

IN PRACTICE

## EVIDENCE

### When Is an Unidentified Declarant's Statement Admissible?

Another gray area in the exceptions to the hearsay rule

By Carolyn Duff

How often do we rely upon statements made by individuals without knowing their identity? It may be as simple as the train conductor who tells you where the train is heading, or as important as a 911 operator assuring you that help is on the way. In both cases you are relying on the speaker to give you truthful information without knowing his or her identity. When would such a statement be admissible in court?

If the statement is being offered for its truthfulness, then one roadblock to admission is hearsay. The contours of the exceptions to the hearsay rule are often subject to debate. One exception that lends itself particularly well to the admission of statements by unidentified declarants is N.J.R.E. 803(b)(4), which allows statements by a "party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." But what happens when the

party's agent or employee is unidentified? Under what context in a civil case will a court admit that statement? New Jersey courts have come down on both sides, with the New Jersey Supreme Court having not yet weighed in, but there does appear to be a pattern both for and against admission.

The leading case for admission in New Jersey is *Reisman v. Great Am. Recreation*, 266 N.J. Super. 87 (App. Div.), *certif. denied*, 134 N.J. 560 (1993). In that case, the Appellate Division affirmed the admission of otherwise hearsay statements by unidentified employees. While at the Vernon Valley Ski Resort, a skier was injured when another skier collided with him. Unidentified individuals, some believed to be members of the ski resort's ski patrol, advised the plaintiff that the skier who collided with him, who was known to them as "Mike," was skiing drunk and had previously had his lift ticket taken away for skiing drunk. Although the individuals were unidentified, the plaintiff testified that the uniforms of the ski patrol, which the plaintiff testified included the words "ski patrol," helped

the plaintiff identify the individuals as employees of the ski resort.

The trial court admitted the plaintiff's statements regarding the alleged drunkenness and dangerousness of "Mike," and the knowledge of the defendant ski resort's employees that "Mike" was unsafe, based on the vicarious admission exception (the precursor to N.J.R.E. 803(b)(4)). On appeal, the defendant argued that the statement was inadmissible in part because the plaintiff could not specifically identify the individuals and thus could not establish that they were, in fact, employees of the defendant. However, the appellate court held that the plaintiff had provided enough testimony to establish the existence of an employment relationship and did not need to identify the employees specifically.

*Reisman* relied on two prior cases that also addressed the vicarious admission exception and statements by unidentified declarants. In *Solomon v. Cont'l Ins. Co.*, 122 N.J. Super. 125 (App. Div. 1972), a declaratory judgment proceeding, the plaintiffs sought a determination of whether their homeowner's policy provided them with coverage for a personal injury lawsuit resulting out of a fire on their property. The *Solomon* court noted that it disagreed with the trial court's determination that a statement, by an unidentified employee of the insurance company's agent, that the plaintiffs were "insured for all" was inadmissible. The court briefly noted that such statements were admissible, even where the individual was unidentified.

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*Reisman* also relied upon *Nobero Co. v. Ferro Trucking*, 107 N.J. Super. 394 (App. Div. 1969), where the plaintiff sought to admit a statement by an unidentified employee of the defendant, which attributed fault to the defendant. However, unlike *Reisman*, the plaintiff had narrowed identification down to two employees of the defendant. Both employees testified at trial, and each denied making the statement. The appellate court ruled it was not error to admit testimony regarding the alleged admission of one of the employees under the vicarious admission exception. The court held that it was for the jury to determine whether one of the employees had in fact made the statement, despite their respective denials.

The Third Circuit, applying New Jersey evidence rules, also allowed a statement by an unidentified declarant in *Joseph T. Ryerson & Son, v. H. A. Crane & Brother*, 417 F.2d 1263 (3d Cir. 1969). In *Ryerson*, the plaintiff sued the defendants for damage caused by a fire in the plaintiff's building. The court, citing New Jersey's vicarious admission exception, held that the trial court properly allowed testimony that an unidentified employee of the plaintiff attributed the cause of the fire as something outside the liability of any defendant. The only comment the court made about the lack of identity was that "the testimony that the maker of the disputed statement was a Ryerson employee is nowhere contested or contradicted in the record." The takeaway from *Ryerson* appears to be that a party must not only object on the grounds of hearsay, as the plaintiff did in *Ryerson*, but also question the alleged identity.

From the line of cases supporting admission, it appears that as long as there is some kind of indicia of reliability, such as the uniform of the employee or the fact that the employee was located at the employer's place of business, then an otherwise inadmissible hearsay statement may be admissible even though the speaker is not identified. An unpublished Appellate Division case, *Estate of Burnett v. Water's Edge Convalescent Ctr.*, A-4970-06 (N.J. App. Div. July 25, 2008), applied the same logic as *Reisman*, and held that a trial court erred in refusing to allow

testimony regarding what an unidentified nursing and rehabilitative center employee had told the patient's daughter after her mother had complained of injury. The unidentified employee attributed the cause of injury to a co-worker. Among other reasons, the court ruled that the statement should have been admitted because the failure to identify the employee specifically was not an automatic bar to admission. In fact, the court noted, the phone call had been logged in the facility's nursing notes and thus was clearly within the scope of the employment of the unidentified declarant.

However, a recent unpublished Appellate Division case highlights the difficulties of trying to admit a statement from an unidentified source. In *Pace v. Elizabeth Bd. of Educ.*, A-4995-10 (N.J. App. Div. Dec. 10, 2012), a jury had ruled in favor of the plaintiff on his Law Against Discrimination claim and his claim for wrongful discharge for filing a petition under the Workers Compensation Act. The Appellate Division overturned the jury verdict, finding that certain statements allegedly made by a member of the defendant Elizabeth Board of Education (EBOE) should not have been admitted.

The plaintiff presented two witnesses who each testified that the same former member of the EBOE (whom they could identify) had told them that the EBOE was looking to terminate employees with workers compensation injuries, based upon an unidentified board member's statements at a closed-door meeting. The trial court had allowed the testimony, but the appellate court disagreed and held the testimony was inadmissible, in part because the alleged board member making the damaging statements was not identified.

That the failure to identify the board member was only part of the trial court's ruling may help to explain why the outcome was different from that in *Reisman*. First, the statements at issue were hearsay-within-hearsay, having first been said to the identified former board member who then told the plaintiff's two witnesses. The appellate court addressed whether the witnesses' hearsay statements from the former board member were admissible and found that they were not. The

court next addressed whether, assuming the former board member's statements were admissible, her statements regarding what an unidentified board member allegedly told her were admissible. The court found that not only was the identity of the declarant unknown, but also the circumstances were unclear.

The *Pace* situation draws a contrast to cases where statements by unidentified speakers were deemed admissible. For example, in *Reisman*, it was clear that the individuals involved were employees of the ski resort. In *Solomon*, the unidentified individual was encountered in the insurance company's agent's office. In *Ryerson*, the plaintiff failed to dispute that the unidentified individual was not an employee, while in *Nobero*, the identity was narrowed down to two individuals, both of whom testified. Certification is pending in the New Jersey Supreme Court in *Pace*, so it may be that the court will weigh in on the issue of unidentified speakers and hearsay.

The court in *Pace* cited to *Beasley v. Passaic County*, 377 N.J. Super. 585 (App. Div. 2005), in determining that the failure to identify the declarant rendered the statements inadmissible. Like *Pace*, *Beasley* also addressed the issue of hearsay-within-hearsay testimony at the trial on the plaintiff's Conscientious Employee Protection Act claim. The plaintiff, who was an employee of the Passaic County Juvenile Detention Center, testified that the center's director had told him that "downtown" wanted him fired. The appellate court ruled that the trial court erred by admitting this hearsay-within-hearsay testimony.

Although the court found that the first layer of hearsay, the statement from the center's director to the plaintiff, was admissible under N.J.R.E. 803(b)(4), it ruled that the second layer of hearsay, the statement regarding what "downtown" had allegedly told the center's director, was inadmissible. According to the court, even though the parties likely understood that "downtown" referred to the Passaic County administration, it was impossible to know who specifically had made the statement and therefore whether the statement was made within that individual's scope of employment. The court

viewed the statement as having had such an impact that it was necessary to reverse the liability ruling and remand for a new trial.

For the practitioner faced with a hearsay statement by an unidentified speaker, one critical factor to its admissibility is

whether the person testifying directly heard the statement and can therefore testify regarding some identifying factors of the speaker. Practitioners should ensure they have identifying testimony, such as that in *Reisman*, which creates a clear picture of who the unidentified declarant

is employed by, even if it does not specifically identify the declarant. When faced with hearsay-within-hearsay, where the final layer is the unidentified speaker, absent compelling testimony regarding the identity, it seems less likely the statement will be admissible. ■