

Introduction To Professional Skills

Course Materials Supplement

Widener University

School of Law

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INTRODUCTION

Professional Duties of Competence and Diligence

Every state has a professional code of ethics governing those admitted to the legal profession in the state. Those codes recognize competence and diligence as fundamental characteristics of the profession.¹ Competence requires knowledge of the law and skill in using that knowledge. You and the faculty for *Introduction to Professional Skills* will use the information in this Course Materials Supplement to develop your skills of acquiring and using the requisite knowledge of the law.

You may initially get confused, frustrated, and intimidated in developing your understanding of the law, but remember you are required to be *diligent* as a lawyer. Professional diligence requires a lawyer “to pursue a matter . . . despite opposition, obstruction, or personal inconvenience . . .”² You can do this! Look at how many others have done so.

SECTION I

COMMON ELEMENTS OF A CIVIL LAWSUIT

Much of the assigned reading in your first semester will describe issues arising in the context of civil litigation. In your Civil Procedure course you will discuss in great detail how a civil lawsuit begins and may progress. It is useful, however, to have a basic understanding now of common elements of a civil lawsuit. Below are brief descriptions of those elements and a summary in two charts.

a. Investigation

Courts seek to provide just resolutions of disputes, but courts do not want to waste resources on frivolous litigation. More than a good story is necessary to begin a lawsuit. There must be a factual basis for the story and the facts must be relevant to a right or obligation arising from some law. Lawyers representing potential claimants must investigate the facts and the law before filing suit on behalf of a client. The same practical duties of investigation apply to defendants before responding to a claim.

¹ For example, Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rule 1.3 provides: “A lawyer shall act with reasonable diligence and promptness in representing a client.” Most States have used the ABA’s Model Rules as a template.

² Model Rule of Prof’l Conduct R. 1.3, Comment 1 (2014).

b. Choice of Forum Limits

Although there are numerous trial courts throughout the United States from which a plaintiff might pick,³ the authority of a particular court to render a valid judgment depends on whether the court has *jurisdiction over the subject matter* and *jurisdiction over the defendant*. Even if those two requirements of jurisdiction are satisfied, a particular court may not be considered an appropriate *venue* within a State containing multiple courts in the same court system. As you will learn, the issues of jurisdiction and venue are complicated topics. It suffices for now that you understand there are multiple factors affecting a plaintiff's choice of a court (forum) capable of rendering a valid judgment.

c. Pleadings

To begin a civil lawsuit in federal court and in many state courts, a the *plaintiff* files a document called a *complaint* with the court and *serves* a copy of the complaint on the person or entity against whom the plaintiff is making the claim – the *defendant*. The complaint sets forth the bases for subject matter jurisdiction, describes the plaintiff's loss, explains how the defendant caused the loss, and asks the court to order a *remedy*. A plaintiff may ask a court to order a variety of remedies, such as money from the defendant to compensate for the plaintiff's loss or a prohibition on the defendant's conduct causing the plaintiff's loss. The court also may also order other types of relief, such as a declaration of the legal rights of the plaintiff in a particular situation.⁴

After being served with the complaint, a defendant has an opportunity to respond to the complaint. A defendant can file a *motion* (a request for court to issue an order) asking the court to dismiss the plaintiff's claims for a variety of reasons, such as lack of jurisdiction over the defendant or the subject matter. A defendant may choose to respond directly to the allegations in the complaint by filing a pleading in which the defendant admits or denies the plaintiff's allegations and asserts other reasons for which the plaintiff would not recover under the applicable law. If a defendant fails to respond to the complaint – or responds in a manner deemed inadequate by the court – a *default judgment* can be entered in favor of the plaintiff.

d. Case Management

Judges seldom follow the tradition of acting merely as neutral referees in the pretrial portions of civil litigation. Rather, judges often foster efficient management of the dispute resolution process by conferring with the parties shortly after the pleading stage to

³ You can find a general description of federal and state court systems in the United States in Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 48-57 (2009).

⁴ For a summary of damages and injunctions as remedies a court might order, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 58-59 (2009).

formulate a plan and a timeline for subsequent parts of the pretrial process. A judge also can use case management conferences to foster settlement discussions among the parties to a lawsuit. If a trial will be necessary to resolve a dispute, case management frequently includes a conference of the judge and the parties to set a plan for the trial.

e. Discovery

Discovery is an opportunity for parties to a lawsuit to collect from each other and from non-parties information relevant to the claims and defenses raised in the suit. Rules of procedure provide a number of different methods for collecting the information, such as depositions, document requests, interrogatories, physical examinations and requests for admissions. Courts have authority to sanction parties and non-parties who fail to comply with proper discovery requests.

f. Dispositive Motions Later in the Pretrial Process

In some of the court opinions below you will see references to motions for *summary judgment*. Such motions are procedural opportunities frequently used by parties in civil litigation. The party making the motion asserts the court has enough information to conclude there cannot be a rational dispute about the facts giving rise to a claim (or defense) in the lawsuit and the applicable law entitles the moving party (the party making the motion) to a judgment in its favor given those facts. The moving party seeks to convince the court there is no need to proceed further with a claim.

g. Trial

Most civil litigation in the United States concludes by the parties agreeing to settle their claims or through dispositive pre-trial motions. If a trial is necessary, constitutions and statutes may afford the right to a jury trial for some claims. At trial the parties must address the *burden(s) of proof* applicable at trial.⁵ The plaintiff presents evidence supporting its version of the facts supporting its claims, and the defendant presents evidence rebutting the plaintiff's evidence or supporting its own version of the facts. From the evidence presented, the jury must decide what happened (the underlying facts) and render a verdict after applying to the facts the applicable law as described by the judge. The judge will enter a judgment after the jury's verdict. If there is no right to a jury trial for a particular claim or if a party waives its right to a jury trial, then the judge becomes the fact finder and applies the applicable law to the facts.

⁵ For a summary of the *burden(s) of proof* at trial, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 102-104 (2009).

During trial and after entry of judgment, a party may make a motion for a judgment as a matter of law. The motion for a judgment as a matter of law and the pretrial motion for summary judgment are similar in that the party making the motion asserts a rational decision maker must find in the moving party's favor based on the information available to the court at the time of the motion. The motion for judgment as a matter of law and the motion for summary judgment differ, however, in two significant ways. First, a motion for judgment as a matter of law can be made only after the non-moving party has had its opportunity to be heard at trial. Second, the motion for judgment as a matter of law focuses on what a rational decision maker could conclude from the information admitted as evidence at trial before a party makes the motion.

A party dissatisfied with a trial judgment also can make a motion in the trial court for a new trial. There are a variety of reasons for which a trial court could grant a new trial. What is important to understand at this point is how a motion for a new trial differs from a motion for judgment as a matter of law. The latter motion requests the court to enter judgment in favor of the moving party, i.e., to pick a winner. The motion for a new trial requests only another chance at a trial.

h. Appeal

A party that is dissatisfied with an outcome in the court in which a suit commences -- often called the *trial court* or *court of original jurisdiction* -- may ask a *court of appeals* to review trial court proceedings for errors. An appellate court may be an *intermediate appellate court* with the authority to review trial court proceedings but which also is subject to review by the *final or highest* appellate court in the particular court system. The jurisdiction of appellate courts to review the proceedings in the lower courts of a court system may be either mandatory or discretionary. Appellate courts apply different *standards of review* in determining how closely to scrutinize the proceedings in a lower court in the particular court system.⁶

⁶ You can find a summary of the role of appellate courts in Tracey E. George & Suzanna Sherry, *What Every Law Student Really Needs to Know: An Introduction to the Study of Law*, 51-55 and 104-106 (2009).

OVERVIEW OF CIVIL LITIGATION - PRETRIAL

EVENT	INVESTIGATION	CHOICE OF FORUM	PLEADINGS & INITIAL MOTIONS	CASE MANAGEMENT	DISCOVERY OF INFORMATION RELEVANT TO CLAIM OR DEFENSE	LATER DISPOSITIVE PRETRIAL MOTIONS	CASE MANAGEMENT
Action by Plaintiff (Π)	1. Find reasonable (objective) bases in fact and law for legal remedy	2. (a) Jurisdiction over subject matter 2. (b) Jurisdiction over defendant (Δ) 2. (c) Venue	3. Complaint (Petition) Π files with court and has complaint served on Δ.	5. (a) Confer with Judge and Δ to plan a just and efficient conduct of pre-trial processes, such as discovery, dispositive motions, and voluntary settlements.	6. (a) Use of Interrogatories, Requests for Documents (Data sets), Requests for Admission, Witness Interviews, and Witness Depositions	7. (a) Motion for Summary Judgment	8. (a) Confer with Judge and Δ to plan a just and efficient conduct of trial.
Action by Defendant (Δ)	[Before step 4. →, Δ must find reasonable (objective) bases in fact and law for defenses, counterclaims and crossclaims.	Despite Π 's initial choice of forum, Δ may be able (after step 3 above) to "remove" the suit from state court to federal court or may request a change of venue within the original court system.	4. (a) Motions (e.g. to dismiss for lack of jurisdiction or failure to state a claim upon which relief can be granted) 4. (b) Answer 4. (c) Default	5. (a) Confer with Judge and Π to plan a just and efficient conduct of pre-trial processes, such as discovery, dispositive motions, and voluntary settlements.	6. (b) Use of Interrogatories, Requests for Documents (Data sets), Requests for Admission, Witness Interviews, and Witness Depositions	7. (b) Motion for Summary Judgment	8. (b) Confer with Judge and Π to plan a just and efficient conduct of trial.

OVERVIEW OF CIVIL LITIGATION – TRIAL AND POST TRIAL

EVENT	TRIAL	DISPOSITIVE TRIAL MOTIONS	VERDICT & ENTRY OF JUDGMENT	POST-TRIAL MOTIONS	APPEAL
Action by Plaintiff (Π)	9. Π’s Case in Chief (Plaintiff’s direct evidence presented through witnesses and exhibits. Defendant cross-examines.)	12. (a) Motion for Judgment as a Matter of Law (Directed Verdict)	13. Verdict rendered by jury if jury trial has been appropriately requested, or Verdict rendered by trial judge if a non-Jury Trial (“Bench Trial.”) and then Entry of Judgment	14. (a) Options Motion for Judgment as a Matter of Law (Judgment Not Withstanding the Verdict) Motion for a New Trial Petition to Open the judgment	15. (a) File Notice of Appeal addressing errors in trial court. Submit briefs arguing merits of appeal. Oral argument before court of appeals might occur.
Action by Defendant (Δ)	10. Motion for Judgment as a Matter of Law (Directed Verdict) 11. Δ’s Case in Chief (Defendant’s direct evidence presented through witnesses and exhibits. Plaintiff cross-examines.)	12. (b) Motion for Judgment as a Matter of Law (Directed Verdict)	(See 13 above)	14. (b) Options Motion for Judgment as a Matter of Law (Judgment Not Withstanding the Verdict) Motion for a New Trial Petition to Open the judgment	15. (b) File Notice of Appeal addressing errors in trial court. Submit briefs arguing merits of appeal. Oral argument before court of appeals might occur.

SECTION II
CASE ANALYSIS IN TORTS

a. Active Reading Strategies

Analyzing precedent is an essential legal skill even newly admitted lawyers are expected to possess.⁷ To begin to develop your competence in analyzing laws for their meaning and utility, we will apply *active reading* skills to several cases in Torts and Civil Procedure.⁸

Many new law students approach reading in law school as they have approached reading all of their lives – as if reading a narrative -- which is to say passively. Active reading skills, however, are necessary for successful performance in law school. Studies have shown that active reading strategies correlate to better grades in law school.⁹ In a variety of ways, active readers engage with readings more deeply than passive readers. Active readers wrestle with assigned materials. A basic, three step process for active reading includes: (1) pre-reading strategies, (2) strategies while reading, and (3) post-reading strategies. Each step is described below.

1. Pre-Reading Strategies

First, before reading, an active reader has a *purpose* for the reading. To set a purpose active readers use *prediction* and *goal setting*. Take a moment to predict what you might get from reading certain materials. What is the court opinion about and why has my professor assigned the reading? How does the reading fit with material previously assigned and discussed? One can use *context clues* such as headings on the course syllabus, a book's table of contents, or notes and questions following a court's opinion¹⁰ in a course text for prediction. For example, one might predict that the cases assigned under syllabus headings

I. Intentional Torts

a. False Imprisonment

⁷ See Model Rule of Prof'l Conduct R. 1.1, Comment 2 (2014) (contrasting competencies of novice and experienced lawyers).

⁸ Both Torts and Civil Procedure are courses you will take during your first semester.

⁹ See, e.g., Leah M. Christensen, Legal Reading and Success in Law School: An Empirical Study, 30 Seattle U. L. Rev 603 (2007)

¹⁰ In many law school text books, a court opinion often is followed by notes and questions providing additional information about the issues addressed in the opinion and raising concerns about the opinion. No rule of law, physics or good nutrition, however, prohibits you from scanning the notes and questions before reading the court opinion.

will set forth the necessary elements of the intentional tort of false imprisonment as distinguished from other intentional torts addressed during a semester. Or, if more than one court opinion is assigned under the heading of False Imprisonment on a syllabus, one might predict that the second opinion provides a different explanation of the law of false imprisonment than the first opinion provided, provides a different example than the first opinion of a fact pattern constituting false imprisonment, or provides an example of facts that do not constitute false imprisonment.

Before reading, you should set a goal for the reading based on the predictions made. For example, “When I am finished reading this case, I will know all of the elements of a claim of false imprisonment and have a better understanding of the element of confinement.” Or, “When I am finished reading this case, I will have constructed a case brief to understand the meaning and precedential value of this case.”

2. Strategies While Reading

While reading a court’s opinion, you should read with your “purpose(s)” in mind. You are not just reading the court’s words; you are searching for certain types of information to fulfill your purposes. For example, you are looking for the court’s words describing the necessary elements of the tort of false imprisonment. You should look up vocabulary that is new to you. You should work to understand parts of the opinion you initially find confusing before continuing with your reading. If a particular part of an opinion remains indecipherable on first reading, you could try reading the remainder of the opinion to see if the context of the whole helps to understand how a the difficult part fits.¹¹

Briefing a court opinion also is a critical active reading strategy for new law students. Creating a written “brief” of a court opinion provides a framework for understanding the new information in an opinion by helping to sort the information into categories useful to a competent lawyer. The sorting will not only help you absorb and recall new information, it also will help you understand how you might competently use the new information. Much of class time during the first year will be devoted to refining your ability to construct such frameworks necessary for professional competence.

3. Post-Reading Assessment

When finished reading a court opinion, you should assess whether your predictions for the case were correct and whether you accomplished your purposes for the reading. For example, did the second opinion provide new factual examples of false imprisonment? Am I able to set forth accurate and complete statements of the elements of the tort of false

¹¹ For additional means of active reading, see Tracey E. George & Suzanna Sherry, What Every Law Student Really Needs to Know: An Introduction to the Study of Law, 65-71(2009).

imprisonment? Am I able to identify the material facts the court identified in its opinion for purposes of assessing the precedential value of the opinion? Experts also recommend evaluating a court's decision as a means of engaging deeply the reading of the opinion. Here are a couple of questions you might use for an evaluation. If one of the material facts in the opinion were changed to "X," how would that have affected the court's decision? Do I agree with the court's decision?

b. Implementing Active Reading Strategies in Analyzing Precedent

For the court opinions that follow, you will engage in one of the essential skills of a competent lawyer, i.e. "the analysis of precedent."¹² Use the active reading strategies described above, including the creation of case briefs for each opinion. Your professors will ask you to explain your use of active reading strategies and the contents of your case briefs. Please remember that thorough preparation and diligence are hallmarks of competent lawyers.

The following three pages contain an annotated template for constructing a case brief.

¹² Model Rule of Prof'l Conduct R. 1.1, Comment 2 (2014).

CASE OPINION (AND POSSIBLE BRIEF) COMPONENTS

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>McCANN V. WALMART</u>)
1. <u>Case</u> Title, Court & Year	Title of the case, court and date	[Fill in]
2. <u>Parties</u> Names, Procedural Designation	Brief description of who is suing whom and role of each in the litigation	
3. <u>Procedural History</u> a.k.a. Procedural Facts (includes Procedural Posture)	<p>Brief description of what has happened in the case <i>since the lawsuit was filed</i>; should be distinguished from the substantive facts of the case (see #4 below).</p> <p>Procedural posture: where the case is now, e.g., on appeal.</p>	
4. <u>Facts</u>	Brief description of what happened to cause one party to sue the other and the facts affecting the court's decision. Sometimes these are called the <i>substantive</i> facts or <i>determinative</i> facts (as distinguished from the <i>procedural</i> facts). (As with all components of a brief, you also should be guided by what your professor likes to discuss in class.)	
5. <u>Issue(s)</u>	The legal question or questions the court must decide. Typically includes substantive facts <i>plus</i> reference to a rule of law. There will always be at least one issue, and often there are multiple issues in a case.	

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>McCANN V. WALMART</u>)
<p>6. <u>Holding & Disposition</u></p>	<p>Holding is the answer to the issue and primary legal conclusion in the casw</p> <p>Disposition is the legal result for the particular case, e.g., “Affirmed” or “Granted.” Often found at the end of the opinion.</p>	
<p>7. <u>Rules (a.k.a. the law)</u></p>	<p>Rules or laws existing prior to the case at hand and which are used to decide the case can include statutes, regulations, rules of procedure, common law, etc. The law existing prior to the instant case being decided are referred to as “precedent.”</p> <p>Courts also will often announce new rules or interpretations of precedent.</p> <p>The holding(s) in a case are also a form of law or rule upon which future litigants can rely.</p> <p>Some professors consider the rules discussed in a case to be part of the court’s reasoning (see #9 below).</p>	
<p>8. <u>Arguments</u> (Made to the court by each party in the case.)</p>	<p>Not always easily discernible; the arguments often merge with or form the basis for the court’s reasoning (see #9 below).</p> <p>Arguments are generally an optional component. Include arguments if your professor likes to discuss them in class.</p>	

CASE COMPONENT	DESCRIPTION	SAMPLE BRIEF FOR (E. G. <u>McCANN V. WALMART</u>)
<p>9. Reasoning</p>	<p>Description of <i>why</i> the court ruled as it did. Can include precedent (see #7 above), policy considerations, etc.</p> <p>The court's reasoning is not always apparent.</p>	
<p>10. Miscellaneous</p> <p>a. Concurring and dissenting opinions, if any.</p> <p>b. Dictum</p> <p>c. Your own comments, questions, etc.</p>	<p>a. Concurring and dissenting opinions are not law but they are often the subject of class discussions and can help you understand the main opinion.</p> <p>b. Dictum likewise is not law but may be useful to include in a brief for the same reasons you might include concurring and dissenting opinions.</p> <p>c. You might include in your briefs your own questions and comments to focus your class participation and case understanding.</p>	

**United States Court of Appeals
First Circuit**

**Debra McCANN, Personally, and as
Mother and Next Friend of Jillian
McCann and Jonathan McCann,
Plaintiffs, Appellees/Cross-Appellants,**

v.

**WAL-MART STORES, INC., Defendant,
Appellant/Cross-Appellee,**

210 F.3d 51 (2000)

Before Boudin, Circuit Judge, Bowens,
Senior Circuit Judge, and Lynch, Circuit
Judge.

BOUDIN, Circuit Judge.

This case involves a claim for false imprisonment. On December 11, 1996, Debra McCann and two of her children—Jillian, then 16, and Jonathan, then 12—were shopping at the Wal-Mart store in Bangor, Maine. After they returned a Christmas tree and exchanged a CD player, Jonathan went to the toy section and Jillian and Debra McCann went to shop in other areas of the store. After approximately an hour and a half, the McCanns went to a register and paid for their purchases. One of their receipts was time stamped at 10:10 p.m.

As the McCanns were leaving the store, two Wal-Mart employees, Jean Taylor and Karla Hughes, stepped out in front of the McCanns' shopping cart, blocking their path to the exit. Taylor may have actually put her hand on the cart. The employees told Debra McCann that the children were not allowed in the store because they had been caught stealing on a prior occasion. In fact, the employees were mistaken; the son of a *different* family had been caught shoplifting in the store about two weeks before, and Taylor and Hughes confused the two families.

Despite Debra McCann's protestations, Taylor said that they had the records, that the police were being called, and that the McCanns “had to go with her.” Debra McCann testified that she did not resist Taylor's direction because she believed that she had to go with Taylor and that the police were coming. Taylor and Hughes then brought the McCanns past the registers in the store to an area near the store exit. Taylor stood near the McCanns while Hughes purportedly went to call the police. During this time, Debra McCann tried to show Taylor her identification, but Taylor refused to look

at it.

After a few minutes, Hughes returned and switched places with Taylor. Debra McCann told Hughes that she had proof of her identity and that there must be some proof about the identity of the children who had been caught stealing. Hughes then went up to Jonathan, pointed her finger at him, and said that he had been caught stealing two weeks earlier. Jonathan began to cry and denied the accusation. At some point around this time Jonathan said that he needed to use the bathroom and Hughes told him he could not go. At no time during this initial hour or so did the Wal-Mart employees tell the McCanns that they could leave.

Although Wal-Mart's employees had said they were calling the police, they actually called a store security officer who would be able to identify the earlier shoplifter. Eventually, the security officer, Rhonda Bickmore, arrived at the store and informed Hughes that the McCanns were not the family whose son had been caught shoplifting. Hughes then acknowledged her mistake to the McCanns, and the McCanns left the store at approximately 11:15 p.m. In due course, the McCanns

brought suit against Wal-Mart for false imprisonment

The jury awarded the McCanns \$20,000 in compensatory damages on their claim that they were falsely imprisoned in the Wal-Mart store by Wal-Mart employees. Wal-Mart has now appealed the district court's denial of its post-judgment motions for judgment as a matter of law and for a new trial pursuant to Fed.R.Civ.P. 50(b) and 59, respectively, arguing that the McCanns did not prove false imprisonment under Maine law and that the court's jury instructions on false imprisonment were in error. * * *

Both of Wal-Mart's claims of error depend on the proper elements of the tort of false imprisonment. Although nuances vary from state to state, the gist of the common law tort is conduct by the actor which is intended to, and does in fact, "confine" another "within boundaries fixed by the actor" where, in addition, the victim is either "conscious of the confinement or is harmed by it." *Restatement (Second), Torts* § 35 (1965). The few Maine cases on point contain no comprehensive definition, *see Knowlton v. Ross*, 114 Me. 18, 95 A. 281 (1915); *Whittaker v.*

Sandford, 110 Me. 77, 85 A. 399 (1912), and the district court's instructions (to which we will return) seem to have been drawn from the *Restatement*.

While “confinement” can be imposed by physical barriers or physical force, much less will do—although how much less becomes cloudy at the margins. It is generally settled that mere threats of physical force can suffice, *Restatement, supra*, § 40; and it is also settled—although there is no Maine case on point—that the threats may be implicit as well as explicit, *see id.* cmt. a; 32 Am.Jur.2d *False Imprisonment* § 18 (1995) (collecting cases), and that confinement can also be based on a false assertion of legal authority to confine. *Restatement, supra*, § 41. Indeed, the *Restatement* provides that confinement may occur by other unspecified means of “duress.” *Id.* § 40A.

Against this background, we examine Wal-Mart's claim that the evidence was insufficient . . . [W]e think that a reasonable jury could conclude that Wal-Mart's employees intended to “confine” the McCanns “within boundaries fixed by” Wal-Mart, that the employees' acts did result in such a confinement, and that the

McCanns were conscious of the confinement.

The evidence, taken favorably to the McCanns, showed that Wal-Mart employees stopped the McCanns as they were seeking to exit the store, said that the children were not allowed in the store, told the McCanns that they had to come with the Wal-Mart employees and that Wal-Mart was calling the police, and then stood guard over the McCanns while waiting for a security guard to arrive. The direction to the McCanns, the reference to the police, and the continued presence of the Wal-Mart employees (who at one point told Jonathan McCann that he could not leave to go to the bathroom) were enough to induce reasonable people to believe either that they would be restrained physically if they sought to leave, or that the store was claiming lawful authority to confine them until the police arrived, or both.

Wal-Mart asserts that under Maine law, the jury had to find “actual, physical restraint,” a phrase it takes from *Knowlton*, 95 A. at 283; *see also Whittaker*, 85 A. at 402. While there is no complete definition of false imprisonment by

Maine's highest court, this is a good example of taking language out of context. In *Knowlton*, the wife of a man who owed a hotel for past bills entered the hotel office and was allegedly told that she would go to jail if she did not pay the bill; after discussion, she gave the hotel a diamond ring as security for the bill. She later won a verdict for false imprisonment against the hotel, which the Maine Supreme Judicial Court then overturned on the ground that the evidence was insufficient. While a police officer was in the room and Mrs. Knowlton said she thought that the door was locked, the SJC found that the plaintiff had not been confined by the defendants. The court noted that the defendants did not ask Mrs. Knowlton into the room (another guest had sent for her), did not touch her, and did not tell her she could not leave. The court also said that any threat of jail to Mrs. Knowlton was only "evidence of an intention to imprison at some future time." *Knowlton*, 95 A. at 283.¹³ In context, the reference to the necessity of "actual, physical restraint" is best understood as a reminder that a

plaintiff must be actually confined-which Mrs. Knowlton was not.

Taking too literally the phrase "actual, physical restraint" would put Maine law broadly at odds with not only the *Restatement* but with a practically uniform body of common law in other states that accepts the mere threat of physical force, or a claim of lawful authority to restrain, as enough to satisfy the confinement requirement for false imprisonment (assuming always that the victim submits). It is true that in a diversity case, we are bound by Maine law, as Wal-Mart reminds us; but we are not required to treat a descriptive phrase as a general rule or attribute to elderly Maine cases an entirely improbable breadth.

* * *

Affirmed.

¹³ Although the distinction may seem a fine one, it is well settled that a threat to confine at a future time, even if done to extract payment, is not itself false imprisonment. See *Restatement, supra*, § 41 cmt. e.

**United States Court of Appeals
Third Circuit**

Victor ZAVALA, et al

v.

WAL-MART STORES INC.,

691 F.3d 527 (2012)

Before: FUENTES, SMITH, and JORDAN,

OPINION

SMITH, Circuit Judge.

I. Introduction

This suit was brought in the U.S. District Court for the District of New Jersey by Wal-Mart cleaning crew members who are seeking compensation for unpaid overtime and certification of a collective action under the Fair Labor Standards Act (FLSA), civil damages under RICO, and damages for false imprisonment. [*Editor's Note: As demonstrated by this opinion, complaints in both federal and state courts often contain multiple claims under more than one law. We will focus only on the false imprisonment claim here.*]

The workers—illegal immigrants who took jobs with contractors and subcontractors Wal-Mart engaged to

clean its stores—allege: (1) Wal-Mart had hiring and firing authority over them and closely directed their actions such that Wal-Mart was their employer under the FLSA; (2) Wal-Mart took part in a RICO enterprise with predicate acts of transporting illegal immigrants, harboring illegal immigrants, encouraging illegal immigration, conspiracy to commit money laundering, and involuntary servitude; (3) Wal-Mart's practice of locking some stores at night and on weekends—without always having a manager available with a key—constituted false imprisonment.

* * *

II. Facts

* * * *

C. False Imprisonment

In support of their false imprisonment claims, Plaintiffs allege that they often worked at stores that were shut down at night and on weekends, during which time the exits were locked. At these stores, they needed to seek out managers to open the doors. Managers were often unavailable and were sometimes not even in the store. However, Plaintiffs'

deposition testimony shows that they could and sometimes did leave for breaks. Testimony also shows that they occasionally left for work-related tasks like retrieving propane (necessary for the buffing equipment).

Plaintiffs cite two specific instances in which they wanted to leave but were unable to do so: (1) Plaintiff Petr Zednek had a toothache and wanted to leave early, but his manager, Steve, refused to permit him to leave; (2) Plaintiff Teresa Jaros had abdominal pain and bleeding and wanted to leave, but no managers were in the store. In Zednek's case, he further asserts that "Steve is a muscular man (with blond hair), and I knew that he would assault me if I tried to escape through any door that would let me out[.]"

In response, Wal-Mart provides two declarations from store managers. The declarations attest that managers were available to unlock doors "when necessary"; that the stores had properly-marked emergency exits; and that—to the managers' knowledge—the emergency exits were neither concealed nor obstructed at any time and were always in proper working order.

In reply to these declarations, Plaintiffs assert that managers were often unavailable. They also assert that they did not know how to leave. Plaintiffs claim that they were never informed of the location of emergency exits. Plaintiffs also speculate that Wal-Mart had motive to conceal these exits.

* * * *

Plaintiffs challenge the District Court's . . . grant of summary judgment for Wal-Mart on Plaintiffs' false imprisonment claims. The District Court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 216(b), 18 U.S.C. § 1964(c), and 28 U.S.C. § 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

* * * *

C. False Imprisonment

* * * * Wal-Mart . . . offered affidavits asserting that it locked its doors at night to provide security for its staff and merchandise, that managers were often available to open locked doors, and that Wal-Mart had accessible emergency exits, as required by state and federal law. Wal-Mart also argued that Plaintiffs' repeated return to stores where they were

“imprisoned” constituted consent.

In response, Plaintiffs: (1) cited specific instances where they wanted to leave and managers were unavailable or refused to let them leave; (2) noted that no one ever showed them the location of emergency exits and their minimal proficiency in English would make it difficult or impossible to find them on their own; and (3) argued that Wal-Mart had an interest in concealing emergency exits to prevent theft of merchandise and discovery of the illegal workers by federal agents.

On summary judgment, the District Court found Wal-Mart’s assertions regarding the presence of emergency exits dispositive, as false imprisonment cannot occur where there is a safe alternative exit. We agree with the District Court’s conclusion, though we will expand on the District Court’s analysis.

Federal Rule of Civil Procedure 56 requires the court to render summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). This standard provides that the mere existence of some alleged factual

dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” An issue of material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. We exercise plenary review over a District Court’s grant of summary judgment and review the facts in the light most favorable to the party against whom summary judgment was entered.

As this is a state law claim, the first question to be resolved is: what state law should be applied? After performing a choice-of-law analysis, the District Court applied New Jersey law. We believe the District Court was correct in its choice of New Jersey law, and Plaintiffs do not dispute its application.

The majority of Plaintiffs’ false imprisonment claims fail because Plaintiffs impliedly consented to their “imprisonment.” Apparently from the very beginning of their employment, Plaintiffs were aware that Wal-Mart’s policy was to close and lock the main doors of its stores when they are not open for business. Plaintiffs nevertheless chose

to continue coming to work. They do not allege that they objected to the locked-door policy, nor do they allege that they requested a manager be available during their shift to open the doors. Continuing to come to work under these conditions is “conduct . . . reasonably understood by another to be intended as consent” and is therefore “as effective as consent in fact.” Restatement (Second) of Torts § 892. As such, Plaintiffs “cannot recover in an action of tort for the conduct or for harm resulting from it.” *Id.* at § 892A.

But consent can be withdrawn, and Plaintiffs allege two instances when they wanted to leave but were unable to do so. Teresa Jaros alleges that she was sick and wanted to leave, but no manager was available to open the door. Petr Zednek alleges that he had a toothache, asked to leave, and was told he could not. He also alleges that he believed his manager, a “muscular” “blond” man, would assault him if he attempted to leave.

Jaros’ consent likely encompasses the incident she alleges. By the time of her illness, she knew that she must work in a locked store for the duration of the shift. She knew that a manager would often be absent and therefore unable to open the

door should a problem arise. Her consent arguably includes that aspect of her work. Consent only terminates “when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct.”

Restatement (Second) of Torts § 892A cmt. h. Since Wal-Mart was unaware that Jaros wanted to leave (because no manager was there), Jaros could not terminate her consent.

Regardless, Jaros’ complaint and Zednek’s complaint are resolved by the availability of emergency exits. “To make the actor liable for false imprisonment, the other’s confinement within the boundaries fixed by the actor must be complete.... The confinement is complete although there is a reasonable means of escape, unless the other knows of it.” Restatement (Second) of Torts § 36. While both Jaros and Zednek disclaim knowledge of the emergency exits, such knowledge is properly imputed to them, even over their proclaimed ignorance and even on summary judgment. Federal Rule of Evidence 201 permits judicial notice of facts “generally known within the trial court’s territorial jurisdiction” and we have noted that this includes “matters of

common knowledge.” See *Gov’t of Virgin Islands v. Gereau*, 523 F.2d 140, 147 (3d Cir.1975). Courts have used judicial notice to establish facts in similar situations. See *Williams v. Kerr Glass Mfg. Corp.*, 630 F.Supp. 266, 270 (E.D.N.Y.1986) (taking judicial notice of the distance between federal courts in New York and Pennsylvania and the numerous means of transportation between them); *Penthouse Int’l, Ltd. v. Koch*, 599 F.Supp. 1338, 1346 (S.D.N.Y.1984) (taking judicial notice of the “layout and physical characteristics” of the New York City subway system, which the judge rode daily to work).

Emergency exits are by regulation a common feature of commercial buildings in the United States. We agree with the District Court that “it appears ... indisputable that these emergency exits are required by law to be clearly marked, easily accessible, and unobstructed.” We conclude that Jaros and Zednek must have been aware of the existence of emergency exits as a general feature of buildings, and therefore they must have been aware that emergency exits were likely to exist in the stores in which they worked. A reasonable jury could not conclude

otherwise.

The question remaining is whether emergency exits were in fact available and unobstructed at the Wal-Mart stores in question. Wal-Mart has offered evidence of the availability and unobstructed nature of emergency exits in its stores. Plaintiffs have not directly rebutted this evidence. They have merely offered speculation that Wal-Mart had motive to conceal any emergency exits. But Plaintiffs do not actually demonstrate that the exits were absent or obstructed in any way. Judgment in favor of Wal-Mart is appropriate.

Plaintiffs cannot succeed by advancing a defense that leaving through the emergency exit would trigger an alarm or potentially result in the loss of their jobs. Regarding the alarm, “it is unreasonable for one whom the actor intends to imprison to refuse to utilize a means of escape of which he is himself aware merely because it entails a slight inconvenience [.]” Restatement (Second) of Torts § 36 cmt. a; *Richardson v. Costco Wholesale Corp.*, 169 F.Supp.2d 56, 61 (D.Conn.2001) (“The fact that opening the employee exit door would result in an alarm sounding and possible employee

discipline does not give rise to an inference that actual confinement or threatening conduct took place.”). Nor is potential loss of employment a sufficient threat to constitute false imprisonment. *See Maietta v. United Parcel Serv., Inc.*, 749 F.Supp. 1344, 1367 (D.N.J.1990) (concluding an employee’s concern that he would lose his job if he exited an interview with company investigators was insufficient to support a claim for false imprisonment under New Jersey law), *aff’d* 932 F.2d 960 (3d Cir.1991); *Richardson*, 169 F.Supp.2d at 61–62 (“Moral pressure or threat of losing one’s job does not constitute a threat of force sufficient to establish that plaintiffs were involuntarily restrained.”).

The only remaining issue is Zednek’s claim that when he approached his manager and was denied permission to leave, he “knew that [the manager] would assault [him] if [Zednek] tried to escape through any door that would let [him] out.” Zednek asserts that the manager wanted the store clean for the impending visit of a Wal-Mart executive. But Zednek’s sole evidence of the manager’s supposed violent tendencies is that the manager “is a muscular man (with blond

hair)[.]” We need not credit this statement in any way.

In an earlier declaration, Zednek relates the toothache story and the request made to and denied by his manager, but curiously omits any belief that his manager would assault him. It is only in his third supplemental declaration—filed only a few weeks *after* Wal-Mart moved for summary judgment—that Zednek mentions the prospect that his manager might randomly assault him. Even on summary judgment, we need not credit a declaration contradicting a witness’ prior sworn statements. While not precisely contradictory, Zednek’s omission of such a crucial fact is highly questionable.

But even absent these suspicious circumstances, we conclude that no reasonable jury could credit Zednek’s speculative statement that his manager would assault him had he tried to leave. Zednek offers no evidence in support of the statement. He does not allege that the manager had a propensity for violence. And he does not allege that the manager overtly or impliedly threatened him. Thus, summary judgment was appropriate.

V. Conclusion

Over the course of eight years and a minimum of four opinions, the District Court rejected final certification of an

FLSA class, rejected the RICO claim on several grounds, and rejected the false imprisonment claim on the merits. We will affirm.

Notes & Questions

1. The case brief template begins with the title of the case, a description of the court issuing the opinion, and the date of the opinion. Of what practical value is such information for a competent lawyer? Consider the following. The United States Court of Appeals for the First Circuit issued the opinion in *McCann* in 2000 and The United States Court of Appeals for the Third Circuit issued the opinion in *Zavala* in 2012. Both Courts are intermediate appellate courts in the federal court system. Is the opinion in *Zavala* binding precedent within the First Circuit?
2. What are the rules of law regarding a claim for false imprisonment described and applied by the courts in *McCann* and *Zavala*? Where would you describe those rules of law in your case briefs? Did the opinion in *Zavala* expand the understanding of false imprisonment you had after reading *McCann*?
3. What are the sources of the laws of false imprisonment described and applied by the courts in *McCann* and *Zavala*? What is the *common law*? What is the *Restatement (Second) of Torts*?
4. Do the courts in *McCann* and *Zavala* discuss each subpart (element) of the rules of law regarding false imprisonment in the same degree of detail?
5. The court in *Zavala* chose to apply the substantive law of New Jersey in ruling on the claim of false imprisonment. Does that make *Zavala* binding precedent for state courts in New Jersey?
6. False imprisonment is an *intentional tort* – one of many intentional torts you will discuss in your Torts course. The word *intent* is used throughout the Restatement (Second) of Torts “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Restatement (Second) Torts Section 8(A) (1965).

The Comments to Section 8(A) of the Restatement provide the following explanation of

intent:

a. "Intent," as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not intend that result. "Intent" is limited, wherever it is used, to the consequences of the act.

b. All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. * * *

Illustrations:

1. A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

7. Should the owner of a store, such as the defendant in *McCann*, have a right to detain someone the owner suspects of shoplifting without being liable for false imprisonment? Consider Section 10 of the Restatement (Second) of Torts which provides:

10. Privilege

(1) The word "privilege" is used throughout the Restatement of this Subject to denote the fact that the conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to liability.

(2) A privilege may be based upon

(a) the consent of the other affected by the actor's conduct, or

(b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise, or

(c) the fact that the actor is performing a function for the proper performance of which freedom of action is essential.

8. Section 892A of the Restatement (Second) of Torts provides:

Effect of Consent

(1) *One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.*

(2) *To be effective, consent must be*
(a) *by one who has the capacity to consent or by a person empowered to consent for him, and*
(b) *to the particular conduct, or to substantially the same conduct.*

(3) *Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction.*

Did the court in *Zavala* use Section 892A in reaching its decision?

9. Which facts would you include in the Facts section of your case briefs? For example, would you include the fact the McCanns had returned a CD player and a Christmas tree to the store before the false imprisonment? Would you include the facts that the registrar receipt generated before the false imprisonment had a time stamp of 10:10 PM and the McCanns left the store at 11:15 PM? Given that the Third Circuit in *Zavala* mentions Steve's blond hair more than once, would you note Steve's blond hair in your brief for *Zavala*?

10. Do the courts in *McCann* and *Zavala* link specific facts to particular subparts (elements) of the rules of law regarding false imprisonment? If so, which facts are linked with which elements?

11. The court in *McCann* describes the facts and holding in the *Knowlton* opinion? Why did the *McCann* court do so? Would you use the discussion of *Knowlton* in your case brief for *McCann*? If you would, where would you place the discussion of *Knowlton* in the brief?

12. The court in *Zavala* states that it is "review[ing] the facts in the light most favorable to the party [the plaintiffs] against whom summary judgment was entered." As you will learn in your Civil Procedure course, reviewing facts in the light most favorable to a party against whom summary judgment is sought [the non-moving party] is part of the common rule explanation for Fed. R Civ. P 56 governing summary judgment in federal courts. Do you think the court in *Zavala* actually viewed the facts in the light most favorable to the plaintiffs, the non-moving party?

13. How would you describe the type of reasoning used by the courts in *McCann* and *Zavala*? Review pages 80-89 in What Every Law Student Really Needs to Know.

**Court of Civil Appeals of Texas,
Waco**

**BIG TOWN NURSING HOME, INC.,
Appellant,
v.
Howard Terry NEWMAN, Appellee.**

461 S.W.2d 195 (1970)

OPINION

McDONALD, Chief Justice.

This is an appeal by defendant nursing home from a judgment for plaintiff Newman for actual and exemplary damages in a false imprisonment case.

Plaintiff Newman sued defendant nursing home for actual and exemplary damages for falsely and wrongfully imprisoning him against his will.

* * *

The trial court entered judgment on the verdict for plaintiff for \$25,000.

* * *

Plaintiff is a retired printer 67 years of age, and lives on his social security and a retirement pension from his brother's printing company. He has not worked since 1959, is single, has Parkinson's disease, arthritis, heart trouble, a voice impediment, and a hiatal hernia. He has

served in the army attaining the rank of Sergeant. He has never been in a mental hospital or treated by a psychiatrist. Plaintiff was taken to defendant nursing home on September 19, 1968 by his nephew who signed the admission papers and paid one month's care in advance. Plaintiff had been arrested for drunkenness and drunk driving in times past (the last time in 1966) and had been treated twice for alcoholism. Plaintiff testified he was not intoxicated and had nothing to drink during the week prior to admission to the nursing home. The admission papers provided that patient 'will not be forced to remain in the nursing home against his will for any length of time.' Plaintiff was not advised he would be kept at the nursing home against his will.

On September 22, 1968 plaintiff decided he wanted to leave and tried to telephone for a taxi. Defendant's employees advised plaintiff he could not use the phone, or have any visitors unless the manager knew them, and locked plaintiff's grip and clothes up. Plaintiff walked out of the home, but was caught by employees of defendant and brought back forceably,

and thereafter placed in Wing 3 and locked up. Defendant's Administrator testified Wing 3 contained senile patients, drug addicts, alcoholics, mentally disturbed, incorrigibles and uncontrollables, and that 'they were all in the same kettle of fish.' Plaintiff tried to escape from the nursing home five or six times but was caught and brought back each time against his will. He was carried back to Wing 3 and locked and taped in a 'restraint chair', for more than five hours. He was put back in the chair on subsequent occasions. He was not seen by the home doctor for some 10 days after he was admitted, and for 7 days after being placed in Wing 3. The doctor wrote the social security office to change payment of plaintiff's social security checks without plaintiff's authorization. Plaintiff made every effort to leave and repeatedly asked the manager and assistant manager to be permitted to leave. The home doctor is actually a resident studying pathology and has no patients other than those in two nursing homes. Finally on November 11, 1968 plaintiff escaped and caught a ride into

Dallas, where he called a taxi and was taken to the home of a friend. During plaintiff's ordeal he lost 30 pounds. There was never any court proceeding to confine plaintiff. Defendant's assistant manager testified that plaintiff attempted to leave the home five or six times, and on each occasion was brought back against his will.

False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification. There is ample evidence to sustain [the] jury findings.

* * *

[The Court affirmed a "reformed" judgment for plaintiff, reducing damages from \$25,000 to \$13,000.]

Notes & Questions

1. Which facts are the determinative facts for false imprisonment in *Big Town Nursing Home*?

SECTION III
ANALYSIS IN CIVIL PROCEDURE

Civil Procedure, like Torts, is one of the courses you are required to take during your first year of law school.¹⁴ Many students struggle with Civil Procedure more so than with other courses in the first year. We have included the readings in this section to help you understand how to use the skills you developed with the Torts readings for Civil Procedure readings as well.

The materials in this section also serve the following purposes:

(a) You will spend much of your time in the Civil Procedure course addressing how the Federal Rules of Civil Procedure govern the process of civil litigation in federal courts. The Rules are an example of a source of law other than the common law. The materials below introduce you to several Federal Rules of Civil Procedure and how federal courts interpret and apply the Rules.

(b) This section introduces you to the concept of claims arising out of the “same transaction or occurrence.” This concept is a key component of number of topics covered in Civil Procedure courses, including modern claim preclusion, counterclaims, cross-claims and party joinder.¹⁵ The court opinions below focus on the “same transaction or occurrence” as used in the context of permissive party joinder because it is very common for lawsuits to involve multiple plaintiffs and multiple defendants. As you will see, the concept as addressed in the following opinions reflects an attempt to balance hopes for consistency and efficiency in adjudication with concerns about the burdens of complexity.

(c) Finally, this section provides the opportunity to practice an active reading technique particularly applicable to readings in Civil Procedure. When evaluating the cases below, ask yourself what practical advantage in the litigation a party anticipates if the court adopts the party’s arguments on the issue of procedure in dispute.

¹⁴ Pages 12 to 13 in What Every Law Student Really Needs to Know contain a brief description of topics likely to be covered in a Civil Procedure course.

¹⁵ A similar concept also forms part of the analysis for supplemental subject matter jurisdiction.

Below are several of the Federal Rules of Civil Procedure to set a context for the cases that follow.

Fed. R. Civ. P. 1 - Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 3 - Commencing an Action

A civil action is commenced by filing a complaint with the court.

Fed. R. Cvi. P. 20 - Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs.* Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants.* Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Extent of Relief.* Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) *Protective Measures.* The court may issue orders--including an order for separate trials--to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Fed. R. Civ. P. 21 - Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

**United States District Court,
E.D. Pennsylvania.**

**Methuselah Z.O. BRADLEY, et al.,
Plaintiff**

v.

**CHOICEPOINT SERVICES, INC. and
Choicepoint, Inc., Defendant.**

2007 WL 2844825 (2007)

DIAMOND, J.

Six individual Plaintiffs bring the instant action under the Fair Credit Reporting Act [FCRA] and related statutes against two credit reporting agencies, Defendants Choicepoint Services, Inc. and Choicepoint, Inc. Defendants have moved to sever, arguing that these are six separate actions. I agree and grant Defendants' Motion.

I. FACTUAL BACKGROUND

Plaintiffs are Lori M. Abate, Methuselah Z.O. Bradley, V, Christopher W. Shepard, Shadee Abusaab, Robert Riley, and Anna Pires. On March 28, 2007, they filed the instant action, charging that Defendants reported derogatory and inaccurate information to various credit bureaus about Plaintiffs and their credit histories. Plaintiffs allege that they disputed the inaccurate information, but that Defendants failed to investigate or correct the errors. Defendants allegedly also

have indicated that they intend to continue publishing the inaccurate information. Because of Defendants' wrongful actions, Plaintiffs allege that they were denied various loans and extensions of consumer credit.

Plaintiffs charge that Defendants violated the FCRA, and are liable for defamation, negligence, and invasion of privacy/false light. Plaintiffs Bradley and Abusaab also allege that Defendants violated Pennsylvania's Unfair Trade Practices and Consumer Protection law.

* * *

On August 31, 2007, Defendants moved to sever the instant action into six individual lawsuits.

III. LEGAL STANDARDS

Fed.R.Civ.P. 21 authorizes courts to sever misjoined parties. . . . A district court has broad discretion in deciding whether to sever a party pursuant to [Rule] 21." *Boyer v. Johnson Matthey, Inc.*, No. Civ.A. 02-CV-8382, 2004 WL 835082, at *1 (E.D.Pa. Apr.16, 2004).

In determining whether parties are misjoined, I must apply Rule 20(a)

Joinder is proper under this Rule only if two requirements are met: “[1] plaintiffs’ claim must arise from the same transaction or occurrence or series of transactions and [2] be based upon a common issue of fact or law.” *Simmons v. Wyeth Labs.*, 1996 WL 617492, at *3 (E.D.Pa. Oct.24, 1996). “Courts generally apply a case-by-case approach in determining whether a particular factual situation meets the same transaction or occurrence test.” *Miller v. Hygrade Food Prods. Corp.*, 202 F.R.D. 142, 144 (E.D.Pa.2001). In determining whether multiple claims arise from the same transaction or occurrence, courts look to whether a “logical relationship” exists among the claims. *See Miller v. Hygrade Food Prods. Corp.*, 202 F.R.D. 142, 144 (E.D.Pa.2001) (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir.1974)). A logical relationship exists when “ ‘the central facts of each plaintiff’s claim arise on a somewhat individualized basis out of the same set of circumstances.’ ” *Simmons v. Wyeth*, 1996 WL 617492, at *3 (E.D. Pa. Oct.24, 1996)).

The common question of law or fact prerequisite necessitates a very low threshold. Plaintiffs need only share one common question of law or fact. Courts in

this Circuit have found that the same series of transactions or occurrences prerequisite under Rule 20 essentially consumes the second requirement that there arise a question of law or fact common to all joined parties.

IV. DISCUSSION

It is apparent that each Plaintiff’s claim is factually unique. Mr. Bradley appears to dispute information Choicepoint recorded relating to a 2001 civil judgment, a 2001 federal tax lien, and 2000 and 2003 state tax liens-all entered in Pennsylvania. Ms. Abate disputes information related to a 2004 state tax lien in North Carolina. Mr. Abusaab disputes information related to civil judgments from 2003 and 2004 entered in Pennsylvania. Ms. Pires disputes information related to a 1999 civil judgment in Georgia, 2005 civil judgments in New Jersey, and a state tax lien in Georgia. Mr. Riley disputes information related to a 1999 civil judgment in Virginia. Mr. Shepard disputes information related to 2003 and 2004 civil judgments in Florida.

Plaintiffs nonetheless believe that their joined claims against Choicepoint-although identical to their earlier, individual lawsuits-are logically related:

Every single Plaintiff had a major public record error placed on his or her credit report by Choicepoint in the first instance; every single Plaintiff disputed the error (some more than once); every single Plaintiff was run through choicepoint's CDV/ACDV system; every simple [sic] Plaintiff's false public record was "verified" by Choicepoint; the policies and practices that led to failure after failure were the same; the automated computer system was the same.

Virtually every FCRA case includes similar allegations respecting a credit bureau's failure to record and report accurate information. Indeed, if such errors warranted joinder, there would scarcely be an individual claim brought under FCRA. *See Simmons*, 1996 WL 617492 (E.D. Pa. Oct.24, 1996) (similarity of Defendant's allegedly wrongful conduct insufficient to warrant joinder). Plaintiffs simply ignore that to establish Choicepoint's "failure after failure," they would first have to prove each erroneous entry with different witnesses and evidence. Thus, Ms. Abate would have to prove that the information Choicepoint reported respecting the North Carolina tax lien was erroneous; Mr. Riley would have to prove that the information Choicepoint reported respecting

the Virginia civil judgment was erroneous; each of the remaining Plaintiffs would similarly have to present individual proof of Choicepoint's errors. Plainly, there is no logical connection among these claims.

The cases Plaintiffs rely upon are inapposite. For example, in *Sabolsky v. Budzanoski*, 100 members of the United Mineworkers of America sued their Union and their Union representatives to compel them to adhere to the Union's constitution. 457 F.2d 1245 (3d Cir.1972). That case thus involved a single claim brought by multiple plaintiffs-exactly the reverse of the situation that obtains here.

Nor am I convinced that the "pattern and practice" race discrimination cases cited by Plaintiffs require joinder here. An employer's practice of discriminating against employees of the same race creates a clear, logical relationship among the resulting discrimination claims because the employer directed its wrongful actions at a single characteristic shared by all the plaintiffs. *See id.*; *see also Mosley v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir.1974) (concluding "that a company-wide policy purportedly designed to discriminate against blacks in employment ... arises out of the

same series of transactions or occurrences.”). There is no such shared characteristic among the Plaintiffs here. On the contrary, the particulars of each Plaintiff’s claim differs from that of the other Plaintiffs; no two claims arise out of the same set of circumstances.

Finally, Defendants observe that in usual circumstances, each Plaintiff would have brought his or her individual FCRA claim in a single action against all involved credit agencies. Defendants suggest that Plaintiffs have brought the instant “collective” action against Choicepoint in a bad faith effort to increase the settlement value of their claims. Although I will not presume Plaintiffs’ bad faith, I am troubled by this attempt to join six unrelated claims, especially after the same Plaintiffs brought identical individual actions against other credit agencies.

V. CONCLUSION

In these circumstances, Plaintiffs have not met the first part of the Rule 20(a) test: their claims do not arise from the same transactions or occurrences. Accordingly, I will grant Defendants’ Motion and sever the six Plaintiffs’ joint Complaint into six individual claims pursuant to Fed. R. Civ. P.

21. In light of my decision, I need not discuss whether Plaintiffs have met the second part of the Rule 20(a) test or the other arguments Defendants have raised.

An appropriate Order follows.

ORDER

AND NOW, this 27th day of September, 2007, upon consideration of Defendant’s Motion to Sever Plaintiffs’ Claims (Doc. No. 20), and Plaintiffs’ Reply Brief (Doc. No. 24), it is hereby **ORDERED** that Defendant’s Motion for Severance is **GRANTED**.

IT IS FURTHER ORDERED that:

1. The action against the Defendants is severed into separate claims.
2. Each individual Plaintiff shall no later than fourteen (14) days from the issuance of this order file with this Court a new complaint naming Choicepoint Service, Inc. and Choicepoint, Inc. as Defendants.
3. The Plaintiff shall pay a separate filing fee for each of the amended complaints filed.
4. All complaints will be deemed to have been filed as of March 28, 2007.

5. The Plaintiff's original action 07-1255 shall remain open only with regard to Methuselah Z.O. Bradley, and I will retain control of that case. Plaintiff Bradley shall file within fourteen (14) days an amended complaint striking the references to the other Plaintiffs.

6. The five other Plaintiffs' new complaints shall be assigned separate civil action numbers, and randomly assigned to new judges pursuant to Local Rule of Civil Procedure 40.1
AND IT IS SO ORDERED.

**United States District Court
N.D. California**

**Paul A. JACQUES and Jean L. Jacques,
Plaintiffs**

v.

**HYATT Corporation, Medical
Technology, Inc., et al., Defendants**

2012 WL 3010969 (2012)

WILLIAM ALSUP, District Judge

* * *

[In this personal-injury action] Hyatt Corporation moves to sever the claims against Hyatt Corporation from the claim against defendant Medical Technology, Inc. for misjoinder of parties pursuant to FRCP 21 The motion to sever is **DENIED** because the claims arise out of a series of related occurrences, involve common questions of law and fact, and Hyatt has not demonstrated it will be prejudiced by maintaining the claims in a single action. * * *

Plaintiffs brought this action as a result of personal injuries suffered by Mr. Jacques during plaintiffs' honeymoon in Hawaii and a subsequent incident in plaintiffs' backyard in California. The following facts are taken from the complaint. In July 2009, plaintiffs visited the Hyatt Regency Maui Resort & Spa in Maui, Hawaii. While

descending stairs outdoors near the pool area, Mr. Jacques slipped and fell, hitting his right knee on a lava boulder lining the staircase. The flagstone steps were very wet, and although the first and second sets of stairs had handrails, the third set—where Mr. Jacques fell—did not. Mr. Jacques suffered a ruptured patella tendon and was non-ambulatory and in extreme pain for the remaining four days of his honeymoon. Upon return to California, the tendon was surgically repaired at the orthopedic Kaiser clinic in South San Francisco.

The second incident occurred two months later, while Mr. Jacques was wearing Medical Technology's orthopedic knee brace to stabilize his knee after the above-described injury. "While descending some stairs in his back yard, he at one point partially shifted his weight to the injured knee, causing the metal strap which holds the top and bottom portions of the knee brace together to bend, which in turn caused him to fall." His patella tendon re-ruptured and required another surgery.

Plaintiffs assert three claims for relief: (1) general negligence against Hyatt, (2) premises liability against Hyatt, and (3)

products liability against Medical Technology. Mr. Jacques seeks damages for the physical injury, pain and suffering, emotional distress, anxiety, and wage loss; Mrs. Jacques seeks damages for loss of consortium. Plaintiffs' complaint was first filed in San Mateo County Superior Court in June 2011, and an amended complaint was filed in September 2011 to add the products liability claim against Medical Technology.

* * *

1. MOTION TO SEVER.

Hyatt moves to sever the claims against Hyatt and Medical Technology because it contends that the claims did not arise out of the same transaction, occurrence, or series of transactions or occurrences. Medical Technology and plaintiffs oppose the motion.

As set forth in FRCP 20(a)(2), multiple defendants may be joined together in one action if "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to

all defendants will arise in the action." "Although the specific requirements of Rule 20 ... may be satisfied, a trial court must also examine the other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir.1980). Such factors may include judicial economy, prejudice, and whether separate claims require different witnesses and documentary proof. *SEC v. Leslie*, No. C 07-3444, 2010 WL 2991038, at *4 (N.D. Cal. July 29, 2010) (Fogel, J.). The FRCP 20(a) requirements and additional fundamental fairness factors will be considered in turn as follows.

A. Same Transaction or Occurrence.

"The Ninth Circuit has interpreted the phrase 'same transaction, occurrence, or series of transactions or occurrences' to require a degree of factual commonality underlying the claims." Typically, this means that a party "must assert rights ... that arise from related activities—a transaction or an occurrence or a series thereof." *Bravado Int'l Grp. Merch. Servs. v. Cha*, 2010 WL 2650432, at *4 (C.D. Cal. June 30, 2010) (citing *Coughlin v. Rogers*,

130 F.3d 1348, 1350 (9th Cir.1997)). District courts have reached different conclusions regarding whether overlapping liability alone is sufficient to satisfy FRCP 20, and our court of appeals has not yet decided this issue. *See Oda v. United States*, No. CV 11-04514-PSG, 2012 WL 692409, at *1-2 (N.D. Cal. Mar.2, 2012) (Grewal, Mag. J.) (describing two lines of cases).

Hyatt argues that the claims against Hyatt and Medical Technology do not arise out of the same transaction, occurrence, or series of transactions or occurrences because the only thing they have in common is the location of the injury—Mr. Jacques’s knee. The first injury was on Hyatt’s property in Maui while the second was in California two months later, and the injuries allegedly occurred in a different manner.

In contrast, plaintiffs contend that the claims arise out of the same “series of occurrences” because the injuries and damages overlap, and the evidence submitted will be relevant to both. Plaintiffs also anticipate that if this motion to sever is granted, defendants will employ an empty-chair defense

“because this case involves injury, then re-injury, to the same body part in exactly the same way, and because the second injury would not have occurred but for the first” . Plaintiffs argue that these two injuries to Mr. Jacques’s knee are causally related, not coincidental . Medical Technology puts forth similar arguments, pointing to the facts that the injuries occurred close in time, to the same plaintiff and part of his knee, and that Mr. Jacques would not have been wearing the knee brace in the second incident, but for the accident involving Hyatt.

Hyatt oversimplifies the issue by arguing that the only thing the claims have in common is an injury to Mr. Jacques’s knee. The rule simply requires “related activities” and “similarity in the factual background of a claim.” *See Bravado*, 2010 WL 2650432, at *4. Plaintiffs have set forth several relationships between the accidents and factual similarities underlying the claims, specifically: that the injury and re-injury occurred to the same body part in exactly the same way, the second accident would not have occurred but for the first, and there are overlapping damages. Plaintiffs’ allegations therefore meet the threshold

requirement.

The instant action is distinguishable from *Oda*, where although the two vehicular accidents “allegedly contribute[d] to [plaintiff]’s current injuries,” the events were “wholly distinct” and were not causally related. *See Oda*, 2012 WL 692409, at *2. Here, Mr. Jacques’s current injuries allegedly stem from two accidents that are alleged to be causally related. Unlike in *Oda*, Mr. Jacques’s second accident allegedly would not have occurred but for the first accident, at least in part because he would not have been wearing the knee brace at issue.

The instant action is more analogous to *Wilson*, where the plaintiff sued for products liability and subsequent medical malpractice after an accident involving a dyeing machine:

Although Dr. Schoenbach’s treatment of [plaintiff]’s finger is a separate proposition from the injury of his finger in the machine, the two incidents are part of a series of occurrences which have allegedly contributed to the current condition of [plaintiff]’s finger.

Common questions of law and overlapping questions of fact will arise both with regard to the cause of [plaintiff]’s disability and the extent of his damages.

Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen, 726 F.Supp. 950, 951–52 (S.D.N.Y.1989). So too here. Because the injuries occurred only two months apart, the first accident was allegedly a causal factor in the second, and both incidents allegedly contributed to the current condition of Mr. Jacques’s knee, this order finds the threshold “series of occurrences” requirement has been met.

B. Common Questions of Law or Fact.

Hyatt argues that in addition to the claims stemming from different incidents, the claims against Hyatt are based on [different legal theories]. Medical Technology counters by pointing to common questions of law such as . . . the claims against each defendant involve multiple common questions of fact:

Mr. Jacques’ preexisting medical, mental, emotional and physical conditions that may

have contributed to the incidents and/or his claimed damages; the circumstances surrounding Mr. Jacques' alleged initial injury and the circumstances surrounding his subsequent re-injury; the nature and extent of Mr. Jacques' alleged injuries and damages; the nature and extent of Mr. Jacques' injuries that could have continued on even had no second accident occurred and the extent of any exacerbation of those claimed injuries by the second accident; the circumstances involved in the initial surgery and pre and post-surgical treatment; the alleged mental and emotional injuries and potential contributing factors, if any such injuries exist; and facts relating to the alleged damages claims, including the purported wage loss claim and pre-existing contributing factors.

(Medical Technology Opp. 7). Medical Technologies also puts forth the argument that Hyatt may be liable for injuries and damages arising from the second accident caused or contributed to

by the first accident, and analogizes to cases where medical malpractice during subsequent treatment was a reasonably foreseeable result of an original tortfeasor's act.

FRCP 20 requires at least one common question of law or fact. At a minimum, preexisting conditions, contributing factors, and the nature and extent of Mr. Jacques's injuries are a common questions of fact for both claims. Each of the defendants, moreover, will surely be pointing to the other as the primary cause of the ultimate injuries. Accordingly, plaintiffs' complaint meets the second threshold requirement under FRCP 20.

C. Fundamental Fairness.

The remaining factors to be discussed pertain to the fundamental fairness analysis and require the defendant to show that joinder, despite satisfying the textual requirements of FRCP 20, should nevertheless be denied.

(1) Facilitation of Settlement or Judicial Economy.

Hyatt believes settlement and judicial economy will not be facilitated by keeping the claims joined because the length of

time between the incidents—a mere two months—and existence of separate medical records pertaining to each incident would effectively result in two trials, one for each defendant. Hyatt contends that having defendants participate in one long trial would not make settlement any more likely.

Plaintiffs, on the other hand, argue that holding two separate trials will be inefficient because it will require physicians to testify twice, and Hyatt and Medical Technology will each likely have to testify at both trials. Medical Technology similarly argues that there will be duplication of witnesses, and also that potentially different schedules for separate trials would hinder settlement.

Largely as a result of the overlapping evidentiary matter discussed in greater detail below, this order finds that efficiency concerns weigh in favor of maintaining the claims in one action. Contrary to Hyatt's assertion, it has not shown that two separate trials will be shorter or less burdensome to the Court, parties, and witnesses; thus, this factor does not support severance.

(2) Prejudice.

Hyatt argues it will be prejudiced if severance is not granted, because of the possibility it will be found liable for incidents after the original accident, over which Hyatt had no control. * * *

Plaintiffs argue they will be prejudiced because * * * with separate trials, each defendant may try to blame the absent defendant for all or part of the damages. Medical Technology adds that mechanisms such as jury instructions, bifurcation of issues, and other protective measures under FRCP 20(b) can prevent prejudice.

With regard to Hyatt's concern that it may erroneously be found liable for incidents after the original accident, protective measures such as careful jury instructions will be sufficient to separate the allegations and evidence relevant to each claim, to the extent this is necessary. Hyatt has not offered any rationale for why such safeguards will not be feasible or effective.

* * *

[P]laintiffs would be subjected to prejudice if severance is granted. Each defendant is likely to argue that the other

is responsible for Mr. Jacques's injuries. Additionally, plaintiffs have limited financial resources. Duplicative litigation in Hawaii would be unaffordable. Whereas protective measures may be employed to prevent prejudice to Hyatt if necessary, the Court would be unable to construct similarly effective safeguards for plaintiffs.

Hyatt has failed to show it will suffer unavoidable prejudice if the instant action proceeds as a single lawsuit; therefore, this factor weighs against severance.

(3) Witnesses and Documentary Proof.

The parties disagree over the extent to which the claims will rely on overlapping documentary proof and witnesses. Hyatt argues that because the injury occurred in Hawaii, many of the witnesses are based in Hawaii, and that furthermore, Medical Technology will use entirely different expert testimony for its products liability claims than Hyatt will use for its personal injury claim. Joining the claims in a lengthy trial would burden both witnesses and the court due to travel and scheduling.

Mr. Jacques has submitted a declaration that Drs. Fang, Atkinson, and Richard, the

doctors responsible for his orthopedic surgeries, primary care, and psychiatric care, are all located in Northern California, and that only emergency care was provided in Hawaii. Furthermore, plaintiffs have photographs of the Maui accident site, and Hyatt has since remediated the site such that it is no longer in the same condition as when the accident occurred. Mr. Jacques also alleges that he and his wife are the only known, direct witnesses to the slip and fall. Medical Technology reiterates the common medical witnesses and adds that witnesses to support Mr. Jacques's wage loss and pain and suffering claims will likely be located in California.

Overlapping documentary evidence includes medical, insurance, and employment records.

Although it is possible that witnesses from Hawaii will be called to testify, the majority of potential witnesses identified thus far, particularly the medical personnel responsible for treating Mr. Jacques in California after each injury, are overlapping in both claims. While Hyatt has argued that the medical records for each incident are separate, it is likely that both claims will rely on overlapping

documentary evidence as to the common questions of fact discussed above, such as preexisting conditions, contributing factors, and the extent of injuries—the date of the second injury does not function as a bright line dividing the documentary evidence each claim may involve. The substantial evidentiary overlap weighs against severing the claims.

* * *

In sum, plaintiffs' complaint meets the two required elements of FRCP 20, and Hyatt fails to show that joinder does not comport with principles of fundamental fairness. Accordingly, Hyatt's motion to sever is **DENIED**.

Notes & Questions

1. While the courts in *Bradley* and *Jacques* discuss the phrase “arising out of the same transaction, occurrence, or series of transactions or occurrences” found in Rule 20(a)(1)(A) and 20(a)(2)(A), neither court address the preceding phrase in each of those subsections, i.e., rights to relief asserted [for or against] “jointly, severally, or in the alternative.” The latter phrase was included in Rule 20(a) to expand joinder of parties in federal courts beyond the scope of joinder permitted prior to the adoption of the Federal Rules of Civil Procedure in 1938. Prior to the adoption of Rule 20(a), plaintiff joinder was limited to plaintiff's asserting a jointly held right. Now, however, plaintiffs asserting individually held (“several”) rights might bring claims in the same suit. A leading treatise on the Federal Rules of Civil Procedure gives the following example:

[S]uppose a bus collides with an automobile. All of the bus passengers who suffered personal injuries or property damage may join as plaintiffs in a single action against defendant under Rule 20(a), even though their respective claims are several rather than joint. Under earlier plaintiff-joinder practice each plaintiff would have been forced to institute a separate action against defendant.

Charles Alan Wright & Arthur R. Miller, 7 Fed. Prac. & Proc. Civ. § 1654 (3d ed.).

An example of joinder of parties in the *alternative* to which Rule 20(a) refers would be the following. Plaintiff is certain plaintiff was assaulted by either D1 or D2, but plaintiff is not certain which of the two committed the assault due to problems of identification outside of plaintiff's control. Rule 20(a) permits plaintiff to join D1 and D2 as defendants even though only one may be held liable.

2. How many issues did you set forth in your briefs for the opinions in *Bradley* and *Jacques*?
3. How is Fed. R. Civ. P. 21 related to Fed. R. Civ. P. 20(a)?

4. The court in *Bradley* stated: “A logical relationship exists when the central facts of each plaintiff’s claim arise on a somewhat individualized basis out of the same set of circumstances” and “The common question of law or fact prerequisite necessitates a very low threshold.” The court in *Jacques* stated: “A trial court must also examine the other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness.” Did you include these statements in your case briefs? If so, where?

5. With respect to the “principles of fundamental fairness” to which the court in *Jacques* refers, what is the source of those principles? Does the court derive the principles from the words in Rule 20 or Rule 21?

6. In *Bradley*, the court distinguishes the facts in *Bradley* from the facts in *Mosley v. General Motors, Inc.* In *Mosley*, eight of the ten plaintiffs made claims against the Chevrolet Division of General Motors for a variety of circumstances, including discrimination in hiring on the basis of race, discrimination in hiring on the basis of sex, discharging on the basis of race, and discrimination based on race and sex in the granting of relief time. Two of the ten plaintiffs made similar claims against the Fisher Body Division of General Motors. All of the plaintiffs alleged that the defendant union had failed to pursue grievances regarding the employment practices to which the individual plaintiffs had been subjected. The court in *Mosley* stated: “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” If the quote accurately reflects the “impulse” under Rule 20(a), why did the claims of the six plaintiffs in *Bradley* fail to meet the requirements of the Rule?

7. The United States Court of Appeals for the Federal Circuit provided the following explanation of Rule 20(a) in a suit by a patent holder alleging that the eighteen defendants offered services infringing the plaintiff’s patent rights.

Thus, independent defendants satisfy the transaction-or occurrence test of Rule 20 when there is a logical relationship between the separate causes of action. The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant

* * *

In addition to finding that the same product or process is involved, to determine whether the joinder test is satisfied, pertinent factual considerations include whether the alleged acts of infringement occurred during the same time period, . . . the use of identically sourced components, . . . and whether the case involves a claim for lost profits. The district court enjoys considerable discretion in weighing the relevant factors.

In re EMC Corp., 677 F.3d 1351, 1358-1359 (Fed. Cir 2012).

Do you understand how the “pertinent factual considerations” identified by the court are pertinent to the application of Rule 20?

8. In *AF Holdings, LLC v. Does 1- 1,058*, 2014 WL 2718839 (D.C. Cir 2014), the court considered the joinder as defendants of 1,058 unknown individuals alleged to have used a peer-to-peer file-sharing application to download and distribute the plaintiff's copyrighted movie. The court decided that users of the file-sharing service who allegedly downloaded and shared the film over five months were unlikely to have had any interaction with one another. Accordingly, the users did not participate in the same series of transactions as would permit joinder as defendants in the absence of any evidence that the users participated in downloading and sharing the film at the same time.

9. Review the discussion of *Rules Versus Standards* on pages 92-95 of What Every Law Student Really Needs to Know. Does Fed. R. Civ. P. 20(a) set forth rules or standards?

There is a substantial body of literature distinguishing between rules and standards as formats for rules of law. With respect to the difference between rules and standards, Professor Russell Korobkin summarizes the existing literature as follows:

Rules establish legal boundaries based on the presence or absence of well-specified triggering facts. Consequently, under a rule it is possible for citizens to know the legal status of their actions with reasonable certainty ex ante. Standards, in contrast, require . . . [the incorporation] into a legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule. Consequently, under a standard, citizens cannot know with certainty ex ante where a legal boundary would be drawn in the event a specified set of facts come to pass. . . . For example, the pronouncement that "mothers are entitled to custody of minor children in the event of a divorce" is a rule, whereas the pronouncement that "custody is determined based on the best interests of the child" is a standard.

Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules Versus Standards*, 79 Or. L. Rev. 23, 26 (2000).

How does "precedent" as described on pages 98-100 of What Every Law Student Really Needs to Know affect whether a law functions as a rule or a standard?

SECTION IV

Outlining Assignment

Using your notes from classes on Tuesday, August 12, as well as the principles discussed here and in the pre-class video, create an outline of false imprisonment and bring a copy with you to the Outlining class on Wednesday, August 13. Note that although you will not be required to hand the outline in, you will be better prepared for the Outlining class if you work on this skill prior to our class discussion.

Outlining Basics

The *process* of outlining the rules (law) covered in your courses helps you to understand and retain the material that you need to know and use on your law school exams.

Generally, an effective outline will:

- A. have an organizational framework based on rules rather than cases, and will clearly depict the relationships between the rules.
- B. present the rules accurately and thoroughly.
- C. be visually accessible so that units of information are easily discernible.

The pre-class video on outlining and your class on outlining during Introduction to Professional Skills will help you understand the process more, and as your first year progresses you will become more adept at this important skill. To get you started, the following is a simple step-by-step approach to use when outlining your courses:

Step 1: Gather Materials.

Begin by gathering your class notes, case briefs, and any supplemental materials you may have (such as hornbooks, dictionaries, etc.). For your other courses this semester you also will want to have your text book and course syllabus with you.

Step 2: Create the Framework.

The next step will be to create the overall organizational framework for your outline. To complete this step, for most courses you will consult your course syllabus and your text book's table of contents.

The overall organizational framework for a course outline usually should be based on rules and concepts, and categories of rules and concepts. For example, a Criminal Law outline might be organized around main categories such as "Theories of Punishment," "Theft Offenses," "Homicide Offenses," and the like.

Under the main headings and categories, you will include subheadings based on material covered in class. Thus under the topic of “Theft Offenses,” your subheadings likely will be the individual theft offenses covered in your class, such as “Theft,” “Burglary,” and “Extortion,” like this:

- I. Theft Offenses
 - A. Theft
 - B. Burglary
 - C. Extortion

For your first outlining exercise for Introduction to Professional Skills, you will not yet have an overall structure because we are focusing on only one discrete tort. With that said, false imprisonment would likely be found in a Torts outline under the main heading of “Intentional Torts.”

An important thing to note is that except in rare instances – such as when you are studying important Supreme Court cases – you will not use case names as headings or subheadings. Therefore, for example, you should not use “McCann v. Wal-Mart” as a subheading in the outline you prepare for this class. The reason for this is that you generally do not need to know individual cases for your exams. You only need to know the rules and examples from those cases. Your headings, subheadings, and sub-subheadings should be brief words or phrases that accurately summarize the information indented under them.

Step 3: Flesh it Out.

Using your notes and other materials, fill in more details about each of your topics and subtopics. As you flesh out an outline, keep in mind the following:

- **Divide main rules into their component parts.** Oftentimes the component parts of a rule are referred to as “elements,” though not every rule has elements. (False imprisonment is an example of a rule that does have elements.) Within your outline, each part (element) of the rule would be its own sub-subheading. For example, under the subheading of “Burglary,” you would include each separate element as described by your professor or course materials, perhaps like this:
 - A. **Burglary:**
 1. Breaking
 2. and entering
 3. the dwelling
 4. of another
 5. at nighttime,
 6. with the intent to commit a felony therein

Complete this step carefully, so that you don't break the rule up too much; be sure that you know exactly what each component or element is. If you are not sure, seek assistance from professors, reliable supplemental materials, and your peers.

- **Indent similar sub-concepts in a consistent manner**, using a simple hierarchical structure to accurately represent the relationship of the concepts. Note in the burglary example that the six elements of burglary are indented together – they are equivalent in importance, so their positioning in the outline structure reflects that equivalence. Among other things, this helps you see at a glance that burglary has six elements that you need to memorize.
- Under each component part or element of the rule, further indent and include what is referred to as “**Rule Explanation**,” or helpful information about the element. This may include definitions of the element (what is a “dwelling?”), exceptions, etc. Rule explanation also includes examples of the element being met or not being met (e.g., can a car sometimes be a “dwelling?”) The examples come from the cases and notes in your text books, as well as sample fact patterns or “hypotheticals” that your professor may discuss in class. The examples, definitions, and other types of rule explanation are essential to your full understanding of a rule and how it needs to be applied to an exam fact pattern.
- **Other items** you will want to put in your outlines include exceptions to rules, policy considerations, minority and majority rules, and the like. *Be sure to place these pieces of information at the appropriate locations within your outline's framework.*
- Strive for **accuracy and thoroughness** in your presentation of the rules in your outlines. Keep in mind that on your exams, part of what you will need to be able to do will be to state relevant rules. Points will be awarded for how well you do this. You must be able to state the rule accurately, including key language and terms of art. Synonyms and paraphrasing should be used sparingly, if at all. Referring back to our burglary example, a student who defines burglary on an exam as “breaking into someone's house at night with the intent to steal” will get fewer points than a student who defines it more precisely. You will increase your chances of getting full credit for a rule statement on an exam if the rule is stated accurately and thoroughly in your outline.

Step 4: Edit for Visual Accessibility.

- The most effective outlines present information in smaller chunks that are easier to remember; for example, listing out the elements of a rule separately often will be easier to remember than stating the elements in a sentence or paragraph form.
 - Many students find it helpful to leave plenty of white space on the page, with good-sized margins and breaks between concepts.
 - And finally, use highlighting techniques such as **bolding** for key terms to help with memorization. Do not overuse highlighting techniques, though – they lose their effectiveness if overused, or if too many different techniques are used.
-

SECTION V

Notes on Writing Essay Answers

Final examinations in law school and state bar examinations include questions in multiple-choice and essay formats. This section provides your first chance to craft responses to essay questions. While you can find many books and articles about how to take law school exams, the following pages describe some strategies commonly identified for success on all exams and for essay questions in particular.

I. For All Examinations

a. Exam Structure

Law school exams often consist of multiple parts, e.g., sections with essay questions and sections with multiple-choice questions. It may be helpful to review the entire exam briefly when you first have the opportunity to do so. Unless your professor requires you to address the sections of the exam in a particular order, knowing the overall structure of an exam gives you the opportunity to build some confidence by addressing a format or issues with which you feel most comfortable.

b. Directions

Carefully read the professor's directions for the exam. There may be directions applicable to multiple sections of the exam and there may be directions applicable only to a particular part of the exam. As an example of the first type of direction, you may be instructed to write answers to essay questions throughout the exam in double-space format if typing or on every other line if handwriting. As an example of the second type of direction, an essay question may have directions requiring you to address specific issues for that question and informing you not to address other issues. You do not want to lose points or adversely affect your professor's perception of your abilities by failing to follow directions.

c. Time Management

A very common refrain of 1L's after an exam is that they needed more time for the exam. And so, if you believe you have completed the exam with time remaining in the exam period, then you may be a 1L genius but it is more likely you could have done more with the exam.

With respect to time dedicated to different sections of an exam, a professor may designate on the exam a recommended amount of time for a section, e.g., "Section A – Recommended Time: 40 Minutes." Follow your professor's recommendation until you become more familiar with law school exams. Even if your professor does not specifically recommend an

amount of time for an exam section, there may be other guides for time management. For example, if your professor tells you that the entire exam is worth 100 points and Section A of the exam is worth 40 out of the 100 points, it is reasonable to spend 40% of the exam period on section A. Ask your professor during the semester whether she or he will be recommending an amount of time or designating a relative weight for the sections of the exam.

II. Essay Questions - IRAC

What are commonly called “essay questions” require students to provide a written analysis of a fact pattern (story) through the lens of the law covered in the course. A successful analysis of the fact pattern demonstrates more than a student’s ability to recite accurately the rules of law learned during a semester. Instead, a successful analysis demonstrates that a student *understands* the law so well that the student can explain how the law learned during the semester might reasonably be applied to a fact pattern different – at least in part -- than the fact patterns of the cases the student prepared for or discussed in class during the semester.

A traditional format for responding to essay questions is known by the abbreviation “IRAC.” As explained below, each letter of the abbreviation stands for a part of the response to an essay question. Professors typically award points for each element of the IRAC framework.

a. “I” (Issue)

Begin by identifying the issue(s) to be addressed (sometimes referred to as issue spotting). Issue identification often takes the form of a question as a matter of custom. Issue identification involves consideration of the professor’s directions for the question as well as facts in the fact pattern relevant to those directions.

For example, multiple legal theories often support claims for relief from the same set of facts. A fact pattern could support a claim of false imprisonment as well as a claim of negligence. If your professor’s directions on the exam asked you to discuss all reasonable claims and defenses presented by the fact pattern, then you would create two “issue statements,” one for the claim of negligence and one for the claim of false imprisonment. If, however, your professor’s directions asked you only to discuss liability for false imprisonment, you would create only one issue statement.

Let’s assume your professor directed you to discuss only a claim of false imprisonment. Your issue statement should do more than merely repeat your professor’s directions. That is to say, you must do more than state: “The issue is whether the defendant, X, is liable to plaintiff, Z, for false imprisonment.” Instead, your issue statement should reflect that you

have spotted key facts and their significance. Accordingly, a better issue statement would read: “Is the defendant, X, civilly liable to plaintiff, Z for false imprisonment when [fill in the material facts from the fact pattern.]”

b. “R” (Rule)

Accurately recite the rules of law you learned during the semester that correspond to your issue statement. For example, in the exam scenario described above, your rule statement would describe the legal standards and policies you synthesized from class during orientation week regarding the liability for false imprisonment. Some professors may award points for citing to the source of the rule, e.g., citation of court case or *Restatement* section. Other professors may award points only for an accurate statement of the applicable rule, and so citing to the source would be a waste of time. Also please note that memorization of accurate rule statements before an exam is often necessary preparation for making accurate rule statements during an exam.¹⁶ A vague paraphrase of the law is not a sufficient substitute for an accurate rule statement.

You should provide a rule statement for each issue presented by a fact pattern in light of your professor’s directions regarding the fact pattern.

c. “A” (Analysis/Application/Argument)¹⁷

After accurately stating a rule, explain how the rule might reasonably be applied to the facts in the fact pattern. For example, identify and explain how specific facts could reasonably support each element of a cause of action for false imprisonment. And, to maximize the award of points, identify and explain how other facts in the fact pattern could reasonably be used to defeat such a claim (counter-analysis or counter-argument). An argument need not be a certain winner to be a reasonable part of your analysis. Also note that most of us tend to favor one side of an argument or party the first time we read through a fact pattern, and so you must plan to look for reasonable counter-arguments.¹⁸

Another way of thinking about the “A” in IRAC is to consider it a necessary step in explaining to the reader of your answer the logic of how you went from the Rule stated

¹⁶ Memorization of key words and phrases is helpful even for “open book” exams. Please do not assume you will have much time to review during an “open book” exam the materials you are permitted to bring with you and use during the exam.

¹⁷ Some descriptions of “IRAC” describe the “A” as standing for “analysis” while others describe it as standing for “application” or “argument.”

¹⁸ During your first semester you may hear about “short answer” and “long answer” essay questions. The former may be contrasted with the latter in that “short answer” fact patterns may focus on a single issue, simple rules, and/or may not contain facts sufficient to support analysis *and* counter-analysis of the facts.

before the “A” to the conclusion (“C”) stated after the “A.” Some have likened the “A” section to showing all of the steps in solving a math problem, such as a proof in geometry.

What will not suffice for analysis is to state the applicable rule and then simply list a bunch of facts from the fact pattern that are relevant to the rule. You must link specific facts with particular parts of a rule (sub-issues). For example, from which facts could a reasonable person conclude the defendants confined the plaintiffs in the *Zavala* case (or the contrary)? From which facts could a reasonable person conclude the plaintiffs in *Zavala* consented to their circumstances (or the contrary)?

Many students in their first semester fail to appreciate the importance of the “A” in IRAC. That is a costly mistake. The “A” is what differentiates in large part the mere *memorization* of the law from a demonstrated *understanding* of the law. Accordingly, some professors award more points for the “A” than for other components of the IRAC framework.

You should provide analysis for each part of each rule statement contained in your essay answer.

d. “C” (Conclusion)

Many professors will award points for stating a conclusion as to which of the reasonable arguments presented in the “A” section is most likely to prevail.

III. Essay Questions – Additional Practical Strategies

Read the fact pattern and directions more than once. Use the first reading to get a basic understanding of the story and the objectives of your professor. On the second – or third – reading, underline or mark in the margin of the exam where facts are described that you can use in the IRAC structure.

Plan your response to an essay question before you write it. It would be reasonable to spend 20% of the time allotted to a question to plan your response. You can create an IRAC chart to create an outline for your answer and to use as a checklist as you complete your answer.

Cross off the facts in the fact pattern as you use them in issue spotting and analysis. If you find there is a fact that you have not used, consider again whether that fact gives rise to another issue or affects an issue you have already identified. While a professor may include some facts solely to make the story in the fact pattern flow better, it is safer to assume that the vast majority of the facts are relevant to some issue the professor wants you to address.

Do not introduce new facts into the fact pattern. Address the fact pattern your professor has created and not one you would rather address. If, however, you conclude a critical fact

is missing from the fact pattern your professor wrote for the exam, then identify the missing fact and explain why it is critical.

Below you will find a sample essay question from a Torts exam and a sample essay question from a Civil Procedure exam. These questions give you the opportunity to practice writing responses to essay questions. Please prepare to discuss in class your responses to each question.

Please note that in the second part of the class addressing Civil Procedure exams, each student will write an essay answer in class based on a fact pattern distributed in class. That is to say, you will be taking an essay exam during the second part of the class. The faculty for Introduction to Professional Skills will grade the essays you write in class. The exam answers will be returned with faculty comments during the class held during the week of August 24.

Sample Torts Question

Frank's Ultimate Nursing home [FUN] located in Small Village, state of Widener, is an assisted care facility for senior citizens and others who need full-time care. Over the past few months, the following events have taken place at FUN:

On June 18, Betty Banana was taken by family members to Local Hospital because she collapsed and could not walk. The doctor on duty determined that Betty needed knee replacement surgery and this surgery was scheduled for June 22. Betty was told by the doctor that she could stay at Frank's Ultimate Nursing Home until her scheduled surgery date. Because she was unable to walk, Betty went to FUN on June 18. After one night, Betty decided that she would rather wait until the surgery date at home. She told Nurse Nancy that she wanted to go home and would call her daughter to pick her up. Nurse Nancy said that Betty could go home, but if she did she would lose her surgery date of June 22. Betty asked for the next available date for knee replacement surgery and was told that it was August 3. Betty said she wanted to leave FUN, but that she could not wait until August 3 to have the surgery. Nurse Nancy said, "Oh well, what can I say? Knee surgery is very popular. Guess you'll just have to deal with it." Betty stayed at FUN and had her surgery on June 22.

Calvin, Debra, and Emerson are custodial workers at Frank's Ultimate Nursing Home. One day in July, as they were mopping the cafeteria floor, the three of them began clowning around. Debra and Emerson were teasing Calvin about his severe fear of enclosed spaces. "Calvin, you old claustrophobic, bet you can't mop out the pantry all by yourself," Debra said. Calvin replied, "Oh, yes I can. Bet you can't make me." At that, Debra and Emerson started throwing cleaning supplies at Calvin. The three of them were laughing as Debra and Emerson pushed Calvin into the pantry in the kitchen. The pantry is a small room, no bigger than a small closet. Calvin started yelling, "Hey! Cut it out, you guys. I was just joking." They laughed and pushed him into the pantry, turned out the lights, and pulled the door shut. Calvin began screaming for them to let him out. He eventually had a panic attack and passed out. Debra and Emerson opened the door and found Calvin unconscious on the floor. He had been locked in the pantry for five minutes.

Please analyze any false imprisonment claims and defenses for each potential party.

Sample Civil Procedure Question

On June 1, 2014, PJ purchased a “Super TreadLyptical” (TL) exercise machine from Dude Buff Equipment, Inc. (DBE). The advertising for the TL described it as combining the best elements of a treadmill and an elliptical exercise machine. DBE had designed and manufactured the TL and was the sole retailer of the machine. On June 2, 2014, PJ was using the TL according to the instructions that came with the TL when suddenly the speed at which the TL was running increased dramatically. Given PJ’s age and physical condition, PJ was unable to keep up with the speed of the TL. PJ frantically tried to turn off the TL by pushing a button labeled “Emergency Stop” on the TL, but that seemed only to increase the speed of the TL. PJ was thrown from the TL, hit the floor, and fractured a hip.

On June 2, 2014, PJ had surgery at Disrecordia Hospital (DH) to repair the fractured hip. The surgeon who operated on PJ was an employee/agent of DH and DH would be liable for any negligence of the surgeon in treating PJ. To repair the hip, the surgeon chose three hip screws designed, manufactured and sold by Dynamic Surgical Products, Inc. (DSP). The surgeon based the choice of screws on information DSP had provided to DH about the design and manufacture of the screws. The DSP screws failed to hold PJ together, necessitating a second surgery on PJ’s hip to replace the DSP screws with surgical screws of another manufacturer. The failure of the DSP screws caused PJ to be hospitalized for two weeks when the typical hospital stay for hip surgery is three days.

On July 11, 2014, PJ sued DBE, DH and DSP in a United States District Court, alleging that the defendants are jointly and severally liable for out of pocket expenses and for pain and suffering PJ incurred as a result of the circumstances described above. In Count I of the complaint, PJ alleges that DBE is liable for DBE’s negligent design, manufacture and marketing of the TL. In Count II, PJ alleges that DH is liable for medical negligence as a result of the surgeon’s choice to use the DSP screws, the surgeon’s acts during the first surgery, and DH’s care of PJ before and after the surgeries. In Count III, PJ alleges that DSP is liable for negligent design, manufacture, and marketing of the screws.

DIRECTIONS: Discuss whether the Federal Rules of Civil Procedure authorizing the permissive joinder of parties permit PJ to bring the claims described above against DBE, DH, and DSP in the same lawsuit