

### QUESTION 3

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.
2. Pete's testimony about Erin's statements at the accident scene? Discuss.
3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.

**3) Please type the answer to Question 3 below. (Essay)**

## Question 3

**1. The hospital intake form**

The facts state that P's witness, N, testified she treated P at the hospital, that P told her his head struck the windshield during the collision and he was still in a great deal of pain at the time of treatment. N recorded this information on this hospital intake form pursuant to standard procedure. P moved that form into evidence. The facts do not expressly state what specific causes of action and relief P has sought or pleaded, but the most plausible interpretation would be a tort cause of action for damages to him and his car.

*Relevance*

D may object to the admission of or move to strike the hospital intake form on grounds that it is not relevant to P's claims against it, in whole or in part.

The Federal Rules of Evidence provide that evidence offered to the court must bear direct relevance upon P's claims or defenses against such claims. The test for relevance is whether its admission tends to make one of P's claims more or less likely than without the evidence.

For a tortious claim by P against D, this hospital form quite clearly meets the relevance test. With the admission of the form and its recordation of P's recollection of D's failure to obey the traffic signal and its subsequent injury to his health and car. Without the form, there is less evidence of P's claim that E struck him with D's van and the resulting injury, and therefore less likelihood that this occurred.

The court would most likely overrule D's objection on grounds of relevance, notwithstanding the other evidentiary rules.

*Probativeness/Prejudice*

D can also object to admission of the hospital form on grounds that it would unfairly prejudice D.

When the probative value of evidence is outweighed by the prejudice resulted against the defending party, it may not be admitted into evidence.

D might object on grounds that the form is prejudicial to D as an official hospital form stating that P was injured by D.

This objection would likely be overruled as it does not result in any unfair prejudice, but tends to prove the extent of P's injuries and that he timely complained after the accident.

*Hearsay*

D should raise the objection that the form is an out-of-court statement, shifting the burden to P to show that it meets an exception.

With numerous exceptions, out-of-court statements that are inadmissible when offered for the truth of the matter asserted.

P will likely be able to defeat the objection on at least one of these many exceptions.

*Business Records*

P should rebut that the hospital form meets the business records exception.

Records regularly made or collected in the course of a business' operations are exempt from the hearsay rule.

The hospital intake form was recorded in accordance with standard hospital procedure. There is no evidence that N deviated from practice in filling out and filing the form.

A court will most likely find that the form meets the business records exception to the hearsay rule.

*Public Records*

Another exemption is granted for records that are regularly recorded with a state agency and made available to the public.

Whether or not the hospital is state-run, the form is unlikely to meet this exception as it is not a public record.

*Authentication*

D may object to the form on grounds of lack of authentication.

In order for a writing to be admitted, a witness must be able to testify that the writing offered in court is a true and accurate representation of the form in its state when it was written.

The facts do not state whether P asked N whether the form was a true and accurate copy, but it seems he would be able to do so in response to an objection. If N testified as such, the court is most likely to overrule an objection on authentication grounds.

*Best Evidence Rule*

*Double Hearsay*

D can further object to the form on grounds that it purports to be the hospital's out-of-court statement as to P's out-of-court statement.

The rule for out-of-court statements offered for the truth of the asserted matter extends to out-of-court statements that contain out-of-court statements. When there are multiple levels of hearsay within one piece of evidence, the evidence may be admitted only if each level of hearsay meets one of the lawful exceptions.

If P is prepared to assert the following legal exceptions, the court will likely admit the content of the form and overrule any objection.

*Present Sense Impression*

P might offer that his statement to N was a present sense impression.

An out-of-court statement is admissible if offered for the declarant's sensual impression at the time of the statement rather than for the truth of the matter asserted.

Although his statement as to the pain he was feeling at the time meets this criteria, his recollection of the accident would not.

*Excited Utterance*

P might offer that his statement was an excited utterance.

An out-of-court statement is admissible if the declarant made the statement while still under the rush of emotional excitement, as such recollections are more likely to be accurate than those of other out-of-court statements.

Although P states that he was in a "great deal of pain," this itself is insufficient to meet the criteria. It would also be suspect that he did not have an emotional outburst until reaching the hospital.

*Recorded Recollection*

P can also offer that his statement was his recorded recollection.

A written record is admissible if offered to show a person's recollection of the events when the circumstances indicate such a recollection would be reasonably reliable.

D might dispute the reliability of this recollection. Since P admits that his head was struck, it may reflect a confused state of mind rather than a sharp recollection. Also, P's statement as to his present pain would not meet this criteria.

Since P only recalled that he struck his head in a collision and N is an uninterested party, the court will likely grant such an exemption but only to the recollection-specific content.

*Statement for Medical Treatment*

P can rebut that the statement he made was for the purposes of medical diagnosis.

An out-of-court statement made to a medical professional for purposes of treatment are reliable and thus exempted from the hearsay rule.

D might counter that any description of the events were not relevant to the treatment, but the facts do not indicate that the form includes any specific allegations about D's fault. P will most likely succeed in having the entire statement admitted under this exception.

*Patient Privilege*

D might try and argue that the form is privileged as it includes private information exchanged between P and his medical care provider. This would be an incorrect

application of the rule, which must be invoked by a party demanded to provide such information, not by the opponent of a willing party.

*Statement Against Interest*

P may try to argue that his admission of pain was a statement against his interest, but this again is an incorrect application of the rule which serves to permit concessions contrary to the declarant's legal interests.

**2. P's testimony about E's statements**

D may object to or move to strike P's testimony that at the accident scene, E told P "I was in a hurry to make a pizza delivery and that is why I ran the red light," in whole or in part.

*Relevance*

D may raise an objection to E's statement on grounds of relevance.

The Federal Rules of Evidence provide that evidence offered to the court must bear direct relevance upon P's claims or defenses against such claims. The test for relevance is whether its admission tends to make one of P's claims more or less likely than without the evidence.

Since P had already established that E was driving D's van during the collision, the admission of disobeying a traffic signal indeed goes to show the further likelihood that E, as an agent of D, drove D's van and struck P.

*Rebuttal - Permissible Scope*

D should raise the objection that P seeks to introduce evidence not raised in his case-in-chief for the impermissible purpose of withholding relevant evidence until after the defense has rested.

Evidence provided on rebuttal is limited to counterattacking defenses that have

been presented. It may not be used to surprise the defense with additional evidence.

Although P likely should have brought this evidence during his case-in-chief, he can rightfully argue that the statement goes to rebut E's testimony that she did not run a red light, and the testimony by D's owner that D was not responsible for the accident.

The court may permit such evidence on grounds that P had already established these facts in his case-in-chief, though D can validly argue that P should have made the statement before rebuttal.

*Foundation/Scope of Knowledge*

D may object to the statement on grounds that it lacks foundation.

Testimony is inadmissible unless the witness has sufficiently established the factual and circumstantial foundation for the matter asserted.

D's objection will likely be overruled, as P is well situated to know what he heard from D's employee at the accident.

*Probativeness/Prejudice*

D may object on grounds that the prejudice against D outweighs any probative value.

When the probative value of evidence is outweighed by the prejudice resulted against the defending party, it may not be admitted into evidence.

The statement's probative value is high. It establishes that E drove D's van in the course of D's business against a red light, which furthers the likelihood of D's fault.



The court will likely overrule any such objection.

*Hearsay*

D should raise the objection that the statement was made out of court, shifting the burden to P to show that it meets an exception.

With numerous exceptions, out-of-court statements that are inadmissible when offered for the truth of the matter asserted.

The court will likely find that it does meet one of the applicable exceptions.

*Opposing Party Statement*

P can respond to the objection that the statement meets the hearsay exception allowing for out-of-court statements made by the opposing party.

Out-of-court statements made by the party opponent are exempt from the hearsay rule, as precluding such statements would result in an unfair burden to plaintiffs in proving their case.

Although D testifies that D was not responsible for the accident, D itself calls E as a witness and never attempts to sever liability or agency between D and E. As is such, P's testimony that E was driving on D's behalf stands materially uncontested.

The court will likely find that this statement meets the party opponent hearsay exception.

*Statement Against Interest*

P can also argue that E's statement is one made against E's interest, and should thus be exempted from hearsay restrictions.

An out-of-court statement made by a declarant against the declarant's interests is exempt from the hearsay rule.

E's admission is a clear-cut statement against her own interest, as she admits to violating traffic laws, thereby admitting liability, and even provides an explanation as to why she did so.

The court will likely exempt the statement from hearsay preclusion as a statement against the declarant's interest.

*Excited Utterance*

P might try to argue that the statement should be exempt from hearsay as an excited utterance.

An out-of-court statement is admissible if the declarant made the statement while still under the rush of emotional excitement, as such recollections are more likely to be accurate than those of other out-of-court statements.

Although E may very well have been excited at the time of the statement, the content does not sufficiently demonstrate this. E's statement does not contain any apparent exclamations or outbursts.

The excited utterance exception will unlikely apply here.

*Present Sense Impression*

P might offer that E's statement to P was a present sense impression.

An out-of-court statement is admissible if offered for the declarant's sensual impression at the time of the statement rather than for the truth of the matter asserted.

That does not seem to apply here where E is discussing the event after it happened, and particularly the second part where she is explaining herself rather than providing a sensual impression.

**3. P's testimony about D's statements**

D should object to the admission of P's testimony of D's statements at the hospital offering to pay medical expenses.

*Rebuttal - Permissible Scope*

D should raise the objection that P seeks to introduce evidence not raised in his case-in-chief for the impermissible purpose of withholding relevant evidence until after the defense has rested.

Evidence provided on rebuttal is limited to counterattacking defenses that have been presented. It may not be used to surprise the defense with additional evidence.

If P claimed or pleaded any contract cause of action against D based upon the purported offer to pay P's medical expenses, he will not be able to do so on rebuttal after he had already rested his case in chief. Although P likely should have brought this evidence during his case-in-chief, he can rightfully argue that the statement rebut's testimony by D's owner that D was not responsible for the accident and that D's owner made no such offer to pay P's medical expenses.

For a tortious cause of action, the court may permit such evidence on grounds that P had already established these facts in his case-in-chief, though D can validly argue that P should have made the statement before rebuttal.

*Relevance*

D may raise an objection to P's testimony of the statements by D's owner on

grounds of relevance.

The Federal Rules of Evidence provide that evidence offered to the court must bear direct relevance upon P's claims or defenses against such claims. The test for relevance is whether its admission tends to make one of P's claims more or less likely than without the evidence.

D can argue that offers to pay medical expenses by D's owner alone do not further the likelihood that D was responsible for P's injury. But without an alternative explanation as to why D's owner visited P in the hospital in the first place, the statement does tend to show a greater likelihood that D was at fault.

The court will likely find the evidence relevant.

*Foundation/Scope of Knowledge*

D may object to the statement on grounds that it lacks foundation.

Testimony is inadmissible unless the witness has sufficiently established the factual and circumstantial foundation for the matter asserted.

D's objection will likely be overruled, as P is well situated to know what he heard directly from D's owner.

*Probativeness/Prejudice*

D may object on grounds that the prejudice against D outweighs any probative value.

When the probative value of evidence is outweighed by the prejudice resulted against the defending party, it may not be admitted into evidence.

Because this statement does not speak to the accident itself, D has some

grounds for this objection. However, in denying that D's owner ever made the statement on cross-examination, D has increased the statement's probative value.

Such an objection will likely be overruled.

*Hearsay*

D should raise the objection that the statement was made out of court, shifting the burden to P to show that it meets an exception.

With numerous exceptions, out-of-court statements that are inadmissible when offered for the truth of the matter asserted.

The court will likely find that it meets one of the hearsay exceptions.

*Opposing Party Statement*

P can respond to the objection that the statement meets the hearsay exception allowing for out-of-court statements made by the opposing party.

Out-of-court statements made by the party opponent are exempt from the hearsay rule, as precluding such statements would result in an unfair burden to plaintiffs in proving their case.

The assertion is that D's offered to pay P's expenses on behalf of D, not that D's owner personally and outside the scope of her business made such an offer. As is such, the out-of-court statement is clearly made by a party opponent.

The court will likely find that it meets this exception.

*Statement Against Interest*

P can also argue that the statement by D's owner is one made against her own

interest, and should thus be exempted from hearsay restrictions.

An out-of-court statement made by a declarant against the declarant's interests is exempt from the hearsay rule.

An offer by a company to pay a patient's medical expenses alone does not clearly constitute a statement against that company's interests.

The court might not grant an exemption on these grounds.

*Confidential Settlement Communications*

D can argue that the communication was a settlement offer, and therefore privileged and inadmissible.

Offers to confer a benefit upon another in exchange for compromising their right to a claim are inadmissible. In order to encourage settlements out of court, the law protects such communications from use in litigation.

Since D has already testified that she never made this offer, she will not be able to claim this privilege without admitting to perjury. D would also have to establish that the offer was offered in exchange for P's right to bring the instant claim.

The court will not exclude the statement under this privilege.

*Offers to Pay Medical Expenses*

D can argue that such offers to pay medical expenses are privileged and inadmissible.

Indeed, the FRE provide for preclusion of offers to help those injured from use in litigation to encourage such payments. Unlike in CA, the FRE do not protect statements that accompany such offers.

It is not clear whether D will be able to claim this privilege without admitting to perjury, she has already testified that she never made this offer. The rule is silent as to whether the offer is still subject to protection after testifying that no such offer was ever made.

*Impeachment*

P can argue that the statement should be admissible for the purpose of impeaching the credibility of D's owner rather than for the truth of the offer. The appropriate time to raise such a claim would have been when D's owner was on the stand, not in his own direct examination.

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**END OF EXAM**