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In California, Proposition 8 allows for all evidence to be admitted in a criminal trial. According to California Evidence Code 352, evidence may be excluded if it is likely to cause prejudice, confusion of the issues, or mislead the jury.

### **A. OBJECTIONS TO MARK'S TESTIMONY**

#### **1. Whether Paul has sued Dell before**

#### **2. Whether anyone saw the accident**

Mark's testimony will not be admissible because he is not qualified to state whether anyone else saw Paul fall down the stairs or not. This would be entering the mind of all of the other people in the store and in the vicinity at the time, and he will not be allowed to do this.

D will not be successful in having this testimony included.

#### **3. Whether Paul employed Mark as a cashier in his grocery store and was fired for stealing money from the cash register**

#### **4. Whether the stairs were repaired the day after Paul fell**

### **Inadmissible due to Public Policy**

In California, evidence may not be admitted if it goes against California public policy interests to do so. Public policy dictates that individuals should be encouraged to fix broken things and offer help, without worrying about the liability stemming from those actions. It goes against public policy to admit evidence of a defendant offering to pay for medical bills as an admission of guilt,

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for instance, or taking out insurance after an accident. Including evidence of repairs as an indication of guilt goes against public policy and may not be admitted. The repair does not indicate a defect in the thing to begin with.

Mark testified that D repaired the stairs the day after P fell. P will argue that the evidence of the stairs being repaired tends to show the liability of D in keeping the stairs in very poor condition. P will argue that D wanted to repair the stairs in order to prevent any other customers from falling down them as he did. P will argue that the repair of the stairs goes to show that the stairs were in a state that needed repairs to begin with as being probative of D's negligence.

However, D will argue that this is inadmissible evidence because it goes against public policy to include this evidence. D will successfully argue that defendants should not be dissuaded from making repairs to potential public harms for fear of later tort liability. Just as defendants should not fear taking out liability insurance or offering to pay medical bills, defendants should not fear making repairs to potential public dangers because that repair might be used against them in a lawsuit.

Furthermore, the stairs were repaired after P's accident, not prior to it, and the insurance company report was made after the accident as well. If the store had been on notice that the stairs were in poor condition but had waited to fix them until after P slipped, then P could argue that the repair of the stairs tends to show that the store was on notice that the stairs were in bad condition but did nothing. This is not the case, and as such P will not be able to admit Mark's testimony that the stairs were repaired the day after P's accident.

## **Conclusion**

D will be able to successfully argue that admission of Mark's testimony about the repair of the stairs goes against public policy and is not probative of D's tortious conduct.

## **5. Carol's exclamation at the time of the accident**

### **Hearsay**

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within one of the hearsay exceptions.

### **Out of court statement**

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An out of court statement is a verbal statement or action made outside of the trial or hearing.

Mark's testimony of Carol's exclamation at the time of the accident of "Oh no! A man just fell on that broken step" is hearsay because Mark is testifying in court to a statement that Carol, the declarant, made out of court. Carol made the statement in the department store on January 15. Mark is in court testifying to what Carol said, so it is an out of court statement.

### **Offered to prove the truth of the matter asserted**

An out of court statement is offered to prove the truth of the matter asserted if it is likely to be probative of the statement itself.

P is offering Carol's statement to prove the truth of the matter asserted, which is that 1) A man just fell, and 2) The broken step. Both of these items are facts that are material to the case, because it is a fact in question 1) whether Paul fell down the stairs, and 2) whether the stairs were in disrepair. If Carol saw a man just fall, then it makes it more likely that Paul fell down the stairs. If Carol saw that the step was broken, then it makes it more likely that the stairs were in disrepair. Mark's testimony of Carol (the declarant's) statement goes to the truth of these two matters asserted in the case.

### **Present Sense Impression**

A present sense impression is a hearsay exception. It requires that the declarant makes the statement contemporaneous to the event with no time to think of a falsehood or lie, and as such is more likely to be truthful.

P will argue that the first part of Carol's statement, that "a man just fell" should be admitted under the Present Sense Impression exception to hearsay. Mark testified that Carol exclaimed the statement at the time of the accident. P will argue that Carol made the statement contemporaneously with the accident, i.e. as she saw P fall on the steps.

P will also argue that the second part of part of Carol's statement, that "on that broken step" should be admitted under the Present Sense Impression exception to hearsay. Mark testified that Carol exclaimed the statement at the time of the accident. P would like to infer that as she saw it happen, she spoke to the truth of what was happening in front of her.

### **Excited Utterance**

An excited utterance is a shout or exclamation done contemporaneous with or immediately after a startling event, and it is a hearsay exception.

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Because Carol was not herself falling down the stairs, it is unlikely that the court will include her statement under the Excited Utterance hearsay exception. P will argue that she was seeing an exciting and startling event, P falling down the stairs, but it is unlikely that P will be successful.

### **Conclusion**

Carol's statement is hearsay but will be admitted under the present sense impression exception.

### **B. DELL'S OBJECTIONS TO THE INSURANCE COMPANY'S REPORT**

#### **Hearsay**

This is hearsay because it does not follow the Best Evidence Rule, in which the insurance company's report

#### **Business Records exception**

Mark testified that the insurance company "always prepare a report in case we get sued." D will argue that it is business document made in the regular practice of business and should be included under the business document exception to hearsay.

P will argue that the report was made preparation of litigation, so should not be admitted. However, because Mark testified that that the insurance company "always" makes a report whenever there is an accident, it is more likely that a court will find that it is indeed a regular business practice to make a report.

Therefore, the insurance company report will be admissible under the business record exception.

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**END OF EXAM**