

## From The President's Notebook By Richard L. Newman

**M**y name is Rick Newman. I have had the great honor of serving as your president this past year. Since this is both the first and last letter in the *Forum* that I will write to you as president, it falls upon me



to both introduce myself and then to excuse myself.

This has been an active and interesting year. I am pleased to tell you that we have resumed publication of the *Forum*, which David Rosen has agreed to edit. As you can see in this issue, Kathleen Nastri and Bob Carter will be doing their usual good work on case reports and worker's compensation developments, and Bob Adelman has once again produced his comprehensive annual College of Evidence materials. We will also continue the annual updates on appellate law and include other articles on both substantive law and trial strategy. I hope that by getting back onto a regular schedule, we will be better able to serve you and inform the judiciary of verdicts and settlements.

In addition, a committee led by Mike Walsh has developed three brochures

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## CTLA Update on Evidence

### 2005 Update on Evidence

By Bob Adelman  
Adelman Hirsch & Newman, Bridgeport

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October/November/December 2005

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## Introduction

The Update on Evidence covers civil and criminal cases. However, criminal cases are covered only to the extent that the rules they announce are applicable and useful in civil cases. This 2005 Update covers cases published from September 7, 2004 through August 23, 2005.

The Table of Contents follows the format of the Connecticut Code of Evidence — to the extent possible, the cases are dealt with under the headings assigned to the ten articles in the Code of Evidence. However, the Connecticut Code of Evidence does not cover every evidentiary issue. As stated in the commentary to Connecticut Code of Evidence (“C.C.E.”) § 1-2 (b): “Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial.”

Therefore, in addition to the ten articles outlined in the Code, the Table of Contents contains two additional headings.

## I. General Provisions

§ 1-5 (b) REMAINDER OF STATEMENTS: FOOTNOTED ARTICLE IN LEARNED TREATISE DOES NOT QUALIFY — *COUSINS, ET. AL. V. NELSON, ET AL.*, 87 Conn. App. 611, (February 22, 2005); Dupont, J.; Trial Judge — Rush, J.

**RULE:** When one side marks in a learned treatise, the other side cannot use the rule of completeness to mark in another learned treatise referred to in a footnote of the admitted treatise.

**FACTS:** Mrs. Cousins had an enlarged bile duct. An enlarged common bile duct may indicate common bile duct stones. The defendant gastroenterologist performed two procedures:

an endoscopic retrograde cholangiopancreatography (ERCP) to evaluate the plaintiff’s bile duct system as well as an endoscopic sphincterectomy



(ES), which utilizes an electric current to make an opening in the muscle that encircles the duct.

*Cousins v. Nelson*, at p. 613.

As a result of these procedures, the plaintiff developed pancreatitis.

The plaintiff claimed that the enlargement or dilation of Mrs. Cousins' bile duct was not enough to justify doing the procedures. Plaintiff's expert, Jeffrey L. Ponsky of the Cleveland Clinic Foundation, opined that the procedures were not indicated because Mrs. Cousins' bile duct was not sufficiently enlarged: one should not perform the procedure unless the bile duct was at least 15 millimeters in diameter.

On cross-examination, Ponsky indicated that he was aware of nothing in the relevant medical literature stating that dilation of the common bile duct to eight millimeters is an indication that an ERCP should be performed. On cross-examination, the defendants showed Ponsky an article, published by the Cleveland Clinic Foundation 2002 and written by a surgeon there, that clearly stated that dilation of the common bile duct of eight millimeters or greater is an indication for an ERCP. Ponsky testified that he disagreed with the conclusions stated in that article. The defendants sought to introduce into evidence the relevant portions of the article, at which point the plaintiff indicated that she did not have any objection to admitting the article in its entirety into evidence. The court admitted the article as defendants' exhibit H.

*Cousins v. Nelson*, at pp. 616-617.

During cross-examination of the defendants' expert, the plaintiff sought to introduce an article from the American Journal of Gastroenterology cited in a footnote to exhibit H which contradicted exhibit H's central point. Defendants' expert refused to recognize plaintiff's article as a standard authority. Defendants' objections to the introduction of the article and its use in cross-examination of defendants expert were sustained. The Appellate Court affirmed.

REASONING: Section 1-5 (b) of the *Connecticut Code of Evidence* provides:

When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible,

that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.

No case cited by the plaintiff allows the introduction of the text of a treatise cited in a footnote of another treatise previously introduced in evidence when the witness has authored neither the admitted treatise nor the cited treatise. The cited treatise was not a clarification of, or a deviation from, a prior statement by the same author. There is no authority for extending the scope of § 1-5(b) to allow a battle of statements made in two different treatises by two different authors. Unlike every other decisional situation in which § 1-5 has been applied, the alleged "statement" here was an article written six years earlier by a person who was neither a witness nor involved in the litigation. We conclude that, on the facts of this case, § 1-5(b) is not applicable.

*Cousins v. Nelson*, at pp. 619-20.

## II. Judicial Notice

§ 2-2 (b) FUTURE RATE OF INFLATION NOT SUBJECT TO JUDICIAL NOTICE — *IZARD V. IZARD*, 88 Conn. App. 506, (April 19, 2005); Defentima, J.; Trial Judge — Caruso, J.

RULE: The court cannot take judicial notice of the effect of inflation on a party's income.

FACTS: When the parties married in 1982, the defendant earned \$757,000. In 2001, he earned \$1.3 million. The trial court made a finding that when considering the effect of inflation over that 20-year period, the defendant's income had remained "relatively the same." *Izard v. Izard*, at p. 509. The Appellate Court reversed.

REASONING: The court held that although the "mere fact of inflation" may be judicially noticed without affording the parties an opportunity to be heard, the extent of inflation and its effect on the defendant's actual income could not be judicially noticed.

## III. Relevancy

§ 4-1 CORROBORATIVE RECORD RELEVANT — *STATE OF CONNECTICUT V. ABNEY*, 88 Conn. App. 495, (April 19, 2005);

Bishop, J.; Trial Judge — Damiani, J.

RULE: A medical record which corroborates a witness's testimony is relevant despite the fact that it is not conclusive; and admissible where it is corroborative.

FACTS: Murder prosecution in which Latoya Abney was accused of stabbing her former boyfriend in April of 2000. Defendant claimed she stabbed him in self-defense. In support of her claim, the defendant testified that four years before, on October 4, 1996, when she was pregnant, her former boyfriend had struck and kicked her in the stomach and bitten her on the shoulder, and that the injuries were serious enough that she went to the emergency room. She sought to introduce the emergency room record for the October 4, 1996 hospital visit. The record reported that she had been assaulted repeatedly in the abdomen and that she had a human bite mark on her shoulder. The record did not identify her former boyfriend as the assailant. The trial judge excluded the evidence on the basis that it was not "the best evidence" of what had happened back in 1996. The Appellate Court reversed.

REASONING: The best evidence rule requires that the contents of a writing be proved with the original document and has no applicability in this situation. On appeal, the State identified two alternative grounds to justify not admitting the hospital record: first, that the record did not identify the former boyfriend as the assailant; and second, that the medical records were cumulative because the defendant had already testified as to the events reflected in the records.

The Appellate Court held that the failure of the record to identify the boyfriend as the assailant went to the weight, not the admissibility, of the record.

The Appellate Court also rejected the cumulateness claim because: "The record of the defendant's October, 1996 hospital treatment provided *independent corroboration* of her claim that McLeod previously had been violent toward her." [emphasis added.] *State v. Abney*, at p. 504.

§ 4-1 DEFENDANT DOCTOR'S EXPERIENCE RELEVANT REGARDING INFORMED CONSENT — *DUFFY, ET. AL. V. FLAGG, ET. AL.*, 88 Conn. App. 484, (April 19, 2005); Bishop, J.; Trial

Judge — Lager, J.

**RULE:** Defendant doctor's incomplete answer to patient's inquiry regarding prior experience relevant on the issue of informed consent.

**FACT:** Plaintiff consulted with her defendant obstetrician regarding having a vaginal birth after cesarean section (VBAC) with her second child. In explaining the risks associated with the VBAC procedure, the defendant indicated that the risks included uterine rupture and a small chance of death of the child. The plaintiff asked the doctor about the doctor's personal experience with VBAC and whether the doctor had had any negative outcomes. The doctor stated that one of her previous patients had suffered a uterine rupture. The doctor did not mention that in that case the infant had died. Plaintiff elected to attempt the VBAC. Her uterus ruptured and her baby died.

Defendant filed a motion in limine requesting the court to prohibit the plaintiff from introducing any evidence regarding the doctor's prior experience with VBAC deliveries. The trial court granted the motion on the basis that unless there was evidence that the defendant doctor's experience of having had one prior death created a statistically more significant risk for the patient, it was not relevant. In other words, unless the plaintiff proved that the undisclosed prior experience of the physician increased the risk of the procedure for the patient, it would not affect the informed decision of a rational patient. The Appellate Court reversed.

**REASONING:** The plaintiff argued on appeal that in granting the defendant's motion in limine the court incorrectly assumed a gate-keeping function. The Appellate Court agreed:

Contrary to the [trial] court's analysis, we do not believe that a plaintiff must first demonstrate a nexus between a physician's prior experience with an anticipated procedure and the statistical risks of the procedure before evidence of a physician's misleading and incomplete answer to a question related to that procedure can be presented to a jury. Additionally, although we have found no appellate Connecticut case directly on point, we believe that the court's narrow construction of the doctrine of informed consent is at odds with our Supreme Court's determination in Logan that jurors should have

the opportunity to determine the scope and amount of information required to support a claim based on a lack of informed consent. See *Logan v. Greenwich Hospital Assn.*, supra, 191 Conn. 292-94.

*Duffy v. Flagg*, at p. 492.

**COMMENT:** This is a particularly strong case for the plaintiff on the facts because the claim was that the defendant physician had provided an incomplete and misleading answer to a specific question. The Appellate Court was careful to point out how narrow its ruling is:

In the present case, we are not called on to decide, generally, whether a physician has an affirmative duty to disclose her prior experience with a particular procedure as part of the required underlayment for informed consent. Rather, we consider whether, in conjunction with an informed consent claim a physician's failure to answer fully and completely a patient's direct question related to an anticipated procedure is probative of a claim that the physician did not obtain informed consent to the procedure.

*Duffy v. Flagg*, at pp. 490-91.

Nevertheless, the Court's reaffirmation that it is up to the jury to decide what the physician should disclose and that in this context the trial court should not be performing a gatekeeper function is a very positive step.

§ 4-3 FAILURE TO OBJECT PRECLUDES UNFAIR SURPRISE ARGUMENT — *COUSINS, ET AL. V. NELSON, ET AL.*, 87 Conn. App. 611, (February 22, 2005); Dupont, J.; Trial Judge — Rush, J.

**RULE:** If one fails to object to a given piece of evidence, one cannot claim unfair surprise.

**FACTS:** See Section 1-5(b) above. Defendants did not provide a copy of exhibit H to the plaintiff in advance or premark it, despite a jury trial management order requiring each party to list all exhibits which he or she intended to offer. Plaintiff argued that out of fairness the item she wanted in evidence should be admitted to balance the scales of justice. It is not clear whether this argument was made to the trial court, but the Appellate Court rejected it.

**REASONING:** The Appellate Court held that the plaintiff's failure to claim surprise and object to the introduction of defendants' exhibit was fatal to this claim. As for the defiance of the jury trial management order, the Appellate Court held:

We note that the defendants' exhibit H was not introduced by the defendants during their case, but during the plaintiff's case. Furthermore, in the civil jury trial management report, the parties reserved their rights to introduce additional exhibits depending on the evidence introduced by the other parties. The testimony of Ponsky could have been considered evidence that invoked the right of the defendants to introduce an exhibit that was not previously disclosed to the plaintiff.

In *Hackling v. Casbro Construction of Rhode Island*, supra, 67 Conn. App. 292, unlike this case, the trial court found that a disputed piece of documentary evidence should have been given to the opposing party earlier in the case. When a party has been less than candid by manufacturing its cross-examination as a vehicle to introduce a document that should have been produced earlier, in an apparent effort to surprise the opposing party and to discredit the latter's expert witness, the withholding constitutes a litigation strategy featuring surprise that is not tolerated by the courts. *Id.*, 292-93. The court in this case made no such findings, and we conclude that *Hackling* is not controlling. We do not disturb the court's exercise of discretion to exclude the article cited in the defendants' exhibit H.

*Cousins v. Nelson*, at pp. 620-21.

§ 4-3 RELEVANCY BALANCING TEST DIFFERENT IN FEDERAL COURT — *DELVECCHIO V. METRO-NORTH RAILROAD COMPANY*. Ruling and Order, Civil No. 3:03CV803 (MRK), United States District Court, D. Conn., December 9, 2004.

**RULE:** Section 4-3 of the *Connecticut Code of Evidence* provides that relevant evidence may be excluded if its probative value is outweighed by other considerations. Rule 403 of the Federal Rules of

Evidence provides that relevant evidence may be excluded only if its probative value is “substantially” outweighed by other considerations.

**FACTS:** Plaintiff was a railroad conductor flagman who injured his foot while disembarking from a Massachusetts Electric high-rail car. The plaintiff claimed that:

“. . . the Mass Electric high-rail car was unsafe because the lone sill step was 30 inches above the top of the rail and the lone handhold by the door was 16 inches in length and 16 inches from the top of the rail.” *Delvecchio v. Metro-North*, at p. 1. Plaintiff sought to introduce evidence that Metro-North’s own high-rail cars had a different and safer handhold and sill step configuration than the Mass-Electric railroad car. Defendant moved to block this evidence on the basis that proof of a safer alternative design is not proof of negligence; and that because under the law the railroad is not required to furnish its employees with the best or most perfect design, but only a reasonably safe one, the evidence posed a risk of prejudice and confusion. The District Court allowed the evidence.

#### REASONING:

Of course, relevance is only a necessary prerequisite; it is not sufficient. As Rule 403 provides, there may be other factors — such as prejudice, surprise, confusion, delay and the like — that may “substantially outweigh” an item’s probative value. Here, the Court believes that Metro-North is correct that this proposed evidence poses some risk of prejudice and confusion because a jury might be misled into thinking that Metro-North’s obligation was to provide the safest equipment possible (as evidenced by its own cars) and not just a reasonably safe workplace (a standard that Metro-North claims the Mass Electric high-rail car satisfied). However, the Court believes that any such prejudice or confusion does not “substantially” outweigh the probative value of Mr. Delvecchio’s proposed evidence.

*Delvecchio v. Metro-North*, at p. 4

4-3      **DUPLICATIVE EXPERT EVIDENCE PRECLUDED AS CUMULATIVE —**  
*GLASER, ET. AL. V. PULLMAN AND COMLEY, LLC*,

*ET. AL.*, 88 Conn. App. 615 (April 26, 2005); Dupont, J.; Trial Judge — Downey J.

**RULE:** Evidence may be precluded if its probative value is outweighed by the “needless presentation of cumulative evidence.” C.C.E., § 4-3

**FACTS:** In 1995 the plaintiffs located a piece of property in Wilton that they wished to purchase for their business. After it was discovered that there was lead contamination on the property, the plaintiffs’ lender withdrew its commitment to provide financing and the deal fell through. The plaintiffs claimed that the defendant law firm did not review the proposed real estate purchase and sale agreement closely enough and failed to include necessary language that time was of the essence in the deal.

Plaintiffs disclosed two expert witnesses. The disclosures indicated that both experts would testify that the defendants deviated from the standard of care in the same four specific ways. Defendants filed a motion in limine before trial to preclude the testimony of the second expert on the basis that he was not qualified and that his testimony would be cumulative of the first expert.

At trial, plaintiffs’ first expert was not available to testify and plaintiffs read to the jury his deposition transcript without objection by the defendants. When plaintiffs sought to call their second expert, defendants renewed their motion in limine regarding the expert’s qualifications and cumulativeness. The trial court precluded the second expert. The Appellate Court affirmed.

**REASONING:** It seems unlikely that if the second expert had been qualified his testimony would have been precluded solely on the ground that it was cumulative. However, the Appellate Court did not simply affirm the trial court’s decision regarding qualifications. The Appellate Court pointed out that civil litigants do not have the right to present duplicative or cumulative expert testimony. Therefore, if a judge does preclude a second expert on the ground of cumulativeness, the standard of review is abuse of discretion. The Appellate Court seemed troubled by the fact that the two expert disclosures seemed exactly the same. The Appellate Court did throw us this bone: “In precluding evidence solely because it is cumulative, however, the court should exercise care to avoid precluding evidence merely because of an

overlap with the evidence previously admitted.” *Glaser v. Pullman & Comley, LLC*, at p. 627.

**COMMENT:** Clearly, live testimony is a horse of a different color from reading deposition transcript. The trial court may have been influenced by the fact that the plaintiffs were on notice of the defendants’ claim that the second expert’s testimony was duplicative when they made the decision to read two days of deposition transcript to the jury.

#### IV. Privileges

§ 5-1      **ATTORNEY/CLIENT PRIVILEGE AND NON-EXECUTED WILL —**  
*GOULD, ET. AL. V. PANICO, ET. AL.*, 272 Conn. 315, (April 12, 2005); Katz, J.; Trial Judge — Silbert, J.

**RULE:** The exception to the attorney/client privilege that allows communications between a decedent and the attorney who drafted an executed will to be disclosed does not apply if no will is executed.

**FACTS:** In 1993 decedent’s law firm provided legal advice to the decedent about a will and estate plan. These consultations resulted in an execution of a will by the decedent in 1993.

On October 7, 2002 the decedent consulted again with an associate of the same law firm, but no will was prepared or executed.

On October 22, 2002 the decedent executed a will drafted by a New York lawyer not affiliated with the original law firm.

The decedent died a year later, on October 31, 2003. The law firm was subpoenaed to testify and disclose its files regarding its consultations with the decedent in October, 2002. The law firm filed a motion to quash. The Probate Court denied the motion to quash. The law firm appealed that decision to the Superior Court. The trial court ruled in the law firm’s favor. The Supreme Court affirmed.

**REASONING:** The Supreme Court refused to expand the exception, which applies only to communications leading to the execution of a will.

§ 5-1      **NO PROTECTION FOR A VIDEOTAPE SESSION —**  
*GRENIER V. CITY OF NORWALK*, Memorandum of Decision, December 16, 2004, 2004 Ct. Sup. 19141; Alander, J.



**RULE:** Presence of videographer waives the attorney/client privilege, and work product privilege fails in the face of substantial need.

**FACTS:** Videographer William Buckley participated in taking a videotape statement from the plaintiff's decedent. Plaintiff intends to introduce into evidence at trial a portion of the videotaped statement. Defendant served a subpoena on the videographer to testify regarding the circumstances regarding the filming and the editing of the statement and to produce all of the unedited videotapes. Plaintiff moved for a protective order. The motion for protective order was denied.

**REASONING:**

It is undisputed that Buckley was present during the conversations between Johnson and her attorney that were captured on the unedited recording of Johnson's videotaped statement. His presence during these discussions waived the attorney-client privilege because his presence was not necessary to the consultation. *Olson v. Accessory Controls & Equipment Corp.*, 254 Conn. 145, 157 (2000). While the videographer was necessary for the videotaping of Johnson's statement, he was not necessary for Johnson to consult with her attorney. The attorney could have easily and effectively communicated with his client outside of Buckley's presence.

Production of the unedited videotape is also not barred by the work product rule. To the extent the videotape was prepared in anticipation of litigation, the defendants have established that they have substantial need for the unedited portions of the tape and they are unable without undue hardship to obtain the substantial equivalent by other means. See Practice Book § 13-3(a). Johnson is deceased and the plaintiff plans to admit into evidence at trial at least a portion of her videotaped statements. The defendants were not given the opportunity to cross-examine Johnson and cannot do so now. They are entitled to investigate the circumstances surrounding the filming and editing of the statements and obtain discovery of any relevant statements made by Johnson that the plaintiff does not intend to submit at trial.

*Grenier v. City of Norwalk*, at p. 1.

## V. Witnesses

### § 6-6 (b) LIMITATIONS ON CROSS-EXAMINATION REGARDING TAXES — STATE V. SAUCIER, 90 Conn. App. 132 (July 12, 2005); Gruendel, J.; Trial Judge — D'Addabbo, J.

**RULE:**

(b) Specific instances of conduct.

(1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness.

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

*C.C.E.*, § 6-6 (b).

**FACTS:** Defendant was charged with the kidnapping and sexual assault of a bartender with whom he was acquainted. In an attempt to impeach her credibility, defense counsel inquired as to whether she had reported tips on her federal income tax returns. The victim responded that she thought she did, but wasn't sure. Defense counsel then had asked her whether she had filed a federal income tax return in 2001. The State objected on the grounds of relevance. The trial court sustained the objection. The Appellate Court affirmed.

**REASONING:** The trial court was concerned first about whether the defense counsel had a good faith basis for the question, since the source of counsel's information that the victim may not have filed a return was the defendant. In addition, the trial court had allowed some questioning on this issue.

Despite the fact that our Supreme Court has held that questions asked of a witness regarding whether he or she has cheated on his or her income taxes may be permissible to demonstrate a lack of veracity; see *State v. Sharpe*, 195 Conn. 651, 658-59, 491 A2d 345 (1985); such questions are not permissible automatically." *State v. Morgan*, supra, 70 Conn. App. 274. Here we find no reason to second-guess the court's evidentiary ruling regarding the victim's tax return because it was made following the introduction of ample

evidence related to the victim's credibility. See *id.* Indeed, as already noted, defense counsel elicited, before the jury, testimony from the victim that she was unsure whether she had disclosed the tips on her federal income tax returns, that she had used different names throughout her lifetime, that she had smoked marijuana and consumed alcohol on the day in question and that she had smoked marijuana in the past. Accordingly, we conclude that the court did not abuse its discretion by prohibiting the defendant from cross-examining the victim about her 2000 federal income tax return.

*State v. Saucier*, at pp. 138-39.

**COMMENT:** If the victim had testified she had filed tax returns, no extrinsic evidence would have been admissible to impeach that testimony. *C.C.E.*, § 6-6(b)(2)

### § 6-6 (b) DRUG POSSESSION RELEVANT ON CREDIBILITY — STATE V. GRANT, 89 Conn. App. 635, (June 14, 2005); Bishop, J.; Trial Judge — Koletsky, J.

**RULE:** Witness' possession of crack cocaine in face of denial that he was not using or dealing drugs admissible on credibility.

**FACTS:** The victim witness was admitted to the hospital with severe stab wounds. During the course of his examination a plastic bag containing crack cocaine was found in his rectum. The defendant was identified by the victim as his assailant.

On cross-examination the victim was asked whether he had used drugs at the time of the assault and he replied that he had not. (Clearly, evidence that he was high at the time would be pertinent to his reliability as a witness.)

The defendant then asked the witness victim whether he was dealing drugs at the time of the assault. The witness victim denied that he was dealing drugs.

The defendant then asked the witness victim whether or not he was in possession of drugs at the time of the assault. The State objected on the grounds that Section 6-6(b) of the *C.C.E.* does not allow evidence of specific instances of conduct of the witness unless "probative of the witness' character for untruthfulness." The trial court sustained the objection.



The Appellate Court found this to be error.

**REASONING:** On appeal the defendant first argued that the victim witness's possession of drugs allowed the jury to infer that he was using drugs at the time. The Appellate Court rejected this argument. "The mere possession of a controlled substance does not constitute an adequate basis for a fact finder to conclude that one's perception has been altered." *State v. Grant*, at p. 648. The Appellate Court agreed with the defendant's second argument, that the victim witness's possession of crack cocaine was relevant to the victim witness' credibility, after he had testified that he was neither using or dealing drugs at the time. The error was held to be harmless.

§ 6-9 (a) **INADMISSIBLE AUDIO-TAPE CAN BE USED TO REFRESH RECOLLECTION — STATE V. LAROCQUE**, 90 Conn. App. 156, (July 12, 2005); Lavery, D., J.; Trial Judge — Klaczak, J.

**RULE:** "Any object or writing may be used by a witness to refresh the witness' memory while testifying." (Emphasis added.) C.C.E., § 6-9(a).

**FACTS:**

Pursuant to General Statutes § 51-72, a Probate Court may authorize a stenographer to record the proceedings if both parties agree in writing. If that occurs, the appeal to the trial court is based on the record before the Probate Court and is not a trial de novo. General Statutes § 45a-186 (a). There was no such agreement here. The Probate Court allowed the plaintiff to tape the proceeding only on counsel's assurance that the recording was to aid his note-taking and would not be used for another purpose. As stated by the trial court, "I do not think that the tape recording has properly been authenticated, and I'm going to sustain the objection to its introduction. I think, in order to do this, the provision that you hire a recorder or a stenographer and have it recorded, properly authenticated, is the way to introduce these things. And I don't think you can take a private tape recorder in and expect it to be introduced into evidence. There are too many variables involved in that kind of proceeding.

I'll sustain the objection.

*Larocque v. O'Connor*, at p. 163-64.

After failing to get an audiotape of the probate court hearing admitted in evidence, the plaintiff sought to use the recording to refresh a witness' recollection. The trial court refused to allow the plaintiff to use the audiotape recording for any purpose. The Appellate Court held that this was error.

**REASONING:**

"The object or writing need not be admissible because the witness will testify from his . . . refreshed recollection, not from the object or writing that was used to refresh his . . . recollection." *Id.* 6-9 (a) commentary. The court should have allowed the tape to be played to the witness in an attempt to refresh her recollection of her prior testimony. The plaintiff, however, has failed to show that this impropriety caused her substantial prejudice or to suffer an injustice.

*Larocque v. O'Connor*, at p. 164.

§ 6-10 (c) **EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT MUST BE SHOWN TO DECLARANT — STATE V. SANDERS**, 86 Conn. App. 757, (January 4, 2005); DiPentima, J.; Trial Judge — Holden, J.

**RULE:**

If a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court. If a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, except in the discretion of the court.

C.C.E., § 6-10 (c).

One should confront a witness with a prior inconsistent statement. If the witness admits to making the statement, extrinsic evidence of the statement is usually not admissible, but the jury has

heard the prior inconsistent statement. If one fails to confront the witness with the prior inconsistent statement, extrinsic evidence of the prior inconsistent statement is generally inadmissible and the jury will never hear it.

**FACTS:** Defendant was accused of shooting the victim witness. At trial the victim witness identified the defendant as his assailant. After the victim witness had left the witness stand, the defendant attempted to offer a nurse's note which stated: "patient is very concerned regarding his safety not knowing his assailant." *State v. Sanders*, at p. 765. The trial court did not allow the evidence. The Appellate Court affirmed.

**REASONING:** Although it is within the discretion of the trial court to allow a prior inconsistent statement into evidence even if the witness is not confronted with that statement, the clear preference is to confront the witness so that the witness has a chance to either explain or deny.

**VI. Opinions and Expert Testimony**

§ 7-1 **ATTEMPT TO ADMIT LAY OPINION AS EXPERT OPINION UNSUCCESSFUL — STATE V. DILORETO**, 88 Conn. App. 392, (April 12, 2005); McDonald, J.; Trial Judge — Espinosa, J.

**RULE:** A part-time bartender does not qualify as an expert witness on the issue of intoxication.

**FACTS:**

Shortly before 10 p.m. on March 29, 2002, as he approached the intersection of Goff Road and Bittersweet Hill Road with Prospect Street in Wethersfield, the defendant drove his pickup truck off the road, through a shallow ravine and into a hedge of arborvitae on the property of David Sturgess. The truck knocked down one of the trees. The defendant attempted to leave the scene, but his truck was caught on the broken tree trunk. While trying to free his vehicle, the defendant yelled profanities at Sturgess.

*State v. DiLoreto*, at p. 395.

Before evidence began, the defendant asked the trial judge to prohibit lay witnesses from giving an opinion on his intoxication. When Mr. Sturgess testified

that in his opinion the defendant was drunk, the defendant objected and the testimony was stricken.

The defendant testified that he had dinner at the Chowder Pot restaurant with his sister and that he left there about an hour before the accident. He called as a witness Mary Tracey, a social acquaintance, whom he had run into when he was leaving the restaurant. She testified that when she saw him, in her opinion he was not drunk. The State objected, citing the court's prior ruling as to Sturgess. The defendant argued that because Tracey had been a part-time bartender for 22 years, she had "specialized knowledge" which would allow her to testify as an expert on the issue of intoxication. The trial court did not allow the testimony. The Appellate Court affirmed.

#### REASONING:

On appeal, the defendant argues that the court should have admitted Tracey's opinion as that of either a lay witness or an expert witness. Our Supreme Court has stated that

"[t]he condition of intoxication and its common accompaniments are a matter of general knowledge . . . . [The question of intoxication] is not a matter of opinion, any more than questions of distance, size, color, weight, identity, age, and many other similar matters are." (Citations omitted; internal quotation marks omitted.) *State v. Jones*, 124 Conn. 664, 667-68; 2 A.2d 374 (1938). Under Connecticut law, "the statement that a person is intoxicated is not so much the expression of an opinion as it is the statement of a conclusion drawn from observation." *D'Amato v. Johnston*, 140 Conn. 54, 58, 97 A.2d 893 (1953).

We conclude that the defendant cannot now claim that the court improperly excluded Tracey's lay conclusion because he induced the court to exclude Sturgess' lay testimony that the defendant was intoxicated and because the defendant failed to make that claim at trial. "The term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling . . . . It is well established that a party who induces an error cannot be heard to later complain about that error . . . . [T]o allow

[a] defendant to seek reversal [after] . . . his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the state [and the trial court] with that claim on appeal." (Citations omitted; internal quotation marks omitted.) *State v. Gibson*, 270 Conn. 55, 66-67, 850 A.2d 1040 (2004). In *State v. Cruz*, 269 Conn. 97, 106, 848 A.2d 445 (2004), our Supreme Court held that review of induced, unpreserved error is not permissible under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989).

The defendant also argues that Tracey, as part-time bartender for twenty-two years, was an expert on matters of intoxication. "[T]he trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions . . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Internal quotation marks omitted) *State v. Kelly*, 256 Conn. 23, 74, 770 A.2d 908 (2001). To qualify Tracey as an expert on the matter of intoxication, the defendant was required to demonstrate that she had the "special skill or knowledge directly applicable to a matter in issue . . . that [her] skill or knowledge is not common to the average person and [that her] testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *State v. Lamme*, 19 Conn. App. 594, 603, 563 A.2d 1372 (1989). *aff'd*, 216 Conn. 172, 579 A.2d 484 (1990). After examining the record, we conclude that the defendant failed to present any evidence that Tracey had or claimed to have any specialized knowledge, training or experience not common to the average person as to judging a person's intoxication. That Tracey had observed "many" drunks in her bars as a part-time bartender does not support a finding that she had expertise beyond common knowledge. The court did not abuse its discretion in determining that Tracey did not qualify as an expert witness.

*State v. DiLoreto*, at pp. 397-99.

§ 7-2 ATTEMPT TO ADMIT  
EXPERT OPINION AS

LAY OPINION UNSUCCESSFUL — *RAUDAT V. LEARY*, 88 Conn. App. 44, (March 15, 2005); DiPentima, Jr., J.; Trial Judge — Meadow, J.

**RULE:** An opinion that is based on specialized knowledge beyond the common knowledge of the average juror is expert opinion and cannot be characterized as lay opinion.

**FACTS:** Plaintiff brought a horse from the defendant for \$2,800. Defendant had represented the horse as being "green broke." Green broke means "incompletely broken or trained." After the horse threw the plaintiff and her trainer, the plaintiff sold the horse for \$200. She then brought suit against the seller alleging misrepresentation in the sale because the horse was not green broke.

During the trial plaintiff called as a witness her trainer who had been thrown by the horse. The trainer had trained horses for more than 37 years, was a member of the United States Equestrian Team, and considered herself an expert. However, she had not been disclosed as an expert witness.

Plaintiff sought to elicit the trainer's opinion as to whether or not the horse was green broke. The defendant objected. The trial court initially sustained the objection, but ultimately allowed the opinion. The plaintiff was awarded \$2,600. The Appellate Court reversed.

#### REASONING:

By the court's own admission, a disputed matter in this case — whether Darryl was green broke — was beyond the ken of the trier of fact. For that reason, expert testimony was required. When the court therefore admitted Pruitt's testimony on that issue as lay opinion, it abused its discretion. "[L]ay opinion testimony is limited to testimony based on the perception of fleeting events that does not require the witness to apply specialized knowledge. Application of specialized knowledge from whatever source would bring the testimony within the sphere of expertise." D. Kaye, D. Bernstein & J. Mookin, *The New Wigmore: Expert Evidence* (2004) § 1.7 p. 40.

*Raudat v. Leary*, at p. 51.

§ 7-2 EXPERT TESTIMONY

## REQUIRED TO PROVE KEROSENE FUMES CAUSED INJURIES — *HUGHES V. LAMAY, ET.*

*AL.*, 89 Conn. App. 378,  
(June 7, 2005); Hennessy,  
J.; Trial Judge — Alvord, J.

**RULE:** Plaintiff cannot testify that kerosene fumes caused various physical ailments.

**FACTS:** Plaintiff rented the first floor of a multi-family dwelling from the defendants. A tenant on the second floor was using a kerosene heater. Plaintiffs sued the landlords claiming they unlawfully allowed the use of a kerosene heater. She claimed that the fumes from the heater had caused her mental and emotional injury as well as various physical ailments. The plaintiff did not disclose any expert witness.

The defendants filed a motion in limine to preclude the plaintiff from testifying that the kerosene fumes caused certain physical injuries, claiming that such causation evidence required expert testimony. The trial court agreed and limited the plaintiff's testimony to her fright, nervousness, stress, and loss of sleep. The plaintiff was not permitted to testify that the kerosene fumes caused her headaches, shoulder soreness, dizziness, nausea, watery eyes, difficulty breathing, hydrocarbon poisoning, fibromyalgia, and vertigo. The jury returned a plaintiff's verdict but awarded zero damages. The Appellate Court affirmed.

### REASONING:

On the basis of the previously mentioned cases addressing the requirement of expert testimony, we conclude that whether soreness in one's shoulder, headaches, nausea, dizziness and watery eyes are conditions caused by exposure to kerosene fumes is outside the scope of ordinary knowledge. Similarly, as to the claims of hydrocarbon poisoning, fibromyalgia and vertigo, the court properly required proof via expert testimony due to their complex and uncommon nature.

*Hughes v. Lamay*, at p. 383.

§ 7-2 EXPERT TESTIMONY  
NOT ALWAYS REQUIRED  
IN LEGAL MALPRACTICE  
CASE TRIED TO COURT  
— *DUBREUIL, ET. AL. V.*  
*WITT, ET. AL.*, 271 Conn.  
782, (November 23, 2004);  
Per Curiam.

**RULE:** Expert testimony is not required to establish the standard of care in a legal malpractice case tried to the court where the malpractice involves Rules of Practice with which the Judge is familiar.

**FACTS:** Defendant attorney was representing the plaintiffs in a collection action brought against them. The defendant failed to attend a pretrial conference and a default was entered against his clients on June 22, 1994. On August 1, 1994, the plaintiff in the collection action moved for judgment. Judgment was entered against the defendant's clients on August 23, 1994. The defendant filed a motion to set aside that judgment on September 16, 1994. That motion was scheduled for argument on February 6, 1995. The defendant failed to appear. The motion was denied. The defendant made no further efforts to have the judgment set aside.

The plaintiff in the original collection action then brought a foreclosure action against the defendant's clients. The clients ultimately paid the plaintiff in the original collection action \$32,500 to satisfy the judgment.

This legal malpractice case was tried to the court. Plaintiffs did not present expert testimony to establish that the defendant's conduct in allowing the default and judgment to enter, and in failing to make further attempts to re-open the judgment, constituted malpractice. The trial judge felt he did not need expert testimony to assist him and entered judgment against the defendant. The Appellate Court affirmed. The Supreme Court adopted the Appellate Court's opinion in a Per Curiam decision.

**REASONING:** The Appellate Court observed that judges of the Superior Court are uniquely qualified to decide what the standard of care is in regard to failing to attend pretrial conferences and not taking effective steps to re-open defaults and judgments entered as a result.

In fact, there may be no expert who knows more about the practice of law before the Superior Court than a judge of that court. Judges routinely rule on motions, preside at pre-trial settlement conferences, conduct jury trials or sit as the trier of fact, among other things . . . . A judge, therefore, is aware of the standard of care that applies to attorneys practicing in the Superior Court.

*Dubreuil v. Witt*, 80 Conn. App. 410, at pp. 421-422.

However, the Appellate Court went out of its way not to recommend reliance on this case in the future. "Our holding is limited to the circumstances of this case." *Dubreuil v. Witt*, 80 Conn. App. 410, at p. 422, footnote 7.

§ 7-2 EXPERT OPINION NOT  
REQUIRED TO PROVE  
EATING MARIJUANA  
BAD FOR CHILDREN —  
*STATE V. PADUA*, 272  
Conn. 183, (March 29,  
2005); Sullivan, C., J.; Trial  
Judge — Foley, J.

**RULE:** While the effect of smoking marijuana is common knowledge and does not require expert testimony, the effect of eating raw marijuana is much less clear. Nevertheless, the Supreme Court held 4-3 that expert testimony is not required to prove that eating raw marijuana is harmful to children.

**FACTS:** When the police entered the defendant's apartment to make a drug bust, they observed marijuana on a kitchen table and on the floor under the kitchen table. They also observed the defendant's two children, ages seven and three in the kitchen and within reach of the marijuana. In addition to the other offenses charged, the defendants were charged with risk of injury to a child based upon the children's proximity to the marijuana. The theory was that the children might orally ingest the marijuana.

The Appellate Court reversed the defendant's conviction on this count on the ground that there was no expert testimony concerning the possible injurious effects of the oral consumption of raw marijuana. The State appealed and on this issue the Supreme Court reversed the Appellate Court 4-3, holding that no expert testimony was required on this point.

### REASONING:

#### Majority:

The defendants argue that information concerning the oral consumption of marijuana pertains to cooked marijuana and does not inform the average juror about the effects of eating raw marijuana. We do not find this distinction to be persuasive. Although it is reasonable to infer that the potency and longevity of the drug in the body may differ depending upon the chosen method of delivery, it is still a widely



known fact that marijuana is an illegal drug that will adversely affect the recipient, whether the drug is smoked, baked, sautéed, infused into alcohol, brewed in a tea, eaten raw, or consumed in any other inventive manner.

*State v. Padua*, 273 Conn. 183, at pp. 155-56.

Dissent:

Common knowledge is limited, however, to those well substantiated facts that are obvious to the general community. See *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 427 (Tex. 1997). Upon careful examination of the available resources on the subject, I would conclude that the effects of eating raw marijuana are far from obvious, largely unreported, and to the extent that they are discussed outside the mainstream media, they are widely disputed. Accordingly, I would conclude that the state should have been required to present expert testimony concerning the possible injurious effects of ingesting raw marijuana, and thus, I would affirm the judgment of the Appellate Court with respect to the defendants' risk of injury convictions. See *State v. Padua*, 73 Conn. App. 386, 398, 808 A.2d 361 (2002).

*State v. Padua*, at p. 193.

COMMENT: Justice Katz's dissent provides an in depth discussion of the "fundamental distinction between that which is merely a common belief and that which is common knowledge . . ." *State v. Padua*, at p. 195. She cites examples of "common beliefs" which turn out to be false.

§ 7-2 EXPERT TESTIMONY NOT REQUIRED TO PROVE EATING CRACK COCAINE BAD FOR CHILDREN — *STATE V. SMITH*, 273 Conn. 204, (March 29, 2005); Sullivan, C., J.; Trial Judge — Freedman, J.

RULE: No dissent on the Supreme Court that expert testimony is not required to prove that eating crack cocaine is bad for children.

FACTS: When the police performed a drug bust on the defendant's apartment they found him in bed in a semi-conscious state. There was an infant sitting

near him on the bed and an aluminum foil packet of crack cocaine was also found on the bed. Among other charges, the defendant was convicted of risk of injury to a child. The Appellate Court reversed on the basis that expert testimony was required to prove the detrimental effects of orally ingesting crack cocaine. The Supreme Court reversed the Appellate Court.

REASONING: "We further believe that the harmful effects of orally ingesting cocaine are within the common knowledge of a typical juror." *State v. Smith*, at p. 214.

§ 7-2 QUALIFICATIONS OF EXPERTS: LAWYER NOT LICENSED IN CONNECTICUT PRECLUDED IN LEGAL MALPRACTICE CASE — *GLASER, ET. AL. V. PULLMAN AND COMLEY, LLC, ET. AL.*, 88 Conn. App. 615, (April 26, 2005); Dupont, J.; Trial Judge — Downey, J.

RULE: Before a lawyer not licensed in Connecticut can give opinions regarding Connecticut law, he must have a sufficient factual basis for those opinions.

FACTS: See § 4-3 above. The plaintiffs' second expert was not licensed to practice law in Connecticut. He conceded that he had never studied or researched specific issues involving Connecticut law and did not review literature or publications covering Connecticut law. He conceded he did not consider himself an expert on Connecticut law. For the past twenty years he had been involved in five or fewer real estate transactions in Connecticut and in each of those cases he had engaged local counsel. The court found that the case involved issues of Connecticut law about which the plaintiffs' second expert was not qualified to give opinions. The Appellate Court affirmed.

REASONING:

There is ample support in the record for the court's conclusion that there was an insufficient factual basis for Sharfstein's opinion regarding the applicable standard of care and whether the defendants breached that standard. Sharfstein, himself, conceded that he did not know whether Connecticut law differs from the law of other states, such as New York and New Jersey, where he is licensed to

practice law, on such specific issues as environmental rules and regulations; buyer remedies, specific contractual terminology, financing, conveyancing or how a Connecticut court would interpret "time is of the essence" clauses. Sharfstein further testified that his opinion was not based on Connecticut law at all, but on "national standards."

The plaintiffs provided no foundation for Sharfstein's opinion that the standard of care applicable in this case is the same, or even substantially the same, as the relevant standard of care in jurisdictions in which Sharfstein had more experience. Cf. *Katsetos v. Nolan*, 170 Conn. 637, 646, 368 A.2d 172 (1976) (physician familiar with standard of care in New York qualified to testify regarding applicable standard of care in Stamford when previous testimony established that standards in both areas were same). Although Sharfstein did testify that he was familiar with the applicable standard of care, the factual basis for that familiarity was lacking.

*Glaser v. Pullman & Comley, LLC*, at p. 629.

§ 7-2 QUALIFICATION OF EXPERT RE LOST PROFITS: EDUCATION NOT REQUIRED, *PORTER/DAUBERT* INQUIRY NOT REQUIRED — *MESSAGE CENTER MANAGEMENT, INC. V. SHELL OIL PRODUCTS COMPANY*, 85 Conn. App. 401, (October 5, 2004); Dupont, J.; Trial Judge — Aurigemma, J.

**RULE:** The fact that the witness had no training in the field of statistics does not disqualify witness from giving opinion testimony regarding future lost profits; nor is such testimony “scientific,” and therefore no Porter/Daubert analysis is required.

**FACTS:** Breach of contract action. Plaintiff’s business was to identify sites appropriate for the placement of telecommunication towers and negotiate leases between telecommunication carriers and property owners. Plaintiff had three contracts with the defendant to negotiate such agreements: the first was for 429 properties of the defendant in New England; the second was for 218 properties of the defendant in Florida; and the third was for 3,529 properties of the defendant across the rest of the United States.

Defendant terminated the third agreement on the basis of nonperformance by the plaintiff.

In addition to establishing breach of contract, plaintiff needed to establish with reasonable certainty the profits which would have been generated by the third agreement.

Plaintiff called as an expert witness Maria Scotti, who was the plaintiff’s office manager. Ms. Scotti’s:

... experience at the company consisted of working with the Federal Communications Commission on licensing issues, certain knowledge of how the wireless communications technology works, finding locations for telecommunications antennae, negotiating management agreements with property owners and negotiating agreements with telecommunications carriers.

Scotti testified as to lost net profits, concluding that the plaintiff would have secured thirty-eight contracts for the defendant within the five year life of the national agreement on the basis of the number of contracts the plain-

tiff had secured under the New England and Florida agreements.

*Message Center Management, Inc. v. Shell Oil Products Co.*, at p. 405.

Based upon this testimony, an accountant testified that the plaintiff’s loss profits were \$2,703,672. Defendant objected to Scotti’s testimony on the basis that Scotti was not qualified as an expert and that her methodology and data were unreliable. The trial judge held a two-day *voir dire* on the admissibility of Scotti’s testimony before allowing her to repeat it in front of the jury. The jury returned a verdict of \$1,351,836, precisely one-half of the sum estimated by Scotti and the accountant.

Pursuant to post-verdict motions the trial judge set aside the jury’s verdict on damages and rendered judgment for the plaintiff in the amount of \$1 on the basis that she had been in error in allowing Scotti to testify because she was not sufficiently qualified and that therefore the plaintiff had failed to prove lost profits to a reasonable certainty. The Appellate Court reversed and re-instated the verdict.

#### REASONING:

The defendant points out that Scotti had only a high school diploma and some further secretarial training after high school. Education is not, however, the only means of attaining the necessary qualifications as an expert. An expert must simply evidence knowledge on a subject that is significantly greater than that of persons lacking such education or experience . . .

As the court correctly pointed out in its memorandum of decision, Scotti had no training in the field of statistics. Scotti utilized a statistical method of inferring loss profits by use of past, similar sales statistics by the plaintiff. A review of the statistical model applied by Scotti, however, shows that the portion of her testimony related to that model was not exceedingly difficult to comprehend. Her testimony was more about the anticipated number of contracts and their value — the value of damages due to breach, calculated in lost profits, than it was about statistical inference. Other experts testified about the validity of the statistical theory. Scotti’s testimony pertained more to the value and experience of the plain-

tiff. As a director and office manager, she was uniquely qualified to testify as to that value and had personal knowledge of it.

*Message Center Management, Inc. v. Shell Oil Products Co.*, at p. 420.

The court then went on to hold that this type of testimony is not the type of “scientific expert evidence” which requires a Porter/Daubert analysis.

§ 7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL-PRACTICE CASES: § 52-184c(c) TREATMENT OUTSIDE SPECIALTY — *FARRELL V. BASS*, 90 Conn. App. 804, (August 23, 2005); Dupont, J.; Trial Judge — Beach, J.

**RULE:** A plastic surgeon advising a patient to discontinue the blood thinner prescribed by her cardiologist is not providing treatment outside of his specialty.

**FACTS:** Plaintiff sought treatment from the defendant plastic surgeon for a suspicious facial lesion. Defendant recommended that the lesion be removed for biopsy. He recommended the plaintiff discontinue taking her Coumadin (a blood thinner) for two days before the surgery to reduce bleeding. He did not consult with plaintiff’s cardiologist (who had prescribed the Coumadin) or her internist. However, the defendant did instruct the plaintiff to discuss his recommendation with her internist.

Three days after the surgery the plaintiff suffered a debilitating embolic stroke which ultimately resulted in her death. In addition to a plastic surgeon, plaintiff offered testimony from two cardiologists that the discontinuance of the Coumadin without discussion with the plaintiff’s treating physicians was a breach of the standard of care and a substantial factor in causing her stroke and death. Defendant filed a motion in limine to preclude the cardiologists from testifying regarding the standard of care for a plastic surgeon. The trial court precluded the testimony. The Appellate Court affirmed.

**REASONING:** The plaintiff first offered the testimony of the cardiologist pursuant to the second half of subsection (c) of Section 52-184c. Subsection (c) provides:

(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is

trained and experienced in a medical specialty, or holds himself out as a specialist, a "similar health care provider" is one who: (1) is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a "similar health care provider".

Plaintiff argued that the plastic surgeon's advice to the patient to discontinue the blood thinning medication prescribed by her cardiologist was "providing treatment . . . for a condition which is not within his specialty . . ." The court held that the advice to discontinue the medication was not outside the plastic surgeon's specialty, but within both specialties: plastic surgery and cardiology.

Plaintiff then offered the cardiologist's testimony pursuant to subsection (d) (2), the catch-all provision:

(d) Any health care provider may testify as an expert in any action if he: (1) Is a "similar health care provider" pursuant to subsection (b) or (c) of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

Plaintiff's argument was that the issue of discontinuing medication without discussing the decision with the prescribing physician is a "standard of care" which crosses all disciplines. The concession of the cardiologists during deposition and during the offer of proof that they: ". . . had no personal familiarity with what the usual and customary practice was in April, 1999, among plastic surgeons regarding communicating with patient's primary care physician with

respect to discontinuing Coumadin prior to performing facial plastic surgery," was fatal to this claim. *Farrell v. Bass*, at p. 809.

§ 7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: § 52-184c (d) (2) FOUNDATION REQUIREMENT OF FAMILIARITY WITH STANDARD OF CARE APPLICABLE TO DEFENDANT — *FRIEDMAN V. MERIDEN ORTHOPAEDIC GROUP, P.C.*, 272 Conn. 57 (December 14, 2004); Borden, J.; Trial Judge — Munro, J.

**RULE:** When an expert witness physician, who is not a "similar health care provider" under § 52-184c (b) or (c) testifies under subsection (d)(2), the foundation for that testimony must demonstrate knowledge of standard of care of the specialty of the defendant.

**FACTS:** During herniated disc surgery on the plaintiff, the defendant was using electrocautery to stop bleeding. The defendant hit one of the plaintiff's nerve roots causing cauda equina syndrome. This resulted in permanent bowel, bladder, and sexual dysfunction.

During the surgery, defendant discovered that the plaintiff had spina bifida occulta (SBO). SBO is a common congenital anomaly of the sacral spine. In the plaintiff's case his condition resulted in a 15 millimeter gap in the bony protective covering of his spinal column.

Before the surgery the defendant had taken plain x-rays which according to his reading did not show the SBO. Those x-rays were missing at the time of the trial.

Plaintiff presented expert testimony from Dr. Avi Bernstein, an orthopedic surgeon, who testified that an orthopedic surgeon needed to be aware of SBO before surgery in order to adequately protect exposed nerve roots.

Plaintiff also offered the testimony of Dr. Barry Pressman, who is a board-certified radiologist with a certificate in the subspecialty of neuroradiology. Part of Pressman's testimony related to how one reads flat x-ray films for the presence of SBO. Because of scheduling difficulties, Pressman's testimony had been videotaped. In the testimony he refers to how "we" read flat x-ray films for the presence of SBO. It was not clear from the testimony whether the colloquial

"we" was referring to how radiologists read films, how orthopedists read films, or both. The defendant objected to this testimony on the basis that it had not been established that Pressman was referring to how an orthopedist should read the films.

**REASONING:** The Supreme Court analyzed the case under subsection (d), which provides that an expert who is not a "similar health care provider" under subsections (b) or (c) can testify he "possesses sufficient training, experience, and knowledge as a result of practice or teaching in a related field of medicine so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine." The fact that the analysis took place under subsection (d) instead of subsections (b) and (c) was very significant because of the different standards of review. Whether or not a given expert qualifies as a similar health care provider under subsections (b) or (c) is a question of statutory interpretation and entitles one to a *de novo* review on appeal. If the analysis takes place under subsection (d), whether the expert qualifies is a discretionary call by the trial court and the standard of review is abuse of discretion. In the absence of explicit testimony from Dr. Pressman demonstrating that he was familiar with the standard of care for orthopedic surgeons reading plane x-rays and that the defendant had breached that standard, the trial court's discretionary ruling was upheld.

**COMMENT:** This case demonstrates one of the dangers of using videotaped testimony. It is difficult to anticipate every objection and to cure gaps in establishing qualifications or foundation which turn out to concern the trial court. In this case, plaintiff's counsel requested leave to conduct a brief telephone deposition of Dr. Pressman to fill the gap in the foundation. With closing arguments scheduled for the next day, permission was denied.

§ 7-2 PORTER/DAUBERT INQUIRY NOT REQUIRED FOR HAIR TESTIMONY — *STATE V. WEST*, 274 Conn. 605, (July 26, 2005); Palmer, J.; Trial Judge — Miano, J.

**RULE:** The Supreme Court refused to revisit its earlier ruling that hair testimony is not the type of "scientific" evi-



dence requiring a Porter/Daubert inquiry.

**FACTS:** Horrific murder case in which the defendant was accused of killing her boyfriend's 7-year old son and attempting to kill his 2-year old daughter because she felt that once his children were disposed of, the boyfriend might agree to marry her and move out of state. The State offered testimony that a hair fragment found at the scene had microscopic characteristics consistent with the defendant's hair. The Supreme Court had ruled in *State v. Reid*, 254 Conn. 540 (2000) that microscopic hair analysis was not the type of evidence that required a *Porter/Daubert* inquiry. In *State v. Reid* the expert had displayed large photographs that depicted side by side one of the defendant's hairs and one of the hairs recovered from the victim's clothing. The expert then compared their characteristics and pronounced them consistent. The Supreme Court ruled in *Reid* that since the jurors could use their own powers of observation to guide them in their determination of whether the hairs were really similar, no *Porter/Daubert* inquiry was required.

The defendant in *State v. West* invited the Supreme Court to revisit that ruling in view of the fact that DNA testing has demonstrated, "the inherent unreliability of microscopic hair analysis." *State v. West*, at p. 636. The Supreme Court declined the invitation.

**REASONING:** The difficulty for the Supreme Court of Connecticut here was that in *State v. Reid*, after the Supreme Court affirmed the conviction, DNA analysis showed that in fact the hairs which were said to be microscopically similar to the defendant's hair were not his hairs. In light of that determination, Mr. Reid was granted a new trial and the State nolle the charges. *State v. West*, at p. 636, n. 35.

§ 7-2 **PORTER/DAUBERT INQUIRY NOT REQUIRED FOR TOXICOLOGIST — STATE V. PERKINS**, 271 Conn. 218, (September 28, 2004); Borden, J.; Trial Judge — Kavanewsky, J.

**RULE:** A *Porter/Daubert* hearing is not required for an expert to testify in general terms that alcohol affects one's central nervous system.

**FACTS:** On Monday, November 20, 2000, the defendant and Michael Novack

met at the Tavern on the Main restaurant in downtown Westport and drank beer. The defendant testified that he only drank one beer. They then moved on to La Cucina in Fairfield, where the defendant was served three glasses of scotch, although he testified he did not drink the third glass. The defendant and Novack then left the restaurant, with the defendant driving and Novack in the front passenger seat. At approximately 11:45 p.m. while traveling on a curvy portion of Wilton Road in Westport at approximately 55 miles per hour, the defendant skidded off the damp road and into a tree. The posted speed limit was 25 mph. Novack was killed. The defendant fled the scene.

At approximately 12 a.m., the defendant called his supervisor, Steven Habetz. There were additional cellular calls at 12:13, 12:25, 12:29, and 12:30, at which point Habetz picked up the defendant and took him to his home. Brain tissue from Michael Novack was found on the defendant's jacket.

The State had no toxicological evidence regarding the defendant's blood alcohol level. However, the State presented testimony from a toxicologist that alcohol is a depressant which inhibits reflexes, the ability to respond to situations, and the ability to perform complex tasks. He also testified in general terms that one dose of alcohol affects individuals to a slight degree but that as alcohol consumption increases, so do the resulting effects. No hypothetical questions were asked using estimates of what the State felt it had proved the defendant had drunk. The defendant objected to this testimony on the basis that without a hypothetical it was not linked to the effects of alcohol in this particular case and the general effect of alcohol was within the common knowledge of the average juror and not the proper subject of expert testimony. The trial court rejected this claim and the Supreme Court affirmed. The defendant went on to make a somewhat contradictory claim that a *Porter/Daubert* inquiry was required for toxicology evidence. The Supreme Court rejected this claim.

**REASONING:** The Supreme Court held that toxicological testimony regarding alcohol's effects is a scientific principle "so well established" that a *Porter/Daubert* inquiry is not required. *State v. Perkins*, at p. 266.

§ 7-2 **PORTER/DAUBERT APPLIED TO PSYCHOLOGIST EMPLOYING NOVEL TEST — STATE V. GRIFFIN**, 273 Conn. 266, (April 5, 2005); Palmer, J.; Trial Judge — Hadden, Jr., J.

**RULE:** A psychologist's testimony regarding the ability of a defendant to competently understand his *Miranda* rights, based upon a novel psychological test, was properly subjected to a *Porter/Daubert* analysis and precluded.

**FACTS:** The defendant robbed the victim of a gold medallion. The victim reported the incident to the police and provided a statement to the police. A short time later, the defendant saw the victim walking along Whalley Avenue in New Haven. He chased her into a convenience store, where she asked an attendant to call the police. The defendant then shot the victim two times in the chest and four times in the back. The defendant was 14 years old at the time.

The defendant was arrested several days later, and confessed to shooting the victim. He filed a motion to suppress the confession on the grounds that he had not voluntarily, knowingly, and intelligently waived his privilege against self-incrimination.

An evidentiary hearing was held on the defendant's motion. The defendant offered expert testimony from a clinical psychologist on the issue of whether the 14-year-old defendant was competent to understand the issues involved in waiving his *Miranda* rights. The State moved in limine to preclude the expert testimony under *Porter/Daubert*. The trial court held that *Porter/Daubert* applied and that the expert testimony did not pass the test. The Appellate Court affirmed. The Supreme Court affirmed.

**REASONING:** In addition to employing more traditional evaluative measures, the expert psychologist utilized a test developed by a forensic psychologist named Grisso, which she testified measured the ability of a juvenile to understand the right to remain silent. The Supreme Court held that:

Baranoski's testimony concerning the Grisso protocol was not the kind of evidence that readily may be understood and evaluated by a fact finder on the basis of common sense or independent powers of observation or comparison.

*State v. Griffin*, at p. 278.

Thus, Baranoski's testimony concerning the Grisso protocol was predicated on the results of a scientific instrument or tool and not solely on her observations, educational background or experience. "[T]he . . . testimony [at issue] was based on a method employed by the expert witness to assess comprehension. Neither powers of observation, comparison nor common sense, however, could be used [by the trier of fact] to assess the validity of the method underlying the Grisso test and in determining whether it accurately measures what it purports to measure. Instead, the methodology underlying the test rested on . . . scientific principles, theory or experiment in the field of psychology." *Id.*, 439. We agree with the Appellate Court that, in such circumstances, a Porter inquiry was a necessary predicate to admissibility.

*State v. Griffin*, at p.280.

The Supreme Court went on to hold that the expert's testimony did not pass the Porter/Daubert test.

COMMENT: The defendant invited the Supreme Court to apply a more lenient standard in determining whether a Porter/Daubert analysis is necessary when the evidence is being presented to a court rather than the jury. The Supreme Court declined to adopt a more lenient standard when the fact finder is a court.

§ 7-2 BURDEN IN PORTER/  
DAUBERT INQUIRY IS  
ON THE OFFEROR OF  
THE EVIDENCE —  
*STATE V. TORRES*, 85  
Conn. App. 303,  
(September 28, 2004);  
Schaller, J.; Trial Judge —  
Koletsky, J.

RULE: Once a Porter/Daubert challenge has been made, the burden of proof regarding the scientific validity of the methodology at issue is on the offeror.

FACTS: Defendant was accused of murdering an 11-year old girl. The State offered the evidence of an expert to reconstruct the crime scene. The defendant moved to exclude the expert's testimony on the grounds that it did not comply with Porter/Daubert. The trial judge then offered the defendant the opportunity to question the expert outside the presence of a jury regarding the methodology used to reconstruct the crime scene. The defendant declined the opportunity,

taking the position that the burden of demonstrating the scientific validity of the methodology rested with the State. The expert then presented his evidence before the jury and although the defendant consistently objected to the testimony on the grounds that it failed to satisfy Porter/Daubert, he declined repeated invitations from the trial judge to *voir dire* on that issue. The trial judge allowed the expert's testimony. The Appellate Court found placing the burden on the defendant was error, although harmless.

REASONING: The Appellate Court agreed with the defendant that the evidence in question was subject to a Porter/Daubert inquiry:

When proffered expert testimony is based on novel techniques, "the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability." *Id.*, 684. That validity assessment is commonly referred to as a "Porter hearing," which allows the judge to examine the underlying methodology to determine if it meets the standards set forth in *State v. Porter*, supra, 241 Conn. 57. To satisfy Porter, the proponent of the evidence must show that "the reasoning or methodology underlying the [scientific theory or technique in question] is scientifically valid and . . . that reasoning or methodology properly can be applied to the facts in issue." (Internal quotation marks omitted) *Id.*, 64. Porter was based largely on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) in which the United States Supreme Court held that the proper inquiry focused on the underlying methodology and not on whether there had been a general acceptance of the technique. See *State v. Porter*, supra, 84-85. Notably, our Supreme Court did not abandon the general acceptance test completely, stating that "if a trial court determines that a scientific methodology has gained general acceptance, then the *Daubert* inquiry will generally end and the conclusions derived from that methodology will generally be admissible." *Id.*, 85. The key distinction after Porter is, however, that even if the technique has not gained general acceptance, it may be admissible if the underlying methodology is appropriate. *Id.*

*State v. Torres*, at p. 325-26.

The preliminary issue which the Appellate Court had to address was the defendant's claim that the trial judge did not hold a *Porter/Daubert* hearing because the testimony was elicited for the first time in front of the jury. The Appellate Court rejected the claim that a separate, pre-trial hearing must be held outside the presence of a jury.

It is thus clear that Porter imposes a burden, but it is a flexible burden focused not on the form of the hearing, but rather on the goal, i.e. to determine whether the methodology is sound. On the basis of that jurisprudence, we conclude that a *Porter* hearing may be held before the jury. In this case, the court held a *Porter* hearing.

*State v. Torres*, at p. 327.

Finally, the Appellate court went on to hold that the State had not elicited sufficient evidence to prove the scientific validity of the methodology in question and that "It is improper to require the party opposing the admission of the scientific evidence to offer rebuttal evidence before the proponent of the evidence carries its burden." *State v. Torres*, at p. 327. However, the error was found to be harmless.

§ 7-2 **PORTER/DAUBERT APPLIES TO HORIZONTAL GAZE NYSTAGMUS TEST, BUT HEARING NO LONGER REQUIRED — STATE V. BALBI**, 89 Conn. App. 567, (June 14, 2005); McLachlan, J.; Trial Judge — White, J.

**RULE:** Appellate Court's prior determination that horizontal gaze nystagmus evidence satisfies the *Porter/Daubert* test for the admission of scientific evidence rendered it unnecessary for the trial court to conduct another *Porter/Daubert* hearing prior to admitting evidence about the test.

**FACTS:** Drunken driving prosecution in which the defendant refused to submit to a breath test. Prior to trial, the defendant filed a motion to suppress the results of the horizontal gaze nystagmus test and requested a *Porter* hearing.

In *State v. Merritt*, 36 Conn. App. 76, 647 A.2d 1021 (1994), appeal dismissed, 233 Conn. 302, 659 A.2d 706 (1995), this court enunciated the three-part test that must be satisfied before such evidence is admissible. The test requires that the state (1) satisfy the criteria for admission of

scientific evidence, (2) a proper foundation with regard to the qualifications of the individual administering the test and (3) demonstrate that the test was conducted in accordance with relevant procedures. *Id.*, 91.

At the time *Merritt* was decided in 1994, the prevailing standard for the admission of scientific evidence was the test enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which required that the party seeking to introduce the evidence of a scientific method or test establish its general acceptance in the scientific community. Seven years after *Merritt*, we decided *State v. Russo*, 62 Conn. App. 129, 134-36, 773 A.2d 965 (2001), in which we modified our holding in *Merritt* to harmonize it with our Supreme Court's decision in *State v. Porter*, *supra*, 241 Conn. 57. Porter changed the applicable evidentiary test from the Frye test to the broader test more recently articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

*State v. Balbi*, at pp. 573-74.

The trial court ruled that although it would still require the State to satisfy the court that the individual administering the test was qualified and the test properly conducted, the trial court would not require the State to satisfy the criteria for the admission of scientific evidence, as that had already been done in a number of cases, including *State v. Commins*, 83 Conn. App. 496 (2004).

#### REASONING:

Our determination in *Commins* that horizontal gaze nystagmus evidence satisfies the *Porter* test for the admission of scientific evidence rendered it unnecessary for the court in the present case to conduct its own *Porter* hearing prior to admitting evidence about the test. The trial court's thorough consideration of the issue in *Commins* sufficiently demonstrated to this court that horizontal gaze nystagmus evidence satisfies *Porter*; and we see no compelling reason to put the state to the burden of having to reestablish, in case after case, the same proposition. Requiring our trial judges to repeatedly hold *Porter* hearings would serve no legitimate purpose and would needlessly squander judicial resources.

*State v. Balbi*, at pp. 576-77.

§ 7-2 **BLACK BOX EVIDENCE ADMISSIBLE UNDER FRYE — MATOS V. FLORIDA**, (In the District Court of Appeal of the State of Florida, Fourth District, January Term 2005); Case No. 4D03-2043, March 30, 2005.

**RULE:** Event data recorder evidence offered in motor vehicle crash case found admissible under the *Frye* test still utilized in Florida.

**FACTS:** On August 17, 2002, two 16-year old girls backing out of their driveway on a residential street were struck by the defendant's vehicle and killed. The black box speed-recording device which operated the defendant's airbag recorded a speed of 114 miles per hour four (4) seconds before the crash and 103 mph one (1) second before the crash. Defendant was convicted of two counts of manslaughter.

The State of Florida still utilizes the *Frye* general acceptance test. The black box is called an "event data recorder" (EDR). The proprietary name for the model in the General Motors car in question is a "Sensing & Diagnostic Module" (SDM).

The State called two experts. Donald Felicella, an accident reconstruction specialist, testified that the information from an SDM is generally accepted in the accident crash investigation community, in the insurance field, and in medical research and biomechanics. It is also being used by the National Highway Safety Administration.

The State's second expert, Dr. Robert McElroy, worked for General Motors where he was responsible for engine and computer control systems. He was also the Chairman of the Society of Automotive Engineers. He testified that the data collected by SDMs is generally accepted in the field of automobile safety, accident reconstruction, and automotive design. He testified that although the data from these systems have only been available to the public for three or four years, the National Highway Traffic Safety Administration has been using these data since 1995. He further testified that the data are extremely accurate because it is a digital system. The trial court admitted the data. The Florida Court of Appeal affirmed.

#### REASONING:

The process of recording and down-



loading SDM data is not a novel technique or method. In any event, the state demonstrated that when used as a tool of automotive accident reconstruction, the SDM data is generally accepted in the relevant scientific field, warranting its introduction.

*Matos v. State*, at p. 3.

§ 7-2 COMPUTER GENERATED ACCIDENT RECONSTRUCTION VIDEO SIMULATION HELD INADMISSIBLE UNDER FRYE — *STATE OF WASHINGTON V. SIPIN* (In the Court of Appeals in the State of Washington, Division One); Case No. 51647-7-I, February 14, 2005.

**RULE:** PC-CRASH computer generated video simulation evidence has not been generally accepted among accident reconstructionists as reliably predicting occupant movement within a vehicle and therefore does not pass the Frye test.

**FACTS:** Defendant Michael Sipin and his friend David Taylor were riding in Sipin's BMW Z-3 convertible when it crashed and Taylor was killed. The issue in the case was who was driving. Defendant Sipin testified that Taylor was driving. Both Sipin and Taylor had been ejected from the car. Passenger Taylor was found on the ground between the passenger side door and a tree, with one foot in the car. Sipin was found 10 to 15 feet behind the vehicle. Defendant Sipin suffered permanent brain damage. He had a blood alcohol level of .11.

The State offered a computer generated video simulation accident reconstruction generated by the use of a computer program called PC-CRASH. The evidence was offered through Ronald Heusser, an engineer and accident reconstructionist, who testified that PC-CRASH is a simulation program, rather than an animation program. It produces a "predictive image" based upon inputting variables such as steering, braking, and speed, based on the laws of physics. Two studies were produced. A 1996 study entitled "Validation of PC-CRASH," which showed a comparison between staged collisions of vehicles and PC-CRASH simulations. The second 1999 study, entitled "The Pedestrian Model in PC-CRASH," sought to validate the program to predict interaction with a pedestrian and the outside of a vehicle.

The defendant objected to the evidence based upon the *Frye* standard of general acceptance which is still the test in the State of Washington. The trial judge allowed the evidence. Heusser presented the PC-CRASH computer simulation with a video simulation, both in actual speed and slow motion. He testified that the simulation illustrated that the defendant was the driver. During closing argument to the jury, the prosecutor explained PC-CRASH as a computer program that actually takes the laws of physics and reduces them to mathematical calculations to generate an accurate picture of what happened during the collision. The PC-CRASH video was shown to the jury during final argument. The defendant was convicted. The Washington Court of Appeals reversed.

#### REASONING:

In sum, the two post-trial declarations provided by Sipin, the three papers that he submitted post trial, and the PC-CRASH manuals themselves illustrate that there is no general acceptance in the relevant scientific community of the use of this PC-CRASH program for the purposes to which it was put by Heusser. We have not been able to locate any documents that support the State's position, and the State has provided none. It is not our task to determine whether a scientific method or theory is correct. Such is beyond the expertise of courts. Instead, it is our task to determine whether the appropriate scientific community has generally reached consensus that the method or theory is reliable.

*State of Washington v. Sipin*, at p. 11.

**COMMENT:** The court noted that the same computer program evidence was admitted in another Washington case to predict the movement of a vehicle in a single impact crash. It was because the State was offering this evidence to predict passenger movement that the court found it not been accepted in the relevant accident reconstruction community.

§ 7-3 (a) IDENTIFICATION OF THE DEFENDANT AS ROBBER IS THE ULTIMATE ISSUE — *STATE V. FINAN*, 275 Conn. 60, (August 16, 2005); Vertefeuille, J.; Trial Judge — Miano, J.

**RULE:** Officers' lay opinion identifying defendant as man on videotape who

accompanied man with a shotgun into a 7-11 was prohibited by the ultimate issue rule.

**FACTS:** Robbery of 7-11 store in which the surveillance videotape showed a man with a green hooded sweatshirt walking in with another man carrying a shotgun. Four police officers testified that the man in the green sweatshirt shown in the videotape was the defendant. The police officers in question had known the defendant for between eight and sixteen years. Their identification rested on the defendant's particular "mannerisms, gait, and profile." The defendant objected to this testimony. The trial court allowed it as "suspicion" evidence. The Appellate Court found this to be error but concluded that the testimony was admissible as lay opinion.

The defendant then argued that the officers' identification testimony is inadmissible as lay opinion testimony because § 7-3 (a) of the *Code of Evidence* prohibits opinion testimony by a lay witness on the ultimate issue.

Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of facts needs expert assistance in deciding the issue.

*C.C.E.*, § 7-3 (a).

The Appellate Court reasoned that identification of the defendant as the person shown on the videotape was not alone sufficient evidence of his guilt and therefore was not barred by the ultimate issue rule. The Supreme Court reversed.

On the facts of the present case, we conclude that the identification of the defendant as one of the perpetrators shown on the videotape was an ultimate issue in the case. Indeed, we agree with Judge Flynn's assessment in his dissent that, "[t]he only real issue to be determined by the jury was whether the defendants, and not some other person was one of the two [men] who had committed the robbery. In that sense, it was an ultimate issue." *State v. Finan*, supra, 82 Conn. App. 242.

*State v. Finan*, at p. 67.

§ 7-3 (a) WHETHER PARTIES ENTERED INTO AN

**ENFORCEABLE REFINANCING AGREEMENT IS ULTIMATE ISSUE — FORTE, ET. AL. V. CITICORP MORTGAGE, INC.,** 90 Conn. App. 727, (August 16, 2005); Bishop, J.; Trial Judge — Karazin, J.

**RULE:** Expert opinion offered on whether there was a binding refinancing contract between the parties would have amounted to an opinion as to the validity and enforceability of the claimed contract and is barred by the ultimate issue rule.

**FACTS:** Plaintiffs obtained a mortgage from the defendant. Plaintiffs claimed they were told that they could refinance their mortgage at any time within one year of the closing and that when they sought to do so after interest rates declined, defendant refused to refinance the mortgage.

Plaintiffs offered the testimony of a banking expert regarding good faith banking practices, contract formation, and breach of contract. Plaintiffs offered the testimony of the expert specifically on whether the parties had entered into a refinancing agreement. Defendant filed a motion in limine and the court precluded the expert from offering his opinion regarding whether there was a refinancing agreement because that was an ultimate issue for the jury to decide. The Appellate court affirmed.

**REASONING:** Section 7-3 only allows an expert to render an opinion on the ultimate issue “where the trier of fact needs expert assistance in deciding the issue.” The was no such showing in this case.

§ 7-4 (b) **HEARSAY RELIED ON BY EXPERT MAY BE ADMITTED TO DEMONSTRATE BASIS OF EXPERT’S OPINION — TADROS V. TRIPODI, ET. AL.,** 87 Conn. App. 321, (February 8, 2005); McLachlan, J.; Trial Judge — Schuman, J.

**RULE:** C.C.E. § 7-4 (b) provides that an expert may base his opinion on hearsay, and even though not admitted for substantive purposes, the hearsay may be admitted to demonstrate the basis of the expert’s opinion.

**FACTS:** Surgeon v. surgeon. Dr. Tripodi joined Dr. Tadros’ practice in 1985 and became a partner in 1990. They also formed a real estate corpora-

tion which owned their building and Dr. Tripodi’s wife became the bookkeeper. In 2001 the practice broke up and Dr. Tadros brought suit against Dr. Tripodi and his wife, claiming that they stole money from the medical practice from 1991 until 2001. The case was tried to the court and the judge concluded that Tripodi and his wife had stolen \$876,985.25 from the practice. Because it was theft, the judge trebled the amount to \$2,630,955.81 and added interest in the amount of \$537,418.50.

The defendant objected to two exhibits on hearsay grounds. Exhibit 47 was introduced through the plaintiff’s forensic accountant, Alan Mandell. Exhibit 47 contained documents prepared by Mandell and by a computer consultant, as well as other supporting documents. Defendant objected to those portions of Exhibit 47 not prepared by Mandell. The court admitted those portions only for the purpose of demonstrating the basis of Mandell’s opinion. The Appellate Court affirmed this ruling.

**REASONING:**

The court was well within its discretion to allow Mandell to testify as to the bases of his expert opinion, regardless of whether the documentation on which he relied was itself admissible. See Connecticut Code of Evidence § 7-4 (b); . . .

*Tadros v. Tripodi*, at p. 329.

**VII. Hearsay**

§ 8-1 **CONVERSATION WITH PHYSICIAN IS HEARSAY — STATE V. LUIS F.\*,** 85 Conn. App. 264, (September 28, 2004); White, J.; Trial Judge — Schaller, J.

**RULE:** Inquiry regarding the witness victim’s conversation with a physician who examined her after the alleged assault is inadmissible hearsay.

**FACTS:** Defendant was accused of sexually assaulting his 14-year old daughter. The assault was reported to the Department of Children and Families which assigned a multidisciplinary investigation team to investigate the alleged assault. The victim was sent by the team for a physical examination which apparently was negative. The defendant asked the victim witness whether or not she had been sent for a physical examination, to which she answered yes. The defendant then

sought to ask her additional questions as to the results of that examination, the State objected and the court sustained the objection. The Appellate Court affirmed.

**REASONING:**

The victim could have known the result of the medical examination only through a discussion with her physician. The victim’s testimony regarding those results, therefore, would be based on hearsay because the physician’s statements regarding the results were out-of-court statements that would be offered for their truth. See Conn. Code Evid. § 8-1. The defendant offers no exception to the hearsay rule for the physician’s discussion with the victim. See Conn. Code Evid § 8-2. Further, “the existence or absence of physical injury to a victim’s genital or anal area and its relation to a sexual assault is not necessarily an obvious matter within the common knowledge of the average person.” *State v. Whitley*, 53 Conn. App. 414, 422, 730 A.2d 1212 (1999). The testimony that the defendant sought to elicit, therefore, would also have been barred by § 7-1 of the Connecticut Code of Evidence, which prohibits nonexperts from giving opinion testimony when the opinion is not “rationally based on the perception of the witness and is [not] helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.” The victim could not have logically had an opinion, based on her personal perception, regarding the results of the medical examination performed on her.

*State v. Luis F.\**, at pp. 273-74.

§ 8-3 (1) (a) **STATEMENT BY A PARTY OPPONENT AND ADMISSION AGAINST INTEREST CONTRASTED — DOE V. CHRISTOFORO, ET. AL.,** 87 Conn. App. 359, (February 8, 2005); McLachlan, J.; Trial Judge — Thompson, J.

**RULE:** Any relevant out-of-court statement by a party opponent may be admitted and it is not necessary that it be a statement against interest.

**FACTS:** Dr. Christoforo was treating the plaintiff for anxiety between 1995

and 1998. The plaintiff alleged that the defendant purported to treat the plaintiff's anxiety by relaxing him with erotic massage therapy and performing sexual acts on him. The plaintiff claimed he suffered damages as a result. After the lawsuit was brought but before the trial, plaintiff *Doe* committed suicide.

The defendant argued that there was no sexual contact and that if there was, it was consensual.

The plaintiff offered a 127-page transcript of the defendant's statement to the police following an accusation of sexual assault by another of the defendant's patients. In the transcript the defendant admitted to having sexual contact with the other patient but stated that it was consensual. He also spoke in vague terms about being tempted to have sexual contact with other patients.

The trial court did not allow the Doctor's statement into evidence, stating:

Although the plaintiff characterizes the subject statements as "admissions," the court did not find the statements to rise to the level of being such. The offered statements concerned statements made by the defendant to the police during investigations of [allegations made by] persons other than [Doe]. The plaintiff simply failed to establish that the statements were admissions and that said statements were relevant to the instant action. Furthermore, upon reviewing the statements, the court determined that any probative value of said statements was outweighed by their prejudicial effect.

*Doe v. Christoforo*, at p. 363.

The Appellate Court affirmed.

REASONING: First, the Appellate Court rejected the trial court's conclusion that the statement was inadmissible hearsay.

We first address the plaintiff's claim that the defendant's statement to police should have been excepted from the hearsay rule as a statement by a party opponent. See Conn. Code Evid. § 8-3 (1) (a). "Whether evidence offered at trial is admissible pursuant to one of the exceptions to the hearsay rule presents a question of law. Accordingly, our review of the [plaintiff's] claim is plenary." *State v. Gonzalez* 75 Conn. App. 364, 375 815 A.2d 1261, cert. granted on other

grounds, 263 Conn. 913, 822 A.2d 242 (2003).

The court, in its ruling on the motion to set aside the verdict and for a new trial, found that the defendant's statement to police did not rise to the level of an admission. The term "admission of a party opponent" is used more commonly than the synonymous term used in our code of evidence, "statement by a party opponent." See footnote 4. The latter is, however, more accurate. Simply stated, a party's statement need not be an admission of fault or wrongdoing of any kind to be admitted against him over a hearsay objection. Any relevant out-of-court statement by a party declarant may be admitted against him by his opponent. "There is no requirement that the statement be against the interest of the party when made or that the party have firsthand knowledge of its content. Basically, the only objection that can be made to the admission of a party/opponent is that it is irrelevant or immaterial to the issues." C. Tait, Connecticut Evidence (3d Ed. 2001)

§ 8.16.3 (c), pp. 589-90; see also *State v. Calderon*, 82 Conn. App. 315, 325, 844 A.2d 866 (statements made out of court by party opponent universally admissible when offered against him as long as statements relevant, material to issue in case), cert. denied, 270 Conn. 905, 853 A.2d 523, cert. denied, U.S. , 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004). "The rule can be neatly summed with the phrase "Everything you say can be used against you." C. Tait, Connecticut Evidence supra, § 8.16.5, p. 594.

The hearsay exceptions for statements against interest, on the other hand, required that the statement be against either the declarant's pecuniary interest or his penal interest when spoken. The statement literally must subject the declarant either to criminal or to civil liability. That hearsay exception is distinguishable from the exception for a statement by a party opponent because the declarant of a statement against interest usually is not a party to the action. Moreover, the exception applies only when the declarant is unavailable to testify at trial. Furthermore, the statement must be based on the declarant's personal knowledge. See

Conn. Code Evid. § 8-6 (3) and (4); C. Tait, Connecticut Evidence, supra § 8.16.4 pp. 592-93; §§ 8.42.1 through 8.43.5, pp.708-16.

The court correctly concluded that the defendant's statement to police was not a statement against interest because the defendant denied any wrongdoing in his statement to police. The statement was, however, a statement by a party opponent under Conn. Code Evid. § 8-3 (1) (A). Thus, the evidence was excluded improperly as hearsay.

*Doe v. Christoforo*, at pp. 363-65.

The Appellate Court went on to hold that the trial court's alternative ground of exclusion, that the statement's probative value was outweighed by its prejudicial effect, was not an abuse of discretion.

COMMENT: Footnote 4 of this opinion states the following:

The term "statement by a party opponent" is interchangeable in this context with the term "admission of a party opponent." The opinions of this court and our Supreme Court often use the latter term. Because, however, the Connecticut Code of Evidence uses the former, we shall conform to the code, See Conn. Code Evid. § 8-3.

*State v. Christoforo*, n.4, at p. 361.

The use of the word "admission" leads to the analytical error made by the trial court in this case.

§ 8-3 (1) (a) FEDERAL RULE RE INCONSISTENT PLEADINGS — *SVEGE V. MERCEDES-BENZ CREDIT CORP.*, Ruling and Order, Civ. No. 3:01cv1771 (MRK), United States District Court, D. Connecticut, August 6, 2004.

RULE: The Connecticut rule is that any statement in a pleading can be used against the pleader. *Danko v. Redway Enterprises, Inc.*, 254 Conn. 369, (2000).

The federal rule is to balance probative value and prejudicial effect.

FACTS: On September 16, 1999, a freightliner tractor-trailer truck went out of control, struck a concrete barrier separating the eastbound and westbound traffic lanes on the Pennsylvania turnpike, became airborne and ultimately collided with and crushed an SUV driven by



Thor Svege and occupied by members of his family who were returning from vacation. Three members of the Svege family were killed and three were injured.

Plaintiffs brought a products liability case against the defendants, who manufactured and sold the freightliner truck, for alleged defects in the freightliner. Defendants sought to offer at trial plaintiff's complaints in two other cases: one against the driver of the truck which was settled and the other against various entities claiming an unreasonably dangerous roadway which was dismissed on the basis of governmental immunity.

Plaintiff moved to preclude admission of the two other complaints. The trial judge refused to allow the other complaints in evidence.

**REASONING:** The Second Circuit has yet to squarely address this issue. However, Judge Kravitz ruled that in view of the fact that the federal rules allow inconsistent pleadings, he would exercise his discretion to exclude the complaints on the basis that their probative value was outweighed by their prejudicial effect: the jury would speculate about the resolution of the other actions and what other avenues of recovery were available to the plaintiffs.

**COMMENT:** There was a defendant's verdict in the case.

## § 8-3 (8) DISCLOSURE OF

**LEARNED TREATISES — FARRELL V. BASS**, 90 Conn. App. 804, (August 23, 2005); Dupont, J.; Trial Judge — Beach, J.

**RULE:** A learned treatise is not admissible pursuant to *C.C.E.*, § 7-4(b).

**FACTS:** See § 7-2 above. Plaintiff had an article which supported his contention that performing the incisional biopsy without discontinuing the Coumadin did not present a significant risk of bleeding. However, he did not find the article until after his expert's deposition. The trial judge precluded the article on basis of *C.C.E.*, § 4-3 because the defendant had not had an opportunity to examine the expert on the article. Plaintiff pointed to § 7-4(b) of the Code and indicated that the expert should have been allowed to testify regarding the contents of the article because his opinion was, in part, based upon the article. The trial court rejected this backdoor attempt to get the content of the learned treatise in front of a jury.

§ 8-4 **NO CHAIN OF CUSTODY SHOWING REQUIRED FOR BUSINESS RECORD — STATE V. RUSSO**, 89 Conn. App. 296, (May 31, 2005); West, J.; Trial Judge — Hadden, J.

**RULE:** Despite the defendant's claim that his prescription records had been altered, the State was not required to establish a chain of custody before the prescriptions were admitted in evidence.

**FACTS:** Defendant was accused of obtaining a controlled substance by forgery of a prescription.

The state presented a series of witnesses who worked at the pharmacies to which the defendant had taken his prescriptions. The witnesses testified that they had filled the prescriptions for the defendant and processed them in the usual course of business by attaching labels or other pharmacy identification to them. Each time a witness authenticated one of the defendant's prescriptions, the defendant objected to the admission of the prescription on the ground of lack of proof of a chain of custody. The court overruled the objections and admitted the prescription records.

*State v. Russo*, at pp. 300-01.

## REASONING:

Because the witnesses were able to identify the prescriptions as having been submitted to their pharmacies by the defendant, the prescriptions were authenticated properly. "[A] proponent need not establish a chain of custody in order to authenticate a business record." *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 604, 717, A.2d 713 (1998). Proof of the chain of custody of the prescriptions was therefore not necessary to establish their admissibility.

*State v. Russo*, at p. 301.

§ 8-4 **REPORT PREPARED ON BEHALF OF BUSINESS ADMITTED AS BUSINESS RECORD — CAVOLICK V. DESIMONE**, 88 Conn. App. 638, (April 26, 2005); Schaller, J.; Trial Judge — Auriegemma, J.

**RULE:** A report or record prepared by an organization with a business duty to

the entity whose business record is at issue, forwarded to the business entity and contained in its file, is a business record.

**FACTS:** Fight between two partners engaged in real estate development. Financing was provided by the Connecticut Housing Finance Authority (Housing Authority). During the testimony of the attorney who represented the partnership in its business matters, the plaintiff offered a capital needs assessment which was done to determine the amount of money which had to be placed in a special reserve account. The assessment had been commissioned by the Housing Authority and was performed by an entity called On-Site In-Site. The defendant objected that the document was hearsay and the objection was sustained. The plaintiff then called an employee of the Housing Authority who testified that part of its procedures included obtaining a capital needs study and that this document was contained in the Housing Authority's file. The trial court then admitted the report. The Appellate Court affirmed.

## REASONING:

General Statutes § 52-180, which outlines the requirements of the business record exception, "should be liberally construed . . . Appellate review of the admission of a document under § 52-180 is limited to determining whether the trial court abused its discretion." (Citations omitted.) *River Dock & Pile, Inc. v. O & G Industries, Inc.*, 219 Conn. 787, 795, 595 A.2d 839 (1991); see also Conn. Code Evid. § 8-4. The court determined that despite the fact that the report was not prepared by the housing authority, the report was made in the regular course of business, and the organization that conducted the assessment had a duty to prepare the report. See *River Dock & Pile, Inc. v. O & G Industries, Inc.*, supra 795. The court did not abuse its discretion and properly admitted the assessment under the business record exception. [footnote omitted.]

*Cavolick v. DeSimone*, at p. 645.

§ 8-5 (1) **VIDEOTAPED STATEMENT ADMITTED PURSUANT TO WHELAN — STATE V. LUIS F\***, 85 Conn. App. 264, (September 28, 2004);

White, J.; Trial Judge — Schaller, J.

**RULE:** Despite the language in *C.C.E.* § 8-5 (1) (A) that a *Whelan* statement must be in writing, a videotape statement qualifies under the rule.

**FACTS:** See Section 8-1 above. The victim witness had given a videotaped statement to the multidisciplinary investigative team regarding the sexual assault by her father. At trial she disavowed the statement. The trial court admitted the statement under *State v. Whelan*. The Appellate court affirmed.

#### REASONING:

The *Whelan* rule is generally accepted as “allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination.” *Id.*, 753. The *Whelan* court recognized that “prior tape recorded statements possess similar indicia of reliability and trustworthiness to allow their substantive admissibility as well.” *Id.*, 754 n.9; see also *State v. Alvarez*, 216 Conn. 301, 313, 579 A.2d 515 (1990) (“[a] prior tape recorded statement . . . is also admissible for substantive purposes”). An important focus of the rule is the reliability of the statement, that is, whether the tape recording is “an accurate rendition of the statement and that the declarant realized it would be relied upon.” *State v. Whelan*, supra 200 Conn. 754. Notably, although § 8-5 (1) of the Connecticut Code of Evidence lists only written statements, the commentary expressly recognizes that although the “post-*Whelan* developments were not expressly incorporated into the language of Section 8-5 (1) . . . [the] post-*Whelan* developments nevertheless are considered to be integral part of this rule.” The commentary also cites *State v. Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993), which dispenses with the declarant’s signature as a requirement when the statement is tape recorded.

*State v. Luis F.*\*, at p. 269.

§ 8-5 (1) SIGNED PRIOR INCONSISTENT STATEMENT ADMITTED DESPITE DENIAL — *OTERO V. HOUSING AUTHORITY*

*OF THE CITY OF BRIDGEPORT*, 86 Conn. App. 103, (November 16, 2004); Peter, J.; Trial Judge - Rush, J.

**RULE:** Pursuant to the *Whelan* rule codified in § 8-5 (1) of the *C.C.E.*, a prior inconsistent statement signed by the declarant may be admitted for substantive purposes despite the declarant’s testimony that she did not write the statement and that its contents were untrue.

**FACTS:** Plaintiff alleged that the defendant discharged her because she filed a claim for workers’ compensation benefits. Defendant claimed it discharged her because she stole a toilet. Defendant offered a hand written statement summarizing the events that led to her discharge which was prepared by the Department of Labor as part of her application for unemployment benefits. The plaintiff acknowledged that the signature on the document was hers, but testified that she had not written the statement and that it was not true. The trial court admitted the statement. The Appellate Court affirmed.

**REASONING:** The critical fact which distinguished this case from other cases holding that a proper foundation had not been laid for admission was the fact that the plaintiff had signed the statement.

#### VIII. Authentication

§ 9-1 (a) AUTHENTICATION OF TRANSLATED STATEMENT BY TRANSLATOR — *STATE V. TORRES*, 85 Conn. App. 303, (September 28, 2004); Schaller, J.; Trial Judge — Koletsky, J.

**RULE:** English translation of Spanish-speaking defendant’s statement, offered through translator, properly authenticated.

**FACTS:** See Section 7-2 above. Defendant gave a statement to two police officers. One police officer spoke only English and acted as stenographer. The other police officer spoke English and Spanish and acted as translator. The stenographer officer would ask a question; the translator officer would translate the question into Spanish. The defendant answered the question in Spanish and the translator officer would then translate the answer into English, which the stenographer officer would then copy down. After the statement was taken, the

translator read it in Spanish to the defendant, he made some minor changes and then the defendant signed the bottom of the statement.

The translator testified that he translated the defendant’s responses accurately and that the defendant appeared to understand his questions and gave answers that were responsive to the questions. The trial court admitted the English statement. The Appellate Court affirmed.

**REASONING:** The Appellate Court was faced with a 1976 Connecticut Supreme Court opinion, *State v. Rosa*, 170 Conn. 417, which stated *in dicta* that because the stenographer could not authenticate the statement as accurate, it should not be admitted. The Appellate court held that the testimony of the translator was sufficient to authenticate the statement.

§ 9-1 (a) AUTHENTICATION OF TRANSLATED STATEMENT BY TRANSLATOR — *STATE V. COLON*, 272 Conn. 106, (December 28, 2004); Zarella, Jr., J.; Trial Judge — D’Addabbo, J.

**RULE:** English translation of Spanish-speaking defendant’s statement, offered through translator, properly authenticated.

**FACTS:** The defendant was accused of beating his girlfriend’s child to death. The defendant did not speak English. The procedure followed was almost the same as in *State v. Torres* above. A stenographer police officer would ask a question in English, a police officer translator would translate the question into Spanish, the defendant would respond in Spanish, the translator officer would translate the response back into English, and the stenographer police officer would type the English translation into a computer. The translator would view the English translation on the computer screen as it was completed. The translator then would translate the English written statement back into Spanish for the defendant. The defendant was asked if any changes should be made, to which he responded no. The English statement was then signed by the defendant. The trial court admitted the statement. The Supreme Court affirmed.

**REASONING:** The Supreme Court distinguished the *Rosa* case, referred to

in the preceding case, by pointing out that the translator was looking at the computer screen and confirming that the stenographer was accurately transcribing his translation. The court held that the testimony of the translator was sufficient to authenticate the statement.

§ 9-1 (a) **TRANSLATOR MUST BE CALLED TO AUTHENTICATE STATEMENT — STATE V. COOKE**, 89 Conn. App. 530, (June 14, 2005); Bishop, J.; Trial Judge — Owens, J.

**RULE:** To authenticate an English translation of a statement by a Spanish-speaking person, the translator must be called.

**FACTS:** Notorious murder prosecution in Bridgeport where three men sought to rob the guests at a garage party while wearing masks and armed with guns, including an AK-47 assault rifle. During a gunfight with the police, one of the three perpetrators was killed as well as one of the guests.

A trial witness, Mario Flores, testified in Spanish. Under cross-examination by counsel for the defendant's co-defendant, counsel sought to admit an English translation of the witness' statement to the police pursuant to *State v. Whelan*. On *voir dire*, Flores testified that he spoke Spanish but not English, that at the police station an English-speaking officer had directed questions to him, which an interpreter then had translated into Spanish for him to answer. After the witness answered the questions, the interpreter translated his answers into English and the police officer wrote down the answers. The witness testified that the interpreter then read back to him the statement in Spanish, which the witness then signed. The witness was unable to testify that the English translation was an accurate transcription of what he had told the police. The interpreter was not called as a witness. The trial court admitted the statement. The Appellate Court found this to be error, although harmless.

#### REASONING:

In the present case, the interpreter was not called to testify. Therefore, the statement attributed to Flores could not be authenticated as an accurate transcription. Unlike Colon, in which the interpreter actually testified "regarding both his translation and his identification of the document

as the statement that the defendant had given on the night of his arrest"; id.; Flores could not confirm sufficiently that the statement, which was introduced at trial in the English language, was a fair and accurate translation of the oral statement he made to police. By not hearing testimony from the interpreter, the court was deprived of an opportunity to confirm that the oral statement given by Flores in December, 2001, accurately reflected the proffered written statement. [footnote omitted.]

*State v. Cooke*, at p. 549-50.

## IX. Expert Disclosures

**CONTINUANCE IS ORDINARILY THE PROPER REMEDY FOR LATE DISCLOSURE — BERKOWITZ V. DEMAINE**, 89 Conn. App. 589, (June 14, 2005); Harper, J.; Trial Judge — Dunnell, J.

**RULE:** If disclosures are made as soon as feasible, then the proper remedy for a party who feels he is prejudiced by a late disclosure is a continuance.

**FACTS:** Minor automobile accident case which resulted in a verdict of \$5,006.69. Plaintiff's original disclosure had disclosed the emergency room treating physician "or in the event of his unavailability any other emergency room doctor affiliated with the New Britain General Hospital". *Berkowitz v. Demaine*, at p. 591. On February 2, 2004, ten days before evidence, plaintiff's counsel met with a different doctor at New Britain General Hospital who had succeeded the doctor originally disclosed. Three days later counsel filed a supplemental disclosure informing the defendant about the new expert and giving more detail regarding his opinions. The disclosure was faxed to defendant's counsel with a letter offering to make the doctor available for deposition on short notice.

The defendant did not raise the issue of precluding the doctor's testimony until the first day of evidence. The trial judge denied the motion to preclude. The Appellate Court affirmed.

#### REASONING:

After reviewing the record and the transcripts, we conclude that the court reasonably could have found that the defendant was not prejudiced by the plaintiff's late disclosure. The defendant did not file a written motion to preclude Finkelstein's testi-

mony, nor did the defendant request a continuance. In fact, the defendant did not raise any issue concerning Finkelstein's testimony until the trial had commenced. "A continuance is ordinarily the proper method for dealing with a later disclosure . . . A continuance served to minimize the possibly prejudicial effect of a later disclosure and absent such a request by the party claiming to have been thus prejudiced, appellate review of a later disclosure is not warranted" (Citations omitted; internal quotation marks omitted.) *Giardini v. Supermarkets General Corp.*, 24 Conn. App. 9, 12-13, 535 A.2d 110 (1991). If the defendant believes that she did not have adequate notice of Finkelstein's testimony and the subject matter to which he would testify, she could have requested a continuance, which would have allowed her ample time to depose the witness.

Additionally, the defendant did not file a written motion to preclude the testimony of Finkelstein. As the court stated: "[T]here's no question [that] if [the defendant] had filed a motion to preclude, this would be over. But . . . it's not just the words. You have to think about what are the purposes of these statutes . . . the purpose . . . is notice. I don't feel that [the plaintiff] gave [the defendant] enough notice but, on the other hand, [the defendant] didn't give [the plaintiff] enough notice either to tell him that you were going to be making a big deal about this the morning of trial. Maybe [the plaintiff] would have asked for a continuance."

*Berkowitz v. Demaine*, at pp. 594-95.

**GOOD FAITH AN IMPORTANT CONSIDERATION — COTE V. MACHABEE**, 87 Conn. App. 627, (February 22, 2005); McLachlan, J.; Trial Judge — Gordon, J.

**RULE:** Late supplemental disclosures containing information which is cumulative of prior disclosures undercuts claim of real surprise.

**FACTS:** Motor vehicle accident case in which the plaintiff originally disclosed that her orthopedic surgeon was expected to testify "that shoulder surgery is an option for the plaintiff, and with regard to the surgical procedure, probability of recovery and costs." *Cote v. Machabee*, at



629. In a pre-trial memorandum filed two months before trial, the plaintiff claimed \$8,000 for future surgery.

Following a discussion with defense counsel at the pretrial, the plaintiff requested a more specific opinion from Miller regarding the likelihood of surgery. Miller prepared a responsive report on October 16, 2003, but did not forward the report to the plaintiff's counsel until November 10, 2003.

At approximately the same time she received this report, the plaintiff contacted Miller's office and requested photocopies of certain office notes from treatment sessions that had not already been disclosed. The plaintiff obtained photocopies of office notes from three visits — September 3, December 6 and December 20, 2002. On November 11, 2003, immediately upon receiving photocopies of these three office notes and the October 16 report, the plaintiff supplemented her earlier response to the defendant's production requests and provided photocopies of all four documents to the defendant.

On November 12, 2003, one day prior to jury selection the defendant filed a motion to preclude introduction of the three office notes and the October 16 report and to preclude Miller from providing testimony as to the contents of those records. The defendant argued that the production of the records on the eve of jury selection was prejudicial to him because they revealed new information about the extent of the plaintiff's injuries and, more particularly, the potential for future surgical intervention. The motion to preclude was denied by the court on November 19, 2003.

*Cote v. Machabee*, at pp. 629-30.

The Appellate Court affirmed.

REASONING: Neither the trial judge nor the Appellate Court bought the defendant's claim of genuine surprise. The defendant's motion for a continuance was denied for the same reason. The defendant knew all along that a future shoulder surgery was in the case.

DISCLOSURE OF NEW EXPERTS TWENTY DAYS BEFORE TRIAL ALLOWED — VILLA V. RIOS, 88 Conn. App.

339, (April 5, 2005); Bishop, J.; Trial Judge — Karazin, J.

RULE: Second medical opinion obtained from new expert disclosed to the defendant one day after the medical appointment and allowing sufficient time for the expert's deposition before trial allowed in evidence.

FACTS: Automobile accident case. The plaintiff originally disclosed Dr. Bakshodeh, a chiropractor. Defendant also disclosed a chiropractor. On January 14, 2004, the plaintiff sought a second medical opinion from Dr. Carpenter, also a chiropractor. Plaintiff's counsel received Dr. Carpenter's report on January 15, 2004 and immediately forwarded it to the defendant. On January 26, 2004, the defendant responded with a motion to preclude. That motion was denied on February 3, 2004. On February 5, 2004, after the jury had been selected but before the commencement of evidence, the defendant filed a motion for continuance. The motion for continuance was denied. The Appellate Court affirmed.

REASONING: The defendant did not forward Dr. Carpenter's report to his expert immediately after receiving it, nor did he accept the plaintiff's invitation to depose Dr. Carpenter.

The defendant argues that the plaintiff's late disclosure of Carpenter violated practice Book § 13-4 (4) and prejudiced the defense because the defendant was not allowed sufficient time for his experts to review Carpenter's report or to respond to his opinion. We agree with the court that the defendant did not prove that he was prejudiced by the disclosure of Carpenter twenty days before trial. We find no fault with the court's determination that in the interval between the disclosure of Carpenter as an expert and the commencement of trial, the defendant had sufficient time to depose Carpenter and have his expert review the report and the deposition, and that the defendant instead, filed a motion to preclude Carpenter's testimony and after, failing that, filed a motion for a continuance. Under the facts and circumstances of this case, we conclude that the court did not abuse its discretion when denying the motion to preclude Carpenter's testimony. [footnotes omitted.]

*Villa v. Rios*, at pp. 342-43.

VIOLATION OF SCHEDULING ORDER LEADS TO PRECLUSION — WEXLER V. DEMAIO, 88 Conn. App. 818, (May 10, 2005), cert. granted; DiPentima, J.; Trial Judge - Sheldon, J.

RULE: Trial court's order that party who had not complied in a timely fashion with the Practice Book requirements regarding expert disclosure file a written report from the expert similar to that required in federal court upheld.

FACTS: Medical malpractice action against four defendants. Three of the defendant physicians were in one practice and represented by one attorney, one defendant was from a different practice and represented by separate counsel.

On July 10, 2002 the court issued a scheduling order requiring the plaintiffs to disclose their experts by November 30, 2002. The plaintiffs disclosed no expert.

On May 5, 2003, defendant Davis filed a motion for summary judgment. On May 19, 2003, the plaintiffs filed a motion seeking until July 2, 2003 to disclose their expert witnesses. On June 12, 2003, the court granted the plaintiffs' motion to extend time until noon on June 26, 2003. The order required that in addition to fully complying with Connecticut Practice Book § 13-4 (4), the disclosure should:

. . . include the expert's curriculum vitae, a list of all materials and information viewed or considered by the expert and a copy of all such materials not yet disclosed, as well as a list of all cases in which the expert had testified since January, 1999. The plaintiffs were also ordered to make the expert available for a deposition on specific dates during the first two weeks of July and to bear all costs associated with the deposition.

*Wexler v. DeMaio*, at pp. 821-22.

The plaintiffs filed their disclosure on June 26, 2003 but it did not fully comply with the court's order. More specifically, it did not include a list of the cases in which the expert had testified. The disclosure did comply with the order to make the expert available for deposition during the first two weeks of July.

Defendant Davis filed a motion to preclude on July 3, 2003. The defendants chose not to depose the expert at a hearing held on September 4, 2003, the court found that the plaintiffs' compliance was

# CTLA Update on Evidence

insufficient and ordered that a written report be supplied by the expert by September 10, 2003. The plaintiffs filed an additional supplemental disclosure on September 25, 2003, which provided more detail, but not the written report. At a hearing on September 29, 2003 the defendant's motion to preclude was granted and the defendant's motion for summary judgment was granted. The Appellate Court affirmed.

**REASONING:** The Appellate Court upheld the trial court's authority to require a written report under the circumstances of this case:

In light of those considerations, the

court ordered the plaintiffs to submit a written report by their expert that met what the court regarded as the minimum requirements of § 13-4 (4), copies of all existing transcripts of expert testimony by the expert, and a list of billings from previous cases in which the expert served as a witness. Given that the court could have precluded the plaintiffs' expert under § 13-4 (4) or its own inherent powers to compel observance of its rules; see *Millbrook Owners Assn., Inc. v. Hamilton Standard*, supra, 257 Conn. 12-13; the court was well within its discretion to issue a new, albeit stringent, discovery order.

*Wexler v. Demaio*, at pp. 831-32.

Judge Lavery dissented.

I respectfully disagree with the decision of the majority because I believe that the expert disclosure provided by the plaintiffs, Howard Wexler and Judy Wexler, on June 25, 2003, met the requirements of Practice Book § 13-4 (4). Accordingly, I would hold that the court order of September 4, 2003, which imposed additional stringent requirements that the plaintiffs were unable to meet and ultimately resulted in the dismissal of their case, was an abuse of discretion.

*Wexler v. Demaio*, at p. 834.

## President's Notebook

*continued from page 1*

which you will be able to put in your waiting room. They deal respectively with the infamous "McDonald's case"; the medical malpractice firestorm; and the civil justice system. While these will not, in and of themselves, be sufficient to turn the tide of propaganda which incessantly attacks the civil justice system, they may arm potential jurors with the facts they need to speak for victims when deliberating in the jury room.

During this past year we have begun a series of regional meetings, which I hope my successor, Ernie Teitell, will continue. We have visited with local members of CTLA in Milford, Danbury, Torrington and Stamford. It has been a pleasure meeting and speaking with many of you, and I want to reiterate how important your input is to our organization and its leadership.

My term saw the third year of the most recent fight on medical malpractice "reform." This fight has been critical, since we are confident that caps on non-economic damages, if enacted in one area of civil litigation, would be soon followed by attempts to impose similar limits in other areas. Hence, we have devoted a lot of our time, energy and resources in fighting this battle. While we gave ground, and the legislature created a series of new hurdles and screens for malpractice victims, the rights of victims were preserved. Additionally, we fought the battle to prevent a limit on the vicarious liability of rental car companies — but Congress has now sabotaged our efforts by prohibiting vicarious liability as part of the recent highway bill. This gratuitous intrusion on state interests is of course exactly the opposite of the fed-

eralism that the far right pretends to champion.

We are fortunate here in Connecticut to have a legislature that is willing to listen to our concerns and protect the rights of victims of wrongdoing. Our credibility, however, rests to a great extent upon your membership, your participation and your voices. This is an increasingly difficult way to make a living, but the good work we do makes a difference in people's lives. I encourage and ask you to remain involved and participate in CTLA activities. As I said at the outset, it has truly been an honor to serve you.

Ave atque vale.

## Editor's Note

By David N. Rosen

**M**y first words as the new Editor of the *Forum* must be to recognize the work of my predecessor, Bill Gallagher. Bill maintained a high standard



of excellence and service to CTLA and the wider legal community. This was in keeping with his work as a lawyer, for forty-two years and counting. Bill has defended the rights of individuals in countless appeals. (What's your guess of how many Lexis hits you get when you plug in his name for cases in the Supreme or Appellate Courts? Whatever you guessed, you were way, way low. It's 461. 461!) At the same time, he has tried countless cases, large and small, always with skill, always with zeal. Bill has never been in it for the money. He's a lawyer who loves being a lawyer and loves the law. He is an example to us all. As your new editor, my first exhortation is, Be Like Bill.

This issue tries to do that by including some of the best things about the *Forum*. For starters, Kathleen Nastri has collected a series of notable verdicts and settlements, an important feature that helps inform the judiciary about potential case values, encourages us, and sends ripples of anxiety through the defense bar and insurance industry. Next, Bob Adelman has yet again produced, and generously shared,

what we all wish we had the focus and discipline to have done ourselves: a comprehensive summary of developments in the law of evidence over the last year, keyed to the Code of Evidence. And third, Bob Carter has, again, provided a similarly comprehensive and indispensable analysis of workers compensation decisions. Even if you don't handle comp cases, read Bob's summary just for the pleasure of seeing what it's like to have complete mastery of an area of law.

I tried a case this summer in which my expert engineer had served in the Air Force during Desert Storm. Like many of us who made a point of missing the opportunity to serve during the Vietnam era, I have a not-so-secret admiration for the heroism and unflappability of soldiers. I asked my expert what made his unit successful, and his answer was that their attitude was AIO. What's that? He explained that AIO stands for adapt, improvise, and overcome. You may have heard that phrase, but it was a revelation to me, and it made the perfect mantra for trying a case. As always happens during jury trials, we had one roller coaster twist after another, and to stave off panic and despair our team often found ourselves saying, out loud, AIO, and using that spirit to rally ourselves.

I tell this story not just to pass along a useful tip but to explain why I agreed to edit the *Forum* and what I hope to do as editor. Both the vocation of being a lawyer for the underdog and the

institution of jury trials are under sustained attack. The current efforts are quite different from the long-running battles that have been fought in Connecticut and elsewhere, because their aim is to eliminate lawyers for individuals — us — as a force in American society. How can the national government possibly believe that it knows better than Connecticut what the rule should be for rental car liability, or non-economic damages, in Connecticut? Only because it knows that every reduction in individual rights hurts trial lawyers, making it easier to continue to erode individual rights, in a downward spiral that some consider progress.

Our response as a profession must be AIO. That includes, among many other things, skillful advocacy in the courtroom, which our contributors to this issue do much to advance, and also principled defense of the jury system, the Seventh Amendment, and the rights of individuals. The *Forum* has played that role as well, and I am eager to help it continue to do so. We will always have space both for articles that explain how to protect our clients' rights and for articles that show why those rights are important. That's an important way that we can be like Bill, and like the many trial lawyers who have helped make this country a place where individuals — not just corporations and the government — have rights.





# CTLA Law Reporter

By Kathleen L. Nastro, Associate Editor

If possible, please submit your verdicts and settlements via email to [knastr@koskoff.com](mailto:knastr@koskoff.com), together with a hard copy.

Several readers have mentioned that the verdicts and settlements reported would be more helpful if we included in our report the date on which the case was resolved and the insurance carrier, if any. Therefore, when you send your reports in, please do your best to include this information.

## JURY VERDICT

### **Motor Vehicle; 44 Year-Old Woman; 10% Impairment, Lumbar Spine; Pre-Existing Degenerative Disc Disease**

In the case of *Gloria Calderon vs. Jeanine T. Marcin*, filed in the Superior Court for the Judicial District of Hartford at Hartford (Docket No. CV 03-0827997), the jury returned a verdict of \$21,272.00 in economic damages and \$100,000.00 in non-economic damages. The plaintiff filed an Offer of Judgment for \$90,000.00. The defendant's insurance company was Allstate. The highest offer made was \$35,000.00.

On September 6, 2001, the plaintiff was stopped at a red light at the intersection of Main and Brewer Streets in East Hartford. The plaintiff claimed that her light changed from red to green before she proceeded. The defendant claimed that she had a green light and proceeded into the intersection. The defendant maintained that position through trial and asserted a claim for comparative negligence.

Dr. Richard Duenas, D.C. at Westside Chiropractic provided treatment initially. He had seen the plaintiff before the collision. She followed up several days later with her general practitioner who diagnosed muscle strain and tendonitis of the upper and low back. Her treatment consisted mainly of chiropractic care until she came under the care of Gerald Becker, M.D. of Orthopedic Associates of Hartford. Dr. Becker diagnosed back and leg pain as a result of an aggravation of

degenerative disc disease at L5-S1. He prescribed Neurontin and physical therapy. When these conservative modalities failed to bring about a response in the plaintiff's pain, Dr. Becker prescribed epidural injections. Ms. Calderon received three rounds of those injections. Ultimately, Dr. Becker assigned Ms. Calderon a 10% permanent partial impairment as a result of her motor vehicle accident in combination with the pre-existing degenerative disc disease. Dr. Becker testified that the motor vehicle accident superimposed trauma on a generally benign pre-existing condition.

The defendant hired Anthony J. Spinella, M.D. of Spinella Orthopedic Associates, Incorporated. Dr. Spinella testified that the plaintiff suffered a low back strain/sprain in the motor vehicle collision and that her ongoing problems were solely related to degenerative lumbar disc disease. On cross-examination, Dr. Spinella admitted that the plaintiff's lumbar disc disease was benign prior to the motor vehicle collision and that the collision was capable of aggravating and/or lighting up that prior benign condition. Dr. Spinella also admitted that Dr. Becker's treatment was reasonable and that as a spine specialist, he was better suited to treat conditions similar to the plaintiff's.

The case was tried to a verdict before The Honorable Robert Satter on May 25, 2005. The jury returned a verdict of \$21,272.00 in economic damages and \$100,000.00 in non-economic damages. After a collateral source reduction and the addition of Offer of Judgment interest, the final judgment totaled \$149,620.25.

Submitted by John J. Houlihan, Jr., Esq. and Paul M. Iannaccone, Esq., RisCassi & Davis, P.C., Hartford and Peter C. DiTomasso, Esq., Law Offices of Peter C. DiTomasso, Hartford.

## VERDICT

### **Medical Malpractice —Perforation of Bladder**

#### **Verdict of \$855,000.00**

In the case of *Debra Casorio v. Christian Ertl*, et al. filed in the Superior Court for the Judicial District of New

Britain at New Britain (Docket No. CV 03 0523128-S), a jury returned a verdict in favor of the plaintiff in the amount of \$855,000.00 on April 29, 2005.

The plaintiff was 45 years old when she underwent a laparoscopic bilateral hernia repair on September 15, 2001. Three days after the surgery, she returned to the doctor with a distended abdomen and in considerable pain. He changed her prescription, but gave no further treatment. Approximately three days later, the plaintiff was discovered unconscious and rushed back to Bristol Hospital. There it was discovered that she was in acute renal failure, and 4800 cc of urine was found in her peritoneal cavity. A second surgery confirmed a torn bladder from the prior laparoscopic procedure. The plaintiff was ultimately discharged from the hospital with a Foley catheter for approximately six weeks, but has remained incontinent.

The defendant Christian Ertl, M.D. at all times denied that the bladder was perforated during the course of his laparoscopic procedure. Instead, he opined alternatively that the bladder spontaneously perforated or otherwise perforated from exertion at home following the procedure. The defense expert on liability, Dr. Paul Safer, offered an opinion that the bladder was likely torn during the bilateral hernia repair; however, it was from an adhesion and might not have been seen by Dr. Ertl during the procedure. The defendant also called Dr. Jill-Peters Gee, who testified that the plaintiff's symptoms of urinary incontinence were a result of interstitial cystitis and not a result of anything that the defendant did during the surgery.

The plaintiff called Dr. Robert Aldoroty, a general surgeon affiliated with Mount Sinai Hospital in New York City. Dr. Aldoroty testified that while the standard of care would, in certain circumstances, allow a physician to perforate a bladder during a bilateral laparoscopic hernia repair, it is a deviation from the standard of care not to find the perforation and repair it before suturing the patient up following the surgery. In other words, the doctor performing the surgery should be aware of the high risk of blad-

der perforation, especially in a patient who had prior abdominal surgery (the plaintiff had a hysterectomy in the early 1980's) and should be prepared to promptly sew up any perforation which may occur and do so laparoscopically. Dr. Aldoroty also testified that the bladder injury occurred while the doctor used a blunt dissector tool or when one of the tubes was placed for the balloon at the initiation of the surgery.

The plaintiff also presented testimony from Dr. Steven Baker, a urologist, whom the plaintiff has been treating with in Florida. Dr. Baker testified that the incontinence that the plaintiff now suffers from was a direct result of the surgical injury. Evidence took approximately five days and the jury deliberated for two days. An offer of judgment had been filed for \$300,000.00 and, as a result, the pre-judgment interest was calculated at over \$167,000. Post-trial motion was also filed for attorney's fees based on a request for admission. The case settled for an undisclosed amount while the post-trial motions were pending.

Submitted by Kevin E. Creed, Esq. and Bruce E. Newman, Esq., Newman, Creed & Associates, Bristol.

## SETTLEMENT

### **Motor Vehicle Accident; 36-Year-Old Male; 30% ppd of lumbar spine;**

#### **"Failed Back Syndrome"**

#### **Settlement of \$1,950,000.00**

In the case of *Cordero v. Blaze*, filed in the Judicial District of New Haven (Docket No. CV-02-0460158), the parties settled prior to jury selection for \$1,950,000.00, after an extensive mediation conducted by Judge Robaina (three days). The settlement also included a reduction of the Worker's Compensation lien of \$100,000.00.

On February 1, 2000, the plaintiff, David Cordero, was traveling eastbound in the right-hand lane of I-95 in the City of Stamford, when the defendant made an improper lane change colliding with the left front quarter panel of his vehicle. The property damage was minimal and the plaintiff did not complain of injuries at the scene. Over the next few days, he began to develop low back pain and sought medical attention. For the next eight months, he received conservative treatment from various physicians, but his condition worsened considerably until he was advised not to return to work.

In September of 2001, seventeen months after the motor vehicle accident, he underwent his first of three back surgeries, a discectomy with fusion and instrumentation at L5-S1. In July of 2002, Mr. Cordero had a bilateral discectomy and fusion with caging at L4-5. Finally, in February of 2003 he had the old instrumentation removed from the first surgery, additional disc excisions and a fusion with cages at L5-S1. None of these surgical interventions resulted in an improvement of his symptoms.

David Cordero was left with a condition known as "Failed Back Syndrome". Failed Back Syndrome is a well-recognized complication of lumbar surgery. It has resulted in chronic pain and permanent disability for Mr. Cordero. Patients suffering from this malady have been referred to as "spinal cripples" in the literature and are often consigned to a life of long-term narcotic treatment with little chance of cure. Because of his chronic pain and significant limitation of motion, Mr. Cordero began using a cane. He was forced to use other parts of his body to compensate for the loss of use of his back and increasing ambulation problems. He gradually developed carpal tunnel syndrome and a cervical disc injury from use of the cane. In December of 2004 and January of 2005, he underwent carpal tunnel surgery of his left and right hands.

In addition to his physical injuries, he suffers from post-traumatic depression. Depression is recognized as an expected component of Failed Back Syndrome.

The plaintiff's past medical bills amounted to \$266,450.00 and his past lost wages were approximately \$142,000.00. His estimated net future loss of earning capacity was \$740,000.00, reduced to present value, and the future cost of health-related goods and services amounted to \$325,000.00.

The plaintiff retained Dr. Kenneth Reagles, a nationally renowned vocational, rehabilitation, and economic consultant, who opined that Mr. Cordero's future work capacity was considered as nil; Dr. Reagles also assessed Mr. Cordero's future health care needs. The treating physicians were Dr. Phillip Dickey, neurosurgeon, Dr. John O'Brien, physical medicine, Dr. Jeffrey Arons, hand surgeon, and Dr. Jerome Schnitt, psychiatry. These physicians were all very helpful in explaining the parameters of Failed Back Syndrome and illuminating the profound consequential damages and losses associ-

ated with this condition.

Finally, it should be noted that Judge Robaina worked tirelessly to mediate this case to resolution. The defendant was well represented by Arthur Riccio and Barry Beletsky of Ricco & Beletsky in East Haven, Connecticut. This case was resolved in February of 2005. The insurance carrier was Amica.

Submitted by Barry J. Sinoway, Esq., Sinoway, McEnery, & Messey, P.C., North Haven.

## JURY VERDICT

### **Motor Vehicle Accident**

#### **41-Year-Old Female; 6% Permanent Impairment**

#### **\$24,000.00 Verdict**

In the case of *Jane Doe v. Hill* (client did not want her name to be used), filed in the Superior Court for the Judicial District of New Haven at Meriden (Docket No. CV-01-0278368-S), a jury returned a verdict on October 6, 2004 in favor of the plaintiff in the amount of \$24,000.00.

The defendant rear-ended the plaintiff in Middletown, Connecticut, while the plaintiff was stopped at a red light.

The plaintiff proceeded to work, but then went to Middlesex Hospital that evening after the pain did not abate. She treated with Dr. Kenneth Kramer, an orthopaedic surgeon, for approximately a year and a half. She had two months of physical therapy.

The plaintiff's medical specials were approximately \$4,500.00, with no lost wages. The plaintiff testified that the injuries had a significant effect on her work, as she was required to sit at her desk for long periods of time. She also indicated there was a significant impact on her enjoyment of life. Specifically, she testified that she was unable to properly care for her 2-year-old daughter, as she could not lift her.

The testimony of Dr. Kenneth Kramer was offered on videotape. Dr. Kramer testified as to the permanency of the injuries that the plaintiff sustained as well as his treatment of her.

The insurance carrier in the case was Allstate Insurance Company. Allstate filed an offer of judgment for \$6,000.00 before trial.

The jury awarded \$1,500.00 in economic damages and \$22,500.00 in non-economic damages.

Submitted by Donald L. Altschuler, Esq., Law Offices Altschuler & Altschuler, West Haven.

## SETTLEMENT

### Motor Vehicle Accident; Lumbar Disc Herniation Settlement of \$450,000.00

In the case of *Frederick Johnson v. David Rodriguez, et al.* filed in the Superior Court for the Judicial District of Fairfield at Bridgeport (Docket No. CV-04-4002005-S), the parties settled the claim for the sum of \$450,000.00 in January, 2005, shortly after litigation commenced.

On October 24, 2002, Mr. Johnson was driving his employer's vehicle in an easterly direction on Cascade Boulevard, approaching a traffic light at the intersection of Marsh Hill Road. At that time, the light turned green and Mr. Johnson proceeded to make a left-hand turn from Cascade Boulevard onto Marsh Hill Road.

At that time, the defendant, David Rodriguez, was driving a vehicle owned by Julian Railroad Construction Company, and was traveling in a southerly direction on Marsh Hill Road. He attempted to stop at the red light and slid on the wet pavement, causing his vehicle to strike Mr. Johnson's vehicle on the front driver's side. The defendant was cited for traveling too fast for road conditions.

As a result of the accident, Mr. Johnson suffered a disc herniation at L4-5, requiring two lumbar surgeries. He also suffers from chronic back pain, bladder problems and erectile dysfunction due to the surgeries or the medication.

As a result of this accident, Mr. Johnson is unable to work as a truck driver or a loader. He has been out of work since the date of the accident. His earning capacity has been impaired.

Mr. Johnson's worker's compensation lien was approximately \$48,912.63. His medical bills totaled approximately \$197,377.08. He was assessed with a 35% permanent partial of his lumbar spine.

Mr. Johnson had been involved in a prior motor vehicle accident, in which he sustained injury to his lumbar spine (L4-5), and was assessed with a 10% permanent partial disability. At that time, he was advised to have the same surgery by Dr. Garver, but he chose not to undergo it. The defendant in the present case contested causation and claimed the surgery resulted from the prior accident.

The claim was made against David Rodriguez and Julian Railroad Construction Company for negligence and recklessness.

Submitted by Mark Arons, Esq., Millman & Arons, Westport.

## CONFIDENTIAL SETTLEMENT

### Nursing Home Negligence; Wrongful Death;

### Life Expectancy Between 3 and 10 Years Settlement of \$395,000.00

In this case, filed in the Judicial District of Fairfield at Bridgeport, a settlement was reached during jury selection in favor of the plaintiff in the amount of \$395,000.00. This case was brought on behalf of the decedent and her surviving husband. At the time of trial, her husband had not remarried and they had no children.

Fifty-one year old Mrs. S was a resident of the defendant nursing home, admitted from Bridgeport Hospital after suffering a stroke. At midnight of the twentieth day of her stay at the facility, Mrs. S was found on the floor next to her bed with a fractured hip and fractured humerus with the bedrail down. The defendant facility claimed that the decedent admitted to lowering the rail herself and consequently fell out of bed. The decedent would have had to manipulate and squeeze the bed rail release mechanism at the foot of the bed to lower the rail. The plaintiff claimed that the nurse's aide left the rail down during evening rounds and Mrs. S was allowed to roll out of bed. A statement in the ambulance report, attributed to a facility nurse, supported this theory stating, "rail was down and patient rolled out of bed". The patient was transported, via ambulance, to Bridgeport Hospital for hip surgery. During her recovery at the hospital, her tracheotomy tube occluded and she died. The plaintiff claimed that since Mrs. S's death occurred during treatment for injuries occurring at the nursing home, it was also responsible for her death.

The decedent had significant pre-existing medical conditions, including end stage renal disease requiring dialysis, insulin dependent diabetes, congestive heart failure, hypertension, cerebular vascular accident, morbid obesity, and below the knee amputation. She had a life expectancy of between three and ten years.

The plaintiff was able to secure deposition testimony concerning staffing shortages and improper and suspicious charting by the defendant's employees, especially around the time of the decedent's fall. The plaintiff retained two experts, both nursing home administrators, to explain the defendant's breach of the standard of care, to criticize the charting practices of the facility, and to explain her physical and mental capabilities. The defendant hired a medical director from a Greenwich nursing home who claimed the care was proper, and that Mrs. S was capable of lowering the rail herself.

The case settled after almost two weeks of jury selection.

Submitted by Jonathan Spodnick, Esq. and Anthony S. Bonadies, Esq., Sette & Bonadies, P.C., Hamden.

## JURY VERDICT

### Pedestrian v. Motor Vehicle Accident Verdict of \$424,320

In the case of *James Scott v. Alex Carrillo, et al.* filed in the Superior Court for the Judicial District of New Haven (Docket No. CV-01-0452020-S), in July 2004 the jury returned a verdict of \$832,000.00, which was reduced by 49% comparative negligence for a net verdict of \$424,320.00.

The plaintiff, Dr. James Scott, was a 49-year-old psychiatrist at the time of the accident, which occurred on August 4, 2000. On the day of the accident, at approximately 5:00 a.m., the plaintiff was jogging in a southerly direction on Edgehill Road, approaching the intersection of Edgehill Road and Huntington Street. The defendant, Alex Carrillo, was driving his car in a westerly direction on Huntington Street approaching the same intersection. Mr. Carrillo, who was delivering newspapers for the New Haven Register and Tri-State Newspaper Services, Inc., began to make a right-hand turn. The plaintiff alleged that at the time that Mr. Carrillo executed the right-hand turn, he failed to stop fully at the stop sign and was not paying attention to the road. As a result, the plaintiff was struck by defendant Carrillo's vehicle and sustained a compound fracture to his right leg. The plaintiff was rushed to Yale New Haven Hospital where emergency surgery was performed by Dr. Baumgaertner.

The plaintiff underwent an intensive course of physical therapy. Approximately



six to eight months after the accident, he was able to return to running, though at a slower pace and decreased duration than before the accident.

The trial, before Superior Court Judge Thomas Corradino, lasted one week. The jury deliberated for approximately five hours before returning the verdict. The verdict included 100% of the plaintiff's economic damages, which included \$67,493.17 in medical bills and \$14,350.00 in lost wages and non-economic damages of \$750,000.00.

Submitted by Louis M. Federici, Esq., Parrett, Porto, Parese & Colwell, P.C., Hamden.

## VERDICT

**\$50,000 Plus Offer of Judgment Interest of \$11,474 and Costs of \$1,374, for a Total of \$62,848**

In the case of *Marianne Sizemore v. Ronald Panda*, Superior Court for the Judicial District of Waterbury at Waterbury (Docket No. CV 00-0161497-S), a woman suffering from fibromyalgia was awarded \$50,000 by a Waterbury jury before the Hon. Carol A. Wolven.

Plaintiff was a married woman in her early 40's, who was employed as a mortgage originator. She was driving her car on Route 10 in Cheshire. At approximately 5 p.m., plaintiff came to a stop for a red light and was rear-ended by defendant. It had been raining before the accident. Plaintiff alleged that defendant failed to keep a proper lookout.

Plaintiff claimed that she suffered soft tissue neck and back injuries and fibromyalgia as a direct result of this accident, which required physical therapy and chiropractic treatment. Plaintiff was initially assessed with a 4% whole person impairment, which was subsequently updated to a 10% impairment of the neck and a 2% impairment of the back. Plaintiff claimed \$10,436 in past medical expenses, past wage loss of \$13,846, and future impairment of earning capacity.

Defendant contended that the weather conditions contributed to the accident and he was not negligent. Defendant also argued that plaintiff had not presented enough evidence that defendant had done anything outside the ordinary care in driving his vehicle. Defendant further asserted that plaintiff's injuries were due to an accident six months earlier.

The plaintiff had filed an offer of judgment for \$40,000. The last pretrial settlement offer was \$12,000 from Progressive Insurance Company. The defendant increased the offer to \$25,000 before closing arguments. The jury returned a verdict of \$10,000 for non-economic damages and \$40,000 for economic damages.

Submitted by Shea S. Kinney, Esq., Kenny, O'Keefe & Usseglio, P.C., Hartford.

## SETTLEMENT

**Fire Death;  
65-Year-Old Male**

### Mediated Settlement of \$250,000

In the case of *Thomas Weaver, Administrator of the Estate of Robert Lowe v. Meriden Ventures*, Superior Court for the Judicial District of New Haven at New Haven (Docket No. CV 00-0437675-S), the parties settled for \$250,000, in a mediation before the Hon. Frederick Freedman.

On January 22, 2000, plaintiff's decedent, 65-year-old Robert Lowe, was a tenant of a second floor apartment in defendant's multi-family dwelling. On that date, two of defendant's employees, while using an open flame torch to thaw a frozen pipe in an unoccupied first floor apartment, caused an adjacent wooden beam to catch fire. The fire quickly spread throughout the building and Mr. Lowe, in his apartment and intoxicated, was overcome by the smoke.

Upon arrival at the scene, the fire department found Mr. Lowe initially unresponsive, but he was resuscitated and transported to Hartford Hospital. He was later transferred by Lifestar to Bay State Medical Center. Despite the administration of hyperbaric oxygen, Mr. Lowe succumbed six hours later from smoke inhalation.

The defendant's employees admitted in their depositions that they were inexperienced in using an open-flame torch and that their use of the torch caused the beam to ignite, resulting in the fire that engulfed the building.

At the time of his death, Mr. Lowe had been unemployed for nearly 20 years and had an extensive criminal record, including having served time in prison on several occasions. He also had a history of alcohol abuse.

Plaintiff's medical expenses were \$5,370; funeral expenses were \$1,400. Plaintiff's settlement demand was \$500,000. Defendant offered \$100,000 to settle the case.

At the mediation, the parties settled for \$250,000.

Submitted by Stephen Jacques, Esq., Moore, O'Brien, Jacques & Yelenak, Cheshire.

## VERDICT

**Consolidation of Two Automobile Accidents**

**5% Impairment of the Cervical Spine and**

**10% of the Lumbar Spine**

**Verdicts of \$268,000.00,**

**Reduced for Comparative Negligence**

In the cases of *David Willox v. Daniel Miller* (Docket No. CV-01-0558639-S) and *Willox v. David Glynn* (Docket No. CV-01-0559548-S), Superior Court for the Judicial District of New London, the jury returned verdicts totaling \$267,638.00 (\$67,638.00 in economic damages and \$200,000.00 in non-economic damages) for the plaintiff, which were reduced for comparative negligence.

The plaintiff was a 39-year-old aide working at a local convalescent home in New London.

In the evening of February 14, 2000, the plaintiff was driving on Route 95 southbound, approaching the Gold Star Bridge, which runs between Groton and New London.

The plaintiff's car was first struck by the defendant Miller's car and, seconds later, the defendant Glynn struck Willox's car, which was sitting disabled in the travel lane of the highway, disabled from the first collision. Both defendants denied liability and claimed that Mr. Willox had improperly changed lanes, cutting off the first defendant and causing the accidents.

The plaintiff filed two lawsuits — one for each accident — which were consolidated for trial.

Mr. Willox's injuries consisted of a sprain/strain of his neck and lower back. The medical bills were about \$11,000.00, almost all of which were for chiropractic treatment and physical therapy. By trial, most of the problems with his neck had gone away, but his back pain persisted.

This interfered with his job at the convalescent home, which included a good deal of lifting and moving of elderly patients.

The verdict form had questions that asked the jury to make a determination of each party's percentage negligence, as well as what percentage of the plaintiff's injuries was caused by each of the accidents.

After subtracting for comparative negligence and adding in offer of judgment interest, the plaintiff was entitled to \$232,000.00.

The Travelers insured the defendant Miller; Allstate insured the defendant Glynn.

Submitted by Phillip Zuckerman, Esq., Law Offices of Phillip Zuckerman, New London.

## JURY VERDICT AND SETTLEMENT

### Civil Rights — Police Misconduct Wrongful Death of 41-year-old Woman

In the case of *Margaret Cowan, Administratrix of the Estate of Victoria Cooper v. Michael Breen and the Town of North Branford*, filed in United States District Court (Docket No. 3:00CV00052(RNC)), the jury returned a liability verdict in favor of the plaintiff, and the case then settled for \$1.5 million.

On July 13, 1999, at about 1:30 in the morning, Victoria Cooper was the passenger in a Chevrolet Camaro traveling on Route 80 in North Branford. Officer Michael Breen pulled the car over for a traffic violation, ordered the driver out of the car and discovered baggies with drug residue in his pocket. The driver then fled down the road on foot. Officer Breen pursued him but lost him in the woods. Returning to the scene of the stop, Officer Breen saw the Camaro, now operated by Ms. Cooper, heading down Route 80 in his direction. He fired two shots as the car went by him: the first hit the front hood and the second went through the driver's window, killing Ms. Cooper.

The State Police investigation, led by Dr. Henry Lee, concluded that the officer shot Ms. Cooper while jumping out of the way of her oncoming car, and the State's Attorney for New Haven County found the shooting to be justified and declined to prosecute the officer.

The defendants had taken an interlocutory appeal on the issue of qualified immunity, in which the Second Circuit sustained the decision of Magistrate Judge Smith denying summary judgment. *Cowan v. Breen*, 352 F.3d 756(2d Cir. 2003).

At trial Kent Schwendy, P.E., of Fuss and O'Neill in Manchester, testified to

testing that he did that determined the angle at which the first bullet struck the car's hood based on comparison of the bullet hole in the hood with the holes left by 50 test shots with a similar weapon and ammunition into sheet metal and the hood of a similar Camaro. The testing showed that the officer was off to the side of the Camaro when he fired the first shot.

James Fyfe, the Deputy Commissioner of Training for the NYPD testified, by deposition, that the standards of police practice require officers not to shoot at vehicles coming at them, but to focus on getting out of the way.

A significant evidentiary issue at trial was the admissibility of the fact that Ms. Cooper had cocaine in her possession and in her bloodstream at the time of the shooting. The officer was unaware of that fact and the defendant's medical expert, Kenneth Selig, M.D., conceded that it was impossible to say with a reasonable degree of probability what if any effect the cocaine had on Ms. Cooper's behavior. The court (Chatigny, C.J.) excluded the evidence in the liability phase.

The jury found in favor of the plaintiff on liability. The parties then settled the case for \$1.5 million.

Reported by David N. Rosen, David Rosen & Associates, New Haven.

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# Workers' Compensation Review

June 14, 2004 through June 13, 2005

By Robert F. Carter

## SUPREME COURT

### ***Insurance company wrong-doing sheltered by exclusivity: bad faith suits eliminated***

Section 31-284(a), providing exclusivity of remedy, bars civil actions for bad faith against carriers for egregious actions taken in the administration of workers' compensation claims. *DeOliveira v. Liberty Mutual Ins. Co.*, 273 Conn. 487 (2005). The carrier contested an unwitnessed injury reported the next day; the physicians apparently all believed the claimant's history. The commissioner's decision on the May, 1989, injury was delayed, at least in part through the claimant's actions and inactions, until March, 1995. The claimant finally got a ruling from the commissioner of unreasonable contest, and an award of interest and attorney's fees. The claimant filed three bad faith civil actions in the same case, based in part on a claim of psychiatric injury, held not compensable by the commissioner, arising from the carrier's delay. The benefits awarded were not paid by Liberty after the 1995 decision, but neither, apparently, did the claimant execute on the finding and award.

The potential remedy of bad faith was useful when the sword stayed mostly sheathed; most practitioners have not wanted a Supreme Court ruling on this issue, since the odds were that the decision would go exactly as it has done.

The Court said that maybe an action would lie for actions so egregious as to make the carrier no longer an agent for the employer, citing a case in which a carrier allegedly used a psychiatric examination intentionally to make a claimant commit suicide. The implication is that suicide caused by the sloth, ill temper or bad faith of adjusters is neither actionable against the carrier nor compensable under the Act.

Several results should flow, if the Court is decent. First, physical or psychiatric injuries resulting from bad claims handling, like injuries during medical treatment for a compensable injury, should be held compensable. The Court did not rule directly on the commissioner's holding below that depression arising from mistreatment by a carrier is not

compensable. But it suggested that it agrees that such injuries are not compensable, counseling claimants not to expect much. Surely, at least, depression or suicide arising from the loss of one's livelihood because of a work-related amputation should be just as compensable as the loss of the arm or leg itself. Depression from unreasonable deprivation of the meager compensation benefits for the injury seems not very different. The Court should remember that most such claimants will simply get no medical treatment for what may be life-threatening conditions, based on the current prevailing rulings, if the condition arises from the mishandling of the claim. Their health insurance, if they had any, is cancelled when they get hurt and can't work.

Second, the burden is now squarely on the commissioners to exercise effectively the feeble remedies for unreasonable contest and delay which are available: the award of interest and attorneys' fees. Interest itself is negligible as a penalty; the value of economic oppression through unreasonable contest and delay in payment is much greater to the carriers than the occasional cost of a little interest. For attorneys' fees, the bias has been to make very modest awards, trimming hours and reducing normal hourly rates, with the unspoken assumption that a symbolic slap on the wrist is safe enough. The commissioners have appeared generally not to want to offend the carriers and the defense lawyers who are their daily companions, although there have been exceptions. But the injuries to claimants and the huge waste of time for claimants' attorneys in unnecessary litigation are real; there is no excuse now for commissioners' holding, *sub rosa*, that compensation for time spent on workers' compensation claims is worth less than time spent by the claimant's attorney on other work.

### ***State disability retirement benefits not considered in determining 308a wage loss benefits***

Correcting a wrong turn by the CRB, the Supreme Court held that commissioners may not consider state disability retirement benefits as earnings in order to reduce a partially disabled claimant's

eligibility for wage loss benefits under Sec. 31-308a. *Starks v. University of Connecticut*, 270 Conn. 1 (July 6, 2004), and *Smedley v. Department of Mental Retardation*, 270 Conn. 32 (July 6, 2004). The Supreme Court pointed out that under Sec. 5-169(g) and Sec. 5-192p(d), workers' compensation benefits are primary, and the state disability retirement benefits may be reduced because of receipt of workers' compensation benefits. In the case of 308a benefits, unlike temporary total disability benefits, the state retirement commission did not actually reduce the retirement benefits, on the ground that the benefits related to permanent partial disability benefits. But because of the statutory offset scheme in which workers' compensation benefits are primary, and because the retirement benefits are not earned income, the Court held that these disability retirement benefits should be disregarded in calculating wage loss benefits under Sec. 31-308a. The Court rejected the argument urged by the respondent, that Sec. 31-314 requires the commissioner to give "due allowance" for any money paid the employer "on account of" the injury, holding that the statute applies only to advances of payments made for the purpose of fulfilling workers' compensation obligations.

The holding in these cases is important, not merely on the issue of state retirement benefits, but also as a reminder that non-earned sources of income, like benefits under a private disability policy, severance pay, or investment income, cannot be considered as earned income when determining 308a benefits. These benefits are meant to replace earnings which have been lost because of the claimant's injury, but not to penalize prudent workers.

### ***Burden-shifting recital unnecessary in retaliation cases***

As long as the trier of fact applies the burden-shifting law in discrimination or retaliation cases under Sec. 31-290a, he or she need not recite it. Here the Court affirmed an award of benefits for wrongful termination under Sec. 290a, where the plaintiff, an employee of 32 years, had trouble performing well because of her injuries. *Cable v. Bic Corp.*, 270



Conn. 433 (Aug. 3, 2004). The Court here found that there was no evidence that the commissioner did not apply the law correctly, i.e. the nutty ping-pong of onus procedendi and onus probandi, cooked up in Federal discrimination law, but which was applied to Sec. 31-290a cases in *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53-54 (1990). The Court suggested the defendant might have sought an articulation of the commissioner's reasoning.

Good work by the Court: the commissioners should be assured that they are being paid to make decisions based on the evidence, and that if evidence is there in the record to support the decision, findings may be short: legal mumbo-jumbo is as unnecessary as the recital of testimony.

#### **Act does not require accommodation, but merely prohibits discrimination**

Drawing a simple line in a muddy case, the Court held that the workers' compensation act, including Sec. 31-313, doesn't require accommodation, and that Sec. 31-290a merely prohibits discrimination. *Mele v. Hartford*, 270 Conn. 751 (Aug. 31, 2004). A teacher with a compensable foot condition couldn't get the first floor office she wanted, to avoid stairs, and claimed discrimination, in that she was forced to take a leave of absence. The case, according to the Court, lacked good evidence that the claimant's supervisors knew of her prior work-related foot injuries, or that she had exercised rights under the Act. The commissioner's award based on discrimination was reversed. The case, with its factual muddle, is a reminder that the claimant must clearly make a record of exercising his or her rights under the Act in order to pursue a Sec. 290a claim; and a strong reminder that the Act doesn't require accommodation, but merely requires the employer to provide light duty work if available.

#### **Motion to preclude can't make mental-mental claim compensable; compensability of class of injury is jurisdictional**

A mental-mental claim, otherwise barred by Sec. 31-275(16)(B)(ii), is not compensable merely because a motion to preclude may lie. Here, the claim was for a police officer's mental condition arising from a shooting incident in which he was not physically injured. The Court held that the class of injury claimed must be compensable in order to support the subject matter jurisdiction of the commission. *Del Toro v. Stamford*, 270 Conn. 532 (Aug. 10, 2004). Thus, timeliness, employee relationship, and now, com-

pensability of the class of injury, are jurisdictional elements; but proof of causation, as the court emphasized, is not.

#### **Inconsistent allegations of compensability survive summary judgment in civil action against employer**

Care in pleading legally inconsistent claims was the lesson in the saga of *Mamudovski v. Bic Corp.*, 271 Conn. 297 (Oct. 5, 2004), where the claimant sought recovery in negligence against her employer on the basis of a motor vehicle accident which occurred immediately after the claimant was fired, and where the firing was the result of the claimant's allegedly faking her limited work capacity following a back injury years earlier. The claimant also alleged, in separate counts, retaliatory discharge under Sec. 31-290a, presumably for exercise of her workers' compensation rights in connection with the first injury. After she was fired she fainted and hit her head in the company bathroom, was escorted to her car and told to leave, and upon driving away fainted again and hit a pole. The trial court granted summary judgment on the negligence count, on the ground that the claimant alleged in the 290a count that the second injury, as well as the first, was compensable under the workers' compensation act. The Appellate Court, in a good decision, had reversed on procedural grounds the too-hasty grant of summary judgment: the trial court didn't put the summary judgment motion on the calendar and limited plaintiff's right to be heard. But the Appellate Court went on to state that the allegation of compensability was not a judicial admission, which was of course true: no one, and certainly not the plaintiff, could make a certain call on whether the second injury was compensable. The new trial was granted only on the negligence claim, since the plaintiff had lost the 290a claims at trial. *Mamudovski v. Bic Corp.*, 78 Conn. App. 715 (2003). The Supreme Court, after taking the case, dismissed the appeal as improvidently granted, sending the plaintiff back to try the negligence case.

Similarly ambiguous cases arise frequently in the gray areas of whether an injured person is an employee or an independent contractor. One should probably plead the legal uncertainty, in order make it clear that the plaintiff has to pursue both civil and workers' compensation remedies, until compensability is decided. In *Nationwide Mutual Ins. Co. v. Allen*, 83 Conn. App. 526 (June 29, 2004), a 30c was held to be an evidential but not judicial (i.e. conclusive) admission of an employment relationship, where the

claimant had also sued the putative employer civilly in an ambiguous situation and the liability carrier sought in this declaratory judgment action to avoid responsibility on the ground that the claimant/plaintiff was an employee and thus excluded from the policy coverage. The courts, however, carefully evaluated the facts in determining that the plaintiff, a landscaper, was an employee under the defendant's control, and hence barred by exclusivity. It might be smart to file a sort of conditional notice of claim in such ambiguous situations ("the claimant appears to have been an employee and claims workers' compensation benefits, but there is enough ambiguity to reserve to the claimant his civil remedies if the facts do not sustain the finding of an employment relationship," or some such waffling).

#### **Finality rules clarified**

In a good decision, the Supreme Court held that where the claimant's hypertension was found compensable despite a defense of untimeliness, the commissioner's decision was appealable, even though no indemnity benefits had been awarded because the claimant had no lost time. The Appellate Court had held the decision not final for purposes of appeal. *Hunt v. Naugatuck*, 273 Conn. 97 (March 22, 2005). Finality issues will always arise in workers' compensation cases, which may last a lifetime.

The underlying real issue, timely notice of claim in heart disease and hypertension cases, is much in need of clarification by the Supreme Court; here the case was remanded to the Appellate Court. As we have noted previously, the CRB has countenanced the notion that the hypertension statute of nonclaim begins to run when the claimant knew or should have known of the hypertensive condition, while giving lip service to the actual law, that notice of claim must be filed within a year from an accidental injury or from the last repetitive trauma. *Hunt v. Naugatuck*, 4607 CRB-5-02-12 (Feb. 9, 2004); see also, *Pearce v. New Haven*, 76 Conn. App. 441 (2003), adopting the scianter analysis of the CRB in *Pearce v. New Haven*, 4385 CRB-03-01-5 (March 28, 2002); *Peck v. Town of Somers*, 4640 CRB-1-03-3 (March 5, 2004).

The Court in *Malchik v. Division of Criminal Justice*, 266 Conn. 728 (Dec. 9, 2003), in holding that heart disease had not been shown to be an occupational disease as a matter of fact in this case, suggested that where the heart disease claim is filed within one year of the last date of the stressful work, it is timely. After the Court's analysis in *Discuillo v.*

*Stone and Webster*, 242 Conn. 570 (1997), it should be clear that the statute of non-claim in repetitive trauma cases which are not occupational diseases is a year from the last repetitive trauma. The Court should clearly spell out and enforce the rule; the claim is timely if filed within one year from the last repetitive trauma, and the date of manifestation of the condition, or scienter, is irrelevant. Otherwise, claimants will not only be barred from filing heart claims which they don't know exist until after the statute of nonclaim has run, as in *Discuillo*; they will also be barred from filing claims for heart conditions which appear, but where the claimant keeps working and continuing the repetitive trauma, and doesn't file a claim for more than a year after the appearance of the condition. The commissioner here held the date of injury to be the date the claimant's condition became clinically significant, and saved the claim: but that is merely a stop-gap measure which avoids applying the Court's explicit rule laid down in *Discuillo* for repetitive trauma cases which are not occupational diseases: one year from the last repetitive trauma, with scienter irrelevant.

#### **Second Injury Fund not liable for Heart and Hypertension COLAs**

Where New London claimed reimbursement for cost-of-living allowance benefits paid to a surviving spouse of a deceased policeman under Sec. 7-433c, the Court held the Second Injury Fund was not liable, as a matter of statutory construction: heart and hypertension benefits, although "payable under" the workers' compensation act, are not benefits paid for a "compensable injury" under Sec. 31-306(a)(2)(A), the provision which obligates the Fund to pay COLAs. The fatal heart attack occurred during the "gap" period July 1, 1993 — Oct. 1, 1997, during which the Fund is liable for COLAs because of the retroactive legislation. *Bergeson v. New London*, 269 Conn. 763 (June 22, 2004).

#### **APPELLATE COURT**

#### **Injury to home health care worker while traveling to visit her patient held compensable**

A CRB decision we fretted about a few years ago finally got straightened out in an important decision by the Appellate Court, where the Court held compensable the injuries suffered by a home health care worker who was struck by a motor vehicle crossing the street to her first home visit of the day for one of her employers. The injured worker, after visiting a patient for Employer A, took the

bus to go to the home of her first patient for Employer B, and was injured after she left the bus and was headed toward the patient's apartment. The first trial commissioner had awarded benefits since the claimant's job required her to travel to patient's houses, and after years of interim proceedings, the Appellate Court agreed: the claimant's accident was compensable because "at the time of her injury she was engaged in an activity that was integral to her employment, as travel was a substantial part of the service the defendant provided to its clients." Whether the claimant had a home office, which had occupied the CRB, was irrelevant. *Labadie v. Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220 (Aug. 3, 2004).

This is a very good, and relatively clear, holding, and returns Connecticut to the mainstream. The only thing excluded by the "going and coming" rule should be an ordinary commute to a regular work-site, whether an office or a construction site. Where the journey "is part of the service," said the Court, quoting Professor Larson, the accident is compensable. Like an appliance repairman, lawyers' trips to hearings, even from home, are journeys which are part of the service provided clients, but the regular morning trip to the office is not. Fair enough.

#### **Compensability held not to mean service-connected!**

The claimant's shoulder injury was found compensable by the State of Connecticut, which paid for the surgery and issued a voluntary agreement for 21% permanent partial disability of the shoulder. The claimant then applied for disability retirement because of his shoulder condition. The state medical examining board, which pursuant to Sec. 5-192p(f) determines the eligibility of state employees for a disability retirement, held that the claimant's shoulder condition was not service-connected, despite the acceptance of the condition by the State as having arisen out of and in the course of the claimant's employment. The state employees retirement commission, to whom the medical board reports, denied the disability pension. Ordinarily the medical board's decisions are not appealable. The claimant, by appeal to the Superior Court and then to the Appellate Court, at least succeeded in having the Court find that the state employees retirement commission did have jurisdiction to consider his appeal on the legal ground that it was bound by collateral estoppel. The Court went on to hold, however, that collateral estoppel did not apply, since the fact of compens-

ability was not actually litigated in the first proceeding. Hence the pension was denied. *Hill v. State Employees Retirement Commission*, 83 Conn. App. 599 (June 29, 2004). This decision seems clearly a misuse of the doctrine of collateral estoppel, where the "actually litigated" requirement is a sensible rule, to bar the importation of findings of facts of marginal significance into later proceedings between the same parties. Here, compensability was the central fact in the workers' compensation claim, and it was legally and bindingly admitted by the State of Connecticut. My impression has been that the medical review board has come in recent years to be seen as not only unconscionably slow, to the point of inhibiting applications for disability pensions, but also biased against the claims of disabled state employees. This proceeding certainly strengthens that impression.

#### **Inconsistency in awards yields new formal hearing**

Where the commissioner, ordered to articulate the reasons for an apparently inconsistent decision, instead ordered different benefits for a different time period, the Appellate Court reversed and remanded the case for a new formal hearing before a different commissioner. *Fantasia v. Milford Fastening Systems*, 86 Conn. App. 270 (Nov. 30, 2004). The first award was for temporary partial benefits; the second was for temporary total disability benefits for a shorter period. Either award seemed justifiable given the wide variety of medical opinions in evidence. The Court emphasized that an articulation doesn't allow a change of result, and found that a new formal hearing before a different commissioner would avoid the appearance of simply going through the motions of a new hearing. Commissioners are free to change their minds prior to a final ruling, and free to correct findings in response to a motion to correct, but are not free to change the result in an articulation.

#### **Underinsured motorist coverage unavailable to fireman injured while directing traffic**

A volunteer fireman struck while directing traffic received workers' compensation benefits, but could not claim against the fire department's underinsured motorist policy, since he was not occupying a covered vehicle. *Gomes v. Massachusetts Bay Ins. Co.*, 87 Conn. App. 416 (Feb. 15, 2005). The exception to exclusivity provided by Sec. 38a-336(f) applies only to a claimant who is occupying an insured vehicle, and "occupying"

requires physical touching.

### ***Injury in Special Olympics benefit not compensable***

The claimant, after his shift was over, was injured shooting basketball at a fund-raiser for the Special Olympics held at a state correctional institution. The injury was held not compensable. *Brown v. Dep't of Correction*, 89 Conn. App. 47 (May 17, 2005). The commissioner held that the claimant's participation was voluntary and that compensability was barred by Sec. 31-275(16)(B)(i). The Appellate Court, interestingly, analyzed the case under the rule of *McNamara v. Hamden*, 176 Conn. 547 (1979), suggesting that if the fund-raiser was a frequent event occurring on the employer's premises during the period of employment and countenanced by the employer, like the ping-pong game in *McNamara*, the injury would be compensable. The claimant had failed to prove the event occurred frequently. If the event occurred seldom, the Court suggested, then the injury would be compensable only upon a showing of employer benefit. I'm not sure that so much of *McNamara* survives the subsequent statutory amendment, if the activity, regularly occurring or not, is social or recreational.

### **Appellate rat's nest; CRB cannot "reopen" decision**

A widow successfully claimed retroactive cost-of-living allowances and interest, but disagreed with the commissioner's calculations and denial of attorneys' fees. Her mistaken appeal in 2003 to the Appellate Court instead of the CRB was fatal to any review of the decision. Although the CRB, later in 2003, after the Court had dismissed the misdirected appeal, at the claimant's request "reopened" an earlier decision in the matter to affirm the trial commissioner's decision, the Appellate Court held that the CRB had no such authority to "reopen" its prior decision, and therefore there was no basis for the current appeal to the Appellate Court, which was dismissed. *Melendez v. Valley Metallurgical Processing Co.*, 86 Conn. App. 880 (Jan. 18, 2005). What? Don't ask; you had to be there.

### ***Lack of final judgment for failure to decide motor vehicle credit issue***

Following remand from a Supreme Court decision allowing the claim to proceed despite probate issues, the parties litigated the extent of temporary total disability benefits. In the earlier decision, however, the Supreme Court had also instructed the commissioner on remand to rule on whether the respondent had a credit for the plaintiff's recovery in a civil case; but apparently the

commissioner made no ruling. On appeal the second time, on the dispute over disability benefits, the Appellate Court sua sponte dismissed for lack of a final judgment, on the ground that the commissioner had not decided the credit issue. *Matey v. Estate of Dember*, 85 Conn. App. 198 (Sept. 21, 2004). The parties were at that point not litigating the credit issue, and the Fund was paying current benefits on the theory that the moratorium had likely been amortized. There is at least a little something to be said for the adversary system, once in a while: if nobody was bellyaching to the commissioner about the credit, maybe it was no longer such an issue?

## **COMPENSATION REVIEW BOARD**

### ***No benefits for elderly worker***

No temporary total disability benefits were payable to a 73-year-old man who was injured at work, because of Sec. 3-307(e), which reduces the workers' compensation benefit by the amount of the Social Security retirement benefit which the claimant receives. Here, the result was zero. *Pasquariello v. Stop & Shop Co.*, No. 4730 CRB-7-03-9 (Sept. 3, 2004). Surely this result should be unconstitutional, despite *Rayhall v. Akim Co.*, 263 Conn. 328 (2003). The Supreme Court there held that the elimination of total disability benefits did not violate the equal protection clause because the rational purpose was to make premiums cheaper for employers. As I learned the law, that is not a rational purpose for the patent discrimination between classes, but merely a rational purpose for more limited benefits, in achieving which the legislature nevertheless must not discriminate irrationally among similarly situated people. The exclusivity rule is founded on the quid pro quo of workers' compensation; but here there is no "quo," no compensation at all for total disability. And the poor guy is stuck paying for half his Social Security premiums himself, thus subsidizing his employer's workers' compensation liability. Perhaps the Court and legislature will find that this provision makes hiring the elderly more attractive to employers, especially for dangerous jobs, since they can be injured at relatively low cost.

### ***Payment on appeal thwarted***

Where a formal hearing was held on an order for payment of widow's benefits on appeal, and the commissioner entered an order for payment of the benefits, including cost-of-living allowances, the CRB remanded the case for more proceedings, on two inexplicable grounds: no specific order was entered for a dollar amount for the COLAs, and the respon-



dents “contend that the claimant-widow may be receiving social security widow’s benefits and that the workers’ compensation benefits should be offset by that amount under Sec. 31-307(e).” No surviving spouse benefits have been paid to the widow at all, following the award of surviving spouse benefits on April 24, 2003. This is outrageous: the COLA argument, that no benefits at all should be paid on appeal to the widow, because no specific dollar amount was found for the COLAs, is patently absurd: at the very least the retroactive benefits for the base compensation rate should have been paid. Second, an eighth grader could calculate the COLA benefits, a ministerial duty; the fact that the commissioner did not reduce them to writing seems hardly to justify depriving the widow of the COLA part of her award, much less her whole award, when the respondents, the claimant, and the CRB obviously can determine the amount of COLAs owed, to the penny, in about ten minutes. Why the CRB would countenance such an abuse of Sec. 31-301(f) I cannot understand. The other ground given by the CRB for depriving the widow of payment on appeal was that the respondents contended that the widow might be getting Social Security benefits. First, the argument is mere legal junk, since the Social Security offset statute, Sec. 31-307(e) explicitly applies only to temporary total disability benefits, not to surviving spouse benefits or any other benefits. The trial commissioner presumably dealt with this ridiculous argument appropriately by rejecting it. Second, if the respondents “contended” that the widow was receiving Social Security benefits, the place for them to make and prove the claim was at the formal hearing on the payment of the benefits, not on appeal. If the respondents didn’t, the commissioner’s order for payment of the benefits at the compensation rate was certainly appropriate. Maybe I’m missing something, but on its face, the decision appears inappropriately to allow the employer to thwart Sec. 31-301(f): the quibbles by the employer, presumably dealt with by the trial commissioner, were successfully used by the employer indefinitely to avoid payment of any benefits at all. *Hummel v. Marten Transport, Ltd.*, 4760 CRB-5-03-12 (Nov. 19, 2004).

#### **Unreasonable denial of surgery countenanced by CRB**

Dr. Gerald Becker, ordinarily a respondents’ darling, recommended back surgery, but it was denied by Travelers’ “utilization reviewer” for the employer’s PPO. The claimant appealed administratively, and the denial was reviewed for

the respondent by Dr. Somogyi, normally a respondent’s IME doctor, who also recommended surgery. Travelers’ “national medical director,” technically a physician of some sort, denied the surgery again, and the “CEO” of the company health plan, a non-medical administrator of the employer, denied the appeal. The commissioner naturally found the denial was unreasonable and ordered the surgery authorized under Dr. Becker’s recommended conditions. The CRB, while criticizing the lack of due process afforded by the regulations (Sec. 31-279-10) and suggesting that the CEO was biased against the claimant, found that it could not hold that the CEO’s decision was “visibly” unreasonable, arbitrary or capricious, and faulted the commissioner for considering additional medical evidence from Dr. Becker, generated after the appeal had been finally denied by the CEO. The CRB remanded for “further consideration,” and perhaps more evidence on the relationship of the CEO to the employer and insurer and his track record on denying appeals. *Figuroa v. Rockbestos Co.*, No. 4633 CRB-1-03-2 (July 20, 2004). Brave new world. The whole PPO system is inherently opposed to the goal to which the CRB even here gives lip service: prompt delivery of medical care to injured workers. The patent interest of the “CEO,” self-advancement within the company by denying claims, should bar such a person from deciding appeals; the Commission clearly could require a disinterested third-party decision-maker. And commissioners are paid for their judgment. The CRB’s quibble, that the commissioner heard later evidence, sounds rational legally, but if I were going to decide about the surgery, I would want to be brought up to date medically, because of the great delays in the system. The PPO system should be scrapped, of course; costs should be controlled by fee caps and responsible IMEs; and the commissioners, not the employers’ henchmen, should decide medical issues based on all the medical evidence.

#### **PPO administration may not be attacked in formal hearing**

The trial commissioner has no jurisdiction to hear complaints that a PPO is being operated without compliance with the statute and regulations, for example in having no medical director for many years. Rather, a complaint must be filed with the chairman of the commission; the CRB suggested that Sec. 4-182 (c)-(d) of the Administrative Procedures Act was applicable. *Byrd v. Bechtel/Fusco*, No. 4656 CRB-2-03-4 (July 14, 2004). Some people have thought that, if the APA were applicable to the commission, many

of the regulations and “guidelines” would fall.

#### **Slap in the face is a physical injury**

Correcting a surprising holding below, the CRB held that a slap in the face is a physical injury which will support a psychiatric claim. *Bilsky v. Ansonia Copper & Brass*, No. 4703 CRB-5-03-8 (Aug. 23, 2004). The CRB remanded, however, for findings on causation and horseplay. If the claimant is not the aggressor in a horseplay attack, however, the claim is ordinarily compensable anyway; here the aggressor had demanded cigarettes prior to the slap.

#### **All 299b respondents may defend claim**

The claimant’s request that she be able to try her case only against the last respondent in the 299b chain of exposure was denied, and the CRB upheld the denial. *Robert v. General Dynamics Corp.*, No. 4691 CRB-2-03-7 (June 14, 2004). Sometimes it would be good to be able to move the case more quickly to and through trial, without the usual cast of thousands in occupational disease or repetitive trauma claims. Sometimes it is beneficial to have the apportionment issues tried simultaneously, since exploration or determination of relative weight of exposure often facilitates resolution. Legally, it seems that where there is a single respondent employer, one defense lawyer should be sufficient; but our system operates otherwise. Here, however, because causation had been established previously in the related Longshore and Harborworkers claim, the CRB limited the respondents to attacks on the application of collateral estoppel; this is puzzling on the facts presented, since apparently only one actual employer was involved.

#### **Seizure-related injuries not compensable**

Where the claimant’s shoulders were injured from being restrained by co-workers during the course of the claimant’s grand mal seizure, the shoulder injuries were not compensable. *Blakeslee v. Platt Brothers & Co.*, No. 4761 CRB-5-03-12 (Oct. 8, 2004). This is a close case in a difficult area. Presumably, under *Savage v. St. Aeden’s Church*, 122 Conn. 343 (1937), if the claimant, because of his seizure, had fallen into a machine or steaming vat, his injuries from the fall would have been compensable because of the instrumentality of the injury, rather than the cause. However, the focus of the CRB on *Porter v. New Haven*, 105 Conn. 394 (1926), is a little off the mark here. In *Porter*, the claimant, on duty at work, was pushed

by a non-employee and fell; his injuries were not compensable as not arising out of work. Where the cause is external and not work-related, rather than personal to the claimant, then it seems right that the injuries are not compensable. But this analysis should not apply to injuries which are initiated by an internal personal malfunction but suffered because of the working situation, such as Mr. Savage's fall from a ladder onto a stone floor, resulting in a skull fracture and death. Here, since the injuries were from co-workers attempting to aid a man in the midst of a seizure, the injuries are more like incidents of the disease itself, rather than injuries received by means of a workplace instrumentality in an incident precipitated by internal causes. And injuries from a fall from unknown causes, possibly from a seizure, were compensable in *Tracy v. Scherwitzky Gutter Co.*, 4797 CRB-1-04-3 (Mar. 21, 2005).

#### **Injuries in physical fitness program held not compensable**

Where the fire department arranged and administered a physical fitness program of winter basketball and summer softball games to keep the fire fighters fit, and gave the fire fighters points toward retirement if they participated, the claimant's injuries during a department-sponsored basketball game were held not compensable. *Hardt v. Watertown*, No. 4743 CRB-5-03-10 (Nov. 30, 2004). The CRB appears to have gone off the track legally on this one. The trial commissioner and the CRB focused on whether the claimant was "in training" under Sec. 7-314a(a), which compensates volunteer fire fighters' training injuries; the CRB held that training meant only training for fire fighting, rather than physical training in general. While sensible, this analysis seems beside the point, since Sec. 31-275(16)(B)(i) allows compensation for injuries in employer-sponsored athletic events which are not primarily social or recreational in nature. "Training" is irrelevant, if a substantial business or professional purpose was served by the program and if the "major purpose" was not social or recreational. The CRB doesn't even mention if there was a finding as to whether the "major purpose" of the program was social or recreational in nature, but merely cites evidence that the fire chief testified that the athletic program was "a loosely organized physical fitness program which was also recreational."

#### **Rate of interest may be challenged**

Where the commissioner awarded interest under Sec. 31-300 at the statuto-

ry rate of 10%, the CRB held that the respondents were entitled to a hearing to request a lower rate of interest. *Izzo v. American Compressed Gases*, No. 4678 CRB-3-03-6 (August 5, 2004). The CRB pointed out that Sec. 31-300 specifically countenances an award of interest at less than the statutory rate. Here, the claimant didn't ask for interest until after the finding and award, by means of a "motion to amend" the award, to which the respondents objected. It is not clear whether the respondents at that time requested a lesser rate. The commissioner awarded statutory interest, and then the respondents both appealed and filed a motion to submit additional evidence on the interest issue. Clearly it is better to ask for interest up front, and just as clearly, the respondent should be prepared to offer its evidence whenever the commissioner will hear it.

#### **Commissioner has broad discretion in resolving attorneys' fee dispute**

In a fee dispute, the commissioner's broad discretion to weigh the relevant factors in the case in determining the appropriate fee to be paid the claimant's first attorney was emphasized by the CRB in affirming the award. The amount of benefits paid during the initial representation and the 20% contingency fee were only two factors to be considered, and probably not the main ones here, where the ultimate results were more important. The claimant's first attorney was paid \$9,500.00 out of a \$69,000.00 settlement. *Dilieto v. New Haven*, No. 4709 CRB-3-03-8 (Aug. 5, 2004). Good work by the CRB.

#### **Commissioner's examiner ordered to be treated; IME report admitted**

The commissioner's order that the commissioner's examiner take over as the treating physician was upheld; but her order for a specific plan of medical treatment to be followed by the new treating physician was reversed, and left to the physician. *Donaldson v. Continuum of Care, Inc.*, No. 4581 CRB-3-02-10 (Oct. 6, 2004). Here, the commissioner had rejected the claimant's prior physician as unauthorized. It wasn't clear that the claimant was given any choice in the matter of physicians, which the statute and regulations have seemed to protect. In addition, the CRB upheld the trial commissioner's admission of a psychological IME report, reasoning that since the claimant submitted the report of a treating psychologist, the respondent had a due process right to put in the psychological IME. This reasoning seems clearly wrong, as explained in *Lee v. Norwalk* 1626 CRB-7-93-1 (1994), which

held exactly to the contrary. Signed reports of treating physicians are admitted by statute. Except by agreement, respondent's examiners must be deposed because of the right of cross examination guaranteed by due process. Fortunately the case has been appealed, at least on the medical treatment issues.

#### **Repayment by claimant held premature**

A period of temporary total disability had been ordered by the trial commissioner and paid during the appeal under Sec. 31-301(f). The case was remanded by the Appellate Court for further proceedings on the issue of temporary total disability. On remand, but prior to the second decision on the merits of the temporary total disability claim, the respondent got the commissioner to order the claimant to repay the benefits previously paid under Sec. 31-301(f). The CRB held that the repayment order was premature, since the matter had not been finally decided on the merits. *Bailey v. State of Connecticut*, No. 4744 CRB-1-03-10 (Dec. 3, 2004).

#### **Visit to company nurse held not to be medical care**

The claimant's visit to a Department of Corrections nurse was held not to constitute medical care, for purposes of applying the medical care exception to the statute of nonclaim. The CRB recited the claimant's testimony that the nurse recommended over-the-counter pain medication for treatment of his back pain; but it did not relate whether that testimony was found to be a fact. Though claimants may feel that it is a stretch to characterize visits to some company medico as "care," nevertheless as a legal matter the visit to a nurse for symptoms, her evaluation of the condition, and her recommendation of a particular medicine, if it happened here, clearly should satisfy the statutory exception. The claim, however, was barred as untimely. *Delconte v. State of Connecticut*, 4766 CRB-8-03-12 (Dec. 8, 2004). The CRB discussion implies a suspicion of the claimant by the trial commissioner, which might well have been appropriate; but better to rule on the merits than make bad law.

#### **Widows held to two-year statute of non-claim in occupational disease cases**

The CRB has again held that surviving spouses have only two years from the first manifestation to file an occupational disease claim, and that the three-year statute of non-claim doesn't apply to surviving spouses. *Stevenson v. Edward*



*Stevenson and Sons* 4710 CRB-5-03-8 (Dec. 17, 2004). They may also file within one year from the date of death. Although the CRB in 1991 expressed its view that the three-year limitations period applied to surviving spouses, the CRB now rejects that view.

***Debt for repayment of benefits paid on appeal is discharged in bankruptcy, including attorneys' fees***

The claimant was successful at formal hearing and was paid permanent partial disability benefits pending appeal. The CRB remanded the claim; the trial commissioner then reversed himself and dismissed the claim. During the second appeal, the claimant went bankrupt and his repayment obligation under Sec. 31-308(g) was discharged in bankruptcy. The discharge also included the attorneys' fees, so that the respondent's claim against the claimant's attorney for repayment of the attorney's fee paid by the claimant out of the permanency award was dismissed. *Horn v. State of Connecticut* 4764 CRB-3-03-12 (Jan. 24, 2005). The respondent is limited to the remedies available to it against the claimant and his payees, including his attorney, under federal bankruptcy law.

***SIF liable for 299b reimbursement***

Although technically the ruling must await a Sec. 31-355 order for payment against the Second Injury Fund, the CRB indicated pretty strongly that the Fund is liable for the Sec. 31-299b reimbursement obligation of a defunct carrier. Nothing in Sec. 31-355 limits the Fund's obligation to particular payees. *Anderson v. W. A. Crosscup, Inc.*, 4795 CRB-3-04-3 (Mar. 23, 2005). Interestingly, the CRB noted that the reimbursement was being paid under a "stipulation," presumably the carriers' stipulation of facts and percentages; the CRB indicated that "award" under Sec. 31-355 would seem to include findings and awards by stipulation. If so, this would actually be an important step forward: a reasonable settlement in multi-carrier cases could be consummated and then enforced by the 299b carrier against a recalcitrant or idle carrier which couldn't bring itself to

act reasonably or promptly.

***Widow's benefits recalculated retroactively***

A widow's benefit rate was ordered recalculated retroactively under Sec. 31-310c, to reflect a rate based on what the claimant's decedent would have been making at the time of the first manifestation of his occupational disease, had he continued working until that time. *Gauthier v. State of Connecticut*, 4779 CRB-2-04-2 (Apr. 1, 2005). Section 31-310c, governing the average weekly wage for retired claimants with occupational diseases, was held to apply retroactively in *Green v. General Dynamics Corp.*, 245 Conn. 66 (1998), and so applied here. The parties argued over whether the voluntary agreement executed by the claimant's decedent barred recalculation; but clearly any such mistaken agreement should be reopened if necessary, to reflect the revealed law.

***Get the boss a sandwich***

When a nurse agreed to work a second shift in an emergency situation to help out the employer, she became famished and rushed out to get a sandwich, with her boss's permission. Her injuries sustained in the motor vehicle accident en route were not compensable. *Rampulla v. Fox Hill Nursing & Rehabilitation Center*, No. 4696 CRB-1-03-7 (June 23, 2004). The CRB is unfortunately probably right on the law, at least without more facts to color the food-getting on the extra shift as a necessary part of the extraordinary service to the employer. Much better for the employee to take orders and get food for others also, especially the boss, and with the boss's blessing.

**SUPERIOR COURT**

***Owner of property may be held liable for injuries to employee of subcontractor***

An injured employee of a subcontractor may sue the owner of the property where he was working for negligent breach of a duty of safe conduct toward the employee. Summary judgment was thus denied on the legal claim; degree of

control by the owner is a matter of fact. *Balogh v. Boehringer-Ingelheim Corp.*, CV01-0276094S (Meriden, July 28, 2004), 37 Conn. L. Rptr. No. 16, 622 (Oct. 4, 2004). Here, a painter had fallen from a dangerous job painting a smokestack under conditions of dubious safety precautions. After the Supreme Court's graceful correction of the law in *Pelletier v. Sordoni/Skanska Construction Co.*, 264 Conn. 509 (2003), the law under Sec. 31-291 is sorting itself out appropriately.

***Video surveillance in church countenanced***

The carrier's investigator pretended to worship at the claimant's church and videotaped her with a camera concealed in an arm sling as she played the piano for the congregation. The court granted summary judgment in the claimant's action for invasion of privacy, holding the church to be a public place and the invasion not unreasonable. *Fiorillo v. Berkley Administrators*, CV-01-0458400S (New Haven, May 5, 2004), 37 Conn. L. Rptr. No. 2, 62 (June 28, 2004).

***Duty of care to passengers permits counterclaim against intervening school bus company***

Contrary to the usual rule, a counterclaim was permitted against an intervening employer, on the ground that the duties of a common carrier to its passengers, here a school bus company to a special education student, created an independent relationship which allowed a counterclaim. The driver-claimant had filed a negligence claim against the student and her father based on the student's falling on the driver and injuring him when she was boarding the bus. *Bertrand-Miller v. Wehry*, CV00-0161711S (Waterbury May 20, 2004), 37 Conn. L. Rptr. No. 4, 146 (July 12, 2004). The basic rule, no counterclaims against negligent employers, has grown to seem dubious to me, as a matter of public policy.

***Retaliatory discharge action not barred by prior denial of grievance on same issue***

The plaintiff was entitled to pursue his action for retaliatory discharge under

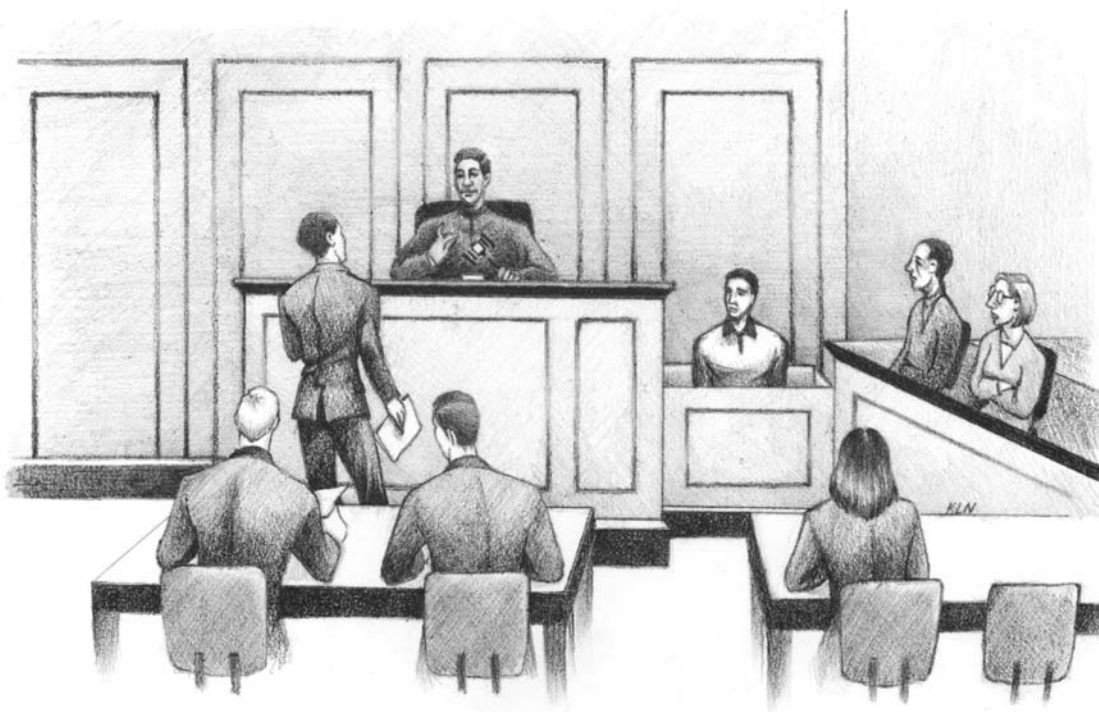


# CTLA

## Code of conduct

*Adopted by the Board of Governors of the Connecticut Trial Lawyers Association on January 17, 2004*

1. No CTLA member shall personally, or through a representative, contact any party, or an aggrieved survivor in an attempt to solicit a potential client when there has been no request for such contact from the injured party, an aggrieved survivor, or a relative of either, or the injured party's union representative.
2. No CTLA member shall go to the scene of an event which caused injury unless requested to do so by an interested party, an aggrieved survivor, a relative of either, or by an attorney representing an injured party or survivor.
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4. No CTLA member shall personally, or through an associate attorney, file a complaint with a specific ad damnum amount unless required by the rules of that court. If such amount is stated, it shall be based upon good faith evaluation of facts which the member can demonstrate.
5. No CTLA member shall personally, or through a representative, make representations of trial experience or past results of litigation either of which is in any way false or misleading.
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7. No CTLA member shall file or maintain a frivolous suit, issue, or position. However, no CTLA member should refrain from urging or arguing any suit, issue or position that he believes in good faith to have merit.
8. The CTLA Board of Governors has condemned attorneys or legal clinics who advertise for clients in personal injury cases and who have no intention of handling the cases themselves, but do so for the sole purpose of brokering the case to other attorneys. Any CTLA member who enters a contract of representation on behalf of a claimant shall, at the time of retention, fully advise the client, in writing, of all relationships with other attorneys who will be involved in the representation, the role each attorney shall play, and the proposed division of fees among them. The client shall also be promptly advised of all changes affecting the representation.
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Justice William O. Douglas  
The Anatomy of Liberty (1954)

# THE CONNECTICUT TRIAL LAWYERS ASSOCIATION

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# CTLA Calendar of Events

## Succeeding at Mediation

Friday, November 4, 2005  
9 am - 1 pm  
Trumbull Marriott

Chairs: Kathryn Emmett & Chris Bernard

From the preparation of mediation materials and memoranda to effective techniques for presenting your case at mediation, (including the use of PowerPoint and other technology) this program is a must for both new and experienced attorneys.

In addition to teaching attorneys how to prepare for mediation, this important program will also explore the psychology of mediation from all sides — addressing the perspectives of the Judge, the plaintiff's counsel and the defense counsel.

Presenters include U.S. Magistrate William Garfinkel, who will answer questions about mediation from a panel of experienced attorneys. Get the perspective of mediation from insurance defense counsel, as well as mediation expert CTLA members.

## Fall Membership Dinner

Wednesday, November 16, 2005  
5:30 – 9 pm  
Lawn Club, New Haven

### Courting Public Opinion

*Ways to Restore Respect and Regard for What Lawyers Do Within Our Communities.*

Our guest speakers are widely regarded media and public-relations strategists, David A. Ball, Ph.D., best-selling author of *“David Ball on Damages”* and Richard A. Jenson, M.S., Partner, Winning Works, Trial Consultants. David and Richard will talk about the issue that impacts all trial lawyers — The Poisoned Jury Pool. Hear their ideas about how lawyers, individually and as a group, can reshape public opinion.

David and Richard will also share their innovative strategies by which you can promote your law firm and the civil justice system at the same time.

Learn how to design your website to encourage the public to log on.

David and Richard will talk about proven ways to enhance your advertising and evaluate its effectiveness.

**Because of the sensitive nature of this program, and at the request of the speakers, this program is only open to those attorneys whose practice is devoted to representing injured individuals.**

## Winning Your Neck and Back Cases

Friday, December 2, 2005  
9 am – 1 pm  
New Haven Lawn Club

Chairs: David Cooney & Cindy Robinson

Insurance companies typically disregard low impact injury cases and these are the cases that often end up at trial. This seminar will teach plaintiff's counsel ways to assist the jury in understanding the significance of connective tissue injuries that affect the neck and back, especially where little property damage is found. The seminar will also address evidentiary issues regarding submission of medical reports as well as knowing when to settle and ways that counsel can attempt to dispel the myth of frivolous lawsuits.

## Teleseminar: Liquor Liability — It's Not Just Dram Shop

Monday, December 12, 2005  
12 noon – 1 pm

Chairs: Morris Borea & Richard Bieder

This seminar will review the present state of the law on liquor liability and dram shop issues. It will include information on the use of expert toxicologists in such cases, the strategies to use in such cases, and the future of such cases after Craig v. Driscoll and recent public acts changing dram shop laws and general liability laws.

In addition to presentations by co-chairs Richard Bieder and Morris Borea, Christopher Wall and Larry Price, the attorneys in Craig v. Driscoll, will each present his perspectives on the case.

# Club Members — As of November 2005

The CTLA Legislative Program is supported in large part by the major contributors listed below. There are, in addition, several donors who wish to remain anonymous. Congratulations and thanks are due to these individuals whose dedication to the civil justice system is demonstrated clearly by their participation in the Clubs, CTLA's Major Donor Program. We thank them for their support.

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