

A plaintiff sued a defendant for injuries she allegedly received when she slipped and fell while shopping in the defendant's grocery store. At trial, the plaintiff calls as a witness another shopper who testifies that she saw the plaintiff slip and fall on an oily substance on the floor of the store.

On cross-examination, the defendant's attorney asks: "Isn't it true that you told an investigator one week after the accident that you did not see [the plaintiff] fall?" The witness denies making the statement.

Later in the trial, the defendant's attorney calls the investigator, who offers to testify that the witness told him, "I never saw [the plaintiff] fall." The plaintiff objects to admission of the investigator's testimony about the witness's out-of-court statement.

Should the court admit the investigator's testimony about the witness's out-of-court statement?

- A. No, because the statement is inadmissible hearsay not within any hearsay exception. (5%)
- B. No, because the witness denied making the statement. (14%)
- C. Yes, to prove that the plaintiff did not fall and to impeach the witness. (10%)
- D. Yes, but only for the limited purpose of impeaching the witness's trial testimony. (68%)

Correct

68% Answered correctly

20 secs Time Spent

2023 Version

Explanation:

Witness's prior inconsistent statement

Use	Applicability	Methods of introduction
Impeachment	Always admissible to discredit witness's trial testimony	Examining witness about prior statement
Substantive evidence	Admissible to prove truth only if excluded or excepted from hearsay	Introducing extrinsic evidence if: witness can address & opposing party can question witness about statement <i>or</i> justice so requires

A **witness's trial testimony** on a material issue may be **impeached** with a **prior inconsistent statement** that is introduced intrinsically (ie, through the witness's own testimony) or extrinsically (ie, by any other method).^{*} However, **extrinsic evidence** of a prior inconsistent statement is **admissible only if** the witness has an **opportunity to explain or deny**, and the opposing party can **question the witness** about, the statement (or justice so requires).

Here, the defense tried to impeach the witness by asking her (intrinsic evidence) about her prior statement to an investigator that she did *not* see the plaintiff fall. The witness denied making that statement, so the defense called the investigator (extrinsic evidence) to testify about the statement. The witness already had an opportunity to explain or deny—and the plaintiff had the opportunity to question the witness about—her prior statement when she was on the stand. Therefore, the investigator's testimony is *admissible* for impeachment purposes.

A prior inconsistent statement may also be **admissible as substantive evidence**—ie, to prove the truth of the matter asserted—if the statement is **excluded or excepted** from the **rule against hearsay**. But here, the investigator's testimony about the witness's prior statement *cannot* be used substantively—ie, to prove that the plaintiff did not fall—because it is neither excluded nor excepted from hearsay. Use of the statement is therefore limited to impeaching the witness's trial testimony (**Choice A & C**).

^{*}Note that the use of extrinsic evidence might be disallowed under the collateral-evidence rule if the witness's prior inconsistent statement pertains to a matter that is NOT material to the outcome of the case (not seen here).

(Choice B) The witness's denial of the prior inconsistent statement does not provide a basis to exclude the investigator's testimony—it instead bolsters the admissibility of that testimony. That is because the investigator's testimony would have been needlessly cumulative had the witness instead admitted to making that statement.

Educational objective:

Extrinsic evidence of a prior inconsistent statement is admissible for impeachment only if (1) the witness has a chance to explain or deny, and the opposing party can question the witness about, that statement or (2) justice so requires. And the statement is admissible for substantive purposes only if it is excluded or excepted from hearsay.

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