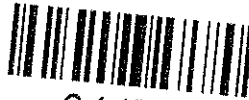


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216

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*In re Anderson*

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**FILE**

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

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**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

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**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 Greer*

**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

# **LIBRARY**

**Excerpts from the Franklin Workers' Compensation Act**

**Franklin Labor Code § 200 *et seq.***

**Article 2. Employers and Employees**

\*\*\*

§ 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**

\*\*\*

§ 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.

# NOTES

## MULTISTATE PERFORMANCE TEST DIRECTIONS

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.

**1) MPT1 - Please type your answer to MPT 1 below**

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**When finished with this question, click Â to advance to the next question.**  
(Essay)

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===== Start of Answer #1 (2221 words) =====

To: David Lawrence

From: Examinee 134

Date: February 23, 2016

Re: Workers' Compensation Claim

Mr. Lawrence,

In analyzing whether Rick Greer would be considered an employee of Nicole Anderson under the applicable statutory provisions and case law, per Franklin code and relevant case law, Mr. Greer would not be considered an employee of Nicole Anderson but rather an independent contractor.

Under the Franklin Labor Code, "Employee" means every person in the service of an employer under any appointment or contract of hire, whether express or implied, oral or written...". Initially, this could look grim for Ms. Anderson. However, Section 253 of the same code states that "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." Mr. Greer was in fact rendering his handyman/fix-it services for specified pay on a case-by-case basis for Ms. Anderson for a specified result. Ms. Anderson was his his principal solely as to the result of his maintenance and fixing up her rental properties and not as to the means by which such result was accomplished.

In looking closer to why Mr. Greer would be classified as an independent contractor rather an employee of Ms. Anderson, we much first look to the applicable case law of the state of Franklin.

Mr. Greer's relationship with Ms. Anderson resembles most closely to the facts of the 2007 case of Robbins v. Workers' Compensation Appeals Board. In this case, the court affirmed that Mr. Robbins was an independent contractor rather than an

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employee. Similar to Mr. Greer's injuries, Robbins injured his head and lower back when he fell from a roof while trimming bushes at a diner. The diner's owner arranged for Robbins to trim the bushes along the roofline of the diner on two occasions, paid him by the hour with no discussion of the number of hours he would work. The two did not discuss the hourly rate until he was finished. The owner did not deduct taxes from his pay - he paid his own taxes. The two agreed that the owner would contact him when his services were needed. The day of the incident the two did not discuss either the number of hours to be worked or the rate. Furthermore, Robbins brought all of his equipment needed to do the job.

With the facts at hand, the principal test of an employment relationship is whether the person to whom services are rendered has the "right to control" the manner and means of accomplishing the result desired. See Franklin Labor Code 253. The existence of such right to control, not the extent of its exercise, gives rise to the employer-employee relationship. Along with this "right to control" test, the Court looked at several secondary factors, the "Doyle factors" in determining whether Robbins was an employee or an independent contractor." In addition, public policy considerations also influence the determination of whether an individual is entitled to workers' compensation protections. To compare Robbins status and Mr. Greer's status, the court will look at the 1) "Right to Control" test, 2) the "Doyle factors", and 3) Public policy considerations.

#### Right to Control Test

The Right to Control test is used in the Robbins case, but set forth in the Doyle Case. Doyle involved unskilled harvesters who worked for the defendant grower. The court held that because all meaningful aspects of the relationship (price, crop cultivation, fertilization, and insect prevention, payment, and right to deal with the buyers) were controlled by the grower, the grower exercised "pervasive control over the operation as a whole," and therefore the harvesters were its employees. The harvesters hardly made any decisions concerning their work. Their 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 rather a function of the unskilled nature of the labor, which required little supervision.

In Robbins, Robbins was engaged to produce the result of trimming the bushes. In Greer's case, Greer was engaged to produce the result of fixing up the rental properties. In Robbins, neither party presented evidence that the diner owner had the power to control the manner or means of accomplishing the trimming. In the case at hand, Mr. Greer very seldom was told how to accomplish the maintenance of the rental properties. When a project came up, Ms. Anderson would call him. Ms. Anderson stated in her interview, that she does not micromanage Mr. Greer and that he is very good at what he does and knows what he is doing. He may be directed at what to fix but not how to accomplish it. He is told of the problem and then figures out on his own how to fix

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it. Ms. Anderson merely would swing by the properties after Mr. Greer was done to make sure the work was done before paying him. Like Mr. Robbins, Ms. Anderson did not tell Mr. Greer exactly how to do his job other than a few pointers here and there on what would look best. Furthermore, Mr. Robbins once accepted a job would complete it without direction from the person for whom he was rendering the service. Here, Mr. Greer's work was not an integral component of Ms. Anderson's operations over which she exercised pervasive control. Thus, the argument of "right to control" by the plaintiffs would fail.

Even more so, under the Harris case, "a person who engaged 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 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. Ms. Anderson did in fact stop to make suggestions as to the work in retaining her broad general power of supervision. The mere fact that she would suggest how to paint or what fixture to use was simply an aesthetic preference and did not change the nature of the independent contractor relationship between her and Mr. Greer. Therefore, under the principal test of the employment relationship, Ms. Anderson did not have the right to control Mr. Greer's work.

#### The Doyle Factors

In addition to the right-of-control test in Doyle, the court will also analyze the secondary factors identified in that case to determine whether Mr. Greer was an independent contractor or an employee. Like in Mr. Robbins case, in analyzing the factors the court will certainly hold that a majority of the factors will support the conclusion that Mr. Greer was an independent contractor because he "rendered 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. See FLC 253.

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

Like in Robbins, Mr. Greer performed his work for Ms. Anderson as part of his "Greer's Fix-Its" services, which he had been doing independently prior to Ms. Anderson hiring him. Mr. Greer advertised his services in the online Yellow pages. Ms. Anderson did not ask him to perform any service other than maintenance and fix-it issues with her rental properties. Therefore, this factor would weigh in favor of Mr. Greer in an independently established business and thus an independent contractor.

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

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Like in Robbins, Mr. Greer supplied the equipment (ladders, tools) he used for the job. Therefore, the worker here has supplied the tools and thus proving that Mr. Greer would be an independent contractor.

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

Like in Robbins, Mr. Greer was not hired by the day or hour, or even on a regular basis. The method of payment and rate was inconsistent in that sometimes Ms. Anderson would pay him on an hourly basis at a rate of \$25/hour and other times she would pay him on a flat rate by project. The rates varied on a case-by-case basis. Taxes were not deducted from his payment. Mr. Greer pays his own taxes. Therefore, this would prove even further that Mr. Greer is an independent contractor.

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

In Doyle, the court concluded that the harvesters were employees due to the fact 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." By contrast in Robbins and in the case at hand, Robbins work was wholly unrelated to the restaurant business as Greer's work was wholly unrelated to Ms. Anderson's full-time job as an accountant. Her work with the rental properties was merely a side job where she would swing by at the end of the day to ensure Mr. Greer had completed his work. Therefore, Mr. Greer's work was not part of the regular business of the principal and simply the duties of an independent contractor.

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

Mr. Greer like Robbins, has invested in all of his equipment as he provides the ladders, tools, drills, saws. Furthermore, the relevant facts point to Mr. Greer substantially investing in his business because he has done bigger projects at different properties over the years.

Factor 6: Whether the worker hires employees to assist him

Like in Robbins, Greer has not hired any employees to assist him but this alone does not negate the overwhelming evidence satisfying the other factors.

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

Neither Ms. Anderson nor Mr. Greer has testified that the parties believed they were creating an employee-employer relationship. The two of them did not enter into any formal agreement. They simply discussed the work via email.



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

While Mr. Greer had been working for Ms. Anderson for three years now, like in the facts in Robbins, Mr. Greer understood that he would be contacted only when his services were needed, with the result that he worked for period of time with no permanence whatsoever in his relationship with Ms. Anderson. Like Mr. Robbins, Mr. Greer's profit or loss depended on his scheduling the need Ms. Anderson had for projects that would come up in her properties. Furthermore his profit or loss depended on the time taken to perform the services, and his investment in tools and equipment.

Altogether, 6 out of the 8 factors support the fact that the court will determine Mr. Greer is an independent contractor because he rendered 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.

Public Policy Consideration

Finally, in determining 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 workers' compensation laws in this state, 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. The court in Doyle, 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 protection of workers' compensation law were intended. In contrast, Mr. Greer like Mr. Robbins was in a distinctly different position from the harvesters in Doyle. Mr. Robbins and Mr. Greer in the case at hand, was free to take or reject the jobs their principal's offered. Mr. Greer was not in a weak bargaining position. Nothing stopped him from declining a job and refusing certain payment terms from Ms. Anderson. These facts support the conclusion that Mr. Greer does not fall under the protection of the workers' compensation act but is an independent contractor.

Like in Robbins, no amount of liberal construction can change the balance of the evidence at hand, and the court will find that Mr. Greer is an independent contractor. Their conclusion will certainly not defeat the policy behind the workers' compensation system. Therefore, Mr. Greer was not an employee of Ms. Anderson but rather an independent contractor.

Thank you,

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==== End of Answer #1 =====

Applicant Number



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# THE MPT<sup>®</sup>

MULTISTATE PERFORMANCE TEST

## *Miller v. Trapp*

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**Miller v. Trapp**

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**FILE**

**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.

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## 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.

# NOTES

## MULTISTATE PERFORMANCE TEST DIRECTIONS

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.

**2) MPT2 - Please type your answer to MPT 2 below (Essay)**

===== Start of Answer #2 (1110 words) =====

**Stuart, Parks & Howard LLC**

**Attorneys at Law**

**1500 Clark Street**

**Franklin City, Franklin 33007**

**Re: Katie Miller's Battery and Assault**

**February 23, 2016**

**Mr. Saul Leffler:**

**I hope this letter finds you well. As you know, our firm is representing Ms. Katie Miller as to her claims of assault**



and battery against your client, Steve Trapp. After our recent phone conversation regarding the claims of my client, I was left with the impression that settlement was off the table. The purpose of this letter is to persuade you that Ms. Miller will be able to recover compensatory and punitive damages against Mr. Trapp, and that settlement would be the better alternative.

As you may know, the claims in this case arise from an incident that occurred at approximately 11:00 p.m. on Feb. 9, 2016, after a concert which Ms. Miller attended. Based on your suggestion in our phone conversation that Trapp was exhausted and does not recall touching Katie Miller, and that even if he had such action was accidental, I would recommend that you direct your client's attention to the photographs, shown on the *Reeling Rock* magazine

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article, which depict Trapp punching a photographer, and also the amateur Youtube Video which recorded this encounter (that article also refers to Ms. Miller's injury, so there are witnesses to this incident). Our client was injured by Trapp when he forcefully grabbed her cell phone out of her hand as she waited backstage after his concert-- this act also resulted in her shoulder being dislocated. Trapp assaulted Ms. Miller when he yelled "Get out of my way, you little punk, or I'll beat the hell out of you," and subsequently raised his arm as if to hit her. He battered her when he grabbed the phone out of Ms. Miller's hand and smashed it to the ground.

Our client will succeed in court on a claim for battery because Trapp intended to cause a harmful or offensive contact to which Ms. Miller did not consent. (*Horton*). Ms.

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Miller will be able to show that there was a contact when Trapp intentionally grabbed her phone out of her hand (see *Polk*, which held that intentional grabbing of the plaintiff's plate by the defendant constituted battery). The intent element was satisfied by Trapp's intent to make the contact with the phone (see *Horton*, as intent to cause the contact is sufficient - intent to cause the result is not required). Ms. Miller will also certainly be able to show that she did not consent to this contact. The court in *Horton* held that even where plaintiff is a voluntary student in a karate class, which is headed by an instructor that often physically disciplines his pupils, there is no consent where the evidence indicates that the contact was made for personal reasons rather than in connection to some class exercise/training. Here, you suggested that Ms.

Miller consented to the contact by attending the concert and going backstage -- this will not be enough to defeat our client's meeting of her burden to show that she did not consent. Thus, all of the elements for battery are met, and Ms. Miller will be successful on this claim.

As for assault, Trapp assaulted Ms. Miller when he yelled (see specific words above) at her and raised his arm as if to hit her. Though words alone are not enough for assault, if taken with a well-founded fear of a battery there is assault. (*Brown*). Here, there is certainly a well-founded fear of battery, given that Ms. Miller had just witnessed Trapp punch the photographer mentioned in the magazine article (and seen in the video). Further, she saw Trapp smash her camera. All of this was before Trapp directed his attention to Ms. Miller, so of course she is going to fear

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Trapp's claim that he will "beat the hell out of her." Her claim here is well-founded and she will succeed on the assault claim as well.

A defendant held liable for civil battery is liable for two types of damages: (1) Compensatory (which include medical costs, lost wages, and pain and suffering), and (2) Punitive damages. Here, Ms. Miller incurred medical costs of \$5,000, had her arm dislocated, missed work, and had to replace the phone that Trapp destroyed. Pain and suffering damages includes hurt feelings and fright (*Polk*). Here, Trapp used to be Ms. Miller's favorite artist and was devastated by her idol having battered and assaulted her. The key to hurt feelings damages is the personal indignation, Trapp need not have intended or known her. (*Polk*).

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[[specific settlement amount]]

We request that you discuss this with your client and should you find that the he is willing to settle this case, we demand \_\_\_\_\_ (specific settlement amount) to be paid no later than March 5, 2016. I would note that there is no formula for determining the amount of compensatory damages and therefore the jury might award a much larger amount than we are presently demanding. Should we not hear from you with regard to this settlement by such date, we will pursue our claims in court.

Thank you for your time,

Timothy Howard, Partner

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To: Timothy Howard

From: Examinee

Date: Feb. 23, 2016

Re: Recommended settlement amounts for each  
category of damages (Miller file)

As requested I have completed the demand letter for your  
signature, below are the suggested settlement amounts for  
each category of damages.

Compensatory:

Medicals (\$5,000)

Lost Income (\$100)

Damages to property (\$500)

Pain and suffering (\$50,000)

As stated in the letter there is no formula for compensatory damages. The medicals, lost income, and property damage are straight-forward and based on her actual losses. However, the pain and suffering includes mental harm and hurt feelings, this along with her dislocated shoulder (and the pain it caused), likely justify \$50,000-- the range based on other verdicts is \$50,000 (broken arm) to \$40,000 (dislocated shoulder). Here, we have hurt feelings to make up another \$10,000.



Punitives:

Maybe \$300,000.

Other cases have gotten denied punitives where evil intent was lacking, but some have succeeded for amounts usually over \$200,000. I would suggest more than this, but here, it does not look like Trapp knows miss Miller, so if the court does award punitives it will be based on reckless indifference (*Polk*). Note, however, the jury can consider the character of the defendant's act and whether it calls for deterrence and punishment (here Trapp has a record of from 2009 for assault and battery). Also, the jury may consider the wealth of the defendant (*Polk*). Here, Trapp is a popular artist with income from the sales at his

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