NY LEGISLATURE EXPANDS SPEAKING AGENT EXCEPTION TO THE HEARSAY RULE

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INTRODUCTION:

In late May of this year, both houses of the New York State Legislature passed bills to expand the long-standing and oft-criticized "speaking agent" exception to the rule against hearsay (S6335, A7599). Not only will statements of agents/employees who are authorized to speak on a matter by their principal/employers be admissible against the latter as party admissions, now so too will be statements of employees if they concern a matter within the scope of their agency/employment and were made within the scope of the relationship.

Until recently, New York was one of only four states to hold on to the speaking agent rule which, in the Legislature's estimation, unfairly denied admission of otherwise relevant and reliable evidence (e.g., a store owner's knowledge of a hazardous condition in a slip-and fall case).

NEW YORK RULE NOW MIRRORS FEDERAL RULE:

The new rule, embodied in CPLR 4549, brings New York Evidence Law into near harmony with the Federal Rules of Evidence (FRE) 801(d)(2)(D) which admits (as non-hearsay) an opposing party's statement that was made by "the party's agent or employee on a matter within the scope of that relationship and while it existed."

Unlike the federal rule, the agent/employee's statement would be admitted in state court as an EXCEPTION to the hearsay rule and, as such, could be considered for the truth of what it asserts (e.g., that the floor in the beverage aisle was wet, and the defendant/store owner -- by virtue of its clerk's admission ["I told maintenance to mop that up an hour ago"] -- was aware of the potentially dangerous condition).

SLOW ROLL:

Though New York courts have long been dubious of the rule limiting admissibility of employee statements to those authorized by their employer to speak (see *Loschiavo v Port Authority of New York*, 58 NY2d 1040 [1983]), they have been reluctant to expand the rule without legislative action, which has been glacial in its arrival.

In Loschiavo, the Court of Appeals held that the trial court properly excluded the employee's statement because the making of the statement was not an activity within the employee's authority, citing *Kelly v Diesel Construction Division of Carl A. Morse, Inc.*, 35 NY2d 1 (1974).

The Court also declined the plaintiff's invitation to change the "well-settled albeit widely criticized" rule of evidence, noting that a proposal to modify the rule was then pending before the legislature.

PRESCIENT DISSENTER:

The dissenting justice, J. Fuchsberg, who seemed concerned about judicial reticence and legislative inertia, found it troubling that the Court would "ignor[e] the chorus of condemnation [and] defer reform of a judge-created… rule of evidence to the Legislature, whenever and however that body may choose to act, in the interim dooming an incalculable number of cases to an unjust result." His dissent cited a concurring opinion in *Fleury v Edwards*, 14 NY2d 334, 341 (1964): "Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts…")

See also Michael J. Hutter, "'Speaking Agent' Hearsay Exception: Time to Clarify, If Not Abandon", NYLJ, June 6, 2013, pg. 3, col. 3, No. 108.

TERRELL V WAL-MART

In the supermarket slip-and-fall case of *Terrell v Wal-Mart*, 95 NY2d 650 (2001), the Court of Appeals held that the trial court erred in admitting the hearsay statement of an unknown employee (described by the mentally disabled plaintiff as a woman in a blue coat with a name tag) who said, "I told somebody to clean this mess up." The trial court concluded that the woman described by the plaintiff and her husband was clearly an employee, and the statement concerned a spill which all employees are required to clean up.

The court also deemed the statement admissible as an EXCITED UTTERANCE (i.e., a statement about a startling/exciting event made while the declarant is still under the stress of nervous excitement resulting from the event. *See* NY Evidence Advisory Committee Rule 8.17 citing, *inter alia*, *People v Nieves*, 67 NY2d 125 [1986]).

On appeal, the Third Department (held that the statement was properly received as an excited utterance but not as an admission because there was no indication that the employee, whoever she was, had any authority to comment on such a matter so as to impute liability to her employer. *See* 278 AD2d 770 (3d Dep't 2000.)

The Court of Appeals reversed, holding that the statement did not qualify as either an admission of a speaking agent nor an excited utterance, because there was insufficient foundation that the declarant, regardless of her employee status, was operating under the stress and excitement of encountering the injured plaintiff.

See also *Hyde v Transcontinental Record Sales Inc.,* 111 AD3d 1139, (4th Dep't 2013): Employee's statement that he "shoveled but didn't salt" the area where the plaintiff fell was inadmissible against the defendant on motion for summary judgment for lack of proof of authority to speak on the matter. The same conclusion was reached in *Gordzica v NYC Transit Authority*, 103 AD3d 598 (1st Dep't 2013) where a ticket booth clerk's statement that she reported the defective condition a half dozen times was deemed inadmissible.

OTHER POTENTIAL AVENUES OF ADMISSIBILITY:

Before the expansion of the rule, clever lawyers had to resort to alternative theories of admissibility such as the NON-HEARSAY purpose of showing circumstantially by the agent/employee's statements that the principal/employer had NOTICE of a hazardous condition (e.g., spilled garlic oil on the store floor as in *Gelpi v 37th Ave Realty Corp.,* 281 AD2d 392 [2d Dep't 2001]).

Similarly, in *Stern v Waldbaum Inc*., 234 AD2d 534 (2d Dep't 1996), the court held that testimony of a customer who overheard an announcement over the store's P.A. system directing an employee to clean up a spill should have been admitted as circumstantial evidence of the employee's notice and, by extension, the employer's knowledge of the spill.

In such case, it could also be argued that the statement "clean up on aisle seven" is more in the nature of a command to take action (clean up the mess) rather than an assertive statement of fact which is the essence of hearsay offered to prove the truth of the matters asserted therein. *See Nucci v Proper*, 95 NY2d 597 (2001).

DECLARATION AGAINST INTEREST:

Another possible alternative theory of admissibility in appropriate cases could be that the statement qualifies as a declaration against pecuniary (or penal) interest which the declarant knew at the time of its making was against his/her interest (or tended to subject him/her to criminal liability. For the statement to be admissible, however, the declarant must be UNAVAILABLE as a witness. *See* Advisory Committee Evidence Rule 8.11.

In *Kelleher v FME Auto Leasing Corp.,* 192 AD2d 581 (2d Dep't 1993), the Court held that admissions of the defendant's cab driver who picked up an intoxicated (BAC .28) and recalcitrant plaintiff from a bar, that the driver dumped the passenger in the snow of a driveway somewhere near the passenger's home (where he died of hypothermia), in order for the driver to get to his next fare at his employer's urging, were admissible against both the driver and his employer as a declaration against interest.

The Court noted that while the cabbie lacked the authority to speak for the employer (citing *Loschiavo v NY Port Authority*, *supra*), his statements constituted a declaration against interest (notwithstanding his subsequent acquittal on criminal charges after which he left the jurisdiction). The Court also pointed out that a declaration against interest may be admitted against a party other than a declarant where the party's liability is derived from the acts of the declarant (citing *Basile v Huntington Utilities Fuel Corp*. 60 AD2d 616 [2d Dep't 1977]).

The Court was satisfied that the plaintiff had established the necessary elements of admissibility including the declarant's unavailability, the adverse nature of the statement, his competent knowledge of the facts and no evidence of any motive to fabricate (citing *People v Thomas*, 68 NY2d 194 [1986]).

In the criminal context, the rule also requires corroborating evidence that provides a high probability of truthfulness if offered against the defendant and a reasonable possibility of truthfulness if offered by the defendant. *See People v Soto*, 26 NY3d 455 (2015).

EXPRESS OR IMPLIED AUTHORITY:

Under the speaking agent rule, the proponent can establish the declarant's speaking authority by direct evidence of EXPRESS AUTHORITY from the principal/employer (e.g., "this is my press agent,"), or by circumstantial evidence of IMPLIED AUTHORITY which may be inferred from the broad scope of the employee/agent's authority vis-a-vis his/her employer/principal's operation.

For example: *Spett v President Monroe Building and Manufacturing Corp.*, 19 NY2d 203 (1963): general foreman who ran employer's business and had complete managerial responsibility over

its operations was found to have speaking authority for the employer. *See also Stecher Lithographic Co v Inman*, 175 NY 124 (1903): employee in "full charge" of the business had authority to speak).

Absent evidence of wide-ranging authority over business operations or an express grant of authority (i.e., those high up the company food chain), admissibility of statements of employees/agents under the speaking agent theory is an unlikely proposition. Now that the New York rule has come into line with the federal rule, admitting employee/agent statements where the foundational predicate has been properly laid, then the incidence of inculpatory statements offered and received against employers will undoubtedly increase significantly, perhaps causing more cases to settle rather than to proceed to trial.

The rule change is probably more appealing to plaintiff's attorneys than to defense counsel in personal injury and medical malpractice cases. Its applicability to criminal cases will come into play where a corporate defendant is charged with a crime and its employee/agent has made admissions relating to matter being prosecuted and during the scope of the relationship. (e.g., site manager of a company that is charged under Article 17 of the NYECL or the Clean Water Act with intentionally depositing toxic waste into a local waterway says something like, "we've been dumping that stuff in there for years.")

RELEVANCE + RELIABILITY = ADMISSIBILITY

The admissibility of just about all evidence, including admissions made by a principal or his/her agent, ultimately comes down to relevance, reliability (likelihood of being true) and the absence of undue prejudice to one side or the other. Lest there be any doubt, the Rules of Evidence are generally intended to be rules of admissibility. As stated by the Court of Appeals in *People v Robinson*, 17 NY3d 868 (2011) (cit. om.): "the paramount purpose of all rules of evidence is to ensure that the jury will hear all pertinent, probative and reliable evidence which bears upon disputed issues."

The change in the law to include statements of employees made about relevant and material matters within the scope of their employment, and during the employment relationship (regardless of whether they have specific authority to speak), appears to be in keeping the above-stated purpose.