2006 Update on Evidence
(and sundry cases of interest to the trial bar)

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"Chicolini: *Now I aska you one. What is it has a trunk, but no key, weighs 2,000 pounds and lives in the circus?*
Prosecutor: *That's irrelevant.*
Chicolini: *Irr-elephant? Hey, that's the answer! There's a whole lotta irr-elephants in the circus."*

- Chico and Groucho Marx, Duck Soup (Universal Studios, 1933).

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INTRODUCTION

The Update on Evidence covers civil cases (insofar as the rules therein are useful in civil cases) and criminal cases published from August 30, 2005 through August 22, 2006.

The Table of Contents and section headings follow the format of the Connecticut Code of Evidence ("C.C.E."). Because the C.C.E. does not cover every evidentiary issue (see, commentary to C.C.E. §1-2(b)), this Update includes additional headings.

Article I. General Provisions.

§ 1-5 (b) REMAINDER OF STATEMENT: WHEN AN EXCERPT OF A VIDEOTAPED STATEMENT IS USED BY ONE SIDE, THE COURT MAY ADMIT THE ENTIRE TAPE - STATE V. EFRAIN M., 95 Conn.App. 590, *cert. denied*, 279 Conn. 909 (2006); Pellegrino, J.; Trial Judge – Harper, J.

RULE: When one side plays a portion of a videotaped interview, the court has discretion to admit the entire videotape.

FACTS: Defendant was accused of sexual assault and risk of injury to a minor. The victims were twin girls who were 9 years old at the time. In July 2002, the girls were separately interviewed by a school psychologist and described the sexual assaults. The interviews, which lasted together approximately one hour, were recorded on videotape.

The jury trial took place in 2004. Both girls testified. During cross-examination, defense counsel played three brief excerpts from the interviews to impeach the girls. On rebuttal, the State offered the entire videotape of the interviews. The defendant objected on the grounds that the videotape "amounted to a replay of their trial testimony and had the effect of emphasizing that testimony over that of the other witnesses. He argue[d]

that the videotape included prejudicial and irrelevant material that necessarily generated sympathy for the victims. According to the defendant… the probative value of the videotape [was outweighed by]… the likely prejudicial impact of its admission…." 95 Conn.App. at 596.

The trial court questioned counsel about the contents of the videotape but did not preview it without the jury present. It then admitted the videotape in its entirety. The Appellate Court affirmed.

REASONING:

> "It is an elementary rule of evidence that where part of a conversation has been put in evidence by one party to a litigation or prosecution, the other party is entitled to have the whole conversation, so far as relevant to the question, given in evidence, including the portion which is favorable to him. Section 1-5 (b) applies to statements, and *its purpose is to ensure that statements placed in evidence are not taken out of context*.... This purpose also demarcates the rule's boundaries; a party seeking to introduce selected statements under the rule must show that those statements are, in fact, relevant to, and within the context of, an opponent's offer and, therefore, are part of a single conversation.... Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements."

95 Conn.App. at 597-98 (internal citations omitted).

QUAERE: If defendant had created a transcript of the interview and used it as we do a deposition, would the court have allowed the State to read the entire transcript?

Article IV. Relevancy

§ 4-1 INFORMED CONSENT: WHAT MINOR PLAINTIFF WOULD HAVE DONE IF PROPERLY INFORMED IS SPECULATIVE; WHAT PARENTS WOULD HAVE DONE IS NOT – MIDLER V. BENJAMIN, 95 Conn.App. 730 (2006); Peters, J.; Trial Judge – Doherty, J.

RULE: The testimony of the minor plaintiff that, if she had been informed of the risks of a procedure, she would not have gone through with it was speculative and therefore inadmissible. However, her mother's testimony - that if properly informed, she would not have consented on her daughter's behalf - is not speculative and is admissible.

FACTS: The plaintiff, a 17-year-old girl, consulted the defendant plastic surgeon to discuss having a nose job (rhinoplasty). Her mother accompanied her to the consultation. The defendant advised mother and daughter that, in addition to the nose job, the girl should have a chin implant (genioplasty). The defendant did not advise them of the risk of permanent nerve damage from such an implant.

On the day of surgery, the mother signed an informed consent form as her daughter's guardian. The girl did not execute an informed consent form. She suffered permanent nerve damage as a result of the chin implant.

At trial, plaintiffs' counsel asked the daughter whether or not she would have gone through with the chin implant if informed of the risk of permanent nerve damage. The defendant objected on the ground the testimony was speculative. The trial court sustained the objection.

Plaintiffs' counsel asked the mother whether or not she would have consented to her daughter undergoing the chin implant if she had been informed of the risk of permanent nerve damage. Again the defendant objected, and again the court sustained the objection.

The jury returned a defendants' verdict.

The Appellate Court agreed with the trial court regarding the minor daughter and disagreed regarding the mother, but held that the preclusion of the mother's testimony was harmless.

REASONING:

> "[T]he minor plaintiff['s]… personal knowledge and life experience was too meager to remove her proffered testimony from the realm of the speculative. The trial court made such a finding. It was not a clear abuse of the court's discretion to so find.
>
> "The trial court did not, however, make any finding with respect to the life experiences of Ann Midler's parents. For both of them, their personal knowledge and life experience should have been accepted as a reasonable, non-speculative basis for making an informed decision balancing the surgical risks and benefits of an intraoral genioplasty for their daughter. The mother's history of having had a genioplasty further underscores the admissibility of the testimony that she was prohibited from presenting to the jury. We conclude, therefore, that the court abused its discretion in upholding the defendant's objections to this proposed testimony."

95 Conn.App. at 738-39.

The Appellate Court went on to explain that the trial court's error was harmless:

> "[T]he plaintiffs' expert witness [testified] that permanent nerve damage from a chin implant is extremely rare and that, in his experience, patients who had been advised of this risk had never declined to undergo the procedure. Thus, regardless of whether the defendant had a duty to disclose the risk of permanent nerve injury associated with an intraoral genioplasty, it would have been highly unlikely for the jury to have found a causal connection between this breach and the plaintiffs' consent to the performance of this surgery."

Id. at 739-40.

COMMENT: The finding of harmlessness misapprehends the nature of an informed consent case. The seminal Connecticut informed consent case, Logan v. Greenwich Hospital, 191 Conn. 282 (1983), concerned a physician's obligation to explain to a patient an alternative procedure the physician considered riskier than the recommended procedure.

The Supreme Court in Logan ruled that the physician had to inform the patient of the more hazardous alternative because the patient had the right to choose a more hazardous procedure. The risks another patient may have been willing to take for a chin augmentation does not determine what Ann Midler and her parents would have chosen, especially since it was the doctor who first suggested the procedure.

Furthermore, as pointed out by the Supreme Court in Burns v. Hanson, 249 Conn. 809 (1999), the excluded testimony was the only direct evidence available in the case. No one knows whether the jury would have credited that testimony in view of the testimony of the plaintiffs' own expert, but the exclusion of the evidence made it impossible for the plaintiffs to prove causation.

§ 4-1 AMOUNT OF DAMAGE TO DEFENDANT'S VEHICLE RELEVANT TO CAUSATION OF INJURIES – SHEPHERD V. MITCHELL, 96 Conn.App. 716, (2006); Flynn, C. J.; Trial Judge – Bellis, J.

RULE: Testimony of appraiser regarding heavy damage to defendant's vehicle is relevant to show that the impact was substantial enough to have caused the plaintiff's injuries.

FACTS: The defendant's car struck the rear of the plaintiff's pick-up truck. The pick-up truck suffered very little damage.

In response to standard discovery requesting information regarding the appraisal and damage to defendant's car, the defendant answered: "Not Applicable." In addition, defendant claimed he had no photographs of the damage. When plaintiff's counsel subpoenaed any photographs, repair bills, and estimates, defense counsel moved to quash the subpoena and represented in her motion that "the defendant and his insurance company are not in possession of any factual documents that have not already been produced."

At the end of *voir dire,* defense counsel disclosed that defendant's insurer, The Infinity Insurance Company, did have a damage estimate prepared by an adjuster.

The plaintiff called the adjuster, who no longer worked for Infinity, as a witness. He indicated that he had done an estimate and had taken photographs of the defendant's car. The photographs had apparently been lost, but the adjuster described the damage as "heavy front-end damage...." He testified that the hood of the Corolla had been folded "like an accordion."

Even though the defense argued this was a "low-impact' case, and had introduced photos of the minimal damage to plaintiff's pick-up truck, the defense argued that the appraiser's testimony regarding the substantial damage to the defendant's car was irrelevant. The trial court admitted the testimony, and the Appellate Court affirmed.

REASONING:

> "Certainly, the condition of the defendant's automobile, after rear-ending the plaintiff's truck, was relevant to assessing the force of the impact and the possible injuries suffered by the plaintiff as a result of this impact. * * * Although adverse to the defendant's stated position that the impact was minor, this testimony was relevant to show that the impact of the rear-end collision was substantial enough to have caused the plaintiff serious injuries. The plaintiff offered [the adjuster's] testimony to prove the plaintiff's position that the impact was substantial and not minor. We conclude that this testimony properly was admitted and that the court did not abuse its discretion."

96 Conn.App. at 722.

COMMENT: This works both ways: the defendant can get in photos of vehicles showing little or no damage.

§ 4-1 MEDICAL DATA ON PATIENT'S ALCOHOL LEVEL INADMISSIBLE WITHOUT EXPERT TESTIMONY - STATE V. HERNANDEZ, 91 Conn.App. 169, *cert. denied*, 276 Conn. 912 (2005); Gruendel, J.; Trial Judge – Licari, J.

RULE: A notation in a hospital record as to a patient's alcohol level is inadmissible absent sufficient foundation to connect it to the issues in the case.

FACTS: Defendant was accused of murdering his girlfriend. He was alleged to have stabbed her at approximately 5 a.m. on the day in question. At approximately 7:30 a.m. the police responded to the victim's apartment. They found the victim dead and the defendant incoherent and semiconscious with a knife protruding from his abdomen. The defendant was taken to a hospital. At 8:46 a.m. a test was done, which revealed his "alcohol level was measured to be 260."

Defendant sought to admit this record to support his defense that, as a result of his intoxication, he lacked the specific intent to commit murder. He offered no expert testimony to interpret the record.

The trial court excluded the evidence as irrelevant, and the Appellate Court affirmed.

REASONING:

> "Under all the circumstances, particularly the lack of an explanation of what '260' at approximately 8:46 a.m. meant, in terms of both the defendant's state of being at 8:46 a.m. and his state of being at the time of the murder, and the lack of any other evidence that the defendant drank prior to the time of the murder, we conclude that the court did not abuse its discretion in finding there to have been 'no sufficient open and visible connection to a claim of intoxication at the time of [the murder] to render [the proffered] evidence relevant.'
>
> "Under the circumstances, the court reasonably could have concluded that the foundation laid for admission of the proffered evidence was insufficient to support the inference suggested by the defendant, which was that he was intoxicated at the time of the murder to such a degree that he lacked the requisite intent to commit murder."

91 Conn.App. at 174-75.

PRACTICE NOTE: Hire a toxicologist.

§ 4-1 "BLOOD SERUM ALCOHOL LEVEL" IN HOSPITAL RECORD IS INADMISSIBLE ABSENT CONVERSION TO "BLOOD ALCOHOL CONTENT" - SHEA V. DOHERTY, 91 Conn.App. 367 (2005); Bishop, J.; Trial Judge – Dunnell, J.

RULE: A hospital record showing plaintiff's blood serum alcohol level is inadmissible without expert testimony converting it to "blood alcohol content."

FACTS: Plaintiff on a motorcycle collided with an excavator. The hospital record indicated that plaintiff had a blood serum alcohol level of 185 milligrams per deciliter.

Defendants disclosed no expert to explain the relationship between "blood serum alcohol level" and "blood alcohol content," the measure used in C.G.S. §14-227a. The trial court precluded the evidence.

REASONING: The Appellate Court refused to review the defendants' claim because of an inadequate record.

PRACTICE NOTE: Hire a toxicologist!

§ 4-7 IN PREMISES CASE, SUBSEQUENT REMEDIAL MEASURE ADMISSIBLE TO SHOW CONTROL – SMITH V. TOWN OF GREENWICH, 278 Conn. 428 (2006); Sullivan, C., J.; Trial Judge – Lewis, William B., J.

RULE: Although a subsequent remedial measure is not admissible to prove negligence, such evidence is admissible to prove control, where control is contested.

FACTS: On December 30, 2000 a snowstorm deposited 13 inches of snow in the Greenwich area. Between January 5 and January 9, 2001, an additional one-half inch of snow fell.

On the morning of January 17, 2001, the plaintiff slipped and fell on a patch of ice on the sidewalk next to the property line between two pieces of property, one owned by defendant Greenwich Acquisition and the other owned by defendant 19 West Elm Street. The Town of Greenwich owned the sidewalk. The patch of ice had formed next to a pile of snow that laid on a planting bed located on Greenwich Acquisition's property.

Plaintiff's theory was that during warmer temperatures after the snowstorm, the negligently-placed snow pile had partially melted, run onto the sidewalk and formed the ice patch there in the early morning hours.

After the fall, the Greenwich Acquisition's building manager called Ronald Passerelli to remove the snow pile. Greenwich Acquisition had previously hired Passerelli to take care of snow removal on its property, and made Passerelli an apportionment defendant in the lawsuit.

During trial, Greenwich Acquisition objected to evidence that, after the plaintiff's fall, it had called Passerelli and asked him to remove the snow pile. The evidence included photos of Passerelli actually removing the snow. Greenwich Acquisition argued that the evidence was inadmissible as a subsequent remedial measure.

C.C.E. § 4-7(a): "[E]vidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

The plaintiff argued that the evidence was not being offered to show "negligence or culpable conduct," but to show control of the snow pile. The trial court allowed the evidence.

At trial plaintiff withdrew her claim against the Town of Greenwich. Passerelli was granted summary judgment on the basis that Greenwich Acquisition's duty was non-delegable. The case went to verdict only against Greenwich Acquisition and 19 West

Elm Street. The jury found only against Greenwich Acquisition apportioning 70% of the blame to Greenwich Acquisition and 30% to the plaintiff.

REASONING:

> "'The central question is the plaintiff's purpose in introducing the evidence. The doctrine bars evidence of subsequent repairs when offered to prove negligence. It does not exclude such evidence when offered to prove some other material issue.' *Rokus v. Bridgeport*, supra, 191 Conn. [62,] 66 [(1983)]. While repairs made after an accident tend to prove that the party conducting them retains control over the area in question; *Killian v. Logan*, supra, 115 Conn. [437,] 439 [(1932)]; if the defendant had admitted orally that it controlled the premises on which the injury occurred, no reference in testimony to subsequent repairs should be made. *Haffey v. Lemieux*, 154 Conn. 185, 192-93, 224 A.2d 551 (1966).
>
> "In the present case, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence as probative on the issue of control over the snow pile. Although Greenwich Acquisition conceded at trial that the plaintiff fell on the sidewalk abutting its land, it did not concede that it was the party responsible, if any party was responsible, for creating the snow pile. Indeed, the trial court directed the jury to determine which of the defendants, Greenwich Acquisition or 19 West Elm Street, if either, was liable for creating the snow pile. Thus, the jury could have used photographs of Passerelli clearing the pile shortly after the accident as evidence that Greenwich Acquisition controlled the pile and caused the dangerous conditions on the sidewalk. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence."

278 Conn. at 448-49.

§ 4-10 LIABILITY INSURANCE INADMISSIBLE TO PROVE CONTROL OF DOG – AUSTER V. NORWALK UNITED METHODIST CHURCH, 94 Conn.App. 617, *cert. granted*, 278 Conn. 915 (2006); McLachlan, J.; Trial Judge – Reynolds, J.

RULE: Liability insurance is inadmissible to prove control of a dog.

FACTS: The defendant church employed a caretaker named Pedro Salinas. Salinas was given living quarters in the parish house as part of his employment. Salinas owned a mixed breed pit bull dog.

Before the plaintiff was injured, the pit bull had attacked another person. After the first attack, the church instructed Salinas that the pit bull had to be kept inside his living quarters during the day and chained to a railing leash when allowed outside between 7 p.m. and 6 a.m.

On the day in question, the plaintiff arrived at the premises at 7:30 p.m. to attend a meeting in the parish house. The front door of the parish house was locked, so the plaintiff walked around to the side door, which was the entrance to Salinas' living quarters. When the plaintiff got to that door, the dog jumped through the broken bottom panel of the door and attacked the plaintiff.

The plaintiff filed two counts, the first under C.G.S. §22-357 (which imposes strict liability on a "keeper" of a dog); and the second in common law negligence.

To show that the church exercised control over the dog, plaintiff offered minutes of a meeting of the defendant's trustees, held about a year after the attack. The minutes contained statements regarding the defendant's insurance coverage, specifically, that "the lawsuit has been turned over to the underwriter by the insurance company," and that continuing to allow the dog on the premises "could jeopardize our [the defendant's] insurance coverage." The trustees then ordered Salinas to remove the dog from the church premises.

The trial court allowed the evidence from the trustees' meeting minutes.

The Appellate Court reversed.

REASONING: The court first found that, as a matter of law, the church was not a "keeper" of the dog under the statute, even though the church (1) had determined both where on the premises the dog was permitted and when it was to be allowed outside, and (2) following the second attack, had Salinas remove the dog permanently from its premises.

Additionally, since it was undisputed that the church was the owner of the premises, the court held that the fact that it maintained liability insurance "[did] not tend to establish that the defendant had control over the dog...." 94 Conn.App. at 624.

COMMENT: The Supreme Court has granted the petition for certification.

Article VI. Witnesses.

§ 6-4 IMPEACHMENT OF OWN WITNESS NOT ALLOWED IF PRIMARY PURPOSE IS TO INTRODUCE OTHERWISE INADMISSIBLE EVIDENCE - STATE V. WINOT, 95 Conn.App. 332, *cert. granted on other issue*, 279 Conn. 905 (2006); Peters, J.; Trial Judge – Mullarkey, J.

RULE: A party may impeach his own witness with a prior inconsistent statement, but not if the primary purpose is to get the prior inconsistent statement in front of the jury for substantive purposes.

FACTS: Defendant was accused of trying to kidnap a 12 year-old girl on two occasions. On the first occasion, the victim ran away before there was any physical contact. On the second occasion four days later, the defendant grabbed her by the arm but she was able to break free.

In the victim's written statement, the two incidents were reversed, indicating that the defendant had grabbed her by the arm in the first incident. At trial, the victim testified that the defendant grabbed her the second time. When impeached with her written statement, the victim testified that dates in the written statement were reversed.

The victim's mother had also given a written statement, relating that the victim said, immediately after the second incident, that the defendant had grabbed her by the arm in the first incident. Defendant sought to call the mother to the witness stand to impeach the victim, by establishing that she had told her mother that the grabbing incident occurred the first time.

The State informed the court that the mother would contradict her sworn statement. The defendant wanted to call the mother anyway and impeach the mother with her prior written statement.

The trial court refused to allow the defendant to call the mother to the stand, holding that the only purpose of calling the mother was to get the mother's written statement in front of a jury for substantive purposes.

REASONING:

C.C.E. § 6-4 provides: "The credibility of a witness may be impeached by any party, including the party calling the witness, unless the court determines that a party's impeachment of its own witness is primarily for the purpose of introducing otherwise inadmissible evidence."

> "It is clear that the defendant's primary purpose in calling the mother to testify, after being informed that she would recant, was to impeach her. In impeaching her, the defendant's objective was to get the statement before the jury with the intent that it be used substantively to impeach the

> credibility of victim. We hold, therefore, that the statement properly was excluded."

95 Conn.App. at 357.

§ 6-7 AUTHOR OF MEDICAL REPORT MAY BE IMPEACHED WITH CRIMINAL CONVICTION – SABATASSO V. HOGAN, 91 Conn.App. 808, *cert. denied*, 276 Conn. 923 (2005); Flynn, J.; Trial Judge – Flanagan, John C., J.

RULE: The author of a medical report is treated as though he or she were a witness who testified on the stand, and may be impeached accordingly.

FACTS: In this rear-end collision case, the plaintiff, who claimed a bulging cervical disc and connective tissue injuries, offered the medical report of Dr. Arthur Seigel. The defendant offered a certified copy of Dr. Seigel's criminal conviction. The trial court admitted the conviction. The jury awarded the plaintiff $25. The Appellate Court affirmed.

REASONING:

Plaintiff argued that Dr. Seigel was a "declarant," but not a witness, and that he therefore could not be impeached "by any means." There is no basis for this argument.

§ 6-10 PROPER FOUNDATION REQUIRED FOR IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT – STATE V. QUILES, 96 Conn.App. 354, *cert. denied*, 280 Conn. 910 (2006); Peters, J.; Trial Judge –Rodriguez, J.

RULE: To use an oral prior inconsistent statement for impeachment, one must call as a witness the person who heard the oral prior inconsistent statement and establish the inconsistent statement.

FACTS: The defendant was accused of beating his elderly father. The father spoke only Spanish and testified at trial through an interpreter.

Defense counsel asked the father whether, when he spoke to Rodriguez, a Spanish-speaking investigator, he had said he had no recollection of what happened; that spirits had told him what happened; and, that in fact he had slipped and fallen in the bathroom. The father vigorously denied making any of these statements to Rodriguez.

The defendant then sought to call Rodriguez as a witness to testify as to the father's statements. The State objected on the grounds that Rodriguez's testimony regarding what the father said would be hearsay. The trial court sustained the objection. As a result, the defendant decided not to call Rodriguez, and thus did not make an offer of proof as to his testimony.

REASONING:

On appeal, the State abandoned its argument that the proposed testimony was hearsay. Instead, the State argued that because the defendant never actually offered the testimony of Rodriguez, there was no showing that the father actually made a prior inconsistent statement. The State argued that defense counsel's representation that that was what the father told the investigator was not sufficient.

The Appellate Court agreed. "We agree with the state that it was not enough to elicit the father's generic disagreement with what he allegedly had told the investigator." 96 Conn.App. at 359.

COMMENT: To preserve the issue on appeal, it would have been necessary for the defendant to call Rodriguez and make an offer of proof detailing what the father had said earlier.

§ 6-10 EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT IS INADMISSIBLE IF THE WITNESS ADMITS MAKING THE STATEMENT - STATE V. BERMUDEZ, 95 Conn.App. 577 (2006); Schaller, J.; Trial Judge – O'Keefe, J.

RULE: The prior inconsistent statement of a witness is admissible only if he or she denies having made the statement.

FACTS: The defendant crashed at more than 90 miles per hour into the back of a car stopped at a red light. The occupants were killed, as was the passenger in the front seat of the defendant's vehicle. The defendant claimed his deceased passenger was actually the driver.

One of the State's witnesses was Thomas Meier of the Waterbury Fire Department. After Meier testified for the State, an audio recording of Meier's conversations with a dispatcher when Meier first responded to the scene was discovered. Some of the statements made in the recording were inconsistent with his testimony.

The court allowed the defendant to call Meier to the witness stand for further cross-examination. At that point, Meier testified he could not recall what he told the dispatcher over the radio. When asked if listening to the audio recording might refresh his recollection, he said it would. The jury was excused, and the recording was played for Meier.

After the jury returned, Meier admitted each of the inconsistencies between his initial testimony and what was on the audio recording. The defendant then moved to have the recording played before the jury. The trial court did not allow it. The Appellate Court affirmed.

REASONING: C.C.E. §6-10(c) provides that "if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court."

"Additionally, the Appellate Courts in this State have established that when a witness admits to making a prior inconsistent statement, additional evidence of the inconsistency is merely cumulative." 95 Conn.App. at 585.

COMMENT: If you want the jury to hear a recording, get the witness to deny making the prior inconsistent statement:

Q: "Lieutenant, didn't you tell the dispatcher that the car was blue?"

A: "No, I did not tell the dispatcher the car was blue."

If you have him on tape telling the dispatcher that the car is blue, you can now play the tape.

§ 6-10 IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT, AND "OPENING THE DOOR" - STATE V. POWELL, 93 Conn.App. 592, cert. denied, 277 Conn. 924 (2006); Schaller, J.; Trial Judge – Nigro, J.

RULE: After a police officer in a criminal case was impeached with his deposition testimony in a civil case stemming from the same incident, the State was permitted to introduce evidence regarding the nature of the civil proceeding.

FACTS: Defendant was charged with possession of narcotics and assault on a police officer. During the arrest, the defendant suffered a broken tibia. He filed a civil suit against the police officers and the City of Stamford alleging unreasonable force. In that suit, the depositions of the arresting officers were taken. The civil lawsuit was pending when the criminal trial took place.

During the criminal trial, defense counsel impeached one of the police officers regarding exactly how the arrest took place using deposition testimony from the civil case, carefully referring to the deposition testimony as from "another proceeding," without elaboration.

The prosecutor responded not by asking the officer about the substance of the inconsistency but by asking him what the other proceeding was about. Defense counsel's objection to this question was overruled, on the ground that the use of the deposition had opened the door to this inquiry. The police officer testified, "The defendant is suing myself as well as the other officers in the City of Stamford for, I believe, $1,000,000 or in excess of $1,000,000." 93 Conn.App. at 595-96.

The prosecutor went on to refer repeatedly to the defendant's "million dollar lawsuit" while questioning witnesses. In closing argument he implored the jury to "say no more to his million dollar lawsuit." 93 Conn.App. at 607. The Appellate Court found no error.

REASONING:

> "Because the defendant successfully impeached Scanlon's trial testimony with his deposition testimony, the court reasonably determined that the question posed by the state was necessary to place the defendant's reference to a deposition from *"another proceeding in this matter"* in its proper context. Accordingly, because defense counsel introduced evidence concerning the deposition, the court did not abuse its discretion by permitting the state to question Scanlon regarding the context of that deposition."

93 Conn.App. at 600 (emphasis in original).

The Appellate Court went on to find that even if it was error to admit this line of questioning, it was harmless error.

Justice Mihalakos dissented: "The doctrine of opening the door cannot... be subverted into a rule for injection of prejudice...." 93 Conn.App. at 612.

> "There is often a stigma attached to those who bring lawsuits against their local governments for millions of dollars; the connotation sometimes is that such individuals are motivated solely by money. That evidence unfairly took the jury's attention away from the facts of the criminal case and emphasized a controversial lawsuit that carried negative connotations about the criminal defendant. The degree of prejudice suffered by the defendant was exacerbated by the repeated reference by the state throughout the remainder of the trial to his 'million dollar lawsuit.'
> * * *
> "The most damaging reference to the civil action was made by the state during its rebuttal argument when the prosecutor urged the jury to '[s]ay no more to his million dollar lawsuit.... And the way you say no more to [the defendant], based on all the evidence that was elicited in this case, is to... find him guilty of those counts.'"

93 Conn.App. at 616-17.

Article VII. Opinions and Expert Testimony.

§ 7-1 LAY OPINION TESTIMONY AS TO REASONS FOR DISCHARGE INADMISSIBLE - JACOBS V. GENERAL ELECTRIC COMPANY, 275 Conn. 395 (2005); Vertefeuille, J.; Trial Judge – Aurigemma, J.

RULE: A lay witness may not offer opinion testimony as to an employer's motivation for an employment decision.

FACTS: Plaintiff went to work for the defendant in 1996, six months before his 50th birthday, as Plant Manager of Fabrication and Sourcing. Although he did not have an engineering degree, he received favorable performance evaluations through 2000.

In 2001, plaintiff was laid off as part of a reduction in force. He was 54 years old. Four other salaried employees in similar positions were not laid off. All four had degrees

in either mechanical or electrical engineering. Two were younger than the plaintiff, and one had less job seniority.

The defendant's Manager of Human Resources and Manager of Manufacturing testified that the decision to lay off the plaintiff was based on his lack of relevant experience and skills comparable to the other four employees.

In addition, the defendant offered the lay testimony of employees Texiera and Gondolfo, who were not involved in the layoff decision, that the plaintiff would be "the right candidate" to be laid off for reasons other than his age. Over objection, the trial court allowed the testimony. The Supreme Court reversed.

REASONING:

> "In the present case, both Texiera and Gondolfo testified to their personal opinions as to whether the plaintiff should have been laid of, despite the fact that neither witness participated in the layoff decision. Neither witness had first-hand knowledge of the basis for the decision. Indeed, Texiera was no longer an employee at the defendant's facility at the time of the layoff. Although the defendant claims that the testimony of both witnesses was helpful to the jury, the potential helpfulness of the testimony cannot overcomes its inadmissibility under § 7-1 of the Connecticut Code of Evidence. Accordingly, we conclude that the trial court abused its discretion in admitting the testimony of these two witnesses, who had no personal knowledge of the layoff process or the defendant's motivation for its decision to lay off the plaintiff."

275 Conn. at 408.

§ 7-2 EXPERT TESTIMONY REQUIRED TO ESTABLISH NEGLIGENT CREDENTIALING - NEFF V. JOHNSON MEMORIAL HOSPITAL, 93 Conn.App. 534 (2006); Bishop, J.; Trial Judge – Sferrazza, J.

RULE: A claim that a hospital was negligent in granting privileges to a physician must be supported by expert testimony.

FACTS: On February 24, 2000 plaintiff was admitted to the defendant hospital by his physician, Thomas Hanny, to undergo a vascular bypass to treat a foot infection. Over the next two months, Hanny performed three amputations on the plaintiff at the hospital.

Plaintiff claimed that the hospital was negligent in allowing Hanny to continue to treat patients at the hospital without adequately investigating three medical malpractice claims brought against him between 1995 and 1999 and while Hanny did not have medical malpractice insurance.

Plaintiff disclosed one expert witness, a physician, who testified during deposition that his only criticism of the hospital was its representation on its website regarding Dr. Hanny's qualifications. It turned out the website was not accessible to the public until 2001, after the alleged malpractice.

Defendant moved for summary judgment on the basis that plaintiff needed an expert witness to prove the defendant hospital was negligent. The trial court granted the motion for summary judgment; the Appellate Court affirmed.

REASONING:

> "In the present case, the plaintiff's claim sounds in corporate negligence. 'Corporate negligence is the failure of the officers or directors who constitute the governing board of a corporation, acting as a board, to maintain the standard of conduct required of the particular corporation, rather than the personal negligence of the corporation's ordinary employees.' *Buckley v. Lovallo*, 2 Conn.App. 579, 582, 481 A.2d 1286 (1984).

> "Under Connecticut law, to sustain a corporate negligence claim against a hospital, a plaintiff is generally 'required to establish, through expert testimony, the standard of care to which [the] defendant [is] to be held and a violation of the standard.' Id. 584. Specifically, the plaintiff is required to 'produce expert testimony of **the standard of care applicable to similar hospitals similarly located**, and expert testimony that the hospital's conduct did not measure up to that standard.' Id., 582; *Pisel v. Stamford Hospital*, 180 Conn. 314, 334-35, 430 A.2d (1980)."

93 Conn.App. at 542-43 (footnotes omitted). (Emphasis added.)

COMMENT: The locale rule was an ancient rule which defined the standard of care of a physician as that degree of skill possessed by other practitioners in the same geographic area. Connecticut abandoned the rule in 1983 in Logan v. Greenwich Hospital, 191 Conn. 282. But the Neff case quoted from Pisel v. Stamford Hospital, a 1980 case, so it may be that the locale rule has been resuscitated in the corporate negligence area.

§ 7-2 EXPERT TESTIMONY REQUIRED IN LEGAL MALPRACTICE CASE - DIXON V. BROMSON AND REINER, 95 Conn.App. 294 (2006); Gruendel, J.; Trial Judge – Miller, J.

RULE: With rare exceptions, expert testimony is required to establish the standard of care and causation in a legal malpractice case.

FACTS: Plaintiff retained the defendant law firm to represent her in a lawsuit seeking the partition of real property in which she owned an interest. She sought a partition in kind because she and her children wanted to remain on part of the property.

The court ultimately ordered a partition by sale, noting that in absence of a survey it could not determine an appropriate partition in kind. Plaintiff alleged in her legal malpractice action that the law firm's failure to obtain and provide a survey was negligent. She did not disclose an expert witness. The defendant law firm filed a motion for sum-

mary judgment, claiming that the plaintiff needed an expert witness on the standard of care and to establish any damages. Trial court granted the motion for summary judgment. The Appellate Court affirmed.

REASONING: The plaintiff argued that the decision of the court in the underlying case made it obvious that the law firm did not produce sufficient evidence to permit the type of partition she sought.

While acknowledging that there are legal malpractice cases where the lawyer's negligence is so obvious and gross that an expert witness is not required, the Appellate Court held that this was not such a case. The failure to produce evidence in the underlying case was not necessarily the result of professional negligence. Furthermore, to establish causation, the plaintiff needed expert testimony that "the kind or kinds of evidence in question actually existed but were not put into evidence by the defendant." 95 Conn.App. at 300.

§ 7-2 QUALIFICATIONS OF EXPERTS: RIDING EXPERT HELD INSUFFICIENTLY QUALIFIED - KEENEY V. MYSTIC VALLEY HUNT CLUB, INC., 92 Conn.App. 368 (2006); Flynn, J.; Trial Judge – Gordon, J.

RULE: Plaintiff's expert, who had not trained young novice riders in more than 20 years, was held insufficiently qualified to testify about the standard of care for a riding instructor teaching a young novice rider.

FACTS: The plaintiff was a young novice rider receiving horseback riding lessons at a riding academy owned by the defendant. During a lesson she was allegedly told to remove her feet from the stirrups and to kick the horse. The horse lunged. The plaintiff was thrown to the ground and fractured her arm.

The plaintiff's expert had been a certified riding instructor since 1973. However, she had not trained young novice riders in more than 20 years, had taken no refresher courses, had never prepared any instructional or training materials for instructors, had never served on a safety committee and had never taught riding instructors.

The trial court concluded that the expert's qualifications were insufficient and directed a verdict for the defendant. The Appellate Court affirmed.

REASONING: Trial court precluded the testimony because the expert's primary job was training horses and dealing with her stable. Only 10% of her time was spent training riders and even that did not involve young novice riders, but experienced riders training for dressage competitions. The Appellate Court did not find this to be an abuse of discretion.

COMMENT: Normally, the expert's qualifications go to the weight the jury puts on her testimony, not its admissibility.

§ 7-2 QUALIFICATIONS OF EXPERTS: INSUFFICIENT RAILROAD EXPERTISE TO ESTABLISH "STANDARD OF CARE" IN PREMISES CASE – SULLIVAN V. METRO-NORTH COMMUTER RAILROAD COMPANY, 96 Conn.App. 741, *cert. granted*, 280 Conn. 919 (2006); Harper, J.; Trial Judge – Frankel, J.

RULE: In proving that Metro-North Railroad provided inadequate security at one of its stations, plaintiff is required to produce an expert with "railroad expertise."

FACTS: James Sullivan was bar-hopping in South Norwalk one night when he encountered Larone Hines and a group of men outside a local nightclub. The encounter became hostile, and the group of men chased Sullivan up a stairway leading to a Metro-North train station, where Hines shot and killed Sullivan.

Plaintiff, who claimed Sullivan's death was a result of inadequate security at the station, disclosed an expert witness on premises security. The expert was a former police officer who had a premises security background but no specific experience, training or knowledge regarding railroad security. The defendant filed a motion to preclude his testimony which was granted by the trial court. The jury returned a verdict for the defendant. The Appellate Court affirmed.

REASONING: The trial court precluded the testimony for a wide range of reasons, including the expert's lack of experience with railroad security. The Appellate Court applied a troublesome standard to the admissibility of expert testimony in this premises liability case, stating that the test "is whether the expert knows the applicable standard of care and can evaluate the defendant's conduct given that standard...." 96 Conn.App. at 746.

The use of "standard of care" language shifts the focus from the safety of the premises to the conduct of the defendant railroad. One is required to prove both in a premises liability case. The expert's testimony on the safety of the premises was clearly relevant, and the expert had sufficient qualifications in this area.

COMMENT/PRACTICE NOTE: Try to match your expert's qualifications as closely as possible to the characteristics of the defendant. The trend toward using "standard of care" language outside the malpractice arena will make qualification of experts more difficult.

The Supreme Court has granted the petition for certification.

§ 7-2 REQUIREMENT FOR EXPERT EVIDENCE ON CAUSATION IN MEDICAL MALPRACTICE CASE NOT FULFILLED BY ENTRY IN

HOSPITAL RECORD - CAVALLARO V. HOSPITAL OF SAINT RAPHAEL, 92 Conn.App. 59, *cert. denied*, 276 Conn. 926 (2005); Schaller, J.; Trial Judge – Lager, J.

RULE: The requirement of expert medical testimony to establish causation in a medical malpractice case cannot be fulfilled by notations in a hospital record, absent evidence that the author of the notations is properly qualified to give the opinion.

FACTS: Plaintiff was admitted to the defendant hospital in May 1997 for bilateral knee replacements. Although the plaintiff had banked his own blood in case he needed a transfusion, the hospital gave him a unit of someone else's blood. The plaintiff claimed an adverse reaction which led to his death.

A notation in the hospital record when he was re-admitted two days before his death included this notation: "Patient has history of immune-medicated pneumonitis secondary to transfusion reaction in 1997. Status post bilateral knee operation with implant in May 1997 which hospital course was complicated by toxic reaction and went to pulmonary edema, recovered gradually." 92 Conn.App. at 73, n.12 (medical abbreviations interpreted).

Plaintiff had no expert to testify on causation.[1] In opposition to defendant's motion for summary judgment, the plaintiff argued that these hospital record notations could be used instead of expert testimony to establish causation. The trial court ruled against the plaintiff on this issue and entered summary judgment. The Appellate Court affirmed.

REASONING:

> "Although the hospital records were business records, neither the records, nor any other evidence, indicated that the persons who made the notations were qualified to give expert testimony regarding causation. Absent such evidence, any opinion regarding causation that was contained in the

[1] *See* Expert Disclosures, *infra*.

> notations was not independently admissible. See *River Dock & Pile Inc.,* v. *O & G Industries, Inc.*, 219 Conn. 787, 799, 595 A.2d 839 (1991) (opinion included within otherwise admissible business record admissible only if entrant would be qualified to give that opinion in testimony)."

92 Conn.App. at 75.

§ 7-2 PORTER/DAUBERT ANALYSIS NOT REQUIRED FOR FIRE MARSHALS' TESTIMONY - Jordan v. Yankee Gas Services Co., 2006 Conn. Super. LEXIS 150, *14-25 (Conn. Super. Ct. 2006) (J.D. Waterbury, Complex Litigation Docket No. XO1CV94018567S) (Sheedy, J.)

RULE: A Porter/Daubert hearing is not required for Fire Marshals' testimony regarding the cause of a fire, because the evidence is not the type of innovative scientific evidence with the potential to mislead jurors that Porter was intended to address.

FACTS: Jordan spilled a container of mixed gas and oil onto his basement floor. While he was attempting to soak up the liquid with cloths, it spread under the gas-piloted hot water heater and ignited. Jordan's wife and children were killed in the fire. Plaintiff brought a product liability case against Yankee Gas, the seller of the gas hot water heater, claming it was defective because it was not elevated on an 18" stand.

The fire was investigated by two Connecticut State Fire Marshals. Defendant moved to preclude their testimony on several grounds, including Porter/Daubert. The trial court declined to subject the Fire Marshals' testimony to a Porter/Daubert analysis or hold a Porter/Daubert hearing.

REASONING: The trial court relied primarily on Hayes v. Decker, 263 Conn. 677 (2003). There was no showing that the Fire Marshals' methodology was "innovative." In addition, their procedures (interviewing witnesses, examining the fire scene, observing debris, noting the location of objects in the fire environment, considering possible igni-

tion sources, studying burn patterns, etc.) produced the type of the evidence a jury could competently evaluate "without abandoning common sense and sacrificing independent judgment to the experts' assertions based on his special skill or knowledge...."

"Because the experts do not expect to testify concerning innovative scientific techniques, their testimony is admissible without undergoing a Porter analysis or being subjected to a Porter hearing."

"It is a jury question whether their investigation was based on valid and reliable methods of origin and cause fire investigation. All that counsel for Yankee Gas was able to elicit as steps not then taken and which the investigators would undertake today if conducting a similar investigation go to weight and not admissibility."

§ 7-3 ANSWER TO HYPOTHETICAL QUESTIONS HELD NOT TO BE AN OPINION ON ULTIMATE ISSUE - STATE V. KELLEY, 95 Conn.App. 423, *cert. denied*, 279 Conn. 906 (2006); Hennessey, J.; Trial Judge – Ginocchio, J.

RULE: Testimony by an expert on an ultimate issue is generally prohibited. However, this prohibition can be circumvented through the use of hypothetical questions.

FACTS: Defendant was stopped for drunk driving. The officer administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. According to the officer, the defendant failed all three tests.

At trial, the State called Jack Richman, an optometrist and certified field sobriety test instructor, as an expert witness.

> "In response to questioning from the state, Richman testified in relevant part as follows:
>
> 'Q. Doctor, assume for this question that subject submits to the standard field sobriety test. And the first test is hori-

zontal gaze nystagmus. It's conducted by a trained person. That person detects six clues. Do you have an opinion whether or not that person is impaired?

'A. If there were six clues, my opinion, there are signs of impairment seen through the eye movement. I need to find out what's the cause of that impairment.

'Q. I'm sorry, walk and turn, how many clues total?

'A. Walk and turn I believe I eight. You need to fail – four is a failure.

'Q. One leg stand?

'A. I think there are four. We need two to fail.

'Q. Now, again, using the same set of circumstances, that subject submits to, now this person submits to the walk and turn, four clues are detected; do you have an opinion on whether or not it's more probable or less probable that he is impaired based on the two tests?

'A. More probable.

'Q. They submit to the walk—I'm sorry, one leg stand. They place their foot down three times; what is that considered?

'A. That's a failure.

'Q. All three tests added up after the third test, more likely or less likely to be impaired?

'A. I believe in my mind, as a clinician, it's clearly more likely there is. It's like a headache, but now you're nauseous with the headache and you have dizziness with the headache. So, you start to have three things together that gives you much more evidence that there's something wrong and there's impairment.

'Q. Now, doctor, taking that same example and the subject was asked if he was ill, if he was injured, if he needed immediate medication? Was he on medication? Was he diabetic? Does he need medication at this time? Does he take insulin? And he admits no to all of those. And the person

> administering the test detects an odor of alcohol on him, slurred speech... again after he denies all the medical issues, there's an odor of alcohol, slurred speech and admits to drinking alcohol. What would your opinion be of this person at this point?
>
> 'A. My opinion would be, one, that they're impaired. Two, the most likely cause until I can get a further test, most likely cause would be the central nervous system depressant of alcohol.
>
> 'Q. Same set of circumstances. The person [is] considered to fail all three tests, admits to no medical issues, admits to drinking, smells of alcohol; do you have an opinion within a reasonable degree of scientific certainty on whether or not that person is operating the motor vehicle under the influence?
>
> 'A. In my opinion, he would be—that individual would be impaired and should not be operating a motor vehicle, an airplane or boat.
>
> 'Q. Likely cause based on?
>
> 'A. Likely cause based on the questions that were answered as well as the signs of impairment, that would be mostly—likely would be due to alcohol.
>
> 'Q. Thank you, doctor.'"

95 Conn.App. at 430-31, Note 10.

The trial court admitted this testimony, and the Appellate Court affirmed.

REASONING:

> "After reviewing the parties' briefs, it appears that **both parties are under the assumption that Richman testified as to the ultimate issue** of impairment. Similarly, the state argued in its closing argument: 'Richman stated that with all the tests [the defendant] has taken and failed, all the clues, with everything else ruled out, **his professional opinion is that [the defendant] was drunk**. He was im-

> paired.' We disagree, however, that Richman testified as to the ultimate issue of the defendant's impairment...."
>
> * * *
>
> "Here Richman never opined that the defendant was impaired. Instead, he merely responded to hypothetical questions mirroring the facts at issue, which we already have held is permissible."

95 Conn.App. at 429-31 (citation omitted). (Emphasis added.)

COMMENT: Talk about exalting form over substance!

Article VIII. Hearsay.

§ 8-3 (1) STATEMENT BY AGENT OF PARTY OPPONENT NOT ADMISSIBLE UNLESS AUTHORIZED BY PRINCIPAL - BROWN. V. BRIGHT CLOUDS MINISTRIES, INC., 94 Conn.App. 181, *cert. denied*, 278 Conn. 907 (2006); West, J.; Trial Judge – Pittman, J.

RULE: "The mere existence of an employment relationship without more does not render statements of an employee admissible against an employer.... Before evidence can be admitted to show what an agent said, it must be established that the agent was authorized by the principal to make an admission." 94 Conn.App. at 186.

FACTS: Plaintiff, who was installing wiring around several large windows at the top of the Bright Clouds Church, which was under construction, claimed he fell through an open window, slid down the roof, and landed on a pickup truck. Defendants maintained that the plaintiff removed the plywood covering the window, stepped out onto the roof, slipped on ice and fell.

At trial, plaintiff offered a handwritten statement of Charles Galda, the church's "clerk of the works" for the construction project, in which Galda did not mention ply-

wood in the window or anything about the plaintiff removing it. The trial court did not allow the statement into evidence. The Appellate Court affirmed.

REASONING: Galda was not a defendant. The fact that he was the principal employee for the defendant on the project was not enough to make his statement admissible under Connecticut's "statement of party opponent" rule.

In Connecticut, the proponent of the statement must establish the authority of the employee to speak on behalf of the employer. That authority cannot be established through the employee. This is a minority position.

COMMENT/PRACTICE NOTE: The Connecticut Code of Evidence Oversight Committee has submitted a proposal to the Rules Committee of the Superior Court to amend this rule to allow in "a statement by the party's agent or servant regarding a matter within the scope of the agency or employment, made during the existence of the relationship."

Until this amendment is adopted, consider naming the employee as a defendant.

§ 8-3 (2) SPONTANEOUS UTTERANCE – 15 HOURS IS TOO LONG – STATE V. GREGORY C., 94 Conn.App. 759 (2006); Gruendel, J.; Trial Judge – Rodriguez, J.

RULE: A statement made 15 hours after the event, and after the declarant has had considerable time and opportunity to reflect on what occurred, is not admissible as a spontaneous utterance.

FACTS: Defendant was accused of sexual assault in a spousal relationship. The alleged assault took place at approximately 11 o'clock at night.

The next day, after describing the incident to a friend and going to the courthouse for a restraining order, the victim went to the police station to report the assault. An officer interviewed the victim at approximately 3:30 p.m.

At trial, the prosecutor asked the police officer to recount what the victim had told him. Defense counsel objected on the ground of hearsay. The prosecutor offered the statement under the spontaneous utterance exception to the hearsay rule. The trial court allowed the police officer to recount the conversation. The Appellate Court reversed.

REASONING: Although the amount of time between the startling event and the statement is not necessarily determinative, 15 hours is probably too much. In addition, the victim had already described what happened to her friend and gone to the courthouse to obtain a restraining order.

§ 8-3 (5) STATEMENT IN MEDICAL RECORD RE: IDENTITY OF DRIVER NOT GERMANE TO TREATMENT OR ADVICE - STATE V. SMITH, 97 Conn.App. 1 (2006); McDonald, J.; Trial Judge – Foley, J.

RULE: Party statements in a hospital record offered by that party are admissible only if they were "made for purposes of obtaining medical treatment or advice pertaining thereto and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical treatment or advice." C.C.E. § 8-3(5).

FACTS: One evening, the defendant and his girlfriend were drinking alcohol, first at their home and then at two bars. After they left the second bar on the defendant's motorcycle, they failed to negotiate a curve, went off the road and hit a guardrail. Defen-

dant's girlfriend was killed. He claimed at trial that she was driving the motorcycle at the time of the collision.

Defendant, also seriously injured, made statements at the hospital that he was the passenger. He offered the hospital record in evidence pursuant to the business record rule. The State requested that defendant's statements, which constituted another level of hearsay, be redacted. The defendant pointed to C.C.E. § 8-3(5), quoted above. The trial court determined that the exception did not apply and redacted the record. The Appellate Court affirmed.

REASONING:

> "We conclude that the court correctly determined that this exception cannot apply to the references to the defendant as the passenger because information regarding who was operating the motorcycle was not necessary to treatment. We have stated that '[b]ecause statements concerning the cause of injury or the identity of the person responsible are generally not germane to treatment, they are not allowed into evidence under the medical treatment exception.' *State v. Dollinger*, 20 Conn.App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). We find persuasive the state's arguments that whether the defendant was the operator or the passenger did not have any bearing on his medical treatment.
>
> "We also find support in the record for the court's conclusion. Richard E. Whitehouse, an emergency medical technician who provided medical care to the defendant, testified that 'how the accident occurred' was '[not] germane to his injuries' and was not important for the purposes of treatment.
>
> "Accordingly, we conclude that the references to the defendant as passenger were not germane to his treatment. We therefore agree with the court's determination that the redacted portions of the medical reports were not relevant to treatment and, thus, were not admissible under this exception."

97 Conn.App. at 7-8

COMMENT: The court appears to be drifting toward a different test for admissibility, requiring that the statement at issue be "necessary" or "important" to medical treatment or advice.

§ 8-3 (5) NOTATIONS IN CHILD'S MEDICAL RECORDS RE: MOTHER'S BEHAVIOR RELEVANT TO MEDICAL TREATMENT - GIL V. GIL, 94 Conn.App. 306 (2006); Dupont, J.; Trial Judge – Prestley, J.

RULE: Portions of a child's medical records documenting her mother's behavior toward her were relevant because her medical care included treatment for an anxiety disorder related to her parents' divorce.

FACTS: In this bitter divorce case, the parents had joint legal custody of their child, and the husband had visitation two days a week. He filed a motion for contempt, claiming that he was being denied visitation. The wife claimed that visitation was being denied because the husband's visits were aggravating the child's anxiety disorder.

The husband claimed the wife was manipulating the child's anxiety disorder to deny him visitation. He offered in evidence the child's medical records as business records. The wife sought to redact from the records all references to her behavior on the basis that her behavior was not "pertinent" to the child's treatment. The trial court admitted the entire record. The Appellate Court affirmed.

REASONING:

> "[T]he portions of the records that document the plaintiff's behavior were relevant to the treatment of the child because they gave insight into the source of the child's anxiety regarding contact with the defendant. Specifically, the question was whether the plaintiff had manipulated the anxiety disorder in order to interrupt telephone contact and visitation between the child and the defendant, or whether the

> plaintiff was the original cause of the anxiety disorder. Therefore, the court did not abuse its discretion when it admitted the child's medical records without redaction."

94 Conn.App. at 320-21.

§ 8-4 ALTERNATE FOUNDATION TO QUALIFY HOSPITAL RECORD AS A BUSINESS RECORD - STATE V. BERMUDEZ, 95 Conn.App. 577 (2006); Schaller, J.; Trial Judge – O'Keefe, J.

RULE: Hospital records subpoenaed to court pursuant to C.G.S. §4-104 with the required accompanying affidavit are admissible as business records without a qualifying witness. Alternatively, the record can be admitted through a live witness testifying as to the proper foundation.

FACTS: See §6-10, *supra*. Part of the State's evidence that the defendant was the driver of the car that rear-ended another vehicle was expert testimony from the Medical Examiner that the defendant's injuries were consistent with those suffered by a driver of a vehicle that struck something head-on.

To lay the foundation for this testimony, parts of the defendant's hospital records were admitted into evidence through Dr. Peter Jacoby, the head of the hospital's emergency department.

The doctor laid the proper foundation for the admission of the hospital record as a business record. The defendant objected on the basis that the State had not complied with C.G.S. §4-104, which requires a subpoena and affidavit. The trial court admitted the record. The Appellate Court affirmed.

REASONING:

> "§4-104 is not the sole avenue by which medical records may be admitted into evidence. Medical records may be admitted under the business record exception.... In the

> present case, the state provided an in-court witness, Peter Jacoby, to testify and to qualify the defendant's medical record as a business record exception to the rule against hearsay. It was therefore unnecessary for the state to comply with the subpoena requirements of § 4-104."

95 Conn.App. at 587, n. 5.

§ 8-4 DOCUMENT GENERATED DURING TRIAL ALLOWED IN AS BUSINESS RECORD - EMIGRANT MORTGAGE COMPANY, INC. V. D'AGOSTINO, 94 Conn.App. 793, *cert. denied,* 278 Conn. 919 (2006); Schaller, J.; Trial Judge – Lewis, William B., J.

RULE: Testimony that a document was created in the course of a bank's business is sufficient to admit the document as a business record, despite the fact that the document was generated specifically to corroborate the witness's testimony.

FACTS: In this foreclosure action, Patricia Gilligan, the plaintiff's Assistant Vice-President and manager of the foreclosure department, testified regarding how the reinstatement amount on the loan was calculated. She testified that she used the bank's computer system to generate the calculations.

On cross-examination, she was unable to answer questions regarding the specific manner in which the reinstatement amount was calculated. After she left the witness stand, she contacted the bank's mortgage accounting department and asked it to produce a document setting forth the steps showing how the reinstatement amount was calculated. The document was generated by the mortgage accounting department that night.

The next day, the bank recalled Gilligan to the witness stand and offered this document in evidence. Gilligan testified that it was in the course of the plaintiff's business to create and to keep such a document, that this particular document was created in

the course of the plaintiff's business with regard to the defendant's loan and that the document was made contemporaneously with her request for the defendant's records.

The defendant objected to the document on the basis that a proper foundation had not been laid. The court overruled the objection. The Appellate Court affirmed.

REASONING:

> "In this case, Gilligan's testimony satisfied the elements of trustworthiness required by §52-180 as well as the requirements pertaining to computer generated business records. Gilligan testified that it was in the regular course of the plaintiff's business to create such a document and that it was generated in the regular course of the plaintiff's business. She also stated that the document was created contemporaneously with her request for the defendant's records. Furthermore, Gilligan testified that the document contained an exact breakdown of how the reinstatement sum was calculated and thoroughly explained that calculation. Moreover, like the sales manager in *American Oil Co.* [179 Conn. 349 (1979)], Gilligan had personal knowledge of the facts and circumstances surrounding the defendant's mortgage that was derived from her position as a supervisor of the bank's foreclosure department, and had personal experience with the plaintiff's general record keeping procedures. We conclude that the court did not abuse its discretion and that Gilligan's testimony sufficed to meet the plaintiff's burden to establish a sufficient foundation."

94 Conn.App. at 810-11.

COMMENT: A bad decision. Unless one defines the "business" of the bank as litigating foreclosure actions, this document was <u>not</u> generated in the regular course of the plaintiff's business, nor was it generated "at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." <u>C.C.E.</u> §8-4(a).

Ironically, the Appellate Court cited the following Supreme Court precedent: "This liberal application [of the business record rule] is derived from the recognition that the trustworthiness of such documents comes from their being used for business purposes

and not for litigation. New England Savings Bank v. Bedford Realty Corp., 246 Conn. 594, 600 (1998)." Emigrant Mortgage at 808. (Emphasis added.)

This principle is completely incompatible with allowing in a document "created in response to the defendant's… cross-examination of Gilligan." Id. at 805, n.5.

§ 8-4 CHAIN OF CUSTODY TESTIMONY NOT REQUIRED WHEN AUTHENTICATING A BUSINESS RECORD - FIRST UNION NATIONAL BANK V. WOERMER, 92 Conn.App. 696 (2005), *cert. denied*, 277 Conn. 914 (2006); McLachlan, J.; Trial Judge - Gallagher, J.

RULE: Even though the witness laying the foundation for a business record did not create a document, provide it to counsel, or know whether it came from the business's files, the record is admissible.

FACTS: In this foreclosure action, the loan was originally made by Center Bank, which merged into First Union Bank of Connecticut, which then merged into First Union National Bank, which initially brought the action. Thereafter, First Union assigned the loan as part of a bulk sale to EMC Mortgage Corporation, which was substituted as plaintiff.

The plaintiff offered in evidence a document containing the defendant's mortgage history with Center Bank. The witness was Carissa Fercodini, who had worked first at Center Bank and then at First Union.

She laid the necessary foundation regarding the document. However, she had not created the document and had not personally pulled the document from the files of Center Bank or First Union. (It appears she was supplied with the document by plaintiff's counsel.) She could not vouch for the origin of the document. Nonetheless, the trial court allowed the document in evidence. The Appellate Court affirmed.

REASONING:

> "The issue of proper authentication of business records was addressed in *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594. 717 A.2d 713 (1998), in which our Supreme Court concluded that a business record may be admitted even though the qualifying witness lacks personal knowledge of the origin of the document. After specifically stating that it is not necessary to establish a chain of title to authenticate a business record, the court indicated that a document may be authenticated by direct testimony, circumstantial evidence or proof of custody.
>
> * * *
>
> "The court noted that establishing a chain of custody should not be a requirement for authentication for persuasive policy considerations. Id., 605. Present day foreclosure actions often involved failed banks and mortgage loans that have been assigned several times. 'To require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans originated by failed institutions.'"

92 Conn.App. at 708.

QUAERE: Is this a special rule in foreclosure cases?

§ 8-5 (1) PERSONAL KNOWLEDGE REQUIREMENT OF WHELAN EXAMINED – IMPORTANCE OF COMMENTARY TO CODE OF EVIDENCE - STATE V. PIERRE, 277 Conn. 42 (2006); Borden, J.; Trial Judge - Schimelman, J.

RULE: When a prior inconsistent statement is admitted for substantive purposes pursuant to C.C.E. §8-5(1) and the rule of State v. Whelan, one of the requirements is that "the witness has personal knowledge of the contents of the statement."

When the statement is offered solely to prove that the defendant made a statement, not for the truth of the underlying facts, the witness need not have personal knowledge of the underlying facts.

FACTS: Murder prosecution in which a witness, Carr, gave a statement relating the defendant's own description of the murder. Carr did not have personal knowledge of these facts.

At trial, Carr insisted that he had never heard the defendant discuss the killing of the victim and that any assertion to the contrary in his seven-page written statement was false. The trial court admitted the written statement for substantive purposes pursuant to Whelan. The Appellate Court affirmed.

REASONING: The Supreme Court held that:

> "The defendant conceded at oral argument before this court that *Grant* [*State v. Grant*, 221 Conn. 93 (1992)] and *Woodson* [*State v. Woodson*, 227 Conn. 1 (1993)] reject *Green's* requirement [*State v. Green*, 16 Conn.App. 390, *cert. denied*, 210 Conn. 802 (1988)] that personal knowledge must be knowledge of the facts underlying the statement. Essentially, the defendant is asking to overrule our prior holdings in *Grant* and *Woodson*, and to retreat to the interpretation of the personal knowledge requirement espoused by the Appellate Court in *Green*. We are not inclined to do so, particularly in light of the fact that, as noted previously, the *Whelan* rule [*State v. Whelan*, 200 Conn. 743, *cert. denied*, 479 U.S. 994 (1986)] and all of the developments and clarifications of the rule that have occurred since *Whelan* was decided, have been codified in §8-5 (1) of the Connecticut Code of Evidence.
>
> "The judges of the Superior Court adopted the Connecticut Code of Evidence (code) in June, 1999, with the intent of codifying Connecticut evidentiary case law. See D. Borden, 'The New Code of Evidence: A (Very) Brief Introduction and Overview,' 73 Conn. B.J. 210, 211-12 (1999). Significantly, 'the [c]ode cannot be properly understood without reference to the accompanying [c]ommentary. The [c]ommentary provides the necessary context for the text of the [c]ode, and the text of the [c]ode expresses in general terms the rules of evidence that the cases cited in the [c]ommentary have established.' Id., 212. Additionally, 'the [j]udges took an unusual step when they formally adopted the [c]ode. Unlike other situations, in which the

> [j]udges, when voting on rules, are guided by but do not formally adopt the commentary submitted by the [r]ules [c]ommittee that normally accompanies proposed rule changes, in adopting the [c]ode the [j]udges formally adopted the [c]ommentary as well. This is the first time that the [j]udges have done so. Thus, the [c]ode must be read together with its [c]ommentary in order for it to be fully and properly understood.' Id., 213. Therefore, the personal knowledge prong of the *Whelan* rule, as codified by the requirements of §8-5 (1) (C) of the code, must be understood as also incorporating our holdings in *Grant* and *Woodson*."

277 Conn. at p. 59-60 (footnote omitted).

§ 8-7 HEARSAY WITHIN HEARSAY – DEAD MAN'S STATUTE – DINAN V. MARCHAND, 279 Conn. 558 (2006); Katz, J.; Trial Judge –Wolven, J.

RULE: Virtually any statement made by a decedent in a case by or against the estate is admissible pursuant to the Dead Man's Statute, C.G.S. §52-172.

FACTS: The decedent, Garofalo, had made a will some time before his marriage to plaintiff Dinan. By operation of law, if a testator does not specifically provide otherwise, his subsequent marriage automatically revokes his will.

Two days before the wedding, Garofalo executed a codicil to his will specifically providing that his will should continue in full force after the marriage. The will made no provision for Dinan, and left his estate to Garofalo's daughter and grandchildren.

Less than three years after the marriage, Garofalo died. Dinan challenged the codicil, claiming Garofalo executed it while under his daughter's influence, domination, and control.

The case was tried to a jury. Dinan offered testimony of a conversation she had with Garofalo on their honeymoon, in which he revealed that he had executed the codicil

and that he had done so because his daughter had told him that if he did not, she would not come to the wedding and he would never see her or his grandchildren again.

The defendant estate objected to the testimony on the basis that it was double hearsay. The trial court sustained the objection. The Supreme Court found error, but held it harmless.

REASONING: This is a double hearsay problem. First, Dinan was seeking to elicit what the daughter told Garofalo. However, Dinan was not offering the statement of the daughter for the truth of its contents (that the daughter would boycott the wedding and not allow Garofalo to see her or the grandchildren). Rather, she offered it to show its effect on Garofalo in coercing him to execute the codicil. Therefore, it was not hearsay. C.C.E. § 8-1(3).

The second link of the hearsay chain was relating what Garofalo had said to Dinan. This statement, the court held, was clearly admissible under the Dead Man's Statute, C.G.S. § 52-172, which provides: "In actions by or against the representatives of deceased persons... the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence...." 279 Conn. at 573.

§ 8-8 IMPEACHMENT OF HEARSAY DECLARANT FOR BIAS OR PREJUDICE - STATE V. CALABRESE, 279 Conn. 393 (2006); Norcott, J.; Trial Judge – Rodriguez, J.

RULE: "When hearsay has been admitted in evidence, the credibility of the declarant may be impeached, and if impeached may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness." C.C.E. § 8-8.

FACTS: The defendant, Edan Calabrese, was accused of assaulting his 69-year old mother. The mother did not testify at trial. Her description of what happened was placed in evidence through statements she made to the police officers and in her medical records. Defendant sought to demonstrate to the jury his mother was biased and prejudiced against him by playing the following string of messages she had left on his answering machine:

> "Edan.
>
> "Please pickup Edan.
>
> "Would you pick up please?
>
> "Pick up will you? [PAUSE] Are you there?
>
> "Are you there? [PAUSE] Pick up. Pick up if you're there. [PAUSE] I just wanted to say good luck and I love you.
>
> "Are you there? Pick up. [PAUSE] Are you there?
>
> Pick up. [PAUSE] Pick up! [PAUSE] pick up! [PAUSE] You prick!
>
> "You'd better come down here and pick up the pork and bring my groceries down here before I call the police.
>
> "Pick up. Won't you pick up?
>
> "I asked for a goddamn sandwich and I never got it and I had a call from the victim's advocate and you are in a hell of a lot of trouble if you don't bring me my sandwich – cheeseburger! You better bring it here and leave it right on the doorstep you son of a bitch you bastard!
>
> "Pick up. [PAUSE] Please pickup.
>
> "Please pick up. [PAUSE] Please pick up."

279 Conn. at 406, n.17.

C.C.E. § 6-5 provides: "The credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely."

The trial court did not allow the defendant to play the recording. The Supreme Court found error and reversed.

REASONING:

> "We can think of no better evidence of animus that might show a motive for making false allegations than the threats of seeking the arrest of the defendant if he did not comply with her wishes, and other invectives, contained in the messages that the trial court improperly excluded from the jury's consideration."

279 Conn. at 410.

§ 8-9 RESIDUAL EXCEPTION – WHAT CONSTITUTES "DUE DILIGENCE" - FERRIS V. FAFORD, 93 Conn.App. 679 (2006); Bishop, J.; Trial Judge – Foley, J.

RULE: The residual exception to the hearsay rule requires "a reasonable necessity for the admission of this statement...." C.C.E. § 8-9. To demonstrate reasonable necessity, the proponent must show "due diligence" in obtaining non-hearsay evidence, but "[d]ue diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible." 95 Conn.App. at 687.

FACTS: This case involved the inheritance of a farm owned by Mamie Nahibowitz. Nahibowitz had no children. In 1973, she executed a will leaving her estate in quarter shares to a nephew, a niece, and the children of the nephew and niece. The farm was the principal asset of the estate.

In 1993, Nahibowitz executed a new will restricting the development of the farm and requiring that it remain a farm. The Commissioner of Agriculture was informed of this restriction.

Nahibowitz died in 1998. Her nephew submitted the 1973 will to probate. In 2002, the Commissioner became aware of the probating of the 1973 will. The Commissioner brought this action, alleging that Nahibowitz's nephew, who submitted the 1973 will, was aware of the 1993 will and fraudulently submitted the 1973 will because the 1993 will would decrease the value of the property.

At the time of trial, the original of the 1993 will could not be located. An unsigned copy was produced by Nahibowitz's attorney. The Commissioner offered an affidavit from Etta Klee, Nahibowitz's closest friend, about the circumstances of the execution of the 1993 will and its whereabouts. Klee was 84 years old and healthy at the time she signed the affidavit. She later had a stroke which rendered her unable to testify.

The affidavit stated that in March 1993, the day that the will was executed, Klee took Nahibowitz to the bank to get a safe deposit box to store the 1993 will.

The affidavit also stated that in June 1993 Nahibowitz had gone to her lawyer's office with her nephew to fix a typo in the 1993 will. The will was later transferred to a safe deposit box owned by the nephew's mother, who died before Nahibowitz.

The nephew testified that when he emptied his mother's safe deposit box he did not find the 1993 will. He denied ever knowing that it existed.

Klee's affidavit was offered pursuant to the residual exception to the hearsay rule. The two requirements of the rule are that: "(1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of

trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." C.C.E., § 8-9. The trial court admitted the affidavit. The Appellate Court affirmed.

REASONING:

The defendant argued that, because Klee was healthy when she signed the affidavit, the Commissioner should have taken her deposition at that time. The court held that the failure to take the deposition did not constitute "a lack of substantial diligence or good faith." 93 Conn.App. at 688.

As to the second prong of the test, the Supreme Court stated: "We further conclude that the document had an adequate indicia of reliability because there was no evidence of undue influence or coercion, no evidence of a motive to fabricate the affidavit, and Etta Klee had sworn to its accuracy." 93 Conn.App. at 687.

§ 8-9 FATHER'S STATEMENT IMPLICATING SON ADMITTED UNDER RESIDUAL EXCEPTION - STATE V. SKAKEL, 276 Conn. 633, (January 24, 2006); Palmer, J.; Trial Judge – Kavanewsky, J.

RULE: A statement by a father implicating his child in a murder has the requisite indicia of trustworthiness and reliability for admission under the residual exception to the hearsay rule.

FACTS: In this infamous murder trial, a friend and neighbor of the defendant's father testified before the grand jury that the father had told her that his son had told him that he had so much to drink that night that he wondered if he could have murdered the victim.

At trial, the neighbor testified that she did not remember the conversation. The State offered the grand jury testimony.

There were three hearsay links in the chain:

(1) The grand jury testimony was hearsay. State offered it pursuant to the Whelan rule, C.C.E., § 8-5(1);

(2) The statement of the father to the neighbor was hearsay. The State offered that link pursuant to the residual exception to the hearsay rule.

(3) The statement of the son to the father that he may have committed the murder was hearsay. The State offered this as a statement of a party opponent. C.C.E., § 8-3(1). The trial court admitted the grand jury testimony. The Supreme Court affirmed.

REASONING: The only link in the chain contested on appeal was the use of the residual exception for the second link. The court found that the friendship between the neighbor and the father, and the fact that the father would probably not falsely implicate his son, made the evidence reliable enough to be admitted.

Article X. Contents of Writings, Recordings and Photographs.

§ 10-5 FOUNDATION REQUIRED FOR ADMISSION OF SUMMARY - NATIONAL PUBLISHING CO. V. HARTFORD FIRE INSURANCE CO., 94 Conn.App. 234, *cert. granted on other issue*, 278 Conn. 903 (2006); Flynn, J.; Trial Judge – Adams, J.

RULE: "[S]ummaries may be admitted provided that the documents on which they are based are available to the court and opposing counsel. Unavailability of some supporting documents, not due to the fault of the deponent, will not bar the admissibility of the summary." 94 Conn.App. at 265.

FACTS: National Publishing Company published low-cost newspaper inserts using a unique computer system containing individualized instructions for printing different

inserts for different clients. The instructions were transmitted via the internet to 13,000 newspapers around the U.S.

In 1994, several of National's employees left the company to form a competitor. According to National's owner, they sabotaged National's computer system on the way out.

The owner reported the loss to National's insurer, The Hartford Fire Insurance Company. National hired its own adjuster to assist with presenting its claim to The Hartford, which rejected the claim. National filed suit against The Hartford, claiming various expenses and business income losses as a result of the sabotage.

National's adjuster took the stand as an expert witness and offered a summary spreadsheet listing 285 operating expenses and 48 extra expenses. The spreadsheet was presented to the jury during the adjuster's testimony using an enlargement. It was apparently treated by counsel and the court as a demonstrative exhibit and used without objection. The summary was marked as a full exhibit and sent into the jury room, but the jury was instructed not to use the summary spreadsheet for substantive purposes.

The jury returned a verdict awarding damages in the amount of $1,338,848.16. The defendant appealed. The Appellate Court affirmed.

REASONING:

> "We are frank to admit that we do not understand why the spreadsheet was not admitted for substantive purposes when § 10-5 of the Connecticut Code of Evidence and a line of cases, of which *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 513 A.2d 1218 (1986), is a part, state that summaries may be admitted provided that the documents on which they are based are available to the court and opposing counsel. Unavailability of some supporting documents, not due to the fault of the proponent, will not bar the admissibility of the summary."

94 Conn.App. at 264-65.

> "When facts sought to be proved are of so voluminous or complicated a character that their introduction would occupy much time, and might be difficult to understand by themselves, and these many facts are to be proved for the purpose of drawing a conclusion from them, the court may permit a witness who is qualified upon the subject of investigation, and has made the investigation, to express an opinion **without giving the details on which the opinion rests.** The opinion of the expert as to whether a building is finished in a workmanlike manner, or according to certain plans and specification [for example], is admissible for the same reason as is the opinion of the accountant as to the result of his examination of the books of account, or as to schedules taken from the books, verified by him . . . or as summaries or averages from voluminous or complicated records are admitted."

94 Conn.App. at 266-67, quoting Schaefer, Jr., & Co. v. Ely, 84 Conn. 501, 509 (1911).

(Emphasis added).

COMMENT: This case is useful in supporting the admissibility of life care plans.

Expert Disclosures

> FACT THAT OPPONENT HAS DISCLOSED EXPERT MAY NOT SUFFICE TO PERMIT USE OF EXPERT AT TRIAL - CAVALLARO V. HOSPITAL OF SAINT RAPHAEL, 92 Conn. App. 59, *cert. denied*, 276 Conn. 926 (2005); Schaller, J.; Trial Judge – Lager, J.

RULE: Normally, where one party has disclosed an expert witness who has been deposed or whose report has been disclosed, either party may call the expert at trial. However, it is within the court's discretion to preclude the expert, absent proper disclosure by the proponent.

FACTS: *See* § 7-2, *supra*. When plaintiff returned to the hospital 11 months after the allegedly negligent blood transfusion, he was admitted by a pulmonologist. He died two days later.

Apparently, the pulmonologist originally told the decedent's wife that he could not answer the question of whether or not the transfusion was a substantial factor in causing her husband's deterioration and death. The plaintiff, therefore, did not disclose him as an expert.

The defendant, apparently believing that the pulmonologist would not connect the death to the transfusion, disclosed him as an expert, specifying that he would testify on causation.

Thereafter, plaintiff's counsel spoke with the pulmonologist, who indicated that he had changed his opinion and now believed that there was a causal link between the improper transfusion and the deterioration and death of the decedent. The plaintiff disclosed him as an expert eight days after the case had been called in for jury selection. The defendant moved to preclude the pulmonologist from testifying.

The plaintiff claimed that, since the defendant had already disclosed the pulmonologist, the plaintiff was not even required to do so. Therefore, the defendant could not complain about late disclosure. The trial court precluded the testimony. The Appellate Court affirmed.

REASONING:

> "We disagree that those cases cited by the plaintiff support her broad proposition that once 'one party discloses an expert, the opposing party is entitled to use that expert in its case-in-chief.' Instead, we conclude that the limited holdings of those cases are inapplicable to the facts of the present case, and, therefore, do not excuse the plaintiff's failure to comply with the requirements of Practice Book §13-4 or allow the plaintiff to escape the sanction imposed by the court."

92 Conn. App. at 72.

COMMENT/PRACTICE NOTE: To be safe, disclose your opponent's expert as soon as you know you intend to call him or her.

The earlier cases cited by the plaintiff did in fact support her proposition that she was entitled to use the expert after he had been disclosed by the defendant. The open question is whether Cavallaro is an aberration to be confined to its facts, or whether, as the court implied, the earlier cases will be confined to their facts.

> AUTHOR OF MEDICAL REPORT MUST BE DISCLOSED AS EXPERT – SABATASSO V. HOGAN, 91 Conn. App. 808, *cert. denied*, 276 923 (2005); Flynn, J.; Trial Judge – Flanagan, John C., J.

RULE: The rules regarding expert disclosure are not relaxed when a party offers evidence in the form of reports instead of testimony.

FACTS: *See* §6-7, *supra*. Plaintiff offered medical reports without having disclosed the expert authors of the reports pursuant to the Practice Book. The trial court excluded the reports. The Appellate Court affirmed.

REASONING: The plaintiff maintained that she was not required to disclose these experts because their opinions were in the form of reports rather than live testimony. The Appellate Court emphatically rejected this argument:

> "If we were to adopt the plaintiff's argument… that no disclosure is necessary, an offering party who had not properly disclosed a medical expert that he or she wanted to call to the witness stand could circumvent the failure to disclose simply by submitting the expert's medical reports, which would not be subject to cross-examination, deposition or rebuttal reports because the other party would not know about the evidence until it was offered during trial. This just does not make sense, especially where our rules of practice require full disclosure."

91 Conn. App. at 822.

> LATE DISCLOSURE RESULTS IN PRECLUSION – MCVERRY V. CHARASH, 96 Conn.App. 589 (2006); Peters, J.; Trial Judge – Alvord, J.

RULE: Repeated failure to comply with expert disclosure deadlines may result in the preclusion of experts, even those disclosed 13 weeks before trial.

FACTS: After plaintiff missed four deadlines for disclosing his experts, the court entered a scheduling order requiring disclosure by June 15, 2003 for a trial on September 15, 2004. Plaintiff did not meet the new deadline. Defendant moved for a nonsuit. The court granted a further extension until July 31, 2003. Again, the experts were not disclosed.

On May 24, 2004 the defendant filed a motion to preclude expert testimony. Plaintiff moved for an extension of time and on June 18, 2004 disclosed four experts. The defendant's motion to preclude was granted and summary judgment entered for the defendant. The Appellate Court affirmed.

REASONING: The Appellate Court found that disclosure 13 weeks before trial in a medical malpractice case prejudiced the defendant. Although a continuance of the trial

date would have removed this prejudice, the Appellate Court declined to second-guess the trial court's decision not to grant a continuance. Finally, the inadvertent nature of the discovery order violations was found insufficient to make the sanction disproportionate to the violation.

Although some of the delay could be attributed to the fact that the lawyer who was working on the case unexpectedly and suddenly died, that did not explain all of the delay. "We agree with the trial court's conclusion that, while unfortunate, Airone's death, did not constitute good cause for the delay." 96 Conn.App. at 598.

Peremptory Challenges

IMPROPERLY GRANTING ADDITIONAL CHALLENGES TO ONE SIDE HARMLESS ERROR - CARRANO V. YALE-NEW HAVEN HOSPITAL, 279 Conn. 622 (2006); Vertefeuille, J.; Trial Judge – Mottolese, J.

RULE: An award of additional peremptory challenges to one side is not presumed harmful.

FACTS: Carrano was admitted to Yale-New Haven Hospital on March 12, 1992 for treatment of a necrotic finger and for a colonoscopy to evaluate his Crohn's disease. He was discharged nine days later, and died of pulmonary edema early the next morning.

Plaintiff sued five defendants. The trial court appears to have concluded that the five did not have a unity of interest[2], and awarded 20 challenges to the defense. The trial judge then decided, based on considerations of fairness, to increase the plaintiff's peremptory challenges to the same number. The defendants did not request additional chal-

[2] Jury selection took place before October 1, 2001, when the amendment to the statute defining unity of interest took effect.

lenges, and at the end of jury selection, still had peremptory challenges left. The jury returned a verdict of $3.4 million.

The Appellate Court, whose decision[3] was under review, had found this to be harmful error, and reversed, interpreting Kalams v. Giacchetto, 268 Conn. 244 (2004) as granting the trial court broad discretion to award additional challenges only when both sides receive them. The Appellate Court had found error based in part on that fact that the trial court had awarded additional challenges only to the plaintiff, and went on to find that the additional challenges granted to the plaintiff fundamentally altered the composition of the jury, and that the defendants were harmed as a result, necessitating a new trial.

On certification, the Supreme Court declined to address whether or not the trial court had discretion to award the additional challenges, concluding that even if the award was improper, the error was harmless.

REASONING:

> "We do not intend to imply… that every award of peremptory challenges not required by law is harmless. If one party is permitted to exclude additional jurors, but another party who perceives a need to exclude additional jurors is denied an equal opportunity to do so, harm may result. As a threshold to demonstrate such harm, however, the complaining party must exhaust all of her own peremptory challenges and request additional challenges."

279 Conn. at 639 (footnote omitted).

> "The defendants in the present case did not exhaust their peremptory challenges, and did not request additional challenges. Moreover, the defendants do not claim that any individual juror who served on the jury was biased against them, or that they were prejudiced by protracted jury selection proceedings. The record therefore does not support the defendants' claim that they suffered harm as a result of the trial court's award of additional challenges, and, accord-

[3] *See* 84 Conn.App. 656 (2004).

> ingly, even if we were to assume arguendo that the award was improper, a new trial is not required."

279 Conn. at 641-2 (footnote omitted).

COMMENT: Justices Zarella and Borden dissented, stating that they "would subject a disproportionate award of peremptory challenges to automatic reversal." 279 Conn. at 667.

Sufficiency of Evidence

> DOCUMENTARY EVIDENCE NOT REQUIRED TO ESTABLISH ECONOMIC DAMAGES – EVIDENCE MUST BE PRESENTED ON PERSONAL LIVING EXPENSES AND INCOME TAXES - CARRANO V. YALE-NEW HAVEN HOSPITAL, 279 Conn. 622 (August 22, 2006); Vertefeuille, J.; Trial Judge – Mottolese, J.

RULES: (1) Plaintiff is not required to produce documentary (as opposed to oral) evidence to prove economic damages.

(2) To prove a claim for loss of future income in a wrongful death case, the plaintiff must present evidence regarding the decedent's personal living expenses and income taxes.

FACTS: *See* Peremptory Challenges, *supra*. In this wrongful death medical malpractice case, the decedent had worked for Sikorsky Aircraft but had become totally disabled before his death at the age of 37. His wife testified that at the time of his death he was receiving a net amount of between $140 and $146 per week in disability payments.

The jury's award included approximately $738,000 in economic damages to the estate - $50,000 in funeral costs, and $733,000 in lost future income.

The Appellate Court, whose reversal was overturned by the Supreme Court, had held that the plaintiff's failure to present documentary - as opposed to testimonial - evidence of economic damages was insufficient as a matter of law.

The Supreme Court disagreed with this conclusion but found the evidence presented by the plaintiff insufficient to support the award for net lost future income because there was no evidence regarding the decedent's personal living expenses and income taxes.

REASONING: The Supreme Court held that documentary evidence was not required to establish the amount of lost disability income. The court rejected the defendant's claim that since the plaintiff could easily have presented documentary proof in the form of a check stub, tax return, or statement of benefits, the wife's unsubstantiated testimony was not enough.

The court pointed out that the absence of corroborative evidence went to the weight of the evidence but did not make it insufficient as a matter of law. "Ordinarily, in civil cases the testimony of a single witness is sufficient to establish any fact, including the amount of damages, unless more proof is required by statute, even though the witness is a party or interested in the action." 279 Conn. at 646.

However, the plaintiff was required to prove net lost income. The failure of the plaintiff to present any evidence regarding the decedent's personal living expenses and income taxes on the lost earnings was fatal to the lost future income claim:

> "In the present case, the plaintiff failed to present any evidence, expert or otherwise, concerning the probable amount of the decedent's income taxes and personal living expenses. The jury only could speculate as to the amount of taxes the decedent would have paid on his gross earnings and the amount of money necessary to support the dece-

> dent. Because the plaintiff's damages are measured by the decedent's net earnings, and because the evidence was insufficient to permit the jury to determine the amount of the decedent's net earnings, we conclude that the plaintiff presented insufficient evidence of economic damages."

279 Conn. at 651.

The Supreme Court therefore reduced the award by the amount of damages awarded for the lost income stream.

PRACTICE NOTE: Hire an economist.

Final Argument

> MULTIMEDIA PRESENTATION DURING FINAL ARGUMENT APPROVED – STATE V. SKAKEL, 276 Conn. 633, (January 24, 2006); Palmer, J.; Trial Judge – Kavanewsky, J.

RULE: A litigant may combine tape-recorded comments, photographs, and transcript in an audio-visual display in closing argument, as long as this is not deceptive.

FACTS: *See* § 8-9, *supra*. During the State Attorney's closing argument he played approximately two minutes of a 32-minute tape-recorded interview with the defendant that had been played for the jury in its entirety during the case. As the tape was played a transcript of the interview appeared on a screen. When it concluded, after a pause, the same text appears on the screen with one phrase in larger font and in red letters.

During another segment where the defendant talked about the victim, a photograph of her smiling appeared in the lower right-hand corner of the screen beneath the written text. Then a photograph of the victim's body lying under a pine tree, followed by another photograph of the body closer up, showing her badly beaten.

The trial court allowed the presentation. The Supreme Court affirmed.

REASONING:

> "As we previously have stated, 'counsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court.' *State v. Ancona*, supra, 270 Conn. [568,] 598 [(2004)].

276 Conn. at 767.