

A plaintiff sued his insurance company for the proceeds of a casualty insurance policy covering his 60-foot yacht, claiming that the yacht was destroyed by an accidental fire. The company has denied liability, claiming that the plaintiff hired his friend to set the fire. In the hospital the day after the fire, the friend, who had been badly burned in the fire, said to his wife, in the presence of an attending nurse, "I was paid to set the fire." Two weeks later, the friend died of an infection resulting from the burns.

At trial, the insurance company calls the wife to testify to the friend's statement.

Is the wife's testimony admissible over the plaintiff's objection?

- A. No, because the marital privilege survives the communicating spouse's death.
- B. No, because the statement was made after the conspiracy ended.
- C. Yes, because it is a statement against interest.
- D. Yes, because it is a statement by a coconspirator.

Explanation:

Statement against interest

(FRE 804(b)(3))

Hearsay statement that reasonable person in unavailable declarant's position would only make if true because it:

is contrary to declarant's proprietary or pecuniary interest
tends to invalidate declarant's claim against someone else *or*
exposes declarant to civil or criminal liability

FRE = Federal Rule of Evidence.

The **rule against hearsay** generally bars the admission of an out-of-court statement offered to prove the truth of the matter asserted therein. But there is an **exception** for a **statement against interest**—ie, a statement that a reasonable person in the declarant's position would only have made if he/she believed it to be true because it:

is contrary to the declarant's proprietary or pecuniary interest
tends to invalidate the declarant's claim against someone else *or*
exposes the declarant to civil or **criminal liability**.

For this exception to apply, however, the declarant must be **unavailable** as a witness (eg, deceased).

Here, the friend's out-of-court statement ("I was paid to set the fire") is hearsay since it is being offered for its truth. But a reasonable person in the friend's position would only have said this if it were true since the statement exposed the friend to criminal liability for arson. And since the friend is unavailable to testify (deceased), the wife's testimony as to the friend's statement is admissible under the statement against interest hearsay exception.

(Choice A) **Spousal communications** are generally privileged if they are made during a valid marriage and reasonably *intended* to be confidential. This marital privilege survives the communicating spouse's death. But here, confidentiality was not intended since the friend's statement to his wife was made in the nurse's presence.

(Choices B & D) An out-of-court statement made by an opposing party's coconspirator *during* and in furtherance of the conspiracy is admissible nonhearsay (ie, is excluded from the hearsay rule) when offered against that party. This exclusion does not apply to the friend's statement, which was made *after* the conspiracy had ended. But the statement is still admissible as a statement against interest.

Educational objective:

A statement against interest is a hearsay exception for statements that are so contrary to the declarant's proprietary, pecuniary, or penal interest that a reasonable person in the declarant's position would only have said it if he/she believed it to be true. But this exception only applies if the declarant is unavailable as a witness.

References

Fed. R. Evid. 804(b)(3) (hearsay exception – statement against interest).

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