July 2012 Bar Examination

Question 1

In order to obtain leniency in another criminal matter, Informant agreed with the police to set up a drug deal with his dealers, Drug Dealer and King Pin, a career criminal. In a conversation recorded by the police, Informant called Drug Dealer, who agreed to call King Pin to obtain the cocaine. In a subsequent conversation recorded by the police, Drug Dealer confirmed with Informant that King Pin was willing to sell a kilo of cocaine for $7500.00.

Informant arranged to meet King Pin and Drug Dealer in the parking lot of an abandoned warehouse. The police made photocopies of the $7500.00, wired Informant for sound, and set up video surveillance of the parking lot.

At the appointed time, Informant drove to the parking lot. Individuals later identified as Drug Dealer and King Pin drove up to the parking lot in a Mustang, accompanied by King Pin's Lookout, who was driving a Range Rover. Lookout rolled down his window and signaled to Drug Dealer. Drug Dealer got out of the Mustang and got into Informant's car. Drug Dealer, caught on tape, gave Informant a kilo of cocaine and Informant paid him with the marked $7500.00 bills.

Once the drug transaction was completed and Drug Dealer exited Informant's car, the police signaled a takedown and converged on all 3 vehicles. Seeing the police, King Pin drove off in the Mustang, leaving Drug Dealer in the parking lot with the marked money. Drug Dealer was immediately arrested, and the marked money was confiscated by the police.

King Pin was chased by the police and was also arrested. Police found a small amount of cocaine in King Pin's pocket. He was given his Miranda warning. He confessed that Drug Dealer had set up the sale to Informant and that he had participated in the sale.

A uniformed police officer approached the Range Rover, which remained in the parking lot, and asked Lookout for his driver's license. Lookout was unable to produce a driver's license or any other form of identification. The police asked Lookout for consent to search the Range Rover, but Lookout refused, stating that King Pin was the owner of the Range Rover. The department's K-9 unit arrived and a trained drug dog alerted to the presence of drugs in the door of the Range Rover. A search revealed a sawed-off shotgun and small amount of powdered cocaine. Lookout was arrested.

Drug Dealer, King Pin and Lookout were jointly indicted for conspiring to sell cocaine, for conspiring to possess cocaine, for conspiring to possess a sawed-off shotgun, and for conspiring to possess a firearm in commission of a felony. Lookout was also indicted for possession of a sawed-off shotgun.

King Pin's request for bond was denied. Drug Dealer was released on bond, but failed to appear at his arraignment. At trial, Drug Dealer's whereabouts were unknown. The

trial judge severed the trial of King Pin and Lookout, and ordered that the case against King Pin and Drug Dealer go forward.

Your firm has been appointed to represent King Pin. The senior partner has asked you to prepare a comprehensive Memorandum of Law that addresses certain legal issues involved in King Pin's defense. Please prepare a memo that addresses the following issues:

1. King Pin wants to block the use at trial of Drug Dealer's recorded statements to Informant.

   (a) What are the arguments that can be made against the use of these statements in King Pin's trial?

   (b) When and how should the arguments be made?

   (c) What is the likelihood of success of each argument?

2. King Pin wants to suppress his confession to the police. He tells you that he was told by the police when they stopped him that if he would make a statement, he would be released on bond.

   (a) What arguments can be made to suppress his confession?

   (b) When and how should the arguments be made?

   (c) What is the likelihood of success of each argument?

3. The District Attorney intends to introduce the shotgun and cocaine found in the Range Rover at King Pin's trial.

   (a) What grounds, if any, does King Pin have to try to exclude this evidence?

   (b) When and how should these arguments be made?

   (c) What is the likelihood of success of each argument?

Question 2

You are an associate in a law firm. The domestic relations partner asks for your assistance with Mary Smith, a new client. Mary has contacted the firm because she and her husband, John, have separated and John has filed for divorce. Mary provides you with the following facts:

She and John were married on April 1, 2001. It was a second marriage for both and they did not sign a prenuptial agreement. There are no children as a result of their marriage. When they married, John owned a home, which was paid for. Mary did not have a home but she did have $15,000.00 in cash from her previous marriage. Right before their marriage, John sold his home and invested all of the proceeds, $200,000.00, in a marital home for the two of them. The home, purchased for $300,000.00, was titled in both names and they jointly signed a mortgage for an additional $100,000.00. A few years later, Mary spent her $15,000.00 to add a pool and pool house. Both parties have worked throughout the marriage, and the mortgage on the marital home was paid in full in 2011. The house has a current value of $280,000.00. Both parties have retirement accounts with approximately the same value, and there are no joint debts. The marital home is the only substantial asset of the marriage.

John had an affair in 2010. Mary found out and they separated. After John agreed to go to counseling, Mary forgave him and they reconciled. Since their reconciliation, Mary has begun an affair with her boss. She thinks John may be able to prove that he separated from her due to her adultery because he has alleged adultery as a ground for the divorce. Despite her affair, Mary does not want a divorce. She blames John for their marital difficulties and wants John ordered to pay her attorneys' fees for the divorce.

Please provide a memo to the domestic relations partner that answers these questions:

1. What claim, if any, does Mary have to the equity in the marital residence?

2. What is the effect, if any, of John's affair on the distribution of the marital assets?

3. What is the effect, if any, of Mary's affair on the distribution of the marital assets?

4. What ability, if any, does Mary have to get the court to order John to pay some or all of her attorneys' fees?

Question 3

A major rift has occurred among the members of the Second Congregational Apostolic Church of Alfalfa, Georgia, Inc. (hereinafter the "Church"). While there are a number of religious and financial issues in contention, the debate between the two Church factions was started by a decision of a majority of the members (hereinafter referred to as the "Defendants") at a duly called church business meeting to go forward with renovations to the Church property, including the installation of indoor plumbing. These renovations had been proposed by the Church's Pastor and its Governing Board.

Both sides to the rift now claim they represent a majority of the Church members in good standing. Within limits, both sides believe that a majority of such members should control the decisions of the Church, as provided in the Church's Articles of Incorporation and Bylaws. However, the faction that "lost" the vote at the Church meeting (hereinafter the "Plaintiffs") also contends that the congregation is subject to the control of its Bishop, the Church being a member of a larger religious organization which claims that its regional Diocese is the true owner of the Church's property, and that the Diocese is in turn under the leadership of its Bishop. The Plaintiffs further claim that their Bishop supports their positions and that the diocesan authority overrides the decisions of a Church "majority" with respect to Church property issues as well as doctrinal issues of faith. The Church's pastor, with the support of the Governing Board and the Defendant majority, excommunicated the Plaintiffs and declared they were no longer members in good standing of the Church and could therefore no longer vote on Church matters.

The Plaintiffs have now filed suit in the local Superior Court seeking an injunction to stop the structural renovations to the Church, to have themselves declared members in good standing of the Church, to find that they in fact represent a majority of the voting members of the Church, and, in the alternative, to have a declaration that the Bishop controls all decisions affecting the Church's property. They also claim the other faction had no authority to pledge the Church property as collateral for a loan to undertake the changes to the Church. The Defendants have answered that, among other things, the Court has no jurisdiction to become involved in religious issues among Church members and in disputes between an individual Church and its Diocese.

In addition, some of the Defendant Church members have become so incensed at the behavior of some of the Plaintiff members that these Defendants are bringing their firearms to Church services. Some of the Plaintiff members, in a separate action, want the Court to enjoin all parties from having guns on the Church premises. Neither the Plaintiff group nor the Defendant group has officially adopted a policy about bringing firearms to Church services. The attorneys for the gun-toting Defendants in this second court filing claim that their clients have an absolute right to protect themselves, their families, and others while attending Church, especially when some of the Plaintiffs have allegedly made threats against them.

Lastly, some of the Plaintiffs have brought a third action seeking removal of the Pastor of the Church and alleging he had slandered and libeled them by excommunicating them as members in good standing and by publishing the excommunication edict in the

Church bulletin. By way of answer, the Pastor's attorneys claim that this is an internal Church matter in which the courts have no jurisdiction.

1. Please discuss the extent to which Georgia courts can become involved in religious controversies, any guiding principles that would apply in such disputes, and, more specifically, how the Superior Court should respond to the issue of whether it has jurisdiction to consider issues raised in the first action for injunctive relief.

2. Please discuss the rights and limitations of Church members to bring firearms to a public church service in Georgia and the analysis a court should apply to the balancing of individual and societal rights in such a context and in light of current law.

3. In considering the third lawsuit, discuss whether the Court has jurisdiction to consider the removal of the Pastor and the status of church members. Also discuss how Church communications may be privileged, or not, in light of the suit for libel and slander as described in this third action.

NOTE: Your discussion of the above issues should primarily focus on the principles of law that a Court should consider in responding to the parties' claims rather than how such a Court might rule on the merits of such claims.

Question 4

In May of 2008, the Gray County Historical Society, a Georgia nonprofit corporation (hereinafter Gray), contacted Professor Author (hereinafter Author) to discuss the writing of a book on the history of Gray County. On May 27th of 2008, the officers of Gray, Author, and Jane Hill (hereinafter Hill), the executive director of Gray, met at Gray's office to discuss the project.

At the meeting, Gray presented a properly-executed letter agreement to Author offering to pay Author $20,000.00 to write the book and have it ready for publication by June 1, 2011. According to the agreement, Gray would pay Author $5000.00 up front and make a final payment of $15,000.00 within one month of the date Author delivered the manuscript to Gray. The agreement provided that at least 18 months would be spent doing research for the book. Gray agreed to make all its records available for that purpose.

At the meeting, Gray explained to Author that the June 1, 2011, delivery date was important because Gray intended to have the book ready for sale for holiday gifts in December of 2011. Gray anticipated that these sales would largely recoup its costs. Gray explained that its publisher needed four months from the delivery of the manuscript to deliver the books to Gray.

At the end of the meeting, Author told Gray he was very busy with teaching and working on other previously contracted projects. Author told Gray he would like to look at his schedule, think it over, and get back to Gray within the next couple of weeks.

On June 7, 2008, Author sent a letter to Gray agreeing to the terms of Gray's letter agreement. Gray sent Author the $5000.00 down payment on June 10, 2008. Author received Gray's check on June 14, 2008.

In August of 2008, while talking about Gray's book with another historical society director, Hill learned that other historical societies had used Author in the past to write books and that he had never finished a book project on time and some had been delayed for years. Hill immediately convened a meeting of Gray's officers and told them what the other historical society director had told her about Author.

The officers of Gray told Hill to call Author and suggest that Author agree to a liquidated damages provision of $1000.00 a month for every month the book was late. Gray instructed Hill to tell Author that if he did not agree, Gray would find another writer and ask Author to return the $5000.00 down payment.

When Hill called Author in August of 2008, he told her he had already begun work on the book and that he had turned down other projects because of his commitment to Gray.

After a long discussion, Author told Hill that the $1000.00 a month penalty for being late was agreeable with him.

In the spring of 2009, Hill noticed a young man, Larry Learner (hereinafter Learner), regularly coming into Gray's office and doing research. Hill inquired as to what Learner was doing. Learner explained he was a graduate student of Author's working on a master's degree and that Author had paid him $5000.00 to help research, outline, and write the book on Gray County history while he was working on his thesis.

Hill called Author immediately and said Gray had contracted with Author to write the book and was upset that Learner was there doing research. Author said he always used graduate assistants to do leg work and that he would oversee the research and writing of the book. Hill and Gray were not happy but did not further pursue the issue with Author.

In early 2011, Learner told Hill that Author had fallen gravely ill and was in the hospital. In fact, Author was hospitalized all of February and most of March of 2011. Before June 1, 2011, Author called Hill and explained that his illness had kept him from being able to finish the book on time and that it would be a few more weeks before it would be completed. On August 1, 2011, Author delivered the finished manuscript to Gray. Two weeks later, Author received a check from Gray for $13,000.00 with a brief letter from Hill explaining that Author's delivery was two months late and that Learner, not Author, did most of the work. Author objected and demanded the additional $2000.00.

1. Was there an enforceable contract between Gray and Author?

    (a) If the contact was enforceable, on what date was the contract effective and why?

    (b) What difference would it have made regarding enforceability if Author's acceptance had been by telephone or email? Explain your answer.

2. After Author balked on accepting the $13,000.00 final payment, Gray comes to you to seek your advice regarding damages.

    (a) What advice do you give Gray with regard to the liquidated damages modification and damages generally? Explain your answer.

    (b) What defenses would Author have with regard to the liquidated damages modification and damages in general? Explain your answer.

    (c) Can Gray use the Parol Evidence Rule regarding the liquidated damages modification of the contract?

3. Presume Gray came to you for legal advice once Hill became aware that Author hired Learner to see what could be done to be sure Author, not Learner, did the research and writing.

   How would you have advised Gray? Explain your answer.

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State of Franklin v. Soper

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STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

MEMORANDUM

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

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

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

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

STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

MEMORANDUM

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

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

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

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

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

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

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

STATE OF FRANKLIN
DISTRICT COURT OF PALOMAS COUNTY

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

MOTION TO EXCLUDE EVIDENCE

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

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

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

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

The Defendant requests a pretrial hearing concerning this motion.

Dated: July 10, 2012

Angela Cupers

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

EXHIBIT A

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

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

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

Operator: Okay, where are you, sir?

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

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

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

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

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

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

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

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

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

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

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

Operator: Who shot you?

Pike: [Silence]

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

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

Operator: Did you see the license plate?

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

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

Operator: Okay, just hold on.

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

[Call terminated.]

EXHIBIT B

CITY OF SPRINGFIELD POLICE DEPARTMENT

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

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

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

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

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

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

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

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

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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.

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.

---

[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.

[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.

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You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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Ashton v. Indigo Construction Co.

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Ashton v. Indigo Construction Co.

FILE

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

STATE OF FRANKLIN
DISTRICT COURT OF BUNCOMBE COUNTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: July 20, 2012

Margaret J. Ashton

Margaret J. Ashton

Signed before me this 20th day of July, 2012

Jane Mirren

Jane Mirren
Notary Public

STATE OF FRANKLIN
DISTRICT COURT OF BUNCOMBE COUNTY

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

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

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

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

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

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

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

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

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

Dated: July 20, 2012

William Porter

William Porter

Signed before me this 20th day of July, 2012

Jane Mirren

Jane Mirren
Notary Public

Appling Gazette

Neighborhood Complains of "Dirty" Business

June 6, 2012

By Claire Anderson

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

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

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

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

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

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

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

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

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.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.