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## WRITING SAMPLE

The following is an extract from the discussion section of a legal memo assignment in my lawyering skills class, fall semester of 2009. The case involved a slip-and-fall at a grocery store in Virginia. Tort issues concerning duty, breach, and contributory negligence are discussed.

### A. Breach of Duty

#### 1. Notice of Hazardous Condition

Premise owners have a duty to remove hazards from their floors when they know, or should have knowledge, of a hazardous condition on their floors. *Memco Stores, Inc. v. Yeatman*, 348 S.E.2d 228, 231 (Va. 1986). In *Yeatman*, an invitee from a pharmacy slipped and fell on a leaf which came from a plant that was on display in the store. *Id.* at 229. While the store argued that another customer might have tracked the leaf into the area where the fall occurred, the court dismissed the argument, stating that the premise owner is still liable regardless of who creates the danger. *Id.* at 230. An expert witness also testified in the trial court that the plant on display was prone to shed leaves. *Id.* at 229-30. Because the store knew, or should have known, of the danger the plant was creating, the court in *Yeatman* held the defendant store liable. *Id.* at 230-31.

Similar to the invitee in *Yeatman*, Rudy Lavigne slipped and fell on a coffee spill as an invitee at the MammothMart. (Orson Aff. ¶ 11, July 25, 2009.) The coffee came from a coffee shop located inside the store premise. (Dole Dep. 6:20-23, Aug. 10, 2009.) A store invitee spilled the coffee on the floor of the grocery store. (Orson Aff. ¶ 7.) MammothMart employees were aware of the high frequency of coffee spills in the store. (Lotus Dep. 4:29-48, Aug. 21, 2009.) Furthermore, Caroline Dole, the manager at work the day of the incident saw a flustered invitee asking for a refill at the coffee shop and overheard the customer saying she had caused a spill. (Dole Dep. 6:5-18.) These facts parallel the facts of the *Yeatman* case, and demonstrate that MammothMart knew, or should have known of the hazardous condition in their store.

## 2. Duration of Hazard

When a jury establishes negligence in a premise owner in slip-and-fall cases, they typically consider the length of time a substance remained on the floor. *Winn Dixie Stores, Inc. v. Gaines*, 542 So. 2d 432, 433 (Fla. 1989). Courts vary in determining what an appropriate length of time should be. *Id.* at 433; *Winn Dixie Stores, Inc. v. Williams*, 264 So. 2d 862, 864 (Fla. Dist. Ct. App. 1972).

In *Gaines*, the store invitee slipped and fell on some loose beans and rice. *Gaines*, 542 So.2d at 432. The area of the accident had been inspected at 11:00, and the slip-and-fall occurred at some point between 11:00 A.M. and 11:30 A.M. *Id.* The *Gaines* court decided a half hour was not long enough to determine constructive notice and negligence on the part of the storeowner. *Id.* at 433.

In *Williams*, the store invitee slipped and fell on a sticky, dusty and dirty substance. *Williams*, 264 So.2d at 863. The store manager testified that he had inspected the area of the fall only 15 minutes prior to the incident. *Id.* The court stated that because the area where the plaintiff fell was sticky, dusty and dirty, it implied the substance had been on the floor for at least the 15-20 minutes prior to the accident. *Id.* at 864. Furthermore, they stated that 15-20 minutes is sufficient for the store to be charged with constructive notice of the hazardous condition. *Id.* at 864.

In contrast to both *Gaines* and *Williams*, the coffee spill in the MammothMart case remained on the floor for an hour. At 1:35 P.M. a customer spilled her coffee on aisle 1. (Orson Aff. ¶ 7.) Between 1:39 P.M. and 2:29 P.M. four customers passed the spill. (Orson Aff. ¶ 8.) The first three took note of the spill, while the fourth may not have seen it. (Orson Aff. ¶ 8). At 2:35 P.M. Rudy Lavigne slipped and fell in the coffee. (Orson Aff. ¶ 11.) At some point between 1:35 P.M. and 2:35 P.M. Caroline Dole learned that somewhere in her store there had been a coffee spill big enough to get visible coffee stains on a customers shirt, and by extension, the floor as well. (Dole Dep. 6:5-23.) A jury will probably find that MammothMart was negligent by not cleaning a coffee spill they knew

about, or should have known about, and allowed the spill to remain on the premise for at least an hour.

### 3. Periodic Cleaning and Inspection

Regularly scheduled inspections and cleaning helps storeowners meet their duty to maintain a safe premise and warn of hazardous conditions. *McCardie v. Wal-Mart Stores, Inc.*, 511 So. 2d 1134, 1135 (La. 1987). In *McCardie*, a Wal-Mart invitee slipped and fell on a non-visible oily substance. *Id.* Wal-Mart employees implemented and followed a “safety sweep” program that ensured all store aisles were checked for floor hazards. *Id.* The “sweep” occurred twice each day—once before noon and once after noon and “sweep” records were kept. *Id.* On the day of the *McCardie* incident, the record showed that the “sweep” occurred. *Id.* While Wal-Mart lost the case on other grounds, the *McCardie* court did state that Wal-Mart had met its duty to keep passageways safe. *Id.*

The MammothMart staff was not as vigilant. MammothMart has an established cleaning routine that ensures all the aisles are cleaned or inspected every two hours. (Dole Dep. 3:37-40.) The 8:00 A.M., 10:00 A.M., and 12:00 P.M. cleanings did take place on the day of the incident; however, the scheduled 2:00 P.M. cleaning did not take place because of an unforeseen spaghetti sauce spill on aisle 5. (Lotus Dep. 3:23-35.) The employee responsible for the cleaning and inspection did not make it to the coffee spill on aisle 1 until after Rudy had already fallen. (Orson Aff. ¶ 13.) The store manager stated that there is no contingency plan to ensure the cleaning schedule is fulfilled when emergency cleanings like the spaghetti sauce spill occur. (Dole Dep. 4:46-5:1.) However, Ms. Dole had knowledge of the spaghetti sauce spill and a potentially large coffee spill in her store. (Dole Dep. 6:5-18.) Her knowledge and her role as manager of the store establish MammothMart’s constructive notice of a coffee spill and their negligence in not cleaning it in accordance with regularly scheduled cleaning procedures.

### B. Contributory Negligence

Contributory negligence is a bar to recovery in Virginia courts. *Tazewell Supply Company v. Turner*, 189 S.E.2d 347, 350 (Va. 1972). In *Tazewell*, a store invitee was distracted by a Christmas display on her way to the checkout counter. *Id.* at 348. Turning back into a store aisle, she tripped over a box on the floor. *Id.* The box was about a foot high and a foot long and witnesses testified they could clearly see the box in the aisle. *Id.* at 349. The court determined the box was an open and obvious hazard, and stated that when a condition is open and obvious the store has no duty to warn its invitees. *Id.* at 349-50. Furthermore, when a hazard is open and obvious, the invitee is responsible for exercising reasonable care for her own safety. *Id.* at 349. As a result, the contributory negligence doctrine barred the plaintiff in *Tazewell* from recovery. *Id.* at 350.

Likewise, contributory negligence will most likely bar Rudy Lavigne from any possibility of recovery. The difficulty in applying contributory negligence in Rudy's case lies in the fact that the danger was not open and obvious. The coffee spill was brown and the floor was tan. (Dole Dep. 3:16-22.) Some of the store's invitees noticed the coffee spill while others did not. (Orson Aff. ¶ 8.) The elderly woman in the aisle at the time of Rudy's fall stated she would not have noticed the coffee if Rudy's "heeling" had not brought her attention to the floor. (Bonner Dep. 3:3-19, Aug. 21, 2009.) The issue in this case will be whether an invitee is responsible for exercising reasonable care for his own safety even when a hazard is not open and obvious.

As mentioned above, to establish negligence in a store owner a jury must first establish a duty, a breach of that duty, proximate cause, and damages. MammothMart breached their duty to warn of hazardous conditions and maintain a safe premise, and that breach had a causal link to the damages Rudy Lavigne sustained. But Rudy's behavior also contributed to his damages. He was rolling on Heelys at the time of the accident and he was listening to his iPod when he fell. (Lavigne Dep. 3:29-33, 4:10-17, July 24, 2009.) Heelys users constitute a large portion of skate/roller related orthopedic injuries. Users of iPods and other portable electronic devices are prone to distraction.

Because of Rudy's Heelys and iPod, MammothMart will likely win on a claim of contributory negligence.

### 1. Rudy's use of Heelys

Rudy might have avoided injury altogether if he had followed the safety guidelines recommended by the manufacturer of Heelys roller shoes—Heeling Sports, Limited. Safety information regarding the use of Heelys can be found on the manufacturer website. Heelys Skate Shoes, <http://www.heelys.com/aboutus/Pages/FAQ.aspx> (last visited Nov. 11, 2009). Heeling Sports, Limited clearly states that protective gear should be worn when the wheels are in the shoes. *Id.* With regards to common courtesy, Heeling Sports, Limited also states that crowded public places are not good areas for skating. *Id.*

Furthermore, the American Academy of Pediatrics encourages the use of safety gear while “heeling” or “street gliding.” Mihai Vioreanu et al., Heelys and Street Gliders Injuries: A New type of Pediatric Injury, 119 *Pediatrics: Official Journal of the American Academy of Pediatrics* e1297 (2007), *available at* <http://www.pediatrics.org/cgi/content/full/119/6/e1294>. In a study conducted in the summer of 2006, eight percent of all children orthopedic injuries were related to Heelys. *Id.* at e1295. None of the injured children wore protective gear at the time of their injury. *Id.* at e1296. The Academy also notes that the “crocodile stance,” the stance Heelys users assume when skating, is a balanced stance of the body that tends to fall backwards. *Id.* at e1295. The Pediatric Academy also cited safety recommendations to ban the use of Heelys in public buildings and malls. *Id.* at e1297.

Rudy fell backwards, which is a textbook example of what the Pediatric information suggests would most likely happen. (Orson Aff. ¶ 12.) There are no statements in the discovery regarding the presence of protective gear. Rudy stated that he normally looks around before rolling, showing that he is aware of the dangers of “heeling” in cramped or public areas. (Lavigne Dep. 3:29-33.) Ultimately, Rudy was injured because he was “heeling” without protective gear in a public area.

## 2. Rudy's use of an iPod

Listening to his iPod while “heeling” may have contributed to Rudy’s fall. Apple, Inc. states that the use of an iPod while driving is not recommended and may even be illegal depending on the jurisdiction. Apple, Inc., *iPod nano User Guide* 95 (2009). The safety manual qualifies the statement by saying it doesn’t recommend listening while driving, even if the headphones are “used in only one ear,” as Rudy stated he was using his iPod. *Id.*; (Lavigne Dep. 4:10-13). The manual recommends users to stop using iPod nano if it is disruptive or distracting while operating a vehicle, riding a bike, or during any other activity that requires attention. Apple, Inc., *supra*, at 95.

“Heeling” is an activity prone to injury and requires attention to perform safely. The iPod manufacturer acknowledges the potential for distraction in the product, but obviously cannot provide an exhaustive list of activities where an iPod may cause a distraction. Other invitees in the MammothMart noticed and avoided the brown coffee on the tan floor. (Orson Aff. ¶ 8.) It is very likely that had he not been listening to his iPod while “heeling,” Rudy Lavigne may have heard Prudence Bonner’s warning and avoided the spilled coffee entirely. (Lavigne Dep. 4:10-17; Bonner Dep. 3:21-38.)

## 3. Distraction caused by the Monster drink display

However, if a premise owner distracts a store invitee via a display, the store may still be held liable even if the invitee was hurt by a hazard that was open and obvious. *Shiflett v. M. Timberlake, Inc.*, 137 S.E.2d 908, 912 (Va. 1964). In *Shiflett*, the store invitee slipped and fell on water that had accumulated on the floor. *Id.* at 910. While the store raised a claim of contributory negligence against the injured invitee, the invitee stated that when she entered the store her attention was attracted to a bright display on the counter and she was unable to see the floor. *Id.* at 912. Because of a distracting display the store in *Shiflett* was held liable. *Id.* at 912.

Like the invitee in *Shiflett*, Rudy Lavigne was looking at a display before his fall. (Lavigne Dep. 3:13-23.) But unlike the invitee in *Shiflett*, Rudy was not unable to see his surroundings while rolling down the aisle and looking at the Monster drinks display. (Lavigne Dep. 3:13-23.) Rudy stated that he did not hear Prudence Bonner's warning, yet he was still able to see her and wave at her. (Lavigne Dep. 3:13-23.) Rudy will most likely not be able to claim he was distracted by the display and shift liability back to the store.