

QUESTION 4

Dave is domiciled and owns a house in California on the state line adjacent to Petra's house in Nevada. Petra is domiciled in Nevada.

Dave installed a large rainwater tank near the property line, which leaked. One day, the water tank fell over onto Petra's property, landing on her retaining wall, which buckled. Petra sued Dave for negligence in federal court seeking \$100,000 to replace the retaining wall, claiming it failed because the water tank, weakened by leaks, landed on it.

At the jury trial, Petra testified that she had complained to Dave several times over the prior decade that the water tank leaked and that he had done nothing. She also testified that the retaining wall was only a couple of years old.

Petra then called Walt, a water tank repairman, who testified that when he repaired Dave's water tank after it fell over, Dave instructed him to caulk all the joints so that it wouldn't leak. Petra rested her case.

Dave called Gwen, Petra's gardener, who testified that she had met with Petra the day before the water tank fell and, while they inspected the retaining wall at issue, she saw it was old and had structural cracks that could cause it to fail, pointed this out to Petra, and told her that it would cost at least \$100,000 to replace it. Gwen testified that Petra had replied, "You're right. It's at least 30 years old."

The jury returned a verdict in favor of Petra and awarded her \$20,000 in damages. Dave filed a motion to dismiss based on lack of subject matter jurisdiction, which was denied. Dave properly appealed the verdict.

Assume all appropriate objections and motions were timely made.

1. Should the court have admitted:

A. Petra's testimony about her complaints to Dave about the leaks? Discuss.

B. Walt's testimony that Dave instructed him to caulk all the joints so that the water tank wouldn't leak? Discuss.

C. Gwen's testimony

- i) That the retaining wall was old? Discuss.
- ii) That the retaining wall had structural cracks that could cause it to fail and that it would cost \$100,000 to replace it? Discuss.

D. Gwen's testimony about Petra's reply, "You're right. It's at least 30 years old." Discuss.

2. Did the court properly deny Dave's motion to dismiss based on lack of subject matter jurisdiction? Discuss.

Answer all questions according to federal law.

QUESTION 4: SELECTED ANSWER A

A.) PETRA'S TESTIMONY ABOUT HER COMPLAINTS TO DAVE

In order to be properly admitted all evidence must be relevant and not be excluded under the Federal Rules of Evidence.

RELEVANCE

All evidence must be logically and legally relevant. Logical relevance means that the evidence tends to make a material fact more or less likely. Legal relevance refers to a judge's discretion to exclude evidence if its probative value substantially outweighed by the risk of unfair prejudice, confusion to the jury, or unreasonable delay.

Here, the evidence is relevant because the issue in the case is whether Dave was negligent in maintaining the water tank that landed on Petra's retaining wall. Petra also contends that the failure of the water tank was due to leaks. The fact that she notified him of the leaking would tend to make it more likely that Dave was negligent in not repairing the tank before it fell. Thus, the evidence is logically relevant. There also does not appear to be any obvious risk of unfair prejudice to the defendant, so it would not be excluded under legal relevance balancing.

HEARSAY

Hearsay is an out of court statement offered to prove the truth of the matter asserted. This applies even to the testifying witness's own statements if they were made out of court. If a statement offered by a witness is offered to prove something other than the truth of the matter asserted, it will be admitted as non hearsay. Otherwise, if it is hearsay, it must fall within an exception to be admissible.

Here, Petra is testifying that she had complained to Dave several times over a decade that the water tank leaked. If offered to prove that the tank did in fact leak, then it would be hearsay and would need to fall under an exception. However, if it is not offered for that purpose, it may be admissible for the other limited purpose.

EFFECT ON THE LISTENER

Statements offered to show the effect on the listener are classified as non hearsay under the FRE. However, the defendant has a right to request a limiting instruction so that the jury does not use the statement to prove the truth of the matter asserted (i.e. inadmissible hearsay).

Here, Petra's complaints can be offered to show that Dave knew about something and did not act in response; thus it is offered to show the effect it had on Dave.

CONCLUSION

Therefore, the testimony is admissible for this purpose and if Dave requested a limiting instruction, it should have been granted. The court did not err in admitting this testimony.

B.) WALT'S TESTIMONY THAT DAVE INSTRUCTED HIM TO CAULK THE JOINTS SO THAT THE WATER WOULDN'T LEAK

RELEVANCE

See rule above. Here the testimony is relevant because it tends to make it more likely that there was problems with the water tank and that Dave requested to have the leaking joints repaired. There also does not appear to be any significant risk of unfair prejudice here. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, Walt is testifying regarding what Dave said to him in requesting repair of the water tank after it fell over. It is being offered to prove that the water tank was in fact leaking, which is at issue in the case. Therefore, it is hearsay and must fall within an exception.

PARTY ADMISSION

A statement by a party opponent is admissible as a hearsay exemption when offered against that party. Here, Dave is a party opponent and his statements are being used against him in this testimony. Thus, the party admission exemption would apply.

SUBSEQUENT REMEDIAL MEASURES

There is a public policy exclusion for evidence of subsequent remedial measures taken when offered to show fault. Here, Dave's statements ordering Walt to caulk the joints so that it wouldn't leak after the water tank fell over onto Petra's property is evidence of a subsequent remedial measure taken in order to show fault. Thus, it should be excluded under the public policy exclusion.

CONCLUSION

The court erred in allowing Walt's testimony, as it should have been excluded as evidence of a subsequent remedial measure.

C.) GWENS TESTIMONY

i) TESTIMONY THAT THE RETAINING WALL WAS OLD

RELEVANCE

See rule above. Here the evidence is relevant because it tends to make show that the wall was old and fell due to that, rather than due to Dave's negligence. As with the previous evidence, there does not appear to be a risk of unfair prejudice that the judge should have determined inadmissibility based on those grounds.

EXPERT WITNESS TESTIMONY

In order to properly admit testimony as expert witness testimony, the following must be met: (i) it must be helpful to the jury, (ii) the expert must be qualified in the field, (iii) the

expert must have a proper factual basis, (iv) and the expert must have used reliable methods and applied them reliably.

Here, Gwen is a gardener who is testifying about her inspection of the retaining wall with Petra. While the testimony would be helpful to the jury in determining whether the wall fell due to its age, it is unlikely that Gwen can meet the other requirements to qualify as an expert witness. There is no evidence offered that shows that Gwen had a proper factual basis for her testimony, nor that she is qualified in determining the age of the wall. Thus, the testimony would not be properly admitted as expert witness testimony.

LAY WITNESS TESTIMONY

In order for a witnesses testimony to qualify as lay witness opinion testimony, it must be (i) helpful to the jury, (ii) be reasonably ascertainable based on the perceptions of a layperson, and (iii) not based on any scientific fact or specialized knowledge.

Here, Gwen is stating that she saw the wall was old. This is helpful for determining the quality of the wall and whether the wall fell due to its age or Dave's negligence. The age of a wall would be reasonably ascertainable by an average person, as plenty of signs can signal a wall's age, such as cracks, or growth of ivy, and the like. The opinion does not appear to be based on any specialized knowledge. Thus, it is lay witness testimony.

CONCLUSION

The court properly admitted the testimony regarding the wall's age as lay witness testimony.

ii) TESTIMONY THAT THE WALL HAD STRUCTURAL CRACKS AND IT WOULD CAUSE \$100,000 TO REPLACE IT

RELEVANCE

See rule above. Here, the testimony is relevant for the same reasons as the testimony regarding the age of the wall above. Thus, it is relevant.

EXPERT WITNESS TESTIMONY

See rule above. Here, again, Gwen does not appear to have the qualifications to be able to speak authoritatively on the structural soundness of the wall or the price to repair it. If Gwen was in fact a builder of retaining walls, then she would be qualified. However, this qualification was not established in the facts given.

Therefore, Gwen likely doesn't qualify as a proper expert witness on these issues.

LAY WITNESS TESTIMONY

See rule above. Here, Gwen's testimony is helpful for the same reasons as the age of the wall. However, the structural soundness of the wall and the cost to replace it are not matters that would be reasonably ascertainable by a layperson. If this perception was in fact based on some kind of specialized knowledge, that it definitely does not qualify as lay witness testimony.

CONCLUSION

The court erred in admitting the testimony regarding that structural cracks and cost to replace the wall, as a proper factual and qualification basis was not established for expert testimony and it does not qualify as admissible lay witness testimony.

D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY TO HER

RELEVANCE

See rule above. Here, the testimony is relevant as it tends to discredit Petra as a witness since she claimed in her testimony that the wall was only a couple of years old. It also tends to prove that the wall was in fact old, which could have led to its collapse and would reduce Dave's liability in negligence. There does not appear to be any risk of unfair prejudice. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, the testimony regarding Petra's statement, if offered to prove both the age of the wall and that Petra knew the wall was old and needed replacing,

would be hearsay as it would be offered to prove the matter asserted. Thus, it must fall under an exemption or exception, or be used for a non hearsay purpose.

PARTY ADMISSION

See rule above. Here, Petra admitting that the wall was old is being offered against her by the defendant. Thus, it would be admissible under this exemption to hearsay.

PRIOR INCONSISTENT STATEMENT

A witness can be impeached based on prior inconsistent statements, however, the witness must be available and they must be given a chance to explain the statement.

Here, Petra is an available witness who testified that the water tank was only a couple of years old. The statement she said to Gwen is inconsistent with this statement.

However, since the other statement was not given under oath, it cannot be used for substantive purposes. It can only be offered for the limited purpose of impeachment. However, the statement falls under a party admission, so it can be admissible for both.

CONCLUSION

The court properly admitted the testimony regarding Petra's statement as a party admission and an impeachment based on a prior inconsistent statement.

2) MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

A party can file a motion to dismiss for lack of subject matter jurisdiction at any time. In order to determine whether the motion was denied improperly, it must be determined whether the court, in fact, had subject matter jurisdiction over the case at issue.

SUBJECT MATTER JURISDICTION

In order for a federal court to have subject matter jurisdiction, it must either have federal question jurisdiction or diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction exists when the claim arises out of federal law, including Constitutional rights, treaties, and the like. Here, the claim is based on negligence which is based on state tort law. Thus, federal question jurisdiction is not present and there must be diversity jurisdiction in order to hear the case.

Diversity Jurisdiction

Diversity jurisdiction requires (i) complete diversity between the plaintiffs and the defendants, and (ii) an amount in controversy exceeding \$75,000.

Complete Diversity

Complete diversity means that each plaintiff is a resident of a different state than each defendant. Residency is determined by domicile which is shown by a physical presence in a state and an intent to remain there.

Here, Dave is domiciled and owns a house in California. Although it is on the state line, the facts state that it is in fact in California, thus he is a California resident for the purposes of diversity. Petra is domiciled in Nevada.

Thus, there is complete diversity between the plaintiff and the defendant.

Amount in Controversy

The amount in controversy must exceed \$75,000. This only requires that it be legally plausible that the defendant could receive those damages based on the injury. The actual amount of damages awarded has no bearing on whether the amount in controversy is satisfied for purposes of diversity jurisdiction.

Here, the amount in controversy is \$100,000. There appears to be evidence supporting the legal plausibility of this claim, given that Petra's gardener stated that it would cause \$100,000 to replace to retaining wall when called by Dave on the stand. Given that there is no reason to doubt that there is a legal plausibility of Petra's claim, the amount in controversy is also satisfied.

CONCLUSION

The court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction, as the federal court had diversity jurisdiction over the claim.

QUESTION 4: SELECTED ANSWER B

1A. PETRA'S TESTIMONY

Relevance

All evidence must be logically and legally relevant to be admissible. Evidence is logically relevant if it has any tendency to prove or disprove a material fact. Otherwise relevant evidence may be excluded for lack of legal relevance, where its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusing the jury. Here, Petra's testimony that she had complained to Dave several times over the prior decade that the water tank had leaked and that he had not done anything is relevant because it makes it more likely that Dave was negligent in not repairing the water tank. Therefore, the testimony is relevant.

Personal Knowledge

A witness must have personal knowledge regarding what the witness wishes to testify to. Here, Petra has personal knowledge because she is testifying to what she has observed and commented on to her neighbor, Dave. Thus she has sufficient personal knowledge.

Hearsay

Hearsay is an out of court statement made by a declarant, and offered in court to prove the truth of the matter asserted. Generally, hearsay is inadmissible, unless it is not offered for its truth, qualifies for an exemption, or an exception. Here, Petra is offering evidence that she had "complained" to Dave several times over the prior decade. If offered to show the truth of the matter asserted, namely that she did in fact complain to Dave, then the testimony is hearsay and will not be admissible, unless an exception applies.

Non-Hearsay Purpose - Notice

An otherwise hearsay statement may qualify as non-hearsay if offered to show the effect on the listener or the declarant's state of mind. Here, Petra will argue that she is offered the evidence to show the effect on Dave, namely that he had notice that the water tank had been leaking. As such, the evidence is admissible as non-hearsay to show the effect on the listener.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Petra may argue that the statement is an admission. However, Petra is the declarant and the evidence is not being offered against her. Therefore, the statement would not constitute an admission.

Conclusion

Petra's testimony is likely admissible as non-hearsay to show the effect on the listener.

1B. WALT'S TESTIMONY

Relevance

Walt's testimony is relevant because it has a tendency to prove that Dave's water tank did in fact fall over, and that it had previously leaked. Therefore, the testimony is relevant.

Personal Knowledge

Walt has personal knowledge because he is testifying to what Dave told him. Therefore, he has sufficient personal knowledge.

Public Policy - Subsequent Remedial Measure

As public policy, generally evidence of subsequent remedial measures are not permitted, except to show ownership or where the defendant has claimed that there was no way to make something more safe. Here, Petra would like to admit into evidence Dave's instruction for Walt to caulk all the joints so that it wouldn't leak, which is likely evidence of a subsequent remedial measure showing that it did in fact leak before. There is no dispute that Dave owned the water tank. Additionally, there is no evidence that Dave has testified or asserted that the water tank was as safe as possible. As such, none of the exception would apply and Walt's testimony that Dave instructed him to caulk the joints would be inadmissible for public policy reasons.

Hearsay

This testimony constitutes hearsay because Walt is testifying to what Dave told him when he was repairing the water tank. The testimony is likely offered to show that Dave did in fact instruct Walt to caulk all the joints, so therefore, unless an exemption or exception applies, this testimony will be inadmissible.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Walt is testifying as to what Dave - the declarant and defendant - said outside of court. Petra is offering the statement against Dave in court. Thus, the statement would be permitted as an admission of a party opponent.

Conclusion

While the statement qualifies as an admission, since it constitutes a subsequent remedial measure, the court would not admit Walt's testimony.

1C. GWEN'S TESTIMONY

Retaining Wall Was Old

Relevance

Gwen's testimony that the retaining wall was old is relevant because it has a tendency to prove that the wall was not only a couple years old, and that it is possible that the water tank was not the reason for the wall failing. Thus, the evidence is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what she told Petra, and what she observed when she was at Petra's house. Therefore, Gwen has sufficient personal knowledge.

Lay Opinion

A lay witness is permitted to give opinion testimony which is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, Gwen seeks to testify that she noted that the retaining wall was old. This is helpful to the trier of fact because it would help the trier determine whether the falling of the water tank was the cause in fact of the failure of the retaining wall. Additionally, an observation that a wall is old, while an opinion, is not based on scientific or specialized knowledge because it is simply an observation that any person could make. As such, Gwen will be permitted to testify that the wall was old.

Retaining Wall Structural Cracks

Relevance

Gwen's testimony regarding the retaining wall having structural cracks is relevant because it has a tendency to prove that the wall did not fail simply because the water tank fell on it. Therefore, the testimony is relevant.

Personal Knowledge

As discussed above, Gwen has personal knowledge because she is testifying to what she observed and what she told Petra. Therefore, she has sufficient personal knowledge.

Lay Opinion Testimony

A lay witness may give opinion testimony where it is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, the testimony that the wall had "structural cracks" that could cause it to fall and that it would cost \$100,000 to replace, is not something a lay witness would be permitted to testify to because whether a retaining wall has structural cracks, and the amount to replace is based on specialized knowledge. Therefore, for this testimony to be admissible, Gwen would need to be qualified as an expert witness.

Expert Witness Testimony

To qualify expert witnesses, the federal courts use the *Daubert* standard, which requires that the expert have sufficient expertise and training, rely on commonly used treatises and materials relied on in that field, and that the expert's opinion is based on such knowledge. Here, Gwen is a gardener and therefore, it is unlikely that Gwen would be qualified as an expert to render an opinion on structural integrity of retaining walls and the cost to replace them because that is outside of the knowledge and purview of a gardener. While a gardener may have a working knowledge of retaining walls based working around them or with them, it is unlikely such experience would qualify Gwen as an expert witness. Thus, Gwen would not be qualified as an expert witness.

Conclusion

Since Gwen does not qualify as an expert witness, she will not be permitted to testify as to her opinion that the retaining wall had structural cracks and would cost \$100,000 to replace. As such, Gwen's testimony regarding those issues would be inadmissible.

1D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY

Relevance

Gwen's testimony that the Petra said the retaining wall was 30 years old is relevant because it has a tendency to prove that the wall was not only a few years old, as Gwen had testified, and that it was susceptible to damage because it was old. Thus, the testimony is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what Petra said to her. Therefore, Gwen has sufficient personal knowledge.

Hearsay

Gwen seeks to testify as to what Petra told her, which is hearsay, and is likely offered to prove the truth of the matter asserted, namely that the wall is in fact old. Thus, to be admissible, the statement must qualify for an exemption or an exception.

Admission

Here, the statement was made by Petra, a party, and is being offered against Petra in court. Therefore, the statement qualifies as an admission of a party opponent and will be admissible substantively.

Impeachment - Prior Inconsistent Statement

A party may be impeached with a prior inconsistent statement. Here, Petra had testified in court that the wall was only a couple of years old. Thus, Gwen's testimony that Petra told her it was at least 30 years old, is admissible as a prior inconsistent statement to impeach Petra's testimony.

Conclusion

Gwen's testimony regarding Petra's statement will be admitted to impeach and substantively to prove the truth of the matter asserted.

2. DAVE'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

The issue is whether the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction should be granted where the court lacks subject matter jurisdiction. A federal court must have subject matter jurisdiction to hear a case. Federal courts are courts of limited subject matter jurisdiction, and are authorized to hear federal questions, or diversity of citizenship cases. A federal question is a cause of action which arises under federal law. A diversity of citizenship case is where the plaintiff is completely diverse from all defendants, and the amount of controversy exceeds \$75,000, exclusive of interests and costs. An individual's citizenship for diversity purposes is based on their domicile, or where the individual is physically present with the subjective intent to remain.

Timing

A motion to dismiss for lack of subject matter jurisdiction can be brought at any time, including for the first time on appeal. Here, Dave brought the motion after the jury rendered the verdict. While a claim of lack of subject matter jurisdiction is not barred, the proper remedy would be to base the appeal on lack of subject matter jurisdiction, since the jury had already rendered the verdict. However, as discussed below, the court had proper subject matter jurisdiction, so the motion to dismiss was properly denied, regardless.

Federal Question

Here, the claim is for negligence, so there is no federal question.

Diversity of Citizenship

As noted, all plaintiffs must be diverse, or of different domiciles, from all defendants. Here, Petra is domiciled in Nevada. Dave is domiciled in California. Therefore, Petra and Dave are of different domiciles and are completely diverse.

Amount in Controversy

The amount in controversy must exceed \$75,000, exclusive of interests and costs, based on the plaintiff's well-pleaded complaint. Here, Petra has plead \$100,000 in damages, which exceeds \$75,000. It does not affect the amount in controversy where the recovery is less than \$75,000, as long as the amount was plead in good faith. Therefore, the amount in controversy element has been met.

Since Petra and Dave are completely diverse, and the amount in controversy is met, the action qualifies for diversity of citizenship jurisdiction. As such, the federal court had proper subject matter jurisdiction and the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction.