

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Advocate's VIEW

### Admissibility of inconsistent statements in hospital records

Courts must frequently determine the admissibility of statements contained in hospital records. What happens when an entry in a hospital record contradicts the plaintiff's account of the accident? For example, will a court admit an entry that states a plaintiff jumped from his window when the lawsuit alleges he fell from a negligently maintained fire escape? What about a hospital record that indicates the plaintiff did not fall on the defendant's premises as alleged in her complaint?

Out-of-court statements offered for the truth of the matters they assert constitute hearsay, and can only be admitted into evidence if an exception applies. Statements contained within hospital records may be admitted as either admissions or business records.

Admissibility depends upon the source, reliability, and relevance of the statement, along with its potential prejudicial effect. The complexity of the issue has led to a body of case law that is important for both plaintiff and defense lawyers to understand.

#### Admission Against Interest

Defense attorneys will argue that inconsistent statements should be admitted as admissions against interest. To qualify as an admission, the record must establish the plaintiff as the source of the statement in the hospital record. See *Dunn v. Garrett*, 138 AD3d 1387, 1388 (4th Dept. 2016) (hospital entries with allegedly inconsistent statements were inadmissible with nothing in the record to establish that plaintiff was the source of the information).

When a hospital record contains only a medical professional's understanding of an accident, it cannot be entered into evidence as an admission. As the proponent of the evidence, it is the de-



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pendant's burden to show "that plaintiff was the source of the information recorded." *Quispe v. Lemle & Wolff, Inc.*, 266 AD2d 95, 96 (1st Dept. 1999) (affirming trial court's exclusion of hospital report). A defendant can meet this burden by having the medical professional testify outside the presence of the jury. *Berkovits v. Chaaya*, 138 AD3d 1050, 1051 (2d Dept. 2016) (recording nurse testified the quotation marks on the record indicated that the patient had made that statement).

Moreover, statements in hospital records that are "either equivocal as to how the accident occurred, or consistent with the injured plaintiff's testimony at trial" do not constitute admissions against interest. *Nelson v. Bogopa Serv. Corp.*, 123 AD3d 780, 781 (2d Dept. 2014) (alleged statements by the injured plaintiff indicating that the accident did not occur on the defendants' premises were equivocal and excluded).

#### Business Record Exception

If the statement does not qualify as an admission, defense attorneys can also seek to admit the statements as business records. An entry in a hospital record is only admissible as a business record if it is germane to the diagnosis or treatment of the patient's condition. See *Passino v. DeRosa*, 199 AD2d 1017, 1017 (4th Dept. 1993). This standard requires a case-specific analysis.

For instance, courts have held that a plaintiff's statement regarding how he landed when he fell was germane to his medical diagnosis or treatment. See *Berrios v. 735 Ave. of the Ams., LLC*, 103 AD3d 472, 472 (1st Dept. 2013). In another case, an injured child's statement in a hospital record that she fell from monkey bars as opposed to an age-appropriate ladder was also deemed to fall under the business records exception. See *Nelson v. Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536, 538 (2d Dept. 2014).

On the other hand, courts have consistently held that descriptions of accidents that do not impact the diagnosis or treatment of the patient should be excluded. In *Sermos v. Gruppuso*, 95 AD3d 985, 986-87 (2d Dept. 2012), the court excluded entries that stated the plaintiff jumped into a pool. These entries contradicted the allegation that he fell due to the defendants' negligence. The court determined this distinction was irrelevant to his diagnosis and treatment for a fractured leg.

Similarly, in *Musaid v. Mercy Hospital*, 249 AD2d 958, 959 (4th Dept. 1998), the court ruled that a hospital record contradicting a mother's account of where she stood as her daughter fell should have been precluded. While it may have been relevant to a negligence cause of action, it was not germane either to the treatment or diagnosis of the daughter's injuries. See also *Cuevas v. Alexander's, Inc.*, 23 AD3d 428, 429 (2d Dept. 2005) (error to admit statements in the hospital record that directly contradicted the plaintiff's account as to how the accident occurred and were not germane to the plaintiff's

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diagnosis and treatment).

Courts often rule on both the admission and business record issues in the same case. These issues are typically intertwined and based on the particular contents of the record. It is important for both plaintiff and defense lawyers to prepare to argue these issues before trial. The admissibility of such records can

have a profound impact in a case.

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