

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

The MPT Question administered by the State Board of Law Examiners for the July 2012 Maryland bar examination was *Ashton v. Indigo Construction Co.* Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “Point Sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “Point Sheet” is analogous to the Board’s analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the State Board of Law Examiners to publish the MPT Question or the “Point Sheet” on the board’s website. However, the MPT Question and Point Sheet are available for purchase on the NCBE website.

**Materials for an unsuccessful applicant:** An applicant who was unsuccessful on the July 2012 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “Point Sheet” for the July 2012 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 2<sup>nd</sup>, 2013.

**Materials for anyone other than an unsuccessful applicant:** Anyone else may obtain the MPT Question and the “point sheet” only by purchasing them at the NCBE Online Store.

Use the following line to access the NCBE Online Store: [www.ncbex2.org/catalog/](http://www.ncbex2.org/catalog/)

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

**REPRESENTATIVE ANSWER 1**

Draft, Motion for Preliminary Injunction

Margaret Ashton, Plaintiff, vs. Indigo Construction Co., Defendant

(Sections I and II, omitted)

III. Argument

Summary of argument, request for relief

We request a preliminary injunction to enjoin Indigo Construction Company from using its property at 154 Winston Drive for dirt storage. We ask that it stop dumping additional dirt, and remove the remaining dirt. Plaintiff meets all of the requirements for a preliminary injunction, as set forth in the case *Otto Records*. To succeed in a claim for a preliminary injunction, plaintiff must prove that 1) the likelihood of ultimate success on the merits, 2) the prospect of irreparable injury if provisional relief is denied, and 3) that the balance of equities tips in plaintiff's favor (*Otto Records*).

In the following section, we set forth reasons why the court should grant Plaintiff a preliminary injunction under the test set forth in *Otto Records*.

A. Ashton is likely to succeed on the merits of its private nuisance claim against Indigo, because Indigo is the proximate cause of the harm, and its use is an unreasonable, intentional interference with plaintiff's enjoyment of the property.

Ashton will meet the first prong of the test for a preliminary injunction, as set forth in *Otto Records v. Nelson*, because it will succeed on the merits of its private nuisance claim against Indigo. The prevailing standard in this jurisdiction for the merits of a private nuisance claim is outlined in *Parker v. Blue Ridge*. In *Parker*, the court applied the Restatement of Torts test for a private nuisance. The elements of this test are as follows: 1) the defendant's action was the proximate cause; 2) of an unreasonable interference with plaintiff's use and enjoyment of her property; and 3) the interference was intentional or negligent.

Plaintiff can prove all of these elements, and is likely to succeed on the merits of her claim.

1. Indigo is the proximate cause of the harm, because the damage to plaintiff's property did not begin until Indigo purchased the lot.

In her affidavit, Ms. Ashton attests that she has lived at her home for 32 years. She has never experienced the damage she alleges until Indigo began dumping its dirt on the lot behind her home. She was able to read, garden, and talk with visitors on the porch before Indigo commenced its activities. She also has had to increase cleaning bills due to the dust. Similarly,

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

the *Appling Gazette* contains quotations from neighbors who also allege harm proximately caused from Indigo's activities (for example, dirt runoff during rainstorms). There are currently no other businesses located in the Graham District that could be causing this kind of harm.

2. Indigo's use is an unreasonable interference with plaintiff's enjoyment of her property. The dust and noise prevents plaintiff from being outside and enjoying her property and imposes additional costs, the interference is of a long-lasting extent and duration, and is an unsuitable use of a residential-type property when defendant has other options for dirt storage.

Under the objective standard set forth below (as directed by Parker), a reasonable person would conclude that Indigo is unreasonably interfering with plaintiff's use and enjoyment of her property.

a. Indigo's dirt storage severely interferes with plaintiff's use if the property by causing noise and dust, thereby preventing her from using and enjoying the property.

In her affidavit, Ashton documents the interference that Indigo has caused her in her enjoyment of her property. There is extreme noise caused by the trucks getting up the incline and breaking. This noise prevents her from sitting outside for longer than an hour, to read, garden, or talk with visitors on her porch. She was able to do these activities before Indigo commenced the harm. She also is unable to grow flowers, and must clean the house more frequently, due to the dust. Runoff from the dirt pile also flows to her backyard in bad weather. Her neighbors echo this complaint in an article from the *Appling Gazette*. All of these factors are ones that courts have recognized as causing a nuisance. In *Parker*, the court recognized a bad smell as being a nuisance. In *Timo*, the court also considered noise to be sufficient to give rise to a claim for damages. While the court would not grant a preliminary injunction due solely to noise, this case can be distinguished, on the grounds that there are additional factors here that were not present in *Timo*. First of all, there is dust pollution here, while in *Timo*, there was not. Second, the noise is more extreme in duration and frequency than in *Timo* (discussed in section b below).

b. Indigo's activities are of an unreasonable extent and duration, because the truck noise happens all day and the dust is constantly present.

Plaintiff alleges in her affidavit that the noise occurs up to 17 times per day, every single hour. In *Timo*, the noise only occurred three nights a week, and was closed many months of the year and in bad weather. In contrast, in this case, Indigo's activities occur every single day. They did agree to stop dumping after 8 p.m., but that still means they are conducting their activities during most of the daylight hours, when residents of the neighborhood wish to enjoy their property.

c. Indigo's activities are unsuitable for the locality. Even though they are sanctioned by law, they are still unreasonable due to the overwhelmingly residential nature of the property.

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

In *Parker*, the court stated that even a use which is permitted by law and which does not violate local zoning restrictions “may nonetheless be unreasonable and create a common-law nuisance”. Even though the City allowed Indigo to conduct its activities in a mixed use zone, they are still unacceptable. The *Applying Gazette* reports that the neighborhood does not have a single business in its borders. Defendant may argue that, as the article suggests, residents are upset that there is commerce, not just the nuisance. But this can be overcome by the overwhelming evidence neighbors have given of damage to their property, such as the neighbors that report dirt runoff in their yards. Indigo was on notice that it was a residential property, and that their actions could cause harm.

d. Indigo is not taking all feasible precautions, because they have other, more suitable property where they could conduct their activities.

An investigation has shown that Indigo owns an undeveloped 50-acre tract. It is not zoned, but does have paved roads. They also have a one acre lot with garage and parking, located at the *Applying Industrial Park*. There does not appear to be a reason why they cannot use either of these facilities for dumping and dirt storage. As to the unzoned property, they appear to have the support of the city, as shown in the *Gazette* quotation by City Manager, who supports their mission. They have not attempted to appeal to the city to get their 50 acre tract zoned for dirt storage. They also are neglecting to use their other 1 acre tract that is in an industrial park. As *Prosser and Keeton on Torts* point out, “a defendant’s use may be reasonable, legal, and even desirable, but it still may constitute a common-law private nuisance because it unreasonably interferes with the use of property by another person.

3. Indigo’s conduct can be inferred to be intentional and negligent.

While plaintiff cannot prove intent, in *Timo*, the court inferred this intent from defendant’s behavior. The same is true here.

B. Plaintiff will be irreparably harmed if injunctive relief is denied, as her land is a unique, and serious impairment has no remedy at law.

Under *Davidson*, courts have held that there is no adequate remedy at law for serious impairment of use of land. Plaintiff has lived at her home for 32 years. It has sentimental and completely unique value to her which cannot be replaced by a damages award. Plaintiff wishes to remain in her home, and is unable to enjoy and use it while Indigo conducts its activities.

C. The balance of equities tips in the plaintiff’s favor, because Indigo will still be able to continue their socially beneficial use without dumping on the property.

In *Timo*, the court holds that when determining the equities, courts must balance the social value, legitimacy, and reasonableness of the defendant’s use against the ongoing harm to the plaintiff.

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

The court must consider 1) the respective hardships to the parties from granting or denying the injunction; 2) the good faith of each party; 3) the interest of the general public in continuing the defendant's activity , and 4) the degree to which defendant's activity complies with laws.

Under this factual inquiry, the balance clearly tips in favor of plaintiff. Plaintiff would suffer greater hardship from the continuing activity, as the damage will get worse. The dirt is already 20 feet high, and will only be higher. In contrast there is a 50 acre plot available to Indigo for dumping already. Indigo is not acting in good faith by using this property, located near a longstanding residential community, for its activities. The general public does have an interest in Indigo's activities. However, these activities can continue despite an injunction. In *Timo*, the court notes that even when a plaintiff satisfies the factor for private nuisance, to enjoin imposes an additional cost, as it may stifle the defendant from socially beneficial behavior. Indigo will point out how their behavior benefits the city, and that the injunction will prevent this use. As the City Manager points out in the *Appling Gazette*, Indigo contributed to affordable housing, and also offers many job opportunities. However, Indigo will still be able to continue their activities, even during an injunction. As previously mentioned, there are alternative places that Indigo already owns where the nightclub could not exist without the loud music, Indigo's purpose is not tied up completely with dumping dirt on this specific property.

IV. Request for relief.

For these reasons, plaintiff requests that the court issue a preliminary injunction enjoining Indigo from further dumping dirt on 154 Winston Drive, the property near her home.

**REPRESENTATIVE ANSWER 2**

To: Jim Hunter

From: Examinee

Date: July 24, 2012

Re: Margaret Aston v. Indigo Construction Co.: Motion for Preliminary Injunction

***III. Argument***

The standard for granting a preliminary injunction requires a plaintiff to show 1) a likelihood of ultimate success on the merits, 2) the prospect of irreparable injury if the provisional relief is withheld, and 3) that the balance of equities tips in the Plaintiff's favor. *Otto Records Inc. v. Nelson* (Fr. Sup. Ct. 1984).

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

**A. Defendant's average of 17 noisy truck visits per day and nearly 20 foot dirt pile unreasonably interfere with Plaintiff's use of her land because she cannot sit outside for long, enjoy her porch or flowers, and must pay to clean the additional dust residue from defendant's land on her house, therefore Plaintiff is likely to succeed on the merits.**

To obtain a preliminary injunction, a plaintiff must prove she will likely prevail on the merits. The standard for judging the likelihood of success on the merits is for the court to consider whether 1) Defendant's conduct is the proximate cause, 2) of an unreasonable interference with the plaintiff's use and enjoyment of his or her property, and 3) the interference was intentional or negligent. *Parker v. Blue Ridge Farms, Inc* (Fr. Sup. Ct. 2002) (citing 4 Restatement (Second) of Torts § 822). Mrs. Ashton can prove all three elements and therefore is likely to succeed on the merits.

*1) Defendant's use results in the average of 17 noisy truck visits per day and the nearly 20 foot dirt pile that causes the interference with Plaintiff's use and enjoyment of her land.*

The defendant Indigo Construction Co. ("Indigo") owns the lot behind plaintiff Mrs. Ashton's residence at 151 Haywood Street, Appling. Since April 2012, an average of 17 times per day, dirt filled trucks have driven through Mrs. Ashton's neighborhood to arrive at the vacant lot. These trucks have created multiple kinds of noise, such as roaring engines, loud and pervasive screeching sounds from braking, and loud crashing and grinding sounds and loud beeping from dump trucks. This increased noise has directly caused Mrs. Ashton to not sit outside for more than an hour and to feel she cannot read, garden, or talk with visitors on her porch, which she used to do prior to Indigo's use of the lot. Though Indigo has agreed to stop dumping after 8:00 p.m., Mrs. Ashton's use during the day will still be impacted. Indigo has also caused a pile of dirt on their property to reach almost 20 feet. Dry weather breezes and steady winds blow dust from this dirt pile onto Mrs. Ashton's property, resulting in significant dirt deposits on her flowers and the need to clean the outside of her house more frequently. Because of these, Mrs. Ashton does not use her property as much as she did before and her property value is lower. Therefore, defendant Indigo's use is the proximate cause of the intrusion into Mrs. Ashton's land that is at issue.

*2) Defendant's frequent, noisy truck traffic and dirt debris on the Plaintiff's house has caused her to not sit outside for more than an hour, not feel she can use her porch, not enjoy her dirt-caked flowers, and spend much more on cleaning dirt off of her house, all of which are unreasonable interferences with her use and enjoyment of the land.*

Whether interference is unreasonable is based on an objective standard of "what a reasonable person would conclude after considering all the facts and circumstances." *Parker v. Blue Ridge Farms, Inc.* (Fr. Sup. Ct. 2002). The court should look to all relevant factors in determining whether a use is an "unreasonable interference," such as the nature of interfering use

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

and the use and enjoyment invaded, the nature, extent, and duration of the interference, the suitability for the locality of both the interfering conduct and the particular use and enjoyment invaded, and whether the defendant is taking all feasible precautions to avoid any unnecessary interference with the Plaintiff's use and enjoyment of his or her property. *Parker v. Blue Ridge Farms, Inc.* (Fr. Sup. Ct. 2002) As *Parker* showed, it is not enough that the defendant's conduct be lawful and potentially reasonable as much as it matters whether the plaintiff's impairment is unreasonable.

Mrs. Ashton's use being invaded is her ability to reside in her home and use the property surrounding her house. She cannot be outside for more than an hour or use her patio because of the high noise. She cannot enjoy her flowers and must clean her house more often because of the dust. Indigo is a construction company that is merely storing dirt on the vacant lot, even though it also owns 50 acres of property outside of Appling with paved roads that it could use for dirt storage. The extent and duration of the interference for Mrs. Ashton is extreme, as she cannot use most of the outside for most of the day. The locality is not suitable for this construction dirt storage because the surrounding eight-square-block area is "entirely single-family homes" aside from defendant's lot. Finally, the defendant is not taking all feasible precautions because truck traffic could be more coordinated to certain times of the day, or rerouted entirely to the 50 acre lot outside of town. The dirt pile also could be kept much smaller or put a fence around it to prevent the dirt from blowing onto Mrs. Ashton's house.

These facts are like *Parker*, where the smell from a dairy farm was a nuisance because the plaintiffs prevented them from going outside during the day and sometimes woke them up at night, even though the dairy farm followed all laws and provided a benefit to society. While Mrs. Ashton is not woken up in the night, she does not have her day time enjoyment. All of these facts show that Mrs. Ashton's inability to go outside most of the time is unreasonable, and defendant's activity should be enjoined.

3) *Defendant's continuance of the truck traffic and dirt, despite plaintiff's objections, demonstrate that defendant intentionally continued the interference.*

The defendant's activity must be intentional or negligent in order for a private nuisance action to succeed. Defendant Indigo is aware that its activities are interfering with Mrs. Ashton's residence because Mrs. Ashton has specifically requested them to stop and has been denied. Similar evidence was adequate to satisfy the intent requirement in *Timo Corp. v. Josie's Disco, Inc.* (Fr. Sp. Ct. 2007). There, the court inferred the necessary mental state because plaintiff had proved "the defendants were aware of the intrusion and chose to continue their behavior." Therefore, Indigo is intentionally interfering with Mrs. Ashton's use by continuing to operate despite her objections.

**MULTISTATE PERFORMANCE TEST  
JULY 2012**

**B. Plaintiff's severe impairment from not being able to go outside for more than an hour a day or enjoy her patio is an irreparable injury justifying an injunction.**

A plaintiff seeking a preliminary injunction must also prove the prospect of Irreparable Injury if provisional relief is withheld. *Timo Corp.* Mrs. Ashton cannot be outside for more than a day because of the noise, cannot use her patio, cannot enjoy her flowers, and must clean her house more often to combat the additional dirt sprayed on her house. Similar injuries were found to be irreparable injury in *Timo Corp.* There, the noise was extremely loud three nights a week from mid-April to mid-October and the court found that this harm was one "for which the law provides no adequate remedy." *Id.* Mrs. Ashton's interference is even worse than *Timo Corp.* In some ways, because it is all throughout the day and prevents her from being outside for more than an hour. Although Indigo no longer brings in trucks during the evening, distinguishing *Timo Corp.* from this case, the continual loud noise preventing Mrs. Ashton from feeling like she can be outside for more than an hour or even be on her patio is a severe impairment of her land because it limits her use to only the inside of her house. She has the right to enjoy all of her property, not just the indoors. Therefore, Mrs. Ashton can show "severe impairment to her land with no adequate remedy at law," *Davidson v. Red Devils Arenas* (Fr. Sup. Ct. 1992), which supports the granting of a preliminary injunction.

**C. The balance of equities tips in the plaintiff's favor because she undergoes more hardship in being unable to go outside than Indigo would in being forced to use it's out of town lot to store dirt.**

The balance of equities determination is factual in nature and should consider four main factors: 1) the respective hardships to the parties from granting or denying the injunction, 2) the good faith or intentional misconduct of each party, 3) the interest of the general public in continuing the defendant's activity, and 4) the degree to which the defendant's activity complies with or violates applicable law. Mrs. Ashton must continue to endure the loud noise and dirt if the injunction is not granted. If the injunction is granted, Indigo could temporarily divert its dirt to the 50 acre plot outside of town. This fact distinguishes this case from *Timo Corp.*, where the court denied a preliminary injunction based on a noise nuisance. There, the court found it particularly relevant both that the bar in question appeared to be obeying the local noise ordinance and that upsetting the status quo by enjoining the bar would potentially hurt the bar's business. Although Indigo does appear to be obeying the local zoning rules, making this case like *Timo Corp.*, the injunction will not harm Indigo the same way it would have hurt the bar in *Timo Corp.* While enjoining the bar from being loud would have diminished the bar's business on the weekends and in the evenings, enjoining Indigo only forces the company to temporarily dump their dirt on the 50 acre plot outside of town. Unlike a bar, which cannot so easily relocate, Indigo can easily move its nuisance-causing behavior. Additionally, there appears to be a public interest in stopping defendant's activity in this area, which is residential, and the interest in the continuance of the construction company can still be fulfilled by having Indigo dump its



**MULTISTATE PERFORMANCE TEST  
JULY 2012**

dirt elsewhere. Therefore, despite Indigo complying with the law and there being no evident misconduct on its behalf, the injunction should be granted.