

A decedent's estate sued a jewelry store claiming that one of the jewelry store's security guards wrongfully shot and killed the decedent when the decedent fled after being accused of shoplifting. The guard was convicted of manslaughter for killing the decedent. At his criminal trial, the guard, who was no longer working for the jewelry store, testified that the jewelry store's security director had instructed him to stop shoplifters "at all costs." Because the guard's criminal conviction is on appeal, he refuses to testify at the civil trial. The decedent's estate now offers an authenticated transcript of the guard's criminal trial testimony concerning the instruction of the jewelry store's security director.

Is the transcript of the guard's criminal trial testimony about the security director's instruction admissible?

- A. No, because it is hearsay not within any exception.
- B. Yes, although hearsay, as former testimony.
- C. Yes, as a statement of an agent of a party-opponent.
- D. Yes, because the instruction from the security director is not hearsay.

Explanation:

Hearsay is an out-of-court statement (eg, the security director's instruction) offered to prove the truth of the matter asserted therein (eg, that the guard was to stop shoplifters at all costs). When a **hearsay statement is contained in another** hearsay statement (eg, the guard's criminal trial testimony), both statements are **inadmissible unless** both fall within an **exclusion** or **exception** to the hearsay rule.

One **hearsay exclusion** applies to statements made by an **opposing party's agent or employee** that (1) concern a matter within the **scope of the agency/employment relationship** and (2) are offered against the opposing party. The security director's statement falls within this exclusion because it was made while he was acting in the course of his employment with the jewelry store and is being offered against the store. But this statement is only admissible if the guard's criminal trial testimony is also excluded or excepted from hearsay (**Choices C & D**).

This raises the **hearsay exception** for **former testimony** of an **unavailable** declarant (eg, one who refuses to testify) that:

was **given at a trial**, hearing, or deposition in the current or any prior proceeding *and*

is offered against a party who had—or, for civil cases, whose predecessor in interest had—an **opportunity** and similar motive to **develop the testimony by examination**.

Here, the guard is unavailable because he has refused to testify at the current civil trial. However, his former testimony does not fall under this hearsay exception because the jewelry store—the party against whom the testimony is offered—did not have the opportunity to question the guard at the criminal trial (**Choice B**). And since this testimony is hearsay not within any exclusion or other exception, the transcript of the guard's testimony about the security director's instruction is inadmissible.

Educational objective:

When one hearsay statement is contained in another hearsay statement, both statements are inadmissible unless both fall within an exclusion or exception to the hearsay rule.

References

Fed. R. Evid. 805 (hearsay within hearsay).

Fed. R. Evid. 801(d)(2) (hearsay exclusion – opposing party's statement).

Fed. R. Evid. 804(b)(1) (hearsay exception – former testimony).

Copyright © 2002 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

Hearsay within hearsay (FRE 805)

Woman's statement is hearsay



FRE = Federal Rules of Evidence

Witness's statement is hearsay within hearsay



©UWorld