

QUESTION 3

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.
2. Pete's testimony about Erin's statements at the accident scene? Discuss.
3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 3: SELECTED ANSWER A

1. HOSPITAL INTAKE FORM

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, Pete (P) is suing Donna's Pizza (D) for a car accident allegedly caused by D's employee, Erin (E). The hospital intake form is logically relevant because it tends to make the fact of P's physical injury, and therefore, damages, more probable.

Legal Relevance

Evidence must be both probative and material in order to be legally relevant. Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, the hospital intake form is legally relevant because it is probative and material as to whether P suffered damages, and its probative value is not outweighed by a risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, Nellie is a nurse who treated P at the hospital. She was also the one who recorded the information on the hospital intake form. Therefore, Nellie is competent to testify.

Authentication

Tangible evidence must be properly authenticated, either through personal knowledge, distinct characteristics, by showing chain of custody, or, in the event of a reproduction of a photo, knowledge of the person who took the photo. Here, the hospital intake form can be authenticated by Nellie's personal knowledge, because Nellie was the one who filled out the intake form. Therefore, the intake form has been properly authenticated.

Best Evidence Rule

The best evidence rule applies when a witness is testifying about a document or the document is at issue. It mandates that in those circumstances, the original document or a properly authenticated duplicate be entered into evidence. Here, Nellie is testifying to her personal knowledge of what P said to her at the hospital. The best evidence rule does not apply, and the business records exception allows the intake form to be admitted.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls under an exemption or an exception to hearsay. The hospital intake form may be hearsay because it was made out of court and is being offered to prove that P struck his head on the windshield and was in a great deal of pain. The intake form is hearsay within hearsay. However, it may fall under one of the following exceptions if both levels of hearsay are exceptions.

Statement for Medical Diagnosis/Treatment

When a statement is made for medical diagnosis or treatment, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that during the collision, his head struck the windshield and that he was still in a great deal of pain. If these statements were made for medical diagnosis or treatment of his head injury, then it is likely the statement will come in.

Statement of Mental/Physical Condition

When a statement is made about a mental, physical, or emotional condition, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that he was still in a great deal of pain. This will likely come in under this exception.

Business Records

Business records fall under an exception to the hearsay rule regardless of whether the

declarant is available to testify. The business records must be made in the regular course of business at or near the time of the event, by a person who had knowledge of the event. It must also be a regularly conducted activity of the business to make such records. Here, the facts indicate that Nellie recorded the information on a hospital intake form at or near the time of the event. Nellie had knowledge of the event because the person to whom P made the statements was Nellie and she recorded them during the regular course of her business as a nurse at the hospital. The facts also indicate that she recorded the information pursuant to standard hospital procedure, making the recording a regularly conducted business activity. Therefore, the hospital intake form is admissible under the business records exception to the hearsay rule.

Conclusion

The statement made to Nellie is a statement for medical diagnosis or treatment and also a statement of a physical condition; it is admissible despite the hearsay rule. The intake form itself is admissible under the business records exception. Therefore, despite being hearsay within hearsay, the court properly admitted the hospital intake form.

2. P'S TESTIMONY ABOUT E'S STATEMENTS AT THE ACCIDENT SCENE

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about E's statements at the accident scene is logically relevant because they tend to make the fact that E was responsible for the accident more probable than without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about E's statements is legally relevant because their probative value is not outweighed by the risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements E made to him at the scene of the accident; therefore, he has personal knowledge of the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about E's statements at the accident scene is hearsay because they are out-of-court statements and they are being offered to prove E ran the red light. They will be inadmissible unless they fall under one of the exemptions or exceptions to hearsay discussed below.

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, E testified during D's case-in-chief that she had the green light and that it was P who ran the red light. However, at the accident, P is willing to testify that E told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." As this statement is inconsistent with what E has testified during D's case-in-chief, it may be admissible under the prior inconsistent exemption.

Vicarious Admission

An employee's statement may be admissible in a case against the employer if the employee was acting within the scope of her duties. A vicarious admission is an exemption to the hearsay rule. Here, E is an employee of D's. She was making a pizza delivery, which is within the scope of her employment. Therefore, what E said at the accident scene is admissible as a vicarious admission in P's suit against D.

Statement Against Interest

A statement against interest is admissible as an exception to the hearsay rule, only if the declarant is unavailable. A declarant may be unavailable for a number of reasons

including she is dead, missing, or refuses to testify. Here, E's statement is a statement against interest; however, E is available, therefore, her statements to P at the accident scene will not come in under this exception.

Present Sense Impression

A statement of present sense impression is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The statement must be made at or soon after the event that is described. It is possible that E's statements could come in under the present sense impression exception because they were made to P immediately following the accident, at the scene of the accident, and they related to the circumstances of the accident--that she ran the red light because she was in a hurry. However, they are more likely to come in via the prior inconsistent and vicarious admission exemptions to the hearsay rule.

Excited Utterance

An excited utterance is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The declarant must make the statement while under the stress or excitement of the event. Excitement can be evidenced by shouting or other excited behavior. Here, there is no evidence to suggest E's statements were made to P under the stress or excitement of the accident. Therefore, they are not admissible under this exception.

Conclusion

The court properly admitted P's testimony about E's statements at the accident scene, because they were prior inconsistent statements as well as vicarious statements.

3. P'S TESTIMONY ABOUT D'S STATEMENTS AT THE HOSPITAL

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about D's

statements at the hospital is logically relevant because they tend to make the fact that E, and therefore D, was responsible for the accident more probable than it would be without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about D's statements is legally relevant because their probative value is not outweighed by any risk of unfair prejudice.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements D made to him at the hospital; therefore, he has personal knowledge about the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about D's statements at the hospital is hearsay because it is being offered to prove that D offered to take care of all of his medical expenses. However, they are not admissible, even if they fall under the following exemptions or exceptions, because of the public policy exception regarding offers to pay medical expenses (see below).

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, D testified during D's case-in-chief that D was not responsible for the accident. On cross-examination, D testified that she had never offered to pay for any of Pete's medical expenses. Since P is testifying that D had said before that she would pay for his medical expenses, these out-of-court statements may be admitted as prior inconsistent statements.

Statement of Party Opponent

A statement made by a party opponent is admissible as an exemption to the hearsay rule. Even though P's testimony about D's statements at the hospital may be a statement of a party opponent, because P is suing Donna's Pizza, it does not fall under this exemption due to the public policy exception regarding offers to pay medical expenses (see below).

Offers to Pay Medical Expenses

Offers to pay medical expenses are not admissible. Under the Federal Rules of Evidence, statements that accompany offers to pay medical expenses are admissible. Here, the only statement P is offering is D's statement that it would take care of all of his medical expenses. The offer is inadmissible under this public policy exception. Therefore, the court did not properly admit P's testimony about D's statements at the hospital.

Conclusion

The court improperly admitted P's testimony about D's statements at the hospital because an offer to pay medical expenses is never admissible. While not admissible as substantive evidence, it may be used to impeach D.

QUESTION 3: SELECTED ANSWER B

1. Hospital Intake Form

Relevance

Evidence is logically relevant if it tends to prove or disprove a material fact. Evidence is legally relevant if its probative value is not substantially outweighed by the risk of unfair prejudice. Here, the hospital intake form includes Pete's (P) statement to the nurse regarding his injury and how it occurred. Thus, it tends to prove a material fact - damages. Additionally, there is little chance of unfair prejudice here as the statement relates directly to the accident and is not shocking to a jury. The form is relevant.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, it is inadmissible, unless an exemption or exception applies. Here, the hospital intake form is offered to show P's injury immediately after the crash. It was created out of court and is therefore hearsay. It is inadmissible unless an exception applies.

Double Hearsay

Documents or statements that have different layers of out of court statements are double hearsay, and each statement must be analyzed for admissibility. Here, not only is the hospital form hearsay, as discussed, but P's statement contained within is also hearsay, as it was made out of court and is offered to prove its truth. Thus, both the form and the statement must apply to a hearsay exception to be admissible.

a. Pete's Statement

Opposing Party

A statement made by an opposing party is not hearsay and thus is admissible. Here, P has offered the hospital record which contains his statement for evidence.

Accordingly, this is not an opposing party, and this exception does not apply.

Medical Diagnosis / Treatment

An out of court statement made to obtain a medical diagnosis or treatment is considered reliable. It is therefore excepted from the hearsay rule and admissible. Here, P had just been in a car accident and was transported to the hospital. There, he told the attending nurse that he "struck his head on the windshield," and that he "was still in a great deal of pain." Accordingly, P was making these statements to obtain a diagnosis and treatment for his pain. This statement is likely admissible as an exception to the hearsay rule.

Physical Condition

A statement by the declarant describing his current physical or emotional condition is admissible as a hearsay exception. Here, P was describing his current condition - he was in a great deal of pain. The defense may argue that the entire statement does not qualify: while the "great deal of pain" portion describes P's condition, the "my head hit the windshield" does not. It describes the reason for the condition, but not the current condition itself. Accordingly, D may move to strike that portion of the statement.

However, because the statement was made for medical treatment and diagnosis, and the "my head hit the windshield" was necessary to determine the type and extent of the injury, the entire statement is admissible.

b. Hospital Record

Business Record

A business record is an out of court statement and thus is hearsay. However, it may be admissible as an exception if it was created in the ordinary course of business, by someone with knowledge, and not in anticipation of litigation. Here, the facts indicate that Nurse Nellie created the document immediately after speaking with P. She had actual knowledge of the information she included in the form. Additionally, the form was created pursuant to standard hospital procedure. Accordingly, the hospital form is

admissible as a business record.

Authentication

Evidence must be authenticated. Typically, personal knowledge is sufficient to authenticate a document. Here, Nellie herself is available to testify as to the creation and the contents of the form. She has personal knowledge and the form is properly authenticated.

Best Evidence Rule

The Best Evidence rule states that an original document must be admitted whenever the contents of a document are at issue. The contents are at issue when a witness is testifying about its contents. Here, P has moved to admit the hospital form. Accordingly, the best evidence rule mandates that the original be admitted. The facts do not indicate that the form is a copy, or that the original is unavailable. It appears that the form is the original, and the best evidence rule is satisfied.

2. Erin's Statements

Relevance

E's statement to P at the scene admits liability, and therefore proves a material fact of the case. Further, there is no risk of unfair prejudice. D may argue differently, claiming that E was acting outside of the scope of D's control and thus the statement is irrelevant to the case against D, and unfairly prejudices her. However, as discussed below, this argument will fail. The statement is both logically and legally relevant.

Hearsay

See rule above. Here, Erin (E) told the P at the scene that she "was in a hurry to make a delivery and that's why [she] ran the red light." This is an out of court statement offered to prove that E ran the red light. It is hearsay.

Opposing Party

See rule above. An employee or agent may be considered as part of the opposing party, if the statement was made within the scope of employment. Here, E was a delivery driver for Donna's Pizza (D). She was delivering pizza when the accident occurred. Accordingly, she was acting within the scope of her employment. Subsequently, when she spoke to the officer at the scene, she was speaking within that same scope of employment. E's statement can be attributed to D, and is thus a statement by an opposing party.

However, D will argue that she is not responsible for the accident. She has claimed that she has no connection to the events. Thus, D will argue, E's statements cannot be attributed to her. However, because E is acting as D's driver, within the scope of her employment, the statement can be attributed to D, and it is admissible as a statement by an opposing party.

Excited Utterance

An excited utterance is admissible as a hearsay exception if the statement is in response to a shocking or startling event, and if the statement is made while the declarant is still under the stress of that shocking event. Here, even if E were not an opposing party, P may argue that her statement is an excited utterance. She was just in a car accident that resulted in injury, a startling event, and she was describing the event immediately after it occurred.

However, D will argue that E was not still under the stress of the accident; enough time had passed and the parties were speaking calmly after the fact. This is likely not an excited utterance.

Present Sense Impression

Like an excited utterance, a present sense impression is admissible if the statement describes an event and was made during or immediately after the event occurred. Here, P will also argue that E was describing the event immediately after it occurred. However, as above, it is likely that some time had passed, and a court may rule that this does not qualify as a present sense impression.

Because E was acting within the scope of her employment, the statement is likely admissible as an admission by an opposing party.

3. Donna's Statements

Relevance

See rule above. D's offer to P tends to prove her control over the car and E's conduct. It is relevant to D's liability.

Hearsay

See rule above. D's statement to P in the hospital in which D promised to pay for P's medical expenses is an out of court statement. It is hearsay.

Opposing Party

See rule above. D is the opposing party, and the statement likely qualifies as an admission by an opposing party. This is non-hearsay, and the statement is admissible barring some other limitation.

Offers to Pay Medical Expenses

Offers to pay medical expenses, even if admissible as a hearsay exception, are inadmissible as they violate public policy. However, the statements, though not admissible as substantive evidence, may be admissible as impeachment or to establish ownership or control of the thing in question. Here, D will argue that her offer to pay P's medical expenses is inadmissible, because public policy encourages these offers. Therefore, the statement is inadmissible.

Ownership: However, P may bring in the statement for two reasons. First, D has denied liability for the accident. An offer to pay medical expenses may be offered to show ownership or control of the subject matter in question. Her offer to P then, may be offered to establish that D owned and/or controlled both the car and her employee E. This is a disputed fact and highly relevant. Thus, the statement may be offered for this

purpose.

Impeachment: The credibility of a witness is always at issue. Thus, statements offered to rebut witness testimony are admissible as impeachment evidence. D has testified on the stand that she did not offer to pay P's medical expenses. Accordingly, P may offer D's out of court statement to him, offering to pay expenses, as impeachment evidence. This is a prior inconsistent statement offered to impeach, and it is admissible.