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Writing Sample

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The attached writing sample is an excerpt from an office memorandum I wrote for my Legal Rhetoric: Research and Writing course this Fall as a 1L student at American University Washington College of Law.

For this assignment, I was required to conduct independent research to write an office memorandum on a given fact pattern. In its original form, the memorandum is 21 pages long and includes a statement of the question presented, a brief answer, a statement of facts, a two-part discussion section, and a conclusion. To limit the length, I have provided a one-paragraph summary of the facts, and have only included the discussion section pertaining to one of the issues at stake. This memorandum is my own work and has not been edited by any other person.

The facts are as follows: our client, Cameron Clarke, was leisurely browsing the aisles of Sonny's Market (her local grocery store in Austin, Texas), when she took her hand sanitizer out of her backpack, used it, and placed it back in her bag. The store manager saw her place the item in her backpack and assumed she was attempting to steal it. Mr. Blakely, a store security guard, then approached Clarke to ascertain whether she had shoplifted. Blakely asked her to empty her backpack; when she refused to comply, he did so himself. Because the hand sanitizer in Clarke's backpack was of the same brand and type as the hand sanitizer sold in the aisle that Clarke had just walked through, Blakely guided Clarke towards a back room. After holding Clarke in the back room for nine minutes, investigating the incident, and finding that Clarke was innocent, the store manager and security guard released her. They did not use any excessive physical force against her, and she did not suffer any physical harm. The memorandum addresses the issue of whether Clarke could successfully overcome the Texas Shopkeeper's Privilege – which exonerates a store from liability if the store can establish the following three elements: reasonable belief of shoplifting on its employee's part; reasonable manner of detention; and reasonable time of detention – to successfully bring a claim against Sonny's.

This submission includes only the analysis of the first element, reasonable belief.

A. Sonny's likely had a sufficient basis to reasonably believe that Clarke attempted to steal hand sanitizer, because a store employee saw her walk through the relevant aisle and place a bottle of the same brand hand sanitizer in her backpack, creating objective grounds for suspicion.

Reasonable belief of shoplifting is established if a store employee sees a patron intentionally engage or tamper with an item sold in store without attempting to purchase it, and if the employee relies upon objective facts – such as evidence of the patron purposefully concealing the item or attempting to do so – to accuse the patron of theft. See Huynh v. Wal-Mart Stores Tex., LLC, No. 18-4257, 2020 U.S. Dist. LEXIS 249057, at *18 (S.D. Tex. Oct. 8, 2020); Martinez v. City of Buda, No. A-16-CA-116-SS, 2018 WL 837609, at *8 (W.D. Tex. Feb. 13, 2018); Riley v. Wilbanks, No. 4:12cv62, 2013 U.S. Dist. LEXIS 58343, at *12 (E.D. Tex. Apr. 24, 2013); Wal-Mart Stores, Inc. v. Resendez, 962 S.W.2d 539, 540-41 (Tex. 1998); Carr v. H.E. Butt Grocery Co., No. 03-07-00149-CV, 2009 WL 3230834, at *4 (Tex. App. Oct. 7, 2009); Wal-Mart Stores, Inc. v. Cockrell, 61 S.W.3d 774, 778 (Tex. App. 2001); Raiford v. May Dept. Stores Co., 2 S.W.3d 527, 528, 531 (Tex. App. 1999); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 520 (Tex. App. 1996); H.E. Butt Grocery Co. v. Saldivar, 752 S.W.2d 701, 702, 704 (Tex. App. 1988); Mapes v. Nat'l Food Stores Inc., 329 So. 2d 831, 832 (La. Ct. App. 1976); J.C. Penney Co. v. Cox, 148 So. 2d 679, 683-84 (Miss. 1963). Reasonable belief does not depend upon the patron's actual guilt or innocence, nor does it require that the store employee either confirm or refute the patron's claims. See Riley, 2013 U.S. Dist. LEXIS 58343, at *10; Resendez, 962 S.W.2d at 541; Carr, 2009 WL 3230834, at *4; Grant, 994 S.W.2d at 873; Odem, 929 S.W.2d at 520. Rather, reasonable belief is assessed objectively: if, based on the patron's actions and apparent intent, a reasonable fact-finder would have a sufficient evidentiary basis to rationally suspect a patron of shoplifting, the employee can successfully establish the first prong of the shopkeeper's privilege.

A store employee reasonably believes that a patron is attempting to steal store merchandise if the patron actively consumes or tampers with an item sold in store, and does not pay nor attempt to pay for it. See Martinez, 2018 WL 837609, at *8 (finding that employee's belief that patron was stealing was reasonable where patron placed several grocery items in her scooter basket, ate one of those items, and attempted to leave without paying); Raiford, 2 S.W.3d at 528, 531 (confirming that employee who saw patrons take store handbags into a fitting room, replace paper stuffing in the bags with their own belongings, and exit store carrying those bags, reasonably believed that patrons were stealing). In Resendez, a Wal-Mart employee saw a patron browse through the store while eating from a bag of peanuts marked with a Wal-Mart price sticker, and stopped her after she attempted to exit without paying for the peanuts. 962 S.W.2d at 540. The Texas Supreme Court held that because the employee saw the patron actively consume an item that seemed to be store merchandise and try to leave without paying for it, the employee could reasonably believe that the patron was stealing it. Id. at 540-41. As such, an employee who sees a patron consume or otherwise seek to exercise control over an item sold in store, without paying for it, can reasonably believe that patron is shoplifting.

A patron's apparent intent provides grounds for reasonable belief of theft. In evaluating a patron's intent to steal a particular item, courts consider whether the patron visits the aisle where that item is sold, and whether the patron's behavior suggests that they are visiting the store for the purpose of stealing that item specifically. For example, in Resendez, the court emphasized that the plaintiff looked for peanuts, the item which she was then accused of stealing, immediately upon entering the store. 962 S.W.2d at 540. In the court's view, the plaintiff's behavior indicated her intent to locate peanuts, and thereby created reasonable grounds for an employee to later believe that she intended to steal them. Id. Similarly, the Martinez Court

found undisputed evidence of the patron's intent to steal where the patron put store merchandise in her scooter cart, grabbed plastic bags from a vacant checkout aisle, and drove out of the store. 2018 WL 837609, at *8. Conversely, in Saldivar, the court held that a store employee lacked the requisite belief to accuse a patron of stealing a pair of sunglasses where the patron had never been near the sunglass display, had visited the store only to buy groceries, and showed no intent of purchasing or stealing sunglasses. 752 S.W.2d at 702, 704. See also Odem, 929 S.W.2d at 520 (citing plaintiff's denial of ever going near clothing department of the store as evidence that she did not intend to steal clothing, and that the employee who accused her of doing so lacked reasonable belief). Therefore, to support reasonable belief of theft, an employee must prove that the patron's actions and physical proximity to an item indicated apparent intent to steal that item.

Reasonable belief is established regardless of whether the item is the plaintiff's property, so long as that exact item is sold in the store and the patron intentionally asserts ownership over it. See Resendez, 962 S.W.2d at 540-41 (disregarding plaintiff's claim that she had purchased the peanuts from another Wal-Mart store the day before, because the act of consuming them without paying for them was sufficient for an employee to reasonably believe that she intended to steal them); Carr, 2009 WL 3230834, at *1 (finding reasonable belief of shoplifting where patron walked out of the store carrying an unmarked bag whose contents set off the store security alarm, even though those contents were items that patron had previously purchased and was unsuccessfully seeking to return); cf. Saldivar, 752 S.W.2d at 702, 704 (finding unreasonable belief where sunglasses that patron was accused of stealing were her personal property and did not match those sold in store). A plaintiff accused of stealing an item thus cannot argue that they were unreasonably accused of theft by merely pointing out that the item was their property, if the object in question is identical to one sold in that store.

To establish reasonable belief of shoplifting, a store employee must base their allegations on objective evidence. For the purposes of the shopkeeper's privilege, objective evidence is any fact that a rational fact-finder would regard as an indication of attempted or actual theft. See Cockrell, 61 S.W.3d at 778 (opining that walking slowly close to a rack of clothes is insufficient to establish reasonable suspicion in the absence of any substantial evidence supporting the claim); Odem, 929 S.W.2d at 520 (finding no reasonable belief where plaintiff never went near the relevant aisle of the store, and the employee who stopped her never saw her in store nor entertained any suspicion about her until she was walking out); Saldivar, 752 S.W.2d at 704. Accordingly, unfounded suspicion or mere conjecture is insufficient to support reasonable belief. See Odem, 929 S.W.2d at 520 (refusing to uphold shopkeeper's privilege for an accusation based on unfounded naked suspicion); Cox, 148 So. 2d at 684 (holding that mere conjecture or suspicion do not constitute reasonable grounds on which to base a shoplifting investigation); cf. Huynh, 2020 U.S. Dist. LEXIS 249057, at *18 (finding reasonable belief where employee, through the store security camera, witnessed patron stuff store merchandise into her purse and attempt to leave without paying for it); Raiford, 2 S.W.3d at 531. Therefore, to prove that they reasonably believed a patron was shoplifting, an employee cannot rely on unsubstantiated assumptions. Instead, they must demonstrate that their suspicion was sufficiently rational and based on objective facts, such as evidence recorded on a store security system.

A patron's actual or apparent attempt to conceal store merchandise is an objective fact sufficient to establish reasonable belief of shoplifting. See Huynh, 2020 U.S. Dist. LEXIS 249057, at *18 (recognizing that store employee who saw customer stuff store merchandise into her purse on camera could reasonably suspect her of shoplifting); Resendez, 962 S.W.2d at 540 (finding reasonable belief where patron placed an empty bag of peanuts marked with a Wal-Mart

price tag under a rose bush, because the act of concealing it could reasonably be interpreted as an attempt to avoid paying for it); Carr, 2009 WL 3230834, at *4 (opining that because store employees did not know that patron had unsuccessfully tried to return store merchandise, they could reasonably assume he was attempting to steal when the security alarm sounded as he walked out of the store carrying an unmarked bag of items that he had not purchased); Wal-Mart Stores Inc. v. Bathe, 715 N.E.2d 954, 960 (Ind. Ct. App. 1999) (holding that belief was reasonable where patron attempted to leave the Wal-Mart store, triggered the security alarm, and was found carrying a box of medication still marked with a store tag in her purse); Mapes, 329 So. 2d at 832 (affirming an employee's reasonable belief that a patron whom he sees putting a small package of medication in her purse, and leaving without paying for it, has committed theft). As such, when an item that could be store merchandise is concealed, reasonable belief of theft is established regardless of whether the patron actually owns the item, whether they intentionally concealed it, and where or how they concealed it.

In the instant case, a store employee saw our client place a travel-sized Germ-X hand sanitizer in her backpack immediately after walking through the personal care aisle of Sonny's. Crucially, travel-sized Germ-X hand sanitizer is sold in the personal care aisle of Sonny's. Under Texas precedent, the fact that Clarke owned the hand sanitizer does not preclude Sonny's from asserting the shopkeeper's privilege, so long as its employees reasonably believed that she was stealing it. See Resendez, 962 S.W.2d at 540-41; Carr, 2009 WL 3230834, at *1, 4. Therefore, Sonny will prevail on the prong of reasonable belief if it can point to specific evidence that objectively seemed to indicate our client's intent, and attempt, to steal.

While browsing through the store, Clarke was not carrying a grocery cart, nor giving any indication that she intended to shop for items in aisles other than those she visited. She

presumably went to the personal care and pharmacy aisles shortly upon entering, since she had only been in the store for approximately seven minutes when Blakely approached her. As established in Resendez, a store employee can reasonably believe that a patron is attempting to shoplift if the patron apparently intends to locate a certain item, and subsequently asserts ownership over that same item without attempting to purchase it. 962 S.W.2d at 540-41. Here, because an employee saw Clarke almost immediately go to the personal care aisle, and subsequently place a bottle of hand sanitizer identical to that sold in that very aisle in her bag, the employee could reasonably believe she had entered the store intending to steal hand sanitizer.

Given the facts of Clarke's case, an objective fact-finder would likely have sufficient grounds to find that it was rational and reasonable of Sonny's employees to suspect her of attempting to conceal the hand sanitizer in order to steal it. Importantly, no Sonny's employees saw Clarke take the hand sanitizer out of her backpack. Since they only saw her put it in her backpack, they will likely maintain that they had no reason to know that it belonged to her, rather than to the store. Further, Clarke refused to comply with Blakely's request that she empty her backpack. Such behavior creates objective grounds for suspicion, because a rational person could reasonably assume that an innocent patron would not refuse to show the contents of their bag, and instead would seize the opportunity to prove their innocence. Therefore, because Clarke's actions created objective grounds for Sonny's employees to suspect her of shoplifting, Sonny's employees will probably be able to establish sufficiently reasonable belief to support the first prong of the shopkeeper's privilege.

Our Firm could argue that Sonny's employees lacked reasonable belief to accuse our client of shoplifting because they did not see her attempt to walk out of the store with the allegedly stolen item. In most cases where courts found that an employee had reasonable belief

to accuse a patron of theft, the patron attempted to leave the store without paying for the item in question, and was only then stopped and accused by a store employee. See Huynh, 2020 U.S. Dist. LEXIS 249057, at *18 (upholding the shopkeeper’s privilege partly because customer had already passed the checkout register without paying for concealed store merchandise when employees stopped her); Martinez, 2018 WL 837609, at *8 (finding employees’ belief of theft reasonable because customer had placed over twenty items of store merchandise in her scooter basket, and subsequently attempted to leave the store building without paying for the majority of those, when employees stopped her); Resendez, 962 S.W.2d at 540 (recognizing reasonable belief where store employee stopped a customer who had consumed and then concealed an empty bag of peanuts marked with a store price sticker only after the customer had left the store without paying for said peanuts); Carr, 2009 WL 3230834, at *4 (confirming that store employees who stopped customer as he walked out of the store and thereby set off the security alarm did have a reasonable basis to believe he was attempting to steal, since they had no reason to know that the merchandise he was carrying was not in fact stolen); Raiford, 2 S.W.3d at 528, 531 (upholding reasonable belief where employee witnessed patrons tampering with store merchandise and attempting to leave without paying for it before she stopped them). As such, we could argue that Sonny’s employees could only have formed reasonable belief if they had seen our client attempt to walk out without paying for the hand sanitizer – which they did not, since they stopped her before she had a chance to do so.

However, this argument is unlikely to prevail. In cases where an employee’s belief of shoplifting was deemed unreasonable, a decisive factor was that the patron had never been near the area in the store where the item was displayed, nor engaged with the item at all. See Cockrell, 61 S.W.3d at 778; Odem, 929 S.W.2d at 520; Saldivar, 752 S.W.2d at 704. It is thus

the nature of a patron's interaction with an item, rather than a patron's attempt (or failure) to pay for that item, that usually determines whether belief of theft is reasonable. Here, Sonny's employees saw our client place hand sanitizer that could have been store merchandise in her own bag immediately after walking through the aisle where it was sold. Because the employees witnessed our client both assert ownership over, and conceal, the item that they accused her of stealing, her case is crucially dissimilar to those of Cockrell, Odem, and Saldivar, where the patrons never engaged with the items in question. Id. Accordingly, we likely cannot argue that Sonny's employees could not establish reasonable belief of theft unless and until Clarke attempted to leave the store without paying, because her concealment of the hand sanitizer likely suffices to form reasonable belief. Further, a court is likely to give weight to Clarke's behavior and apparent intent – both of which a rational fact-finder could interpret as objective indications of her intent to shoplift.

Therefore, because Sonny's employees saw Clarke engage with an item that they could reasonably presume to be store property, and witnessed her place that item in her backpack, they will likely be able to maintain that they reasonably believed she was attempting to steal it. Accordingly, Sonny's will probably be able to sustain the first prong of the shopkeeper's privilege in the instant matter.