

**2007 Update on Evidence**  
**(and sundry cases of interest to the trial bar)**  
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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 29, 2006 through August 28, 2007.

It also discusses five amendments to the Connecticut Code of Evidence (“C.C.E.”) that will take effect on January 1, 2008.

The Table of Contents and section headings follow the format of the 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 IV – Relevancy

§ 4-1 BUILDING CODE AND CONSUMER PRODUCT SAFETY COMMISSION REGULATIONS, THOUGH NOT DIRECTLY APPLICABLE, ADMISSIBLE AS EVIDENCE OF STANDARD OF CARE - CONSIDINE V. WATERBURY, 279 Conn. 830 (2006); Vertefeuille, J.; Trial Judge – Moraghan, J.

**RULE:** The state building code and Consumer Product Safety Commission regulations are admissible as evidence of the standard of care, even though, because they were enacted after the fact, their violation did not constitute negligence *per se*.

**FACTS:** Plaintiff was at a restaurant in the clubhouse of a municipal golf course. On the way out, while one of his friends stopped to use the restroom, the plaintiff stood by the exit door to wait for him.

Next to the exit door was a floor to ceiling window panel, sometimes called a sidelite. Plaintiff’s leg gave out, and he fell through the sidelite. Because it was not made of safety glass, he received lacerations.

The clubhouse building had been constructed in 1962. In 1970, a state building code was enacted, requiring safety glass in sidelites. The code specifically exempted owners of buildings already constructed from having to install new sidelites. In 1980, the Consumer Product Safety Commission (“CPSC”) promulgated regulations to similar effect.

Plaintiff sought to introduce the building code and CPSC regulations as evidence of the standard of care for safe sidelites. Plaintiff’s expert testified that, although the regulations did not require the building owner to replace the sidelites, they reflected the judgment of the state building inspector and the CPSC that sidelites, because they are next to a door, are in a hazardous location that requires special precautions.

The trial court admitted the regulations and the expert’s testimony regarding those regulations. The Supreme Court affirmed.

**REASONING:** The Supreme Court distinguished between the admissibility of a regulation which is enforceable and the admissibility of a regulation which is not. The violation of an applicable building code regulation is negligence *per se*. The fact that a building is not up to the standard of an inapplicable regulation can be considered by the jury in deciding whether or not, under common law principles, the owner conducted himself as a reasonably prudent person.

“We therefore conclude that the trial court properly considered the building code and the federal regulations as *some* evidence of the standard of care because they reflected the collective experience and expertise of both the office of the state building inspector and the federal Consumer Product Safety Commission and what they believe to be the safe use of glass in entryways.”

279 Conn. at 867-68 (footnote omitted.)

The defense argued that the likelihood that the jury would misuse the regulations and apply them as negligence *per se* standards was too great to allow their admission. Justice Zarella, in dissent, agreed.

§ 4-1            DEFENDANT DOCTOR’S EXPERIENCE NOT RELEVANT REGARDING INFORMED CONSENT – DUFFY V. FLAGG, 279 Conn. 682 (2006); Vertefeuille, J.; Trial Judge –Lager, J.

**RULE:**            Defendant doctor’s incomplete answer to patient’s inquiry regarding the doctor’s prior experience – which was not claimed to affect the patient’s risk – is not relevant on the issue of informed consent.

**FACTS:**            Plaintiff consulted with the defendant obstetrician regarding having a vaginal birth after cesarean section (“VBAC”) with her second child. In explaining the VBAC procedure, the defendant said the risks included uterine rupture which could result in the death of mother or child.

The plaintiff asked the doctor about the doctor’s personal experience with VBAC and whether the doctor had had any negative outcomes. The doctor stated that one of her previous patients had suffered a uterine rupture; she did not tell the patient that the infant had died and that she had been sued.

Plaintiff elected to attempt the VBAC. Her uterus ruptured, and her baby died.

Defendant filed a motion in limine to prohibit the plaintiff from introducing any evidence regarding the earlier case where the infant died and the doctor was sued. The trial court granted the motion, ruling that unless there was evidence that the defendant doctor’s experience of having had one prior death created a statistically more significant risk for the patient, it was not relevant.

In other words, unless the plaintiff proved that the prior uterine rupture and infant death *increased the risk* of the procedure for the plaintiff, it was not one of the four areas doctors must discuss when obtaining informed consent.

In the decision being appealed, Duffy v. Flagg, 88 Conn. App. 484 (2005), the Appellate Court had held:

“[W]e do not believe that a plaintiff must first demonstrate a nexus between a physician’s prior experience with an anticipated procedure and the statistical risks of the procedure before evidence of a physician’s misleading and incomplete answer to a question related to that procedure can be presented to a jury. \* \* \* [W]e believe that the court’s narrow construction of the doctrine of informed consent is at odds with our Supreme Court’s determination in *Logan* that jurors should have the opportunity to determine the scope and amount of information required to support a claim based on a lack of informed consent. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292-94.”

88 Conn. App. at 492.

The Supreme Court reversed the Appellate Court.

The defendants argued that the Appellate Court failed to confine the doctor’s duty to inform to the four factors recognized in prior case law: (1) the nature of the procedure; (2) the risks and hazards of the procedure; (3) the alternatives to the procedure; and (4) the anticipated benefits of the procedure. They contended that the court below had added a fifth element, “an obligation on the part of a physician to disclose details of his or her professional experience even if this experience did not increase the risk to the patient.”

279 Conn. at 688.

The Supreme Court agreed, rejecting the idea of a flexible standard:

“First, the [plaintiff’s] claim runs afoul of our adoption and consistent application of an *objective* standard of

disclosure. We do not require a physician to disclose information that a particular patient might deem material to his or her decision, but, rather, limit the information to be disclosed to that which a reasonable patient would find material. Second, the information that the plaintiff sought to admit into evidence did not relate to any of the four specific factors encompassed by informed consent as we have defined it. Before granting the defendants' motion in limine the trial court in the present case carefully ascertained that the plaintiff did not claim, and was not offering any evidence that, Flagg's prior experience with vaginal birth after cesarean section increased the risks or hazards of that procedure for the plaintiff. The evidence therefore had no relevance to any of the four established elements of informed consent in this state."

Id. at 693.

**COMMENT:** The court was careful to point out that if the physician's prior experience increased the risk to the patient, that information must be disclosed under the second factor.

Furthermore, the decision does not limit a patient's right to recover for a doctor's misrepresentation.

§ 4-1           FACT THAT MOST DRIVERS ON A GIVEN ROAD EXCEED THE SPEED LIMIT NOT ADMISSIBLE AS CUSTOM - DEEGAN V. SIMMONS, 100 Conn. App. 524, *cert. denied*, 282 Conn. 923 (2007); Bishop, J.; Trial Judge – Arnold, J.

**RULE:**           Testimony as to the average or "normal" speed of drivers on a particular road is not admissible as custom and practice, the reasonableness of speed being within the common knowledge and experience of the jury.

**FACTS:**           Intersection collision case in which the plaintiff pulled out from a stop sign and attempted to make a left turn onto Research Parkway in Meriden and was hit by a truck.

Plaintiff alleged speeding and traveling unreasonably fast. The speed limit on Research Parkway was 40 m.p.h. The plaintiff's accident reconstructionist opined that the truck driver was traveling 49 to 51 m.p.h. The defendant's accident reconstructionist opined that the truck driver was traveling at 39.03 m.p.h.

Over objection, defense counsel was allowed to elicit from the police officer that the average speed of traffic on Research Parkway was between 40 and 50 miles an hour, and even higher later at night. Also over objection, defense counsel elicited testimony from a lay eyewitness, who regularly drove on Research Parkway, that the "normal speed" of the flow of traffic on Research Parkway was 45 to 50 m.p.h.

The Appellate Court reversed.

**REASONING:**

"The general rule unquestionably is that a party charged with negligent conduct will not be allowed to show that such conduct was common or customary among those... placed under like circumstances and owing the same duties." 100 Conn. App. at 531.

"Where the evidence in a case is such that the trier, applying to the facts found proven the common knowledge and experience of men in general has an adequate basis for determining whether the conduct in question is that of an ordinarily prudent person, the practice of other persons would serve no sufficient purpose to justify its admission, especially in a jury trial where it might create confusion as to the ultimate test to be applied.... When the question is, did a person use ordinary care in a particular case, the test is the amount of care ordinarily used by men in general, in similar circumstances. If it be matter of common knowledge, such amount of care needs no proof-the jury take notice of it."

Id. at 532 (citations omitted; internal quotation marks omitted).

§ 4-1           PRIOR DWI CONVICTIONS ADMISSIBLE ON ISSUE OF PUNITIVE DAMAGES - YEAKLEY V. DOSS, Supreme Court of Arkansas, No. 06-851, WestLaw 1560550 (May 31, 2007); Corbin, J.

**RULE:**       Even when a defendant driver admits negligence and intoxication, defendant's earlier drunken driving convictions are relevant to punitive damages claim.

**FACTS:**       Claim arising from motor vehicle accident. Defendant had pled guilty to DWI on the day in question. Plaintiff sought to introduce evidence that defendant had pled guilty to drunken driving twice before. Defendant moved in limine to exclude the prior convictions.

The trial court excluded the prior convictions as irrelevant. The jury did not award punitive damages. The Supreme Court of Arkansas reversed.

**REASONING:**   The standard for awarding punitive damages includes an assessment of whether the defendant acted recklessly, i.e., "with the knowledge that his conduct of driving while intoxicated could result in injury and that he continued that conduct in reckless disregard of the consequence from which malice could be inferred."

Yeakley at 8.

The court held that the earlier convictions were relevant to this determination:

“Specifically, the evidence of his convictions is relevant to the question of whether he knowingly drove in an intoxicated state in conscious disregard to the fact that his actions could result in injury, an element that Yeakley was required to prove for an award of punitive damages.

\*           \*           \*

Evidence that Doss was intoxicated in this one instance versus evidence that this was in fact his third conviction for DWI could certainly impact a jury's ability to award punitive damages.”

Id. at 9-10.

**COMMENT:** The standard in Connecticut for awarding common law punitive damages or double/treble damages under C.G.S. §14-295 are similar to the Arkansas standard.

§ 4-3 EVIDENCE RE: INFORMED CONSENT NOT ADMISSIBLE IN SURGICAL ERROR CASE - HAYES V. CAMEL, 283 Conn. 475 (2007); Norcott, J.; Trial Judge - Radcliffe, J.

**RULE:** Where there is no informed consent claim, evidence that the surgeon told the patient that the consequence the patient ultimately suffered was a risk of the procedure is inadmissible because its probative value is outweighed by the danger of confusion of the issues.

**FACTS:** Medical malpractice case claiming surgical error. Plaintiff had an L4 herniated disc for which Dr. Camel performed surgery. During the procedure, Camel pierced the dura, causing a leak of cerebral spinal fluid and damage to the plaintiff's sacral nerves.

Plaintiff did not claim lack of informed consent, but that defendant negligently pierced the dura.

Dr. Camel had informed the plaintiff before surgery that nerve damage was a risk. Plaintiff filed a motion in limine to prohibit the defendant from offering evidence that Camel informed plaintiff of this risk on the grounds (a) that it was not relevant in the absence of an informed consent claim and (b) that it would mislead the jury into thinking that, when he agreed to the surgery, the plaintiff assumed the risk of nerve damage.

The trial court ruled that the fact that nerve damage is a risk of the procedure is relevant because it demonstrates that resulting nerve damage does not itself establish

negligence. (Contrast this with a case in which the complication is not a risk of the procedure, so that the fact that the complication occurred may establish negligence.)

The trial court also recognized that, as there was no informed consent claim, there was danger of the jury being misled, and gave a charge designed to avoid the misuse of this evidence:

“[S]imply because a particular injury is considered to be a risk of the procedure does not mean that a physician is relieved of the duty of adhering to the appropriate standard of care and does not mean that because the injury was a risk of the procedure injury did not result from a failure to conform to the standard of care.”

283 Conn. at 492 n.20.

The Supreme Court held that the admission of the evidence was error that, in view of this charge, was harmless.

**REASONING:** The court agreed with the trial judge that the fact that nerve damage is a risk of the procedure is relevant, but held that the fact that that risk was communicated to the patient is not relevant.

“[A]dmission of testimony about what the plaintiff specifically had been told raised the potential that the jury might inappropriately consider a side issue that is not part of the case, namely, the adequacy of the consent.... Thus although evidence of the risks of a surgical procedure is relevant in the determination of whether the standard of care was breached, it was unduly prejudicial to admit such evidence in the context of whether and how they were communicated to the plaintiff. Rather, such evidence is properly admitted, without this risk of confusion and inappropriate prejudice, in the form of, for example, testimony by the defendants or nonparty expert witnesses about the risks of the relevant surgical procedures generally.”

Id. at 487-88.

**Article VII – Opinions and Expert Testimony.**

§ 7-1 SPOUSE NOT PERMITTED TO GIVE OPINION ON VALUE OF REAL PROPERTY - PORTER V. THRANE, 98 Conn. App. 336 (2006); McLachlan, J.; Trial Judge – Winslow, J.

**RULE:** Although a property owner is permitted to give an opinion regarding the value of real property, the owner’s spouse is not.

**FACTS:** In this divorce case, the principle issue was the value of the marital residence. The husband had sole ownership of the property since 1988. The parties were married in 1991. The wife had moved out when the parties separated in 2001.

The trial court permitted the wife to testify as to the value of the property, reasoning that “the owner of the property has intimate knowledge of the characteristics of the property, the finances associated with the property, the condition of the property and so forth. This witness would appear to be in a similar situation.” 98 Conn. App. at 341.

The Appellate Court reversed.

**REASONING:**

“[A] party, although having no qualification other than his ownership, is competent to testify as to the value of his real property.... Commentary to § 7-1 of the Connecticut Code of Evidence acknowledges this narrow exception to the general rule that lay witnesses may not give expert opinions. Absent a proper foundation and the establishment of reasonable qualifications, a witness who is not the owner of property is not competent to testify as to its value.”

Id. (citations omitted).

“Although we recognize that in some situations a non-owner may be competent to testify about the value of property, none of those circumstances is present here, and we decline the defendant’s urging that we extend this

exception further to permit a non-owner, nonresident spouse to testify as to the value of real property. At the date of dissolution, the defendant had not lived at the property for almost three years.

Id. at 341-42 (footnote omitted).

§ 7-2            PORTER ANALYSIS REQUIRED FOR OPINION THAT WIND COULD NOT KNOCK OVER LADDER - PRENTICE V. DALCO ELECTRIC, INC. – 280 Conn. 336 (2006); Borden, J.; Trial Judge – Frazzini, J.

**RULE:**            Testimony regarding the amount of force required to move a particular object is within the realm of physics and beyond the understanding of the average juror; therefore, it is the type of evidence requiring a validity assessment under Porter.

**FACTS:**            Defendant hired the plaintiff to install a sign on the front of its building in Meriden. When plaintiff and a co-worker arrived and inspected the site, they informed the defendant that they would be unable to complete the work because the ladders they had brought were too short. The defendant offered the plaintiff the use of an extension ladder. Plaintiff said they could not complete the installation because they needed two extension ladders, but accepted the loan of the one extension ladder in order to take measurements. The owner then offered a second extension ladder, which they did not accept.

The plaintiff and his co-worker set up the first extension ladder to take the measurements. The owner got the second extension ladder and leaned it against the building, 8 to 10 feet from where the plaintiff and his co-worker had placed the first ladder. At that point the plaintiff informed the owner that they could not use the second ladder because it was missing braces required for stability.

While the plaintiff was on the first ladder taking measurements, the second ladder fell, striking the first and knocking the plaintiff to the ground. No one was touching the second ladder when it fell.

Plaintiff offered the expert testimony of Mervin Strauss, a forensic engineer and accident reconstructionist, who testified over objection that the wind conditions at the time and place of the accident would not have caused a properly set up ladder, free of defects, to fall.

Strauss contradicted his own testimony by conceding that he could not state with reasonable engineering probability that the wind conditions were not the sole cause of the ladder becoming dislodged and colliding with the plaintiff.

He acknowledged that determining the amount of force required to move a particular object is an exercise within the realm of physics requiring certain factual data (wind speed, the ladder's weight, and the coefficient of friction between the ladder and the edge of the roof) and the completion of calculations. Strauss conceded that he had not gotten any of the data or performed the calculations that would allow him to express his opinion to a reasonable probability.

The defendant filed a motion in limine seeking to preclude this testimony, and requested a Porter hearing. The trial court denied the request and admitted the testimony.

The Supreme Court reversed.

**REASONING:** “We conclude that Strauss’ opinion was scientific evidence within the meaning of *Porter*, and that the trial court abused its discretion by permitting Strauss’ expert opinion testimony without first assessing the validity of the methodology underlying his opinion as part of a *Porter* hearing.” 280 Conn. at 347.

Next, the court rejected the argument that because the effect of wind on a ladder is a matter of common experience upon which the jury can exercise independent judgment, no Porter analysis was necessary. The court points out that the critical issue here was not the effect of wind in general, but whether the specific wind speed on the day in question could generate enough force to knock over the ladder.

The court then pointed out that “by Strauss’ own admission, and despite his familiarity with the scientific calculations that would have allowed him to have tested his theory..., he used no methodology to arrive at his conclusions.” Id. at 351-52.

Finally, the court rejected the plaintiff’s reliance on a line of cases holding that not all scientific evidence requires a Porter hearing. Those cases are confined to areas, such as hair analysis and footprint analysis, where the jury can exercise its own powers of observation to test the expert’s opinion. The jury in this case had no such tools at its disposal.

§ 7-2            PORTER ANALYSIS NOT REQUIRED FOR TESTIMONY THAT IS NEITHER SCIENTIFICALLY OBSCURE NOR INSTILLED WITH AN AURA OF MYSTIC INFALLIBILITY - HENDERSON V. DEMATTEO MANAGEMENT, INC., Superior Court, New London (March 14, 2007); Docket Number CV-05-5000094; Leuba, J.

**RULE:**            Testimony which is neither scientifically obscure nor instilled with an aura of mystic infallibility, and which merely places a jury in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment, does not require a Porter analysis.

**FACTS:**            In this premises liability case, plaintiff had gone into a stall in a handicapped ladies’ room and hung her eight-pound purse from the hinged grab bar.

When she bent down to assist her child in using the toilet, the bar fell from its upright position and hit her on the head.

The grab bar was designed to rest vertically against the wall next to a toilet until needed by a disabled person, who moves it to a horizontal position for railing support. The bar pivots on a hinge with an adjustable clamping mechanism.

The evidence at issue in the case related to the amount of force needed to move the bar from upright to horizontal. The plaintiff sought to offer the testimony of an engineer that the more an adjustable clamp around the hinge is tightened, the slower the grab bar descends. Plaintiff sought to offer the engineer's opinion that in this case the clamp was adjusted too loose, allowing the bar to "free fall" rather than descend at a controlled pace.

Defendant filed a motion in limine to preclude this evidence. The trial court denied the motion.

**REASONING:** The trial court held that this testimony "does not involve the 'aura of mystic infallibility' nor is it 'scientifically obscure.'" For this reason the court finds a Porter analysis inappropriate to the case." Henderson at 13.

§ 7-2            EXPERT TESTIMONY NOT REQUIRED TO ESTABLISH THAT A PROFESSIONAL'S FAILURE TO FILE A REQUIRED NOTICE WAS NEGLIGENT - VANLINER INSURANCE COMPANY V. FAY, 98 Conn. App. 125 (2006); Gruendel, J.; Trial Judge – Stevens, J.

**RULE:**        While a claim against an insurance adjuster sounds in professional negligence, expert testimony was not required to establish negligence where the adjuster's failure to file a required notice constituted a gross and obvious want of care and skill.

**FACTS:** The defendant insurance adjuster failed to file a notice to transfer a workers' compensation claim from the plaintiff to the Second Injury Fund on time.

Defendant claimed that expert testimony was needed to establish the standard of care for a workers' compensation adjuster in Connecticut. The trial court disagreed. The Appellate Court affirmed.

**REASONING:** Although expert testimony as to the standard of care is usually required in professional negligence cases, there is an exception for an obvious and gross mistake. "In this instance we are satisfied that the court was able to discern the various days on a calendar without the need for expert testimony." 98 Conn. App. 125 at 138.

§ 7-2 EXPERT TESTIMONY IS NOT REQUIRED TO APPLY BOATING REGULATIONS - MICHALSKI V. HINZ, 100 Conn. App. 389 (2007); Gruendel, J.; Trial Judge – Frankel, J.

**RULE:** Issues involving the applicability of, and compliance with, boating regulations are not beyond the ken of the average trier of facts.

**FACTS:** Boating collision in which one of the plaintiff's claims was that the defendant failed to sound his horn before the collision. The 2001 Connecticut Boaters' Guide was admitted as an exhibit. That Guide provides that two vessels on a collision course should exchange a one-blast signal.

Defendant claimed that plaintiff could not establish a prima facie case of negligence without the aid of expert testimony. The trial court disagreed. The Supreme Court affirmed.

**REASONING:**

"The issues before the court involved boating regulations and the defendant's compliance therewith. \* \* \* [O]ur boating regulations require the sounding of a horn when

two vessels are approaching in a head-on situation. Whether the defendant in fact complied with that precautionary requirement is a relatively straightforward inquiry that is not manifestly beyond the ken of the average trier of fact.”

100 Conn. App. at 404-05.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO ADMIT PHOTOS OF VEHICLE DAMAGE - BRENMAN V. DEMELLO, 191 N.J. 18, 921 A.2d 1110 (2007); Justice Rivera-Soto.

**RULE:** Expert testimony is not required for the admission of photographs of vehicle damage offered to show the cause or extent of a plaintiff’s injury.

**FACTS:** Plaintiff alleged that, as a result of a rear-end collision, she required a three-level cervical fusion. Defendant offered photographs of plaintiff’s car, showing minimal bumper damage.

Plaintiff filed a motion in limine to exclude the photographs absent expert biomechanical testimony connecting the extent of the car damage to the force of the impact. Defendant argued that the photographs were admissible to prove the extent of the impact, the damage to plaintiff’s vehicle, and, by inference, the force involved and the extent to which plaintiff’s injuries were caused by the impact.

The trial court admitted the photographs. The jury found that the defendant did not cause the plaintiff’s injuries. The Supreme Court of New Jersey affirmed.

**REASONING:**

“We reject a per se rule that requires expert testimony as a foundation for the admissibility of a photograph of vehicle damage when the photograph is used to show a correlation between the damage to the vehicle and the cause or extent of injuries claimed by an occupant of the struck vehicle. Instead, we commend that judgment to the sound discretion of the trial court. Consistent there-with, a party opposing

the admission of photographs of damage to a car remains free to offer expert proofs for the purpose of showing that there is no relationship between the extent of the damage and the cause and severity of the resulting injuries. Conversely, a party proposing the use of photographs of impact may tender its own expert proofs to further support the proposition in its case-in-chief – either that slight impact force results in no or slight injury, or that great impact force results in great injury – or to rebut its opponent’s assertions. In the end, however, such expert proofs address the weight to be given to photographs of impact, not their admissibility.”

191 N.J. at 21.

§ 7-2 EXPERT TESTIMONY IS REQUIRED TO PROVE THAT METHADONE IN BLOOD IMPACTED BEHAVIOR – STATE V. LAWSON, 99 Conn. App. 233, *cert. denied*, 282 Conn. 901 (2007); McDonald, J.; Trial Judge – Tobin, J.

**RULE:** The effect of a trace amount of methadone in a driver’s blood is relevant only if it is shown to have affected the driver’s ability to operate, a subject on which expert testimony is required.

**FACTS:** Prosecution for manslaughter with a motor vehicle, in which defendant, a drunk driver, turned left in front of a motorcycle, killing the motorcyclist. The defendant fled the scene.

On autopsy, a trace amount of methadone was found in the motorcyclist’s blood. The State filed a motion in limine to preclude the defendant from offering this evidence. The trial court granted the motion, ruling that “the effects of a trace amount of methadone on motor skills or judgment must be shown by testimony from a qualified expert.” 99 Conn. App. at 247. The trial court gave the defendant the opportunity to produce such expert testimony, which the defendant did not do. The Appellate Court affirmed.

**REASONING:** In support of its claim that expert testimony is not required, the defendant pointed to State v. Padua, 273 Conn. 138 (2005) in which the Supreme Court held that expert testimony was not required to prove that eating marijuana is bad for children. The Lawson court distinguished Padua in that “unlike the effects of marijuana, the effects of a trace amount of methadone on driving impairment is not a matter of common knowledge, experience, and common sense; therefore expert evidence would be required.” 99 Conn. App. at 250.

§ 7-2 EXPERT TESTIMONY IS REQUIRED TO LINK MARIJUANA IN BLOOD TO BEHAVIOR - DEEGAN V. SIMMONS, 100 Conn. App. 524, *cert. denied*, 282 Conn. 923 (2007); Bishop, J.; Trial Judge – Arnold, J.

**RULE:** A laboratory report showing that a driver’s blood tested positive for marijuana is inadmissible absent expert testimony linking the finding to behavior.

**FACTS:** When defendant truck driver Simmons was taken to the hospital, a test for a cannabinoid in his system resulted in a finding of “abnormal.” Plaintiff alleged that Simmons was operating under the influence of marijuana. Defendant filed a motion in limine to exclude the laboratory report. The trial court granted the motion. The Appellate Court affirmed.

**REASONING:** On appeal, plaintiff relied on State v. Clark, 260 Conn. 813 (2002) which held that expert testimony was not required to demonstrate the effect of marijuana on an eyewitness who testified to smoking five marijuana cigarettes shortly before witnessing the incident in question. The Supreme Court distinguished Clark on numerous points:

“In the case at hand, the court correctly noted that there was no evidence that marijuana had been used prior to the accident and no evidence that Simmons was impaired while driving his vehicle. Without corroborating evidence, the laboratory report itself would not explain: (1) how long a cannabinoid substance stays in a person’s system; (2) the amount of cannabinoid in Simmons’ system at the time of the accident; (3) the relationship between cannabinoid and marijuana; (4) what other products might cause a positive result for a cannabinoid substance; (5) whether urine tests could produce a false positive result and, if so, how often; (6) the possibility for contamination of the sample; and (7) the chain of custody of any sample. These are not subject areas within the common knowledge of the jury and yet each of these factors has evidentiary significance. Thus, the court correctly concluded that the laboratory report indicating an “abnormal result” for a cannabinoid screen was inadmissible absent explanatory expert opinion.”

100 Conn. App. at 538.

§ 7-3 NUMBER OF M.P.H. OVER SPEED LIMIT AT WHICH OFFICER ISSUES TICKETS INADMISSIBLE - DEEGAN V. SIMMONS, 100 Conn. App. 524, *cert. denied*, 282 Conn. 923 (2007); Bishop, J.; Trial Judge – Arnold, J.

**RULE:** Police officer’s testimony that he does not ticket motorists unless they are traveling more than 15 m.p.h. over the speed limit is inadmissible opinion testimony on the ultimate issue of reasonable speed.

**FACTS:** See § 4-1 above. Over objection, the defendant offered the testimony of Officer Harris that he usually ticketed motorists only when they went more than 15 miles over the posted speed limit, because he felt it was reasonable.

The trial court allowed the testimony. The Appellate Court reversed.

**REASONING:**

“Here, it is undisputed, that an ultimate issue at hand was the reasonableness of the speed at which [defendant]

Simmons was driving at the time of the accident. Thus the question is whether Harris' testimony constituted an opinion on this ultimate issue. Although the defendants argue that Harris' testimony was factual in nature and not opinion testimony, we conclude that his testimony taken as a whole and given its logical effect, was an opinion on the ultimate issue in the case. Thus, it should not have been admitted.

"Harris' testimony regarding the speeds he considers to constitute a chargeable offense constituted no more than an indirect or disguised opinion of whether Simmons' actions were unreasonable. In essence Harris was suggesting by implication that he does not ticket drivers for speeds up to fifteen miles per hour over the speed limit because he believes it is reasonable for motorists to drive at such speeds on Research Parkway. Thus, in the guise of a factual representation, Harris was permitted to suggest that Simmons was traveling at a reasonable speed. Indeed, when asked why he usually tickets someone driving more than fifteen miles per hour over the posted speed limit, Harris responded "[b]ecause I feel it's reasonable." Accordingly, we conclude that under the facts of the present case, the court improperly admitted Harris' testimony because it constituted improper opinion evidence."

100 Conn. App. at 535-36.

#### **Article VIII – Hearsay.**

§ 8-4 POLICE DIAGRAM BASED ON WITNESS STATEMENTS INADMISSIBLE - PIROLO V. DEJESUS, 97 Conn. App. 583 (2006); Schaller, J.; Trial Judge – Zoarski, J.

**RULE:** A police diagram showing how vehicles collided based on what the drivers and witnesses said is hearsay and does not fall within the business record exception.

**FACTS:** In this rear-end collision case, plaintiff testified that, while stopped at a red light, she was hit from behind by the defendant. The defendant testified that plaintiff

backed up into defendant after unsuccessfully attempting a right turn. The cars were not moved before the police officer arrived at the scene.

The police diagram showed the plaintiff's vehicle turned slightly to the right at the corner of the intersection, but the arrows did not indicate that the plaintiff had backed up. The police officer testified the diagram was based upon the statements of the drivers and witnesses.

The trial court admitted the diagram. The Appellate Court found the admission to be error, but harmless.

**REASONING:** Police reports are subject to the business record analysis. Statements in a police report must be based upon the officer's own observations or upon information provided by an observer with a business duty to transmit the information (e.g., another officer). Therefore, witness statements in police reports are inadmissible unless they fall within another hearsay exception, as do statements of opposing parties.

A police diagram showing how the vehicles collided is treated much like a statement. If it is based upon the accounts of the drivers and witnesses, it is inadmissible. If it is based upon the police officer's own observation, his independent accident reconstruction, or the observations of other officers, it is admissible. (If the diagram is based on the statement of a party opponent, it is also admissible.)

## **Discovery**

REFUSAL TO ENFORCE PARTIES' DISCOVERY RIGHTS REVERSIBLE ERROR - RAMIN V. RAMIN, 281 Conn. 324, (February 20, 2007); Boren, J.; Trial Judge – Shay, J.

**RULE:** Where motions to enforce discovery requests are properly presented to the court, the court has an obligation to consider these motions and if necessary to allow a party to properly prosecute her case, enter appropriate orders to enforce the parties' discovery rights.

**FACTS:** On August 2, 2000 the plaintiff filed her first discovery requests. The defendant failed to comply. Plaintiff filed a motion for contempt. In October 2000 the court ordered the defendant to comply.

The plaintiff filed her second motion for contempt in January 2001. Defendant provided an authorization allowing plaintiff to obtain information directly from his employer. Plaintiff was unsuccessful in obtaining the information from the employer.

In July 2001 the plaintiff filed her third motion for contempt, in response to which the court ordered the defendant to respond within 30 days and imposed a \$2500 sanction. In August, the defendant provided partial compliance. In October, the plaintiff provided the defendant with a detailed list of documents still missing, and requested the payment of the \$2,500.

In January 2002 the plaintiff filed her fourth motion for contempt, which led the court to impose attorney's fees and sanctions against the defendant. In February, the parties participated in a discovery mediation which resulted in a court order for the production of documents. Still, production was incomplete.

In August, the plaintiff filed her fifth motion for contempt. When the motion for contempt was presented for a hearing in September, the court pointed out that the case was the oldest case on the docket and set it down for trial. When the plaintiff attempted to bring to the court's attention the specific items needed for the trial, the court, evincing

its frustration with the age of the case and the court's own caseload, refused to address the issues.

The Supreme Court reversed in a 4 to 3 decision.

REASONING:

“We have already squarely addressed this issue, concluding that, in the absence of ‘an extreme, compelling situation,’ a trial court that has jurisdiction over an action lacks authority to refuse to consider a litigant’s motions.”

281 Conn. at 336.

### **Discovery**

SANCTION OF DEFAULT FOR DISCOVERY VIOLATION HELD REVERSIBLE ERROR - SWEENEY V. CHOICE HOTELS INTERNATIONAL, INC., 97 Conn. App. 741 (2006); Flynn, J.; Trial Judge – Gordon, J.

**RULE:** Before a trial court may impose sanctions for violation of a discovery order, the order must be reasonably clear, and the record must establish that the order was in fact violated. In addition, the sanction must be proportional to the violation.

**FACTS:** Slip-and-fall case in which the defendant failed to produce its franchise agreement. The trial court entered a default against the defendant and added as a further sanction that certain paragraphs of the plaintiff’s complaint were deemed admitted. The Appellate Court reversed, finding an abuse of discretion.

**REASONING:** The Appellate Court relied on the Millbrook Owners Assn. Inc. v. Hamilton Standard, 257 Conn. 1 (2001), which established the rule set forth above for the imposition of sanctions as a result of the violation of discovery orders. The court held that in this case the first prong (that the discovery order be reasonably clear and that the record establishes it was violated) was not met.

## **Expert Disclosure**

PRECLUSION OF EXPERT REVERSED – WEXLER V. DEMAIO, 280 Conn. 168 (2006); Vertefeuille, J.; Trial Judge - Sheldon, J.

**RULE:** Trial court's order that party who had not timely complied with expert disclosure requirements file a detailed written expert report; and the subsequent orders precluding the expert and granting summary judgment, reversed.

**FACTS:** Medical malpractice action against four physicians. Three were in one practice and represented by the same attorney. The fourth, Davis, was from a different practice and represented by separate counsel.

In July 2002 the court issued a scheduling order requiring the plaintiffs to disclose their experts by November 2002. The plaintiffs did not comply.

In May 2003 defendant Davis filed a motion for summary judgment. Two weeks later, the plaintiffs filed a motion seeking more time to disclose their expert witnesses. The court granted the plaintiffs' motion to extend time until June, but required that, in addition to fully complying with the Practice Book disclosure requirements, the disclosure include (a) the expert's c.v., (b) a list of all materials and information viewed or considered by the expert, (c) a copy of all such materials not yet disclosed, and (d) a list of all cases in which the expert had testified since January 1999.

The court also ordered the plaintiffs to make the expert available for a deposition on specific dates during the first two weeks of July, and to bear all costs associated with the deposition.

The plaintiffs filed their disclosure within the court's deadline, but did not include a list of the cases in which the expert had testified.

Defendant Davis filed a motion to preclude. The defendants chose not to depose the plaintiffs' expert.

A hearing was held on September 4, 2003 at which the court found that the plaintiffs' compliance was insufficient and ordered that a written report be supplied by the expert by September 10, 2003.

15 days after this deadline, the plaintiffs filed an additional supplemental disclosure which provided more detail, but no written report, billing list, or transcripts of prior testimony.

The trial court then granted the defendant's motions to preclude and for summary judgment. The Appellate court affirmed.

The Supreme Court unanimously reversed the Appellate Court.

**REASONING:** The Appellate Court had upheld the trial court's authority to require a written report under the circumstances of this case: "Given that the court could have precluded the plaintiffs' expert under § 13-4 (4) or its own inherent powers to compel observance of its rules; see *Millbrook Owners Assn., Inc. v. Hamilton Standard*, supra, 257 Conn. 12-13; the court was well within its discretion to issue a new, albeit stringent, discovery order." Wexler v. Demaio, 88 Conn. App. 818, 831-32 (2005).

Judge Lavery had dissented: "I believe that the expert disclosure provided by the plaintiffs... met the requirements of Practice Book § 13-4 (4). Accordingly, I would hold that the court order of September 4, 2003, which imposed additional stringent requirements that the plaintiffs were unable to meet and ultimately resulted in the dismissal of their case, was an abuse of discretion." Id. at 834.

Judge Lavery continued:

“The plaintiffs argue persuasively that the court improperly imported into state court proceedings the more rigorous standard for expert disclosure in federal cases. The current federal rule, in contrast to § 13-4 (4), explicitly contemplates disclosure similar to that ordered by the court, in particular, disclosure of a detailed “written report prepared and signed by the witness . . . contain[ing] a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Fed. R. Civ. P. 26 (a) (2) (B).

Id. at 837-38.

As this dissent points out, the federal rule was designed to eliminate or reduce the need for deposing experts. In contrast, Connecticut state courts, the disclosure is designed to give the opposing side a framework to be examined in detail at deposition.

In reversing the Appellate Court, the Supreme Court reiterated that the rule regarding the imposition of sanctions is set forth in Millbrook Owners Assn., Inc. v. Hamilton Standard, 257 Conn. 1 (2001).

The court then addressed whether or not the plaintiffs’ disclosure met the requirements of § 13-4(4), and held that it did. The court specifically rejected some of the conditions imposed by Judge Sheldon and approved by the Appellate Court. It held that the failure of the disclosure to distinguish specifically what opinions related to each defendant was not a violation of § 13-4(4), and rejected the assertion that the failure to

link the documents relied on by the experts to specific opinions was a violation of § 13-4(4).

The Supreme Court noted that § 13-4(4) is designed to “apprise the defendant of the basic details of the plaintiffs’ claims.” 280 Conn. at 187.

“Indeed, the text of § 13-4(4) was modeled on the interrogatory requirements of Practice Book § 13-4(1)(A), which was not intended to elicit “an overly detailed exposition of the expert’s opinion.” R. Ciulla & R. Allen, “Comments on New Practice Book Revisions,” 4 Conn. L. Trib., June 19, 1978, p. 3 (explaining amendments to rules of practice).

“In the present case, although the plaintiffs’ June disclosure was not as precise and detailed as it could have been, we nevertheless conclude that it complied with the minimal requirements of § 13-4(4) because it adequately disclosed the name of the plaintiffs’ expert witness, the subject matter on which he was expected to testify the substance of the facts and opinions to which he was expected to testify and a summary of the grounds of each opinion.”

Id. at 189-90 (footnotes omitted).

### **Expert Disclosure**

INCORPORATING EXPERT REPORT BY REFERENCE SUFFICIENT FOR DISCLOSURE - MILARDO V. KOWALESKI, 101 Conn. App. 822, (June 19, 2007); Gruendel, J.; Trial Judge - Aurigemma, J.

**RULE:** Disclosing that an expert will testify in accordance with an attached report is sufficient to set forth “the substance of the facts and opinions to which the expert is expected to testify.”

**FACTS:** Rear-end collision in which the defendants contested whether the plaintiff’s neck and back pain were caused by the collision. Defendants offered expert testimony that the collision was not the cause of the plaintiff’s problems.

In their disclosure pursuant to Practice Book § 13-4(4), as to the substance of the facts and opinions to which the expert would testify, the defendants stated that he would testify “in accordance with his written report (copy attached).” 101 Conn. App. at 833. The trial court admitted the opinions. The Appellate Court affirmed.

**REASONING:** The court cited the Wexler case (above) as well as Catalano v. Falco, 74 Conn. App. 86 (2002) which held sufficient an expert disclosure that clearly indicated that the expert was expected to testify in accordance with his treatment notes and evaluation and consultation reports, which had previously had been produced.

### **Peremptory Challenges**

PEREMPTORY CHALLENGES CANNOT BE EXERCISED ON THE BASIS OF GENDER - STATE V. GEORGE J., 280 Conn. 51 (2006); Katz, J.; Trial Judge – Hadden, J.

**RULE:** The constitutional rights to due process and a fair trial do not supersede the mandates of equal protection so as to render unconstitutional the rule prohibiting gender based peremptory challenges.

**FACTS:** Defendant was accused of sexually assaulting boys. He maintained that male jurors were more likely to be biased against him than female jurors, and sought to exercise peremptory challenges on the basis of gender. The trial court did not allow the defendant to exercise peremptory challenges solely on the basis of gender. The Supreme Court affirmed.

**REASONING:** Under established case law, no litigant is permitted to exercise peremptory challenges on the basis of race. The court rejected the proposition that gender-based challenges are permissible because a less exacting standard of scrutiny is applied by the court to gender-based equal protection argument.

## **Demonstrative Evidence**

UNLESS MARKED AS A FULL EXHIBIT, A PIECE OF DEMONSTRATIVE EVIDENCE DOES NOT GO INTO JURY DELIBERATION ROOM - BARRY V. QUALITY STEEL PRODUCTS, INC., 280 Conn. 1 (2006); Borden, J.; Trial Judge – McWeeney, J.

**RULES:** Evidence that is not marked as a full exhibit cannot be used by the jury in deliberations, even if requested.

**FACTS:** Plaintiffs, installing a roof, stood on staging attached to the roof with brackets designed and manufactured by the defendants. One of the brackets bent, toppling the plaintiffs off the roof. Plaintiffs brought this products liability case, alleging the bracket was defective.

Defendants claimed that the bracket had not bent, but had been improperly affixed to the roof with nails that were too small. They claimed that the bend in the bracket after the fall was caused by impact with the ground.

At trial, the defendants used a model of the roof on which the plaintiffs were working when they fell, and marked it as a demonstrative exhibit.

During jury deliberations, the jury requested access to the model. The trial court did not permit the jury access to the model, because it had not been marked as a full exhibit. The Supreme Court affirmed.

**REASONING:** The defendants argued that the reason the model was never offered as a full exhibit was because it was large and heavy, but that it model should be treated like a request to view the scene of an accident, which also would not be marked into evidence. It would be within the court's discretion to allow a jury visit to the scene.

The court rejected this analogy, noting that it is within the court's discretion to admit demonstrative exhibits and mark them as full exhibits. This would have required the defendants to establish that the model was "substantially similar to the scene at the time of the accident" which they had not done. The defendants had not even offered the model as a full exhibit. 280 Conn. at 20.

**COMMENT:** The defendants could have offered the model as a full exhibit when the jury requested to see it.

### **Evidence in Arbitration**

RELAXED RULES OF EVIDENCE IN UNRESTRICTED ARBITRATION - KRASSNER V. ANSONIA, 100 Conn. App. 203 (2007), Bishop, J.; Trial Judge – Nadeau, J.

**RULE:** In arbitration under an unrestricted submission, arbitrators are not required to follow the rules of evidence.

**FACTS:** Plaintiff police officer was discharged due to abuse of OxyContin, association with drug dealers, and lack of truthfulness. Under the collective bargaining agreement between the Police Union and Ansonia, the matter was submitted to arbitration. The arbitration panel admitted unsworn witness statements that the officer was using drugs and associating with drug dealers.

Plaintiff filed an application to vacate the award for allowing unsworn statements of witnesses into evidence. The trial court held that the use of such statements deprived the plaintiff of the right to cross-examine these witnesses and vacated the arbitration award. The Appellate Court reversed.

**REASONING:** Since arbitrators are not bound by the rules of evidence, the trial court must find that the admission of the statements amounts to misconduct that

substantially prejudiced the movant - in other words, that the improper evidentiary ruling likely affected the result.

The Appellate Court held that the unsworn statements were admitted in error, because under the Regulations of Connecticut State Agencies, § 31-91-39(a), they were required to be in the form of sworn affidavits. However, the court held that the admission did not constitute misconduct which deprived the officer of a full and fair hearing, and therefore reversed the trial court.

### **Collateral Source Adjustment**

JURY INSTRUCTED TO DISREGARD REFERENCES TO MEDICAL INSURANCE - CAPOZZIELLO V. ROBINSON, 102 Conn. App. 93 (2007); *per curiam*. Trial Judge - Gilardi, J.

**RULE:** It is not necessary to redact references in exhibits to medical insurance coverage or payment of medical bills.

**FACTS:** In this collision case, defense counsel questioned of the plaintiff as to whether he had medical insurance. The medical bills marked as full exhibits contained references to payment by medical insurance. Plaintiff did not object, and claimed plain error on appeal. The Appellate Court affirmed.

**REASONING:** The Appellate Court approved the trial court's use of the following charge:

“Now, you’ve heard reference to insurance, and there may be reference on the medical bills to insurance, which may or may not cover some of the medical expenses incurred by the plaintiff. You’re not to concern yourself with whether or not there was insurance coverage for some or any of these expenses, nor should you speculate or guess as to what amount, if any ... may have been [paid] by insurance. Any payments made are not your concern because after the

case is over, the court makes any and all necessary adjustments to your verdict... and we take into account any payment . . . that were made from... collateral sources.”

102 Conn. App. at 94 n.2 (ellipses in original).

### **Apportionment**

APPORTIONMENT OF NEGLIGENCE IS NOT AVAILABLE AS TO A WITHDRAWN PARTY - VIERA V. COHEN, 283 Conn. 412 (2007); Katz, J.; Trial Judge – Eveleigh, J.

**RULE:** When a plaintiff withdraws a case against one defendant for no consideration, remaining defendants cannot claim apportionment as to the withdrawn defendant.

**FACTS:** This is a medical malpractice case arising out of the delivery of Jodee Viera, during which she suffered shoulder dystocia.

Dr. McNamee attended to Jodee’s mother during her pregnancy, and was present during the early stages of her labor. However, McNamee left during the second stage of her labor and thereafter was unavailable.

Dr. Cohen, one of McNamee’s partners, attended to the mother during the final stages of labor and delivery and delivered the baby.

During the delivery, Jodee’s head delivered but her shoulders became lodged. In order to avoid catastrophic neurological injury or death, Jodee was delivered in a fashion which injured her brachial plexus, leaving her with permanent injury to her left arm.

The plaintiff, who sued both McNamee and Cohen, decided during jury selection to pursue only McNamee, and withdrew the case against Cohen. The plaintiff’s theory at trial was that McNamee had breached the standard of care by failing to ascertain and recognize risk factors for shoulder dystocia before and during the mother’s early stages of

labor, and by failing to perform a cesarean section during those early stages. In particular, the plaintiff's expert opined that Jodee's unusually large size was the predominant cause of the shoulder dystocia. The plaintiff's position was that, by the time Cohen appeared on the scene, it was too late to avoid the injury.

After the plaintiff filed the withdrawal, McNamee filed a notice of claim of apportionment as to his partner, the withdrawn defendant Cohen. The trial court refused to allow McNamee to claim apportionment against Cohen. The Supreme Court affirmed.

**REASONING:** C.G.S. § 52-572h(d) allows a jury to apportion to only two classes of persons: (1) the present parties to the action; and (2) "settled or released persons under subsection (n)." A "settled or released person" under subsection (n) is one who has entered into "release, settlement, or similar agreement...."

Defendant argued that, based on the public policy of requiring defendants in negligence cases to pay only their fair share, the statutory definition should be read broadly enough to include a simple withdrawal that is not a settlement. The Supreme Court rejected this claim in a 3 to 2 decision.

The defendant also argued that plaintiff had conditioned her withdrawal on Cohen agreeing not to meet with defense counsel, endeavor to meet with plaintiff's counsel, etc. The Supreme Court held that the record did not establish that there was a *quid quo pro* for withdrawing the action.

**COMMENT:** It is essential that a plaintiff withdrawing an action against a defendant not seek anything in return if plaintiff wants to avoid apportionment. For example, an agreement that the doctor will not bring a vexatious lawsuit claim against the plaintiff would allow the remaining defendants to claim apportionment

## **Authority to Change the Code of Evidence**

CAN THE SUPREME COURT CHANGE THE C.C.E., OR MERELY INTERPRET AND APPLY IT? - STATE V. SAWYER, 279 Conn. 331 (2006); Zarella, J.; Trial Judge – Espinosa, J.

**RULE:** While authority to change the C.C.E. lies with the judges of the Superior Court in the discharge of their rule-making function, to the extent that changes to evidentiary rules implicate substantive rights, authority may reside in the Supreme Court in the exercise of its common-law authority.

**FACTS:** In State v. Kulmac, 230 Conn. 43 (1994), the Supreme Court had held that in sexual assault cases prior misconduct evidence may be viewed more liberally. This holding was then codified in the C.C.E.

The question raised in Sawyer, a sexual assault prosecution, was whether or not the Supreme Court has the authority to reconsider Connecticut’s approach to prior misconduct evidence in sexual assault cases and change the rule.

**DISCUSSION:** The majority opinion, by Justice Zarella, declined to decide the issue.

In a concurring opinion, Justice Katz, Chair of the Evidence C.C.E. Oversight Committee, set forth her opinion that the Supreme Court cannot “reconsider that holding absent a rule change by the judges of the Superior Court, guided by the Evidence Code Oversight Committee.” 279 Conn. at 363. Justice Katz continued:

“Nonetheless, the majority questions, but leaves to another day, whether, to the extent that evidentiary rules may “implicate substantive rights,” those rules properly may be the subject of such judicial rule making, as opposed to common-law adjudication. In my view, for the reasons that follow, the answer to this question is clear and

straightforward and we should not suggest otherwise to the trial judges who are charged with the daily application of the Code. The Code governs where it speaks, and the courts' common-law rule-making authority governs either where the Code does not speak or where the Code requires interpretation. See Conn. Code Evid. § 1-2.

“The majority’s questioning of this judicial rule-making authority appears to be predicated on a distinction in evidentiary rules between those that are substantive in effect and those that are, I assume, merely procedural in effect. I disagree with the majority’s foundational premise. This court has stated unequivocally that ‘[t]he rules of evidence are procedural.’”

279 Conn. at 363-64 (footnotes omitted).

Justice Katz went on to opine that the Code of Evidence should be treated as “an extension of the Practice Book...” 279 Conn. at p. 366.

Justice Borden, who was chair of the committee that drafted the C.C.E., wrote a concurring and dissenting opinion agreeing with Justice Katz. His opinion contains a comprehensive discussion of the history of the C.C.E. Justice Borden wrote that, in his view, changes in the existing evidentiary law can be accomplished only by amendments to the C.C.E. voted on by the judges of the Superior Court, while the power to interpret the C.C.E. remains with the judges in their common-law authority.

### **Appellate Review of Code Decisions**

STANDARD OF APPELLATE REVIEW FOR CODE OF EVIDENCE DECISIONS - STATE V. SAUCIER, 283 Conn. 207 (2007); Katz, J.; Trial Judge – D’Addabbo, J.

**RULE:** A trial court’s decision based on an interpretation of the C.C.E. is subject to plenary review. The trial court’s decision about whether particular evidence fits within a given rule, is reviewed under an abuse of discretion standard.

**FACTS:** Sexual assault prosecution in which, after the victim reported the assault to the police, she told an acquaintance, “I got Richie, I got him good.”

The defendant offered this statement under the state of mind exception to the hearsay rule, § 8-3(4). The trial court did not admit the statement, ruling that the statement did not fit the exception because it was a statement about a past act not a “then existing mental or emotional condition....” The Supreme Court affirmed.

The decision clarifies the standard of appellate review for cases involving the C.C.E. The court adopts a rule under which the standard of review depends upon the nature of the ruling in the context of the issues of the case:

“To the extent a trial court’s admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no ‘judgment call’ by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility....

“We review the trial court’s decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion.... In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. For example, whether a statement is truly spontaneous as to fall within the spontaneous utterance exception will be reviewed with the utmost deference to the trial court’s determination. Similarly, appellate courts will defer to the trial court’s determinations on issues dictated by the exercise of discretion, fact finding, or credibility assessments.”

283 Conn. at 218-19.

## **Amendments to the Code of Evidence**

Following years of careful scholarship and meetings, the Evidence Code Oversight Committee recommended to the Rules Committee on the Superior Court seven changes to the C.C.E.

The Rules Committee voted to submit to public hearing five of the proposed changes, and to table the two proposals which implicated the authority of the judges of the Superior Court to adopt the Rules of Evidence that are not in accordance with common law or statute. (See discussion of State v. Sawyer, above.)

The five proposed changes were adopted by the judges at their Annual Meeting, and will take effect on January 1, 2008.

### **The Adopted Changes:**

#### ***§ 2-1. Judicial Notice of Adjudicative Facts***

The provision in § 2-1 regarding the court's instruction to the jury on the effect of judicial notice was deleted, in recognition of the fact that the C.C.E. "is not the appropriate repository for jury instructions."

#### ***§ 7-2. Testimony by Experts***

A typo was corrected in the commentary that the Rule is 7-2 not 702.

#### ***§ 8-3. Hearsay Exceptions: Availability of Declarant Immaterial***

Subsection 5 of § 8-3, dealing with statements for purposes of obtaining medical treatment, was amended to give substantive effect to all statements made to medical professionals. The change is described in the new commentary:

"Early common law distinguished between statements made to physicians consulted for the purpose of treatment

and statements made to physicians consulted solely for the purpose of qualifying as an expert witness to testify at trial. Statements made to these so-called ‘nontreating’ physicians were not accorded substantive effect. See, e.g. *Zawisza v. Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2d 578 (1961); *Rowland v. Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418-19, 28 A. 102 (1893). This distinction was virtually eliminated by the Court in *George v. Erickson*, 250 Conn. 312, 73 A.2d 889 (1999), which held that nontreating physicians could rely on such statements. The distinction between admission only as foundation for the expert’s opinion and admission for all purposes was considered too inconsequential to maintain. Accordingly, the word ‘diagnosis’ was added to, and the phrase ‘advise pertaining thereto’ was deleted from, the phrase ‘medical treatment or advice pertaining thereto’, in Section 8-3 (5).”

**§ 8-5. Hearsay Exceptions: Declarant Must be Available**

Subsection 1 (prior inconsistent statement) was amended to reflect the fact that statements covered by this section do not have to be in writing. They can be on audiotape, videotape, or some other equally reliable medium.

**§ 8-6. Hearsay Exceptions: Declarant Must be Unavailable**

A new subsection 8 was added allowing the introduction into evidence of a statement against a party who caused the unavailability of a witness. This is aimed at a case in which the defendant murders the witness.

**The Tabled Changes:**

As noted above, the Rules Committee did not forward two of the Evidence Code Oversight Committee’s recommendations to the judges.

The first involved an amendment to § 4-4(a)(1) regarding character evidence in criminal cases.

The second involved an amendment to § 8-3(1) that would have allowed into evidence “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” The change would have abolished Connecticut’s archaic rule that a statement of an agent is not admissible against the principal without proof that the agent was authorized to speak on behalf of the principal.