A plaintiff who was involved in a vehicular collision with a commercial driver filed a personal-injury lawsuit against the driver's employer. The plaintiff planned to introduce evidence of the driver's prior driving-while-intoxicated (DWI) conviction obtained during discovery. The employer filed a pretrial motion in limine to exclude evidence of the DWI conviction on the ground that intoxication was not an issue in the case. The court denied the motion.

At trial, the plaintiff called the driver and asked if he had any prior DWI convictions, and the employer renewed its objection. The judge sustained the objection and instructed the plaintiff not to mention or question the driver about any prior DWI convictions. The plaintiff proceeded to examine the driver without mentioning the DWI conviction. The jury recessed immediately after the driver's testimony. While the jury was in recess, the plaintiff informed the judge on the record of the relevancy of the conviction and basis for the conviction's admissibility. No additional evidence of the conviction was provided.

Can the plaintiff challenge the court's exclusion of the driver's DWI conviction on appeal?

A. No, because the plaintiff did not provide formal evidence of the conviction on the record.

B. No, because the plaintiff's offer of proof was made outside the jury's presence.

C. Yes, because the plaintiff explained the relevancy of the conviction and the grounds for its admissibility.

D. Yes, because the trial court's ruling on the pretrial motion in limine to exclude the conviction was definitive.

Explanation:

Preserving evidentiary rulings for appeal

(FRE 103)

Evidence *admitted*	Opponent of evidence must: timely object or move to strike *and* unless apparent from context, state specific ground(s) for objection or motion
Evidence *excluded*	Proponent of evidence must: obtain definitive ruling *and* unless apparent from context, make timely offer of proof

FRE = Federal Rule of Evidence.

A party must take steps to preserve the right to challenge a trial court's ruling on appeal through a process called "**preservation of error**." When a party disagrees with a judge's **decision to exclude evidence** (as the plaintiff does here), the party offering that evidence ordinarily must preserve error by:

obtaining a definitive ruling on the issue *and*

making a **timely offer of proof**.*

An offer of proof is an **oral or written explanation** of the **relevance and admissibility** of the excluded evidence that is **made on the record**—no formal evidence is required **(Choice A)**. An offer of proof is timely if it is made within a **reasonable time *outside* the jury's presence** so that the judge has the opportunity to correct the alleged error **(Choice B)**.

Here, the judge made a definitive ruling to exclude any mention of the driver's prior DWI conviction. The plaintiff then made a timely offer of proof while the jury was in recess immediately after the driver's testimony. The offer of proof explained the relevancy of the driver's DWI conviction and the basis for its admissibility on the record. As a result, the plaintiff properly preserved error, and the trial court's ruling can be challenged on appeal.

*An offer of proof is not required if the substance of the evidence is apparent from the context (eg, when seeking to admit a statement that constitutes slander per se in a defamation action).

(Choice D) The trial court's pretrial ruling to admit the DWI conviction was definitive because it fully decided the matter. But a court can reconsider a prior definitive ruling and reverse course, as the court did here. The party who is adversely impacted by the new decision must then preserve any error by objecting, moving to strike, or making an offer of proof—as the plaintiff did here.

Educational objective:

To preserve a challenge to the exclusion of evidence for appeal, a party generally must make a timely offer of proof on the record, in the form of an oral or written explanation of the relevance and admissibility of the excluded evidence. No formal evidence is required.

References

Fed. R. Evid. 103 (rulings on evidence).

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