Update on Evidence 2014

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"What can be asserted without evidence can be dismissed without evidence."

-Christopher Hitchens

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Introduction

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from July 30, 2013 through July 29, 2014.

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

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

VII. Opinions and Expert Testimony

§ 7-1 LAY OPINION TESTIMONY REGARDING SAFETY OF COMMON OBJECTS - CZAJKOWSKI V. YMCA OF METROPOLITAN HARTFORD, INC., 149 Conn. App. 436 (2014); Lavine, Sheldon and Pellegrino, Js.; Trial Judge - Doherty, J.

RULE: A witness not testifying as an expert may give testimony in the form of an opinion, if that opinion is rationally based on the witness's perception and is helpful to a clear understanding of his or her testimony or the determination of a fact in issue. CCE § 7-1.

FACTS: Premises liability case involving a fall at a YMCA camp. After lunch at Camp Jewel in Colebrook, the kids congregated outside the dining hall. The area was enclosed by a split-rail fence. Where two sides of the fence met, there was a stone engraved with the word "unless", after a stone slab in the Dr. Seuss story, The Lorax, in which the stone conveys the message that environmental problems will not improve "unless" we care and take action.

The "unless" stone had flowers around it, surrounded by an 18" fence. The camp's executive director testified that the purpose of the fence was to prevent people from walking on the flowers. There was testimony that the fence was not intended to prevent falls onto a path on the other side of the fence from the area where the kids had gathered.

When it was time for the kids to head over to that path, some went around the short fence and some either stepped or jumped over it. Frank Czajkowski, age 14, attempted to jump, but did not clear it, fell, and hit his head. He suffered a traumatic brain injury.

The plaintiff brought suit alleging that the 18" fence was a hazard.

Defense counsel asked the assistant director of Camp Jewel, Jody Grove, whether she considered the fence dangerous. Plaintiff's counsel objected that because she was not an expert, her opinion as to whether the fence was dangerous was not admissible.

The objection was overruled. Grove testified that she did not consider the fence dangerous.

There was a defendant's verdict. The plaintiff appealed. The Appellate Court affirmed.

REASONING:

At issue is Grove's opinion that the fence was not dangerous. "The elements that enter into the question of reasonable safety are often numerous and difficult to describe; and for this reason it has long been the practice in this state to admit even the opinions of nonexperts, founded on their own personal knowledge, and in connection with facts stated by them, upon questions [regarding] whether a road is or is not in repair, or whether a bridge is sound and safe. . . . The exception to the general rule in such cases is grounded on necessity. . . . The facts are sometimes incapable of being presented with their proper force and significanc[e] to any but the observer himself. . . . Under these circumstances the opinions of witnesses must of necessity be received." (Citations omitted; internal quotation marks omitted.) *Ryan* v. *Bristol*, 63 Conn. 26, 38, 27 A. 309 (1893). Our courts previously have admitted lay witness opinion testimony regarding the safety of common objects that the witness has observed. *Seidel* v. *Woodbury*, 81 Conn. 65, 75, 70 A. 58 (1908) (this jurisdiction "permit[s] nonexperts to state an opinion in respect to conditions they have seen and have described in their testimony"); see also *Lunny* v. *Pepe*, 116 Conn. 684, 687, 165 A. 552 (1933) (ramp); *Campbell* v. *New Haven*, 78 Conn. 394, 395-96, 62 A. 665 (1905) (sidewalk); *Ryan* v. *Bristol*, supra, 38 (road); *Porter* v. *Pequonnoc Mfg. Co.*, 17 Conn. 249, 256-57 (1845) (dam).

In light of our precedent allowing lay witnesses to testify as to their opinion regarding the safety of common outdoor objects about which they have personal knowledge, such as roads, sidewalks and ramps, we conclude that the court did not abuse its discretion in allowing Grove's testimony that she did not consider the fence in question to be dangerous. Grove's opinion that the fence was not dangerous was based on her regular observation of the fence and her experience as an employee of the camp. She testified that, at the time of the plaintiff's accident, she was familiar with the fence in question and walked by it on a regular basis. Although Grove could have testified to the facts regarding each and every observation and experience that she had in relation to the fence, due to the number of years she worked at the camp these accounts would be too "numerous and difficult to describe; and for this reason it has long been the practice in this state to admit . . . the opinions of nonexperts

> . . . ." (Internal quotation marks omitted.) *Ryan* v. *Bristol*, supra, 63 Conn. 38. We conclude, therefore, that the court did not abuse its discretion in allowing Grove's testimony.

Id. at 446-47.

The Appellate Court also held that the opinion, that the fence was not dangerous, did not violate the rule prohibiting opinion testimony on the ultimate issue. The court stated that the ultimate issue was not whether the fence was dangerous but "how a reasonable person would have acted under those circumstances." Id. At 447 n.10. The court appears to have been straining to find a distinction here. At any rate, CCE §7-3 prohibits opinion testimony that even "*embraces* an ultimate issue."

§ 7-2 AN EXPERT CANNOT BASE HIS OR HER OPINION ON A CODE PROVISION THAT DOES NOT APPLY - CZAJKOWSKI V. YMCA OF METROPOLITAN HARTFORD, INC., 149 Conn. App. 436 (2014); Lavine, Sheldon and Pellegrino, Js.; Trial Judge - Doherty, J.

RULE: A building code provision aimed at the prevention of falls cannot be used by an expert as foundation for an opinion that an exterior fence, to which the building code does not apply, constituted a tripping hazard. In the absence of a building code or other violation, the expert's opinion was not "beyond the ken" of the average juror and, therefore, inadmissible.

FACTS: See Section 7-1 above. The plaintiff offered the expert testimony of an engineer that the fence in question, intended to serve as a barrier to pedestrian traffic, was unreasonably dangerous.

In reaching his opinion, the engineer relied on building code provisions specifying that barriers intended to prevent falls should be at least 42" high. However, the evidence indicated that this fence was not intended to prevent falls.

The defendant moved in limine to preclude the expert's testimony on the basis that the building code provisions relied upon by the expert were not relevant; and, that the remainder of the expert's opinions were not "beyond the ken" of the average juror – the threshold test for the admissibility of expert opinion.

The defendant argued that the engineer's opinions, once stripped of the building code provisions, were not based on his specialized knowledge as an engineer, and therefore, would not assist the jury.

The trial court granted the motion and precluded the plaintiff's expert from testifying.

There was a defendant's verdict. The plaintiff appealed.

REASONING:

In arguing that the building code provision in question was relevant, the plaintiff relied on Considine v. Waterbury, 279 Conn. 830 (2006). Considine stands for the proposition that even a building code provision with which a building owner is not required to comply (as in the case of many "grandfathered" older buildings) is admissible as evidence of the standard of care.

In Considine, the plaintiff had fallen through a "side light" – a floor-to-ceiling window panel adjacent to a door. A building code provision requiring safety glass in side lights, enacted in 1970, did not apply to the building in question, which had been built in 1962. The Supreme Court held in Considine that even though the building code provision did not strictly apply, it was properly admitted as evidence of the standard of care and whether the side lights were reasonably safe.

In Considine, the building code provision was precisely in point. The only reason it was not binding was that the building was grandfathered. In Czajkowski, the code provision on which the expert sought to rely was for guards designed to prevent falls, not for fences designed to prevent people from trampling flowers. The provision was, in other words, entirely inapplicable.

The Appellate Court held that the attempt to use the building code in this situation was beyond the boundary of Considine.

The Appellate Court went on to hold that without the references to the building code, the expert's opinions were not based on specialized knowledge and, therefore, would not assist the jury, and upheld the trial court's preclusion of the expert.

§ 7-2 CAUSATION TESTIMONY IN "SURGICAL OUTCOME" CASE NEED NOT BE PROVIDED BY A SURGEON - WARD V. RAMSEY, 146 Conn. App. 485 (2013), *cert. denied*, 310 Conn. 965 (2014); DiPentima, D. J., and Sheldon, and Bishop, Js.; Trial Judge - Young, J.

RULE: In a case in which it is alleged that a timely diagnosis would have led to surgery that would have saved the plaintiff's life, precluding plaintiff's expert on causation because he is not a surgeon was error.

FACTS: Dr. Ramsey, a gastroenterologist, inserted a percutaneous endoscopic gastrostomy feeding tube in Elbert Ward**.** During the procedure, Ward's small intestine or bowel was perforated. Plaintiff did not allege that the perforation of the bowel was negligent.

After the procedure, Ward exhibited signs and symptoms of a perforated bowel, including severe abdominal pain and a distended abdomen. The plaintiff alleged that Dr. Ramsey failed to monitor Mr. Ward closely enough, failed to recognize the complication

in a timely manner, failed to obtain a timely surgical consultation, and as a consequence, there was a delay in treatment. The plaintiff alleged that Mr. Ward developed sepsis, suffered multiorgan failure, and died, as a result of the delay in treatment.

Proper and timely treatment of Ward's perforation would have included surgery to close the perforation.

Plaintiff disclosed William Bisordi, a board-certified gastroenterologist, as his expert on both the standard of care and causation. Plaintiff's expert testified at deposition that the defendant failed to recognize the perforation in a timely manner, that the failure to recognize the perforation in a timely manner meant that the plaintiff did not receive treatment in a timely manner, and that the failure to receive treatment in a timely manner caused his death.

The defendants moved in limine to preclude plaintiff's gastroenterologist from testifying on causation, on the ground that only a surgeon was qualified to offer an opinion on whether timely surgery would have saved the plaintiff's life.

The trial court granted the motion in limine and subsequent motion for summary judgment. The plaintiff appealed, the Appellate Court reversed.

REASONING:

The defendants and trial court relied on Wallace v. St. Francis Hospital and Medical Center, 44 Conn. App. 257 (1997). In Wallace, the plaintiff arrived at the ER at 9:44 p.m. At 11:15 p.m., before he was examined by a physician, he went into cardiac arrest and died.

Mr. Wallace died from a massive intraperitoneal hemorrhage. The autopsy revealed a large amount of blood in the abdomen, but not the cause or origin of the internal bleeding.

The plaintiff offered the testimony of an ER physician on both the standard of care and causation. The trial court refused to allow the ER physician to testify on causation on two grounds: 1) the expert was not a surgeon, and not qualified to render an opinion on the likelihood of a particular surgical outcome; and 2) there was no evidence as to the cause or origin of Mr. Wallace's internal bleeding. The Appellate Court affirmed.

Wallace was been broadly interpreted as holding that if the treatment in question includes surgery, only a surgeon can testify as to the probable success of that surgery.

Ward rejects that broad interpretation, and holds that the key to the Wallace case was that there was no evidence as to the source of Mr. Wallace's bleeding and, therefore, any opinion as to whether earlier treatment would have saved his – even from an expert surgeon – would be speculative.

The Ward court goes on to hold that a gastroenterologist, who regularly treats patients with bowel perforations, usually in coordination with a surgeon and an infectious disease specialist, is qualified to testify as to the patient's prognosis:

> [W]e conclude that the trial court abused its discretion by precluding Bisordi from testifying on the issue of causation on the ground that he is not a surgeon. Instead of treating his lack of that credential as dispositive, the court should have examined the full range of Bisordi's professional familiarity with the cause of, proper treatment for and likely prognosis of patients timely diagnosed with perforated bowels to determine if he was competent to offer expert testimony that the defendants' failure to monitor the decedent for the signs and symptoms of that dangerous

> complication proximately caused his sepsis and resulting death. Had it done so on the basis of the record before it, where undisputed evidence of Bisordi's professional familiarity with these matters as a board certified gastroenterologist was substantial, the court should have denied the defendants' motion to preclude, and, accordingly, their subsequent motion for summary judgment in ruling that only a surgeon would be qualified to testify as to causation in this case. In so doing, the court erred in concluding that Bisordi was not qualified to testify as to causation, and thus improperly granted the defendants' motion to preclude Bisordi's causation testimony. We further conclude that the court's summary judgment in favor of the defendants, rendered on the basis of that erroneous evidentiary ruling, was also improper.

146 Conn. App. at 498-99.

COMMENT: The best practice is to retain a gastroenterologist, a surgeon *and* an infectious disease specialist to testify on causation.

§ 7-2 REAL ESTATE APPRAISER'S TESTIMONY DOES NOT REQUIRE A PORTER ANALYSIS; THE APPLICABILITY OF PORTER IS LIMITED TO "SCIENTIFIC" EVIDENCE - BANCO POPULAR NORTH AMERICA V. DU'GLACE, LLC, 146 Conn. App. 651 (2013); Gruendel, Robinson and Keller, Js.; Trial Judge - Abrams, J.

RULE: Because a real estate appraisal does not involve "scientific" evidence, no Porter hearing is required in Connecticut courts (unlike Federal courts, in which a Daubert hearing may be necessary).

FACTS: At a hearing in this mortgage foreclosure case to determine the amount of a deficiency judgment, the plaintiff offered a real estate appraiser's testimony on the value of the property. Defendant guarantor Holt objected that the expert's testimony was based on a "restricted use" appraisal report and did not meet the uniform standards of professional appraisal practice.

The trial court admitted the testimony, ruling that the defendant's objection went to the weight, not the admissibility, of the evidence. A deficiency judgment was granted against the defendant. The defendant appealed. The Appellate Court affirmed.

REASONING:

On appeal, the defendant claimed that a "restricted use" appraisal is intended only for the client's use and not for third parties such as the court.

> Holt supports his argument by relying on admissibility standards for scientific evidence; see *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998) (adopting similar approach to admissibility of scientific evidence as set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 [1993]); and citations to two tax assessment cases from other jurisdictions, one in which the court granted a motion in limine under the Federal Rules of Evidence barring admission of an appraisal report because it was not "the product of reliable methods and the authors have not applied reliable principles and methods reliably to the facts of the case", *Boltar, L.L.C.* v. *Commissioner of Internal Revenue*, 136 T.C. 326, 340 (2011); and the other holding that "restricted use" appraisals should not be admitted as evidence for valuation purposes. See *Omaha Country Club* v. *Douglas County Board of Equalization*, 11 Neb. App. 171, 177-78, 645 N.W.2d 821 (2002). We do not find the arguments persuasive.
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> In *Daubert*, the United States Supreme Court charged federal trial judges to act as gatekeepers regarding the reasoning or methodology behind scientific evidence so as to exclude from admission any unreliable evidence and related expert testimony. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, supra, 509 U.S. 589-90, 592-93. Our Supreme Court adopted the *Daubert* approach regarding the threshold admissibility of scientific evidence. See *State* v. *Porter*, supra, 241 Conn. 61. Although federal courts have applied the *Daubert* gatekeeping function as to the admission of all expert testimony, not just testimony based in science; see *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999);

> Connecticut has never adopted that expansion of the *Daubert* holding. See *Message Center Management, Inc.* v. *Shell Oil Products Co.*, 85 Conn. App. 401, 422 n.12, 857 A.2d 936 (2004). Because a real estate appraisal is not scientific evidence, any reliance by Holt on the *Porter-Daubert* line of cases or cases such as *Boltar* applying federal admissibility standards is misplaced.

Id. at 657-58.

§ 7-2 EXPERT TESTIMONY IS REQUIRED TO ESTABLISH THAT USING QUARTER-INCH PLYWOOD TO MAKE A FLOOR OVER A PIT CREATES A DANGEROUS CONDITION - BRYE V. STATE, 147 Conn. App. 173 (2013); Gruendel, Bear and Dupont, Js.; Trial Judge - Trombley, J.

RULE: In a case involving the collapse of quarter-inch plywood used to cover a pit and create a flooring surface, expert testimony to establish that the use of such thin plywood creates a dangerous condition is required, because this is not "within the ken" of an average fact finder.

FACTS: Marvie Brye was an inmate at a state correctional institution in Niantic. While acting as a spotter for a fellow inmate using a weight lifting bench located on a gymnasium stage, he took a step backward when the floor collapsed, causing his right foot and leg to penetrate the floor by approximately 18 inches. He injured his leg and back.

The location where the accident occurred had been used as a lighting pit for theatrical performances, and was later covered with ¼ inch thick plywood.

After receiving permission from the Claims Commissioner, the plaintiff brought suit against the State. He alleged that covering the pit with ¼ inch plywood created a dangerous condition. Notice was not an issue, as the State had created the condition.

The case was tried to the court, which granted judgment in favor of the State on the ground, among others, that the plaintiff was required to produce an expert to opine that the use of ¼ inch plywood would create a dangerous condition. The Appellate Court affirmed.

REASONING:

> "Nevertheless, [a]lthough expert testimony may be admissible in many instances, it is required only when the question involved goes beyond the field of the ordinary knowledge and experience of the trier of fact. . . . The trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters. . . . Rather, [j]urors [and courts] are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct. "(Citations omitted; footnotes altered; internal quotation marks omitted.) *Utica Mutual Ins. Co.* v. *Precision Mechanical Services, Inc.*, 122 Conn. App. 448, 454-55, 998 A.2d 1228, cert. denied, 298 Conn. 926, 5 A.3d 487 (2010).
>
> In the present case, we conclude that the question of whether it was a breach of the standard of care and, therefore, negligent, for the state to use one-quarter inch thick plywood to cover the lighting pit involved a question that was beyond the field of the ordinary knowledge and experience of the average fact finder. See id., 455; see also *Vanliner Ins. Co.* v. *Fay*, 98 Conn. App. 125, 137, 907 A.2d 1220 (2006). The plaintiff argues in his brief that the only issue in this case is "whether one-quarter inch thick plywood will hold up a person's weight when used to cover a hole . . . ." We, like the trial court, are not persuaded that the average fact finder knows the answer to that question.

147 Conn. App. at 182-183.

Comment: If there is even a shadow of a question in your mind about the possible need for a liability expert, go ahead and hire one.

§ 7-2 QUALIFICATIONS OF EXPERTS: NOT AN ABUSE OF DISCRETION TO ALLOW PHYSICIAN TO TESTIFY AS TO DIAGNOSIS OF CONDITION OUTSIDE THAT PHYSICIAN'S SPECIALTY - GOIS V. ASARO, 150 Conn. App. 442 (2014); DiPentima, C. J., and Sheldon and Bishop, Js.; Trial Judge - Povodater, J.

RULE: Trial court has discretion to determine whether physician practicing in one discipline is qualified to make a diagnosis not strictly in that discipline. Defendant's claim that only a psychiatrist may give an opinion regarding post-traumatic stress disorder (and that a neurologist must be barred from doing so) rejected. Any disparity in relative qualifications goes to the weight of the evidence, not its admissibility.

FACTS: This case arose out of a motor vehicle accident on I-95 in which the plaintiff was driving in the right lane in her Hyundai when a tractor-trailer attempted to merge into her lane and collided with her. Her car crashed into the shoulder barrier and flipped over into a construction zone.

The plaintiff was treated by two neurologists in the same office, Drs. Cuzzone and Story. In the plaintiff's medical records admitted at trial, Dr. Cuzzone noted: "It is my feeling that she is suffering from [PTSD] and that many of her physical symptoms are related to the effects of these panic episodes on her body. She has some insight into this and I told her that referral back to her psychiatrist might be helpful in the short term to manage these symptoms." Dr. Story's report of his visits with the plaintiff notes: "I agree with Dr. Cuzzone's consideration of [PTSD]. She is seeing a psychiatrist and is taking Xanax." Id. at 447.

When questioned at deposition concerning the notes in his medical records indicating that the plaintiff was suffering from PTSD, Dr. Story stated that he did not consider himself adequately trained to make such a diagnosis. When questioned about Cuzzone's notes on PTSD in the plaintiff's medical records, Story said, "Looking at what [Cuzzone] wrote precisely I don't think that he would have intended to make a formal diagnosis of [PTSD] because we don't make that diagnosis as neurologists. . . . I believe we can suspect it and I think that's what he was writing in the note but would not have--would not have made a formal diagnosis on his own." Id. at 448.

The defendant filed a motion in limine to preclude the plaintiff from introducing into evidence the records of Cuzzone and Story regarding PTSD. The trial court denied the motion, stating that the fact that PTSD was outside a neurologist's specialty did not mean that a neurologist was not qualified to diagnose it.

The medical records and Story's deposition testimony were admitted at trial. The plaintiff received a verdict of $370,000. The defendant appealed. The Appellate Court affirmed the trial court's ruling.

REASONING:

> "Expert testimony should be admitted when ... the testimony would be helpful to the ... jury in considering the issues." (Internal quotation marks omitted.) *Marchell v. Whelchel*, 66 Conn.App. 574, 585, 785 A.2d 253 (2001). Story's and Cuzzone's testimony as licensed physicians concerning the plaintiff's likely PTSD was helpful to the jury in considering the issues and the weight to be accorded to their testimony. Moreover, the lack of a formal diagnosis by either of them was for the jury to determine. Based on the entirety of Story's deposition testimony and the plaintiff's treatment with both Story and Cuzzone, as noted in the plaintiff's medical records, it is clear that it was their shared professional opinion that the symptoms experienced by the plaintiff were consistent with PTSD, and thus, that she likely suffered from that disorder. On the basis of the

> foregoing, the admission of evidence from the two physicians regarding PTSD was not an abuse of discretion.

Id. at 451.

§ 7-2 SANCTION OF DISMISSAL SHOULD ONLY BE USED WHERE A PARTY, OR HIS COUNSEL, SHOWS A DELIBERATE, CONTUMACIOUS OR UNWARRANTED DISREGARD FOR THE COURT'S AUTHORITY - D'ASCANIO V. TOYOTA INDUSTRIES CORP., 309 Conn. 663 (2013); Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.; Trial Judge - Miller, J.

RULE: The sanction of striking an expert's entire testimony, where it results in a directed verdict, was not justified by court's finding that the expert's testimony was deceptive, in the absence of evidence that the plaintiffs, or their counsel, were complicit in the deception.

FACTS: In this product liability action against Toyota for personal injuries sustained while operating an allegedly defective forklift, the plaintiffs began their case with the testimony of Daryl Ebersole, an expert engineer. In Ebersole's opinion, the forklift's steering system and its electronic control display were defective.

During Ebersole's testimony, the plaintiffs sought to introduce into evidence a videotape depicting a forklift with an electronic control display. The defendants objected. During a hearing in which the plaintiffs attempted to authenticate the video, the court was left with the impression that the control display shown in the videotape was the same as the one on the forklift at issue. (The printed record seems to indicate that the testimony was to the effect that the control display on the forklift shown on the videotape was similar, but not exactly the same.)

Plaintiffs' counsel argued that the differences between what was shown on the videotape and the forklift at issue went to the weight of the evidence, not its

admissibility. The trial court admitted the video, and it was shown to the jury, which was excused for the weekend.

After the jury was excused, the defendants renewed their objection on the basis that the forklift shown on the videotape was not the same model and did not have the same control displays. The judge indicated that he had thought that the videotape was going to depict the same control display, and that, now that he understood the display was not the same, he would strike the video and instruct the jury to disregard it.

When court reconvened it was established that: (1) the forklift in the videotape was a sit-down reach lift truck, not a stand-up reach lift truck like the model at issue; (2) the depicted forklift was not designed and manufactured by the defendants, but instead by a European subsidiary of a Toyota company that had no direct working relationship with the defendants; (3) the forklift in the videotape was first manufactured in 2009, five years after the accident at issue and 10 or 11 years after the forklift at issue was manufactured, giving rise to the misimpression that the display panel depicted on the forklift (with twice as many directional signals and a different display mechanism) would have been available to the defendants in lieu of the one at issue; (4) Ebersole gave inaccurate information to the court regarding where he found the videotape, stating that he had found it on '"Toyota's website for that model"' and at '"Toyotaforklift.com,"' when it actually had come from a European website; and (5) Ebersole untruthfully represented that the videotape had not been edited, when it was "obvious" from watching a longer form videotape that the videotape shown to the jury had been edited. Id. at 685.

Defendants then moved for a mistrial, claiming that the witness, and plaintiffs' counsel, had intentionally misled the jury and the court in their efforts to admit the videotape into evidence.

The court found that Ebersole's testimony laying the foundation for the videotape was "deceptive", and as a sanction, struck all of his testimony – not merely the portion concerning the videotape – and precluded him from testifying further in the case.

Plaintiffs moved for a continuance to obtain a new expert, which would have necessitated a mistrial. Judge Miller ruled that granting a continuance and mistrial for the plaintiffs to obtain a new expert was not a sufficient sanction because it would give the plaintiffs "a do over".

Without an expert, the plaintiffs were not able to make out a prima facie case. Judge Miller directed a verdict for the defendants.

The Appellate Court reversed. The Supreme Court affirmed the Appellate Court's holding.

REASONING:

The Supreme Court emphasized that the misconduct in this case was by the expert, not the plaintiffs or their counsel. The trial court did not find that either the plaintiffs or their counsel were complicit in the expert's deceitful conduct. Therefore, dismissal of the action, a sanction which only penalized the plaintiffs, and not the expert, was not justified.

Justice McDonald, in his concurring opinion, emphasized that the case warranted reversal only because the defendants had conceded on appeal that the trial court attributed the misconduct only to the witness. In the absence of this concession, Justice McDonald

would have concluded that plaintiffs' counsel shared the fault: “I cannot help but note that it seems somewhat incredulous that the plaintiffs' counsel was wholly unaware of, and/or failed to recognize the significance of, the numerous inconsistencies between the model shown in the videotape and the one at issue in the present case.” Id. at 687.

§ 7-4(b) A TREATING PHYSICIAN'S OPINION ON CAUSATION, CONTAINED IN MEDICAL RECORDS, AND BASED ON STATEMENTS TO THE PROVIDER, IS ADMISSIBLE IN A MEDICAL MALPRACTICE CASE - MILLIUN V. NEW MILFORD HOSPITAL, 310 Conn. 711 (2014); Rogers, C. J., and Norcott, Zarella, Eveleigh and McDonald, Js.; Trial Judge - Alvord, J.

RULE: An expert may base an opinion on hearsay, if the evidence is "of a type customarily relied on by experts in the particular field in forming opinions on the subject." CCE Sec. 7-4(b).

FACTS: In July 2002, the plaintiff, a patient at New Milford Hospital, suffered a severe respiratory dysfunction incident. She alleged that her breathing was reduced to two breaths per minute for four minutes, and that as a result of this anoxic incident, she suffered brain damage.

Before the incident, plaintiff suffered from Stiff Man Syndrome (SMS), a rare disease first documented in 1956 by doctors at the Mayo Clinic.

In April 2003, plaintiff sought treatment at the Mayo Clinic in connection with her cognitive health. The plaintiff and her sister described the anoxic incident at New Milford Hospital to the Mayo Clinic doctors. The plaintiff was seen by a neurologist, Dr. Kathleen McEvoy, who wrote in the chart that the plaintiff was suffering from a severe neurological disorder which had some manifestations of SMS, but that she “obviously

[had] additional deficits and involvement that would not be expected with [SMS] alone." Id. at 716.

In February 2005 the plaintiff returned to the Mayo Clinic. She saw Dr. McEvoy and another neurologist, Dr. Keith Josephs, who wrote in the chart that the plaintiff's cognitive impairment was "secondary" to the anoxic incident.

Plaintiff planned to prove that the anoxic incident caused her cognitive impairment through the Mayo Clinic doctors. She therefore disclosed Drs. McEvoy and Josephs as her experts, and the defendant New Milford Hospital sought to depose them. However, the Mayo Clinic refused to cooperate in making the physicians available for deposition.

New Milford Hospital filed a Motion to Preclude the plaintiff from calling McEvoy and Josephs as expert witnesses because the hospital was unable to depose them. At a hearing on the motion, plaintiff represented that she sought only to introduce the chart. The parties then agreed to attempt take the physicians' depositions, limited to questions concerning what was in the chart.

The Mayo Clinic still refused to cooperate. The plaintiff filed a motion for a commission to issue subpoenas for the depositions. New Milford Hospital moved to preclude the admission of the chart unless it could depose the doctors.

At the hearing, the court expressed its opinion that the opinions of McEvoy and Josephs, contained in the chart, would be insufficient for the plaintiff to carry her burden of proof on causation, because they were based on inadmissible hearsay – the descriptions of the anoxic incident provided by the plaintiff and her sister. (The court was incorrect in this, since CCE Section 8-3(5) establishes a hearsay exception for

statements made for the purpose of obtaining medical diagnosis or treatment, and the commentary makes clear that the exception extends the patient's family members.)

The court granted the motion to take the depositions of the doctors, both for the plaintiff to make her case on causation and for the hospital to have the opportunity to cross-examine.

At the beginning of the Josephs deposition, counsel for the Mayo Clinic indicated that the doctor would not give any opinions on causation, despite the fact that those opinions were contained in the chart. Josephs himself stated that he did not intend to give any opinion on causation; however, his actual testimony was that he had concluded the anoxic incident caused the plaintiff's cognitive deficits.

Despite the understanding of the parties that the deposition could go as long as four hours, counsel for the Mayo Clinic unilaterally terminated the deposition after two.

The next day, the plaintiff issued subpoenas to compel the continued deposition of Dr. Josephs and for the deposition of Dr. McEvoy. The Mayo Clinic filed a motion for protective order to preclude the plaintiff from completing Dr. Josephs' deposition and from conducting any deposition of Dr. McEvoy, contending that the depositions were an annoyance and unduly burdensome. New Milford Hospital joined in the motion, arguing that neither Josephs nor McEvoy should be compelled to testify as to their medical opinions on causation.

The court agreed with the clinic and the hospital, and vacated its previous order granting the commissions for the depositions.

New Milford Hospital then filed a motion for summary judgment, on the basis that the plaintiff could not establish the element of causation. The trial court granted the motion.

The Appellate Court reversed. The Supreme Court affirmed the Appellate Court, although on different grounds.

REASONING:

> "[A]n expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration by the jury."

Id. at 727.

§ 7-4(b) & (c) UNDER SPECIFIC CIRCUMSTANCES, AN EXPERT MAY NOT BE REQUIRED TO MAKE PERSONAL EXAMINATION OF PRODUCT AT ISSUE - R.I. POOLS, INC. V. PARAMOUNT CONCRETE, INC., 149 Conn. App. 839, *cert. denied*, 312 Conn. 920 (2014); Lavine, Sheldon and Keller, Js.; Trial Judge - Blawie, J.

RULE: An expert can rely upon facts supplied to him at or before the trial, or presented in a hypothetical question. CCE, § 7-4(b) & (c).

FACTS: In this product liability case brought by a pool installer against a concrete supplier, the plaintiff claimed that the Shotcrete-brand concrete used to construct 19 pools was defective, and that as a result the pools cracked, necessitating repair and/or replacement. The defendant's position was that the pools cracked only because of the plaintiff's defective construction practices.

The plaintiff presented expert testimony from an engineer, that the cracks in the pools were caused by the defective Shotcrete. During the engineer's testimony, it was

established that he had not personally examined four of the 19 pools, but that "someone had told him that these pools exhibited the same types of cracks as the other pools made with the defendant's Shotcrete that he personally had studied." Id. at 8.

The jury found for the plaintiff, and awarded damages in equal amounts for each of the 19 pools.

The defendant moved to set aside the verdict on the ground that the plaintiff had failed to present sufficient evidence that the defective concrete caused the damage to the four pools the expert did not examine.

The trial court denied the motion to set aside the verdict. The Supreme Court affirmed the trial court's ruling on this issue (although it reversed the case as to damages on another ground).

REASONING:

The expert's reliance on what "someone" told him in reaching his opinion did not fatally undermine the reliability of his opinion under the particular circumstances of this case.

Plaintiff's counsel bootstrapped the opinion by posing a hypothetical question to the expert which assembled the facts of the case, including the fact that the expert had not personally examined the four pools at issue, and to which there was no objection. In response to this question, the expert reaffirmed his opinion that the defective concrete caused the cracking.

COMMENT: Had the Appellate Court not reversed on the issue of damages, it is hard to imagine that it would not have found error. While it is true that an expert's opinion is not rendered inadmissible because it has a basis in inadmissible hearsay, it must

ultimately be based in "trustworthy information". Milliun, *supra*, 310 Conn. 711, 727 (2014). Can it seriously be argued that what an unspecified "someone" told an expert qualifies as trustworthy?

Ultimately, R. I. Pools should be read as confined to its facts, which are persuasive. The expert did examine 15 of the 19 pools. The Shotcrete used in the four pools at issue was mixed and delivered in the same way as the Shotcrete in the other 15 pools. Finally, the most importantly, the Appellate Court was already reversing the case on damages, since the jury had assessed same dollar amount of damages for each pool rather than a reasoned amount for each.[1] The court upheld the verdict only as to liability, not damages, and knew the case was going back for a hearing in damages on each separate pool.

PRACTICE TIP: A wrap-up hypothetical question including all the facts necessary to support the expert's opinion – including adverse facts – is a good idea. Your appellate counsel will thank you.

VIII. Hearsay

§ 8-1 BECAUSE A COMPUTER IS NOT A DECLARANT, THE INFORMATION IT SELF-GENERATES IS NOT A HEARSAY "STATEMENT" - STATE V. GOJCAJ, 151 Conn. App. 183, *cert. denied*, 314 Conn. 924 (2014); DiPentima, C. J., and Lavine and Alvord, Js., Trial Judge - Pavia, J.

RULE: Section 8-1. Definitions.

As used in this Article:

[1] "The record supports the plaintiff's observation that, given the size of the jury's award and the fact that it is a mere ten cents less than the gross amount of damages suggested by the plaintiff's attorney during closing argument, it appears that the jury awarded damages consistent with that gross damages figure and, as nearly as practicable, divided that figure by nineteen to arrive at its findings of damages for each pool." Id. at 857.

> (1) "Statement" means (A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (2) "Declarant" means a person who makes a statement.
>
> (3) "Hearsay" means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted.

CCE Sec.. 8-1.

FACTS: The defendant in this murder prosecution was the nephew of the victim, Zef Vulevic. The defendant and Uncle Zef were the co-owners of Gusto Ristorante, an Italian restaurant in Danbury. The defendant ran the front room, and Zef was the chef. They also lived together in an apartment in Danbury.

On the evening of April 4, 2004, after dinner at The Inn at Newtown, the defendant and his uncle returned to Gusto's and continued drinking. The uncle became quite drunk. They closed the restaurant at 11:30 p.m.

At approximately 2 a.m., a witness in an apartment across the street from Gusto's saw the uncle attempting to crawl out the front door, and the defendant grabbing the uncle’s shirt and dragging him back inside.

At approximately 3:30 a.m., the same witness saw the defendant park a white van in front of the restaurant.

At approximately 8 a.m., a white van resembling the defendant's was observed parked on the side of a road in Bedford, New York.

At 9 a.m., the defendant spoke on his cell phone. Cell phone records indicated that he was near Bedford at the time,.

The defendant returned to Gusto's at 11 a.m.

The next day, April 6, 2004, the defendant rehired a chef who had last worked at Gusto's two months earlier, telling the chef that the uncle was missing. When the chef entered the kitchen, he noticed that the bone saw was missing.

Two days later, the defendant arranged to have Gusto's carpets cleaned. After they were cleaned, he called the police and reported his uncle missing.

The next day, the police interviewed the defendant. He said that his uncle had been very drunk, and left Gusto's at about 1 a.m. on the night in question – he assumed to walk home. The defendant told the police he left Gusto's 10 to 15 minutes later, and when he got home, his uncle was not there.

On April 16, 2004, the defendant had Gusto's carpets replaced.

On April 24, 2004, the uncle's dismembered remains were found in Bedford, New York. The autopsy revealed two gunshots to the back of his head. The defendant was charged with murder.

At trial, the State offered a document from United Alarm Services that showed when the alarm at Gusto's was turned on and off. The document showed the alarm was turned on at 3:59 a.m. the night of the murder. This bolstered the testimony of the witness across the street, who said she had seen the defendant park a van in front of Gusto's at 3:30 a.m., and contradicted the defendant's statement to the police that "he was certain he left Gusto's no later than 1:30 a.m." Id. at 192.

The State offered the document as a business record of United Alarm Services. The witness from United Alarm testified that at the request of the police he remotely

connected to Gusto's security system's panel and downloaded the data from the panel's memory. The panel automatically records when the alarm is turned on and off.

The defendant objected on the basis that the document did not qualify as a business record because it was not kept within the ordinary course of business of United Alarm. The information was stored in the panel at Gusto's and only retrieved by United Alarm Services at the request of the police.

The trial court overruled the objection and admitted the document. The Appellate Court affirmed.

REASONING:

Although at trial and on appeal, both the State and the defendant characterized the document as hearsay, the Appellate Court disagreed:

> It is hornbook law that, absent an exception, hearsay is inadmissible. Pursuant to Connecticut Code of Evidence § 8-1, hearsay is "a statement, other than one made by the declarant while testifying at the proceeding offered in evidence to establish the truth of the matter asserted." Our code defines "declarant" as "a person who makes a statement" and a "statement" as "an oral or written assertion" or the "non-verbal conduct of a person, if it is intended by the person as an assertion." Conn. Code Evid. § 8-1.
>
> We observe that many computerized records require consideration of the hearsay rule because the electronic record at issue is based on the statement of a human declarant. Computer printouts that contain stored human statements are hearsay when introduced for the truth of the matter asserted in those statements. See *United States* v. *Ruffin*, 575 F.2d 346, 356 (2d Cir. 1978). This is the case with electronic bank records or other documents that, while stored in a electronic format, are clearly based on the statement of a human being. See, e.g., *Silicon Valley Bank* v. *Miracle Faith World Outreach, Inc.*, 140 Conn. App. 827, 836, 60 A.3d 343, cert. denied, 308 Conn. 930, 64 A.3d 119 (2013). The out-of-court declarant in such as

> case would typically be the bank clerk, patron, or whoever supplied the information that was entered into a computer.
>
> Not all computerized records, however, are hearsay. As in this case, records that are entirely self-generated by a computer do not trigger the hearsay rule because such records "are not the counterpart of a statement by a human declarant . . . ." 2 C. McCormick, Evidence (J. Strong ed., 4th Ed. 1992) § 294. Stated differently, the hearsay rule is inapplicable because the opposing party is not deprived of an opportunity to cross-examine an out-of-court declarant when one does not exist and there is no danger of a "bare untested assertion of a witness . . . ." 5 J. Wigmore, Evidence (Chadbourn Rev. 1974) § 1362, p. 3.
>
> For instance, "[w]hen an electronically generated record is entirely the product of the functioning of a computerized system or process, such as the 'report' generated when a fax is sent showing the number to which the fax was sent and the time it was received, there is no 'person' involved in the creation of the record, and no 'assertion' being made. For that reason, the record is not a statement and cannot be hearsay." *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 564 (D. Md. 2007); see also *United States* v. *Lamons*, 532 F.3d 1251, 1263-64 (11th Cir.) (raw phone billing data not hearsay because it was "stated" by the machine, not by a person), cert. denied, 555 U.S. 1009, 129 S. Ct. 524, 172 L. Ed. 2d 384 (2008).
>
> In this case, the state introduced the panel-log into evidence. As Corbett testified, the panel was programmed to record automatically every time the alarm was either activated or deactivated. When the correct passcode was entered, the panel recorded the date, time, and whether the system was being armed or dis-armed. The panel-log merely was a printout of this information and did not contain the statement of a declarant.

Id. at 200-01.

COMMENT: When offering a computer record, the proponent must establish the reliability of the computer system. Id. at 202 n. 12.

§ 8-3(1)(C) STATEMENT OF EMPLOYEE OF A PARTY INADMISSIBLE WITHOUT PROOF OF AUTHORIZATION TO MAKE STATEMENT - BURNS V. RBS SECURITIES, INC., 151 Conn. App. 451, *cert. denied,* 314 Conn. 920 (2014); Lavine and Bishop, Js.; Trial Judge - Genuario, J.

RULE: Under Connecticut's antiquated rule, for the statement of a party's employee to be admissible, the proponent must prove that the employee was authorized by the employer to speak on the subject, and the speaking authority "must be established without reference to the purported agent's out-of-court statements, save when those statements are independently admissible." CCE Sec. 8-3(1)(C), Commentary.

FACTS: In this breach of contract action, the plaintiff sued RBS over a bonus. At trial, plaintiff offered, as a statement of a party opponent, an undated, unsigned affidavit by Julian Ingleby, an RBS employee, created for United Kingdom litigation, and disclosed by RBS during discovery. The document stated the terms of a cash infusion into RBS by the British government to save the bank. It was offered to show that RBS had cash on hand to pay bonuses to its employees at the time in question.

The trial court refused to admit the document. The Appellate Court affirmed.

REASONING:

> Pursuant to Connecticut Code of Evidence § 8-3(1)(C), "a statement by a person authorized by the party to make a statement concerning the subject" is not subject to the hearsay rule. However, "[b]efore evidence can be admitted to show what an agent said, it must be established that the agent was authorized by the principal to make an admission. . . . The agency relationship must be proved by a fair preponderance of the evidence." (Citation omitted; internal quotations marks omitted.) *Chieffalo* v. *Norden Systems, Inc.*, 49 Conn. App. 474, 48, 714 A.2d 1261 (1998).
>
> In this case, for the affidavit to admissible, the plaintiff was required to establish that Ingleby had the authority to speak on the defendant's behalf. This he did not do. The plaintiff

> relies on the affidavit itself to prove the existence of this authority because Ingleby testified that he was the head of "Executive Reward [at the defendant]" and that he was responsible for overseeing and administering the defendant's bonus program. It is well established that "agency cannot be . . . proved . . . by the declaration of the [purported] agent. The agency must be proved in some other way before the declaration of the agent can be admissible against his principal." *Metropolitan Cleaners & Dyer, Inc.* v. *Tondola*, 114 Conn. 244, 246, 158 A. 240 (1932).

Id. at 462.

COMMENT: Connecticut's rule on this point is archaic. Most states allow in evidence a statement by an adverse party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of a relationship.

§ 8-3(7) PUBLIC RECORD EXCEPTION – THE FOUNDATION FOR AN ABSTRACT OF AN UNAVAILABLE DOCUMENT IS THE SAME AS THE FOUNDATION FOR THE DOCUMENT ITSELF - STATE V. TENAY, 150 Conn. App. 140 (2014); Gruendel, Robinson and Alvord, Js.; Trial Judge - Keegan, J.

RULE: An abstract which appears to be prepared from a public record is not admissible absent the foundation for the public record exception to the hearsay rule.

FACTS: In this drunk driving prosecution, the defendant was accused of being a third-time offender. The State sought to prove prior DUI convictions in Florida in 1996 and in Connecticut in 2002.

As to the Connecticut offense, the State offered, and the court properly admitted under the public record exception to the hearsay rule, a certified copy of the judgment of conviction.

As to the Florida conviction, Ian Shackleton, a secretary in the State's Attorney's office, testified about his conversation with a clerk in the Archives Division of the Santa Rosa County Clerk of Courts, as a result of which he learned that, because of a state law on document retention, Florida no longer had a copy of the actual judgment of conviction. A summary of the conviction had been abstracted and stored electronically.

The Florida clerk supplied Shackleton a certified letter explaining the Florida law on document retention, and a certified copy of the abstract containing the case history of the conviction.

The trial court admitted the abstract. The Appellate Court found error.

REASONING:

> **(7) Public records and reports.** Records, reports, statements or data compilations, in any form, of public offices or agencies, provided (A) the record, report, statement or data compilation was made by a public official under a duty to make it, (B) the record, report, statement or data compilation was made in the course of his or her official duties, and (C) the official or someone with a duty to transmit information to the official had personal knowledge of the matter contained in the record, report, statement or data compilation.

CCE Sec. 8-3 (7).

> The trial court ruled that because the abstract was a court document under seal and certified by the clerk of that court, the state had addressed all concerns raised by the foundational requirements in § 8-3 (7) of the Connecticut Code of Evidence. Although the seal and certification served as proof of the authenticity of the abstract, authenticity was never challenged by the defendant. The court's ruling suggests that the same elements that serve as indicia of authenticity--the seal and certification--also serve to satisfy the foundational elements set forth in § 8-3(7) with respect to the hearsay exception for public records. We can find no legal support for that proposition in the Code of Evidence, in our statutes or in our case law.

> In order to satisfy the requirements set forth in § 8-3 (7) of the Connecticut Code of Evidence, the state needed to show that the abstract was prepared by a public official under a duty to do so, that the abstract was prepared in the course of that duty, and that the official either had personal knowledge of the information contained in the abstract or the information was provided by someone with a duty to transmit that information to the official. In its appellate brief, the state addresses the lack of foundation claim by stating that it was reasonable for the court to have inferred that the foundation requirements had been met. The state does not cite to any case law that directly supports the proposition that a trial court is permitted to infer evidentiary foundational requirements. Further we do not agree that it reasonably can be inferred from either the certification or the seal that the deputy clerk who certified the abstract was the same official responsible for its preparation, or that the deputy clerk, or someone with a duty to transmit evidence to the deputy clerk, had personal knowledge of the information contained on the abstract.
>
> The state presented only Shackleton's testimony as a foundation for the admission of the abstract. Shackleton provided no background information about how or by whom the abstract was prepared. The state fails to point to any portion of Shackleton's testimony that could have served as a basis for the court drawing inferences that the foundational requirements of § 8-3 (7) of the Connecticut Code of Evidence had been met.

Id. at 161-63.

Article IX - Authentication

§ 9-1(a) INSTRUCTION MANUAL - FAILURE TO AUTHENTICATE PROPERLY HELD HARMLESS ERROR - ROSA V. LAWRENCE & MEMORIAL HOSPITAL, 145 Conn. App. 275 (2013); Robinson, Keller and Bishop, Js.; Trial Judge - Cosgrove, J.

RULE: **(a) Requirement of Authentication.** The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. CCE Sec. 9-1(a).

FACTS: This was a medical malpractice case against an anesthesiologist. During plaintiff's hernia surgery, anesthesia was provided by Anesthesia Associates of New London (AANL). Before surgery, the plaintiff was examined by Dr. Miett, an AANL anesthesiologist who approved monitored anesthesia, which was administered by an AANL nurse anesthetist.

After administering the monitored anesthesia, the nurse anesthetist recognized that it was not having the desired effect. She paged Dr. Miett to order a change to a general anesthetic, but since Miett was unavailable, one of his partners, Dr. Calobrisi, responded to the page. Calobrisi approved the switch to general anesthesia and approved the delivery of the general anesthesia through a laryngeal mask airway (LMA) device.

During administration of the anesthesia, the plaintiff began coughing and experiencing oxygen deficiency. The nurse anesthetist discontinued the LMA device and substituted an endotracheal tube. Surgery was cancelled.

It became apparent that the plaintiff had aspirated stomach acid into her lungs. She was placed into an induced coma for 26 days and developed acute respiratory distress syndrome. She suffered a number of injuries as a result.

The plaintiff alleged that the defendant anesthesia group, AANL, breached the standard of care by administering general anesthesia via an LMA device rather than an endotracheal tube. The plaintiff alleged that her morbid obesity created a risk of aspiration, making it a breach of the standard of care to use an LMA device. The

manufacturer's manual for the LMA device included the following warning under "Contraindications":

> "Due to the potential risk of regurgitation and aspiration, do not use the LMA airway as a substitute for an endotracheal tube in the following elective or difficult airway patients on a non-emergency pathway . . . Patients who are grossly or morbidly obese. . . ."

145 Conn. App. at 288 n. 12.

At trial, plaintiff's expert opined that it was a deviation from the standard of care for the defendant to use an LMA device on the plaintiff because she was morbidly obese. The manufacturer's manual was not part of the plaintiff's case-in-chief.

During its case, the defendant presented the testimony of Dr. Miett. Miett testified on cross-examination as follows:

> "Q. Okay. And part of being conservative and cautious is being familiar with the manufacturer's warnings for the devices that you put in patients.
>
> "A. Yes.
>
> "Q. Okay. And you wouldn't want to put a medical device in a patient until you had thoroughly read and understood the manufacturer's warnings with respect to that device.
>
> "A. The manufacturer's warnings and package inserts in drugs are medical/legal material that we rarely consult. We rely more on our expertise and formal training to use the drugs and devices. The package insert in drugs and equipment is the equivalent of 'this beverage is hot, don't spill it on yourself' that comes on the Dunkin' Donuts cup of coffee.
>
> "Q. So, it's obvious things that you shouldn't do.
>
> A. It's material they put in the package on account of lawyers. . . .

"Q. Do you have cause to unpackage LMAs in your practice?

"A. Yes. The individual LMAs come in a plastic envelope which we open up, and the brand that we use has no written material that falls out. They just have the syringe that you use to inflate it and it has a little packet of what we call goop, water soluble lubricant that you put on it.

"Q. Like anything else that you get. You probably can't get a bathroom plunger without there being an instruction manual inside the packaging.

"A. In this day and age.

"Q. Yes, right. And that's for the lawyers.

"A. (Nods head.)

"Q. Yep, okay. And so when you unpackage an LMA, and I'll just hand [an LMA device and packaging marked as an exhibit for identification] to you, there's sometimes a package insert. Or, why don't you look inside there and tell me what's in there, if that's consistent with what you find when you open an LMA.

"A. No, it's not. I've never seen this package; I've never seen this brand; I've never seen this booklet that has either been placed in here or I've never seen this--

"Q. Okay.

"A. --device."

Id. at 283-84.

Dr. Miett had brought an LMA device to court. Plaintiff's counsel presented Miett with what he represented was the instruction manual for the device Miett had brought. Miett testified he had never seen that manual before.

Plaintiff's counsel continued to examine Miett regarding the manual. Outside of the presence of the jury, defense counsel objected on the ground that the manual did not

establish a standard of care and there was no evidence that Miett had ever read or used the manual.

The court overruled the objection on the ground that the manual related to the device Miett had brought to court. Miett then read aloud the critical warning contained in the manual. The defense objected on the ground that the plaintiff's attorney improperly elicited testimony from a document that was not in evidence, at which point the court admitted into evidence the portion of the manual containing the critical warning for the limited purpose of assessing the witness's credibility, and so instructed the jury.

There was a plaintiff's verdict. The defendant appealed on the ground that the plaintiff had not properly authenticated the manual. The Appellate Court found that the admission of the manual was error, but found it to be harmless, due to the fact that the defense addressed the manual when it called its expert anesthesiologist, James D'Amato.

REASONING:

> A fair and careful assessment of Miett's testimony reveals that he did not affirmatively testify that he had any familiarity with the manual admitted into evidence. As set forth previously in this opinion, the plaintiffs' attorney repeatedly asked Miett about his recognition of the manual at issue. Repeatedly, Miett testified that he did not recognize the writing and that, in fact, he had never seen the writing before it was presented to him at trial. The plaintiff accurately refers to the fact that Miett brought an LMA device with him to court and that he agreed with the assertion of the plaintiffs' attorney that "part of being conservative and cautious is being familiar with the manufacturer's warnings for the devices that you put in patients." This evidence, however, did not support a finding that the writing at issue was what the proponent claimed it to be, namely, a manufacturer's manual for an LMA device. As such, the exhibit was not properly authenticated and it was improper for the court to admit it into evidence.

> Turning to an evaluation of whether the court's erroneous evidentiary ruling was harmful, we readily conclude that the improperly admitted manual was cumulative of other validly admitted testimony concerning the manufacturer's warnings in the manual. The only aspect of the manual that was germane to the present case was the contraindication regarding the use of the LMA device on morbidly obese patients in elective, nonemergency cases. As set forth previously, however, D'Amato testified about the weight he afforded information about the LMA device provided by its manufacturer, but also testified that the manufacturer included this particular contraindication in its manual. It cannot be disputed that D'Amato's testimony concerning the content of the manual, admitted without objection or limitation as to its use, was duplicative of the evidence that the court admitted improperly, namely, the contraindication appearing in the manual. In light of this determination, we are not persuaded by the defendant's argument that the ruling at issue was harmful.

Id. at 293-95.

COMMENT: The safest way to get such a manual into evidence is to have your own expert identify it as something upon which he or she relies in reaching an opinion on the standard of care. This would, however, require disclosing the manual in advance of the deposition of your expert and supplying a copy to the defense, thus losing the element of surprise.

Premarking of Exhibits

PREMARKING AS "FULL EXHIBIT" DOES **NOT** PLACE EXHIBIT IN EVIDENCE - KORTNER V. MARTISE, 312 Conn. 1 (2014); Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Vertefeuille, Js.; Trial Judge - Brazzel-Massaro, J.

RULE: Pretrial marking of an exhibit as a "full exhibit" by agreement of the parties does not place the exhibit in evidence. The exhibit must at some point be offered and received into evidence on the record.

FACTS: Mary Kortner brought this case on behalf of her daughter, Caroline Kendall Kortner (Kendall), seeking damages for sexual battery, civil assault and intentional infliction of emotional distress.

Kendall had a long history of mental illness, and struggled with (among other issues) a severe eating disorder, clinical depression, borderline personality disorder, and obsessive compulsive disorder. She required repeated hospitalizations. In 1994, when Kendall was 24, her mother was appointed conservator.

In 1999, Kendall and the defendant, Craig Martise (who was married with four children), began communicating online. In 2002, they started talking on the telephone. In 2003, they began meeting at Kendall's apartment. Eventually their relationship became sexual and then sadomasochistic. In August 2003, Kendall's mother became aware of the sexual relationship, and it ended.

In 2006, Kendall's mother, as conservator, filed the lawsuit.

The case was tried to a jury over ten days in December 2009. The principal defense was that Kendall had consented to the sexual contact.

Prior to the start of evidence, the plaintiff premarked a typewritten letter “exhibit 7” - a full exhibit with the consent of both parties. The letter was purportedly from Kendall (although the plaintiff claimed it was actually written by the defendant) to her landlord complaining about sexual advances being made by an employee of the landlord. The letter suggested that Kendall was capable of resisting an unwanted sexual advance.

Before trial, the plaintiff filed a motion in limine to prohibit the defendant from presenting any evidence regarding sexual advances by the landlord's employee, or

Kendall's response thereto. The court initially reserved decision on the motion, but ultimately granted it.

At trial, no evidence regarding the landlord's employee's sexual advances was admitted, and there was no testimony regarding exhibit 7, nor was there reference to the exhibit during final arguments.

Counsel for both parties reviewed the documents to be provided to the jury for deliberation. Exhibit 7, marked as a full exhibit, went into the jury room with the rest of the exhibits.

During deliberations, the jurors prepared a note for the judge questioning whether they were supposed to have exhibit 7, because there had been no reference to it during the trial. When the clerk went into the jury room, the jurors asked whether they were supposed to have exhibit 7. The clerk told the jurors that she was familiar with exhibit 7 and that it was supposed to be part of the evidence. The foreperson then discarded the note, and the jury went on with their deliberations. The clerk did not inform the judge or the parties of the jurors' inquiry.

The jury returned a verdict for the defendant.

After the verdict was read and accepted by the court and court adjourned, the judge met with the jury to thank them for their service. A juror mentioned exhibit 7 and expressed confusion about the fact that there had been no testimony regarding it during the trial. The judge did not offer an explanation regarding exhibit 7, but stated that it had been marked as a full exhibit.

The plaintiff moved to set aside the verdict on the ground that exhibit 7 had never been admitted into evidence and was mistakenly sent in to the jury. The trial court denied the plaintiff's motion. The Supreme Court reversed and set aside the verdict.

REASONING:

The first issue was whether an exhibit premarked by the parties as a full exhibit is in evidence. The Supreme Court held that the premarking of the document as a full exhibit did not make it evidence in the trial. The court held that the document must be offered and received in evidence during the trial to be considered evidence.

In a concurring opinion, Justice Palmer stated that in his opinion the plaintiff waived her right to raise this claim by premarking exhibit 7 as a full exhibit, and by failing to change that marking and remove the exhibit before the exhibits went to the jury. He concurred in the result because he found that the court clerk's failure to inform the trial judge of the jurors' inquiry about exhibit 7 "trumped the plaintiff's waiver." Id. at 65.

Justice McDonald, dissenting, agreed with the majority that an exhibit must be received into evidence during the trial in order for it to be a proper matter for the jury's consideration. He stated that in his opinion "it is sufficient for a party simply to state in the presence of the trier of fact (court or jury) that the exhibit is a full exhibit by agreement of the parties, and that there is no further requirement that the proponent of the exhibit must introduce it through a witness. Id. at 74 n.6.

COMMENT: This case offers yet another example of the importance of thoroughly checking all exhibits before they go into the jury room, no matter how tired you are.

Missing Witness Argument

TO ARGUE AN ADVERSE INFERENCE, A PARTY MUST PROVE THE WITNESS "AVAILABLE" AT THE TIME OF TRIAL - STATE V. CAMPBELL, 149 Conn. App. 405, *cert. denied*, 312 Conn. 907 (2014); Gruendel, Bear and Flynn, Js.; Trial Judge - Ginocchio, J.

RULE: To support a missing witness argument, a party must prove that the witness is presently "available." Testimony by someone who last spoke with the witness two years ago, that as far as he knows the witness is around, is not sufficient.

FACTS: The five members of the Forbidden Motorcycle Club were at their clubhouse in Torrington. Two members, the victim and the defendant's brother, Campbell, got into an argument about whether a new member was entitled to receive his one-year patch. They decided to go outside and settle the dispute "old school."

The victim and the defendant's brother started to fight and the defendant's brother was knocked to the ground. The defendant said to the victim, "you're a dead man," drew a pistol and shot the victim in the chest, killing him. The defendant was charged with murder. The defendant claimed he discharged his gun accidentally or in self-defense.

The first trial was in 2009. The defendant's brother testified during the defense case. There was a hung jury and a mistrial was declared. During the second trial in 2012, the defendant's brother did not testify.

The defendant took the stand, and the prosecutor elicited the following testimony regarding the defendant's brother, Campbell:

> "[The Prosecutor]: By the way, when was the last time you spoke with [Campbell]?
>
> "[The Defendant]: Probably two years ago."
>
> "[The Prosecutor]: And [Campbell] lives in where, Plymouth?

> "[The Defendant]: Yes.
>
> "[The Prosecutor]: Whereabouts in Plymouth, do you know?
>
> "[The Defendant]: Near the lake there, Plymouth Lake.
>
> "[The Prosecutor]: Okay, still living there?
>
> "[The Defendant]: As far as I know, yes."
>
> "[The Prosecutor]: Still living, conscious, competent, nothing happened to him today? Today, as we sit here today?
>
> "[The Defendant]: I believe so."

Id. at 417 n.6.

Before final argument, the State sought permission to make a missing witness argument to the jury. The defendant objected on the basis that since the defendant testified he had not spoken with his brother in two years, the State had failed to demonstrate that the brother was available to testify.

The court ruled that the State could make the missing witness argument, which it did. The defendant, 57 years old, was convicted and sentenced to 40 years in prison.

The Appellate Court found the court's ruling to be error, but harmless.

REASONING:

> We conclude that the court erred in finding that the state put on sufficient evidence of Campbell's availability through its cross-examination of the defendant. "To satisfy the availability requirement, the [party] must put forth sufficient evidence before the jury to support a conclusion that the witness was available at the time of trial." *State* v. *Owen*, 40 Conn. App. 132, 138, 669 A.2d 606, cert. denied, 236 Conn. 912, 673 A.2d 114, cert. denied, 237 Conn. 922, 676 A.2d 1376 (1996). The state did not establish that Campbell was actually available to testify. Although it

> probed the defendant in an attempt to elicit evidence about whether Campbell was available, the defendant testified that only "as far as he knew," Campbell still lived near Plymouth Lake and that he "believed" Campbell was still living, conscious, and competent. These statements, standing alone, are insufficient to establish Campbell's availability to testify during the trial. Without more definite and reliable evidence, the court erred in finding that Campbell was available. See *State* v. *Woods*, 257 Conn. 761, 768, 778 A.2d 933 (2001).

Id. at 421-22.

Sufficiency of Evidence

CIRCUMSTANTIAL EVIDENCE SURROUNDING REAR-END COLLISION SUFFICIENT TO PROVE NEGLIGENCE - RAWLS V. PROGRESSIVE NORTHERN INS. CO., 310 Conn. 768 (2014); Rogers, C. J., and Palmer, Zarella, McDonald and Espinosa, Js.; Trial Judge - Stodolink, J.

RULE: Circumstantial evidence may be sufficient to prove negligence and causation in a rear-end collision case. The plaintiff no longer has the burden of disproving all possible non-negligent causes: sudden mechanical failure, sudden illness, and sudden emergency.

FACTS: In this rear-end collision case, the plaintiff was stopped at a traffic light behind another vehicle. The plaintiff estimated that he was stopped for approximately 15 seconds before the tortfeasor's vehicle hit the back of his car, forcing it into the car in front. Plaintiff testified that he did not see the tortfeasor's vehicle beforehand.

The circumstantial evidence marshaled by the plaintiff included the plaintiff's testimony that the back of his own vehicle was "destroyed", and the front was heavily damaged. The plaintiff introduced photographs of this damage.

The investigating police officer testified as to the heavy vehicle damage; described the road as relatively straight, flat, and wide; and related that the weather had been clear.

After the plaintiff rested his case, the defendant moved for a directed verdict. The court denied the motion. There was a plaintiff's verdict. The defendant filed a motion to set aside the verdict, which the trial court denied. The Appellate Court reversed.

The Supreme Court reversed the Appellate Court and reinstated the verdict.

REASONING:

The Appellate Court was compelled to reverse the trial court based on Supreme Court cases holding that the fact that there was a rear-end collision, without direct evidence as to the cause of that collision, was not sufficient for the plaintiff to establish negligence. That case law had held that the plaintiff was required to eliminate potential non-negligent causes such as sudden mechanical failure, sudden illness and sudden emergency.

The Supreme Court did not follow these cases, ruling instead that the circumstantial evidence presented by the plaintiff was sufficient to prove negligence and causation. The court pointed to evidence that he was stopped at a red traffic light normally highly visible to drivers; that the weather was clear; that the road was flat and straight; that the plaintiff was stopped for at least 15 seconds, and that there was heavy damage to plaintiff's vehicle.

Most importantly, the court specifically rejected the rule (without admitting it was overruling its earlier cases) requiring the plaintiff to disprove all possible non-negligent causes of a rear-end collision: sudden mechanical failure, sudden illness, and sudden

emergency. The Court held although it is "possible" that such an event occurred, it is not "probable." In footnote 9 on p. 782, it shifted the burden of proof of "possible" non-negligent causes to the defendant.

COMMENT: Be careful here. The opinion goes to great lengths to make clear that mere proof of the fact of a rear-end collision is not enough. A plaintiff must marshal as much additional circumstantial evidence as possible. However, a plaintiff can now carry his or her burden of proof in a rear-end collision case without direct eyewitness evidence, and without negating every non-negligent cause.