Question MPT-1 – July 2023 – Selected Answer 1

III. Legal Argument

A. Trial Testimony By Doris Gibbs Describing Her Interaction With Mr. Dobson Is Inadmissible Because It Is Hearsay Under Franklin Rule of Evidence 801.

For the reasons stated, trial testimony by Mrs. Gibbs describing her interaction with Mr. Dobson is inadmissible as hearsay under Franklin Rule of Evidence 801. In the alternative, Mrs. Gibbs testimony is inadmissible under Franklin Rule of Evidence 403.

1. Mrs. Gibbs's Testimony Is Inadmissible Under Franklin Rule of Evidence 801 As Hearsay.

First, Mrs. Gibbs's testimony is inadmissible under Franklin Rule of Evidence 801 as hearsay. Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and a party offers in evidence to prove the truth of the matter asserted in the statement. Franklin Rule of Evidence 801. A statement includes nonverbal conduct, if the person intended it as an assertion. In *Reed v. Lakeview Advisers*, the Franklin Court of Appeal held that for a statement to be acquiesced by silence, the party must have heard the statement, the party must have understood the statement, the circumstances must be such that a person in the party's position would likely have responded if the statement were not true, and the party must not have responded. In *State v. Patel*, the Franklin Court of Appeal excluded a statement at a loud party because it was unclear whether the defendant had heard and understood the statement.

Here, it is similarly unclear whether Mr. Dobson heard Mrs. Gibbs's statements alleging that Mr. Dobbs was on his phone and was trying to get to the store quickly. The context is important, as the Court stated in *Patel*, and here it is similarly unclear: the statement was made while they were out to dinner, had a beer, and there was the sound of conversation in the restaurant. Brooks may argue that Mrs. Gibbs testimony, if hearsay, should be admissible under 801(d)(2)(A). Brooks will also argue that Mrs. Gibbs believes that Mr. Dobson was listening because he set his drink down and looked at her while she was speaking.

However, it is similarly unclear whether Mr. Dobson understood the meaning of Mrs. Gibbs's statement. After Mrs. Gibbs made the statement, everyone at the table did not say anything for about a minute. Thus, it is likely that Mr. Dobson, like the others at the table, did not understand the meaning of the statement, because such a statement is likely to elicit some kind of response. As such, because Mr. Dobson's silence

constitutes hearsay not falling into any exception or exemption, it should be excluded under Franklin Rule of Evidence 801.

2. Mrs. Gibbs's Testimony Is Inadmissible Under Franklin Rule of Evidence 403.

Second, even if the Court finds that Mrs. Gibbs's testimony is not hearsay, it is still inadmissible under Franklin Rule of Evidence 403. Franklin Rule of Evidence 403 requires exclusion of evidence when its probative value is substantially outweighed by a prejudicial danger. Franklin Rule of Evidence 403. These dangers include unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. *Id.* Probative value is the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. *Reed v. Lakeview*. Unfair prejudice is that which has an undue tendency to suggest decision on an improper basis, commonly as an emotional one. *Smith v. State* (Franklin Supreme Court 2000).

Here, Mrs. Gibbs's testimony offers little probative value other than to circumstantially show and allege that Mr. Dobson agreed with her statement, even though Mr. Dobson made no oral or written affirmation. Mrs. Gibbs's testimony concerns an event after the incident in question, and thus it does not make it more or less likely that Brooks was negligent on the day in question. Second, Mrs. Gibbs's testimony probative value, if any, is substantially outweighed by a danger of unfair prejudice. As such, Mrs. Gibbs's testimony is inadmissible under Franklin Rule of Evidence 403.

B. Deposition Testimony Of The Physician Who Examined Mr. Dobson Is Inadmissible Because It Is Hearsay Not Within Any Exemption or Exception

Dr. Miller's testimony is inadmissible under Franklin Rule of Evidence 801, does not fall within the former testimony exception under Franklin Rule of Evidence 804, and is otherwise inadmissible under Franklin Rule of Evidence 403.

1. Dr. Miller's Testimony Is Inadmissible Hearsay Under 801.

First, Dr. Miller's testimony is inadmissible hearsay under Franklin Rule of Evidence 801. Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing and a party offers in evidence to prove the truth of the matter asserted in the statement. Franklin Rule of Evidence 801. Here, Brooks seeks to offer the deposition testimony for the truth of its comments concerning Mr. Dobson's injuries. This testimony was made out of this court at a past deposition in an unrelated

matter and not at any current trial or hearing. As such, Dr. Miller's deposition testimony is hearsay.

2. Dr. Miller's Testimony Does Not Fall Within the Former Testimony Exception of Franklin Rule of Evidence 804.

Second, Dr. Miller's testimony does not fall within the former testimony exception of Rule 804. Former testimony is an exception to the hearsay rule allowing for evidence to be admitted if a declarant is unavailable and the testimony was given as a witness at a trial, hearing, or deposition, and is now offered against a predecessor in interest or had an opportunity and similar motive to develop it by examination. Franklin Rule of Evidence 804. Franklin courts have defined predecessor in interest as there being some similarity of interest between the party in the instant case against whom the testimony is sought to be introduced and the party against whom testimony was introduced in the prior matter.

Here, Mr. Dobson concedes that Dr. Miller is dead, and thus unavailable. Mr. Dobson also concedes that Dr. Miller's testimony was given at a deposition. Brooks may argue that Mr. Dobson is the predecessor in interest because he is the same plaintiff as in the prior case. However, despite, this, Mr. Dobson is not a predecessor in interest in the case at bar; in *Thomas v. WellSpring Pharmaceutical*, the Court held that because both parties were suing the defendant with identical claims and the same defendant, they were predecessors in interest. However, Mr. Dobson faced a different defendant in the action where the deposition was held; it was his employer rather than Brooks. Second, there was a different cause of action, as the lawsuit against the City concerning a disability discrimination claim. As such, Mr. Dobson was no predecessor in interest.

For similar reasons, Mr. Dobson had no similar opportunity or motive to cross-examine Dr. Miller at the deposition because it was a different cause of action, different lawyer, and different issues at play. Brooks may argue that Mr. Dobson had equal opportunity to examine Dr. Miller about the extent of his injuries in the deposition, and there is no requirement that Mr. Dobson actually used that opportunity; only that it was there. *See Thomas; see also State v. Williams*. In *Thomas*, the Court held that there was similar motive and opportunity in the cross-examination of a doctor concerning side effects of medication in both instances. In *Williams*, the Franklin Supreme Court allowed depisition testimony where there was the same counsel in both cases and that there was similar motive. Here, however, both cases are distinguishable; the issue in the disability case against the city is merely whether accommodations were made, and Dobson has a different lawyer in each case. Similarly, Dobson's lawyer in the disability case focused on the issue of accommodation rather than the extent of the injuries. As such, Mr. Dobson did not

have a similar opportunity or motive to cross-examine in the first deposition, and as such Dr. Miller's testimony by deposition does not fall within Rule 804.

3. Dr. Miller's Testimony Is Inadmissible Under Franklin Rule of Evidence 403.

Third, even if Dr. Miller's testimony is admissible under Rule 804, it should be excluded under Rule 403. Dr. Miller's testimony poses a risk of confusing the issues, as most of the testimony consisted of measures concerning accomodations for Mr. Dobson at work. As such, Dr. Miller's testimony should be excluded under Franklin Rule of Evidence 403.

C. The Brooks Real Estate Agency Insurance Policy Is Admissible Because It Will Not Be Offered to Prove Fault And Is Not Excludable Under Rule 403

For the reasons stated below, the Brooks Real Estate Agency ("Brooks") insurance policy should be admissible because it will not be offered to show that Brooks Real Estate Agency acted negligently or otherwise wrongfully and is not otherwise inadmissible under Franklin Rule of Evidence 403.

1. The Brooks Insurance Policy Is Admissible Under Franklin Rule of Evidence 411.

First, evidence of the Brooks insurance policy is admissible under Franklin Rule of Evidence 411 because it will not be offered to prove Brooks's fault or lack of fault. Franklin Rule of Evidence 411 provides that evidence that "a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." Franklin Rule of Evidence 411. "But the Court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." *Id.* "If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault." Advisory Committee Notes to Franklin Rule of Evidence 411.

Here, Mr. Dobson does not seek to introduce evidence of the Brooks Insurance Policy to show Brooks's fault in Mr. Dobson's injury; rather, Mr. Dobson seeks to introduce this evidence to prove Brooks' ownership and control of the sidewalk where the injury was caused. While Brooks may argue that it is not possible to know Mr. Dobson's purpose for offering the evidence until trial, this argument is unfounded. It is well-settled that evidence of liability insurance is inadmissible to prove whether someone acted negligently. *See* Franklin Rule of Evidence 411. Likewise, the policy at question explicitly covers sidewalks adjacent to the property,

which is essential to show ownership and control of the sidewalks by Brooks. As such, the Brooks insurance policy is admissible under Franklin Rule of Evidence 411.

2. The Brooks Insurance Policy Is Admissible Under Franklin Rule of Evidence 403.

Second, Franklin Rule of Evidence 403 does not bar admission of the Brooks insurance policy on the sidewalk. Brooks may argue that even if the insurance policy is admissible under Franklin Rule of Evidence 411, it still should be excluded under Franklin Rule of Evidence 403. Franklin Rule of Evidence 403 requires exclusion of evidence when its probative value is substantially outweighed by a prejudicial danger. Franklin Rule of Evidence 403. These dangers include unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. *Id.* If offered for a purpose not barred by Rule 411, Rules 402 and 403 still govern. Advisory Committee Notes to Franklin Rule of Evidence 411.
Here, the probative value of the Brooks insurance policy is exceedingly high; at issue in the case is whether Brooks should be held liable for injuries Mr. Dobson sustained on the sidewalk in front of the Brooks Real Estate Agency building. Furthermore, any prejudicial danger is minimal. Brooks may argue that evidence of the Brooks insurance policy poses a severe risk of unfair, prejudice, confusing the issues, or misleading the jury. However, this concern is unfounded; the insurance policy's exceedingly high probative value of showing ownership and control of the icy sidewalk far outweighs any prejudicial danger. As such, the Brooks insurance policy is admissible under Franklin Rule of Evidence 403.

Question MPT-1 – July 2023 – Selected Answer 2

DOBSON V. BROOKS REAL ESTATE AGENCY
BRIEF IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE

I. Introduction

II. Argument

A. Doris Gibbs pretrial testimony is inadmissible because Dobson did not adopt the statement through silence, he merely moved the conversation in a different direction.

The court should exclude Doris Gibbs' testimony because it is hearsay that does not fall within any exception. Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. Rule 801(c). However, Rule 801(d)(2)

excludes from the definition of hearsay any statement made by a party and offered by an opposing party. Reed v. Lakeview. 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. Id. Thus, if through silence, a party acquiesces in a statement made by another, that statement may be introduced against that party. Id.

The court in Reed v. Lakeview outlined four conditions that must be satisfied before a statement will be considered to be acquiesced by silence. These conditions include: (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 have responded if the statement were not true, and (4) the party must not have responded. Id.

The statement in this case occurred at a social gather after Dobson's injury. Ms. Gibbs was the neighbor of Dobson and provided him assistance after his injury. Once Dobson was able to use his arm and leg again and leave his house, he and his wife went to dinner with Ms. Gibbs and her wife. At the dinner, Ms. Gibbs brought up the topic of how Dobson was injured. She did so by stating that we have all been clumsy before and that Dobson was probably trying to get to the store quickly and looking at his phone. Dobson did not respond to her statement and the conversation moved on shortly after.

The first and second factors weigh in favor of excluding Dobson's testimony because it is unclear whether Dobson heard Ms. Gibbs' statement in its entirety. Although Dobson looked at Ms. Gibbs when she made the statement, the couples were eating dinner in a restaurant where there was usual background sounds of conversation. This surrounding noise is similar to that in State v. Patel, where the court held that a statement should not be admitted because it was unclear whether the defendant had heard and understood the statement, which was made at a loud party attended by over 100 people. Restaurants are often crowded and filled with noise of other customers and music. Because this likely affected Dobson's ability to hear Ms. Gibb's statement, and there is no evidence that he actually heard her statement, the first factor weighs in favor of excluding her testimony.

The third factor also weighs against admitting the evidence because Ms. Gibbs's statement was not a question likely to invoke a response. Ms. Gibbs admitted that her statement was a statement of fact and of understanding. Nothing indicates that Ms. Gibbs asked Dobson a question. In fact, she simply stated her best guess as to how the events unfolded. Dobson had no obligation to respond to this statement and had no reason to contradict it. Ms. Gibbs was essentially gave a statement about how she would have likely fallen under the circumstances. In addition, Ms. Gibbs had been

very kind to Dobson by helping him after his injuries, so he may not have wanted to offend her by correcting her statement. Furthermore, Dobson may have wished to avoid the topic because of how awful the event was for him. It is unlikely that someone would like to replay that in their mind at a casual dinner. This is evident by the fact that the conversation returned to other topics after a short period of silence.

Thus, the court should exclude Ms. Gibbs' testimony because it is hearsay and does not fall within any exception.

The court should also exclude the evidence because it fails the Rule 403 balancing test. Under Rule 403, a judge should exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Reed v. Lakeview. Rule 403 allows the judge to prohibit only the use of evidence that is unfairly prejudicial, that is, evidence that allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference. Id. Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Id. Here, the court should exclude Ms. Gibbs testimony because it is highly prejudicial to Dobson. Ms. Gibb's statement introduces factors that could have cause Dobson to fall, but have not been proven to be true. The statement is merely Ms. Gibbs' hypothetical version of the events that lead to Dobson injury. Thus, the court should exclude her testimony because it fails the Rule 403 balancing test.

<u>B. Emergency room physician testimony is inadmissible because Dobson did not have a similar motive to examine the physician in the deposition due to the nature of his lawsuit involving a different cause of action.</u>

The court should exclude the testimony of the emergency room physician that examined Dobson after his injury. To admit former testimony under Rule 804(b)(1), the proponent must satisfy three requirements: (1) the witness must be currently unavailable; (2) the former testimony was given as a witness at a trial, hearing, or lawful deposition; and (3) the testimony is being offered against a party who had (or in a civil case, whose predecessor in interest had) a similar motive and opportunity to develop the challenged testimony at the earlier proceeding. Thomas v. WellSpring.

We admit that Dr. Miller is unavailable under the definition in Rule 804 because she passed away on November 17, 2022. Further, Dr. miller gave her testiony at a prior deposition, which satisfies the second factor. However, Dr. Miller's testimony is not admissible because it fails the third factor.

Dobson did not have a similar motive and opportunity to develop Dr. Miller's testimony at the earlier deposition. In order to be a predecessor in interest, there must be some *similarity of interest* between the party in the instant case against whom the testimony is sought to be introduced and the party against whom the testimony was introduced in the prior matter. Id. In assessing similar motive, the court must apply a two part test: (1) whether the questioner is on the same side of the same issue at both proceedings, and (2) whether the questioner had a substantially similar interest in asserting that side of the issue. Id. As to opportunity, the question is whether the party in the earlier case had the opportunity to develop the testimony, not whether the party did indeed develop the testimony. Id.

Here, although Dobson is a party in the proceeding where Dr. Miller's deposition was taken, the third factor is not satisfied because Dobson did not have a similar motive and opportunity to develop the testimony. Dr. Miller's deposition was taken in connection with Dobson's suit against the City of Bristol, his employer at the time of injury. Dobson's brought the lawsuit because his employer denied him more time away from work and other accommodations for his injures. Dobson's claim in the lawsuit was for alleged discrimination in violation of Franklin's Disability Act. Thus, the prior lawsuit where Dr. Miller's testimony was taken related to a different issue that the one in this case. Further, the source of Dobson's injures were not at issue in the prior proceeding. Thus, Dobson did not have a similar motive when examining Dr. Mille

Further, Dobson was represented by a different attorney in that case, Robert Chen. Mr. Chen did not examine Dr. Miller about her opinion about the extent of Dobson's injuries because his focus was on the level of accommodations given to Dobson by his employer. In addition Chen's examination focused on prior malpractice lawsuits against Dr. Miller. This makes clear that Mr. Chen did not have a substantially similar interest in asserting Dobson's case as the attorney's in this proceeding do.

Thus, Dr. Miller's testimony should not be admitted because Dobson did not have a similar motive to examine Dr. Miller in the prior proceeding.

In addition, Dr. Miller's testimony should be excluded under Rule 403. Under Rule 403, a judge should exclude evidence if the danger of unfair prejudice substantially outweighs the probative value of that evidence. Probative value is defined as the ability of a piece of evidence to make a relevant disputed point more or less likely to be true. Reed v. Lakeview. Rule 403 allows the judge to prohibit only the use of evidence that is unfairly prejudicial, that is, evidence that allows or encourages the jury to reach a verdict based on an impermissible ground or to make an impermissible inference. Id. Unfair prejudice means an undue tendency to suggest decision on an

improper basis, commonly, though not necessarily, an emotional one. Id. Dr. Miller's testimony is highly prejudicial because she essentially claims that Dobson is exaggerating his injuries. This will have a direct impact on Dobson's case and warrants exclusion of the deposition testimony.

C. Brooks insurance policy is admissible because it is being offered to show control and not liability, which is admissible under Rule 411.

Lastly, the court should admit evidence of Brooks Real Estate's (Brooks) insurance policy. Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. Rule 411. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control. Rule 411. If relevant, evidence of insurance may be admitted to prove any fact other than fault or lack of fault. Advisory Committee Notes to Rule 411.

Here, we seek to introduce the insurance policy to prove that Brooks controls the sidewalk. Brooks has claimed that it does not control the sidewalk and therefore was noet responsible for clearing it of ice. Our purpose for introducing the evidence does not concern Brooks' liability. It is simply for the purpose of showing that Brooks was in control of the sidewalk. Rule 411 and the Advisory Committee Notes to the rule support this purpose for admitting the policy. Thus, the court should admit evidence of the insurance policy at trial.