

Applicant Number

MPT-1

716

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In re Whirley

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In re Whirley

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FILE

HUMPHRIES & ASSOCIATES, LLP
ATTORNEYS AT LAW
2700 MADISON AVE., SUITE 120
FRANKLIN CITY, FRANKLIN 33017

MEMORANDUM

TO: Examinee
FROM: Della Gregson, Partner
DATE: July 26, 2016
RE: Barbara Whirley matter

Our client, Barbara Whirley, is renting a house. She is a little over halfway through a one-year residential lease and has encountered several problems with the house. Ms. Whirley would prefer not to move and wants the conditions repaired. She needs to know her options under Franklin law to remedy each condition.

In Franklin, specific statutes govern the landlord-tenant relationship. *See* Franklin Civil Code § 540 *et seq.* Both landlords and tenants have certain statutory duties, in addition to any duties they may have under a written lease.

Please draft a memorandum to me analyzing and evaluating Ms. Whirley's options with regard to each of the unrepaired conditions, which are described in the attached client interview summary. If more than one option is available with regard to a specific condition, explain the potential advantages and disadvantages of each option. If an option is *not* available to Ms. Whirley with respect to a particular condition, briefly explain why. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

HUMPHRIES & ASSOCIATES, LLP
ATTORNEYS AT LAW
2700 MADISON AVE., SUITE 120
FRANKLIN CITY, FRANKLIN 33017

MEMORANDUM TO FILE

FROM: Della Gregson, Partner
DATE: July 25, 2016
RE: Summary of interview of Barbara Whirley

Today I met with Barbara Whirley regarding her dispute with her landlord over repairs needed to the rental house where she resides. This memorandum summarizes the interview:

- In January of this year, Whirley rented a three-bedroom, two-bathroom house from Sean Spears. See attached lease.
- Whirley is the only occupant of the home, and she has a dog, Bentley. She and Spears agreed in a separate “Pet Addendum” to the lease that she was allowed to have a dog. Whirley will provide a copy of the Pet Addendum at our next meeting.
- The house has eight rooms: a kitchen, a living room, a master bedroom with bathroom, two additional bedrooms, one additional bathroom, and a laundry room. The master bathroom is accessible through the master bedroom. The second bathroom is in the hallway between the second and third bedrooms. She uses one spare bedroom as her home office and the other as a guest room for family and friends when they visit her (one or two visits per month).
- Whirley is experiencing a number of problems with the residence.
- About two months after she moved in, the toilet in the second bathroom began leaking.
- In late March, she began having problems with the outdoor sprinkler system not functioning.
- In May, she noticed a smell in the guest bedroom. The smell is coming from the carpet near the sliding glass door leading from the bedroom to the backyard. The carpet is damp, and there is a half-inch gap between the bottom of the door and the door frame. Whirley isn’t sure whether the door is off its track or whether the door is too small for the door frame. She has not opened the door since she moved in. The door is currently in the

closed position, but she isn't sure whether any of her houseguests may have used the door. When she discovered the gap between the door and door frame and tried to open the door, the door wouldn't budge. She has placed plastic along the door frame to try to keep outside moisture from coming in, to no avail. The carpet near the sliding door is increasingly discolored and smelly, and she has noticed mold growing around the door. The smell is so bad now that no one can use the room.

- Whirley keeps Bentley in the laundry room on weekdays while she is at work, because the laundry room door exits to the backyard and has a "doggy door" that allows Bentley to go in and out of the laundry room throughout the day. Bentley is a golden retriever, and sometimes he gets bored when Whirley is at work and chews on things. Five days ago, Whirley realized that Bentley had sneaked along the side of the washing machine next to the wall and chewed away a two-foot strip of the baseboard and areas of the wall above the baseboard. She has since moved the washing machine closer to the wall to prevent Bentley from having access to the chewed area. Since Spears allowed Whirley to have a dog at the house, she would like to have him take care of the repairs to the wall and baseboard if possible.
- Whirley has notified Spears about the toilet, sprinkler system, and guest bedroom sliding door and carpet, but he has not made any repairs. See attached emails.
- Whirley is now considering making arrangements herself to have the repairs completed. She has obtained an estimate from a handyman, a copy of which is attached.
- Whirley has paid her rent (\$1,200) on time every month.
- The average cost to rent a two-bedroom house in the same area is \$1,000. The average cost to rent a three-bedroom house in the area is \$1,200 (what Whirley is currently paying).
- Whirley does not want to leave her home because it is close to her workplace in a desirable neighborhood with limited rental options.

RESIDENTIAL LEASE AGREEMENT

THIS AGREEMENT (the "Agreement") is made and entered into this 1st day of January 2016 by and between Sean Spears ("Landlord") and Barbara Whirley ("Tenant"). For and in consideration of the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. PROPERTY. Landlord owns certain real property and improvements located at 1254 Longwood Drive, Franklin City, Franklin 33015 (the "Premises"). Landlord desires to lease the Premises to Tenant for use as a private residence upon the terms and conditions contained herein. Tenant desires to lease the Premises from Landlord for use as a private residence upon the terms and conditions contained herein.

2. TERM. This Agreement shall commence on January 1, 2016, and shall continue until December 31, 2016, as a term lease.

3. RENT. Tenant agrees to pay \$ 1,200 per month by no later than the 3rd day of each month during the lease term

* * *

8. PETS. No animals are allowed on the Premises, even temporarily, unless authorized by a separate written Pet Addendum to this Agreement. Tenant will pay Landlord \$ 25.00 per day per animal as additional rent for each day Tenant violates the animal restrictions by keeping an unauthorized animal. Landlord may remove or cause to be removed any unauthorized animal and shall not be liable for any harm, injury, death, or sickness to unauthorized animals. Tenant is responsible and liable for any damage or required cleaning to the Premises caused by any unauthorized animal

9. SECURITY DEPOSIT. On or before execution of this Agreement, Tenant will pay a security deposit to Landlord of \$ 1,200 At the end of the lease, Landlord may deduct reasonable charges from the security deposit for damage to the Premises, excluding normal wear and tear, and all reasonable costs associated with repairing the Premises.

* * *

11. DESTRUCTION OF PREMISES. If the Premises become totally or partially destroyed during the term of this Agreement such that Tenant's use is seriously impaired, Landlord or Tenant may terminate this Agreement immediately upon three days' written notice to the other.

* * *

14. PROPERTY MAINTENANCE.

A. Tenant's General Responsibilities. Tenant, at Tenant's expense, shall

(1) keep the property clean;

(2) promptly dispose of all garbage in appropriate receptacles;

...

(11) not leave windows or doors in an open position during any inclement weather;

(12) promptly notify Landlord, in writing, of all needed repairs.

B. Yard Maintenance. Unless prohibited by ordinance or other law, Tenant will water the yard at reasonable and appropriate times and will, at Tenant's expense, maintain the yard.

* * *

16. EARLY DEPARTURE FROM PREMISES. If Tenant vacates the Premises before the end of the lease term, Landlord may hold Tenant responsible for all rent payments due for the balance of the lease term, subject to any remedies available to Tenant under Franklin law.

Dated this 1st day of January, 2016

Tenant's Signature Barbara Whirley

Landlord's Signature Sean Spears

Email Correspondence between Barbara Whirley and Sean Spears

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Repair request
Date: February 19, 2016

Hi, Sean. Last weekend I noticed some water on the floor of the hall bathroom between the toilet and the shower. I think the toilet may have a leak. Can you please stop by in the next couple of days to see if the toilet is leaking? I'll put a towel down and make sure to keep the area dry in the meantime. Thanks!

From: Sean Spears<sspears65@cmail.com>
To: Barbara Whirley<bwhirl@cmail.com>
Subject: Repair request
Date: February 27, 2016

Hi, Barbara. I'm sorry it's taken me a while to get back to you. I've been out of town—my oldest son just got married! I'm back in town now, but I'm absolutely snowed under at work this week. I should be able to swing by this weekend—would Saturday morning work for you?

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Leaking toilet
Date: March 4, 2016

Sean, I left two phone messages that last Saturday morning was good for me, and I waited at the house until almost 2 p.m. that day, but you never showed up. The leak in the toilet is getting worse. I've put a plastic bucket behind the toilet to catch the dripping water. Please stop by as soon as you can. I am home most weeknights by 6 p.m. and should be around this weekend. Thanks!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: March 31, 2016

Sean, I've tried calling you several times over the last few weeks and left voicemail messages about the leaking toilet, but you haven't called me back. The toilet really needs to be fixed. The leak is so bad now that I have to empty the plastic bucket twice a day and sometimes the toilet doesn't flush. In addition, the automatic sprinkler system for the front yard just stopped working, so I have to water the front flower beds by hand two or three times a week. This takes 15–20 minutes and is a real hassle—especially in this hot weather. I do not see any leaks, so I think the sprinkler box has malfunctioned. Can you please figure out what is wrong and get it fixed? Please call or email me about both of these problems ASAP. Thanks!

From: Sean Spears<sspears65@cmail.com>
To: Barbara Whirley<bwhirl@cmail.com>
Subject: Needed repairs
Date: April 6, 2016

Barbara, I'm sorry for the delay, but I've got a lot on my plate right now. I promise I will get by the house to check on everything as soon as I can. Please hold down the fort in the meantime! Thanks!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: April 27, 2016

Sean, I just got your voicemail message saying you wanted to stop by this weekend. I will be out of town Friday and Saturday, but anytime on Sunday would work for me. See you Sunday!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: May 4, 2016

Sean, what happened Sunday?! I thought you were going to stop by.... If you can't make it, then please at least have the courtesy to call and let me know! When can you come by?

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Problem with sliding door and other repairs
Date: May 26, 2016

Sean, I have been very patient. The toilet in the hall bathroom has been leaking for the past three months, and the automatic sprinkler system is still not working. These problems are very troubling, but now there's an even bigger problem—the sliding glass door in the guest bedroom is leaking and the carpet is wet and smelly. The smell is so bad that I can't even use the guest bedroom! Plus, mold is growing around the door, and I know that mold can cause health problems, so I have stopped using this room. I think the door and the carpet need to be replaced! Maybe you didn't take seriously the other problems I reported and that's why you haven't made any of the other repairs I've requested. But now a whole room in the house is completely unusable! Why should I pay rent for a 3-bedroom house when all I'm really getting is a 2-bedroom house and my guests have to sleep on the living room couch? If you don't make arrangements to get everything fixed, then I'm going to look into making the repairs myself and take appropriate legal action. I really like living here, but I can't continue to "hold down the fort" any longer!

JB Handyman Services

You Break It, We Fix It!

Estimate 000347

DATE: June 23, 2016

98 Meadow Lane
Franklin City, Franklin 33019
Phone 111-555-4500

TO:

Barbara Whirley
1254 Longwood Drive
Franklin City, Franklin 33015

Description	Amount
Replace toilet water supply valve and hose; Reseal toilet tank	\$200
Replace automatic sprinkler control box (6 zones)	\$300
Replace sliding glass door, door frame, and insulation; Replace 10 X 12 square-foot carpet and pad adjacent to door	\$1,800
Replace 2-foot section of baseboard in laundry room; Patch and repair drywall above damaged baseboard; Retexture and repaint damaged wall to match existing wall	\$300

Total Estimate \$2,600

THANK YOU FOR YOUR BUSINESS!

LIBRARY

Excerpts from Franklin Civil Code

Franklin Civil Code § 540 – Requirement of Tenantability

The lessor of a building intended for human occupation must put it into a condition fit for such occupation and repair all subsequent conditions that render it untenable.

Franklin Civil Code § 541 – Untenable Dwellings

A dwelling shall be deemed untenable for purposes of Section 540 if it lacks any of the following:

- (1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
- (2) Plumbing or gas facilities . . . maintained in good working order.
- (3) Heating facilities . . . maintained in good working order.
- . . .
- (7) Electrical lighting, wiring, and equipment . . . maintained in good working order.
- (8) Floors, stairways, and railings maintained in good repair.
- (9) Interior spaces free from insect or vermin infestation.

Franklin Civil Code § 542 – Tenant’s Remedies for Untenable Dwellings

(a) If a landlord neglects to repair conditions that render a premises untenable within a reasonable time after receiving written notice from the tenant of the conditions, for each condition, the tenant may:

- (1) if the cost of such repairs does not exceed one month’s rent of the premises, make repairs and deduct the cost of repairs from the rent when due;
- (2) if the cost of repairs exceeds one month’s rent, make repairs and sue the landlord for the cost of repairs;
- (3) vacate the premises, in which case the tenant shall be discharged from further payment of rent or performance of other conditions as of the date of vacating the premises; or
- (4) withhold a portion or all of the rent until the landlord makes the relevant repairs, except that the tenant may only withhold an appropriate portion of the rent if the conditions substantially threaten the tenant’s health and safety.

(b) If the exercise of any of these remedies leads to an eviction action, a justified use of the remedies provided in (a)(1)–(4) in this section is an affirmative defense and may shape the tenant’s relief in the event it is determined that the landlord has breached Section 540.

(c) For the purposes of this section, if a tenant makes repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted after a reasonable time. A tenant may make repairs after shorter notice if the circumstances require shorter notice.

(d) The tenant’s remedies under subsection (a) shall not be available if the condition was caused by the violation of Section 543.

(e) The remedies provided by this section are in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

Franklin Civil Code § 543 – Tenant’s Affirmative Obligations

No duty on the part of the landlord to repair shall arise under Section 540 or 541 if the tenant is in violation of any of the following affirmative obligations, provided the tenant’s violation contributes materially to the existence of the condition or interferes materially with the landlord’s obligation under Section 540 to effect the necessary repairs:

- (1) To keep that part of the premises which the tenant occupies and uses clean and sanitary as the condition of the premises permits.
- (2) To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits.
- (3) Not to permit any person or animal on the premises to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto.

* * *

Franklin Civil Code § 550 – Eviction Proceedings

(a) In an eviction action involving residential premises in which the tenant has raised as an affirmative defense a breach of the landlord’s obligation under Section 540, the court shall determine whether a substantial breach of this obligation has occurred.

(b) If the court finds that a substantial breach of Section 540 has occurred, the court shall (i) order the landlord to make repairs and correct the conditions which constitute the breach, (ii)

order that the monthly rent be reduced by an appropriate amount until repairs are completed, and
(iii) award the tenant possession of the premises.

(c) If the court determines that there has been no substantial breach of Section 540 by the landlord, then judgment shall be entered in favor of the landlord.

(d) As used in this section, “substantial breach” means the failure of the landlord to maintain the premises with respect to those conditions that materially affect a tenant’s health and safety.

Burk v. Harris

Franklin Court of Appeal (2002)

Defendant Ashley Harris (Tenant) appeals the judgment entered in favor of plaintiff Roger Burk (Landlord) in this eviction action. The issue on appeal is whether the trial court misapplied the law when it found that the conditions proved to exist were nonsubstantial and therefore not a breach of the warranty of tenantability.

Landlord sought possession of the premises, forfeiture of the lease agreement, and past-due rent. Tenant asserted the defense of breach of the warranty of tenantability, set forth in Franklin Civil Code § 540, and the right to withhold rent under § 542(a)(4).

At trial, Tenant testified that the roof and windows of the premises had leaked during the entire term of her tenancy and, as a result, had caused water damage to the walls and floors and had damaged her personal property. Tenant also testified that the thermostat was broken and that the shower leaked. Tenant offered into evidence several letters she sent to Landlord complaining about the leaking roof and other conditions in the apartment, as well as photographs documenting the problems. Landlord denied receiving any such letters, asserted that he had not been inside the premises since Tenant moved in and did not have a key to the residence, and introduced before-and-after photos of repairs he had made upon learning of Tenant's complaints.

The trial court found that the conditions were not "substantial" as defined in Franklin Civil Code § 550. Accordingly, it entered judgment for Landlord for possession of the premises and past-due rent.

In *Gordon v. Centralia Properties Inc.* (Fr. Sup. Ct. 1975), the Franklin Supreme Court held that in every residential lease, there is an implied warranty of tenantability. In *Gordon*, the Franklin Supreme Court further held that a tenant who proves that the landlord has breached the warranty of tenantability is entitled not only to maintain possession of the premises but also to an appropriate reduction of rent corresponding to the reduced value of the premises. The *Gordon* court further held that a tenant is not entitled to a reduction in rent for minor violations that do not materially affect a tenant's health and safety. *Id.*

The *Gordon* decision is codified in the Franklin Civil Code. Under this statutory scheme, when a tenant raises breach of the warranty of tenantability as a defense in an eviction case, the trial court is required to determine whether a substantial breach has occurred. *See* §§ 542(b) and 550(a). If the court finds that there has been a substantial breach, it shall order the landlord to

make the repairs and correct the conditions caused by the breach, order that monthly rent be reduced by an appropriate amount, and award the tenant possession of the premises. § 550(b).

Section 540 requires that the landlord of a building intended for human occupation “put it into a condition fit for such occupation and repair all subsequent conditions that render it untenable.” Under § 541, a dwelling is untenable for human occupancy if it lacks effective waterproofing and weather protection of roof and exterior walls, plumbing maintained in good working order, heating facilities maintained in good working order, and floors maintained in good repair.

Here, the trial court found that the premises were not properly waterproofed from the outside elements, the thermostat did not work, and the shower leaked. The trial court erred when it concluded that these conditions were nonsubstantial. These conditions are not merely cosmetic defects or matters of convenience but affect Tenant’s health and safety.

Accordingly, Tenant is entitled to judgment on the defense of breach of the warranty of tenantability, to possession of the premises, and to an appropriately reduced rent. *See* §§ 542(a)(4) and 550(b).

To determine the appropriate reduction in rent, a trial court may either (i) measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition, or (ii) reduce a tenant’s rental obligation by the percentage corresponding to the relative reduction of use of the leased premises caused by the landlord’s breach.

Additionally, the trial court must order Landlord to make the repairs necessary under the statute. These are issues for the trial court to determine on remand. Reversed and remanded.

Shea v. Willowbrook Properties LP

Franklin Court of Appeal (2012)

After suffering through two separate bedbug infestations in his apartment, plaintiff Jordan Shea moved out and filed a complaint against his landlord, Willowbrook Properties LP, seeking to recover rent he had paid for the apartment (\$1,000/month for 16 months) and out-of-pocket expenses relating to the infestation (\$2,000). After a bench trial, the trial court found Willowbrook responsible for the first infestation, but not the second. It awarded Shea a fraction of the damages he sought (\$400), limiting his recovery to his documented out-of-pocket expenses and declining to award any rent recovery. Shea appeals.

The facts are as follows: within a few days of entering into a six-month lease with Willowbrook on July 1, 2010, Shea began to suffer from insect bites, which he discovered were the result of bedbugs. He reported this to Willowbrook, which sprayed his apartment, replaced his carpeting, and cleaned his apartment thoroughly to remove the bugs. While this work was being done, Shea stayed at a nearby motel. For several months after Willowbrook cleaned his apartment, Shea experienced no bedbug problems, so he believed that the problem had been corrected. In January 2011, he renewed his lease for an additional year; he then departed for a three-week study-abroad program. Upon his return, he started to get bedbug bites again; the bedbug problem continued throughout the renewal period, but Shea failed to report the second infestation to Willowbrook. He finally moved out of the apartment in October 2011, two months before the end of his lease.

A. Rent

The trial court denied Shea's claim that he was entitled to a full refund of all the rent he had paid over the course of his tenancy. When a landlord breaches the warranty of tenantability and creates an untenable property, as is alleged here, a tenant has several options: (1) repair and deduct the cost of repairs if the cost of the repairs is less than one month's rent; (2) repair and sue, if the cost of the repairs exceeds one month's rent; (3) vacate the premises and be discharged of paying further rent; or (4) withhold some or all of the rent if the landlord does not make the repairs, provided the conditions substantially threaten the tenant's health and safety. Franklin Civil Code §§ 540, 542. In his lawsuit, Shea sought to recover all the rent he had paid (\$16,000) pursuant to the initial and renewed leases.

We believe that the trial court correctly declined to award Shea the rent requested. First, the evidence supports the conclusion that Willowbrook's efforts to address the first infestation (spraying, replacing carpet, and cleaning the apartment) were successful. Shea even renewed his lease for another 12 months, from which the trial court concluded that the apartment was free of the infestation when he renewed and was therefore not untenable as he claimed. Thus there is no factual basis to support awarding Shea damages for rent paid in 2010 under the first lease.

Nor is there a basis to award damages with respect to the second bedbug infestation, which arose in 2011 after Shea returned from abroad. Shea failed to demonstrate that the 2011 prolonged bedbug infestation occurred through Willowbrook's fault and through no fault of his own. If Shea were responsible, he would have been obligated to resolve the issue himself. *See* Franklin Civil Code § 543 (landlord has no duty to repair under § 540 or 541 if tenant has breached his affirmative obligation to keep premises as clean and sanitary as the condition of premises permits). If Shea believed that his landlord was responsible for the bedbug infestation, he had an obligation to mitigate his damages by promptly notifying Willowbrook to give it an opportunity to resolve the problem. *See Burk v. Harris* (Fr. Ct. App. 2002). Since this did not occur, the trial court declined to find Willowbrook responsible for the second infestation and concluded that Shea was not entitled to vacate the premises under § 542(a)(3). Because Shea retained possession of the apartment and reaped the benefit of staying, he could have been held responsible for the remaining two months of rent under the lease had Willowbrook sought it.

The trial court correctly declined to award Shea any damages related to rent already paid. We affirm the denial of the \$16,000 rent reimbursement claim.

B. Out-of-pocket expenses

Shea also requested a total of \$2,000 for motel and medication costs he incurred while living in the apartment. However, Shea submitted a receipt only for \$400 for the motel room he rented while his apartment was being sprayed for bedbugs during the initial infestation in 2010. He provided no further documentation of his claimed expenses. Therefore, the trial court properly awarded him \$400 but appropriately declined to award \$1,600 for medication because Shea provided no documentation or explanation of how he came to that number.

Affirmed.

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

Do not include your actual name anywhere in the work product required by the task memorandum.

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

1) MPT1 - Please type your answer to MPT 1 below

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When finished with this question, click Â to advance to the next question.

(Essay)

===== Start of Answer #1 (1938 words) =====

TO: Della Gregson, Partner

FROM: Examinee #137

DATE: July 26, 2016

RE: Barbara Whirley

MEMORANDUM

You asked me to draft a memorandum reflecting Ms. Whirley's legal options against her landlord with regard to each unrepaired conditions on the premises. The following constitutes the entirety of that memorandum.

Applicable Law

Generally speaking, landlords and tenants have specific duties to one another

provided under Franklin code. Where a building is intended to be leased for residential purposes, the landlord must "put it into a condition fit for such occupation and repair all subsequent conditions that render it untenable." FCC § 540. Because Franklin statutory law provides legal remedies to a tenant for a untenable dwellings if a landlord fails to repair the damages after receiving written notice, the first issue is to determine whether each condition renders the premises untenable. See FCC § 542. Untenable is defined in relevant portion as "lack[ing] any of the following: (1) effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors; (2) plumbing or gas facilities maintained in good working order. . ." FCC §541. Recall that Ms. Whirley's conditions include a leaking toilet in the second bathroom, a malfunctioning sprinkler system, a leaking door that has resulted in mold, and damage to the baseboard in the laundry room caused by her dog.

Toilet Leak

Ms. Whirley's options with regard to the toilet leak are dependent on a number of things. First, it is dependent on whether Ms. Whirley's use of the toilet was proper, and also whether she kept the toilet clean and sanitary, because FCC §543 imposes an affirmative obligation on tenants to do so. Nothing in our files indicate that Ms. Whirley used the toilet improperly; it appears that she merely noticed a leak one day. However, it is important to note that if she did misuse the toilet, or cause the leak, Spears would not be responsible to repair the damage. FCC §543. The Franklin Court of Appeals has applied this affirmative duty to a bedbug infestation in the case of *Shea v. Willowbrook Properties*. In *Shea*, the plaintiff suffered two bedbug infestations and moved out, bringing suit against his landlord for paid rent and out-of-pocket expenses.

The court held that Shea was not entitled to recover for the second bedbug infestation because he failed to show that the infestation arose through no fault of his own. While Shea was applying the tenant's duty to keep the premises clean and sanitary, and not to use plumbing facilities properly, it is helpful because it required the tenant to show that the condition arose through no fault of his own, and thus § 543 would not be available to the landlord as a defense. The court in Shea also noted that if Shea believed that the condition were caused by the landlord, he had a duty to mitigate his damages, which could be met by notifying the landlord. Here, it appears that the condition arose through no fault of Ms. Whirley (although this should be explored in future interviews), and that she promptly emailed Spears about the condition. Thus it appears that Ms. Whirley has met her affirmative duty.

The second issue that arises with respect to the toilet leak is whether the toilet leak is an untenantable condition. Where a building is intended to be leased for residential purposes, the landlord must "put it into a condition fit for such occupation and repair all subsequent conditions that render it untenantable." FCC § 540. Because Franklin statutory law provides legal remedies to a tenant for a untenantable dwellings if a landlord fails to repair the damages after receiving written notice, the first issue is to determine whether each condition renders the premises untenantable. See FCC § 542. Untenantable is defined in relevant portion as "lack[ing] any of the following: (1) effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors; (2) plumbing or gas facilities maintained in good working order. . ." FCC §541. Reading these provisions in conjunction, it is clear that Franklin law requires a landlord to repair all untenantable conditions in a residential lease. Therefore, Ms. Whirley's options regarding the toilet depend on whether the toilet leak

constitutes an untenable condition.

Ms. Whirley's toilet leak constitutes an untenable condition. A dwelling is untenable if its plumbing facilities are not maintained in good working order. FCC § 541(2). The Franklin Court of Appeals has deemed a leaking shower to be a substantial condition that affects the tenant's health and safety. *Burk v. Harris*. While *Burk* was decided in the context of an eviction action, the finding of the court that a leaking shower is helpful because the trial court in an eviction action is required to determine whether a landlord's breach of the warranty of tenantability (in other words, what is now codified at §§ 540 & 541) whether the landlord committed a substantial breach of that warranty. Because the court found a leaking shower to be not just a breach, but a substantial breach, of the warranty of tenantability, a leaking toilet would qualify as an untenable condition.

The tenant's remedies for an untenable dwelling are laid out in FCC § 542. First, in order to invoke a §542 remedy, the tenant must provide written notice to the landlord, to which the landlord fails to respond by repairing the untenable dwelling within a reasonable time. 30 days is the general rule of thumb for a reasonable amount of time, subject to circumstances which require shorter notice. *Shea v. Willowbrook* makes it clear that the written notice to the landlord is required as a reflection of the tenant's duty to mitigate her damages. Here, Ms. Whirley provided prompt written notice in the form of an email. Also, Spears has clearly failed to respond in a reasonable time because the leak was discovered in February and it hasn't been repaired; it's now July. Between Spears' comments about Ms. Whirley "hold[ing] down the fort" and his persistent failures to respond, a reasonable time has certainly passed. The tenant, after waiting a reasonable time for repairs, can then either: (1) repair and

deduct the cost of repairs if that cost is less than one month's rent; (2) repair and sue if the repair costs are more than one month's rent; (3) vacate the premises and be discharged from paying further rent; or (4) withhold some or all rent if the landlord does not make the repairs provided that the conditions substantially threaten the tenants health and safety. See FCC §§ 540, 542; see also *Shea v. Willowbrook*.

Thus, Ms. Whirley's options with respect to the leaking toilet are to repair it and deduct it from one month's rent (because rent is \$1,200 and the cost of the repair to the toilet, \$200, is less than the rent); or she may vacate the premises and be discharged from paying further rent (although she may be required to reimburse Spears for the sprinkler system and dog damage, see below); or she may withhold some rent because, as discussed above, similar conditions have been held to threaten tenants' health and safety in *Burk*. She may not repair and sue because the repair costs for the toilet are less than one month's rent. Her best option is to repair the condition herself and deduct in from a month's rent since she would like to remain in the neighborhood; abandoning the premises may result in frivolous lawsuits and other future issues.

Sprinkler System

Ms. Whirley's options with respect to the sprinkler system are much more limited. First, the lease itself provides that it is the tenant's responsibility to water the yard at reasonable and appropriate times, as well as maintain the yard, all at the tenant's expense. As a general rule, the lease will control, and this does not appear to be render the dwelling untenable. Therefore, Ms. Whirley's options with respect to the sprinkler system appear to be limited to paying for the repairs herself. The court noted in *Burk*, in finding certain conditions to be substantial breaches of the warranty of

tenantability, that "[t]hese conditions are not merely cosmetic defects or matters of convenience but affect Tenant's health and safety." The sprinkler issues seem to be cosmetic defects or matters of convenience; the fact that Ms. Whirley has to water the yard by hand is not likely to lend itself to the condition being untenable. Thus, she will likely be required to repair the condition herself.

Door Leak

Her options with respect to the door leak appear to be very similar to those options regarding the leaking toilet. This issue meets the definition of untenable as it is an ineffective waterproofing or weather protection of a door. However, she will likely need to show that the defect was not caused through her fault or any fault of her guests. The fact that the door would not open when she tried to open it is helpful. If she can show that neither she nor any of her few guests have opened that door, she can likely seek the aforementioned options, with one difference. The cost to repair the door is \$1,800, which is more than one month's rent. Under FCC §542(2), when the repairs exceed one month's rent, the tenant may make the repairs and sue the landlord. Thus, to remedy the door leak, Ms. Whirley may pay to have the repairs made and then sue Spears for the balance. Importantly, two other options are also still available to her; she may vacate the premises, or she may withhold rent if the defect substantially threatens her health and safety. In *Burk*, the court found that a leaking roof and window (s) that caused water damage to the walls, floors, and tenant's personal property constituted a condition that affected the tenant's health and safety. Here, Ms. Whirley's door leak has resulted in a smell so pervasive that the room cannot be used; mold; and damaged carpet. This clearly affects her health and safety.

When determining an appropriate reduction in rent, a court will either measure the difference in the fair rental value if as warranted and the fair rental value as during occupancy, or reduce the rental obligation by the percentage corresponding to the relative reduction caused by the landlord's breach. Here, the first measure would likely result in reducing the rent by \$200, (\$1,200 fair market value as warranted minus \$1,000 for a two-bedroom, which is as used during the occupancy). The second measure would likely result in a reduction by 1/8 because there were 8 rooms in the house and she lost the use of 1.

Dog Damage

Ms. Whirley's remedies with respect to the damage caused by her dog are very limited. While the lease merely holds Ms. Whirley liable for any damage caused by unauthorized animals (which is not her dog here because they executed a separate Pet Addendum), Franklin Code clearly provides that, as part of a tenant's affirmative obligations under § 543, the tenant may not permit an animal to damage any part of the dwelling. Here, Ms. Whirley has breached her affirmative obligation because her dog damaged the property. While it is slightly helpful that she made subsequent changes to prevent future damage, it will be important to see what the terms of the Pet Addendum provide. Without that Addendum, it is difficult to know what her remedies or other obligations were. It should be noted that she has apparently not notified Spears of this damage, so any duty that he would have to repair would not have begun to run without notice.

===== End of Answer #1 =====

Applicant Number

MPT-2

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MULTISTATE PERFORMANCE TEST

Nash v. Franklin
Department of Revenue

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Nash v. Franklin Department of Revenue

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FILE

The Carter Law Firm LLC
1891 Virginia Way
Bristol, Franklin 33800

MEMORANDUM

TO: Examinee
FROM: Sara Carter
DATE: July 26, 2016
RE: Tax Appeal of Joseph and Ellen Nash

Our clients Joseph and Ellen Nash own property in Knox Hollow, on which they raise Christmas trees for sale. For many years, they sold only to friends and neighbors. Five years ago, they started a commercial tree-farming operation and put a lot more money into the farm.

Starting that same year, they began to claim tax deductions for expenses from a trade or business. They had a huge start-up loss to report in the first year. Since then, their income from the farm has gone up, but their expenses have varied. For each of the past five years, they reported a loss on their joint tax return.

Since the Nashes' last tax filing, as the law allows, the Franklin Department of Revenue (FDR) reviewed the Nashes' returns for the years 2011–2015 and denied their claim of full deductions for the farm expenses for those years. The FDR said that the Nashes could only take deductions to offset income they earned from the farm in each of those five years. The Nashes want the full deductions so that they can offset the business losses against their other income.

The FDR also denied the Nashes' claim for a home office deduction.

The FDR assessed the Nashes with additional tax for all five years. To avoid interest and penalties, the Nashes paid the additional tax. Representing themselves, they filed an internal administrative review with the FDR, which was unsuccessful. (See attached Notice of Decision.)

The Nashes then retained us and we filed an appeal to the Franklin Tax Court, which went to hearing last week. We stipulated to the dollar amounts in question, and Mr. Nash testified. I have attached a transcript. The Tax Court has requested post-hearing briefing.

Please draft the legal argument portion of our brief to the Tax Court, following the attached guidelines for drafting persuasive briefs. You should argue that Mr. Nash's testimony establishes the Nashes' right under Franklin law to the full deductions that they claimed. Franklin law uses the federal Internal Revenue Code and regulations to calculate Franklin tax liability.

The Carter Law Firm LLC
1891 Virginia Way
Bristol, Franklin 33800

OFFICE MEMORANDUM

TO: Attorneys
FROM: Sara Carter
DATE: August 18, 2014
RE: Format for Persuasive Briefs

The following guidelines apply to persuasive briefs filed in the Franklin Tax Court.

[Other sections omitted]

...

III. Legal Argument

Your legal argument should be brief and to the point. Make your points clearly and succinctly, citing relevant authority for each legal proposition.

Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument, and follow the same rule as your argument: do not state abstract conclusions, but integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The deduction should be allowed." An effective heading states: "Under the Internal Revenue Code, the appellant may deduct the amount by which the value of the gift exceeds the value of the concert ticket he received."

The body of your argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. If necessary, make concessions, but only on points that do not concede essential elements of your claim or defense.

**FRANKLIN DEPARTMENT OF REVENUE
NOTICE OF DECISION — ADMINISTRATIVE REVIEW**

Taxpayers: Joseph Nash and Ellen Nash
Tax Years: 2011–2015

Type: Joint Filing
Date Issued: May 16, 2016

The taxpayers claim that the Franklin Department of Revenue incorrectly denied their claims for (1) deductions for expenses paid or incurred during the taxable year in carrying on a trade or business and (2) deductions related to the business use of their home.

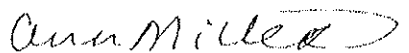
(1) The taxpayers claim certain deductions related to the carrying on of a “Christmas tree farming” business as follows:

	<i>2011</i>	<i>2012</i>	<i>2013</i>	<i>2014</i>	<i>2015</i>
Income	\$1,500	\$2,000	\$2,000	\$3,500	\$5,000
Deductions	\$35,000	\$9,500	\$7,000	\$9,000	\$12,500
Gain/(Loss)	(\$33,500)	(\$7,500)	(\$5,000)	(\$5,500)	(\$7,500)

The Department determines that the taxpayers are not engaged in the tree-farming business for profit, due to the lack of a profit motive. Therefore, the taxpayers cannot take full deductions in each year. Instead, they may only deduct annual expenses up to the amount of income earned from the tree-farming activity: \$1,500 in 2011; \$2,000 in 2012; \$2,000 in 2013; \$3,500 in 2014; \$5,000 in 2015. Of the nine factors identified in federal regulation 26 C.F.R. § 1.183–2(b)(1–9), which is controlling in Franklin tax cases, these factors support our conclusion: no profit in the tax years in question; a regular history of losses; no plan to recoup those losses; a history of similar activity without any deductions; and no evidence of operations in a businesslike manner.

(2) The taxpayers may take no deduction attributable to the use of a room in their home because the room was not used exclusively for business purposes. Internal Revenue Code § 280A(c)(1).

The assessment of tax for the years in question is affirmed. The taxpayers have exhausted their internal administrative remedies. They have the right to appeal to the Franklin Tax Court.



Ann Miller, Commissioner of Franklin Department of Revenue

FRANKLIN TAX COURT, SIXTH DISTRICT
Transcript of Testimony of Joseph Nash
July 21, 2016

DIRECT EXAMINATION BY ATTORNEY CARTER

Att’y Carter: State your name for the record.

Joseph Nash: Joseph Nash.

Carter: Where do you live?

Nash: 3150 Old Sawmill Road in Knox Hollow, Franklin.

Carter: How long have you lived there?

Nash: Since we bought it in 1997.

Carter: Describe the land, please.

Nash: It’s 13 acres: an acre for the house and sheds, and another two acres of fields. The rest is forested.

Carter: You started claiming tax deductions in 2011. Please tell the court how you used the land before then.

Nash: Originally, about two acres of the land had Leland cypress, spruce, and pine on it, good for Christmas trees. Soon after we bought it, our daughter and her friends would cut down trees for their own use. After a while, we put up a sign on the road each November and put out a garbage can with saws and twine in it. We charged \$15 for the cypress, \$20 for the pine, and \$25 for the spruce.

Carter: What happened next?

Nash: At some point, we realized that most of the good trees would be gone in a few years. So I researched how to raise Christmas trees in a more orderly way.

Carter: What did you do?

Nash: I read a lot of books on raising trees, Christmas trees in particular. I took a whole series of classes on forest management. Finally, I met a nearby Christmas tree farmer and spent a whole vacation on that farm. I got really interested in it.

Carter: What did you do next?

Nash: First we set apart some of the acreage, cut everything down, and replanted in organized rows, leaving space to plant new seedlings in rotation. When the new trees came in, we’d sell them off, same as before.

Carter: How much did you make?

Nash: Up until five years ago, never more than \$1,000 in any one year.

Carter: Did you report this as income on your tax returns during this period?

Nash: Yes. And up until that point, we claimed no deductions.

Carter: What happened then?

Nash: About five years ago, in 2011, the tree farmer I'd worked with let me know that he was planning to go out of business. And my wife retired from her job with the county. So we had to decide whether to step it up or not. We both liked working in the fields and selling the trees, so we said, "Why not?"

Carter: Then what happened?

Nash: That same year we contacted the farmer's commercial customers, as a target for expansion. Then we invited the farmer over to walk us through what a bigger operation would look like. He showed us how to keep records about the trees and to keep good books. We did exactly what he told us . . . still do.

Carter: You couldn't have sold that many more trees right away.

Nash: No, we didn't. 2011 was a hard year, because we cut down several acres of forest for additional fields and bought new equipment to deal with the additional planting. We couldn't do it by hand, the way we had before. So we bought specialized equipment to trim and shape the trees.

Carter: How do you manage things?

Nash: Starting in 2011, we set aside a room in the house just for this business. We keep the records there, and catalogues and books that we consult. We have a computer that we use just for the business and nothing else. The room has a desk and two chairs, and that's it. Nothing happens there but the business.

Carter: How did things go from then on?

Nash: Well, that first year, we made only \$1,500, including sales to some retailers in the city. We made more each year after that, up until last year when we made \$5,000.

Carter: How much of that was profit?

Nash: None of it. We had a huge loss in 2011. After that, we had to maintain the equipment, and we had to increase the size of each year's planting to

increase our sales five to six years later. For the past two years, we have had to hire people to help us during the harvest; it was just too much for us. And of course, the economy has been bad, and sales haven't been what we thought they would be. It's coming back, though.

Carter: How much time have you and your wife put into this?

Nash: Since 2011, my wife has spent pretty much full time year-round on this. I spend summers and weekends, when I can . . . a lot more time during the harvest. We love it; it's hard work, but it's outdoors and it's satisfying.

Carter: Just to be clear, you've never made a profit?

Nash: That's right.

Carter: Do you plan to make a profit?

Nash: Yes, we will make a profit, once the trees we started planting five years ago are big enough for harvesting. We have reliable customers who want our trees, and we've learned a lot in the past few years about how to keep costs down.

Carter: No further questions.

CROSS-EXAMINATION BY Franklin Dep't of Revenue ATTORNEY SHEPARD

Att'y Shepard: Mr. Nash, you work full-time at Knox County High School as an associate principal, correct?

Joseph Nash: Yes, that's right.

Shepard: Since your wife retired, hasn't she received a pension from the county?

Nash: Yes.

Shepard: You've lived off your salary and her pension the last five years, correct?

Nash: Yes.

Shepard: You've never run a business of your own, have you?

Att'y Carter: Objection. Argumentative.

Shepard: I'll rephrase. Other than this activity on your land, you and your wife have never run a business of your own, have you?

Nash: No.

Shepard: You've never taken a salary for either of you from this activity, have you?

Nash: No.

Shepard: You don't insure your trees, do you?

Nash: No. We do insure the farm equipment.

Shepard: You don't advertise, do you?

Nash: No, not commercially. Our local business is by word of mouth, and we have good connections with our commercial customers.

Shepard: You testified that you set a room aside only for this activity.

Nash: Yes.

Shepard: How did you use the room before?

Nash: We used it as a spare bedroom.

Shepard: You said that there is nothing in that room but a desk and two chairs?

Nash: Yes—we took out the bed.

Shepard: One of those two chairs is a recliner, isn't it? And you have a radio and TV there too, correct?

Nash: Yes. I keep the TV on the Weather Channel, for business reasons.

Shepard: The computer is connected to the Internet.

Nash: By wireless, yes.

Shepard: Your dogs will lie in that room with you while you're there?

Nash: Yes, they will.

Shepard: There's a fireplace in that room too, isn't there?

Nash: Yes.

Shepard: You testified that you love tree farming and are fascinated by it?

Nash: Yes.

Shepard: You enjoy working on the land and making things grow.

Nash: I do.

Shepard: It doesn't really matter to you if this activity makes a profit, does it?

Nash: Maybe not; but we mean to make one anyway. That's part of the fun.

Shepard: No further questions.

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Excerpts from Internal Revenue Code

Internal Revenue Code § 162. Trade or business expenses

(a) **In general.** There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . .

Internal Revenue Code § 183. Activities not engaged in for profit

(a) **General rule.** In the case of an activity engaged in by an individual . . . , if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section.

(b) [deductions for activity not engaged in for profit limited to the amount of income earned by that activity] [text omitted]

(c) **Activity not engaged in for profit defined.** For purposes of this section, the term “activity not engaged in for profit” means any activity other than one with respect to which deductions are allowable for the taxable year under section 162. . . .

Internal Revenue Code § 280A. Disallowance of certain expenses in connection with business use of home, rental of vacation homes, etc.

(a) **General rule.** Except as otherwise provided in this section, in the case of a taxpayer who is an individual . . . , no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

. . .

(c) Exceptions for certain business or rental use . . .

(1) **Certain business use.** Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—

(A) as the principal place of business for any trade or business of the taxpayer.

Excerpts from Code of Federal Regulations

Title 26. Internal Revenue

26 C.F.R. § 1.183–2. Activity not engaged in for profit defined.

(a) In general. [Except as otherwise provided . . . ,] no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit. . . . The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. . . . In determining whether an activity is engaged in for profit, greater weight is given to objective facts than to the taxpayer's mere statement of his intent.

(b) Relevant factors. In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the basis that the number of factors (whether or not listed in this paragraph) indicating a lack of profit objective exceeds the number of factors indicating a profit objective, or vice versa. Among the factors which should normally be taken into account are the following:

(1) Manner in which the taxpayer carries on the activity. The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially similar to other activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent to improve profitability may also indicate a profit motive.

(2) The expertise of the taxpayer or his advisors. Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices. . . .

(3) The time and effort expended by the taxpayer in carrying on the activity. The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. . . .

(4) Expectation that assets used in activity may appreciate in value. The term profit encompasses appreciation in the value of assets, such as land, used in the activity. . . .

(5) The success of the taxpayer in carrying on other similar or dissimilar activities. The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable.

(6) The taxpayer's history of income or losses with respect to the activity. A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status, such continued losses, if not explainable as due to customary business risks or reverses, may be indicative that the activity is not being engaged in for profit. If losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as drought, disease, fire, theft, weather damages, other involuntary conversions, or depressed market conditions, such losses would not be an indication that the activity is not engaged in for profit. A series of years in which net income was realized would of course be strong evidence that the activity is engaged in for profit.

(7) The amount of occasional profits, if any, which are earned. The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. An occasional small profit from an activity generating large losses, or from an activity in which the taxpayer has made a large investment, would not generally be determinative that the activity is engaged in for profit. However, substantial profit, though only occasional, would generally be indicative that an

activity is engaged in for profit, where the investment or losses are comparatively small.

...

(8) The financial status of the taxpayer. The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.

(9) Elements of personal pleasure or recreation. The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit. It is not, however, necessary that an activity be engaged in with the exclusive intention of deriving a profit or with the intention of maximizing profits. . . . An activity will not be treated as not engaged in for profit merely because the taxpayer has purposes or motivations other than solely to make a profit. Also, the fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed in this paragraph.

Stone v. Franklin Department of Revenue

Franklin Tax Court (2008)

In this appeal, we review and affirm a decision of the Franklin Department of Revenue denying deductions to taxpayers Jim and Maxine Stone related to the operation of a horse-breeding business. Orders of the Department of Revenue are presumed correct and valid; the taxpayer bears the burden of demonstrating that the challenged order is incorrect. *Nelson v. Franklin Dep't of Revenue* (Franklin Tax Ct. 1998). The Franklin legislature intended to incorporate the federal Internal Revenue Code (IRC) and the Code of Federal Regulations (CFR) for the purpose of determining Franklin taxable income.

The Stones claimed deductions for expenses relating to the operations of an alleged trade or business: a horse-breeding business operated under the name “Irontree.” The FDR limited their deductions to the amount of income that they earned from horse breeding in each of the last seven tax years, because the Stones lacked a profit motive. The Stones appeal, seeking full deductions.

26 C.F.R. § 1.183–2 outlines the activities that may be considered “for profit” in order to allow income tax deductions. The regulation requires an objective standard and delineates nine factors used to assess whether the taxpayer “entered into the activity, or continued the activity, with the objective of making a profit.” 26 C.F.R. § 1.183–2(a) & (b). These factors are not exclusive, nor is one factor or combination of factors determinative on the issue of profit motive. *Morton v. Franklin Dep't of Revenue* (Franklin Sup. Ct. 1984).

1) Manner of Carrying Out Activity: The Stones operated Irontree for nearly 20 years, and began to claim deductions for the last seven. The Stones offered slight evidence of businesslike operations. They produced no records of business activities. Mr. Stone knew little about when horses were purchased or sold, the prices paid, or what training occurred. They lacked a business plan and had no plan to recoup their losses. Such plans can suggest a motive to earn a profit. *Jennings v. Franklin Dep't of Revenue* (Franklin Tax Ct. 2001).

The Stones bought horse semen from a national champion. The Stones contend that this purchase reflected an effort to stem their losses, an effort that failed. The Stones never paid or received a salary from Irontree. Only for a hobby does one work for nothing for 20 years. The Stones advertised only by attending horse shows, an insufficient effort to advertise a horse

breeding business. The Stones did not insure the assets of Irontree. Thus, when a horse slipped on some ice and eventually died, Irontree received nothing for its loss.

2) *Taxpayer Expertise:* The Stones have no formal education in breeding horses or the business of horse breeding. They have only recreational experience. They contend that they consulted with others on issues such as crossbreeding, animal care, and fence construction. But nothing shows that the Stones got or took advice on how to make Irontree profitable.

3) *Time and Effort Invested:* Mr. Stone claimed that he and his wife worked 30 to 40 hours per week on the farm, but did not show how he spent this time. The Stones kept full-time jobs. At best, we find this factor to be neutral.

4) *Appreciation of Assets:* Irontree consists of 20 acres, including the Stones' residence; barns for storage of hay, equipment, and tack; horse stalls; and wash stalls. Mr. Stone conceded that none of these assets appreciated.

5) *Success in Similar Activities:* Irontree was the Stones' first attempt at operating a horse-breeding operation or any business.

6) *History of Income and Losses:* The Stones own six horses. A seventh, Shiloh, was born and sold in 2005. During the years in question, Irontree accumulated losses of \$132,751, compared to income of \$4,000 from the sale of Shiloh. That \$4,000 compared to losses of \$33,901 in the same year. This history of losses over the entire existence of Irontree shows neither a history of profitability nor the potential for income to match losses.

7) *Amount of Profits:* Irontree made no profit in any of the years in question, or in any two consecutive years of its entire history. It seems unlikely that Irontree ever had the opportunity to generate a profit, let alone a profit substantial enough to justify the significant losses incurred.

8) *Financial Status of Taxpayer:* Mr. Stone worked for a bank during all the years in question, and Ms. Stone worked for an insurance agency. The Stones' income averaged \$163,000. The Stones never received a salary or relied upon income from Irontree.

9) *Recreational Nature of Activity:* Mr. Stone engaged in rodeo events as part of his work with Irontree. He has been riding horses since he was a child, and rode horses in games and trail rides. Despite the hours and difficult work required to maintain the farm, the Stones' activities, including the pleasure in riding and caring for horses, indicate recreation, rather than operation of a business for profit.

Conclusion

For all of the foregoing reasons, we find that the factors outlined in 26 C.F.R. § 1.183–2(b)(1–9), except perhaps for factor three, weigh in favor of the Department. Therefore, we find that the Stones did not enter into the activity, or continue the activity, with the objective of making a profit. 26 C.F.R. § 1.183–2(a). The Department’s assessment is affirmed.

Lynn v. Franklin Department of Revenue

Franklin Tax Court (2013)

Lorenzo Lynn claimed deductions for \$2,307 in expenses attributable to the business use of his homes. The Franklin Department of Revenue denied those deductions and assessed additional tax due. Lynn paid the tax and then filed a claim for a refund. After an administrative review affirmed the Department's decision, Lynn timely appealed to this court. We affirm in part and reverse in part.

Lynn claimed that he operated his law practice first out of his house in Chatsworth, Franklin, and then out of his apartment in Athens, Franklin (to which he moved in May 2006). He claimed that the first floor of the Chatsworth house (25% of the total area of the house) and one of the eight rooms of the Athens apartment (the "computer office room") were used exclusively for his law practice. The Department argues that Lynn did not use any portion of either his house or his apartment exclusively as a principal place of business and that he is not entitled to any deduction for the business use of either residence.

We note that the Franklin legislature intended to make Franklin personal income tax law identical to the Internal Revenue Code (IRC) for purposes of determining Franklin taxable income, subject to adjustments and modifications specified by Franklin law. IRC § 280A provides that, generally, no deduction is allowed with respect to the personal residence of a taxpayer. However, under § 280A(c)(1)(A), this prohibition does not apply to expenses allocable to a portion of the taxpayer's residence that is used exclusively and on a regular basis as the principal place of business for any trade or business of the taxpayer. The exclusive use requirement is an "all-or-nothing" standard. *McBride v. Franklin Dep't of Revenue* (Franklin Tax Ct. 1990). The legislative history explains:

Exclusive use of a portion of a taxpayer's dwelling unit means that the taxpayer must use a specific part of a dwelling unit solely for the purpose of carrying on his trade or business. The use of a portion of a dwelling unit for both personal purposes and for the carrying on of a trade or business does not meet the exclusive use test.

S. Rept. No. 94-938, at 48 (1976).

We first consider the Chatsworth house. We find that Lynn used the first floor of the premises—25% of the total area of the home—exclusively and on a regular basis as the principal

place of business of his law practice. The area's physical separation from the living areas of the home, its physical conversion from a residential-type "mother-in-law suite" to an office, and the fact that it had a separate entrance with an awning all inform our finding.

We next consider the "computer office room" of the Athens apartment. We find that Lynn did not prove that he used the "computer office room" exclusively as the principal place of business of his law practice. Lynn testified cursorily that he used the room exclusively for his law practice and that he stored files and law books there. But he offered almost no details about what was in the room and how the room was used. His reference to the room as the "computer office room" suggests that his computer was in the room, but we believe that he used his computer for both personal and business tasks. Moreover, he testified that he would occasionally watch his infant daughter in that room, while his wife attended to personal business, and that he would do so by having his daughter watch television at a low volume. The presence of a television in the room, coupled with his cursory testimony about business use, leads us to conclude that Lynn has not met his burden of proving that he used the "computer office room" exclusively as his principal place of business.

Accordingly, we reverse the determination of the Department as it relates to the business use of the Chatsworth home and affirm its determination as it relates to the Athens apartment.

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

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

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

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

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

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

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

Do not include your actual name anywhere in the work product required by the task memorandum.

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

2) MPT2 - Please type your answer to MPT 2 below (Essay)

===== Start of Answer #2 (2668 words) =====

Legal Argument

I. Under the Internal Revenue Code, the appellants are entitled to the full deduction claimed for expenses paid or incurred in the taxable year while carrying on their business.

The IRC states that any activity engaged in not for profit will not entitled the tax payer to a deduction. (IRC 162(a)). That same section provides several factors to determine whether or not an act is engaged in for profit, including: manner in which the taxpayer carries on the activity, the expertise of the taxpayer in the field, the time and effort expended by the tax payer in carrying on the activity, the expectation that assets used in the activity may appreciate in value, the success of the taxpayer in carrying on similar or dissimilar activities, the history of income or lossess with respect the the activity, the amoung of occasional profits earned, the financial statuts of the taxpayer, and the elements of personal pleasure or recreation involved. None of these factors are dispositive on their own, and they are considered in totality. (CFR 26(b)).

Further the IRC states that, these are objective standards, and that a reasonable expectation of profit is to be made, taking in to consideriong all the facts and circumstances that indicate that the taxpayer entered into an activity, or continued the act, for the purpose of profiting (CFR 26(a)). In making the determination of whether an

act is entered into for making a profit, greater weight is given to objective facts, rather than to the taxpayers statement of intent. (CFR 26(a)).

Because the Nashes meet or exceed many of these factors, they have successfully proven that they carry on their business to make a profit, and therefore are entitled to the full business deductions for the operation of their Christmas Tree farm, as discussed below.

1. The manner in which the taxpayer carries on the activity

The Franklin Tax Court considered whether a taxpayer was carrying on a business for a profit in the *Stone v. FDR* case, in 2008. In that case, the court held that the taxpayers, who claimed to operate a horse breeding farm for profit, were not "carrying out" the activity for profit because: the appellants kept no records, had no business plan, took no salary, used no advertisements, and held no insurance on their horses.

The appellants in our case, the Nashes, however, keep complete books for their sales, as evidenced by Mr. Nash's prior testimony. Further, they have a business plan, which involves determining new areas of their farm to clear and plant trees on, determining how to plant the trees appropriately, and have purchased equipment and hired employees over the years as their business plan for growth has taken off. The Nash's, however, do not currently take a salary. Ms. Nash left her full time job to run the tree farm, and while receiving a small pension, the farm has not made the profit necessary

for a salary to be taken, because the Nashs have continued to invest in their business. The Nash's position is much different from the appellants in *Stone*, who had never taken a salary in over 20 years of operating a "business." The Nash's are simply in a start-up phase of their business, and both have plans to take salaries when the profits allow.

While the Stones did absolutely no advertising, which was innappropriate for the horse business, the Nashs have local ads at their farms. Also, do to the nature of the Christmas tree business (being that customers must come back for a new tree every year), advertising other than word-of-moth by past costumers and return customers is quite unnecessary. Also, distinguishable from *Stone*, the Nash's have taken steps to procure expensive equipment, which they have insurance on. While the Nash's do not insure their Christmas Tree crop, they have had no reason to do so; as the trees often are only on their property temporarily.

According to the IRC, a change in operating methods, adoptions or new techniques, or abandonment of unprofitable methods in a manner consistent with intent to improve profitability and indicate a profit motive. The Nash's, over the past 5 years, have (1) started selling trees for profit, (2) cleared new land and planted new trees, (3) developed a business plan to hire more employees (and have done so in order to meet the growing demand of their business), (4) theyve also incurred new land and more farms from a neighbor who retired from the business. All of these indicate that the Nash's are carrying on their farm for the purposes of making a profit, and not just for recreational purposes.

2. The expertise of the taxpayer in the field.

Preparation for the activity and extensive study of the accepted business and scientific practices, consultation with an expert, all evidence an intent to make a profit. (IRC (b) (2)). When Mr. Nash became involved in selling the trees, he took it upon himself to "read a lot of books" regarding Christmas trees, took a series of classes in forest management. These are all acts in which Mr. Nash took steps to become an expert in the field of Christmas Trees. Further, Mr. Nash spent an entire vacation shadowing a neighbor who had been in the business for years, and is considered an expert in the Christmas Tree field. These acts are much different from the Stones, who, stated that they had talked to other breeders for advice, but offered no evidence of how they took that advice. The Stones implemented everything that they learned from the expert and his courses, from how to raise the trees, to how to maintain their business books. The Nashs have clearly taken steps to become experts in the fields, even if they have not yet attained that status.

3. The time and effort expended by the tax payer in carrying on the activity

A taxpayers withdrawal from another occupation to devote their time or energy to their business is evidence that they are engaged for a profit. Ms. Nash quit her full time job and now solely works for the Christmas tree farm. While she receives a small pension, it is not the same as she had made prior, showing an intent to earn a salary, eventually, from the farm. Further, Christmas tree farming does not have a substantial recreational

aspect, as considered in the IRC. While the Nash's enjoy the business, it is much different from the horse breeding business of the Stones, when Mr. Stone had been riding horses and competing in rodeos his entire life. Christmas trees, unlike horses, are not pets and do not provide that type of recreational benefit. Further, Mr. Nash, while still working full time (after all, their start-up is not yet producing profits), spends all of his free time on the farm working. This is a substantial commitment of time and effort in the farm.

4. The expectation that assets used in the activity may appreciate in value

The Nash's have purchased substantial equipment to care for their land, and have developed the land from simply being forest, to being an actual planned tree farm. This venture surely has raised the value of the property. The factor, is at best, neutral.

5. The success of the taxpayer in carrying on similar or dissimilar activities.

The Nash's have never carried on a business like this before. But, it is important to note, that they have continued to make at least a small income from the business over the past 5 years.

6. The history of income or loss with respect to the activity

The IRC provides that a series of losses during the initial or start-up stage of an activity

may not be an indication that the activity is not engaged in for profit, as long as the period does not extend beyond that of the customary start up period. The Nash's have been in business for only 5 years; which is typically seen as an initial start up period. Further, while they have felt losses of that time, their income has gone up substantially as well, evidenced of a growth in the business that is likely to start returning a profit. As Mr. Nash had testified to, the economy, the need to hire more help, and expand their business, were all factors that effected the loss/income ratio for the business, which are "due to customary business risks or reverses," the existence of which weigh in favor of an activity being completed for profit.

This is a much different situation than that found in Stone, where the business had only ever made \$4000 off the sale of one horse over a 20 year period, in which they incurred over \$130,000 in losses. This disporporition in loss/income is much higher, and over a much longer period, than the Nashs' activity; whose tree farm is already showing the promise of profit after 5 short yeas.

Mr. Nash has testified, based on the turn around of the economy and the maturity of seedlings that will be available for sell next year, the business is expected to profit, as they have worked toward the past 5 years.

7. The amount of occasional profts earned

In looking at this factor, the courts take into consideration the amount of investment,

amount of profit compared to loss, and the consecutive years of profit. While the Nash's have no profit yet, they have continued to earn more income each year that they are in business; earning \$5,000 in 2015, compared to only \$1,500 in 2011. This shows a continued pattern on behalf of the tree farm to keep growing in size, earning more income, and eventually turning a profit.

8. The financial status of the taxpayer

Mr. Nash does earn an income from being an assistant principal full-time, which the IRC states may indicate that the activity is not carried out for the purposes of earning an income, especially if there are personal or recreational elements involved. Mr. Nash does not deny that he enjoys his times working on the tree farm, but also asserts that it is hard work. He spends a majority of his free time working solely on the farm. Further, Ms. Nash quit her full time job. While they both love the work, this was a huge sacrifice, and done so with the intent of replacing Ms. Nash's salary from the county with that earned from the farm. Unlike the Stones, who both held full-time jobs for the full 20 year period of their business, the Nash's are consistently taking steps to be dependant financially on the tree farm, and have done so in the short period of 5 years. It would be unwise for Mr. Nash to quit his full-time job until their tree farm was stable; and the past record indicates that he should be able to do so soon.

9. The elements of personal pleasure or recreation involved.

Mr. Nash had never participated in farming, or tree farming, until he purchased the tree

farm. Neither had his wife. They took steps necessary to educate themselves in the practice, and while they grew to enjoy it, they did not have a past in it, and the enjoyment of the activity is not dispositive that it is not done for profit (IRC). Compared to the Stone case, where Mr. Stone actively participated in rodeos and the like, and had done so since childhood. Because of this, the Nash's are not engaged in the tree farm solely for recreational reasons.

Because the Nash's satisfy, and exceed, the factors that the court considers when determining whether or not an act is carried out for profit, it is objectively clear that the Nash's Christmas Tree farm is carried on for-profit, and thus the ruling of the Franklin Tax Court should be overturned and vacated.

II. Under the Internal Revenue Code, the appellants are entitled to the full deduction claimed related to the business use of their home.

Under the IRC, no deduction is allowed with respect to a dwelling, unless it meets the exception provided in 280(A)(c)(1). That section provides that a deduction may be sought for a portion of a home that is used solely for business purposes as the principal place of business or trade of the taxpayer. The Nash's have committed a full room in their home to use exclusively for their business, because of this, they are entitled to the full deduction.

The Franklin tax court applied the IRC rules in 2013 in *Lynn v. FDR*. In that case, the court concluded that a portion of the taxpayers first home was used exclusively for business purposes and a portion of a subsequent home of the taxpayers was not.

The court stated that the test was an "all or nothing" test, and that the taxpayer must use that part of the dwelling claimed for solely the purpose of carrying on his trade or business; use for personal and business purposes did not meet the exclusivity of the test. (*Lynn*, citing *McBride* and S. Rept. No. 94).

Part of the home concluded to be used for business purposes in that case was a bottom floor of a home, of which the physical use had changed from a mother in law suit, to a solely business office, with a separate entrance. The part of the subsequent home of the taxpayer that was used for business purposes was said to not be exclusive, because the taxpayer offered little evidence or proof of its exclusivity. The taxpayers testimony had no details of the use, simply referring to it as a "computer room" in which he had a TV for his daughter to watch when she accompanied him in the room. Further, the taxpayer had seemed to use the room for personal and business reasons, not meeting the exclusive test.

The Nash's use a home in their room solely for business purposes, as Mr. Nash testified to with specificity. They converted the room from a bedroom, into an office, that contains a desk chair and a recliner. Further, the room has a computer with internet access, and a TV in which Mr. Nash uses only to watch the weather, which specifically relates to the business of farming. The room has been set aside for "just for the

business" since 2011, as quoted by Ms. Nash, and "nothing else." They use the room to store records and catalogues and books they consult for the business. Mr. Nash has given specific, detailed testimony of his use of the room as only for business purposes. Further, the existence of the Tv, to watch the weather, is much different from the television in Lynn, which was used to entertain a young child (clearly not a business purpose.) The conversion of the room from a bedroom to an office fits with the determination of a "business use" in the Lynn court. Mr. Nashs dog does occasionally come in to the room, but is not kept or fed in the room. This does not defeat the purpose; many businesses have animals on site. The appellant notes that the office in their house does not have a seperate entrance, but is strictly used for business purposes only, and the existence of another entrance is irrelevant.

Because of their use of the office for solely, exclusive business purposes, the Nash's are entiteld to a full deduction from the portion of their home that is used as an office, and the decision of the Frankling Tax.

Conclusion:

Because of their use of the office for solely, exclusive business purposes, the Nash's are entiteld to a full deduction from the portion of their home that is used as an office. Because the Nash's satisfy, and exceed, the factors that the court considers when determining whether or not an act is carried out for profit, it is objectively clear that the Nash's Christmas Tree farm is carried on for-profit, and thus the ruling of the Franklin Tax Court should be overturned and vacated.
