

Question 3

Paul sued David in federal court for damages for injuries arising from an automobile accident.

At trial, in his case-in-chief, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway having two westbound lanes. He further testified that his passenger, Vera, calmly told him she saw a black SUV behind them weaving recklessly through the traffic. He also testified that, about 30 seconds later, he saw David driving a black SUV, which appeared in the left lane and swerved in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing Vera. He rested his case.

In his case-in-chief, David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that, on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that, as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul had said to her. She testified that she had no recollection of the conversation. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast and that he offered to pay medical expenses for anyone injured. David rested his case.

Assuming that all appropriate objections and motions were timely made, should the court have admitted:

1. Vera's statement? Discuss.
2. The photocopy of Molly's notes? Discuss.

Answer according to the Federal Rules of Evidence.

Question 3

Answer A

I. VERA'S STATEMENT

The first issue is whether or not Vera's statement to Paul claiming that the black SUV behind them was weaving recklessly through the traffic. Evidence is admissible if it is logically and legally relevant and not subject to any restrictions in the federal rules of evidence.

A. Relevance:

Logical Relevance: Evidence is logically relevant if it tends to prove any fact of consequence in the trial more or less probable. Here, Paul is suing David for injuries arising from an automobile accident. A central issue in this case will be who was at fault for the automobile accident that caused the injuries. The fact that David drives a black SUV and the fact that Vera observed a black SUV weaving recklessly through traffic tends to prove that David was driving recklessly and therefore was at fault for the accident. This evidence is logically relevant.

Legal Relevance: If evidence is logically relevant than [sic] it also must be legally relevant. Legal relevance is determined by whether the evidence is more prejudicial than probative. This requires a balancing test. Here, the evidence is probative because as mentioned it illustrates how one of the parties in this case was driving before the accident. David will argue that it is prejudicial because Vera called him "reckless" and that this statement might cause a jury to cast judgment on his driving. A judge will determine that the probative value outweighs any slight prejudice this evidence may include and is therefore legally relevant.

A court may also exclude evidence that is not legally relevant because it would waste time or confuse the jury. However, this evidence does not require any additional time to be spent to prove additional elements and is not confusing to a jury.

B. Lay Opinion:

David will argue that the statement should be inadmissible because it contains a lay opinion as to the nature in which he was driving his vehicle. Lay opinions are admissible evidence if they are (1) helpful to the jury and (2) do not require any special analysis. Here, if Paul is suing on a negligence theory, David might argue that Vera stating that he was driving recklessly is allowing the witness to testify as to an element of the cause of action. However, David will be successfully [sic] in arguing that Vera could easily see the car driving and that her expression that the car is driving recklessly is merely her opinion on how the driver was swerving through lanes. This evidence will be rendered inadmissible because it is a lay opinion.

C. Hearsay

Paul will argue that Vera's statement is inadmissible because it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible because the validity of out-of-court statements is questionable and unreliable. Hearsay is inadmissible unless a valid exception applies. David will argue that the following exceptions apply:

(1) **Present Sense Impression:** A present sense impression is when someone makes a statement about an event they are perceiving at the moment. Present sense impressions are exceptions to the hearsay rule, because they are presumed to be reliable. When someone makes a present sense impression, they have no motivation to lie or misstate what is actually occurring. The facts state that just 30 seconds after Vera made this statement that a black SUV hit Here [sic], Vera simply stated at the time of observing the black SUV that she saw that SUV weaving recklessly through traffic. Therefore, it will be admissible as a present sense impression.

(2) **Present State of Mind:** Another hearsay exception are statements made by individuals that express their current state of mind. Here, Paul will argue that when Vera made the comments about the SUV, she was expressing what she thought

and felt at the time. This statement would also be admissible under the Present State of Mind exception.

(3) **Excited Utterance:** Paul may argue that the excited utterance exception applies as well. An excited utterances [sic] is a statement made at the time of a shocking or exciting event that is made before the shock or excitement as [sic] worn off. Here, David will argue that the swerving of an SUV was not a shocking or exciting event. Further, the facts state that Vera calmly told Paul about the SUV which illustrates that she was not under the shock or excitement of any event. Therefore, the excited utterance exception does not apply.

(4) **Prior Statement:** Prior statements made by individuals that are unavailable to testify sometimes qualify as an exception to the hearsay rule. However, the federal rules of evidence require that the prior statement be made under oath in the course of some type of previous testimony. This statement was made in the car to Paul and is therefore not a valid exception under the prior statement rule.

(5) **Dying Declaration:** Paul may attempt to argue that Vera's statement qualifies under the Dying Declaration exception. This exception states that under some circumstances, statements made under the impression of impending death are valid exceptions to the hearsay rule. However, the federal rules of evidence state that these statements are only admissible in criminal homicide cases. Moreover, the statement was not made with the knowledge of impending death because the car had not been hit yet and Vera did not know that she might be dying soon. Therefore, it would not qualify under this hearsay exception.

(6) **Federal Catchall Exception:** The federal rules of evidence also allow a catchall exception for statements that are made under circumstances of trustworthiness. Paul will argue that Vera did not have any motivation to lie or to make this information up because it happened at the time of the accident. He will also argue that because Vera is dead there is no other way for this evidence to be admitted for trial. The judge would likely not apply the federal catchall exception because the Present Sense Impression exception is a stronger argument, and you only need one valid exception to admit the evidence.

In conclusion, Vera's statement would be admissible evidence as a present sense impression.

II. PHOTOCOPY OF MOLLY'S NOTES

The issue here is whether or not the photocopy of Molly's notes that state that Paul told her he was at fault because he was driving too fast and that he offered to pay medical expenses can be admitted into evidence.

A. Capacity to Testify:

A witness may testify if she has personal knowledge of the event in question, she recalls the event in question, she has the ability to communication [sic] these perceptions, and she takes an oath to tell the truth. Here, Molly has personal knowledge of the facts perceived because she was there the day of the accident, saw what happened, and remembers that she took notes describing the day's events. While she does not recall the events at this moment, this can be satisfied in other ways that are discussed below. She has the ability to communicate and presumably took an oath prior to testimony.

B. Authentication of Document

Before any documents or other types of recordings are entered into evidence, they must be authenticated and the proper foundation must be laid. Here, Molly has testified that she was there on the day of the accident and they [sic] she remembers that she carefully wrote down notes of what Paul had said to her. Therefore, there is a foundation for the photocopy of the notes. Moreover, David showed Molly the copy of the notes while she was on the stand and she identified them as the ones that she took that day. This would suffice as authentication.

Documents being admitted into evidence are also subject to the Best Evidence Rule. The Best Evidence Rule states that if a document is going to be admitted into evidence, then the original must be produced or the party must account for why the original cannot be produced. The federal rules of evidence have accepted photocopies of documents as satisfying the best evidence rule.

Therefore, the document has been properly authenticated and a photocopy will suffice as a representation of the original.

C. Relevance

Logical Relevance: (See rule statement above.) Here, Paul's statements are logically relevant. They tend to prove whether or not Paul was at fault in the accident more probable than not. Whether or not Paul was at fault or not is a fact of consequence to this case since a central issue is who was at fault to the accident.

Legal Relevance: (See rule statement above.) These statements are more probative than prejudicial. There are not statements that might prejudice Paul because they are statements that Paul himself stated.

Offer to Pay Medical Expenses: However, there are some types of evidence that are not admissible for public policy reasons under the rule of legal significance. For example, evidence of insurance, subsequent remedial repairs, and offers to settle are inadmissible because as a society we want to promote people to carry insurance, rectify dangerous situations, and settle cases as not to clog the courts. Another such category is when one party offers to pay the medical expenses of the other party. Here, there are two statements that Paul made. The first is that he was at fault because he was driving too fast. The second is his offer to pay medical expenses for anyone injured. The *ferenda* rules of evidence will sever these two statements. Because the offer to pay medical expenses is inadmissible but the other statements made in connection with the offer are admissible.

D. Dual Hearsay:

(See rule statement above.) The issue with the photocopy of Molly's notes is that there are two levels of hearsay. In order for a document that contains two levels of hearsay to be admissible evidence, there must be valid exceptions for both statements.

a. First Level of Hearsay: Paul's Statements.

The first level of hearsay is Paul's statements that he made to Molly. These statements were made at the scene of the accident presumably and thus are out of court statements. David will argue that the following exceptions apply:

(1) Party Admission: An admission made by a party to the case is admissible because under the federal rules, it constitutes non-hearsay. Here, Paul admitted fault to the accident. He stated that he was driving too fast and explicitly said that he was at fault. Thus, this is a valid party admission and would be admitted as non-hearsay.

(2) Statement Against Interest: Another category of non-hearsay is when a party makes a statement against interest. Statements against interest are any statements that an individual makes that are against his pecuniary interest. Here, stating that one is at fault for an auto accident would be a statement against his interest. Therefore, this exception would apply.

b. Second Level of Hearsay: Molly's notes

The second level of hearsay is the notes that Molly wrote down on the paper. Molly wrote those notes on the day of the accident and not while in the courtroom. Therefore, the notes are Molly's out-of-court statements. David will argue that the evidence should be admitted because of the following two exceptions:

(1) Prior Recollection Recorded: Courts will admit prior recollection recorded if four elements are met. First, the witness must currently not be able to recall the facts that are in the writing. The facts state here that Molly testified that she has no recollection of the conversation. The second is that the writing be created by the witness or adopted by the witness. Here, Molly herself wrote down the notes. Third, the writing must have been made when her memory was still fresh. Here, Molly created the writing as soon as Paul was taken away in the ambulance; therefore, we can assume that her memory was still fresh. Fourth, the writing must have been made under reliable conditions. Here, there is no evidence of an alternative purpose that Molly created the writing except for the document [sic] the events as they occurred. If all of these elements are satisfied, the recollection may be read into evidence; however, the photocopy should not be admitted into evidence.

(2) Present Recollection Refreshed: A party can refresh a witness' memory with virtually any document. Therefore, if Molly did not recall the events, David could have shown Molly the document and allowed her to look over the writing. If this refreshed her memory, then she could testify as to her knowledge of the events. In this situation, the writing would normally not be entered into evidence unless the opposing party suggested that it be admitted. However, this does not apply because Molly was shown the document, but then did not review it or subsequently answer questions based off of her review.

In conclusion, the photocopy should not have been entered into evidence because even though there were valid hearsay exceptions applied, the appropriate way to admit the evidence would have been to read the evidence into the record as opposed to giving the jury the photocopy.

Question 3

Answer B

The case between Paul in [sic] David is a civil case, which means there are a few different rules than when you are in a criminal case. This case is about injuries arising out of an automobile accident in which Paul is suing David. At issue is going to be who is at fault for the injuries and the accident.

1. Did the court err in admitting Vera's statement?

Vera's statement was made while she was a passenger in the car with Paul on the day of the accident. She stated in a calm manner that she saw a black SUV behind them weaving recklessly through the traffic.

Logical Relevance

All evidence must be relevant to be admissible. This includes tending to prove or disprove a fact that is of consequence. Even if evidence is relevant it may be inadmissible if it is not legally relevant.

Here, Vera's statement is being offered to prove the identity of a vehicle that she observed driving recklessly, which is the same vehicle that David drives. It is also relevant to prove that Paul had notice/was aware of the black SUV driving radically. Additionally, it is relevant to prove that David was at fault and was driving recklessly.

So although Vera's statement has logical relevance its probative value must be determined.

Legal Relevance

Evidence that is logically relevant may be excluded if it will create an unfair prejudice. The court has discretion as to whether or not to exclude the evidence. The test to determine whether the evidence should be excluded on a legal relevancy

ground is whether the unfair prejudicial effect substantially outweighs the probative value.

Here, the prejudicial effect will be that David will be determined to have driven recklessly by weaving in and out of traffic. However, this is highly probative and is what is at issue and being determined in the case, so Vera's statement will not be excluded on grounds of legal relevance.

Even relevant evidence that is otherwise admissible can be inadmissible when it is in violation of one of the federal rules of evidence.

One of the objections that David could make regarding the admissibility of this evidence, besides relevancy, would be hearsay.

Hearsay

Hearsay is a rule which prevents out-of-court statements from being admitted into evidence, if the statement is being offered for the truth of the matter asserted. The reason hearsay evidence is prohibited is because it was not subject to cross-examination and cannot be determined if the statement was fabricated or reliable. Since the information in Vera's statement about a black SUV driving recklessly would be helpful to a jury or trier of fact and is being offered to prove that the reckless driving of the SUV did in fact take place it is being offered for its truth and should be excluded unless a hearsay exception or exemption applies.

Hearsay Exceptions

Hearsay exceptions are statements that are made out of court and are admitted for their truth but we allow them in for other reasons. Here, Paul will try and argue that Vera's statement should get in under several different exceptions.

Present Sense Impression

A present sense impression is an exception to hearsay because it is considered to have reliability given the fact that the statement is made while or immediately after

perceiving an event. There seems to be little time to fabricate a statement when it is made while you are perceiving it.

Here, Paul is going to argue that Vera made the statement while still in the car when she saw the black SUV weaving recklessly through traffic. She was currently perceiving the SUV driving in such a manner and made the statement while making the observation. It is of no matter that she made the statement calmly because this does not negate that she had just observed the SUV driving recklessly.

David might try and counter that Vera did not make the statement immediately when she observed the car driving recklessly, but there are no facts to support that she didn't make the statement while she was observing. Also statements are allowed to be made immediately after observation, because there is still the indication that there is not time to fabricate. Absent any facts showing that Vera waited any amount of time after observing the SUV driving recklessly and telling Paul this statement could come in under the present sense impression.

Excited Utterance

Excited utterance allows hearsay evidence to come in if the statement was made while under the stress or effect of an exciting or startling event. Here, Paul might try and claim that Vera commented on the SUV's reckless driving while she was still under the stress of the observation. However, David will have a valid argument against this contention because Vera calmly told Paul about the SUV and did not seem to be effected by it in a manner to justify an excited utterance.

Former Statement

Former statements can be admitted as long as the declaring is unavailable. Unavailability of a declaring can be because of death, not able to locate after reasonable attempts, and/or incapacity. Here, Vera is dead so she is unavailable. Former statements that are made under oath at a previous proceeding can be admitted for impeachment purposes and to prove the truth of the matter asserted. Here, Vera's statement was not made under oath at a formal proceeding and could

only be used for impeachment. However, since there is no one to impeach because Paul is offering his case and chief [sic] as a plaintiff, thus going first, this statement cannot be admitted as a former statement even though Vera is unavailable.

Dying Declaration

Dying declarations are allowed in criminal homicide cases as well [as] civil. Here, we are in a civil case so a dying declaration is allowed as long as the declaring is unavailable, they do not have to actually die, they made a statement regarding the cause of their death, and they made the statement under the belief that death was impending or imminent. Here, there is no valid argument to support that Vera's statement was a dying declaration since she made the statement prior to Paul's car being struck by the black SUV and prior to her death. Even though Vera is now unavailable she did not make a statement thinking she was going to die or describing the cause of her death and this exception is not available for Paul to get Vera's statement admitted.

Personal Knowledge

Personal knowledge is required for a witness to be able to testify as to an event. While Paul did not personally observe the black SUV driving recklessly as Vera did, he did perceive Vera's statement with one of his 5 senses and thus has personal knowledge that the statement was made and the manner in which it was made.

Hearsay Exemptions

These statements are not hearsay because they are not admitted to prove the truth of the matter and are admitted for a different purpose. Here, Paul is going to argue that Vera's statement should come in as non-hearsay under several different grounds.

Effect on the hearer

Effect on the hearer is not being offered to prove the truth of the matter and thus is not hearsay. This is offered to show the effect the statement had on the person hearing the statement. Here, Paul could assert this statement is being offered to

show that Paul was aware of a black SUV that was driving recklessly. Since Paul's driving is also being put at issue by David this is important for Paul to prove that he was on alert of the black SUV driving recklessly that struck him 30 seconds after hearing the statement from Vera.

Conclusion

Because this statement could fall under the present sense impression exception and effect on the hearer exemption to hearsay this statement cannot be excluded on hearsay grounds and the court properly admitted Vera's statement.

2. Did the court err in admitting the photocopy of Molly's notes?

Logical/Legal Relevancy

Molly's notes are relevant to prove that Paul made a statement accepting fault and offering to pay medical bills. They are being offered by David for this matter and to prove that it is true as well. Although relevant to determine fault the evidence must also not be unfairly prejudicial.

Policy reasons to exclude relevant evidence

Certain evidence although relevant will be excluded because of public policy reasons. Courts want to encourage parties to fix wrongs, settle cases, and help each other out. Here, Paul will argue that the notes should be excluded because they were an offer to pay medical bills. Offers to pay medical bills cannot be offered to show fault of a party.

Although offers to pay medical bills of the injured [sic] is not allowed into evidence under the federal rules of evidence, the FRE severs statements made in connection with the offers and allows them into evidence. Here, Paul made the statement that he was driving too fast, was at fault, and offering to pay medical expenses of anyone injured.

The statements regarding Paul driving too fast and being at fault will not be excluded under this policy reason but may be excluded on other grounds (see discussion below).

Error in allowing an offer to pay medical expenses

So in regards to the court allowing in a photocopy of a document that included the offer to pay medical expenses there is an error because public policy seeks to keep these sorts of statements excluded.

The statement regarding Paul driving too fast and being at fault

The photocopy of Molly's notes being admitted constituted a recorded recollection and is actual evidence being admitted. All tangible, physical, non-testimonial evidence that is being admitted must be authenticated in order to be admitted.

Authentication

Here, Molly is on the stand claiming that she wrote the notes immediately after the accident and that the notes are hers. This is sufficient to authenticate the notes because Molly is claiming they are what David purports them to be and she is on the stand and capable of being questioned as to the notes' authenticity.

Refreshing Recollection

Anything can be used to refresh a witness's recollection. Here, David is attempting to use notes to refresh Molly's recollection. Witnesses must be shown whatever is attempting to refresh their recollection in order to see if the item is successful in helping them recall. Whatever is used to refresh a witness's recollection may be offered into evidence by the opposing party.

Here, it is not Paul offering the notes used to refresh Molly's recollection into evidence; it is David, which means he is attempting to offer the notes as a recorded recollection.

Paul may argue that Molly was not given the notes before claiming that her memory failed and thus the rules regarding admitting record recollection evidence were not followed. Generally a witness should be given the document to review silently and then if they still cannot remember the document may be admitted into evidence. Paul may have a valid argument here since the facts do not say that this was done. It appears from the facts that Molly before even reviewing the document said she couldn't remember, then it was moved into evidence.

Record Recollection

Documents offered into evidence that were used to refresh a witness's recollection are permitted so long as the witness's memory has failed to be refreshed, the witness is on the stand and able to be cross and authenticate the document, the witness accurately prepared the document close in time to perceiving the events, and had personal knowledge of the thing to which they recorded information about.

Here, Molly did testify that she was unable to recall the conversation. She is on the stand and subject to cross and questioning. And she testified that she carefully wrote down the notes as soon as Paul was taken away in the ambulance; additionally she had personal knowledge of the conversation with Paul since she heard the conversation herself. Given these facts David would be able to properly admit the evidence as record recollection as long as no other restrictions exist permitting the admissibility of the evidence.

Best Evidence Rule

The Best evidence rule is a rule which calls for the document itself to be admitted when someone is on the stand trying to testify as to the contents of the document. Here, Molly is trying to recall a conversation and the notes contain information about the conversation. Since the notes are her own memory and not of legal significance the best evidence rule does not apply.

However, Paul will try and assert that there is a problem with the best evidence rule as well as authentication because the actual note itself was not admitted and a

photocopy was admitted. Paul will try and argue that unless David can show a justifiable reason why a photocopy of the note and not the actual note was admitted there is a problem/violation with the best evidence rule. David will successfully counter that argument by claiming that a photocopy, properly authenticated, is an acceptable document to satisfy the best evidence rule.

Hearsay/ Multiple Hearsay

See rule above and discussion above. Here we also have a case of multiple hearsay since there is a statement within a document both made/prepared out of court and being offered for the truth of the matter asserted. So both the statement and the document must meet their own separate hearsay exception or exemption. As discussed above the document itself can get in under the record recollection rule but there needs to be an exception for the actual statements.

Party Admission-

Party admissions are considered non-hearsay and are statements offered by a party opponent made by the other party. These statements do not have to be against interest necessarily but they must be made by one party and offered by the other. Here David is attempting to offer statements that Paul made, and although not required, are against his interest and regard his fault in the accident. This could be a valid ground for admitting the statements made by Paul.

Statement against interest

David may try and assert that the statements made by Paul can come in under a statement against interest exception to hearsay. However, this exception requires that the declaring be unavailable which is not the case here, since Paul is the plaintiff in the matter and is available in court.

Conclusion

The court was likely proper in admitting the evidence because the document can come in under the record recollection and the statement is admissible as a party admission.