PART I  STUDY OUTLINE

I.  INTRODUCTION

II.  COURT OPINIONS—IN GENERAL

Case law is the body of law on a particular subject created by the court opinions. Case law is found in the written opinions of the courts.

Case law consists of the law made by courts when they interpret existing law or create new law. It is composed of the legal rules, doctrines, and principles adopted by the courts.

A court opinion is a court’s written statement explaining its decision in a case. It is the court’s resolution of the legal dispute before the court and the reasons in support of its resolution. It usually includes a statement of fact, points of law, and rationale.

III.  COURT OPINIONS—IMPORTANCE

Case law constitutes the largest body of law, far larger in volume than constitutional or statutory law.

Major reasons for studying case law:

1. To Learn the Case Law—to determine what law applies and the probable outcomes
2. To Interpret Constitutional or Statutory Law—to understand how to interpret and apply statutes and constitutional provisions
3. To Understand the Litigation Process
4. To Gain Insight into Legal Analysis—to learn how to assemble a legal argument, how to determine if a law applies, and how to support a legal argument
5. To Develop Legal Writing Skills—to see how sentences and paragraphs are structured, how case law and statutory law are referred to and incorporated into legal writing, and how transitions are accomplished
IV. COURT OPINIONS—ELEMENTS

A. In General

A court opinion usually includes some or all of the following components:

1. The facts that gave rise to the legal dispute before the court
2. The procedural history and posture of the case—that is, what happened in the lower court or courts, who appealed the decision, and why
3. The issue or issues that are addressed and resolved by the court
4. The rule of law that governs the dispute
5. The application of the rule of law to the facts—in other words, the holding
6. The reason or reasons supporting the court’s application of the rule of law to the facts, that is, why the court decided as it did
7. The relief granted or denied, for example, “The judgment of the trial court is upheld”

B. Elements of a Reported Case

1. Citation

The citation refers to the volume number, page number, and the name of the reporter where the case may be found.

2. Caption

The caption includes the name of each party to the lawsuit and their court status.

3. Syllabus

The syllabus is a brief summary of the opinion.

4. Headnotes

The headnotes are summaries of the points of law discussed in the case.

Headnotes follow in sequential order the relevant paragraphs of the opinion. The number to the left of the headnote corresponds to the bracketed number in the body of the opinion. They are not the opinion of the court and have no authority of law.

5. Key Numbers

In bold print next to the headnote number are a few words indicating the area of law addressed in the headnote. Next to this bold print description of the area of law is a small key symbol and a number. Each area is identified by a topic name (the bold print), and each specific topic or subtopic is assigned a key number.

6. Attorneys

This section provides the names and cities of the attorneys in the case and the parties they represent.

7. Judge

At the beginning of the opinion is the name of the judge who wrote it.
8. Body of the Opinion
   a. Facts. Opinions usually include the facts that gave rise to the legal dispute.
   b. Prior Proceedings. In this part of the opinion, the court presents a summary of what happened in the lower court and who appealed.
   c. Issue or Issues. The issue is the legal question addressed by the court in the opinion.
   d. Rule of Law. The rule of law is the law that governs the issue.
   e. Holding. The holding is the court’s application of the rule of law to the facts of the case. The holding is usually presented immediately after the rule of law in the opinion or after the reasoning at the end of the opinion.
   f. Reasoning. The reasoning is the court’s explanation of how or why the rule of law applies to the dispute.
   g. Disposition/Relief Granted. The relief granted is usually a one-sentence statement by the court that includes the order of the court as a result of the holding.

A court has several options when granting relief:
   • It may agree with the trial court and affirm the trial court’s decision.
   • It may disagree with the trial court and reverse the trial court’s decision. If it reverses the decision, it will remand, that is, send the case back to the trial court. When a case is remanded, the appellate court may order the trial court to:
     1. Enter a judgment or order in accordance with the appellate court decision
     2. Retry the case (conduct a new trial)
     3. Conduct further proceedings in accordance with the appellate court decision
   • If there are several issues, it may affirm the trial court on some of the issues and reverse the trial court on other issues.

h. Concurring Opinion. In some instances, a judge may agree with the majority holding but for different or additional reasons than those presented by the majority.

i. Dissenting Opinion. If a judge disagrees with the majority decision, the judge may present his or her reasons in what is called a dissenting opinion.

V. COURT OPINIONS—RESEARCHING

Researching case law is the process of finding a court opinion that answers a question being researched.
A. Publication of Court Opinions

1. In General

Most federal and state trial court decisions are not published. The “official” publications of case law are those published at the direction of the government.

2. Forms of Publication

Most court opinions are published three times in three formats: slip opinions, advance sheets, and bound volumes called reports or reporters.

a. Slip Opinion. The slip opinion is usually in the form of a pamphlet that contains the full text of the court’s opinion in a single case. Slip opinions do not usually include a syllabus (synopsis or summary of the facts, issues, and holding of a case), nor do they include headnotes.

b. Advance Sheets. Advance sheets are temporary pamphlets (often softcover books) that contain the full text of a number of recent court decisions.

c. Reporter. Court opinions are permanently published in hardbound volumes usually referred to as a reporter or reports. The cases are presented chronologically and paginated with the same page numbers as the advance sheets.

3. National Reporter System

Most court decisions, both federal and state, are published by West in multivolume sets called reporters. Most reporter volumes include:

- A table of cases that lists in alphabetical order the opinions presented in the volume.
- A table of statutes that lists the various statutes, constitutional provisions, and often rules interpreted or reviewed and lists the relevant court opinions.
- A table of words and phrases that lists alphabetically words and phrases judicially defined and indicates the page number in the volume where they are defined.
- A key number digest in the back of each volume that provides a summary of each case in the volume, arranged by topic and key number.
- A case syllabus (a synopsis case summary), headnotes, and key numbers at the beginning of each case presented in the volume.

4. Publication of Federal Court Decisions

a. United States Supreme Court. Three different sets publish the decisions of the United States Supreme Court:

   United States Reports. The United States Reports (cited as U.S.) is the official reporter for the Supreme Court of the United States.

   Supreme Court Reporter. The Supreme Court Reporter (cited as S. Ct.) is an unofficial publication of the decisions of the United States Supreme Court.
United States Supreme Court Reports, Lawyers’ Edition. The United States Supreme Court Reports, Lawyers’ Edition (cited as L.Ed. or L.Ed.2d for volumes since 1956).

Loose-leaf Services and Newspapers. There are various sources to obtain quick access to the decisions of the Supreme Court of the United States.

Computer and Internet Resources. Access to most federal court opinions is available through Westlaw and LexisNexis.


d. Other West’s Federal Reporters. West publishes the following specialized federal reporter sets:

(1) Federal Rules Decisions (cited F.R.D.)
(2) West’s Bankruptcy Reporter
(3) United States Claims Court Reporter
(4) West’s Military Justice Reporter
(5) West’s Veterans Appeals Reporter

5. Publication of State Court Decisions

a. Regional Reporters. The National Reporter System publishes state court decisions by geographic region in reporters called regional reporters. The reporters are the following: Pacific Reporter, North Western Reporter, South Western Reporter, North Eastern Reporter, Atlantic Reporter, South Eastern Reporter, and Southern Reporter.

Some states have an official publication as well as a public domain citation (also referred to as medium-neutral citations or vendor-neutral citations). When this is the case, three citation numbers will be required.

b. Computer and Internet Resources. Note that access to most state court opinions is available through Westlaw and LexisNexis. In addition, court opinions are often available through the official court website and other Internet sites.

6. Attorney General Opinions

The chief attorney for the federal or state government is usually referred to as the Attorney General. Upon the request of legislators or other government officials, an Attorney General may issue a written opinion interpreting how the law applies. These opinions are secondary authority.
B. Researching Court Opinions—Locating Case Law

Whenever conducting case law research, remember to check the advance sheets, pocket parts, or whatever is used to update the source you are researching to ensure that you locate the most recent court decision that answers your question.

1. Statutory Annotations
   If your research involves a situation that requires the interpretation of a statute, the first step is to read the statute and look to the case annotations following the statute.

2. Digest
   If the question being researched does not involve a statute or the annotations do not direct you to a relevant case, the next step is to look to a digest.

3. Computer-Aided Research
   Court opinions may be located through Westlaw and LexisNexis. Also, court opinions may often be found through other Internet sources.

4. Other Case Law Research Sources
   You may also locate court opinions through other research sources, such as legal encyclopedias, treatises, *ALRs*, and law review articles.

5. *Shepard’s Citations*, Westlaw’s *KeyCite* and Updating Research
   If you know the citation of a case and you are looking for other cases that have referred to the case or if you want to know if the case has been reversed or modified, refer to the appropriate *Shepard’s* citator, *Shepard’s* online or Westlaw’s *KeyCite*.

VI. COURT OPINION—BRIEFING (CASE BRIEF)

A. Introduction

A brief of a court opinion is usually called a case brief or a case abstract. A case brief is a written summary identifying the essential components of a court opinion.

B. Importance of Briefing

The process of briefing a case serves several useful purposes and functions:

1. Analysis/Learning. Writing a summary of the essential elements of an opinion in an organized format leads to better understanding of the case and the reasoning of the court.

2. Research/Reference. A case brief is a time-saving research tool. It provides a summary of the essentials of a case that can be referred to quickly when reviewing the case.

3. Writing. The process provides you with an exercise in which you learn to sift through a court opinion, identify the essential elements, and assemble your analysis into a concise, written summary.
C. How to Read a Case

A case cannot be read like a newspaper or novel for several reasons:

1. If you are a beginner, you are slowed by having to look up the meaning of legal terms and become familiar with the style of legal writing.
2. Some opinions are difficult to read and take time because they involve complex, abstract, or unfamiliar subjects involving multiple issues.
3. Some opinions are difficult to read because they are poorly written. Not all judges are great writers. The reasoning may be scattered throughout the case or not completely presented.
4. Some opinions are difficult to read and understand because the court may have incorrectly interpreted or applied the law.

D. Case Brief—Elements

The goal of a good case brief is a concise summary of the essentials of the court opinion that may be used as a quick reference in the future.

The recommended outline for a case brief format:

1. Citation
   The citation includes the name of the parties, where the case can be found, the court that issued the opinion, and the year of the opinion.

2. Parties
   The caption at the beginning of the opinion gives the full name and legal status of each party.

3. Facts
   The fact section of a case brief includes a summary of those facts that describe the history of the events giving rise to the litigation. The fact section should include key and background facts.

4. Prior Proceedings/Procedural History
   Prior proceedings are those events that occurred in each court before the case reached the court whose opinion you are briefing.
   The prior proceedings should include:
   a. The party initiating the proceeding and the cause of action
   b. The court before which the proceeding was brought
   c. The result of the proceeding
   d. The party appealing and what is being appealed

5. Issue or Issues
   The issue(s) should be stated as narrowly and concisely as possible in the context of the facts of the case.
6. Holding

There should be a separate holding for each issue identified in the issue section of the case brief. The holding should be presented as a complete response to the issue, which means that the presentation of the holding should include all the elements of the issue and should be in the form of a statement.

7. Reasoning/Rationale

The reasoning section of the case brief should include the rule of law and a summary of the court’s application of the rule of law to the facts—how the rule of law applies to the facts of the case. Lengthy quotes from the case should be avoided. The reasoning should be summarized. Also included in the reasoning section is a summary of the reasoning of any concurring opinion.

8. Disposition

Include the relief granted by the court, which is the order entered by the court.

9. Comments

This could include any of the following:

a. Why you agree or disagree with the decision
b. A summary of any dissenting opinions
c. Why the case may or may not be on point
d. References to the opinion in subsequent cases or secondary sources, such as a law review article
e. Any information updating the case, that is, concerning whether the case is still good law

E. Case Brief—Updating

The primary method of accomplishing this is through the use of the appropriate Shepard’s citator.

Some online services are the following:

- **LexCite**—includes a list of the recent cases citing a case (available through LexisNexis)
- **Insta-Cite**—provides a summary of the prior and subsequent history of a case and includes references to the case in *Corpus Juris Secundum* (available through Westlaw)
- **KeyCite**—includes a list of all cases citing a case (available through Westlaw)
- **Shepard’s Citator Services**—presents information not yet included in the Shepard’s printed volumes (available through both Westlaw and LexisNexis)
PART II STUDY QUESTIONS

1. What does case law consist of?
2. What is a court opinion?
3. What are five reasons why reading and analyzing court opinions and studying case law are important?
4. What does a citation refer to?
5. What is the syllabus of a reported case?
6. What are headnotes?
7. What are the eight elements of a reported case?
8. What are the nine elements of the body of an opinion?
9. What are the options a court has when granting relief?
10. What are the three formats in which most court opinions are published?
11. What do the terms reporter and reports refer to?
12. What do most reporter volumes include?
13. Name the three main reporters for decisions of the Supreme Court of the United States.
14. Name five specialized federal reporters published by West.
15. What are Attorney General Opinions and what type of authority are they?
16. What is a case brief?
17. What are three useful purposes and functions that briefing a case serves?
18. Why can a court opinion not be read like a newspaper or novel?
19. What are the elements of a case brief?
20. What are five observations that you may include in the comment section of a case brief?
21. What are the two parts that usually make up the reasoning portion of an opinion?

PART III ASSIGNMENTS

ASSIGNMENT 1

Read Baumgardner v. Stuckey presented in the Student Companion Site Chapter 3, Assignment 3. Brief the case following the format presented in Chapter 5.
ASSIGNMENT 2
Read United States v. Howard presented later. Brief the case following the format presented in Chapter 5.

ASSIGNMENT 3
Read United States v. Kutas presented later. Brief the case following the format presented in Chapter 5.

ASSIGNMENT 4
Refer to annotations to 18 U.S.C.A. § 1072, Concealing Escaped Prisoner. What is the name and citation of 1988 District Court case from Oregon that discussed what the words harbor and conceal refer to? What does the court say the terms refer to?

ASSIGNMENT 5
Refer to annotations to 18 U.S.C.S. § 1111, Murder. What is the name and citation of a 1978 case that discusses the element of intent? What does the court state is an essential element of the crime of murder in the second degree?

Case Law: United States v. Howard, 545 F.2d 1044 (6th Cir. 1976)

UNITED STATES of America, Plaintiff-Appellee,
v.
Ernest HOWARD a/k/a Earnest Howard, Defendant-Appellant.

No. 76-1818.

Argued Nov. 18, 1976.

*1044 Robert W. Willmott, Jr., Arnold & Willmott, Lexington (Court appointed CJA), for defendant-appellant.

Before PECK, McCREE and LIVELY, Circuit Judges.

PER CURIAM.
Defendant-appellant was convicted by jury verdict for harboring an escaped fugitive in violation of 18 U.S.C. s 1072. A three-year sentence was imposed, and this appeal followed.

Appellant was found guilty of having harbored one Dillon Sargent, and since at least for present purposes appellant concedes the act of harboring, the issue presented on appeal concerns the status of Sargent at the time in question. Some days earlier, Sargent had entered a plea of guilty to a charge of possession of a firearm by a convicted felon in
violation of 18 U.S.C. App. s 1202(a)(1), and following his arraignment he had been remanded to the custody of the U.S. Marshal to await sentencing, set for ten days later. During that period Sargent was incarcerated in a local County Jail, and during this period he escaped from that facility, and was harbored by the appellant.

Appellant was charged and convicted under 18 U.S.C. s 1072, which reads as follows: “Whoever willfully harbors or conceals any prisoner after his escape from the custody of the Attorney General or from a Federal penal or correctional institution, shall be imprisoned not more than three years.”

Since as indicated Sargent escaped from a county jail, it is apparent that the portion of the statute dealing with escape “from a Federal penal or correctional institution” is without application, and it therefore becomes necessary to determine whether his escape was “from the custody of the Attorney General.”

[1] In this case of first impression, appellant argues that since 18 U.S.C. s 4082 provides that after conviction a person shall be committed for such term of imprisonment as the Court may direct “to the custody of the Attorney General of the United States,” Sargent was not in such custody because he had not at that time been so committed. We do not agree.

We conclude that Section 1072, which as a statute defining a crime must be strictly construed, must be read as proscribing escape in either of two circumstances, since otherwise the presence of the words “from the custody of the Attorney General or” would be entirely without meaning. The question thus becomes not whether that language extends the basis of the offense beyond escape “from a Federal penal or correctional institution,” but how far it extends beyond that basis. Clearly (and we understand appellant to concede this), escape from interim confinement at a non-Federal facility or while in transit to a Federal penal or correctional institution after the imposition of sentence would constitute a violation. In the present case, Sargent’s guilt had been judicially determined, and we conclude, without expressing an opinion as to his status prior to that determination, that at the time of his admitted harboring by the appellant, Sargent was in the “custody of the Attorney General” within the meaning of 18 U.S.C. s 1072.

[2] We further observe that 18 U.S.C. s 4086 provides “United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.” Since in the statutory scheme, the office of the Marshal exists as an arm of the office of the Attorney General, commitment to the Marshal can only be construed as a commitment to the Attorney General. See, e.g., 28 U.S.C. ss 561(c), 562, 567, and particularly s 569(c).

The judgment of the District Court is affirmed.
United States v. Kutas, 545 F.2d 527 (9th Cir.1976)

UNITED STATES of America, Plaintiff-Appellee,
v.
Eva Agnes KUTAS, Defendant-Appellant (two cases).

Nos. 75-2756, 75-3806.

Sept. 27, 1976.

Norman Sepenuk (argued), Portland, OR., for defendant-appellant.
Kristine Olson Rogers, Asst. U.S. Atty. (argued), Portland, OR., for plaintiff-appellee.

Before KOELSCH, DUNIWAY and CHOIY, Circuit Judges.

DUNIWAY, Circuit Judge:

Kutas appeals from a judgment of conviction of harboring and concealing, and of conspiracy to harbor and conceal, an escaped federal prisoner in violation of 18 U.S.C. ss 1072 and 371.

I. The Sufficiency of the Evidence.

[1] We state the evidence in the light most favorable to the government, Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680. On May 17, 1974, Carl Bowles, a federal prisoner serving concurrent state and federal sentences at the Oregon State Penitentiary, left the penitentiary under a four-hour pass and failed to return. Coconspirator Joan Coberly hid Bowles for approximately ten days, after which she and Bowles were driven to a house in Eugene, Oregon, where coconspirator Ray Eaglin was persuaded to help Bowles to escape. Kutas was present in the house at the time. Over the next hour or so Kutas and Eaglin loaded gear and supplies into a station wagon. Then Eaglin drove Bowles, Kutas and Coberly to a remote area of the Willamette National Forest where Bowles and Coberly set up camp in an underground bunker some distance into the forest. On the trip from Eugene to the campsite, Kutas prepared a list of things which Bowles would need for a long stay at the campsite. Throughout the trip, Eaglin carried a handgun visible in a side holster, at some point gave Bowles a gun, and, according to Coberly, told Bowles in Kutas’ presence: “I don’t think they are going to be looking for you, because everybody is looking for Hearst.”

The evidence was sufficient to support a jury finding that Kutas knowingly harbored and concealed an escaped prisoner. Whether Kutas knew that Bowles was an escaped prisoner was for the jury; the knowledge could be inferred. Her claim that the evidence did not show that she harbored and concealed Bowles is also without merit. The evidence shows that she participated intimately in “transporting (Bowles and) furnishing him food, clothing, and a gun.” United States v. Hobson, 9 Cir., 1975, 519 F.2d 765, 774.

The judgment and the order appealed from are affirmed.
PART IV WEB ASSIGNMENTS

ASSIGNMENT 1
The client is charged with the crime of bigamy in the state of California. Is wrongful intent an element of the crime? Using a digest, identify a 1995 California case that answers this question.

ASSIGNMENT 2
The defendant is charged with conspiracy to commit murder under 18 U.S.C. 1117. The defendant did not know that the victim was a federal officer. Does the statute require that the defendant know the identity of the victim? Give the citation of the second circuit case that addresses this question.

ASSIGNMENT 3
The supervising attorney is working on a contract case. The assignment is to locate a case that holds that damages need not be calculated with mathematical certainty and the method used to compute damages need not be more than an approximation. Give the citation of a 2000 New Hampshire case that addresses this matter.

ASSIGNMENT 4
The supervising attorney is working on a corporation case. She recalls that there is a case on point from the seventh circuit. She remembers that the plaintiff’s name was Akerman and the defendant’s name was either Orix, Ornx, or Orynx Communication. Locate the case.

ASSIGNMENT 5
Read Hershley v. Brown, presented later. Following the format presented in Chapter 5, brief the strict liability for unsuccessful sterilization and the two-year statute of limitations issues.

ASSIGNMENT 6
Read State v. Wong, presented later. Following the format presented in Chapter 5, brief the issue of ineffective assistance of counsel based on the attorney’s failure to argue the insanity defense.

ASSIGNMENT 7
Read Melia v. Dillon Companies, Inc., presented later, and brief the false imprisonment issue.
ASSIGNMENT 5 CASE

Missouri Court of Appeals, Western District.
Shelley HERSHLEY and Roy Hershley, Plaintiffs/Appellants, v.
Merlin D. BROWN, Defendant/Respondent.
655 S.W. 2d 671 (Mo.App. 1983)

TURNAGE, Judge.

Shelley and Roy Hershley filed an action against Dr. Merlin Brown and Richard Wolfe Medical Instruments. The trial court sustained the defendants’ motion to dismiss the claim on grounds that Missouri does not recognize actions for wrongful conception, and that the action was barred by limitations. The Hershleys appealed, claiming that because this case involved a foreign object, it was not time barred, that the statute of limitations was tolled because of Dr. Brown’s fraudulent concealment, and that Missouri recognizes wrongful conception [FN1] claims. Affirmed in part and reversed in part.

FN1. This term is synonymous with the term wrongful pregnancy.

The circumstances which gave rise to this case began in 1977, when the petition alleges that Shelley Hershley and her husband, Roy Hershley, consulted with Dr. Merlin Brown regarding the possibility of Mrs. Hershley’s undergoing a tubal ligation to become sterile. Dr. Brown allegedly informed the Hershleys that he would perform a bilateral tubal ligation by burning, cauterizing, or otherwise removing portions of Mrs. Hershley’s fallopian tubes.

The petition alleges that Dr. Brown performed a surgical sterilization procedure on Mrs. Hershley on December 27, 1977, and that in October of 1980, Mrs. Hershley conceived a child by her husband. The child came to term in July of 1981. [FN2] The petition further alleges that not until after Mrs. Hershley had conceived did she and her husband become aware of the fact that rather than burning, cauterizing, or otherwise removing portions of Mrs. Hershley’s tubes, Dr. Brown had performed the sterilization procedure by inserting a tubal ring instrument manufactured and distributed by Richard Wolfe Medical Instruments.

FN2. There is no indication in the record that this child was not normal and healthy.

In October of 1981, Mr. and Mrs. Hershley filed suit against Dr. Brown and Richard Wolfe Medical Instruments. Their petition contained counts by both Mr. and Mrs. Hershley alleging strict liability, negligent installation of a foreign object, and fraudulent misrepresentation and concealment of a battery. The defendants moved to dismiss the case on the ground that it failed to state a claim upon which relief could be granted, and that the claim was barred by the statute of limitation set forth in § 516. 105 RSMo 1978. [FN3] The trial court granted these motions.

FN3. All sectional references are to Missouri’s Revised Statutes, 1978.

[1] The scope of review in appeals from the granting of a motion to dismiss a petition for failure to state a claim upon which relief can be granted is well settled. The petition is to
be construed favorably to the plaintiffs, giving them the benefit of every reasonable and fair intendment in view of the facts alleged. *Ingalls v. Neufeld*, 487 S.W.2d 52, 54[4] (Mo.App.1972). If the facts pleaded and all reasonable inferences to be drawn therefrom, viewed most favorably from the plaintiff’s point of view, show any ground for relief, the plaintiff’s petition should not be dismissed for failure to state a claim. *Burckhardt v. General American Life Insurance Company*, 534 S.W.2d 57, 63[5] (Mo.App.1975).

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The first count of the petition alleges that both Richard Wolfe Medical Instruments and Dr. Brown should be held strictly liable for the unsuccessful sterilization of Mrs. Hershley, because the Wolfe ring was defective. At the oral argument of this appeal, the Hershley’s counsel announced that they were dismissing their appeal on their claim against Richard Wolfe Medical Instruments. Thus, the appeal from the dismissal of this count hinges on the applicability of the strict liability doctrine to physicians.

While no Missouri case has addressed this issue, leading cases from other jurisdictions have held that physicians may not be held liable under this theory. One such case is *Hoven v. Kelble*, 79 Wis.2d 444, 256 N.W.2d 379 (1977). There, the court ruled that a physician was not liable for injuries suffered by a patient in the course of a lung biopsy.

[3] One theory advanced by the plaintiff was that the physician was strictly liable for allegedly defective medical services rendered. Noting that it had found no decision of any court applying the strict liability doctrine to the rendition of professional medical services, the Hoven court affirmed *675 the trial court’s sustaining of demurrers to the strict liability cause of action, offering the following support for its decision:

Medical services are an absolute necessity to society, and they must be readily available to the people. It is said that strict liability will inevitably increase the cost for medical services, which might make them beyond the means of many consumers, and that imposition of strict liability might hamper progress in developing new medicines and medical techniques. 256 N.W.2d at 391.

Another leading case which discusses the applicability of the strict liability doctrine to physicians in *Carmichael v. Reitz*, 17 Cal.App.3d 958, 95 Cal.Rptr. 381 (1971), which held that the treating physician was not liable under a theory of strict liability in tort for pulmonary embolisms and thrombophlebitis allegedly suffered by the plaintiff as the result of a drug which the physician prescribed. The Carmichael court stated that if an injury results but if no negligence or fault is shown, liability without fault may not be imposed to find the medical doctor liable.

This court is persuaded by the doctrines expressed in *Hoven and Carmichael*, and refuses to apply the strict liability doctrine to physicians. Thus, the trial court properly dismissed the first count of Mrs. Hershley’s petition, which alleged a cause of action against Dr. Brown on a theory of strict liability.

[4] Because this petition involves claims of negligence and malpractice on the part of Dr. Brown, it is governed by § 516.105, the statute of limitations for actions against health care providers. That section provides that all such actions must “be brought within
two years from the date of occurrence of the act of neglect complained of....” One exception to this rule [FN4] provides that:

FN4. The only other exception mentioned in the statute itself relates to minors under the age of ten, who have until their twelfth birthday to bring action.

In cases in which the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a living person, the action shall be brought within two years from the date of the discovery of such alleged negligence, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligence, whichever date first occurs.

To come within the tolling provision set out above, the act of negligence complained of must be “introducing and negligently permitting any foreign object to remain within the body....” To fall within this tolling provision, the petition must allege that the object was introduced and negligently permitted to remain in the body. This situation is distinguished from one in which the foreign object is intentionally introduced in the body and is intended to remain there, although the procedure itself is performed in a negligent manner. Negligence of the latter type does not fall within the tolling provision of § 516.105.

[5] Count two of the Hershley’s petition alleges that Dr. Brown advised Mrs. Hershley that he would accomplish her sterilization by burning, cauterizing, and removing portions of her fallopian tubes, but that he instead performed her sterilization by use of a Wolfe ring instrument without advising her that he had implanted a foreign object in her body. The court further states that Dr. Brown “negligently installed and implanted a Wolfe ring instrument,” and alleges damages as a direct result of that act. Thus, it pleads that the ring was implanted in a negligent manner rather than that it was negligently permitted to remain in Mrs. Hershley’s body.

As stated above, the negligent performance of a surgical procedure is subject to the two year limitations period, and it is only when a foreign object is introduced and negligently permitted to remain in the body that the tolling provision comes into play. The allegation here is that Dr. Brown negligently performed the procedure by which the Wolfe ring was implanted, rather than that it was negligently permitted to *676 remain in the body. Thus, the tolling provision does not apply, and count two is subject to the two year statute of limitations and was properly dismissed.

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The judgment of dismissal as to counts 1, 2, 5, and 6 is affirmed. The judgment as to *678 counts 3, 4, 7, and 8 is reversed and this cause as to those counts is remanded for further proceedings.

All concur.
ASSIGNMENT 6 CASE

The STATE of Ohio, Appellee,
v.
WONG, Appellant.
97 Ohio App.3d 244, 646 N.E.2d 538 (1994)

HARSHA, Presiding Judge.

Carrie Wong seeks reconsideration of our decision that affirmed her conviction of six counts of felonious assault, R.C. 2903.11, and two counts of vandalism, R.C. 2909.05. See State v. Wong (1994), 95 Ohio App.3d 39, 641 N.E.2d 1137.

On October 25, 1991, appellant fired several shotgun blasts from her home, which injured two police officers, causing one to lose his right eye, and damaged a police cruiser. Appellant had recently had a miscarriage and was taking Fiorinal, a barbiturate, to control the pain and uterine contractions. She had also fought with her husband the day before, and was under the influence of alcohol at the time of the shootings.

At trial, defense counsel explored the possibility of a defense of not guilty by reason of insanity, but later abandoned it when neither of the two psychologists would testify that appellant was insane under Ohio law. A jury convicted appellant on all counts, and the court sentenced her to a term of imprisonment of fifteen to forty years. We rejected appellant’s arguments on appeal, and this motion for reconsideration, pursuant to App.R. 26, followed.

[1] Although App.R. 26 does not provide guidelines to be used in determining when a decision should be reconsidered, the test generally applied is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for the court’s consideration that was either not considered at all or was not fully considered by the court when it should have been. State v. Black (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171, 172; Columbus v. Hodge (1987), 37 Ohio App.3d 68, 523 N.E.2d 515; Matthews v. **540 Matthews (1981), 5 Ohio App.3d 140, 143, 5 OBR 320, 323, 450 N.E.2d 278, 282 283.

Appellant initially wishes us to reconsider the first assignment of error regarding trial counsel’s decision not to raise the insanity defense. Appellant has *247 strenuously argued that the failure to do so constituted ineffective assistance of counsel.

On appeal, we held that trial counsel’s actions were not deficient. We offered two basic reasons for our decision. First, we noted that both court appointed psychologists, Dr. Winter and Dr. Jackson, agreed that appellant did not meet the legal definition of insanity, although each would have testified that appellant met one prong of the insanity defense. [FN1]

FN1. R.C. 2901.01(N) requires that the defendant, at the time of the offense, not know right from wrong as a result of a severe mental disease or defect. Dr. Jackson believed that appellant did not know right from wrong at the time of her actions, but did not think she suffered from a severe mental disease or defect. Dr. Winters, on the other hand, believed that appellant suffered from a severe mental disease, but also believed that she
knew right from wrong. Appellant essentially argues that trial counsel was ineffective for not putting both doctors on the stand and asking the jurors to believe the appropriate half of each doctor’s testimony.

We found that given the fact that both experts agreed that appellant was not insane, it could well be considered sound trial strategy to avoid the prosecution’s potential cross examination of the psychologists. We ruled that an attorney might reasonably decide not to risk losing credibility with the jurors by having his own witnesses on cross examination state that appellant was actually sane. Instead, an attorney might validly choose to argue other issues.

Appellant now states that our reasoning, while sound in theory, should not apply in the context of this case, because “without the presentation of the insanity defense, Ms. Wong was left without any viable complete defense.” In other words, appellant appears to be saying that trial counsel had a duty to argue the insanity defense because it was her only hope of acquittal.

[2][3] We disagree with appellant’s reasoning. We know of no law, and do not wish to create one, which would require every criminal defense attorney to plead the insanity defense just because it was a defendant’s only chance to escape a conviction. In order to establish a claim for ineffective assistance of counsel, the trial lawyer’s conduct must be so deficient as to deprive the defendant of a fair trial, meaning that there exists a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different. State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus. We agree that at times this might require counsel to explore and perhaps even raise the insanity defense. However, we do not feel that it demands that every trial lawyer plead insanity when all the court appointed psychologists agree that the defendant was not insane.

We also believed that trial counsel’s actions were justifiable because of the evidentiary ramifications of pleading not guilty by reason of insanity. At the trial, the prosecution attempted to introduce into evidence a letter allegedly *248 written by appellant just prior to the shooting. Although the contents of this letter were not part of the record, it was evident that the letter was damaging to appellant, as trial counsel worked very hard, and successfully, to keep it out of evidence. Because both psychologists relied on this letter when assessing appellant’s psychological condition, allowing them to testify would have possibly opened the door to this letter that counsel obviously wanted excluded from evidence.

Appellant now contends that this was improper reasoning on our part, because the contents of the letter were not part of the record, and therefore we were precluded from using the existence of the letter in our reasoning. We disagree.

[4][5] While it is axiomatic that appellate courts do not generally consider matters not part of the record, a claim of ineffective assistance of counsel always demands that appellate courts engage in some amount of speculation. The very nature of the issue demands that an appellate court consider what the possible ramifications of a trial attorney’s actions or inactions would be in any **541 given case. In short, we are not considering matters outside the record so much as we are considering what could have
been had counsel acted differently. The essence of a claim of ineffective assistance of
counsel claim demands that we do this. [FN2]

FN2. See, e.g., State v. Sandy (1982), 6 Ohio App.3d 37, 6 OBR 147, 452 N.E.2d 515
(failure to call two witnesses for defense was not ineffective assistance of counsel,
because it may have opened the door to unfavorable testimony).

As a result, we overrule appellant’s motion for reconsideration of her first assignment of
error.

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Appellant has not satisfied her burden, pursuant to App.R. 26, of calling to the attention
of the court an obvious error in its decision or raising an issue for our *250 consideration
that was either not considered at all or was not fully considered by the court when it
should have been. Black; Hodge; Matthews; supra.

Motion denied.

PETER B. ABELE, J., concurs.

GREY, J., concurs in judgment only.

ASSIGNMENT 7 CASE

Martin MELIA, Appellee,
v.
DILLON COMPANIES, INC., Appellant.
No. 67939.

**258

Before BRISCOE, C.J., RULON, J., and DAVID S. KNUDSON, District Judge,
Assigned.

DAVID S. KNUDSON, District Judge, Assigned.

Martin Melia filed suit seeking compensatory and punitive damages against Dillon **259
Companies, Inc., (Dillon) upon allegations of false imprisonment and malicious
prosecution. The jury returned a verdict in favor of Melia, awarding compensatory
damage of $20,200. The trial court additionally imposed punitive damages of $20,000.
Dillon appeals, contending the trial court erred in not granting its motion for directed
verdict. We agree and reverse the judgment of the trial court.

Randy Atkin, head of security for the Dillon’s store in this case, observed Melia leave the
store without paying for a pouch of tobacco. Melia had placed the tobacco in his shirt
pocket prior to leaving the store. Atkin stopped Melia in the store’s parking lot, at which
time Melia stated he had forgotten to pay for the tobacco. Believing he would be allowed
to pay for the tobacco, Melia agreed to reenter the store with Atkin.

Once inside the store, Atkin informed Melia the incident would be treated as a shoplifting
offense. Melia followed Atkin into a conference room in the store. Melia attempted to
explain he had unintentionally left the store without paying for the tobacco, but Atkin
refused to listen. Atkin informed Melia that, pursuant to Dillon’s policy, the police would be called and a complaint would be filed. Atkin indicated this process would take approximately 45 minutes. Since he had recently been released from the hospital with a heart condition, Melia requested that he be allowed to telephone his wife and explain why he would be late returning home. Atkin initially refused, but later relented and allowed Melia to call his wife.

A police officer arrived at the store and investigated the alleged incident. The officer discussed the incident with Atkin and then took Melia’s statement. A notice to appear in municipal court on a charge of theft was issued, and Melia was informed he was free to leave. Melia was held in the conference room approximately one hour. At trial in municipal court, Melia was found not guilty of theft.

In ruling on a motion for directed verdict, the court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought and, where reasonable minds could reach different conclusions based on the evidence, the motion must be denied and the matter submitted to the jury. This rule must also be applied when appellate review is sought on a motion for directed verdict. *Simon v. National Farmers Organization, Inc.*, 250 Kan. 676, 683, 829 P.2d 884 (1992).

**False Imprisonment Claim**

[1] In evaluating the merits of Melia’s false imprisonment claim, the following provisions of K.S.A. 21 3424 are controlling:

“(1) Unlawful restraint is knowingly and without legal authority restraining another so as to interfere substantially with his liberty.”

“(3) Any merchant, his agent or employee, who has probable cause to believe that a person has actual possession of and (a) has wrongfully taken, or (b) is about to wrongfully take merchandise from a mercantile establishment, may detain such person (a) on the premises or (b) in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Such reasonable detention shall not constitute an arrest nor an unlawful restraint.”

Although 21 3424 is a criminal statute, the merchant’s defense set forth in subsection (3) is applicable to civil actions for false imprisonment. *Alvarado v. City of Dodge City*, 238 Kan. 48, 60, 708 P.2d 174 (1985).

[2] Dillon asserts that, in this case, the merchant’s defense operated to preclude any recovery for false imprisonment by Melia. According to Dillon, Melia’s concealment of the tobacco provided probable cause to believe a theft was occurring. Melia contends the merchant’s defense does not apply because mere possession of the tobacco did not establish probable cause to believe he was shoplifting.

**Probable cause such as may justify a detention exists where the facts and circumstances within the knowledge of the one who is detaining are sufficient to warrant a person of reasonable caution to believe that the person detained has committed an**
offense. See *State v. Morin*, 217 Kan. 646, Syl. ¶ 1, 538 P.2d 684 (1975). Here, Melia removed tobacco from a display in the store and concealed it from view by placing it in his shirt pocket. He then left the store without paying for the tobacco. Based on his observations of these acts, Atkin had probable cause to believe Melia had wrongfully removed the tobacco from the premises.

Melia argues that, under the terms of the statute, possession of property is insufficient grounds for detention where the suspect asserts the taking was an innocent mistake. This argument is not persuasive. Atkin’s observation of Melia’s actions was sufficient to create probable cause to detain Melia. See *Whitlow v. Bruno’s Inc.*, 567 So.2d 1235, 1238-39 (Ala.1990) (store manager who observed plaintiff going through checkout line and exiting store without paying for videotape rentals had probable cause to detain plaintiff in spite of plaintiff’s claim she forgot to pay the rental fees; summary judgment entered in favor of store on plaintiff’s false imprisonment claim); *Prieto v. May Department Stores Company*, 216 A.2d 577, 579 (D.C.App.1966) (in determining whether probable cause existed to support plaintiff’s detention, the court viewed the actions of a store detective based on what he observed rather than what may have been in the mind of plaintiff); *Fields v. Kroger Company*, 202 Ga.App. 475, 475-76, 414 S.E.2d 703 (1992) (Georgia statute precluding recovery for false imprisonment upon a showing that a store owner reasonably believed the person detained was a shoplifter “implicitly recognizes the right of a shop owner to protect himself from shoplifting by detaining a customer who has acted in a suspicious manner”).

[4] Although the existence of probable cause is a jury question where the facts are in dispute, the issue becomes a matter of law for the courts where the undisputed facts demonstrate the presence or absence of probable cause. *Stohr v. Donahue*, 215 Kan. 528, Syl. ¶ 4, 527 P.2d 983 (1974). Here, it is uncontested that Melia concealed and failed to pay for merchandise belonging to the store. Consequently, the existence of probable cause in this case is not a jury question.

[5] Melia also asserts the merchant’s defense is not applicable because Atkin did not detain Melia for the purpose of conducting an investigation. This assertion is not convincing. Although Atkin did not question Melia about the alleged shoplifting incident, police were called to the store to conduct an investigation. Melia had an opportunity to explain his version of events to the police officer. We hold that, once probable cause exists, the merchant’s defense under 21 3424(3) includes the right to reasonably detain a suspected shoplifter for the sole purpose of investigation by a law enforcement officer.

The evidence in the record, even when viewed in the light most favorable to Melia, indicates that probable cause existed to detain Melia in order to allow police to investigate the alleged shoplifting incident. We conclude the trial court erred in denying Dillon’s motion for a directed verdict on Melia’s false imprisonment claim.

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**261** Having determined that Melia is not entitled to prevail under either theory upon which recovery was sought, we need not discuss the punitive damage issue raised by Dillon.

Reversed.
PART V  CHAPTER SUMMARY

A court opinion, often referred to as a case, is the court’s resolution of a legal dispute and the reasons in support of its resolution. When resolving disputes, courts often interpret constitutional or statutory provisions or create law when there is no governing law. The body of law that emerges from court opinions is called case law. It constitutes the largest body of law in the United States, far larger than constitutional, legislative, or other sources of law.

Because you must read court opinions to learn case law, it is necessary to become familiar with and proficient at reading and analyzing case law. There are several additional reasons, however, for reading opinions. A court opinion does the following:

- Helps you understand and interpret constitutional provisions and statutory law
- Helps you understand the litigation process
- Provides insight into the structure of legal analysis and legal argument
- Provides a guide to proper legal writing

Most court opinions are composed of the facts of the case, the procedural history of the case (what happened in the lower court), the legal questions (issues) that are addressed by the court, the decision or holding of the court, the reasons for the decision reached, and the disposition (the relief granted).

Federal and state court opinions are published in books called reports and reporters, which are available through Westlaw and LexisNexis. In addition, court opinions are often available through official court websites and other Internet resources. If the question involves a statute, the search for case law should begin with a review of the annotations following the statute. If the question does not involve a statutory law, the search usually begins with a digest.

A case brief is a written summary of a court opinion that presents, in an organized format, all the essential information of the opinion. A researcher may be assigned the task of briefing a case. A case brief is valuable because it:

- Saves an attorney the time of reading the case
- Serves as a valuable learning tool
- Is a reference tool
- Is a writing tool

The first and possibly most important step in briefing a case is to read it carefully and slowly. Reading case law is often a difficult process, especially for the beginner. It becomes easier as more opinions are read.

Chapters 2 and 3 provide guidelines that are helpful in identifying many of the elements of a case brief.
The importance of case law cannot be overemphasized. The difficulties you encounter in reading and briefing court opinions can be lessened through the use of the guidelines presented in this chapter.

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