ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

WINTER 2019

FROM THE TRENCHES: THE SPONTANEOUS STATEMENT EXCEPTION TO THE HEARSAY RULE

Robert Glassman

Nathan Werksman

"Objection, hearsay" is probably the single most uttered objection in trials as attorneys on both sides of the aisle attempt to use this rule of evidence to gut the other side's case. Because the hearsay rule can ultimately prevent the jury from hearing critical evidence that may make or break your case, understanding its exceptions is crucial.

In a recent jury trial, we faced a hearsay objection that sought to exclude a key statement made by an eyewitness to a police officer. We represented a young man whose vehicle was struck by a 22,000-pound dump truck driving through an intersection. The defense's position was that the dump truck driver had entered the intersection on a yellow light and that our client had sped into the intersection just as his light turned green. An eyewitness to the crash testified at her deposition that she told the police officer at the scene that she saw "the white work truck run the red light and hit the blue Nissan Versa." But because the witness now lived in Texas, she was unavailable to testify at trial. Moreover, at her deposition, she was only asked what she told the police officer, rather than simply "What did you see?" And since we inherited the case after her deposition, we did not have the ability to ask that question. So, her statement to the police officer was all we had.

Because the defense was disputing liability and because there were no other disinterested eyewitness statements regarding the defendant's fault, we knew that getting this deposition testimony admitted was critical for our case. We expected the defense to raise a hearsay objection to our showing the deposition clip of her statement to the police officer as part of our opening statement, and, sure enough, they did. The judge issued a tentative ruling sustaining the objection and excluding the evidence, subject to further briefing.

Thankfully, we were prepared to address this in short order and turned to one of the most well-known exceptions to the hearsay rule: the "Spontaneous Declaration" exception codified in Evidence Code section 1240. This exception has been the subject of scholarly debate in California for almost a century. (E.g., *McWilliams, The Admissibility of Spontaneous Declarations* (1933) 21 Cal. L.Rev. 460 [complaining that "(t)he cases on this subject are in almost hopeless confusion"].)

If an out-of-court hearsay statement "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception," it is admissible under the "Spontaneous Declaration" exception. (Evid. Code, § 1240.) Ultimately, by drawing on the circumstances of the witness's statement and applying it to longstanding and well-settled California case law, we successfully argued that the statement fell under this exception, and her statement to the police officer was admitted. It played a key role in helping us prove the defendant's negligence and prevail at trial.

Here's how we did it:

First, we showed the judge that the statement met section 1240's first criterion—that the statement "(a) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant." This was the easy part. In the statement, the eyewitness is doing just that. She is describing to a police officer the collision she had just perceived.

Second, we tackled the much more complicated criterion of the exception—that the statement "(b) was made spontaneously while the declarant was under the stress of excitement caused by such perception." Proving this

criterion required proving its sub-criteria, namely 1) that the statement was "made spontaneously," 2) that the perception caused the declarant to experience the "stress of excitement," and 3) that the statement was made while the declarant was experiencing that stress. Because the witness did not testify at her deposition that she made the statement "under the stress of excitement," we had to demonstrate that what she did say met the criteria under California law.

As for the spontaneity of the statement, California case law takes an expansive view. In *People v. Washington* (1969) 71 Cal.2d 1170, the California Supreme Court held that "[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity." (*Id*. at p. 1176.) Rather, the critical component in assessing spontaneity is whether the declaration was "made under the stress of excitement and while the reflective powers were still in abeyance." (*Ibid*.)

Based on this case law, we showed that the statement was not inadmissible simply because the eyewitness made the statement in response to police questioning or because time had lapsed between her perception of the collision and when she made the statement.

Third, we showed that the perception of the collision caused the declarant to experience the "stress of excitement." Stress of excitement results from the perception of an event "startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting." (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) Such a determination is inherently subjective and fact-based—what startles some may not startle others. (Ibid.) Therefore, in order to show this, we dug into the facts, drawing heavily on how the eyewitness described the event she perceived. Her deposition provided important information. We noted that she described the collision as "shocking" to her. The white truck "slammed" into the blue Nissan Versa, which then "spun pretty violently." There was a "zoom, bang" and everything happened "really fast." We used these statements of the eyewitness to show that the event she perceived—the car crash—was "startling enough" to have caused her the "stress of excitement."

Lastly, we showed the judge not only that the event caused stress to the witness, but also that she made the statement while under that stress. As discussed above, authorities are clear that lapse of time alone does not preclude admissibility under the spontaneous declaration exception. (See *People v. Washington*, *supra*, 71 Cal. 2d at p.1176; Simons, Cal. Evidence Manual (2018) Spontaneous Statements, § 2:46.) Proving that the statement was made while under the stress of excitement is also a factual enterprise, in which the court must consider "all of the surrounding circumstances." (*People v. Jones* (1984) 155 Cal.App.3d 653, 661; see *People v. Gutierrez* (2009) 45 Cal.4th 789 ["The amount of time that passes between a startling event and subsequent declaration is not dispositive, but will be scrutinized, along with other factors, to determine if the speaker's mental state remains excited"].). Because of the fact-based nature of such a determination, courts set no rigid time limit after which a statement can no longer be made while under the stress of excitement. In fact, courts have found admissible spontaneous statements made anywhere from 30 minutes to several hours after the perceived event. (See *In re Damon H.* (1985) 165 Cal.App.3d 471, 475-476; *People v. Clark* (2011) 52 Cal.4th 856, 925-926.) All that matters is that the declarant was under the stress of excitement when the statement was made.

Here, we showed that the witness's statement was made shortly after perceiving the event. The witness testified at deposition that after the incident, she and our client "exchanged a few words, the other driver came up, and then I—I believe I got my attention turned towards the police or somebody." The witness may have had a conversation with a fire captain before giving her statement to the police, but this whole sequence (including giving her statement to the police) occurred within roughly 15 minutes. Considering the startling nature of the event, as previously discussed, we argued to the court that the witness was very likely still under the stress of excitement when she made her statement to the police.

Ultimately, the judge agreed with us, reversed his tentative ruling and determined that the evidence was admissible. It ended up playing a key role in our victory at trial.

So the next time your opposing counsel makes a hearsay objection, don't relent. Have your list of hearsay exceptions—and the supporting evidence—handy, and be ready to argue. Knowing the exceptions and understanding how they apply may just make all the difference between winning and losing your case.

Robert Glassman and Nathan Werksman are attorneys at Panish Shea & Boyle LLP.