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2016 Update on Evidence

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Introduction

The Update on Evidence covers civil and criminal cases. However, criminal cases are covered only insofar as the rules therein are applicable and useful in civil cases. The 2016 Update covers cases published from August 25, 2015 through September 13, 2016.

The Table of Contents follows the format of the Connecticut Code of Evidence. That is, to the extent possible, the cases are dealt with under the headings assigned to the ten articles in the C.C.E.

Article IV -RELEVANCY

§ 4-3 EVIDENCE THAT EXPERT HAD TESTIFIED FALSELY THAT HE HAD NOT TESTIFIED ON BEHALF OF DEFENDANT IN OTHER MEDICAL MALPRACTICE ACTIONS HELD MORE PREJUDICIAL THAN PROBATIVE - *FILIPPELLI, III, ET AL*. V. *SAINT MARY'S HOSPITAL, ET A*L. 319 Conn. 113 (2015)

RULE: Fact that defense expert was serving as an expert for the defendant in two other medical malpractice cases, and lied about that fact at deposition, held more prejudicial than probative because the jury would find out that the defendant had been sued for malpractice two other times.

FACTS: On March 4, 2005, the plaintiff sustained a comminuted tibial plateau fracture playing basketball. He arrived at St. Mary's Hospital's emergency department at approximately 10 p.m. He was treated and released, with instructions to consult an orthopedic surgeon.

Plaintiff returned to the emergency department at 7:30 the next morning reporting severe pain in his leg. He was examined by an emergency department doctor. The emergency department doctor made a diagnosis of compartment syndrome and called in a consultation with an orthopedic surgeon, Dr. Denis Rodin.

Dr. Rodin examined the plaintiff and admitted him to the Hospital. He wrote in his note that there was a "question of compartment syndrome." He also wrote "this may very well be an impending compartment syndrome and we will closely monitor this every two hours for neurovascular check." He did not take compartment pressures. He later testified that he was certain that Mr. Filippelli did not have compartment syndrome that morning.

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 alleged he suffered permanent nerve and muscle damage as a result of a delay in diagnosing and treating the compartment syndrome.

The plaintiff's claim was that it was the standard of care to take compartment pressures in the morning. That if Dr. Rodin had done that he would have diagnosed compartment syndrome and operated in the morning.

The defendant denied that it was the standard of care to take compartment pressures in the morning. He claimed that Mr. Filippelli did not have compartment syndrome in the morning. Finally, he denied that any damage was done by delaying surgery until that evening.

Defendants' expert was Dr. Andrew Bazos. His deposition was taken on April 4, 2011. When asked at deposition how often he testified in medical malpractice cases, Dr. Bazos testified that he had been disclosed as an expert in only three or four cases. He testified that he only remembered the name of the physician in one of those cases, an action that did not involve Dr. Rodin. Dr. Bazos further testified that he did not know Dr. 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 Dr. Bazos had been retained in two other cases to testify as an expert on behalf of Dr. Rodin, by the same lawyer who was representing Dr. Rodin in this case. He had been deposed in one of those two cases two months before the plaintiff deposed him in this case. He had signed the errata sheet

for that deposition five days before the deposition in this case, while meeting with defense counsel to prepare for this deposition.

The defendant filed a motion in limine seeking to preclude cross examination of Dr. Bazos regarding the fact that he was serving as the defendant's expert in two other cases. The motion in limine claimed that it would be unfairly prejudicial for the jury to learn that the defendant had two other medical malpractice cases pending against him. Defendant claimed Dr. Bazos had not lied, at deposition. That Dr. Bazos had misunderstood the questions as referring to testimony at trial and intended to use the errata sheet to amend and clarify his deposition testimony.

Plaintiff argued the evidence was critical for the jury to assess Dr. Bazos' credibility.

Defendant argued that plaintiff was attempting to use this evidence as a back-door way of getting into evidence that Dr. 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. The Supreme Court affirmed the Appellate Court, in a four to three ruling.

REASONING: The analysis should begin by clearly distinguishing between false testimony at deposition and false testimony at trial. In this case, the court is dealing with false testimony at deposition. The rules regarding the admissibility of false testimony at deposition are completely different than the rules regarding impeaching false testimony at trial.

The fact that a witness had given false testimony at deposition is admissible under Connecticut Code of Evidence § 6-6 (b) (1): "General rule. A witness may be asked, in

good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness."

The Supreme Court majority opinion acknowledges that "false testimony given under oath is a classic example of misconduct that may be used for such purposes." *Filippelli v. Saint Mary's Hospital*, page. 145. The issue on appeal was not whether or not Dr. Bazos' lie at deposition was admissible. The issue was whether or not the trial court's abused its discretion in determining that the probative value of the evidence was outweighed by the danger of unfair prejudice.

> In the present case, it is apparent that the trial court properly exercised its discretion in precluding the plaintiff from questioning Bazos as to whether he previously had testified as an expert on behalf of Rodin. First, whether Bazos previously served as an expert on behalf of Rodin was a collateral matter because it was relevant only to Bazos' credibility and not to any substantive issue in the case. See *State* v. *Annulli*, supra, 309 Conn. 494-95 ("[a]n issue is collateral if it is not relevant to a material issue in the case *apart from its tendency to contradict the witness*" [emphasis in original; internal quotation marks omitted]). In other words, although Bazos' alleged false deposition testimony bore on his veracity, his relationship with Rodin was not relevant to the plaintiff's claim that Rodin was negligent in failing to timely diagnose and treat the plaintiff's compartment syndrome. Furthermore, for obvious reasons, evidence of prior claims of professional negligence against Rodin, which were not otherwise admissible, would have been highly prejudicial to the defendants. Thus, as the trial court concluded, allowing the plaintiff unrestricted inquiry into Bazos' work as an expert for Rodin would have injected a collateral issue into the case that was extremely prejudicial to the defendants.

Filippelli v. *Saint Mary's Hospital*, at pages 146-147.

Justice Eveleigh argued in dissent that not allowing this cross-examination of Dr. Bazos was an abuse of discretion.

> I recognize that a trial court has broad discretion in ruling on the admissibility of evidence and that we will not disturb such a decision in the absence of an abuse of discretion. See, e.g., *Statewide Grievance Committee* v. *Burton*, 299 Conn. 405, 415, 10A.3d 507 (2011). "Nevertheless, [t]he exercise of discretion to omit evidence in a civil case should be viewed more critically than the exercise of discretion to include evidence. It is usually possible through instructions or admonitions to the jury to cure any damage due to inclusion of evidence, whereas it is impossible to cure any damage due to the exclusion of evidence." (Internal quotation marks omitted.) *Hayes* v. *Manchester Memorial Hospital*, 38 Conn. App. 471, 474, 661 A.2d 123, cert. denied, 235 Conn. 922, 666 A.2d 1185 (1995). It is through the lens of a more critical analysis that I would conclude that the trial court's decision improperly limited the cross-examination of the defendants' single expert witness harmed the plaintiff. Accordingly, I would reverse the judgment of the Appellate Court and remand the case for a new trial.

Filippelli v. *Saint Mary's Hospital*, pg. 153.

Article VI – WITNESSES

§ 6-8 PROHIBITION AGAINST ASKING A WITNESS TO CHARACTERIZE ANOTHER WITNESS'S TESTIMONY AS A LIE, MISTAKEN OR WRONG. *STATE* v. *JONES*, 320 Conn. 22 (2015)

RULE: In *State* v. *Singh*, 259 Conn. 693 (2002) the Connecticut Supreme Court established the rule that it is improper to ask one witness to comment on another witness's veracity. In a civil case, the rationale behind the rule is that the determination of credibility is for the jury, and not for witnesses. Therefore, such questions have no probative value and are improper and argumentative. However, in order to preserve this issue for appeal, counsel must object to any such questions.

FACTS: The defendant and another man, George Harris, got into a fight in which the defendant slashed Mr. Harris with a box cutter.

The defendant and Harris had completely different versions of the altercation. The case boiled down to a credibility contest between the defendant and Harris that required the jury to determine which of them was telling the truth.

The defendant testified at trial. On cross-examination, the prosecutor asked the defendant whether all this testimony from Harris "was a lie?"

The State conceded on appeal that the challenged questions and the prosecutor's final argument were improper under Singh. The State defended the appeal by claiming the questions and argument were harmless.

The Appellate Court disagreed that the questions and argument were harmless. The Supreme Court reversed the Appellate Court and reinstated the verdict.

REASONING: In finding that the Singh violations did not deprive the defendant of a fair trial the Supreme Court relied primarily on the fact that defense counsel did not object to the questions or the prosecutor's final argument. In addition, the Supreme Court stated that in a case where it is clear that one of the two witnesses in question has to be lying, the violation is not as harmful.

Justice Eveleigh argued in dissent that the majority opinion "weakens, if not, destroys the Singh doctrine". *State* v. *Jones*, at page 72.

Article VII – OPINIONS AND EXPERT TESTIMONY

§ 7-1 OPINION BY LAY WITNESSES- 1) DISTINGUISHING OPINION AND FACT; 2) LAY OPINION THAT INJURY IS A BITE MARK INADMISSIBLE; 3) LAY OPINION THAT OBJECT IN VIDEO IS A SNEAKERBOX INADMISSIBLE- *STATE* v. *HOLLEY*, 160 Conn. App. 578 (2015) cert. granted, 320 Conn. 906 (2015).

RULE: It is not the lay witness's job to interpret the evidence for the jury.

FACTS: The victim, William Castillo, lived in an apartment in East Hartford. The victim earned money by selling sneakers both from his car and from his apartment.

The State alleged that on June 30, 2009, the defendant Kenny Holley, and Donele Taylor, entered the victim's apartment to rob him. There was a struggle during which the victim bit Taylor on his wrist and Taylor shot the victim, who died.

Shortly after the shots were fired images of the defendant and Taylor running from the apartment to a bus stop were captured by a video surveillance camera located at a nearby convenience store. A video on the bus then showed Taylor and the defendant boarding the bus.

The police circulated a still photograph taken from the bus surveillance video to the public in an attempt to obtain leads. A witness, Nicole Clark, saw the photograph and called the police. Clark told the police she had worked with the defendant and recognized him in the photograph.

The defendant objected to Clark's testimony on the basis that Clark's "opinion" that the person shown in the photograph is the defendant was inadmissible under Connecticut Code of Evidence § 7-3 because it embraced an ultimate issue. The trial court allowed Clark's testimony.

The Appellate Court rejected the claim that the testimony embraced an ultimate issue. The Appellate Court also held that Clark's testimony was not an opinion.

> "The state argues, and we agree, that Clark's testimony that she recognized the defendant as the person depicted in the photograph that had been disseminated by the police is not characterized accurately as *opinion* testimony as to whether the photograph depicted the defendant. Clark recognized the defendant's face as it appeared in the still image based upon the fact of her past acquaintance with him; she did not merely offer an opinion as to whether the still image depicted the defendant. Thus, her testimony was based on the *fact* that she recognized the defendant, not on an opinion that the photograph depicted him. The significance of this distinction has been recognized in prior decisions…."

State vs. *Holley, at page. 617.*

The police investigation led them to Taylor. A gun which had belonged to Taylor was linked to the crime scene and Taylor's DNA was found on a baseball cap found at the crime scene.

On July 16, 2009, Taylor confessed. He told the police that the victim had bitten him on the wrist and a photograph was taken of the bite mark. Taylor pleaded guilty and was sentenced 32 years in prison.

Taylor refused to testify in the defendant's trial. Therefore, his statements to the police were not admissible.

Detective Donald Olson testified that when he interviewed Taylor on July 16, 2009: "he appeared to have a bite mark on his wrist…." *State* v. *Holley*, pg. 606. The defendant objected to this testimony on the ground that it was an inadmissible lay

opinion. The trial court allowed the testimony. The Appellate Court found this to be error.

> "Here, Olson was not testifying as an expert witness with any type of training or experience related to the recognition of bite marks. Cf. *State* v. *Ingram*, 132 Conn. App. 385, 401-402, 31 A.3d 835 (2011) (testimony that wounds appeared to be result of dog bite permissible because it came from witnesses with training and experience related to matters about which they testified), cert. denied, 303 Conn. 932, 36 A.3d 694 (2012). The prosecutor asked Olson about "the nature of the injuries" to Taylor that he had observed on July 16, 2009. The prosecutor showed Olson photographs of the injuries at issue, marked as full exhibits, which Olson testified were fair and accurate representations of the injuries he observed on July 16, 2009. The prosecutor's inquiry permitted Olson to describe his observations of Taylor's injuries on that date. By replying, however, that Taylor appeared to have "a bite mark on his wrist," Olson did not merely describe what he had observed in terms of the physical appearance of the skin on Taylor's wrist. Instead, by describing the injury as "a bite mark," he unquestionably expressed his opinion that Taylor had been bitten without establishing the necessary expertise or qualifications."

State vs. *Holley, pg. 621*

The surveillance video from the bus shows the defendant approaching the front of the bus and unzipping his backpack to retrieve money. The video appears to show a box which has a lid that is visibly separated from the base of the box in the backpack.

The bus video was placed in evidence during the testimony of Detective Smola.

The backpack was never recovered. Therefore, Smola had no knowledge of what was in the backpack other than what was shown on the video.

The prosecutor asked Smola the following questions:

> "'There appears to be a backpack up by the garbage can. Were you able to determine through your investigation what you believe is contained within that backpack?' After the court overruled a defense objection to the inquiry, Smola testified: "It's my belief through investigation it was a sneaker box."

State vs. *Holley, pg. 634.*

The Appellate Court found the admission of this testimony to be error.

> "As we already have set forth in part III B of this opinion, § 7-1 of the Connecticut Code of Evidence provides: "If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." The state did not present Smola as an expert witness with training or experience related to the interpretation of video evidence. It is apparent from a review of his testimony that he did not have any firsthand knowledge of the item in the backpack; he plainly testified that the police never recovered the backpack or its contents. We are unaware of any authority under which a lay witness who lacks firsthand knowledge of matters in evidence may render his or her opinion as to such matters by presenting his interpretation of the evidence to the jury. The state argues that the testimony was proper because the evidence reflects that Smola had viewed the bus video and merely rendered a lay opinion that the item depicted therein was similar to a shoe box. Under the state's rationale, it would be proper for *any* witness who was capable of watching the video evidence to render his or her opinion with regard to what the video depicted. We are unaware of any support in the law for such a broad proposition".

State vs. *Holley, pgs. 635-636.*

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO ESTABLISH THAT FACEBOOK POSTS WERE PUBLICALLY EXHIBITED- *STATE* v. *BUHL*, 321 Conn. App. 688 (2016)

RULE: Testimony by a lay witness explaining the concepts regarding privacy settings were sufficient to support a fact-finders conclusion that certain Facebook postings were public in nature.

FACTS AND REASONING: The defendant was involved in a romantic relationship with a man who lived with his seventeen year old daughter from his previous marriage. The defendant and the daughter's relationship was "tense" and "uncomfortable." The daughter kept a diary in a drawer of a nightstand in her bedroom.

On June 23, 2010 the night of the daughter's high school graduation, the daughter received a telephone call from a friend who stated that there was a fake profile posted on Facebook with information about her. The friend had received and accepted a friend request from the person who created the fictitious account. The daughter logged into Facebook through the friend's account and viewed the posts. The profile was created under the username "Tasha Moore". It contained derogatory information regarding the daughter stating that she got drunk at parties and engaged in certain sexual activities. The post also contained a photograph of the daughter and photographs of entries from the daughter's diary. The diary entries described the daughter's drinking and performing oral sex.

Although "Tasha Moore" sent friend requests to seven or eight of the daughter's friends from school, she did not send a friend request to the daughter herself.

The daughter started receiving phone calls from these friends and decided not to go out that night to celebrate her graduation.

The next morning the daughter sent a message to "Tasha Moore" via Facebook asking her to take down the posts and warning her that if they were not removed that she would go to the police. The posts were not taken down. The daughter went to the police. Later that afternoon, the father received an anonymous envelope, sent by overnight mail, which contained copies of the daughter's diary entries- the same ones that had been posted on Facebook. A typed unsigned cover letter claimed to be from a friend of the daughters.

The next night the father was having dinner with the defendant and he told her about these events. The defendant did not react to the story.

Two days later, however, the defendant told the father that she had sent the anonymous mailing. She claimed that the daughter's anonymous friend had given her copies of the daughter's diary. When the father asked for the friend's name, the defendant refused to reveal that information, claiming she had promise to keep it confidential.

The police served an ex-parte order on Facebook for the disclosure of the internet protocol address associated with "Tasha Moore" profile. The police then served an ex-parte order on Cablevision seeking disclosure of the person associated with that IP address. It was the defendant.

The defendant was arrested and charged with Breach of Peace and Harassment. She was convicted after a court trial. She appealed claiming that the State had failed to prove that the Facebook posts were publicly exhibited and that she posted the diary entries on Facebook.

In order to prove that the Facebook posts were publicly exhibited the State relied on the testimony of the daughter. The daughter explained Facebook concepts such as "friending" and the sites privacy settings. The daughter testified that even though she was never friends with "Tasha Moore" she was able to view the profile which the defendant had posted.

The Appellate Court reversed one of the defendant's convictions holding that expert testimony was required to demonstrate that the posts were publicly exhibited. The Supreme Court reversed the Appellate Court and held that expert testimony was not required.

> "Regardless of any comments by the trial court, the elementary Facebook concepts in the present case did not go beyond "the field of ordinary knowledge and experience" of an objective trier of fact. *State* v. *Smith*, supra, 273 Conn. 211. The prevalence of Facebook use in American society cannot be reasonably questioned. Indeed, a 2015 survey performed by the Pew Research Center reveals that 72 percent of American adults that use the Internet also use Facebook".

State v. *Buhl*, pg. 700.

The defendant also argued on appeal that because the State never produced direct evidence affirmatively linking her IP address to the one associated with the "Tasha Moore" profile the circumstantial evidence was insufficient to prove beyond a reasonable doubt that she posted the diary entries. The Supreme Court reviewed the evidence regarding the defendant's access to the diary entries, her acknowledgment of writing the anonymous letter, and other circumstantial evidence to hold that the circumstantial evidence was sufficient.

§ 8-3(2) INSUFFICIENT FOUNDATION FOR ADMISSION OF SPONTANEOUS UTTERANCES - *STATE* v. *DALEY*, 161 Conn. App. 861 (2015)

RULE: A proponent seeking admission of a statement under the spontaneous utterance exception to the hearsay rule must establish four elements: 1) the declaration must follow a startling occurrence; 2) the declaration must refer to that occurrence; 3) the declarant must have observed the occurrence; 4) the declaration must be made under circumstances that negate the opportunity for deliberation and fabrication by the declarant.

FACTS: On July 4, 2010, at around 10:00 pm, Byron McLennon, Jr., and his brother Roland McLennon arrived on Edna Avenue in Bridgeport. Byron parked the car and his brother Roland got out of the car and walked across the street toward a black Mercedes SUV with a New York license plate. Byron followed his brother. Once Roland reached the SUV he had a short conversation with the driver who Byron recognized as the defendant.

A gunshot rang out from inside the SUV and his brother fell to the ground. He had been shot in the head. Byron saw something black in the defendant's right hand.

Byron ran back to his car and drove away. Byron did not go to the Police. He later said he knew his brother was dead.

Someone called the police with a report of gunshots. When the police arrived at the scene they spoke with three onlookers at the scene. The police broadcasted a lookout for a dark-colored sport utility vehicle.

Nine months later the Police approached Byron to talk to him about his brother's death and Byron reported to the Police for the first time what he had seen.

At trial, the defendant, who drove a black Mercedes SUV at the time of the murder presented an alibi defense, through three friends, that he was at a party in Stratford at the time of the murder.

At trial the defendant offered an audio recording of a Bridgeport Police Officer calling into his dispatcher in response to the broadcast to be on the lookout for a dark-colored sport utility vehicle.

On the recording the police officer reported that he had just received a telephone call from his mother who reported to him that she had almost been struck by a black, older jeep Cherokee that was speeding down a road near the scene of the murder with its headlights off.

The State objected to the audio recording on the ground that it was hearsay within hearsay. The trial court did not allow the recording into evidence. The Appellate Court affirmed.

REASONING: There are two links to the hearsay chain. The first link is the mother's statement to the Police Officer. The defendant argued that this statement was admissible under the spontaneous utterance exception to the hearsay rule. The Appellate Court affirmed the trial courts ruling because the defendant failed to establish how close in time the mother's statement was to the event in question.

> "Here, assuming that the mother's reported experience of almost being struck by a speeding vehicle was a startling event that she personally had witnessed and described to her son, the remaining issue that the court had to resolve before admitting the statement was whether the mother was

> still under the stress of that startling event when she spoke to her son about it. The record does not contain any evidence as to the time when the mother called the police officer in relation to the time of the event described in her reported statement. Although, time is not necessarily dispositive, a time line of the events may have provided at least some evidence as to whether the mother had time to reflect on the events before she made the reported statement to the police officer. The police officer did not report that his mother called him while, or shortly after, seeing the speeding vehicle, nor did he report that his mother was or seemed to be upset. Without such evidence before it, the court had no way of knowing whether the police officer's mother had called someone else before she called her son, or done anything else in the interim that gave her time for " 'reasoned reflection'…." Id.; see also *State* v. *Gregory C.*, 94 Conn. App. 759, 771-72, 893 A.2d 912 (2006) (statement not spontaneous utterance when declarant spoke with her friend at length before making statement). In sum, the court reasonably could have ruled the mother's statement inadmissible under the spontaneous utterance exception to the rule against hearsay because the court lacked any record basis for determining that she made it under circumstances negating the opportunity for deliberation and fabrication. We conclude on that basis that the trial court did not abuse its discretion in excluding the recording reporting her statement from evidence.

State v. *Daley*, pgs. 884-885.

§ 8-3(8) ATTEMPT TO USE LEARNED TREATISE TO IMPEACH DEPOSITION TESTIMONY UNSUCCESSFUL
FILIPPELLI, III, ET AL. V. *SAINT MARY'S HOSPITAL, ET AL.*, 319 Conn. 113 (2015)

RULE: The only practical way to get a medical article into evidence is to have your expert testify that the article is "recognized as a standard authority in the field" and that 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 Journal of The American Academy of Orthopedic Surgeons. He testified that the article supported his management of the case. Dr. Rodin was not disclosed as an expert. 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." Since Dr. Rodin did not take a compartment pressure in the morning, the article did not support Dr. Rodin's management of Mr. Filippelli's case.

Plaintiff's counsel listed the article on her list of exhibits for trial. Defendant objected to its admission as hearsay.

Plaintiff's counsel first offered the article through her own expert.

Plaintiff's expert testified that The Journal of the American Academy of Orthopedic Surgeons is a "standard authority in the field of orthopedic surgery." However, he did not testify that the specific article in question was a standard authority.

He could not credibly do so because he had testified at deposition that he did not recognize any textbook or article as authoritative on the issues in this case.

The defendant objected to the admission of the article through plaintiff's expert on three grounds: (1) First, 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. Second, the expert had not testified that the specific article, as opposed to the Journal, was a standard authority. Third, plaintiff's expert had not relied on the article.

The defendants' objection was sustained. The Appellate Court affirmed that ruling. The Supreme Court did not review that ruling.

Plaintiff's counsel then attempted to use the article during cross-examination of Dr. Rodin at trial.

She first asked Dr. Rodin whether he recalled reading a journal article before his deposition. He said he did not. He acknowledged that he had testified at deposition that he had read a journal article, but at the time of trial he could not recall doing so.

Plaintiff's counsel then showed Dr. Rodin the article and asked him if it was the article he had read before his deposition. He testified he did not recognize the article and did not remember reading it.

Plaintiff's counsel was able to authenticate the article as the article which Dr. Rodin must have been referring to when he testified at deposition because it was the only article on compartment syndrome in the Journal of The American Academy of

Orthopedic Surgeons during the relevant time period. The trial court found that the article which the plaintiff had found and marked was the article that Dr. Rodin referred to during his deposition testimony.

Since Dr. Rodin had testified at his deposition that the article that he reviewed supported his management of Mr. Filippelli case, when in fact it did not, plaintiff's counsel, offered the article, not as a learned treatise but to establish that Dr. Rodin had lied at deposition, under the Connecticut Code of Evidence § 6-6(b) (1).

The defendant objected on the basis that the article was hearsay, a proper foundation had not been laid to admit the article as a learned treatise and that Dr. Rodin had not been disclosed as an expert witness.

The trial court sustained the objection.

The Supreme Court affirmed the trial judge's ruling. The Court acknowledged that the plaintiff was not offering the article under the learned treatise exception and therefore it was not hearsay.

The Supreme Court analyzed the issue under Connecticut Code of Evidence § 6-6(b), the same section used to analyze whether or not Dr. Bazos' false testimony was admissible. The Court acknowledged that Dr. Rodin's false claim at deposition that the article supported his case management of Mr. Filippelli was admissible under Connecticut Code of Evidence § 6-6 (b) (1). But then simply when on to Connecticut Code of Evidence § 6-6 (b) (2) which provides:

> "Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence."

Therefore, although plaintiff's counsel was entitled to ask Dr. Rodin whether or not he was being truthful when he claimed that he had read a journal article which supported his case management the plaintiff was then stuck with the answer. Whether Dr. Rodin answered yes or no, the rule does not allow the questioner to put the article in evidence to contradict the witness' testimony.

Plaintiff's counsel made a third attempt to get the article in during cross-examination of the defendants' expert, Dr. Bazos. Dr. Bazos refused to agree that the article was a standard authority. However, plaintiff argued that since plaintiff's expert had already testified the Journal of The American Academy of Orthopedic Surgeons is a standard authority, he was entitled to call it "to the attention of an expert witness on cross examination…." Connecticut Code of Evidence §8-3(8).

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 plaintiff argued on appeal that the entire article should have been fully allowed in evidence. The Appellate Court upheld the trial court's ruling on the basis that Dr. Bazos had not acknowledged that the article was a standard authority. The Supreme Court affirmed.

REASONING: The Supreme Court affirmed the trial court's ruling on two grounds.

First, the Supreme Court addressed the issue of whether an experts testimony that a given journal is a standard authority, without testimony that the specific article in question is a standard authority, is sufficient foundation under the learned treatise

exception to the hearsay rule to get the article into evidence. The Supreme Court had never addressed this issue before. The issue had been addressed by the Appellate Court in *Musorofiti* v. *Vlcek* 65 Conn. App. 365, 382-85, 783 A.2d 36, cert. denied. 258 Conn. 938,786 A 2d 426 (2001). In *Musorofiti* v. *Vlcek*, the Appellate Court declined to adopt a rule that testimony that a particular journal is a standard authority is sufficient to classify all the articles from that journal as standard authority. However, in *Musorofiti* v. *Vlcek*, the Appellate Court adopted the approach that for certain highly esteemed periodicals which are subject to close scrutiny and peer review there should be a presumption in favor of admitting an article from such a publication. In *Filippelli*, the Supreme Court stated: "We agree generally with the approach adopted by the Appellate Court in *Musorofiti*." *Filippelli* vs. *Saint Mary's Hospital*, pg. 138.

The Supreme Court stated that it was questionable whether plaintiff's expert had provided a sufficient foundation to justify the presumption in this case. The Supreme Court then held that even if a sufficient foundation had been laid to allow the article into evidence under the learned treatise exception, the trial court's limitations on how the plaintiff was allowed to use the article were an appropriate use of its discretion.

> "Moreover, the mere fact that the trial court found that the article met the requirements for admissibility under the learned treatise exception does not mean that the court was required to allow the plaintiff unfettered use of the article. Section 8-3 (8) merely provides that materials which meet the foundational requirements of the learned treatise exception are "not excluded by the hearsay rule," and does not mandate the admission of such materials or otherwise "purport to circumscribe the discretion generally afforded to a trial court to determine the admissibility of evidence in light of the facts of record."

Filippelli v. *Saint Mary's Hospital*, at pg. 139.

COMMENT: Because defendants and their experts have been warned by counsel not to 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 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 POLICE OFFICER'S TELEPHONE CALL TO DISPATCHER ADMISSIBLE AS PART OF BUSINESS RECORD - *STATE* v. *DALEY*, 161 Conn. App. 861 (2015)

FACTS: See § 8-3(2) above.

REASONING: The second level of hearsay in regard to the recording is the police officer's statement to the dispatcher. The defendant argued that this out of court statement fell under the business record exception to the hearsay rule. The Appellate Court did not decide this issue because the court decided that the first level of hearsay, the mother's statement to the police officer, did not qualify under the spontaneous utterance exception. However, the Appellate Court stated that in its view the police officers statement to the dispatcher would be admissible under the business record exception to the hearsay rule.

> "Although we assume without deciding that the police officer's statements to the dispatcher fall under the business record exception to the hearsay rule, we have little doubt that this recording of a police officer calling the police dispatcher was made in the regular course of police work and that it was in the regular course of police work to make such a recording."

State v. *Daley*, pg. 882, n. 7

§ 8-4 TWO-PART TEST FOR THE ADMISSION OF COMPUTER GENERATED BUSINESS RECORDS – *MIDLAND FUNDING, LLC* v. *MITCHELL-JAMES*, 163 Conn. App. 648 (2016)

RULE: In order to lay the proper foundation for a computer generated business record the proponent must satisfy a two-part test. First, the proponent must satisfy the statutory requirements of the business record exception to the hearsay rule. Second, the proponent of the computer generated business records must establish that the basic elements of the computer system are reliable.

FACTS: Defendant ran up a debt of $24,086.46 on her chase credit card. Chase sold the debt to the plaintiff, Midland Funding. Midland Funding brought suit against the defendant to collect on the debt.

Plaintiff filed a Motion for Summary Judgment. Plaintiff appended to the motion an affidavit from a "legal specialist," Tamra Stayton who was employed by a related business, Midland Credit Management. In the affidavit, Stayton swore that the defendant had defaulted on the credit card account, that the plaintiff was the current owner of the debt, and that the plaintiff was owed $24,086.46.

Attached to the affidavit were eighteen copies of monthly credit card statements of the subject account from April, 2008 through October, 2009 and a bill of sale that documented the alleged sale of the unpaid credit card from Chase to the plaintiff. The defendant, who was representing herself pro-se, filed an opposition to the motion for summary judgment arguing that the affidavit contained hearsay and did not fall within the business record exception. She included a copy of a letter from Midland Credit Management notifying her that the amount of the debt was $24,112.85. The plaintiff

replied with a supplemental memorandum and an additional affidavit from an employee of Chase who swore that Chase had sold the debt in question to the plaintiff.

After a hearing, the trial court granted the plaintiff's motion for summary judgment. The Appellate Court reversed.

REASONING: The Appellate court held that the plaintiff failed to established that the computer system used to generate the documents in question was reliable because the authors of the affidavits did not have such knowledge.

> "Satisfying this additional layer of scrutiny of computer generated business records is essential but not onerous. "[I]t is not necessary to produce as a witness the keypunch operator who actually entered information into the computer or the programmer who designed the processing program….While a witness from the computer department may well be the optimal proponent of such evidence, such a person may not always be able to testify. What 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.) Id., 360-61.

Midland Funding, LLC v. *Mitchell-James*, pg. 657-658.

There was no showing by the plaintiff that Stayton, the author of the affidavit had a working acquaintance with how the computer generated documents were made.

§ 8-8 IMPEACHING HEARSAY DECLARANT – *STATE v. GUERRERA*, 167 Conn. App. 74 (2016)

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

FACTS: The defendant and his brother were charged with murdering a friend who they believed had stolen money. They were accused of beating the victim to death with a baseball bat.

Prior to trial the brother pleaded guilty. The trial proceeded against the defendant. The defense was that the brother was solely responsible.

During the trial, hearsay statements of the defendant's brother were admitted into evidence. One witness testified that the brother told her "we killed someone." *State* v. *Guerrera*, p. 93, n.5.

The brother was in prison. The Department of Correction recorded a conversation between the brother and their mother. In the conversation, the brother made the following statement: "[t]hat's why I…didn't go to trial and copped out to what…I did…. It wasn't right what I did, but it...happened." *State* v. *Guerrera*, pg. 93, n. 6.

The defendant offered the recording of the conversation between his brother and mother. The issue was is the statement "I" committed the murder, inconsistent with the statement already in evidence that "we" killed someone.

The trial court concluded that these were not inconsistent statements and refused to admit the recording. The Appellate Court affirmed.

REASONING: The Appellate Court acknowledged prior case law which has held that in order to be considered inconsistent, two statements need not directly contradict one another, nor do they need to be diametrically opposed. However, the Appellate Court reached back to older case law for the concept that statements from which a possible inference of inconsistency may be drawn are insufficient for the purpose of impeachment.

In view of the fact that the defendant's defense was that it was his brother that beat the victim to death, the retreat to earlier case law regarding what should be considered "inconsistent" is clearly result oriented.