



## Essay Question One

Frances House went shopping at a Wal-Mart store in Waldron. She slipped and fell. She sued Wal-Mart in Arkansas state court and the jury awarded her \$50,000.

Her case at trial was based upon three elements: (1) According to her testimony: she was shopping in the household aisles at 11:00 a.m. She noticed a liquid on the floor. It was a disinfectant that had a strong and noticeable pine odor. The spill was approximately ten to twelve inches in diameter. She walked around the spill and went to the shelf with Brillo scrubbing pads. As she put the box of Brillo pads into her cart, she stepped back about a half step, she slipped, and hit her head on the bottom shelf. She said she was exercising caution in the aisle.

On cross examination she admitted that in a deposition she had stated that she had stepped backwards three steps to her shopping cart with her Brillo pads. But she then stated, "I was not feeling well at the time of the deposition. That lawyer asked me many questions about the fall, and I was confused. I have no doubt that I only stepped back about a half step with my left foot."

(2) Kathy Jo, a friend of Frances, was shopping with her. She testified that the smell was so distinctive and obvious that the Wal-Mart employee stationed at the paint counter 15 feet away certainly smelled it.

Wal-Mart had three witnesses:

(1) Sue Young, a Wal-Mart employee, had checked the aisle at 10:45 as a part of her regular duties. She saw nothing on the floor.

(2) Walter, a Wal-Mart employee, worked at the paint counter 15 feet away and was the first employee to arrive at the accident scene. He did not smell anything distinctive; however he admitted on cross examination that he was suffering from a sinus infection and his olfactory sense of smell was not working properly.

(3) Manager Marcia described the store policy of checking every aisle every 30 minutes. She was summoned after the accident. She admitted that she noticed the pine smell at the accident when she arrived. Her examination revealed no footprints or tracks through the spill. Once Frances was taken away, Marcia had the spill cleaned up immediately.

The judge instructed the jury as to the controlling law:

An invitee enters the property with the permission of the owner, for a purpose connected with an activity of the owner, and for the mutual benefit of both parties. A customer on business premises is the classic invitee, but workers and prospective employees also fall into this category. A related doctrine is that of the implied invitee, which requires an affirmative act by the landowner to induce another to enter the premises. In some instances, the duty of an owner to an invitee may even extend beyond the boundaries of the owner's property. To the invitee the owner owes the higher duty of using ordinary

care to keep the premises in a reasonably safe condition. To recover from the owner because of a failure to use ordinary care, the invitee must show that (1) the premises were defective; (2) the owner created the defect, or the defect was apparent to a reasonable owner who should have then warned the invitee; and (3) the defect caused the injury.

The owner's increased duty to an invitee does not mean that the owner is absolutely liable for any injury to the invitee. For example, in the typical "slip and fall" case, the mere accident does not create an inference of negligence. Nor is a case of negligence established by the plaintiff's testimony that the floor was slick or slippery. The plaintiff must offer evidence demonstrating the probable causes of the accident, not merely possible causes. The customer/invitee has the burden of showing that the presence of the substance or object on the floor was the result of the negligence of the defendant. In the alternative, the customer must establish that the substance had been on the floor for such a period of time that the defendant knew or should have known of its presence and that the defendant failed to use ordinary care to remove the substance. The burden is on the plaintiff to demonstrate that the length of time the substance was on the floor was substantial. For example, the presence of water in an aisle of a grocery store for an hour was inadequate to establish that any employee of the defendant knew of its presence. Lacking evidence of either alternative approach, the plaintiff's claim must fail.

See Brill, *Arkansas Law of Damages*, § 30-7 (5th ed. 2004).

The trial started Monday morning. Tuesday afternoon, after the close of all the evidence Wal-Mart moved for a directed verdict, which was denied. In its argument, Wal-Mart did not dispute the size of the alleged damages; it only challenged its own liability. Wednesday morning after closing arguments and jury instructions took place, the judge submitted the case to the jury. They deliberated for one hour and took a lunch break. The judge said, "I am telling the bailiff to take you to Pizza Hut for lunch. You will have a private room. Do not discuss the case. Enjoy your meal. Because of another hearing that I must conduct, you will have two hours for lunch." During lunch Juror Jim had a can of beer with his pizza. After lunch the jury returned and deliberated for 3 hours. At 6:00 p.m. they returned the general verdict form, signed by 10 of the 12 jurors (Jurors Becky and Barbara did not sign it). It found for the plaintiff and awarded \$50,000.

Five days have passed since the jury verdict. You represent the defendant Wal-Mart and have filed appropriate motions. [Wal-Mart has not challenged the amount of the verdict; it concedes that, if it is liable, \$50,000 is a fair amount.] You are standing in front of the Arkansas trial judge. Make the best arguments that you can for your client. Be thorough, be creative, be organized.

Note: This question is based generally on:

House v. Wal-Mart Stores, 316 Ark. 221 (1994)  
Smith v. Basin Park Hotel, Inc., 350 F. 3d 810 (2003).

## Essay Question Two

Tim Tyler underwent surgery in which a "plate and screw device " (Model 4-H) was implanted in his lower spine. Tyler was disappointed with the results of the surgery and resorted to litigation in the federal court in Arkansas, based on diversity jurisdiction. Tim sues for \$100,000. The suit was brought against one defendant, Surgical-Ortho Corporation (SOC), the manufacturer of the device. Other potential parties are the hospital (HOSP) and the surgeon (MD).

Instructions: each of the following subparts is worth 2 points. Each is independent and each can be answered in a paragraph. Detailed analysis is not required. Jurisdiction is not an issue in any of the subparts, do not discuss jurisdiction.

- A) SOC files a 12 (b)(7) motion to dismiss. How should the judge rule? Why?
  
- B) Tyler moves to amend his complaint. He argues that this device has been inserted into approximately 500 patients across the nation in the last 3 years. He wishes to add a count, by naming himself as the representative of the class of 500 patients. How should the judge rule? Why?
  
- C) Paula Patient had the identical device (same model, same manufacturing process) inserted into her spine. She has her own lawyer. Her lawyer moves to intervene in Tim's lawsuit. How should the judge rule? Why?
  
- D) Tim's lawyer has obtained a written statement from a nurse who assisted in the surgery. The nurse now lives in Ames, Iowa. The lawyer for SOC has demanded a copy of the statement. How should the judge rule? Why?
  
- E) The jury concludes in a special verdict that the "plate and screw device" (Model 4-H) was not defective. Accordingly, Tim Tyler loses. Six months later, in Oklahoma, Victoria Victim sues SOC, alleging that she had received the identical device (same model, same manufacturing process) and she was harmed. SOC files a Rule 8(c) affirmative defense. SOC asks the court to give estoppel effect to the finding of the Arkansas court. How should the Oklahoma judge rule? Why?