

A woman who owns a motorized scooter brought her scooter to a mechanic for routine maintenance service. As part of the maintenance service, the mechanic inspected the braking system on the scooter. As soon as the mechanic finished inspecting and servicing the scooter, he sent the woman a text message to her cell phone that read, "Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We'll order the parts."

The woman read the mechanic's text message and returned the next day to pick up her scooter. As the woman was wheeling her scooter out of the shop, she saw the mechanic working nearby and asked, "Is my scooter safe to ride for a while?" The mechanic responded by giving her a thumbs-up. The woman waved and rode away on the scooter.

One week later, while the woman was riding her scooter, a pedestrian stepped off the curb into a crosswalk and the woman collided with him, causing the pedestrian severe injuries. The woman had not had the scooter's brakes repaired before the accident.

The pedestrian has sued the woman for damages for his injuries resulting from the accident. The pedestrian has alleged that (1) the woman lost control of the scooter due to its defective brakes, (2) the woman knew that the brakes needed repair, and (3) it was negligent for the woman to ride the scooter knowing that its brakes needed to be repaired.

The woman claims that the brakes on the scooter worked perfectly and that the accident happened because the pedestrian stepped into the crosswalk without looking and the woman had no time to stop. The woman, the pedestrian, and the mechanic will testify at the upcoming trial.

The pedestrian has proffered an authenticated copy of the mechanic's text message to the woman.

The woman plans to testify that she asked the mechanic, "Is my scooter safe to ride for a while?" and that he gave her a thumbs-up in response.

The evidence rules in this jurisdiction are identical to the Federal Rules of Evidence.

Analyze whether each of these items of evidence is relevant and admissible at trial:

1. The authenticated copy of the mechanic's text message;
2. The woman's testimony that she asked the mechanic, "Is my scooter safe to ride for a while?"; and
3. The woman's testimony describing the mechanic's thumbs-up.

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A woman took her scooter in for service. Right after inspecting the brakes, the mechanic texted her: "Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We'll order the parts." The next day, as she wheeled the scooter out, she asked the mechanic, "Is my scooter safe to ride for a while?" and he gave her a thumbs-up. A week later, having never had the brakes repaired, she collided with a pedestrian who stepped into a crosswalk. The pedestrian sues her for negligence, alleging the brakes were defective and that she knew it. He offers the text message; she plans to testify to her question and to the thumbs-up.

- ← Sent the instant the service ended: a present sense impression.
- ← Tells her the brakes need repair: relevant to the defect and to her knowledge.
- ← A question, not an assertion: outside the hearsay definition entirely.
- ← A thumbs-up is nonverbal conduct meant as an assertion: a statement, but usable for her belief.
- ← She rode without the repair: ties the evidence to the negligence issue.

Section 1: The Mechanic's Text Message (Item 1)

Issue. Whether the authenticated text message is relevant and admissible.

Rule. G/R: evidence is relevant if it has any tendency to make a consequential fact more or less probable.

G/R: hearsay is an out of court statement offered for the truth of the matter asserted, barred unless it is non-hearsay or an exception applies. A statement offered to show its effect on the listener or the listener's state of mind, rather than its truth, is not hearsay.

Present sense impression: a statement describing a condition made while or immediately after perceiving it.

A business record may qualify if made near the time by someone with knowledge, kept in the regular course, as a regular practice, and shown by a qualified witness or certification.

Analysis. Here, the message makes it more probable that the brakes were defective and that the woman knew they needed repair, both consequential to negligence, so it is relevant. Offered to prove the brakes actually needed repair it is hearsay, but offered to show the woman's state of mind, that she had been told of the problem, it is non-hearsay. It also describes the scooter's condition immediately after the mechanic serviced it, so it fits the present sense impression exception. It might also be a business record,

Item 1: relevance, then hearsay.

Two independent theories, plus a possible third.

State of mind and present sense impression both carry it; business record is incomplete.

though the facts do not show that such texts are a regular practice.

Conclusion. Therefore, Section 1: the text message is relevant and admissible to show the woman's knowledge and as a present sense impression.

Section 2: The Woman's Question to the Mechanic (Item 2)

Issue. Whether the woman's testimony that she asked whether the scooter was safe to ride is relevant and admissible.

Rule. G/R: evidence is relevant if it has any tendency to make a consequential fact more or less probable.

G/R: the hearsay rule reaches only statements, and a statement is an oral or written assertion or assertive nonverbal conduct. A genuine question ordinarily asserts nothing.

Analysis. Here, the question tends to show the woman was careful rather than negligent, which is consequential. Because a question asserts nothing, it is not a statement, and the hearsay rule does not apply to it at all.

Conclusion. Therefore, Section 2: the woman's testimony about her question is relevant and admissible.

Item 2: is a question even a statement?

No assertion, no hearsay problem.

The question shows diligence.

Section 3: The Mechanic's Thumbs-Up (Item 3)

Issue. Whether the woman's testimony describing the mechanic's thumbs-up is relevant and admissible.

Rule. G/R: evidence is relevant if it has any tendency to make a consequential fact more or less probable.

G/R: nonverbal conduct is a statement if the person intended it as an assertion. A statement offered to show its effect on the listener or the listener's state of mind, rather than its truth, is not hearsay.

Analysis. Here, the thumbs-up tends to show the woman reasonably believed the scooter was safe, which bears on negligence, so it is relevant. The gesture was intended to assert that the scooter was safe, so it is a statement. Offered to prove the scooter actually was safe it is hearsay, but offered to show the woman's state of mind, her reasonable belief that it was safe, it is non-hearsay and admissible.

Conclusion. Therefore, Section 3: the thumbs-up is relevant and

Item 3: conduct as a statement.

Assertive conduct is hearsay only if offered for its truth.

Same state-of-mind path as the text.

admissible to show the woman's state of mind.

Step-by-Step: Relevance Then Hearsay for Each Item

Screen every item for relevance, then ask whether it is a statement, and if so, whether it is offered for its truth.

1. Relevant? Any tendency to make a consequential fact more or less probable. All three items bear on the woman's negligence.



2. Text message: offered for its truth it is hearsay, but it comes in for her knowledge and as a present sense impression.

→ **Admitted**



3. The question: a question asserts nothing, so it is not a statement and hearsay does not apply.

→ **Admitted**



4. The thumbs-up: assertive nonverbal conduct is a statement, but it comes in to show her belief, not its truth.

→ **Admitted**