THE MPT®

MULTISTATE PERFORMANCE TEST

July 2012 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2012 MPT. Each test includes two 90-minute items; user jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the Uniform Bar Examination [UBE] use two MPTs as part of their bar examinations.) The instructions for the test appear on page iii. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

Description of the MPT

The MPT consists of two 90-minute items, one or both of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
>
> The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
>
> You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
>
> The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
>
> Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
>
> Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

July 2012 MPT

▶ *FILE*

MPT-1: *State of Franklin v. Soper*

STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

MEMORANDUM

TO: Examinee
FROM: Judge Leonard Sand
RE: *State of Franklin v. Soper*, Case No. 2012-CR-3798
Bench Memorandum on Defendant's Pretrial Motion to Exclude Evidence
DATE: July 24, 2012

The State has charged Daniel Soper with killing Vincent Pike. Specifically, the prosecution alleges that Soper shot Pike in the chest during an argument while Pike was sitting in his car outside his own house. The criminal complaint alleges that Soper killed Pike out of jealousy, because Pike was dating Soper's former girlfriend, Vanessa Mears.

The crux of the prosecution's case rests on Pike's statements identifying Soper and his truck. Pike made these statements after he was shot. Soper has made a pretrial motion to exclude these statements from evidence at trial. In particular, Soper's motion seeks to exclude, on both evidentiary and constitutional grounds, a transcript of a 911 call that includes statements by Pike and a statement Pike made to a police officer at the hospital. An evidentiary hearing on this motion is set for tomorrow.

Please prepare a bench memorandum addressing the issues presented by Soper's motion. You should assume for the purposes of your analysis that the testimony at the hearing will be consistent with the attachments to the motion. Address the evidentiary issues first and then analyze the constitutional issues. Include a recommendation as to how I might rule on each issue. Be sure to follow the attached guidelines for drafting bench memoranda.

STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

MEMORANDUM

TO: All Judicial Law Clerks
RE: Preparation of Bench Memoranda
DATE: August 18, 2009

A bench memorandum advises and helps to prepare the judge for a particular hearing or oral argument—it does not decide the case. It is neither a brief by counsel nor a judicial opinion. The bench memorandum condenses facts, identifies the key legal and factual issues, analyzes the applicable law, and provides a recommendation as to the resolution of the issues.

You should write your bench memorandum based on a review of the case file, the record (if available), and your legal research. The bench memorandum format should be as follows:

(1) Statement of Issues: brief, single-sentence statements of the questions to be presented at the trial or hearing;

(2) Analysis: an assessment of each issue in light of the facts and applicable law; and

(3) Recommendation: a recommendation as to the resolution of each issue.

Do not prepare a separate statement of facts. However, when writing a bench memorandum for an evidentiary hearing, you should tie your legal analysis and recommendations closely to the relevant facts in the file. You should cite authority for all legal propositions germane to the issues presented by the case.

STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

STATE OF FRANKLIN, Plaintiff, v. DANIEL SOPER, Defendant.	Docket No. 2012-CR-3798

MOTION TO EXCLUDE EVIDENCE

The Defendant, Daniel Soper, moves this Court to exclude certain evidence from the trial of this matter, as follows:

1. Any and all statements made by the alleged victim, Vincent Pike, in a telephone call with a 911 dispatcher on March 27, 2012, on the grounds that the admission of this evidence would violate Franklin Rules of Evidence 801 *et seq*. and the Defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

2. Any and all statements made by the alleged victim, Vincent Pike, in response to questioning by Police Officer Timothy Holden on March 27, 2012, on the grounds that the admission of this evidence would violate Franklin Rules of Evidence 801 *et seq*. and the Defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In support of this motion, the Defendant attaches a transcript of the 911 call and a police report filed by Officer Holden that contains Mr. Pike's statements. For purposes of this motion, the Defendant does not contest the authenticity of the transcript or the police report.

The Defendant requests a pretrial hearing concerning this motion.

Dated: July 10, 2012

Angela Cupers

Angela Cupers, Esq.
Franklin State Bar No. 629090
Counsel for Defendant Daniel Soper

EXHIBIT A

CITY OF SPRINGFIELD 911 CENTER
TRANSCRIPT OF 911 TELEPHONE CALL
MARCH 27, 2012, 6:08 P.M.

Operator: Hello. 911 Center. What is your emergency?

Caller: Yes, hello. It looks like my neighbor was shot. He's bleeding real bad.

Operator: Okay, where are you, sir?

Caller: I'm at 551 . . . no, 553 Kentucky Drive. Please hurry—he's really hurt.

Operator: Sir, we're sending someone now . . . [pause] . . . sir, can you tell me what happened?

Caller: Yes, I was driving home, and I saw my neighbor's car sideways in the driveway. I walked over to check, and he's just . . . sitting in his car—it's awful.

Operator: Listen, I need you to help us. What's your name and your neighbor's name?

Caller: I'm Jake Snow and my neighbor is Vince Pike.

Operator: Mr. Snow, do exactly as I say. Turn your phone volume up and hold the phone to Vince's ear.

Caller: Yes . . . here goes . . . Vince, I've called 911 and the operator wants to talk to you. I'm just going to put the phone up to your ear now . . . you're going to be okay . . .

Operator: Okay. Mr. Pike, can you hear me?

Pike: Yes, I can. I don't feel so good.

Operator: Help is on the way, but you need to help us. What happened?

Pike: It was him. He shot me, then . . . he drove away. He's going to get her.

Operator: Who shot you?

Pike: [Silence]

Operator: Mr. Pike, stay with me. What was he driving?

Pike: Okay, I'm back, I'm doing better. A black pickup.

Operator: Did you see the license plate?

Pike: [After silence] Jake, Jake . . . is that you?

Caller: Yeah, Vince, we're still on the phone with the 911 Center. Hang in there, buddy.

Operator: Okay, just hold on.

Caller: Wait, there's a police car and an ambulance. I've got to go. Thank you, thank you. . . .

[Call terminated.]

EXHIBIT B

CITY OF SPRINGFIELD POLICE DEPARTMENT

Incident No. 142AQ-424		Date of Incident: March 27, 2012	
Officer:	Holden, Timothy	Incident Type:	Homicide
Time started:	6:12 p.m.	Time ended:	4:50 a.m., March 28, 2012

Officer received call from 911 dispatcher reporting shooting at 553 Kentucky Drive, Springfield, at 6:12 p.m. I proceeded directly to location. On arrival, a car was parked at an angle in the driveway. An adult male was standing over the driver's-side window holding a phone and looking in the window. Upon my approaching the car, he stood away from the car and pointed to the driver's seat, saying, "He's in there."

I observed a roughly 40-year-old male in the car, who was unconscious, with hands by his sides and blood on his chest and stomach. The other male identified himself as Jake Snow and identified the injured male as Vince Pike.

Medical personnel had arrived with me and took Pike to Regional Hospital. I followed to speak with Pike. I arrived at the hospital at 6:47 p.m.

At the hospital, I spoke with Vanessa Mears, who identified herself as Pike's girlfriend. She stated that Pike had been visiting her that afternoon before returning to his house on Kentucky Drive. She said that, shortly before he left, he received a phone call on his cell phone from Daniel Soper, her ex-boyfriend. She stated that she knew that it was Soper because Pike had the speaker phone on, Soper was speaking very loudly, and she recognized his voice. She said that Soper insisted that Pike meet him at Pike's house "or else there will be trouble." She reported that Pike left shortly thereafter.

Mears said that she and Pike had been threatened by Soper over the past several months. She reported that these threats started after Pike told Soper of Pike's relationship with her.

I was able to see Pike at 8:12 p.m. Dr. Alexander told me that Pike would not likely make it. I asked to see him in the Intensive Care Unit and was admitted. Pike had regained consciousness. I said, "Mr. Pike, hang in there. We don't want to lose you, but you're fading fast, and you need to help us. We need to put this guy away. Who shot you?" Pike took a deep breath and said, "It was Dan, my girlfriend's ex-boyfriend, and he's going after her." Pike then lost consciousness and died at 8:45 p.m.

After leaving the hospital, I obtained information concerning the vehicles registered in Soper's name. I also obtained an arrest warrant for Soper. At 3:00 a.m. the following morning, based on a tip, I observed Soper on Galena Avenue in Springfield. He was driving a black pickup truck registered in his name. With Officers Randall and Jerome, I stopped him, arrested him, and read him his rights. Soper made no statements either before or after arrest.

July 2012 MPT

▶ *LIBRARY*

MPT-1: *State of Franklin v. Soper*

Franklin Rules of Evidence*

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

. . .

(c) Hearsay. "Hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a Franklin statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . .

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

. . .

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;

. . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . .

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

. . .

* The Franklin Rules of Evidence conform to the newly restyled Federal Rules of Evidence.

State v. Friedman

Franklin Supreme Court (2008)

Following a jury trial, the defendant, John Friedman, was convicted of the murder of a convenience store clerk. Friedman appealed his conviction on the grounds that the decedent's statement describing his attacker was improperly admitted under the excited utterance and dying declaration exceptions to the hearsay rule, and that admission of the statement violated the Sixth Amendment of the United States Constitution. The appellate court affirmed his conviction. For reasons stated below, we affirm.

FACTS

Early on June 24, 2005, Paul Lund arrived at the convenience store where he worked and began filling the outside vending machine with newspapers. Carrie Hilton, who lived nearby, heard "hollering" and heard Lund shout, "I don't have no more, I don't have no more." She then heard two gunshots. She looked out her window and saw Lund on one knee, continuing to say, "I don't have no more."

Hilton also saw a tall man searching through a nearby car. The man went to the streetlight where Hilton could see him examining his hand. He was wearing some sort of head covering. Hilton then saw Lund limp away.

Some time later, Lund was found about a block away by an early-morning jogger, who called 911. Officer Anita Sanchez arrived on the scene about two or three minutes before the paramedics arrived. When Sanchez found him, Lund said that he had been shot. Sanchez testified that Lund was in great pain and lying in a fetal position, and that he kept repeating, "I don't want to die, I don't want to die."

As the paramedics prepped Lund for transport, Officer Sanchez asked Lund, "What happened?" Lund stated that a tall man with a black ski mask over his face and a snake tattoo on his right hand came up to him and shot him after demanding money.

Lund never spoke again. He soon lost consciousness and died. An autopsy showed that the gunshots had pierced his respiratory system and his liver. These wounds were each sufficient to have caused his death.

Friedman was convicted in part based on Lund's identification and other evidence found at the convenience store.

ANALYSIS

A. Excited Utterance Exception

For a statement to qualify as an excited utterance under Rule 803(2) of the Franklin Rules of Evidence (FRE), the statement must relate to a startling event or condition and the person making the statement (the "declarant") must be under the stress of excitement caused by the event or condition.

In this case, Lund was shot during a robbery—an event startling enough to satisfy Rule 803(2). His statement described the shooter, satisfying the requirement that the statement "relate to" the event or condition.

The record does not tell us how much time elapsed between the shooting and Lund's statement to Officer Sanchez. We have previously noted that "an excited utterance need not occur at the same time as the event to which it relates. But it must be made while the declarant still feels the stress of the startling event and has had no time for reflection." *State v. Cabras* (Fr. Sup. Ct. 1982). The lack of time to reflect, and thus to contrive or misrepresent facts, assures the reliability of such statements.

However, the lapse of time alone does not control our decision as to whether a declarant speaks under the stress of the startling event. Other factors include the declarant's physical and mental condition, his observable distress, the character of the event, and the subject of his statements.

In this case, when he spoke, Lund was bleeding profusely. Officer Sanchez testified that Lund had difficulty breathing, was lying in a fetal position, and appeared to be in great pain. Lund fell silent within minutes of Sanchez's

arrival. This evidence suffices to establish that Lund spoke while under the stress of a startling condition.

The courts below did not err in concluding that the statement was admissible under FRE 803(2). But that does not end the inquiry.

B. Dying Declaration Exception

Franklin Rule 804(b)(2) embodies the common law exception for dying declarations. In order for a statement to qualify under this exception, it must meet the following criteria: (1) the declarant must have died by the time of the trial, (2) the statement must be offered in a prosecution for homicide or in a civil case, (3) the statement must concern the cause or the circumstances of the declarant's death, and (4) the declarant must have made the statement while believing that death was imminent.

We have justified this rule on the assumption that "a person who knows that death is imminent will be truthful. The cost of death with a lie on one's lips is too great to risk." *State v. Donn* (Fr. Sup. Ct. 1883). We have also stated that "the imminence of death encourages the truth as strongly as any oath." *State v. Leon* (Fr. Sup. Ct. 1942).

In this case, Friedman concedes all but the fourth criterion of FRE 804(b)(2). He argues that nothing in the record indicates that Lund believed that he would soon die. Friedman contends that the presence of police and of paramedics assured Lund of survival at the time he spoke, thus taking his statement out of the rule.

We disagree. The prosecution may prove a belief in imminent death in several ways: by the declarant's express language, by the severity of his wounds, by his conduct, or by any other circumstance which might shed light on the state of the declarant's mind.

In this case, the gunshots had pierced Lund's respiratory system and his liver; he died of his wounds. Officer Sanchez testified that Lund lay in a fetal position, apparently in great pain. Lund also repeatedly stated, "I don't want to die, I don't want to die." In fact, Lund died shortly after making the statement, leading to the reasonable inference that he knew the severity of his situation when he spoke.

The courts below did not err in concluding that the statement was admissible as a dying declaration under FRE 804(b)(2). But again, this does not end the inquiry.

C. Confrontation Clause

Friedman claims that admission of Lund's statement violated his rights under the Confrontation Clause of the Sixth Amendment. In *Crawford v. Washington* (2004), the United States Supreme Court focused on whether a statement admitted under a hearsay exception was "testimonial." If so, and if the declarant was otherwise unavailable for cross-examination, the Confrontation Clause would require the exclusion of that statement from evidence.

In the case at hand, were Lund's statement admissible solely as an excited utterance, we would need to assess whether the statement was "testimonial" under *Crawford* and subsequent cases.

However, the prosecution in this case properly offered Lund's statement as a dying declaration. In *Crawford*, the Supreme Court noted that certain exceptions permitting testimonial hearsay against an accused in a criminal case existed before 1791, the year the Sixth Amendment was adopted, and that these exceptions might survive the adoption of the Sixth Amendment. The Supreme Court in *dicta* specifically discussed the dying declarations exception as such an exception. Courts in our neighboring states of Columbia and Olympia have addressed the issue and have held that the Confrontation Clause does not bar admission of evidence of dying declarations. *See State v. Karoff* (Olympia Sup. Ct. 2007) and *State v. Wirth* (Columbia Sup. Ct. 2006).

Accordingly we conclude that the victim's statement was not barred from admission by the Confrontation Clause.

Affirmed.

Michigan v. Bryant

562 U.S. ____, 131 S. Ct. 1143 (2011)

At Richard Bryant's trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a parking lot. A jury convicted Bryant of second-degree murder. The Supreme Court of Michigan held that the Sixth Amendment's Confrontation Clause, as explained in *Crawford v. Washington* (2004) and *Davis v. Washington* (2006), rendered Covington's statements inadmissible testimonial hearsay, and the court reversed Bryant's conviction. We granted the State's petition to consider whether the Confrontation Clause barred admission of Covington's statements to the police.

I

Around 3:25 a.m. on April 29, 2001, Detroit police officers responded to a radio dispatch indicating that a man had been shot. At the scene, they found Covington lying on the ground next to his car in a gas station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty. The police asked him what had happened, who had shot him, and where the shooting had occurred. Covington stated that "Rick" [Bryant] shot him at around 3 a.m. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant's house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.

Covington's conversation with police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours. The police left the gas station after speaking with Covington, called for backup, and traveled to Bryant's house. They did not find Bryant there but did find blood and a bullet on the back porch and an apparent bullet hole in the back door. Police also found Covington's wallet and identification outside the house.

II

The Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford* [involving a station-house interrogation by a detective after a stabbing], we noted that in England, pretrial examinations of suspects and witnesses by government officials "were sometimes read in court in lieu of live testimony." In light of this history, we emphasized the word "witnesses" in the Sixth Amendment, defining it as "those who bear testimony," and defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." We therefore limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment "demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford* noted that "at a minimum" it includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations."[1]

In 2006, the Court in *Davis* and *Hammon v. Indiana* (*Davis*'s companion case) made clear that not all those questioned by police are witnesses and not all "interrogations by law enforcement officers" are subject to the Confrontation Clause. In *Davis*, the victim made the statements at issue to a 911 operator during a domestic disturbance. In *Hammon*, police responded to a domestic disturbance call at the Hammon home. One officer remained in the kitchen with the defendant, while another officer talked to the victim in the living room about what had happened.

[1] The Supreme Court of Michigan held that the question whether the victim's statements would have been admissible as "dying declarations" was not properly before it because the prosecution established the factual foundation only for admission of the statements as excited utterances. The trial court ruled that the statements were admissible as excited utterances and did not address their admissibility as dying declarations. This occurred prior to our 2004 decision in *Crawford v. Washington*, where we first suggested that dying declarations, even if testimonial, might be admissible as a historical exception to the Confrontation Clause. Because of the State's failure to preserve its argument with regard to dying declarations, we similarly need not decide that question here.

To address the facts of both cases, we discussed the concept of an ongoing emergency.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*.

We held that the statements at issue in *Davis* were nontestimonial and the statements in *Hammon* were testimonial. *Davis* did not attempt to produce an exhaustive classification of all conceivable statements as either testimonial or nontestimonial.[2]

Here, we confront for the first time circumstances in which the "ongoing emergency" discussed in *Davis* extends beyond an initial victim to a potential threat to the responding police and the public at large.

III

To determine whether the "primary purpose" of an interrogation is "to enable police assistance to meet an ongoing emergency," we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.

The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." Rather, it focuses them on "end[ing] a threatening situation." *Davis*. Because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

Whether an emergency exists and is ongoing is a highly context-dependent inquiry. *Davis* and *Hammon* involved domestic violence, a known and identified perpetrator, and, in *Hammon*, a neutralized threat. Because *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.

An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized, because the threat to the first responders and public may continue.

The duration and scope of an emergency may depend in part on the type of weapon employed. In *Davis* and *Hammon*, the assailants used their fists, as compared to the scope of the emergency here, which involved a gun.

The medical condition of the victim is also important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

Another factor is the importance of informality in an encounter between a victim and police. Formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution."

The statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.

[2] *Davis* explained that 911 operators "may at least be agents of law enforcement when they conduct interrogations of 911 callers," and therefore "considered their acts to be acts of the police" for purposes of the opinion.

To give an extreme example, if the police say to a victim, "Tell us who did this to you so that we can arrest and prosecute them," the victim's response that "Rick did it" appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

IV

Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. The record reveals little about the motive for the shooting. What Covington did tell the officers was that he fled Bryant's back porch, indicating that he perceived an ongoing threat. The police did not know, and Covington did not tell them, whether the threat was limited to him. The potential scope of the dispute and therefore the emergency in this case encompasses a threat potentially to the police and the public.

This is also the first of our post-*Crawford* Confrontation Clause cases to involve a gun. Covington was shot through the back door of Bryant's house. At no point during the questioning did either Covington or the police know the location of the shooter. At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.

The circumstances of the encounter provide important context for understanding Covington's statements to the police. When the police arrived at Covington's side, their first question to him was "What happened?" Covington's response was either "Rick shot me" or "I was shot," followed very quickly by an identification of "Rick" as the shooter. In response to further questions, Covington explained that the shooting occurred through the back door of Bryant's house and provided a physical description of the shooter. When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive. From this description of his condition and report of his statements, we cannot say that a person in Covington's situation would have had a "primary purpose" "to establish or prove past events potentially relevant to later criminal prosecution."

For their part, the police responded to a call that a man had been shot. They did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—what had happened, who had shot him, and where the shooting occurred—were the exact type of questions necessary to allow the police to "assess the situation, the threat to their own safety, and possible danger to the potential victim" and to the public, including "whether they would be encountering a violent felon." *Davis*. In other words, they solicited the information necessary to enable them "to meet an ongoing emergency."

Finally, we consider the informality of the situation and the interrogation. This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*. Here the situation was fluid and somewhat confused; the officers did not conduct a structured interrogation. The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.

Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the "primary purpose of the interrogation" was "to enable police assistance to meet an ongoing emergency," Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.

The judgment of the Supreme Court of Michigan is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

July 2012 MPT

▶ *FILE*

MPT-2: *Ashton v. Indigo Construction Co.*

Hunter, Wilhelm and Slaughter, P.C.
40 N. Cardinal Way
Appling, Franklin 33809

TO: Examinee

FROM: Jim Hunter

DATE: July 24, 2012

RE: Margaret Ashton v. Indigo Construction Co.: Motion for Preliminary Injunction

Margaret Ashton has been our client for 35 years, since she and her husband first went into business. We have represented them for business and other legal matters. Joe Ashton died in 2004. Mrs. Ashton still lives in the house that she and her husband built 32 years ago.

Indigo Construction Co. bought the vacant lot behind the Ashton property over three months ago. Mrs. Ashton found this out when she heard and saw large trucks dumping dirt onto the vacant lot. After several phone calls, she learned that Indigo operates a residential construction and landscaping business. Indigo stores dirt on the lot from various sites, to use at a later date in either business.

Mrs. Ashton's affidavit describes the impact that Indigo's operations are having on her property: noise, dust, and (when rainy) mud and flooding. She organized neighborhood efforts to stop Indigo, arranged for newspaper coverage, and pushed her contacts in City Hall. Indigo limited its operations slightly after a meeting with neighbors, but its actions did not satisfy Mrs. Ashton. City Hall will do nothing—Indigo's use of the land complies with relevant zoning.

Mrs. Ashton has asked us to sue Indigo to enjoin its use of the lot for dirt storage. I am drafting a complaint seeking damages and injunctive relief. We are alleging, among other things, that Indigo has created a private nuisance.

In addition, I am preparing a motion for preliminary injunction seeking to enjoin the private nuisance. Please draft the argument section of our brief in support of the motion for preliminary injunction. In drafting your argument, be sure to follow the attached guidelines.

Hunter, Wilhelm and Slaughter, P.C.

TO: Associates
FROM: Firm
DATE: July 8, 2011
RE: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to persuasive briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Argument

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments they cover. A brief should not contain a single broad argument heading. The argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle.

> For example, <u>improper</u>: The court should compel the defendant to remove all non-complying construction from its property.
>
> <u>Proper</u>: The defendant's garage that sits 15 feet from the curb fails to comply with the setback requirements of the homeowners' association and should be removed.

STATE OF FRANKLIN
DISTRICT COURT OF BUNCOMBE COUNTY

MARGARET J. ASHTON,	)	
Plaintiff,	)	AFFIDAVIT
v.	)	of
INDIGO CONSTRUCTION CO.,	)	MARGARET J. ASHTON
Defendant.	)	

I, Margaret J. Ashton, being duly sworn, state as follows:

1. I reside at 151 Haywood Street, Appling, Franklin, and have resided there for 32 years in a house and on property I own.

2. The neighborhood in which I reside includes an eight-square-block area consisting entirely of single-family homes.

3. My property abuts other residences on two sides. On the third side, behind my house, my property abuts a lot that has been vacant for as long as I have lived on my property.

4. In April 2012, I began to hear and to see large trucks, filled with dirt, driving onto the vacant lot and dumping the dirt onto the lot.

5. Since that time, trucks filled with dirt have been traveling through my neighborhood to the vacant lot an average of 17 times per day, both day and night.

6. On each visit, the trucks make several different kinds of noise:

— The drivers apply more power to get up the incline in the roadway leading to the abutting lot, resulting in the pervasive sound of roaring engines.

— When they turn into the lot, the drivers apply brakes, resulting in a loud and pervasive screeching sound.

— Some of the trucks are dump trucks, which raise their beds to deposit the dirt. In some cases, a front-end loader or a backhoe takes the dirt out of the truck. All these activities cause loud crashing and grinding sounds and loud beeping.

7. The noise associated with the trucks has seriously and severely interfered with my use and enjoyment of my property. During the daytime, I cannot sit outside for periods of longer than one hour without hearing trucks coming to, depositing at, or leaving the lot. The noise is loud and insistent and prevents me from reading, gardening, or talking with visitors on my porch, all activities which I enjoyed before this new use of the lot behind my property.

8. Indigo met with members of the neighborhood and agreed to stop dumping after 8 p.m. Trucks continue to dump dirt from 6 a.m. to 8 p.m.

9. The pile of dirt on the lot behind my property is now almost 20 feet high.

10. In dry weather, even a slight breeze will blow dust and other dirt particles from the dirt pile onto my property. Steady winds will blow larger quantities of dust and dirt onto my land, with the following results:

— I am unable to enjoy the flowers that I grow in my garden because of the quantity of dust deposited on them.

— I must spend additional sums for cleaning the outside of my house, especially the windows, and must do so on a more frequent basis than ever before.

11. In wet weather, runoff from the dirt pile flows into my backyard.

12. All these effects of the dirt pile have resulted in a significant lessening of my ability to use and enjoy my property and have lowered its value.

13. Despite my requests, Indigo has refused to stop its activities on the adjacent lot and to remove the existing dirt.

Dated: July 20, 2012

Margaret J. Ashton

Margaret J. Ashton

Signed before me this 20th day of July, 2012

Jane Mirren

Jane Mirren
Notary Public

STATE OF FRANKLIN
DISTRICT COURT OF BUNCOMBE COUNTY

MARGARET J. ASHTON,	)	
Plaintiff,	)	AFFIDAVIT
v.	)	of
INDIGO CONSTRUCTION CO.,	)	WILLIAM PORTER
Defendant.	)	

I, William Porter, being duly sworn, state as follows:

1. I am employed as an investigator by the law firm of Hunter, Wilhelm and Slaughter, P.C.

2. On July 12, 2012, I reviewed records on file with the Franklin Secretary of State concerning Indigo Construction Co., a Franklin corporation licensed to do business in the State of Franklin. Its registered address is in Appling.

3. On July 13, 2012, I reviewed the land records for Buncombe County and made copies of any records listing Indigo Construction Co. as having a recorded interest in real estate. According to my review, and after visits to all locations, the following is a complete list and description of properties owned by Indigo Construction Co. in Buncombe County:

(a) an office building located in Appling Industrial Park.

(b) a one-acre lot with a garage and parking, also located in Appling Industrial Park.

(c) a one-acre lot, which is the lot in question, located at 154 Winston Drive, which lies directly behind the property located at 151 Haywood Street, Appling, and which is zoned for mixed use.

(d) an undeveloped 50-acre tract on the outskirts of Appling. The site is not zoned, but it does have paved roads.

Dated: July 20, 2012

William Porter

William Porter

Signed before me this 20th day of July, 2012

Jane Mirren

Jane Mirren
Notary Public

Appling Gazette

Neighborhood Complains of "Dirty" Business

June 6, 2012

By Claire Anderson

Kids like nothing better than big trucks and a huge pile of dirt. But residents of the Graham District aren't kidding. They're angry, as a dirt pile gets higher and higher and trucks get louder and louder. And they want the City to do something.

The trouble started when Indigo Construction Co. bought a vacant lot right behind the heart of the old Graham District, a neighborhood of peaceful homes and shady trees. Soon after, residents woke to the sound of dump trucks, each one carrying a load of dirt to dump on the vacant lot.

Problems escalated from there. "Most days, I can't read, I can't sleep, I can't talk to my guests, I can't even hear myself think," says longtime resident Margaret Ashton, who lives in front of Indigo's lot. "You should see my garden: the dust is killing my roses!"

Other neighbors complain about the runoff during rainstorms, which often floods their yards.

"It's not the neighborhood for this," Ashton says. She has a point. The Graham District is one of the largest residential communities in Appling without a single business located within its borders. Many residents seem more upset at having commerce invade their quiet world than they do at the noise or the dirt.

Indigo refused comment for this story, but a talk with city government offers a different perspective. Says City Manager Kayleen Gibbons, "Indigo has a right to do what it's doing." The Graham District is zoned for residential use only, but the Indigo lot is in an adjacent area zoned for mixed use. The City sees no legal grounds to stop Indigo.

In fact, says Gibbons, Indigo has a good record on environmental matters, and an even better one on home construction. "Indigo pushed through some affordable housing projects that might not have happened without its initiative," according to Gibbons. "And it's offering jobs and opportunity for a lot of young families."

Dirty business? Or good management? Let us know at views@appgazette.com.

July 2012 MPT

▶ *LIBRARY*

MPT-2: *Ashton v. Indigo Construction Co.*

Parker v. Blue Ridge Farms, Inc.
Franklin Supreme Court (2002)

This common-law private nuisance action arises out of the defendant's operation of a dairy farm near the plaintiffs' home. Plaintiffs Bill and Sue Parker live on property located along the west side of Route 65 in Caroline Township. Defendant Blue Ridge Farms, Inc., owns and farms land on the opposite side of Route 65, approximately one-third of one mile north of the Parkers' property. In 1990, Blue Ridge Farms built a 42,000-square-foot free-stall barn and milking parlor to house a herd of dairy cows. It also dug a pit in which to store the manure from the herd.

The Parkers first noticed an objectionable smell from the defendant's dairy farm in early 1991. The Parkers could barely detect the smell at first. Over time, however, the smell became substantially more pungent and took on a sharp, burnt odor. In 1997, Blue Ridge Farms installed an anaerobic digestion system to process the manure from the herd. It intended the system to produce material that could power the generators on the farm. Because the system overloaded, however, the odor from the farm became more acrid and smelled of sulfur. At times, the smell was so strong that it would waken the Parkers during the night, forcing them to close their windows. Eventually, the odor prevented them from spending time outdoors during the day.

The Parkers sued seeking damages and injunctive relief. They based their claims on common-law private nuisance, alleging that Blue Ridge Farms generated offensive odors that unreasonably interfered with the Parkers' use and enjoyment of their property. The Parkers moved to another home, rendering moot their request for an injunction and leaving only their claim for damages. The jury returned a verdict for the Parkers for $100,000 in damages. The trial court entered judgment. Blue Ridge Farms appealed. The court of appeal affirmed.

Blue Ridge Farms contends that the trial court improperly instructed the jury on a key element of the nuisance claim. The trial court instructed the jury to consider "whether the defendant's use of its property was reasonable." The instruction also stated: "A use which is permitted or even required by law and which does not violate local zoning or land use restrictions may nonetheless be unreasonable and create a common-law nuisance." The verdict form included specific questions for the jury to answer, including the following: "Did the plaintiffs prove that the defendant's dairy farm produced odors which unreasonably interfered with plaintiffs' enjoyment of their property?"

Blue Ridge Farms concedes that the trial court correctly instructed the jury to consider a multiplicity of factors in making the determination of reasonableness. However, it argues that the trial court failed to instruct the jury to consider Blue Ridge Farms's legitimate interest in using its property. In reviewing this claimed error, we use our long-standing standard of review: "whether the instruction fairly presents the case to the jury so that injustice is not done to either party."

"A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land." 4 RESTATEMENT (SECOND) OF TORTS § 821D (1979). "The essence of a private nuisance is an interference with the use and enjoyment of land." W. PROSSER & W. KEETON, TORTS § 87 (5th ed. 1984). We have adopted the basic principles of the Restatement (Second) of Torts. To recover damages in a common-law private nuisance cause of action, a plaintiff must prove the following elements: (1) the defendant's conduct was the proximate cause (2) of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and (3) the interference was intentional or negligent. 4 RESTATEMENT (SECOND) OF TORTS § 822.

In applying element (2), the reasonableness of the interference with the plaintiff's use, the fact finder should consider all relevant factors, including (a) the nature of both the interfering use and the use and enjoyment invaded; (b) the nature, extent, and duration of the interference; (c) the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded; and (d) whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property.

As with our prior standard, the focus of the inquiry into the "reasonableness" of the interference is objective, not subjective. The question is what a reasonable person would conclude after considering all the facts and circumstances.

Interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. Thus, a business enterprise that exercises utmost care to minimize the harm from noxious smoke, dust, and gas—even one that serves society well, such as a sewage treatment plant or an electric power utility—may still be required to pay for the harm it causes to its neighbors. W. PROSSER & W. KEETON, TORTS § 88. A defendant's use of his property may be reasonable, legal, and even desirable. But it may still constitute a common-law private nuisance because it unreasonably interferes with the use of property by another person.

Here, the jury instruction at issue asked, "Did the plaintiffs prove that the defendant's dairy farm produced odors which unreasonably interfered with plaintiffs' enjoyment of their property?" This interrogatory correctly captured the crux of a common-law private nuisance cause of action for damages. It correctly stated that the focus in such a cause of action is on the reasonableness of the interference and not on the use that is causing the interference. The trial court further instructed the jury to consider a multiplicity of factors in determining the unreasonableness element.

In sum, the trial court's charge provided the jury with adequate guidance with which to reach its verdict. Under the circumstances, we are satisfied that the trial court's instructions fairly presented the case to the jury.

Affirmed.

Timo Corp. v. Josie's Disco, Inc.
Franklin Supreme Court (2007)

Plaintiff Timo Corp. owns a cooperative residential apartment building in Franklin City. In June 2006, the defendants opened a bar on the roof of a six-story building next door to the plaintiff's building. In August 2006, the plaintiff filed this private nuisance action, alleging, among other things, that the defendants play music at extremely loud levels, "tormenting the cooperative's residents who live in apartments across from the bar." The complaint also alleges that the pounding and accompanying noise often continues until 3 a.m., and that it creates a nuisance that degrades the residents' quality of life and diminishes the value of their property. The plaintiff seeks damages and injunctive relief.

In September 2006, the plaintiff moved for a preliminary injunction barring the defendants from using the rooftop for music and dancing. Accompanying the motion were affidavits from residents of the cooperative and neighboring buildings. The plaintiff also submitted the affidavit of an acoustical consultant who set up sound-measuring equipment in an apartment in the plaintiff's building and found the sound levels to be four times more intense than the legal limit of 45 decibels.

The defendants offered affidavits from their own consultants who contested the conclusions of the plaintiff's expert. The defendants' experts stated that the defendants were in full compliance with all applicable building and business regulations, and that (despite numerous complaints and a full investigation) City officials had declined to cite them for violations of applicable noise ordinances. Finally, the defendants noted that the rooftop was open only Thursdays, Fridays, and Saturdays, and was closed from mid-October through mid-April and in periods of bad weather.

The trial court denied the plaintiff's request for a preliminary injunction, noting that the City had never found the bar to be in violation of the noise ordinance. The court concluded that the operation of the bar was "entirely reasonable" and said it could find no precedent for granting relief that would upset the status quo and potentially hurt the bar's business. The court did, however, permit the plaintiff to file an interlocutory appeal. The court of appeal affirmed, and we granted review.

The plaintiff argues that the trial court and the court of appeal misapplied the standard for claims of private nuisance under *Parker v. Blue Ridge Farms, Inc*. (Fr. Sup. Ct. 2002). The plaintiff contends that the courts below erred in focusing on whether the operation of the bar was "entirely reasonable." Rather, the plaintiff argues that, under *Parker*, the reasonableness of a defendant's use of its land is irrelevant to the granting of a preliminary injunction for nuisance.

The standard for granting a preliminary injunction is well-established. The plaintiff must show (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) that the balance of equities tips in the plaintiff's favor. *Otto Records Inc. v. Nelson* (Fr. Sup. Ct. 1984).

In this case, the plaintiff has established a likelihood of success on the merits under *Parker*. The plaintiff has shown that the defendant's operation of a dance bar with loud music on the rooftop of an adjoining building is the source of the noise, and the affidavits filed in support of its motion establish that the noise constitutes an "unreasonable interference with the plaintiff's use and enjoyment of his or her property." Finally, while the plaintiff cannot establish that the defendants intended the noise to cause discomfort to their neighbors, the plaintiff did prove that the defendants were

aware of the intrusion and chose to continue their behavior. From that awareness, we can infer that mental state.

The plaintiff has also established irreparable injury. Given the likelihood of success on the merits of its damages claim, the plaintiff could be seen as having an adequate remedy at law. However, our cases have long held that land is unique and that any severe or serious impairment of the use of land has no adequate remedy at law. *Davidson v. Red Devil Arenas* (Fr. Sup. Ct. 1992). In this case, the prospect of nightly intrusions of noise from a nearby neighbor creates a harm for which the law provides no adequate remedy.

The plaintiff has thus established a likelihood of success on the merits and irreparable injury. However, when, in addition to damages, a plaintiff seeks injunctive relief for private nuisance, additional considerations come into play.

As noted in *Parker*, even the most reasonable of uses may become a nuisance, requiring that the defendant pay for the harmful effects of that use on others. However, to *enjoin* a reasonable use of property goes beyond imposing an added cost of doing business. It might well stifle legitimate activity, which could continue while the business pays for the consequences of its actions. To avoid this risk, when ruling on motions for injunctive relief, courts must necessarily distinguish between those uses which should continue while absorbing the relevant costs, and those which are so unreasonable or undesirable that they should be stopped completely.

Courts must thus balance the social value, legitimacy, and indeed the reasonableness of the defendant's use against the ongoing harm to the plaintiff. At first glance, this does little more than restate the standard for preliminary relief: "a balance of equities tipping in the plaintiff's favor." But in cases involving an underlying nuisance claim, the court must weigh the reasonableness of the defendant's use in making its determination.

In so doing, a court may consider (1) the respective hardships to the parties from granting or denying the injunction, (2) the good faith or intentional misconduct of each party, (3) the interest of the general public in continuing the defendant's activity, and (4) the degree to which the defendant's activity complies with or violates applicable laws. We stress that this judgment is factual in nature.

In this case, the courts below correctly understood *Parker* to state the elements of a cause of action for damages for a private nuisance. At the same time, the trial court properly applied the test for equitable relief. The trial judge understood that in ruling on whether to grant injunctive relief, the court must assess the reasonableness of the defendant's use in light of all relevant factors. We find no abuse of discretion in the trial court's denial of the motion for preliminary injunction. The plaintiff remains free to pursue its claim for damages.

Affirmed.

July 2012 MPT

▶ *POINT SHEET*

MPT-1: *State of Franklin v. Soper*

State of Franklin v. Soper

DRAFTERS' POINT SHEET

This performance test requires examinees to write a bench memorandum to a trial judge in preparation for a hearing on a motion to exclude evidence in a homicide case. The motion seeks to exclude, on state law hearsay and federal constitutional grounds, statements made by the victim after the shooting during a 911 call and later at the hospital shortly before the victim died.

The File contains the task memo from the judge, a format memo, the Motion to Exclude Evidence, the 911 call transcript, and the police report. The Library contains excerpts from the Franklin Rules of Evidence (conforming to the restyled Federal Rules of Evidence), a Franklin Supreme Court case, and an edited version of *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

I. FORMAT AND OVERVIEW

The assigning judge has requested that the examinee draft a bench memorandum for the judge's use during an evidentiary hearing on the defendant's motion to exclude evidence. Examinees' work product should include

- Statement of Issues: brief, single-sentence statements of the relevant issues;
- Analysis: an assessment of each issue in turn, in light of relevant facts and law; and
- Recommendation: for each issue, a recommendation for its resolution.

Examinees should not draft a separate statement of facts but should integrate the relevant facts into their analyses and recommendations.

II. FACTS

The relevant facts below are labeled by source: the 911 call transcript ("911 Call") or the police officer's report ("Report").

- Several months before the shooting, Vincent Pike told Daniel Soper that he was dating Soper's ex-girlfriend, Vanessa Mears. Mears observed Soper making several threats to Pike because of Pike's relationship with her. (Report.)
- On the day of the incident, Mears overheard a phone call to Pike. Recognizing the caller's voice as Soper's, Mears heard Soper tell Pike to meet him at Pike's house "or else there will be trouble." Mears said that Pike then left, returning to his house. (Report.)
- Shortly after 6 p.m. on that date, a man identifying himself as Jake Snow called 911, telling the 911 dispatcher that he had found his neighbor, Pike, sitting in his car in the driveway of his house, bleeding from what appeared to be a gunshot wound. (911 Call.)
- The 911 dispatcher asked Snow to put his phone to Pike's ear, which Snow did, telling Pike, "I'm just going to put the phone up to your ear now . . . you're going to be okay. . . ." The dispatcher then asked Pike, ". . . can you hear me?" He answered, "Yes, I can. I don't feel so good." (911 Call.)
- The dispatcher asked Pike, "What happened?" and he said, "It was him. He shot me, then . . . he drove away. He's going to get her." (911 Call.)

- The operator asked Pike who shot him, but Pike didn't answer. However, when asked, "What was he driving?" Pike said, "Okay, I'm back, I'm doing better. A black pickup." Pike did not say anything else. Snow hung up when Officer Holden and EMS arrived. (911 Call; Report.)
- Holden arrived at the hospital at 6:47 p.m. Pike remained unconscious in the ICU. Mears was also at the hospital. She identified Daniel Soper as her ex-boyfriend, described Pike's earlier phone conversation, and told Holden about Soper's threats. (Report.)
- At about 8:12 p.m., Holden spoke with Pike's doctor, who told him that Pike "would not likely make it." Holden then spoke with Pike, telling him, "Mr. Pike, hang in there. We don't want to lose you, but you're fading fast, and you need to help us. We need to put this guy away. Who shot you?" Pike said, "It was Dan, my girlfriend's ex-boyfriend, and he's going after her." (Report.) Pike then lost consciousness and died at 8:45 p.m. without making further statements.
- At 3 a.m. the next day, Holden arrested Soper while driving his black pickup. (Report.)

III. LEGAL ISSUES

The defendant's Motion seeks to exclude Pike's statements made in response to questions from the 911 dispatcher and in response to questions from Officer Holden. The task memo asks examinees to address first the evidentiary issues and then the federal constitutional issues.

The evidentiary issues focus on whether Pike's statements are admissible under Franklin hearsay rules: first, whether Pike's statements are admissible as excited utterances under F.R.E. 803(2), and second, whether these statements are separately admissible as dying declarations under F.R.E. 804(b)(2). The state law case, *Friedman,* sets out the standards for determining whether these hearsay exceptions apply. Examinees must then assess whether admission of these statements would violate the federal Confrontation Clause, using *Bryant* as their guide.

IV. ANALYSIS

As a preliminary matter, examinees should note that all of Pike's statements are hearsay under F.R.E. 801(c) and thus inadmissible under F.R.E. 802 unless they fit within an exception.

1) *Excited Utterance Exception to the Rule Against Hearsay*

F.R.E. 803(2) defines the excited utterance exception: A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

State v. Friedman (Fr. Sup. Ct. 2008) provides the criteria for applying the excited utterance exception, and its facts are similar to the facts here. In *Friedman*, the declarant had been shot; the court found that a shooting was "startling" enough to satisfy the rule. Both here and in *Friedman*, the statements tended to identify the shooter; the *Friedman* court found that statements identifying the shooter "related to" the shooting sufficiently to satisfy the rule.

In *Friedman*, the court assessed whether too much time had elapsed between the shooting and the statements. There, it was unknown how much time had elapsed between these two events, but the court inferred that because the victim "had difficulty breathing, was lying in a fetal position, and appeared to be in great pain" when he spoke to the officer, the victim was still under the stress of a startling condition when he made the statement at issue.

Here, two time gaps exist, one of unknown length. The File does not indicate when Pike was shot, or how much time passed between the shooting and when Snow found him and

called 911 at 6:08 p.m., but it was roughly two hours later when Officer Holden spoke with Pike and elicited Pike's last statements at 8:12 p.m. Thus, Pike's statements at the scene and his statements at the hospital should be assessed separately.

Under *Friedman*, the lapse of time alone does not control whether the speaker was still "under the stress of excitement caused by the event or condition." The following facts were sufficient for the victim's statements to fall within the excited utterance exception:

- The speaker was bleeding badly, had difficulty breathing, and appeared to be in pain.
- The speaker suffered from severe, ultimately fatal wounds.
- The statements related to the shooter.
- The speaker fell permanently silent shortly after giving his final statements.

At the scene: Pike was also bleeding badly and faded in and out of consciousness. No statements describing his pain are in the File. He suffered from severe, ultimately fatal wounds. His statements related to the shooter. He lost consciousness completely before being removed by medical personnel. As in *Friedman*, the victim's condition here should lead to the conclusion that he spoke to the 911 operator while under the stress of excitement caused by the condition.

At the hospital: Whether this statement would be an excited utterance is less clear. Examinees could very well argue this point either way.

Pike's bleeding was under control, but his situation (according to the treating physician) had worsened medically. After making a single statement, he again lost consciousness. Officer Holden states only that Pike took a deep breath before making a statement relating to the shooter. No statements describing his pain at the hospital are in the File, but he was under intensive care, still suffered from severe wounds which (in the doctor's opinion) would cause his death, lost consciousness soon after making a statement, and died shortly thereafter. While these facts are less analogous to the facts of *Friedman* than those above, the court could also reasonably conclude that Pike spoke while under the stress of excitement caused by the condition.

On the other hand, over two hours had passed since Snow discovered Pike. He was no longer at the scene and made no comments about his physical condition as he had in the 911 call (i.e., "I don't feel so good."). The questioning by Officer Holden did not have the urgency that the 911 call did. In short, examinees could recommend that the court decide this issue either way. They can receive credit as long as they support their analyses and recommendations.

2) *Dying Declaration Exception to the Rule Against Hearsay*

F.R.E. 804(b)(2) states that a statement made under belief of imminent death is admissible (1) in a homicide prosecution (2) if the statement was made by the declarant while believing the declarant's death to be imminent, (3) if the statement was made about the cause or circumstances of the declarant's death, and (4) if the declarant has since died. *See Friedman*. Pike died, this case is a homicide prosecution, and Pike's statements serve to identify Soper. Thus, no question exists about three of the four factors. The question is whether Pike spoke while believing his death to be imminent.

The *Friedman* court reviewed several factors relevant to this determination:

- Whether the speaker expressly stated such a belief. In *Friedman,* the speaker stated repeatedly, "I don't want to die." Pike made no statement of this kind at either location.
- The severity of the wounds, and whether they caused the speaker's death. Here, the exact nature of Pike's wounds is unknown, and the File does not indicate a specific cause of

death. However, at the scene Pike was bleeding severely, lost and regained consciousness a few times, and had trouble answering questions. At the hospital, the doctor told Holden that "Pike would not likely make it." There is little doubt that the wounds were severe and caused death.

- Whether the speaker's conduct indicated a belief that he would die. In *Friedman*, the speaker appeared to be in great pain, and lay in a fetal position. He also repeatedly stated, "I don't want to die." The court also inferred a belief in imminent death from the fact that the speaker fell permanently silent shortly after making the statements.
- Here, at the scene, Pike was seated and required medical assistance to move. At the hospital, he was in the ICU and attended by a doctor. At both locations, Pike lost consciousness shortly after making relevant statements.
- Any other circumstance which might shed light on the state of the declarant's mind. At the scene, the dispatcher reassured Pike that help was coming. Pike was bleeding severely, was regularly losing and regaining consciousness, and had trouble responding to questions. The dispatcher exhorted Pike to "stay with me," and Pike responded, "Okay, I'm back, I'm doing better." One could infer from this statement that Pike assumed that he would recover. By contrast, at the hospital, Officer Holden said to Pike, "[H]ang in there. We don't want to lose you, but you're fading fast." One could infer that upon hearing this, Pike would conclude that he was dying. Also, Pike's physician believed that Pike "would not likely make it," but the record does not indicate whether the doctor communicated that opinion to Pike.

Examinees should assess statements at the scene and at the hospital separately to determine their admissibility under the dying declarations exception to the rule against hearsay.

At the scene: Unlike the victim in *Friedman*, Pike made no statement about his own death. The dispatcher and Snow reassured him that help was coming. In fact, at one point Pike said, "Okay, I'm back, I'm doing better." Examinees may reasonably conclude that the statements by Pike in the 911 call present a relatively weak case for a "dying declaration."

At the hospital: There are no observations in the record of Pike's bleeding at the hospital. However, he was under care in the ICU, attended by a doctor who told Holden that Pike "would not likely make it." Holden then told Pike, "We don't want to lose you, but you're fading fast." While mildly ambiguous, this phrasing appears to communicate Holden's belief that Pike was dying. In response, Pike had to breathe deeply to make a short statement, and then lost consciousness and died within 40 minutes. Under *Friedman*, these facts support a strong inference that Pike spoke "while believing that death was imminent."

In short, examinees should conclude that Pike's statements at the hospital qualify as dying declarations and that his statements at the scene probably do not.

3) *Confrontation Clause*

In *Crawford v. Washington* (2004) (cited in *Bryant*), the U.S. Supreme Court held that hearsay evidence (even if permitted by state evidence law) might violate the defendant's rights under the Sixth Amendment's Confrontation Clause if it is "testimonial." Examinees should recognize that the decision their judge makes in the state law hearsay analysis will impact the Confrontation Clause analysis: if Pike's statements are dying declarations, the Confrontation Clause does *not* bar their admission; to the extent that either statement is *solely* admissible as an excited utterance, the Confrontation Clause will bar its admission if the statement is testimonial.

A) Dying Declarations—If any or all of Pike's statements are admissible as dying declarations, it seems clear under Franklin law that the Confrontation Clause would not require their exclusion. In *Crawford*, the Supreme Court inquired whether the hearsay statements at issue were "testimonial." However, in that opinion (discussed in *Friedman*), the Supreme Court noted that the dying declarations exception existed at the time of the ratification of the Sixth Amendment in 1791 and suggested in dicta that, as a result, admission of evidence that qualified under a state's dying declarations rule would not violate the Confrontation Clause. The Franklin *Friedman* Court noted this dicta and stated its belief that *Crawford* thus supports a conclusion that evidence admitted as a dying declaration does not violate the Confrontation Clause. (Note that the *Bryant* Court does not address *Crawford*'s suggestion about dying declarations.)

As noted above, the prosecution has a strong argument that Pike's statements at the hospital qualify for the dying declarations exception. However, the prosecution has a weaker argument that statements at the scene of the shooting are dying declarations. Admission of all these statements seems relatively likely under the excited utterance exception and would thus require analysis under the Confrontation Clause.

B) "Testimonial" vs. Meeting an Ongoing Emergency—In *Bryant*, the Supreme Court explored whether statements made to police might not be testimonial if made with the primary purpose of meeting an ongoing emergency. Specifically, the Court further developed a distinction (first made in *Davis v. Washington* and its companion case, *Hammon v. Indiana*, cited in *Bryant*) between statements made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" (non-testimonial), on the one hand, and statements made when "there is no such ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" (testimonial), on the other.

In *Friedman*, the Franklin Supreme Court did not analyze whether, if admitted solely as an excited utterance, the statement would be admissible under the Confrontation Clause. Instead, it rested its Confrontation Clause ruling on the fact that the statement was a dying declaration.

In *Bryant*, the victim was shot by someone he knew. The police found him on the ground next to his car at a gas station, bleeding from an abdominal wound. The police asked him what had happened, who had shot him, and where. The victim responded by identifying the shooter and describing the circumstances of the shooting. The victim later died at a hospital.

Bryant creates an open-ended set of questions concerning whether the "primary purpose" of particular statements to the police is "testimonial." It describes the task as an objective and context-based inquiry and discusses different criteria that are relevant to the question, including

- whether a threat to the police or the public continues to exist;
- the type of weapon employed (in *Bryant*, a gun);
- the medical condition of the declarant;
- the formality or informality of the encounter between the police and the declarant; and
- the combined actions of the police as questioners and the declarant as interviewee, including how police ask questions and the manner in which the declarant responds.

Applying these considerations to the facts, the Supreme Court found that the victim's statements were not "testimonial," but instead were made for the purpose of meeting an ongoing emergency.

Here, Pike's statements at the scene and at the hospital require slightly different analyses:

<u>At the scene</u>: Pike spoke with the 911 dispatcher after the shooter had fled. Using the contextual approach of *Bryant* suggests that Pike made these statements with the primary purpose of meeting an ongoing emergency. Specifically, using the analysis of *Bryant*:

- On the one hand, the shooter was no longer on the scene, and no present threat appeared to exist. On the other hand, the shooter was still at large, and neither the police nor the 911 operator had reason to think that the threat posed by the shooter had abated.
- The case involved a gun, which the shooter had apparently retained.
- The victim appeared to be in serious pain, raising doubts about his ability to form any clear intention, much less a "testimonial" intention.
- The conversation occurred with the formality of a 911 call but was rendered unstructured and even chaotic by the severity of Pike's wounds.
- Pike's statements indicated a potential threat to Pike's girlfriend and thus an awareness of an ongoing threat to her. In addition, the 911 operator did not make any mention of an effort to catch, try, or prosecute the offender, as described in *Bryant*.

Examinees should conclude that, taken together, the statements made by Pike to the 911 operator constitute statements made with the primary purpose of meeting an ongoing emergency, are not testimonial, and would thus be admissible under the Confrontation Clause.

At the hospital: Pike spoke with Holden in the hospital ICU. Under *Bryant*, it appears that Pike made statements (and Holden elicited them) with a primarily testimonial intent.

- The shooter was no longer present at the scene. Pike lay in the ICU. Pike's girlfriend was also at the hospital, reducing the threat to her. By now, the police had reason to understand that the threat posed by Soper was directed at Pike and perhaps at his girlfriend.
- The case involved a gun, which the shooter had likely retained.
- Pike's statements were made in his hospital room, under circumstances where Pike could believe that he was dying.
- Officer Holden said to Pike: "[Y]ou need to help us. We need to put this guy away. Who shot you?" This language mirrors the example in *Bryant* of an invitation for "testimonial" statements. Pike pulled himself together and responded accordingly, with a clear identification.

Examinees should conclude that, taken together, Pike's statements to Officer Holden at the hospital constitute statements made with the primary purpose of providing an identification for later use at trial; in other words, that they are testimonial under *Bryant*.

4) Conclusion

In sum, the problem lends itself to the following rulings by the trial court (although it certainly permits well-reasoned contrary responses):

1) The statements to the 911 operator should qualify as excited utterances and as being made with the primary purpose of helping to meet an ongoing emergency, thus avoiding exclusion under the Confrontation Clause. They seem less likely to qualify as dying declarations.

2) The statements made in the hospital most likely qualify as dying declarations and may also qualify as excited utterances. If they are dying declarations, *Friedman* suggests that they come in without the "primary purpose" analysis. However, if they qualify solely as excited utterances, *Bryant* suggests that these statements were made for the primary purpose of providing evidence for use at trial and thus are "testimonial" and excluded under the Confrontation Clause.

July 2012 MPT

▶ *POINT SHEET*

MPT-2: *Ashton v. Indigo Construction Co.*

Ashton v. Indigo Construction Co.

DRAFTERS' POINT SHEET

This performance test requires the examinee to write a persuasive legal argument in support of a motion for a preliminary injunction in a case alleging a private nuisance. In the underlying case, the defendant, Indigo Construction Co., started dumping a large amount of dirt on a vacant lot in a residential neighborhood. The plaintiff, examinees' client, Margaret Ashton, lives next to the lot and the dirt pile. Ashton suffers from several effects of the dirt pile, including noise, airborne dust, and flooding as a result of runoff from the pile. Ashton wants to sue Indigo to end the piling of dirt on the lot.

The File contains a memorandum from a firm partner telling examinees to prepare the legal argument, a "format memo" that lays out the format for persuasive writing of trial briefs, two affidavits (from Margaret Ashton and from a firm investigator), and a newspaper article about the dirt pile from a local newspaper. The Library contains two cases from the Franklin Supreme Court: *Parker v. Blue Ridge Farms, Inc.* (dealing with the elements of the common-law action of private nuisance) and *Timo Corp. v. Josie's Disco, Inc.* (dealing with the standards for granting injunctive relief for a private nuisance).

The following discussion covers the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

I. FORMAT AND OVERVIEW

Examinees are asked to draft the argument section of a persuasive brief in support of a motion for a preliminary injunction. The "Guidelines for Persuasive Briefs in Trial Courts" offer several pieces of advice to examinees:

- Persuasively argue how fact and law support the client's position.
- Analyze legal authority, both by emphasizing supporting authority and by citing, addressing, and distinguishing or explaining contrary authority.
- Break the argument into major components, and write carefully crafted headings summarizing the arguments in each component. Headings should not be conclusory but should offer a specific application of the law to the facts of the case.

II. FACTS

Examinees are expected to integrate the following facts thoroughly into their arguments.

- Margaret Ashton owns and has resided at her property on Haywood Street for 32 years (Ashton affidavit).
- Her property sits on the edge of an eight-square-block neighborhood consisting entirely of residential housing (Ashton affidavit) with no business presence within its borders (*Gazette* article).
- Immediately adjacent to Ashton's property is a vacant lot, which had been vacant for over three decades (Ashton affidavit). The vacant lot is located in an area zoned for mixed use (*Gazette* article).
- Indigo Construction Co. purchased the vacant lot (Porter affidavit).
- Indigo Construction Co. is a Franklin corporation (Porter affidavit) engaged in doing business as a home construction and landscaping firm in Appling (task memo).
- Immediately after the purchase, in April 2012, Indigo began sending trucks with large loads of dirt to dump onto the vacant lot (Ashton affidavit).

- Ashton noticed the trucks and the dirt immediately. Over time, she experienced negative effects from the dirt pile in three areas (Ashton affidavit, *Gazette* article):
  - Noise: the sound of the trucks arriving, dumping, and leaving prevented her from staying outdoors and from talking with visitors.
  - Airborne dust and dirt: dirt particles from the dirt pile came onto Ashton's land, coating her flowers and her house with dirt, affecting her roses, and requiring her to spend additional money on cleaning the outside of her house.
  - In rainy weather, runoff from the dirt pile flowed into her backyard.
  - Overall, Ashton stated that the truck operation and the dirt pile interfered with her use and enjoyment of her own property.
- Indigo met with residents of the neighborhood about their concerns. As a result, Indigo limited its hours of operation to 6:00 a.m. to 8:00 p.m. (Ashton affidavit).
- Nonetheless, Ashton requested that Indigo stop the dumping, and it refused (Ashton affidavit).
- Indigo did not require a special permit for using the property for this purpose: the lot is located in an area zoned for mixed use (Porter affidavit, *Gazette* article).
- Indigo owns another property that might provide a suitable alternate location for storing the dirt (Porter affidavit).
- Indigo has generated substantial goodwill with the city government as a developer who observes good environmental practices, who takes the initiative in developing affordable housing projects, and who remains a viable business, thus providing jobs to Appling residents (*Gazette* article).

III. LEGAL ISSUES

The firm's motion for a preliminary injunction on the private nuisance claim presents three distinct elements: (1) Examinees must identify and apply the standard for granting preliminary injunctions, (2) examinees must identify and apply the elements of a claim for private nuisance under Franklin law, and (3) examinees must identify and apply the court's approach to injunctive relief for a private nuisance claim.

A. Injunctive Relief Generally

Timo Corp. v. Josie's Disco, Inc. (Fr. Sup. Ct. 2007) states a standard for granting injunctive relief that is widespread and familiar. The plaintiff must show (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balance of equities tipping in the plaintiff's favor. *Timo Corp.* both states this standard and applies it to the facts of that case. Examinees should therefore have a good sense from reading this case of how to work with the standard in the context of a private nuisance claim.

The assigned task is to argue in favor of a preliminary injunction. Better examinees will recognize the need to use the standard for preliminary injunctions in some way in their arguments. Examinees might organize their arguments to match the three parts of the standard or use an alternate structure.

B. Common-Law Private Nuisance: Elements of a Claim (Likelihood of Success on the Merits)

The first element for issuance of a preliminary injunction is likelihood of success on the merits. Examinees will therefore need to be familiar with the common-law elements of private nuisance, as established in the leading case of *Parker v. Blue Ridge Farms, Inc.* (Fr. Sup. Ct. 2002). The later case (*Timo Corp*.) suggests that a proper analysis of the "likelihood of success on the merits" portion of the preliminary injunction test requires that the examinee review the common-law elements of the underlying cause of action.

Parker held that to establish a common-law private nuisance claim, the plaintiff must prove that (1) the defendant's conduct was the proximate cause (2) of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and (3) that the defendant acted either intentionally or negligently. On the facts of this case, the plaintiff, Margaret Ashton, has strong arguments on each portion of the claim, as follows:

Causation: Little doubt exists that the noise, airborne dirt, and runoff are all caused by the defendant maintaining a large dirt pile on the adjoining property.

Unreasonable interference with the plaintiff's use and enjoyment of her property: The critical inquiry focuses on the interference with the plaintiff's use and enjoyment of her property. *Parker* suggests a wide range of factors, all of which are available to the examinee in constructing a persuasive argument:

- the nature of the interfering use
- the nature of the use and enjoyment invaded
- the nature, extent, and duration of the interference
- the suitability for the locality of the interfering conduct
- the suitability for the locality of the particular use and enjoyment invaded
- whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment of his or her property

In the case at hand, the noise, dust, and runoff have a range of different effects on the plaintiff's use and enjoyment of her property. Examinees should note that the question is not what the plaintiff believes, but whether a reasonable person would conclude that the effects of the noise, dust, and runoff constitute an unreasonable interference.

Examinees have available at least the following points in applying these standards:

- Ashton has used her property as a personal residence for 32 years.
- Indigo has used its property for dirt storage for a relatively short period of time.
- Indigo's use of the property creates visible, offensive, long-standing and persistent intrusions on Ashton's use of her property.
- Ashton's use of her property is consistent with the neighborhood's general character as an exclusively residential neighborhood.
- Indigo's use of the property is inconsistent with any prior uses of the parcel or the neighborhood.
- Although Indigo has reduced the hours of dumping, the effects are still extensive and interfere with Ashton's enjoyment of her land.

Examinees might also analogize to the facts of the two principal cases. The odors in *Parker* seem fairly analogized to the noise, dust, and runoff in this case, especially to the extent that they prevent daytime outdoor use of the property. The facts of *Timo Corp.* offer a specific noise analogy. Although the claim in that case was arguably weaker (the noise was neither persistent throughout the week nor over the course of a year), the court in *Timo Corp.* found the noise intrusion sufficient to support a common-law claim for damages.

Intent or negligence: Ashton has no direct proof that Indigo intended to cause the harms that she alleges it is causing. However, in *Timo Corp.*, the court found that if a defendant continues the complained-of conduct after being put on notice of the harm it causes, the court may infer the required mental state from the defendant's awareness of the interference.

Considering the facts as a whole, examinees should find ample ground on which to construct a persuasive argument in support of this point. Better examinees should cite *Parker*, should understand the objective nature of the test, should stress the "unreasonableness of the interference" and not the "reasonableness of the use," and may note the defendant's awareness of the interference.

C. Common-Law Private Nuisance: Claim for Injunction

In addition, examinees should recognize that *Timo Corp.* requires them to analyze the second and third portions of the preliminary injunction standard. The case offers examinees a relatively straightforward way to work with the second portion of the standard ("irreparable injury"). *Timo Corp*. found that "the prospect of nightly intrusions of noise from a nearby neighbor creates a harm for which the law provides no adequate remedy." This language offers a direct analogy to the present case. An examinee can note the greater frequency and pervasiveness of the harms here and the fact that this behavior appears likely to persist year-round.

The third portion of the preliminary injunction standard creates a more difficult analytical challenge. While a common-law claim for *damages* focuses almost exclusively on the unreasonableness of the *interference* with the plaintiff's use and enjoyment of his or her property, a claim for injunctive relief requires the trial court to "balance the equities." As explicitly noted in *Timo Corp.*, this balancing of equities requires a trial court to consider the reasonableness of the *conduct causing the nuisance*: exactly the behavior that *Parker* went to great lengths to distinguish and exclude from the damages claim. An examinee must understand that to gain an injunction, the examinee must not only argue "unreasonable interference" with the plaintiff's use of her land; the examinee must also argue that the *defendant's use* is unreasonable.

Timo Corp. sets out several factors that examinees might use in assessing the reasonableness of Indigo's use of the property in this case:

- the respective hardships to the parties from granting or denying the injunction
- the good faith or intentional misconduct of each party
- the interest of the general public in continuing the defendant's activity
- the degree to which the defendant's activity complies with or violates applicable laws

On these factors, examinees can muster the strongest arguments on the first two. Ashton has no other easily available alternatives to her primary long-standing residence, while Indigo can at least consider using its vacant 50-acre tract as a possible storage site for the dirt. Indigo has made no statements indicating malice or lack of good faith, but its continuation of the dumping in the face of neighborhood protest and an available alternate site can be construed as ill-intentioned. An examinee should note that Indigo did modify its work schedule in response to neighborhood demands, but that the modification did not correct the interference with the plaintiff's use and

enjoyment of her property. Moreover, one could plausibly note that Indigo's use of a lot bordering the Graham District, a long-standing residential neighborhood, indicates a lack of concern for the interests of its neighbors that is arguably relevant to the reasonableness of the use.

The plaintiff's weaker arguments relate to points three and four. Indigo appears to have generated a generally positive opinion with city government, which took pains to stress the virtues of Indigo's operations in the news article. Moreover, this problem assumes that Indigo operates in compliance with all existing laws.

These facts pose the challenge of how to integrate contrary facts into a persuasive brief. An examinee might fairly accomplish this in several ways:

- by conceding the issue of compliance with relevant law but stressing other factors in the "balancing of the equities" portion of the standard
- by suggesting that Indigo's stubbornness in the face of opposition and its silence on the issue itself places its reputation as a "quality business" in jeopardy
- by structuring the argument to focus largely on the neighborhood context, or even just on the connection between Ashton and Indigo, while suggesting that any broader inquiry into Indigo's collateral business practices is irrelevant or at best insignificant in assessing how to weigh the equities between plaintiff and defendant

D. Summary

This task requires examinees to persuade, not to assess. As a result, it is less critical that an examinee reach a "correct" result, and more important that the examinee use the proper tools in completing the assigned task. In brief, the problem offers the examinees several challenges in creating their arguments:

1) They should recognize and use the three-part standard for granting preliminary injunctions stated in *Timo Corp*.
2) They should recognize that the first portion of that standard ("likelihood of success on the merits") turns on analysis of the common-law claim for damages for private nuisance.
    - The standard focuses on the "reasonableness of the interference with the plaintiff's use."
    - Examinees will understand and argue "reasonableness" as an objective test.
    - They will find ways to integrate the facts of this problem into the factors identified as relevant to the "unreasonable interference" standard.
    - Better examinees will recognize and mention the defendant's awareness of the problems and the defendant's refusal to cease its activities after receiving notice.
3) Examinees will argue the second portion of the three-part standard ("irreparable harm") as a separate and distinct standard with a relatively straightforward argument presented in *Timo Corp.*, focused on the uniqueness of damage to land.
4) They should understand and argue the third portion of the three-part standard ("balance of equities") as focusing on the "reasonableness of the defendant's use" of its land.
    - "Reasonableness" is an objective test.
    - Examinees will distinguish between weaker and stronger arguments in favor of Ashton's claim for injunctive relief.
    - Examinees will make efforts to stress the strongest arguments, while working with the vulnerabilities so as to minimize their effect.

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