

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

At trial, the plaintiff calls an emergency room physician to testify that when the physician asked the plaintiff's husband if he knew what had happened, the husband, who was upset, replied, "I saw my wife get run over two hours ago by a driver who went right through the intersection without looking."

Is the physician's testimony about the husband's statement admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because it relates an opinion.
- C. Yes, as a statement made for purposes of diagnosis or treatment.
- D. Yes, as an excited utterance.

### Explanation:

An out-of-court statement offered for the truth of the matter asserted therein is inadmissible under the rule against hearsay unless it is **excluded** from that rule or falls within a **hearsay exception**. In the context of an emergency room visit (as seen here), a declarant's out-of-court statement may fall within the hearsay exception for:

**excited utterances** – statements related to a startling event or condition that are made while the declarant is still under the stress of the excitement caused by the event or condition *or*

**statements for medical diagnosis or treatment** – statements made for and reasonably pertinent to medical diagnosis or treatment that describe the declarant's medical history, symptoms, or the inception or general cause of those symptoms.

Here, the husband made a statement to the emergency room physician *two hours* after seeing the wife get run over by the car. It is therefore unlikely that he was still in the state of excitement necessary for that statement to qualify as an excited utterance (**Choice D**). Additionally, his statement pertained more to the driver's recklessness than the wife's medical diagnosis or treatment (**Choice C**). And since no other hearsay exception (or exclusion) applies, testimony about the husband's statement is inadmissible.

(**Choice B**) The fact that an out-of-court statement relates an opinion does not automatically render it inadmissible. That is because an opinion is admissible if it is (1) rationally based on the declarant's personal knowledge, (2) helpful to understanding the declarant's statement or determining a fact in issue, and (3) excepted or excluded from the hearsay rule.

### Educational objective:

An out-of-court statement offered for the truth of the matter asserted therein is inadmissible unless it is excluded from the rule against hearsay or falls within a hearsay exception (eg, excited utterance, statement for medical diagnosis or treatment).

### References

Fed. R. Evid. 801(c) (hearsay definition).

Fed. R. Evid. 803 (hearsay exceptions).

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