

THE MPT

MULTISTATE PERFORMANCE TEST

February 2004 MPTs and Point Sheets

State v. Miller

*Rivera v. Baldisari
Amusement Parks, Inc.*

*Bennett v. Sands
Construction Company*



The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in February 2004 in twenty-nine jurisdictions: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia, Guam, and the Northern Mariana Islands. Delaware and North Dakota only administer the MPT in July.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a “model answer.” Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at **www.ncbex.org**.

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance 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.
2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. 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.
3. 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 also include some facts that are not relevant.
4. 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 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.
5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. 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.
6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) 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.
7. This performance test will be graded on your responsiveness to 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.

FILE

State v. Miller

State of Franklin
State's Attorney, Williamson County
Courthouse Square
Fairfield City, Franklin 33001

MEMORANDUM

TO: Applicant February 24, 2004
FROM: Karla Lee, Assistant State's Attorney
RE: *State v. Miller*

Defendant, Tom Miller, is charged with two counts of aggravated assault, which involve domestic violence against Jan Adams. The charges result from actions he took on October 29, 2003 and November 5, 2003. He pleaded not guilty to the charges and the case is set for jury trial.

At a pretrial conference we gave him timely notice, as required by Franklin Rule of Evidence 418E, of our intention to introduce at trial evidence of his three prior acts of violence. He has been convicted of a prior assault upon Jan Adams on February 12, 2003, and one assault upon a minor, Sara Kelly, in the presence of her mother, Jan Adams, on September 21, 2002. We also know of an earlier assault upon Jan Adams on or about July 4, 2001. No charges were ever filed on the July 4, 2001 incident.

Defense counsel objected to the admission of this evidence, claiming that:

- None of the prior incidents constitutes domestic violence under Franklin Penal Code § 501, and therefore, Franklin Rule of Evidence 418 does not apply;
- Each prior incident constitutes inadmissible character evidence under Franklin Rule of Evidence 404A; and
- Even if the evidence is admissible under Franklin Rule of Evidence 404B or 418, the court should exercise its discretion under Franklin Rule of Evidence 403 to exclude the evidence.

Judge Gebippe has ordered both parties to submit concurrent briefs in support of our positions on each objection raised by defense counsel. Please prepare ours. Because of the concurrent filing, we will not have an opportunity to submit a rebuttal brief, so be sure to set forth all our arguments.

State of Franklin
State's Attorney, Williamson County
Courthouse Square
Fairfield City, Franklin 33001

MEMORANDUM

July 1, 2000

TO: Assistant State's Attorneys
FROM: John Copper, State's Attorney
RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to all attorneys, all persuasive briefs or memoranda, such as Memoranda of Points and Authorities, to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should 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 statement of an abstract principle. For example, improper: THE WITNESS IS COMPETENT TO TESTIFY. Proper: A FIVE-YEAR-OLD WHO ADMITTED HER MOTHER WOULD NOT PUNISH HER FOR LYING, BUT STILL TESTIFIED SHE KNEW THAT LYING WAS WRONG, IS COMPETENT TO TESTIFY.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Assistants need not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

TRANSCRIPT OF INTERVIEW WITH JAN ADAMS
BY DETECTIVE TINA RUIZ

November 15, 2003

Det. Ruiz: Good Afternoon, Ms. Adams. I am Tina Ruiz, the detective assigned to this case. I know you have already talked to the police about this, so I ask your patience as we go through it again.

Ms. Adams: That's okay. I understand.

Q: You've said it's okay for me to tape record this, right?

A: Yeah, that's okay.

Q: Let's start with some background information. Where do you live?

A: Fairfield City, here in Franklin.

Q: Tell me about Tom Miller.

A: He and I met in June 2001.

Q: How would you describe your relationship?

A: It was a close, personal relationship. I guess you would call it intimate. We lived together. I even added Tom to the lease and we shared expenses for almost a year. That was until the end of September 2002.

Q: In September 2002, what happened?

A: I moved out of the apartment with my daughter, Sara. She was six years old at the time. Anyway, on October 1, 2002, we moved into a different apartment in Fairfield City.

Q: Did Mr. Miller move with you and Sara?

A: No, but Tom and I had planned to move together. In fact, he helped choose the new apartment and we split the cost of the security deposit. We also had keys made for both of us. Then we had a fight and split up. Sara and I moved without Tom, but I never got the key back from him.

Q: So, Mr. Miller didn't live with you after you moved on October 1, 2002, right?

A: That's right.

Q: And, how about a year later in October 2003? He wasn't living with you then either, was he?

A: No, he wasn't.

- Q:** Now I know this may be difficult, but we need to review what happened a few weeks ago. Can you tell me what happened on October 29, 2003?
- A:** Tom came to the apartment and let himself in. My daughter, Sara, was at school and after lunch, I decided to take a nap so I went to bed. Then, around 2:30 in the afternoon, I heard someone come into the apartment. It was Tom.
- Q:** Then what happened?
- A:** He came into my bedroom and swore at me, and yelled at me to get up off the bed. He was real mad.
- Q:** Did he say why he was angry?
- A:** He said he found out that I'd been talking to my ex-husband, Charles Kelly, Sara's dad.
- Q:** What happened after Mr. Miller yelled at you?
- A:** He ordered me to get Charles on the phone. Tom grabbed the phone from me and started yelling at Charles and cursing him over the phone. He told Charles to stay away from me or else he'd regret it. He kept saying, "There'll be trouble." Tom has always been jealous of my relationship with Charles. I've always felt that Tom's hatred of Charles makes him resent Sara. He knows it hurts me when he takes it out on Sara.
- Q:** Getting back to October 29, 2003, what else happened?
- A:** I told him I had had enough and I didn't want to see him anymore. Then, he slapped me so hard I hit my head against the wall. He warned me that if I reported him to the police and he went to jail, "When I get out, I'm going to kill you and your precious little Sara." Then he left.
- Q:** What did you do?
- A:** Well, about then Sara came home from school. I called Mr. Liang – that's the apartment manager – and asked him to change the locks.
- Q:** Did you see Mr. Miller again?
- A:** Yes, about a week later. He came back around 1:00 A.M. on November 5, 2003, pounding on my door and window, making noises, yelling for me to let him in.
- Q:** Did you let him in?
- A:** No way. Mr. Liang apparently told Tom to leave the property. I guess he heard all the commotion. Anyway, Tom left, but about two hours later, Tom called the apartment, telling me to open the door. He must have called three or four times over a couple of hours.
- Q:** Did you talk with him?

A: No, I let the answering machine take the messages. I knew it was Tom, though. I have caller ID and it was his phone number and it was his voice on the machine. No doubt about that.

Q: Did he say anything else?

A: Yeah, he told me that I would regret sending him away, and that I had better let him in or else, and that I would find out what he could do to me and Sara if I called the police again. In the last call, he told me he would never allow me to leave him, and said, “You’re my woman until I say so.” Those were his exact words on the answering machine.

Q: After the phone calls, what happened?

A: About two hours after his last telephone call, I heard a crash in Sara’s room. I went in there and saw a great big rock and glass all over the floor. I looked out and saw Tom standing there. The next day I went to a women’s crisis center for help in getting a restraining order, and I gave a statement to a police officer. By the way, have you spoken to Tom?

Ruiz: Very briefly. He pretty quickly asked for a lawyer.

Adams: I assume he denies everything.

Ruiz: Absolutely, denies he did it, says it was probably Charles who threw the rock. Was October 29, 2003, the first time you had trouble like this with Mr. Miller?

A: No. He had caused trouble for me before, that was why we broke up when we were moving.

Q: Tell me about that.

A: On September 21, 2002, I remember the date. That’s when I asked him to pack his stuff and leave because he had yelled at Sara and pushed her against a wall.

Q: What happened?

A: Sara had been sick and when she is sick, she gets whiny and tired and cranky and Tom can’t stand her then. So he got mad at her and told her to quit whining. She said she wasn’t whining, and he told her to shut up and listen to him and then he pushed her into the wall. Then he left the apartment.

Q: What did you do?

A: I called the police. I thought that it would teach him a lesson. That’s when I told him he was not moving with us.

Q: On this date in September when he pushed Sara, did Mr. Miller hurt you?

A: No, but I could not stand to see Sara get hurt. That was when I drew the line. I told him to get out.

Q: Was there another time when he hurt you?

A: On February 12, 2003, he came over. He was about to go to court for the incident where he pushed Sara. He wanted me to change my story and drop the charges.

Q: What happened?

A: I said there was nothing I could do about it because the prosecuting attorney told me that it was in the state's hands now. Tom got real mad and pushed me against the wall and stuck his finger in my eye and hit me in the face and choked me. He said that I would live to wish I had never called the police. Finally, he left and I called the police. About an hour after the police left, a rock broke my living room window. I was in the bedroom at the time and I heard this crashing noise. I went into the living room and saw that the window was broken. Then I saw Tom's car leaving the driveway immediately afterwards.

Q: Were you hurt when the rock came in the house?

A: No. I was in the bedroom and there is no way he could have hit me from outside when I was in the bedroom.

Q: Was there any other time when he hurt you?

A: Wait a minute! I just remembered! Right after we started dating – we'd been going out a few weeks – we'd been at a bar with a lot of friends. This was July 4 – three years ago. As we were leaving, we were in the parking lot, everyone started talking and arguing. Someone asked Tom what it was like to date Charles' woman and Tom got really mad and pushed me, pushed me hard. I fell.

Q: What happened after that?

A: Nothing, really. Mike, one of my friends, took me home. I didn't call the police or anything like that.

Q: Tom was convicted for both the September 2002 assault on Sara and the February 2003 assault on you, right?

A: Yes.

Q: But he wasn't charged or convicted for what happened on July 4, 2001, in the parking lot?

A: That's right.

Q: Can you add anything else to what you have told me?

A: No, except that this has been so horrible. I'm scared for Sara and I guess, I'm scared for me, too.

LIBRARY

State v. Miller

Franklin Penal Code

§ 211. Aggravated Assault

A person is guilty of aggravated assault if the person:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

* * * *

§ 501. Domestic Violence – Definitions

As used in this title:

(a) “Abuse” means intentionally or recklessly causing or attempting to cause a person bodily injury, or placing a person in reasonable apprehension of imminent serious bodily injury.

(b) “Domestic violence” means abuse committed by an individual against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the individual has had a child or is having or has had a dating or engagement relationship. For purposes of this subsection, “cohabitant” means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether persons are cohabiting include a combination of circumstances, such as (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties’ holding themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

Franklin Rules of Evidence

Rule 403. Discretion of court to exclude evidence

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Rule 404. Evidence of character to prove conduct

A. Evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

B. Evidence of past crimes, civil wrongs, or other acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common plan, identity, or absence of mistake or accident.

* * * *

Rule 418. Evidence of past instances of specified offenses

A. Subject to subsections D and E, in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Rule 404.

B. Subject to subsections D and E, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Rule 404.

C. As used in this section, "domestic violence" has the meaning set forth in § 501 of the Franklin Penal Code.

D. Nothing in this section shall be admissible if a court pursuant to Rule 403 deems it inadmissible.

E. When a party in a criminal action intends to introduce evidence pursuant to subsection A or B above, the party intending to introduce the evidence must give the defendant notice of its intent thirty (30) days prior to the trial of the criminal action.

State v. Grubb

Franklin Supreme Court (1990)

The defendant, Brian K. Grubb, was charged with assault and battery on his wife, Kelly Grubb. The defendant denied assaulting his wife and testified at trial that she assaulted him. On rebuttal, Deidra Hoskins, defendant's ex-wife, testified over defendant's objection that she had been assaulted by the defendant on two occasions. Defendant was convicted of assault and battery and now appeals, claiming that the court erred in allowing his ex-wife to testify.

Franklin Rule of Evidence 404A codifies the general rule that evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity with his character on a particular occasion. Offering evidence of a person's character poses an inherent risk that the trier of fact will be distracted from the central issues in the case and decide the case based upon the defendant's character rather than upon the operative facts. Character evidence is generally excluded not because it lacks relevancy, but because its probative value is substantially outweighed by the danger of unfair prejudice.

Franklin Rule of Evidence 404B, however, allows other prior acts to be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Defendant claimed self-defense. He also testified to an alternative, albeit somewhat inconsistent, defense of lack of intent to cause harm or accident. Specifically, Grubb testified that it was his wife who jumped on him (not vice versa) and that he simply grabbed her and pulled her off. He said that he did not assault her nor did he cause her any injury. He further testified that if she did sustain injuries, they occurred when he tried to pull her off him or when she jumped on him and they fell down the stairs.

When an accused asserts self-defense, he does not seek to negate any of the elements of the offense that the state is required to prove. Self-defense is not a denial or contradiction of evidence offered by the state to prove the essential elements of the charged crime. Rather, an accused admits the prohibited conduct, but claims that the surrounding facts or circumstances justified the conduct, therefore excusing the accused from criminal liability. In cases where the accused asserts only self-defense and accordingly does not deny or contradict the essential elements of the charged crime, the state cannot properly utilize prior crimes, wrongs, or acts by the accused to establish his intent, or demonstrate that the injuries suffered by his victim were not the result of accident, as such matters are uncontested and simply not in issue.

However, in this case Grubb not only asserted a claim of self-defense, but also alleged that his wife's injuries were accidental and not the result of any intentional (or knowing) conduct on his part. To that extent, intent and absence of accident, two matters specifically identified in Rule 404B, were at issue in this case. Accordingly, the state was entitled to utilize the evidence regarding defendant's assaults on his former wife to meet its burden of proving that Grubb intended to injure his wife and that her injuries were not accidental.

Judgment affirmed.

State v. Beck
Franklin Court of Appeal (2002)

Defendant Bill Beck appeals from his conviction for aggravated assault. He claims that, at his trial, prior acts of domestic violence were admitted over his objection. He concedes that Franklin Rule of Evidence 418B permits the admission of prior instances of domestic violence as relevant evidence, but he claims that the probative value of their admission was substantially outweighed by the prejudice to him.

On December 3, 1999, Sue Beck was leaving a grocery store when Bill Beck met her at her car and demanded that she give him a ride. The Becks were married for three years as of December 3, 1999, but were living apart on that date. Sue Beck took Bill Beck to her home so he could call a cab. Once there, Bill Beck began slapping Sue Beck on the face and upper body and yelling at her. He accused her of cheating on him. Finally, he struck several hard blows to her face and walked out. She called the police.

At trial, Sue Beck testified to prior instances of domestic violence. Specifically, she testified that on May 31, 1998, while they were living together, Bill Beck was arrested after he slapped Sue on her face and hit her on her upper body at their home earlier that day. Sue also testified that on November 25, 1998, they were again living together. On that date, Bill came home from work and accused her of seeing other men. He then

struck her on the face and upper body with his fist. She fell down due to the blows. He walked out. After a few minutes, Sue called the police. She testified that they have been separated since November 25, 1998.

On January 17, 1999, Bill Beck pleaded guilty to the assaults of May 31 and November 25, 1998, and was sentenced to time served and placed on probation for six months. At the trial for the December 3, 1999 incident, Bill Beck admitted pleading guilty to the prior charges but said his lawyer told him it was the only way to stay out of jail.

Defendant asserts, correctly, that Rule of Evidence 418D makes the admissibility of evidence of prior domestic violence under Rule 418B contingent on whether the evidence is more probative than prejudicial under Rule 403. Rule 403 requires a weighing of certain specific factors: (1) an examination of the nature, relevance and possible remoteness of each such offense; (2) the degree of certainty of its commission; (3) the burden on the defendant of defending against the uncharged offense; (4) the likelihood of confusing, misleading or distracting the jurors from their main inquiry; and (5) its likely prejudicial impact on the jurors.

The weighing process under Rule of Evidence 403 depends upon the trial court's consideration of the unique facts and issues

of each case. We will not overturn or disturb a trial court's exercise of its discretion under Rule 403 in the absence of manifest abuse or unless we find that its decision was arbitrary and capricious.

The prior incidents of domestic abuse introduced in this case were of the same nature and displayed a pattern of abuse, all within the eighteen months prior to the crime for which Bill Beck was charged. The past instances, to which he pleaded guilty, were very similar to and were no more egregious than the charged offense. There is no question about their commission, nor must Bill Beck defend against them, having already admitted them. Thus, there is little reason to believe that the jury will be confused, misled, distracted, or unduly prejudiced by this evidence.

The judgment of the trial court is affirmed.

FILE

Rivera v. Baldisari
Amusement Parks, Inc.

Smith, Taylor & Isely
Attorneys at Law

MEMORANDUM

To: Applicant
From: Thomas Isely
Subject: *Rivera v. Baldisari Amusement Parks, Inc.*
Date: February 24, 2004

We represent Cara Rivera, who was injured when she fell from the Ferris wheel at Wild Wonder World (“WWW”), an amusement park owned and operated by Baldisari Amusement Parks, Inc. (“Baldisari”) here in Great Bend. The trial is set to begin in 60 days, and I need your help in getting the trial exhibits ready for use at trial.

Counsel for Baldisari has said that she will not stipulate to the authenticity of several items of evidence we intend to introduce at trial. She may end up waiving her objections once we get to court, but because she might not, we need to be prepared.

I have prepared a list entitled Items of Evidence which describes the only items I’m concerned about and identifies individuals connected with the evidence we want to authenticate. Assume that all the evidence is admissible if properly authenticated and do not concern yourself with potential hearsay issues. All I am concerned about at this stage is that we satisfy the procedural steps necessary for producing the items in court and can establish that they are authentic. We want to do this *by the most direct and efficient method*, so if there is a way of shortcutting the procedures to avoid wasting courtroom time with the live testimony of a parade of record custodians and sponsoring witnesses, we should opt for the shortcut.

Please draft a memorandum in which you answer the following questions for each item of evidence:

- What steps must we take to ensure that the evidence is available in court?
- What must we do to establish the authenticity of each item of evidence?

In answering these questions, in addition to citing the applicable rules and code sections, be sure to discuss narratively how the governing section(s) of the Franklin Rules of Evidence and/or the Franklin Code of Civil Procedure enable us to produce each of the items of evidence in court and establish its authenticity.

Organize your memorandum along the following lines, as to each item of evidence:

- A heading specifying the item of evidence, and under each heading:
 - a. the steps necessary for getting the item to court, and
 - b. what needs to be done to authenticate the item.

Items of Evidence

Opposing counsel will not stipulate to the authenticity of the following items of evidence:

1. Frank Electronics, Inc.'s Personnel File on Cara Rivera: Ms. Rivera is employed by Frank Electronics, Inc. She has been off work for the past 18 months as a result of the accident. Just before she was injured, she had been promoted to the position of Vice President of Manufacturing at a substantially higher salary than her previous position. Because of her extended absence, Frank filled the position with another person. Frank's personnel file on Ms. Rivera contains the documentation that shows the details of the promotion and its subsequent rescission. Nancy Sanders, Frank's Director of Human Resources, is the custodian of those records.

2. WWW's Personnel File on Brady Spitz: Spitz, the employee who was operating the Ferris wheel at the time of the accident, quit his job at WWW after the incident. We have been unable to find and depose him, so we must assume he will be unavailable to testify at the trial. In pretrial discovery, we learned that WWW maintained a personnel file on Spitz and that the file contains his last known address and shows he was repeatedly disciplined for drinking on the job.

3. State Safety Inspection Report: About a year before the accident, the Franklin Department of Public Safety conducted an inspection and cited Baldisari for a number of deficiencies in the maintenance and operation of the WWW Ferris wheel, including a defect that caused the wheel to surge forward at times. In its report, the Department required Baldisari to repair the defect and recommended that Baldisari install automatic seat-guard locks. Baldisari did not retain a copy of the report in its files.

4. Baldisari's Maintenance Records: Baldisari has a maintenance department, which retains records of all maintenance performed on its equipment, including the Ferris wheel. Among those records is correspondence showing that Baldisari declined to purchase automatic seat-guard locks for the Ferris wheel.

5. Hospital and Medical Records: Ms. Rivera was taken from the scene of the accident to Franklin General Hospital. The hospital's records include bills, charts, x-rays, test results, etc., relating to her emergency room treatment, surgery, and hospitalization until she was released one month later to return home.

Ripka Investigations

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June 23, 2003

Thomas Isely, Esq.
Smith, Taylor & Isely
One Court Center, Suite 1805
Great Bend, FR 33706

Re: *Rivera v. Baldisari Amusement Parks, Inc.*

Dear Tom:

I have completed the investigation you asked me to make in connection with the *Rivera* case, and here is what I have found:

1. Police Officer: I spoke with Officer Arnold Hurlbet of the Great Bend PD, who responded to the scene. He interviewed Brady Spitz, the Ferris wheel operator. Spitz admitted to Officer Hurlbet that he drank “a lot” of muscatel wine in the hours before the accident and that he (Spitz) “guesses” he had neglected to engage Ms. Rivera’s seat lock so that she was ejected from her seat on the Ferris wheel when it for some reason surged violently.

2. U.C.C. Filings: In the office of the Secretary of State, I found a recent U.C.C. 1 showing Upland Bank as the secured party and Baldisari Amusement Parks, Inc., as the debtor on the Ferris wheel located at Baldisari’s Wild Wonder World facility in Great Bend. The U.C.C. 1 indicates that Baldisari is the owner.

3. Department of Public Safety: The Department’s records show that Baldisari has a long record of citations for safety violations relating to the operation of Wild Wonder World park. Specifically, with respect to the Ferris wheel, there is an inspection report dated January 29, 2003, showing that the Department issued a safety violation citation to Wild Wonder World relating to a mechanical defect that caused the Ferris wheel to surge at odd times. The Department also recommended installation of automatic seat-guard locks. A copy of the record is enclosed. The inspector who made the report is David Steele. The head of the Department’s Bureau of Records is Marta Jones.

4. Television Reporter: I also interviewed Jake Meerstein, a news reporter from WGVP. He told me he covered the accident and interviewed a woman who was waiting in line to ride the Ferris wheel. She told him that she had told the operator that Ms. Rivera's seat-locking device was not locked. The woman said that she could smell alcohol on the operator's breath and that he told her to mind her own business. Mr. Meerstein told me that he would make sure the tape was preserved and that he would check his notes to find out her name.

5. Brady Spitz: I have been unable to locate Mr. Spitz. The night manager at the Bay View Residence Hotel at 423 Carlton Street, Great Bend, FR 33706, which was Spitz's last known address, says he "checked out a long time ago and didn't leave a forwarding address." None of the other hotel residents I spoke to had any idea where Spitz is.

Please let me know if there is anything further you need.

Very truly yours,

A handwritten signature in black ink, appearing to read "JP Ripka". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John Paul Ripka

LIBRARY

*Rivera v. Baldisari
Amusement Parks, Inc.*

WALKER ON EVIDENCE IN THE FRANKLIN COURTS (3d ed. 2004)

The Requirement of Authentication¹

Franklin Rule of Evidence (FRE) 901(a) provides the standard for authenticating exhibits and other forms of nontestimonial evidence. It establishes an across-the-board rule that something is properly authenticated by “evidence sufficient to support a finding” that it is “what the proponent claims.” Unless an exhibit is self-authenticating, formal proof of authenticity must be offered before the evidence can be admitted or even shown to the jury. Frequently, authentication is a formality to which the parties agree before trial, but, if counsel do not agree on authenticity, then authentication will have to be done at trial.

Authentication is a separate and distinct issue from *production* of the evidence. Before evidence can be authenticated, it must be brought to court either voluntarily or by compulsion of process, such as subpoena or other authorized statutory method. The provisions by which production at trial can be compelled are found in the Franklin Code of Civil Procedure (FCCP).

The preliminary showing of authenticity required by FRE 901(a) necessarily depends on the nature of the thing in question, and often a single exhibit can be authenticated in several different ways. The traditional steps to authenticate an exhibit are the following: (1) having the exhibit physically in court; (2) having the exhibit marked for identification; and (3) authenticating the exhibit by the testimony of a witness (called a “sponsoring witness”) unless the exhibit is self-authenticating.

By far, the most common method of authenticating documents and other physical evidence is to have the sponsoring witness, either a custodian of the evidence or other possessor of it, appear in court and testify that the evidence is what the proponent claims it to be. However, certain types of evidence, such as those specified in FRE 902, are “self-authenticating” so that extrinsic evidence of authenticity is not necessary. The Franklin Code of Civil Procedure sets forth additional procedures for production and authentication of certain business records. These types of records can be submitted under seal with a supporting affidavit, thus avoiding the need for live testimony about authenticity. These shortcuts save judicial and trial time, and the principle is that the materials are unlikely to be anything other than what they appear to be and that, for the convenience of the parties and the court, they should be admitted without the requirement of extrinsic authenticating evidence.

¹ This section contains excerpts and paraphrasing from Mueller & Kirkpatrick, *Evidence* (1995).

Franklin Rules of Evidence

Rule 901. Requirement for Authentication or Identification

(a) General Provisions

The requirement for authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming to the requirements of this rule:

- (1) *Testimony of witness with knowledge.* Testimony that the matter is what it is claimed to be.
- (2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (3) *Comparison by trier or expert witness.* Comparison by the trier of fact or expert witnesses with specimens which have been authenticated.
- (4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
- (5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
- (6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

- (8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.
- (9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
- (10) *Methods provided by statute or rule.* Any method of authentication or identification provided by the laws of the State of Franklin or by other rules prescribed by the Franklin Supreme Court pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution.
- (2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
- (3) *Foreign public documents.* * * *
- (4) *Certified copies of public documents.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed or actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by a certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the State of Franklin or rule prescribed by the Franklin Supreme Court.
- (5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

- (6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.
- (7) *Trade inscriptions and the like.* * * *
- (8) *Acknowledged documents.* * * *
- (9) *Commercial paper and related documents.* * * *
- (10) *Presumptions under the laws of the State of Franklin.* * * *
- (11) *Domestic records of regularly conducted activity accompanied by affidavit.* The original or duplicate of a record of a regularly conducted activity that would be admissible under Franklin Code of Civil Procedure § 1991.
- (12) *Certified foreign records of regularly conducted activity.* * * *

* * * *

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) in the circumstances it would be unfair to admit the duplicate.

* * * *

Franklin Code of Civil Procedure

§ 1984. Subpoena; notice to produce party or agent; method of service; production of books and documents

- (a) In the case of the production of a party to any civil action or of a person for whose immediate benefit an action is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such party or person as a witness is not required if written notice requesting the party or person to attend at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person.
- (b) The notice specified in subsection (a) may include a request that the party or person bring with him or her books, documents, or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. The procedure provided in this subsection is an alternative to the procedures specified in § 1985 but not to those specified in § 1986.

§ 1985. Subpoena defined; affidavit for *subpoena duces tecum*; issuance of subpoena in blank

- (a) The process by which the attendance of a custodian is required is the subpoena. It is a writ or order directed to a person requiring the person's attendance at a particular time and place to testify as a custodian. It may also be a *subpoena duces tecum* and require a custodian to bring any books, documents or other things under the custodian's control that the custodian is bound by law to produce.
- (b) An affidavit shall be served with a *subpoena duces tecum* issued before trial specifying the exact matters and things desired to be produced and stating that the custodian has the desired matters or things in his or her possession or under his or her control.
- (c) The clerk, or a judge, shall issue a subpoena or *subpoena duces tecum* signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service. Alternatively, an attorney at law who is the attorney of record in an action or proceeding may sign and issue a subpoena or *subpoena duces tecum* to require attendance or to produce matters or things described in the subpoena, before the court in which the action or proceeding is pending or at the trial of an issue therein. The subpoena in such a case need not be sealed.

§ 1986. Employment records; notice to employee of subpoena; motion to quash or modify subpoena

- (a) Not less than 15 days prior to the date called for in a *subpoena duces tecum* for the production of employment records, the subpoenaing party shall either (1) obtain a written authorization signed by the employee to release the records, or (2) serve or cause to be served on the employee whose records are being sought a copy of the *subpoena duces tecum*, the affidavit supporting the issuance of the subpoena, and the notice described in subsection (c). This service shall be made to the employee personally or at his or her last known address.
- (b) Prior to the production of the records, the subpoenaing party shall serve or cause to be served upon the custodian an attestation of compliance with subsection (a).
- (c) Every copy of the *subpoena duces tecum* and affidavit served upon an employee in accordance with subsection (a)(2) shall be accompanied by a notice, in a typeface designed to call attention to the notice, indicating that (1) employment records about the employee are being sought from the custodian named on the subpoena; (2) the employment records may be protected by a right of privacy; (3) if the employee objects to the custodian furnishing the records to the party seeking the records, the employee shall file papers with the court prior to the date specified for production on the subpoena; and (4) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the employee's interest in protecting his or her rights of privacy, including the right to bring a motion to quash or limit the subpoena.

* * * *

§ 1990. Compliance with *subpoena duces tecum* for business records of non-parties

- (a) When a *subpoena duces tecum* is served upon a custodian of records of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian, within 15 days after the receipt of the subpoena in any civil action, delivers by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of the court together with the affidavit of the custodian stating in substance each of the following:

- (1) The affiant is the duly authorized custodian of the records and has authority to certify the records.
 - (2) The copy is a true copy of all the records described in the *subpoena duces tecum*.
 - (3) The identity of the records.
- (b) The copy of the records shall be separately enclosed in an inner envelope, sealed, with the title and number of the action and date of the subpoena clearly inscribed thereon; the sealed envelope shall then be enclosed in an outer envelope, sealed, showing the number and title of the action, and directed to the clerk of the court.
- (c) The copy of the records shall remain sealed and shall be opened only at the time of trial, upon the direction of the judge in the presence of all parties who have appeared in person or by counsel at the trial.

§ 1991. Affidavit laying the foundation for admission of business records of non-parties

If the affidavit specified in § 1990(a) contains statements that (1) the records were prepared by the personnel of the business in the ordinary course of business at or near the time of the action, condition, or event, (2) it was the regular practice of that business activity to make the record, (3) describe the mode of preparation of the records, and (4) the original business records would be admissible in evidence if the custodian had been present and testified to the matters stated in the affidavit, then the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated in the affidavit and is sufficient to meet the requirements of Rule 902(11) of the Franklin Rules of Evidence.

FILE

*Bennett v. Sands
Construction Company*

*Roberts, Dinny & Stein
Attorneys At Law*

MEMORANDUM

TO: Applicant
FROM: Celia Roberts
DATE: February 26, 2004
RE: *Bennett v. Sands Construction Company*

Our client, Samuel Bennett, wants us to bring an action against Sands Construction Company (SCC) to recover \$45,000, which is the cost of both replacing the roof and repairing the substantial water damage to his house. The house is a custom structure, designed by an architect and built for our client by SCC, supposedly to the architect's specifications. The roof began leaking seven years ago, the first year that our client occupied the house, and continued to do so until last month, when a new contractor replaced the roof and repaired the structural damage. Bennett only learned about the extent of the problem and its cause when he brought in the new contractor.

Although there are possible contract and tort causes of action, it is apparent that there are serious statute of limitations problems with the case. Bennett has made it clear that he does not want to throw good money after bad. If the statute has run, then we need to let him know and not encourage a lost cause.

Please write a memorandum that analyzes whether the tort and contract causes of action are barred by the statutes of limitation. Be sure your analysis discusses and sets forth your conclusion as to whether we can convince a court that one or both statutes should be tolled.

Notes from Interview with Samuel Bennett

February 23, 2004

Client just paid \$45,000 for new roof and structural and electrical repairs in 7-year-old house. Original roof leaked despite repeated repairs by contractor. Client claims the problem was caused by contractor who substituted a less expensive type of roof for the one specified by architect. Client didn't discover substitution until he got architect to inspect roof in September 2003.

Client contracted with Sands Construction Company (SCC) to build his house in accordance with architect's specifications. Client chose contractor after receiving proposal that was the lowest of 3 bids and after checking on reputation of SCC and its owner, Ray Sands. SCC agreed in writing to "construct house per plans and specifications" and to perform the work in a "professional and workmanlike manner." These plans and specifications called for the installation of an "EPDM rubber membrane roof." Client and Mr. Sands did not specifically discuss the substitution of a different type of roofing material from that contained in the specifications for construction of a flat roof. Client was not aware that the description of the roof contained in the "pricing sheet" attached to the contractor's proposal ("Roofing: Flat-Darbex Roof") was not a brand of rubber membrane roofing. He admits to signing the "pricing sheet" in January 1997, but did so without understanding that the substitution had been made. Says he just relied upon Mr. Sands to stick to the architect's plans and expected that any changes would be brought to his attention. Client has now gone back and compared his copies of the architect's original specifications and Sands' pricing sheet, and it is very clear that Sands substituted a "Flat-Darbex Roof" for the "EPDM rubber membrane roof" specified by the architect.

In July 1997, the building inspector issued a certificate of occupancy, and Bennett moved into the house. By October 1997, the first leaks occurred after there was a huge rain storm. Water dripped along walls in upstairs bedrooms, damaging walls. Contractor Sands inspected after storm and said that windows were problem (see Sands letter 10/9/97 in file). Contractor convinced client that changing windows would solve problem and client agreed to pay to have work done. Client repaired damage to walls himself.

In March of 1998, the first warm day caused melting of the more than 8 inches of snow on the roof. Water poured into upstairs bedroom, and contractor said nothing could be done until snow melted completely. Lots of damage to walls. Contractor finally came a week later and admitted gutters were clogged with “construction debris that hadn’t been cleaned up.” Sands cleaned gutters, apologized, and repainted walls at own expense.

July 1999. Huge thunderstorm caused water to drip down face of stone wall of kitchen. Sands came next day, reported that some flashing that should have been installed wasn’t and repaired it. Sent letter blaming problems on roof design (see Sands letter 7/31/99 in file).

March 2000. Small water leaks into upstairs bathroom during spring melt-off of snow. Sands inspected and blamed it on accumulations of ice in gutter system.

April 2001. Water poured down face of fireplace brick wall onto wood floor. Sands inspected after all of snow melted. Said flashing around chimney was loose and he re-cemented it at no charge. Insurance paid for sanding and refinishing living room floor.

February 2002. Water stains appeared on walls of upstairs bedroom after freezing rain and snow. Sands said, “Everyone with a flat roof is having problems right now due to unusual pattern of freezing and melting that followed the snow storm.” Advised client to re-read letter of 7/31/99. Client very angry. Repainted walls himself.

April 2003. Big storm, three days of heavy rain. Water dripped along walls of south side of house, upstairs and down, soaking carpets and ruining wallpaper and paint. Sands came and reported that seam of roof along south parapet wall had become loose due to accumulation of ice and snow from previous winter. Said, “this is a common problem with roofs of this design.” Used blow-torch and special cement to reseal the seam. Charged \$500 and repeated advice about redesigning the roof. Insurance paid \$300 toward roof repair and additional amount for repairing walls and cleaning carpet.

September 2003. Mike Rainier, the architect who designed the house, came at client's request to assess and give advice. Inspection revealed that roofing material was not the type he specified. Said he had specified a rubber membrane roof and that the roof installed was instead a "torch-down roof." First time client knew about this. Architect said the roof design depended upon the rubber membrane to prevent leaks and that the change in materials "might account for the problem." Said that to replace roof at this stage would be "quite expensive, but may be the only effective solution." Client stunned by news, feels misled by years of dealing with Sands, whom he thought was trustworthy.

After client got written report from architect, client wrote angry letter to Sands (see Bennett letter 11/3/03 in file). Sands responded on November 18, 2003. Client called Darbex Company, roofing manufacturer, to try to get them to take responsibility. Darbex blamed it on contractor (see Darbex letter 12/3/03 in file).

Client hired Certified Roofing Contractors to replace roof for \$18,000 on December 22, 2003. Job took from January 19, 2004 to February 16, 2004. When old roof was removed, substantial amount of rotted wood and wet electrical wiring was exposed. Total cost of fixing roof, wood and wiring is \$45,000.

Sands Construction Company

quality builders of custom homes

4801 Industrial Park Road

Gatesville, Franklin 33415

www.Sandsbuild.com

(555)555-1133

October 9, 1997

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

I have inspected your home to determine the cause of the water seepage you experienced in the recent extraordinary rains. It appears that the fault is with the windows on the top floor. The window model specified by the architect, the Solara model 3000, is not well matched to the siding on the top floor of the house. The top of the window extends past the surface of the siding and therefore collects water. It is inevitable that some of that water will get into the house and damage the interior walls.

I recommend replacing the eight model 3000 windows with the Solara model 5000. Those replacement windows will not change the appearance of the house but will be a better fit with the siding. I am confident this will solve the problem.

The charge for replacing those windows, at my cost, is \$1,749. Please indicate your acceptance of this offer by signing one copy of this letter and returning it to me. We can do the work next week, weather permitting.

Very truly yours,



Ray Sands, President

Accepted:



Sands Construction Company

quality builders of custom homes

4801 Industrial Park Road

Gatesville, Franklin 33415

www.Sandsbuild.com

(555)555-1133

July 31, 1999

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

We have completed our additional investigation of the cause of the water problem you are experiencing with your roof. We discovered that metal flashing had not been installed over some wooden banding above the upper gable walls. We have now installed that flashing and thoroughly sealed it to the wall surfaces. This will prevent the water seepage that was occurring in that area. We have done this work at no additional charge to you.

At the same time, I must share with you my misgivings about this roof. Regarding future water problems, it should be noted that the flat roof design is of high risk. As you know, the flat roof is a series of hips and valleys so designed to shed the water through the openings in the parapet walls. If the water settles or doesn't shed fast enough, you run the risk of water seeping through below. A better arrangement would be to redesign the roof and parapet to allow water to drain under the wall and into the gutter system. I would also recommend that the gutter system be built out an additional 4" to discourage dampness and water seepage through and into the side walls. Please contact me if you wish to pursue these suggestions.

Very truly yours,



Ray Sands, President

***Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417***

November 3, 2003

Ray Sands, President
Sands Construction Company
4801 Industrial Park Road
Gatesville, Franklin 33415

Dear Ray:

I have had nothing but trouble regarding roof leaks from the first year I moved into what was supposed to be my dream house. By my count you have been out to try to fix the problem at least 12 times in the past 6 years. Although every time you come you tell me that you have solved the problem, the fact is that each of the repairs has been only temporarily successful. The leaks always seem to return, and whatever wall or ceiling or floor that I have had fixed is again damaged by water.

I have discussed the problem with Mike Rainier, the architect who designed the house. I told him that you think that the design of the roof is the source of the problem. He said that the specifications for the roof in the original plans called for a "rubber membrane roof" but that the roof you installed is not rubber but is instead made of some other material. He says that because you substituted that material, he is not responsible for the defects in the roof. He says that I should look to you to make this right.

I was astonished and outraged to learn that the roof was not built to specifications. In our contract you guaranteed that the material described in the specifications would be used in the construction and that the work would be performed in a workmanlike manner. Nothing you have done can make up for the fact that you didn't adhere to what you promised at the time of the original construction.

Ray, I think you need to accept responsibility for this and make it right. Please assure me that you will do so before we go through another winter with the probability of more leaks.

Very truly yours,



Samuel Bennett

Sands Construction Company

quality builders of custom homes

4801 Industrial Park Road

Gatesville, Franklin 33415

www.Sandsbuild.com

(555)555-1133

November 18, 2003

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Sam:

I have just received your letter of November 3, 2003. Some time ago, I informed you of the potential for roof leaks at your Fairmont house. I felt that the roof as constructed would not allow for adequate drainage and runoff and that the longer this condition was allowed to exist, the worse it would get. Now after the heavy snowfall of last winter a leak has developed. The flatness of the roof and the parapet wall create a trap for snow.

According to my records, your insurance company paid approximately \$1,200 to correct this situation, of which \$300 was paid to me for cosmetic work, and a \$200 balance remains unpaid. Surely a portion of that money should have been used to correct the problem.

As for the roofing product used on your house, the decision to use a torch-down roofing was made for pricing considerations with your full knowledge. I have reviewed our original contract, along with the specification sheet, approved and endorsed by you. The specification sheet clearly says "Flat-Darbex Roof," and your signature is on it, clear as day. Any questions regarding the selection of material should have been raised at the time of construction, not now, 7 years later.

I disagree with Mike Rainier. As an architect, he should know that roofs like the one he designed are wrong for our climate and that no matter what roofing material is used leaks will occur. While the roof that we put on your house is substantially less expensive than a rubber one, we have had very positive experiences with it in many other installations. Should you wish to replace it now, we would do so at your expense. Please let me know if you would like me to provide you with an estimate of the cost.

Very truly yours,



Ray Sands, President

The Darbex Company
2117 Maple Avenue
Nakoma, Franklin 33420
Exclusive Franklin Distributors of Darbex Roofing Supplies

December 3, 2003

Mr. Samuel Bennett
3216 Lauderdale Lane
Fairmont, Franklin 33417

Dear Mr. Bennett:

We have completed our inspection of your roof to determine whether the Darbex membrane used to construct it is defective. While we sincerely regret the problems you have had with moisture seepage, the Darbex membrane, where visible, was found to be in good condition, free from any signs of manufacturing defects, and weathering normally for its relative exposure age.

As you know, Darbex is a superior modified bitumen membrane reinforced with a high-quality nonwoven polyester mat and is one of the finest heat-weld-applied, modified bitumen membranes ever produced. However, Darbex roofing products are intended for use by professional roofers only, thoroughly trained and skilled in the use and handling of propane heat-weld equipment. It seems apparent that the installer of your roof either did not adequately prepare the sub-surface or did not sufficiently heat the material to ensure a waterproof bond. To the best of my knowledge, Sands Construction Company is not a certified installer of Darbex products.

In addition, to be eligible for a Darbex Limited Material Warranty, all exposed smooth surfaced products must be coated with an approved roof coating. Darbex particularly recommends Johns Manville TopGard® Type A aluminum emulsion roof coating. Periodic maintenance and recoating is the responsibility of the building owner. Your roof is not fully treated with this coating.

For these reasons, although the Darbex Company stands behind its product, since the problems with your roof were caused by the installer, we are unable to cover the situation under our product warranty. We recommend that you have the existing roof removed and a new Darbex membrane installed by a qualified contractor. We would be pleased to supply you with the names of such contractors on request.

Very truly yours,



Tonya Braniff
Quality Assurance Manager

LIBRARY

*Bennett v. Sands
Construction Company*

Franklin Civil Code

§ 9-20. Definitions

As used in this article, the term:

* * * *

(2) “Substantial completion” means the date when construction was sufficiently completed, in accordance with the contract as modified by any change order agreed to by the parties, so that the owner could occupy the project for the use for which it was intended or a certificate of occupancy is issued or whichever comes first.

* * * *

§ 9-24. Actions on written contracts; exceptions

All actions upon written contracts shall be brought within six (6) years after the same become due and payable, or in the case of contracts for construction, upon substantial completion. However, this Code section shall not apply to actions under the Uniform Commercial Code for the breach of contracts for the sale of goods or to negotiable instruments.

* * * *

§ 9-30. Trespass or damage to realty

All actions for trespass upon or damage to realty shall be brought within four (4) years after the right of action accrues.

* * * *

§ 9-96. Tolling of limitations for fraud

If the defendant is guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, any period of limitation established by Franklin law shall run only from the time of the plaintiff’s discovery of the fraud. Tolling under this section shall apply to tort and contract actions.

* * * *

Popper v. Naybors

Franklin Court of Appeal (2000)

In this case we are asked to determine whether the four-year statute of limitations in tort actions for damage to realty¹ bars Betty Popper's claims for house damage caused by the use of synthetic stucco. First, we conclude that the six-year statute of limitations in actions for breach of written contract² applies to Popper's contract claim. We therefore reverse the trial court's summary judgment ruling that Popper's contract claim against the builder is barred by the four-year statute of limitations in tort actions for damage to realty. Second, we affirm the trial court's summary judgment ruling that Popper's tort claim for damage to realty is barred by the four-year statute of limitations.

The record shows that Popper contracted with Joseph Naybors to purchase a newly constructed home built by Naybors' construction company. Popper closed on her home on September 2, 1994. In 1999, Popper discovered that her home had substantial wood rot under the exterior insulation and finishing system, also known as synthetic stucco.

On March 4, 1999, Popper filed suit against Naybors, asserting claims for breach of contract and the tort of damage to realty.

¹ Franklin Civil Code § 9-30.

² Franklin Civil Code § 9-24.

Naybors moved for summary judgment on all plaintiff's claims on the basis that the claims were barred by the four-year statute of limitations set forth in Franklin Civil Code § 9-30 because all claims involved damage to property. The trial court granted the motion, finding that the four-year statute of limitations was applicable because all of Popper's claims, whether framed as contract or tort, actually involved damage to realty and that the record was devoid of evidence of fraud, which would toll the limitation period.

1. Popper first contends that the trial court erred in applying the four-year statute of limitations to all her claims. We agree.

Written contracts are governed by a six-year statute of limitations. Franklin Civil Code § 9-24. The period of limitation on a construction contract commences on the date the work was substantially complete. Popper filed her action within six years of the date her home was substantially complete. Therefore, summary judgment was not warranted as to her contract claim.

We conclude that the four-year statute of limitations in § 9-30 applies only to tort actions for damage to realty. Actions arising out of contract do not fall within § 9-30's purview. The foundation for Popper's contract claim is simply the failure of Naybors to

fulfill the contract for a home suitable for its intended purpose and constructed with quality workmanship and materials. That Popper has experienced consequential damages that may be described as “damage to realty” does not change the fact that her claims are based on Naybors’ contractual duty.

2. Popper also contends that the trial court erred in finding that the four-year statute of limitations applicable to actions for damage to realty had run. She claims that she timely filed her tort cause of action for damage to realty because the cause of action could not accrue until she “discovered” the damage in 1999. However, it is well established that this so-called common-law “discovery rule” does not apply to tortious damage to realty.

The common-law discovery rule, which tolls the statute of limitations until the plaintiff discovers or reasonably should have discovered the existence of a cause of action, is confined to cases of bodily injury that developed over an extended period of time.

An action under § 9-30 for damage to realty must be brought within four years of substantial completion of the work. This rule that the statute of limitations begins to run upon substantial completion of the work applies notwithstanding the fact that Popper may have had no knowledge of any alleged defects until after the substantial completion of the house. Because the home was substantially completed in mid-1994, the four-year

statute of limitations expired in mid-1998, and Popper’s tort claim is barred, unless the statute of limitations is tolled for some other reason.

3. Popper next contends that summary judgment on her tort cause of action was precluded by evidence of fraudulent concealment, which should have tolled the four-year statute of limitations for damage to realty until the time when the defects were discoverable. Franklin Civil Code § 9-96. This argument is based on the contention that Naybors knew about the defects in synthetic stucco systems at the time he sold the house to Popper, yet withheld this information from her and represented that the home was constructed with quality workmanship and materials. However, Popper failed to present any competent evidence rebutting Naybors’ affidavit that he did not know of any problems associated with the use of synthetic stucco and did not intentionally conceal the real problem from Popper.

To establish fraudulent concealment under § 9-96 sufficient to toll the statute of limitations, Popper must prove that (1) Naybors committed actual fraud, (2) by his fraud he intentionally concealed the cause of action from Popper, and (3) she exercised reasonable diligence to discover the cause of action despite her failure to do so within the applicable statute of limitations. Moreover, to toll the statute, the concealment of a cause of action must be by positive affirmative act,

not by mere silence. Some trick or artifice must be employed to prevent inquiry or elude investigation or to mislead and hinder the party who has the cause of action from obtaining the information. Here, Popper made no showing that Naybors' construction of the house or actions in selling the house to her involved fraud or that by some artifice he concealed the allegedly faulty construction.

The only evidence to support Popper's allegation of fraudulent concealment consists of (1) a 1991 article addressing moisture and wood rot problems associated with synthetic stucco, (2) deposition testimony from the president of the stucco supply company stating that he distributed installation direction brochures for buyers of his product, and (3) an expert affidavit documenting construction defects. There is no evidence rebutting Naybors' testimony that he did not know of any problems associated with the use of synthetic stucco. There is also no evidence that Naybors affirmatively concealed any allegedly defective construction or that he hindered or prevented Popper from discovering any alleged defect. Even when the damages suffered by purchaser were not the type that would be readily discernible by the purchaser without taking extraordinary action, the purchaser must show any act or artifice by the seller that was meant to deter timely discovery of the facts.

Construing the facts in a light most favorable to Popper, the record contains no evidence of fraud or fraudulent concealment that would toll the four-year statute of limitations.

Judgment affirmed in part and reversed in part.

Wolman Windows, Inc. v. JOE Industries, Inc.

Franklin Court of Appeal (1999)

Wolman Windows, Inc. (Wolman) filed a multicount suit against JOE Industries, Inc. (JOE). The district court granted summary judgment for the defendant, holding that the claims were barred by the statute of limitations.

Wolman manufactures and sells custom-made wooden doors, windows, and other construction products. JOE makes and sells, among other things, wood preservatives. The dispute here arose from Wolman's purchase of a wood preservative called N-Rot from JOE for Wolman's use in treating its windows and doors.

Wolman purchased and used N-Rot from 1985 to 1988. On April 22, 1994, Wolman filed this suit. Wolman's central allegation is that JOE's products did not meet Wolman's expectations in preventing wood rot and deterioration in Wolman's doors and windows.

Under the Uniform Commercial Code, adopted in Franklin, contract claims must be brought within four years of their accrual. Ordinary warranty claims generally accrue upon tender of delivery. Wolman last took delivery of JOE's product in December 1988 and failed to file suit until April 1994, almost two years too late, unless the statute of limitations was tolled.

Wolman alleges that JOE fraudulently concealed the N-Rot defects forming the basis of Wolman's causes of action. Fraudulent concealment, if established, would toll the statute of limitations until Wolman discovered or had a reasonable opportunity to discover the concealed defects. *See* Franklin Civil Code § 9-96. To prevail under § 9-96, Wolman must show that JOE fraudulently concealed the very existence of the facts that establish the cause of action and that Wolman was "actually unaware" of these facts. Since these are disputes of fact, summary judgment is appropriate only where a reasonable juror could not find fraudulent concealment. The district court found that the evidence in the record did not create a genuine issue of material fact on fraudulent concealment. We agree.

The substance of Wolman's claims is that JOE warranted that N-Rot would adequately prevent wood rot, but the product failed. The first critical question therefore is whether JOE fraudulently concealed N-Rot's alleged failure to prevent rot in Wolman's wood products. Acts that can constitute fraudulent concealment include outright misrepresentations or failures to disclose information when a duty of disclosure is present, such as in a fiduciary relationship. No such disclosure duty arises from the arm's-length transactions of the parties here, notwithstanding that one of

them might have possessed superior knowledge. Misleading partial disclosures, however, may constitute fraudulent concealment. If there is evidence that JOE undertook fraudulently concealing acts, the second question is whether Wolman knew or should have known of the facts that make up its cause of action. Since Wolman has not supplied any evidence of the necessary fraudulent acts, we need not reach the second inquiry.

In attempting to make out a triable case of fraudulent concealment, Wolman alleges that JOE misrepresented N-Rot's effectiveness and made misrepresentations that, while not directly vouching for N-Rot's effectiveness, tended to promote it. For example, Wolman alleges that JOE misled Wolman about long-term research supporting N-Rot's effectiveness, about N-Rot's certification by an industry standards organization, about changes in the formulation and manufacturing process for N-Rot over the years during which Wolman bought and used it, and about the similarity between the type of N-Rot sold to Wolman and the type sold to a well-known competitor. All of these misrepresentations, Wolman alleges, prevented Wolman from learning that N-Rot was failing. As we discuss below, even if JOE intentionally made such misrepresentations, those acts do not constitute fraudulent concealment.

In *Shine v. Grain Elevator Corp.* (Franklin Court of Appeal, 1981) and *Mills v. Grain Elevator Corp.* (Franklin Court of Appeal,

1985), the plaintiffs sued the manufacturer of a particular model of grain elevator that allegedly failed to protect its contents as promised. In each case, the defendant raised a statute of limitations defense.

In *Shine*, the plaintiff alleged that, while inherent and known design defects were the cause of the elevator's failure, the seller intentionally misled Shine by fooling him into believing that the problem was faulty seals, which could be fixed, and the seller attempted to repair the seals in order to deceive him. This court held that a genuine issue of material fact existed as to fraudulent concealment.

In *Mills*, the plaintiff alleged that the defendant misled her by continually extolling the virtues of the elevator model in printed material, all the while knowing that the elevator did not work. This court held that this conduct did not constitute fraudulent concealment. We noted that it would have been impossible for the defendant to conceal the facts that gave rise to Mills' cause of action, because the evidence that it was defective was in Mills' yard. We distinguished *Shine*, noting that the defendant intentionally lulled the plaintiff into believing that the problems with the elevator could be, and would be, repaired.

These cases demonstrate that Wolman's allegations that JOE fraudulently misrepresented N-Rot's effectiveness do not constitute

fraudulent concealment, at least where Wolman still had access to the facts that would make out its cause of action. At all times, Wolman had access to each of the very facts that establish Wolman's breach of contract action, namely N-Rot's alleged failure to prevent rot on Wolman's products. The oral and written representations that Wolman relies on to support its fraudulent concealment argument did not, and indeed could not, prevent Wolman from discovering that JOE's representations concerning the virtues of N-Rot were false. None of JOE's alleged acts could have covered up the relevant facts.

Wolman comes closest to alleging fraudulent concealment by asserting that JOE misled Wolman about the cause of Wolman's rot problems. The record reflects that, faced with accusations by Wolman that N-Rot was failing, JOE told Wolman that JOE believed that Wolman's construction practices were to blame. At the time, JOE had information which both supported and undercut N-Rot's efficacy. For example, N-Rot's performance for several other customers had been positive, and laboratory tests of N-Rot produced many satisfactory results. On the other hand, some tests returned less favorable results, especially some water repellency tests. These facts are not evidence of fraudulent concealment. Absent some duty to disclose, not present here, JOE was not required to inform Wolman of the facts that reflected poorly on N-Rot's performance.

JOE's denial of liability alone is certainly not fraudulent concealment. At best, Wolman might be able to prove that JOE was wrong in stating that Wolman's construction practices resulted in Wolman's rot problem. But Wolman can point to no evidence that shows that JOE's representations about the cause of Wolman's rot problem were fraudulent. Thus, Wolman's fraudulent concealment claim fails.

Affirmed.

POINT SHEET

State v. Miller

State v. Miller
DRAFTERS' POINT SHEET

In this performance test item, the applicant is employed by the State's Attorney and is assisting in the trial of the defendant, Tom Miller. Mr. Miller is charged with two domestic violence offenses against Jan Adams, the woman with whom he had previously cohabited, and her grade-school-age daughter, Sara Kelly. Miller was previously convicted of separate assaults against Jan Adams and Sara. According to Adams, in another incident very early in their relationship, Miller had assaulted her, but was never charged for that incident.

The State's Attorney, in compliance with Franklin Rule of Evidence (FRE) 418E, served notice on Miller's attorney that it intended to introduce evidence of the three prior acts of violence at defendant's trial. Defense counsel raised three objections, and the judge ordered the parties to submit concurrent briefs on the issues raised in defense counsel's objections.

Applicants' task is to write the brief. The File contains the instructional memo from the supervising State's Attorney, which sets forth defense counsel's three objections, an office memo prescribing the format and contents of briefs and memoranda, and a transcript of a police detective's interview with Jan Adams. The Library contains various sections of the Franklin Rules of Evidence and the Franklin Penal Code as well as two appellate cases bearing on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. That is within the discretion of the graders in the user jurisdictions.

I. Overview. The task is to write a persuasive brief arguing that evidence of Miller's prior acts of violence is admissible against him under the appropriate statutes. The work product should resemble a brief that follows the instructions in the office memo Re: Persuasive Briefs and Memoranda, including a Statement of Facts and Arguments preceded by expositive section headings.

The applicants should address each of the objections:

- That none of the prior incidents constitutes domestic violence under Franklin Penal Code § 501, and therefore, FRE 418B does not apply;
- That each prior incident constitutes inadmissible character evidence under FRE 404A; and

- That, even if the evidence is admissible under FRE 404B or 418B, the court should exercise its discretion under FRE 403 to exclude the evidence.

II. Statement of Facts. Some applicants may wish to set forth the facts at length. Others may wish to state only enough facts to set the scene and import other facts as necessary into their arguments. Either way is acceptable as long as the Statement of Facts adequately informs the court of the nature of the case and the issues.

The following chronology of facts might be included in the Statement:

- Tom Miller and Jan Adams met in June 2001.
- Jan Adams has a grade-school-age daughter, Sara Kelly, whose father is Charles Kelly.
- After they met, Miller and Adams lived together in an “intimate” relationship for almost a year. They were cotenants on the lease of their apartment and shared expenses.
- As early as July 4, 2001, in an incident outside a bar, Miller became angry about a remark someone made about Adams being “Charles’ woman” and shoved Adams to the ground. Adams’ friend, Mike, took her home after the incident.
- This incident was not reported to the police, and Miller was not charged.
- On September 21, 2002, Miller became angry with Sara because she was “whining,” and he yelled at her and pushed her against the wall. Adams told Miller to pack up and get out. Adams reported this incident to the police.
- Adams and Sara moved to another apartment that she and Miller had been planning to move to; Miller had a key to the new apartment.
- On February 12, 2003, when Miller was getting ready to go to court regarding the September 21 incident, he went to Adams’ apartment and tried to convince her to change her story and drop the charges. When she refused, Miller pushed her against the wall, stuck his finger in her eye, hit her in the face and choked her. Miller left and Adams called the police.
- About an hour after the police left, Adams heard a crash in her living room. She found a rock and a broken window. She saw Miller’s car leaving the driveway immediately afterwards.

- On October 29, 2003, Miller let himself into the apartment, found Adams in the bedroom, and began yelling in a jealous rage because he heard she had been “talking with Charles Kelly.”
- When Adams told Miller she did not want to see him anymore, he slapped her so hard that she hit her head on the wall.
- As he was leaving, Miller warned Adams he would “kill you and your precious little Sara” if she reported the incident to the police.
- Adams believes that Miller’s hatred of Charles Kelly makes him resent Sara and that, “He knows it hurts me when he takes it out on Sara.”
- On November 5, 2003, Miller showed up at Adams’ apartment at about 1:00 A.M. and began yelling and pounding on the door until the landlord commanded him to leave.
- In the next couple of hours, Miller phoned and left messages on Adams’ answering machine threatening dire consequences if she called the police again. Miller said “You’re my woman until I say so.”
- About two hours after Miller’s last phone call, Adams heard a crash in Sara’s room. There, she found a large rock and glass on the floor. She looked out of the window and saw Miller standing there. Adams reported this incident to the police.

III. Argument. Applicants’ arguments should address each of defense counsel’s objections. One format is for each *objection* to be the subject of a separate heading followed by argument relating to that heading. Alternatively, applicants can organize their briefs by each *incident* and then respond to defense counsel’s objections as they relate to the particular incident. The applicants are expected to merge the facts and the law to make a persuasive argument. The headings appearing below are exemplars only and are not intended as the *only* acceptable headings.

- THE FEBRUARY 12, 2003, INCIDENT IS ADMISSIBLE AS AN INCIDENT OF DOMESTIC VIOLENCE UNDER FRE 418B¹.
 - The February 12, 2003, incident: This is the incident in which Miller beat Adams because she refused to “drop the charges,” threatened her for

¹ Somewhere in their briefs, applicants should recognize that the other two incidents (especially the incident involving Sara) probably do *not* qualify as “domestic violence” under § 501 and FRE 418. For these two incidents, applicants should argue that they are admissible under FRE 404B. This discussion follows on page 4, *infra*.

having called the police, and threw a rock through her living room window. He was convicted for this offense.

- This incident satisfies all the definitional requisites for domestic violence under Penal Code § 501(b):
 - It is unclear exactly when Miller and Adams began living together. She says they had lived together “for almost a year” and that they separated in September 2002. Thus, they had probably lived together from September 2001 to September 2002, which by any measure was a sufficiently long relationship under § 501(b). By February 2003, they had been living apart for five months, but they were nonetheless “former cohabitants.”
 - They lived in an “intimate” relationship (which means they probably had sexual relations) while living in the same apartment; they shared expenses; both were “on the lease,” thus satisfying the joint use of property factor; and, apparently, the relationship was a continuous one.
 - The passage of a mere five months from the time of their separation does not render the incident so remote in time as to divorce it from their former cohabitational relationship.
 - Accordingly, it is admissible under FRE 418B as domestic violence, irrespective of FRE 404.
 - To be sure, it is still subject to the court’s discretion under FRE 403. (See *infra*.)
- The September 21, 2002, incident is admissible under FRE 404B: This is the incident in which Miller became angry with Sara and shoved her against the wall. He was convicted for this offense.
 - This, too, occurred after Miller and Adams had been living together for a year and all the cohabitation factors recited in § 501(b) were present.
 - The difficulty with trying to cast it as “domestic violence” is that it does not meet the definitions.

- Section 501(b) requires that the “abuse” be committed against an adult or fully emancipated minor. Sara was then six years old.
 - Notwithstanding that Adams says Miller took things out on Sara only as a way of hurting Adams (i.e., emotionally injuring Adams), it does not meet the definition of “abuse” under § 501(a), which requires “bodily injury.”
 - Thus, this incident is probably not admissible under FRE 418B, but would be under FRE 404B. (See *infra*.)
- The July 4, 2001, incident: This is the incident in which Miller became angry over the “Charles’ woman” remark and shoved Adams to the ground in the parking lot. It was not reported to the police, and he was not charged with an offense.
 - This is probably not an incident of domestic violence.
 - Miller and Adams had not yet begun cohabiting.
 - According to Adams, it happened “right after we started dating.” Although this fact *might* bring it within the § 501(b) rubric of abuse against one with whom “the suspect . . . has had a dating . . . relationship,” the relationship was incipient at the time, and none of the § 501(b) factors is present.
 - However, applicants could make a persuasive argument here that a “dating relationship” existed and argue that the dating relationship alone is a basis for classifying this incident as one of domestic violence under § 501 and therefore admissible under FRE 418B.
 - The better course of action is to argue admissibility under FRE 418B but, in the alternative, admissibility under FRE 404B.
- THE INCIDENT OF FEBRUARY 12, 2003, IS ADMISSIBLE IRRESPECTIVE OF WHETHER IT IS CHARACTER EVIDENCE, AND THE SEPTEMBER 21, 2002, AND THE JULY 4, 2001, INCIDENTS ARE ADMISSIBLE UNDER FRE 404B TO SHOW MOTIVE, INTENT, OR COMMON PLAN.

- As shown above, the February 12 incident is clearly an incident of domestic violence and is admissible irrespective of FRE 404².
 - And, in any event, it is a past crime (Miller was convicted of it) that can be used to show motive, opportunity, intent, and common plan under 404B: “Evidence of past crimes, civil wrongs, or other acts. . . may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, common plan, identity, or absence of mistake or accident.”
 - In either case, it remains subject to the court’s discretion under FRE 403. (See *infra*.)
- Even if it is determined that the September 21 incident does not qualify as an incident of domestic violence (*supra*), it is a past crime (Miller was convicted of it) that can be admitted to show motive, opportunity, intent, and common plan.
- Applicants could argue any of the following or any of the alternative purposes listed in 404B, provided they support their arguments:
 - Motive: Miller knows it hurts Adams when he takes his anger out on Sara. He is also deeply distrustful of Adams’ relationship with Charles Kelly, Sara’s dad, and because of this, he resents Sara and his violent outburst reflects that hostility. Miller also wants to exert power and control over Adams by being violent with her and Sara.
 - Common plan: Miller has repeatedly sought to control and intimidate Adams by threats and violence against her and Sara.
 - Intent: Miller has denied all allegations against him. Therefore, the State has to prove all the elements of the assault charges, including that he intended to cause injury in the 10/29/03 and 11/4/03 incidents. His violent “pushing” is relevant to proving his intent to cause injury.

² FRE 404A prohibits admission of character evidence to prove propensity. FRE 404B’s first sentence prohibits the admission of other acts to prove propensity.

- Again, admission of this evidence is subject to the court’s discretion under FRE 403.
- The July 4 incident is also admissible under FRE 404B.
 - The difference is that Miller was not convicted of this incident and has denied it.
 - However, it is still a past *wrong* or *act* and should be admitted to show any of the listed acceptable purposes under FRE 404B. FRE 404B does not limit other acts to those resulting in convictions.
- Applicants could argue any of the following or any of the alternative purposes listed in FRE 404B, provided they support their arguments:
 - Motive: Defendant’s jealousy over Adams’ relationship with Charles Kelly fuels his violence against Adams. He also seeks to assert power and control over Adams using violence with her and threats of violence.
 - Common plan: This was the first of several violent outbursts directed at Adams (and Sara) that Miller used to intimidate and control Adams.
 - Intent: Such violent outbursts were intended to cause harm—they were not done in self-defense or as a result of an accident.
 - Admission of this evidence is subject to the court’s discretion under FRE 403. (See *infra*.)
- IN EXERCISING ITS DISCRETION UNDER FRE 403 AND 418, THE COURT SHOULD CONCLUDE THAT ADMISSION OF THE EVIDENCE WILL NOT UNDULY CONSUME TIME OR CREATE A SUBSTANTIAL DANGER OF UNDUE PREJUDICE.
 - Applicants should remind the court that it has very broad discretion in these matters and that it will be reversed only in cases of “manifest abuse.” *State v. Beck*.
 - Here, applicants should address the *Beck* factors in light of each of the three incidents:
 - The February 12, 2003, incident (beating Adams because she would not drop the charges) falls under FRE 418 and is a prior conviction.

- The September 21, 2002, incident (assaulting Sara) probably doesn't fall under FRE 418 but is also a prior conviction.
- The July 4, 2001, incident (shoving Adams to the ground in the parking lot) might be, but is probably not, a domestic violence violation and is not a prior conviction.
- The test the court is required to apply to protect a defendant's due process right to a fair trial is discussed best in *State v. Beck*. Applicants should apply these factors based on the available facts.
 - The nature, relevance, and remoteness of the event.
 - The degree of certainty that the defendant committed the offense.
 - The burden placed on the defendant of defending against uncharged offenses.
 - The risk of confusing or misleading the jurors.
 - The prejudicial impact on the jurors.
- The February 12, 2003, incident: This is the incident in which Miller beat Adams severely because she refused to drop the charges and he threw a rock through her living room window.
 - In its nature, it is very similar to the October 29 and November 5, 2003, incidents with which he is currently being charged.
 - It is similar to the abuse he engaged in on October 29.
 - It involves the same threats about what he would do if she called the police.
 - At that time, he also threw a rock through a window (then it was through the living room window; on November 5, it was through Sara's bedroom window, a difference without a distinction).
 - Its relevance is that it shows Miller's propensity and a pattern of domestic violence.
 - It is not remote either in time or in place. It occurred at the same apartment just seven months or so before the current October 29 offense.

- There is no doubt that Miller committed the act. He was convicted, so it will not unduly consume time at the trial in proving it.
- Miller has denied the current charges, admission of the evidence of the prior conviction will *help* rather than hinder the jury in confirming that it is Miller's modus operandi. Moreover, it is a prior conviction, as to which there cannot be any confusion.
- It will not create a substantial risk of prejudice on the jurors because it is a crime of the same kind (certainly no worse) than that with which he is currently charged.
- The September 21, 2002, incident: This is the one in which Miller shoved Sara against the wall.
 - In its nature and relevance are that it is similar to the November 5 rock-throwing incident in that it illustrates his animus toward Sara. Moreover, this is the incident that led to the February 12 beating of Adams, i.e., he beat her because she refused to drop the charges for the assault on Sara.
 - It is not remote either in time or in place because it occurred a little over a year ago in the apartment where Adams and Miller were living together.
 - There is no question of certainty that Miller committed the earlier assault against Sara because he was convicted. It will not unduly consume time at the trial to prove it using Adams' testimony, nor will it confuse the jury.
 - Admission of the incident will not create a substantial risk of undue prejudice because it is not significantly worse than the pending offense (throwing a rock through the child's bedroom window, a place he knew would be occupied by the child late at night because he knew the layout of the apartment).
- The July 4, 2001, incident: This is the one in which Miller shoved Adams to the ground over the "Charles' woman" remark.
 - In its nature and relevance, it is similar to the October 29 incident with which Miller is now charged. On October 29, he raged against

Adams and slapped her so hard that she hit her head against the wall because he was jealous that Adams had been talking with Charles Kelly. That same rage and jealousy precipitated the earlier July incident in the parking lot.

- Although he was never charged or convicted for the parking lot incident, it is a past act that can come in under FRE 404B to show any of the purposes listed.
- The fact that it is an uncharged offense will necessarily involve some consumption of time at trial. However, putting forth evidence of this incident is not qualitatively different from putting forth evidence of the incident for which Miller was convicted. Here, in addition to Adams' testimony, Adams' friend, Mike, could also testify that he saw the incident. Mike took her home after Miller pushed her.
- It will not confuse the jurors to hear this evidence. Rather, it will help them understand the impact that Miller's jealousy had on his behavior toward Adams.
 - Moreover, Miller has denied the current charges, so it is appropriate that evidence of past similar acts be admitted under FRE 404B provided that the court can do so within the strictures of FRE 403. *State v. Grubb*.
 - Nor will admission of this evidence unduly prejudice the jurors because the July 4 incident is not nearly as egregious as the charges Miller currently faces. *State v. Beck*.
- Therefore, the court should admit the evidence of all three past incidents.

POINT SHEET

*Rivera v. Baldisari
Amusement Parks, Inc.*

Rivera v. Baldisari Amusement Parks, Inc.

DRAFTERS' POINT SHEET

The applicant works for a firm that represents Cara Rivera, a plaintiff in a personal injury action that is about to go to trial. The supervising partner is concerned that the opposing counsel is going to object on authenticity grounds to the documents and other exhibits he intends to introduce in Ms. Rivera's case in chief. The task assigned to the applicant is to assist the partner in getting the exhibits ready for introduction at the trial.

Specifically, the applicant is asked to write a memorandum spelling out exactly what has to be done to compel production of the documents and exhibits in court for use at trial and to lay the foundation for (i.e., authenticate) them for introduction in evidence. The partner's memo prescribes the format the applicant is expected to use. They are told to assume that all the evidence is relevant and admissible if properly authenticated.

The File consists of the partner's instructing memo, a list of the exhibits in question and a letter-report from an investigator. The Library contains an excerpt from *Walker on Evidence in the Franklin Courts* and sections of the Franklin Rules of Evidence (FRE) and the Franklin Code of Civil Procedure (FCCP) that bear on the task. The *Walker* excerpt is intended to give the applicants a thumbnail sketch of the meaning and intent of the requirement for authenticating trial exhibits, as well as some hints as to the alternative means of producing them in court.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. That is within the discretion of the graders in the user jurisdictions.

I. Overview. The applicants' work product should resemble an office memo and should address both questions posed by the partner for each of the items of evidence.

- The items of evidence with which the applicants must deal are described briefly in the Items of Evidence list prepared by the partner, and additional information about some of them is given in the report from John Ripka, the investigator.
 - The applicants will have to pull information from both sources to perform the task.
- As to each item of evidence, they must do the following:
 - Identify the item of evidence they are dealing with;

- State what steps must be taken to compel production of that particular item in court;
- State what needs to be done to establish the authenticity of each item.
 - In connection with these last two steps, the partner’s instructions tell them to use the “most direct and efficient” method.
 - As is suggested in *Walker* and as some of the Rules and Code sections provide, there are some time-saving shortcuts available that obviate the need for requiring the attendance of live witnesses and in-court testimony (e.g., alternative means of requiring production of business records).
 - Wherever possible, the applicants are expected to bring those shortcuts to bear.
- Cite to the appropriate sections of the Rules and Code.
 - They can cite these separately at the end of each section or, as is done in this point sheet, include them in the discussion as they go through the foregoing steps.
 - The important thing is that they cite the Rules and the Code discriminatingly, not just randomly throw in a string of citations covering all the possible sections.
- Somewhere in their answers, applicants should refer to FRE 1003 for the proposition that duplicates of documents are admissible to the same extent as originals, barring any question of authenticity.

II. Frank Electronics’ Personnel File on Cara Rivera. According to the partner’s Items of Evidence list, this file contains important information relating to the wage and promotion loss Ms. Rivera suffered as a result of her injuries at WWW. The documents are therefore “material” to the issues in the case.

- The situation regarding Ms. Rivera’s personnel file is different from that relating to Mr. Spitz’s file (*infra*).
- There are no privacy concerns because Ms. Rivera has put her employment status in issue and she, herself, is requesting production of the file.
 - Therefore, the elaborate cross-notice provisions of FCCP § 1986 are inapplicable.

- In the unlikely event that her employer, Frank Electronics, balks at producing the file, Ms. Rivera’s counsel could furnish Frank with a “written authorization signed by the employee to release the records.” FCCP § 1986(b)(2).
- The personnel file is clearly a “business record” and can be subpoenaed under FCCP § 1990 *et seq.*
 - In this case, counsel can take advantage of the shortcut procedure of having Frank lodge the documents with the court in a sealed envelope; i.e., Frank is neither a party nor a place where the injury occurred.
 - Accordingly, Ms. Rivera’s attorney should issue and serve on Frank’s custodian a *subpoena duces tecum* with the appropriate supporting affidavit.
 - That would most likely be Nancy Sanders, Frank’s Director of Human Resources.
 - There is no need to state in the subpoena that the witness is required to appear in court.
 - Accordingly, Frank can seal and lodge the records as provided in FCCP § 1990 and execute an affidavit that complies with § 1991.
 - The affidavit will serve to authenticate the records. FCCP § 1991.

III. WWW’s Personnel File on Brady Spitz. From the partner’s Items of Evidence list and Ripka’s report, it is known that the personnel file will show prior incidents of discipline for drinking on the job. Spitz is nowhere to be found. His last known address, however, is available. The information is sufficiently “material” to support a *subpoena duces tecum (infra)*.

- Because of privacy considerations, the personnel file involves special statutory considerations that must be complied with.
- First, Ms. Rivera’s counsel must obtain or issue a *subpoena duces tecum* requiring Baldisari to bring the personnel file to court at the time of trial.
 - The subpoena may be obtained from the court clerk or be issued directly by the requesting attorney. FCCP § 1985(c).

- Since it is a *subpoena duces tecum*, it must be accompanied by an affidavit specifying the exact matters being sought, the materiality of the matter to the issues in the case, and that the matters are in Baldisari's possession or control. FCCP § 1985(b).
- The fact that it is a personnel file that is being sought has other ramifications:
 - Production in court cannot be compelled by the summary procedure requesting a party to the action to bring the documents to court under FCCP § 1984(b).
 - The affidavit supporting the subpoena must contain specified statements advising the employee whose records are being sought of the fact of the subpoena and his rights to object, including the right to bring a motion to limit or quash the subpoena. FCCP § 1986(a) and (c).
 - The subpoena and the affidavit must then be served on the employee either personally or at his last known address, observing certain time limits. FCCP § 1986(a).
 - Although it will probably be futile to send the subpoena to Spitz's last known address, Rivera's counsel will have to do it to avoid a challenge to the subpoena by Baldisari.
 - Then, it must be served on Baldisari's "custodian of records" with a proof of service attesting to compliance with all of the foregoing.
- Finally, the *subpoena duces tecum* must require Baldisari's "custodian" to appear in court and bring the personnel file with him/her.
 - This is so even though the personnel file would no doubt qualify as a "business record," which would ordinarily be susceptible to compelling production by the summary procedure set forth in FCCP § 1990, *et seq.*, i.e.,
 - Compliance with a *subpoena duces tecum* for business records by submitting copies and an affidavit to the court in a sealed envelope.
 - However, this summary procedure is not available here because FCCP § 1990 limits it to a *subpoena duces tecum* served on a custodian where the business is "neither a party nor the place where any cause of action is alleged to have arisen."

- Here, Baldisari is both a party and Baldisari's Amusement Park (WWW) is the place.
- Thus, although it is unlikely that Baldisari will challenge the authenticity of a personnel file from its own records once it has been produced in court, Rivera's counsel will have to go through the motions and elicit the testimony of Baldisari's custodian regarding the business nature of the documents, i.e.,
 - That they were made at or near the time of the occurrence of the matters set forth therein;
 - That they were kept in the course of regularly conducted activity; and
 - That they were made as a regular practice.
 - See FRE 902(11).

IV. State Safety Inspection Report. The partner's Items of Evidence list and the investigator's report show that this report contains evidence of citations for violations related to the operation and maintenance of the Ferris wheel and evidence of the Department of Public Safety's recommendation for installation of automatic seat-guard locks. The inspection and report were made by Inspector David Steele, and the head of the Department's Bureau of Records is Marta Jones.

- This document is a "public record" and can be authenticated either by calling a sponsoring witness (Steele or Jones) or by getting a certified copy.
 - Again, FRE 902(4) provides that a certified copy suffices to prove the contents of the document.
 - Since getting a certified copy that complies with FRE 902(11) will avoid the necessity of issuing and serving a *subpoena duces tecum*, calling a witness, and examining the witness on the stand, this is the procedure for which the applicants should opt.

V. Baldisari's Maintenance Records. It is known from the partner's Items of Evidence list that these records exist and are kept in Baldisari's maintenance department files. They contain correspondence showing that Baldisari declined to purchase the automatic seat-guard locks. They are clearly "material" for purposes of a *subpoena duces tecum*.

- In this case, Ms. Rivera's counsel should issue and serve upon Baldisari's "custodian" of the maintenance records a *subpoena duces tecum* with a supporting affidavit.

- To satisfy the requirement that the affidavit should specify exactly what matters it seeks production of FCCP § 1985(b), it should ask for records that relate to the Ferris wheel “surge” problem experienced by Ms. Rivera and the correspondence relating to the seat-guard locks.
- The subpoena should require the in-court appearance of the custodian.
 - This is axiomatic because, even though the maintenance records are clearly business records (*supra*), the summary procedure of lodging the documents with the court in a sealed envelope is not available under FCCP § 1990 because Baldisari is a party as well as the place (WWW) where the cause of action arose.
 - The custodian would then be examined on the stand as to the bona fides and means of preparation and retention of the records in the ordinary course of business.

VI. Hospital and Medical Records. These are the records from the various health care and service providers that rendered services to Ms. Rivera. The expenses are obviously recoverable as damages, and for that reason, the records are material to the issues of the case. They are all business records of the entities that furnished the services. Since the records relate to Ms. Rivera’s treatment, there are no privacy concerns such as those that accompany requests for production of third-party medical records.

- Thus, Ms. Rivera’s attorney should issue business records *subpoenas duces tecum* and the required supporting affidavits and serve them on the record custodian at Franklin General Hospital, requiring them to lodge with the court the records and affidavit in a sealed envelope. FCCP § 1990 *et seq.*
 - The affidavit will serve to authenticate the records from the hospital. FCCP § 1991.

POINT SHEET

*Bennett v. Sands
Construction Company*

Bennett v. Sands Construction Company
DRAFTERS' POINT SHEET

The client, Samuel Bennett, has just spent \$45,000 to replace the roof on his house and repair damage resulting from leaks in the original roof. He wants to sue Sands Construction Company (SCC), the contractor that built his home and installed the original roof seven years ago. The problem is that the applicable four- and six-year statutes of limitation appear to have run.

The applicants are asked to write a memorandum analyzing whether there is any way around the apparent bar of the tort and contract statutes of limitation.

SCC agreed to build the house in accordance with the architect's plans and specifications. At the time of contracting seven years ago, SCC presented Bennett with a "pricing sheet" showing that the roof to be installed was a "Flat-Darbex Roof." Bennett signed the pricing sheet without noticing that the contractor had substituted the Darbex roof for the "EPDM rubber membrane roof" specified by the architect.

Bennett moved into the house in July seven years ago and, within months, began experiencing water leaks. The problem recurred periodically until about five months ago. Each time there was a leak, Bennett would call Ray Sands, the proprietor of SCC, and Sands would attempt to diagnose and repair the leak. Sands ascribed the leaks to various problems with the types of windows, the gutters, and faulty flashing. His constant criticism, however, was of what he perceived as a faulty roof design by the architect. At one point about five years ago, Sands suggested that the roof and the gutter system be redesigned.

Five months ago, finally fed up with the abortive efforts to remedy the problem, Bennett contacted the architect who designed the house. The architect inspected the property. It was then that Bennett learned for the first time that SCC had substituted the Darbex roof. In addition, Bennett contacted the Darbex Company and learned that SCC had improperly installed the Darbex roof and that SCC was not a certified installer of Darbex products.

The File contains notes of an interview with Bennett and a series of letters chronicling the events. The Library contains the applicable statutes and two cases interpreting them.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. That is within the discretion of the graders in the user jurisdictions.

I. Overview. The task for the applicants is to write a memorandum in which they discuss whether the apparent bar of the statutes of limitation can be avoided. The work product should resemble an office memorandum from an associate to a supervising attorney.

There are two separate statutes of limitation. One, the four-year statute, applies to tort actions. The other, the six-year statute, applies to contract actions. The applicants are specifically told to explore the possibilities with respect to *both* statutes.

On the face of it, both statutes have run. The case law makes it clear that the common-law “discovery rule” (i.e., the rule that the statute of limitations does not begin to run until the discovery of the cause of action) does not apply in these circumstances. The applicants are therefore left with the possibility that SCC and Sands committed acts of fraudulent concealment, which might or might not have tolled the statutes.

On analysis of the facts and the case law, the likely outcome is that there was no fraudulent concealment that would toll the statutes and that Bennett comes too late. However, applicants will probably be tempted to construe the facts to create at least a material issue whether there was fraudulent concealment, and those whose analyses do so persuasively can receive credit.

II. The Statutes of Limitation. There are two separate statutes of limitation the applicants must deal with: § 9-24, the six-year statute relating to actions on written contracts, and § 9-30, the four-year statute relating to trespass or damage to realty. As the court held in *Popper v. Naybors*, the mere fact that the recovery being sought is for damage to realty does not prevent application of the longer six-year statute; i.e., if the damage results from the breach of a contractual duty, the longer, six-year statute can be applied.

The Six-Year Contract Statute. Bennett’s claim for breach of contract against SCC is based on SCC’s failure to construct the house in accordance with the architect’s plans and specifications. The plans specified installation of an “EPDM rubber membrane roof,” and SCC installed a “Flat-Darbex Roof.” The installation of the substitute roof resulted in damage to the house.

There is, of course, an issue whether, in the first instance, the roof substitution constituted a breach of contract by SCC. Bennett signed the pricing sheet on which the substituted roof was clearly noted. This was arguably a modification approved by Bennett. If so, the focus shifts from a claim for failure to construct the house in accordance with the plans to a claim for breach of the promise that SCC would perform the work in a “professional and workmanlike manner.” In either case, Bennett’s claim arises from a breach of contract.

- Franklin Civil Code § 9-24 provides that:
 - “All actions upon written contracts shall be brought within six years after the same become due and payable, or in the case of contracts for construction, upon substantial completion.”
 - The statute goes on to say that it is not applicable to contracts subject to Article 2 of the UCC. This is irrelevant, but it may be a distractor to some applicants who might try to argue that the contract in this case was for the sale of goods, i.e., a roof, which would be an incorrect analysis.
 - “Substantial completion” is defined in § 9-20 as “the date when construction was sufficiently completed . . . so that the owner could occupy the project for the use for which it was intended.”
 - In this case, Bennett moved into the house in July seven years ago.
 - Accordingly, that is the apparent date on which the statute began running.¹
 - Absent the occurrence of something to toll the statute, Bennett’s contract claim is barred.

The Four-Year Torts Statute. Bennett’s claim for damages, apart from the claim for breach of contract, is necessarily based on SCC’s negligence in the installation of the roof; i.e., irrespective of whether, by signing the pricing sheet, Bennett authorized the substitution of the Darbex roof for the rubber membrane roof, the roof was negligently installed. That much is clear from the letter from the Darbex Company, which points out that SCC did not install the roof properly and that the damage was a result of the faulty installation.

- Franklin Civil Code § 9-30 provides that:
 - “All actions for . . . damage to realty shall be brought within four years after the right of action accrues.”

¹ Applicants might be tempted to argue that each time SCC came to the house to make a repair there was a “new” contract to perform the repairs in a professional and workmanlike manner and that each “new” contract was breached on each occasion. Thus, the argument would go, although the repairs carried out by SCC longer ago than six years would fall outside of the statute, the repairs carried out at and after the time of the installation of the flashing in the area of the gable walls in July five years ago all fall within the six-year limitations period and that all claims for damages resulting from and after that event should not be barred.

That would be a strained argument. All claims, no matter when the damage occurred, spring from the roof installation, and, under § 9-24, all actions must be brought within six years of substantial completion. Sands installed the roof more than six years ago.

- The first leak occurred in October seven years ago.
- That is the time at which the cause of action for damage resulting from the negligent installation of the roof accrued.²
- Absent the occurrence of something to toll the statute, Bennett's tort claim is barred.

III. Whether SCC Engaged in Fraudulent Concealment That Would Toll the Statutes. The only basis for tolling these statutes of limitation is upon a showing that SCC engaged in fraudulent concealment that prevented Bennett, in the exercise of reasonable diligence, from discovering the defect. In *Popper v. Naybors*, the court holds that Franklin does not recognize the common-law "discovery rule," i.e., the rule that would toll the statute of limitations until the plaintiff actually discovers or reasonably should have discovered the cause of action.³

- Franklin Civil Code § 9-96, applied and interpreted in *Popper* and *Wolman Windows*, provides that:
 - "If the defendant is guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, any period of limitation established by Franklin law shall run only from the time of the plaintiff's discovery of the fraud."
- *Popper* and *Wolman* establish the following requirements for a showing of fraudulent concealment sufficient to toll the statutes:
 - That SCC/Sands committed *actual fraud*, either by
 - Outright misrepresentation or
 - Failure to disclose, or misleading partial disclosures, in the face of a duty to disclose.
 - That SCC/Sands took *positive action* by artifice or trick to prevent Bennett from making inquiry or to elude investigation, i.e.,

² Again, applicants might try to argue that Bennett has a separate cause of action for negligence each time SCC was unsuccessful in carrying out the series of repairs over the years. Thus, they might argue that all repairs performed at and after the time of the repairs to the chimney flashing in April, three years ago, fall within the four-year torts statute and that claims for damages arising since then are not barred.

This, too, would be a strained argument. The right of action for the negligent installation of the roof, from which all claims spring, was at the latest October seven years ago when the first leaks appeared.

³ Specifically, *Popper* holds that the common-law discovery rule does not apply to claims for *tortious damage to realty*. This leaves open the argument that the discovery rule might still be applied to claims for breach of contract.

There is nothing in the Library that would support such an argument. The best reading of the contract statute of limitations (§ 9-24) is that it is in the nature of a statute of repose. That is, the statute establishes six years as the outside limit for the assertion of contract claims, *unless* the fraud exception of § 9-96 can be brought to bear.

- That SCC/Sands “lulled” Bennett into inaction.
- That Bennett was reasonably diligent in discovering the cause of action, i.e., whether
 - Bennett knew or should have known of the defect.

The applicants are expected to apply the facts to the elements of fraudulent concealment expressed in the cases. This will require discussion and close analysis rather than a knee-jerk reaction that SCC/Sands misled Bennett because there were so many incidents that Sands *must* have been trying to cover up his own mistakes. To the contrary, close examination of the facts and their application to the law should lead to the conclusion that Bennett will probably not be able to show fraudulent concealment:

- The starting point is the inquiry of whether SCC engaged in fraud when it substituted the Darbex roof on the pricing sheet in January seven years ago.
 - Except for some vague suspicion that SCC was trying to cut corners on the contract, there is really nothing in the File to show that SCC misrepresented anything.
 - It was clearly stated in the architect’s specifications that the roof was to be a rubber membrane roof, and the pricing sheet, which Sands openly presented to Bennett for signature, clearly showed that SCC intended to install a Darbex roof.
 - It might be argued that SCC/Sands, because of presumably superior knowledge, had a duty to explain the substitution, but, under a dictum in *Wolman*, that would only be the case in a fiduciary situation. Here, there was an arm’s-length transaction and not a fiduciary relationship.
 - The final letter from SCC to Bennett suggests that Sands believed Bennett was aware of the substitution: “. . . the decision to use a torch-down roof was made for pricing considerations with your full knowledge.”
 - Unless one is prepared to ascribe to Sands a deceitful motive, which is not supported by any fact in the File, it must be concluded that Sands honestly believed Bennett was conscious of the substitution.

- Certainly, SCC/Sands did not engage in artifice or trick to prevent Bennett from discovering the substitution.
 - All Bennett had to do was compare the architect’s specifications with the pricing sheet, both of which were presumably in his possession, and the difference would have put him on notice.
 - Thus, at all times he had the means of discovering the facts. *Wolman*.
- There is nothing to suggest that there was any attempt to defraud or conceal when Sands suggested that the first leak, in October seven years ago, could be cured by replacing the top floor windows. Likewise, it does not appear that Sands undertook the subsequent repairs pretextually just to cover up the initial substitution or faulty installation.
 - The subsequent repairs appear to have been undertaken in good faith by SCC without any effort to hide anything from Bennett and without any knowledge that there was any problem with the way SCC had installed the roof.
 - Indeed, in Sands’ final letter to Bennett, he points out that he has had trouble-free experience using the Darbex product in other installations. *Cf. Wolman*, where the efficacy of a product in some applications was a factor considered by the court in determining that no duty arose to disclose problems in other applications.
 - Even Bennett concedes that each repair seemed at first to fix the problem (see Bennett’s letter to Sands).
 - The fact, subsequently revealed by the letter from the Darbex Company, that SCC was not a “certified” Darbex installer might be evidence of SCC’s negligence, but there is nothing about that to suggest fraud.
- The most persuasive evidence of the absence of fraudulent concealment is the fact that, as early as July five years ago, SCC/Sands expressed “misgivings” to Bennett about the roof design (see Sands’ second letter to Bennett).
 - That was tantamount to telling Bennett that, notwithstanding interim repairs, the leaks were likely to recur.

- It was also tantamount to telling Bennett that his architect had screwed up and should be consulted.
- Had Bennett heeded those “misgivings,” he would have done sooner rather than later what he ended up ultimately doing, i.e., consulting his architect, learning of the substitution, and pursuing an action.
- Thus, even if the initial roof substitution and the subsequent events can be construed to create an inference of fraudulent concealment, the means of discovering the cause of action were at all times readily available to Bennett.
 - SCC/Sands did nothing to prevent Bennett “from timely obtaining the true facts,” *Popper*; and, “At all times [Bennett] had access to each of the very facts that establish [SCC’s] breach of contract” *Wolman*.
 - Bennett knew he was experiencing recurring damage over a period of years;
 - He knew the successive repairs were ineffectual;
 - He could have ascertained the substitution by merely looking at documents in his possession, and, even if he was incapable of comprehending the impact of the substitution, it would have put him on notice; and
 - Had Bennett heeded Sands’ misgivings about the design, he would have brought the architect in sooner and discovered the cause of action.
- Accordingly, it is not likely that we can overcome the bar of the statutes of limitation.

NOTES

