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2018 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 2017-2018 Update covers cases published from September 20, 2016 through October 16, 2018.

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 Code.

ARTICLE I - GENERAL PROVISIONS

§ 1-5 REMAINDER OF STATEMENTS –

STATE *v*. *NORMAN P.*, 329 Conn. 440 (2018).

RULE: When a portion of a statement introduced by a party has been taken out of context, the remainder of the statement should be admitted, even if the remainder is otherwise inadmissible

FACTS: Norman P. was accused of sexually assaulting his 61-year-old wife. Before his arrest he gave a sworn written statement to the police.

Norman took the witness stand in his defense. The state's attorney used the written statement Norman gave to the police to cross-examine Norman. The State did not offer the police statement as an exhibit. On redirect examination, defense counsel offered the entire police statement. The defendant claimed that the state's attorney had cherry picked a few inconsistencies to impeach the defendant and the jury should have the entire statement to evaluate the content of the testimony and the defendant's credibility.

The state's attorney objected to the admission of the statement on the ground it contained self-serving hearsay.

The trial court sustained the objection. The Appellate Court found this to be error and reversed the conviction. The Supreme Court agreed with the Appellate Court.

REASONING:

> In accordance with these principles, when a portion of a statement introduced by a party has been taken out of context such that it distorts the meaning of the entire statement and could mislead the jury, § 1-5(b) of the Connecticut Code of Evidence requires that the relevant remainder be admitted – even if that remainder would otherwise be inadmissible. We have relied on a useful inquiry in determining whether § 1-5(b) requires the

> admission of a remainder of a statement: does the remainder "alter the context" of the already introduced portion of the statement? *State v. Castonguay*, 218 Conn. 486, 497, 590 A.2d 901 (1991). The nature of the question suggests a practical approach to applying §1-5(b): identify which portions of the statement were initially introduced into evidence, set forth the argument of the party proffering the remainder as to how the partial introduction distorts the meaning of the whole, then juxtapose that initial offering with the remainder. If the addition of the remainder would alter the meaning of the initial offering – or, in other words, would demonstrate that the initial portion was taken out of context – then § 1-5(b) requires that the remainder be admitted into evidence.

State v. Norman P., 460.

ARTICLE IV - RELEVANCY

§ 4-1 DEFINITION OF RELEVANT EVIDENCE -

WEIHING V. PRETO-RODAS, 170 Conn. App. 880 (2017).

RULE: Are photos of Boo Boo admissible to prove the plaintiff was teasing, tormenting or abusing Boo Boo?

FACTS: Plaintiff was walking her three dogs: two sixty-pound pit bull mixes, Angelica and Roscoe, and one hundred-pound German Shepard – Akita mix, Max. All three dogs were on leashes.

Roscoe defecated on the defendants' lawn. While plaintiff was bent over picking up the feces, the defendants' dog, Boo Boo, came running from his back yard to the front yard and started barking. Boo Boo is a 12-pound corgi chihuahua mix. Plaintiff claimed Boo Boo attacked Angelica, Roscoe and Max and she was dragged over because she was holding their leashes.

A neighbor testified that Angelica, Roscoe and Max attacked Boo Boo.

At some point Angelica and Roscoe grabbed Boo Boo by the head and he sustained injuries.

Plaintiff sued defendants pursuant to the dog bit statute, §22-357, which holds a dog owner strictly liable unless the plaintiff was trespassing or "teasing, tormenting or abusing the dog." The defendant filed a special defense that plaintiff, through the action of her dogs, was tormenting and abusing Boo Boo.

Defendants offered photos of Boo Boo showing his injuries. Plaintiff objected on the ground of relevance. Defendant argued the photos were relevant to prove that plaintiff, through the actions of her dogs, was abusing Boo Boo.

The trial court admitted the photos. There was a defendant's verdict. The Appellate Court affirmed.

REASONING: The Appellate Court did not reach the issue of whether the photographs were admissible on the special defense of "teasing, tormenting or abusing" Boo Boo. The Appellate Court held that considering all the evidence in the case, the jury could reasonably have concluded that Boo Boo was not the proximate cause of plaintiff's injuries.

ARTICLE V - PRIVILEGES

§ 5-1 GENERAL RULE –

REDDING LIFE CARE, LLC V. REDDING, 174 Conn. App. 193 (2017), cert. granted, 327 Conn. 991 (2018).

RULE: Unretained experts have a qualified privilege that may allow them to refuse to testify. A party seeking to compel testimony from an unretained expert must demonstrate (1) that the expert should have expected to be required to give an opinion; and (2) that there exists a compelling need for the opinion testimony.

FACTS: Redding Life Care filed a tax appeal against the Town of Redding claiming that the Town had over valued its property, Meadow Ridge in Redding. The Town valued the property at $112 million. Redding Life valued the property at $82 million.

The expert in question is an appraiser who was retained by two banks to provide opinions regarding the value of the property in connection with a loan.

The Defendant Town of Redding subpoenaed the appraiser to a deposition seeking to obtain those opinions.

The appraiser filed a motion for a protective order. He argued that an unretained expert should have an absolute privilege not to testify against his will. The trial court denied the motion for a protective order. The appraiser appealed.

REASONING: The Appellate Court refused to recognize an absolute privilege. However, the Appellate Court did recognize a qualified privilege. The Appellate Court held that a qualified privilege properly balances the right of expert witnesses to be free from testifying against their will and the needs of the courts and the litigants for that testimony in the search for truth.

The case is ready for argument in the Supreme Court.

ARTICLE VI - WITNESSES

§ 6-11(b) PRIOR CONSISTENT STATEMENT OF A WITNESS -

STATE V. HENRY D., 173 Conn. App. 265 (2017), cert. denied, 336 Conn. 912 (2017).

RULE: A prior consistent statement is admissible to rehabilitate an impeached witness' credibility.

FACTS: The defendant was accused of sexually assaulting the 12-year-old daughter of his girlfriend.

The victim gave a video recorded forensic interview (which was transcribed) to a social worker in 2008. The defendant was not arrested until 2012. The case went to trial in 2014.

Defense counsel cross examined the victim for two days. He utilized the transcript of the 2008 video recorded interview to impeach the victim. In addition to highlighting discrepancies between her direct examination and the six-year-old forensic interview, he asked questions which implied that the witness' testimony was influenced by her meetings with the prosecutor before trial.

At the end of the cross examination the State offered the entire video interview as a prior consistent statement. The defendant objected on the basis that it was hearsay. The State responded that it was not being offered for the truth of its content, but soley to rehabilitate the witness' credibility and to refute the defendant's suggestion that the witness was coached by the prosecutor.

The trial court admitted the video of the forensic interview. The Appellate Court affirmed.

REASONING:

> "Although the general rule is that prior consistent statements of a witness are inadmissible, we have recognized exceptions in certain circumstances." *State* v. *Lewis*, 67 Conn. App. 643, 651, 789 A.2.d 519, cert. denied, 261 Conn. 938, 808 A.2d 1133 (2002). "Section 6-11 (b) of the Connecticut Code of Evidence sets forth three limited situations in which the prior consistent statement of a witness is admissible: If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance…." (Internal quotation marks omitted.) Daley v. McClintock, 267 Conn. 399, 403-404, 838 A.2d 972 (2004). Our appellate courts have held that a suggestion that a witness' testimony was unduly influenced or coached by outside influences is grounds to allow a prior consistent statement into evidence. See id., 412 (witness' deposition testimony admissible to rebut plaintiff's suggestion that witness contrived testimony after talking with defendant's attorney prior to testifying); *State* v. *Vines*, 71 Conn. App. 359, 371, 801 A. 2d 918 (prior consistent statement admissible because evidence supported conclusion that witness subjected to undue influences on several occasions before testifying, including threats and offers of money), cert. denied, 261 Conn. 939, 808 A.2d 1134 (2002); *State* v. *Harris*, 48 Conn. App. 717, 731, 711 A.2d 769 (detective's testimony admissible to refute suggestion that victim's testimony was influenced by conversations with police officers or social workers), cert. denied, 245 Conn. 922, 717 A.2d 238 (1998).
>
> The court admitted the interview because the defendant attempted to impeach N.A. with apparent inconsistent statements and he attempted to show that N.A.'s testimony had "changed or been coached" by the prosecutor and T.M. We conclude that the court did not abuse its discretion in admitting the interview into evidence because the defendant attempted to impeach N.A. with the suggestion that N.A.'s testimony was the product of undue influence.

State v. Henry D., 275-276.

STATE v. RIOS, 171 Conn. App. 1 (2017).

RULE: Improper to ask one witness to comment on another witness' veracity.

FACTS: Defendant was accused of intentionally driving his car into two men, propelling one of them onto the hood of the car, into the windshield and against a wall. He then got out of his car, got on top of the victim and started punching him in the face. An independent eyewitness testified to these facts.

The defendant testified he was driving his car at the victim in self-defense because he thought the victim had a gun.

The prosecutor asked the defendant whether, when the eyewitness testified that he had seen the two men standing on the corner minding their own business and the defendant crashed directly into them, whether the eyewitness was incorrect?

The defendant objected. The court overruled the objection.

Q: So, do you believe that he purposefully sat there and mischaracterized the event?

A: I believe he was mistaken.

REASONING:

> It is well established that questions seeking a witness' opinion regarding the veracity of another witness are barred. *State* v. *Singh*, 259 Conn. 693, 706, 793 A.2d 226 (2002). The underlying basis for such a rule is to prohibit a fact witness from invading the jury's exclusive function to determine the credibility of witnesses. Id., 707. "[Q]uestions of this sort… create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied." Id.,708. This prohibition includes questions that ask whether another witness is lying, mistaken, wrong, or incorrect. Id., 712.

State v. *Rios*, 31.

The Appellate Court found that allowing these questions was error. But found the error harmless.

ARTICLE VII – OPINIONS AND EXPERT TESTIMONY

§ 7-1 OPINION TESTIMONY BY LAY WITNESSES -

STATE v. *HOLLEY*, 327 Conn. App. 576 (2018).

RULE: (1) Lay opinion that injury is a bite mark is admissible; 2) Lay opinion that object in video is a sneaker box is not admissible.

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, defendant Kenny Holley and Donele Taylor, entered the victim's apartment to rob him. There was a struggle during which Castillo bit Taylor on his wrist and Taylor shot and killed the victim.

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 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 during the struggle the victim had bitten him on the wrist. 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. Taylor's 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…." <u>*State*</u> v. <u>*Holley*</u>, 606. The defendant objected to this testimony on the ground that Detective Olson was not a bite mark expert. Olson's testimony that in his opinion the mark on Taylor's wrist was a bite mark was, therefore, an inadmissible lay opinion.

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

> In determining whether the trial court abused its discretion in deeming Olson's testimony to be permissible lay opinion; see, e.g., *State* v. *Finan*, supra, 275 Conn. 65-66; we note that the governing rule of evidence requires that the lay opinion testimony (1) must be rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue. Conn. Code Evid. § 7-1. Indeed, the commentary to the rule cites as illustrative "matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property… the *appearance of persons or things*…sound…the speed of an automobile …and physical or mental condition." (Citations omitted; emphasis added.) Conn. Code Evid. §7-1, commentary.

<u>*State*</u> vs. <u>*Holley*</u>, *608-609.*

> We conclude that it was within the trial court's broad discretion to determine that Olson, as a lay witness, was competent to testify regarding the appearance of wounds that he had observed. Indeed, it was well within the trial court's discretion to determine that Olson's testimony that Taylor's wounds appeared to be a bite mark, based on Olson's personal observation and rational perception of Taylor's injuries, was more beneficial to the jury than a more abstract recitation or description of the size, location, and shape of the wound. See Conn. Code Evid. §7-1, commentary;…

State vs. *Holley*, *610.*

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 personal knowledge of what was in the backpack.

The prosecutor asked Smola the following question:

> Q: "Were you able to determine through your investigation what you believe is contained within that backpack?"
>
> The defendant objected on the basis that it was an improper lay opinion. The trial court overruled the objection.
>
> Smola testified: "It's my belief through investigation it was a sneaker box."

State vs. *Holley*, *613.*

The Appellate Court had found the admission of this testimony to be error. The Supreme Court declined to address the issue, deciding that the admission was harmless. However, the Supreme Court did provide guidance regarding the narration of videos.

> Although there is some division in the federal and state courts on this point, there is significant authority under rule 701 of the Federal Rules of Evidence to support the proposition that a lay witness narrating a video to a jury may state his or her impressions of what is depicted in the video, even if he or she did not observe those events firsthand. See, e.g., *United States* v. *Begay*, 42 F.3d 486, 502-503 (9th Cir. 1994), cert. denied subnom. *McDonald* v. *United States*, 516 U.S. 826, 116 S. Ct. 93, 133 L. Ed. 2d 48 (1995). Nonetheless, we need not consider whether the

> Appellate Court properly determined that Smola's narration of the bus surveillance video was not based on his personal observations for purposes of § 7-1 of the Connecticut Code of Evidence, insofar as he did not witness the events on the bus firsthand. See *State* v. *Holley*, supra, 160 Conn. App. 635-36. Even if we assume, without deciding, that the trial court improperly allowed Smola to testify that he perceived the object to be a shoe box, we believe that any error in that regard was harmless and, therefore, does not require reversal.

State vs. *Holley*, *614-616.*

The Supreme Court, in a four to three decision, reinstated the defendant's conviction.

§ 7-2 TESTIMONY BY EXPERTS -

SUNTECH OF CONNECTICUT, INC. v. *BRUNOLI*, 173 Conn. App. 321 (2017), cert. granted, 326 Conn. 923 (2014), appeal dismissed as improvidently granted, 330 Conn. (2018).

RULE: An expert can also testify as a fact witness.

FACTS: Breach of contract case arising out of the construction of a technology center at Naugatuck valley Community College. The plaintiff subcontractor sued the defendant general contractor. The case was tried to the court.

During the construction the State retained a scheduling expert to review change orders, permits, supplemental instructions and schedules.

The scheduling expert made multiple visits to the site, met with the general contractor and wrote reports.

The scheduling expert was deposed by the plaintiff subcontractor.

During the trial the defendant filed a motion to preclude plaintiff from presenting expert testimony from the scheduler, or putting his reports in evidence, because plaintiff had not disclosed him as an expert.

In its trial management report, plaintiff identified the scheduling expert only as a fact witness.

The plaintiff called the scheduling expert to testify. The motion in limine was argued. The trial court ruled that he would permit the scheduling expert to testify as a fact witness, but not an expert witness. The court indicated he would rule question by question on what constituted fact and what constituted opinion.

The plaintiff's claim on appeal was that the trial judge drew the line in the wrong place and sustained objections to questions which sought to elicit facts. For instance, what the scheduling expert actually saw at the site.

The Appellate Court agreed with the plaintiff that the trial court had improperly sustained some objections, but held the plaintiff failed to demonstrate harm.

REASONING:

> "A witness, who is also expert in a field, is not thereby disqualified from testifying to personal observations on a matter, including giving a non-expert opinion on a subject on which a layperson could also opine." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 7.1.2, p. 445. "The general rule is that witnesses must state facts and not their individual opinions, but there are exceptions to this rule as well established as the rule itself." (Internal quotation marks omitted.) Johnson v. Newell, 160 Conn. 269, 277, 278 A.2d 776 (1971).
>
> Witnesses are permitted to testify as to what they perceive. Cianfaglione, therefore, should have been permitted to testify as to what he observed when he walked onto the project site, such as the number of laborers present, which was a factual inquiry. The court had ruled that it would permit the plaintiff to make factual inquiries of Cianfaglione. The court should have overruled the contractor's objection that the answer called for an opinion. The plaintiff's claim fails, however, because it has not demonstrated how it was harmed by the court's sustaining the contractor's objections. Counsel made an offer of proof that Cianfaglione's testimony would have shown that the contractor, not the state or architect, hindered and interfered with the plaintiff's ability to perform. That representation, however, is a legal conclusion, not the facts to which Cianfaglione would have testified. See. Id. ("No offer of proof appears in the record. Without knowing the purpose of the offer or the answer that might be forthcoming we are unable to rule on this assignment of error.") Because the plaintiff has failed to demonstrate that the court's rulings were harmful to it, it cannot prevail on its claim that the court abused its discretion by sustaining some of the contractor's objections to its direct examination of Cianfaglione.

Suntech v. Brunoli, 340-341.

§7-2 TESTIMONY BY EXPERTS -

BAGLEY v. *WIGGINS*, 327 Conn. 89 (2017).

RULE: Expert testimony may be needed to prove a fact.

FACTS: Defendant manufactured a glue used to bind together interior components of helicopter blades. The glue contained 8.6 percent asbestos. The manufacturer's product information sheets did not indicate the glue contained asbestos.

After the blades were assembled, excess glue was chiseled and sanded off. The plaintiff alleged that the sanding caused dust to fly into the air and that the dust contained asbestos fibers.

The plaintiff worked in the helicopter blade shop for 10 months in 1979 and 1980. He was diagnosed with mesothelioma in 2011. He died in 2012. He brought suit alleging that the glue was unreasonably dangerous and that it was a substantial factor in causing his mesothelioma and death.

Plaintiff's pathologist testified, in response to a hypothetical question. The hypothetical question asked the pathologist to assume that the decedent had been exposed to dust from the sanding of the helicopter blades which contained 8.6% asbestos.

After plaintiff rested, defendant moved for a directed verdict on the ground that plaintiff had proved that the dust in the blade room in fact contained asbestos fibers. The trial court denied the motion. There was a plaintiff's verdict. The Supreme Court reversed.

REASONING:

> After our careful review of the record, we conclude that the plaintiff's case lacked essential expert testimony to prove a vital fact in support of her negligence and strict liability claims, namely, that respirable asbestos fibers in a quantity

> sufficient to cause mesothelioma were released from FM-37 when it was used in the manner that it was in the Sikorsky blade shop during the decedent's tenure there. Proof of this fact was necessary to prove both that (1) FM-37 was dangerous, and (2) FM-37's dangerous condition caused the decedent to develop mesothelioma. Although the plaintiff proved that breathing respirable asbestos fibers above ambient levels can cause mesothelioma, that FM-37 contained 8.6 percent asbestos and was sanded, producing dust, and that the decedent was exposed to that dust, both directly and secondarily, she nevertheless failed to establish that the dust from the FM-37 necessarily contained respirable asbestos fibers. Moreover, the question of whether respirable asbestos fibers are released by sanding a modified epoxy adhesive product with 8.6 percent asbestos, after it has been heated and cured, is a technical one whose answer is not within the common knowledge of lay jurors. Accordingly, competent expert testimony was necessary to assist them in answering it. Because the plaintiff did not present such testimony, the trial court should have granted the defendant's motion for a directed verdict or its motion to set aside the verdict and for judgment notwithstanding the verdict.

Bagley v. Wiggins, 103-104

The pathologist's opinion was based on a hypothetical question that assumed that the sanding process caused asbestos fibers to float into the air. It was never proved that the sanding process in fact caused this to happen.

§7-2 TESTIMONY BY EXPERTS -

OSBORN v. *WATERBURY*, 181 Conn. App. 239 (2018), cert. granted, 329 Conn. 901 (2018).

RULE: Expert testimony required regarding playground supervision.

FACTS: Plaintiff was a fifth-grade student who was assaulted on an elementary school playground during the lunch recess.

The plaintiff claimed there was an inadequate level of supervision on the playground. A school paraprofessional was assigned to monitor the students on the playground during recess. There was conflicting evidence regarding the number of students on the playground and how many additional staff members were present.

The case was tried to the court. The plaintiff did not present expert testimony on what constituted adequate supervision. Judge Sheedy entered judgment for the plaintiff. The Appellate Court reversed.

REASONING:

> The dispositive claim in this appeal is whether the court improperly concluded that "one… student intern and three… or four… staff members were not sufficient to exercise proper control over perhaps as many as… (400) students" where there was no evidence that any defendant breached the pertinent standard of care. The defendants argue on appeal that the plaintiffs failed to produce any evidence, let alone expert testimony, that the pertinent standard of care required more than four or five adults to monitor students on the playground and therefore the court's finding that the defendants breached the standard of care was clearly erroneous. We agree with the defendants that the plaintiffs were required to present expert testimony as to the standard of care applicable to the defendants under the circumstances.

Osborn v. *Waterbury*, 244-245.

> We conclude, as a matter of law, that the standard of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground is not a matter of common knowledge; far from it. The policies and procedure of our public school system are highly regulated by governing bodies and accreditation organizations. School teachers and administrators are required to be accredited in accordance with educational standards. The plaintiffs themselves alleged that, under the laws of the state, the city is charged with the control and supervision of students in elementary schools. As to the board, the plaintiffs alleged that it was responsible for establishing and enforcing its policies, regulations and procedures regarding the education and safety of students such as the plaintiff. The standards, therefore, are set by professionals are not within the common knowledge of general public. A judge's subjective view on the subject is far from sufficient.

Osborn v. *Waterbury*, 246.

The Supreme Court has granted cert.

§7-2 TESTIMONY BY EXPERTS -

STATE v. *EDWARDS*, 325 Conn. 97 (2017).

RULE: Expert testimony is required to use cell phone data to establish location–A Porter hearing is required.

FACTS: On June 22, 2012, the defendant followed the victim home from the grocery store. He cornered her in her garage, assaulted and robbed her.

Defendant claimed that on the date of the assault he was in North Carolina at his aunt's funeral. According to the State, cell phone data showed that three calls were made from the defendant's cell phone in the area of the assault on the day of the assault. More specifically, the calls were "handled" by a cell phone tower 1200 feet from the grocery store where the victim was shopping at the time the victim was shopping there. A similar analysis showed three calls from the defendant's cell on the date in question "accessed" a cell tower near the victim's house.

Prior to trial the defendant file a motion in limine seeking to preclude the cell phone location data and requesting a Porter hearing.

The State made an offer of proof through Detective Christopher Morris who testified he had attended a three-day training session on "advanced cell phone investigations." He explained how he used computer software to map cell phone towers that cover specific areas. He acknowledged that he had been told to used "extreme caution" in reaching conclusions and that network congestion, weather, maintenance issues, natural topography, thick foliage and manmade structures can affect coverage.

The trial court admitted the testimony.

The Supreme Court found the admission to be error, but harmless.

REASONING:

> The defendant asserts that the trial court abused its discretion by admitting testimonial and documentary evidence through Morris without determining that the evidence was based on reliable scientific methodology. This court has not previously had the opportunity to examine the criteria for determining the admissibility of cell phone data. The issue has, however, been addressed in federal court. See. United State v. Mack, United States District Court, Docket No. 3:13CR00054 (MPS) (D. Conn. November 19, 2014).

State v. *Edwards*, 131.

> The approach of the United States District Court for the District of Connecticut is consistent with decisions from many other federal courts that have required the government to demonstrate that the methodology used by their expert witness on cell phone data "clears the hurdle imposed by *Daubert* …." *United States* v. *Machado-Erazo*, 950 F. Supp. 2d 49, 56 (D.D.C. 2013); see also *United States* v. *Jones*, 918 F. Supp. 2d 1, 5-6 (D.D.C. 213): *United States* v. *Davis*, United States District Court, Docket No. 11-60285-CR (ESH) (S.D. Fla. May 17, 2013).

State v. *Edwards*, 132-133.

§7-2 TESTIMONY BY EXPERTS -

RUFF v. *YALE*, 172 Conn. App. 699 (2017).

RULE: Pursuant to §52-184c (b), a nonspecialist expert in a medical malpractice case must have "active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim."

FACTS: Michael Ruff had a total knee replacement. Before the operation, a registered nurse inserted a Foley catheter. Plaintiff claimed that the nurse negligently inserted the foley catheter and punctured his prostate.

Plaintiff's expert was a registered nurse. She had worked for the Department of Public Health as a nurse consultant since 1995 but did not treat patients in that capacity. She did work as an independent private duty nurse. However, in that capacity, she did not insert Foley catheters.

Defendant moved in limine to preclude the expert because she was not actively involved in the practice or teaching of nursing in the five-year period before the incident. The trial court granted the motion in limine. The court then directed a verdict in favor of the defendant. The Appellate Court affirmed.

REASONING:

> After a careful review of the record, none of Maselli's training and experience seems to suggest that she was actively involved in the practice or teaching of nursing in the five-year period prior to February 4, 2010. Therefore, the trial court did not abuse its discretion in determining that she did not satisfy the qualifications to be considered a "similar health care provider" for nonspecialists, pursuant to § 52-184c (b), nor does she satisfy the requirements of the residual provision, pursuant to § 52-184c (d).

Ruff v. *Yale*, 715.

§7-2 TESTIMONY BY EXPERTS –

GOSTYLA V. *CHAMBERS*, 176 Conn. App. 506 (2017), cert. denied, 327 Conn. 993 (2018).

RULE: A biomechanical engineer cannot testify that the collision did not cause the plaintiff's injuries.

FACTS: Defendant backed his dump truck into plaintiff's car, pushing it backwards 50 to 60 feet. There was no damage to the dump truck. There was significant damage to the car. But it was drivable. There was no report of injury at the scene.

Plaintiff claimed three injuries: a meniscus tear in the knee, a ligament tear in the hip and a tear in the abdominal muscle which required hernia surgery. Plaintiff's treating physicians opined that the injuries were caused by the collision.

The defendant offered an opinion from an orthopedic surgeon that the tear in the abdominal muscle was not caused by the collision.

The defendant offered an opinion from a biomechanical engineer that none of the injuries were caused by the collision.

Plaintiff filed a motion in limine claiming that the biomechanical engineer was not qualified to testify as to the causation of the plaintiff's injuries he is not a doctor.

The trial court admitted the opinion. The jury returned a defendant's verdict. The Appellate Court found the admission of the opinions to be error, but harmless.

REASONING:

> Under the circumstances of the present case and in light of the foregoing authorities, we conclude that the trial court abused its discretion in admitting McRae's causation testimony. As a biomechanical engineer, McRae was qualified to provide his opinion as to the amount of force generated by the May 19, 2011 collision and the types of injuries likely to result from exposure to that amount of

force. His testimony that *this specific plaintiff's* injuries were not caused by the collision, however, exceeded his expertise in biomechanics and should have been excluded. Opinion testimony regarding the cause of specific injuries "requires the identification and diagnosis of a medical condition, which demands the expertise and specialized training of a medical doctor." Bowers v. Norfolk Southern Corp., supra, 537 F. Supp. 2d 1377. McRae's causation testimony was, therefore, a medical opinion, not a biomechanical one. Because, as he readily admitted, he was not a medical doctor and did not have the experience diagnosing or treating injuries, he did not possess the "reasonable qualifications" required to offer such an opinion. See *Weaver* v. *McKnight*, supra, 313 Conn. 408.

That McRae formulated his opinion in part through reviewing a subset of the plaintiff's medical records and other documents related to the accident; see footnote 2 of this opinion; does not alter our analysis. Regardless of his access to these materials, the record does not reflect that he possessed the medical training necessary to identify the plaintiff's "individual … tolerance level and [preexisting] medical conditions," both of which "could have [had] an effect on what injuries result[ed] from [the] accident …." *Smelser* v. *Norfolk Southern Railway Co.*, supra, 105 F.3d 305; see also *Day* v. *RM Trucking, Inc.*, Docket No. 3:11CV400-J-25 (HLA), 2012 WL 12906568, *1 (M.D. Fla. August 31, 2012) ("biomechanical engineers ordinarily are not permitted to give opinions about the precise cause of a specific injury" because they are not trained to "identify the different tolerance levels and preexisting medical conditions of individuals" [internal quotation marks omitted]). Accordingly, the trial court could not reasonably have concluded that McRae was qualified to testify about the cause of the plaintiff's injuries. The court abused its discretion in failing to exclude the testimony.

Gostyla v. *Chambers*, 514-515

§7-2 TESTIMONY BY EXPERTS -

RILEY v. *TRAVELERS*, 173 Conn. App. 422, cert. granted, 326 Conn. 922 (2017).

RULE: Porter hearing not required for five investigation expert.

FACTS: On February 26, 2009, a fire destroyed a significant portion of plaintiff's home. Plaintiff made a claim under his homeowner's policy with Travelers.

The town fire marshal investigated the fire. He concluded the fire was the result of an electrical problem inside a wall.

Traveler's sent out its fire investigator who concluded the fire was a result of arson. Travelers denied plaintiff's claim under the policy.

Plaintiff had two experts: the fire marshal and a retained expert. The defendant filed a motion in limine to preclude the testimony of both on the grounds that their investigations did not pass the Porter threshold of scientific reliability. Defendant requested a Porter hearing.

The trial court denied the motion in limine and ruled that a Porter hearing was not required. The Appellate Court affirmed.

REASONING:

> "The mere fact that scientific evidence is sought to be admitted into evidence, however, does not require necessarily that *Porter* inquiry be conducted as to the threshold admissibility of the evidence. As we have recognized, some scientific principles have become so well established that [a threshold admissibility] analysis is not necessary for admission of evidence thereunder. …Evidence derived from such principles would clearly withstand [such an] analysis, and thus may be admitted simply on a showing of relevance….
>
> "Moreover, certain types of evidence, although ostensibly rooted in scientific principles and presented by expert witnesses with scientific training, are not scientific

for … purposes of our admissibility standard for scientific evidence, either before or after *Porter* [was decided] …. Thus, even evidence with its roots in scientific principles, which is within the comprehension of the average juror and which allows the jury to make its own conclusions based on its independent powers of observation and physical comparison, and without heavy reliance upon the testimony of an expert witness, need not be considered scientific in nature for … purposes of evidentiary admissibility …. [E]vidence … which merely places a jury … in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge … is not the type of scientific evidence within the contemplation of *Porter*, and similarly was not within the ambit of our standard for assessing scientific evidence prior to *Porter*." (Citations omitted; internal quotation marks omitted.) State v. West, 274 Conn. 605, 630-31, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005).

"[Q]uestions about the methodological validity of proffered scientific testimony will generally go to the *weight* of such evidence, not to its admissibility. Courts should exclude scientific evidence, however, when such concerns render the technique, and the resulting evidence, incapable of assisting the fact finder in a sufficiently meaningful way…. Moreover, in light of the traditional policy regarding the admission of relevant evidence, [a] judge frequently should find an expert's methodology helpful [and thus admissible] even when the judge thinks that the expert's technique has flaws sufficient to render the [expert's] conclusions inaccurate. He or she will often still believe that hearing the expert's testimony and assessing its flaws was an important part of assessing what conclusion was correct and may certainly still believe that a jury attempting to reach an accurate result should consider the evidence…. A trial judge should therefore deem scientific evidence inadmissible only when the methodology underlying such evidence is sufficiently invalid to render the evidence incapable of helping the fact finder determine a fact in dispute." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) State v. Porter, supra, 241 Conn. 88-89. "Once the validity of a scientific principle has been satisfactorily established, any remaining questions regarding the manner in which that

technique was *applied* in a particular case is generally an issue of fact that goes to weight, and not admissibility." (Emphasis in original.) Id., 88 n.31.

Here, the defendant argues, the plaintiff's "two experts agreed [as to] what constituted the standard methodology for fire investigation ([standard] 921), but disregarded that methodology and sought instead to testify as to their 'general experiences.'" "In large part, the focus of [the defendant's] objections to [the] plaintiff's experts was that they were tainted by expectation bias, examining only that evidence that supported their assertion that the fire was electrical in origin." The defendant argues: "[D]espite their acknowledgement of the authoritative nature of [standard] 921, neither Scheuritzel nor Mullen testified that he had followed its protocols. Neither man had even looked at all of the evidence. Mullen, a latecomer to the investigation, had not even examined the wire that was said to have been the source of the electrical fault… nor did he look at the kerosene container and cap collected form the scene…. [The defendant] was especially concerned with the introduction of expectation bias in the investigations conducted by these two individuals because their testimony revealed that they both heeded only that evidence that supported the theory of an electrical fault, and had not adequately addressed or even considered other possible causes of the fire. By refusing to consider evidence which might lead to an alternative conclusion, neither Scheuritzel nor Mullen conducted a systematic and scientific investigation of the fire scene. Their failure to comply with even the most basic tenets of a scientific methodology (including the performance of a full and complete investigation) illustrates the concerns [the defendant] had in having their opinions offered to the jury as expert opinions." The defendant argues "[b]ecause neither of [the] plaintiff's proposed witnesses considered all of the evidence or relied on any recognized or reliable method in determining that the fire was caused by an electrical fault, their proposed testimony did not meet the *Porter* standard." (Citations omitted; footnote omitted; internal quotation marks omitted.)

In other words, the defendant challenges the admissibility of the expert testimony, as it did at trial, on the ground that the plaintiff's expert witnesses did not adhere to the methodology set forth in standard 921, which

> both witnesses recognized as authoritative. The defendant does not attack the scientific basis for the expert testimony, but, rather, argues that they did not adhere to that science – that they did not follow the recognized scientific methods set forth in standard 921. This is the precise circumstance contemplated by the Porter court when it instructed that "questions regarding the manner in which [a scientific] technique was applied … [are] generally an issue of fact that goes to weight, and not admissibility." (Emphasis omitted.) State v. Porter, supra, 241 Conn. 88 n.31. The defendant's assertion that investigations conducted by Scheuitzel and Mullen were not thorough and that they did not do all that could or should have been done goes to the weight of their testimony, not its admissibility. Because the defendant did not, in fact, attack the scientific reliability of the witnesses' testimony, the court did not abuse its discretion in admitting that testimony into evidence without a *Porter* hearing.

Riley v. *Travelers*, 454-458.

Cert. was granted in this case, but not on the Porter issue.

§7-2 TESTIMONY BY EXPERTS -

STATE v. *WYNNE*, 182 Conn. App. 706 (2018), cert. denied, 330 Conn. 911 (2018).

RULE: Drug recognition expert's testimony allowed regarding interaction of alcohol and marijuana.

FACTS: Defendant was accused of a violation of Conn. Gen. Stat. §14-227 a (a) which provides: "No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both."

The defendant was observed not staying in his lane on Interstate 95. He was pulled over by a State Trooper. When he rolled down the window the Trooper smelled alcohol and marijuana. The Trooper asked whether he had consumed any alcohol and the defendant stated he had had two beers. The Trooper administered a field sobriety test, which the defendant flunked. The defendant was arrested and taken to the police station.

At the police station the defendant admitted that in addition to the two beers he had smoked a joint.

A breathalyzer test showed his blood alcohol to be .0352, less than half the legal limit.

At trial the State offered the testimony of State Trooper Tom Ehret, the State's "drug recognition expert", who testified about the effect of marijuana on field sobriety tests and regarding the effects of alcohol and marijuana in combination.

The defendant filed a motion in limine regarding Ehret's testimony on the grounds of relevance, confusion and waste of time. The trial court denied the motion in limine. The defendant was convicted. The Appellate Court affirmed.

REASONING: On appeal, the defendant claimed the court erred in not conducting a Porter hearing. The defendant had not requested the trial judge to conduct a Porter hearing.

The Appellate Court refused to review the claim.

The Appellate Court found that Ehret's testimony was relevant.

ARTICLE VIII – HEARSAY

§8-1 DEFINITIONS -

STATE v. *JOHNSON*, 171 Conn. App. 328 (2017), cert. denied, 325 Conn. 911 (2017).

RULE: The testimony of a police officer that no one at a given location reported hearing gunshots is hearsay.

FACTS: At 7:50 p.m. on October 21, 2012, the police received a 911 call reporting that someone had been shot. When they arrived they found Christian Garcia dead. A witness reported hearing four or five shots.

At 8:02, the police received a telephone call from Yale-New Haven Hospital that the defendant had come into the Hospital with a gun shot wound to his knee. When the police came to the hospital to interview the defendant he said he was walking in front of the Southern Hospitality Soul Food restaurant on Whalley Avenue when he heard three or four gunshots and felt a pain in his leg. He said he then walked to the hospital. A hospital surveillance camera showed the defendant arriving at the hospital in an automobile.

A police officer went to the restaurant and asked whether anyone had heard any gun shots. The State elicited the following testimony.

> "[The Prosecutor]: Did anyone say that they had heard or seen any gunshots?
> "[Defense Counsel]: Objection as to what anybody said.
> "[The Prosecutor]: I think he can answer that yes or no.
> "[The Court]: I will again allow that question to be answered yes or no.
> "[Jackson]: I'm sorry, could you repeat, sir?
> "[The Prosecutor]: Sure. Did anyone say that they had heard or seen any gunshot?
> "[Jackson]: No one reported that, sir.

> "[Defense Counsel]: I would move to strike, Your Honor. I think the court instructed him to answer yes or no.
> "[The Court]: What is the reason to strike it?
> "[Defense Counsel]: Foundation.
> "[The Court]: The answer is no. Well, this is what he heard, so there's certainly foundation; he was there. So with respect –
> "[Defense Counsel]: Well, it's hearsay.
> "[The Court]: Well, but nothing was said, so there's no hearsay. Hearsay is an out-of-court statement introduced for proof of the fact asserted. There's no out-of-court statement, therefore, no hearsay. So denied. Proceed."

State v. *Johnson*, footnote 7, 336.

The Appellate Court assumed that the non-statement was hearsay rather than analyze the issue, but found the error harmless.

§8-1 DEFINITIONS

STATE v. *SINCLAIR*, 173 Conn. App. 1 (2017), cert. granted, 326 Conn. 904 (2017).

RULE: Testimony by police officer regarding vehicle inspection information obtained by someone in his office from the New York State Police is hearsay.

FACTS: On February 5, 2013, the defendant and his girlfriend drove from the Bronx, where they lived, to Waterbury. They were driving a Jeep. The girlfriend was driving.

When they got to Waterbury the defendant directed his girlfriend to a side road, where they parked. Another vehicle parked on the same side of the road. The defendant took two parcels of heroin out of the center console and gave them to someone in the other car. The defendant and his girlfriend then drove to a mall in Waterbury.

The police, who had received an anonymous tip, pulled the Jeep over. The officer asked the defendant who owned the Jeep. The defendant said, "it was his friend's."

When Bella, a narcotic detection canine, arrived she alerted her handler to the Jeep's center console. In the center console, the police found 10,000 bags of heroin stored in ten bricks and $12,248 in cash. The defendant claimed he had no knowledge that the heroin and money were in the Jeep.

The State introduced into evidence a printout showing that the Jeep was registered in New York to a man named Victor Manana.

The defendant owned a used car business known as Sinclair Enterprises. The State claimed that the Jeep was inspected at a business located next door to Sinclair Enterprises called Manny's Auto Repair. However, that information, where the Jeep was

inspected, was not on the printout introduced in evidence. When the prosecutor asked a sergeant where the Jeep was inspected. The defendant objected.

Asked where the sergeant got the information that the Jeep was inspected at Manny's, the sergeant testified he got it from someone in his office who obtained it from an unidentified individual in New York. The State argued that the sergeant was merely getting help interpreting codes on the vehicle registration, but those links were never forged.

The trial court admitted the inspection location.

The Appellate Court assumed, without deciding, that the trial court abused its discretion by admitting the vehicle inspection location but held that the error was harmless – one Judge dissenting.

The Supreme Court heard argument on this case on April 3, 2018.

§8-3(1) STATEMENT BY A PARTY OPPONENT

REYES v. *LOVERAS*, 174 Conn. App. 804 (2017).

RULE: If it is in the hospital record, it is probably a good idea to assume it is coming in.

FACTS: On January 7, 2013, Stephanie Reyes was injured while using the men's bathroom at the Discovery Café in Stamford.

The plaintiff testified she went into the men's bathroom because there was a long line for the women's bathroom. She testified she used the toilet. She then decided to take a selfie in the bathroom. She leaned against the sink, put her hand on the sink, and the sink collapsed. The porcelain sink fell to the ground and shattered. She fell on top of it. She suffered a four-inch laceration on her buttock. She was taken to Stamford Hospital where the laceration was stapled.

She brought a premises liability case against the defendant.

The defense offered a statement contained in the patient history section of the Stamford Hospital record. The statement was not in quotation marks. 21-year-old female, who was drunk and trying to urinate into a sink, which broke, and she fell.

The defendant offered the statement as a statement of a party opponent.

The plaintiff objected.

The plaintiff testified that she did not make the statement in question.

The defendant put the doctor who wrote the statement on the witness stand. The doctor testified that the information contained in the statement "would have come" from the plaintiff. The doctor did not testify that she remembered the plaintiff making such a statement.

The trial court admitted the statement in the hospital record. The Appellate Court affirmed.

The following language from the trial court's ruling is quoted with approval in the Appellate Court decision: "Almost all admissions that come in as an exception to the hearsay rule are paraphrases… The declarant may well have said it differently or in slightly different words, but the import of what the declarant said is what comes in. And because the declarant is an adverse party and is in court, she is in a position to refute it and that's why it's fair." Reyes v. Loveras, 810.

There are no case citations in the Appellate Court opinion to back up this statement that paraphrasing is acceptable when we are dealing with a statement of a party.

Furthermore, §8-3(1) is not limited to situations where the declarant is available to testify.

The Appellate Court also held that the statement is admissible under §8-3(5) of the Code: Statement for purposes of obtaining medical diagnosis or treatment. The case law is clear that intoxication and the mechanics of how someone fell are relevant to diagnosis and treatment.

§8-3(2) SPONTANEOUS UTTERANCE

STATE v. *SWILLING*, 180 Conn. App. 624 (2018), cert. denied, 328 Conn. 937 (2018).

RULE: 911 recording admissible as spontaneous utterance despite the fact that the declarant was responding to questions; claim probative value outweighed by prejudicial effect rejected.

FACTS: The defendant was renting a room in the victim's apartment for a few days. Over the course of two days on Christmas Eve and Christmas day in 2014, the defendant assaulted and imprisoned the victim, including inflicting a number of stab wounds. When the victim finally escaped, she ran to a neighbor's apartment and called 911. Police and emergency personnel arrived. They found the defendant hiding in a closet in the victim's apartment.

The State offered the victim's 911 call in evidence as a spontaneous utterance. Some of the victim's statements were volunteered. Some were in response to questions.

The defendant argued that because parts of the 911 call were responses to questions, those parts were not spontaneous. Defendant also argued that the 911 call was cumulative to the victim's testimony and that its probative value was outweighed by its prejudicial effect.

The trial Judge admitted the entire 911 recording. The Appellate Court affirmed.

REASONING:

> Our careful review of the recording reflects that some of the victim's statements in the recording at issue were made in response to questions posed to her by the 911 dispatcher. Many others, however, were made spontaneously. Nevertheless, the central premise of the defendant's argument is not legally correct. "[T]hat a statement is made in response to a question does not preclude its admission as a spontaneous utterance." *State*

> v. *Kirby*, 280 Conn. 361, 376, 908 A.2d 506 (2006); *State* v. *Davis*, 109 Conn. App. 187, 195 n.3, 951 A.2d 31 (same), cert. denied, 289 Conn. 929, 958 A.2d 160 (2008); State v. Nelson, 105 Conn. App. 393, 407, 937 A.2d 1249 (same), cert. denied, 286 Conn. 913, 944 A.2d 983 (2008).

State v. *Swilling*, 669.

The Appellate Court also rejected the defendant's argument that the probative value of the recording was outweighed by its prejudicial effect.

§8-3(2) SPONTANEOUS UTTERANCE

STATE v. *VEGA*, 181 Conn. App. 456 (2018), petition for cert. pending.

RULE: Statement of a witness at the scene of the shooting, and statement of a gunshot victim made in an ambulance found admissible as spontaneous utterances.

FACTS: Two groups of people got into a fight at a bar in New London. The fight was broken up, but not before Rahmel Perry punched and kicked the defendant.

One group, including Perry, returned home to the apartment of Michael Ellis, arriving at about 1:30 a.m.

At 2:00 a.m. the defendant and one other man broke into the apartment through a back door – both were armed with handguns. The defendant fired two shots at Perry, who was sitting on a couch, killing him. Ellis ran out the back door and down the street. The intruders chased him, firing approximately four shots, hitting Ellis Twice. Ellis was able to flag down a police officer who was responding to a call about the shooting at the apartment. Ellis was placed in an ambulance for transportation to the hospital.

A police officer rode with Ellis to the hospital. The police officer asked Ellis who shot him and Ellis responded that "Mike" had shot him.

The State offered Ellis' statement as a spontaneous utterance. The defendant objected, claiming that Ellis had time to think about his answers to the police officer's questions, and therefore had time to deliberate and fabricate his statements. The trial Court admitted the statement.

When police arrived at the apartment, the group of people who had been in the apartment were outside, including Keyireh Kirkwood. A police officer overheard Kirkwood speaking on the phone to her mom. He heard Kirkwood tell her mom: "Mikey

shot them." The telephone call ended, Kirkwood identified the defendant as the person she was talking about in her telephone call when she referred to "Mikey."

The State offered both the statement over the telephone and the follow up statements to the police as spontaneous utterances. The defendant argued Kirkwood's statements were not made under circumstances that negate the opportunity for deliberation and fabrication. The trial court admitted the statements.

REASONING: The Appellate Court affirmed the trial court's rulings. The defendant has petitioned for cert. The Supreme Court has not yet ruled.

§8-3(5) STATEMENT FOR PURPOSES OF OBTAINING MEDICAL DIAGNOSIS OR TREATMENT

STATE v. *ABRAHAM*, 181 Conn. App. 703 (2018), cert. denied, 329 Conn. 908 (2018).

RULE: The correct test is whether the statement had a medical purpose from the declarant's perspective.

FACTS: Defendant was accused of sexual assault of his stepdaughter. On March 4, 2013, the stepdaughter was interviewed by a clinical services coordinator, Lisa Murphy-Cipolla, at the Children's Advocacy Center at Saint Francis Hospital. On June 11, 2013, the victim was interviewed a second time by Murphy-Cipolla and provided greater detail. Both interviews were video recorded.

Murphy-Cipolla testified the primary purpose of these forensic interviews was to elicit clear and accurate information, to minimize any additional trauma, and to make appropriate recommendations for mental health and/or medical examinations.

Murphy-Cipolla testified that these forensic interviews are conducted primarily on referral from DCF, but also on referral by health care professional and the police. She testified they are typically observed from behind a one-way mirror by police and/or DCF officials. She consults with them during the interview and sometimes asks follow up questions to clarify and supplement.

At trial the State offered the second interview. The defendant objected on the basis that the second interview was not primarily for obtaining medical treatment. The defendant argued that second interviews should not be admitted under the medical treatment exception to the hearsay rule.

The trial court admitted the video, ruling that the interview was primarily for medical treatment. The Appellate Court affirmed.

REASONING: The Appellate Court held that the interview did not have to be primarily for medical treatment to be admissible. The interview only needs to have a medical purpose and that the declarant understand it has a medical purpose.

> Our case law, then, holds that the statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has *a* medical purpose. Statements of others, including the interviewers, may be relevant to show the circumstances.

State v. *Abraham*, 713.

> As for the defendant's policy argument, we are not persuaded that successive interviews should categorically fall outside the medical treatment exception. Admissibility under the medical treatment exception "turns principally on whether the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 552. Although successive interviews may in some cases, as the defendant suggests, have minimal medical purposes, it is for the trial court to determine whether they were *reasonably pertinent* to obtaining medical treatment. We decline to hold as a matter of law that successive forensic interviews are never reasonably pertinent to medical treatment.

State v. *Abraham*, 715.

§8-3(5) STATEMENT FOR PURPOSES OF OBTAINING MEDICAL DIAGNOSIS OR TREATMENT

STATE v. *EZEQUIEL R.*, 184 Conn. App. 55 (2018), petition for cert. pending.

RULE: A statement "reasonably pertinent" to obtaining medical diagnosis or treatment is admissible, even if the primary purpose of the interview was not to obtain medical diagnosis or treatment.

FACTS: Defendant was accused of sexual assault of his girlfriend's daughter. The victim was interviewed at the Children's Advocacy Center at Saint Francis Hospital by a clinical child interview specialist, Lyndsey Craft. The interview was a forensic interview, videotaped and observed behind a one-way mirror by a doctor, two medical residents, a DCF worker and a detective. The state offered the video in evidence. The defendant objected. The state argued the video was admissible as a statement to obtain medical diagnosis or treatment. The trial court admitted the statement. The Appellate Court affirmed.

REASONING:

> Even if we were to assume the defendant is correct that the primary purpose was not for medical treatment, statements from the victim nevertheless may be admissible so long as there is sufficient evidence that the statements were reasonably pertinent to obtaining medical diagnosis and treatment. See *State* v. *Griswold*, supra, 160 Conn. App. 552-53, 557; see also *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266 (forensic interview statements admissible under medical diagnosis and treatment exception because purpose of interview was, at least in part, to determine whether victim was in need of medical treatment), cert. denied, 291 Conn. 910, 969 A.2d 174 (2009).

State v. *Ezequiel R*. 70.

§8-4 ADMISSIBILITY OF BUSINESS ENTRIES AND PHOTOGRAPHIC COPIES: AVAILABILITY OF DECLARANT IMMATERIAL

LM INS. CORP. v. *CONNECTICUT DISMANTELING, LLC,* 172 Conn. App. 622 (2017).

RULE: A business record of one business, placed in the ordinary course of business in the record of a second business, is "made" in the regular course of business of the second business and admissible as a business record of the second business.

FACTS: The plaintiff insurance company brought an action against the defendant to recover insurance premiums. The plaintiff initially charged the defendant $1,000 for its workers' compensation insurance based on representations of the defendant. At the conclusion of the year, the plaintiff had an audit conducted and based upon the resulting reclassification of the defendant's workers by the type of work they performed plaintiff increased the premium by $82,899. The defendant refused to pay. The plaintiff filed suit.

The plaintiff offered the audit in evidence as a business record. The defendant objected because the audit was performed not by an employee of the plaintiff but by an employee of a third party, NEIS, Inc. The trial court admitted the NEIS audit. The Appellate Court affirmed.

REASONING:

> The defendant first argues that the court improperly admitted the White audit into evidence pursuant to the business records exception to the rule against hearsay because it was a business record of NEIS and not the plaintiff. The defendant further contends that the decision relied upon by the trial court in overruling its objection to the White audit, *Crest Plumbing & Heating Co.* v. *DiLoreto*, supra, 12 Conn. App. 468, was decided incorrectly. We are not persuaded by the defendant's arguments.

LM Ins. Corp. v. *Connecticut Dismanteling, LLC*, 630-631.

The Appellate Court carefully analyzed and reaffirmed the holding in Crest Plumbing. The Appellate Court pointed out that the Supreme Court had quoted with approval the following language from Crest Plumbing: "there is no requirement in §52-180 … that the documents must be prepared by the organization itself to be admissible as that organization's business records." LM Ins. Corp. v. Connecticut Dismanteling, LLC, 633.

This now appears to be settled law.

§8-4(c) REPRODUCTIONS ADMISSIBLE

WILLIAMS GROUND SERVICES, INC. v. *ROBERT F. JORDAN*, 174 Conn. App. 247 (2017).

RULE: You do not have to produce the original of a business record.

FACTS: The plaintiff provided lawn care and snow plow services to the defendant at the defendant's home in Darien. The defendant, who was in ill health, claimed he was unable to pay the plaintiff's bills on an ongoing basis. He told the plaintiff he was selling his house and would pay the accumulating bills when the house was sold. When the house was sold the bills totaled $32,558.70. The house sold for $950,000 and $40,000 was placed in escrow.

Plaintiff had delivered the original bills to the defendant and kept photocopies for his file. He offered the photocopies in evidence. The defendant objected. The trial judge admitted the copies. The Appellate Court affirmed.

REASONING:

> Section 8-4 (c) of the Connecticut Code of Evidence provides that a "reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding …." Although the defendant argues that the plaintiff sought to admit reproductions into evidence, the plaintiff sought to admit his *original business records*. His original *business records*, for the purposes of § 8-4(c), were the photocopies of the invoices sent to the defendant that the plaintiff kept for his records. These were the documents that the plaintiff testified were being admitted into evidence. He did not testify that *reproductions* of business records were being submitted into evidence. The court, therefore, did not abuse its discretion when it admitted the invoices into evidence. In the circumstances of this case, any issue concerning whether they were substantively complete went to the weight to be given them and not to their admissibility. See *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 699 n.11, 1 A.3d 157 (2010) ("[B]usiness

> records do not carry any presumption of accuracy merely because they are admissible. The credibility of such records remains a question for the trier of fact." [Internal quotation marks omitted.]).

Williams Ground Services, Inc. v. *Robert F. Jordan*, 259.

§8-6(1) HEARSAY EXCEPTIONS: DECLARANT MUST BE UNAVAILABLE (1) FORMER TESTIMONY

MAIO v. *CITY OF NEW HAVEN*, 326 Conn. 708 (2017).

RULE: When dealing with former testimony under subsection (1), there is no requirement that the offeror attempt to depose the witness.

FACTS: Anthony Maio was a New Haven police officer. In 2008, he was doing security work at "Bar" nightclub in New Haven. There was an interaction between him and two women in the 2nd floor bathroom. They claimed he had sexually assaulted them. He was charged with sexual assault.

Maio's criminal trial took place in 2009: he was acquitted.

There is a statute which provides that a police officer acquitted of criminal charges for conduct alleged to have been committed while on duty is entitled to indemnification for economic loss.

Maio brought a civil suit against the City of New Haven seeking his economic loss: his attorney's fees and his lost earnings.

During the trial of the civil case, defendant New Haven sought to introduce the former testimony of the two women who made the complaint gave against Maio, given during his criminal trial. The testimony was offered under §8-6(1) of the Code which creates a hearsay exception for former testimony, if the declarant is unavailable. Mr. Maio objected on the ground that defendant New Haven had not sufficiently shown that these two women were unavailable.

One of those women lived in Massachusetts. New Haven's lawyer represented to the Court that he had talked with her recently and that even though she was beyond subpoena power she had told him she would come to New Haven to testify. Counsel

represented to the court that on the eve of trial, she had apparently changed her mind. She was no longer taking his calls.

The second woman lived in East Haven. Counsel represented to the court that she also had, until the eve of trial, told him she would testify. Counsel represented that she also had stopped taking his calls. He had directed a marshal to attempt to serve a subpoena on her. He put the marshal on the stand. The marshal testified that he had been to her house 5 times and once to her place of work but had not been successful in serving the subpoena.

The trial judge ruled that because defense counsel had had ample opportunity in the months leading up to trial to secure the testimony of these two witnesses by deposition, they were not "unavailable".

The Judge also stated that in making her ruling she was not permitted to rely on counsel's representations that the witnesses had assured him up until the eve of trial that they would voluntarily testify.

For those two reasons the Judge refused to admit the former testimony of the two women.

There was a plaintiff's verdict for $187,000. New Haven appealed. The Supreme Court reversed.

REASONING: The Supreme Court ruled that as to this particular hearsay exception, the exception for former testimony, there is no requirement that we make a good faith effort to take a deposition.

But this holding, that we are not required to try to get the witness' deposition, is limited to the former testimony exception to the hearsay rule. The holding does not apply to the other seven exceptions listed in §8-6.

The reason former testimony is treated differently than the other seven hearsay exceptions listed in § 8-6 is that former testimony is considered as good as a deposition. It is sworn testimony under oath with the right of cross-examination. That rationale does not apply to the other seven hearsay exceptions listed in §8-6. So this holding in Maio regarding the obligation to make a good faith effort to take a deposition is very narrow.

The Supreme Court also held that a trial court can rely on counsel's representations regarding his "own efforts" to secure the witnesses' attendance. The words "own efforts" are italicized in the Supreme Court opinion. Do not assume that includes your paralegal or even your partner.

§8-9 RESIDUAL EXCEPTION

STATE v. *BENNETT*, 324 Conn. 744 (2017).

RULE: Two important criteria in assessing whether a statement is sufficiently trustworthy to admit under the residual exception are (1) whether the declarant was subject to cross-examination; and (2) whether there is corroboration.

FACTS: The defendant stabbed and killed the victim after they got into an argument outside a bar. The defendant was wearing a red shirt. The victim was wearing a white shirt. A third man, who tried to break the fight up, Christopher Benjamin, was wearing a yellow shirt. Eye witnesses identified the defendant as the man who stabbed the victim.

Jennifer Matias was in her mother's apartment across the street from the bar. She called 911. She went to the police station about an hour later and gave a recorded statement. Her version of the events was different than the State's. She stated she saw the man in the yellow shirt (Benjamin) push the man in the white shirt (victim) to the ground. She then left the window to call 911. She then heard one or more gunshots. When she returned to the window, the man in the yellow shirt (Benjamin) was kneeling next to the victim. He was hysterical and said: "Oh, I killed him." She saw the man in the red shirt (defendant) flee.

Defense counsel's attempts to subpoena Matias were unsuccessful. He sought admission of her recorded statement under the residual exception to the hearsay rule. The trial court refused to admit the statement. The Supreme Court held that it was not an abuse of discretion to not allow the statement in evidence.

REASONING:

> The trial court rested its decision solely on the ground that Matias' statement lacked sufficient reliability and trustworthiness. One factor supporting that conclusion was that Matias had never been subjected to cross-examination regarding the circumstances surrounding her observations of the incident. A declarant's availability for cross-examination has been deemed particularly significant in determining whether hearsay evidence is supported by guarantees of trustworthiness and reliability.

State v. *Bennett*, 763.

> Additionally, the evidence at trial not only failed to materially corroborate Matias' statement, it contradicted her statement in part. See, e.g., *State* v. *McClendon*, supra, 248 Conn. 584 (report unreliable for these reasons); *State* v. *Heredia*, 139 Conn. App. 319, 331, 55 A.3d 598 (2012) (offered testimony properly deemed unreliable when it "constituted hearsay within hearsay and was corroborated only by other hearsay statements rather than established facts"), cert. denied, 307 Conn. 952, 58 A.3d 975 (2013). None of the witnesses reported hearing any gunshots, and Brown's injuries were inflicted by a knife. Matias' report that a man in a yellow shirt was kneeling beside the victim stating, "Oh, I killed him. I killed him," was consistent with the other witnesses only insofar as they reported that Benjamin wore a yellow shirt as he knelt by Brown; no one reported that anyone had made statements remotely consistent with that statement or any others recounted by Matias. Given that Matias' report of this inculpatory statement constituted hearsay within hearsay, the lack of corroboration bore significantly on its indicia of reliability. See *State* v. *Heredia*, supra, 331.

State v. *Bennett*, 763-764.

§8-9 RESIDUAL EXCEPTION -

SMITH v. *LONG*, 2016 Conn. Super. LEXIS 3260, Docket No.: HHD-CV-146052608-S

RULE: Affidavit of no insurance admitted under the residual exception to the hearsay rule in uninsured motorist case.

FACTS: Defendant Mikeya Long, the tortfeasor, was defaulted for failure to appear. GEICO was the plaintiff's insurer.

Plaintiff's counsel appeared at the criminal hearing where Long's motor vehicle charges were handled. Long applied for and was granted accelerated rehabilitation. During those criminal proceedings, Long executed an affidavit that she had no insurance. Plaintiff offered the affidavit in the uninsured motorist case.

GEICO objected on the basis that the affidavit was notarized by plaintiff's counsel and there was no independent basis for the court to conclude Long executed the affidavit. Judge Elgo took judicial notice of the criminal file and relied on the representations of plaintiff's counsel. Judge Elgo found Long executed the affidavit.

The plaintiff also offered the testimony of a marshal regarding his unsuccessful efforts to serve Long with a subpoena to trial.

REASONING: The Judge first considered whether the affidavit was admissible as a statement of a party opponent. §8-3(1). She rule that it was. (Is the statement admissible against GEICO?)

Next, the Judge considered whether the affidavit was admissible as a declaration against civil interest, §8-6(3), or penal interest, §8-6(4). Because the affidavit was secured in exchange for the plaintiff's agreement to withdraw her opposition to

defendant's application for accelerated rehabilitation, the Court found it was not against Long's civil or penal interest.

Finally, the Judge considered whether the affidavit was admissible under the residual exception to the hearsay. The Court ruled that the witness was unavailable and sufficiently trustworthy because the affidavit was under oath.

ARTICLE IX – AUTHENTICATION

§9-1 REQUIREMENT OF AUTHENTICATION

STATE v. *SMITH*, 179 Conn. App. 734 (2018).

RULE: The proponent of Facebook evidence alleged to be a statement of a party does not have to "rule out" the possibility that the message was not sent by the declarant.

FACTS: At 2:00 in the morning on March 7, 2014, a state trooper saw a tan colored Volvo stopped in the travel lane of Route 320.

The trooper put on his emergency lights and stopped his cruiser directly behind the Volvo. He knocked on the window and when the defendant rolled down the window the trooper smelled pot. When the trooper asked the defendant why he was stopped in the middle of the road the defendant said to use his cell phone. The defendant flunked his field sobriety tests and was arrested. The defendant refused to take a breathalyzer test.

It was the defendant's intent to claim at trial that the Volvo had had a mechanical malfunction that stopped it in the middle of the road. The defendant attempted to enlist his girlfriend and his girlfriend's friend to back-up his story.

The girlfriend and her friend initially agreed to go along with the plan. But when an investigator from defense counsel's office came to interview the girlfriend's friend, she got cold feet about giving a false statement.

When the defendant found out she had gotten cold feet he started sending her threatening Facebook messages to persuade her to stick with the plan. More specifically, he threatened to report her to the police for driving an unregistered car and he threatened to tell the wife of a married man that she was having an affair with about the affair. The

friend told the state's attorney about the threats and supplied the state's attorney with a copy of the Facebook messages from the defendant.

The state's attorney added a charge of tampering with a witness to the drunk driving case. The cases were consolidated.

The friend testified at trial as to her interactions with the defendant and the threats. The prosecutor marked the Facebook threat sent by the defendant for I.D.

In order to authenticate the Facebook threat the state's attorney elicited the following testimony from the friend.

The friend testified that she knew the message was from the defendant "because it comes in from my Facebook and says who it comes from on Facebook." She testified the defendant's name appears at the top of the message because "it prints out automatically from the internet." *State* v. *Smith*, 756.

The state offered the printout. The defendant objected that the state had failed to sufficiently prove that the message came from the defendant. Defense counsel argued anyone could have sent the message using the defendant's Facebook account.

The trial judge admitted the exhibit. The defendant was convicted of drunken driving and tampering with a witness. He was sentenced to fifteen years, execution suspended after serving seven. The Appellate Court affirmed.

REASONING: All of the principal cases and the relevant discussion from the Commentary to the Code on this issue, authenticating Facebook evidence, are cited in the *State* v. *Smith* opinion. *State* v. *Smith* is now the definitive case on the authentication of Facebook evidence.

The bottom line is that the proponent does not have the "burden of ruling out any possibility that the message was not sent by the defendant." *State* v. *Smith*, 765. Judge Keller wrote that the defendant's arguments "which were appropriate fodder for the jury in its scrutiny of the state's case, are misdirected at the court's decision to admit the evidence." 766. The arguments the defendant made go to the weight of the evidence, not its admissibility.

§9-1 REQUIREMENT OF AUTHENTICATION –

TEODORO v. *BRISTOL*, 184 Conn. App. 363 (2018).

RULE: The certification page from the original certified deposition page is sufficient to authenticate deposition transcripts in a Summary Judgment proceeding.

FACTS: The plaintiff sustained injuries during a high school cheerleading practice. The defendants filed a Motion for Summary Judgment on the ground of governmental immunity. The papers plaintiff filed in opposition to the Motion included excerpts from original certified transcripts of depositions accompanied by the cover page, the page on which the court reporter certified the truth and accuracy of the deposition and the deponent's oath.

The trial court declined to consider the deposition transcripts because they were not separately certified as true and accurate excerpts from the original certified deposition and not accompanied by affidavits stating the excerpts were true and accurate excerpts of the original.

The trial court then entered summary judgment for the defendant. The Appellate Court reversed.

REASONING:

> This court has never directly addressed the issue of whether an excerpt from a certified deposition transcript must be separately certified as such, apart from the certification of the original transcript from which it was excerpted, in order to make it admissible in support of or in opposition to a motion for summary judgment under Practice Book § 17-45. Our Superior Courts are divided as to what type of certification is required for that purpose. Because our review is plenary, we consider, but are not bound by, these decisions.

Teodoro v. *Bristol*, 377.

> The plaintiff claims that the trial court's reading of Practice Book § 17-45 was overly narrow, and that that section allows a court to consider more than merely entire certified deposition transcripts or excerpts from deposition transcripts that have been separately certified for their truth and accuracy as such by an affidavit from the court reporter or the submitting party's attorney. She contends that because the phrase "certified transcripts of testimony under oath" is not defined in Practice Book § 17-45 or elsewhere, and the deposition transcript excerpts she submitted along with her opposition memorandum of law included the deposition cover page, the page on which the court reporter certified the accuracy of the entire deposition transcript as he transcribed it, and the page on which the deponent swore that she had read the entire deposition transcript and certified to its truth and accuracy, so transcribed, it fully satisfied the requirements of the rules of practice. At oral argument, the trial court disagreed with the plaintiff's contention. We, however, agree with the plaintiff.

Teodoro v. *Bristol*, 379-380.

SUFFICIENCY OF EVIDENCE -

HAMMER v. *POSTA*, 170 Conn App. 701 (2017).

RULE: A trier of fact can conclude an injury is permanent without medical testimony.

FACTS: Odie, Plaintiff's 21 pound miniature schnauzer was attacked by Sarge, defendant's seventy pound pit bull. During the attack, plaintiff was injured. The case was tried to the court. There was no medical testimony that plaintiff's injuries were permanent. The defendant claimed on appeal that the court could not rely solely on the plaintiff's testimony to determine there was permanent injury. The Appellate Court disagreed and affirmed the Judgment.

REASONING:

> With respect to the defendants' claim that the court could not rely on plaintiff's testimony alone to conclude that his injuries were permanent, Connecticut case law has long held to the contrary. "Our state courts have recognized that the permanency of an injury is a finding that can be determined by jurors without expert testimony. This principle is based on the recognition by Connecticut courts that jurors are able to evaluate for themselves the testimony of the plaintiff, as well as the nature and duration of the injury, the likelihood of its continuance into the future, and the lack of total recovery by the time of trial …. If a jury has the opportunity to appraise the condition of a plaintiff and its probable future consequence, an award of damages for permanent injury and for future pain and suffering is proper." (Internal quotation marks omitted.) *Scandariato* v. *Borrelli*, 153 Conn. App. 819, 828-29 n.5, 105 A. 3d 247 (2014). "A trier of facts can conclude, by inference, that an injury will be permanent even though there is no medical testimony expressly substantiating permanency." (Internal quotation marks omitted.) *Parker* v. *Supermarkets General Corp.*, 36 Conn. App. 647, 650, 652 A2.d 1047 (1995). In *Royston* v. *Factor*, 1 Conn. App. 576, 577, 474 A.2d 108, cert. denied, 194 Conn. 801, 477 A.2d 1021 (1984), this court concluded that the trier in fact

> could conclude, by inference, that the plaintiff's injury was permanent on the basis that her disability still existed two years after the accident.

Hammer v. *Posta*, 711-712.

SUFFICIENCY OF EVIDENCE -

RILEY v. *TRAVELERS*, 173 Conn. App. 422, cert. granted, 326 Conn. 922 (2017).

RULE: To prove negligent infliction of emotional distress, the plaintiff must prove four elements: (1) defendant's conduct created an unreasonable risk of causing emotional distress; (2) the distress was reasonable; (3) the distress was severe enough that it might result in illness or bodily harm; (4) defendant's conduct was the cause of the distress

FACTS: See § 7-2 above.

The plaintiff claimed that in addition to breaching its contract by not paying on the claim, Traveler's claim that the plaintiff intentionally set the fire constituted negligent infliction of emotional distress.

The plaintiff did not introduce any expert testimony regarding his emotional distress.

The jury returned a verdict of $504, 346.10 for the property damage and $1,000,000 for negligent infliction of emotional distress. All post verdict motions were denied.

At the conclusion of the plaintiff's case the defendant moved for a directed verdict. The Judge reserved decision. The defendant then moved for Judgment Notwithstanding the verdict after a plaintiff's verdict was returned, which was denied.

On Appeal, the defendant made three claims regarding the plaintiff's emotional distress claim.

The defendant claimed that in deciding the motion for directed verdict the Judge was limited to the information the plaintiff introduced during his case in chief. The

Appellate Court disagreed. This is the only issue on which the Supreme Court has granted cert. It is scheduled for argument on November 8, 2018.

The defendant went on to claim that even if the Court considered all the evidence introduced during the trial, the evidence was not sufficient to prove negligent infliction of emotional distress. The Appellate Court rejected this claim.

REASONING:

> "[I]n order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm." (Internal quotation marks omitted.) Id., 446. In other words, "[t]o prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress: (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm: and (4) the defendant's conduct was the cause of the plaintiff's distress." (Internal quotation marks omitted.) Grasso v. Connecticut Hospice, Inc., 138 Conn. App. 759, 771, 54 A.3d 221 (2012).

Riley v. *Travelers*, 431.

> "There was sufficient evidence that the plaintiff's distress was reasonable in light of the defendant's conduct. The defendant conducted its investigation using its own employees to establish whether the fire that occurred at the plaintiff's residence was intentionally set. The defendant was required to conduct itself reasonably in conducting its investigation, since an accusation of arson insurance fraud would obviously have far-reaching personal, criminal and financial consequences for an innocent policyholder. That in innocent man falsely accused would suffer emotional distress is self-evident. The impact is aptly described in George Eliot's classic [1861] novel, Silas Marner, a tale of a man falsely accused of stealing, where it is observed that: 'deep are the sorrows that spring from false ideas for which no man is culpable.'

Riley v. *Travelers*, 435-436.

> "In addition, there was sufficient evidence that the plaintiff's distress was severe enough for the jury reasonably to conclude that it might result in illness or bodily harm. The jury heard testimony that when the plaintiff learned that coverage had been denied based on (the defendant's) conclusion that the fire had been intentionally set, he was 'shocked' and tremendously upset. The plaintiff's wife testified that the plaintiff's physical appearance reflected how much he had been staggered and taken aback: 'I remember thinking that the color of his face looked different, his skin color looked different.' Witnesses recounted the plaintiff's subsequent emotional state as he 'carried the burden' of a false accusation of arson, variously describing emotions of shame, embarrassment, unhappiness and depression. Witnesses also described behavioral changes in the plaintiff such as irritability and moodiness, and withdrawal from family and friends. From all [of] this testimony, the jury could have reasonably concluded that the long-term effect of this emotional turmoil might be physical illness or bodily harm.
>
> "Finally, there was sufficient evidence from which the jury could find causation. The plaintiff's wife and daughter testified to a marked change in the plaintiff's moods, demeanor and behavior in the wake of the accusation of arson. The plaintiff himself testified to changes in the wake of the denial of coverage: 'I just plain pulled into a shell and, you know, I was – I spent a long time waiting for the state police to come and take me away."
>
> On the basis of the foregoing findings, the court concluded that "there was sufficient evidence for the jury reasonably to have concluded as it did." The court thus denied the defendant's motion for judgment notwithstanding the verdict.

Riley v. *Travelers*, 437.438.

The defendant also claimed that it was entitled to a remitter. That claim was also rejected.

SUFFICIENCY OF EVIDENCE -

PROCACCINI v. *LAWRENCE & MEMORIAL HOSPITAL, INC.* 175 Conn. App. 692 (2017), cert. denied, 327 Conn. 960 (2017).

RULE: (1) In proving that the doctor should have "admitted" the patient, you need to prove the hospital would have done so. (2) You don't need to put in the life expectancy table, but you should.

FACTS: The decedent was found unconscious at a friend's home. She was revived with intravenous administration of Narcan. She admitted to having taken methadone. There was a question of whether she had also taken heroin.

The decedent was taken to the Lawrence & Memorial Hospital emergency department. She was assessed by the defendant emergency room doctor. She was discharged about 4 ½ hours later. She returned to the friend's home. She was found dead the next morning. The autopsy showed that she had died from methadone toxicity.

Plaintiff claimed the decedent died due to delayed respiratory depression caused by methadone she took before she went to the hospital. Plaintiff brought suit against the emergency room doctor claiming he discharged the decedent prematurely.

Defendant claimed the decedent must have ingested additional methadone after she returned home.

There was a plaintiff's verdict of $512,095: 12,095 in economic; $350,000 for the decedent's death; and $150,000 for the destruction of decedent's capacity to carry on and enjoy life's activities.

The defendant's made three claims on appeal regarding the sufficiency of the evidence.

First, defendant claimed that the plaintiff had failed to prove that the decedent overdosed on methadone taken before she went to the hospital. This claim appeared to be an attempt to retry claim the defendant made at trial – that the decedent took additional methadone after she was discharged. The Appellate Court rejected the claim.

Second, the defendant claimed there was a "missing link" in the plaintiff's causation case because the plaintiff failed to produce evidence that even if the emergency room doctor had recommended the decedent be admitted to Lawrence and Memorial Hospital, the plaintiff did not produce evidence that the hospital would in fact have admitted her. Defendant claimed the plaintiff was required to present evidence regarding Lawrence & Memorial's admission standards and whether the decedent met them.

This claim stems from the fact that the defendant emergency room doctor did not work for Lawrence and Memorial Hospital. He worked for Emergency Medical Physicians of New London County, LLC.

Third, the defendant claimed there was not sufficient evidence of loss of the ability to pursue life's enjoyment because plaintiff did not put in a life expectancy table.

REASONING: Regarding the "missing link" argument the Appellate Court did not have to face the issue because plaintiff's expert had testified that it was the standard of care for the decedent to be admitted or monitored for 24 hours. There was evidence that monitoring could be done in the emergency room, without the necessity for admission.

Regarding the life expectancy table, the Appellate Court pointed out that the decedent's birth date was in evidence (through her driver's license).

> With respect to the *type* of evidence that can be used to prove one's life expectancy, our Supreme Court has stated the following: "A mortality table is *not* the exclusive evidence admissible to establish the expectancy of life,

since *age*, *health, habits* and *physical condition* may afford evidence thereof."

Procaccini v. *Lawrence & Memorial Hospital, Inc.*, 736.

Thus, insofar as the defendant argues that the plaintiff's proof of the decedent's destroyed capacity to enjoy life's activities is insufficient because he did not present "government mortality tables," we disagree.

Procaccini v. *Lawrence & Memorial Hospital, Inc.*, 738.