

A homeowner sued a plumber for damages resulting from the plumber's allegedly faulty installation of water pipes in her basement, which caused flooding. At trial, the homeowner is prepared to testify that when she first detected the flooding, she turned off the water and called the plumber at his emergency number for help and that the plumber responded, "I'll come by tomorrow and redo the installation for free."

Is the homeowner's testimony regarding the plumber's response admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the statement was an offer in compromise.
- C. Yes, as a subsequent remedial measure.
- D. Yes, as evidence of the plumber's fault.

Explanation:

Nonhearsay statements

(FRE 801(d))

Statement by declarant-witness

Out-of-court statement admissible if witness subject to cross-examination & prior statement:

is inconsistent with current testimony & was made under penalty of perjury

is consistent with current testimony & offered to (1) rebut charge of fabrication/improper influence or (2) rehabilitate witness *or* identifies person witness perceived earlier

Statement by party-opponent

Out-of-court statement admissible if offered against opposing party & statement was:

made or adopted by party

made by person authorized by party

made by party's agent/employee on matter within scope of relationship *or*

made by party's coconspirator during & in furtherance of conspiracy

FRE = Federal Rule of Evidence.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein and is **generally inadmissible**. But Federal Rule of Evidence (FRE) 801 **excludes** some statements from the rule against hearsay and allows them to be offered as substantive evidence (eg, to establish fault). This includes **statements made by an opposing party** that are **offered against that party**.

Here, the homeowner seeks to introduce the plumber's out-of-court statement—that he would redo the installation for free—to prove that his initial pipe installation was faulty. But since this statement was made by the plumber (a party-opponent) and is being offered against him at trial, it is excluded from the rule against hearsay. Therefore, the statement can be used as evidence of the plumber's fault **(Choice A)**.

(Choice B) Under FRE 408, an offer of compromise (ie, settlement offer) is inadmissible to prove the validity or amount of a disputed claim. But this rule only applies if there was a *pending dispute* at the time the offer was made (not seen here).

(Choice C) FRE 407 *bars* the admission of subsequent remedial measures to prove a party's negligence or culpable conduct. But here, the homeowner is seeking to introduce the plumber's statement—not any subsequent measures taken to remedy the flooding.

Educational objective:

Statements of an opposing party are excluded from the rule against hearsay—and are admissible as substantive evidence—when offered against that party.

References

Fed. R. Evid. 801 (nonhearsay statements).

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