
Punitive damages—$1,000,000

$52,000—Little v. Franklin Chargers, Inc. (October 2015)

Plaintiff attended a professional basketball game as a spectator. During halftime, defendant's team mascot grabbed plaintiff hard and attempted to pull him onto the floor to participate in an entertainment routine. The mascot pulled plaintiff's arm with such force that plaintiff fell down, dislocating his left shoulder. Plaintiff felt that he had been humiliated in front of his fiancée and a stadium full of onlookers.

Medical expenses—$12,000
Pain and suffering—$40,000
Punitive damages of $200,000 requested but denied.

February 2016

MPT-2 Library:

Miller v. Trapp

Horton v. Suzuki

Franklin Court of Appeal (2009)

This is an appeal from a judgment for the plaintiff following a bench trial of a civil battery case. The defendant argues that 1) the lower court's finding of lack of consent was clearly erroneous; 2) the lower court's finding on intent was clearly erroneous; and 3) even if there was a battery, the damages award was excessive.

Plaintiff John Horton sued defendant Rikuo Suzuki, his karate instructor, for injuries suffered as a result of an alleged battery committed by Suzuki.

It is undisputed that Horton was a student in a karate class conducted by Suzuki. Horton testified that he knew he would be subjected to rough physical contact by classmates and the instructor as a necessary part of the class. A classmate testified that Horton was speaking in the locker room to another student after class when Suzuki apparently misunderstood what Horton said and struck Horton on the cheek. The classmate further testified that Suzuki appeared angry and yelled at Horton.

Suzuki argues that Horton consented to the contact by enrolling in the karate class. Several witnesses for Suzuki testified that a student of karate must expect rough treatment from his instructor and that the instructor often physically disciplines the students during class. Suzuki testified that he was attempting to discipline Horton when he struck him. However, there is no evidence that the blow had any connection with the karate instruction, and the evidence indicates that Suzuki struck Horton for some personal reason.

An actor is subject to liability to another for the tort of battery if he or she acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. To prevail on a civil battery claim, the plaintiff must show that he or she did not consent to (or give apparent consent to) the defendant's contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact.

Here Horton may have consented to a certain amount of harmful or offensive contact during his karate instruction. Nothing in the record, however, indicates that Horton consented to being struck on the cheek by his instructor after class had been dismissed.

Suzuki also argues that he is not liable for battery because he did not intend to harm or offend Horton. In Franklin, for a plaintiff to prevail on a battery claim, it is sufficient that the

defendant intended to cause a contact that turned out to be harmful or offensive. The defendant does not have to have intended that the contact result in harm or offense.

Thus, it is irrelevant whether Suzuki intended that Horton be harmed or offended. Suzuki intended to strike Horton on the cheek, and in doing so engaged in intentional harmful and offensive contact.

Finally, Suzuki argues that even if there was a battery, the trial court erred by awarding Horton excessive damages of $7,500. For intentional torts like assault or battery, a plaintiff may seek two kinds of damages: compensatory and punitive. Compensatory damages may include medical expenses, lost wages, and pain and suffering. Pain and suffering includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright caused by the battery. Moreover, mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, and unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact.

Horton suffered a cut on the inside of his mouth which became infected, and for which he incurred only $1,500 in medical expenses. The court properly found that Suzuki committed battery and awarded Horton $7,500 in compensatory damages: $1,500 for medical expenses and $6,000 for pain and suffering.

Although punitive damages are also available in civil assault and battery cases, the trial court denied Horton’s request for punitive damages and that denial was not appealed.

We find the total award of $7,500 to be adequate and in conformity with awards in battery cases in which the injuries incurred were minimal.

Our review of the record persuades us that there is sufficient evidence to support the lower court’s findings. We therefore conclude that the lower court’s findings were not clearly erroneous.

Affirmed.

Polk v. Eugene

Franklin Supreme Court (2004)

This is a suit for compensatory and punitive damages growing out of an alleged battery. The plaintiff, Barrington Polk, is a physician. The defendant, John Eugene, is a member of the private Hills Club. After a jury trial, the court rendered judgment for the plaintiff, including an award of punitive damages. The Franklin Court of Appeal reversed. The questions before this Court are whether a battery was committed and, if so, whether the trial court abused its discretion in entering judgment for $3,000 in punitive damages.

Polk had been invited to a one-day medical conference at the Hills Club. The invitation included a luncheon. The luncheon was buffet style, and Polk stood in line with others. As Polk was about to be served, Eugene approached him, snatched the plate from Polk's hand, and shouted that Polk could not be served in the club because of his race. Polk was not actually touched during the incident. Polk testified that he did not fear or apprehend physical injury but that he was highly embarrassed by Eugene's conduct in the presence of his associates.

The jury found that Eugene "forcibly dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Polk could not be served there, thus subjecting Polk to humiliation and indignity. The jury found that Eugene acted maliciously and awarded Polk $1,000 in compensatory damages for pain and suffering due to his humiliation and indignity and $3,000 in punitive damages. Eugene appealed, arguing that there was no battery but even if there was a battery, the evidence did not support an award of punitive damages.

The court of appeal held that there was no battery because there was no physical contact and therefore did not reach the issue of punitive damages. However, it has long been settled that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of Polk's plate constituted a battery. We held that the snatching of an object from one's hand constituted a battery in *Riley v. Adams* (Franklin Sup. Ct. 1960). In *Riley*, the plaintiff bought some articles of intimate apparel from a store at which the defendant was the manager. The defendant claimed that he suspected that the plaintiff had not paid for all the articles in her shopping bag. Rather than confronting the young woman at the cash register or in the store, the defendant waited until she had walked several blocks and crossed the square to confront her. He

ran up and took the plaintiff's bag from her by force. He proceeded to search it and take the articles out and hold them up to the public view. The court held that the defendant's acts constituted a battery, explaining that "to constitute a battery, it is not necessary to touch the plaintiff's body or even his clothing. Knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute an offensive touching." *Riley*.

Since the essence of the plaintiff's grievance consists in the offense to his dignity involved in the unpermitted and intentional invasion of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another's person is actionable as an offensive contact with his person. We hold, therefore, that the forceful dispossession of Polk's plate in an offensive manner was sufficient to constitute a battery.

Damages for mental suffering are recoverable without a showing of actual physical injury in a civil action for battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Personal indignity is the essence of an action for battery; consequently, the defendant is liable not only for contacts that do actual physical harm but also for those that are offensive. We hold, therefore, that Polk was entitled to compensatory damages for mental suffering due to the battery, even in the absence of any physical injury.

We now turn to the question of punitive damages. The jury verdict concluded with a finding that $3,000 would "reasonably compensate plaintiff for Eugene's evil act and reckless disregard of plaintiff's feelings and rights."

It has long been established in Franklin that punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. This common law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. In assessing punitive damages, the trier of fact can properly consider (a) the character of the defendant's act, namely whether it is of the sort that calls for deterrence and punishment; (b) the nature and

extent of the harm to the plaintiff that the defendant caused or intended to cause; and (c) the wealth of the defendant.

Punitive damages are never awarded as a matter of right, no matter how egregious the defendant's conduct. Compensatory damages, by contrast, are mandatory. Once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

Eugene argues that the award of punitive damages is not supported by substantial evidence. However, the standard of review for an award of punitive damages is whether the trial court abused its discretion. The amount of punitive damages is left to the discretion of the trier of fact, based on the circumstances of each case, but should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. The United States Supreme Court has instructed that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003).

An appellate court should disturb a determination of punitive damages only in extreme cases. Here, the jury awarded $1,000 in compensatory damages and $3,000 in punitive damages. The punitive damages awarded were only three times the amount of compensatory damages and within the *State Farm v. Campbell* guideline.

The jury found that Eugene acted with an evil motive and a reckless disregard of Polk's rights and feelings. The record contains sufficient evidence to support this finding.

The court of appeal's holding that there was no battery is reversed, and the judgment of the trial court is reinstated in favor of the plaintiff.

Brown v. Orr

Franklin Court of Appeal (2000)

The plaintiff, Lydia Brown, appeals from a summary judgment for the defendant, Richard Orr, in which the trial court found that his actions did not constitute assault. For the reasons set forth below, we reverse.

Brown and Orr were both employed at Hotel Livingston in Franklin City and were members of the same labor union. During a conversation concerning the proper method of filing a grievance against the hotel with the union, Orr allegedly shook his finger in Brown's face. Brown told Orr that the last man who pointed his finger at her "was sorry that he did it." Orr then allegedly stated that he would "take [her] down anytime, anywhere." The conversation then ended, and Brown returned to work. The next day she and Orr had a second confrontation, during which Orr allegedly repeated his earlier threat. Following that second incident, Brown became "agitated and upset" and reported Orr's threats to her supervisor. Brown commenced this civil suit against Orr for assault. Orr moved for summary judgment, claiming that his conduct did not create a reasonable apprehension of physical harm in Brown. The trial court granted Orr's motion. Brown appeals. We reverse.

An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. The trial court found that Orr's conduct could not have put Brown in apprehension of an imminent battery.

On appeal, Brown cites *Holmes v. Nash* (Fr. Sup. Ct. 1990) in arguing that Orr's threats, when combined with the fact that he shook his finger in her face during their first conversation, created a question for the jury on the issue of assault. She contends that Orr's actions were similar to those of the defendant in *Holmes.*

In *Holmes*, defendant Tom Nash repeatedly threatened to kill plaintiff Jenny Holmes if she sued him. When Holmes filed a legal action, Nash came to her home, beat on the door, and attempted to pry it open, while repeating his threats to kill her. There was also evidence that Nash made harassing telephone calls to Holmes. Those acts so unnerved Holmes that she changed the locks on her door, nailed her windows closed, and had friends spend the night at her home. In *Holmes*, the court held, "Words standing alone cannot constitute an assault. However, they may give meaning to an act, and when taken together, they may create a well-founded fear of a

battery in the mind of the person at whom they are directed, thereby constituting an assault." The court concluded that it could not say that Nash's actions were sufficient to give rise to a well-founded apprehension of an imminent harmful or offensive contact but that it was a question for the jury.

Although the facts in this case are not as strong as those in *Holmes*, we cannot say that, as a matter of law, Orr's acts and threats could not create a reasonable or well-founded apprehension of imminent physical harm. There was evidence that after Orr's first alleged threat, Brown walked away. That evidence is not conclusive, however, as to whether she discounted the threat or whether she left to avoid the threatened harm. Brown also testified that after the second alleged assault the next day, she had to leave work because she was so frightened and upset.

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. After reviewing the evidence before the trial court in a light most favorable to the non-movant, as this court must do when reviewing a summary judgment, we conclude that Brown presented sufficient evidence that Orr's alleged threats created a well-founded fear of imminent harm and created a jury question on her claim of assault. Therefore, the summary judgment on Brown's assault claim is reversed.

Reversed and remanded.

February 2016
MPT-1 Point Sheet:
In re Anderson

In re Anderson

DRAFTERS' POINT SHEET

In this performance test, the client, Nicole Anderson, is seeking legal advice in response to a workers' compensation claim filed against her by Rick Greer, a handyman retained by Anderson to perform general maintenance and repair work for Anderson's residential rental properties. Greer was injured while painting the exterior of one of Anderson's rental houses.

Under the Franklin Workers' Compensation Act, employers are required to maintain insurance coverage for employees who may sustain injuries arising out of and in the course of their employment. Workers' compensation does not apply to independent contractors.

Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, she could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage. It is undisputed that Greer was injured while performing handyman services at one of Anderson's rental houses. Thus, the critical issue is whether Greer was Anderson's employee or an independent contractor at the time that he was injured.

Examinees' task is to draft an objective memorandum analyzing whether Greer would likely be considered an employee of Anderson or an independent contractor under the applicable statutory provisions and case law. The File contains the instructional memo from the supervising attorney, a transcript of a client interview, an email exchange between Anderson and Greer, and a copy of the workers' compensation claim submitted by Greer to Anderson for processing. The Library contains excerpts from the Franklin Labor Code and two cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

The task is to write an objective memorandum analyzing whether Greer is an employee of Anderson or an independent contractor. No specific formatting guidelines are provided, except that examinees are instructed not to prepare a separate statement of facts but to be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses.

II. THE STATUTES AND CASES

The following points, which examinees should extract and use in formulating their analyses, emerge from the Franklin Labor Code provisions and the cases in the Library:

- The Franklin Workers' Compensation Act ("the Act"), codified in the Franklin Labor Code, extends only to injuries suffered by an "employee" which arise in the course of his employment. *Robbins v. Workers' Compensation Appeals Board* (Franklin Ct. App. 2007).
- The Franklin Labor Code defines the terms "employee" (§ 251) and "independent contractor" (§ 253) and includes a presumption that a person rendering service for another is an

employee (§ 257). Employees include most persons "in the service of an employer under any . . . contract of hire" (§ 251), but do not include independent contractors (§ 257).

- The Labor Code further mandates that the provisions of the Act "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Franklin Labor Code § 280.
- Finally, the Act places the burden of proof on the alleged employer to establish that a person injured while performing services for the employer was an independent contractor, rather than an employee. *Id*. § 705.
- The Labor Code definitions, presumptions, and burden of proof provide the statutory framework for analyzing workers' compensation claims, but they do not, standing alone, answer the question whether particular persons in particular situations are employees or independent contractors. Rather, such determinations are fact-specific and involve an analysis of several factors.
- The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. *Robbins.*
- The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. However, this factor is not exclusive. *Id.*
- Determining whether an individual is an employee or an independent contractor also requires an analysis of eight additional, secondary factors, derived largely from the Restatement (Second) of Agency and from other jurisdictions. These are known as the *Doyle* factors because they were first enunciated collectively in *Doyle v. Workers' Compensation Appeals Board* (Franklin Sup. Ct. 1991).
- The *Doyle* factors (cited in *Robbins*) are as follows: (1) whether the worker is engaged in a distinct occupation or an independently established business; (2) whether the worker or the principal supplies the tools or instrumentalities used in the work, other than tools and instrumentalities customarily supplied by employees; (3) the method of payment, whether by time or by the job; (4) whether the work is part of the regular business of the principal; (5) whether the worker has a substantial investment in the worker's business other than personal services; (6) whether the worker hires employees to assist him; (7) whether the parties believe they are creating the relationship of employer-employee; and (8) the degree of permanence of the working relationship.

III. ANALYSIS

A. The Right-of-Control Test

Examinees should recognize that where an injured worker claims to be an employee and the employer claims that the worker is an independent contractor, the employer has the burden of proof in establishing the worker's independent contractor status. Franklin Labor Code § 705.

- The distinguishing characteristic of an employer is the power to control the details of the work and methods of performance. *Robbins.*

- In *Robbins*, a case involving a gardener hired by a diner to prune bushes, the court concluded that the gardener was hired to "produce *the result* of trimming the bushes," and the court found no evidence to suggest that anyone instructed the gardener on how to do his work. The court contrasted the lack of supervision over the gardener against the "pervasive control" exercised by the defendant grower in the *Doyle* case, where the employees served as unskilled laborers and "all meaningful aspects" of the business (including price, crop cultivation, etc.) were controlled by the grower.
- Here, Anderson was involved in picking out paint and fixtures such as ceiling fans, and in ensuring the overall *results* of the project. In her own words, she was "pretty particular" about making sure the job was "done right," especially in situations involving an expensive rental property such as the Clover Circle rental house. (*See* client interview.)
- However, she typically did not get involved in supervising *how* Greer did the projects (i.e., the "means" by which the results were accomplished). In her own words, she did not "micromanage" Greer's work. To the contrary, because she holds a full-time job, she often showed up *after* Greer had completed a project just to make sure it was finished and done correctly—again evidencing control over the result, not the means. For instance, when a toilet was leaking, Greer was the one who diagnosed and fixed the leak, and then she would check to make sure the leak had been fixed.
- Anderson also required Greer to inspect the exteriors of each of her properties monthly, using a checklist that she provided to him.
- With regard to the painting project at issue, Anderson acknowledges in her interview that she exercised some degree of control over the means of the project by instructing Greer to mask the windows, use a narrow brush to paint the trim, and apply three coats of paint.
- However, a person who engages an independent contractor retains "broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance," including the "right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work." *Harris v. Workers' Compensation Appeals Board* (Franklin Ct. App. 2003).
- That Anderson exercised this right in connection with the Clover Circle project does not transform the independent contractor nature of the parties' relationship into one of employer-employee. Nor do the monthly inspections alter the nature of the parties' relationship, as the inspections were necessary in order to identify repairs that needed to be made and thereby ensure satisfactory performance of the work performed by Greer.
- The facts indicate that with few exceptions, Anderson relied on Greer's expertise as a handyman and controlled only the result of his work (e.g., paint color or the particular type of ceiling fan installed), not the means by which the result was achieved (e.g., the techniques used by Greer in painting a room or installing a fan).
- This contrasts with the circumstances in *Harris*, wherein the court concluded that the employer country club controlled the manner and means and not just the result, because

the club supervised golf caddies' dress, behavior, types of services rendered, and even the payment process, notwithstanding that members paid for the caddies' services.

- Moreover, the client interview transcript and email exchange between Anderson and Greer indicate that Greer set his own hours, as did the gardener in *Robbins*. Anderson indicated that she would call Greer as needed and he would schedule the work and complete it at his convenience. Although Anderson paid Greer a retainer of $250 per month and she stated in her client interview that the purpose of the retainer was to ensure that Greer "is always available" to work on her projects, there is no indication that she required him to work a certain number of hours or work on certain days or at particular times. Rather, as projects came up, Anderson would call Greer and he would "work[] [her] into his schedule and get[] the project done."
- Thus, like the gardener in *Robbins*, Greer worked in a largely unsupervised, highly skilled capacity on his own schedule, subject only to practical limitations such as a tenant's availability or the presence of an unsecured dog.

B. The *Doyle* Factors

Factor #1: Whether the worker is engaged in a distinct occupation or an independently established business

- The client interview transcript and the emails indicate that Greer has his own business called "Greer's Fix-Its" and even advertises in online classified ads. It is not stated how long Greer has been in business, but the File indicates that he has multiple clients (including the references whom Anderson contacted as well as Anderson's friend Jim, who owns an eight-unit apartment complex).
- Thus, Greer is more like the gardener in *Robbins* (who also had multiple clients and his own separate business) than the golf caddie in *Harris* (who did not have a separate business and who worked exclusively for the alleged employer).

Factor #2: Whether the worker or the principal supplies the tools or instrumentalities used in the work, other than tools and instrumentalities customarily supplied by employees

- In *Robbins*, the gardener supplied his own equipment for his work, including tools that a restaurant would not "commonly" have. Conversely, in *Harris*, there were very few tools involved (caddie assignment/locker room, golf carts, and golf clubs), all of which were provided either by the country club or by club members.
- Here, Greer supplied his own tools, including a big toolbox in the back of his pickup truck and the ladder that he fell from. Better examinees may note that the tools supplied and used by Greer are tools that a rental property owner such as Anderson might have (which distinguishes this situation somewhat from the restaurant owner in *Robbins*), but that nonetheless the tools were in fact supplied by Greer.

- Although Anderson sometimes picked out the paint, and fixtures such as ceiling fans and faucets for particular projects, astute examinees should note that paint, ceiling fans and the like are not tools. Rather, they are materials, the cost of which Anderson was already responsible for paying. So whether she paid for these materials up front or reimbursed Greer after the fact should have no bearing on the analysis of this *Doyle* factor.

Factor #3: The method of payment, whether by time or by the job

- This factor is a closer call than Factor #2. Greer worked for Anderson on a steady basis that averaged out to about 10 hours a month (as contrasted against the two-project engagement in *Robbins*) and was paid a $250-per-month retainer. However, the File also indicates that the work fluctuated and that Greer was paid on a job-by-job basis for hourly work exceeding 10 hours a month, that he was paid a flat fee (instead of an hourly rate) for certain projects such as painting interior rooms, and that the parties negotiated the fee for more complicated projects.
- In addition, there is no indication of any obligation on Anderson's part to continue paying Greer a retainer or on Greer's part to keep Anderson as a client, and Anderson did not deduct income taxes from the money that she paid Greer.
- Thus, on balance, this factor also weighs in favor of Greer as an independent contractor.

Factor #4: Whether the work is part of the regular business of the principal

- In *Doyle* and *Harris*, the work performed by the employee was part and parcel of the employer's business—growers need laborers to harvest their crops and high-end golf courses provide caddie service to their members, respectively. Conversely, in *Robbins*, pruning bushes was found to be "wholly unrelated" to the business of food service.
- In *Doyle*, the court concluded that harvesting formed "a regular and integrated portion" of Doyle's business operation, in that Doyle's "entire business" was the production and sale of agricultural crops. Here, it cannot be said that Anderson's "entire business" is the maintenance and repair of rental properties. Rather, she is in the business of providing living spaces for people, and maintaining and repairing those spaces takes on average less than one hour per rental house per month.
- Although it could be argued that repair and maintenance of rental property is not "wholly unrelated" to the business of renting property—in that Anderson needed to ensure that her rental properties were maintained in good condition—at the same time it cannot be said that the work performed by Greer was at the "heart" of Anderson's business, as was the case with the harvesters in *Doyle*.
- Ultimately, this factor involves thoughtful analysis and is a closer call than some of the other factors, but better examinees should conclude that the maintenance work provided by Greer—which averaged out to less than one hour per rental house per month (10 hours total divided by 11 rental properties)—was not so central to the business of providing

residential rental properties as to transform Greer into Anderson's employee, especially when considered in conjunction with the other *Doyle* factors.

Factor #5: Whether the worker has a substantial investment in the worker's business other than personal services

- The gardener in *Robbins* had 25 years invested in his gardening business and owned his own equipment. Although we do not know how long Greer's Fix-Its has been operating, we do know that Greer has a built-in toolbox on the bed of his pickup truck containing a multitude of tools and that he advertises his services online.
- Thus, unlike the golf caddie in *Harris* (who invested in nothing more than the country club shirt required to be worn by the club's caddies), here the facts strongly suggest that Greer has a "substantial investment" in his business.

Factor #6: Whether the worker hires employees to assist him

- None of the workers in the cases hired assistants. Neither did Greer. But as noted in *Robbins*, the process of distinguishing employees from independent contractors is fact-specific and qualitative, not quantitative, and it does not depend on the presence or absence of any one *Doyle* factor viewed in isolation. In addition, the reality is that many independent contractors, such as the gardener in *Robbins*, are able to perform all particulars of a job without needing to hire employees. Thus this factor is probably not as important as the others in determining an individual's employment status.

Factor #7: Whether the parties believe they are creating the relationship of employer-employee

- Based on the claim filed by Greer and Anderson's response upon receiving the claim, it appears that Greer may have viewed himself as an employee (or at least he is asserting this in order to be eligible for workers' compensation benefits), whereas Anderson clearly did not view him as such. Examinees may note that the filing of a workers' compensation claim should not have any bearing on whether the parties believe they have created an employer-employee relationship, as it was not considered by the *Robbins* court.
- Ultimately, not enough facts are known to fully analyze this factor. However, based on the facts in the File, the nature of the relationship between Anderson and Greer is more akin to the relationship between the parties in *Robbins* than in *Harris*.
- In *Harris*, the employee had little or no bargaining power, and the court concluded that the country club enjoyed a "clearly superior bargaining position" over its caddies.
- Here, in contrast, both the client interview and the emails suggest that the parties had equal bargaining status. Greer set his hourly rate, and the parties negotiated payment on any projects involving a flat fee, such as painting nonstandard interior rooms. Also, because Greer had other clients, he was necessarily in a better bargaining position than the employee in *Harris*, who depended exclusively on the country club for income.

Factor #8: The degree of permanence of the working relationship

- In *Robbins*, no date was specified for the gardener's return after the first time he pruned bushes for the diner. Here, as discussed above, although Anderson paid Greer a monthly retainer, there was no obligation on Anderson's part to continue paying Greer a retainer or on Greer's part to continue working on Anderson's rental properties. Greer did not report to work for Anderson but instead provided services only on an as-needed basis. Either party had the right to terminate the arrangement at any time, and thus their arrangement lacked the "permanence" of a traditional employer-employee relationship.

C. Statutory/Policy Analysis

- Franklin Labor Code § 280 mandates that the provisions of the Act "be liberally construed" for purposes of protecting persons injured in the course of their employment.
- The *Robbins* court noted that it must consider the remedial purpose of workers' compensation laws, the class of persons intended to be protected, and the relative bargaining positions of the parties. Excluding independent contractors from the class of persons protected does not contravene the spirit of the law in that independent contractors have control over how their work is done, have primary power over safety, and can distribute the risk and cost of injury as an expense of their business.
- Like the gardener in *Robbins*, Greer had the ability to spread the cost of insurance against work-related injuries through the fees he charged his various customers for his services. Greer also did the work mainly on his own terms using his own equipment. While Anderson did check his work, and sometimes picked a particular fixture or paint color, Greer did the work unsupervised by her.
- Finally, Greer and Anderson *negotiated* his rates—he was paid either by the hour or by the job. He was on an equal footing with Anderson, and was free to work for others or take or leave assignments from her, unlike the unskilled workers in *Doyle* or the caddie in *Harris*.
- Thus, Greer was not like the harvesters in *Doyle*, who needed the protection of the Act, or the caddie in *Harris*, whose work performance was under the strict supervision of the country club.

IV. CONCLUSION

Examinees should conclude that Greer will most likely be considered an independent contractor rather than Anderson's employee. Although some of the *Doyle* factors are closer calls than others, on balance most weigh in favor of a finding that Greer is more like the gardener in *Robbins* than the employees in *Doyle* and *Harris*. Thus, Greer would likely *not* be considered an employee of Anderson, and his claim for workers' compensation benefits should be denied.

February 2016
MPT-2 Point Sheet:
Miller v. Trapp

Miller v. Trapp

DRAFTERS' POINT SHEET

In this performance test, the examinee is employed by the law firm of Stuart, Parks & Howard. Katie Miller has retained the firm to pursue claims for civil assault and battery against musician Steve Trapp in connection with an incident that occurred after a concert by Trapp's band, the Revengers. Examinees have two tasks to complete: (1) draft a demand letter on behalf of Miller in anticipation of a lawsuit for assault and battery against Trapp, and (2) draft a brief memo to the assigning partner setting forth an analysis and recommendation of the compensatory and punitive damages that Miller can reasonably and realistically expect to recover from Trapp at trial. Based on the analysis in the examinee's memo, the partner will determine the appropriate amounts of damages to seek in the demand letter.

The File contains an instructional memo from the assigning partner Timothy Howard, the law firm's guidelines for drafting demand letters, an excerpt from Katie Miller's blog RockNation, an article from *Reeling Rock* magazine about the incident, a file memorandum summarizing a phone conversation between Timothy Howard and Trapp's attorney Saul Leffler, and summaries of Franklin jury verdicts in civil cases. The Library contains three Franklin cases: *Horton v. Suzuki*, *Polk v. Eugene*, and *Brown v. Orr*.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The assigning partner requests that the examinee (1) write a demand letter to Steve Trapp's attorney, Saul Leffler, on behalf of the client, Katie Miller, setting forth the basis for Miller's assault and battery claims and the basis for compensatory and punitive damages; and (2) write a brief memo to the assigning partner setting forth the examinee's analysis and recommendation of the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial.

A. Demand Letter

The examinee's first task is to write a demand letter to Saul Leffler. The demand letter should persuasively set forth the strength of Miller's assault and battery claims and her eligibility for compensatory and punitive damages. The guidelines for drafting demand letters indicate that demand letters should state the client's legal claim, demand that the other party pay damages and/or take or cease taking a certain action, and advocate a position and persuade the recipient.

The firm's guidelines state that a demand letter typically includes

(1) a brief statement indicating that the lawyer represents the client in the present matter;

(2) a brief statement of the purpose of the letter;

(3) a succinct but persuasive statement of facts;

(4) a thorough analysis of the bases for the client's claims;

(5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner;

(6) a deadline by which the other party must comply (usually one or two weeks); and

(7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

Examinees must follow the guidelines and draft a demand letter to Saul Leffler that includes each of the seven listed components. In the discussion of the bases for the client's claims (item (4) above), the examinee should thoroughly analyze and integrate both the facts and the applicable law. The examinee should also respond to arguments made against the claim and set forth the strongest credible claim on behalf of the client so that there is room for negotiation. In line with the instructions from Timothy Howard, the examinee should not refer to the Franklin jury verdict summaries in the demand letter.

B. Memo Regarding Damages

The examinee's second task is to draft a brief memo to the assigning partner about Miller's damages arising from the assault and battery claim. Examinees are told to analyze and recommend the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial, using the cases and the Franklin jury verdict summaries for guidance. The partner will then use this memo in determining the amounts of requested damages to be inserted into the demand letter.

Specific amounts for the damages award to be expected from a trial should be identified. This includes an amount for total compensatory damages with specific amounts for medical expenses, pain and suffering, and lost wages, and an amount for punitive damages. The examinee should explain the analysis resulting in these amounts.

II. FACTS

- Katie Miller is a reporter for her college newspaper and has a blog called RockNation that provides commentary about rock and roll. Miller was very excited to obtain a press pass to go backstage at the Revengers rock concert held at the Franklin City Arena. She hoped to interview the Revengers' famous lead singer and guitarist Steve Trapp after the concert for the newspaper and then post the details of the interview on her blog. Miller has "followed every piece of news" about Trapp's music and personal life; he has been her idol since he joined the Revengers.
- Miller watched the concert offstage with other photographers and journalists. She had her smartphone in her hand, set to record. After the final encore, Trapp walked offstage. Nina Pender, a photographer from *Celebrity* magazine, was in front of the crowd and leaned in to take a picture of Trapp. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the nose, and smashed her camera on the ground. Other photographers at the scene and an amateur YouTube video captured the incident. Pender was hospitalized with serious injuries. A police investigation is ongoing, and Pender intends to sue Trapp for $5 million in damages.

- After hitting Pender, Trapp stormed through the crowd of paparazzi and journalists, yelling obscenities and pushing individuals out of his way.
- Trapp yelled at Miller, "Get out of my way, you little punk, or I'll beat the hell out of you." He raised his arm as if he was going to hit her. Miller was "freaking out." Then Trapp grabbed Miller's phone out of her hand and smashed it to the ground. She was holding the phone tightly, and Trapp dislocated her shoulder when he grabbed the phone. She went to the hospital and was in "unbelievable" pain for almost four hours until the doctor popped her shoulder back into place.
- Miller has been "a wreck" since the incident and has found it "devastating."
- Miller has $5,000 in medical bills; her arm was in a sling for three days; she missed a week of part-time work in the school cafeteria, losing $100; and she had to pay $500 to replace her phone.
- Trapp owns a 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. The Revengers' most recent album, *Jab*, has received universal acclaim and awards, including 2015 Album of the Year at the Franklin City Music Awards.
- Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs; the charges were later dropped. In 2012, he pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard Alex Peel.
- Timothy Howard recently spoke to Trapp's attorney, Saul Leffler, and memorialized the conversation in a memorandum to file. Leffler asserted that Miller does not have meritorious claims for assault and battery and is not entitled to punitive damages. Trapp states that he does not remember touching Miller and that if he did touch her it was accidental. Howard pointed out that Trapp does not need any more bad publicity.

III. LEGAL ISSUES

A. Assault

- An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. *Brown v. Orr*.
- Words standing alone cannot constitute an assault. However, they may give meaning to an act, and together, they may create a well-founded fear of a battery in the mind of the person at whom they are directed, thereby constituting an assault. *Holmes v. Nash* (cited in *Brown*).
- In the demand letter, examinees must argue that Trapp's conduct constitutes assault. They should address two issues: (1) that Trapp intended to cause imminent apprehension of a battery, and (2) that Miller was put in well-founded apprehension of an imminent battery.
- The relevant facts indicate that Trapp intended to cause imminent apprehension of an imminent battery in Miller. He said he would "beat the hell" out of her if she did not get out of his way and then raised his arm as if to hit her.

- The facts also demonstrate that Trapp's acts created a well-founded fear of a battery in Miller's mind. Miller had just watched Trapp punch Nina Pender in the face and break her camera. Trapp was pushing journalists and photographers out of his way. Miller observed this conduct and could have formed a well-founded fear that Trapp was about to commit a battery upon her. Trapp specifically threatened to "beat the hell" out of her and then raised his arm as if to hit her. Moreover, Trapp's criminal record includes an assault and battery of his former bodyguard Peel, indicating his willingness to engage in violence. Miller likely knows of this criminal history because she has "followed every piece of news about Steve's music and personal life." While Trapp's drug history is not especially relevant, his attacks of Pender and Peel would contribute to Miller's well-founded fear of a battery.
- Examinees should argue that while "words standing alone cannot constitute an assault," Trapp's verbal threats combined with his physical acts could have created a well-founded fear of a battery in Miller's mind. Examinees can analogize to *Brown v. Orr* in which the court held that an assault may have occurred when the defendant shook his finger in the plaintiff's face and stated that he would "take [her] down anytime, anywhere." Examinees can also rely on *Holmes*, in which the court held that the defendant's acts may have constituted assault when the defendant came to the plaintiff's home, beat on the door, and attempted to pry it open, all while threatening to kill her.

B. Battery

- An actor is subject to liability to another for battery if he or she acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. *Horton v. Suzuki*. It is sufficient that the defendant intended to cause a contact that turned out to be harmful or offensive; the defendant does not have to have intended that the contact result in harm or offense. *Id*.
- Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another's person is actionable as an offensive contact with his person. *Polk v. Eugene*. To constitute a battery, it is not necessary to touch the plaintiff's body or even his clothing. Knocking or snatching anything from [a] plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute an offensive touching. *Riley v. Adams* (cited in *Polk*).
- The plaintiff must show that the plaintiff did not consent to (or give apparent consent to) the defendant's contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact. *Horton.*
- In the demand letter, examinees must argue that Trapp's actions constituted a battery. Examinees should address the two components of battery: (1) that Trapp intended to make contact with Miller and a harmful and offensive contact with Miller resulted; and (2) that Miller did not consent to the contact.
- Trapp intended to make contact with Miller when he grabbed her phone on purpose and with such force that he dislocated her shoulder. The resulting contact was both offensive

and harmful. (It is sufficient that Trapp intended the contact with Miller, regardless of whether he meant the contact to be harmful or offensive.)

- It was offensive because Trapp made unpermitted and intentional contact with her phone, which was so connected to her body (in her hand) as to be regarded as part of Miller's person.
- The resulting contact was harmful because Trapp dislocated Miller's shoulder and caused pain and suffering.

- Examinees should also address consent. Miller did not consent to having her phone grabbed by Trapp. Nothing about her seeking an impromptu backstage interview with Trapp would signal consent to having her phone forcefully grabbed from her hand. That she was upset as a result of the contact also indicates lack of consent.

C. Compensatory Damages

- A plaintiff in an intentional tort suit like assault or battery can seek compensatory damages for medical expenses, lost wages, and pain and suffering. *Horton*.
- Compensatory damages are mandatory once liability is found. The jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. *Polk*.
- If Trapp is found liable for assault and/or battery, the jury must award Miller compensatory damages to compensate her for her losses.
  - In the demand letter, examinees should address Miller's eligibility to receive compensatory damages for medical expenses, lost wages, pain and suffering, and her broken phone. The specific amounts requested in the demand letter should be left blank.
  - In the memo to the partner, examinees should list specific amounts as to each type of compensatory damages (medical expenses, lost wages, pain and suffering, and broken phone) that Miller could reasonably and realistically expect to receive at trial and explain their reasoning in arriving at those amounts.
- Certain compensatory damages are straightforward. Miller should be awarded
  - $5,000 in medical expenses to cover her $5,000 in medical bills;
  - $100 for lost wages to compensate her for the $100 in lost wages from missing a week at her part-time job in the school cafeteria; and
  - $500 for the broken phone Miller had to replace.
- Pain and suffering (another category of compensatory damages) includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright. Mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact. *Horton*.
- Miller should be awarded damages for physical pain. She endured "unbelievable" pain for almost four hours until the doctor popped her shoulder back in place. If Miller experienced

pain when Trapp dislocated her shoulder, when the doctor popped her shoulder back in place, or during or after the time she had her arm in a sling, she can seek compensation for that, too.

- Miller may be able to recover for mental suffering, including insult and indignity, hurt feelings, and fright caused by Trapp's conduct. She suffered insult and indignity when Trapp yelled at her, threatened to "beat the hell out of [her]," and grabbed and smashed her phone in front of the other journalists and photographers. Examinees could also argue that Miller should recover for hurt feelings. Trapp was Miller's idol, and she feels devastated by the incident. Miller suffered fright, as she was "freaking out" when Trapp raised his arm as if to hit her, threatened to beat her, and grabbed the cell phone from her hand. Miller has been "a wreck" since the incident.
- In the damages memo, examinees must provide a specific amount that Miller could expect to recover at trial for pain and suffering. To determine a specific amount, examinees should refer to the cases in the Library and the Franklin jury verdict summaries.
- In *Polk*, the jury awarded the plaintiff $1,000 for pain and suffering. The jury found that the defendant subjected Polk to compensable humiliation and indignity when he "forcibly dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that the plaintiff could not be served in a private club. In *Horton*, the plaintiff was awarded $6,000 for pain and suffering for being struck on the cheek by his karate instructor.
- The jury verdict summaries provide additional guidance. In *Little v. Franklin Chargers Inc.*, the plaintiff was awarded $40,000 in pain and suffering for the pain of having his shoulder dislocated and the suffering of being humiliated in front of his fiancée and a stadium full of fans. In *Cook v. Matthews Garage*, the plaintiff was awarded $50,000 for pain and suffering when an automobile repair shop employee screamed and cursed at him and broke his arm by pushing him to the floor. In *Alma v. Burgess*, the plaintiff was awarded $400,000 in damages for pain and suffering after she was stabbed and hospitalized for her injuries.
- Examinees should compare the facts of Miller's case to those in the Library and the Franklin jury verdict summaries to arrive at a specific amount for pain and suffering. Miller's pain and suffering damages should be more than the $1,000 in *Polk* where the defendant took the plaintiff's plate and shouted in a loud and offensive manner. They should be less than the $400,000 in *Alma*, as that plaintiff experienced significantly more pain and suffering from being stabbed and was hospitalized. Examinees could suggest an amount similar to the $40,000 awarded in *Little* or the $50,000 awarded in *Cook*. As in *Little*, where the plaintiff's shoulder was dislocated and he was humiliated in front of his fiancée and a stadium full of fans, Miller too had her shoulder dislocated and was humiliated in front of a crowd of journalists and photographers.
- A perceptive examinee will notice that the pain and suffering awards in this problem are about three to five times the amount of the medical expenses. In *Horton*, the medical expenses were $1,500, and the pain and suffering damages were $6,000. In *Cook*, the

medical expenses were $10,000, and the pain and suffering damages were $50,000. In *Alma*, the medical expenses were $100,000, and the pain and suffering damages were $400,000. In *Little*, the medical expenses were $12,000, and the pain and suffering damages were $40,000.

- Miller's medical expenses are $5,000. Using the ratio of one to between three and five, a plausible amount for her pain and suffering damages would be between $15,000 and $25,000.

An excellent examinee will analyze pain and suffering damages both by comparing the facts of Miller's case to those of the other cases and by recognizing and applying the multiplier of between three and five between her medical expenses and pain and suffering damages.

D. Punitive Damages

- A plaintiff may seek punitive damages for assault and battery claims. *Horton*.
- Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Polk*.
- Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id*.
- In assessing punitive damages, the trier of fact can consider (a) the character of the defendant's act (whether it is of the sort that calls for deterrence and punishment); (b) the nature and extent of the harm that the defendant caused or intended to cause; and (c) the wealth of the defendant. *Id*.
- Punitive damages should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. *Id*. Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003) (cited in *Polk*).
- In the demand letter, examinees are expected to make the case that Miller is entitled to punitive damages. Examinees should argue that Trapp's conduct toward Miller was outrageous because of his evil motive or reckless indifference to the rights of others. The facts do not entirely support this proposition, but a credible argument can be made that Trapp's conduct constituting both the assault and the battery could lead a court to award punitive damages.
    - The conduct underlying the assault—Trapp threatening to "beat the hell" out of Miller and acting as if he was about to hit her—shows evil motive.
    - His conduct constituting the battery—forcefully grabbing Miller's phone from her hand and breaking it and dislocating her shoulder—shows evil motive and reckless indifference to the rights of others. Examinees can argue that Trapp was acting with evil motive and reckless indifference to the rights of others as he rampaged through the crowd of journalists and photographers, injuring Miller and pushing others. Grabbing

someone's phone contravenes that person's right to be free from offensive or harmful contacts.

- Examinees should address the negative character underlying Trapp's acts: his yelling at Miller, threatening to beat her, acting like he was going to hit her, and grabbing and smashing her phone. Hostile, threatening, and (somewhat) violent behavior should be deterred and punished.
- Examinees will have a harder time claiming that the nature and extent of the harm to Miller warrants elevated punitive damages. She sustained some harm—a shoulder injury, $5,000 in medical bills, pain and suffering, $100 in lost wages, and a broken phone. While the harm is not especially serious, examinees should argue that it bolsters her eligibility for punitive damages.
- Examinees should claim that punitive damages should be substantial because of Trapp's wealth. While the extent of his financial resources is unknown, Trapp's band the Revengers has had great success. Their most recent album received universal acclaim and was named 2015 Album of the Year. Trapp presumably had substantial financial rewards from this success. His wealth is also reflected by his large vacation home in Xanadu, the exclusive Franklin beach resort.
- In the memo to the assigning partner, examinees must specify an amount Miller is likely to receive for punitive damages if the case goes to trial and their reasoning in choosing that amount. Examinees should use the above factors for assessing punitive damages in their reasoning as to the amount they choose. They should also rely on the Franklin jury verdict summaries, the cases in the Library, and the single-digit ratio rule from *Campbell* in determining and explaining the appropriate amount of punitive damages.
- In *Little*, the plaintiff requested but was not awarded punitive damages after a team mascot tried to pull the plaintiff onto the floor during halftime of a professional basketball game. In *Cook*, the plaintiff was awarded $300,000 after being screamed and cursed at and pushed to the floor, resulting in a broken arm. In *Alma*, the plaintiff was awarded $1,000,000 in punitive damages after being stabbed by the defendant.
- Examinees should request less than the $1,000,000 of punitive damages awarded in *Alma*. In *Alma*, the character of the defendant's act and the nature and extent of the harm to the plaintiff were more severe than the character of Trapp's acts and the harm suffered by Miller. Trapp may be wealthier than the defendant in *Alma*, however. An examinee might request an amount similar to the $300,000 awarded in *Cook*. The character of Trapp's acts is similar to those in that case. The defendant in *Cook* screamed and cursed at the plaintiff, and Trapp yelled at and threatened Miller. The defendant in *Cook* used minor violence (pushing the plaintiff), and Trapp too used minor violence by grabbing and smashing Miller's phone. Again, Trapp's wealth is likely greater than that of the defendant in *Cook*, thus perhaps justifying a higher award.
- In *Little* and *Horton* the plaintiffs were not awarded punitive damages. Examinees may choose to distinguish the facts of Miller's case from the facts of these cases.

- Under the single-digit ratio rule from *Campbell*, the punitive damages amount must be only up to nine times the total compensatory damages award. Here, Miller's compensatory damages will be $5,600 ($5,000 in medical expenses + $100 in lost wages + $500 for the broken phone) plus the amount the examinee has chosen for pain and suffering. For instance, if the examinee concludes that $20,000 is the amount of pain and suffering damages likely to be awarded, the total compensatory damages will be $25,600 ($20,000 + $5,600). Then, under the *Campbell* rule, the punitive damages should not exceed $230,400 (9 x $25,600).
    - Excellent examinees will use the factors for assessing punitive damages, the jury verdict summaries, the cases in the Library, and the *Campbell* single-digit ratio in reaching and explaining the amount of punitive damages.

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