

A cyclist sued a defendant corporation for injuries sustained when she was hit by a truck owned by the defendant and driven by its employee, who was making deliveries for the defendant. The day after the accident, the employee visited the cyclist in the hospital and said, "I'm sorry for what I did."

At trial, the employee has testified that he exercised due care.

Why is the cyclist's testimony relating what the defendant's employee said at the hospital admissible to prove negligence?

- A. It is a prior inconsistent statement.
- B. It is a statement against interest.
- C. It is a statement by a party-opponent's agent.
- D. It is a statement of then-existing state of mind.

Explanation:

Nonhearsay statement by party-opponent

(FRE 801(d))

Out-of-court statement is nonhearsay if offered against opposing party AND:

made or adopted by opposing party

made by person authorized by opposing party to make statement on subject

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

OR

made by opposing 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 such statements are **excluded** from this rule (ie, are nonhearsay) if they:

are **offered against** an opposing party

were made by that party's **agent or employee** *and*

pertained to a matter within the **scope of that relationship** while it existed.

These statements are attributed to the opposing party and are admissible as substantive evidence at trial (eg, as proof of negligence).

Here, the employee's apology is being offered to prove the truth of the matter asserted—that he felt responsible for the accident. But it is *nonhearsay* because it is offered against the defendant, was made by its employee, and concerned an accident that occurred while the employee was making deliveries for the defendant in its truck. As a result, this statement by a party-opponent's agent is admissible to prove the corporation's negligence.

(Choice A) A witness's prior inconsistent statement is admissible to *impeach* the witness on a material matter. But it is only admissible to *prove* the truth asserted (ie, as substantive evidence) if the statement was made under oath at a trial, hearing, or other proceeding—which did not occur here.

(Choice B) 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 since this exception only applies if the declarant is unavailable as a witness, it is inapplicable here.

(Choice D) Statements regarding the declarant's **then-existing state of mind**—not later statements of memory, belief, or reflection (eg, "I'm sorry for what I did")—are excepted

from the hearsay rule. Therefore, the employee's apology is not admissible under this exception.

Educational objective:

Statements that are (1) offered against an opposing party, (2) made by that party's agent or employee, and (3) pertinent to a matter within the scope of the agency or employment are excluded from the hearsay rule.

References

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

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