

MEE Question 1

At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. "It'll be funny," Adam said. "When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch." "That's a stupid idea," Bob said. "In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event." "Oh, I'll bet someone will come," Adam replied. "And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy."

At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.

At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.

Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called "unlawful-act" involuntary manslaughter.

1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.
2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.

1)

===== Start of Answer #1 (451 words) =====

1. A jury could find Adam guilty of involuntary manslaughter.

Involuntary manslaughter is a general intent crime. Reckless conduct that disregards the outcome and potential harm to others is sufficient to meet the this intent requirement. Adam is 18 so there are no issues with being old enough to have the requisite criminal intent. Adam counted on vehicles having problems and possibly even crashing. This is reckless conduct which disregards the harm to others. Therefore Adam had the required intent for involuntary manslaughter.

The reckless conduct must be the actual cause of the death. Adam placed marbles in the intersection which resulted in a vehicle not being able to stop and subsequently hitting another. The car wreck resulted in the ejection of the victim, causing their death. Adam's placing marbles in the intersection is the actual cause of the victim's death.

For Adam to be guilty of involuntary manslaughter, the marbles must also be the proximate cause. This has to do with foreseeability. It is foreseeable that there would be a car wreck; in fact he hoped for one. It is foreseeable that car wrecks result in the death of others. The victim not wearing a seatbelt is also foreseeable. It is foreseeable that passengers fail to wear their seatbelts. Therefore this is not a supervening cause that will break the proximate chain cause. The resulting death was foreseeable.

MEE Question 2

Fifteen years ago, Mom and Dad were married in State A, where both were domiciled.

Fourteen years ago, Mom gave birth to Daughter in State A. Dad is Daughter's biological father.

Four years ago, Dad died in State A. After Dad's death, Mom relied heavily on Dad's parents, Grandparents. Mom and Daughter moved to an apartment near Grandparents in State A. Thereafter, Grandparents visited Mom's home at least once a week. Daughter was also a frequent visitor at Grandparents' home. Grandparents also helped Mom to support Daughter financially.

Four months ago, Mom married Stepdad and moved with Daughter to Stepdad's home in State B, 500 miles from Mom's former residence in State A. Stepdad believes that Grandparents discouraged Mom's marriage to him, and he asked Mom not to invite Grandparents to visit. Mom agreed to Stepdad's request. However, she allowed Daughter to visit Grandparents in State A during a school vacation.

One week ago, Grandparents sent Daughter a bus ticket. Without revealing her plans to Mom, Daughter used the ticket to go to Grandparents' home in State A. When she arrived at Grandparents' home, Daughter telephoned Mom and said, "I hate State B, I dislike Stepdad, and I want to live with Grandparents in State A until you leave Stepdad and return to State A, too."

On the same day that Mom received this telephone call, she was served with a summons to appear in a State A court proceeding, brought by Grandparents, in which Grandparents seek custody of Daughter. Grandparents' petition was brought pursuant to a State A statute that authorizes the award of child custody to a grandparent when the court finds that (1) the "child has been abandoned or one of the child's parents has died" and (2) an award of custody to the petitioner grandparent "serves the child's best interests."

Both State A and State B have enacted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Mom has sought advice from your law firm. She asks the following questions:

1. Does State A have jurisdiction to award custody of Daughter to Grandparents? Explain.
2. On the merits, may a court deny Grandparents' custody petition if Daughter testifies that she wants to live with Grandparents? Explain.
3. Is the State A statute authorizing the award of custody to grandparents constitutional? Explain.

2)

===== Start of Answer #2 (505 words) =====

I. JURISDICTION

Pursuant to the Uniform Child custody Jurisdiction and Enforcement Act (the "UCCJEA"), a state has jurisdiction to determine custody issues with regard to a child if the state is the child's "home state" or if no state is the child's home state and the child has sufficient connections with the state seeking to determine the child custody issue. A child's home state is the state where the child has resided with a parent or someone who acts as a parent for the past six months before the petition is brought or where the child has resided with a parent since birth if the child is not yet six months old.

In this case, Daughter has only lived with Mom and Stepdad in State B for four months. Thus, State B is not her "home state" under the UCCJEA. However, she also has not lived in State A for the six months prior to the filing of the petition and thus State A is not her home state either. In determining whether State A may exercise jurisdiction and determine the custody of Daughter, State A must determine whether Daughter's connections with it are sufficient. It seems likely that jurisdiction is proper in State A since it is the state where Daughter has been domiciled for the past fourteen years until four months ago. Further, Daughter has visited there within the past four months after moving away and has stated a desire to permanently reside there.

II. CUSTODY

Yes, even if Daughter testifies that she wants to live with Grandparents, the court may properly deny Grandparents' custody petition on the merits. In determining whether to award custody to Grandparents, the court will determine whether an award of custody to Grandparents will be in Daughter's best interests. Because Daughter is fourteen, the court may properly consider her request to live with Grandparents, but even her request will not conclusively determine the issue. Other factors the court should consider include each party's ability to care for the child, the child's support system when living with each party, where the child will attend school, where the child has supportive friends, and other similar factors. Thus, if the court determines that living with Mom and Stepdad is in Daughter's best interests, it may properly deny Grandparents' petition.

III. CONSTITUTIONALITY

It is likely that the State A statute is unconstitutional. Because a parent's right to raise her children as she sees fit is a fundamental right, a state statute that purports to limit that parent's right in favor of a grandparent is presumptively invalid unless it is narrowly tailored to a compelling state interest. Though it is likely that the best interests of children is a compelling state interest, it is unlikely that the state statute is narrowly tailored such that it would withstand a constitutional challenge where it only requires the death of one parent before it becomes applicable. Accordingly, on these facts, the State A court cannot properly award custody of Daughter to Grandparents pursuant to the statute.

=====**End of Answer #2**=====

END OF EXAM

MEE Question 3

On March 1, Recycled, a business that sells new and used bicycles and bicycle equipment, borrowed \$100,000 from Bank. To secure its obligation to repay the loan, Recycled signed an agreement granting Bank a security interest in "all the inventory of Recycled, whether now owned or hereafter acquired."

On March 5, Bank filed a financing statement in the appropriate state office. The financing statement listed Recycled as debtor and "inventory" as collateral.

Over the next month, Recycled entered into the following transactions:

(a) On March 10, Recycled sold a new bicycle to Consumer for \$1,500. The sale was made in accordance with the usual business practices of Recycled. Both parties acted honestly and in accordance with reasonable commercial standards of fair dealing, and Consumer was unaware of the financial relationship between Recycled and Bank.

(b) On March 15, Recycled traded a used bicycle to Student for a used computer that Student no longer needed. Recycled immediately began using the computer in its business.

(c) On March 31, Recycled bought 100 new bicycle helmets from Manufacturer. The sale was on credit, with payment due in 15 days. The written sales agreement, signed by Recycled, states that Manufacturer retains title to the helmets until Recycled pays their purchase price to Manufacturer. No financing statement was filed. None of the helmets has been sold by Recycled.

Recycled has not paid its utility bills for several months. On April 29, Utility obtained a judgment in the amount of \$2,500 against Recycled and, pursuant to state law, obtained a judgment lien against all the personal property of Recycled.

Recycled is in default on its repayment obligation to Bank, and it has not paid the amount it owes to Manufacturer.

Bank claims a security interest in all the bicycles and bicycle helmets owned by Recycled, the bicycle bought by Consumer, and the computer obtained by Recycled in the transaction with Student. Manufacturer claims an interest in the bicycle helmets, and Utility seeks to enforce its lien against all the personal property of Recycled.

1. As between Bank and Consumer, which has a superior claim to the bicycle sold to Consumer? Explain.
2. As between Bank and Utility, which has a superior claim to the used computer? Explain.
3. As among Bank, Manufacturer, and Utility, which has a superior claim to the 100 bicycle helmets? Explain.

3)

===== Start of Answer #3 (888 words) =====

1.

Consumer has a superior claim over Bank as to the bicycle sold to Consumer by Recycled. At issue is the priority between a secured Article 9 creditor and a Buyer in the Ordinary Course of Business.

To have an enforceable security interest in personal property under Article 9, there must be attachment. Attachment includes three things: (1) an authenticated security agreement, describing the collateral and evidencing an intent to create a security interest; (2) value given by the creditor; and (3) rights in the collateral by the debtor. (There is attachment on these facts, giving bank has a security interest in Recycled's inventory, including all new and used bicycles). However, attachment is only the first step in a secured party gaining priority over competing creditors-- to win against a subsequent creditor, the earlier secured party must have perfected. Perfection is usually done by filing a financing statement with the secretary of state, including the debtor and creditor's information and a description of the collateral. (Here, it appears Bank filed a proper financing statement, making its interest perfected).

The general rule is that once a party has properly perfected their interest (i.e., by filing), subsequent transferees will be on notice of that party's claim to the collateral and take subject to the earlier creditor's interest. However, there are a few exceptions to this rule; namely, the Buyer

in the Ordinary Course of Business exception. This exception allows a subsequent purchaser to obtain priority over an earlier secured party when: the buyer (1) pays value for the goods (2) from a party (the debtor) who deals in goods of the kind, (3) in good faith, (4) without notice that the sale violates any other party's claim to the property. Also, the buyer's seller must have been the one to create the prior security interest at issue.

Here, Consumer qualifies as a buyer in the ordinary course of business and has priority over Bank's claim to the bicycle. Consumer paid value for the bicycle (\$1500) and bought it from a party who deals in goods of that kind (Recycled sells bicycles as its main business). The facts state that there was good faith, and the Consumer had no knowledge that Bank had not consented to the sale (which it could have done had it wanted to). Also, Recycled was the party who created the security interest in the first place. Therefore, Consumer should win against the Bank.

2.

Bank has a superior claim to the used computer. At issue is when priority will continue in proceeds.

A secured party's perfected interest generally continues *automatically* in proceeds of the collateral subject to the original security agreement. (Proceeds are the property obtained by a debtor upon any disposition of the collateral). This automatic perfection lasts twenty days unless one of three requirements are met to make the perfection in the proceeds permanent: (1) the secured party may re-file, or perfect by other proper means, within the 20-day period without losing priority; (2) the perfection will continue if the proceeds were identifiable (traceable) cash proceeds; or (3) if the "same-office rule" applies. Under the same-office rule, perfection will

continue in the proceeds (and date back to the original date of perfection for the original collateral) if the proceeds are of a type which could be filed in the same state office in order to be properly perfected.

Here, the used computer qualifies as proceeds (since it was acquired upon a disposition of inventory) to which Bank may continue to have a perfected security interest in if it meets the same-office rule. Bank originally had a perfected interest in Recycled's *inventory* by filing a financing statement in the appropriate state office; however, the used computer in this case will most likely qualify as *equipment*. (Equipment is any good other than inventory, consumer goods, or farm products. It is not inventory because it is not being "consumed" in the business, nor is it being sold to customers). Since a security interest in equipment can properly be perfected by filing, the same office rule should apply here to continue Bank's perfection in the computer. A previous secured party will prevail over a subsequent lien holder if it has perfected before the lien came into existence. Therefore, Bank will prevail over Utility.

3.

Bank will prevail over Manufacturer and Utility. At issue is the priority between a lien holder, an Article 2 creditor, and a perfected Article 9 security interest.

A seller of goods under Article 2 who maintains title to the goods (upon a sale on credit) and delivers the goods to the buyer is treated as an unsecured creditor under Art. 9. Additionally, an Art. 9 secured party will take ahead of a judgement lien holder if it perfects before the lien comes into existence.

Here, Manufacturer is an Article 2 seller who is treated as an unsecured Article 9 creditor

MEE Question 4

Plaintiff, a female employee of Defendant, a large manufacturing firm, sued Defendant in federal district court for violating a federal statute that creates a right to be free of sex discrimination in the workplace.

Plaintiff alleged the following: (1) Plaintiff worked for Defendant in a position for which females had seldom been hired in the past. (2) Shortly after Plaintiff was hired, male coworkers began to make sexually charged remarks to Plaintiff. (3) Plaintiff's male supervisor asked her out on dates and became angry each time she refused. (4) There were occasional incidents in which the supervisor or another male worker "accidentally" made contact with various parts of Plaintiff's body. (5) No one from company management ever took steps to monitor or limit behavior of this sort. (6) As a result of this behavior, Plaintiff began to suffer from various physical ailments that were related to stress. (7) Plaintiff made no complaint to management about the situation because the job paid very well and there were, to her knowledge, no comparable opportunities that would be available to her if she lost this particular job.

Defendant's answer to the complaint admitted that Plaintiff was an employee and that the individual named as her supervisor was her supervisor. Defendant denied all allegations relating to the alleged sex discrimination.

A well-established affirmative defense is available in cases of this sort if the defendant employer proves that (a) the plaintiff employee was not subject to any adverse job action (firing, demotion, loss of promotion opportunity, etc.), (b) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (c) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

In a pretrial deposition, Plaintiff admitted that she had suffered no loss of pay or promotion opportunity. Plaintiff also admitted that she was aware of company policies forbidding sex discrimination and sexual harassment, as well as the procedures that employees could use to complain about perceived discrimination. Plaintiff stated that although she was aware of those policies and procedures, she had not seen any effort on the part of Defendant to enforce the policies and was afraid that she would suffer retaliation if she made use of the procedures available to complain of sex discrimination.

After the close of discovery, Defendant moved to amend its answer to add the affirmative defense set forth above. It also moved for summary judgment, claiming that Plaintiff's deposition testimony sufficiently established the elements of the affirmative defense to warrant a judgment in Defendant's favor.

Plaintiff opposed both motions. The trial judge ruled in Defendant's favor, allowing the amendment and granting summary judgment.

Did the judge err? Explain.

4)

===== Start of Answer #4 (557 words) =====

MEE Question 4: Federal Civil Procedure

Amendment. The trial judge likely did not err in allowing Defendant to amend his answer because the amendment is not unfair to the plaintiff. Under the Federal Rules of Civil Procedure, an amendment to a pleading is allowed at any time before the other party is served with a pleading, or if no response is required, then within 21 days after service. A court may grant a party leave to amend a pleading, and such leave is regularly granted when the "interests of justice" so require. The trial judge has the discretion to grant leave to amend, and his decision will not be overturned absent an abuse of that discretion.

In this case, new facts came to light after the time that Defendant could amend as a matter of right. Namely, after the deposition of Plaintiff, it came to light that Defendant may have an affirmative defense applicable to the facts. Because it is not indicated that trial is imminent, justice is not inhibited by the judge's grant of leave to amend. Both parties still have time to investigate the issue to present at trial. Therefore, the judge likely did not abuse his discretion and the amendment was not improperly granted.

Motion for Summary Judgment. The trial judge likely erred in granting summary judgment for Defendant. At issue is whether a genuine issue of material facts remains.

A motion for summary judgment is a disposition of the case prior to trial. Because it limits the non-moving party's ability to present her case, summary judgment should not be granted unless (i) there are no material facts in dispute, and (ii) all the facts, taken from the pleadings, affidavits, and other exhibits, when viewed in a light most favorable to the non-moving party entitle the movant to a judgment as a matter of law. If there is a dispute as to a material fact, then the court should not grant summary judgment.

In this case, in order to prove his affirmative defense, Defendant needs to show that (a) the plaintiff was not subject to adverse job action, (b) the employer exercised reasonable care, and (c) that the plaintiff unreasonably failed to take advantage of prevenative or corrective measures. The facts as to the second and third elements are in dispute here. Defendant offers no facts in the pleadings or other attachments to show that it exercised reasonable care in this situation, and Plaintiff stated in her deposition that she had not seen such effort to enforce its policies, e.g., that it did not take reasonable care. Furthermore, it is disputed whether Plaintiff's failure to take adavantage of the preventitve or corrective opportunities was unreasonable. Plaintiff stated in her depostiion that she was afrain that she would suffer retaliation if she used the proscribed procedures, and indeed her pleadings indicate that her direct supervisor may have been involved in the misconduct and substantiated her fears of retaliation. Thus, material facts are in disupte, and the matter should proceed to trial. Even if these facts were taken as Defendant pleads, when viewed most favorably to the defendant, a jury could find for Plaintiff, and thus Defendant is not entitled to a summary judgment. Therefore, the trial judge erred in granting summary judgment for Defendant. The case should be remanded and the trial should proceed.

=====**End of Answer #4**=====

END OF EXAM

MEE Question 5

Acme Inc. manufactures building materials, including concrete, for sale to construction companies. To create a market for its building materials, Acme enters into agreements with construction companies under which Acme and the construction company agree to form a member-managed limited liability company (LLC). The LLC builds the project, purchasing building materials from Acme and contracting for construction services with the construction company.

The operating agreements for these LLCs always provide that Acme has a 55% voting interest, that Acme and the construction company contribute equally to the capital of the venture, and that the parties share in profits at a negotiated rate. The agreements are silent as to the allocation of losses.

Acme entered into such a relationship with Brown Construction Co. LLC (Brown), forming Acme-Brown LLC (A-B LLC) to build 50 homes. The operating agreement for A-B LLC gives Acme a 55% voting interest and provides for a 20%/80% division of profits in favor of Brown.

A-B LLC built all 50 homes and sold them to homeowners. The members received a distribution of profits from the sales, split between them according to their agreement on the division of profits. However, all the concrete manufactured by Acme and sold to A-B LLC for the foundations of the homes proved to be defective. After a year, the concrete dissolved, collapsing the homes and rendering them worthless. In a class action by the homeowners against A-B LLC, the plaintiffs were awarded a \$15 million judgment. The LLC has no assets with which to pay the judgment.

Although Acme would be liable to A-B LLC for the loss caused by the defective concrete, A-B LLC has not brought a claim against Acme. Acme has the financial resources to pay damages equal to the amount of the \$15 million judgment in the homeowners' lawsuit and to fully cover A-B LLC's liability.

Brown has sent a letter to A-B LLC demanding that A-B LLC bring a claim against Acme to recover those damages and pay the judgment to the plaintiffs, after which A-B LLC would be dissolved. But Acme, as the manager of A-B LLC, has refused to do so.

Acme's lawyer has sent a letter to Brown stating the following:

- (1) Acme has no fiduciary obligations to either A-B LLC or Brown that require it to have A-B LLC bring the concrete claim against Acme.
- (2) Brown cannot bring a claim against Acme.
- (3) Brown does not have sufficient grounds to seek the judicial dissolution of A-B LLC.
- (4) Because the A-B LLC agreement provides for a 20%/80% division of profits, the losses arising from the judgment obtained by the plaintiffs against the LLC should also be allocated 20% to Acme and 80% to Brown.

Is Acme's lawyer correct? Explain.

5)

===== Start of Answer #5 (853 words) =====

Question 1

Acme has fiduciary obligations that obligate it to bring the concrete claim against Acme. At issue are whether the managing partner of an LLC has a duty to bring claims against those that damage the LLC.

The managing member of an LLC owes a fiduciary obligation to the LLC and to the other members. Part of this obligation is the duty to protect and preserve the property of the LLC. If another party is liable to the LLC, then the managing member must bring a claim against that party unless there is a good faith reason not to. Moreover, there is also an issue of self-dealing. The managing member cannot refuse to sue itself simply because it is an interested party because it is a breach of loyalty. The managing member also owes a fiduciary duty to the other members. This duty is not abrogated by the limited liability status - the managing member can be personally liable to the other members.

Here, Acme is the managing member, and it is allowing a judgment to make the LLC insolvent when it has a good faith claim against a third party. Failure to bring the claim is a breach of its fiduciary duty. Acme has no good faith reason not to bring the suit other than that it is an interested party. Thus, Acme is required to bring the claim against itself on behalf of the LLC.

Acme also has a duty to Brown to bring the claim against itself. Favoring itself over the LLC is a

breach of its fiduciary duty to the other members of the LLC.

Therefore, Acme has fiduciary obligations to both the LLC and to Brown to bring the claim against Acme.

Question 2

Brown can bring a claim against Acme. At issue is the rights of a member of an LLC to bring a claim against another member and the right to bring a derivative action.

Generally, members of LLCs are immune from personal liabilities. However, managing members are not immune in carrying out their duties as members. Thus, if managing members breach a fiduciary duty to the other members, they can be personally liable.

Members can also bring a derivative claim against the LLC as long as they first make a demand that the LLC itself bring suit.

Here, Acme was the managing partner, and it breached its fiduciary duty to Brown and the LLC by refusing to bring a claim against itself, as mentioned in response to question one. This is a managerial duty, so Acme can be held liable for this breach. It will not receive limited liability because it made this decision as a managing member.

Moreover, because Brown made a demand on the LLC and it refused, he can bring a derivative action against the LLC to compel it to file suit against Acme.

Thus, Brown could sue Acme personally as a member, or derivitively on behalf of the

corporation.

Question 3

Brown has sufficient grounds to seek dissolution of the LLC. At issue is whether breach of fiduciary duty is sufficient grounds to dissolve an LLC.

An LLC can be dissolved when its members no longer agree and it can no longer achieve its purpose. An LLC can also be dissolved when one party acts to the unfair detriment of the other party.

Here, Acme has the majority of the voting rights. The LLC is not deadlocked because Acme can control every vote. However, Acme is acting at the detriment of Brown. When one party takes advantage of another party and treats the other party unfairly in a way such as this, the courts will agree to dissolve the LLC. Here, Acme has 55% of the vote, so Brown is being unfairly suppressed. Moreover, as discussed below, Brown will be liable for most of the \$15 million judgment.

Question 4

Losses should be allocated 20% to Acme and 80% to Brown. At issue is allocation of losses when the operating agreement is silent.

Generally, profits and losses are split equally unless the operating agreement provides otherwise. If the operating agreement provides for a specific allocation of profits and omits a provision on losses, then losses follow profits. If the agreement provides for the allocation of profits and losses, then the operating agreement will be upheld.

Here, the operating agreement provides that Acme will receive 20% of the profits and Brown will receive 80% of the profits. The facts do not mention allocation of losses, so, presumably, the operating agreement does not provide for the allocation of losses. In that case, losses will mirror profits. Thus, the losses should be allocated 20% to Acme and 80% to Brown.

However, in LLCs members are not personally liable for the corporation. Thus, while the losses can be allocated against Brown's profits, Brown cannot personally be held liable because Brown is a member and receives limited liability. In some instances, members lose this protection, but there is nothing in the facts to suggest that Brown did anything that would cause it to lose limited liability. Thus, Brown is not personally liable for the judgment.

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===== End of Answer #5 =====

END OF EXAM

MEE Question 6

Zach died a domiciliary of State A. At Zach's death, he owned a house located in State A. Zach also owned a farm located in State B and had a savings account at a bank in State B.

Zach left a handwritten document containing instructions for the disposition of his assets. The only words on this document were the following:

I, Zach, being of sound and disposing mind, leave my entire estate to my alma mater, University. I appoint Bank as executor of my estate.

Zach's wife predeceased him. Zach was survived by three children, Alex, Brian, and Carrie. Alex was the biological child of Zach and his deceased wife. Brian was the biological child of Zach's deceased wife and her first husband, but Zach adopted Brian when Brian was 12. Carrie was the biological child of Zach and a woman whom Zach never married. Zach's paternity of Carrie was adjudicated during Zach's lifetime.

State A law provides that a holographic will "entirely handwritten and signed at the end by the testator" is valid. State A law also provides that if a decedent dies intestate and leaves no surviving spouse, the decedent's estate passes in equal shares to the decedent's "surviving children." The phrase "surviving children" is defined to exclude "nonmarital children." There are no other relevant statutes in State A.

State B law provides that (1) the will of a nonresident that bequeaths real property located in State B must comply with the law of State B; (2) a will is invalid unless it was signed by the testator and two witnesses; and (3) the estate of an intestate decedent who leaves no surviving spouse passes to the decedent's "biological and adopted children, in equal shares." There are no other relevant statutes in State B.

How should Zach's three assets be distributed? Explain.

6)

===== Start of Answer #6 (832 words) =====

I. House in State A

The issue is how should Zach's (Z) house in State A be distributed. The domiciliary of the decedent at death determines how an estate should be distributed. A will must comply the formalities required of the testator's domicile at death. State A's requirements for a holographic will require the entire document to be handwritten and signed at the end. Z's will failed to be signed at the end and therefore his will is invalid. Because his will is invalid the estate will fall to intestacy. State A requires that if the decedent leaves no surviving spouse that the estate will pass in equal shares to the decedent's surviving children. This phrase has been specifically defined to exclude nonmarital children.

Z was survived by Alex, Brian and Carrie. Alex is Z's biological child and therefore Alex will share in the home. Brian will also share in the home, because although adopted, Brian was adopted during the marriage between Z and his late wife.

As for Carrie, State A's statute prevents her from inheriting under the intestacy statute. The statute, however, is unconstitutional. This is because State A may not treat children born out of wedlock who have established paternity during the lifetime of the decedent as different under the intestacy statutes than children born in wedlock. Here, Carrie successfully established paternity during Z's lifetime. Therefore, State A may not constitutionally treat her differently than a child born in wedlock.

If State A' statute goes unchallenged, the house should only be distributed to Alex and

Brian in equal shares. If however, Carrie challenges State A statute as unconstitutional she will succeed and will also be entitled to inherit the home in an equal share with Alex and Brian because she successfully established paternity during Z's lifetime.

II. Bank Account in State B

The issue is which state law should govern the disposition of personal property outside of the decedent's domicile. The law of the testator's domicile determines the validity of a will. The will may properly dispose of real property located within the state and personal property wherever located. A savings account is personal property.

Z is a domiciliary of State A and attempted to dispose of personal property located in State B. This is permissible and State A will govern the distribution of the savings account. As noted before, Z failed to comply with the requirements for a holographic will because although handwritten, he did not sign at the end of the holographic will. Because he failed to properly dispose of his estate through his will the property will be distributed according to State A's intestacy statute. As noted above, if State A's intestacy statute goes unchallenged, Alex will take from the Bank account because he is a marital child. Brian will also take because he was adopted. Carrie will not take because State A does not recognize nonmarital children.

If however, Carrie challenges State A's statute as unconstitutional she will be successful because intestacy statutes may not treat children born out of wedlock who establish paternity before during the life of decedent differently than marital children. Carrie is also entitled to a 1/3 share of the State B savings account.

If State A's statute goes unchallenged only Alex and Brian take the savings account and will do so in a 1/2 share each. If challenged, Alex, Brian and Carrie will each share in 1/3 of the savings account.

III. Farm in State B

The issue is whether or not State B's law determines the disposition of real property when the real property is located within State B. Normally, the law of the decedent's domicile governs the distribution of assets. This is not the case, however, in a situation involving real property. It has long been acknowledged that that situs of real property governs all matters in relation to the property, including disposition of the property under a will. Where two state laws conflict on the issue of a disposition of real property, the law of the situs governs because it is generally accepted that the law of the situs has the greater interest in maintaining uniformity and control over property matters and property records located within its borders.

Although Z was a domiciliary of State A, he attempted to dispose of real property in State B. Because this disposition related to a disposition of real property, the law of the situs, State B, will govern. State B requires a formal will execution with attestation by two witnesses. Z's holographic will attempt was not attested and furthermore, it was not signed by Z. Because his will fails the property will pass according to State B's intestacy statute. Under State B, all biological and adopted children inherit in equal shares. Therefore, Alex and Carrie as biological children, and Brian, as an adopted child, will all take an equal 1/3 share in the property.

The farm in State B will be distributed in equal shares to Alex, Brian and Carrie.

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===== End of Answer #6 =====

END OF EXAM

03905



Applicant Number

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State of Franklin v. Soper

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State of Franklin v. Soper

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FILE

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

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.]

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.

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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.

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.

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. 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.

1) MPT1 - Please type your answer to MPT 1 below**When finished with this question, click to advance to the next question.***(Essay)*

===== Start of Answer #1 (1403 words) =====

Memo

To: Judge Leonard Sand

Re: State v. Soper

From: Examinee

Date: July 24, 2012

The State has charged Daniel Soper with killing Vincent Pike. Soper has moved to exclude evidence of statements by the alleged victim made 1) during a telephone call with a 911 dispatcher, and 2) in response to questioning by Officer Holden. The defendant's motion claims both sets of statements violate the Franklin Rules of Evidence 801 et seq. and the Defendant's rights under the Confrontation Clause of the Sixth Amendment.

Franklin Rules of Evidence 801 et seq.: Hearsay and exceptions

Both sets of statements made by Pike are within the definition of 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. Here both sets of statements were made by Pike prior to the upcoming trial and the Prosecution seeks to admit them for the truth of the assertions contained within the statements (assertions identifying the the defendant). Therefore the issue is whether the statements are

admissible as an exception to the hearsay rule.

Statements during the 911 call

Statements made by Pike during a 911 dispatch call must be analyzed to determine whether they fit within a hearsay exception. The relevant exceptions in this instance would be both the excited utterance exception found in Franklin Rule of Evidence 803(2) and the dying declaration exception in Franklin Rule of Evidence 804(b)(2).

Excited Utterance

A statement is not excluded by the hearsay rule, regardless of whether the declarant is available as a witness if the statement relating to a startling event or condition is made while the declarant is still under the stress of the excitement it caused. Here the statements made by Pike during the 911 call were likely made while under the stress of the situation. The emergency call was made by the alleged victim's neighbor upon realizing Pike had been shot. It is unclear how long after the shooting the call was made because the neighbor claims to have driven up to the house and found the situation.

However, the Franklin Supreme Court has stated that the "excited utterance need not occur at the same time as the event to which it relates. But must be made while the declarant still feels the stress of the startling event and has had no time for reflection." *State v. Friedman*, Fr. Sup. Ct. (2008) (quoting *State v. Cabras* (Fr. Sup. Ct. (1982))). Factors the court will consider when determining whether the statement was made out of stress of the startling event include: the declarant's physical and mental condition, his observable distress, the character of the event and the subject of his statements. *State v. Friedman*. The transcript reflects that Pike was still in his car which was parked sideways, and was bleeding from a gun shot wound. The facts also indicate that while the victim was speaking at 6:08 P.M. he was unconscious by 6:12 P.M. when the police arrived. These indications of the victim's physical condition and

statements about the victims pain could easily lead the court to conclude that Pike spoke while under the stress of the startling condition (the gun shot wound clearly being the startling condition).

Dying Declaration

Whether the statements made by Pike during the 911 call constitute a dying declaration is a closer call. A statement is not excluded by the hearsay rule if the declarant is unavailable to testify in a homicide prosecution if the statement was made by the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances. Further, the declarant must have died by the time of the trial. Here, Pike has died, making him an unavailable declarant, the statements concern the cause of the declarant's death, and this is a homicide prosecution. However, the court must look at the facts to determine whether the declarant believed his death to be imminent at the time of the statements.

The prosecution may prove a belief in imminent death by the declarants express language, by the severity of the wounds, or by any other circumstances which may shed light on the declarant's state of mind. *State v. Friedman*. The Franklin Supreme Court have found statements to be in belief of imminent death where the declarant had gunshot wounds to the respiratory system and liver and said "I don't want to die, I don't want to die," and in fact died shortly after. *Id.* Here, Pike did have gunshot wounds to his chest and/or stomach, and he declared "I don't feel so good." The court could also consider that the paramedics had not yet arrived. Still, Pike also said "I'm doing better," indicating that perhaps he did not believe he would die from the wounds.

The 911 phonecall statements should likely be admitted under the excited utterance exception, but probably not under the dying declaration exception.

Statements at the hospital.

The court should determine whether the statements made by Pike due to police questioning at the hospital are within either the excited utterance exception or the dying declaration exception to the hearsay rule.

Excited Utterance

The court must determine if the statements fit the definition and considerations of excited utterance discussed above. Here the statements were made by Pike after he had been unconscious, taken to the hospital, and had regained consciousness. Though the declarant was likely in a state of stress, this is not the question the court employs, but whether the state of stress is caused by the startling event and whether the declarant has had an opportunity to reflect. The record reflects that the police questioning took place two hours after the event, that Pike had regained consciousness and that he had had medical attention. It is unlikely that Pike was still under the same stress of the startling event, such that the statement could be considered an excited utterance.

Dying Declaration

The court must determine if the statements at the hospital fit the definition of the dying declaration exception discussed above. As noted, the statements were by a declarant who has died, and the statement will be offered in the homicide prosecution. Additionally, the statements by Pike that "It was Dan," concern the cause of death. The court must determine whether the declarant believed that death was imminent according to the factors discussed above and the surrounding circumstances.

It appears as though by the time the declarant made the statements, the doctors had

determined Pike would not likely survive. Whether Pike knew this is unclear. The Officer claims to have told Pike that he was "fading fast" just prior to Pike making the statements about the defendant and that Pike in fact did die half an hour later. This is probably sufficient proof, taken together, to show that Pike believed his death was imminent and that his statements made to Officer Holden were in such belief.

The court should admit the statements made by the victim at the hospital under the dying declaration exception to the hearsay rule.

Confrontation Clause of the Sixth Amendment

The Defendant has also raised his constitutional rights under the Sixth amendment as a reason to exclude statements by the alleged victim. The Supreme Court has noted that the Confrontation Clause bars testimony unless a criminal defendant has a right to confront the witness testifying. The Supreme Court identified historical reasoning to the rule and historical exceptions in *Crawford v. Washington*, which seems to allow dying declarations to be admitted at trial. Additionally the Court stated in *Hammon v. Indiana* and *Davis v. Washington* that statements are nontestimonial when made in the course of police interrogation in an ongoing emergency and that 911 operators may be agents of law enforcement when the conduct interrogations of 911 callers. Such statements should be admissible regardless of the Confrontation Clause so long as the police objectively indicate that the "primary purpose of the interrogation was to enable police assistance in meeting an ongoing emergency." *Michigan v. Bryant* (131 S. Ct. 1143 2011).

It seems the Supreme Court's recent decisions surrounding the Confrontation Clause have expanded the scope of admissibility such that the court may admit both the statements

made by Pike during the 911 call (ongoing emergency) and the statements at the hospital (dying declaration historical exception) without interfering with the defendant's constitutional rights.

=====
===== End of Answer #1 =====

END OF EXAM



Applicant Number

03905



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Ashton v. Indigo Construction Co.

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Ashton v. Indigo Construction Co.

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FILE

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, improper: The court should compel the defendant to remove all non-complying construction from its property.

Proper: 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.

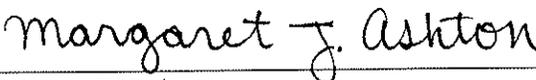
— I must spend additional sums for cleaning the outside of my house, especially the windows, and must do so on a more frequent basis than ever before.

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

Signed before me this 20th day of July, 2012



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

Signed before me this 20th day of July, 2012



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.

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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.

2) MPT2 - Please type your answer to MPT 2 below
(Essay)

===== Start of Answer #2 (1854 words) =====

MEMORANDUM

TO: Jim Hunter

FROM: Examinee

DATE: July 24, 2012

RE: Argument Section, Ashton v. Indigo

Argument

I. The Defendant's use of their property that abuts Plaintiff's property severely interferes with Plaintiff's use and enjoyment of her property and is a private nuisance.

A private nuisance is a non-trespassory invasion of another's interest in private use and enjoyment of land. 2nd Restatement of Torts (1984). To recover damages in a common-law nuisance case the plaintiff must prove: (1) the defendant's conduct was the proximate cause (2) of an unreasonable interference with the plaintiff's use and enjoyment of her property and (3) the interference was intentional or negligent. Parker v. Blue Ridge Farms, Inc. (2002).

A. Unreasonable Interference

In applying 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, (d) whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the plaintiff's use and enjoyment. Parker. Interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. Id. The defendant's use of his property may even be legal and desirable, but it still is a private nuisance because of the unreasonable interference. Id. In Parker, the jury used these factors to find that a dairy farm--a perfectly legal business and with a legal economic purpose--had created a private nuisance when the factory omitted offensive odors that unreasonably interfered with Plaintiff's use and enjoyment of land.

In the present case, Plaintiff admits that Defendant's use of their property to store 20 foot high mounds of dirt is legal. The Defendant's lot is zoned mixed use, although all other lots in the Graham District are zoned for residential use only. The Plaintiff readily admits that Defendant can haul dirt into the lot 14 hours a day leaving a dirt storm for neighbors to contend with. However, Defendant's legal use of their land is unreasonable to Plaintiff and her neighbors, and is a private nuisance.

Defendant's interference with Plaintiff's property is very extensive. The interference occurs an average of 14 hours a day, as trucks are constantly entering Defendant's lot to both load and unload piles of dirt. The trucks make a very recognizable and offending sound that is not common in the mainly residential neighborhood. Neighbors are used to the occasional garbage truck, but dump trucks screeching their tires and revving their engines is not at all within

the reasonable expectations of the neighborhood. Furthermore, the interference extends beyond the hours of 6am to 8pm when trucks are actually on site. The trucks leave mounds of dirt, dirt that is transported onto Plaintiff's property by wind. And when it rains, mudslides ensue and wreak havoc on Plaintiff's property. Plaintiff's property is constantly interfered with by Defendant's use of their land.

Looking at the suitability of the locality of Defendant's conduct, Defendant is the only business in the neighborhood. The Graham District is zoned residential use only, however the Defendant's lot is adjacent and is mixed use. Many of the residents of the Graham District, including Plaintiff, enjoy gardening and spending time in their backyards. This is a reasonable use of a residence. However, due to the noise and dust bowl, Plaintiff and her neighbors are not able to use their property, simply because one construction site decided to buy a mixed lot right in the middle of a residentially zoned area.

Looking at whether Defendant is taking all feasible precautions to avoid unnecessary interference, they are not. Plaintiff is aware, after obtaining property records from Buncombe County, that Defendant owns 50 acres of land on the outskirts of Appling. The site has paved roads. This land would be much better suited for Defendant's dirt pile. Defendant cannot argue their use of the property in the Graham District is reasonable when they have much more suitable property for dirt storage just miles away. Nonetheless, there is little evidence that Defendant has taken all feasible precautions to make the current site less of an interference. They know that dirt is constantly being blown onto Plaintiff's land, yet they have not attempted to erect a large fence. They leave the dirt piles uncovered and susceptible to being wind blown. The dump truck enters the property some 17 times a day, and there is no indication they have taken steps to make fewer trips.

Following the Parker analysis, Defendant's use of their property is an unreasonable interference with the Plaintiff's use and enjoyment of her property.

B. Proximate Cause and Intent

To complete a cause of action for private nuisance, Plaintiff must not only prove that Defendant's use property is and unreasonable interference with Plaintiff's use, but that interference is proximately caused by Defendant and that the interference was either intentional or negligent. Here, the Defendant's use is undoubtedly the proximate cause of Plaintiff's damages, and it is unlikely that Defendant would even dispute such. Plaintiff did not have massive amount of dirt coming onto her property until Defendant began using their lot as a dirt pile. The same is true for the offensive noises, that are solely the contribution of the dump trucks.

Furthermore, Defendant's interference was intentional. While Defendant's may not intend the Plaintiff's damages, they do and continue to use their property in an intentional manner, and that use causes the Plaintiff damages. The court in Timo Corp v. Josie's Disco found that while the defendants may not have intended that the noise from their business would cause discomfort to their neighbors, defendants were aware of the intrusion and chose to continue their behavior. Timo Corp v. Josie's Disco (2007). In the present case, Defendants are well aware that their use of the property for dirt storage is causing neighbors and the Plaintiff discomfort, as the Plaintiff and neighbors have met with Defendant over the issue and spoken with both the city and the press over the issues.

For all the reasons stated, this court should find that Defendant's use of their land is an intentionall and unreasonable use of their land, that has proximately caused Plaintiff damages, namely, the lack of the use and enjoyment of her land.

II. The Defendant's use of their property that abuts Plaintiff's property is a private nuisance and this court should grant Plaintiff's injunction to enjoin Defendant's use of their land for dirt storage.

The standing for granting a preliminary injunction is that the Plaintiff must show (1) a likelihood of ultimate success on the merits, (2) the prospects of irreparable injury if the provisional relief is withheld, and (3) that the balance of equities tips in the plainitff's favor. Otto Records Inc. v. Nelson (1984).

A. Success on the Merits

As outlined in the above brief, Plainitff can show a likelihood on a success of the merits.

B. Prospects of Irreparable Injury

Courts will generally not award an injuction when there is an adequate remedy at law,

such as money damages. Timo Corp. However, 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 Devis Arenas (1992). In Davidson, the court found that the Plaintiff's complaint that defendant was causing nightly intrusions of noise had no adequate remedy at law.

Here, just like in Davidson, the Plaintiff does not have an adequate legal remedy. Plaintiff does not seek money, as money will not make the constant noise and dirt collection stop. The Plaintiff here, just like in Davidson, needs the Defendant to stop their interference with her land. An injunction is the only adequate remedy.

C. Balancing of Equities

Courts are hesitant to enjoin a party's legal use of their land, as it will not only stifle legitimate business activity, but will add an additional cost of doing business. Timo Corp. Courts must necessarily distinguish between those uses which should continue while absorbing the relevant cost, and those which are so unreasonable or undesirable that they should be stopped completely. Id. In determining the balance of equities, courts 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 of lawfulness of defendant's conduct.

First, looking at the hardship to the Defendant, the hardship is small. Plaintiff is not asking the Defendant to close down a factory or stop making some product. Plaintiff is asking Defendant not to store their dirt on the property. Enjoining will this use will not close down any

business, it will not cause Defendant to have to remove infrastructure, it will not cause Defendant to lose employees or stop selling a product. Enjoining the current use will only effect dirt, literally. Defendant's will have to find a new place to store their dirt. Coincidentally, Defendants own a 50 acre plot of land just on the outskirts of town, very suitable for dirt storage. Defendant's have ready access to that location, with no additional cost to Defendants. The hardship to Defendant is very slight considering the great hardship that Plaintiff is facing.

Second, in viewing the good faith or intentional misconduct of Defendant's use of their land, it is unlikely that Defendant has acted with any misconduct. However, they have not been entirely receptive to the wishes of the neighborhood concerning the lot. All Defendant has done is slow the use of the land down to 14 hours a day, instead of all hours of the night. Furthermore, there has been no good faith attempt by Defendant to find other means of stopping the movement of dirt onto Plaintiff's property. Defendant is a construction company, and it is likely they could construct a tall fence or some type of structure to help stop the movement of dirt. However, they have not. Their good faith only begins at 8pm when they stop hauling dirt, but it subsequently ends when they begin hauling again at 6am every morning.

Third, the interest of the general public in continuing the defendant's activity is slight. The Defendant is a private construction company and they have other locations to store their dirt. Enjoining Defendant from using their current lot will not harm the general public. While the Defendant has brought jobs to the area with construction projects, use of the lot in question is just part of their overall operation.

Finally, Defendant's conduct is legal. However, Plaintiff's have been unable to get the lot Defendant uses rezoned because of Defendant's good will with the city. Indigo has been very

