Update on Evidence 2013
by Bob Adelman and Neil Sutton

"Circumstantial evidence is a very tricky thing.
It may seem to point very straight to one thing, but if you shift
your own point of view a little,
you may find it pointing in an equally uncompromising manner
to something entirely different"

— Sir Arthur Conan Doyle, The Adventures of Sherlock Holmes

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Introduction

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from August 28, 2012 through July 23, 2013. .

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 possibly 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 Code, the Table of Contents contains three additional headings: Sequestration of Witnesses in Civil Cases, Sufficiency of Evidence and Video Evidence - Jury Deliberations - Jury Room or Courtroom?

IV. Relevancy

§ 4-1 EVIDENCE OF PLAINTIFF'S NEGLIGENCE ADMISSIBLE ON CAUSATION - MULCAHY V. HARTELL, 140 Conn. App. 444 (2013); Beach, J.; Trial Judge – Peck, J.

RULE: Evidence tending to show that plaintiff's conduct was the sole cause of an injury is admissible on the issue of causation although the defendant has not alleged comparative negligence.

FACTS: In this medical malpractice case against chiropractor Gary Hartell, following acupuncture, the plaintiff developed a cellulitis infection at the treatment site.

Plaintiff claimed that the defendant failed to utilize clean needle techniques and thereby caused the infection.

Defendant's position was that the infection was caused when the plaintiff wiped the site with her hand or a discarded tissue after the procedure.

Plaintiff filed a motion in limine seeking to preclude evidence that the plaintiff wiped the site with an unsterile item, on the ground that the defendant had not pleaded comparative negligence.

The trial court denied the motion in limine.

The jury found that the defendant breached the standard of care, but that the breach did not cause the plaintiff's infection.

The Appellate Court affirmed the trial court's denial of the plaintiff's motion in limine.

REASONING:

> "The decisive issue is the distinction between cases in which the defendant asserts that the plaintiff has been comparatively negligent, and thus the defendant's conduct could also be a proximate cause, and those cases in which the defendant claims that his conduct did not cause the plaintiff's injuries at all. An assertion of comparative negligence is consistent with the plaintiff's rendition of the facts, and therefore must be raised as a special defense. On the other hand, the claim that an actor other than the defendant caused the plaintiff's injuries is inconsistent with a prima facie negligence case, and, thus, can be pursued under a general denial. The essence of the defense at issue in the present case was that the plaintiff was entirely responsible for her injuries; therefore, the court correctly admitted it without the assertion of a special defense."

Id. at 450.

> "Evidence that an actor other than the defendant was the sole proximate cause of the plaintiff's injuries constitutes a factual scenario 'inconsistent with the plaintiff's allegation that the proximate cause of the injuries to the [plaintiff]... was the negligence, whether sole or concurrent, of the defendant.' Bernier v. National Fence Co., *supra*, 176 Conn. 630. Therefore, such evidence properly is admitted pursuant to a general denial. Id.
>
> "In situations in which the defendant attempts to show that the plaintiff was the sole proximate cause of his injury, 'there is neither need nor room for the doctrine of contributory negligence.... Contributory negligence is never properly invoked when the plaintiff's negligence alone causes the damage but only when the negligence of both the plaintiff and the defendant are contributing proximate causes of it.'"

Mulcahy at 452.

§ 4-3 EVIDENCE THAT EXPERT HAD TESTIFIED ON BEHALF OF DEFENDANT IN OTHER MEDICAL MALPRACTICE ACTIONS HELD MORE PREJUDICIAL THAN PROBATIVE - FILIPPELLI V. SAINT MARY'S HOSPITAL, 141 Conn. App. 594; Lavine, J.; Trial Judge - Ozalis, J. *cert. granted*, 308 Conn. 947 (2013)

RULE: Fact that defense expert was serving as an expert for the defendant in two other medical malpractice cases, and did not disclose that fact at deposition, held more prejudicial than probative because it would bring to the jury's attention that the defendant had been sued two other times.

FACTS: After sustaining a comminuted tibial plateau fracture, plaintiff was taken to St. Mary's Hospital's ED at approximately 10 p.m., where he was treated and released with instructions to consult an orthopedic surgeon.

Plaintiff returned to the ED the next morning at 7:30 a.m. reporting severe leg pain. He was examined by an ED doctor, who called in a consultation with an orthopedic surgeon, Dr. Denis Rodin.

Rodin examined the plaintiff and admitted him to the hospital. Rodin noted that there was a "question of compartment syndrome," and wrote that "this may very well be an impending compartment syndrome and we will closely monitor this every two hours for neurovascular check." He did not, however, issue an order to take compartment pressures.

At 6:45 p.m., Rodin examined the plaintiff a second time, took compartment pressures, and found them to be elevated. He diagnosed compartment syndrome and performed surgery that night.

The plaintiff suffered permanent nerve and muscle damage as a result of the build-up of pressure in his leg caused by the compartment syndrome.

In the lawsuit, plaintiff's claim was that Rodin should have diagnosed compartment syndrome and operated earlier in the day.

Defendants' expert was Dr. Andrew Bazos. When asked at deposition how often he testified in medical malpractice cases, Bazos testified that he had been disclosed as an expert in only three or four unrelated cases, and that he remembered the name of only one of those cases, which did not involve Rodin. Bazos further testified that he did not know Rodin, other than seeing his name on medical records that came across his desk in the regular course of his medical practice.

The truth was that at the time of the deposition, Bazos had been retained in two other cases to testify as an expert on behalf of Rodin. He had been deposed in one of those cases two months before the deposition in this case, and had signed the errata sheet for that deposition just five days before.

The defendant filed a motion in limine. Defendant claimed Bazos had misunderstood the questions and intended to use the errata sheet in this case to amend his deposition testimony.

Plaintiff argued the evidence was admissible to impeach Bazos.

Defendant argued that plaintiff was attempting to use this impeachment evidence as a back-door way of getting into evidence that Rodin was a defendant in two other cases. Defendant argued the evidence was more prejudicial than probative.

The trial court granted the motion in limine. The Appellate Court affirmed the ruling.

REASONING:

The Appellate Court chose to characterize this testimony as whether or not Bazos could "remember the names of physicians on whose behalf he had been disclosed as an expert witness. That credibility issue does not go to the standard of care regarding the diagnosis of compartment syndrome, which is the central issue in the present case." Filippelli at 622.

The Appellate Court ignored the fact that at a minimum this testimony indicated Bazos was incredibly sloppy; and that, if the jury concluded that Bazos was lying, as opposed to not remembering, the defendant would be left with no credible expert to testify that he did not breach the standard of care.

The Supreme Court has granted certification.

§ 4-7 SUBSEQUENT REMEDIAL MEASURE INADMISSIBLE – DUNCAN V. MILL MANAGEMENT COMPANY OF GREENWICH, INC., 308 Conn. 1 (2013); Zarella, J.; Trial Judge - Karazin, J.

RULE: The probative value of evidence of subsequent remedial measure, offered to show feasibility and for impeachment, outweighed by highly prejudicial nature of the evidence.

FACTS: Catherine Duncan was descending a deck on the top floor of the Greenwich Chateau Condominium. The deck was accessed by a single step concrete riser 10” high and 10” deep. As Ms. Duncan attempted to leave the deck, her foot missed the concrete riser. She fell and broke her ankle.

The concrete riser did not comply with the Town Building Code because the riser was greater than 7" in height, less than 11" in depth and had no hand rail.

Ms. Duncan was the President of the Board of Directors of the Condominium Association. After she fell, she contacted the building management company, Mill Management Company of Greenwich, and requested that something be done to fix the stairs. Within a few weeks, the building manager hired a contractor to build new stairs that complied with the Building Code.

Ms. Duncan sued the building's Management Company and the Condominium Association.

The building's Management Company moved in limine, pursuant to CCE §4-7(a), to block evidence of the subsequent remedial measure. That Section provides:

> "Except as provided in subsection (b), evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

As part of its defense in the lawsuit, the defendant Management Company claimed that it could not order a new set of stairs without approval from the Board of Directors of the defendant Condominium Association. The Management Company made this claim despite the fact that after the accident, the building manager had arranged the building of the new stairs without the approval of the Board of Directors. (He had done so at the direction of the President of the Board of Directors – the plaintiff.)

The plaintiff offered the evidence regarding the building of the new stairs on two grounds: first, to show that the building manager, acting on behalf of the defendant Management Company, could have contracted to have a safe new stairway built without the advance approval of the Board of Directors of the Condominium Association; second, to impeach the testimony of the building manager that he needed such approval.

As to the first ground, the plaintiff claimed that evidence was relevant to show that it was “feasible” for the building manager to have installed the stairs earlier. However, this is not “feasibility,” as the term is used in the Connecticut Code of Evidence. The cases which created the "feasibility" exception to the rule barring subsequent remedial measures are cases where a defendant claims that it was not possible to remedy the hazard.

Regarding the second ground, the plaintiff claimed that the evidence was admissible to impeach the building manager who had testified that the Board of Directors of the Condominium Association had to approve a project like this before the management company could contract it out.

The trial court allowed the evidence in to impeach the building manager.

There was a plaintiff's verdict.

The Appellate Court reversed on the ground that the evidence was more prejudicial than probative.

The Supreme Court agreed with the Appellate Court as to the prejudicial-probative balancing. However, the Supreme Court reinstated the plaintiff’s verdict, holding that the error caused by admitting the evidence was harmless.

REASONING:

On the "feasibility" issue, the Supreme Court noted that other evidence could have been used to prove that the Management Company had the authority to contract to have a new staircase built without Board approval.

On the impeachment issue, the court held that the probative value was outweighed by the prejudicial effect of the evidence.

V. Privileges

DEFENSE INQUIRY INTO PEER REVIEW EXONERATION LEADS TO SETTING ASIDE OF VERDICT – BRIDENSTINE, EXECUTRIX V. GIOVANNI, 142 Conn. App. 850 (2013); Sheldon, J.; Trial Judge – Cosgrove, J.

RULE: An intentional attempt to elicit in front of the jury the obvious inference that the defendant physician was exonerated by a Peer Review Committee deprived the plaintiff of a fair trial and required setting aside a defendants' verdict.

FACTS: In this medical malpractice case arising out of gastric bypass surgery, the plaintiff had developed a leak at the bypass site, which caused an abdominal infection. The leak and infection were not diagnosed for four days. On the fifth day, plaintiff's condition deteriorated, and she was transferred to the ICU. She coded and was revived, but had suffered an anoxic brain injury. After 17 months in a persistent vegetative state, she died.

The case was brought against three defendants: Dr. Barba, who performed the surgery and cared for the plaintiff for the first four days; St. Francis

Hospital, where the plaintiff was hospitalized; and Dr. Giovanni, one of Dr. Barba's partners, who took over her care on the fifth and critical day.

The claim against Barba was that he performed the surgery improperly and failed to detect and deal with the leak at the bypass site, and its consequent infection, in a timely manner.

The claim against St. Francis Hospital was for improper monitoring.

The claim against Giovanni was that when she took over the care of the patient on the fifth day, the signs of infection were evident and she failed to intervene in a timely fashion.

The case settled against Barba and St. Francis and was tried only against Giovanni.

The fifth day, when Giovanni took over the plaintiff's care from Barba, was a Saturday. Giovanni made rounds that morning and saw the plaintiff. She entered orders and left the hospital. During the afternoon, the plaintiff's condition deteriorated. The resident caring for the plaintiff made several telephone calls to Giovanni to inform her the plaintiff's condition was deteriorating. Giovanni ordered the plaintiff be transferred to ICU. While in ICU, the plaintiff suffered a Code. Her heart was restarted. Giovanni then returned to the hospital and took the plaintiff into surgery that night. However, the plaintiff had suffered massive brain damage.

The plaintiff's claim against Giovanni was that if Giovanni had discovered the infection that morning and taken her to surgery, she would not have suffered the Code.

Apparently, during the peer review conducted at the hospital regarding the management of this case, Giovanni was exonerated. The plaintiff had no knowledge of what had happened in the peer review.

Defense counsel for Dr. Giovanni asked the following questions during her direct examination:

"MR. WHITE CONTINUING:

Q. During the course of this entire litigation, from the time you were named a defendant up until today, has any one of the attorneys for the plaintiff or attorneys for any of the apportionment defendants ever asked you if your care of Gail Stalinski was reviewed and evaluated at St. Francis Hospital?

A. No.

Q. Was it?

A. Yes, it was.

Q. What was it –

ATTY. RECK: Your Honor –

THE COURT: Hold on. Let me excuse the jury.
(Jury Excused)

Mr. Reck?

ATTY. RECK: Peer review – I couldn't get it. I couldn't get this information. There would be no way I could examine the people after she said it.

It is clearly not allowed. Once again, he throws this stuff out which he knows shouldn't be brought up.

ATTY. WHITE: Peer review, the privilege rests with who owns the privilege, and the privilege rested with St. Francis Hospital – I am not disputing that – and with the doctors who are there.

> Now, she is not revealing and has no intention of revealing anything about any co-defendant – excuse me, apportionment defendant, only about the fact that there was a finding as to her that there was no finding of anything done inappropriately."

Id. at 855 n.6.

The objection was sustained.

The plaintiff did not move for a mistrial.

The judge issued a cautionary instruction. There was a defendant's verdict.

Plaintiff moved to set aside the verdict on the ground that counsel had intentionally asked questions which he knew could only lead to inadmissible evidence. Plaintiff claimed defense counsel's purpose in asking these questions was to poison the jury. Plaintiff further alleged that even though Dr. Giovanni did not answer that she had been exonerated by the peer review committee, the jury would have no trouble making that inference, since it was her counsel who asked her whether her "care of Gail Stalinski was reviewed and evaluated at St. Francis Hospital".

The trial judge agreed and set aside the defendant's verdict. The Appellate Court affirmed.

REASONING:

Defense counsel's pretext to the trial judge for these questions was that the peer review privilege is personal and can be waived by the doctor holding the privilege. In other words, the doctor can assert the peer review privilege if the Committee finds against her, but if exonerated, waive the privilege and inform the

jury of that fact during trial. Defense counsel provided no authority for this absurd proposition.

Judge Cosgrove concluded that defense counsel's attempt to elicit clearly inadmissible evidence was *intentional*. He further concluded that plaintiff's counsel's timely objection did not cure the problem:

> "'It was a series of questions somewhat akin to those types of questions where counsel need not care about the answer or if an objection is sustained - the purpose of the question can be achieved without a response. E.g., when did you stop beating your wife? Once the jury knew that Dr. Giovanni's care was evaluated at St. Francis Hospital, it was not necessary for the defendant to tell the jury that she had not been sanctioned by the peer review process conducted at the St. Francis Hospital. Why would the defendant and her counsel have brought up this event unless they considered it favorable to the positions she was asserting?' Trial Judge's Memorandum of Decision, pp. 17-18."

Id. at 864.

The judge found that his curative instruction was insufficient to preserve the plaintiff's right to a fair trial. This line of questioning went to the heart of the case because the plaintiff had sued Saint Francis Hospital and later withdrawn that action. Dr. Giovanni's defense included the assertion that Saint Francis, now an apportionment defendant, was at fault for not notifying her of the deterioration of the plaintiff's condition in a timely manner. Therefore, Judge Cosgrove found this was "the exceptional case" where a new trial was required.

On appeal, Giovanni's counsel refined his argument as to why the evidence was admissible. Despite his assertion at trial that he was offering the evidence to show "the fact that there was a finding as to her that there was no finding of anything done inappropriately," he claimed on appeal that he intended

only to elicit her testimony that her privileges had not been restricted or terminated by Saint Francis, and that such testimony was permitted under C.G.S. §19a-17(b)(d)(4), which allows evidence if a doctor's staff privileges are terminated or restricted.

The Appellate Court did not address the issue of whether such testimony would be permissible under that statute, because the trial transcript made it perfectly clear, as the trial judge had found, that the questioning was intended to elicit that Dr. Giovanni had been exonerated by the peer review committee.

The Appellate Court affirmed the trial judge's decision to set aside the defendant's verdict: "The trial court was in the best position to sense the atmosphere of the trial and to assess its probable effect of the improper questioning and its implications on the jury's deliberative process." Id. at 870.

COMMENT ONE:

C.G.S. §19a-17(b)(d)(4) provides that the peer review statute does not preclude the introduction of evidence "in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restriction imposed, if any." However, the statute does not allow evidence that privileges were not restricted. A plaintiff's standard interrogatories should ask whether a defendant doctor's privileges were terminated or restricted as a result of the conduct at issue in the case.

COMMENT TWO:

The defense lawyer who posed the questions was William White, of Providence, Rhode Island, who was admitted pro hac vice. Judge Cosgrove

ordered that the local firm which had sponsored his admission for the case, Rosenblum Newfield, be present at all further proceedings in the matter. The Appellate Court affirmed that order.

Article VI - Witnesses

A WITNESS MAY BE ASKED PERMISSIBLE TO COMMENT ON HIS OR HER OWN TRUTHFULNESS **-** STATE V. TAFT, 306 Conn. 749 (2012); Norcott, J.; Trial Judge - Hauser, J.

RULE: Although it is not permissible to ask a witness whether another witness is lying, it is permissible to ask a witness whether she is lying.

FACTS: In September 2001, while attempting to make a drug buy, Zoltan Kiss was shot to death by bullets fired from two guns. Defendant was accused of being one of the two shooters.

A witness testified at trial that she had seen the defendant carrying a gun while following the victim to his car and shortly thereafter she had seen gun fire.

She admitted on cross-examination that she had given a statement to the police soon after the murder that the defendant was with her at the time of the murder, thus supplying him with an alibi defense. She testified that since that time she had been having trouble sleeping and having repeated dreams regarding the victim's death. She testified that her conscience ultimately drove her to testify as to the truth.

> "On redirect, A testified that she had turned her life around since September, 2001, specifically that she had finished school and had become religious. The prosecutor then asked: 'Based on your life right now would you come in and lie and finger that man for [a] killing that didn't occur?' to which A responded: 'Never.' Defense counsel did not object to this question or A's answer."

Id. at 763.

The defendant was convicted. On appeal he claimed that asking this question amounted to prosecutorial impropriety, because it invited the witness to vouch for her own credibility. The Supreme Court this line of questioning permissible.

REASONING:

> "'In [State v. Singh, 259 Conn. 693, 706, 793 A.2d 226 (2002)], this court adopted the well established evidentiary rule [in other jurisdictions] that it is improper to ask a witness to comment on another witness' veracity…. The primary reason for this prohibition, we explained, is that determinations of credibility are for the jury, and not for witnesses.... Thus, questions that ask a [witness] to comment on another witness' veracity [are improper because they] invade the province of the jury.... Moreover, [a]s a general rule, [such] questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness' credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence.' (Citations omitted; emphasis added; internal quotation marks omitted.) State v. Bell, 283 Conn. 748, 778-79, 931 A.2d 198 (2007)."

Id. at 764.

> "In the present case, the prosecutor did not inquire of other witnesses about the credibility of A. Rather, in eliciting the statement that, based on her life at the time of the trial, A would never lie and wrongly accuse the defendant of participating in the shooting of the victim, the prosecutor merely provided the jury with information relevant to determining why A may have changed her story and whether it should believe the version of events that she testified to at trial. Such testimony, therefore, did not improperly invade the province of the jury in determining whether A was credible. Indeed, exploring A's motivation for lying and her awareness of the ramifications of not telling the truth is exactly the type of information a jury requires to make an appropriate determination regarding a witness' credibility. Accordingly, we conclude that the prosecutor's inquiry was not improper."

Id. at 765.

VII. OPINIONS AND EXPERT TESTIMONY

§ 7-2 QUALIFICATIONS OF EXPERTS: IN CASE INVOLVING VEHICLE ENGINE FIRE, CERTIFIED FIRE INVESTIGATOR NOT QUALIFIED TO TESTIFY REGARDING WHETHER VEHICLE WAS DEFECTIVE - WHITE V. MAZDA MOTOR OF AMERICA, INC., 139 Conn. App. 39 (2012); Bear, J.; Trial Judge – Robaina, J., *cert. granted*, 307 Conn. 949 (2013)

RULE: In a case involving a vehicle engine fire, a certified fire investigator, who was not an expert in automobile design or manufacture, and who conceded at deposition that he was not offering an opinion that the vehicle was defective, was not qualified to carry the plaintiff's burden of proof.

FACTS: On October 16, 2006, plaintiff purchased his 2007 Mazda 3 car. One month later, on November 15, 2006, he lifted up the hood and flames erupted from the engine, causing burn injuries.

Plaintiff disclosed as his expert a certified fire investigator who opined that the fire was probably caused by a fuel leak in the fuel rail system. More specifically, either a clip was improperly installed on the gas line, which allowed it to loosen, or, a gasket was improperly installed, allowing gasoline to seep through and drop onto the engine manifold. The vehicle's engine was destroyed in the fire. The fire investigator's opinion was based upon an examination of an exemplar 2007 Mazda 3.

At deposition, the fire investigator testified he was "not offering an opinion that the vehicle was defective," and agreed that he was not an expert in automobile design or manufacture.

Defendant filed a motion for summary judgment, claiming that in order to carry his burden of proof, the plaintiff needed expert testimony as to three elements: (1) that the vehicle was defective; (2) that the defect caused the plaintiff's injury; and (3) that the defect existed at the time of the sale. Defendant claimed that plaintiff's expert was unable to testify as to those three elements and therefore, plaintiff was unable to carry his burden.

The trial court granted summary judgment, determining that the issues involved complex questions outside the ordinary knowledge and experience of jurors and that the expert's opinion on the origin of the fire was insufficient to establish the existence of a design or manufacturing defect in the vehicle.

The Appellate Court affirmed the trial court's granting of the motion for summary judgment.

REASONING:

The Appellate Court agreed with the trial court that the questions involved in this case went beyond the field of ordinary knowledge and experience of jurors and that, therefore, expert testimony was required. The Appellate Court also agreed with the trial court that the fire investigator was not qualified to offer the critical opinions.

The plaintiff argued on appeal that he should have been allowed to proceed under the malfunction theory of product liability. The Appellate Court held that the plaintiff failed to raise the theory before the trial court and refused to consider it on appeal.

Judge West, dissenting, opined that in his view the plaintiff had sufficiently raised the malfunction theory in the trial court and that under that theory had sufficient evidence to carry his burden of proof.

The Supreme Court granted certification on this question.

§ 7-2 EXPERT TESTIMONY ON CAUSATION HELD SUFFICIENT DESPITE FAILURE TO USE "MAGIC LANGUAGE" - SARGIS V. DONAHUE, 142 Conn. App. 505; Robinson, J.; Trial Judge – Tanzer, J., *cert. denied* 309 Conn 914 (2013)

RULE: Although in this case the Appellate Court held that the failure of plaintiff's expert to specifically state that the defendant's breach was a substantial factor in causing the injury was not fatal to the plaintiff's case, you will avoid a lot of trouble and heartache if you elicit such an opinion in every case

FACTS: On September 23, 2002, the defendant performed laparoscopic hernia repair on the plaintiff. The procedure involved the implantation of a mesh on the plaintiff's abdominal wall. The plaintiff developed an infection which she alleged the defendant failed to diagnose and treat in a timely manner. On November 1, 2002, another surgery was performed to remove the infected mesh.

Plaintiff brought suit against the defendant on December 17, 2004. The plaintiff died in 2007, and her husband was substituted as the plaintiff. The case was tried in September 2009.

Plaintiff's expert testified that the defendant breached the standard of care because he did not prescribe appropriate antibiotics until three weeks after he had identified the possibility of an infection. On the issue of causation, plaintiff

expert's testimony did not use the “magic language” that the breach of the standard of care was a substantial factor in causing the infection of the mesh.

The defendant moved for a directed verdict at the conclusion of the plaintiff’s case-in-chief and again after the defendant rested his case. The trial court reserved decision, and allowed the case to go to the jury.

The jury rendered a plaintiff’s verdict for $149,334.00.

The defendant moved for a judgment notwithstanding the verdict. The trial court granted the motion and set aside the verdict based upon the failure of the plaintiff’s expert specifically to opine that the defendants’ breach was a substantial factor in causing the injury. The Appellate Court reversed.

REASONING:

> “‘To be reasonably probable, a conclusion must be more likely than not.... Whether an expert’s testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert’s testimony.’ (Internal quotation marks omitted.) Macchietto v. Keggi, supra, 103 Conn. App. 776. “An expert... need not use talismanic words to show reasonable probability.” (Internal quotation marks omitted.) Milliun v. New Milford Hospital, 129 Conn. App. 81, 100, 20 A.3d 36, *cert. granted on other grounds*, 302 Conn. 920, 28 A.3d 338 (2011).”

Id. at 513.

The Appellate Court waded through the plaintiff expert's testimony and concluded that there was enough evidence to carry the plaintiff’s burden of proof. “We conclude, on the basis of Kovacs’ testimony, that the jury reasonably could have found that the plaintiff had met his burden of proof that the defendants had

proximately caused the decedent's injuries by failing to diagnose and to treat her postoperative infection in a timely and adequate manner." Id. at 516.

COMMENT: Plaintiff should be thankful that Judge Tanzer followed the correct path by allowing the case to go to the jury and then setting it aside, rather than directing a verdict. The Appellate Court leaned over backwards to preserve the jury verdict. Thankfully, the Supreme Court denied certification.

§ 7-2 EXPERT TESTIMONY REQUIRED TO PROVE BYSTANDER EMOTIONAL DISTRESS - SQUEO V. THE NORWALK HOSPITAL ASSOCIATION, Memorandum of Decision on Defendant's Deborah M. Shahid, APRN and The Norwalk Hospital Association's Motion for Summary Judgment re Bystander Emotional Distress Claims Dated July 20, 2012 (#317.00); Docket Number FST CV 09-5012548S, Superior Court, Judicial District of Stamford/Norwalk at Stamford, (April 30, 2013; Tierney, J.)

RULE: Because a bystander's emotional injury must be "serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response," expert testimony is required to prove the injury.

FACTS: On August 14, 2007, Agnes Squeo telephoned the Norwalk Police Department because her son was depressed and had expressed a desire to hang himself with an electrical cord. The police detained the son and took him to Norwalk Hospital for an emergency psychiatric examination. The son was evaluated by an advanced practice registered nurse (APRN).

The following morning, the nurse left a voicemail message for the parents that the son would soon be released because he was no longer a danger to himself or others.

The son left the Hospital soon after the voicemail message was left. He walked home, obtained an electric cord, and hung himself from a tree in the front yard. Sometime later his parents found him, still alive, cut him down and administered CPR. He had suffered substantial brain damage. He was taken off life support and died a week later, on August 23, 2007.

A lawsuit was brought in two counts: the first was on behalf of the boy's estate; the second was on behalf of the parents individually for bystander emotional distress.

The defendants filed a motion for summary judgment on the bystander emotional distress count, on three grounds: (1) whether there could be a claim for bystander emotional distress arising out of medical malpractice; (2) whether the facts of the case fit within the parameters of a bystander emotional distress case; and (3) whether the injuries suffered by the parents were serious enough to support a bystander emotional distress claim.

The trial court granted summary judgment on the third ground: that the injuries suffered by the parents were not sufficiently serious.

REASONING:

The trial court recited the facts: that the parents found their son hanging from a cord tied to a tree in the front yard of their home; that they were able to cut him down and lay him on the ground; that he was still alive.

Judge Tierney then noted that neither parent had been diagnosed with a condition recognized by the Diagnostic and Statistical Manual of Mental Disorder. The judge described the parents' treatment: that Mrs. Squeo had spoken with a

psychiatric therapist and her pastor; that Mrs. Squeo had been prescribed sleeping pills but stopped taking them shortly after the tragedy; and that Mr. Squeo was treated by a psychiatrist, although no reports were supplied to the court.

"From these documents the court finds that there is no material issue of fact that either of the parents, Agnes Squeo and Joseph Squeo, have suffered a serious injury 'beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response.'" Squeo at 11.

COMMENT: Although this case was wrongly decided, until it is overturned on appeal, cautious plaintiff's counsel should consider retaining experts in a bystander emotional distress cases.

§ 7-4(a) EXPERT TESTIMONY MUST BE BASED ON SUFFICIENT FACTUAL FOUNDATION - FORTIN V. HARTFORD UNDERWRITERS, 139 Conn. App. 826; Espinosa, J.; Trial Judge - Quinn, J. *cert. granted*, 308 Conn. 905 (2013)

RULE: Where an insured settles a case and claims an insurer improperly failed to defend and provide coverage, the insured has the burden of proving that the claims were within the policies' coverage and that the settlement was reasonable. The insured must provide expert testimony to carry this burden of proof.

FACTS: The plaintiffs purchased an underlying insurance policy from The Hartford and an umbrella insurance policy from North River Insurance Company. These policies were purchased in connection with the plaintiffs' businesses.

The plaintiffs were sued in May 1998 for slander. They alleged that the slander case gave rise to coverage under these policies. Plaintiffs promptly notified The Hartford and North River of the claims. The Hartford initially undertook a defense, but during the pendency of the action disclaimed coverage and declined to provide any further representation to the plaintiffs or indemnify the plaintiffs. The plaintiffs then requested North River to defend and indemnify. North River declined.

As a result of a mediation in September 2002, a settlement was reached in the underlying action. The plaintiffs then brought this action against their insurers seeking to recoup a portion of the money paid in the settlement.

The plaintiffs filed a motion for partial summary judgment. The trial court granted the motion, ruling that The Hartford and North River had breached a duty to defend the plaintiffs.

The plaintiffs disclosed Dale Faulkner as an expert witness to testify that the plaintiffs' settlement in the underlying action was objectively reasonable.

The $3.15 million paid by or on behalf of the plaintiffs to settle the underlying case settled both claims alleged to be covered under the insurance policies at issue and additional claims.

At deposition, Mr. Faulkner testified that he knew little about the other claims covered by the settlement, and did not know what portion of the settlement should be allocated to the claims arguably covered by the insurance policies.

The defendants filed a motion in limine seeking to preclude Faulkner's testimony on the ground that it was not based on sufficient facts and was therefore without adequate foundation. The defendants also filed a motion for summary judgment on the ground that, in the absence of expert testimony, the plaintiffs were unable to prove that their settlement of the underlying action was objectively reasonable. The trial court granted the motion to preclude and the motion for summary judgment. The Appellate Court affirmed.

REASONING:

Section 7-4(a) provides: "An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion."

> "The foregoing testimony reflects that Faulkner did not base his opinion, that the settlement of the relevant claims was reasonable, on an adequate investigation of the facts underlying the claims or an independent, or expert, evaluation of the merits of the claims or potential defenses. The record does not reveal that Faulkner was aware of the amount for which the plaintiffs ultimately settled the claims at issue.
>
> "The record, viewed in the light most favorable to the plaintiffs, does not reveal that Faulkner had an adequate factual basis upon which to evaluate whether there was a significant prospect of an adverse judgment against the plaintiffs, whether the settlement was advisable, whether the [slander] claims were brought in good faith or whether the amount for which the plaintiffs ultimately settled the claims at issue was excessive. Given these deficiencies, we conclude that Faulkner's opinion concerning the reasonableness of the settlement was without substantial value to a finder of fact, and therefore, properly was precluded by the court."

Id. at 840.

The Appellate Court went on to hold that expert testimony was necessary for the plaintiffs to carry their burden of proof and that, therefore, the trial court had properly granted summary judgment to the defendants.

§ 7-4(b) TO BE ADMISSIBLE, HOSPITAL BYLAWS MUST BE LINKED TO THE STANDARD OF CARE BY EXPERT TESTIMONY, TIM DOE #1 V. SAINT FRANCIS HOSPITAL AND MEDICAL CENTER, 309 Conn. 146 (2013); Palmer, J., Trial Judge – Shaban, J.

RULE: Because hospital rules, regulations and policies do not themselves establish the standard of care, in order to be relevant in establishing negligence, there must be expert testimony that the rules coincide with and reflect the standard of care.

FACTS: Dr. George Reardon, a physician employed by Saint Francis Hospital, was authorized by the hospital to conduct a "child growth study" there. The study was Reardon's ruse to recruit and sexually exploit hundreds of children. The plaintiff brought suit against the hospital alleging that it negligently failed to supervise Reardon's activities and failed to discover and prevent the abuse.

Reardon began his "study" in 1964 and conducted it out of his office on the hospital's fourth floor. The study was approved by the hospital's research committee and funded by the Saint Francis Hospital Association.

Reardon died in 1997. In 2007, the owner of Reardon's former residence found behind a false wall in the basement between 50,000 and 60,000 photographic slides and 130 films, all containing child pornography. Many of the sexually explicit slides and films depicted children who had been recruited to

participate in Reardon's purported growth study. Some of the images were of the plaintiff and his sister. The plaintiff brought suit against Saint Francis seeking damages for the sexual abuse.

The plaintiff presented expert testimony from a health care administration consultant and former hospital administrator that the standard of care applicable to the hospital's supervision of research was reflected in the hospital's bylaws, rules and regulations. A copy of the 1969 version of those rules was entered into evidence. One of the rules required the following:

"The (research) (c)ommittee shall require and receive periodic reports of the progress of investigations which have been approved and initiated. On the basis of such reports, it shall recommend continuance or discontinuance...." Id. at 159.+

Numerous other hospital rules and regulations regarding the supervision of research projects by the hospital were introduced into evidence. None of them had been followed by the hospital. The hospital did not require or receive periodic reports from Dr. Reardon and took no steps for decades to review or supervise his research.

The hospital introduced expert testimony from Dr. Thomas Godar, a retired physician who had served on its research committee from 1969 through the 1980's. Godar testified that the hospital's internal policies regarding research did not apply to "observational" research like Reardon's. He testified that these policies only applied to research which involved invasive medical procedures. He testified that with respect to observational research, no oversight or

supervision was required or undertaken. He acknowledged under cross-examination that while a member of the research committee he was aware that Reardon was photographing and measuring the genitals of children as part of his growth study.

The hospital requested the trial judge to instruct the jury that the hospital bylaws do not themselves establish the standard of care. The trial court refused to give that instruction.

The jury found for the plaintiff and awarded $2,750,000. On appeal, the hospital argued that the failure to give this instruction was reversible error. The Supreme Court held that the trial court was not required to give the instruction.

REASONING:

Although it is true that hospital rules do not themselves establish the standard of care, the Supreme Court has articulated this principle only in cases in which there was no expert testimony that the hospital rules coincide with, represent or reflect the standard of care. In this case, the Supreme Court held that since the plaintiff's expert testified that the hospital's bylaws reflected the standard of care, there was no need for such an instruction. Id. at 199-203.

Justice Zarella dissented on the basis that in his view the plaintiff's expert did not clearly testify that the hospital's bylaws reflected the standard of care.

VIII. Hearsay

§ 8-3(8) A LEARNED TREATISE IS ADMISSIBLE ONLY IF ESTABLISHED AS A STANDARD AUTHORITY UPON WHICH THE EXPERT RELIES - FILIPPELLI V. SAINT MARY'S HOSPITAL, 141 Conn.

App. 594 Lavine, J.; Trial Judge - Ozalis, J. *cert. granted*, 308 Conn. 947 (2013)

RULE: In order to get a learned treatise into evidence an expert must testify that the article being offered is "recognized as a standard authority in the field." When offered in direct examination, the expert must also testify he relied upon it.

FACTS: See § 4-3 above.

During Dr. Rodin's deposition he testified that in preparing for the deposition he had reviewed an article from The American Academy of Orthopedic Surgeons. He did not bring a copy of the article to the deposition.

After the deposition, plaintiff's counsel did a literature search and found the article. The article said: "Whenever a diagnosis is uncertain in a patient at risk you use a compartment pressure."

Plaintiff's counsel listed the article on her list of exhibits for trial. Defendant filed a motion in limine.

Plaintiff's counsel first offered the article through her own expert. The defendant objected on the ground that the plaintiff had not identified the article as one upon which the plaintiff's expert relied as requested in the notice of deposition. The defendant, therefore, had not had the opportunity to question the plaintiff's expert about the article at deposition. The defendants' objection was sustained. The Appellate Court affirmed that ruling.

Plaintiff's counsel then attempted to use the article to impeach Dr. Rodin. The circumstantial evidence was clear that the article being offered by the

plaintiff was the article described by Dr. Rodin during his deposition and the trial court so found. However, at trial Dr. Rodin did not recall reading the journal article and did not concede that it was a standard authority. In the absence of testimony that the article was a standard authority, the trial court refused to admit it for impeachment purposes. The Appellate Court affirmed this ruling.

In her third attempt to admit the article, the plaintiff's counsel offered it in cross-examination of the defendants' expert. The defendants' expert refused to agree that the article was a standard authority. The trial court allowed the plaintiff to use parts of the article in cross-examination of defendants' expert but did not allow the entire article into evidence. The Appellate Court upheld this ruling.

REASONING:

In the absence of testimony from an expert that the article is "recognized as a standard authority in the field," a learned treatise is not admissible in evidence.

COMMENT: Because defendants and their experts have been warned by counsel never to concede agree that an article identified by the other side is a "standard authority," the only practical way to get a learned treatise into evidence is to have your own expert testify it is a standard authority and that he or she relied upon it. *Under our discovery rules, any such article must be identified and supplied to the opposition before the expert's deposition.*

8-4 SCREENSHOTS ADMITTED AS BUSINESS RECORDS - SILICON VALLEY BANK V. MIRACLE FAITH WORLD

OUTREACH, INC., 140 Conn. App. 827; Beach, J.; Trial Judge - Hartmere, J., *cert. denied*, 308 Conn. 930 (2013)

RULE: In order to admit an electronic document such as a screenshot, a foundation must be laid by a witness who has knowledge about the basic elements that prove the reliability of the document.

FACTS: In this foreclosure action, bank employee Eugene Wong, was called as a witness to admit the business records of the bank describing the loan transaction.

Wong also testified regarding the amount of the debt owed to the plaintiff. To demonstrate the basis for Wong's calculations, the plaintiff introduced screenshots that captured its records of the defendant's loan activity from May 31, 2002, to the time of trial. The loan activity was recorded in an accounting program called Silicon Valley Bank Online (SVB Online).

Wong testified that the loan records depicted in the screenshots were updated at the time each a payment or charge was assessed against the loan; that it was the plaintiff's regular course of business to keep such records; and that the records were made in the regular course of the plaintiff's business. Although Wong was not the employee who entered the information into the accounting program, he testified that he reviewed the entries to make sure that they were accurate and applied correctly as between principal and interest.

The defendant objected to the admission of the screenshots on the ground that the plaintiff had failed to establish the elements of the business records exception. See CCE §8-4. Specifically, the defendant took issue with the fact

that Wong had not personally entered the loan repayment data into the SVB Online system. The defendant's objection was overruled.

The trial court rendered a judgment of foreclosure by sale. The defendant appealed, claiming that the admission of the screenshots pursuant to the business record exception to the hearsay rule was error. The Appellate Court affirmed.

REASONING:

> "The defendant also asserts that the screenshots were inadmissible because of Wong's 'limited' role in the administration of the loan, or because other employees more involved with the loan were available to testify. This claim merits little discussion. As the Connecticut Code of Evidence makes explicitly clear, a business record is 'not... rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record... or (2) the party's failure to show that such persons are unavailable as witnesses....' (Internal quotation marks omitted.) Conn. Code of Evid. § 8-4 (b).
>
> "It is also clear that Wong was competent to testify regarding the screenshots. The party proffering a document under the business records exception must present a witness who can establish the foundational requirements of the exception. See Berkeley Federal Bank & Trust, FSB v. Ogalin, 48 Conn. App. 205, 208, 708 A.2d 620, *cert. denied*, 244 Conn. 933, 711 A.2d 726 (1998). Regarding electronic documents, our Supreme Court recognized in American Oil Co. v. Valenti, 179 Conn. 349, 360-61, 426 A.2d 305 (1979), that '[w]hat is crucial is not the witness' job description but rather his knowledgeability about the basic elements that afford reliability to computer printouts.... The witness must be a person who is familiar with computerized records not only as a user but also as someone with some working acquaintance with the methods by which such records are made.' (Citation omitted.) Wong certainly exceeded this threshold. He testified that he was responsible for overseeing the subject loan, that he was familiar with the relevant loan documents, and that he [sic] fluent with SVB Online, having used the program for two and a half years. Thus, the court properly admitted the screenshots."

Id. at 836-37.

Sequestration of Witnesses in Civil Cases

SEQUESTRATION RESTS IN THE DISCRETION OF THE TRIAL COURT - CIRINNA V. KOSCIUSZKIEWICZ, 139 Conn. App. 813 (2013); Dupont, J.; Trial Judge - Young, J.

RULE: "In a civil proceeding, a court has the discretion to sequester any witness, including a party, if (1) seasonably requested, (2) specific and supported by sound reasons, and (3) false corroboration would probably result." (Internal quotation marks omitted.) In re Christopher A., 22 Conn. App. 656, 663, 578 A.2D 1092 (1990). Although sequestration is requested more frequently in criminal trials, there should be no distinction in its application between civil and criminal cases. *See* 6 J. Wigmore, Evidence (6th Ed. 1976) § 1839, p.470." Cirinna at 825.

FACTS: Property dispute between two neighbors in which the plaintiff claimed an easement by prescription. The dispute arose from the plaintiff's use of a driveway between the properties leading to the rear of the properties owned by the plaintiff and the defendant. For decades, the common driveway was used by both owners.

The plaintiff's family purchased their property in July 1974 and had used the driveway openly and continuously since that time.

The defendant purchased the property next door in February, 2008. For the first two years there was no dispute regarding plaintiff's use of the driveway.

In December 2009, the defendant became upset when the plaintiff did not contribute to snow removal. In the summer of 2010 he became upset further when a vehicle using the driveway allegedly rode recklessly and played loud

music, and someone allegedly damaged a retaining wall on defendant's property. After conducting a property survey and discovering that he owned the land on which the driveway was located, the defendant erected a fence blocking plaintiff's access to her parking area and garage.

Plaintiff filed a lawsuit alleging prescriptive and express easements over the defendant's driveway.

A trial to the court was held. The plaintiff, her mother and her sister testified regarding their use of the driveway over the past 35 years.

During the trial, the defendant filed a motion to sequester the plaintiff's witnesses. The defendant argued that because all of the plaintiff's witnesses would be testifying about their use of the driveway over the past 35 years, it would be likely that they would falsely corroborate each other's testimony. The trial court denied the motion. The Appellate Court affirmed.

REASONING:

"Sequestration of witnesses... is not demandable as a right but rests in the discretion of the trial court.... The court's action is subject to review and reversal for abuse of discretion." Id. at 825.

In the present case, the court found that the defendant's motion to sequester was filed in a timely fashion, but nonetheless denied his request because the defendant did not demonstrated a "good faith reason" that false testimony was likely, and noted that sequestration in civil cases is not typical. The defendant argues that the trial court stated the law incorrectly when it indicated that sequestration in civil cases is "very unusual."

The question, however, is not whether sequestration is more or less likely depending upon whether the underlying action is civil or criminal, but whether the rationale for sequestration has been satisfied. Although the court stated that sequestration is unusual in the civil context, it did not base its denial of the defendant's motion on that conclusion as a matter of law. Instead, the court explained that there was no reason to believe that the plaintiff's witnesses would testify falsely, and any such tailoring could be addressed through cross-examination of the plaintiff's witnesses. Id. at 825-26.

Sufficiency of Evidence

PERSONAL ESTIMATE OF LOST EARNING CAPACITY – DUNCAN V. MILL MANAGEMENT COMPANY OF GREENWICH, INC., 308 Conn. 1 (2013); Zarella, J.; Trial Judge – Karazin, J.

RULE: Plaintiff's estimate of her decrease in productivity sufficient to support verdict for future lost earning capacity.

FACTS: See Section 4-7 above. As a result of her broken ankle, Ms. Duncan underwent three surgeries. The parties stipulated that she had incurred $61,042.28 in past medical expenses and that her lost wages were $46,328.

The damages issue on appeal was the jury's award for future lost earning capacity and future medical expenses.

In support of her claim for future lost earning capacity the plaintiff placed in evidence her income tax returns from 2003 through 2008. "The plaintiff also testified that she had suffered a lasting diminution in productivity of between 20

and 25 percent attributable to the injuries, and that the injuries also had negatively affected her efforts to expand her client base." Id. at 31.

As to future medical expenses, the plaintiff's orthopedic surgeon, Dr. Clain, testified that the plaintiff had a 70% to 80% chance of requiring future arthroscopic surgery and a 10% to 20% chance of future ankle fusion surgery. He also provided estimates of the surgeon's fee for both types of surgeries, and explained that the plaintiff's prior surgeries could be used to predict the hospital's charges associated with potential future surgeries.

During summation, the plaintiff's attorney estimated the plaintiff's loss of earnings potential at $351,000 and future medical expenses at a minimum of $29,000. When combined with the stipulated amounts for past medical expenses and lost earnings, the amount of economic damages that the plaintiff's counsel requested totaled $487,990. The defendants' counsel, however, urged the jury to limit its award of economic damages to the stipulated amounts (past economic damages) if it found the defendants liable.

The jury returned a verdict in favor of the plaintiff and awarded her $500,000 in noneconomic damages and $235,000 in economic damages – approximately $127,630 more than the amount stipulated by the parties for past medical expenses and lost wages.

The defendants filed several post trial motions, including motions to set aside the verdict and for remittitur, which the trial court denied. The Supreme Court affirmed.

REASONING:

Plaintiff's counsel used case law allowing a plaintiff to estimate the value of her own real or personal property to argue that she should also be allowed to give an opinion regarding her future lost earning capacity. The Supreme Court held that this evidence was sufficient to support the award:

> "In the present case, by contrast, the jury reasonably could have credited the plaintiff's testimony that she became up to 25 percent less productive as a result of her injuries and that her injuries adversely affected her efforts to expand her client base, as well as her ability to travel and undertake other activities necessary to obtain clients for her consulting business. See, e.g. Carrano v. Yale-New Haven Hospital, 279 Conn. 622, 646-47, 904 A.2d 149 (2006) ("if a plaintiff presents testimonial evidence with respect to damages, it is solely within the province of the jury to assess the credibility of the plaintiff and to weigh the value of his or her testimony"). In light of such testimony, coupled with the plaintiff's income tax returns and Clain's testimony regarding her permanent partial disability, the jury reasonably could have attributed a portion of the contested economic damages to this loss of earnings capacity."

Id. at 37.

The Supreme Court also held that the evidence from the orthopedic surgeon was sufficient to support an award of future medical expenses:

> "In the present case, the jury reasonably could have found that the plaintiff would require significant, future medical treatment. Clain's testimony, which indicated a high likelihood of future surgery, was unopposed, and the plaintiff's prior medical bills also were admitted into evidence. Thus, the jury could have used the prior medical expenses in the manner suggested by Clain, coupled with the probabilities of future procedures, to arrive at an estimate of future medical expenses. See id., 55-56."

Id. at 36.

EVIDENCE OF CONTROL IN PREMISES LIABILITY CASE - MILLETTE V. CONNECTICUT POST LTD. PARTNERSHIP, 143 Conn. App. 62 (2013); Robinson, J.; Trial Judge - Thompson, J.

RULE: In a premises liability case for an injury occurring at a construction site, there must be evidence of who was in control of the precise area where the injury occurred, i.e., who locked the door at night.

FACTS: In 2006, the Connecticut Post Mall was undergoing an expansion. The plaintiff was a security guard employed by a company called MetroGuard to provide security for the construction site.

The plaintiff ascended a stairway that led to the construction site. At the top of the stairway, plastic strips hanging from a scaffolding above divided the stairway from the hallway beyond. The plaintiff moved aside the hanging plastic, stepped through the opening and slipped or tripped onto a concrete floor. He severely fractured his wrist.

The plaintiff brought suit against three defendants: Connecticut Post Limited Partnership, Connecticut Post Mall LLC and Westfield Corporation. During the trial the plaintiff presented evidence that these three defendants were, in one form or another, the title owners of the mall.

After the plaintiff rested, the defendants filed a motion for a directed verdict on the ground that the plaintiff had not established that defendants had control of the area where the fall occurred. The court reserved decision and allowed the case to go to the jury. There was a substantial plaintiff's verdict.

The defendants filed a motion for judgment notwithstanding the verdict. The trial court set aside the verdict on the ground that the plaintiff had failed to

offer evidence to prove the defendants were in control over the area where the fall occurred. The Appellate Court affirmed.

REASONING:

> "The general rule is that where the owner of premises employs an independent contractor to perform work on them, the contractor, and not the owner, is liable for any losses resulting form negligence in the performance of the work.... The basic premise is that the assumption and exercise of control over the offending area is deemed to be in the independent contractor.... The explanation for [this rule] most commonly given is that, since the [owner] has no power or control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and [the contractor], rather than the [owner], is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it....
>
> "'Exceptions to that rule arise when the employer retains control of the premises or supervises the work of the contractor, or where the work to be performed by the contractor is inherently dangerous, or where the employer has a nondelegable duty to take safety precautions imposed by statute or regulation....' (Citations omitted; internal quotation marks omitted.) Mozeleski v. Thomas, 76 Con. App. 287, 291-92, 818 A.2d 893, *cert. denied*, 264 Conn. 904, 823 A.2d 1221 (2003). Accordingly, in order to satisfy his burden of proof as to the duty element of the cause of action alleged, the plaintiff needed to establish by a preponderance of the evidence that the defendants retained control over the construction site where the plaintiff fell."

Millette v. Connecticut Post Ltd. Partnership, at p. 70-71.

The plaintiff failed to present evidence that any of the exceptions applied.

Plaintiff pointed to the defendants' responses to certain Requests for Admission that had been filed in the case, claiming that they demonstrated control. However, the requests for admission were not placed in evidence and, therefore, not considered by the fact finder or the court.

The plaintiff also pointed to the nondelegable duty doctrine, however, the court held "that the nondelegable duty doctrine applies only when the plaintiff has established that the defendant maintained control and possession of the property." Id. at 75.

IN DRAM SHOP ACTION, PLAINTIFF MUST PROVE OBSERVABLE INTOXICATION OR EXCESSIVE CONSUMPTION - O'DELL, ADM. V. KOZEE, 307 Conn. 231 (2012); Harper, J.; Trial Judge - Tanzer, J.

RULE: C.G.S. §30-102, the dram shop statute, requires proof of visible or otherwise perceivable intoxication.

FACTS: The plaintiff and Joel Pracher went to the Deja Vu Restaurant in Plainville. Pracher consumed at least 15 alcoholic beverages, including beer, tequila and brandy. Pracher later admitted that he was drunk. However, no witnesses were found who observed Pracher exhibiting signs of intoxication while at the restaurant.

Pracher and the plaintiff left the bar at approximately 12:45 a.m. Approximately two miles from the bar, Pracher drove into the back of a box truck parked on the shoulder of the road at approximately 60 miles per hour. The plaintiff, seated in the front right seat, was killed. Pracher's blood alcohol shortly after the accident was .187. Pracher did not remember much about the accident.

Plaintiff brought suit against the Deja Vu Restaurant. Before trial, plaintiff filed a motion in limine asking the court to rule on whether or not visible signs of intoxication were required to carry his burden of proof. The trial court ruled that it was not necessary prove visible intoxication.

At trial, the plaintiff did not offer eyewitness testimony that Pracher was visibly intoxicated, nor did he offer expert testimony that Pracher, because of his blood alcohol level of .187, would necessarily be visibly intoxicated.

The jury returned a verdict of $4,000,000, which was reduced to $250,000, pursuant to the statutory cap of C.G.S. § 30-102.

The defendant appealed, claiming that it was necessary for the plaintiff to prove visible intoxication to carry his burden of proof under the Dram Shop Act. The Appellate Court agreed with the defendant, as did the Supreme Court, and the verdict was reversed.

REASONING:

The Supreme Court held that the word "intoxicated", in its statutory context, means visibly or perceptibly intoxicated, based on prior case law and legislative intent. "Intoxication is a state of being, induced by the consumption of alcoholic liquor, that can be observed by the layperson through various indicators. In other words, intoxication under §30-102 requires both an internal effect and an external manifestation." O'Dell at 256-57.

However, the Supreme Court also stated, in dicta, that "a plaintiff could establish visible intoxication through blood alcohol content and expert testimony, as long as the expert properly took into account all pertinent facts relating to the individual consuming the alcohol." Id. at 259.

Most importantly, the Supreme Court held that there is no requirement that the plaintiff prove that the defendant knew, or should have known, that the patron in question was intoxicated:

> "It also is self-evident that the statute contains no element of proof of the purveyor's knowledge or state of mind. *Cf*. State v. Katz, *supra*, 122 Conn. 441-42 (no knowledge of intoxicated condition required under § 30-86). Undoubtedly, when there are perceivable signs of intoxication, in many but not all cases a plaintiff likely would be able to establish that the purveyor at the very least should have known of the patron's condition. This result does not alter the fact that a plaintiff has no obligation to make such a showing under the act. As this court has recognized with respect to strict liability criminal statutes: '[S]trict liability offenses dispense with the mens rea of a crime, meaning that the possession of a guilty mind is not essential before a conviction can take hold.... In strict liability statutes, it is not required that the defendant know the facts that make his conduct fit the definition of the offense.... [Nonetheless, the defendant] if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion that it might reasonably exact from one who assume his responsibilities.' (Citations omitted; emphasis added; internal quotation marks omitted.) State v. T.R.D., 286 Conn. 191, 219-20, 942 A.2d 1000 (2008). "

Id. at 264-65.

> "[A]ny perceptible indicator of intoxication at the time of service, including excessive alcohol consumption itself, can be sufficient to deem the purveyor on notice of its potential exposure to liability under the act and thus permit recovery."

Id. at 268.

> "[T]he plaintiff need prove only that signs of Pracher's intoxication could have been observed, not that they would have been obvious to anyone coming into contact with him."

Id. at 272-73.

Video Evidence - Jury Deliberations - Courtroom or Jury Room?

> REPLAY OF TASER VIDEO - STATE V. OSBOURNE, 138 Conn. App. 518 (2012); Sheldon, J.; Trial Judge - Hauser, J., *cert. denied*, 307 Conn. 937 (2013)

RULE: It is within the trial court's discretion to require the jury to review a video admitted as an exhibit in the courtroom.

FACTS: During an encounter with the defendant, a police officer drew his Taser gun and turned it on. When he turned the Taser gun on, its camera began to record the encounter with the defendant. As the defendant struggled with the police officer, the officer tased the defendant. After the defendant was tased, he reached down to his shorts pocket, from which he grabbed and partially removed a gun.

During the trial the taser video was admitted as a full exhibit and played for the jury. At the conclusion of the case, the video was not sent into the jury deliberation room, despite the Practice Book Rule which states that the judicial authority "shall submit to the jury... all exhibits received in evidence."

After commencing its deliberations, the jury sent a note to the court asking to have the video replayed for it. The jury was brought back into the courtroom and the video was replayed. Later in the deliberations, the jury sent another note asking to view the video "in private."

The trial court, relying on case law that required video "testimony" to be played in court,[1] informed counsel that the video must be viewed in open court, under the supervision of the trial judge, in the presence of the parties and their counsel. There was no objection by the State or the defense to this procedure.

The jury was then brought into the courtroom and the video was replayed multiple times. At no time did the defendant ask that the jury be allowed to review the video in the deliberating room.

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[1] State v. Gould, 241 Conn. 1 (1997).

The defendant was convicted. On appeal, the defendant claimed that despite the fact that he did not object to the procedure that was followed, or request that the video be sent into the jury deliberation room, his claim should be reviewable in the Appellate Court as Constitutional error. The Appellate Court held that the defendant's claim was not of Constitutional magnitude and refused to review the claim.

REASONING:

> "On the basis of our review of the record, we cannot conclude that the court's ruling requiring the jury to view the video in the courtroom constituted a manifest injustice. There is nothing in the record to suggest that the jury felt constrained in the manner in which it reviewed the video. Although the defendant contends that the "jury was unable to adequately view and consider a key piece of evidence in the trial," his claim is belied by the fact that the jury viewed the video, or portions of it, no fewer than twelve times throughout its deliberations, often asking that specific portions be played and at various speeds. There is no indication in the record that the jury was exposed to any undue influence as a result of being required to view the video in the courtroom. The defendant has failed to demonstrate that the court's denial of the jury's request to view the video in the deliberating room constituted an obvious error that affected the integrity of the trial. Therefore, the defendant's attempt to invoke the plain error doctrine in this case must fail."

Id. at 540.

REPLAY OF DASHBOARD CAMERA - STATE V. JONES, 140 Conn. App. 455 (2013); Alvord, J.; Trial Judge - Alander, J.

RULE: It is within the trial court's discretion to require the jury to review a video admitted as an exhibit in the courtroom.

FACTS: Two police officers sitting in an unmarked police car observed the driver of a green Dodge Charger engaging in what appeared to be a drug transaction. As the Charger began to drive away, the police officers followed it, and requested by radio that a marked police cruiser stop the Charger. A cruiser soon arrived, activated its emergency lights and stopped the Charger. When the cruiser's emergency lights were turned on, a dashboard camera automatically turned on and recorded the ensuing events.

After the Charger was stopped, one of the officers from the unmarked car approached the Charger, identified himself as a police officer and requested the driver show him his hands. When the driver did not comply, the officer drew his firearm. The Charger backed up, hit the officer and accelerated forward. The officer fired two shots at the Charger, which then sped away. The police pursuit was unsuccessful.

The following day, the police officer identified the defendant as the driver of the Charger from a photographic array. In addition, the woman who had rented the Charger informed the police that she had rented the Charger at the request of the defendant. The defendant was arrested and charged with assault on a police officer, in addition to other charges.

During the trial the dashboard camera video was introduced as a full exhibit. At the end of the case, the judge informed the jury that it could view the recording in the courtroom upon request.

The following morning, defense counsel for the first time asked whether the jurors would be able to view the video in the jury room. The judge informed

defense counsel that no provisions had been made to enable the jury to view the video in the jury deliberation room. Defense counsel indicated that he thought the jury should be able to view the video in the jury deliberation room and the judge responded that he did not think that was necessary and in any event no provision had been made for this to be done. The defendant was convicted.

At the defendant's sentencing hearing defense counsel moved for a judgment of acquittal and a new trial on the ground requiring the jury to view the video in the courtroom reduced the jury's ability to freely discuss the facts of the case. The defendant's motion was denied. The defendant appealed. The Appellate Court affirmed the conviction.

REASONING:

> "Practice Book §42-23(a) states in relevant part: 'The judicial authority shall submit to the jury... [a]ll exhibits received in evidence.' Such exhibits are distinguished from other items, listed in subsection (b), that '[t]he judicial authority may, in its discretion, submit to the jury.' Practice Book §42-23(b). On appeal, the defendant argues that use of the word 'shall' in subsection (a), as opposed to the word 'may' in subsection (b), creates a mandatory directive with regard to exhibits received in evidence. The defendant further argues that the procedure the court followed for the replaying of the video-the procedure for the replaying of testimony as set forth in Practice Book § 42-26-was improper because the rules of practice set different standards for testimonial and demonstrative evidence. We agree with the defendant that testimonial and demonstrative evidence are subject to the standards set forth in practice Book §§ 42-26 and 42-23, respectively, and that Practice Book § 42-23 requires commanding the court to submit exhibits received in evidence to the jury. We disagree, however, with the defendant's contention that the video was not submitted to the jury."

Id. at 463-64.

> "'Words and phrases are to be given their ordinary meaning in construing statutes unless the text indicated otherwise.' State v.

Cook, 183 Conn. 520, 522, 441 A.2d 41 (1981), citing General Statutes § 1-1. Dictionary definitions of 'submit' include in relevant part: '[t]o commit (something) to the consideration or judgment of another'; American Heritage Dictionary of the English Language (New College Ed. 1981); 'to present for the approval, consideration, or decision of another or others'; Random House Webster's Unabridged Dictionary (2d Ed. 2001); 'to send or commit for consideration, study, or decision . . . to present or make available for use or study'; Webster's Third New International Dictionary. A review of these definitions reveals the two crucial components of the ordinary meaning of 'submit': the subject matter in question must be (1) committed, presented or sent to a person or persons (2) for consideration, study, decision or judgment.

"More than one century ago, our Supreme Court stated that 'every tribunal for the trial of civil or criminal causes should have open to it the best legitimate means of acquiring such knowledge of the law and facts as will enable it to decide the cases before it fairly and intelligently.' (Emphasis added.) State v. Rubaka, 82 Conn. 59, 67, 72 A. 566 (1909). The trial court has 'the authority to manage cases before it'; (internal quotation marks omitted) State v. Colon, 272 Conn. 106, 256, 864 A.2d 666 (2004), *cert. denied*, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); 'and may, of course, take all steps reasonably necessary for the orderly progress of the trial.' State v. Woolcock, 201 Conn. 605, 622, 518 A.2d 1377 (1986).

"In this case, the court instructed the jury that it could view the video in the courtroom. This instruction provided a means of presenting the video to the jury for its consideration, and, therefore, fell within the ordinary meaning of 'submit.' The court, using its inherent authority to manage the trial before it, offered the best legitimate means of presenting the exhibit to the jury in compliance with the mandatory directive of Practice Book §42-23. The record reflects that defense counsel raised to the court his concern that the jury be able to view the video in the jury deliberation room only moments before the final jury instructions were given. Under such circumstances, and with no other viable option presented to it, the court took the reasonable and necessary action to ensure compliance with the rules of practice and the orderly progress of the trial. The court did not abuse its discretion in instructing the jury that it could view the dashboard camera video in the courtroom during deliberations."

Id. at 465-66.

COMMENT: The equivalent Practice Book Section for civil cases is § 16-15.