Update on Evidence 2010
by Bob Adelman and Neil Sutton

"A wise man proportions his belief to the evidence."
David Hume

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Introduction

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from September 15, 2009 through July 27, 2010.

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

However, as stated in the commentary to CCE §1-2 (b): "Although the Code will address most evidentiary matters, it cannot possible address every evidentiary issue that might arise during trial." In addition, the authors have included a few cases dealing not with evidence, but with trial practice and procedure, which may be of use to trial lawyers. Therefore, in addition to the articles outlined in the Code, the Table of Contents contains four additional headings: Spoliation of Evidence, Final Argument, Sufficiency of Evidence, and Excessiveness and Remittitur.

IV. Relevancy

§ 4-1 REFUSAL TO TAKE BREATHALYZER BEFORE SPEAKING WITH ATTORNEY ADMISSIBLE TO SHOW CONSCIOUSNESS OF GUILT – STATE V. WEED, 118 Conn. App. 654 (2009); Bishop, J.; Trial Judge – Kavanewsky, J.

RULE: Defendant's refusal to take a breathalyzer test until he spoke with an attorney was admissible as evidence of consciousness of guilt.

FACTS: The defendant spent a summer day on his boat with a friend, and drank beer. After docking in Norwalk, defendant drove to his friend's home in Danbury, dropped him off, and when returning home, crashed into a sign and some traffic cones at a large, well-lit construction site. No one was injured.

Defendant flunked the field sobriety test. He was arrested and taken to the police station. There, he was asked to take a breath test. He was informed that he had a right to call an attorney before submitting to the test. Defendant attempted to call two attorneys, but was unsuccessful in reaching them.

Approximately 15 minutes after he was first requested to take a breath test, he was asked again to submit to the test. He insisted that he wanted to speak to an attorney. He was informed that his continued request for counsel, instead of taking the test, would be deemed a refusal to take the breathalyzer, and was notified of the consequences of the refusal. The defendant still would not take the test.

At trial, the defendant objected to the State presenting evidence of his request to speak with counsel and his declining to take a breathalyzer until he had talked with a lawyer. He claimed that the admission of this evidence unreasonably burdened his constitutional right to counsel. The trial court allowed the evidence.

The Appellate Court affirmed.

REASONING:

It is well settled that a defendant does not have a constitutional right to counsel at the time he is asked to take a breathalyzer test. His request for counsel is not separately admissible. However, in this case, the request to speak with counsel was admitted to prove that defendant effectively refused to take the test, although he never explicitly refused.

In a criminal case, C.G.S. §14-227a(e) specifically provides for the admission of a refusal and that the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a test.

In accordance with the statute, the trial court instructed the jury that if it found that the defendant in fact refused to take the test, it could be considered as evidence of consciousness of guilt. The Appellate Court concluded that this instruction was proper.

COMMENT: The analysis is different in a civil case, but the result should be the same. The best analogy is to cases in which the defendant flees the scene of a collision, which is admissible in a civil case. *See*, Tait and Prescott, Handbook of Connecticut Evidence §8.16.12 (d) (4th ed. 2008).

§ 4-1 CITIZENSHIP STATUS INADMISSIBLE ON CREDIBILITY – STATE V. JORDAN, 118 Conn. App. 628 (2009), *cert. granted*, 295 Conn. 901 (2010); Robinson, J.; Trial Judge – Blue, J.

RULE: The fact that a witness is not a U.S. citizen is not admissible as to credibility, because the motivation to lie to avoid deportation for a felony conviction is not significantly greater than the motivation to lie to avoid imprisonment for a felony conviction.

FACTS: Defendant was operating his motorcycle on I-95 at a high speed when he struck a car driven by Ricardo Ringor. The collision killed the defendant's passenger.

At trial, the defendant sought to cross-examine Ringor about the fact that he was not a U. S. citizen. The State objected.

Defendant's argument was that Ringor was at fault in the accident and had an enhanced motive to lie about it, to avoid inculpating himself and facing felony charges which might result in his deportation.

The trial judge ruled that all people have a motive to lie to avoid felony charges and possible imprisonment, and that the motive to lie is not significantly greater because

of the risk of deportation. Therefore, the evidence of citizenship was not relevant. The Appellate Court affirmed.

REASONING:

"The proffering party bears the burden of establishing the relevance of the offered testimony." 118 Conn. App. at 637.

§ 4-2 EVIDENCE OF CONTRIBUTORY NEGLIGENCE IS NOT RELEVANT WHERE CONTRIBUTORY NEGLIGENCE HAS NOT BEEN PLEADED – UTICA MUTUAL INSURANCE COMPANY V. PRECISION MECHANICAL SERVICES, 122 Conn. App. 448, cert. denied, 298 Conn. 926 (2010); Hennessy, J.; Trial Judge – Meadow, J.

RULE: Evidence (including expert testimony) of contributory negligence is inadmissible where contributory negligence has not been pleaded.

FACTS: A plumber employed by the defendant was sent to the Commons Condominium in Branford to install a shower diverter. The plumber needed to use a torch to solder the connections. Before he began soldering, the plumber removed some, but not all, of the paperbacked insulation in the area, because he was aware that it was combustible.

A short time after he began soldering, he noticed a glow in the wall. The insulation had caught fire, which spread through the building.

Utica Mutual paid for the repairs to the building under its policy with the Commons Condominium. Utica Mutual then brought a subrogation action against the plumbing company, alleging that the negligence of its plumber caused the fire. The case was tried to the court.

At trial, the defendant offered the report and testimony of an architect, Loomis, to the effect that the absence of fire stops at the condominium contributed to the rapid spread of the fire.

The trial court initially admitted the report and testimony, but ultimately concluded that the only purpose of the offer was to establish a reduction in damages on the ground that the condominium was partly responsible for the spread of the fire.

The court then concluded that since the defendant did not plead contributory negligence, the architect's testimony should not be considered. The Appellate Court affirmed.

REASONING:

The defendant argued that because the evidence did not negate its liability, but only proved an additional or contributing cause of the fire, the evidence should have been admitted and the damages reduced accordingly. The Appellate Court disagreed:

> "[T]he gravamen of the defendant's argument is that the extent of its liability should be mitigated due to the contributory or comparative negligence of the Commons. The plaintiff framed the purpose of Loomis' testimony as grounded in contributory negligence - an argument the defendant never refuted at trial - and the court characterized it in the same manner as well....
>
> "General Statutes § 52-114 explicitly states that there is a presumption that the plaintiff in a negligence action was exercising reasonable care at the time of injury, and that the defendant must specially plead contributory negligence. The statute allocates the burden of proof of contributory negligence to the defendant once it has been specially pleaded.' Sady v. Liberty Mutual Ins. Co., 29 Conn. App. 552, 556, 616 A.2d 819 (1992). In the present case, the defendant did not plead contributory negligence, so the plaintiff had no burden under the law to prove that the Commons exercised reasonable care; it was presumed. Id., 556-57."

122 Conn. App. at 460-61.

§ 4-3 EVIDENCE OF WORKERS' COMPENSATION PAYMENTS INADMISSIBLE – CRUZ V. MONTANEZ, ET AL., 294 Conn. 357 (2009); Palmer, J.; Trial Judge – Matasavage, J.

RULE: Even though an employer who pays workers' compensation payments is entitled to recover those payments from the defendant, evidence of the amount of those payments is inadmissible.

FACTS: Motor vehicle collision in which the plaintiff suffered connective injuries and bulging discs. Plaintiff, who was in the course of employment at the time of the accident, collected $26,000 in workers' comp benefits, 38% of which was medical payments and temporary total disability (lost earnings) benefits, and 62% of which was loss of use benefits.

The employer intervened as a plaintiff, but after entering a stipulation as to the amount of comp benefits paid, did not participate at trial.

Because C.G.S. §31-293(a) grants the employer reimbursement for comp benefits paid, plaintiff sought to introduce the amount of benefits in evidence, and argued for the inclusion on the plaintiff's verdict form of a separate line for the jury to enter the amount of benefits paid by the employer, to serve as the basis of a judgment for the employer directly against the defendant.

The trial judge refused to admit in evidence the amount of benefits paid. He ruled that, under prior case law, all the plaintiff could do was put in evidence his medical bills and lost wages, which could then be awarded to the plaintiff, and from which the employer would then receive what it paid. Since medical bills and lost wages made up

only 38% of the lien, the remaining 62% (loss of use benefits), would not be awarded. The plaintiff declined to follow this procedure, and did not submit evidence of economic damages or submit a claim for economic damages to the jury.

The jury returned a verdict of $75,000 in non-economic damages.

The trial judge then awarded the employer its full workers' compensation lien from the non-economic damages. The Supreme Court affirmed

REASONING:

The Supreme Court had outlined a procedure for dealing with workers' comp liens, in dicta, in cases decided in 1946 and 1950.

In Stavola v. Palmer, 136 Conn. 670, 679 (1950) the court stated: "Ordinarily, when both the employee and the employer are parties plaintiff, the jury should not be told the amount of the employer's obligation for [workers'] compensation. The jury returns a verdict for the amount of damages to which [it] find[s] the employee is entitled, and thereafter the court apportions that to the employer and the employee."

In the 1946 case, Mickel v. New England Coal & Coke Co., 132 Conn. 671, 1946) the court wrote:

> "[T]he employer has a right to take part in the trial [insofar] as the issues involve the question of the legal liability of the third party to the plaintiff employee and the amount of damages which the employee is entitled to recover for his injuries, but... the amount the employer has paid or become obligated to pay has no bearing [on] the issues to be submitted to the jury, and evidence and argument as to that amount should have no place in the trial In the event of a... verdict [for the plaintiffs], it is for the court, without the jury, to apportion the damages between the two plaintiffs [on] the basis either of a stipulation entered into by them or of evidence heard by it."

Id. at 680-81.

The Supreme Court in Cruz did not analyze why the amount of workers' compensation benefits should be kept from the jury.

When the employer's case is tried, the amount of benefits paid is relevant – it defines the damages sought. Perhaps the court's unarticulated belief is that the jury should not know that workers' compensation benefits were paid, or how much. It is difficult to discern any policy reason for such a belief.

The Cruz court did not address the fact that the benefits paid exceeded the economic damages which could have been awarded, preferring instead to enrobe its ancient dicta in the false mantle of *stare decisis*: "In any event, we see no persuasive reason to deviate from the approach that we recognized as the proper one in those cases." 294 Conn. at 377.

§ 4-3 INADMISSIBILITY OF TESTIMONY ABOUT "DEFENSIVE MEDICINE" – PIN V. KRAMER, 119 Conn. App. 33, *cert. granted*, 295 Conn. 911 (2010); Bishop, J.; Trial Judge – Shay, J.

RULE: The danger of unfair prejudice outweighs the probative value of a medical malpractice defense expert's testimony that the reason he would have ordered tests, though they were not required by the standard of care, is that he must practice defensively because of a "malpractice crisis", and is therefore inadmissible.

FACTS: An osteochondroma is a benign tumor which can continue to grow, damage the spine and displace organs. The medical issue is whether to leave it alone or remove it.

When Erik Pin was ten years old, he developed scoliosis. His pediatrician ordered x-rays and a CT scan and discovered an osteochondroma growing between his vertebrae.

The pediatrician referred him to an orthopedic surgeon, Dr. Kramer, who first saw Erik on April 2, 2001. Kramer reviewed the earlier x-rays and CT scan and recommended that they take a conservative approach: watch and wait.

At Erik's next visit with Kramer eight months later, Erik said that the tumor was bothering him when he lay down or pressed his back against a wall. He wanted the tumor removed.

Kramer scheduled the surgery for December 28, 2001. He did not order any new radiological studies before the surgery. The original x-rays and CT scan were now nine months old.

Although Kramer's plan was to remove the tumor in one piece, he was unable to do so, and broke it into pieces to get it out. Kramer did not order any post-op x-rays to monitor whether the tumor had regrown. He testified that he was satisfied he had successfully removed the entire tumor, and that in his opinion the chance of reoccurrence was very small.

About six months after surgery, Erik's pediatrician noted an asymmetry in Erik's ribs. He ordered x-rays, which revealed that the tumor had regrown.

Erik returned to Kramer, who referred him to a tumor specialist, who performed another, much more extensive surgery nine months after the initial surgery.

Because of extensive bone loss, a spinal fusion was required, but failed. Nine months later, another surgery was done, in which metal rods were inserted into Erik's back. The rods were also unsuccessful in stabilizing his spine. Erik is crippled.

One of the plaintiff's principal claims was that it was a breach of the standard of care for Kramer not to order new radiology studies before surgery, because the CT scan on which he relied when planning the surgery was nine months old, and did not accurately reflect the then-current extent of the tumor.

The plaintiff claimed that new studies were necessary to map the tumor and plan the surgery, and that without them, Kramer underestimated how extensive the tumor was and failed to get it all out.

Defendant's expert, Todd Albert, testified at trial that it was not the standard of care to order new radiological studies before surgery.

However, Albert had testified at deposition that if he had been Erik's surgeon, he would have ordered both a CT scan and an MRI before surgery.

Defense counsel, anticipating plaintiff's cross-examination, asked Albert why, since it was not the standard of care, he would have ordered a CT scan and an MRI. Albert testified first that he was at a teaching institution, and ordered a lot of tests to give the residents, fellows, and medical students an opportunity to read them.

His testimony went on:

> "The second reason is much different than in this part of the country and this state. I live in the worst malpractice community in the world. And people – and we practice a lot of defensive medicine. It's true. It's unfortunate, but it's true. And so we order way more tests. You hear about the cost of medicine going up. We are the epicenter of it because we have more doctors leaving because they can't get insurance and things like that. So, we order way more

> tests than are necessary to protect ourselves. And that's just a fact. And so we get acclimated to practicing like that. So, there's lots of reasons."

119 Conn. App. at 40.

After the jury was excused, plaintiff's counsel argued that the defense expert had injected totally inappropriate issues into the case, and requested a mistrial, or at least a curative instruction.

Defense counsel argued that his expert should be permitted to explain why he would have ordered these tests, even though it was not the standard of care to do so.

The trial court refused the motion for mistrial and – although defense counsel indicated he had no objection to it – refused to give a curative instruction. The Appellate Court reversed.

REASONING:

The Appellate Court held that the probative value of this evidence was outweighed by the danger of unfair prejudice.

> "During his testimony, Albert introduced highly prejudicial issues into the case. Albert explained that he would have done more radiology tests on the plaintiff due to his concern about malpractice claims. He noted that there is a need to practice 'defensive medicine' in order to protect against malpractice litigation and discussed how this trend is leading to the increased cost of medicine and is forcing physicians to leave the profession. The unspoken inference to be drawn from this testimony was that the only reason Kramer would have needed to do additional radiology tests on the plaintiff would be to protect himself against the very litigation that he was then experiencing. After hearing this testimony, it would be difficult to imagine that the jury could or would have ignored its logical implications when considering whether the defendants should be held liable. In addressing the plaintiffs' claim, we are cognizant that the trial court is often better positioned to determine whether a particular section of testimony was prejudicial and that the

> court's determination of whether or not to grant a remedy for any such prejudice should be given great deference. We cannot, however, defer to the court's decision not to act in this case."

Id. at 43-4.

> "This testimony painted a picture sympathetic to physicians, portraying them as constantly forced to defend against malpractice claims and to bear the exorbitant cost of insurance. Whether or not the comment has merit in public discourse, it had no place in this trial."

Id. at 45.

NOTE: The Supreme Court has granted certification on the following question: "Did the Appellate Court properly determine that the trial court incorrectly failed to give a curative instruction, and if so, was such failure harmful?"

§ 4-5 PRIOR SPEEDING CONVICTIONS OR LICENSE SUSPENSIONS INADMISSIBLE – STATE V. JORDAN, 118 Conn. App. 628 (2009), *cert. granted*, 295 Conn. 901 (2010); Robinson, J.; Trial Judge – Blue, J.

RULE: Evidence that a witness had prior speeding convictions or license suspensions is inadmissible.

FACTS: *See* Section 4-1 above. In addition to offering evidence that Ringor was not a U. S. citizen, as discussed above, defendant offered evidence that Ringor had prior convictions for speeding and prior license suspensions. The trial court refused to allow the evidence. The Supreme Court affirmed.

REASONING:

C.C.E. § 4-5(a) provides as follows:

> (a) Evidence of other crimes, wrongs or acts inadmissible to prove character. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person.

VII. Opinions and Expert Testimony

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO PROVE PLUMBER NEGLIGENT WITH TORCH - UTICA MUTUAL INSURANCE COMPANY V. PRECISION MECHANICAL SERVICES, 122 Conn. App. 448, cert. denied, 298 Conn. 926 (2010); Hennessy, J.; Trial Judge – Meadow, J.

RULE: A plaintiff is not required to call a plumber as an expert to establish that it is negligent for a plumber to use a torch near combustible materials. This is within the ordinary knowledge and experience of the trier of fact.

FACTS: *See* Section 4-1 above. Defendant claimed that plaintiff was required to present expert testimony establishing the "standard of care" of a professional plumber installing a shower diverter, because this work, which included soldering pipes, was outside the common layperson's knowledge.

The trial court held that such testimony was not necessary. The Appellate Court affirmed.

REASONING:

> "[T]he issue did not entail the technical skills required to replace shower diverters and the soldering of pipes. Because the question of whether a reasonable person should operate a torch within the vicinity of combustible materials does not go beyond the field of the ordinary knowledge and experience of the trier of fact, we hold that expert testimony was not required to determine if the defendant's performance complied with the requisite standard of care."

Id. at 456.

§ 7-2 QUALIFICATIONS OF EXPERTS: PROOF OF THE STANDARD OF CARE THROUGH THE TESTIMONY OF A DEFENDANT - UTICA MUTUAL INSURANCE COMPANY V. PRECISION MECHANICAL SERVICES, 122 Conn. App. 448, cert. denied, 298 Conn. 926 (2010); Hennessy, J.; Trial Judge – Meadow, J.

RULE: Plaintiff can fulfill the need for expert testimony by calling the defendant or its personnel.

FACTS: *See* Section 4-1 above. Although the Appellate Court held that expert testimony was not required in this case, the court noted that if expert testimony had been required, the testimony of the defendant's plumber, who set the fire, would have been sufficient.

Defendant's plumber testified that, to complete his work in a safe and workmanlike manner, he had to remove all combustible materials from the vicinity of his torch. He testified that a plumber would violate the standard of care if a torch was used within the immediate vicinity of paperbacked insulation. Finally, he testified that his torch caused the fire.

REASONING:

> We note also that our Supreme Court has determined that a plaintiff may prove the standard of care through the testimony of a defendant. LePage v. Horne, *supra*, 262 Conn. [116,] 132 [(2002)]. As an expert witness, the defendant is "not required specifically to have expressed as an opinion that [she] breached the standard of care in order for the [plaintiff] to prevail.... Rather, the [plaintiff] need only have produced sufficient expert testimony to permit the [the court] reasonably to infer, on the basis of its findings of fact, that [the defendant] breached the standard of care." (Internal quotation marks omitted.) Id."

122 Conn. App. at 456-7.

§ 7-2 QUALIFICATIONS OF EXPERTS: CONNECTICUT VS. OUT-OF-STATE INSURANCE AGENT – KNOWLEDGE OF SPECIFIC STANDARD OF CARE - BARANOWSKI V. SAFECO INS. CO. OF AMERICA, 119 Conn. App. 85 (2010); Schaller, J.; Trial Judge – Upson, J.

RULE: An insurance agent whose experience is exclusively in New York, although licensed in Connecticut, is not qualified to testify about the intricacies of Connecticut uninsured/underinsured motorist (UIM) coverage.

FACTS: In 1998, plaintiff met with his agent to purchase auto insurance. According to the agent, she discussed the option of purchasing UIM conversion coverage. According to the plaintiff, the agent either did not offer him, or did not fully inform him about, conversion coverage. He purchased $100,000 of standard UIM coverage from Safeco Insurance.

Plaintiff's Safeco policy automatically renewed every six months thereafter. There were no further discussions between the plaintiff and the agent.

On February 3, 2001, the plaintiff was involved in an accident in which he alleged that he sustained damages of over $500,000. The driver of the vehicle who caused the accident paid his $50,000 limit to the plaintiff.

Plaintiff sued Safeco and his agent. Safeco paid $35,000, the amount remaining after deductions, and the case against Safeco was withdrawn.

Plaintiff continued the suit against the agent, claiming she failed to offer conversion coverage, or failed to fully inform him regarding conversion coverage, and failed to discuss conversion coverage with him at each six-month policy renewal.

The case was tried to a jury. The plaintiff sought to offer expert testimony from Kim Fiertz, an insurance agent, that an agent in the defendant's position would normally

use a checklist to document that she had discussed conversion coverage with the plaintiff and offered conversion coverage.

Although Fiertz had received her New York license in 1980 and her Connecticut license in 1990, all her work was for an insurance agency in New York.

She testified that the standards she used, which provided the basis for her testimony, were national standards. She also testified that she had sold insurance to Connecticut customers and applied these standards.

On the other hand, Fiertz testified she had no knowledge of whether Connecticut insurance agencies applied these same standards.

The trial court refused to allow the testimony, finding that she did not qualify as an expert on the standard of care in this particular area in 1998 in Connecticut. The Appellate Court affirmed.

REASONING:

> "The record supports the court's finding that Fiertz was precluded from testifying because she in fact did not know the applicable standard of care of insurance agents in Connecticut during the relevant time frame. We agree with the plaintiff that an expert's "knowledge may be drawn from reading alone, from experience alone, or from both." The plaintiff has failed to show, however, that Fiertz acquired sufficient knowledge, either from reading, experience or course work, of the applicable standard of care in Connecticut in 1998. The record is clear that the court did not abuse its discretion in making this finding. Accordingly, we conclude that the court did not abuse its discretion in precluding the proposed expert testimony."

Id at 96-98 (internal quotation marks omitted).

COMMENT: Because the plaintiff did not raise his claim on the standard of care – that the court should establish a national standard of care for insurance agents similar to the

national standard of care in medical malpractice cases – until appeal, the Appellate Court declined to address this issue. Id. at 92 n.6.

A national standard of care may not even make sense in this context. Unlike the human body, which is the same in every state, the law regarding underinsured motorist coverage differs from state to state. It is hard to imagine that there could be a national standard of care on offering conversion coverage when most states do not have conversion coverage.

§ 7-2 QUALIFICATIONS OF EXPERTS: VETERINARIAN QUALIFIED TO TESTIFY ON STANDARD OF CARE FOR "TURNING OUT" HORSES - DOW-WESTBROOK, INC. V. CANDLEWOOD EQUINE PRACTICE, 119 Conn. App. 703 (2010); Mihalakos, J.; Trial Judge – Aurigemma, J.

RULE: In proving veterinary malpractice – unlike medical malpractice – the plaintiff is not required to produce testimony by a professional expert who specializes in the particular area at issue in the case.

FACTS: The plaintiff's broodmare (female horse used for breeding), boarded with the defendant veterinarian for artificial insemination, was "turned out" into a pasture with another broodmare, who kicked her and damaged her leg.

Plaintiff brought suit, alleging that the defendant veterinarian was negligent in turning out together mares in heat, especially during the time they were being artificially inseminated.

The case was tried to the court. The plaintiff offered the testimony of a veterinarian, Dr. Gaby, that it was a breach of the standard of care to allow these two broodmares to be turned out together when in heat and while being artificially inseminated.

Gaby had extensive education, training and experience in equine medicine. His practice in Massachusetts had three veterinarians. Although approximately 80% of his practice focused on lameness, the practice also dealt with equine reproduction.

The trial court refused to allow Gaby to testify. She held that his particular expertise was in lameness and not the standard of care for turning out horses during artificial insemination. The Appellate Court found this ruling to be error.

REASONING:

> "Resolution of the issue before us turns on whether Gaby was qualified to render an expert opinion on the turnout of horses. Gaby testified that he was familiar with turning out horses for breeding purposes. Although his current practice focuses mainly on lameness, he testified that he has worked with artificial insemination in the past and that he still does some breeding. Gaby further testified that he has been 'involved in the design and layout of the turnout situation because it is, after all, [his] practice and [he has] veterinary support working under [him].' Gaby stated that he was familiar with breeding and horse turnout and dealt specially with the process while at the University of Mississippi. Finally, Gaby testified that, on the basis of his knowledge and experience, he would feel comfortable turning a horse out and has mares of his own at the clinic that he turns out.
>
> "Although Gaby may not specialize in turning out horses, he is a qualified veterinarian with experience and knowledge uncommon to the world that could have assisted the trier of fact in this case. Accordingly, we conclude that the court improperly precluded Gaby's expert testimony."

Id. at 721.

The Appellate Court found the error to be harmless. Although the plaintiff's expert disclosure indicated that Gaby would have testified that it was not reasonably prudent to turn out the plaintiff's horse under the circumstances of this case, the plaintiff did not make an offer of proof and elicit the actual testimony on the record.

COMMENT: A witness important enough to call to the stand is presumably important enough for an offer of proof if the trial court either limits or precludes the proffered testimony. *See*, Practice Book §60-5.

§ 7-2 MEDICAL MALPRACTICE: EXPERT FAILS PORTER TEST – KAIRON V. BURNHAM, 120 Conn. App. 291 (2010) *cert. denied*, 297 Conn. 906 (2010); Peters, J.; Trial Judge – Domnarski, J.

RULE: When a critical fact relied on by an expert is based on "speculation", the opinion fails to satisfy the Porter standard for scientific reliability.

FACTS: The defendant plastic surgeon performed a mini-facelift on the plaintiff, after which plaintiff developed facial lesions and swelling. She sought treatment from Dr. Benavides, an otolaryngologist, who was disclosed as plaintiff's expert.

Defendant moved *in limine* to preclude Benavides from testifying on two grounds: 1) that Benavides was not a "similar health care provider" as required by C.G.S. §52-184c; and 2) that Benavides's testimony did not satisfy the Porter standard for scientific reliability.

At a hearing on the motion in limine, the trial court found that Benavides though an otolaryngologist, was a similar health care provider, because he possessed "sufficient training, experience and knowledge... in a related field of medicine…." C.G.S. §52-184c(d)(2).

At the hearing, Benavides testified that, although the defendant plastic surgeon's note indicated an appropriate type of suture, Benavides's opinion was that in reality, the surgeon probably used a different, non-approved type of suture. He based this on the nature, severity and location of the patient's facial lesions and swelling. In

Benavides's opinion, it would be highly unusual for the plaintiff to develop this type of reaction to the proper type of suture.

However, Benavides did not dispute the report of another plastic surgeon, that sometimes even appropriate types of sutures can cause this type of adverse reaction. Furthermore, the pathology report did not note any foreign body in the plaintiff's face.

Noting that, at his pretrial deposition Benavides testified that this opinion as to the type of sutures, "while not pure speculation, was speculation", the trial judge precluded his testimony, finding that the opinion did not satisfy the Porter standard for scientific reliability. The Appellate Court affirmed.

REASONING:

> "Viewing the record as a whole, we are not persuaded that the court abused its discretion in finding that Benavides had no reasonable scientific basis for opining that the defendant negligently had performed facial surgery on the plaintiff. The fact that Benavides was the plaintiff's treating physician gave him expertise to describe the plaintiff's state of health, but it did not relieve him of the burden of articulating a persuasive theory scientifically linking her medical problems to professional malpractice on the part of the defendant. Our Supreme Court, in State v. Porter, *supra*, 241 Conn. [57,] 84, [(1997) (en banc), cert. denied, 523 U.S. 1058 (1998)] stated that '[t]he factors a trial court will find helpful in determining whether the underlying theories and techniques of the proffered evidence are scientifically reliable will differ with each particular case.' (Internal quotation marks omitted.) The case on which the trial court relied, however, *E.I. du Pont de Nemours & Co.* v. *Robinson*, 923 S.W.2d 549,557 (Tex. 1995), pointedly held it was improper for a trial court to assume that one of several possible causes could have produced injury. Id., 558-60. That precedent is persuasive here."

120 Conn. App. at 297.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO PROVE CAUSATION OF EMOTIONAL DISTRESS IN MEDICAL MALPRACTICE CASE – THORNTON V. GARCINI, 237 Ill.2d 100, 928 N.E.2d 804 (Ill. 2009, *as mod. upon denial of rehearing,* 2010); Kilbride, J.

RULE: Although expert testimony is ordinarily required to prove causation of injury in a medical malpractice case, such testimony is not required to prove emotional distress where, based on personal experience alone, the jury could reasonably find that the defendant's negligence caused plaintiff's emotional distress.

FACTS: On August 28, 2000, when her son was at a gestational age of approximately 24 weeks, plaintiff went into premature labor. .

At 6:35 a.m. the defendant obstetrician was called at his home and advised that plaintiff was having contractions. At 7:10 a.m., with no doctor present, the infant was partially delivered in a breech position, during which the infant became entrapped at the neck.

A nurse called the doctor, who was still at his home. He instructed the nurse not to deliver the infant unless it could be done easily, because there was a risk of decapitation. The nurses were unable to deliver the infant and he died.

The nurse then called the doctor, still at home, and informed him the infant had died and that the head had still not been delivered.

The doctor then took a shower, and drove to the hospital to deliver the dead infant.

An hour and ten minutes passed after the doctor was told the infant died before he delivered the dead child. During that time the plaintiff waited with her partially-delivered infant between her legs.

Plaintiff sued the defendant for wrongful death and for negligent infliction of emotional distress. The jury found against the plaintiff on the wrongful death claim, but in her favor on her claim that the doctor negligently inflicted emotional distress by unreasonably delaying coming to the hospital to deliver the deceased infant, and awarded her $700,000.

Defendant appealed on the ground that plaintiff had not produced expert testimony to establish that her emotional distress was caused by the delay in delivering the deceased infant. The Supreme Court of Illinois affirmed the judgment.

REASONING:

The Supreme Court of Illinois held that the absence of expert medical testimony on causation of emotional distress did not prevent the issue from being submitted to the jury. "[E]xpert testimony, while it may assist the jury, is not required to support a claim for negligent infliction of emotional distress." 237 Ill.2d at 109. "Based on personal experience alone, the jury could reasonably find that the circumstances of the case caused emotional distress." Id.

> "Defendant also contends expert proof of causation is necessary when there is more than one possible cause of the emotional distress 'to ensure that the recovery is only for compensable emotional injuries proximately caused by the event for which defendant was found liable, and not for grief suffered, or other emotional distress resulting from other causes for which defendant is not liable.' According to defendant, causation is at issue here when plaintiff simultaneously lost her infant and suffered a traumatic event by having the infant protruding from her body until defendant's arrival. Defendant surmises that expert testimony would have established whether the delay in delivering the deceased infant caused the entire emotional injury, as opposed to the death of the infant.

> "Here, plaintiff's testimony established that the emotional distress she experienced derived directly from defendant's delay in delivering the deceased infant and not from the death of her child. Plaintiff testified that she was depressed, and could not eat, or sleep. She could only think about laying there for an hour and 10 minutes, and there was nothing she could do but 'sit there like that with my baby.' She further testified that she has these thoughts '[a]ll the time' and she has had thoughts of suicide because '[i]t was so horrible' and 'I'm always reminded of that hour and ten minutes that I sat there with him.'
>
> "Viewing the evidence in the light most favorable to the plaintiff as we must here, the trial testimony established that she suffered emotional distress because of defendant's delay in delivering the deceased baby. We cannot say that the evidence so overwhelmingly favored defendant that no contrary verdict could ever stand. Accordingly, we hold defendant is not entitled to a judgment notwithstanding the verdict due to the lack of expert testimony on the issue of plaintiff's emotional distress."

237 Ill.2d at 110-11 (internal citation omitted).

VIII. Hearsay

§8-3(a) STATEMENT OF PARTY NOT BINDING – EVIDENTIARY VS. JUDICIAL ADMISSION – TODD V. NATIONWIDE MUTUAL INS. CO., 121 Conn. App. 597 (2010) *cert. denied*, 297 Conn. 929 (2010); Borden, J.; Trial Judge – George Ripley, J.

RULE: An allegation in previous lawsuit that tortfeasor was an authorized driver is an evidentiary admission, not a judicial admission, and therefore not binding on the plaintiff.

FACTS: The plaintiff was involved in an automobile accident in which she was struck by another vehicle operated by Bernacchi. Bernacchi was driving a leased vehicle owned by American Honda Finance Corporation ("Honda") which had a liability policy with Pacific Employers Insurance Company with limits of $1,000,000.

Bernacchi also had his own auto policy with GEICO, with liability limits of $100,000.

Suit 1: plaintiff first brought suit against Bernacchi and Honda, alleging that Bernacchi was an authorized driver of the leased vehicle, which Honda denied. Plaintiff settled against Bernacchi for $100,000 (thereby exhausting the limitis of his personal auto liability policy) and against Honda for $275,000 - a total of $375,000.00.

Suit 2: plaintiff then brought an underinsured motorist case against her own company, Nationwide, alleging that Bernacchi was not an authorized driver; that Honda therefore had no legal obligation to pay; and that Honda's Pacific Employer's insurance policy was therefore not "applicable."

The trial court granted Nationwide's motion for summary judgment, finding that, because plaintiff had accepted less than all of the Pacific Employers $1,000,000 policy, she had failed to exhaust "the applicable liability policies," and was therefore barred from recovery. The Appellate Court reversed.

REASONING:

The Appellate Court held that Nationwide had failed to establish that the Pacific Employers policy, covering Honda's leased vehicle, was "an applicable policy". The court held there was a genuine issue of fact regarding whether Bernacchi was an authorized driver, rejecting Nationwide's claim that the plaintiff's acceptance of funds in settlement from a disputed policy precluded recovery of underinsured motorist benefits.

The court then turned to the effect of the plaintiff's allegations in Suit 1:

> "Finally, we also reject the defendant's reliance on the plaintiff's prior pleading, in the negligence case against Bernacchi, which alleged that Bernacchi was an authorized driver of the vehicle at the time of the accident. As a prior

> pleading in a different case, although that pleading may well have evidentiary value in the present case, it is not legally binding on the plaintiff in the present case. See *State* v. *James*, 247 Conn. 662, 684, 725 A.2d 316 (1999) (Berdon, J., dissenting) (testimony at prior trial admissible on retrial as evidentiary admission); see also C. Tait, Connecticut Evidence (3d Ed. 2001) § 8.16.3, p. 587 ('Judicial admissions are conclusive only in the judicial proceeding in which made.... In subsequent proceedings, such prior judicial admissions are merely evidentiary admissions, to be used as evidence to prove a matter in dispute in the subsequent trial.' [Citation omitted.]). "

121 Conn. App. at 604.

§ 8-3 (5) STATEMENT FOR PURPOSES OF OBTAINING MEDICAL DIAGNOSIS OR TREATMENT - STATE V. MILLER, 121 Conn. App. 775, *cert. denied*, 298 Conn. 902 (2010); DiPentima, J.; Trial Judge - Miano, J.

RULE: Statement by minor sexual assault victim to licensed family therapist admitted, despite presence of police behind one-way mirror.

FACTS: Defendant was accused of sexual assault. The minor victim received treatment at St. Francis Hospital. While at St. Francis, the victim was interviewed by a licensed family therapist for approximately 50 minutes, while police officers observed from behind a one-way mirror. At one point, the therapist left the interview room to obtain guidance from the police as to what information to obtain. The police used the information from the interview to support their application for a search warrant.

The State offered the statement of the minor victim through the testimony of the therapist, pursuant to C.C.E. §8-3(5), which allows hearsay statements "made for purposes of obtaining a medical diagnosis or treatment...."

The defendant objected on the basis that the primary purpose of the therapist's interview was not medical treatment but to obtain information for the police.

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

REASONING:

The therapist testified that the purpose of the interview was to "make the necessary recommendations for mental health and, or, the need for a medical exam." Id. at 782. The Appellate Court held that the trial court did not abuse its discretion in finding that the purpose of the victim's interview was for medical treatment.

§ 8-3 (8) ABUSE OF DISCRETION TO PRECLUDE (AS CUMULATIVE AND UNDULY MISLEADING) VIDEO SUPPORTING EXPERT'S OPINION; NOT ABUSE OF DISCRETION TO PRECLUDE (AS "UNNECESSARY" AND POSSIBLY CONFUSING) LEARNED TREATISE EXCERPTS – STATE V. GUPTA, 297 Conn. 211 (2010); Katz, J.; Trial Judge - Rodriguez, J.

RULE: Videotapes depicting the proper way to conduct a physical examination, offered during the direct examination of an expert, were probative, not needlessly cumulative, and not unduly misleading. It was an abuse of discretion to refuse to admit the videotapes.

Once an expert has testified on direct that a medical treatise corroborates her opinion, the excerpts are ordinarily probative and not merely cumulative.

However, where counsel reads the excerpts to the jury, asks the expert about the excerpts, and elicits the expert's testimony that they corroborate her testimony, it is not an abuse of discretion to refuse to admit the treatise excerpts as a full exhibit, because the printed treatise is "unnecessary" and possibly confusing to the jury.

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

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

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

Defendant offered the testimony of a pulmonologist that the breast examinations performed by the defendant on the two patients were appropriate. During direct examination, the defendant attempted to introduce 12 excerpts from medical medical texts, which used words, pictures, and diagrams to illustrate the proper method for conducting a pulmonological examination, and offered the excerpts to corroborate the expert's opinion that the examinations described by the patients were consistent with accepted medical practice.

The State objected on the ground that the medical texts were cumulative, essentially repeating what the defense expert had testified to. The trial court sustained the objection and refused to allow the excerpts as full exhibits, because they were cumulative and might confuse the jury.

However, the trial court allowed counsel to read the excerpts to the jury and ask the expert questions based on the excerpts. The expert testified that the excerpts corroborated her testimony.

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

the videotapes to assist the jury in understanding the expert's testimony. The State objected on the grounds of relevancy and hearsay.

The defendant argued that an expert is entitled to rely on hearsay. The court sustained the objection, on the ground that the videotapes might mislead the jury.

The Appellate Court found both these rulings to be an abuse of discretion.

The Supreme Court held that since the trial court had allowed the excerpts to be read to the jury during the questioning of the expert, it was not an abuse of discretion to refuse to mark them as full exhibits.

The Supreme Court agreed with the Appellate Court that refusing to allow the defendant to show the videotapes was an abuse of discretion.

REASONING:

As to the medical treatises, the opinion is inconsistent with the Connecticut rule, see Kaplan v. Mashkin Freight Lines, 146 Conn. 327, 341 (1959), that medical treatises which support an expert's opinion are marked as full exhibits and go into the jury. The opinion relies heavily on the fact that counsel was permitted to read the excerpts to his expert and holds that under these circumstances, admitting them as full exhibits was "unnecessary."

This holding, and the contextually imprecise use of the word "unnecessary", will create needless confusion in the future. In his concurring opinion Justice Palmer wrote that the excerpts should have been admitted.

As to the videotapes, the Supreme Court held that the videotapes, depicting a proper examination of the lungs and thorax, were relevant and should have been admitted. The court held that as long as the videotapes were shown during the expert's

testimony, with an opportunity to ask the expert questions regarding the videotapes, they were not misleading. Because the videotapes had been completely precluded, their exclusion was held to be an abuse of discretion, and harmful error.

§ 8-9 STATEMENTS OF CHILDREN ADMITTED UNDER RESIDUAL EXCEPTION TO THE HEARSAY RULE BECAUSE "PSYCHOLOGICALLY UNAVAILABLE" - IN RE TAYLER F., 296 Conn. 524, (2010); Katz, J.; Trial Judge – Graziani, J.

RULE: The residual exception to the hearsay rule requires a finding that "there is a reasonable necessity for the admission of the statement...." A finding that a child will suffer serious emotional or mental harm if required to testify, and that the child is therefore psychologically unavailable, fulfills this requirement.

FACTS: Action by the Commissioner of Children and Families to adjudicate two minor children as neglected. In December 2004, Tayler and Nicholas were 11 and 9 years old and living with their mother and her boyfriend.

On December 8, 2004, the children's father contacted the Enfield Police to report an incident between the boyfriend and the children the day before. Officer Skop investigated. He went to the children's house, interviewed the children, and reported the results to DCF.

Karen Dupuis, a DCF social worker, investigated the allegations and interviewed the children.

After the neglect petitions were filed, the court ordered that an examination be performed by a clinical psychologist, David Mantell, who interviewed the children in 2005.

The State offered the children's statements to the police officer, the social worker, and the psychologist in reports by these witnesses. The mother objected on the ground

that the statements were hearsay. The court allowed the statements in evidence pursuant to the residual exception to the hearsay rule.

The Appellate Court and in turn The Supreme Court affirmed.

REASONING:

> "Consistent with these authorities [from other jurisdictions] and our jurisprudence, we conclude that a trial court properly may conclude that a child is unavailable if there is competent evidence that the child will suffer psychological harm from testifying. The court's determination must be based, however, on evidence specific to the child and the circumstances, not a generalized presumption that testifying is per se harmful."

Id. at 544.

The court went on to detail the substantive and procedural requirements for establishing the psychological unavailability of a child whose statement is objected to as hearsay:

> "The trial court has discretion to accept an uncontested representation by counsel for the offering party that the child is unavailable due to psychological harm.... If the other party challenges that representation, proof of psychological harm must be adduced at an evidentiary hearing, either from an expert or another uninterested witness with knowledge of the child or from the court's in camera interview of the child, with or without counsel.... Finally, a finding of psychological unavailability requires the court to find that the child will suffer serious emotional or mental harm if required to testify.... Although the claims in the present case does not require us to quantify further this term, we emphasize that a finding that it is not in the best interest of the child to testify is not equivalent to psychological harm. Rarely will it be in a child's best interest to testify."

Id. at 546-47.

Spoliation of Evidence

COURT ORDER TO PRESERVE EVIDENCE IS ADMISSIBLE TO SHOW DILIGENCE OF PARTY SEEKING ADVERSE INFERENCE - PAYLAN V. ST. MARY'S HOSPITAL CORP., 118 Conn. App. 258 (2009); Peters, J.; Trial Judge - Scholl, J.

RULE: Evidence of a court order requiring an adverse party to preserve evidence is admissible to show that the party seeking an adverse inference acted with due diligence with respect to the spoliated evidence.

FACTS: The defendant hired the plaintiff in February 2003, to complete the fourth year of her surgical residency. The contract stipulated that her employment would end on June 30, 2003. If hired to complete the fifth year of her residency, that contract would begin on July 1, 2003 and extend to June 30, 2004.

In May 2003, the plaintiff complained to a supervisory resident that she was being discriminated against because of her gender. On June 11, 2003, plaintiff was informed that, due to deficiencies in her performance, her contract would not be renewed for the following year.

Plaintiff brought suit alleging gender discrimination and retaliation.

A critical piece of evidence in the case was a negative performance review dated March 29, 2003 – before plaintiff complained to the supervisory resident about gender discrimination.

Plaintiff alleged that the date of the review had been altered, and that in fact the negative review had been created after she complained in May 2003.

In June 2005, plaintiff obtained a court order requiring the defendant to preserve any computer hard drive containing evidence of the performance review at issue.

On October 25, 2005, the court ordered the defendant to provide the plaintiff with a copy of the metadata (information about the document contained within it but not readily viewable, e.g., date created, last author, last person who saved it, last time printed) of the document.

After examination of the metadata failed to reveal the date when the original had been created, the plaintiff sought access to the hard drive itself. On February 28, 2007, however, in a request for a supplemental order, the defendant informed the court that the hard drive had been reformatted after a crash. On April 10, 2007, the defendant disclosed that the hard drive had been destroyed.

To get a charge to the jury that it could draw an inference that the defendant destroyed the hard drive because it contained evidence adverse to the defendant, the plaintiff sought to lay the necessary three-prong foundation: (1) that the spoliation was intentional, (2) that the spoliated evidence was relevant to the issue or matter for which the plaintiff sought the inference, and (3) that the plaintiff acted with due diligence with respect to the spoliated evidence, e.g., that the defendant was on notice that the evidence should be preserved.

To prove that she had acted with due diligence, the plaintiff sought admission of the court order requiring the defendant to preserve the hard drive.

The trial judge ruled that the plaintiff could not present evidence about the preservation order because, without a judicial determination that the order had been violated, that evidence would be unduly prejudicial to the defendant.

The Appellate Court found this to be error.

REASONING:

> "We agree with the plaintiff that, in light of the importance of the hard drive to her ability to prove the circumstances of the nonrenewal of her employment contract, the court should have permitted her to inform the jury of the existence of a court order for its preservation. Without showing the existence of the court order, the plaintiff could not have established her entitlement to an adverse inference that is based on the unavailable evidence under the third prong of Beers [v. Bayliner Marine Corp., 236 Conn. 769, 775 (1996)]." That conclusion does not, however, end the matter.

118 Conn. App. at 264.

The Appellate Court went on to hold that because the plaintiff had failed to establish that the hard drive had been intentionally destroyed, the first prong of the Beers test described above, she had not established that she had the right to the adverse inference charge. In the absence of that evidence, she did not establish that the court's ruling was harmful.

PRACTICE POINTER: Consider getting a court order against the destruction of evidence early on, when a case first comes into your office.

QUERY: According to a footnote in the opinion, the plaintiff had a computer forensic expert testify. Presumably, the expert could have testified that, while a hard drive can crash by accident, it can only be reformatted intentionally, and the reformatting process requires significant time and expertise. Would that testimony, together with the defendant's awareness of the court's preservation order, have supported an inference that the spoliation was intentional?

Final Argument

IMPROPER TO ARGUE CONTRIBUTORY NEGLIGENCE THAT IS NOT ALLEGED; NECESSITY FOR IMMEDIATE OBJECTION – FORRESTT V. KOCH, 122 Conn. App. 99 (2010); Flynn, D.J.; Trial Judge – Peck, J.

RULE: In the absence of a pleading alleging contributory negligence, defense counsel's argument injecting the legal and factual issues of comparative negligence is improper.

However, because the bell cannot be "unrung", plaintiff's counsel must object when the argument is made, or at a minimum move for a mistrial.

FACTS: On January 28, 2003 plaintiff had LASIK eye surgery at the East Lyme Laser Vision Center performed by Dr. Koch.

On February 15, plaintiff called the Center and reported that his left eye was bloodshot and painful.

On February 20, he returned to the Center for a standard post-op exam. He was examined by a technician who told him that "everything would be fine."

His condition worsened, so he returned to the Center the next day (February 21) and was seen by a different technician, who told him to discontinue one of his medications. The technician also recommended that he travel to the defendants' Rhode Island office the next day for an exam.

When plaintiff arrived at the defendants' Rhode Island office the next day (February 22), he was told that there was no physician available to see him. He indicated he would seek treatment at a nearby hospital. The defendants' staff persuaded him not to go to the hospital, "because the hospital did not know about LASIK." Ultimately, one of the defendants' physicians agreed to see the plaintiff and performed a debridement of his

left eye. This physician noted that there was pus in the eye, but no culture was performed.

The next day, February 23, plaintiff was in extreme pain and vomiting. He was seen by Dr. Koch in the East Lyme office. Koch again debrided the left eye, but did not do a culture.

On February 25, 2003, Koch examined the plaintiff again and told him he was "out of the woods."

The next day (February 26), plaintiff sought treatment at the Massachusetts Eye and Ear Infirmary in Boston. He was diagnosed with a multiple organism corneal ulcer, required multiple eye surgeries, and was left with permanent vision damage.

Plaintiff brought suit against the defendants. The defendants filed a special defense claiming that plaintiff was negligent for failing to seek immediate and appropriate medical treatment.

At the close of defendants' case, and prior to closing arguments, the defendants withdrew their special defense of comparative negligence.

During closing argument, defense counsel argued that the plaintiff had made bad decisions, and detailed those decisions, "But just as I am not being critical of the decisions that he made, I would suggest that he shouldn't be critical of the decisions, the good, solid decisions that were made by the [the defendants]. * * * Don't criticize us for making a doctor available when you refuse to go to a doctor. Don't criticize us about not having a doctor when you won't go to the emergency room."

Plaintiffs' counsel neither objected to these comments during the course of the defendants' closing argument nor moved for a mistrial at any time.

In his rebuttal argument, however, counsel for the plaintiffs addressed the statements directly: "The argument's being made that Mr. Frank Forrestt, the patient, the sick patient, was at fault for what happened to him. He was not at fault. Ladies and gentlemen, it's not even an issue in this case.

> "Now, Her Honor is going to soon instruct you on what the applicable law in his case, including what the issues are for you, ladies and gentlemen, to decide. And when you hear these instructions, you are not going to hear that there's any type of issue as to whether or not Mr. Frank Forrestt was at fault for what happened to him. You're not going to hear it because it's not an issue. But it's argued to you anyway. Why? Why are you hearing this? Because you can't defend what is undefendable, malpractice. To avoid dealing with the facts in the case and the issues in the case, we blame the patient. Deflect your attention on the issues in the case to distract you from doing the right thing. When you don't have the facts on your side, you argue the law. And when you don't have the law on your side, you argue the facts. When you have neither, you blame the patient. It's shameful."

Id. at 106.

After closing arguments, the plaintiffs requested a jury charge that there was no issue of negligence on Frank Forestt's part, and the court gave such a charge.

Following a defendants' verdict, the trial court denied the plaintiffs' motion to set aside the verdict, which alleged that the remarks of the defendants' counsel during closing argument were improper and prejudiced the plaintiffs.

The Appellate Court affirmed.

REASONING:

> "We agree with the plaintiffs that the remarks of the defendants' counsel during closing argument were improper. The defendants had withdrawn their comparative negligence defense that would have permitted the jury to consider the relative contributory negligence of

> the parties and determine whether the plaintiffs' recovery should be either barred or diminished in the case. Despite the repeated assurances by the defendants' counsel that he was "not being critical" of Forrestt and that he was "not criticizing [Forrestt's] decisions" made during his treatment by the defendants, *the remarks of the defendants' counsel clearly invited the jury to consider Forrestt's actions as negligent and as a potentially causative factor in his injuries that should excuse his own clients from criticism.* Under their pleaded special defense of comparative negligence, the defendants were afforded the opportunity to adduce evidence in proof of their allegation that Forrestt was negligent for, inter alia, failing to follow the instructions and warnings of the defendants and failing to take reasonable precautions under the circumstances. At the close of their case, and prior to argument, however, the defendants withdrew the special defense. The repeated remarks of the defendants' counsel concerning Forrestt's decisions, therefore, *allowed the defendants to insinuate Forrestt's negligence after having been relieved of the burden of proving as much by a preponderance of the evidence."*

Id. at 109-10.

However, because plaintiff's counsel did not object to the remarks during defendants' closing argument, and did not move for a mistrial, but chose instead to address the argument in rebuttal, and obtain from the court a curative instruction, it was not an abuse of discretion to deny the plaintiffs' motion to set aside a defendants' verdict.

NOTE: A similar issue may arise in a medical malpractice case, where a defendant seeks apportionment against a settled or withdrawn co-defendant. If the remaining defendant has not carried the burden of proof against the settled defendant (which requires expert testimony that the settled defendant breached the standard of care and that the breach caused the injury) the same principles apply, and the same tactical decisions should be made.

TIMELY OBJECTION TO IMPROPER ARGUMENTS (LOTTO TICKET; RETIREMENT FUNDING; DEFENDANT WILL PERSONALLY PAY) IS NECESSARY – GRECI V. PARKS, 117 Conn. App. 658 (2009); Harper, J.; Trial Judge - Scholl, J.

RULE: By failing to make a timely objection to challenged remarks, and by waiting until the jury is deliberating before requesting a curative instruction, a party waives its right to claim that final argument by opposing counsel affected the fairness of the proceeding and requires setting aside the verdict.

FACTS: In November 2003, the plaintiffs were hit from behind on Interstate 84 in Cheshire. Their vehicle was towed from the scene.

Michael Greci first sought medical attention three days later from his local family practitioner, who diagnosed a herniated disc and referred him to a neurosurgeon. The neurosurgeon recommended surgery, which was done in April 2004, and opined that the herniation was caused by the collision.

Plaintiffs' suit included a claim for loss of consortium. Defendant admitted negligence.

In plaintiffs' final argument, he suggested that the jury award $145,900 in economic damages and $2,000,000 in non-economic damages. In response, defense counsel, Anthony Santacroce of the Law Offices Donna-Maria Lonergan, made the following argument, during part of which showed the jury a lottery ticket:

> "I will say that since it's not a complicated case, that the case is not worth anywhere near a million dollars. I'm also going to suggest to you that with those figures, it's the equivalent of Lotto, and what [the] plaintiffs' counsel thinks is that it's easier for him to pick six of you who will award a million dollars than it is to get a Lotto ticket and win a million dollars. I suggest to you if he wants a million dollars or anything near that, go buy a Lotto ticket. But

> lotteries and Lotto have nothing to do with fair, just and reasonable awards and to be in courthouses."
> * * *
> "The last thing I wanted to say to you was that the judge is going to tell you that the award is not to punish the defendant nor is it to reward the plaintiff. And the figures [that the plaintiffs' counsel is] talking about [are] just that: it's something to punish the defendant and something to reward the plaintiff. I made an analogy a minute ago to say that this is not Lotto, it's not a lottery, nor should it be a retirement plan. What [the plaintiffs' counsel] is asking for, essentially, is more money than most people end up with in their retirement plan after a lifetime of working, and I suggest to you [that the defendant], by virtue of being in this accident, should not be asked to fund, he should not be asked to pay for a retirement plan for [Michael] Greci."

Id. at 670-71.

Closing arguments and the jury charge took place on a Friday. Plaintiffs' counsel did not object to defense counsel's closing argument or use of the lottery ticket until the following Tuesday, when counsel filed a motion for a curative instruction. The jury did not return for deliberations until Thursday because of a holiday and a winter storm. On that day, the trial court denied the plaintiffs' motion.

The jury awarded Mr. Greci $117,795 in economic damages and $100,000 in non-economic damages for a total of $217,795. The jury awarded Mrs. Greci nothing for her loss of consortium. The trial court declined to set aside the verdicts. The Appellate Court affirmed.

REASONING:

> "In civil cases, an objection to the closing argument of opposing counsel is timely and not waived if it is made "at the time [the remarks] were made or at the close of the argument...." Cascella v. Jay James Camera Shop, Inc., 147 Conn. 337, 343, 160 A.2d 899 (1960). Here, such a timely objection did not occur; the plaintiffs waited until the jury was deliberating to request a curative instruction.

> Under these circumstances, we conclude that the plaintiffs waived their right to press the claim of error that the argument of the defendant's counsel affected the fairness of the proceeding."

117 Conn. App. at 673.

> PROVING UNAVAILABILITY FOR MISSING WITNESS ARGUMENT – STATE V. JORDAN, 118 Conn. App. 628 (2009), *cert. granted*, 295 Conn. 901 (2010); Robinson, J.; Trial Judge – Blue, J.

RULE: Pursuant to case law in criminal cases and C.G.S. §52-216c in civil cases, counsel may not make a missing witness argument unless the witness in question "has been proven to be available to testify."

FACTS: *See* Section 4-1 above. At the time of the accident, defendant was traveling with two friends, Howard, who was driving with a passenger, and Hutchings, who was driving with two passengers. At trial, the defense called Howard and Hutchings, but not the three passengers.

The trial court granted the State's motion for permission to make the missing witness argument as to the passengers. The Appellate Court found error.

REASONING:

> "When proving availability, counsel seeking to make the missing witness argument must offer evidence to support the witness' availability and the court must make a finding that the witness was actually available to testify. Raybeck v. Danbury Orthopedic Associates, P.C., 72 Conn. App. 359, 365, 805 A.2d 130 (2002). For example, counsel can "serve a subpoena on that witness and put the subpoena in evidence to show that that person was available or, for instance... [in a case where] the wife is the passenger. The husband is the plaintiff. The question is who had the red light. The husband doesn't call the wife as a witness. Then the husband's on the witness stand and [the attorney says] by the way, where's your wife? [The husband responds]

> [w]ell, she's home. Established availability." (Internal quotation marks omitted.) Id., 367 n.4, quoting Conn. Joint Standing Committee Hearings, Judiciary, Pt. 5, 1998 Sess., p. 1564, remarks of Robert Adelman[1] on behalf of the Connecticut Trial Lawyers Association.
>
> "In the present case, when asked about the availability of the witnesses, the prosecutor informed the court that he had asked Howard and Hutchings, two other witnesses, if Ellis and Cook were in the area and available to testify, and they indicated that they were. There is not testimony from either witness, however, that they knew of Ellis' or Cook's availability. Further, at the hearing on the motion, the court asked the state about the availability of Washington, but the state provided no answer. The state did not establish that any of the three witnesses included in the missing witness argument were actually available to testify. *See* Raybeck v. Danbury Orthopedic Associates, P.C., *supra*, 72 Conn. App. 367-68 (holding that counsel must prove witnesses' availability through evidence presented at trial)."

118 Conn. App. at 640.

The Appellate Court went on to find that the error was not harmful.

Sufficiency of Evidence

> BURDEN OF PROOF – DIRECT V. CIRCUMSTANTIAL EVIDENCE – INFERENCE V. SPECULATION – CURRAN V. KROLL, 118 Conn. App. 401 (2009). *cert. granted*, 295 Conn. 915 (2010); Flynn, D. J.; Trial Judge - Berger, J.,

RULE: Proof by a preponderance of the evidence, more probably than not, does not require absolute certainty. Circumstantial evidence may be as good, or better, than direct evidence. Drawing an inference is not speculation.

FACTS: When Leeann Curran was 45 years old, she developed menopausal type symptoms. On May 6, 2002, she told her internist, Dr. Kroll, about the symptoms. Kroll prescribed birth control bills.

[1] You really want to quote yourself? LOL

After taking the pills for a few weeks, Mrs. Curran told her mother she felt worse and she wanted to stop taking the pills. She told her mother that she had called and spoken with Kroll about the fact that she felt worse, and that Kroll had advised her to continue taking the birth control pills a while longer, to give them a chance.

On June 6, a month after her visit to Dr. Kroll, Mrs. Curran developed left leg pain. She told her mother and her husband that she did not know what was causing the leg pain.

The next day, June 7, the leg pain was so severe that she had trouble getting up and down stairs. She spent the early morning hours on a couch in the living room, keeping her painful leg elevated.

On the morning of June 8, two days after she developed the leg pain, Mrs. Curran collapsed. She told her husband that she was unable to breathe. An ambulance was called, but before they could get her to the hospital, she lost consciousness and stopped breathing. Attempts to revive her were unsuccessful.

The cause of death was bilateral pulmonary emboli caused by deep vein thrombosis. In other words, clots had formed in the deep veins of her leg, broken loose and travelled through her heart and into the pulmonary vasculature, where they closed off major vessels leading to both lungs.

The plaintiff brought suit against Dr. Kroll claiming that Kroll was negligent (1) in failing to advise Mrs. Curran that one of the risks of the birth control pills was blood clots, and (2) in failing to advise her that leg pain is a symptom of deep vein thrombosis and if leg pain occurs, she had to seek medical attention immediately.

Since Mrs. Curran could not testify, there was no direct evidence that Kroll did not advise her that the birth control pills carried a risk of blood clots or that leg pain was a symptom of the formation of such clots.

Kroll testified that although she did not have a specific recollection of the conversation with Mrs. Curran, she "definitely" would have advised Mrs. Curran of the risks associated with the birth control pills, including clotting, and about the signs and symptoms of deep vein thrombosis.

Defendant moved for a directed verdict at the close of the plaintiffs' case. The trial court granted the directed verdict. The Appellate Court reversed.

REASONING:

Judge Flynn's brilliant opinion is an exposition of three basic building blocks for the trial of a civil case: (1) the burden of proof, (2) direct versus circumstantial evidence and (3) the distinction between inferences and speculation.

> "Unlike Aristotelian and Thomistic logic, law does not demand metaphysical certainty in its proofs. In law, we recognize three principal proofs: beyond a reasonable doubt, which is the very high burden in a criminal case; clear and convincing evidence, required to prove fraud and certain other claims, which equates to a very high probability; and preponderance of the evidence, applied to civil claims generally, which means it is more probable than not. None of these varying proofs require absolute certainty.
>
> "To meet one's burden of proof, evidence is necessary. This evidence comes in two forms, direct and circumstantial. 'The basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to common experience.' 29 Am. Jur. 2d 329,

Evidence § 313 (1994). 'Proof of a fact by the use of circumstantial evidence usually involves a two-step process. A fact is first established by direct evidence, which is ordinarily eyewitness or other direct testimony. That direct evidence can serve as a basis from which the jury infers another fact. Thus, the direct evidence may operate as circumstantial evidence from which a fact is inferred by the jury.' State v. Sullivan, 11 Conn. App. 80, 97, 525 A.2d 1353 (1987), *citing* State v. Rome, 64 Conn. 329, 334, 30 A. 57 (1894). 'When the necessity to resort to circumstantial evidence arises either from the nature of the inquiry or the failure of direct proof, considerable latitude is allowed in its reception.' 29 Am. Jur. 2d 331, Evidence § 315 (2008).

"'An inference is a factual conclusion that can rationally be drawn from other facts. If fact A rationally supports the conclusion that fact B is also true, then B may be *inferred* from A. The process of drawing inferences based on a rough assessment of probabilities is what makes indirect or circumstantial evidence relevant at trial. If the inference (fact B from fact A) is strong enough, then fact A is relevant to prove fact B. Inferences are by their nature permissive, not mandatory; although the fact proved rationally supports the conclusion the offering party hopes will be inferred, the fact finder is free to accept or reject the inference.' (1992) § 4:1, pp. 299-300; see also D. Faulkner & S. Graves, Connecticut Trial Evidence Notebook (2d Ed. 2008 Rev.) I-14. Much has been written about the jury's ability to draw inferences, but, as explained by Professor McCormick, 'in few areas of the law have so many words been spoken by the courts with so little conviction.' 2 C. McCormick, Evidence (5th Ed. 1999) § 338, p. 418."

"Just because a jury could, but is not required to, draw an inference does not mean that it is resorting to speculation. 'Inferences are based on common experience and probability. Reasonable inferences permit the jury to find the inferred fact without direct proof of the fact. Direct evidence of a fact or facts will often give rise to circumstantial evidence of other fact or facts. Such inferences, if reasonable, permit the fact finder to find the inferred fact without direct proof of that fact....

"'A trier is entitled to draw all reasonable and logical inferences based on the facts proved.... Inferences should

> be based on probabilities, not possibilities, surmise, or conjecture.... To state a truism, the only kind of inference the law recognizes is a reasonable one.... Connecticut does not subscribe to the oft-repeated rule that an inference cannot be based on an inference. Successive inferences are permissible if justified by the facts.... Thus, one inference can be founded upon facts whose determination is the result of other inferences.... The only question is whether the successive inferences are rationally justified by the facts.' (Citations omitted.) C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) §4.3.1, p. 139; see State v. Crafts, 226 Conn. 237, 245, 627 A.2d 877 (1993) ('[t]here is, in fact, no rule of law that forbids the resting of one inference upon facts whose determination is the result of other inferences' [internal quotation marks omitted])."

118 Conn. App. at 408-411.

Judge Flynn then marshaled the circumstantial evidence produced by the plaintiff to support her claim that Dr. Kroll did not advise Mrs. Curran that blood clots were a risk of birth control pills or that leg pain was a symptom of deep vein thrombosis requiring medical attention:

1. There was no notation in the doctor's chart that she had informed Mrs. Curran of the risk of blood clots or the signs and symptoms of blood clots.

2. Dr. Kroll testified that she was uncertain how much risk was presented by the new form of birth control pills she had prescribed. If the doctor was uncertain about the degree of risk, how could she have properly informed her patient?

3. Although Dr. Kroll testified at trial that she advised patients that pain in the leg is a symptom of blood clots, at deposition she had testified that she only told patients to watch out for swelling. She had not mentioned pain as a symptom at deposition.

4. Mrs. Curran had told her mother and her husband that she did not know the source of her leg pain.

5. The experts in the case testified that if a patient has been properly advised that leg pain is a symptom of blood clots and that if this symptom develops, the patient should immediately seek medical attention, they would expect a patient who had received this advice to seek medical treatment if the symptom developed. Mrs. Curran did not seek medical attention.

The Appellate Court concluded that the trial court should not have directed a defendants' verdict, but should have given the jury the opportunity to weigh the evidence and decide the issue.

COMMENT:

As the Supreme Court counseled, the better practice for the trial court, where there is even a remote possibility that a jury could find in favor of the plaintiff, is to allow it to reach a verdict. If it returns a plaintiff's verdict, the trial court can set it aside so that, in the event of a reversal, the verdict is simply reinstated. If the jury returns a verdict for the defense, the trial court will have avoided any possibility of error.

"Where the trial court's decision to direct a verdict is determined to have been erroneous, the parties in the judicial system are subjected to the burdens of a new trial. The preferred procedure, therefore, is to submit the issues to the jury and then to set aside a verdict. Finding error in such a case, this court could simply direct that the verdict be reinstated." Boehm v. Kish, 201 Conn. 385 (1986).

MEDICAL REPORT ON CAUSATION – MARANDINO V. PROMETHEUS PHARMACY, ET AL., 294 Conn. 564 (2010); Vertefeuille, J.

RULE: A medical report admitted without objection containing an opinion on causation is sufficient to prove causation, despite the fact that the report does not contain factual support for the opinion.

FACTS: In July 1999 Susan Marandino fell at the pharmacy where she worked at and badly broke her right arm. She ended up having three surgeries. She developed a regional pain syndrome and reflex sympathetic dystrophy, and was rated with a 41% permanent disability of her master arm. She received workers' comp benefits under a voluntary agreement.

About six months after breaking her arm, Marandino was in her basement when she heard the phone ring. As she hurriedly climbed the stairs to get the phone, she lost her balance. Because of her broken right arm she could not grab the hand rail, which was on her right, so she twisted and grabbed it with her left hand. When she twisted, she felt a "crunch" in her knee, which apparently resulted in inflammation of the cartilage. Her orthopedic surgeon, Dr. Santoro, performed two surgeries on the knee.

The issue in her workers' comp hearing was whether the knee injury was causally related to her arm injury. Dr. Santoro's report stated that the knee injury was "a direct result of her previous work related trauma." During the workers' comp hearing, Santoro's report was admitted without objection.

The Commissioner found that the knee injury was causally related to the right arm injury and awarded benefits.

The defendants appealed to the Compensation Review Board. The CRB affirmed the findings of the Commissioner.

The defendants appealed to the Appellate Court. One of the claims the defendants made in the Appellate Court was that there was insufficient evidence that the knee injury was causally related to the arm injury.

The Appellate Court agreed with the defendants, holding that because Santoro's report did not set forth factual support for his opinion on causation, it did not constitute "competent evidence" of causation.

The Supreme Court reversed.

REASONING:

The Supreme Court held that an objection that there the report contained insufficient facts to support Santoro's opinion, had to be made when the report was offered in evidence. Once the opinion was in evidence, it was "competent evidence." The Commissioner, as the fact finder, was permitted to consider it and assign whatever weight he felt appropriate in reaching his decision.

Considering Dr. Santoro's opinion alongside Ms. Marandino's testimony about how she injured her knee, there was sufficient evidence to support the finding that the knee injury was causally related to the arm injury.

VIOLATION OF MOTOR VEHICLE STATUTE NEED NOT BE INTENDED TO BE NEGLIGENCE PER SE - O'DONNELL V. FENEQUE, 120 Conn. App. 167 (2010), *cert. denied*, 297 Conn. 909 (2010); Schaller, J.; Trial Judge - Roche, J.

RULE: In order to prove negligence *per se* in the violation of a statute, the plaintiff is not required to prove that the defendant intended to do what the statute proscribes.

FACTS: Plaintiff was operating her vehicle northbound on Route 8. The weather was rainy, and the road was covered with slush. A vehicle going southbound on Route 8, driven by Carmen Feneque, crossed the grass median divider and collided with the plaintiff's vehicle.

The plaintiff sued Feneque and her own uninsured motorist carrier, Quincy Mutual Fire Insurance Company. Feneque did not appear, and was defaulted. Neither party called Feneque to testify. The case went to trial on the uninsured motorist claim. Plaintiff claimed, *inter alia*, that Feneque was negligent for failure to operate in the proper lane in violation of C.G.S. §14-236. There was no explanation in the evidence as to why Feneque left her lane of travel.

The jury returned a verdict in favor of the plaintiff. The defendant filed a motion to set aside the verdict, which the court denied. The Appellate Court affirmed.

REASONING:

> "The defendant claims that the evidence was insufficient to support the jury's verdict on the plaintiff's claim of negligence. Specifically, the defendant argues that the jury could not reasonably have concluded that Feneque negligently operated her vehicle or that Feneque's operation could have been the proximate cause of the plaintiff's injuries. The defendant bases its arguments on the assertion that the plaintiff failed to submit evidence that would allow the jury reasonably to infer that Feneque

> *voluntarily* crossed the median divider in her vehicle. The defendant's reliance on the proposition that the plaintiff had to prove affirmatively that Feneque voluntarily crossed the median in her vehicle is mistaken."

Id. at 170.

> "To prove negligence per se, a plaintiff must show that the defendant breached a duty owed to her and that the breach proximately caused the plaintiff's injury." Pickering v. Aspen Dental Management, Inc., 100 Conn. App. 793, 802, 919 A.2d 520 (2007). 'Negligence per se operates to engraft a particular legislative standard onto the general standard of care imposed by traditional tort law principles, i.e., that standard of care to which an ordinarily prudent person would conform his conduct. To establish negligence, the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. They merely decide whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law.' (Internal quotation marks omitted.) Considine v. Waterbury, 279 Conn. 830, 860-61 n.16, 905 A.2d 70 (2006)."

Id. at 171-72.

> "The defendant tries to distinguish Danzell [v. Smith, 150 Conn. 35, 184 A.2d 53 (1962)] from the present case by arguing that the voluntariness element of negligence per se can only be found 'when sufficient evidence negates any other non-negligent cause such as sudden emergency, sudden illness or sudden mechanical malfunction....' If any evidence had been put forth that Feneque's vehicle crossed the median as a result of an emergency, a sudden illness, a mechanical malfunction or because of snow and ice, the jury could have taken that into account in determining whether Feneque violated § 14-236. This is because § 14-236 requires that "a vehicle shall be driven as *nearly as practicable* entirely within a single lane."

Id. at 174.

> "The defendant next argues that there was insufficient evidence for the jury reasonably to conclude that Feneque's actions proximately caused the plaintiff's injuries.

> Specifically, the defendant argues that '[m]any scenarios other than driver negligence can cause a loss of control, including being cut off, sideswiped or struck in the rear by another vehicle, hitting a patch of ice, water, slush or sand, or a medical or mechanical emergency.' In Burton v. Stamford, *supra* 115 Conn. App. 68-88, [cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009)] the court discuss in detail the relevant case law on insufficiency of evidence claims on the issue of causation. Similar to Burton, this case most closely resembles Terminal Taxi Co. v. Flynn, 156 Conn. 313, 240 A.2d 881 (1968). 'In Terminal Taxi Co., the vehicle of the plaintiff taxicab driver was forcibly struck at the left rear by the right front of an automobile owned and operated by the defendant's decedent…. [A]n eyewitness to the accident testified. . . . That witness was the plaintiff who had been involved in the automobile accident. Significantly, the court noted that [the plaintiff] did not testify that the [decedent's] vehicle was being driven at a high rate of speed before the accident or that [the decedent] was not looking where he was going or that [the decedent] lost control of his car. The evidence as to these facts was circumstantial. . . . Rather, the plaintiff testified about what he saw . . . . In addition, evidence of physical facts was introduced through the investigating officer.' (Citations omitted; internal quotation marks omitted.) Burton v. Stamford, supra 70-71. The court concluded that "[t]he jury could have found from the nature and the extent of the damage to the vehicles that [the decedent] was operating his car at an excessive speed and that he was not driving at a reasonable distance apart from the taxicab." (Internal quotation marks omitted.) Id., 72. Similarly, in this case, the plaintiff has provided both eyewitness testimony and testimony concerning physical facts by the investigating officer to establish how the accident occurred. The plaintiff, accordingly, has provided a sufficient evidentiary basis for the jury reasonably to conclude the Feneque's negligence was the proximate cause of the plaintiff's injuries. *See* Terminal Taxi Co. v. Flynn, *supra*, 313; Burton v. Stamford, *supra*, 68-88.

120 Conn. App. at 176-177.

COMMENT: In a negligence *per se* case, once the plaintiff has proved a violation of the statute, the burden shifts to the defendant to prove that the defendant could not avoid violating the statute.

CHIROPRACTOR'S OPINION ON FUTURE MEDICAL EXPENSES IS SUFFICIENT- DEAS V. DIAZ, 121 Conn. App. 826, *cert. denied*, 298 Conn. 905 (2010); Flynn, D.J.; Trial Judge - Corradino, J.

RULE: Chiropractor's report opining the annual cost of future symptomatic care is sufficient to support an economic damage award for future medical costs.

FACTS: Was in a collision caused by defendant Enrique Diaz and an uninsured vehicle.

Plaintiff brought suit against Diaz and against his uninsured motorist carrier. The jury returned a verdict against both defendants, finding Diaz 20% negligent and the uninsured vehicle driver 80% negligent.

Plaintiff was treated by Dr. Sorrentino, a chiropractor. He had $4,116.50 in medical bills. The chiropractor, in his medical report, anticipated the need for symptomatic care costing approximately $1,000 - $2,000 annually. The plaintiff was 29 years old.

The jury awarded $4,116.50 in past medical bills, $15,000 for future medical expenses, and $25,500 for non-economic damages.

The defendant moved for remittitur or to set aside the verdict on the basis that the evidence was not sufficient to support the award of future economic damages. The trial court denied the motion. The Appellate Court affirmed.

REASONING:

> "[T]he evidence cited clearly supports such an award. Sorrentino specifically opined that the plaintiff would incur expenses at a rate of $1000 to $2000 per year throughout his life for medical care due to the accident. At the time of trial, the plaintiff was a young man, only twenty-nine years old. Even using the lower rate of $1000 per year, an award of $15,000 would cover the plaintiff's anticipated medical expenses for a mere fifteen years, until he was in his early forties. Certainly, such an award is not excessive as matter of law. As to the award for noneconomic damages, the plaintiff testified that he continued to experience pain and trouble sleeping even at the time of trial. Sorrentino reported that the plaintiff's "spine has now been compromised and is *not capable* of returning to pre-injury status." (Emphasis added.) An award of $25,500 for the permanent physical injury suffered by the plaintiff, like the award for the future economic injury, cannot be considered excessive as a matter of law."

Id. at 839-40.

Excessiveness and Remittitur

> JUDGE'S USE OF MATHEMATICAL FORMULA TO SET ASIDE VERDICT IMPROPER - SALEH V. RIBEIRO TRUCKING, LLC, 117 Conn. App. 821, *cert. granted*, 294 Conn. 922 (2009); Hennessy, J.; Trial Judge – Rittenband, J.

RULE: It is an abuse of discretion for the trial court to take away from the jury the determination of the amount of non-economic damages.

FACTS: On March 28, 2003, the plaintiff was rear-ended on I-91 in Hartford. The accident caused damage to the plaintiff's right-rear bumper and trunk. Plaintiff complained of neck, back and shoulder pain at the scene and was taken to the hospital by ambulance. He was discharged that day. He followed up with his family physician approximately ten days later, and referred to an orthopedist, whom he saw 12 time. He received physical therapy.

On January 22, 2004 the orthopedist assessed plaintiff's permanency at 7.5% to 10% of the right shoulder and 7.5% of the lumbar spine.

On January 19, 2005, plaintiff saw a different orthopedic surgeon. He had an injection in his shoulder. The second orthopedic surgeon assessed his permanency at 10% for the shoulder and 5% for the neck and back.

At the time of trial the plaintiff continued to take pain medications and muscle relaxers. Plaintiff testified that he was in constant pain. His life expectancy was 15.8 years.

The defendant admitted liability. The jury returned a verdict of $12,132.31 in economic damages and $687,868 in non-economic damages, for a total of $700,000.31.

Defense counsel filed a motion for remittitur of the non-economic damages. The court ordered a remittitur of $503,608, thus reducing the non-economic award to $184,260. The Appellate Court reversed.

REASONING:

> "The court did not find that the verdict was contrary to the law. The court instead found that the verdict shocks the conscience. In determining what the jury could have reasonably awarded the plaintiff, the court attempted to attach a mathematical formula to what should have been awarded. The court did not follow its directive to determine whether the evidence, reviewed in a light most favorable to the prevailing party, reasonably supports the jury's verdict."

Id. at 828.