POINT SHEET

MPT-2: *Logan v. Rios*
The task for the applicants in this performance test item is to prepare the initial draft of one part of the Early Dispute Resolution (EDR) statement that the supervising attorney will submit to the EDR judge, on behalf of the firm’s client, Trina Rios, the defendant in a slip-and-fall case. Plaintiff Karen Logan was shopping at Trina’s Toys, the toy store owned by Trina Rios, when she slipped on a small puddle of water and fell in one of the aisles, injuring her ankle in the process. As a result, Logan sued Rios, claiming that Rios violated her duty as a premises owner. Rios pled an affirmative defense of contributory negligence, which, if proven, would be a complete bar to Logan’s recovery under Franklin law.

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

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

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

I. Overview

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

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

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

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

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

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

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

Strengths of Rios’s case:

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

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

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

Strengths of Rios’s case:

- Patel, one of Rios’s employees, was in the store at the time of the fall. Neither he nor Rios knew about the water and thus could not have prevented it or warned customers about it. (Patel Dep. Tr.)
- Further, it was not unreasonable that Rios and her employees were unaware of the water.
- There are no sources of water in the area of the fall that would have caused water to accumulate there: no leaking ceiling, no squirt gun displays. In fact, aisle 3 was an area of puzzles and games. (Patel Dep. Tr.)
- It was not raining or snowing on the day of the incident. (Logan Dep. Tr.)
- Trina’s Toys is not a store that sells refreshments or toys containing water, so it is arguably unexpected for there to be a spill on the floor.
- Patel mops the floors at night, after the store closes, so the floors would presumably dry by the next morning.
- No one reported to store employees that there was water in the aisle, even though the store had had a steady stream of customers that day. (Patel Dep. Tr.)
- If a customer spilled the water, neither Rios nor Patel had knowledge of the spill. (Patel Dep. Tr.)
- A key factor in determining whether a premises owner acted with reasonable care is the length of time an unsafe condition existed. (JI 35 Commentary) Here, even
if Logan relies on Patel’s admission that no store employee had checked on the aisle for two hours (Patel was in the aisle just before the store opened at 10 a.m.; Logan fell before noon), there was no reason to anticipate spills in the toy store and thus no duty to periodically check for them. (Patel Dep. Tr.) (Chad v. Bill’s Camera Shop (Fr. Ct. App. 2006))

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

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

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

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

Weaknesses of Rios’s case:

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

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

Strengths of Rios’s case:

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

- Although Rios has no duty to warn of open and obvious conditions, she does have a duty to warn if a customer is likely to be distracted and therefore fail to notice the dangerous condition. *(Ward v. ShopMart)*

- Holiday decorations may constitute a distraction. If so, the “distraction exception” to the open and obvious rule applies and the defendant is not relieved of liability for the plaintiff’s injury. *(Gardner v. Wendt)*

- But *Gardner* is distinguishable—holiday decorations qualify as a distraction because they are not usually present.

- In this case, the aisle where Logan fell—indeed, the entire store—is filled with merchandise that is meant to attract customers. *(Patel Dep. Tr.)*
  - The end of the aisle had a computer-animated display of games. *(Id.)* This display may have distracted Logan from noticing where she was walking.
  - She claims to have been looking at the merchandise ahead of her, further down the aisle. *(Logan Dep. Tr.)*

- The store also had a Wii game available for play, which Logan had been playing just before her fall. *(Id.)* She may have been distracted by it.

- If it was reasonable to expect that the store displays would distract Logan from watching for open and obvious conditions, Rios had a duty to warn of the puddle.
  - It is undisputed that there were no warnings about the water puddle that could have alerted Logan to it.

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

- In light of Logan’s questionable credibility as a witness (see below), a jury might find it more likely than not that she was still using her cell phone when she slipped and so, under *Brown*, the “distraction” was of her own making, and the exception would not apply.
E. Defendant’s Affirmative Defense: Contributory Negligence. The plaintiff was negligent in spilling the water on which she slipped, and that negligence was the proximate cause of her injury. (Jury Instruction 35)

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

Weaknesses of Rios’s affirmative defense:
- No witness actually saw Logan spill the water.
  - Patel testified that he is unaware of any witnesses to Logan’s fall who might be able to apportion some blame to her. (Patel Dep. Tr.)
  - Logan herself testified that she did not see anyone else spill any water, including the toddler using the sippy cup. (Logan Dep. Tr.)
  - Nevertheless, while there were no witnesses, it cannot be ruled out that the toddler with the sippy cup or another customer with water caused the spill.
F. Defendant’s Affirmative Defense: Contributory Negligence: The plaintiff was negligent in failing to exercise due care for her safety by wearing shoes that were unsafe, especially while carrying a heavy backpack, and that negligence was the proximate cause of her injury. (Jury Instruction 35)

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

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

G. Additional Strengths of Rios’s Case

- Logan has the burden of proving by a preponderance of the credible evidence, including testimony, that she was injured as a result of Rios’s negligence. (Jury Instruction 35)
- Logan is vulnerable to impeachment as a witness.
- Rios will present evidence that Logan has lied about some of her damages, and therefore Logan’s account of how she fell is suspect.
  - Logan lied about her injury causing the loss of her job.
    - According to Joe Nyugen, Logan’s supervisor at Fresh Grocers, Logan lost her job because she failed to report to work for three days and failed to call in. Nyugen may testify that Logan was absent for three days without notice to her
employer and that the employer had no knowledge of her injury when it fired her. (Ling’s report)

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

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