**Update on Evidence 2008**
by Bob Adelman and Neil Sutton

"Blessed is the man who, having nothing to say,
abstains from giving us wordy evidence of the fact."
George Eliot (Mary Anne Evans), Impressions of Theophrastus Such (1900)

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## *Introduction*

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from September 4, 2007 through November 4, 2008.

The Update is organized to follow the format of the Connecticut Code of Evidence ("CCE."). That is, to the extent possible, the cases are dealt with under the headings assigned to the ten articles in the CCE.

However, as stated in the commentary to CCE §1-2 (b): "Although the Code will address most evidentiary matters, it cannot possible address every evidentiary issue that might arise during trial." In addition, the authors have included a few cases dealing not with evidence, but with trial practice and procedure, which may be of use to trial lawyers. Therefore, in addition to the articles outlined in the CCE, the Update contains five headings: New Expert Disclosure Rule, Rebuttal Argument, Sufficiency of Evidence, Affidavit Countered by Circumstantial Evidence, and Status of the Code of Evidence.

## *IV. Relevancy*

§ 4-1 NEGLIGENCE OF DRIVER INADMISSIBLE IN "ENHANCED INJURY" CASE – GIANNINI V. FORD MOTOR COMPANY, U.S.D.C., District of Connecticut, Civil Action No. 3:05cv244(SRU), (2007) Underhill, J.

**RULE:** Evidence that driver's negligence caused collision is not relevant in a case alleging seat belt failure.

**FACTS:** Plaintiff alleged that her vehicle accelerated uncontrollably across a parking lot, hit a concrete barrier and then a lamp post. She also alleged that when she attempted to brake, the brakes did not work. Finally, she alleged that her seat belt did not

properly restrain her. Defendant claimed that the plaintiff stepped on the gas, did not brake, was not wearing her seat belt, and was drunk.

The court granted the defendant summary judgment on the allegations that the car accelerated uncontrollably and that the brakes failed. The sole remaining allegation was the alleged failure of the seat belt.

The defendant sought to introduce evidence that the plaintiff was negligent in causing the collision by hitting the gas, not braking and that she was impaired by alcohol.

The court held that evidence offered to prove that the plaintiff was negligent in causing the collision was not admissible.

**REASONING:**

Cases alleging failure of restraint systems are usually referred to as "enhanced injury" or "second collision" cases.

The plaintiff's argument is that the cause of the first collision (the vehicle with the lamp post) is not relevant because the enhanced injuries were caused by the second collision (the occupant with the car's interior), and that second collision should have been prevented by the restraint system. Since car manufacturers know that collisions are inevitable, they are charged with the duty to build cars that are reasonably safe to withstand them.

The defendant's argument is that if the plaintiff negligently caused the collision, the jury should assess comparative fault.

The plaintiff's rebuttal is that since the plaintiff is seeking compensation for only the enhanced injuries – those caused exclusively by the second collision – assessing comparative fault would constitute a double deduction.

The courts are split on this issue. The Connecticut Supreme Court has not yet addressed it.

Judge Underhill held that because the allegations of the plaintiff's negligence did not affect the operation of the seat belt, the evidence was inadmissible.

The plaintiff's victory on this evidentiary issue may have been pyrrhic, because the judge also ruled that evidence of the plaintiff's intoxication was relevant to the plaintiff's ability to observe and recall the critical events of that night – specifically, whether or not she buckled her seat belt.

§ 4-1 FOUNDATION FOR MAP - STATE V. SKIDD, 104 Conn. App. 46, (2007); Harper, J.; Trial Judge – Wilson, J.

**RULE:** Map offered to show the layout of a parking lot not relevant absent a showing that it depicts the lot as it existed at the time of the incident.

**FACTS:** Prosecution for intimidation based on bigotry or bias, threatening, and breach of the peace. On July 12, 2003 a flea market was held in the parking lot of Stamford High School. At the close of the flea market, a man whose property was directly behind the high school got into a dispute with several of the vendors about their leaving garbage in the parking lot. The neighbor was African American. The defendant was accused of using racial epithets toward the neighbor and threatening him.

At trial, defense counsel offered a map of the Stamford High School parking lot. The map was certified in October 2001, almost two years before the incident.

The State objected to the introduction of the map on the ground of relevance, stating that the defendant had not established that the map was a fair and accurate

representation of the conditions that existed at the time of the incident. The court sustained the State's objection. The Appellate Court affirmed.

**REASONING:**

The Appellate Court noted that the admissibility of a map is similar to the admissibility of a photograph: it must be established that the map is a fair and accurate representation of the scene at the time in question. Since the date of the map varied from the date of the incident, the defendant was required to provide foundation testimony that there had been no significant change in the parking lot between October 2001, and 2003. The court suggested to the defendant that he provide a town official to establish this foundation. The defendant did not do so.

**QUAERE:** Could the defendant himself have provided the necessary foundation?

§ 4-1 BILLING CODE ADMISSIBLE TO ESTABLISH TYPE AND NATURE OF EXAMINATION AND IMPEACH PHYSICIAN – TERIO V. RAMA, 104 Conn. App. 35 (2007), *cert. denied*, 285 Conn. 912 (2008); West, J.; Trial Judge – Adams, J.

**RULE:** When the type and nature of the examination undertaken by a physician is in dispute, the billing code, which denotes the type of examination billed to the insurance company, is relevant both to establish what type of examination was actually done and to impeach a physician who testifies that a different examination was done. Furthermore, such evidence is not unduly prejudicial.

**FACTS:** On June 25, 2001 the defendant did a physical examination of the plaintiff. The plaintiff was over 40, had high cholesterol and was overweight. The defendant did not do an electrocardiogram (EKG). Four months later, the plaintiff had a heart attack and died. The autopsy showed a prior heart attack which would have shown up on the

EKG. The issue for the jury was whether the defendant's failure to do an EKG during the examination was a breach of the standard of care.

In support of his contention that an EKG was not required, the defendant claimed that he had not been asked to do, and had not done, a full, comprehensive examination, but only a "camp physical". In this regard he introduced evidence that in the summer of 2001 the plaintiff was about to go on a Boy Scout camping trip with his two children and needed a medical evaluation form signed by a physician in order to be allowed to go on the trip. According to the defendant, the plaintiff came to the defendant's office on June 25, 2001 and asked him to complete the form without any examination. The defendant refused but agreed to give him a "camp physical" that afternoon. The defendant claimed that the plaintiff was told to come back for a full physical and did not return. There was no notation in the chart to that effect.

The plaintiff's claim was that the June 25, 2001 physical was supposed to be a full, comprehensive examination.

The defendant testified that the billing code submitted to the plaintiff's insurance company listed the physical as a camp physical. The plaintiff attempted to introduce evidence in contradiction to this testimony, that the billing code used by the defendant designated the visit as a comprehensive, preventive care physical. This kind of physical, according to plaintiff's expert, must include an EKG. The plaintiff also sought to introduce the American Medical Association's current procedure terminology code book to show the definition of the billing code number used by the defendant.

The trial court excluded the evidence on the basis that the billing code evidence was not relevant on the standard of care and would be unduly prejudicial. The Appellate Court found this ruling to be error, but held that the exclusion was harmless.

**REASONING:**

Actions speak louder than words. The fact that the doctor billed the insurance company for a comprehensive, preventive care physical is a piece of evidence which tends to prove that the physician did what was supposed to be full and comprehensive, preventive care physical. Therefore, the evidence was relevant and admissible under § 4-1 of the CCE.

The more difficult issue was whether or not the evidence was unduly prejudicial under § 4-3. If the jury believed the doctor's testimony that he in fact only intended to do a camp physical, his billing the insurance company for a comprehensive, preventive care physical would mean that he was charging the insurance company for work he did not do. However, for admissibility purposes the question is not whether or not the evidence is prejudicial. The question is whether it is "unduly prejudicial." The Appellate Court concluded it was not.

> "We also conclude that the admission of the evidence would not have created undue prejudice. The fact that the evidence would have had an adverse effect on the defendant does not mean that it was overly prejudicial, especially when weighed against its probative value. We have recognized that "[e]vidence that is inadmissibly prejudicial is not to be confused with evidence that is merely damaging.... All evidence adverse to a party is, to some degree, prejudicial. To be excluded, the evidence must create prejudice that is ***undue*** and so great as to threaten an injustice if the evidence were to be admitted." (Emphasis in original; internal quotation marks omitted.) *Ramos v. Ramos*, 80 Conn. App. 276, 281, 835 A.2d 62 (2003), cert. denied, 267 Conn. 913, 840 A.2d 1175 (2004); *Chouinard v. Marjani*, 21 Conn. App. 572, 576, 575 A.2d 238 (1990).

104 Conn. App. at 42.

The Appellate Court went on to conclude that the erroneous exclusion of this evidence was not harmful to the plaintiff. When one considers the fact that the plaintiff was not around to tell his side of the story in regard to what type of physical he thought he was getting, this holding is difficult to accept.

§ 4-3 PROBATIVE VALUE OF OSHA REPORT OFFERED TO PROVE LACK OF NOTICE OF DANGEROUS CONDITION OUTWEIGHED BY PREJUDICE - LINGENHELD V. DESJARDINS WOODWORKING, INC., 105 Conn. App. 163 (2008); Berdon, J.; Trial Judge – Pickard, J.

**RULE:** The probative value of an OSHA report, which did not criticize the dangerous placement of a piece of machinery, and which was offered by the defendant to prove lack of notice, was outweighed by its prejudicial effect.

**FACTS:** On February 14, 2003, an employee of the defendant was using a table shaper to cut wood into cabinet molding. The plaintiff was in the shop to pick up materials when a piece of wood was ejected from the table shaper, flew 19 or 20 feet across the room and struck the plaintiff's right hand.

Plaintiff brought suit alleging that the location of the table shaper was unsafe because of the known risk of kickback.

The defendant conceded at trial that if he had read the maintenance manual, he would have known that the location of the table shaper was unsafe.

In 1995 and 1996, OSHA visited the defendant's shop to provide on-site safety surveys and consultations. Reports were issued after these visits. The reports indicated a

number of violations and concerns, and made safety recommendations. Neither report mentioned the location of the table shaper as a concern.

Defendant offered the OSHA reports to prove that it did not have knowledge of the danger created by the placement of the table shaper. Plaintiff objected on the basis that the probative value of the reports was outweighed by their prejudicial effect. The trial court did not allow the reports in evidence. The Appellate Court affirmed.

**REASONING:**

> "To permit evidence of the department's inspections, without any attendant testimony relating to the scope of the investigation or the qualifications of the individual who composed the report, would have been highly prejudicial to the plaintiff."

105 Conn. App. at 171-72.

§ 4-3 WHETHER INVOCATION OF FIFTH AMENDMENT BY NON-PARTY WITNESS IS MORE PROBATIVE OR MORE PREJUDICIAL TO BE DECIDED ON CASE-BY-CASE BASIS - RHODE V. MILLA, 287 Conn. 731 (2008); Norcott, J.; Trial Judge – Rodriguez, J.

**RULE:** A non-party witness's claim of the Fifth Amendment privilege against self-incrimination is not *per se* inadmissible in a civil case. In the present case, in which the privilege was invoked by the plaintiff's treating chiropractor, the trial court did not abuse its discretion in holding that its probative value was outweighed by its prejudicial effect.

**FACTS:** Rear-end collision connective tissue case. Plaintiff was treated by a chiropractor. The chiropractor was the subject of a federal criminal investigation into his patient treatment and billing practices. During the deposition of the chiropractor by the defendant, the chiropractor asserted his Fifth Amendment privilege against self-

incrimination. Plaintiff filed a motion in limine to preclude the defendant from eliciting evidence that the chiropractor had claimed the Fifth Amendment. The trial court precluded the evidence. The Supreme Court affirmed.

**REASONING:**

The Supreme Court has already ruled that a party's invocation of the Fifth Amendment privilege is admissible evidence in a civil proceeding. Olin Corp. v. Castells, 180 Conn. 49 (1980). The defendant sought to extend this rule to non-party witnesses.

> "Although this is an issue of first impression in Connecticut, it is settled law in other jurisdictions that a nonparty's invocation of the fifth amendment privilege against self-incrimination is admissible evidence so long as it does not unduly prejudice a party to the case.
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> * * * * *
>
> Thus, we conclude that, in determining whether a nonparty witness' invocation of the privilege should be admitted into evidence, courts should consider on a case-by-case basis whether the probative value of admitting the privilege exceeds the prejudice to the party against whom it will be used under § 4-3 of the Connecticut Code of Evidence.
>
> "In making this determination, factors that courts should consider include: (1) "the [n]ature of the [r]elevant [r]elationships... [as] invariably... the most significant circumstance," "examined... from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be"; (2) "the [d]egree of [c]ontrol of the [p]arty [o]ver the [n]on-[p]arty [w]itness," such as whether the assertion of the privilege may be viewed as a vicarious admission; (3) "the [c]ompatibility of the [i]nterest of the [p]arty and [n]on[p]arty [w]itness in the [o]utcome of the [l]itigation," namely, whether the "non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interest of both the non-party witness and the affected party in the outcome of the litigation"; and (4) "the [r]ole of the [n]on-[p]arty [w]itness in the [l]itigation," such as "[w]hether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects...."

287 Conn. at 737-39.

Applying the test in this case, the Supreme Court held that the chiropractor's invocation of the Fifth Amendment was properly ruled inadmissible.

**COMMENT:** The jury in this case returned a verdict of $8,224.50 in economic damages and $1,775.50 in non-economic damages for a total verdict of $10,000. After the collateral source offset, the defendant appealed a judgment of $7,013.70. The plaintiff did not participate in the appeal. The insurance company did not fund this appeal to avoid paying $7,000.00.

§ 4-3 INTERNIST WITH SUBSPECIALTY CERTIFICATION IN CARDIOLOGY PRECLUDED FROM TESTIFYING AGAINST INTERNIST – RUSSO V. PHOENIX INTERNAL MEDICINE ASSOCIATES, PC, 109 Conn. App. 80 (2008); Gruendel, J.; Trial Judge – Bozzuto, J.

**RULE:** A physician with a subspecialty board certification in internal medicine was not permitted to testify against another physician with a subspecialty board certification in internal medicine, because the expert's additional subspecialty certification in cardiovascular disease was held to invite confusion and possibly mislead the jury as to the standard of care.

**FACTS:** Medical malpractice action. Plaintiff began treating with the defendant, an internist, in September 2000 for asthma-related symptoms. On January 19, 2001 she reported new symptoms, including chest tightness, shortness of breath, and ankle swelling. The defendant ordered an echocardiogram.

The echocardiogram, performed and interpreted by a cardiologist, showed pericardial effusion.

On February 13, 2001 the plaintiff telephoned the defendant and reported flu-like symptoms, weakness and a temperature of 103°. The defendant prescribed antibiotics and ordered a chest x-ray, but the chest x-ray was put "on hold." Although there was no notation in the chart, the defendant testified the chest x-ray was put on hold because the plaintiff refused to have the chest x-ray. The defendant also testified that the plaintiff was offered an appointment to come to the office and did not do so.

Two days later, on February 15, 2001, the plaintiff died. The medical examiner listed the likely causes of death as cardiac arrhythmia or infarction from myocarditis. No autopsy was performed.

Plaintiff disclosed two experts, one with only a subspecialty board certification in internal medicine and Dr. Herskowitz, who had subspecialty board certifications in both internal medicine and cardiology. Defendant moved to preclude Herskowitz's testimony, arguing that because of his subspecialty certification in cardiology, his testimony would confuse the standard of care to which the defendant should be held. The trial court granted the motion in limine. The Appellate Court affirmed.

**REASONING AND COMMENT:**

To put the court's ruling in context, the plaintiff had a second expert who was board certified only in internal medicine. So the trial court's ruling was also based upon the ground that Herskowitz's testimony was cumulative.

C.G.S. §52-184c controls the admission of expert testimony in a medical malpractice case. The defendant physician was board certified in internal medicine. Section 52-184c(c) provides:

> "If the defendant heath care provider is certified by the appropriate American board as a specialist, is trained and experienced in a

> medical specialty, or holds himself out as a specialist, a similar health care provider is one who: (1) is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty...."

There are 24 American boards of medical specialties.[1] Both the defendant and the Dr. Herskowitz were certified by the American Board of Internal Medicine. However, the American Board of Internal Medicine grants subspecialty certificates in 20 areas, including internal medicine and cardiovascular disease. The defendant only had a subspecialty certification in internal medicine, while Dr. Herskowitz had subspecialty certifications in internal medicine and cardiovascular disease.

Since Herskowitz was "certified by the appropriate American board in the same specialty" he was qualified to testify under the statute. Nevertheless, the Appellate Court held:

> "[B]ecause Herskowitz maintained two board certifications, one as an internist and one as a cardiologist, it was paramount for the plaintiff to prove to the court that Herskowitz not only knew the standard of care of a board certified internist but also that he would testify to that standard of care without imposing the standard of care expected of a board certified cardiologist."

109 Conn. App. at 89.

The problem with this reasoning is that the plaintiff never got the chance to prove that Herskowitz was applying the standard of care of a board certified internist only, because he was precluded from taking the witness stand. The trial court's ruling was made on the basis of Dr. Herskowitz's deposition testimony. Apparently, the plaintiff had the burden of proving ***at deposition*** that Herskowitz knew the standard of care of a board certified internist under the facts and circumstances of this case and that

[1] The American Board of Medical Specialties has a website, http://www.abms.org/, which describes the different boards and each board's subspecialty certificates.

Herskowitz was not imposing his additional education, training, and experience as a cardiologist on the defendant in reaching his opinion that the defendant breached the standard of care of an internist.

In essence, the court ruled that Herskowitz was overqualified to testify on the standard of care. Ordinarily, such a claim goes to the weight accorded to the testimony rather than its admissibility.

The trial court also refused to allow Dr. Herskowitz to testify on causation because "that testimony would have implicated his improper testimony on the standard of care." 109 Conn. App. at 92.

Again, it is difficult to understand how the trial court could reach this conclusion without hearing Herskowitz's testimony. Is it the plaintiff's burden to elicit testimony during the deposition taken by defense counsel to prove that the causation opinion is independent? Shouldn't the plaintiff be permitted to rely on the expert disclosure?

These kinds of objections can only be fairly ruled upon when the witness is on the stand and the questions are asked.

**PRACTICE POINTER**: Plaintiff must either elicit clear opinion testimony during the expert's deposition, or ask the judge to defer ruling until the doctor takes the stand, and at that point insist on making an offer of proof. If the judge will not wait, insist on bringing the expert to court, put him on the witness stand, and pose the questions to establish that the expert will apply the appropriate and applicable standard of care.

§ 4-7(a) MOVING VEHICLE AFTER ACCIDENT NOT A "SUBSEQUENT REMEDIAL MEASURE" - HICKS V. STATE, 287 Conn. 421 (2008); Katz, J.; Trial Judge – Jones, J.

**RULE:** Moving a vehicle after an accident, supposedly because it posed a danger to other motorists, was not, under the facts of this case, a subsequent remedial measure. The evidence was relevant to issues other than negligence, and therefore admissible.

**FACTS:** On November 29, 2001 the defendant State Department of Transportation (DOT) was conducting a mowing operation on Route 94 in Glastonbury. Three DOT workers were using two vehicles, an over-the-fence mower, which is a tractor with an implement on the side that extends over a guard rail or fence to cut the grass, and a large orange dump truck.

According to the plaintiff, the dump truck was following the mower and moving very slowly in the travel lane. The plaintiff came around a curve on Route 94, encountered the dump truck in his lane of travel, swerved his truck to the right to avoid the dump truck, hit the guard rail on the right side of the road and flipped over onto his left side.

The defendant DOT workers testified that the dump truck was parked off the road, before the curve; that two workers were flagging traffic on either side of the mower while another operated the mower; and that, after the accident, a worker got into the parked dump truck and moved it, because it posed a danger to other motorists.

The plaintiff suffered a head injury and had no memory of the collision. An eyewitness testified that the DOT dump truck was moving slowly in the plaintiff's travel lane; that when the plaintiff's truck veered to avoid the DOT dump truck, it struck the guard rail on the right side of the road, flipped onto its left side and slid very close to the still-moving DOT truck; that, although the plaintiff's truck did not hit the DOT truck, it

came very close; and that immediately after the accident, one of the DOT workers yelled to the driver of the DOT truck to move the truck further up the road.

Under state law, sovereign immunity is waived for the operation of a motor vehicle by a state worker, but not if the vehicle is being used as a warning device or protective barrier. C.G.S. §52-556.

There was no dispute that, after the accident, the State worker moved the truck further up the road away from the plaintiff's truck.

The plaintiff offered the evidence of the sequence of events, including the fact that the DOT worker moved the truck up the road immediately after the accident, to set the scene and to explain why the police photographs of the scene and accompanying sketch did not show the DOT truck close to the plaintiff's truck.

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

**REASONING:**

The bar against evidence regarding subsequent remedial measures only applies when the evidence is offered to prove negligence. The Supreme Court did not buy the State's argument that the reason the truck was moved was to protect other motorists:

> 'We agree with the plaintiff that moving the department truck was not a subsequent remedial measure in light of the plaintiff's claim and the evidence adduced at trial. The plaintiff produced evidence to support his claim that the truck was in the westbound travel lane as he approached the department's work site. The evidence established that, after the accident, the plaintiff's truck was on its side, blocking the entire westbound lane, with the department truck ahead of him in that lane. Accordingly, should any other vehicle have approached the accident scene in the westbound travel lane, it was the *plaintiff's* truck that blocked the road and hence posed the danger to oncoming vehicles. Therefore, moving the department truck from its position on the other side of the plaintiff's vehicle would not have remedied the danger posed by the presence of the department truck prior to the accident. Indeed, removing the

> department truck from the accident scene entirely, before police arrived, would in any event go beyond a remedial measure and cross over into destruction of relevant evidence. See *Leonard v. Commissioner of Revenue Services*, 264 Conn. 286, 306, 823, A.2d 1184 (2003) ("we have recognized that an adverse inference may be drawn when relevant evidence is intentionally destroyed")."

287 Conn. at 440-41.

§ 4-7(b) SUBSEQUENT REMEDIAL MEASURE INADMISSIBLE IN FEDERAL PRODUCT LIABILITY CASE – HARLEYSVILLE WORCESTER INSURANCE CO. V. BROAN-NUTONE LLC, U.S.D.C., District of Connecticut, Civil No. 3:07cv1317(JBA), (October 10, 2008); Arterton, J.

**RULE:** In product liability cases, subsequent remedial measures, though admissible in state court, are inadmissible in federal court.

**FACTS:** Defendant's ceiling fan-light started a building fire. The product was manufactured in the 1970s. The plaintiff offered evidence that in 1991 the defendant incorporated into its ceiling fan-light a thermal cut-out device. Defendant moved in limine to prohibit this evidence.

Plaintiff argued that the evidence was admissible to prove that the thermal cut-out device was a feasible design. The trial court granted the motion in limine.

**REASONING:**

Federal Rule of Evidence 407 prohibits subsequent remedial measures in product liability cases to prove a defect in a product or its design, or a need for a warning or instruction.

The plaintiff had other evidence that a thermal cut-out device was a feasible design. The trial court therefore ruled that prejudicial effect of the defendant's change in design outweighed the probative value to the plaintiff of proving the design's feasibility. This evidence would have been admissible in state court.

§ 4-8(a) HIGH-LOW SETTLEMENT AGREEMENT MUST BE DISCLOSED TO THE COURT AND NONSETTLING DEFENDANT - MONTI V. WENKERT, 287 Conn. 101, (May 27, 2008); Katz, J.; Trial Judge – Teller, J.

**RULE:** "All verdict contingent settlement agreements promptly must be disclosed to the court and any nonsettling defendants. Congruent with § 4-8 (a) of the Connecticut Code of Evidence, such agreements may not be used to prove liability or damages. The trial court may, however, in the exercise of its discretion, permit these agreements to be used for the limited purpose of showing the bias or prejudice of a witness with an appropriate cautionary instruction, provided that the evidence is not otherwise barred by other rules." 287 Conn. at 125-26.

**FACTS:** Medical malpractice action. On November 8, 1996, plaintiff went to the office of Dr. Mark Decker, a family practice physician, complaining of an earache. A physician's assistant prescribed antibiotics.

On November 14, plaintiff returned to the office complaining of a headache, loss of appetite, ear pain, chills, and body aches.

On November 15, plaintiff went to the Emergency Room at Rockville General Hospital with worsening symptoms. The hospital staff told her that they believed that she was suffering an adverse reaction to the antibiotics. She was prescribed a different medication and sent home.

She returned to the hospital the next day with worsening symptoms, including increased respiratory rate. She was admitted to the intensive care unit, and Dr. Decker became her attending physician. Four days later he discharged her, telling her and her

family that there was nothing medically wrong with her and implying her symptoms might be, at least in part, psychological.

The day after her discharge, November 21, the plaintiff went to see her regular psychiatrist, Dr. Naomi Wenkert. While at Wenkert's office, she collapsed and exhibited symptoms of respiratory distress, including purple lips. Wenkert diagnosed the plaintiff as having a panic attack, prescribed a sedative and sent her home.

She died that night as a result of acute respiratory distress syndrome.

Plaintiff originally sued only the psychiatrist, Dr. Wenkert. Dr. Wenkert filed an apportionment complaint bringing in Dr. Decker as a co-defendant.

During the trial, plaintiff entered into a high-low agreement with Dr. Wenkert as follows: in the event of a defendant's verdict for Dr. Wenkert, the plaintiff would receive $300,000; in the event of a verdict against Dr. Wenkert between $300,000 and $1,000,000, the plaintiff would receive the amount of the verdict; and in the event of a verdict against Dr. Wenkert of more than $1,000,000, the plaintiff would receive $1,000,000. The high-low agreement was not disclosed to Dr. Decker or the court.

The jury returned a defendant's verdict for Dr. Wenkert and a plaintiff's verdict against Dr. Decker in the amount of $1,750,000. After the verdict, Dr. Decker became aware of the high-low agreement, and moved to set aside the verdict against him on the ground that the high-low agreement should have been disclosed to him because its nondisclosure deprived him of the opportunity to challenge and impeach Wenkert's evidence. The trial court refused to set aside the verdict. The Supreme Court held that the high-low settlement agreement should have been disclosed, but that in this case, Dr. Decker did not demonstrate sufficient prejudice to overturn the verdict.

**REASONING:**

In this case, the relationship between Dr. Wenkert and Dr. Decker was adversarial from the beginning. It was Dr. Wenkert, not the plaintiff, who brought Dr. Decker into the case. Therefore, throughout the litigation, Dr. Decker had the incentive and motivation to vigorously challenge Dr. Wenkert's evidence.

Although the Supreme Court ruled that these agreements must be disclosed in the future, it is unclear from the opinion what use, if any, the defendant will be able to make of these agreements during trial. The Court specifically pointed to CCE 4-8's prohibition of the admission of offers to compromise except under very limited circumstances, and stated that "we caution trial judges to be extremely careful in exercising their discretion when considering any exception." 287 Conn. at 126 n.17.

**PRACTICE POINTER**: The reasoning of this case cuts both ways. Plaintiff's counsel should file pretrial Wenkert motions in multi-defendant cases to ascertain whether there are any off-the-record agreements between defense counsel regarding blaming each other, limiting cross-examination, etc.

§ 4-10 MINUTES OF MEETING RELATING TO LIABILITY INSURANCE INADMISSIBLE TO PROVE CONTROL OF DOG – AUSTER V. NORWALK UNITED METHODIST CHURCH, 286 Conn. 152 (2008); Palmer, J.; Trial Judge – Reynolds, J.

**RULE:** Prejudicial effect of reference to liability insurance outweighs the fact that the evidence shows control.

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

Before the plaintiff was injured, Shadow had attacked another person, after which the church instructed Salinas to keep Shadow 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. for a meeting in the parish house. The front door of the parish house was locked, so the plaintiff walked to the side door, which was the entrance to Salinas' living quarters. When the plaintiff got to that door, Shadow jumped through the broken bottom panel of the door and attacked the plaintiff.

The plaintiff's complaint was in two counts, one under C.G.S. §22-357 (the "dog bite statute"), which imposes strict liability on a "keeper" of a dog, and one in common law negligence.

The defendant's Board of Trustees met to discuss the plaintiff's lawsuit. The minutes of that meeting included a reference to the fact that the defendant's insurance company had demanded that Shadow be removed from the premises, or coverage would be jeopardized. The church thereafter directed Salinas to get rid of the dog, which he did.

Plaintiff offered the minutes to show that the church was able to exercise control over whether Shadow was allowed on the premises. If the church could order Shadow's removal after the plaintiff was bitten, it presumably could have issued such an order after the first person was bitten. The trial court allowed the evidence. The Appellate Court reversed. The Supreme Court affirmed the Appellate Court's ruling.

**REASONING**:

The Supreme Court agree with the Appellate Court that as a matter of law the church was not a "keeper" of the dog under the statute, despite the facts that the church

had determined where on the premises Shadow was permitted, the times Shadow would be allowed out, and, after this second attack, required Salinas to remove Shadow from the premises completely.

The Supreme Court also agreed with that because there "was no dispute that the defendant had the authority to require Salinas to remove his dog from the premises… there was no justification for the court to have permitted the plaintiff to present evidence of the defendant's liability insurance coverage." 286 Conn. at 167.

Justice Norcott, dissenting, observed that "the minutes tend to prove that the board members viewed Shadow and his attendant problems as a matter within their control." 286 Conn. at 176.

> 'Virginia Auster, the plaintiff in this case, has been bitten thrice. First, on the evening of July 27, 2000, by Shadow, a mixed breed pit bull owned by the defendant Pedro Salinas, the sexton for the named defendant, Norwalk United Methodist Church, while she attended a meeting of a charitable organization held at the defendant's building. She next was bitten by the Appellate Court's judgment disturbing the trial court's discretionary decision not to set aside the jury's verdict holding the defendant strictly liable to the plaintiff pursuant to the dog bite statute, General Statutes § 22-357. *Auster v. Norwalk United Methodist Church*, 94 Conn. App. 617, 624, 894 A.2d 329 (2006). Today, the majority of this court has inflicted the plaintiff's third, and hopefully final, injury with its affirmance of the Appellate Court's intrusion."

286 Conn. at 168.

## *VII. Opinions and Expert Testimony*

§ 7-2 MOTION TO COMPEL CAUSATION TESTIMONY FROM NONPARTY TREATING PHYSICIAN IN MALPRACTICE CASE DENIED – HILL, RALPH, ADMINISTRATOR V. LAWRENCE & MEMORIAL HOSPITAL, J.D. of Hartford at Hartford, No. HHD XO4 CV-05-4034622 S (June 30, 2008); Shapiro, J.

**RULE:** Absent compelling need, physicians who treated the plaintiff after the malpractice cannot be compelled at deposition to render opinions on causation.

**FACTS:** Medical malpractice action alleging that the defendant radiologists missed a lung mass on an x-ray on November 28, 2001. The mass turned out to be lung cancer, and the plaintiff died.

After her diagnosis, two oncologists, who were not defendants in the action, treated the plaintiff. Plaintiff filed an expert disclosure stating that the oncologists would testify that if the mass had been detected on November 28, 2001, when the x-ray was taken, the plaintiff could have been successfully treated and would have survived. The oncologists had not agreed to give this testimony.

Plaintiff noticed the depositions of the two oncologists, who filed a motion for protective order seeking to prohibit any questioning on causation. The trial court granted the motion.

**REASONING:**

The court noted that compelling this testimony would place a strain on the relationships between the defendant radiologists and the treating oncologists who worked at the same hospital. He further noted that the testimony might not be objective. The court rejected the plaintiff's argument that these treating oncologists "have unique insight

concerning the decedent and would therefore be in the best position to testify as to treatment and survivability." Memorandum at p. 7.

The court focused on whether or not there was compelling need for the testimony. He noted that because other oncologists disclosed by the plaintiff could provide similar testimony, there was no compelling need. There was no discussion of the fact that testimony from the treating oncologists would be much more powerful than testimony from hired experts.

§ 7-2 JURY DETERMINES IF FUTURE ELECTIVE SURGERY IS PROBABLE - LINGENHELD V. DESJARDINS WOODWORKING, INC., 105 Conn. App. 163 (2008); Berdon, J.; Trial Judge – Pickard, J.

**RULE:** Because the decision whether or not to have elective surgery is the patient's, not the physician's, the plaintiff is not required to produce medical testimony that the surgery is probable in order to claim compensation for future surgery. Whether or not the surgery is probable (and is thus compensable) is a question of fact for the jury. The physician's testimony that the surgery would improve the plaintiff's condition, along with the patient's testimony that he intends to have the surgery, provide a sufficient basis for the claim to go to the jury.

**FACTS:** See Section 4-3, above. The injury was to the plaintiff's right hand., involving three fractures, contused tendons, and a partially transected radial sensory nerve.

The plaintiff's surgeon, Caputo, testified by videotaped deposition that he had discussed with the plaintiff doing a dorsal wrist arthroplasty and arteriogram, and that, more probably than not, these surgeries would improve the plaintiff's condition and reduce his disability.

Defense counsel moved to strike this testimony, arguing that the surgeon did not testify that it was probable that the plaintiff would undergo the future surgeries.

The trial court denied the motion on the ground that whether or not plaintiff would undergo the future medical procedures was a question of fact for the jury to decide. The surgeon's testimony was relevant evidence that the jury could consider in deciding that issue. The Appellate Court affirmed.

**REASONING:**

> "In the present case, Caputo testified that he had discussed the possibility of future surgery with the plaintiff and believed that it was reasonably probable that the future surgical procedures would improve the plaintiff's condition. This testimony was both relevant and probative as to the extent of the plaintiff's injuries. Therefore, such testimony when considered in conjunction with the plaintiff's testimony indicating that he would seek the surgeries in the future, aided the jury in determining whether it was reasonably probable that the plaintiff would undergo the dorsal wrist arthroplasty and arteriogram in the future. Accordingly, we conclude that the court did not abuse its discretion in admitting Caputo's testimony."

105 Conn. App. at 175.

§ 7-2 ADMISSIBILITY OF "FACT/OPINION" OF TREATING PHYSICIAN IN MEDICAL RECORD - BREEN V. SYNTHES-STRATEC, INC., 108 Conn. App. 105 (2008); Flynn, C. J.; Trial Judge – Eveleigh, J.

**RULE:** Opinions of treating physicians contained in medical records and rendered in the course of treatment are part of the factual matrix of the case. The distinction between facts and opinions in this context is not a bright-line boundary. It is not an abuse of discretion to allow such "opinions" in evidence, even in the absence of an expert disclosure.

**FACTS:** On April 14, 2002 the plaintiff broke his left femur. On April 15, his orthopedic surgeon performed an open reduction and internal fixation in which he secured the fracture with a plate. Six months later the plate broke. A new plate was implanted. Six months after the second surgery the second plate broke. Thereafter a different surgeon implanted a third plate with a bone graft which was successful.

Plaintiff brought a product liability action against Synthes-Stratec alleging that the plates were defective.

The medical records of the orthopedic surgeon who implanted the plates that broke contained two notes the plaintiff sought to redact.[2] The first, dated July 2, 2002, was made after the first surgery and before the first plate failed. It stated "[the plaintiff] was instructed regarding the conservative nature of treatment for this and the fact that it is a race between his biology and the plate breaking." 108 Conn. App. at 116. The second notation was made on November 4, 2002 after the first plate had broken and before the insertion of the second plate. "It is always a race between biological healing and plate failure since this is a load sharing device. Due to persistent motion at the fracture, the plate has subsequently failed." 108 Conn. App. at 117.

The plaintiff argued that because the orthopedic surgeon had not been disclosed by the defense as an expert witness these "opinions" in the medical records should be redacted and the orthopedic surgeon prohibited from testifying regarding these statements. The plaintiff argued that these "opinions" have nothing to do with the care and treatment of the plaintiff.

[2] The plaintiff had already marked the medical record as a full exhibit, including the disputed portions. Although the trial judge still had the authority to subsequently redact these excerpts, the fact that they were already part of a full exhibit made it more of an uphill struggle for the plaintiff.

The defendant argued that these statements constituted statements of fact related to the surgeon's treatment of the plaintiff. The trial court refused to redact the medical records. The Appellate Court affirmed.

**REASONING:**

> "With respect to the plaintiff's redaction request, the court noted that the contested records already had been marked in evidence as full exhibits. The court then concluded that the challenged portions of the medical records were a part of the plaintiff's treatment record and that the contested statements were in the nature of treatment. In so concluding, the court implicitly recognized that the facts surrounding a patient's treatment inevitably involve statements pertaining to diagnosis, treatment and prognosis. Such facts, memorialized in Lena's treatment record of the plaintiff, are a part of the factual matrix surrounding the plaintiff's medical treatment, including the fracture of the first plate implanted in the plaintiff's body. "The distinction between so-called 'fact' and 'opinion' is not a difference between opposites or contrasting absolutes, but instead a mere difference in degree with no bright line boundary.... [I]n a changing world there will constantly be a myriad of new statements to which a judge must apply the distinction. Thus, good sense demands that the trial judge be accorded a wide range of discretion at least in classifying evidence as 'fact' or 'opinion,' and probably in admitting evidence even where found to constitute opinion." 1 C. McCormick, Evidence (5th Ed. 1999) § 11, pp. 45-46.
>
> "In light of the inherent difficulties in distinguishing between opinions and facts in the context of a patient's treatment record, we cannot conclude that the court abused its discretion in determining that the challenged portions of the July 2 and November 4, 2002 medical records concerned Lena's treatment of the plaintiff and, thus, properly were characterized as the facts of treatment. Accordingly, the court properly denied the plaintiff's request to redact the July 2 and November 4, 2002 medical records. Although Lena did testify about the statements in the treatment record, he did not offer any opinions about the notations. The court therefore properly permitted testimony from Lena about how those notations appeared in his treatment record of the plaintiff. Thus, we conclude that the court did not abuse its discretion."

108 Conn. App. at 122-23.

**PRACTICE NOTE:** See also, Conn. Pract. Book §13-4(b)(2), discussed below, about expert disclosures of treating physicians.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO PROVE HOW TO PARK TRUCK SAFELY – ALLISON V. MANETTA, 284 Conn. 389, (November 13, 2007); Vertefeuillie, J; Trial Judge – Frazzini, J.

**RULE:** Because the parking of a motor vehicle on a public roadside is a common place activity with which most jurors are familiar, expert "standard of care" testimony is not required as to whether or not the defendant performed this activity safely.

**FACTS:** Plaintiff was driving east on Route 44 in Salisbury. An employee of the Department of Transportation (DOT) who had been proceeding west on Route 44, parked his dump truck partially obstructing the westbound lane. A tractor-trailer also going west swerved into the eastbound lane to avoid the DOT dump truck and struck the plaintiff.

Plaintiff sued the driver of the tractor-trailer and the driver of the DOT dump truck. The jury returned a verdict of $2,000,000, apportioning responsibility 11% to the plaintiff, 18% to the driver of the tractor-trailer, and 71% to the driver of the DOT dump truck. The defendant moved to set aside the verdict on the ground that the plaintiff "failed to produce any expert testimony regarding the appropriate standard of care to be exercised when parking a truck along the road to perform maintenance tasks." 284 Conn. at 404.

The trial court denied the motion to set aside. The Supreme Court affirmed this ruling, although it reversed the case on other grounds.

**REASONING:**

> "We conclude that the factual issues raised in the present case involved a commonplace activity with which most jurors are familiar, namely, the parking of a motor vehicle on a public roadside. Moreover, the jurors heard significant testimony from

> Richard Binkowski, a state trooper and accident reconstructionist who had investigated the accident; Michael Cei, an accredited accident reconstructionist; and Manetta, the driver of the tractor trailer that had struck the plaintiff and a former supervisor with the New York department of transportation. Binkowski and Cei both testified about their opinion regarding the cause of the accident, including the role that the placement of the truck played in the accident. Binkowski, Cei and Manetta all testified that there was adequate room for Zucco to have parked the truck without blocking the roadway. The defendant's expert witness on reconstruction, Stephen Benanti, also confirmed that there was adequate space for Zucco to have parked the truck so as not to block the roadway.
>
> "In addition, several photographs of the accident scene were admitted into evidence at trial. These photographs depicted the roadway, including the space available on the shoulder of the roadway, the curves in the roadway. The photographs also depicted the placement of the truck on the roadway, the road conditions at the time of the accident and the general accident scene. In addition to the testimony of Benanti, Cei and Manetta, these photographs were available for the examination of the jury to assist them in applying their own knowledge to determine whether Zucco had parked the truck negligently."

284 Conn. at 406-07.

§ 7-4 EVIDENCE OF A "LOCAL STANDARD OF CARE" PROVED TO BE CONSISTENT WITH THE NATIONAL STANDARD OF CARE ALLOWED – SMITH V. ANDREWS, 289 Conn. 61 (2008); Schaller, J.; Trial Judge – Adams, J.

**RULE:** Despite the fact that physicians are held to a national standard of care, evidence establishing a standard of care at a particular hospital is relevant if it is proved to be consistent with an acceptable, applicable national standard of care.

**FACTS:** On August 6, 2001 the plaintiff underwent a cervical diskectomy. During the surgical process, the plaintiff suffered a severe spinal cord injury and was rendered paraplegic.

The plaintiff claimed that the injury was inflicted during his intubation, which was performed by a nurse anesthetist utilizing a standard endotracheal intubation by laryngoscopy. The plaintiff claimed that he had an unstable spine before the surgery, and that the standard of care for intubation of an unstable spine was awake fiber-optic intubation, which requires less physical manipulation of the neck.

The defendants agreed that if the plaintiff had an unstable spine, fiber-optic intubation was required by the standard of care. Thus, the issue in the case was whether or not the plaintiff's neck was unstable.

During preoperative evaluation, the plaintiff's surgeons had diagnosed the plaintiff as having "instability" in his spine. However, they claimed that "instability" did not mean that the spine was "unstable". The treating surgeons testified that the two terms, instability and unstable, are not interchangeable and represent two different degrees of injury. They testified that "instability" is a chronic, less serious condition, whereas, an "unstable" spine is an acute, more serious condition, such as one caused by trauma. The defendants' position was that, while it would have been a breach to use endotracheal intubation for a patient with an "unstable" spine, it was not a breach to use endotracheal intubation on a patient with cervical "instability."

Only witnesses affiliated with St. Vincent's Medical Center, where the surgery was performed, made this distinction between "instability" and "unstable" spines. For instance, the Chairman of the Anesthesiology Department, who was the defendant's partner, "testified that there were unwritten protocols at St. Vincent's for anesthesiologists to utilize standard endotracheal intubation with laryngoscopy for patients with spinal 'instability.'" 289 Conn. at 70.

The plaintiff objected to this testimony on the ground that the "unwritten protocol" at St. Vincent's Medical Center was not relevant, because it tended to prove a standard of care at one particular hospital and thus represented a retreat from a national standard of care and toward the locality rule, rejected by Connecticut in 1983. The trial court allowed the testimony. The Supreme Court affirmed.

**REASONING:**

"In the absence of expert testimony linking the St. Vincent's practice to a national standard of care, the evidence would be inadmissible as irrelevant." Id. The Supreme Court held that the defendants' expert had testified that the practice at St. Vincent's was in accordance with the national standard of care.

**COMMENT:** The plaintiff may have had more success arguing that the evidence was confusing and misleading under §4-3. Compare this ruling with the ruling in Russo v. Phoenix Internal Medicine Associates, above.

§ 7-4 ACCIDENT RECONSTRUCTION EXPERT CAN RELY ON EYEWITNESS TESTIMONY - HICKS V. STATE, 287 Conn. 421 (2008); Katz, J.; Trial Judge – Jones, J.

**RULE:** Experts are entitled to rely on hearsay if it is of a type customarily relied on by experts in a particular field. Thus, an accident reconstruction expert can rely on, and testify about, eyewitness statements upon which the expert relied.

**FACTS:** See Section 4-7 above. As indicated above, there was an eyewitness to this accident who testified that the DOT truck was moving slowly in the right lane and that the plaintiff was forced to take evasive action to avoid it. The plaintiff's accident reconstruction expert had interviewed the eyewitness and relied on her statements in

performing his reconstruction. In explaining his reconstruction he described what the eyewitness had told him. The defendant objected to this testimony on the basis that it was hearsay. The trial court admitted the testimony. The Supreme Court affirmed.

**REASONING:** The accident reconstruction expert's recitation of what the eye witness told him was not offered for the truth of its content, but to explain the basis of his opinions.

**COMMENT:** The trial judge does have the discretion to preclude this hearsay testimony if its probative value, in explaining the basis of the expert's opinion, is outweighed by its prejudicial effect. If the eyewitness has already testified in a manner consistent with the expert's rendition, there is no prejudice.

In a case where the eyewitness did not testify, the prejudicial effect might well outweigh the probative value.

## *VIII. Hearsay*

§ 8-3(l)(b) TACIT ADMISSION EXCEPTION TO THE HEARSAY RULE – MANN V. REGAN, 108 Conn. App. 566 (2008); Flynn, C. J.; Trial Judge – Miller, J.

**RULE:** "The failure of one person to contradict or reply to the statement of another person made in his presence and hearing may amount to an admission by adoption of the other's assertion, providing the person remaining silent actually heard and understood the statement and was not disabled or prevented from replying, and the statement, under the circumstances made, was such as would naturally call for an answer." Obermeier v. Nielsen, 158 Conn. 8, 11-12 (1969).

**FACTS:** The plaintiff and the defendant had been friends for 30 years. Plaintiff lived in Windsor, Connecticut, and the defendant lived in Florida. The defendant had a Lhasa Apso dog named Sam. On December 17, 2004, Sam and the defendant came to Connecticut. Three days later, the defendant left Sam with at the plaintiff's house while she traveled to Wisconsin for a wedding. Hours after the defendant left for Wisconsin, while the plaintiff was attempting to put a blanket underneath him, Sam bit her in the face.

Two days later, defendant returned to Connecticut and went to retrieve Sam. Upon seeing the plaintiff's bandaged face, the defendant asked her what had happened. The plaintiff told the defendant that Sam had bitten her. The defendant responded: "What do you mean Sam bit you? What did you do to him?" 108 Conn. App. at 571. The plaintiff then explained that she had been attempting to put a blanket under the dog when he bit her. The defendant's daughter, who was with her mother, then stated: "Well, mom, you know he bit you." Id. The defendant remained silent.

The defendant objected to plaintiff's testimony recounting what the daughter had said on the ground that it was hearsay. The trial judge admitted the defendant daughter's statement. The Appellate Court affirmed.

**REASONING:**

> "The plaintiff, as the proponent of the tacit admission, had to establish that (1) the defendant comprehended the statement made, (2) the defendant had the opportunity to speak, (3) the circumstances naturally called for a reply from the defendant and (4) the defendant remained silent."

108 Conn. App. at 573-74.

The defendant argued that the plaintiff failed to establish the third prong of the test. She argued that the circumstances did not naturally call for a reply because the statement was made at, "a meeting among long standing friends who gathered around the holiday season and whose first concern was not the fault of any person, but the injury that the plaintiff incurred." 108 Conn. App. at 574. The Supreme Court held that the circumstances called for a response if in fact Sam had not bitten the defendant before he bit the plaintiff.

§ 8-3(2) SPONTANEOUS UTTERANCE – 40-MINUTE DELAY ALLOWED - STATE V. DAVIS, 109 Conn. App. 187, *cert. denied*, 289 Conn. 929 (2008); McDonald, J.; Trial Judge – Devlin, J.

**RULE:** A 40-minute delay between the event and the statement is not excessive if the statement was made under circumstances indicating the absence of opportunity for contrivance and misrepresentation.

**FACTS:** Defendant was accused of assault. On May 8, 2004, the victim was fumbling with his key at his apartment door when the defendant approached him. The two men had words, and the defendant pulled out a handgun and shot the victim. As the victim ran, the defendant shot him four more times. The victim made it out onto the sidewalk before he collapsed. A police officer arrived and found the victim lying on the sidewalk.

The victim was taken by ambulance to the hospital. It was uncertain whether he would survive surgery. A police officer accompanied him in the hospital elevator to the operating room. When the police officer asked the victim if he knew who had shot him, the victim moved his head up and down.

The State offered this nonverbal statement (the victim shaking his head up and down indicating that he knew his assailant) at trial. The "statement" was made 40 minutes after he was shot. The defendant argued that a statement made 30 minutes after a startling event represented the outer limits of a spontaneous utterance under Connecticut case law. The trial court allowed the statement. The Appellate Court affirmed.

**REASONING:**

While the amount of time involved is an important consideration, it is not decisive. Under these circumstances, the victim did not have the opportunity to reflect or contrive a story. Moreover, the fact that the statement was made in response to a question does not preclude its admission as a spontaneous utterance.

§ 8-3(2) 911 CALL ADMITTED AS SPONTANEOUS UTTERANCE – STATE V. TORELLI, 103 Conn. App. 646 (2007); Peters, J.; Trial Judge – Damiani, J.

**RULE:** A 911 call from a witness actually observing the event qualifies as a spontaneous utterance.

**FACTS:** Drunken driving prosecution. A citizen informant, Gillis, who was driving behind the defendant called 911 to report what he believed to be someone driving under the influence. The call was recorded. "I called here to report a drunk driver. I am still following him. He's all over the place...." 103 Conn. App. at 651.

The defendant objected to the recording on the basis that it was hearsay. The trial court admitted the recording under the business record exception to hearsay rule.

The Appellate Court found this ruling to be in error because the citizen informant had no duty to report to the police.

However, the court went on to find that the recording was admissible pursuant to the spontaneous utterance exception to the hearsay rule.

**REASONING:**

> "[W]e are persuaded that Gillis' statements to the 911 dispatcher were admissible because they satisfy the criteria for the spontaneous utterance exception to the hearsay rule. Startled by an erratic driver, Gillis called 911. During the call, he continued to observe and comment on the defendant's erratic driving and course of travel. His declarations were made in the course of an ongoing urgent situation, negating the opportunity for deliberation or fabrication."

103 Conn. App. at 662.

§ 8-3(2) 911 CALL ADMITTED AS SPONTANEOUS UTTERANCE – STATE V. NELSON, 105 Conn. App. 393, *cert. denied*, 286 Conn. 913 ( 2008); Lavine, J.; Trial Judge – Vitale, J.

**RULE:** Recording of 911 telephone call from victim of assault is admissible as spontaneous utterance.

**FACTS:** The defendant, "Sticky" Nelson, was accused of breaking into the victim's apartment, binding his hands and feet, burning him with a knife heated on his stove, driving him around and then dumping him at the Weaver High School in Hartford.

The victim called 911 and told the operator he was tied up, bleeding, and in need of help. He identified one of the assailants and described their vehicle. The 911 telephone call recording was offered in evidence as a spontaneous utterance. The defendant objected on the ground it was hearsay. The trial court allowed the recording in evidence. The Appellate Court affirmed.

**REASONING:**

The defendant claimed that the recording did not meet the criteria for a spontaneous utterance on two grounds. First, the defendant claimed that since the victim's eyes had been duct taped, he did not have sufficient opportunity to observe the events that were the subject of the 911 call. However, the victim testified that his vision was not completely obscured by the duct tape.

The defendant then argued that the victim's statements were "not made under stress sufficient to negate the opportunity for fabrication." 105 Conn. App. at 406. The Appellate Court found this argument unpersuasive:

> "It is clear that Marshall, who had been robbed, burned, beaten, threatened with murder, forcibly removed from his apartment, tied up, driven around for an extended period of time and abandoned in wintry conditions, experienced grave stress during his entire conversation with the 911 operator. 'I'm still tied up,' he told the operator. '[T]hey burned and cut me. . . .[The blood] is all over my face and my head right now. Please send help.'"

105 Conn. App. at 407.

§ 8-3(8) LEARNED TREATISE OR VIDEOTAPE THAT TENDS TO CONFIRM EXPERT'S OPINION CANNOT BE PRECLUDED AS CUMULATIVE OR CONFUSING - STATE V. GUPTA, 105 Conn. App. 237, *cert. granted*, 286 Conn. 907 (2008); West, J.; Trial Judge – Rodriguez, J.

**RULE:** Once an expert has testified on direct examination that a medical treatise corroborates her opinion, it is an abuse of discretion to preclude the medical treatise on the ground that it is cumulative of that opinion. Nor does the fact that the medical treatise contains medical terms allow preclusion on the ground that it has the potential to confuse the jury.

A videotape depicting the proper way to conduct a physical examination, offered during the direct examination of an expert, would have assisted the jury in deciding this issue and should not have been precluded as misleading.

**FACTS:** Sexual assault prosecution. The defendant physician was accused of sexually assaulting two patients. Defendant was a pulmonologist.

The first patient went to him for a sinus infection. During the appointment, the defendant allegedly performed an inappropriate breast examination.

The second patient was referred to the defendant because on x-ray spots had been found on her lungs. The defendant was again alleged to have performed inappropriate breast examinations.

Defendant offered the testimony of a pulmonologist that the breast examinations performed by the defendant on the two patients were appropriate. During direct examination, the defendant attempted to introduce a number of excerpts from medical treatises. The excerpts used words, pictures, and diagrams to illustrate the proper method for conducting a pulmonological examination. They were offered to demonstrate that the breast examinations described by the patients were consistent with accepted medical practice.

The State objected to the medical treatises on the ground that the medical texts were cumulative because they essentially repeated what the defense expert had already testified to. The trial court sustained the objection both because the excerpts were cumulative and because they might confuse the jury.

The defendant also offered, during the direct examination of his expert, two videotapes depicting the proper way to conduct a physical examination, to assist the jury

in understanding the expert's testimony. The State objected on the grounds of relevancy and hearsay. The defendant argued that an expert is entitled to rely on hearsay. The court sustained the objection on the ground that the videotapes might mislead the jury.

The Appellate Court found both these rulings to be an abuse of discretion and reversed. The Supreme Court has granted cert.

**REASONING:**

As to the State's argument that the medical treatises were cumulative, the very purpose of introducing treatises on direct examination is to corroborate the testimony of the expert. Indeed, a learned treatise is admissible if it "tends to confirm" the expert's opinion. Kaplan v. Mashkin Freight Lines, 146 Conn. 327 (1959). Thus, excerpts from medical treatises are *always* cumulative when offered on direct examination.

As to the potential to confuse the jury, the court held as follows:

> "Although the excerpts do contain various medical terms, there is enough plain language that an average person with no medical background would be capable of understanding the words, pictures and diagrams. Furthermore, the attorneys were able to examine the expert witnesses while referring to the excerpts. Therefore, any confusion that might have arisen from the jurors' looking at the excerpts during deliberation could have been clarified during direct and cross-examination of the expert witnesses. Because the evidence was relevant, noncumulative and would not tend to confuse the jury, we hold that the court abused its discretion in refusing to admit the excerpts."

105 Conn. App. at 253.

As to the videotapes, the Appellate Court held that although the entire videotapes were not admissible, parts depicting a proper examination of the lungs and thorax were relevant and should have been admitted. The Court went on to hold that as long as the

videotapes were shown during the expert's testimony, with an opportunity to ask the expert questions regarding the videotapes, the videotapes were not misleading.

§ 8-4 BILL OF PHYSICIAN CLAIMING FIFTH AMENDMENT INADMISSIBLE - RHODE V. MILLA, 287 Conn. 731 (2008); Norcott, J.; Trial Judge – Rodriguez, J.

**RULE:** Pursuant to C.G.S. §52-174(b), medical bills of a treating doctor are admitted as a business record without the necessity of calling a witness. However, since the defendant has an "absolute" common law right to cross-examination, the invocation by the doctor of his Fifth Amendment privilege precludes the application of the statute under these circumstances.

**FACTS:** See Section 4-3 above. In addition to attempting to elicit evidence before the jury that plaintiff's chiropractor had claimed the Fifth Amendment, the defendant objected to the admission of the chiropractor's bill, on the ground that his invocation of his Fifth Amendment privilege at his deposition denied them the right to cross-examine him regarding that bill. The trial court allowed the bill in evidence. The Supreme Court found this to be error.

**REASONING:**

The Supreme Court began its analysis with Struckman v. Burns, 205 Conn. 542 (1987), wherein the constitutionality of Section 52-174(b) was challenged on the ground that it deprived the defendant of his right of cross-examination. In Struckman, the Supreme Court upheld the constitutionality of the statute, because the defendant had the right to subpoena the doctor to court, or if the doctor was beyond subpoena power, to take his deposition. In the case at bar, after the doctor invoked his Fifth Amendment privilege

at deposition, this rationale disappeared. The Supreme Court concluded that the trial court improperly admitted the bills in evidence, but found the error harmless.

§ 8-6(1) PROVING UNAVAILABILITY - STATE V. WRIGHT, 107 Conn. App. 85, *cert. denied,* 289 Conn. 933 (2008); Flynn, D. J.; Trial Judge – Thim, J.

**RULE:** Under the former testimony exception to the hearsay rule, a proponent must satisfy a two-part test: (1) the witness must be unavailable, and (2) the former testimony must be determined to be reliable.

**FACTS:** In an earlier trial, the defendant was acquitted of murder, but convicted of carrying a pistol without a permit and possession of a weapon in a motor vehicle. He appealed that conviction. The conviction was reversed, and his case was remanded for a new trial.

At the new trial, the State offered the testimony of a witness from the first trial by reading a transcript. The defendant objected on the ground that the State had not satisfied the requirement that the proponent demonstrate that the witness is unavailable. The trial court allowed the use of the transcript. The Appellate Court affirmed.

**REASONING:**

The efforts of the inspector from the State's attorney to locate the witness were sufficient:

> "Inspector Michael Kerwin from the office of the state's attorney testified as to the efforts that he made to procure the witness for this trial. Kerwin looked for the witness over a nine day period, including part of the day he testified. He reviewed databases containing drivers' license information and vehicle registration information. He checked with the department of correction to determine whether the witness was incarcerated and with the state police to see if there were any pending cases against the witness.

> He also checked nationwide to see if there were any pending arrests. Kerwin reported that he checked, through the witness' social security number, to see if the witness was working. Kerwin spoke with prior landlords and went to eight or nine different locations in the Bridgeport area and to one location in New Haven in an attempt to locate the witness. He checked on child support orders and protective orders, of which there were none. Kerwin also attempted to locate the witness' mother and brother through the drivers' license and motor vehicle databases to no avail. Kerwin physically went to all the addresses that came up through these searches, but he still was not successful in locating the witness or his family members."

107 Conn. App. at 90-92.

§ 8-9 STATEMENTS OF CHILDREN ADMITTED UNDER RESIDUAL EXCEPTION TO THE HEARSAY RULE - IN RE TAYLER F., 111 Conn. App. 28 (2008); McLachlan, J.; Trial Judge – Graziani, J.

**RULE:** Finding that children would suffer emotional harm if forced to testify was an adequate basis for the court's ruling that they were unavailable to testify, thus satisfying that requirement of the residual exception to the hearsay rule.

**FACTS:** Action by the Commissioner of Children and Families to adjudicate two minor children as neglected.

In December 2004 the two children, Tayler and Nicholas, were 11 and 9 years old, respectively. They lived with their mother and her live-in boyfriend.

On December 8, 2004 the children's father contacted the Enfield Police Department to report an incident between the live-in boyfriend and the children the day before. In response, an officer went to the children's house, interviewed them, and reported the results to the Department of Children and Families.

In addition, a department social worker interviewed the children on December 10, 2004.

After the neglect petitions were filed, the court ordered that an examination by a clinical psychologist, who interviewed the children three times in 2005.

The petitioner offered the children's statements to the police officer, the social worker, and the psychologist in various reports prepared by these witnesses. The respondent objected to the statements as hearsay. The court allowed the statements pursuant to the residual exception to the hearsay rule. The Appellate Court affirmed.

**REASONING:**

The issue in dispute on appeal was whether or not the court abused its discretion by finding that the children were unavailable to testify because they would suffer emotional harm. The Appellate Court found that the trial court did not abuse its discretion:

> "We conclude that the court properly admitted the children's statements under the residual exception to the hearsay rule. The court was presented with sufficient information to decide that the children would be harmed if called to testify against the respondent in a contested hearing."

111 Conn. App. at 48-49.

The clinical psychologist testified that the children should not be required to testify in court because they would be harmed if forced to testify against their mother.

Judge Lavery, in dissent, pointed out that the court made its decision that the children were unavailable before hearing the testimony of the psychologist.

The dissent also pointed out that the court had never met with the children:

> "This case was not a rare or exceptional instance, and it was an abuse of discretion to allow the children's statements in. This is a case in which the fact finders were the therapist and social workers. Their testimony on the credibility, which was wrongfully admitted, was piled onto the multitude of hearsay evidence under the residual exception to the hearsay rule, which strained the

> residual hearsay exception beyond all reasonable bounds. The residual exception as interpreted by the majority for all practical purposes eliminated the hearsay rule. The children were ten and twelve and by all accounts were reasonably articulate. The trial court should have, at a minimum, held a hearing with the children in a reasonable setting to determine the ability of the children to testify."

111 Conn. App. at 67-68.

### *New Expert Disclosure Rule*

The new rule, which went into effect January 1, 2009, significantly changes the prior rule. This is a brief summary of the minefield created by the new rule.

§ 13-4(b)(1) of the old rule required that a party state the "substance of the facts and opinions to which the expert is expected to testify." The new rule requires disclosure of the "opinions to which the witness is expected to offer expert testimony." It is unclear what is intended by removing the term "substance" as it relates to the expert opinion, but in Wexler v. DeMaio, 280 Conn. 168 (2006), the court relied upon the term "substance" in Section 13-4(4) in finding that the disclosure in that case was sufficient under that section, and reversing the trial judge for precluding the plaintiff's expert.[3] The trial judge who was reversed in Wexler was Judge Sheldon, the principal architect of the new rule. It will no doubt be argued that the removal of the term "substance" in the new rule renders Wexler inapposite and requires the disclosure to have a greater level of detail and specificity than what was found by the Supreme Court to be sufficient in Wexler.[4]

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[3] In Wexler, the court stated, "although the disclosure does not delineate explicity and individually Wiernik's expected testimony with respect to each of these essential elements, we conclude that it adequately sets forth the substance of Wiernik's expected testimony concerning each element." (emphasis in original text) Id. at 184.

4 As noted in Wexler, the text of the current Section 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." Id. at 189.

In addition, the old rule provided for disclosure of "a summary of the grounds for each opinion" whereas the new rule requires disclosure of the "substance of the grounds for each such expert opinion." Although it is not entirely clear what, if any difference, there may be between "summary" and "substance" in this context, the change will likely engender creative arguments to preclude experts.

The new § 13-4(b)(2) deals with treating physicians differently than other expert witnesses. If the medical records and reports of the treating physician are disclosed, the treating physician "shall be permitted to offer expert opinion testimony at trial as to any opinion as to which fair notice is given in the disclosed medical records or reports." Any opinion not disclosed in those records or reports must be separately disclosed in accordance with the new rule.

The new Section 13-4(b)(3), which deals with disclosure of materials, requires the party disclosing an expert witness to produce "all materials obtained, created, and/or relied upon by the expert in connection with his or her opinions in the case" within 30 days of the date of the disclosure. This section does not apply to treating physicians.

In the context of any complex case, 30 days is not sufficient time to identify the materials obtained, created, and/or relied upon by the expert, gather it and produce it to the opposing side. This is particularly so in medical malpractice, accident reconstruction or products liability cases. Can we rely on our experts to accomplish this task, or do we need to travel to the expert's offices, which are often out of state, to review the expert's entire file in order to ensure compliance with this rule? Trial schedules, deposition schedules and the expert's schedule are such that the 30-day period for compliance is both unrealistic and impractical.

The rule change as stated does not recognize that discovery is and should be ongoing even after an expert disclosure is filed. An expert often obtains and reviews additional material after the disclosure is filed and before the expert's deposition is taken. In medical malpractice cases, for example, scheduling problems very often arise, preventing the completion of fact witness depositions, including those of the defendant doctors, before the deadline for expert disclosure.

In practice, the parties are usually able to deal with these scheduling problems in a civil manner, each side accommodating the other. The expert's file is then produced at the deposition, where it is reviewed. In those cases in which a party desires to have the expert's materials before the deposition, case law has evolved permitting a party to obtain such materials on a case-by-case basis. This adaptable, realistic approach has been replaced with a blanket rule, devoid of flexibility, which will create undue and unnecessary hardship on the parties and require frequent court intervention.

The new rule requires disclosure of materials "created" by the expert. In the context of a medical malpractice case this requirement may conflict with the statutory privilege provided in Section 52-190a of the General Statutes. Under that statute, in order to file a medical malpractice action, the plaintiff must obtain a report from a similar health care provider containing an opinion that there appears to be evidence of medical negligence. The report must include a detailed basis for the formation of such opinion. The 2005 amendment to that section requires that the report be appended to, and filed with, the complaint. That statute provides, however, that the name and signature of the author of that report be redacted from the report and further provides that "[s]uch written opinion shall not be subject to discovery by any party except for questioning the validity

of the certificate." The statutory scheme is such that the validity of the written opinion may be questioned only "after completion of discovery." It seems clear that the statute trumps the new Practice Book Rule, but no doubt there will be some lawyers who will argue otherwise.

Section 13-4(b)(4) specifically provides that "nothing in this section should prohibit any witness disclosed hereunder from offering nonexpert testimony at trial."

Section 13-4(c) sets forth new rules regarding the depositions of experts and who pays for what.

Section 13-4(d)(1) requires "a party shall file with the court a list of all documents or records that the party expects to submit in evidence pursuant to any statute or rule permitting admissibility of documentary evidence in lieu of the live testimony of an expert witness." Clearly, this is aimed at the reports of treating physicians.

Section 13-4(e) requires a party expecting to call an expert disclosed by another party to file a notice within the time parameters of a scheduling order.

Section 13-4(g) requires the parties to file a scheduling order regarding expert disclosure in every case.

***Rebuttal Argument***

RIGHT TO ADDRESS PRECLUDED EVIDENCE AFTER OPPONENT "OPENS THE DOOR" - CONNECTICUT LIGHT & POWER CO. V. GILMORE, 289 Conn. 88, (October 21, 2008); Zarella, J.; Trial Judge – Radcliffe, J.

**RULE:** When a defendant makes a misleading final argument, the plaintiff has the right to respond, even if it necessitates reference to excluded evidence.

**FACTS:** Action by Connecticut Light & Power Company to collect on a bill for electricity supplied to the defendant's residence. The residence also contained the law practice of her son, who defended the action. The case was tried to a jury.

Over the years, the defendant repeatedly complained about her high electric bills. A number of energy audits and meter tests were performed by the plaintiff. A review officer employed by the plaintiff also conducted an "independent" investigation at the defendant's request. The review officer prepared a report which concluded the billing was correct. This report was sent to the defendant.

After receiving the review officer's report, the defendant requested that the Department of Public Utility Control (DPUC) investigate the review officer's findings.

The DPUC investigated and also issued a report, which concluded the defendant's bill was correct. This report was also sent to the defendant.

At trial, plaintiff's counsel offered copies of both reports in evidence. Defense counsel objected to the review officer's report on hearsay grounds and to the DPUC's report on the ground that the DPUC's conclusions constituted an expert opinion which would invade the province of the jury. The objections were sustained, and neither report was allowed in evidence.

During closing argument, defense counsel stated that the review officer had not prepared a report, or at least had not provided the defendant with any report following her visit to the defendant's residence. He also stated that the defendant had not received a copy of the report issued in connection with the DPUC's investigation. During rebuttal argument the plaintiff stated: "There was a report. We offered the report of... the review officer. [Defense counsel] objected to it. He didn't want you to see that. And there was

another report. It went to the [department]. There's a report there. He objected. He didn't want you to see it. Okay? So there have been reports." 289 Conn. at 97.

The trial court instructed the jury that objections of counsel to the admission of evidence should not be held against their clients, that the arguments of attorneys are not evidence, and that the jury should not consider excluded evidence. There was a plaintiff's verdict. Defendant moved to set aside the verdict on the ground that the rebuttal argument was improper. The trial court denied the motion. The Supreme Court affirmed.

**REASONING:**

> "In the present case, defense counsel stated during closing argument that the defendant had not been given any reports following the inspections of her residence in 1999 and 2001. The plaintiff's counsel countered during rebuttal argument that reports had been produced by the review officer and the department, respectively, after their investigations and that defense counsel had objected to their admission. The remarks by the plaintiff's counsel thus were made to correct defense counsel's misrepresentation to the jury that the defendant had received no reports. Furthermore, counsel for the plaintiff did not disclose the contents of the reports, but limited her remarks to the fact that reports had been made following the investigations and that they had not been admitted into evidence because of defense counsel's objections."

289 Conn. at 99.

**PRACTICE POINTER**: Don't object – get even.

## *Sufficiency of Evidence*

FACT OF REAR-END COLLISION IS NOT ENOUGH TO PROVE NEGLIGENCE - SCHWEIGER V. AMICA MUTUAL INS. CO., 110 Conn. App. 736, *cert. denied*, 289 Conn. 955 (2008); Beach, J.; Trial Judge – Tanzer, J.

**RULE:** The fact that the defendant hit the plaintiff from behind does not establish negligence. In order to establish negligence, the plaintiff must introduce evidence of negligence or eliminate non-negligent causes.

**FACTS:** Rear-end collision on Route 44 in Avon. Plaintiff testified she slowed and brought her car to a stop behind a line of traffic. She was stopped for four to five seconds before being struck in the rear by the alleged tortfeasor. Plaintiff testified that she did not observe the car that struck her before she was hit. Plaintiff introduced no other evidence regarding the tortfeasor's negligence.

The trial court granted the defendant's motion for a directed verdict. The Appellate Court affirmed.

**REASONING:**

> "In an automobile accident case, '[a] plaintiff cannot merely prove that a collision occurred and then call upon the defendant operator to come forward with evidence that the collision was not a proximate consequence of negligence on his part. Nor is it sufficient for a plaintiff to prove that a defendant operator might have been negligent in a manner which would, or might have been, a proximate cause of the collision. A plaintiff must remove the issues of negligence and proximate cause from the field of conjecture and speculation.' (Internal quotation marks omitted) *O'Brien* v. *Cordova*, 171 Conn. 303, 306, 370 A.2d 933 (1976).
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> "Recently in *Winn* v. *Posades*, 281 Conn. 50, 913 A.2d 407 (2007), our Supreme Court affirmed the trial court's judgment of dismissal in an automobile accident case in which no evidence existed regarding liability beyond the fact that the collision had occurred and that the defendant operator had been traveling at an

> unreasonable, even reckless, speed when he struck the vehicle of the plaintiff's decedent. Id., 52-56. The defendant was the only surviving eyewitness to the accident, and he testified that he recalled nothing of the accident or how it occurred. Id. 52. The Supreme Court concluded that '[a]lthough the plaintiff's evidence showed that [the defendant] had been negligent or reckless in operating his [vehicle] through the intersection at a highly excessive rate of speed, there was no evidence that his speed actually had caused the collision.' Id., 60. The Supreme Court, therefore, concluded that insufficient evidence existed to establish legal cause. Id., 64.
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> "The plaintiff in the present case similarly failed to present sufficient evidence regarding negligence and proximate cause to remove the issues from the field of speculation or conjecture. The plaintiff introduced no evidence beyond the fact that her vehicle was struck by Blodgett's vehicle, perhaps with some force. The fact that there was a collision by itself is insufficient to establish legal cause. See *O'Brien* v. *Cordova*, supra, 171 Conn. 306 ('[c]ommon experience shows that motor vehicle accidents are not all due to driver negligence'). No one testified as to the actual circumstances that caused Blodgett's vehicle to strike the plaintiff's vehicle, and the plaintiff testified that she did not see Blodgett's vehicle strike her vehicle. There remains a number of factual possibilities that could explain how the accident occurred. See *Palmieri* v. *Marcero*, 146 Conn. 705, 707-708, 155 A.2d 750 (1959)."

110 Conn. App. at 741-42.

**PRACTICE POINTER**: How should plaintiff's counsel deal with the reality of this rule? If your client saw the car in her rear-view mirror before impact, she may be able to testify that it was following too closely or estimate its speed. That would be direct evidence of negligence. Scrutinize any statements you have from the defendant to the police, in a written statement to his insurer, or at deposition. There may be some admission there that is enough.

If such evidence is unavailable, use circumstantial evidence to eliminate the non-negligent causes of the collision: sudden mechanical failure, sudden illness, and sudden emergency.

***Affidavit Countered by Circumstantial Evidence***

DOCTOR'S SWORN AFFIDAVIT NOT CONCLUSIVE
- BEDNARZ V. EYE PHYSICIANS OF CENTRAL CONNECTICUT, P.C., 287 Conn. 158, (June 3, 2008); Katz, J.; Trial Judge – Lopez, J.

**RULE:** The fact that a physician signs an affidavit claiming that he had no knowledge of a test is not conclusive on that point if there is circumstantial evidence to support a contrary inference.

**FACTS:** On February 16, 1980, plaintiff was referred to Eye Physicians of Central Connecticut, P.C. by her then treating ophthalmologist for evaluation of a puffy area below her right eyebrow which the referring ophthalmologist thought might be a tumor. One of the ophthalmologists at Eye Physicians, David Parke, ordered a CAT scan. The CAT scan, performed on February 25, 1980, showed two meningiomas. A meningioma is a benign brain tumor that nevertheless must be removed because, as it continues to grow, it occupies space and exerts pressure inside the skull. A copy of the 1980 CAT report was in the plaintiff's Eye Physician's chart. The plaintiff was not informed of the results of the CAT scan or the presence of the two meningiomas.

The plaintiff remained a patient of Eye Physicians until 2004, when she began to suffer seizures and memory loss. Tests revealed the two meningiomas, which were removed. However, some brain damage had already occurred, and the surgery was more difficult and extensive than it would have been 24 years earlier.

Plaintiff brought suit against Eye Physicians and two of its individual ophthalmologists, including Dr. Burch, who moved for summary judgment on the statute of limitations. Plaintiff claimed that the statute of limitations in regard to Dr. Burch was tolled by the continuing course of conduct doctrine. That doctrine requires the plaintiff to prove three elements: 1) an initial wrong; 2) a continuing duty; and 3) continued breach of that duty. In this case, the continuing duty and its continued breach could only be established by proving that Burch had actual knowledge of the 1980 CAT scan report and failed to inform the plaintiff.

Burch first saw the plaintiff on January 26, 1988, eight years after the CAT scan was done. He became her principal treating ophthalmologist on February 20, 1990 and he remained her principal treating ophthalmologist until his retirement on June 30, 2000. During that time period he saw the plaintiff approximately ten times.

In support of his motion for summary judgment, Burch filed an affidavit stating that he had no knowledge of the CAT scan performed on the plaintiff in 1980.

The trial court granted the motion for summary judgment finding that although the defendant should have known about the report, there was no evidence that he had actual knowledge of the report. The Supreme Court reversed.

**REASONING:**

> "We agree with the plaintiff that, because she had presented evidence from which a jury reasonably could infer that the defendant had actual knowledge of the 1980 CAT scan and that the jury would not be required to credit the defendant's testimony to the contrary, there existed a genuine issue of material fact with respect to whether the period of repose under § 52-584 was tolled by the defendant's ongoing failure to warn the plaintiff."

287 Conn. at 167.

The plaintiff's expert had filed an affidavit stating that Burch was required to be familiar with the medical records, including the CAT scan report.

> "On the basis of this evidence, the plaintiff maintains that there was sufficient direct and circumstantial evidence that, at some stage during the course of his long-standing treatment of her, the defendant had learned about the CAT scan results, and thus, that this knowledge gave rise to a continuing duty to advise the plaintiff, to refer her for further treatment, and to perform follow-up care. The defendant, by way of his self-serving affidavit, maintains that, despite both his ten year relationship with the plaintiff and the notes he made in her medical records pertaining to his treatment of her over the course of that time period, he did not have actual knowledge of the presence of the meningiomas. The defendant suggests that this denial was sufficient to demonstrate the absence of any genuine issue of material fact. We agree with the plaintiff that, based on the evidence she has produced, the defendant has not established that his claimed lack of knowledge of the plaintiff's condition was undisputed."

287 Conn. at 174.

***Status of the Code of Evidence***

SUPREME COURT HAS THE FINAL SAY – STATE V. DEJESUS, 288 Conn. 418 (2008); Rogers, C. J.; Trial Judge - Lavine, J.

**RULE:** Despite the adoption of the CCE by the judges of the Superior Court, the Appellate Courts of Connecticut retain the authority to develop and change the rules of evidence through case-by-case common law adjudication.

**FACTS:** Criminal prosecution in which the defendant was alleged to have sexually assaulted a mentally impaired young woman under his supervision at a grocery store. During the trial, the State sought to introduce testimony from another young woman who also worked under the defendant's supervision at the store, and was also mentally impaired, that the defendant had sexually assaulted her. The trial court allowed the evidence under the liberal rule of admission for evidence of uncharged sexual misconduct

under the common scheme or plan exception in sexual assault cases codified in § 4-5 of CCE. The defendant was convicted. He appealed, claiming that despite the liberal rule's codification in the CCE, the Supreme Court retained the authority to reconsider and reverse the rule codified in the CCE. The Supreme Court agreed with the defendant that Connecticut Appellate Courts retained the authority to reconsider and reverse a rule codified in the CCE; however, they declined to reverse the rule at issue in this case.

**REASONING:**

This case resolves an issue which has been hanging over the CCE for the last three years. The majority opinion, by Chief Justice Rogers, holds that when the judges of the Superior Court adopted the CCE, they did not intend to divest the Supreme Court of its inherent common law adjudicative authority to develop and change the rules of evidence on a case-by-case basis.

Justice Rogers' opinion also addresses the role of the Evidence Code Oversight Committee. She divests that Committee of the power to recommend substantive changes in the law of evidence which directly contradict recent Appellate or Supreme Court precedent.

> "[W]e conclude that the judges of the Superior Court did not intend for the committee to recommend substantive changes to the common-law evidentiary rules codified in the code, but, rather, intended for the committee simply to recommend revisions reflecting common-law developments in evidentiary law, clarifications of the code to resolve ambiguities and additions to the code in the absence of governing common-law rules."

288 Conn. at 455.

Justice Palmer's concurring opinion agrees with the majority that the judges of the Superior Court were not attempting to strip the Supreme Court of its traditional common

law role regarding the growth and development of the law of evidence. However, Palmer goes on to state that if the judges acting in their rule making capacity were to attempt such an action, they do not have that power.

Justice Zarella's concurring opinion directly faces the constitutional issue and holds that "the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence." 288 Conn. at 490.

Justice Katz dissented. "In my view, it is the exclusive purview of the evidence code oversight committee, the rules committee of the Superior Court, and ultimately the judges of the Superior Court to make changes to the Code." 288 Conn. at 494.

Justice Katz's opinion clearly sets forth the views of Justice Borden, who was the chairman of the committee that drafted the CCE, as well as her own opinion as Chair of the Evidence Code Oversight Committee, a position from which she resigned after State v. DeJesus was released. Justice Katz's dissenting opinion ends with the following:

> "In conclusion, I note that, in this case, my colleagues have disavowed recent positions taken by this court with respect to both the binding effect of the code and the circumstances under which judgment of acquittal is proper. Understandably, the bench and bar may be somewhat confused by this result, as am I. Like Shakespeare's Puck, I can only apologize to the audience and suggest that it also pretend that this has all been a bad dream."

"If we shadows have offended,
Think but this, and all is mended,
That you have but slumb'red here
While these visions did appear.
And this weak and idle theme,
No more yielding but a dream,
Gentles, do not reprehend.
If you pardon, we will mend.
And, as I am an honest Puck,
If we have unearned luck
Now to 'scape the serpent's tongue,
We will make amends ere long;
Else the puck a liar call.
So, good night until you call.
Give me your hands, if we be friends,
And Robin shall restore amends"

W. Shakespeare, A Midsummer Night's Dream, act 5, sc. 1.

288 Conn. at 547.