July 2023
MPT-1
Drafters' Point Sheet

Dobson v. Brooks Real Estate Agency

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

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Dobson v. Brooks Real Estate Agency
DRAFTERS' POINT SHEET

The item presents the examinee with the task of drafting a brief in support of a motion *in limine* seeking to bar the admission of two pieces of evidence and to permit the introduction of one piece of evidence. The examinee's law firm represents Peter Dobson, who slipped and fell on an ice-covered sidewalk. He sustained substantial injuries and missed three months' work. On Dobson's behalf, the law firm has filed a lawsuit alleging negligence against the Brooks Real Estate Agency, which owns the building abutting the sidewalk where Dobson slipped on the ice. Discovery has been completed with the trial set to begin next month. The motion *in limine* will address the admissibility of three things: a conversation that Dobson had with a neighbor, the deposition testimony of a physician who is now deceased, and the insurance policy on the Brooks Real Estate Agency building.

The File contains the task memorandum from the supervising attorney, the firm's guidelines for writing persuasive trial briefs, the transcript of the client interview, a file memorandum summarizing a related action, another memorandum from an investigator, and excerpts from the deposition of a physician who examined Dobson. The Library contains selected provisions from the Franklin Rules of Evidence (FRE), and two Franklin cases: *Reed v. Lakeview Advisers LLC* (discussing "admission by silence" under FRE 801), and *Thomas v. WellSpring Pharmaceutical Co.* (discussing the use of former testimony under FRE 804(b)).

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

The examinee's task is to draft the argument in support of the plaintiff's *motion in limine*. The File includes a format memorandum containing guidelines for persuasive briefs, which examinees are expected to follow. The legal argument should be divided into sections that address the key issues, citing relevant authority for each legal proposition, and including carefully written subject headings. Contrary authority should be addressed and explained or distinguished. Note that examinees are directed *not* to draft a statement of facts. Finally, examinees are instructed to anticipate and respond to likely arguments from the opposing party.

II. FACTS

This section summarizes those facts most relevant to an argument in support of the motion *in limine*. Note that examinees are instructed *not* to prepare a statement of facts.

As detailed in the client interview, Dobson was walking on the sidewalk on Elm Street when he slipped and fell on ice in front of the building owned by the Brooks Real Estate Agency. Dobson sustained a broken arm, a broken leg, and a concussion. He was hospitalized for two days and off work for three months. The law firm has filed a negligence action against Brooks alleging that the agency had a duty to keep the sidewalk safe and breached that duty. Dobson is seeking damages for medical expenses, lost wages, and pain and suffering.

There is another pending action arising from Dobson's fall on the icy sidewalk. Dobson is represented by attorney Robert Chen in a disability discrimination case based on the failure by Dobson's employer, the City of Bristol, to accommodate his injuries after the fall. Dobson has given the law firm permission to discuss that case with attorney Chen.

The suit against the City, *Dobson v. City of Bristol*, was brought under Franklin's Disability Act. Essentially, Dobson's claims are that he was not given sufficient time away from the office and was not given other accommodations to which he was entitled. The City's position is that Dobson's injuries were not as severe as claimed. The cause of Dobson's injuries is not at issue in the case against the City. Discovery has been completed and a trial date has been set.

Attorney Chen suggested that the partner review the deposition Chen took of Dr. Miller as part of the discovery in the *Dobson v. City of Bristol* litigation. Miller, who is now deceased, was the physician who examined Dobson after the incident. At the deposition, Chen made the strategic decision not to examine Dr. Miller as to her opinion about the extent of the injuries because Chen's focus was on the level of accommodations given to Dobson. He also asked Dr. Miller about several malpractice claims against her.

The File also contains a memorandum from the law firm's investigator. The investigator spoke with Doris Gibbs, who is on the witness list for the defense. Gibbs brought food to Dobson and visited while he was recovering from his injuries. After Dobson was well enough, he and his wife invited Gibbs and her wife to dinner to thank Gibbs for her generosity. At that dinner, the topic of how Dobson was injured came up. Gibbs told the investigator that she had said to Dobson, "We have all been clumsy before. I bet that you were trying to get to the store quickly. And I would guess, like most of us, you were on your phone at the time." Gibbs states that she had not said this

as an accusation but only as a statement of fact and of understanding. Dobson made no response to her statement. Gibbs said that she thought he was listening—Dobson had set his drink down and looked at her while she was speaking. Gibbs said that there was the usual background conversation sound in the restaurant. After she made the comment about Dobson likely using his phone when he fell, no one said anything for about a minute. The couples then talked about other things. The dinner concluded amicably. Gibbs stated that she knows nothing else about Dobson's fall and has no personal knowledge of it.

The investigator also verified that Dr. Lena Miller, the physician who examined Dobson in the emergency room, died two months after being deposed.

Finally, the investigator reviewed the deed for the building occupied by Brooks Real Estate Agency and determined that it was indeed owned by the agency. The insurance policy for the property explicitly covers sidewalks adjacent to the property.

The File also contains excerpts from the deposition of Dr. Miller in *Dobson v. City of Bristol*. Dr. Miller testified that she examined Dobson in the emergency room. Dr. Miller opined that Dobson suffered from hairline fractures of his arm and leg. Consequently, he should have been able to walk using a walking cast after about two weeks. His arm should have fully healed in about six weeks. In her opinion, the concussion was minor, with only a week needed for recovery. Dr. Miller said that the pain from Dobson's injuries would not have been that great. He should have been able to return to work after six weeks.

III. THE LAW

The Library contains excerpts of Franklin Rules of Evidence 403, 411, 801, and 804. The Franklin Rules are identical to the Federal Rules of Evidence.

Hearsay Exceptions under FRE 801(d): Admission by Silence

Franklin Rule of Evidence 801(d)(2) excludes from the definition of hearsay any statement made by a party and offered by an opposing party. Included within the definition of a statement made by a party is a statement that "the party manifested that it adopted or believed to be true." Courts have construed this language to include statements that were "admitted by silence." If, through silence, a party acquiesces in a statement made by another, that statement may be introduced against the party under Rule 801(d)(2).

There are four preconditions for a statement to be admitted by silence:

(1) the party must have heard the statement;

(2) the party must have understood the statement;

(3) the circumstances must be such that a person in the party's position would likely respond if the statement were not true; and

(4) the party must not have responded.

Reed v. Lakeview Advisers LLC (Fr. Ct. App. 2015). Context is critical when determining whether any of the four preconditions have been met. *Id*.

In *Reed*, the trial court granted the plaintiff's motion *in limine* to preclude the introduction of a statement made by the defendant's head of human resources (HR). In a meeting after Reed's firing, the head of HR told Reed that she had been terminated because of her inadequate work and tardiness. Reed said nothing in response to the statement.

The appellate court reversed, holding that by not responding to the statement made by HR, Reed had made an "admission by silence" that should have been admitted under FRE 801(d)(2) as an opposing party's statement. The court noted that Reed had heard and understood the statement, which was made during a serious conversation, in an office setting where employment matters were discussed. The court reasoned that one in Reed's situation, who felt she had been terminated unlawfully, would have responded to the statements made by the HR head. In refusing to admit the statement as an admission by silence, the trial court abused its discretion.

Rule 403, Exclusion of Relevant Evidence

A party may challenge the introduction of a statement under Rule 403 if "its probative value is substantially outweighed by a danger" of unfair prejudice," among other things. For example, in *Reed*, the plaintiff also challenged admission of the silently acquiesced-to statement as being unfairly prejudicial under Rule 403. The court rejected that argument, concluding that introduction of the statement was not *unfairly* prejudicial to the plaintiff as the statement would not cause the jury to reach an unacceptable inference or an incorrect result.

Rule 804(b)(1), Hearsay Exceptions, Declarant Unavailable

Under Rule 804(b)(1), the proponent must satisfy both requirements of the rule to admit testimony from an unavailable witness: the testimony was given as a witness at a trial, hearing, or

lawful deposition, and the party against whom the testimony is offered, or that party's predecessor in interest, had an opportunity and similar motive to develop the challenged testimony. *Thomas v. WellSpring Pharmaceutical Co.* (Fr. Ct. App. 2017) provides guidance for how Franklin courts apply Rule 804(b)(1).

In *Thomas*, the plaintiff was one of many consumers who sued the defendant drug manufacturer after suffering side effects from use of a cold medicine called ExitCold. The trial court granted WellSpring's motion *in limine* to admit the testimony of a Dr. Shaw, who had testified for WellSpring in another ExitCold trial, *Murphy v. WellSpring*, but was now deceased and thus unavailable to testify in *Thomas v. WellSpring*.

Predecessor in Interest Standard

In *Thomas*, a preliminary issue was whether Murphy, the plaintiff in the earlier case in which Dr. Shaw had testified, satisfied the Rule 804(b)(1) requirement that the party in the prior proceeding be a "predecessor in interest" of the party in the current litigation. The plaintiff argued that Murphy was not a "predecessor in interest" to her.

Rule 804(b)(1) requires some "similarity of interest" between the party against whom the testimony is now sought to be introduced and the party against whom the testimony was introduced in the prior matter. The plaintiffs in both cases (both Thomas and Murphy) had sued WellSpring over the side effects caused by ExitCold. The causes of action were identical. In *Thomas*, the court found this sufficient to satisfy the "predecessor in interest" requirement.

Similar Motive Inquiry

The court then turned to whether the predecessor in interest (Murphy) had "a similar, not necessarily an *identical*, motive to develop the adverse testimony in the prior proceeding." *Id.* (emphasis added). Assessing "similar motive" requires application of a two-part test: "whether the questioner is on the same side of the same issue at both proceedings, and whether the questioner had a substantially similar interest in asserting that side of the issue." *Id.*

Dr. Shaw's testimony related to the drug's side effects in general and not the side effects incurred by any particular individual. Plaintiff Murphy had had the opportunity and similar motive to cross-examine Dr. Shaw at his trial, as the issues in both cases were the same: whether the drug

caused debilitating side effects. Murphy did in fact robustly cross-examine Dr. Shaw. On these facts, the trial court properly admitted Dr. Shaw's testimony from the Murphy case.

Opportunity to Develop the Testimony

Rule 804(b)(1) requires that the party against whom the evidence is introduced had "an opportunity . . . to develop [the former testimony] by direct, cross-, or redirect examination." The rule does not require that the party actually developed the testimony. Thus in *State v. Williams* (Fr. Sup. Ct. 2013) (cited in *Thomas*), deposition testimony from a now-unavailable witness in a related civil case was admissible because counsel had spent considerable time during the deposition impeaching the witness and exploring the witness's motive. Moreover, the defendant did not explain how he was prevented from pursuing lines of questioning or how they would have been pursued any differently at trial. In *Thomas*, the fact that the former testimony was from a trial on the same issue (the medication's side effects) made an even stronger argument for the conclusion that there had been ample opportunity to develop the testimony.

IV. LEGAL ISSUES

The examinee will need to make three arguments, one directed at each piece of evidence, and apply the relevant Rule of Evidence for that portion of the motion *in limine*.

A. The Court should not admit the conversation between Dobson and his neighbor, Doris Gibbs, because Dobson's silence does not meet the criteria for an admission by silence under FRE 801(d)(2).

As stated in the task memorandum, the law firm wants the trial court to rule that the content of the dinner conversation between Dobson and his neighbor, Doris Gibbs, is inadmissible. Examinees should formulate their argument based on the requirements of FRE 801(d)(2) and the criteria identified in *Reed*.

- Analysis should begin with Rule 801(b)(2), which provides that a statement made by a party may be introduced by any opposing party. Included within that definition are statements the party manifested that it adopted or believed to be true, often referred to as "adoptive admissions."
- Examinees should analyze the statement using the preconditions discussed in *Reed*:

- the party must have heard the statement;
    - the party must have understood the statement;
    - a person in the party's position would have responded had the statement been incorrect; and
    - the party did not respond.
- Note that in *Reed*, all four preconditions were met. The meeting occurred in the HR director's office, and Reed knew that the subject of her termination would be discussed. The office was quiet and there was no question that Reed heard and understood the statement. Moreover, it was phrased in a way that suggested that a response was appropriate. The HR director began the statement with "You know that…," suggesting that Reed should say something if it were not true.
- The *Reed* court emphasized the importance of context when evaluating a statement for purposes of Rule 801(d)(2). Accordingly, the examinee should use the facts in the investigator's memorandum to distinguish *Reed*.
    - Here, the possible adopted admission was not made by a person in authority, such as the HR director in *Reed*; Doris Gibbs is just one of the Dobsons' neighbors.
    - Gibbs was not involved in the circumstances of Dobson's fall or commenting on a topic that she had an interest in, unlike the HR director in *Reed*. [E.g., the circumstances would be very different if the conversation had been between Dobson and the owner or an employee of the Brooks Real Estate Agency.]
    - The statement was made not in an office environment but in a restaurant.
    - The participants had imbibed a beer each.
    - Thus, the circumstances were not necessarily such that a response would be expected.
- The noise level at the restaurant is unclear—a fact that goes to three of the *Reed* considerations: whether Dobson heard the statement, whether he understood it, and whether he was expected to respond. *Cf. State v. Patel* (Fr. Ct. App. 2010) (cited in *Reed*) (holding that statement was not acquiesced to by silence because it was unclear whether the defendant heard or would be expected to respond to a statement made at a loud party with over 100 attendees).
- Arguably, Gibbs's statement was posed in such a way that it would likely have provoked a response ("And I would guess, like most of us, you were on your phone at the time."). On

the other hand, it is rather innocuous and a far cry from the accusation of adultery that was admitted in *Hill v. Hill*. So there is a solid basis for the examinee to argue that the statement was not necessarily one that demanded a response.

- Because the goal of the motion *in limine* is to exclude the statements, a thorough response should reference FRE 403 and argue in the alternative that, even if Gibbs's statement is admissible as an adopted admission under *Reed*, the danger of unfair prejudice significantly outweighs the probative value of the evidence. The statement about the reason for the plaintiff's discharge in *Reed* had much greater probative value than does Doris Gibbs's offhand comment during dinner. The context of the statements in *Reed* gave them more probative value. By contrast, here there is a substantial danger of unfair prejudice that the jury will give Gibbs's statement undue weight, or even view it as dispositive as to the cause of Dobson's fall, which is a key issue in the case.

B. The Court should exclude the deposition testimony of Dr. Miller because Dobson, the party against whom the testimony is being introduced, has not had the opportunity to develop the testimony by direct or cross-examination, nor did he have a similar motive in developing the prior testimony in *Dobson v. City of Bristol* as required by FRE 804(b)(1).

- Rule 804 provides the structure for the examinee's argument that Dr. Miller's deposition testimony in *Dobson v. City of Bristol* should not be admitted. On this issue, the facts are not particularly favorable to Dobson.
- Under Rule 804(a), the witness must be unavailable. Here there is proof that Dr. Miller is deceased, thus the witness meets the standard of Rule 804 for unavailability.
- Under Rule 804(b), the former testimony must be from the same or a similar proceeding and the party against whom the testimony is being introduced must be the same party or, in a civil case, a predecessor in interest. Also, the party against whom the testimony is being introduced must have had the opportunity to develop the testimony by direct or cross-examination and must have had a similar motive in developing the prior testimony.
- This issue should be analyzed under *Thomas v. WellSpring*. In *Thomas*, the prior testimony was admitted even though it was from a trial with a different plaintiff.

- Here, the former testimony is being introduced against the same party—Dobson. The only difference is that there is now a different party on the opposing side—the Brooks Real Estate Agency.
    - The discussion in *Thomas* of the "predecessor in interest" standard is not relevant in Dobson's case because the party against whom the evidence is being introduced (Dobson) is the same person.
- The crucial issue here is whether Dobson had an opportunity and similar motive to develop the testimony. Here, Dr. Miller's testimony in *Dobson v. City of Bristol* occurred during a deposition and not in court. Depositions are generally taken for discovery and are not intended to replace trial testimony. An attorney may not want to ask certain questions during a discovery deposition but can save them for later use at a trial.
- The examinee should distinguish language in *Thomas* (citing *State v. Williams*) noting that deposition testimony can be introduced in a trial of a related action. To that end, the argument should emphasize the strategy mentioned by Attorney Chen—to focus during the deposition on the lack of accommodations rather than the severity of Dobson's injuries—and so demonstrate that there were important and valid reasons for not asking all potential questions of Dr. Miller at the deposition but reserving some for trial.
- Again, a thorough response will include an argument that the testimony of Dr. Miller should be excluded under Rule 403. Although this is a weak argument, the examinee should argue that the probative value of Dr. Miller's deposition is low, because it was focused on an issue other than the gravity of the injuries, and that the danger of unfair prejudice arises from the jury giving too much weight to the testimony of the ER physician.

C. The property insurance policy for the Brooks Real Estate Agency building should be admitted under FRE 411 to demonstrate the defendant's control of the sidewalk.

- One of the defenses raised by the Brooks Agency is that it does not control the sidewalk in front of its building and therefore is not responsible for it. The motion *in limine* seeks admission of evidence of the insurance carried on the property to show that the policy covers Brooks for injuries occurring on the sidewalk adjacent to its building.

- Under Rule 411, Liability Insurance, whether someone has insurance is not admissible to show fault or lack of fault. It may, however, be introduced for any other purpose, including to establish ownership or control.
- Franklin courts may consider the Advisory Committee Notes in determining how to interpret the Rules of Evidence. *See Reed*.
- The Advisory Committee Notes to Rule 411 discuss the concern that a jury would make improper inferences based on evidence that a party has or does not have insurance covering the type of loss at issue in the litigation. But the notes go on to state that "If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault. . . . [I]f offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402 and 403."

Accordingly, the examinee should carefully delineate the purpose for admitting the insurance policy—not to prove fault but to show that Brooks has control of the property extending to the sidewalk and is therefore responsible for keeping the sidewalk in good repair. In this case, that means free from ice on which pedestrians could slip and fall.