Update on Evidence 2011
by Bob Adelman and Neil Sutton

"It is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence."
William James

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Introduction

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from August 3, 2010 through August 23, 2011. 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, subjects that 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: Expert Disclosures, Final Argument and Sufficiency of Evidence.

Article IV. Relevancy

§ 4-1 REPORTS OF OTHER PROBLEMS RELEVANT ON CONSTRUCTIVE NOTICE –
LOMBARDI V. EAST HAVEN, 126 Conn. App. 563 (2011) (Schaller, J); Trial Judge: Keegan.

RULE: Call log reflecting citizen complaints of unrelated problems at same location admissible to prove constructive notice.

FACTS: On March 12, 2005, Paulina Lombardi tripped and fell over a three-inch raised sidewalk slab in front of 641 Main Street in East Haven. She suffered two transverse fractures of her left arm, requiring several surgeries, developed

reflex sympathetic dystrophy and ended up with a 33% permanent partial disability of her left hand.

Ms. Lombardi brought suit against the Town of East Haven, alleging that the sidewalk was not reasonably safe. To prove her claims, the plaintiff was required to prove that the Town had actual or constructive knowledge of the defect.

While the plaintiff could not prove actual notice, she did offer evidence to prove constructive notice.

First, she offered expert testimony from an engineer, Michael Miller. Miller testified that the defect was at the joint between two slabs of concrete. One slab was raised approximately three inches over the other. The raised slab had been pushed up by the growth of a tree root exerting pressure from underneath. Miller testified that the condition occurred over years and that the discrepancy in the joint between the two slabs had existed for at least one year.

The Town objected to Miller's testimony on the ground that it was "irrelevant, speculative, lacked foundation, usurped the jury's function and was not helpful to the jury in considering the issues involved in this case." Id. at 567. The court overruled defendant's objection and Miller's testimony was admitted. The Appellate Court affirmed.

The plaintiff also offered in evidence a call log of complaints made to the Town of conditions on Main Street during the two years before the plaintiff fell. While the log contained no complaints about the sidewalk in front of 641 Main Street, it did reflect 76 complaints about other locations on Main Street.

The defendant objected to the call log on the basis that it was not relevant to whether the Town had notice of the particular defect at issue. The plaintiff argued that the log was relevant to show constructive notice – how many times the defendant's employees had been called about problems on Main Street and had an opportunity to inspect the sidewalk there. The plaintiff claimed the call log demonstrated the Town's failure to fulfill its duty to inspect the sidewalk on Main Street. The trial court admitted the call log. The Appellate Court affirmed.

REASONING:

The Appellate Court held that Miller was qualified as an expert, and that his opinion assisted the jury and was therefore admissible. *See* CCE §7-2.

The Appellate Court concluded that the call log was relevant on the issue of whether the defendant could be charged with constructive notice. The log established that the defendant's employees responded to 76 calls regarding various problems on Main Street and no employee of the defendant reported the sidewalk defect at issue. This was relevant on the issue of whether the Town fulfilled its duty to inspect.

§ 4-7 SUBSEQUENT REMEDIAL MEASURE INADMISSIBLE – DUNCAN V. MILL MANAGEMENT COMPANY OF GREENWICH, INC., 124 Conn. App. 415 (Sullivan, J.), *cert. granted,* 299 Conn. 918 (2010); Trial Judge: Karazin.

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

FACTS: On April 17, 2005, Catherine Duncan was descending a deck on the top floor of the Greenwich Chateau Condominium. The deck was accessed by a single step concrete riser measuring 10" high by 10" wide. As Ms. Duncan attempted to leave the deck, her foot missed the concrete riser. She fell and broke her ankle. The concrete riser did not comply with the Town Building Code.

Ms. Duncan was the President of the Board of Directors of the Condominium Association. After she fell, she contacted Richard Deutsch, the building manager, and requested that something be done to remedy the stairs. Deutsch, without involving the condominium association's board of directors, hired a contractor to build new stairs that complied with the Code. The new stairs were built over the concrete riser, two to three weeks after the fall.

In the lawsuit, the defendant management company claimed it needed advance approval from the defendant condominium association for a project of this type.

The defendants filed a motion in limine, pursuant to CCE §4-7(a), to block any evidence of the subsequent remedial measure. That Section provides:

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

The trial court denied the motion in limine without prejudice.

The plaintiff then offered two pieces of evidence regarding the new stairs.

First, the plaintiff offered testimony from Deutsch that he had arranged for new stairs to be built two to three weeks after the plaintiff's fall. The plaintiff offered the testimony to prove that it was "feasible" for Deutsch to have arranged to have stairs installed earlier.

The evidence was not offered (or germane) to establishing "feasibility" as that term has been used in the case law regarding evidence of subsequent remedial measures, i.e., that it was possible to remedy the hazard. Instead, the plaintiff offered the evidence to show that Deutsch, acting on behalf of the defendant management company, could have contracted to have a safe stairway built without advance approval from the condo's board of directors, as he did after the plaintiff's fall here.

The plaintiff also claimed the evidence was admissible to impeach Deutsch's testimony that he needed approval of the project from the condo association's board of directors before he could contract it out. The trial court allowed the testimony.

The second piece of evidence offered by the plaintiff regarding the new stairs was two photographs which showed the concrete riser and the newly constructed stairs on top of it. The plaintiff offered these photographs to show the cement riser as it existed at the time of the plaintiff's fall. The trial court admitted the photographs.

The Appellate Court reversed.

REASONING:

The Appellate Court held that proof that the management company could have contracted to have a new staircase built without Board approval was not "feasibility" as used in CCE §4-7(a):

> The plaintiff sought to prove that the defendants could have had a new staircase built, which goes directly to the issue of culpability, not feasibility of construction as claimed by the plaintiff. The plaintiff elicited testimony from Deutsch concerning the replacement staircase in order to prove that the defendants were negligent because they did not do all that they could have done in order to make the entryway safe. The plaintiff could have used other evidence to prove that the defendants did not need the approval of the board of directors to construct the new staircase, including the testimony of the plaintiff. The admission of evidence indicating that the defendants fixed the stairs on which the plaintiff fell was highly prejudicial and not necessary to show feasibility of construction.

124 Conn. App. at 422.

In regard to the plaintiff's second argument, that the evidence was admissible to impeach Deutsch's testimony, the court held that its probative value was outweighed by the prejudicial effect of the evidence.

As for the photographs, the plaintiff argued they were necessary to show the cement riser as it existed at the time of the plaintiff's fall. The court held that if the photographs were not inextricably tied to the Building manager's testimony regarding the building of the new stairs, they may have been admissible for that limited purpose. However, under the circumstances of this case, where the photographs were admitted with the building manager's testimony, the Appellate Court held it was an abuse of discretion to admit the photographs.

The Appellate Court went on to find that the erroneous admission of the testimony and photographs was harmful, and reversed.

V. Privileges

INQUIRY INTO PEER REIVEW LEADS TO SETTNG ASIDE OF VERDICT – BRIDENSTINE V. GIOVANNI, Memorandum of Decision Re: Motion to Set Aside Verdict and/or for a New Trial and/or For Sanctions, Docket Number CV-07-5003067S, Superior Court, Judicial District of New London, (January 27, 2011); Trial Judge: Cosgrove.

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

FACTS: The case was a medical malpractice case arising out of gastric bypass surgery. Plaintiff developed a leak at the bypass site and a consequent abdominal infection, which were not diagnosed for four days. On the fifth post-op day plaintiff's condition deteriorated, and she was transferred to the ICU. She coded, stopped breathing, and her heart stopped. She was revived but suffered anoxic brain injury. She survived for 17 months in a persistent vegetative state.

The case was brought against three defendants: Dr. Carlos Barba, who performed the surgery and cared for the plaintiff for the first four days; St. Francis Hospital, where the plaintiff was hospitalized; and, Dr. Jeannine Giovanni, Dr. Barba's partner, who took over the plaintiff's care the fifth and critical day.

The claim against Barba was that he performed the surgery improperly and failed to detect and deal with the leak at the bypass site, and its consequent infection, in a timely manner. The claim against St. Francis Hospital was for improper monitoring. The claim against Giovanni was that when she took over

on the fifth day, signs of infection were present and she failed to respond appropriately.

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

The fifth day, on which Giovanni took over the plaintiff's care, was a Saturday. Giovanni made hospital rounds that morning. During the afternoon, the plaintiff's condition deteriorated and she was transferred to ICU. The hospital staff called Giovanni to inform her of the plaintiff's changed condition. Giovanni did not return to the hospital to reassess the plaintiff's condition, and returned only after the plaintiff coded, then took the plaintiff into surgery that night.

Apparently, during the peer review of the management of this case, Giovanni was exonerated. The plaintiff had no knowledge of this fact.

Counsel for Giovanni asked the following questions during direct examination:

> MR. WHITE CONTINUING:
>
> Q. During the course of this entire litigation, from the time you were named a defendant up until today, has any one of the attorneys for the plaintiff or attorneys for any of the apportionment defendants ever asked you if your care of Gail Stalinski was reviewed and evaluated at St. Francis Hospital?
>
> A. No.
>
> Q. Was it?
>
> A. Yes, it was.
>
> Q. What was it –
>
> ATTY. RECK: Your Honor –

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

Mr. Reck?

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

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

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

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

So the peer review privilege rested with St. Francis. He asked St. Francis people if there was peer review.

Memorandum of Decision, Appendix A, pp. 1-2.

The plaintiff did not move for a mistrial. The judge issued a cautionary instruction. There was a defendants' verdict.

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

The trial judge agreed and set aside the defendants' verdict.

REASONING:

Defense counsel's lame excuse for asking these questions was that the peer review privilege is personal and that a doctor can waive the protection of the privilege. In other words, the doctor can assert the privilege in the event the Peer Review Committee finds against her, but waive the privilege if she is exonerated, and introduce that fact during a trial. Defense counsel provided no authority for this proposition.

The trial judge concluded that defense counsel's attempt to elicit clearly inadmissible evidence was intentional. He further concluded that the fact that the ultimate answer was blocked by a timely objection, did not cure the problem:

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

Memorandum of Decision, pp. 17-18.

The judge found that his curative instruction was insufficient to preserve the plaintiff's right to a fair trial. Therefore, Judge Cosgrove found this was "the exceptional case" where a new trial was required.

COMMENT:

Judge Cosgrove also ordered that upon re-trial defense counsel who was posed this series of questions, William White, of Providence, Rhode Island, who

had been admitted *pro hac vice* to try the case, be accompanied by local counsel who sponsored his admission during the case, James Rosenblum.

VII. Opinions and Expert Testimony

§ 7-2 KUMHO TIRE DECISIVELY REJECTED - STATE V. ORAL H., 125 Conn. App. 276 (2010); (*Per Curiam*, Harper, Bear and Mihalakos, Js.); *cert. denied*, 300 Conn. 902 (2011), *cert. denied*, 131 S.Ct. 3003 (2011); Trial Judge: Schuman.

RULE: Porter analysis only applies to scientific expert testimony, not the testimony of a clinical psychologist.

FACTS: Sexual assault prosecution in which the State offered the testimony of Dr. Garnet, a clinical psychologist, to testify regarding the tendency of victims of sexual abuse to delay disclosing the abuse. Defense counsel requested a Porter hearing, which would require a determination by the trial court that Garnet's testimony was reliable before allowing it in evidence. The trial court refused to hold a Porter hearing. The Appellate Court affirmed.

REASONING:

The Appellate Court summarized the basis for its decision as follows:

> The defendant claims that Garnet's expert testimony concerning delayed disclosure of sexual abuse constituted testimony of a technical or specialized nature that was subject to a test of admissibility under Porter. In State v. Porter, 241 Conn. 57, 61, 698 A.2d 739 (1997) (en banc) *cert. denied*, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), our Supreme Court adopted the test for the admissibility of scientific evidence that was set forth by the United State Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). In State v. Vumback, 68 Conn. App. 313, 327-32, 791 A.2d 569 (2002), *aff'd*, 263 Conn. 215, 819 A.2d 250 (2003), this court determined that evidence similar to that at issue in the present claim—expert testimony concerning delayed disclosure of sexual abuse—was not scientific evidence and, thus, was not

> subject to the Daubert standard of admissibility adopted in Porter. The defendant does not dispute that the testimony at issue was not scientific in nature. Rather, relying upon Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), which extended Daubert's test for admissibility to technical and other specialized knowledge, the defendant urges us to conclude that the evidence at issue was subject to a Porter analysis. No appellate court in this state had adopted the approach set forth in Kumho Tire Co. Ltd., and we decline to do so here.

125 Conn. App. at 284-85.

COMMENTS:

This case does not cover new ground since the Appellate Court's ruling in State v. Vumback in 2002 (above). The Supreme Court denied certiorari in Vumback.

The last paragraph of the Commentary to CCE § 7-2 talks about Kumho Tire, and concludes: "§7-2 should not be read either as including or precluding the Kumho Tire rule." Because that is now incorrect, you may want to note, in your copy of the CCE, that Kumho Tire was specifically rejected, at least by the Appellate Court, in State v. Oral H.

§ 7-2 PORTER ANALYSIS APPLIED TO DEFENSE EXPERT WHO HAS NOT EXAMINED PLAINTIFF – KLEIN V. NORWALK HOSPITAL, 299 Conn. 241 (2010) (Katz, J.); Trial Judge: Tobin.

RULE: Where a defendant offers a diagnosis from a physician based on medical records and depositions, but not on a physical examination of the plaintiff, the expert's opinion is subject to a Porter inquiry.

FACTS: Plaintiff alleged that during the insertion of an intravenous line into his arm, a nurse negligently hit a nerve, which caused nerve palsy.

The opinion of Dr. Strauch, the defendant's expert, was that the plaintiff's nerve palsy was caused not by insertion of the intravenous line, but by Parsonage Turner Syndrome, an unrelated neurological disorder. The defense expert reached his opinion based upon his review of the medical records and depositions. He did not examine the plaintiff.

The plaintiff objected to the expert's testimony and requested a Porter hearing. The plaintiff's position was that since physicians do not in their medical practice reach a diagnosis on the basis of the review of medical records and deposition testimony and without examining the patient, the defendant had the burden of proving that the methodology was reliable pursuant to Porter.

The trial court held a Porter hearing. The Supreme Court found that, because Strauch's testimony did not satisfy Porter, the trial court's admission of his testimony was error.

REASONING:

The Court summarized its holding as follows:

> Although the trial court in this case conducted a Porter hearing to consider the admissibility of Strauch's testimony, the defendant did not demonstrate at the hearing the reliability of the methodology upon which Strauch relied. Notably, the defendant made no showing that Strauch's methodology had been subjected to peer review, nor was Strauch able to identify a likely rate of error for his chosen methodology. While neither of these determinations is a talismanic requirement for satisfaction of the Porter requirements, their absence is, in this case, determinative of the inadequacy of the defendant's proof of the methodology's reliability. *See also* Maher v. Quest Diagnostics, Inc., 269 Conn. 178 (concluding that requirements of Porter are not met, even when expert has 'sufficient background and prestige' if offering party 'adduced no evidence on whether [the expert's] methodology: [1] can be, and has been tested; [2] has been subjected to peer review; [3] has a known or potential rate of error; and [4] has garnered general

> acceptance in the relevant scientific community'). Without these or any other meaningful indicia of reliability, Strauch's conclusion was without basis in an assuredly reliable methodology; without any stated support for its reliability other than his own personal expertise, it was nothing more than his ipse dixit. *See* Merriam-Webster's Collegiate Dictionary (10th Ed. 1995) (defining 'ipse dixit' as 'an assertion made but not proved; dictum'). 'Nothing... requires a... court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.' General Electric Co. v. Joiner, 522 U.S. 136, 137, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

299 Conn. at 262-63.

COMMENT:

Rather than moving to preclude the testimony of a defense doctor who has not examined the plaintiff, it may be preferable to cross-examine such an expert, especially one who has done extensive defense work. A plaintiff who successfully precludes the testimony of such a doctor and obtains a favorable verdict faces not only the challenge of an appeal, but the risk of losing the verdict.

§ 7-2 EXPERT TESTIMONY REQUIRED TO PROVE BREACH OF FIDUCIARY DUTY BY LAWYER – MARCIANO V. KRANER, 126 Conn. App. 171, *cert. denied*, 300 Conn. 922 (2011) (Gruendel, J.); Trial Judge: Aurigemma.

RULE: A breach of fiduciary duty count, held to be basically nothing more than a carbon copy of a count for legal malpractice, requires expert testimony.

FACTS: Plaintiff had lived with his family since 1996 in a home owned by his parents. His mother was in a nursing home and his father, who had serious mental health problems, was living at the Institute of Living in Hartford. Plaintiff

sought to shield the house from state and federal Medicaid liens. He hired the defendant lawyer, Kraner, to accomplish this task.

Although Medicaid laws prevented the property from being transferred directly to the plaintiff, plaintiff had a disabled brother to whom the property could legally be transferred. Kraner proposed that the property be transferred to the disabled brother who would then transfer it to the plaintiff.

At the closing, two quit claim deeds were executed: one from the parents to the disabled brother; and a second one from the disabled brother to the plaintiff.

After the closing but before Kraner recorded the deeds, Kraner learned that the scheme was an illegal attempt to circumvent Medicaid laws. He further learned if he recorded the second quit claim deed from the disabled brother to the plaintiff, both Kraner and the plaintiff could be subject to criminal prosecution. In addition, Kraner learned that if he recorded the second deed, the father's Medicaid application would be denied. Kraner refused to record the second deed. The plaintiff sued.

The complaint had two counts: the first count was for legal malpractice; the second count was for breach of fiduciary duty. The plaintiff did not have an expert on either count. The case was tried to the jury. At the conclusion of the plaintiff's case, the court granted the defendant's motion to dismiss the legal malpractice count because the plaintiff had not produced expert testimony. The court reserved decision with respect to the count alleging breach of fiduciary duty. The jury returned a verdict in favor of the plaintiff on the breach of fiduciary

duty claim. The trial court then set aside the verdict, ruling that the breach of fiduciary count also required expert testimony. The Appellate Court affirmed.

REASONING:

The Appellate Court summarized:

> It is important to note at the outset that our review of the record discloses that the plaintiff's count for breach of fiduciary duty is basically nothing more than a carbon copy of his count for legal malpractice.... Because the plaintiff failed to introduce any expert testimony as to the preliminary issue of the attorney-client relationship, we cannot say, on the basis of the facts in the present case, that the court improperly granted the defendants' motion to set aside the verdict. Indeed, the jury's verdict awarding the plaintiff damages for breach of fiduciary duty was unsupported by any evidence as to what fiduciary duty was owed by the defendants to the plaintiff, other than inherent in the attorney-client relationship, and how that duty was violated in this case. Although every attorney-client relationship imposes a fiduciary duty on the attorney; *see* Matza v. Matza, 226 Conn. 166, 183-84, 627 A.2d 414 (1993); a plaintiff cannot avoid his burden to present expert testimony to articulate the contours of that relationship by styling his cause of action as one for breach of fiduciary duty.

126 Conn. App. at 178-79.

§ 7-4(b) TREATING PHYSICIAN: (1) OPINION CAN BE BASED ON HEARSAY; (2) RECORD/REPORT DOES NOT HAVE TO USE TALISMANIC WORDS; (3) CAN BE COMPELLED TO TESTIFY – MILLIUN V. NEW MILFORD HOSPITAL, 129 Conn. App. 81 (2011) (Borden, J.); Trial Judge: Alvord

RULE: There are three rules set forth in this case: 1) a treating physician can rely on hearsay and non-expert opinion in formulating his opinions; 2) a treating physician's record or report does not have to use the talismanic words "reasonable degree of medical probability" for the opinion to be admissible; and, 3) there is no privilege permitting treating physicians to refuse to testify at deposition.

FACTS: In July 2002, plaintiff was a patient at New Milford Hospital when she 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 anoxic incident, the plaintiff was already suffering from Stiff Man Syndrome, a rare disease which creates progressive muscle stiffness and was first described in medical literature by Mayo Clinic doctors in 1956.

In April 2003, plaintiff sought treatment at the Mayo Clinic in connection with her cognitive health. She was seen by Dr. Kathleen McEvoy, who wrote in her records that the plaintiff was suffering from a severe neurological disorder which had some manifestations of Stiff Man Syndrome but "obviously has additional deficits and involvement that would not be expected with [SMS] alone." 129 Conn. App. at 85.

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

Plaintiff planned to carry her burden of proof that the anoxic incident caused her cognitive impairment with the Mayo Clinic records. She therefore disclosed Dr. McEvoy and Dr. Josephs as experts. Defendant New Milford Hospital sought to depose Dr. McEvoy and Dr. Josephs. However, the Mayo Clinic did not cooperate in making them available for deposition.

The Hospital filed a motion to preclude plaintiff from calling Drs. McEvoy and Josephs as expert witnesses because they had not the opportunity to

depose them. Plaintiff represented at the hearing on the motion that she only sought to introduce their medical records. The parties then agreed to attempt take the depositions of Drs. McEvoy and Josephs, limited to questions concerning what was in their reports.

The Mayo Clinic still refused to cooperate. The plaintiff filed a motion for a commission to issue subpoenas to take the depositions. The Hospital then moved to preclude the admission of the records and reports in the absence of the opportunity to depose the doctors. At the hearing on this motion, the trial court expressed its opinion that the opinions of Drs. McEvoy and Josephs, as set forth in the medical records and reports, would be insufficient for the plaintiff to carry her burden of proof on causation because they were predicated on lay person opinion and inadmissible hearsay. The trial court granted the motion to take the depositions. In the court's view, the depositions were necessary both for the plaintiff to make her case on causation and so that the Hospital would have the opportunity to cross-examine the doctors regarding the opinions.

The deposition of Dr. Josephs took place on February 2, 2009. At the beginning of the deposition, counsel for the Mayo Clinic indicated that Dr. Josephs would not be giving any opinions on causation, despite the fact that opinions on causation were contained in the Dr. Josephs' records. Dr. Josephs then testified 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 would last four hours, counsel for the Mayo Clinic unilaterally terminated the deposition after two hours.

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. The Mayo Clinic contended that these depositions were an annoyance and unduly burdensome. The Hospital joined in the Mayo Clinic's motion. The Hospital argued in its brief that neither Dr. Josephs nor Dr. McEvoy should be compelled to testify as to their medical opinions on causation.

The trial court agreed with the Mayo Clinic and the Hospital and vacated its previous order granting the commissions for the depositions. The Hospital then filed a motion for summary judgment, on the basis that the plaintiff could not establish the required element of causation. The trial court granted the hospital's motion for summary judgment. The Appellate Court reversed.

REASONING:

The Appellate Court first addressed the trial court's ruling: "[T]hat the statements contained in the reports pertaining to causation were either predicated on inadmissible hearsay, as they were made by the patient and her sister or predicated upon the 'expert' opinions of lay witness." 129 Conn. App. at 94. The Appellate Court held that the trial court's ruling was wrong for two reasons:

First, CCE §8-3(5) establishes a hearsay exception for statements made for purposes of obtaining medical diagnosis or treatment. Therefore, the statements of the plaintiff to her treating physicians were not "inadmissible" hearsay.

More fundamentally, in 1999, Connecticut's rule on the admissibility of expert opinions was changed to allow an expert to rely on hearsay if it is of the type customarily relied on by experts in the field. This change in the law is codified in CCE §7-4(b): "The facts in the particular case upon which an expert bases an opinion... need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject." Treating physicians customarily rely on the history related by their patients in reaching their opinions.

> Furthermore, our case law is clear that a physician's medical opinion is not inadmissible because it is formed, *in whole or in part*, on the basis of hearsay statements made by a patient. *See* George v. Ericson, 250 Conn. 312, 320, 736 A.2d 889 (1999) (although '[i]t is the general rule that an expert's opinion is inadmissible if it is based on hearsay evidence,... [o]ne exception to this rule... is the exception which allows a physician to testify to his opinion even though it is based, in whole or in part, on statements made to him by a patient for the purpose of obtaining from him professional medical treatment or advice of incidental thereto') [citation omitted; emphasis added; internal quotation marks omitted]). The rationale for this exception is that 'the patient's desire to recover his health... will restrain him from giving inaccurate statements to a physician employed to advise or treat him.' (Internal quotation marks omitted.) State v. Cruz, 260 Conn. 1, 7, 792 A.2d 823 (2002); *see also* C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) §8.20.2, p. 520 ('[the] exception is based on the theory that person who consults a doctor for advice or treatment will be motivated by a desire to recover... and that such persons will therefore refrain from giving inaccurate statements to the individual advising or treatment them'). Accordingly, we conclude that the treating physicians' reliance on statements provided by the patient to establish a

> temporal basis for their medical conclusions did not render their opinions as to causation inadmissible. See George v. Ericson, supra, 325('fact that an expert opinion is drawn from sources not in themselves admissible does not render the opinion inadmissible' [internal quotation marks omitted]); Poulin v. Yasner, supra, 64 Conn. App. 743 (trial court improperly precluded physician's expert testimony that was based in part on statements by injured party)."

129 Conn. App. at 96-97.

The Hospital also argued on appeal that because they did not use the talismanic words we use in court (that the opinion is "based on a reasonable degree of medical probability") the records and reports in question were inadmissible. In response, Judge Borden cited a long line of cases holding consistently over 20 years that, since treating physicians cannot be expected to use lawyers' magic language when they write their records and reports, it would not make sense to impose such a requirement on the admissibility of these records:

> "An expert, however, need not use 'talismanic words' to show reasonable probability." Shegog v. Zabrecky, supra, 36 Conn. App. 746. "As long as it is clear that the opinion of the expert is expressed in terms of probabilities, the opinion should be submitted into evidence for a jury's consideration." Struckman v. Burns, supra, 205 Conn. 555; *see also* Mallory v. Mallory, 207 Conn. 48, 54, 539 A.2d 995 (1988) (expert opinion that injuries 'most likely' result of abuse expressed in terms of reasonable medical probability); Hammer v. Mount Sinai Hospital, 25 Conn. App. 702, 720, 596 A.2d 1318 (opinion that injury 'might have been caused by a piercing of the subclavian artery' stated with sufficient medical certainty to be considered by jury), *cert. denied*, 220 Conn. 933, 599 A.2d 384 (1991)."

129 Conn. App. at p. 100.

The Hospital next argued that Dr. Josephs' testimony at deposition, that he could not give an opinion on causation, should preclude the opinion on

causation in his report from being admitted. The Appellate Court held that: ". . . . to the extent that the defendant raises a dispute between the conclusions expressed in Josephs' medical reports and his deposition testimony, such concerns go to the weight of that evidence, rather than admissibility." 129 Conn. App. at 102.

The Hospital next argued that since it did not have the opportunity to finish the deposition of Dr. Josephs, or take the deposition of Dr. McEvoy, the opinions should not be admitted. The Appellate Court ruled that having joined in the Mayo Clinic's motion to quash the subpoenas, the Hospital could not now argue that it had been deprived of the right to take the doctors' deposition.

Finally, the Appellate Court addressed the trial court's ruling quashing the subpoenas. The Appellate Court ruled that the court abused its discretion in quashing the subpoenas. On appeal, the Hospital argued that treating physicians enjoy a testimonial privilege against being compelled to testify as causation witnesses, "an absolute privilege not to be pressed into service as experts for the plaintiff." 129 Conn. App. at 107. The Appellate Court rejected this claim:

> Finally, *the idea that an expert witness who already has expressed an opinion in connection with the material facts of a case cannot be called to testify as to the basis for such opinion is inconsistent 'with the very nature of a trial as a search for truth'*; Nix v. Whiteside, 475 U.S. 157, 166, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986); and in stark contrast to the 'fundamental maxim that the public . . . has a right to every man's evidence.' (Internal quotation marks omitted.) Jaffee v. Redmond, 518 U.S. 1, 9, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). For this reason, the United States Supreme Court has cautioned that evidentiary privileges 'are not lightly created nor expansively construed, for they are in derogation of the search for truth.' United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090,

41 L. Ed. 2d 1039 (1974) *see also* PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 330, 838 A.2d 135 (2004) (testimonial privilege 'tends to prevent a full disclosure of the truth in court''); Kaufman v. Edelstein, 539 F.2d 811, 820 (2d Cir. 1976) ('we perceive no sufficient basis in principle or precedent for holding that the common law recognizes any general privilege to withhold . . . expert knowledge'); 8 J. Wigmore, Evidence (McNaughton Rev. 1961) § 2192, p. 70 ('we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional'). Although we do not hold that a person may be compelled to offer expert testimony in a case simply because he is an expert in a particular field; *see* In re American Tobacco Co., 880 F.2d 1520, 1527 (2d Cir. 1989); Statutory Committee of Unsecured Creditors v. Motorola, Inc., 218 F.R.D. 325, 326 (D.D.C. 2003); that does not mean that a treating physician cannot be compelled to testify at a deposition as to opinions documented in his medical records and the statements made therein. In this connection, we emphasize that both Josephs and McEvoy were disclosed as experts by the plaintiff because, during the course of their care as treating physicians, each offered a tangible opinion as to the causal connection between the defendant's alleged negligence and Leslie's injuries. Because '[t]here is no justification for a rule that would wholly exempt experts from placing before a tribunal factual knowledge relating to the case in hand [*or*] *opinions already formulated*'; (emphasis added; internal quotation marks omitted) Lane v. Stewart, 46 Conn. App. 172, 176, 698 A.2d 929 *cert. denied*, 243 Conn. 940, 702, A.2d 645 (1997); we decline to accept the defendant's invitation to create a testimonial privilege that would prevent such witnesses from being deposed in the present case.

129 Conn. App. at 108-09 (emphasis added).

VIII. Hearsay

§ 8-1 VERBAL ACT NOT HEARSAY – STATE V. GRANT, 127 Conn. App. 654, *cert. denied,* 301 Conn. 910 (2011) (Pellegrino, J.); Trial Judge: Frechette.

RULE: Hearsay is an out-of court statement offered to prove the truth of its content. A statement offered to prove a verbal act (a statement that causes legal consequences) is not hearsay.

FACTS: On September 13, 2007, New London police officers went to 24 Connecticut Avenue in New London to execute a search-and-seizure warrant related to narcotics activity at that address. When the officers arrived, the defendant was standing in front of the residence. An officer identified himself to the defendant and told him he had a warrant, at which point the defendant ran inside the residence and locked the door. The police used a battering ram to gain entry into the home.

Upon entering the home the officers heard a toilet flushing. The officers also found rocks of crack cocaine, assorted pills, digital scales and plastic bags.

A cell phone belonging to the defendant rang numerous times while the search was being conducted. A police officer answered the phone and pretended to be the defendant's girlfriend. A male caller stated "he was looking for one," which the officer understood to be one rock of crack cocaine. The caller stated he would be arriving a few moments later to make the purchase. And a few minutes later a person arrived and attempted to purchase crack cocaine at the back door.

The State offered the police officer's testimony regarding the cell phone conversation. The defendant objected to the testimony on the basis that it was hearsay. The State argued that the testimony was admissible as a verbal act. The court agreed and allowed the testimony. The Appellate Court affirmed.

REASONING:

The Appellate Court explained:

> A verbal act is an out-of-court statement that causes certain legal consequences, or, stated differently, it is an utterance to which the

> law attaches duties and liabilities . . . [and] is admissible nonhearsay because it is not being offered for the truth of the facts contained therein." (Internal quotation marks omitted.) State v. Perkins, 271 Conn. 218, 255, 856 A.2d 917 (2004).

126 Conn. App. at 658 n. 2.

The State was offering the evidence to prove that the caller was seeking to purchase narcotics from the defendant. The court held this to be a verbal act.

§ 8-3(1) STATEMENT OF PARTY'S EMPLOYEE NOT AUTOMATICALLY STATEMENT OF PARTY – FRIENDS OF ANIMALS, INC. V. UNITED ILLUMINATING COMPANY, 124 Conn. App. 823 (2011) (Robinson, J.); Trial Judge: DeMayo.

RULE: A statement of an employee of a party is not admissible as that party's statement unless: (A) the employee made the statement in a representative capacity; (B) the party has adopted or approved the employee's statement; or (C) the employee was authorized to make a statement concerning the subject.

FACTS: Friends of Animals ("FoA") brought suit against United Illuminating ("UI") seeking to halt UI from gassing, killing or capturing monk parakeets.

During FoA's case in chief, FoA offered in evidence the deposition testimony of various employees of UI. FoA claimed that the testimony of the employees was admissible pursuant to CCE §§8-3 1(A) and (C); and Conn. Pract. Book §13-31(a)(3). The trial court refused to allow the depositions in evidence. The Appellate Court affirmed.

REASONING:

In regard to CCE §8-3(1), there was no showing by the plaintiff that (1) the employee deposition testimony was given in a representative capacity or (2) that UI authorized these employees to make statements concerning the monk parakeets. "The speaker must have speaking authority concerning the subject upon which he or she speaks; a mere agency relationship – e.g. employer-employee—without more, is not enough to confer speaking authority." CCE, §8-3(1), Commentary.

In regard to Practice Book §13-31(a)(3), there was no showing that the employees in question had been designated by UI to speak for it pursuant to Pract. Bk. § 13-27(h).

COMMENT:

The Connecticut rule requiring that the principal authorize the agent to speak for it before the statement can be attributed to the principal and thus admissible is antiquated and contrary to the overwhelming majority of jurisdictions.

The test under the federal rule and in most states is whether the statement was made by the agent acting in the scope of his employment. Attempts to amend the CCE to adopt the modern rule have so far been unsuccessful. The CCE Oversight Committee recommended to the Judicial Rules Committee in 2006 that the § 8-3(1) be amended to allow statements by a party's agent concerning a matter within the scope of the agency. However, a Supreme Court case, Wade v. Yale University, 129 Conn. 615 (1943), holds that an employee

must be authorized by the employer to make a statement before it is admissible against the employer. Because the Supreme Court has the final say on rules of evidence, State v. DeJesus, 288 Conn. 418 (2008), the Judicial Rules Committee refused to approve a change in the CCE which directly conflicts with a Supreme Court precedent. The proposed change died in the Rules Committee.

PRACTICE TIP:

When you notice the deposition of a corporate party-opponent pursuant to Practice Book §13-27(h) and you request that the employer designate a person to address one or more issues in question, the deposition of that employee will be admissible against the employer both under the Practice Book rule and CCE §8-3(1).

§ 8-3(2) SPONTANEOUS UTTERANCE – "STOP HITTING HIM" – STATE V. SERRANO, 123 Conn. App. 530 (2010), *cert. denied,* 300 Conn. 909 (2011) (Lavine, Beach and Lavery, Js.); Trial Judge: Levin.

RULE: Statement made by the defendant's roommate in an attempt to stop an assault on the victim comfortably fits within the spontaneous utterance exception to the hearsay rule.

FACTS: The defendant and the victim were arguing in a yard shared by several homes. The defendant then started to beat the victim. Two witnesses overheard the defendant's roommate yelling "stop hitting him, you don't have to do that, don't hit him, you're going to kill him." 123 Conn. App. at 532.

The State offered the roommate's statement as a spontaneous utterance. The trial court allowed the statement. The Appellate Court affirmed.

REASONING:

> The Appellate Court held:
>
> Section 8-3 (2) of the Connecticut Code of Evidence provides that a spontaneous utterance is '[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.' A hearsay statement is admissible as a spontaneous utterance when '(1) the declaration follows a startling occurrence, (2) the declaration refers to that occurrence, (3) the declarant observed the occurrence, and (4) the declaration is made under circumstances that negate the opportunity for deliberation and fabrication by the declarant.' State v. Kelly, supra, 256 Conn. 41-42; *see also* State v. Slater, supra, 285 Conn. 179.
>
> Here, all four requirements were satisfied.

123 Conn. App. at 537.

§ 8-3(2) 911 CALLS AS SPONTANEOUS UTTERANCES – STATE V. SILVER, 126 Conn. App. 522, *cert. denied,* 300 Conn. 931 (2011) (Harper, Alvord and Peters, Js.); Trial Judge: Devlin.

RULE: Recorded 911 calls to the police can qualify under the spontaneous utterance exception to the hearsay rule.

FACTS: The defendant and victim had a physical altercation, after which the defendant got into the victim's car and used the car to crush him against a chain link fence. The defendant then took off in the car.

The first witness, Grass, saw the car hit the victim. When the defendant took off in the car, Grass got into his car and began following the defendant. He called 911 and told the dispatcher that he was following the defendant. He gave his location and a description of the vehicle: a gold colored Mercury Sable. Grass lost the defendant when the defendant ran a red light.

The second witness, Gosselin, was a tow truck driver who heard the police radio broadcast of the description of the vehicle. He saw a gold colored Mercury Sable driving erratically and at high speed. He called 911 to alert the police. He remained on the telephone with the dispatcher as he followed the Mercury. The defendant crashed the car and was fleeing on foot when he was apprehended by police.

At trial, the State offered the 911 recordings from the two witnesses. The defendant objected on the basis of hearsay. The trial court ruled that the recordings were admissible under the spontaneous utterance exception to the hearsay rule. The Appellate Court affirmed.

REASONING:

The defendant argued that neither of the witnesses was speaking spontaneously, that by their very decisions to call the police, they were manifesting their ability to use reason and judgment, and had the opportunity for deliberation. The Appellate Court held that evidence of reasoned thinking does not mean disqualify statement as a spontaneous utterance:

> The ultimate question is whether the utterance was spontaneous and unreflective and made under such circumstances as to indicate absence of opportunity for contrivance and misrepresentation. (Internal quotation marks omitted.) State v. Torelli, supra, 103 Conn. App. 662. Unlike Dollinger [State v. Dollinger, 20 Conn. App. 530 (1990)], the record amply supports the court's ruling that, in this case, the statements on the 911 recordings bore sufficient indicia of reliability in light of their contemporaneous descriptions of events as they unfolded and the absence of any opportunity for the declarants to fabricate their statements. Furthermore, the court expressly noted and relied on the emotional tone of voice manifested by the recordings.
>
> In light of the totality of the evidence of record, the court did not abuse its discretion in concluding that the 911 statements by Grass and Gosselin that were recorded by the police and presented by the state were admissible as spontaneous utterances. They were thus admissible under the provisions of § 8-3 (2) of the Connecticut Code of Evidence.

126 Conn. App. at 537.

§ 8-3(2) REASONABLE INFERENCE OF DECLARANT'S PERSONAL KNOWLEDGE SATISIFIES OBSERVATION REQUIREMENT OF SPONTANEOUS UTTERANCE EXCEPTION – STATE V. LANGLEY, 128 Conn. App. 213 (2011) (DiPentima, C. J.; and Harper and Beach, Js.); Trial Judge: Comerford.

RULE: One of the requirements of the spontaneous utterance exception to the hearsay rule is that the declarant observed the occurrence. It is not necessary to establish conclusively such personal observation. Rather, the question is whether a reasonable inference may be drawn that the declarant had personal knowledge of the facts that are the subject of the statement.

FACTS: Mary Langley discovered that her husband, James Langley, was having an extramarital affair. A little before 5:00 a.m. on December 14, 2006, James awoke and saw Mary pouring a liquid on him. (The liquid turned out to be acetone, a highly flammable solvent.) She then lit him on fire.

Mary's niece and nephew lived directly next door. They were awakened by the sound of James calling for help. When they entered his residence, James was in the kitchen patting his stomach with a towel. They observed that the skin over his stomach appeared to be "hanging" off, as if it had "melted."

Mary's niece testified that James said he saw Mary pour liquid on him and light him on fire. Mary's nephew said that James said that "when he woke up he was on fire." James died from his burns.

The State offered the statements James made to his niece and nephew as spontaneous utterance exceptions to the hearsay rule. The defendant objected on the basis the statement to the nephew indicated that James did not actually observe the occurrence. The statement to the nephew was that "when he woke

up he was on fire," necessarily meaning that he did not actually see his wife pour the liquid on him or light him on fire. The defendant argued that because the spontaneous utterance rule requires that the statement of the declarant be based on personal observation, the exception did not apply.

The trial court allowed James's statements into evidence. The Appellate Court affirmed.

REASONING:

The Appellate Court explained its holding as follows:

> We decline to interpret Langley's statements that 'he was sleeping' moments before the defendant poured accelerant on his body and lit him on fire as an absolute bar to the possibility that he did not have 'an opportunity to observe' the defendant's conduct. State v. Nelson, supra, 105 Conn. App. 405. To the contrary, we agree with the state's position that Langley's description of what transpired reasonably can be interpreted to mean that as he was in the process of waking up, he observed the defendant 'pour... liquid on him and light him on fire.' To conclude that Langley could not possibly observe the defendant's conduct in this case would not only be disingenuous, but would also require us to blink at the reality of the stressful circumstances giving rise to Langley's statements. Such is not the test for admissibility pursuant to the excited utterance exception to the hearsay rule. 'Rather, the question for the trial court is whether a *reasonable inference* may be drawn that the declarant had personal knowledge of the facts that are the subject of his or her statement.'

128 Conn. App. at 228-29.

§ 8-3(2) DEAD MAN'S STATUTE APPLIES IN FEDERAL COURT – LARSEN v. SUNRISE SENIOR LIVING MANAGEMENT, INC., USDC, District of Connecticut, Docket Number 7:08-cv-455 (WWE), (October 20, 2011) (Eginton, J).

FACTS: Connecticut Dead Man's Statute, admitting statements of the decedent, held to be a rule of substantive law. Therefore, such statements are admissible in federal court in diversity cases, even though they are not admissible under the Federal Rules of Evidence.

FACTS: Fall down case in which the plaintiff sought to admit a statement of the decedent regarding the passage of time between her fall at a nursing home and the response by defendant's employees. The defendant filed a motion in limine to preclude the statement. The trial court denied the motion and ruled that the statement would be admitted.

REASONING:

> The trial court explained its reasoning as follows:
>
> > The Dead Man's Statute is a rule of substantive law and not purely an evidentiary rule. As such, it applies in diversity cases such as this one. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). See also Rosenfeld v. Basquiat, 78 F.3d 84, 88 (2d Cir. 1996) (addressing New York's Dead Man's Statute); Estate of Genecin v. Genecin, 363 F. Supp. 2d 306, 313 (D. Conn. 2005) (addressing Maryland Dead Man's Statute).
>
> Larsen at 2.

Authentication

§ 9-1 (a) AUTHENTICATING AUTHOR OF MESSAGES SENT ON FACEBOOK- STATE V. ELECK, 130 Conn. App. 632 (2011) (Bishop, Beach and Sullivan, Js.); Trial Judge: White.

RULE: Proof that a message was sent from a person's Facebook account is not sufficient to prove the Facebook account holder is the author of the message, which may have been sent by a third party.

FACTS: Defendant was accused of stabbing two men during a fight at a party. One of the guests at the party was Judway. Judway testified that before the fight defendant told her, "If anyone messes with me tonight, I am going to stab them." 130 Conn. App. at 635.

During cross-examination of Judway, defense counsel sought to impeach her credibility by asking her whether she had communicated with the defendant by computer since the incident. She said she had not. Defense counsel then showed Judway a print-out showing an exchange of electronic messages between her Facebook account and the defendant's. Judway denied sending the messages to defendant and testified someone had hacked into her Facebook account. Defendant then offered into evidence the messages purportedly from Judway. The State objected on the ground that the authorship of the messages had not been sufficiently authenticated. The trial court sustained the objection. The Appellate Court affirmed.

REASONING:

The Appellate Court explained:

> The precise issue raised here is whether the defendant adequately authenticated the authorship of certain messages generated via

> Judway's Facebook account. The need for authentication arises in this context because an electronic communication, such as Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender. This is true even with respect to accounts requiring a unique user name and password, given that account holders frequently remain logged in to their accounts while leaving their computers and cell phones unattended. Additionally, passwords and website security are subject to compromise by hackers. Consequently, proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship. See, e.g., Commonwealth v. Williams, 456 Mass. 857, 869, 926 N.E.2d 1162 (2010) (admission of MySpace message was error where proponent advanced no circumstantial evidence as to security of MySpace page or purported author's exclusive access)."

130 Conn. App. at 638-39 (footnotes omitted).

Although the Appellate Court held that the defendant in this case did not offer sufficient evidence to authenticate the message in question, it provided a detailed road map on how one might authenticate social media such as e-mail and text messaging in the future. Judge Bishop's opinion provides an exhaustive review of the case law from other states and federal courts on this issue.

COMMENT:

Under CCE §9-1, "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." Although Judway claimed her account had been hacked, and the Appellate Court speculated that she might have signed in and left her computer available for others to use, it seems one could argue persuasively that there was "evidence sufficient to support a finding" she made the statements.

Expert Disclosures

PLAINTIFF'S EXPERT PERMITTED TO OFFER OPINION NOT CONTAINED IN DISCLOSURE TO REBUT DEFENSE EXPERT'S OPINION - KLEIN V. NORWALK HOSPITAL, 299 Conn. 241 (2010) (Katz, Palmer, McLachlan, Eveleigh and Vertefeuille, Js.); Trial Judge: Tobin.

RULE: Where plaintiff's expert has opined that the defendant's negligence caused the plaintiff's injury and defendant's expert has opined that plaintiff's injury was caused by a totally unrelated condition, plaintiff's expert is permitted to testify that the unrelated condition is not the cause of the plaintiff's injury, despite plaintiff's failure to specifically set forth that opinion in the expert disclosure.

FACTS: See § 7-2 above. Plaintiff's expert, Dr. Gevirtz, was disclosed before defendant's expert. The disclosure stated that Gevirtz "will testify that the placement of the intravenous line caused the plaintiff's nerve injury." 299 Conn. at 251.

The defendant retained an expert who informed defense counsel before Gevirtz's deposition that, in his opinion, the plaintiff's injury was caused not by the placement of the intravenous line, but by an unrelated condition, Parsonage Turner Syndrome.

During the deposition of Gevirtz, defense counsel asked questions of a general nature about whether there were other potential causes for the impairment of the plaintiff's nerve, but carefully avoided asking whether the injury could have been caused by Parsonage Turner Syndrome.

After the deposition of plaintiff's expert, defendant disclosed its already-retained expert and his opinion that the cause of the plaintiff's injury was

Parsonage Turner Syndrome. Plaintiff did not file a supplemental disclosure specifically stating Gevirtz would rebut defendant's expert and testify that the cause of plaintiff's nerve injury was not Parsonage Turner Syndrome.

At trial, the plaintiff sought to elicit from Gevirtz the opinion that the plaintiff's nerve palsy was not caused by Parsonage Turner Syndrome. The defendant objected on the basis that it was not contained in the expert disclosure. The trial court precluded the testimony. The Supreme Court found this to be error.

REASONING:

The Supreme Court explained its reasoning:

> In the present case, Gevirtz was permitted to testify that, in his expert opinion, the plaintiff's alleged injury 'can only happen as a result of negligence as a result of deviating from the standard of care.' To the extent that this conclusion was the result of Gevirtz' differential diagnosis, it necessarily was based on his consideration and elimination of the other possible causes for the alleged injury, including the theory of causation advanced by the defendant. This court never has articulated a requirement that a disclosure include an exhaustive list of each specific topic or condition to which an expert might testify as the basis for his diagnosis; disclosing a categorical topic such as 'causation' generally is sufficient to indicate that testimony may encompass those issues, both considered and eliminated, necessary to explain conclusions within that category.
>
> On a more fundamental level, a disclosure generally complies with the requirements of Practice Book § 13-4 (4) so long as it adequately alerts the defendant to the basic nature of the plaintiff's case.

299 Conn. at 252-53 (emphasis added).

Applying this analysis, the Court explained:

> There is no question, considering this evidence, that the defendant was apprised adequately of the details of the plaintiff's claim, the

> general substance of Gevirtz' testimony that would be offered to attempt to prove that claim, and his rejection of any neurological diseases, including Parsonage Turner Syndrome, as a cause of the plaintiff's alleged injury. There was, accordingly, no need for the plaintiff to file a supplemental disclosure. Accordingly, the trial court improperly precluded the plaintiff from offering Gevirtz' testimony as to his exclusion of Parsonage Turner Syndrome as a possible cause of the plaintiff's alleged injury.

Id. at 254.

Final Argument

> MISSING WITNESS ARGUMENT: EXPANDED DEFINITION OF "AVAILABILITY" – DAVIES V. JEZEK, 123 Conn. App. 555 (2010) (DiPentima, C. J. and Harper and Mihalakos, Js.); Trial Judge: Peck.

RULE: In order to be allowed to make the missing witness argument, a party must prove that the witness is available. In this case, a former plaintiff was held to be available, despite the fact that she lived in California and counsel had informed the court that she did not want to travel to Connecticut for the trial because she wanted to stay in California with her husband who had cancer.

FACTS: Legal malpractice case against a lawyer who handled a closing for the plaintiffs, Ralph and Lauren Davies. The defendant was Scott Jezek. The Davies were going to buy a piece of property in East Haddam that had a house on it. The seller was simultaneously selling the property next door, which had a package store on it.

A few days before the closing, Mr. Jezek informed the Davies that there was a potential boundary dispute involving the package store property next door. He recommended that the closing be postponed and that a survey be obtained.

The Davies told Mr. Jezek that they had discussed the issue with the purchaser of the package store property and were satisfied that any boundary dispute would only be a matter of a few inches and that they would prefer to deal with it after the closing. They instructed him to go forward with the closing.

Mr. Jezek suggested that they enter into a boundary dispute agreement with the buyer of the package store property. The Davies accepted that recommendation and entered into a boundary dispute agreement with the purchaser of the package store property. The closing went ahead.

It turned out that the boundary dispute was not a matter of a few inches. In fact, the Davies owned a large portion of the package store property. Now the boundary dispute agreement worked against them.

The Davies sued Jezek, claiming he should not have gone ahead with the closing without the survey.

Four days before trial, plaintiffs' counsel informed the court that he had learned the day before that Mr. Davies had cancer. The Davies now lived in California. Counsel represented that Mr. Davies could not travel from California to Connecticut and Mrs. Davies did not want to leave her husband. He requested that Mr. and Mrs. Davies be permitted to testify by video link or that there be a continuance.

The defendant objected to the continuance on the ground that Mr. Davies had known for at least four months that he had cancer. The defendant objected to Mrs. Davies testifying by video on the ground that she was available and could travel to Connecticut.

The court denied the motion for continuance. The court allowed Mr. Davies to testify by video link, but not Mrs. Davies. Mrs. Davies then withdrew as a party plaintiff and did not testify.

The defendant's counsel sought permission from the trial court to make the missing witness argument regarding the failure of Mrs. Davies to testify. The trial court allowed the argument. The Appellate Court affirmed.

REASONING:

The issue on appeal was whether or not there was sufficient evidence that Mrs. Davies was "available" to testify. The Appellate Court found:

> Abundant evidence was adduced to establish that Lauren Davies was available to travel to Connecticut to testify. She (1) lived with the plaintiff, (2) previously traveled to Connecticut to visit properties on behalf of the plaintiff, (3) was not barred from traveling by a medical order or condition and (4) was a plaintiff in the case until the first day of trial and would have been required to testify. Moreover, aside from argument by the plaintiff's attorney, Lauren Davies never presented evidence to the court as to why she could not travel to testify. According to the plaintiff, much of his knowledge of the transaction came from Lauren Davies. As the court noted in its memorandum of decision on the plaintiff's motion to set aside the verdict, 'Lauren Davies dealt primarily with [the defendant] about matters leading up to [the transaction], and would have more relevant and material knowledge about the closing transaction....' Because she was an essential witness, it was natural for the jury to expect her to testify so that it could 'judge her testimony and assess her credibility in person....' Rather than be forced to testify in person, Lauren Davies chose to withdraw from the case, and the plaintiff chose not to call his wife as a witness. Therefore, the court properly permitted the defendant to present in closing argument that the jury could draw an adverse inference from the plaintiff's decision not to call his wife as a witness.

123 Conn. App. at 562-63.

COMMENT:

Davies v. Jezek was wrongly decided, ignoring half a century of case law defining "availability" in the context of the missing witness argument. See Raybeck v. Danbury Orthopedic Assoc., 72 Conn. App. 359 (2002). None of the reasons set forth by the court above (she lived with her plaintiff husband; she had previously traveled to Connecticut; she was not barred from traveling to Connecticut by a medical order or condition; she was a former plaintiff) constitutes "availability" under that case law.

Disturbingly, the Appellate Court seemed to reverse the burden of proof, noting that Mrs. Davis did not present proof "as to why she could not travel to testify." It was not her burden to prove that she was unavailable. It was the defendant's burden to prove she was available. Hopefully, this case will be confined to its facts and only apply to former plaintiffs who are suing their lawyers.

ARGUING INFERENCE OF SPEED FROM PHYSICAL DAMAGE - STATE V. WEAVING, 125 Conn. App. 41 (2010), *cert. denied*, 299 Conn. 929 (2011) (Gruendel, Alvord and Peters, Js.); Trial Judge: Alander.

RULE: If there is sufficient corroborating evidence, counsel may argue to the jury that it can infer speed from physical damage to a car, a bicycle and the decedent's body.

FACTS: Shortly before 7 p.m. on April 27, 2007, the defendant was driving south on Route 69 in Prospect, a residential road with one northbound and one southbound lane. It was a foggy evening, and the road was damp. The posted speed limit was 45 miles per hour.

According to the State expert, the defendant was travelling at high speed when he crested a small hill. He suddenly came upon another car traveling in his lane at or below the speed limit. He was approaching a passing zone.

He crossed over into the northbound lane to pass, when he saw a young boy standing on the pedals of a bicycle near the center of the northbound lane. The boy was dressed in dark clothing. The bicycle he was riding was black and there was no head lamp on the bicycle. The defendant collided with the bicycle, and the boy was killed.

The defendant was charged with manslaughter. The State's expert opined, based on accident reconstruction and specifically on the skid marks the defendant left on the roadway, that the defendant was traveling at least 83 miles per hour when he crested the hill. The opinion was not based upon the damage to the car, the damage to the bicycle or injuries inflicted on the boy's body.

During final argument the State's attorney asked the jury to infer from the damage to the car, the bicycle and the body, that the defendant was speeding. On appeal, the defendant argued that the prosecutor's argument constituted prosecutorial impropriety and deprived him of a fair trial. The Appellate Court disagreed, and found the argument to be proper.

REASONING:

First, the Appellate Court addressed the defendant's argument that it was improper for the State's attorney to ask the jury to infer speed from the damage to the bicycle:

> We disagree with the defendant's contention that this argument invited speculation on the part of the jury. . . . In addition to viewing

> the victim's bicycle, the prosecutor properly reminded the jury to consider other physical and testimonial evidence, including expert testimony, that supported a reasonable inference that the defendant was speeding. For similar reasons, we reject the defendant's contention that expert testimony was needed to corroborate the inference that the extensive damage to the bicycle was caused by the speed with which the defendant was operating his vehicle.

125 Conn. App. at 48.

Next, the Appellate Court stated;

> In the next claim of prosecutorial impropriety, also challenging a statement made during the state's initial closing argument, the defendant criticizes the prosecutor's references to the extensive physical injuries suffered by the victim. The defendant maintains that it was improper for the state to argue that the medical evidence demonstrated that the defendant was 'going in excess of 80 miles per hour' at the time that he struck the victim. Again, we are unpersuaded.
>
> During the trial, the treating emergency room physician testified in detail about the extensive injuries suffered by the victim on the evening of April 27, 2007. The prosecutor's statements merely suggested inferences that "the jury could have drawn entirely on its own." State v. Stevenson, 269 Conn. 563, 585, 849 A.2d 626 (2004). At no time did the prosecutor refer to facts that were not in evidence to bolster his argument, nor did the prosecutor imply that "the state had more evidence than it actually did...." Thus, the state's references to the victim's injuries as probative of the defendant's excessive speed at the moment of the collision did not amount to prosecutorial impropriety.
>
> Finally, the defendant challenges the prosecutor's summary statement, made during rebuttal, that the state's evidence about the victim's injuries, the victim's bicycle, and the defendant's car, permitted the jury to infer that the defendant was driving 83 miles per hour at the time of the collision. Again, we are unpersuaded.

Id. at 48-9.

Sufficiency of Evidence

REAR-END COLLISION NOT SUFFICIENT TO SUPPORT INFERENCE OF NEGLIGENCE — RAWLS V. PROGRESSIVE NORTHERN INSURANCE COMPANY, 130 Conn. App. 502 (2011) (Beach, Alvord and Schaller, Js.); Trial Judge – Stodolink.

RULE: In Connecticut, the fact that the defendant hit the plaintiff from behind does not establish negligence. In order to establish negligence, the plaintiff must introduce evidence of negligence or eliminate non-negligent causes.

FACTS: Rear-end collision in Bridgeport. Plaintiff stopped at a traffic light behind another vehicle. Plaintiff estimated that he was stopped for approximately 15 seconds before the vehicle driven by the tortfeasor hit the back of his car forcing his vehicle into the car in front of him. Plaintiff testified that he did not see the vehicle before it hit his car. Plaintiff introduced no other evidence regarding the tortfeasor's negligence.

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

REASONING:

The Appellate Court explained:

> In an automobile accident case, [a] plaintiff cannot merely prove that a collision occurred and then call upon the defendant operator to come forward with evidence that the collision was not a proximate consequence of negligence on his part. Nor is it sufficient for a plaintiff to prove that a defendant operator might have been negligent in a manner which would, or might have been, a proximate cause of the collision. A plaintiff must remove the

issues of negligence and proximate cause from the field of conjecture and speculation. (Internal quotation marks omitted.) Schweiger v. Amica Mutual Ins. Co., 110 Conn. App. 736, 741, 955 A.2d 1241, *cert. denied*, 289 Conn. 955, 961 A.2d 421 (2008), citing O'Brien v. Cordova, 171 Conn. 303, 306, 370 A.2d 933 (1976) ("[c]ommon experience shows that motor vehicle accidents are not all due to driver negligence").

In Burton v. Stamford, supra, 115 Conn. App. 68-88, this court discussed in detail the relevant case law. Therein, this court found significant the fact there was an eyewitness to the collision who testified to the circumstances from which the accident arose and that two officers testified, one of whom conducted an accident reconstruction that included evidence of the physical factors contributing to the accident. Id. at 81-84. Thus, this court concluded that Burton was controlled by Terminal Taxi Co. v. Flynn, 156 Conn. 313, 317, 240 A.2d 881 (1968), in which our Supreme Court found that there was sufficient evidence of negligence when the plaintiff was struck from behind by the defendant's car and the plaintiff proffered testimony as to what he had seen immediately before the accident occurred and evidence was presented as to other physical facts reflected in the police officer's accident report. Likewise, in Hicks v. State, 287 Conn. 421, 437, 948 A.2d 982 (2008), our Supreme Court noted the significance of an eyewitness who testified as to the causation of the accident.

In contrast, the facts of the present case more closely conform to those of Schweiger v. Amica Mutual Ins. Co., supra, 110 Conn. App. 736, in which this court upheld the trial court's granting of a motion for a directed verdict because the plaintiff "introduced no evidence beyond the fact that her vehicle was struck by [the alleged tortfeasor's] vehicle, perhaps with some force. The fact that there was a collision by itself is insufficient to establish legal cause.... No one testified as to the actual circumstances that caused [the alleged tortfeasor's] vehicle to strike the plaintiff's vehicle, and the plaintiff testified that she did not see [the alleged tortfeasor's] vehicle strike her vehicle." (Citation omitted; internal quotation marks omitted.) Id., 741-42. Like Schweiger, the present case is controlled by Winn v. Posades, 281 Conn. 50, 63, 913 A.2d 407 (2007), in which our Supreme Court held that, even where there was evidence that a collision had occurred and that the defendant was negligent or reckless in operating his vehicle at an excessive rate of speed, there was no evidence of causation.

130 Conn. App. at 507-09 (footnote omitted).

MALFUNCTION THEORY OF PRODUCT LIABILITY RECOGNIZED BY CONNECTICUT SUPREME COURT – METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY v. DEERE AND COMPANY – 302 Conn. 123 (2011) (Rogers, C.J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.); Trial Judge: Bentivegna.

RULE: In order to successfully prosecute a case under the malfunction theory of product liability the plaintiff must present evidence establishing that: (1) the incident that caused the injury was of the kind that ordinarily does not occur in the absence of a product defect; and (2) that any defect most likely existed at the time the product left the manufacturer's control and was not the result of other reasonably possible causes not attributable to the manufacturer.

FACTS: The homeowners purchased a John Deere tractor in 1998, and had no problems with it until 2002. In November 2002, they took the tractor back to the dealer for a tune-up. The next time they tried to use the tractor, in the spring of 2003, the engine ran unevenly, causing the tractor to kick, sputter, and backfire. They took the tractor back to the dealer. The next time they tried to use the tractor it ran better, but the problems returned. They continued to use the tractor, despite the problems, up to and including July 13, 2003.

On July 13, 2003, the homeowner attempted to mow the lawn with the tractor. However, the engine was running so roughly that she was unable to finish the job. At approximately 10 a.m., she parked the tractor in the garage. At about 11:30 a.m. she went into the garage to get her car. She noticed a smell she likened to the smell of anti-freeze. She inspected the garage, including the tractor, but noticed nothing unusual. She then drove from her house and closed the garage door.

At approximately 1:00 p.m., witnesses reported a fire at the residence. No one was injured, but the fire damaged or destroyed a substantial portion of the residence and its contents. The investigation determined that the fire originated in the portion of the garage where the tractor was parked.

The homeowners made a claim under their homeowners' policy with Metropolitan Insurance. Metropolitan hired investigators to determine the cause of the fire. The investigators concluded that the tractor's electrical system was the cause. However, because most of the electrical system was destroyed in the fire, the investigators could not conclude what in the electrical system caused the fire.

The defendant, Deere and Company, also hired an investigator, who concluded that the fire did not originate in the tractor, but on a work bench nearby.

Metropolitan paid out on its policy with the homeowners and brought a subrogation case against Deere and Company. Because the plaintiff was unable to identify the specific defect in the electrical system, the plaintiff relied on the malfunction theory of product liability to make its case. There was a plaintiff's verdict of $749,642.69. The Supreme Court reversed.

REASONING:

The Supreme Court explained:

> Although most product liability cases are based on direct evidence of a specific product defect, there are cases in which such evidence is unavailable. For example, a product malfunction may result in an explosion, a crash or a fire that damages or destroys much, if not all, of the product's components. See, e.g. Liberty Mutual Ins. Co. v. Sears, Roebuck & Co., 35 Conn. Sup. 687, 689 406 A2d 1254

> (components of television set destroyed in fire), *cert. denied*, 177 Conn. 754, 399 A.2d 526 (1979). The product also may be lost when it has been discarded or destroyed after the incident such that the parties are no longer able to examine it. *See, e.g.* Fallon v. Matworks, 50 Conn. Sup. 207, 210, 918 A.2d 1067 (2007) (product discarded after accident but before it could be examined by experts). In such cases, the plaintiff is unable to produce direct evidence of a defect because of the loss of essential components of the product.

302 Conn. at 131-32.

> Whether a plaintiff in this state may use the malfunction theory when the product is still available for inspection but the plaintiff nevertheless is unable to produce direct evident of a specific defect is a question that we need not resolve in this appeal.

Id. at 132 n.4.

> The absence of direct evidence of a specific product defect is not, however, fatal to a plaintiff's claims, and a plaintiff, under certain circumstances, may establish a prima facie case using circumstantial evidence of a defect attributable to the manufacturer.

Id. at 132.

> "Although this court has not examined the precise contours of those circumstances in which this principle might apply, the Appellate and Superior Courts have used the 'malfunction theory' of products liability to permit a jury to infer the existence of a product defect that existed at the time of sale or distribution on the basis of circumstantial evidence alone.

Id. at 133.

> The malfunction theory of products liability permits the plaintiff to establish a prima face product liability case on the basis of circumstantial evidence when direct evidence of a defect is unavailable.... This theory is based on the same principles underlying the doctrine of res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of a specific wrongful act.

Id. at 134-5.

> Although the malfunction theory is based on the principle that the fact of an accident can support an inference of a defect, proof of an accident alone is insufficient to establish a manufacturer's liability. The fact of a product accident does not necessarily establish either the existence of a defect or that the manufacturer is responsible, both of which must be proven in product liability cases.

Id. at 135.

After the Supreme Court held for the first time that the malfunction theory of product liability is available in Connecticut, Justice Zarella went on to narrowly restrict its scope. He wrote that, when the evidence presented by the plaintiff does not remove the case from the realm of speculation, the trial court must prevent the case from reaching the jury:

> With these concerns in mind, we conclude that, when direct evidence of a specific defect is unavailable, a jury may rely on circumstantial evidence to infer that a product that malfunctioned was defective at the time it left the manufacturer's or seller's control if the plaintiff presents evidence establishing that (1) the incident that caused the plaintiff's harm was of a kind that ordinarily does not occur in the absence of a product defect, and (2) any defect most likely existed at the time the product left the manufacturer's or seller's control and was not the result of other reasonable possible causes not attributable to the manufacturer or seller. These two inferences, taken together, permit a trier of fact to link the plaintiff's injury to a product defect attributable to the manufacturer or seller. A plaintiff may establish these elements through the use of various forms of circumstantial evidence, including evidence of (1) the history and use of the particular product, (2) the manner in which the product malfunctioned, (3) similar malfunctions in similar products that may negate the possibility of other causes, (4) the age of the product in relation to its life expectancy, and (5) the most likely causes of the malfunction. If lay witnesses and common experience are not sufficient to remove the case from the realm of speculation, the plaintiff will need to present expert testimony to establish a prima facie case. See D. Owen, supra, 53 S.C. L. Rev. 880 and n.183 (citing cases in which expert testimony was required); cf. Potter v. Chicago Pneumatic Tool Co., supra, 241 Conn. 217-18.

302 Conn. at 139-41.

Applying these principles to the case at hand, the Supreme Court held the plaintiff's evidence did not support an inference that any defect in the electrical system existed when the tractor left the manufacturing facilities or at the time it was sold, principally due to the age of the tractor and the intervening acts of the dealer who "tuned up" the tractor.

TAKE THE PLAINTIFF AS YOU FIND HIM – EVIDENCE REQUIRED TO OBTAIN JURY CHARGE – RUA V. KIRBY, 125 Conn. App. 514 (2010) (*Per Curiam*); Trial Judge: Rush.

RULE: In order to obtain the "take the plaintiff as you find him" charge, the plaintiff must (1) prove a preexisting condition, (2) plead aggravation of that condition and (3) prove aggravation of that condition with expert medical evidence.

FACTS: Rear-end collision case. Plaintiff was suffering from pre-existing degenerative disc disease. He alleged in his complaint that as a result of the accident he suffered an aggravation of an asymptomatic disc condition. He also alleged in his complaint that as a result of the accident he suffered two herniated discs.

The plaintiff offered expert testimony that the two herniated discs were caused by the collision. Plaintiff did not offer expert testimony that the collision aggravated the preexisting disc disease.

Plaintiff requested a "take the plaintiff as you find him" charge. The trial court refused to give the charge. The Appellate Court affirmed.

REASONING:

The Appellate Court explained:

> Although the trial transcript reveals that the plaintiff introduced evidence of the existence of the preexisting condition, it does not reveal that the plaintiff presented any evidence that his preexisting condition was *aggravated* by the accident or that it had an *effect* on the claimed injuries that resulted from the accident. See id., 869; *see also* Rubano v. Koenen, 152 Conn. 134, 136-37, 204 A.2d 407 (1964) (preexisting injury charge appropriate when claim of aggravation of preexisting injury not raised by plaintiff but trial court heard expert testimony that plaintiff had sustained a back injury in accident 'with probable aggravation of a preexisting disc pathology at the lumbosacral level'). The plaintiff's theory at trial was that the accident had caused him to suffer two herniated discs and that the herniated disc resulted in radiculopathy. The plaintiff did not present any evidence or pursue a line of questioning that would reasonably support a finding that the preexisting condition was aggravated by the accident. In fact, the plaintiff's question with respect to the preexisting condition was intended to show that it was the accident that had caused the plaintiff's radiculopathy and not the preexisting condition. We therefore reject the plaintiff's claim that the court improperly refused to charge the jury that the defendants must "take the plaintiff as they find him" and conclude that the court acted well within its discretion when it refused to set aside the verdict.

125 Conn. App. at 518-19.

SUMMARY JUDGMENT AND EXPERT TESTIMONY – DIPIETRO V. FARMINGTON SPORTS ARENA, LLC, 123 Conn. App. 583, cert. granted, 299 Conn. 920 (2010) (Bishop, Beach and Borden, Js.); Trial Judge: Berger.

RULE: In a summary judgment proceeding, any question as to the admissibility of an expert's testimony must be resolved in favor of admissibility. Weaknesses in the foundation for the expert's opinion go to its weight, not its admissibility. If there is a conflict between an expert's affidavit and his deposition testimony, the trial court cannot resolve the conflict and disregard the affidavit.

The legal remedy for inconsistent statements by a witness is impeachment. Such a conflict is not a ground for precluding the witness' testimony.

FACTS: Action brought by soccer player, Michelle DiPietro, alleging injury caused by an unreasonably dangerous carpet surface in an indoor soccer facility. The defendant moved for summary judgment on the ground that the plaintiff had not disclosed sufficient expert testimony to carry her burden of proof.

The plaintiff disclosed as an expert Benno Nigg, a professor of biomechanics at the University of Calgary, Canada. The expert disclosure stated that Nigg would testify, among other things, that the carpet provided by the defendants "was unreasonably dangerous and unfit for use at an indoor soccer arena." 123 Conn. App. at 605 n.10.

In opposition to the defendant's motion for summary judgment, the plaintiff presented Nigg's deposition testimony and his affidavit, signed three months later. Attached to Nigg's affidavit was a copy of his report and his C.V. Nigg swore in his affidavit that "the flooring surface provided by the defendant was unreasonably dangerous." Id. at 609.

The trial court found that Nigg lacked personal knowledge of the essential facts of the case, and discounted Nigg's statement in his affidavit that the flooring was unreasonably dangerous because it conflicted with his deposition testimony "that he [was] only able to testify as to causation." Id.

Based upon these findings, the trial court concluded that the plaintiff did not have sufficient evidence to prove her case, and granted summary judgment to the defendants. The Appellate Court reversed.

REASONING:

As to the trial court's ruling that Nigg's testimony was inadmissible because he lacked personal knowledge of the essential facts of the case, Justice Borden first pointed out that, in a summary judgment proceeding, the trial court must view the evidence in the light most favorable to the nonmoving party and resolve any doubts about the question of admissibility in favor of admissibility.

Using that standard, the Appellate Court held that Nigg's evidence should have been fully considered:

> Thus, with regard to Nigg's personal knowledge, the defendants' arguments in support of the trial court's decision are unavailing. The facts that Nigg had not spoken to Michelle, her father or her coach, that he did not have her deposition or medical records when he issued his report, that he did not know of the environmental conditions at the time of the injury, or of the facility's age or its use, that he had no information regarding the frequency of injuries, or regarding the fit of her shoe, or her soccer position, all go to the weight, not the admissibility, of his testimony. Considering the range of Nigg's personal knowledge of the facts that he did have, we disagree with the trial court and the defendants that the absence of Nigg's personal familiarity with these facts rendered his opinion without substantial value. See Shelnitz v. Greenberg, 200 Conn. 58, 67, 509 A.2d 1023 (1986) ('doctor may give an [expert] opinion... without having examined or treated the patient' [internal quotation marks omitted]).

123 Conn. App. at p. 615.

> To the extent that the trial court disregarded Nigg's affidavit because it was merely inconsistent with his deposition testimony, we conclude that that is an insufficient reason for a trial court to disregard it entirely. The usual legal remedy for inconsistent statements by a witness is for the adversary to point them out for purposes of impeaching the witness' credibility; such an inconsistency is not ordinarily a ground for precluding the witness' testimony entirely. We see no reason for a different rule to prevail in a summary judgment proceeding, particularly given the fact that in such a proceeding the evidence is to be viewed in a light most favorable to the nonmoving party.

Id. at 617.

Finally, the Appellate Court rejected the defendant's invitation to adopt the federal court "sham affidavit" rule, which allows a court under some circumstances to disregard an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior sworn deposition testimony.