



### From The President's Notebook

By Carl D. Anderson

### Calling All Leaders

CTLA is looking for A Few Good Men and Women — leaders in their communities — to help us with a special project for which our Public Relations Task Force has taken the lead.

Recently, you should have received the latest edition of the *CTLA Monitor* newsletter. Attached was a short questionnaire concerning your activities outside of your daily practice. Your community involvement, coaching, mentoring, church leadership, a position within a state or local political or environmental organization — in which you may hold a committee or leadership position — anything which describes your involvement in the community in which you live or work.

Our purpose for this effort is to make our small attempt at re-branding the Connecticut trial lawyer. The effort of taking the lawyer out of the courtroom, off the television screen and out of the demonized public mindset and reminding the community that this person is an important and valuable asset to the community and to the lives of the people in it.

Will we have an immediate reversal of the public perception of trial lawyers? I doubt it. It has taken decades and billions of dollars of targeted effort to demonize the persona of trial lawyers — the position in which we now find ourselves. But I for one do not intend to sit idly by without making an effort — even this small effort — of regaining

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## Introducing new “staff” person at Connecticut Trial Lawyers Association: Adam Nicholson

Adam joined the staff on January 1, 2007, as our new Grassroots & Membership Coordinator. Adam comes to us from another Connecticut non-profit, *Love Makes a Family*, where he managed their political and grassroots operations. Before moving to Connecticut, Adam worked as campaign manager and field director on several political campaigns all over the country — ranging from Oklahoma to New Hampshire.

As the Grassroots & Membership Coordinator, Adam will be working with the membership of CTLA around our legislative and political agenda. You will be hearing a lot from Adam as he works to organize meetings with legislators, letters to media outlets, and more broad-based advocacy actions.

We are very excited to have Adam on board at CTLA, and hope you will greet him with the same enthusiasm that he brings to CTLA.

some of the respect I know we all deserve. All of us have active and private lives outside of the law. Some of us have even chosen to use that private life in an effort to give something back to the community in which we live. It is that special dedication and involvement which carries the message of who we are and what we do. What are your values? What manner have you chosen to exercise those values outside of your practice? Already we've received completed surveys

from members who have begun telling us about what they do for the communities or what they would like to do if given the chance. Now it is your turn. Our Public Relations Task Force is beginning to grapple with the details of how best to utilize these resources in their most efficient manner — but we — as CTLA members need to give them the tools that will help make their job a success. If you have not received *The Monitor* or wish to receive a copy of the questionnaire contact the CTLA office at (860) 522-4345.

To quote David Ball, “*You need to take control of the way jurors [and the general public] think about you. Not as part of a group, but you as an individual attorney*” and “*You can not hide from the stereotype. Nor can you change it. The only solution is to transcend it.*” This is the foundation on which this project is fundamentally based. It's up to you to help us meet this challenge. May you all have a Happy and Healthy New Year.

# FCTLA Forum

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**2006 Update on Evidence  
(and sundry cases of interest to the trial bar)**

By Bob Adelman and Neil W. Sutton, *Adelman Hirsch & Newman, Bridgeport*

**“Chicolini:** Now I aska you one. What is it has a trunk, but no key, weighs 2,000 pounds and lives in the circus?  
**Prosecutor:** That’s irrelevant.  
**Chicolini:** Irr-elephant? Hey, that’s the answer! There’s a whole lotta irr-elephants in the circus.”

— Chico and Groucho Marx, *Duck Soup* (Universal Studios, 1933).

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**INTRODUCTION**

The Update on Evidence covers civil cases (insofar as the rules therein are useful in civil cases) and criminal cases published from August 30, 2005 through August 22, 2006.

The Table of Contents and section headings follow the format of the *Connecticut Code of Evidence* (“C.C.E.”). Because the C.C.E. does not cover every evidentiary issue (see, commentary to C.C.E. §1-2(b)), this Update includes additional headings.

**Article I. General Provisions**

§ 1-5 (b) REMAINDER OF STATEMENT: WHEN AN EXCERPT OF A VIDEO-TAPED STATEMENT IS USED BY ONE SIDE, THE COURT MAY ADMIT THE ENTIRE TAPE — *STATE V. EFRAIN M.*, 95 Conn. App. 590, *cert. denied*, 279 Conn. 909 (2006); Pellegrino, J.; Trial Judge — Harper, J.

**RULE:** When one side plays a portion of a videotaped interview, the court has discretion to admit the entire videotape.

**FACTS:** Defendant was accused of sexual assault and risk of injury to a minor. The victims were twin girls who were 9 years old at the time. In July 2002, the girls were separately interviewed by a school psychologist and described the sexual assaults. The interviews, which lasted together approximately one hour, were recorded on videotape.

The jury trial took place in 2004. Both girls testified. During cross-examination, defense counsel played three brief excerpts from the interviews to impeach the girls. On rebuttal, the State offered the entire videotape of the interviews. The defendant objected on the grounds that the videotape “amounted to a replay of their trial testimony and had the effect of emphasizing that testimony over that of the other witnesses. He argue[d] that the videotape included prejudicial and irrelevant material that necessarily generated sympathy for the victims. According to the defendant... the probative value of the videotape [was outweighed by]. . . the likely prejudicial impact of its admission. . .” 95 Conn. App. at 596.

The trial court questioned counsel about the contents of the videotape but did not preview it without the jury present. It then admitted the videotape in its entirety. The Appellate Court affirmed.

**REASONING:**

“It is an elementary rule of evidence that where part of a conversation has been put in evidence by one party to a litigation or prosecution, the other party is entitled to have the whole conversation, so far as relevant to the question, given in evidence, including the portion which is favorable to him. Section 1-5 (b) applies to statements, and its purpose is to ensure that statements placed in evidence are not taken out of context. . . This purpose also demarcates the rule’s boundaries; a party seeking to introduce selected statements under the rule must show

that those statements are, in fact, relevant to, and within the context of, an opponent’s offer and, therefore, are part of a single conversation. . . Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements.”

95 Conn. App. at 597-98 (internal citations omitted).

**QUAERE:** If defendant had created a transcript of the interview and used it as we do a deposition, would the court have allowed the State to read the entire transcript?

**Article IV. Relevancy**

§ 4-1 INFORMED CONSENT: WHAT MINOR PLAINTIFF WOULD HAVE DONE IF PROPERLY INFORMED IS SPECULATIVE; WHAT PARENTS WOULD HAVE DONE IS NOT — *MIDLER V. BENJAMIN*, 95 Conn. App. 730 (2006); Peters, J.; Trial Judge — Doherty, J.

**RULE:** The testimony of the minor plaintiff that, if she had been informed of the risks of a procedure, she would not have gone through with it was speculative and therefore inadmissible. However, her mother’s testimony — that if properly informed, she would not have consented on her daughter’s behalf — is not speculative and is admissible.

**FACTS:** The plaintiff, a 17-year-old girl, consulted the defendant plastic surgeon to discuss having a nose job (rhinoplasty). Her mother accompanied her to the consultation. The defendant advised mother and daughter that, in addition to the nose job, the girl should have a chin implant (genioplasty). The defendant did not advise them of the risk of permanent nerve damage from such an implant.

On the day of surgery, the mother

signed an informed consent form as her daughter's guardian. The girl did not execute an informed consent form. She suffered permanent nerve damage as a result of the chin implant.

At trial, plaintiffs' counsel asked the daughter whether or not she would have gone through with the chin implant if informed of the risk of permanent nerve damage. The defendant objected on the ground the testimony was speculative. The trial court sustained the objection.

Plaintiffs' counsel asked the mother whether or not she would have consented to her daughter undergoing the chin implant if she had been informed of the risk of permanent nerve damage. Again the defendant objected, and again the court sustained the objection.

The jury returned a defendants' verdict.

The Appellate Court agreed with the trial court regarding the minor daughter and disagreed regarding the mother, but held that the preclusion of the mother's testimony was harmless.

**REASONING:**

"[T]he minor plaintiff[s]... personal knowledge and life experience was too meager to remove her proffered testimony from the realm of the speculative. The trial court made such a finding. It was not a clear abuse of the court's discretion to so find.

"The trial court did not, however, make any finding with respect to the life experiences of Ann Midler's parents. For both of them, their personal knowledge and life experience should have been accepted as a reasonable, non-speculative basis for making an informed decision balancing the surgical risks and benefits of an intraoral genioplasty for their daughter. The mother's history of having had a genioplasty further underscores the admissibility of the testimony that she was prohibited from presenting to the jury. We conclude, therefore, that the court abused its discretion in upholding the defendant's objections to this proposed testimony."

95 Conn. App. at 738-39.

The Appellate Court went on to explain that the trial court's error was harmless:

"[T]he plaintiffs' expert witness [testified] that permanent nerve damage

from a chin implant is extremely rare and that, in his experience, patients who had been advised of this risk had never declined to undergo the procedure. Thus, regardless of whether the defendant had a duty to disclose the risk of permanent nerve injury associated with an intraoral genioplasty, it would have been highly unlikely for the jury to have found a causal connection between this breach and the plaintiffs' consent to the performance of this surgery."

*Id.* at 739-40.

**COMMENT:** The finding of harmlessness misapprehends the nature of an informed consent case. The seminal Connecticut informed consent case, *Logan v. Greenwich Hospital*, 191 Conn. 282 (1983), concerned a physician's obligation to explain to a patient an alternative procedure the physician considered riskier than the recommended procedure.

The Supreme Court in *Logan* ruled that the physician had to inform the patient of the more hazardous alternative because the patient had the right to choose a more hazardous procedure. The risks another patient may have been willing to take for a chin augmentation does not determine what Ann Midler and her parents would have chosen, especially since it was the doctor who first suggested the procedure.

Furthermore, as pointed out by the Supreme Court in *Burns v. Hanson*, 249 Conn. 809 (1999), the excluded testimony was the only direct evidence available in the case. No one knows whether the jury would have credited that testimony in view of the testimony of the plaintiffs' own expert, but the exclusion of the evidence made it impossible for the plaintiffs to prove causation.

§ 4-1 AMOUNT OF DAMAGE TO DEFENDANT'S VEHICLE RELEVANT TO CAUSATION OF INJURIES — *SHEPHERD V. MITCHELL*, 96 Conn. App. 716, (2006); Flynn, C. J.; Trial Judge — Bellis, J.

**RULE:** Testimony of appraiser regarding heavy damage to defendant's vehicle is relevant to show that the impact was substantial enough to have caused the plaintiff's injuries.

**FACTS:** The defendant's car struck the

rear of the plaintiff's pick-up truck. The pick-up truck suffered very little damage.

In response to standard discovery requesting information regarding the appraisal and damage to defendant's car, the defendant answered: "Not Applicable." In addition, defendant claimed he had no photographs of the damage. When plaintiff's counsel subpoenaed any photographs, repair bills, and estimates, defense counsel moved to quash the subpoena and represented in her motion that "the defendant and his insurance company are not in possession of any factual documents that have not already been produced."

At the end of *voir dire*, defense counsel disclosed that defendant's insurer, The Infinity Insurance Company, did have a damage estimate prepared by an adjuster.

The plaintiff called the adjuster, who no longer worked for Infinity, as a witness. He indicated that he had done an estimate and had taken photographs of the defendant's car. The photographs had apparently been lost, but the adjuster described the damage as "heavy front-end damage. . ." He testified that the hood of the Corolla had been folded "like an accordion."

Even though the defense argued this was a "low-impact" case, and had introduced photos of the minimal damage to plaintiff's pick-up truck, the defense argued that the appraiser's testimony regarding the substantial damage to the defendant's car was irrelevant. The trial court admitted the testimony, and the Appellate Court affirmed.

**REASONING:**

"Certainly, the condition of the defendant's automobile, after rear-ending the plaintiff's truck, was relevant to assessing the force of the impact and the possible injuries suffered by the plaintiff as a result of this impact. \* \* \* Although adverse to the defendant's stated position that the impact was minor, this testimony was relevant to show that the impact of the rear-end collision was substantial enough to have caused the plaintiff serious injuries. The plaintiff offered [the adjuster's] testimony to prove the plaintiff's position that the impact was substantial and not minor. We conclude that this testimony properly was admitted and that the court did not abuse its discretion."

96 Conn. App. at 722.

**COMMENT:** This works both ways: the defendant can get in photos of vehicles showing little or no damage.

§ 4-1 MEDICAL DATA ON PATIENT'S ALCOHOL LEVEL INADMISSIBLE WITHOUT EXPERT TESTIMONY — *STATE V. HERNANDEZ*, 91 Conn. App. 169, cert. denied, 276 Conn. 912 (2005); Gruendel, J.; Trial Judge — Licari, J.

**RULE:** A notation in a hospital record as to a patient's alcohol level is inadmissible absent sufficient foundation to connect it to the issues in the case.

**FACTS:** Defendant was accused of murdering his girlfriend. He was alleged to have stabbed her at approximately 5 a.m. on the day in question. At approximately 7:30 a.m. the police responded to the victim's apartment. They found the victim dead and the defendant incoherent and semiconscious with a knife protruding from his abdomen. The defendant was taken to a hospital. At 8:46 a.m. a test was done, which revealed his "alcohol level was measured to be 260."

Defendant sought to admit this record to support his defense that, as a result of his intoxication, he lacked the specific intent to commit murder. He offered no expert testimony to interpret the record.

The trial court excluded the evidence as irrelevant, and the Appellate Court affirmed.

**REASONING:**

"Under all the circumstances, particularly the lack of an explanation of what '260' at approximately 8:46 a.m. meant, in terms of both the defendant's state of being at 8:46 a.m. and his state of being at the time of the murder, and the lack of any other evidence that the defendant drank prior to the time of the murder, we conclude that the court did not abuse its discretion in finding there to have been 'no sufficient open and visible connection to a claim of intoxication at the time of [the murder] to render [the proffered] evidence relevant.'

"Under the circumstances, the court reasonably could have concluded that the foundation laid for admission of the proffered evidence was insufficient to support the inference suggested by the defendant, which was that he was intoxicated at the time of the murder

to such a degree that he lacked the requisite intent to commit murder."

91 Conn. App. at 174-75.

**PRACTICE NOTE:** Hire a toxicologist.

§ 4-1 "BLOOD SERUM ALCOHOL LEVEL" IN HOSPITAL RECORD IS INADMISSIBLE ABSENT CONVERSION TO "BLOOD ALCOHOL CONTENT" — *SHEA V. DOHERTY*, 91 Conn. App. 367 (2005); Bishop, J.; Trial Judge — Dunnell, J.

**RULE:** A hospital record showing plaintiff's blood serum alcohol level is inadmissible without expert testimony converting it to "blood alcohol content."

**FACTS:** Plaintiff on a motorcycle collided with an excavator. The hospital record indicated that plaintiff had a blood serum alcohol level of 185 milligrams per deciliter.

Defendants disclosed no expert to explain the relationship between "blood serum alcohol level" and "blood alcohol content," the measure used in *C.G.S. §14-227a*. The trial court precluded the evidence.

**REASONING:** The Appellate Court refused to review the defendants' claim because of an inadequate record.

**PRACTICE NOTE:** Hire a toxicologist!

§ 4-7 IN PREMISES CASE, SUBSEQUENT REMEDIAL MEASURE ADMISSIBLE TO SHOW CONTROL — *SMITH V. TOWN OF GREENWICH*, 278 Conn. 428 (2006); Sullivan, C., J.; Trial Judge — Lewis, William B., J.

**RULE:** Although a subsequent remedial measure is not admissible to prove negligence, such evidence is admissible to prove control, where control is contested.

**FACTS:** On December 30, 2000 a snowstorm deposited 13 inches of snow in the Greenwich area. Between January 5 and January 9, 2001, an additional one-half inch of snow fell.

On the morning of January 17, 2001, the plaintiff slipped and fell on a patch of ice on the sidewalk next to the property line between two pieces of property, one owned by defendant

Greenwich Acquisition and the other owned by defendant 19 West Elm Street. The Town of Greenwich owned the sidewalk. The patch of ice had formed next to a pile of snow that laid on a planting bed located on Greenwich Acquisition's property.

Plaintiff's theory was that during warmer temperatures after the snowstorm, the negligently-placed snow pile had partially melted, run onto the sidewalk and formed the ice patch there in the early morning hours.

After the fall, the Greenwich Acquisition's building manager called Ronald Passerelli to remove the snow pile. Greenwich Acquisition had previously hired Passerelli to take care of snow removal on its property, and made Passerelli an apportionment defendant in the lawsuit.

During trial, Greenwich Acquisition objected to evidence that, after the plaintiff's fall, it had called Passerelli and asked him to remove the snow pile. The evidence included photos of Passerelli actually removing the snow. Greenwich Acquisition argued that the evidence was inadmissible as a subsequent remedial measure.

*C.C.E. § 4-7(a)*: "[E]vidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

The plaintiff argued that the evidence was not being offered to show "negligence or culpable conduct," but to show control of the snow pile. The trial court allowed the evidence.

At trial plaintiff withdrew her claim against the Town of Greenwich. Passerelli was granted summary judgment on the basis that Greenwich Acquisition's duty was non-delegable. The case went to verdict only against Greenwich Acquisition and 19 West Elm Street. The jury found only against Greenwich Acquisition apportioning 70% of the blame to Greenwich Acquisition and 30% to the plaintiff.

**REASONING:**

"The central question is the plaintiff's purpose in introducing the evidence. The doctrine bars evidence of subse-

quent repairs when offered to prove negligence. It does not exclude such evidence when offered to prove some other material issue.’ *Rokus v. Bridgeport*, supra, 191 Conn. [62,] 66 [(1983)]. While repairs made after an accident tend to prove that the party conducting them retains control over the area in question; *Killian v. Logan*, supra, 115 Conn. [437,] 439 [(1932)]; if the defendant had admitted orally that it controlled the premises on which the injury occurred, no reference in testimony to subsequent repairs should be made. *Haffey v. Lemieux*, 154 Conn. 185, 192-93, 224 A.2d 551 (1966).

“In the present case, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence as probative on the issue of control over the snow pile. Although Greenwich Acquisition conceded at trial that the plaintiff fell on the sidewalk abutting its land, it did not concede that it was the party responsible, if any party was responsible, for creating the snow pile. Indeed, the trial court directed the jury to determine which of the defendants, Greenwich Acquisition or 19 West Elm Street, if either, was liable for creating the snow pile. Thus, the jury could have used photographs of Passerelli clearing the pile shortly after the accident as evidence that Greenwich Acquisition controlled the pile and caused the dangerous conditions on the sidewalk. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence.”

278 Conn. at 448-49.

§ 4-10 LIABILITY INSURANCE INADMISSIBLE TO PROVE CONTROL OF DOG — *AUSTER V. NORWALK UNITED METHODIST CHURCH*, 94 Conn. App. 617, cert. granted, 278 Conn. 915 (2006); McLachlan, J.; Trial Judge — Reynolds, J.

**RULE:** Liability insurance is inadmissible to prove control of a dog.

**FACTS:** The defendant church employed a caretaker named Pedro Salinas. Salinas was given living quarters in the parish house as part of his employment. Salinas owned a mixed breed pit bull dog.

Before the plaintiff was injured, the pit bull had attacked another person. After the first attack, the church instructed Salinas that the pit bull had to be kept inside his living quarters during the day and chained to a railing leash when allowed outside between 7 p.m. and 6 a.m.

On the day in question, the plaintiff arrived at the premises at 7:30 p.m. to attend a meeting in the parish house. The front door of the parish house was locked, so the plaintiff walked around to the side door, which was the entrance to Salinas’ living quarters. When the plaintiff got to that door, the dog jumped through the broken bottom panel of the door and attacked the plaintiff.

The plaintiff filed two counts, the first under C.G.S. §22-357 (which imposes strict liability on a “keeper” of a dog); and the second in common law negligence.

To show that the church exercised control over the dog, plaintiff offered minutes of a meeting of the defendant’s trustees, held about a year after the attack. The minutes contained statements regarding the defendant’s insurance coverage, specifically, that “the lawsuit has been turned over to the underwriter by the insurance company,” and that continuing to allow the dog on the premises “could jeopardize our [the defendant’s] insurance coverage.” The trustees then ordered Salinas to remove the dog from the church premises.

The trial court allowed the evidence from the trustees’ meeting minutes.

The Appellate Court reversed.

**REASONING:** The court first found that, as a matter of law, the church was not a “keeper” of the dog under the statute, even though the church (1) had determined both where on the premises the dog was permitted and when it was to be allowed outside, and (2) following the second attack, had Salinas remove the dog permanently from its premises.

Additionally, since it was undisputed that the church was the owner of the premises, the court held that the fact that it maintained liability insurance “[did] not tend to establish that the defendant had control over the dog. . .” 94 Conn. App. at 624.

**COMMENT:** The Supreme Court has granted the petition for certification.

## Article VI. Witnesses

§ 6-4 IMPEACHMENT OF OWN WITNESS NOT ALLOWED IF PRIMARY

PURPOSE IS TO INTRODUCE OTHERWISE INADMISSIBLE EVIDENCE — *STATE V. WINOT*, 95 Conn. App. 332, cert. granted on other issue, 279 Conn. 905 (2006); Peters, J.; Trial Judge — Mullarkey, J.

**RULE:** A party may impeach his own witness with a prior inconsistent statement, but not if the primary purpose is to get the prior inconsistent statement in front of the jury for substantive purposes.

**FACTS:** Defendant was accused of trying to kidnap a 12 year-old girl on two occasions. On the first occasion, the victim ran away before there was any physical contact. On the second occasion four days later, the defendant grabbed her by the arm but she was able to break free.

In the victim’s written statement, the two incidents were reversed, indicating that the defendant had grabbed her by the arm in the first incident. At trial, the victim testified that the defendant grabbed her the second time. When impeached with her written statement, the victim testified that dates in the written statement were reversed.

The victim’s mother had also given a written statement, relating that the victim said, immediately after the second incident, that the defendant had grabbed her by the arm in the first incident. Defendant sought to call the mother to the witness stand to impeach the victim, by establishing that she had told her mother that the grabbing incident occurred the first time.

The State informed the court that the mother would contradict her sworn statement. The defendant wanted to call the mother anyway and impeach the mother with her prior written statement.

The trial court refused to allow the defendant to call the mother to the stand, holding that the only purpose of calling the mother was to get the mother’s written statement in front of a jury for substantive purposes.

### REASONING:

C.C.E. § 6-4 provides: “The credibility of a witness may be impeached by any party, including the party calling the witness, unless the court determines that a party’s impeachment of its own witness is primarily for the purpose of introducing otherwise inadmissible evidence.”

“It is clear that the defendant’s primary purpose in calling the mother to testify, after being informed that she would recant, was to impeach her. In impeaching her, the defendant’s objective was to get the statement before the jury with the intent that it be used substantively to impeach the credibility of victim. We hold, therefore, that the statement properly was excluded.”

95 Conn. App. at 357.

§ 6-7 AUTHOR OF MEDICAL REPORT MAY BE IMPEACHED WITH CRIMINAL CONVICTION — *SABATASSO V. HOGAN*, 91 Conn. App. 808, cert. denied, 276 Conn. 923 (2005); Flynn, J.; Trial Judge — Flanagan, John C., J.

**RULE:** The author of a medical report is treated as though he or she were a witness who testified on the stand, and may be impeached accordingly.

**FACTS:** In this rear-end collision case, the plaintiff, who claimed a bulging cervical disc and connective tissue injuries, offered the medical report of Dr. Arthur Seigel. The defendant offered a certified copy of Dr. Seigel’s criminal conviction. The trial court admitted the conviction. The jury awarded the plaintiff \$25. The Appellate Court affirmed.

**REASONING:**

Plaintiff argued that Dr. Seigel was a “declarant,” but not a witness, and that he therefore could not be impeached “by any means.” There is no basis for this argument.

§ 6-10 PROPER FOUNDATION REQUIRED FOR IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT — *STATE V. QUILES*, 96 Conn. App. 354, cert. denied, 280 Conn. 910 (2006); Peters, J.; Trial Judge -Rodriguez, J.

**RULE:** To use an oral prior inconsistent statement for impeachment, one must call as a witness the person who heard the oral prior inconsistent statement and establish the inconsistent statement.

**FACTS:** The defendant was accused of beating his elderly father. The father spoke only Spanish and testified at trial through an interpreter.

Defense counsel asked the father whether, when he spoke to Rodriguez, a Spanish-speaking investigator, he had said he had no recollection of what happened; that spirits had told him what happened; and, that in fact he had slipped and fallen in the bathroom. The father vigorously denied making any of these statements to Rodriguez.

The defendant then sought to call Rodriguez as a witness to testify as to the father’s statements. The State objected on the grounds that Rodriguez’s testimony regarding what the father said would be hearsay. The trial court sustained the objection. As a result, the defendant decided not to call Rodriguez, and thus did not make an offer of proof as to his testimony.

**REASONING:**

On appeal, the State abandoned its argument that the proposed testimony was hearsay. Instead, the State argued that because the defendant never actually offered the testimony of Rodriguez, there was no showing that the father actually made a prior inconsistent statement. The State argued that defense counsel’s representation that that was what the father told the investigator was not sufficient.

The Appellate Court agreed. “We agree with the state that it was not enough to elicit the father’s generic disagreement with what he allegedly had told the investigator.”

96 Conn. App. at 359.

**COMMENT:** To preserve the issue on appeal, it would have been necessary for the defendant to call Rodriguez and make an offer of proof detailing what the father had said earlier.

§ 6-10 EXTRINSIC EVIDENCE OF A PRIOR INCONSISTENT STATEMENT IS INADMISSIBLE IF THE WITNESS ADMITS MAKING THE STATEMENT — *STATE V. BERMUDEZ*, 95 Conn. App. 577 (2006); Schaller, J.; Trial Judge — O’Keefe, J.

**RULE:** The prior inconsistent statement of a witness is admissible only if he or she denies having made the statement.

**FACTS:** The defendant crashed at more than 90 miles per hour into the back of a car stopped at a red light. The occupants were killed, as was the passenger in

the front seat of the defendant’s vehicle. The defendant claimed his deceased passenger was actually the driver.

One of the State’s witnesses was Thomas Meier of the Waterbury Fire Department. After Meier testified for the State, an audio recording of Meier’s conversations with a dispatcher when Meier first responded to the scene was discovered. Some of the statements made in the recording were inconsistent with his testimony.

The court allowed the defendant to call Meier to the witness stand for further cross-examination. At that point, Meier testified he could not recall what he told the dispatcher over the radio. When asked if listening to the audio recording might refresh his recollection, he said it would. The jury was excused, and the recording was played for Meier.

After the jury returned, Meier admitted each of the inconsistencies between his initial testimony and what was on the audio recording. The defendant then moved to have the recording played before the jury. The trial court did not allow it. The Appellate Court affirmed.

**REASONING:** *C.C.E.* §6-10(c) provides that “if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court.”

“Additionally, the Appellate Courts in this State have established that when a witness admits to making a prior inconsistent statement, additional evidence of the inconsistency is merely cumulative.”

95 Conn. App. at 585.

**COMMENT:** If you want the jury to hear a recording, get the witness to deny making the prior inconsistent statement:

**Q:** “Lieutenant, didn’t you tell the dispatcher that the car was blue?”

**A:** “No, I did not tell the dispatcher the car was blue.”

If you have him on tape telling the dispatcher that the car is blue, you can now play the tape.

§ 6-10 IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENT, AND “OPENING THE DOOR” — *STATE V. POWELL*, 93 Conn. App. 592, cert. denied, 277 Conn. 924 (2006); Schaller, J.; Trial Judge — Nigro, J.

**RULE:** After a police officer in a criminal case was impeached with his deposition testimony in a civil case stemming from the same incident, the State was permitted to introduce evidence regarding the nature of the civil proceeding.

**FACTS:** Defendant was charged with possession of narcotics and assault on a police officer. During the arrest, the defendant suffered a broken tibia. He filed a civil suit against the police officers and the City of Stamford alleging unreasonable force. In that suit, the depositions of the arresting officers were taken. The civil lawsuit was pending when the criminal trial took place.

During the criminal trial, defense counsel impeached one of the police officers regarding exactly how the arrest took place using deposition testimony from the civil case, carefully referring to the deposition testimony as from “another proceeding,” without elaboration.

The prosecutor responded not by asking the officer about the substance of the inconsistency but by asking him what the other proceeding was about. Defense counsel’s objection to this question was overruled, on the ground that the use of the deposition had opened the door to this inquiry. The police officer testified, “The defendant is suing myself as well as the other officers in the City of Stamford for, I believe, \$1,000,000 or in excess of \$1,000,000.”

93 Conn. App. at 595-96.

The prosecutor went on to refer repeatedly to the defendant’s “million dollar lawsuit” while questioning witnesses. In closing argument he implored the jury to “say no more to his million dollar lawsuit.”

93 Conn. App. at 607. The Appellate Court found no error.

**REASONING:**

“Because the defendant successfully impeached Scanlon’s trial testimony with his deposition testimony, the court reasonably determined that the question posed by the state was necessary to place the defendant’s reference to a deposition from “*another proceeding in this matter*” in its proper context. Accordingly, because defense counsel introduced evidence concerning the deposition, the court did not abuse its discretion by permitting the state to question Scanlon regarding the context

of that deposition.”

93 Conn. App. at 600 (emphasis in original).

The Appellate Court went on to find that even if it was error to admit this line of questioning, it was harmless error.

Justice Mihalakos dissented: “The doctrine of opening the door cannot. . . be subverted into a rule for injection of prejudice. . .” 93 Conn. App. at 612.

“There is often a stigma attached to those who bring lawsuits against their local governments for millions of dollars; the connotation sometimes is that such individuals are motivated solely by money. That evidence unfairly took the jury’s attention away from the facts of the criminal case and emphasized a controversial lawsuit that carried negative connotations about the criminal defendant. The degree of prejudice suffered by the defendant was exacerbated by the repeated reference by the state throughout the remainder of the trial to his ‘million dollar lawsuit.’

\* \* \*

“The most damaging reference to the civil action was made by the state during its rebuttal argument when the prosecutor urged the jury to ‘[s]ay no more to his million dollar lawsuit. . . And the way you say no more to [the defendant], based on all the evidence that was elicited in this case, is to. . . find him guilty of those counts.’”

93 Conn. App. at 616-17.

**Article VII. Opinions and Expert Testimony.**

§ 7-1 LAY OPINION TESTIMONY AS TO REASONS FOR DISCHARGE INADMISSIBLE — *JACOBS V. GENERAL ELECTRIC COMPANY*, 275 Conn. 395 (2005); Vertefeuille, J.; Trial Judge — Aurigemma, J.

**RULE:** A lay witness may not offer opinion testimony as to an employer’s motivation for an employment decision.

**FACTS:** Plaintiff went to work for the defendant in 1996, six months before his 50th birthday, as Plant Manager of Fabrication and Sourcing. Although he did not have an engineering degree, he received favorable performance evaluations through 2000.

In 2001, plaintiff was laid off as part of a reduction in force. He was 54 years old. Four other salaried employees in similar positions were not laid off. All four had degrees in either mechanical or electrical engineering. Two were younger than the plaintiff, and one had less job seniority.

The defendant’s Manager of Human Resources and Manager of Manufacturing testified that the decision to lay off the plaintiff was based on his lack of relevant experience and skills comparable to the other four employees.

In addition, the defendant offered the lay testimony of employees Texiera and Gondolfo, who were not involved in the layoff decision, that the plaintiff would be “the right candidate” to be laid off for reasons other than his age. Over objection, the trial court allowed the testimony. The Supreme Court reversed.

**REASONING:**

“In the present case, both Texiera and Gondolfo testified to their personal opinions as to whether the plaintiff should have been laid off, despite the fact that neither witness participated in the layoff decision. Neither witness had firsthand knowledge of the basis for the decision. Indeed, Texiera was no longer an employee at the defendant’s facility at the time of the layoff. Although the defendant claims that the testimony of both witnesses was helpful to the jury, the potential helpfulness of the testimony cannot overcome its inadmissibility under § 7-1 of the Connecticut Code of Evidence. Accordingly, we conclude that the trial court abused its discretion in admitting the testimony of these two witnesses, who had no personal knowledge of the layoff process or the defendant’s motivation for its decision to lay off the plaintiff.”

275 Conn. at 408.

§ 7-2 EXPERT TESTIMONY REQUIRED TO ESTABLISH NEGLIGENT CREDENTIALING — *NEFF V. JOHNSON MEMORIAL HOSPITAL*, 93 Conn. App. 534 (2006); Bishop, J.; Trial Judge — Sferrazza, J.

**RULE:** A claim that a hospital was negligent in granting privileges to a physician must be supported by expert testimony.

**FACTS:** On February 24, 2000 plaintiff was admitted to the defendant hospital by his physician, Thomas Hanny, to undergo a vascular bypass to treat a foot infection. Over the next two months, Hanny performed three amputations on the plaintiff at the hospital.

Plaintiff claimed that the hospital was negligent in allowing Hanny to continue to treat patients at the hospital without adequately investigating three medical malpractice claims brought against him between 1995 and 1999 and while Hanny did not have medical malpractice insurance.

Plaintiff disclosed one expert witness, a physician, who testified during deposition that his only criticism of the hospital was its representation on its website regarding Dr. Hanny's qualifications. It turned out the website was not accessible to the public until 2001, after the alleged malpractice.

Defendant moved for summary judgment on the basis that plaintiff needed an expert witness to prove the defendant hospital was negligent. The trial court granted the motion for summary judgment; the Appellate Court affirmed.

**REASONING:**

"In the present case, the plaintiff's claim sounds in corporate negligence. 'Corporate negligence is the failure of the officers or directors who constitute the governing board of a corporation, acting as a board, to maintain the standard of conduct required of the particular corporation, rather than the personal negligence of the corporation's ordinary employees.' *Buckley v. Lovallo*, 2 Conn. App. 579, 582, 481 A.2d 1286 (1984).

"Under Connecticut law, to sustain a corporate negligence claim against a hospital, a plaintiff is generally 'required to establish, through expert testimony, the standard of care to which [the] defendant [is] to be held and a violation of the standard.' *Id.* 584. Specifically, the plaintiff is required to 'produce expert testimony of **the standard of care applicable to similar hospitals similarly located**, and expert testimony that the hospital's conduct did not measure up to that standard.' *Id.*, 582; *Pisel v. Stamford Hospital*, 180 Conn. 314, 334-35, 430 A.2d (1980)."

93 Conn.App. at 542-43 (footnotes omitted). (Emphasis added.)

**COMMENT:** The locale rule was an ancient rule which defined the standard of care of a physician as that degree of skill possessed by other practitioners in the same geographic area. Connecticut abandoned the rule in 1983 in *Logan v. Greenwich Hospital*, 191 Conn. 282. But the Neff case quoted from *Pisel v. Stamford Hospital*, a 1980 case, so it may be that the locale rule has been resuscitated in the corporate negligence area.

§ 7-2 EXPERT TESTIMONY REQUIRED IN LEGAL MALPRACTICE CASE — *DIXON V. BROMSON AND REINER*, 95 Conn. App. 294 (2006); Gruendel, J.; Trial Judge — Miller, J.

**RULE:** With rare exceptions, expert testimony is required to establish the standard of care and causation in a legal malpractice case.

**FACTS:** Plaintiff retained the defendant law firm to represent her in a lawsuit seeking the partition of real property in which she owned an interest. She sought a partition in kind because she and her children wanted to remain on part of the property.

The court ultimately ordered a partition by sale, noting that in absence of a survey it could not determine an appropriate partition in kind. Plaintiff alleged in her legal malpractice action that the law firm's failure to obtain and provide a survey was negligent. She did not disclose an expert witness. The defendant law firm filed a motion for summary judgment, claiming that the plaintiff needed an expert witness on the standard of care and to establish any damages. Trial court granted the motion for summary judgment. The Appellate Court affirmed.

**REASONING:** The plaintiff argued that the decision of the court in the underlying case made it obvious that the law firm did not produce sufficient evidence to permit the type of partition she sought.

While acknowledging that there are legal malpractice cases where the lawyer's negligence is so obvious and gross that an expert witness is not required, the Appellate Court held that this was not such a case. The failure to produce evidence in the underlying case was not necessarily the result of professional negligence. Furthermore, to establish causation, the plaintiff needed expert testimony that "the kind or kinds of evidence

in question actually existed but were not put into evidence by the defendant."

95 Conn. App. at 300.

§ 7-2 QUALIFICATIONS OF EXPERTS: RIDING EXPERT HELD INSUFFICIENTLY QUALIFIED — *KEENEY V. MYSTIC VALLEY HUNT CLUB, INC.*, 92 Conn. App. 368 (2006); Flynn, J.; Trial Judge — Gordon, J.

**RULE:** Plaintiff's expert, who had not trained young novice riders in more than 20 years, was held insufficiently qualified to testify about the standard of care for a riding instructor teaching a young novice rider.

**FACTS:** The plaintiff was a young novice rider receiving horseback riding lessons at a riding academy owned by the defendant. During a lesson she was allegedly told to remove her feet from the stirrups and to kick the horse. The horse lunged. The plaintiff was thrown to the ground and fractured her arm.

The plaintiff's expert had been a certified riding instructor since 1973. However, she had not trained young novice riders in more than 20 years, had taken no refresher courses, had never prepared any instructional or training materials for instructors, had never served on a safety committee and had never taught riding instructors.

The trial court concluded that the expert's qualifications were insufficient and directed a verdict for the defendant. The Appellate Court affirmed.

**REASONING:** Trial court precluded the testimony because the expert's primary job was training horses and dealing with her stable. Only 10% of her time was spent training riders and even that did not involve young novice riders, but experienced riders training for dressage competitions. The Appellate Court did not find this to be an abuse of discretion.

**COMMENT:** Normally, the expert's qualifications go to the weight the jury puts on her testimony, not its admissibility.

§ 7-2 QUALIFICATIONS OF EXPERTS: INSUFFICIENT RAILROAD EXPERTISE TO ESTABLISH "STANDARD OF CARE" IN PREMISES CASE — *SULLIVAN V. METRO-NORTH COMMUTER*

*RAILROAD COMPANY*, 96 Conn. App. 741, *cert. granted*, 280 Conn. 919 (2006); Harper, J.; Trial Judge — Frankel, J.

**RULE:** In proving that Metro-North Railroad provided inadequate security at one of its stations, plaintiff is required to produce an expert with “railroad expertise.”

**FACTS:** James Sullivan was bar-hopping in South Norwalk one night when he encountered Larone Hines and a group of men outside a local nightclub. The encounter became hostile, and the group of men chased Sullivan up a stairway leading to a Metro-North train station, where Hines shot and killed Sullivan.

Plaintiff, who claimed Sullivan’s death was a result of inadequate security at the station, disclosed an expert witness on premises security. The expert was a former police officer who had a premises security background but no specific experience, training or knowledge regarding railroad security. The defendant filed a motion to preclude his testimony which was granted by the trial court. The jury returned a verdict for the defendant. The Appellate Court affirmed.

**REASONING:** The trial court precluded the testimony for a wide range of reasons, including the expert’s lack of experience with railroad security. The Appellate Court applied a troublesome standard to the admissibility of expert testimony in this premises liability case, stating that the test “is whether the expert knows the applicable standard of care and can evaluate the defendant’s conduct given that standard. . . .”

96 Conn. App. at 746.

The use of “standard of care” language shifts the focus from the safety of the premises to the conduct of the defendant railroad. One is required to prove both in a premises liability case. The expert’s testimony on the safety of the premises was clearly relevant, and the expert had sufficient qualifications in this area.

**COMMENT/PRACTICE NOTE:** Try to match your expert’s qualifications as closely as possible to the characteristics of the defendant. The trend toward using “standard of care” language outside the malpractice arena will make qualification of experts more difficult.

The Supreme Court has granted the petition for certification.

§ 7-2 REQUIREMENT FOR EXPERT EVIDENCE ON CAUSATION IN MEDICAL MALPRACTICE CASE NOT FULFILLED BY ENTRY IN HOSPITAL RECORD — *CAVALLARO V. HOSPITAL OF SAINT RAPHAEL*, 92 Conn. App. 59, *cert. denied*, 276 Conn. 926 (2005); Schaller, J.; Trial Judge - Lager, J.

**RULE:** The requirement of expert medical testimony to establish causation in a medical malpractice case cannot be fulfilled by notations in a hospital record, absent evidence that the author of the notations is properly qualified to give the opinion.

**FACTS:** Plaintiff was admitted to the defendant hospital in May 1997 for bilateral knee replacements. Although the plaintiff had banked his own blood in case he needed a transfusion, the hospital gave him a unit of someone else’s blood. The plaintiff claimed an adverse reaction which led to his death.

A notation in the hospital record when he was re-admitted two days before his death included this notation: “Patient has history of immune-medicated pneumonitis secondary to transfusion reaction in 1997. Status post bilateral knee operation with implant in May 1997 which hospital course was complicated by toxic reaction and went to pulmonary edema, recovered gradually.”

92 Conn. App. at 73, n.12 (medical abbreviations interpreted).

Plaintiff had no expert to testify on causation.<sup>1</sup> In opposition to defendant’s motion for summary judgment, the plaintiff argued that these hospital record notations could be used instead of expert testimony to establish causation. The trial court ruled against the plaintiff on this issue and entered summary judgment. The Appellate Court affirmed.

**REASONING:**

“Although the hospital records were business records, neither the records, nor any other evidence, indicated that the persons who made the notations were qualified to give expert testimony regarding causation. Absent such evidence, any opinion regarding causation that was contained in the notations was not independently admissi-

ble. See *River Dock & Pile Inc., v. O & G Industries, Inc.*, 219 Conn. 787, 799, 595 A.2d 839 (1991) (opinion included within otherwise admissible business record admissible only if entrant would be qualified to give that opinion in testimony).”

92 Conn. App. at 75.

§ 7-2 *PORTER/DAUBERT* ANALYSIS NOT REQUIRED FOR FIRE MARSHALS’ TESTIMONY — *Jordan v. Yankee Gas Services Co.*, 2006 Conn. Super. LEXIS 150 (Conn. Super. Ct. 2006) (J.D. Waterbury, Complex Litigation Docket No. XO1CV94018567S) (Sheedy, J.)

**RULE:** A *Porter/Daubert* hearing is not required for Fire Marshals’ testimony regarding the cause of a fire, because the evidence is not the type of innovative scientific evidence with the potential to mislead jurors that *Porter* was intended to address.

**FACTS:** Jordan spilled a container of mixed gas and oil onto his basement floor. While he was attempting to soak up the liquid with cloths, it spread under the gas-piloted hot water heater and ignited. Jordan’s wife and children were killed in the fire. Plaintiff brought a product liability case against Yankee Gas, the seller of the gas hot water heater, claiming it was defective because it was not elevated on an 18” stand.

The fire was investigated by two Connecticut State Fire Marshals. Defendant moved to preclude their testimony on several grounds, including *Porter/Daubert*. The trial court declined to subject the Fire Marshals’ testimony to a *Porter/Daubert* analysis or hold a *Porter/Daubert* hearing.

**REASONING:** The trial court relied primarily on *Hayes v. Decker*, 263 Conn. 677 (2003). There was no showing that the Fire Marshals’ methodology was “innovative.” In addition, their procedures (interviewing witnesses, examining the fire scene, observing debris, noting the location of objects in the fire environment, considering possible ignition sources, studying burn patterns, etc.) produced the type of the evidence a jury

<sup>1</sup> See Expert Disclosures, *infra*.

could competently evaluate “without abandoning common sense and sacrificing independent judgment to the experts’ assertions based on his special skill or knowledge. . . .” 2006 Conn. Super. LEXIS 150, at \*23 (citation omitted).

“Because the experts do not expect to testify concerning innovative scientific techniques, their testimony is admissible without undergoing a Porter analysis or being subjected to a Porter hearing.” *Id.* at \*24.

“It is a jury question whether their investigation was based on valid and reliable methods of origin and cause fire investigation. All that counsel for Yankee Gas was able to elicit as steps not then taken and which the investigators would undertake today if conducting a similar investigation go to weight and not admissibility.” *Id.* at \*25.

§ 7-3 ANSWER TO HYPOTHETICAL QUESTIONS HELD NOT TO BE AN OPINION ON ULTIMATE ISSUE — *STATE V. KELLEY*, 95 Conn. App. 423, cert. denied, 279 Conn. 906 (2006); Hennessey, J.; Trial Judge — Ginocchio, J.

**RULE:** Testimony by an expert on an ultimate issue is generally prohibited. However, this prohibition can be circumvented through the use of hypothetical questions.

**FACTS:** Defendant was stopped for drunk driving. The officer administered the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. According to the officer, the defendant failed all three tests.

At trial, the State called Jack Richman, an optometrist and certified field sobriety test instructor, as an expert witness.

“In response to questioning from the state, Richman testified in relevant part as follows:

**Q.** Doctor, assume for this question that subject submits to the standard field sobriety test. And the first test is horizontal gaze nystagmus. It’s conducted by a trained person. That person detects six clues. Do you have an opinion whether or not that person is impaired?

**A.** If there were six clues, my opinion, there are signs of impairment seen through the eye movement. I need to

find out what’s the cause of that impairment.

**Q.** I’m sorry, walk and turn, how many clues total?

**A.** Walk and turn I believe I eight. You need to fail — four is a failure.

**Q.** One leg stand?

**A.** I think there are four. We need two to fail.

**Q.** Now, again, using the same set of circumstances, that subject submits to, now this person submits to the walk and turn, four clues are detected; do you have an opinion on whether or not it’s more probable or less probable that he is impaired based on the two tests?

**A.** More probable.

**Q.** They submit to the walk-I’m sorry, one leg stand. They place their foot down three times; what is that considered?

**A.** That’s a failure.

**Q.** All three tests added up after the third test, more likely or less likely to be impaired?

**A.** I believe in my mind, as a clinician, it’s clearly more likely there is. It’s like a headache, but now you’re nauseous with the headache and you have dizziness with the headache. So, you start to have three things together that gives you much more evidence that there’s something wrong and there’s impairment.

**Q.** Now, doctor, taking that same example and the subject was asked if he was ill, if he was injured, if he needed immediate medication? Was he on medication? Was he diabetic? Does he need medication at this time? Does he take insulin? And he admits no to all of those. And the person administering the test detects an odor of alcohol on him, slurred speech. . . . again after he denies all the medical issues, there’s an odor of alcohol, slurred speech and admits to drinking alcohol. What would your opinion be of this person at this point?

**A.** My opinion would be, one, that they’re impaired. Two, the most likely cause until I can get a further test, most likely cause would be the central nervous system depressant of alcohol.

**Q.** Same set of circumstances. The

person [is] considered to fail all three tests, admits to no medical issues, admits to drinking, smells of alcohol; do you have an opinion within a reasonable degree of scientific certainty on whether or not that person is operating the motor vehicle under the influence?

**A.** In my opinion, he would be that individual would be impaired and should not be operating a motor vehicle, an airplane or boat.

**Q.** Likely cause based on?

**A.** Likely cause based on the questions that were answered as well as the signs of impairment, that would be mostly likely would be due to alcohol.

**Q.** Thank you, doctor.”

95 Conn. App. at 430-31, Note 10.

The trial court admitted this testimony, and the Appellate Court affirmed.

**REASONING:**

“After reviewing the parties’ briefs, it appears that **both parties are under the assumption that Richman testified as to the ultimate issue** of impairment. Similarly, the state argued in its closing argument: ‘Richman stated that with all the tests [the defendant] has taken and failed, all the clues, with everything else ruled out, his professional opinion is that [the defendant] was drunk. He was impaired.’ We disagree, however, that Richman testified as to the ultimate issue of the defendant’s impairment. . . .”

\*\*\*

“Here Richman never opined that the defendant was impaired. Instead, he merely responded to hypothetical questions mirroring the facts at issue, which we already have held is permissible.”

95 Conn. App. at 429-31 (citation omitted). (Emphasis added.)

**COMMENT:** Talk about exalting form over substance!

**Article VIII. Hearsay**

§ 8-3 (1) STATEMENT BY AGENT OF PARTY OPPONENT NOT ADMISSIBLE UNLESS AUTHORIZED BY PRINCIPAL — *BROWN. V. BRIGHT CLOUDS MINISTRIES*,

*INC.*, 94 Conn. App. 181, cert. denied, 278 Conn. 907 (2006); West, J.; Trial Judge — Pittman, J.

**RULE:** “The mere existence of an employment relationship without more does not render statements of an employee admissible against an employer. . . Before evidence can be admitted to show what an agent said, it must be established that the agent was authorized by the principal to make an admission.”

94 Conn. App. at 186.

**FACTS:** Plaintiff, who was installing wiring around several large windows at the top of the Bright Clouds Church, which was under construction, claimed he fell through an open window, slid down the roof, and landed on a pickup truck. Defendants maintained that the plaintiff removed the plywood covering the window, stepped out onto the roof, slipped on ice and fell.

At trial, plaintiff offered a handwritten statement of Charles Galda, the church’s “clerk of the works” for the construction project, in which Galda did not mention plywood in the window or anything about the plaintiff removing it. The trial court did not allow the statement into evidence. The Appellate Court affirmed.

**REASONING:** Galda was not a defendant. The fact that he was the principal employee for the defendant on the project was not enough to make his statement admissible under Connecticut’s “statement of party opponent” rule.

In Connecticut, the proponent of the statement must establish the authority of the employee to speak on behalf of the employer. That authority cannot be established through the employee. This is a minority position.

**COMMENT/PRACTICE NOTE:** The Connecticut Code of Evidence Oversight Committee has submitted a proposal to the Rules Committee of the Superior Court to amend this rule to allow in “a statement by the party’s agent or servant regarding a matter within the scope of the agency or employment, made during the existence of the relationship.”

Until this amendment is adopted, consider naming the employee as a defendant.

§ 8-3 (2) SPONTANEOUS UTTERANCE — 15 HOURS IS TOO LONG — *STATE V. GREGORY C.*, 94 Conn. App.

759 (2006); Gruendel, J.; Trial Judge — Rodriguez, J.

**RULE:** A statement made 15 hours after the event, and after the declarant has had considerable time and opportunity to reflect on what occurred, is not admissible as a spontaneous utterance.

**FACTS:** Defendant was accused of sexual assault in a spousal relationship. The alleged assault took place at approximately 11 o’clock at night.

The next day, after describing the incident to a friend and going to the courthouse for a restraining order, the victim went to the police station to report the assault. An officer interviewed the victim at approximately 3:30 p.m.

At trial, the prosecutor asked the police officer to recount what the victim had told him. Defense counsel objected on the ground of hearsay. The prosecutor offered the statement under the spontaneous utterance exception to the hearsay rule. The trial court allowed the police officer to recount the conversation. The Appellate Court reversed.

**REASONING:** Although the amount of time between the startling event and the statement is not necessarily determinative, 15 hours is probably too much. In addition, the victim had already described what happened to her friend and gone to the courthouse to obtain a restraining order.

§ 8-3 (5) STATEMENT IN MEDICAL RECORD RE: IDENTITY OF DRIVER NOT GERMANE TO TREATMENT OR ADVICE — *STATE V. SMITH*, 97 Conn. App. 1 (2006); McDonald, J.; Trial Judge — Foley, J.

**RULE:** Party statements in a hospital record offered by that party are admissible only if they were “made for purposes of obtaining medical treatment or advice pertaining thereto and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical treatment or advice.” *C.C.E.* § 8-3(5).

**FACTS:** One evening, the defendant and his girlfriend were drinking alcohol, first at their home and then at two bars. After they left the second bar on the defendant’s motorcycle, they failed to negotiate a curve, went off the road and

hit a guardrail. Defendant’s girlfriend was killed. He claimed at trial that she was driving the motorcycle at the time of the collision.

Defendant, also seriously injured, made statements at the hospital that he was the passenger. He offered the hospital record in evidence pursuant to the business record rule. The State requested that defendant’s statements, which constituted another level of hearsay, be redacted. The defendant pointed to *C.C.E.* § 8-3(5), quoted above. The trial court determined that the exception did not apply and redacted the record. The Appellate Court affirmed.

**REASONING:**

“We conclude that the court correctly determined that this exception cannot apply to the references to the defendant as the passenger because information regarding who was operating the motorcycle was not necessary to treatment. We have stated that ‘[b]ecause statements concerning the cause of injury or the identity of the person responsible are generally not germane to treatment, they are not allowed into evidence under the medical treatment exception.’ *State v. Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). We find persuasive the state’s arguments that whether the defendant was the operator or the passenger did not have any bearing on his medical treatment.

“We also find support in the record for the court’s conclusion. Richard E. Whitehouse, an emergency medical technician who provided medical care to the defendant, testified that ‘how the accident occurred’ was ‘[not] germane to his injuries’ and was not important for the purposes of treatment.

“Accordingly, we conclude that the references to the defendant as passenger were not germane to his treatment. We therefore agree with the court’s determination that the redacted portions of the medical reports were not relevant to treatment and, thus, were not admissible under this exception.”

97 Conn. App. at 7-8

**COMMENT:** The court appears to be drifting toward a different test for admissibility, requiring that the statement at

issue be “necessary” or “important” to medical treatment or advice.

§ 8-3 (5) NOTATIONS IN CHILD’S MEDICAL RECORDS RE: MOTHER’S BEHAVIOR RELEVANT TO MEDICAL TREATMENT — *GIL V. GIL*, 94 Conn. App. 306 (2006); Dupont, J.; Trial Judge — Prestley, J.

**RULE:** Portions of a child’s medical records documenting her mother’s behavior toward her were relevant because her medical care included treatment for an anxiety disorder related to her parents’ divorce.

**FACTS:** In this bitter divorce case, the parents had joint legal custody of their child, and the husband had visitation two days a week. He filed a motion for contempt, claiming that he was being denied visitation. The wife claimed that visitation was being denied because the husband’s visits were aggravating the child’s anxiety disorder.

The husband claimed the wife was manipulating the child’s anxiety disorder to deny him visitation. He offered in evidence the child’s medical records as business records. The wife sought to redact from the records all references to her behavior on the basis that her behavior was not “pertinent” to the child’s treatment. The trial court admitted the entire record. The Appellate Court affirmed.

**REASONING:**

“[T]he portions of the records that document the plaintiff’s behavior were relevant to the treatment of the child because they gave insight into the source of the child’s anxiety regarding contact with the defendant. Specifically, the question was whether the plaintiff had manipulated the anxiety disorder in order to interrupt telephone contact and visitation between the child and the defendant, or whether the plaintiff was the original cause of the anxiety disorder. Therefore, the court did not abuse its discretion when it admitted the child’s medical records without redaction.”

94 Conn. App. at 320-21.

§ 8-4 ALTERNATE FOUNDATION TO QUALIFY HOSPITAL RECORD AS A BUSINESS RECORD — *STATE V. BERMUDEZ*, 95 Conn. App. 577 (2006);

Schaller, J.; Trial Judge — O’Keefe, J.

**RULE:** Hospital records subpoenaed to court pursuant to *C.G.S.* §4-104 with the required accompanying affidavit are admissible as business records without a qualifying witness. Alternatively, the record can be admitted through a live witness testifying as to the proper foundation.

**FACTS:** See §6-10, *supra*. Part of the State’s evidence that the defendant was the driver of the car that rear-ended another vehicle was expert testimony from the Medical Examiner that the defendant’s injuries were consistent with those suffered by a driver of a vehicle that struck something head-on.

To lay the foundation for this testimony, parts of the defendant’s hospital records were admitted into evidence through Dr. Peter Jacoby, the head of the hospital’s emergency department.

The doctor laid the proper foundation for the admission of the hospital record as a business record. The defendant objected on the basis that the State had not complied with *C.G.S.* §4-104, which requires a subpoena and affidavit. The trial court admitted the record. The Appellate Court affirmed.

**REASONING:**

“§4-104 is not the sole avenue by which medical records may be admitted into evidence. Medical records may be admitted under the business record exception. . . In the present case, the state provided an in-court witness, Peter Jacoby, to testify and to qualify the defendant’s medical record as a business record exception to the rule against hearsay. It was therefore unnecessary for the state to comply with the subpoena requirements of § 4-104.”

95 Conn. App. at 587, n. 5.

§ 8-4 DOCUMENT GENERATED DURING TRIAL ALLOWED IN AS BUSINESS RECORD — *EMIGRANT MORTGAGE COMPANY, INC. V. D’AGOSTINO*, 94 Conn. App. 793, cert. denied, 278 Conn. 919 (2006); Schaller, J.; Trial Judge — Lewis, William B., J.

**RULE:** Testimony that a document was created in the course of a bank’s business is sufficient to admit the document as

a business record, despite the fact that the document was generated specifically to corroborate the witness’s testimony.

**FACTS:** In this foreclosure action, Patricia Gilligan, the plaintiff’s Assistant Vice-President and manager of the foreclosure department, testified regarding how the reinstatement amount on the loan was calculated. She testified that she used the bank’s computer system to generate the calculations.

On cross-examination, she was unable to answer questions regarding the specific manner in which the reinstatement amount was calculated. After she left the witness stand, she contacted the bank’s mortgage accounting department and asked it to produce a document setting forth the steps showing how the reinstatement amount was calculated. The document was generated by the mortgage accounting department that night.

The next day, the bank recalled Gilligan to the witness stand and offered this document in evidence. Gilligan testified that it was in the course of the plaintiff’s business to create and to keep such a document, that this particular document was created in the course of the plaintiff’s business with regard to the defendant’s loan and that the document was made contemporaneously with her request for the defendant’s records.

The defendant objected to the document on the basis that a proper foundation had not been laid. The court overruled the objection. The Appellate Court affirmed.

**REASONING:**

“In this case, Gilligan’s testimony satisfied the elements of trustworthiness required by §52-180 as well as the requirements pertaining to computer generated business records. Gilligan testified that it was in the regular course of the plaintiff’s business to create such a document and that it was generated in the regular course of the plaintiff’s business. She also stated that the document was created contemporaneously with her request for the defendant’s records. Furthermore, Gilligan testified that the document contained an exact breakdown of how the reinstatement sum was calculated and thoroughly explained that calculation. Moreover, like the sales manager in *American Oil Co.* [179 Conn. 349 (1979)], Gilligan had personal knowledge of the facts and circumstances

surrounding the defendant's mortgage that was derived from her position as a supervisor of the bank's foreclosure department, and had personal experience with the plaintiff's general record keeping procedures. We conclude that the court did not abuse its discretion and that Gilligan's testimony sufficed to meet the plaintiff's burden to establish a sufficient foundation."

94 Conn. App. at 810-11.

**COMMENT:** A bad decision. Unless one defines the "business" of the bank as litigating foreclosure actions, this document was not generated in the regular course of the plaintiff's business, nor was it generated "at the time of the act, transaction, occurrence or event or within a reasonable time thereafter." *C.C.E.* §8-4(a).

Ironically, the Appellate Court cited the following Supreme Court precedent: "This liberal application [of the business record rule] is derived from the recognition that the trustworthiness of such documents comes from their being used for business purposes and not for litigation. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 600 (1998)." *Emigrant Mortgage* at 808. (Emphasis added.)

This principle is completely incompatible with allowing in a document "created in response to the defendant's . . . cross-examination of Gilligan." *Id.* at 805, n.5.

§ 8-4 CHAIN OF CUSTODY TESTIMONY NOT REQUIRED WHEN AUTHENTICATING A BUSINESS RECORD — *FIRST UNION NATIONAL BANK V. WOERMER*, 92 Conn. App. 696 (2005), *cert. denied*, 277 Conn. 914 (2006); McLachlan, J.; Trial Judge — Gallagher, J.

**RULE:** Even though the witness laying the foundation for a business record did not create a document, provide it to counsel, or know whether it came from the business's files, the record is admissible.

**FACTS:** In this foreclosure action, the loan was originally made by Center Bank, which merged into First Union Bank of Connecticut, which then merged into First Union National Bank, which initially brought the action. Thereafter, First Union assigned the loan as part of a bulk sale to EMC Mortgage Corporation,

which was substituted as plaintiff.

The plaintiff offered in evidence a document containing the defendant's mortgage history with Center Bank. The witness was Carissa Fercodini, who had worked first at Center Bank and then at First Union.

She laid the necessary foundation regarding the document. However, she had not created the document and had not personally pulled the document from the files of Center Bank or First Union. (It appears she was supplied with the document by plaintiff's counsel.) She could not vouch for the origin of the document. Nonetheless, the trial court allowed the document in evidence. The Appellate Court affirmed.

**REASONING:**

"The issue of proper authentication of business records was addressed in *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 717 A.2d 713 (1998), in which our Supreme Court concluded that a business record may be admitted even though the qualifying witness lacks personal knowledge of the origin of the document. After specifically stating that it is not necessary to establish a chain of title to authenticate a business record, the court indicated that a document may be authenticated by direct testimony, circumstantial evidence or proof of custody.

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"The court noted that establishing a chain of custody should not be a requirement for authentication for persuasive policy considerations. *Id.*, 605. Present day foreclosure actions often involved failed banks and mortgage loans that have been assigned several times. "To require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans originated by failed institutions."

92 Conn. App. at 708.

**QUAERE:** Is this a special rule in foreclosure cases?

§ 8-5 (1) PERSONAL KNOWLEDGE REQUIREMENT OF *WHELAN* EXAMINED — IMPORTANCE OF COM-

MENTARY TO CODE OF EVIDENCE — *STATE V. PIERRE*, 277 Conn. 42 (2006); Borden, J.; Trial Judge — Schimelman, J.

**RULE:** When a prior inconsistent statement is admitted for substantive purposes pursuant to *C.C.E.* §8-5(1) and the rule of *State v. Whelan*, one of the requirements is that "the witness has personal knowledge of the contents of the statement."

When the statement is offered solely to prove that the defendant made a statement, not for the truth of the underlying facts, the witness need not have personal knowledge of the underlying facts.

**FACTS:** Murder prosecution in which a witness, Carr, gave a statement relating the defendant's own description of the murder. Carr did not have personal knowledge of these facts.

At trial, Carr insisted that he had never heard the defendant discuss the killing of the victim and that any assertion to the contrary in his seven-page written statement was false. The trial court admitted the written statement for substantive purposes pursuant to *Whelan*. The Appellate Court affirmed.

**REASONING:** The Supreme Court held that:

"The defendant conceded at oral argument before this court that *Grant* [*State v. Grant*, 221 Conn. 93 (1992)] and *Woodson* [*State v. Woodson*, 227 Conn. 1 (1993)] reject Green's requirement [*State v. Green*, 16 Conn. App. 390, *cert. denied*, 210 Conn. 802 (1988)] that personal knowledge must be knowledge of the facts underlying the statement. Essentially, the defendant is asking to overrule our prior holdings in *Grant* and *Woodson*, and to retreat to the interpretation of the personal knowledge requirement espoused by the Appellate Court in *Green*. *We are not inclined to do so*, particularly in light of the fact that, as noted previously, the *Whelan* rule [*State v. Whelan*, 200 Conn. 743, *cert. denied*, 479 U.S. 994 (1986)] and all of the developments and clarifications of the rule that have occurred since *Whelan* was decided, have been codified in §8-5 (1) of the Connecticut Code of Evidence.

"The judges of the Superior Court adopted the Connecticut Code of Evidence (code) in June, 1999, with

the intent of codifying Connecticut evidentiary case law. See D. Borden, ‘The New Code of Evidence: A (Very) Brief Introduction and Overview,’ 73 Conn. B.J. 210, 211-12 (1999). Significantly, ‘the [c]ode cannot be properly understood without reference to the accompanying [c]ommentary. The [c]ommentary provides the necessary context for the text of the [c]ode, and the text of the [c]ode expresses in general terms the rules of evidence that the cases cited in the [c]ommentary have established.’ *Id.*, 212. Additionally, ‘the [j]udges took an unusual step when they formally adopted the [c]ode. Unlike other situations, in which the [j]udges, when voting on rules, are guided by but do not formally adopt the commentary submitted by the [r]ules [c]ommittee that normally accompanies proposed rule changes, in adopting the [c]ode the [j]udges formally adopted the [c]ommentary as well. This is the first time that the [j]udges have done so. Thus, the [c]ode must be read together with its [c]ommentary in order for it to be fully and properly understood.’ *Id.*, 213. Therefore, the personal knowledge prong of the *Whelan* rule, as codified by the requirements of §8-5 (1) (C) of the code, must be understood as also incorporating our holdings in *Grant and Woodson*.”

277 Conn. at p. 59-60 (footnote omitted).

§ 8-7 HEARSAY WITHIN HEARSAY — DEAD MAN’S STATUTE — *DINAN V. MARCHAND*, 279 Conn. 558 (2006); Katz, J.; Trial Judge — Wolven, J.

**RULE:** Virtually any statement made by a decedent in a case by or against the estate is admissible pursuant to the Dead Man’s Statute, *C.G.S.* §52-172.

**FACTS:** The decedent, Garofalo, had made a will some time before his marriage to plaintiff Dinan. By operation of law, if a testator does not specifically provide otherwise, his subsequent marriage automatically revokes his will.

Two days before the wedding, Garofalo executed a codicil to his will specifically providing that his will should continue in full force after the marriage. The will made no provision for Dinan, and left his estate to Garofalo’s daughter and grandchildren.

Less than three years after the marriage, Garofalo died. Dinan challenged the codicil, claiming Garofalo executed it while under his daughter’s influence, domination, and control.

The case was tried to a jury. Dinan offered testimony of a conversation she had with Garofalo on their honeymoon, in which he revealed that he had executed the codicil and that he had done so because his daughter had told him that if he did not, she would not come to the wedding and he would never see her or his grandchildren again.

The defendant estate objected to the testimony on the basis that it was double hearsay. The trial court sustained the objection. The Supreme Court found error, but held it harmless.

**REASONING:** This is a double hearsay problem. First, Dinan was seeking to elicit what the daughter told Garofalo. However, Dinan was not offering the statement of the daughter for the truth of its contents (that the daughter would boycott the wedding and not allow Garofalo to see her or the grandchildren). Rather, she offered it to show its effect on Garofalo in coercing him to execute the codicil. Therefore, it was not hearsay. *C.C.E.* § 8-1(3).

The second link of the hearsay chain was relating what Garofalo had said to Dinan. This statement, the court held, was clearly admissible under the Dead Man’s Statute, *C.G.S.* § 52-172, which provides: “In actions by or against the representatives of deceased persons. . . the entries, memoranda and declarations of the deceased, relevant to the matter in issue, may be received as evidence. . . ” 279 Conn. at 573.

§ 8-8 IMPEACHMENT OF HEARSAY DECLARANT FOR BIAS OR PREJUDICE — *STATE V. CALABRESE*, 279 Conn. 393 (2006); Norcott, J.; Trial Judge — Rodriguez, J.

**RULE:** “When hearsay has been admitted in evidence, the credibility of the declarant may be impeached, and if impeached may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.” *C.C.E.* § 8-8.

**FACTS:** The defendant, Edan Calabrese, was accused of assaulting his 69-year old mother. The mother did not testify at trial. Her description of what

happened was placed in evidence through statements she made to the police officers and in her medical records. Defendant sought to demonstrate to the jury his mother was biased and prejudiced against him by playing the following string of messages she had left on his answering machine:

“Edan.

“Please pickup Edan.

“Would you pick up please?

“Pick up will you? [PAUSE] Are you there?

“Are you there? [PAUSE] Pick up. Pick up if you’re there. [PAUSE] I just wanted to say good luck and I love you.

“Are you there? Pick up. [PAUSE] Are you there?

Pick up. [PAUSE] Pick up! [PAUSE] pick up! [PAUSE] You prick!

“You’d better come down here and pick up the pork and bring my groceries down here before I call the police.

“Pick up. Won’t you pick up?

“I asked for a goddamn sandwich and I never got it and I had a call from the victim’s advocate and you are in a hell of a lot of trouble if you don’t bring me my sandwich — cheeseburger! You better bring it here and leave it right on the doorstep you son of a bitch you bastard!

“Pick up. [PAUSE] Please pickup.

“Please pick up. [PAUSE] Please pick up.”

279 Conn. at 406, n.17.

*C.C.E.* § 6-5 provides: “The credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely.”

The trial court did not allow the defendant to play the recording. The Supreme Court found error and reversed.

**REASONING:**

“We can think of no better evidence of animus that might show a motive for making false allegations than the threats of seeking the arrest of the defendant if he did not comply with her wishes, and other invectives, contained in the messages that the trial

court improperly excluded from the jury's consideration."

279 Conn. at 410.

§ 8-9 RESIDUAL EXCEPTION  
— WHAT CONSTITUTES  
"DUE DILIGENCE" —  
*FERRIS V. FAFORD*, 93  
Conn. App. 679 (2006);  
Bishop, J.; Trial Judge —  
Foley, J.

**RULE:** The residual exception to the hearsay rule requires "a reasonable necessity for the admission of this statement. . ." C.C.E. § 8-9. To demonstrate reasonable necessity, the proponent must show "due diligence" in obtaining non-hearsay evidence, but "[d]ue diligence does not require omniscience. Due diligence means doing everything reasonable, not everything possible."

95 Conn. App. at 687.

**FACTS:** This case involved the inheritance of a farm owned by Mamie Nahibowitz. Nahibowitz had no children. In 1973, she executed a will leaving her estate in quarter shares to a nephew, a niece, and the children of the nephew and niece. The farm was the principal asset of the estate.

In 1993, Nahibowitz executed a new will restricting the development of the farm and requiring that it remain a farm. The Commissioner of Agriculture was informed of this restriction.

Nahibowitz died in 1998. Her nephew submitted the 1973 will to probate. In 2002, the Commissioner became aware of the probating of the 1973 will. The Commissioner brought this action, alleging that Nahibowitz's nephew, who submitted the 1973 will, was aware of the 1993 will and fraudulently submitted the 1973 will because the 1993 will would decrease the value of the property.

At the time of trial, the original of the 1993 will could not be located. An unsigned copy was produced by Nahibowitz's attorney. The Commissioner offered an affidavit from Etta Klee, Nahibowitz's closest friend, about the circumstances of the execution of the 1993 will and its whereabouts. Klee was 84 years old and healthy at the time she signed the affidavit. She later had a stroke which rendered her unable to testify.

The affidavit stated that in March 1993, the day that the will was executed, Klee took Nahibowitz to the bank to get a safe deposit box to store the 1993 will.

The affidavit also stated that in June 1993 Nahibowitz had gone to her lawyer's office with her nephew to fix a typo in the 1993 will. The will was later transferred to a safe deposit box owned by the nephew's mother, who died before Nahibowitz.

The nephew testified that when he emptied his mother's safe deposit box he did not find the 1993 will. He denied ever knowing that it existed.

Klee's affidavit was offered pursuant to the residual exception to the hearsay rule. The two requirements of the rule are that: "(1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." C.C.E., § 8-9. The trial court admitted the affidavit. The Appellate Court affirmed.

### REASONING:

The defendant argued that, because Klee was healthy when she signed the affidavit, the Commissioner should have taken her deposition at that time. The court held that the failure to take the deposition did not constitute "a lack of substantial diligence or good faith."

93 Conn. App. at 688.

As to the second prong of the test, the Appellate Court stated: "We further conclude that the document had an adequate indicia of reliability because there was no evidence of undue influence or coercion, no evidence of a motive to fabricate the affidavit, and Etta Klee had sworn to its accuracy."

93 Conn. App. at 687.

§ 8-9 FATHER'S STATEMENT  
IMPLICATING SON  
ADMITTED UNDER  
RESIDUAL EXCEPTION  
— *STATE V. SKAKEL*, 276  
Conn. 633, (January 24,  
2006); Palmer, J.; Trial Judge  
— Kavanewsky, J.

**RULE:** A statement by a father implicating his child in a murder has the requisite indicia of trustworthiness and reliability for admission under the residual exception to the hearsay rule.

**FACTS:** In this infamous murder trial, a friend and neighbor of the defendant's father testified before the grand jury that the father had told her that his son had told him that he had so much to drink

that night that he wondered if he could have murdered the victim.

At trial, the neighbor testified that she did not remember the conversation. The State offered the grand jury testimony.

There were three hearsay links in the chain:

(1) The grand jury testimony was hearsay. State offered it pursuant to the Whelan rule, C.C.E., § 8-5(1);

(2) The statement of the father to the neighbor was hearsay. The State offered that link pursuant to the residual exception to the hearsay rule.

(3) The statement of the son to the father that he may have committed the murder was hearsay. The State offered this as a statement of a party opponent. C.C.E., § 8-3(1). The trial court admitted the grand jury testimony. The Supreme Court affirmed.

**REASONING:** The only link in the chain contested on appeal was the use of the residual exception for the second link. The court found that the friendship between the neighbor and the father, and the fact that the father would probably not falsely implicate his son, made the evidence reliable enough to be admitted.

### Article X. Contents of Writings, Recordings and Photographs

§ 10-5 FOUNDATION  
REQUIRED FOR ADMIS-  
SION OF SUMMARY —  
*NATIONAL PUBLISHING  
CO. V. HARTFORD FIRE  
INSURANCE CO.*, 94 Conn.  
App. 234, cert. granted on  
other issue, 278 Conn. 903  
(2006); Flynn, J.; Trial Judge  
— Adams, J.

**RULE:** "[S]ummaries may be admitted provided that the documents on which they are based are available to the court and opposing counsel. Unavailability of some supporting documents, not due to the fault of the deponent, will not bar the admissibility of the summary."

94 Conn. App. at 265.

**FACTS:** National Publishing Company published low-cost newspaper inserts using a unique computer system containing individualized instructions for printing different inserts for different clients. The instructions were transmitted via the internet to 13,000 newspapers around the U.S.

In 1994, several of National's employees left the company to form a competitor. According to National's owner, they sabotaged National's computer system on the way out.

The owner reported the loss to National's insurer, The Hartford Fire Insurance Company. National hired its own adjuster to assist with presenting its claim to The Hartford, which rejected the claim. National filed suit against The Hartford, claiming various expenses and business income losses as a result of the sabotage.

National's adjuster took the stand as an expert witness and offered a summary spreadsheet listing 285 operating expenses and 48 extra expenses. The spreadsheet was presented to the jury during the adjuster's testimony using an enlargement. It was apparently treated by counsel and the court as a demonstrative exhibit and used without objection. The summary was marked as a full exhibit and sent into the jury room, but the jury was instructed not to use the summary spreadsheet for substantive purposes.

The jury returned a verdict awarding damages in the amount of \$1,338,848.16. The defendant appealed. The Appellate Court affirmed.

**REASONING:**

"We are frank to admit that we do not understand why the spreadsheet was not admitted for substantive purposes when § 10-5 of the Connecticut Code of Evidence and a line of cases, of which *Brookfield v. Candlewood Shores Estates, Inc.*, 201 Conn. 1, 513 A.2d 1218 (1986), is a part, state that summaries may be admitted provided that the documents on which they are based are available to the court and opposing counsel. Unavailability of some supporting documents, not due to the fault of the proponent, will not bar the admissibility of the summary."

94 Conn. App. at 264-65.

"When facts sought to be proved are of so voluminous or complicated a character that their introduction would occupy much time, and might be difficult to understand by themselves, and these many facts are to be proved for the purpose of drawing a conclusion from them, the court may permit a witness who is qualified upon the subject of investigation, and has made the investigation, to express an opinion

**without giving the details on which the opinion rests.** The opinion of the expert as to whether a building is finished in a workmanlike manner, or according to certain plans and specification [for example], is admissible for the same reason as is the opinion of the accountant as to the result of his examination of the books of account, or as to schedules taken from the books, verified by him. . . or as summaries or averages from voluminous or complicated records are admitted."

94 Conn. App. at 266-67, quoting *Schaefer, Jr., & Co. v. Ely*, 84 Conn. 501, 509 (1911). (Emphasis added).

**COMMENT:** This case is useful in supporting the admissibility of life care plans.

**Expert Disclosures**

FACT THAT OPPONENT HAS DISCLOSED EXPERT MAY NOT SUFFICE TO PERMIT USE OF EXPERT AT TRIAL — *CAVALLARO V. HOSPITAL OF SAINT RAPHAEL*, 92 Conn. App. 59, cert. denied, 276 Conn. 926 (2005); Schaller, J.; Trial Judge — Lager, J.

**RULE:** Normally, where one party has disclosed an expert witness who has been deposed or whose report has been disclosed, either party may call the expert at trial. However, it is within the court's discretion to preclude the expert, absent proper disclosure by the proponent.

**FACTS:** See § 7-2, *supra*. When plaintiff returned to the hospital 11 months after the allegedly negligent blood transfusion, he was admitted by a pulmonologist. He died two days later.

Apparently, the pulmonologist originally told the decedent's wife that he could not answer the question of whether or not the transfusion was a substantial factor in causing her husband's deterioration and death. The plaintiff, therefore, did not disclose him as an expert.

The defendant, apparently believing that the pulmonologist would not connect the death to the transfusion, disclosed him as an expert, specifying that he would testify on causation.

Thereafter, plaintiff's counsel spoke with the pulmonologist, who indicated that he had changed his opinion and now believed that there was a causal link between the improper transfusion and the

deterioration and death of the decedent. The plaintiff disclosed him as an expert eight days after the case had been called in for jury selection. The defendant moved to preclude the pulmonologist from testifying.

The plaintiff claimed that, since the defendant had already disclosed the pulmonologist, the plaintiff was not even required to do so. Therefore, the defendant could not complain about late disclosure. The trial court precluded the testimony. The Appellate Court affirmed.

**REASONING:**

"We disagree that those cases cited by the plaintiff support her broad proposition that once 'one party discloses an expert, the opposing party is entitled to use that expert in its case-in-chief.' Instead, we conclude that the limited holdings of those cases are inapplicable to the facts of the present case, and, therefore, do not excuse the plaintiff's failure to comply with the requirements of Practice Book §13-4 or allow the plaintiff to escape the sanction imposed by the court."

92 Conn. App. at 72.

**COMMENT/PRACTICE NOTE:** To be safe, disclose your opponent's expert as soon as you know you intend to call him or her.

The earlier cases cited by the plaintiff did in fact support her proposition that she was entitled to use the expert after he had been disclosed by the defendant. The open question is whether Cavallaro is an aberration to be confined to its facts, or whether, as the court implied, the earlier cases will be confined to their facts.

AUTHOR OF MEDICAL REPORT MUST BE DISCLOSED AS EXPERT — *SABATASSO V. HOGAN*, 91 Conn. App. 808, cert. denied, 276 923 (2005); Flynn, J.; Trial Judge — Flanagan, John C., J.

**RULE:** The rules regarding expert disclosure are not relaxed when a party offers evidence in the form of reports instead of testimony.

**FACTS:** See §6-7, *supra*. Plaintiff offered medical reports without having disclosed the expert authors of the reports pursuant to the Practice Book. The trial court excluded the reports. The Appellate Court affirmed.

**REASONING:** The plaintiff maintained that she was not required to disclose these experts because their opinions were in the form of reports rather than live testimony. The Appellate Court emphatically rejected this argument:

“If we were to adopt the plaintiff’s argument... that no disclosure is necessary, an offering party who had not properly disclosed a medical expert that he or she wanted to call to the witness stand could circumvent the failure to disclose simply by submitting the expert’s medical reports, which would not be subject to cross-examination, deposition or rebuttal reports because the other party would not know about the evidence until it was offered during trial. This just does not make sense, especially where our rules of practice require full disclosure.”

91 Conn. App. at 822.

LATE DISCLOSURE RESULTS IN PRECLUSION — *MCVERRY V. CHARASH*, 96 Conn. App. 589 (2006); Peters, J.; Trial Judge — Alvord, J.

**RULE:** Repeated failure to comply with expert disclosure deadlines may result in the preclusion of experts, even those disclosed 13 weeks before trial.

**FACTS:** After plaintiff missed four deadlines for disclosing his experts, the court entered a scheduling order requiring disclosure by June 15, 2003 for a trial on September 15, 2004. Plaintiff did not meet the new deadline. Defendant moved for a nonsuit. The court granted a further extension until July 31, 2003. Again, the experts were not disclosed.

On May 24, 2004 the defendant filed a motion to preclude expert testimony. Plaintiff moved for an extension of time and on June 18, 2004 disclosed four experts. The defendant’s motion to preclude was granted and summary judgment entered for the defendant. The Appellate Court affirmed.

**REASONING:** The Appellate Court found that disclosure 13 weeks before trial in a medical malpractice case prejudiced the defendant. Although a continuance of the trial date would have removed this prejudice, the Appellate Court declined to second-guess the trial court’s decision not to grant a continuance. Finally, the inad-

vertent nature of the discovery order violations was found insufficient to make the sanction disproportionate to the violation.

Although some of the delay could be attributed to the fact that the lawyer who was working on the case unexpectedly and suddenly died, that did not explain all of the delay. “We agree with the trial court’s conclusion that, while unfortunate, Airone’s death, did not constitute good cause for the delay.”

96 Conn. App. at 598.

### Peremptory Challenges

IMPROPERLY GRANTING ADDITIONAL CHALLENGES TO ONE SIDE HARMLESS ERROR — *CARRANO V. YALE-NEW HAVEN HOSPITAL*, 279 Conn. 622 (2006); Vertefeuille, J.; Trial Judge — Mottolese, J.

**RULE:** An award of additional peremptory challenges to one side is not presumed harmful.

**FACTS:** Carrano was admitted to Yale-New Haven Hospital on March 12, 1992 for treatment of a necrotic finger and for a colonoscopy to evaluate his Crohn’s disease. He was discharged nine days later, and died of pulmonary edema early the next morning.

Plaintiff sued five defendants. The trial court appears to have concluded that the five did not have a unity of interest<sup>2</sup>, and awarded 20 challenges to the defense. The trial judge then decided, based on considerations of fairness, to increase the plaintiff’s peremptory challenges to the same number. The defendants did not request additional challenges, and at the end of jury selection, still had peremptory challenges left. The jury returned a verdict of \$3.4 million.

The Appellate Court, whose decision<sup>3</sup> was under review, had found this to be harmful error, and reversed, interpreting *Kalams v. Giacchetto*, 268 Conn. 244 (2004) as granting the trial court broad discretion to award additional challenges only when both sides receive them. The Appellate Court had found error based in part on that fact that the trial court had awarded additional challenges only to the plaintiff, and went on to find that the additional challenges granted to the plain-

tiff fundamentally altered the composition of the jury, and that the defendants were harmed as a result, necessitating a new trial.

On certification, the Supreme Court declined to address whether or not the trial court had discretion to award the additional challenges, concluding that even if the award was improper, the error was harmless.

### REASONING:

“We do not intend to imply . . . that every award of peremptory challenges not required by law is harmless. If one party is permitted to exclude additional jurors, but another party who perceives a need to exclude additional jurors is denied an equal opportunity to do so, harm may result. As a threshold to demonstrate such harm, however, the complaining party must exhaust all of her own peremptory challenges and request additional challenges.”

279 Conn. at 639 (footnote omitted).

“The defendants in the present case did not exhaust their peremptory challenges, and did not request additional challenges. Moreover, the defendants do not claim that any individual juror who served on the jury was biased against them, or that they were prejudiced by protracted jury selection proceedings. The record therefore does not support the defendants’ claim that they suffered harm as a result of the trial court’s award of additional challenges, and, accordingly, even if we were to assume arguendo that the award was improper, a new trial is not required.”

279 Conn. at 641-42 (footnote omitted).

**COMMENT:** Justices Zarella and Borden dissented, stating that they “would subject a disproportionate award of peremptory challenges to automatic reversal.”

279 Conn. at 667.

<sup>2</sup> Jury selection took place before October 1, 2001, when the amendment to the statute defining unity of interest took effect.

<sup>3</sup> See 84 Conn. App. 656 (2004).

## Sufficiency of Evidence

DOCUMENTARY EVIDENCE NOT REQUIRED TO ESTABLISH ECONOMIC DAMAGES — EVIDENCE MUST BE PRESENTED ON PERSONAL LIVING EXPENSES AND INCOME TAXES — *CARRANO V. YALE-NEW HAVEN HOSPITAL*, 279 Conn. 622 (August 22, 2006); Vertefeuille, J.; Trial Judge — Mottolese, J.

**RULES:** (1) Plaintiff is not required to produce documentary (as opposed to oral) evidence to prove economic damages.

(2) To prove a claim for loss of future income in a wrongful death case, the plaintiff must present evidence regarding the decedent's personal living expenses and income taxes.

**FACTS:** See Peremptory Challenges, *supra*. In this wrongful death medical malpractice case, the decedent had worked for Sikorsky Aircraft but had become totally disabled before his death at the age of 37. His wife testified that at the time of his death he was receiving a net amount of between \$140 and \$146 per week in disability payments.

The jury's award included approximately \$738,000 in economic damages to the estate — \$50,000 in funeral costs, and \$733,000 in lost future income.

The Appellate Court, whose reversal was overturned by the Supreme Court, had held that the plaintiff's failure to present documentary — as opposed to testimonial — evidence of economic damages was insufficient as a matter of law.

The Supreme Court disagreed with this conclusion but found the evidence presented by the plaintiff insufficient to support the award for net lost future income because there was no evidence regarding the decedent's personal living expenses and income taxes.

**REASONING:** The Supreme Court held that documentary evidence was not required to establish the amount of lost disability income. The court rejected the defendant's claim that since the plaintiff could easily have presented documentary proof in the form of a check stub, tax return, or statement of benefits, the wife's unsubstantiated testimony was not enough.

The court pointed out that the absence of corroborative evidence went to the weight of the evidence but did not make it insufficient as a matter of law. "Ordinarily, in civil cases the testimony of a single witness is sufficient to establish any fact, including the amount of damages, unless more proof is required by statute, even though the witness is a party or interested in the action."

279 Conn. at 646.

However, the plaintiff was required to prove net lost income. The failure of the plaintiff to present any evidence regarding the decedent's personal living expenses and income taxes on the lost earnings was fatal to the lost future income claim:

"In the present case, the plaintiff failed to present any evidence, expert or otherwise, concerning the probable amount of the decedent's income taxes and personal living expenses. The jury only could speculate as to the amount of taxes the decedent would have paid on his gross earnings and the amount of money necessary to support the decedent. Because the plaintiff's damages are measured by the decedent's net earnings, and because the evidence was insufficient to permit the jury to determine the amount of the decedent's net earnings, we conclude that the plaintiff presented insufficient evidence of economic damages."

279 Conn. at 651.

The Supreme Court therefore reduced the award by the amount of damages awarded for the lost income stream.

**PRACTICE NOTE:** Hire an economist.

### Final Argument

MULTIMEDIA PRESENTATION DURING FINAL ARGUMENT APPROVED — *STATE V. SKAKEL*, 276 Conn. 633 (January 24, 2006); Palmer, J.; Trial Judge — Kavanewsky, J.

**RULE:** A litigant may combine tape-recorded comments, photographs, and transcript in an audio-visual display in closing argument, as long as this is not deceptive.

**FACTS:** See § 8-9, *supra*. During the State Attorney's closing argument he played approximately two minutes of a

32-minute tape-recorded interview with the defendant that had been played for the jury in its entirety during the case. As the tape was played a transcript of the interview appeared on a screen. When it concluded, after a pause, the same text appears on the screen with one phrase in larger font and in red letters.

During another segment where the defendant talked about the victim, a photograph of her smiling appeared in the lower right-hand corner of the screen beneath the written text. Then a photograph of the victim's body lying under a pine tree, followed by another photograph of the body closer up, showing her badly beaten.

The trial court allowed the presentation. The Supreme Court affirmed.

### REASONING:

"As we previously have stated, 'counsel is entitled to considerable leeway in deciding how best to highlight or to underscore the facts, and the reasonable inferences to be drawn therefrom, for which there is adequate support in the record. We therefore never have categorically barred counsel's use of such rhetorical devices, be they linguistic or in the form of visual aids, as long as there is no reasonable likelihood that the particular device employed will confuse the jury or otherwise prejudice the opposing party. Indeed, to our knowledge, no court has erected a per se bar to the use of visual aids by counsel during closing arguments. On the contrary, the use of such aids is a matter entrusted to the sound discretion of the trial court.' *State v. Ancona*, *supra*, 270 Conn. [568,] 598 [(2004)]. 276 Conn. at 767.

By David Rosen

## Ten Unconventional Rules for Appeals

Most of the writing I've seen on appellate advocacy doesn't offer much beyond the familiar bromides. On briefs: "write clearly"; "the statement of facts is critical"; "just raise your best issues." On oral argument: "be candid"; "don't read your argument"; "answer the judges' questions." Etcetera. But there is a lot you can learn about being an effective appellate advocate that goes beyond the conventional wisdom. To get you started, here are my own Ten Rules of Appellate Advocacy.

**Rule 1: Don't stop thinking about tomorrow. (It'll soon be here.)** Often trial lawyers try cases as if there were no such thing as an appeal. But law isn't like sports, where it's a mistake to look ahead to your next opponent. It's more like a military campaign, where you don't want to win the battle but lose the war. The value of a verdict — for either side — varies enormously with its vulnerability on appeal. In every trial, if you're aggressive you will have at least one point you can win with the trial judge that will enormously increase your vulnerability on appeal. You need to be able to recognize it and back off if it's not critical for your case. And in every trial, if you're alert you will have at least one point you can lose with the trial judge that will give you a great appellate issue; you need to be able to recognize that too — or, even better, be able to create it. How? First, think about it; put it on your radar screen. Ask yourself, do I really need to win this point? What are the costs if I lose and the risks if I win? Second, talk during and before the trial to someone who actually likes appeals. There are such people, and they (ok, we) all love to *kibbitz*. They'll be happy to hear from you *before* the die is cast.

**Rule 2: Get over it, or, You're not in Oz anymore.** The appeal is a new and different case. Appeals are like The Wizard of Oz in reverse. You are moving from the colorful world of the trial to a very different — but equally compelling — drama in black and white. That's why it can be a disadvantage to have tried the case. When I hear a lawyer at oral argument talk about

some really exciting part of the trial or, worse, tell the court, "you had to be there," my heart sinks. Yes, the facts are always critical, but appeals have their own logic, and facts are important only as they drive the kind of issue that concerns an appellate court, not what would move a jury.

**Rule 3: Control the middle.** Like most people, courts don't like to go out on a limb. Make sure you're not the one putting them there. Here's how: For many issues, you can imagine four positions: call them extreme on your side, modest on your side, modest on the other side and extreme on the other side — or just A, B, C, D. For example, A) the court's ruling was per se reversible error; or B) the court's ruling was wrong or harmful because of particular facts in this case; or C) under the circumstances of this case the court's ruling wasn't so bad; or D) the court's ruling was completely correct. If you can give the court a plausible A, the court will be more comfortable ruling in your favor by finding only a relatively modest B. If you don't have both an A and a B, and the defendant has a C and D, then the intermediate position becomes C — and if the court picks it, you lose.

**Rule 4: You gotta believe.** If you go into an argument thinking there is a question that will blow you out of the water, you haven't thought hard enough. It's your job to put together an argument you find convincing, and that means figuring out why you should win despite that problem you are most afraid the court might raise. In fact, your job really begins when you've thought of the best possible argument the other side can make — whether or not they've thought of it themselves. When you figure out why their best argument is wrong, you know you should win and oral argument is (almost) as simple as telling the court why.

**Rule 5: It's not a speech.** Oral argument isn't like opening statement or summation: it's like cross-examination — and you're the witness. Judges don't want to hear speeches; they are much more interested in answers to their questions. As every trial lawyer knows, good witnesses figure out how to answer questions and still say what they want to say. Think

about how the best witnesses can give answers to questions — on both direct and cross-examination — that are responsive but make the points they came to court to make.



**Rule 6: It's like getting to Carnegie Hall. Always do practice arguments.** The more you think you'd rather not because they make you nervous, or you're too busy, or you don't want to mess with your mojo, or you don't need it — the more you need it. There's nothing like practice. You will feel more comfortable; you will know which moves work and which don't; you and your moot court judges will think of issues and answers you never would have thought of otherwise; you will be more prepared. Where to get judges? Ask your partners; ask your friends; call someone in CTLA; ask non-lawyers (because you need to have an argument non-lawyers can understand); ask your mother. If there's a budget, pay people to be judges; if there isn't, you'll owe them one, and it turns out you'll learn a lot when it's your turn to be a practice judge.

**Rule 7: Have a mantra.** Conventional wisdom says that you need to have an answer for all of the court's questions. A mantra is a single capsulization of your argument that you can use as the answer to many questions, especially all those hypotheticals you can't possibly think of in advance. It differs from a trial theme because it states a legal test or standard. In a recent appeal from a summary judgment for police officers in an excessive force case, we boiled forty pages of briefing down to the mantra that police may not use more force than is necessary to accomplish their legitimate law enforcement purpose. So when the court asked questions like, what if the officers thought the suspect was going to run away, or pull a gun, we were able to crisply distinguish those situations, and to reinforce our argument, by repeating our mantra.

**Rule 8: Use the record.** It's magic. If you say to the court, "please look at the statute/testimony/pleading/exhibit/docu-



By Kathleen L. Nastri, Associate Editor

ment] on page 152 of our appendix” the judges will look there. For that moment at least, you will be in control. Give them time to find the reference; if they can’t find it, tell them, “that’s the thicker blue volume.” Then tell them why that document means that you win. It is a golden opportunity to set the agenda. It also works great on rebuttal: “Mr. X said \_\_\_\_\_. The actual \_\_\_\_\_ is in the record. I’d like to call your attention to page 152 of the appendix,” etc.

**Rule 9: Keep your head up.** You are talking to judges who are interested in your case. They want to hear about it — really they do. And they really do want to be fair and to follow the law. And unlike a jury, they will tell you what concerns them, and you will have a chance to address their concerns. Even if they are beating you up, hang in there. Behave as if they will agree with you when you explain; maybe they, or some of them will.

**Rule 10: Rebut with bullets.** Your rebuttal begins with the words, “just 1 (or 2, or 3, no more than 4!) points.” Then say the points, calling the court’s attention to the record reference or the case that the appellee missed, or that answers Judge X’s question. No speeches: the court is tired of speeches. As a matter of fact, they’re probably ready to be done with the argument, but if they think you have something specific to tell them, and they know that’s all you’re doing, they’ll pay attention.

Those are some of the rules I try to live by. They really work; try them yourself. And here’s one more.

**Bonus Rule: After the argument — before you have packed up your briefcase — go right over to your adversary and shake his or her hand — warmly.** Offer your congratulations. Mean it. Why? Because you were in this together. Because a judge or law clerk might be watching. Because you may meet that lawyer again. Because it’s good karma.

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*If possible, please submit your verdicts and settlements on a 3.5” floppy disk in Word 97 format, 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.*

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### JURY VERDICT

**Award of \$38,000 (\$3,000 Economic Damages); Offer Before Trial — \$0; Plaintiff Found 25% Comparative Fault**

The case of *Dorris Powell v. Walmart*, filed in the Judicial District of New London, involved a premises liability claim against Walmart Corporation concerning falling merchandise from a negligently constructed display. The large, heavy and bulky boxes of the display were stacked by Walmart upon a higher shelf and none were placed below for the safe removal by consumers. Plaintiff wanted to purchase one of these boxes and none were stocked on the lower shelves. The plaintiff looked for a store employee to help her remove the merchandise. No employees were working in that department at the time of the incident. While the plaintiff attempted to remove the box from the higher shelf, another box fell from the same display and hit her in the head, causing a concussion and soft tissue injury to her neck. Walmart took a no-pay position throughout the trial.

One of the issues during the trial was an allegedly forged witness statement of an 11-year-old girl. Walmart claimed the statement was taken as a usual part of their investigation policies. The little girl testified that the Walmart witness statement was not hers, she never gave a statement and she never used technical words contained in the statement like “hip shelf” and “riser.” She further testified that she did not sign the statement as was shown on the paper. In fact, whoever actually forged her signature even spelled her name wrong.

Also at issue during the trial was a store surveillance tape that was disclosed on the eve of trial by Walmart only after the plaintiff filed a supplemental Motion to Compel. The tape was clearly edited, yet Walmart denied editing the tape in any manner. The tape began with real time footage, but then shifted to a slow-motion, frame by frame speed with many helpful frames missing. The result was surveillance footage that showed a box falling (but not clear from where), a box possibly hitting the plaintiff, and then a box disappearing after it hit the plaintiff. All first aid administered to the plaintiff in the same aisle was not shown on the tape when it should have appeared on the tape. At trial, a Walmart Loss Prevention employee repeatedly testified that he copied this tape but did not edit it in any manner. This denial caused one juror to audibly gasp in despair. It was established that Walmart records continual footage from approximately 125 cameras in the Waterford Walmart Superstore and that this employee was asked to “copy” selected footage from a master tape. After Walmart chose the footage it wanted, Walmart management apparently took the master tape. It is believed the tape was either destroyed or sent to the Home Offices in Arkansas. Even when served a subpoena duces tecum for “all footage of the event,” the master tape was not produced.

Defendants challenged the significance of plaintiff’s injuries. Plaintiff claimed a 5% permanent cervical impairment. Defendant themed the plaintiff’s case a “pleasant fiction” in the opening statement. The plaintiff opened claiming this was a case of putting “profits over safety”. Walmart’s written protocol was presented showing they violated their own safe stacking procedure and the jury was asked to “tell Walmart what you think about their behavior”. The focus of the case was continuously upon Walmart. The first witness and last were Walmart employees. The jury returned a verdict of \$35,000 non-economic damages and just \$3,000 economic damages.

*Submitted by James Hall, IV of Trebisacci, Hall & Associates, Pawcatuck.*

**JURY VERDICT**

**Motor Vehicle Accident; 46-Year-Old Female; 5% Impairment Lumbar Spine; Verdict of \$100,335**

In the case of *VanKirk v. Tyliszczak*, et al, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport (Docket No. CV-04-0409328), the jury returned a verdict on February 9, 2006 for \$100,335, after a two day trial. The trial was held before Edward Stodolink, JTR.

The case arose out of a rear-end collision in Stratford on February 20, 2002. The plaintiff's vehicle was a total loss. Her total medical specials were \$12,160.40, all of which had been paid by the defendants' carrier directly and through her own medical payments coverage. There were no lost wages and no claim of impaired earning capacity. The plaintiff treated with Orthopaedic Specialty Group of Fairfield and was diagnosed with a muscular ligamentous sprain of the lumbar spine. All diagnostic tests were negative other than a soft tissue injury. She was assigned a 5% impairment by her treating physician and an IME confirmed a 3-5% impairment.

During the course of the trial, the plaintiff offered testimony via videotape of one of her treating physicians, Michael Saffir, M.D., who opined that the plaintiff's low back pain was likely to be permanent despite ongoing treatment. Testimony from the independent medical examiner, Jerold Perlman, M.D., was also offered via videotape. The focus of the defense was the soft tissue nature of the injury and three subsequent motor vehicle accidents that the plaintiff had disclosed at her deposition about fifteen months before the trial. Per the plaintiff's testimony, none of the subsequent accidents resulted in any injuries, exacerbations, flare-ups or treatment.

The plaintiff had filed an Offer of Judgment in the amount of \$35,000 within eighteen months of the filing of the complaint. The last offer from the defendants' carrier the day before the trial was \$23,000. The jury deliberated for about 90 minutes before returning a verdict for the plaintiff for \$14,160 in economic and \$86,175 in non-economic damages for a total of \$100,335. The defendants are entitled to a collateral source set-off in the amount of \$11,541.53, resulting in a net award of \$88,793.47, on top of which the plaintiff is entitled to 24 months of Offer

of Judgment interest, leaving a final total of \$110,103.90.

Encompass (Allstate) was the carrier for the defendants.

*Submitted by Andrew W. Skolnick, Esq. of Sinoway, McEnery & Messey, P.C., North Haven.*

**JURY VERDICT**

**Motor Vehicle Accident; 42-Year-Old Male Verdict of \$505,521.70**

On November 22, 2005, a jury returned a verdict against the Hartford Insurance Company for \$384,438.98. Including offer of judgment interest of \$121,082.72, the total amount of the verdict was \$505,521.70. Upon the court's denial of the defendants' motion for remittitur, the case settled for a confidential amount.

The case involved a 42-year-old man who was rear ended in September of 2000. As a result of the collision, he was diagnosed with a herniated disc in his lower back and three disc herniations in his neck.

On June 29, 2001, he was involved in another motor vehicle collision, which was the subject of the lawsuit. There were no radiographic findings indicating a difference in the plaintiff's condition between the June 29, 2001 collision and the September, 2000 collision. The plaintiff, however, testified that the pain in his neck worsened significantly, and the pain in his lower back (which resolved from the September, 2000 collision) had returned. The plaintiff testified that as a result of the June 29, 2001 collision, he was forced to change the course of his employment from a limousine driver to a limousine dispatcher, he could no longer run, and he experienced post-traumatic stress disorder.

The plaintiff filed an offer of judgment for \$60,000. The defendants offered \$20,000 to settle the case. On the eve of trial, the defendants took their offer off the table.

*Submitted by Eric G. Blomberg, Esq. of Berkowitz & Reinken, Stamford.*

**JURY VERDICT**

**Motor Vehicle Accident; 31-Year-Old Woman; 10% Impairment Lumbar Spine; Pre-Existing Degenerative Disc Disease; 29-Year-Old Man; 14% Impairment Cervical Spine, 8% Impairment Lumbar Spine**

In the case of *Alba Cartagena and Roberto Delgado v. Johanna Makles and Ralph Desena*, filed in the Superior Court for the Judicial District of New Britain at New Britain (Docket Number CV05-4003186), the jury returned a verdict of \$7,104.00 in economic damages and \$75,000.00 in non-economic damages in favor of Ms. Cartagena and \$6,444.00 in economic damages and \$75,000.00 in non-economic damages in favor of Mr. Delgado. The jury assessed liability on the part of the defendant, Makles, at 60% and as against the defendant, Desena, at 40%.

The defendant, Johanna Makles, was insured by The Hartford and the defendant, Ralph Desena, was insured by Progressive. During settlement negotiations the parties were \$1,000.00 apart. The plaintiffs' final demand was \$36,000.00. The final offer of the insurance companies was \$34,000.00. In an effort to resolve the cases, the plaintiffs suggested a settlement in the amount of \$35,000.00. Progressive offered an additional \$500.00, but the Hartford would not do so.

Roberto Delgado was driving the car, with Alba Cartagena as his passenger. He stopped at a red light. When his light turned green and he proceeded, he had to stop suddenly for the defendant, Makles, who had run a red light on the intersecting street. When he did so, he was rear-ended by the defendant, Desena. Property damages was slightly in excess of \$1,000.00.

The plaintiffs' treatment was rendered for the most part by Dr. George Costanzo, D.C. of Southington, CT. They were also seen by a neurologist and physiatrist at the direction of Dr. Costanzo. Mr. Delgado was diagnosed with post-traumatic headaches due to cervical strain and lumbar strain. Ms. Delgado was diagnosed with a bulging disc superimposed on degenerative disc disease. Their treatment consisted mainly of chiropractic. Dr. Costanzo testified at trial for the plaintiffs. The defendants did not offer an expert.

The plaintiffs were represented by Attorneys Paul M. Iannaccone and David W. Cooney of RisCassi & Davis, P.C. The defendant, Johanna Makles, was represented by Tom Kyzivat of the Law Offices of David Mathis and the defendant, Ralph Desena, was represented by John Hanks of Noble, Young & O'Connor.

*Submitted by David W. Cooney Jr., Esq. and Paul M. Iannaccone, Esq. of RisCassi & Davis, P.C., Hartford.*

## SETTLEMENT

### Medical Malpractice; Injury to Common Bile Duct; Settlement of \$150,000

In the case of *Cheryl Lisk v. Balasubramaniam Dandapani, M.D.*, filed in the Superior Court for the Judicial District of Tolland at Tolland (Docket No. CV-01-0076239-S), the parties settled five months after the complaint was filed for \$150,000.

On February 14, 2000, 53-year-old Cheryl Lisk underwent gallbladder removal surgery at Rockville General Hospital by the defendant. During the procedure, the defendant injured the patient's common bile duct. This first became evident in the days following the plaintiff's discharge when she became jaundiced. She returned to the hospital and the defendant performed a laparoscopy, which failed to identify the injury. The plaintiff was referred to Hartford Hospital where surgery both diagnosed and repaired the common bile duct injury.

For approximately six months thereafter, the plaintiff wore a bile bag and lost 38 pounds. At the time the complaint was filed, the plaintiff had made a substantial recovery and her damages were limited to the post-repair surgery, scarring and intermittent numbness to a portion of her abdomen and difficulty sleeping. There was no wage loss and the plaintiff's medical bills were paid by her health insurer.

Following the exchange of written discovery responses, including requests for admissions in which the defendant admitted that he "injured" the plaintiff's common bile duct, the parties settled for \$150,000.

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

## VERDICT

### Medical Malpractice; 27-Year-Old Single Female; Verdict of \$308,834

In the case of *Patricia Collins v. Daniel Scoppetta, M.D.*, filed in the Superior Court for the Judicial District of Hartford at Hartford (Docket No. CV-03-0822784-S), the jury returned a verdict of \$350,000, less remittitur of economic damages in the amount of \$35,435 and collateral source offset in the amount of \$5,731 for a net verdict of \$308,834. The breakdown was \$50,000 for economic

damages and \$300,000 for non-economic damages.

The plaintiff, Patricia Collins, presented to defendant, Daniel Scoppetta, M.D., a general surgeon, with an inguinal hernia. Defendant determined that the hernia needed to be repaired surgically. On September 11, 2001, defendant performed surgery on the plaintiff. Following the surgery, plaintiff was diagnosed with nerve entrapment of the lateral femoral cutaneous nerve, resulting in continuing pain and thigh numbness.

The plaintiff alleged that during the placement of the mesh used in the repair, defendant placed tacks onto or into the lateral femoral cutaneous nerve, causing entrapment. As a result, plaintiff sustained a permanent nerve injury with continuing pain and numbness in the thigh.

The defendant argued that his care of plaintiff fell within all acceptable standards and the injury was one of the risks of the surgery. Defendant also argued that the plaintiff's leg injury was caused by insufflating the surgical site with CO2 under pressure.

The last demand was \$200,000; there was no offer. The insurance carrier was CMIC.

The plaintiff's experts were Mitchell Frost, M.D., Rockville, MD (general surgeon), Mark A. Reiner, M.D., New York (general surgeon), and Robert L. Van Uitert, M.D., North Adams, MA (neurologist).

*Submitted by Kevin C. Ferry, Esq., Hartford.*

## VERDICT

### Medical Malpractice; Failure to Timely Diagnose Colon Cancer Verdict of \$832,500.00

In the case of *Theresa Lombardo v. James Guthrie, M.D.*, filed in the Superior Court for the Judicial District of Stamford at Stamford (Docket No. CV-03-0201245-S (X05)), a jury returned a verdict in favor of the plaintiff in the amount of \$1,110,000.00, which was reduced by 25% comparative negligence for a net verdict of \$832,500.00.

The plaintiff was 78 years old at the time of the trial and treated with the defendant James Guthrie, a colorectal surgeon, for her colon and rectal needs from 1978 until 2001. The defendant performed routine sigmoidoscopies on the plaintiff on each visit, but failed to order or perform a colonoscopy and/or at minimum a barium enema to look at her entire

colon, despite the diagnosis of a small benign polyp found during a sigmoidoscopy in 1985. In 2001, the plaintiff was diagnosed with Stage III colon cancer resulting in multiple surgeries, recurrent adhesions and hernias. The plaintiff claimed a decrease in her five-year disease-free survival as a result of the delay in diagnosis.

The defendant Guthrie claimed that the plaintiff was advised each visit from 1985 to 2001 to have a colonoscopy and/or barium enema, but she refused. The defense produced records and testimony from the plaintiff's treating physician that he recommended colonoscopy to the plaintiff six years before the ultimate diagnosis, but the plaintiff did not undergo the procedure. Three months prior to the commencement of trial, the defendant produced "records" purporting to show that he did make recommendations to the plaintiff regarding colonoscopy/barium enema, but she declined. The validity and authenticity of these newly discovered "records" were aggressively disputed at the time of trial. The defendant failed to produce any witness to corroborate such recommendations were made by the defendant or declined by the plaintiff.

The plaintiff called Dr. Maxwell Chait, a gastroenterologist, of Hartsdale, New York, who testified as to the standard of care with respect to colorectal screening and surveillance post-discovery of the 1985 polyp. Dr. James Vogel, medical oncologist, of New York City, testified that the majority of colorectal cancers arise from polyps, as well as to the duration of the polyp to cancer sequence. Dr. Vogel testified that, at the time of the diagnosis, the plaintiff had Stage III cancer and had a 60% five year disease-free survival rate. If the lesion had been discovered at earlier visits, it would have been an earlier stage cancer and/or a non-cancerous lesion with an 85% to 100% five year disease-free survival rate.

The defendant called Dr. Paul Shellito, a colorectal surgeon at Massachusetts General in Boston, who testified that he did not believe that the defendant violated the standard of care and that it was not possible with medical certainty to determine one way or another the rate of growth of the lesion and what would have been there if earlier tests were done.

Evidence took approximately three weeks and the jury deliberated for four

days. The plaintiff's Offer of Judgment was filed at \$450,000.00. The defendant made no offer at the time of trial.

*Submitted by Tremont & Sheldon, Bridgeport.*

**SETTLEMENT**

**34-Year-Old Male;  
Work-Related Injury;  
Mediated Settlement \$1,000,000**

In the case of *Michael Morrissey v. Jesmac, Inc., et al*, filed in the Superior Court for the Judicial District of New London at Norwich (Docket No. CV-0111896-S), the parties settled for \$1,000,000. The plaintiff, Michael Morrissey, worked for Sturdy Concrete at a construction site at the Mashantucket Pequot Reservation. The general contractor was the defendant, C.R. Klewin, Inc. Another contractor was the defendant, Jesmac, Inc.

On December 8, 1994, during the course of his employment, Mr. Morrissey was kneeling on the ground, picking up some brackets from forms used to pour concrete. He was kneeling next to one of the concrete columns which had been poured the previous day. He was struck on the head by a metal stud, which fell from an uncompleted wall on the second level of the building, directly above him. The stud weighed approximately ten pounds. Fortunately, it struck Michael Morrissey on the helmet he was wearing. The stud left a gouge in his helmet. Mr. Morrissey was not rendered unconscious as a result of the blow, but was dazed. He could not remember being hit by the stud. He has no memory of the events immediately before being hit by the stud to a time shortly after the stud hit him, when he was being helped up by a fellow worker from the ground.

The defendant, Jesmac, Inc., was responsible for erecting the studs, the type of which struck the plaintiff in the head. None of its employees admitted to seeing the stud fall. The plaintiff claimed that the stud was not properly screwed into place in its tracks, and was blown out of the wall by the wind.

The plaintiff's construction expert testified that it was negligent to place the stud in its track and not screw it down. He also testified that the general contractor, Klewin, was negligent for failing to make sure that the stud was screwed into the wall.

The plaintiff suffered an aggravation of

pre-existing degenerative disc disease at C5-6, a lumbar sprain and a traumatic brain injury as a result of the blow to the head. He underwent an anterior cervical discectomy and fusion at C5-6 in January, 1997. He was left with a 12% permanent impairment of function of the cervical spine as a result of his injuries. He has a 5% permanent impairment of function of the low back as a result of his injuries.

The plaintiff did not complain of personality change or cognitive difficulties for three years after the accident. When those complaints began to surface, Mr. Morrissey treated with a psychiatrist and underwent neuropsychological testing. Dr. Robert Novelly, who performed the neuropsychological testing, testified that Mr. Morrissey has a traumatic brain injury, resulting in a 40% permanent impairment of function of the whole person, as a direct result of the cognitive losses and personality/emotional symptomatology caused by the injuries of December 8, 1994.

The workers' compensation carrier, Aetna, had Mr. Morrissey examined by Dr. Kenneth Selig, a forensic psychiatrist. Dr. Selig testified that Mr. Morrissey has a traumatic brain injury and severe depression as a result of the injuries of December 8, 1994.

Mr. Morrissey became extremely depressed after he was diagnosed with a traumatic brain injury. He had multiple admissions to local hospitals for treatment of his depression.

Dr. Edward Fredericks, a neurologist who examined Mr. Morrissey at the request of Dr. Becker, stated that Mr. Morrissey did not have a brain injury and was malingering.

The defense disclosed that it would call Walter A. Borden, M.D. as an expert in psychiatry. Dr. Borden was expected to testify that Mr. Morrissey's mental condition is not the result of a traumatic brain injury, but rather involves complicated psychological problems that are unrelated to the accident. Dr. Borden did not examine Mr. Morrissey, because plaintiff's counsel objected to an examination by Dr. Borden. Dr. Borden's testimony was going to be based on his review of the medical records.

The defense also disclosed that it would call Marc J. Bayer, M.D. as an expert toxicologist, who was expected to testify that the medications taken by the

plaintiff after December 8, 1994 interfered with his mental abilities and affect his personality.

The defense also disclosed that it would call Kimberlee J. Sass, PhD, a neuropsychologist to testify at trial. Dr. Sass was supposed to testify that conditions other than traumatic brain injury have caused the plaintiff's persisting mental, emotional and behavioral signs and symptoms. Those conditions include a pre-existing personality disorder, psychosocial stressors, and the effects of prescription medications and illicit drugs. Dr. Sass was also expected to testify that the plaintiff's treating psychologist and psychiatrist did not properly evaluate him. Dr. Sass was also expected to testify that the neuropsychological test results are invalid.

The defense also disclosed that Thomas N. Byrne, M.D., a neurologist, would testify at trial. Dr. Byrne was expected to testify that the plaintiff did not receive a traumatic brain injury as a result of the accident.

None of the defense experts examined the plaintiff. Their testimony was going to be based on their review of medical records.

The plaintiff was convicted of possession of heroin, with intent to sell in 1992. The felony conviction would have been admissible at trial.

The plaintiff admitted in deposition testimony that he smoked pot on a regular basis, both before and after the accident.

The case was scheduled for trial commencing in July, 2002. The case was mediated before retired Justice John Speziale in June 2002. The case was settled at the mediation.

*Submitted by Dennis A. Feron, Esq. of Anderson & Ferdon, Norwich.*

**SETTLEMENT**

**Motor Vehicle Accident;  
Settlement of \$810,000**

*In the case of John Doe v. XYZ Rent-A-Car and B.A. Driver* (the identities of the parties are confidential pursuant to a confidentiality agreement), filed in the Superior Court for the Judicial District of Stamford/Norwalk at Stamford, the case settled during trial for \$810,000.

On or about April 28, 1994, at approximately 3:43 p.m., the plaintiff was driving a tractor trailer in the right-hand lane of East Putnam Avenue in Greenwich

approaching the intersection of Mead Avenue. He was driving within the posted 35 mph speed limit. The defendant driver was driving a car owned by the defendant XYZ Rent-A-Car in the left-hand lane on East Putnam Avenue. The defendant driver suddenly and without signaling moved from the left lane into the right lane directly in the path of the plaintiff's tractor trailer.

Defendant's statement to his insurance company, given shortly after the crash, stated that when he changed lanes, he was only 30 to 40 feet in front of the truck and then the light at Mead Avenue changed from green to yellow. Defendant suddenly stopped his car rather than continue through the intersection. Defendant's actions forced the plaintiff to swerve to the right, at which point the right front tire mounted the curb of the road. The truck crashed into a utility pole located on the corner of East Putnam and Mead Avenues. As a result of the collision, the plaintiff was thrown about the interior of his vehicle and struck his head.

As a result of the collision, the plaintiff hurt his neck and back and suffered headaches. In addition, the plaintiff was totally disabled from working. The Social Security Administration determined that he was totally disabled from the combined effect of a number of medical conditions which pre-existed the subject crash, but it was the subject crash that pushed him over the edge. During the pendency of this action, the plaintiff's wife left him relocating to Massachusetts and leaving him to care for their children, 17-year-old Christine Marie and 11-year-old Aubrey Jr., who at age 5 suffered a severe stroke leaving him both physically and mentally disabled.

The plaintiff acknowledged that he suffered from a number of medical conditions, some of which are related to the injuries that he sustained in this incident. His unrelated medical conditions included hypertension, colitis, asthma, multiple hernia repair and bipolar disorder. He had suffered previous injury to both his neck and back in work-related incidents, which were accepted workers' compensation claims. The plaintiff was, however, able to return to work and function in most activities of daily living before the April 28, 1994 crash, which left the plaintiff totally disabled and unemployable.

The plaintiff sustained new injuries in

the collision, including a proliferative myofascial pain disorder. He also complained of pain down his right leg and migraine headaches, which did not respond to medication. Dr. Elisabeth Post, the plaintiff's neurosurgeon, testified that Mr. Davis' neck, arm and back symptoms, which arose following the collision of April 28, 1994, were an aggravation of his pre-existing condition and prevented him from working as a truck driver. Although the plaintiff had sustained previous work-related injuries and Dr. Post had offered to give him a period of time off from work, Mr. Davis insisted that he must continue to work in order to maintain the family health insurance so that his disabled son could receive needed physical therapy. Dr. Post's office note from a visit on March 17, 1994 quoted Mr. Davis: "As long as I can walk, I have to work." And he did continue to work successfully up until the crash involving Mr. Reeser.

Since the crash of April 28, 1994, the plaintiff gained substantial weight reaching approximately 350 pounds, as compared to his previous weight of approximately 250 pounds. He underwent bariatric surgery about one year prior to the case being reached for trial, resulting in a 120 pound weight loss.

The plaintiff was evaluated by Richard Schuster, Ph.D. of New York City for vocational purposes. Dr. Schuster concluded that in the absence of the subject injury, the plaintiff would have continued to work in truck driving or other fields.

Plaintiff's life expectancy was 36.1 years. No disability ratings were requested as the nature of the premorbid condition made comparing potential ratings of little use. Rather, the plaintiff prepared the case as one involving functional disability and loss of earning capacity.

Lost earnings and earning capacity were calculated by Gary Crakes, Ph.D., based upon the premorbid work capacity established by Dr. Schuster. Dr. Crakes determined that the loss was \$691,000 if the plaintiff was totally disabled and \$497,000 if he retained some earning capacity.

The plaintiff's medical expenses were \$112,000, including the bariatric surgery and complications. Without the bariatric surgery, medical expenses were approximately \$38,000.

*Submitted by Stewart Casper, Esq. of Casper & de Toledo LLC, Stamford.*

## SETTLEMENT

### **61-Year-Old Male Delay in Diagnosis of Colon Cancer, Resulting in Metastatic Adenocarcinoma of the Rectum With Liver Metastasis Settlement of \$1,900,000.00**

In the case of *John Doe v. Internist* ("Dr. I"), filed in the Superior Court for the District of Stamford, Complex Litigation Docket at Stamford, the parties settled the claim for the sum of \$1,900,000.00.

In July of 1994, John Doe went for a yearly office visit with his internist, Dr. I, and was complaining of occasional loose stools. Dr. I performed a physical examination, but did not perform a rectal examination or check John Doe's stool for occult blood. John Doe continued to see Dr. I on a yearly basis over the next four years, and reported gastric pain and loose stool. At no time during these annual physical exams did Dr. I perform a rectal examination or check John Doe's stool for occult blood.

In March of 1998, when Dr. I retired, John Doe sought medical treatment with Dr. S. Dr. S performed a physical examination, including a rectal examination and tested his stool for occult blood. The rectal examination revealed a large mass and the stool for occult blood was positive. John Doe then underwent a colonoscopy, endoscopy and biopsy. Results showed a 70 mm annular mass in the rectum 3 cm from the anal verge which appeared malignant. Pathological examination of the rectal biopsy was demonstrative of invasive adenocarcinoma.

In April of 1998, John Doe was diagnosed with metastatic adenocarcinoma of the rectum with liver metastasis, which caused his death in December of 1999.

Plaintiff claimed that Dr. I was negligent in his care of John Doe. In fact, John Doe's tumor advanced from a polyp to a large metastatic tumor in his rectum, resulting in metastatic rectal cancer.

Defendant claimed that Dr. I did not have a duty to perform a complete physical exam, including a lower gastrointestinal examination, because John Doe was only seeing him for upper gastrointestinal complaints.

*Submitted by Ernest F. Teitell, Esq. of Silver Golub & Teitell LLP, Stamford.*

# Workers' Compensation Review

## May 31, 2006, through October 10, 2006

Robert F. Carter and Donna Civitello

### Commissioner Mlynarczyk Appointed

Welcome to recently appointed Commissioner Peter Mlynarczyk of New Britain, who replaces retiring Commissioner Ralph Marcarelli. A former New Britain corporation counsel and a hearing officer for the Department of Motor Vehicles, Commissioner Mlynarczyk practiced law for ten years with Commissioner Howard Belkin in New Britain. He also served as a police officer for the City of New Britain and continues to be a member of the Police Officer Standards and Training Council. Commissioner Mlynarczyk worked for Travelers for ten years, during which he completed law school at Western New England.

### Support the Medicare Set-Aside Bill

Practitioners should urge their Congressional Representatives and Senators to support H.R. 5309, which would fix the Medicare set-aside mess, which has made settlements of workers' compensation cases much more difficult in the last few years. The bill, which has bipartisan sponsorship, has a real chance for passage in the next Congress, if enough voices are raised to get the attention of leadership. Settlements of less than \$250,000 or where no future medical expenses are likely would be exempt from set-aside requirements. Any set-aside would be binding upon Medicare if the amount is 10% or more of the settlement. Submission of a proposed set-aside would be explicitly optional [they are legally optional already, but carriers have been spooked by Medicare set-aside (MSA) "vendors."] Medicare would have to act on proposed set-asides within sixty days. If the claimant or carrier pays the MSA amount to CMS, CMS would be responsible for administering the MSA. Further, CMS would have to provide the amounts of claimed past "conditional" payments within sixty days. So please call, write and email your elected representatives, and do whatever else you can to support the bill. The bill is the product of years of cooperative work by carriers, organized labor and workers' compensation claimants' attorneys, particularly the Workplace Injury Law & Advocacy Group, a national claimants' attorneys organization which practitioners should join and support (WILG.org).

## SUPREME COURT

### Motor vehicle exception restored

In a sweeping decision, the Supreme Court restored the motor vehicle exception to exclusivity to its former scope: a claimant may again sue civilly for damages from injuries received in the negligent operation of a motor vehicle, except for those off-road vehicles named in the statute, Sec. 31-293a. The Court simply removed from the books the "special hazard of the workplace" limitation which lower courts had invented, and which had essentially swallowed up the statute, so as to allow only suits by passengers in roadway accidents unrelated to the job. For years we have noted here the shrinking scope of the motor vehicle exception; the Court when it finally took a close look, did the right thing in the right way, and wiped out the doctrine-creep. *Colangelo v. Heckelman*, 279 Conn. 177 (July 18, 2006). The Court, reversing a summary judgment based on the "special hazard" gimmick, remanded but did not determine whether the defendant's action here, stopping an automobile in a service bay with the engine running, with the transmission in neutral but without setting the emergency brake, could constitute negligent "operation" of a motor vehicle. Surely so.

### Injuries from restraint during seizure compensable

The claimant, flailing during a grand mal seizure, suffered shoulder dislocations from being pinned down by co-employees seeking to keep him from hurting himself. The injuries caused by the restraint were compensable, as arising out of employment.

*Blakeslee v. Platt Bros. & Co.*, 279 Conn. 239 (Aug. 1, 2006).

It is important that the Court flatly rejected the respondent's contention that, since the claimant's seizure was not compensable, any subsequent injury related to the seizure was also not compensable. If an employee falls at work from a home-grown condition and hits his head on a cement floor or falls into a machine, the injuries are compensable. The actions of fellow servants, the Court pointed out, are part of the "conditions of employment" as much as machines, and are therefore a "risk of employment," and their actions

during an emergency are within the scope of their employment and for the benefit of the employer.

### Home care not compensable unless ordered by physician for medical reasons

The brain-damaged claimant's nephew-conservator and his wife provided essential care to the claimant, who without assistance could not take his medicine, eat, change clothes, etc. After the claimant's death, the plaintiff sought compensation for the services rendered. The claim was denied, since the care was not ordered and directed by a physician; the Court characterized the care, though necessary for life, as not constituting medical care. *Tracy v. Scherwitzky Gutter Co.*, 279 Conn. 265 (Aug. 1, 2006). The rule is from *Galway v. Doody Steel Erecting Co.*, 103 Conn. 431, 435-36, 130 A. 705 (1925): whether "the care provided to the injured worker" was (1) "under the direction of a treating physician," and (2) "with the consent of the treating physician . . ." As a practical matter, it is also important to seek authorization by the commissioner promptly and contemporaneously; faced with the likelihood of having to pay for the institutionalization of a helpless claimant, the carrier is usually amenable to reasonable accommodation.

### Besieged school superintendent dies from heart attack at contentious meeting; compensable

During a meeting with the board of education, the Derby school superintendent, almost at the end of his employment, was given a lot of grief by board members over his handling of a personnel issue. Upset, he had a heart attack and died. The heart attack was held compensable. *Chesler v. Derby*, 96 Conn. App. 207 (June 27, 2006). Why not? This baseless appeal wasted everyone's time but the defense lawyers: physical injuries caused by emotional disturbance are clearly compensable (read the statute). Only mental-mental claims are excluded. The respondents also claimed that the claimant's claim was barred as a mental condition arising from a personnel action (sic); the Court politely pointed out that the claim was for a heart attack and death.

## APPELLATE COURT

### Death during pre-employment physical fitness test not compensable

The claimants' decedent, seeking employment as a corrections officer, died of a heart attack after a run, during a physical fitness test which was part of the application process. The death was not compensable, for lack of an employment relationship. *Bugryn v. State of Connecticut*, 97 Conn. App. 324 (Sept. 5, 2006). The Court distinguished two CRB cases in which injuries which occurred during training or inoculation activities were held compensable after a job offer had been extended.

### Injury in fight not compensable where claimant was aggressor

Where the claimant aggressively confronted a coworker who had reported on the claimant's delinquency in his work, the elbow injury which occurred when the co-worker pushed him away was not compensable, as not arising out of the employment. *Ryker v. Bethany*, 97 Conn. App. 304 (Aug. 29, 2006). Although this case was a close one, since performance of duties was an issue in the dispute, if the claimant is the aggressor, the incidents are usually held not compensable. Smile, keep your voice low and let the other guy take the first swing, is my advice.

## COMPENSATION REVIEW BOARD

### Mental-physical heart failure compensable; practice tip on posthumous permanency

Despite vigorous if disingenuous attempts by the State to have the CRB disregard the law, the compensability of congestive heart failure caused by allegations of sexual misconduct was upheld by the CRB. The CRB pointed out that physical injuries caused by work-related stress really are compensable, as in *Chesler, supra. Estate of Michael Sullo v. State of Connecticut*, 4796 CRB 1-04-3 (Sept. 8, 2006). More interestingly, however, the CRB held that a pre-death request by the claimant for the payment of permanent partial disability as an alternative to temporary total disability should be construed as a request for the payment of permanency benefits at whatever date the claimant ceased to be totally disabled, thereby "vesting" the permanency benefits for payment to the estate. The law, according to the CRB, is that a deceased claimant's dependents or estate may collect permanency if the claimant has requested permanency benefits prior to his death and

has reached maximum medical improvement prior to his death. However, it is not clear whether the CRB now believes that a rating of permanency must be made prior to death. The CRB did not mention Sec. 31-308(d), which since 1993 has allowed the commissioner to award Sec. 31-308 benefits based on an award made posthumously. The statute would appear specifically to allow fully posthumous medical analyses of percentages of disability and maximum medical improvement. Until the law is fully rationalized, however, it seems reasonable to make a claim for permanent partial disability benefits to be paid at the termination of temporary total disability, or as an alternative to permanent partial disability benefits, should total disability not be found. It is also probably still reasonable, for now, to ask a doctor to confirm, prior to death, that maximum medical improvement has been reached (which is always the case if a person is dying of the work-related condition), and to give an estimate of the degree of permanency, although Sec. 31-308(d) probably doesn't require this. It is better, however, not to demand an immediate switch from temporary total to permanent partial disability benefits, which is always the claimant's prerogative; the dependents would thereby be deprived of the value of the permanency benefits paid prior to the claimant's death.

### Appellate procedural mysteries

The CRB often kindly allows technically late appeals to be heard on the merits. But the law concerning a late notice of appeal is not wholly clear. In *Numan v. Warnaco, Inc.*, 5007 CRB-4-05-10 (Sept. 22, 2006), where the respondents' appeal was two days late, the CRB held that the respondents' filing with the trial commissioner of a request for extension of time in order to file a motion to correct and to file the appeal petition constituted substantial compliance with the appeal statute, Sec. 31-301(a). The CRB confirmed that the trial commissioner had no authority to extend the appeal period. The CRB noted, however, that prior decisions have allowed the filing of a motion to correct or a motion for extension of time to save otherwise untimely appeals. It's not clear that one can rely on such leniency. I expect that a denial of a motion to correct should be appealable as of right, since Sec. 31-301(a) allows an appeal of a "decision on a motion." But I would also expect that an appeal solely of a motion to correct would be limited to consideration of the correctness of the decision on the motion to cor-

rect. The CRB has so held previously. *Robare v. Robert Baker Companies*, Case No. 4328 CRB-1-00-12 (Jan. 2, 2002); *Buccieri v. Pacific Plumbing Supply Co.* 3286 CRB-7-96-3 (1997), *aff'd*, 53 Conn. App. 671 (1999). But if the more expansive rule applies, as here, where the CRB held that the filing of an extension of time to file a motion to correct satisfied Sec. 31-301(a), the mere filing of the motion to correct, or motion for extension, would guarantee a hearing on the merits of all the issues identified by the appellant.

### Home office rules diminished

The claimant had a home office which she used on a daily basis to complete her work, which was too much for her to finish during the regular work day at her office at the employer's facility. On the day of the accident, she reviewed documents at home for 45 minutes to prepare for a meeting at her regular workplace, then had a wreck on the way there. The CRB reversed the commissioner's finding of compensability because it found that, despite the commissioner's explicit factual finding to the contrary, the claimant failed to show that special employment circumstances existed that made it necessary rather than personally convenient to work at home. The trial commissioner had found that working at home was necessary because overtime had been barred and the claimant had too much work to complete during her regular hours. The test ostensibly remains the same: a regular and substantial quantity of work performed at home, continuing presence of work equipment at home, and special circumstances which make it necessary rather than simply convenient to work at home. But the reversal was essentially a policy decision to limit this exception to the "going-and-coming" rule, by restricting (without defining) the scope of a "necessity" to work at home. *Matteau v. Mohagan Sun Casino*, 4998 CRB-2-05-9 (Aug. 31, 2006). The CRB also held that the claimant's activity at home, review of documents for the meeting, was merely "preparatory" and therefore not compensable under Sec. 31-275(1), but this part of the holding is clearly wrong: that statute only applies to injuries occurring in the claimant's abode, not a highway; and the claimant's document review here was real work, not merely a "preparatory" act, like packing a bag or brushing one's teeth. The CRB reversal suggests that the

(Continued on page 28)

claimant must show affirmatively that he or she wouldn't be allowed to get in to the regular workplace early and do the necessary extra work there. Such a requirement goes a bit too far, though there will clearly be close cases in this developing area of the law.

### Interlocutory appeals blasted

Crummy interlocutory appeals were blasted by the CRB where the respondent appealed an evidentiary ruling by the commissioner in a formal hearing to determine factual issues regarding wage loss benefits which had been remanded for determination by the CRB previously. The CRB, disparaging the vile practice, pointed out that clearly the remand order invited additional evidence on the remanded issues concerning wage loss benefits, and that the trial commissioner has discretion as to how to proceed to resolve remanded issues. *Richardson v. Bic Corp.*, 4953 CRB-3-05-6 (Sept. 7, 2006). The CRB might consider amending the appeal regulation, Sec. 31-301-1, to define appealable "motions" to include only dispositive motions, such as successful motions to preclude contest of compensability or dismiss for lack of jurisdiction, and to delay appeals of rulings on evidentiary motions or motions in limine, which are in fact objections or offers of evidence, or on motions to recuse, to the time of appeal of the decision on the merits.

### Prior award for permanent partial disability does not bar subsequent claim for temporary total

A prior award of permanent partial disability benefits does not prevent a claimant from proving and receiving total disability benefits at a later time. *Dellacamera v. Waterbury*, 4966 CRB-5-05-6 (June 29, 2006). The claimant, a firefighter, had suffered significant lung damage and was paid 33% respiratory permanency in 1994. In 2005 he was awarded total disability benefits. The respondents argued that the claimant, by seeking and accepting 308(b) benefits, was legally barred from claiming that the lung condition totally disabled him. Flirting with a dangerous and spurious argument by respondents, however, the CRB suggested that the claimant might be required to show a changed and deteriorated physical condition in order to sup-

port the later claim for temporary total disability. This suggestion was merely dicta here, however, since the claimant's condition had deteriorated. But the implication is that the claimant, in order to have received the permanent partial disability award in 1994, must not have been totally disabled in 1994 based on his lung condition. This principle is quite wrong and without legal basis. That a claimant receives permanent partial disability benefits never implies legally that he or she had a work capacity or was not totally disabled during the time the permanency benefits were paid. A claimant may demand payment of 308(b) benefits at any time, despite being totally disabled, if he has reached maximum medical improvement. *McCurdy v. State*, 227 Conn. 261 (1993). It may be wholly beneficial for a claimant, while receiving permanency benefits, to attempt to return to the work force before finally throwing in the towel and seeking total disability benefits. Very often severely disabled people manage to work, and claimants should be encouraged to make the attempt. Thus no showing of a deteriorated condition is legally required in order for the claimant later to claim total disability after permanency has been paid, where the issue of temporary total disability was not previously litigated.

### Fund reopens finding and award seven years later

Although the reported facts are not elaborated, the CRB allowed the Second Injury Fund in a no-insurance case to reopen and obtain a reversal of a 1997 finding and award seven years later, after it located the putative employer, who then denied the employment relationship. The employer had declined to appear at the first formal hearing; the finding and award was entered based on the claimant's evidence. The CRB, however, broadly indicated that the finding and award could be reopened at any time on a claim of lack of jurisdiction because of lack of an employment relationship, citing only Sec. 31-315, which limits the power to reopen to the scope of the power of the Superior Court to reopen its judgments. *Mankus v. Mankus*, 4958 CRB-1-05-6 (Aug. 22, 2006). The commissioner in the second formal hearing found that the claimant had somehow induced the putative employer not to attend the first formal hearing; but the CRB said that fact was irrelevant, that even if the employer failed to show up for "neutral" reasons the case could later be reopened. That dictum seems wrong to me, as between the

claimant and the defaulting putative employer. The Second Injury Fund could rightfully claim that the issue of employment relation was not litigated between it and the claimant; but if the Fund was noticed for the first formal and failed to appear, it would not be allowed to relitigate the employment relation, but would rather be estopped. It is important in Sec. 31-355 no-insurance cases always to notice the Fund from the very beginning.

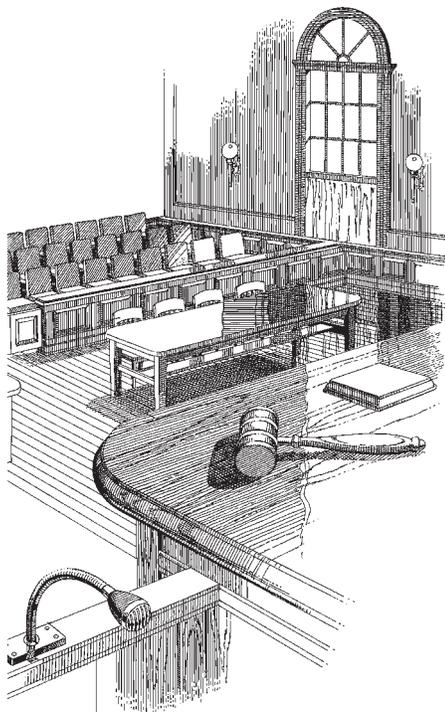
### Timely claim by injured worker prerequisite for claim by surviving spouse

The CRB held again that a surviving spouse may not make a claim for death benefits where the injured or diseased employee allowed the statute of non-claim to elapse prior to his or her death. The CRB also held that a timely Longshore & Harbor Workers' claim made by the claimant's decedent for the claimant's lung condition did not save the widow's claim. *Chambers v. General Dynamics Corp.*, 4952 CRB-8-05-6 (June 7, 2006). The only support cited by the CRB for this doctrine is *Biederzycki v. Farrel Foundry & Machine Co.*, 103 Conn. 701, 704-705 (1926), in which the Court stated that the widow's claim is "derivative" of the original claim. But in *Biederzycki* the Court merely held that the employer, after the commissioner had found the claimant's injury compensable during his lifetime, could not relitigate the compensability of the injury after the widow sought surviving spouse benefits; all she had to prove was that the compensable injury caused her husband's death. I am hopeful that this CRB-made doctrine will be reviewed by the Supreme Court, which has taken the appeal in this case. After all, numerous reasons, such as dealing with imminent death or having a good disability policy, may give a dying worker no reason at all to file a workers' compensation claim before he dies; but the widow's claim will still be of vital significance.

### Hatt used to deprive claimant of 308(a) benefits from first injury

In *Pizzuto v. State of Connecticut*, 4959 CRB-5-05-6 (June 23, 2006) the claimant, a state employee, had a compensable back injury in 1989 followed by two surgeries. She was paid twenty percent specific, but kept working at her regular job and did not claim Section 31-308a benefits at that time. She injured her back again in 2000, and was paid an additional five percent permanent partial disability, or 18.7 weeks, and then 18.7 weeks of Section 31-308a benefits. She was unable to return to

her job, and sought additional 31-308a benefits, based upon the effects of the 1989 injury, under the 1989 statute, which allows discretionary 308a benefits. The trial Commissioner awarded 104 weeks of 308a benefits based on the effects of the 1989 injury, but the CRB reversed, holding that *Hatt v. Burlington Coat Factory*, 263 Conn. 279 (2003) and *Houghton v. Andover*, 4949 CRB-2-05-6 (May 18, 2006) barred an award for 308a benefits based on the first injury. A nasty misuse of Hatt, which merely defined the ability of the last carrier to seek reimbursement from a prior carrier under Sec. 31-299b. Section 299b has nothing to do with the rights of claimants; and in fact here there was only one respondent. Whether the claimant can obtain 308a benefits based on the first injury should be a question of medical fact: do the consequences of the first back injury constitute a significant contributing factor to the claimant's current condition and her reduced earning capacity? If so, she should be able to seek 308a benefits based on the law in effect at the time of her first injury. The proof may be difficult, but the claim should not be barred as a matter of law: Sec. 299b does not extinguish claimants' rights. The CRB with crocodile tears referred to the humanitarian purpose of the Act to support its decision — in this case, a humanitarian purpose to make a gift to insurers and employers with no legal basis. The CRB decisions in both *Houghton* and *Pizzuto* thankfully have been appealed.



## Getting It Right — The *CTLA Forum* Notable Judicial Opinion

We continue our series of noteworthy judicial opinions with a remarkable decision by Judge Jon Alander. In an exemplary display of judicial conscientiousness and integrity, Judge Alander candidly admits that he erred and reverses his own previous decision. The opinion is also a noteworthy analysis of the interplay of code standards and negligence standards, a recurrent and important issue. This case resulted in a large (\$32.5 million) verdict for the plaintiffs and is on appeal to the Supreme Court. (Because the plaintiff suffered such catastrophic injuries, including paraplegia, the defendant does not claim on appeal that the verdict was excessive.)

Superior Court of Connecticut, Judicial District of Waterbury.

### **Norman Pelletier et al. v. Sordoni/Skanska Construction Company et al. No. X06CV950155184S. 2004 WL 3128800 (Conn.Super.), 38 Conn. L. Rptr. 404**

Dec. 16, 2004.

JON M. ALANDER, Judge.

\*1 This decision is the product of the rare instance when a request for reargument is granted. It further reflects the even rarer occurrence when, after granting reargument, the court vacates a prior decision. Since it is better to be right than consistent, upon reargument, I hereby vacate my prior granting of the defendant's motion for summary judgment and now deny that motion.

On August 6, 2004, I granted the motion for summary judgment of the defendant Sordoni/Skanska Construction Company (Sordoni) and entered summary judgment on the first and third counts of the plaintiffs' third amended complaint which were the sole remaining counts of the plaintiffs' complaint. In the first count, the plaintiff Norman Pelletier asserts a claim of negligence against Sordoni and, in the third count, his wife, Reine Pelletier alleges loss of consortium. On August 26, 2004, the plaintiff requested and I subsequently granted reargument and reconsideration of the court's entry of summary judgment. The defendant's motion for summary judgment was reargued on November 1, 2004.

For purposes of deciding the motion for reconsideration, a brief review of the undisputed facts of this case is appropriate. At the time of the incident giving rise to this action, Sordoni was the general contractor for the construction of a building for Pitney Bowes, Inc. (Pitney Bowes). The plaintiff was an employee of Berlin Steel Construction Company (Berlin Steel), the structural steel fabrication and erection subcontractor for the project. On June 20, 1994, the plaintiff suffered serious physical injuries in an accident at the

Pitney Bowes construction site when a steel cross beam fell and struck him. The cross beam fell because it had only been temporarily welded to its seat connection by a tack weld, rather than permanently welded as required. The plaintiff received workers' compensation benefits from Berlin Steel for his injuries. In the present action, the plaintiff claims that Sordoni was negligent for failing to ensure that the steel beam was permanently welded to its seat connection.

In its motion to reargue, the plaintiff first contends that this court erred in holding that Sordoni did not owe the plaintiff a duty of care based on Sordoni's contract with Pitney Bowes. The plaintiff claims that Sordoni's contract with Pitney Bowes imposed upon Sordoni safety and inspection duties which extended to the protection of the plaintiff. As I noted in my previous decision, our Supreme Court specifically rejected the plaintiff's claim that Sordoni's contract with Pitney Bowes created a duty owed by Sordoni to the plaintiff.<sup>1</sup> *Pelletier v. Sordoni/Skanska Construction Co.*, 264 Conn. 509, 531-32 (2003). The plaintiff argues that it is inappropriate for this court to rely on the Supreme Court's determination that Sordoni owed no duty to the plaintiff pursuant to its contract with Pitney Bowes because the plaintiff is claiming here that Sordoni negligently breached its duty to

<sup>1</sup> This action is before this court on remand from the Connecticut Supreme Court. \*\*\* [after the Supreme Court] reversed the \*\*\* the trial court[']s \*\*\* summary judgment [for] Sordoni on the plaintiff's negligence claim but affirmed summary judgment on the plaintiff's breach of contract claim.

(Continued on page 30)

him while the Supreme Court decided that the plaintiff was not a third-party beneficiary to the contract and could not maintain a breach of contract claim against Sordoni. The plaintiff's point is well-taken. The issue of whether the defendant owes the plaintiff a duty of care under negligence law arising from contractual obligations is a separate question from whether the plaintiff is a third-party beneficiary of that contract. See *Gazo v. City of Stamford*, 255 Conn. 255, 249-51 (2001). Nonetheless, the defendant here remains entitled to the entry of summary judgment on the issue of whether it negligently breached a duty it owed the plaintiff under its contract with Pitney Bowes.

It is undisputed that Sordoni, as the general contractor for the construction project, delegated its responsibility to ensure the safety of the structural steel and to inspect the welds to Berlin Steel, its independent contractor. "Under its subcontract with Sordoni, Berlin Steel had the responsibility to provide all of the structural steel for the Pitney Bowes project, and to ensure its integrity\*\*\*. Furthermore, Berlin Steel had the duty to inspect . . . welds, ensuring their ability to bear weight\*\*\*" *Pelletier v. Sordoni/Skanska Construction Co.*, 264 Conn. 509, 512-13 (2003). It is also undisputed that an employee of Berlin Steel failed to inspect, as he was required to do, the temporary tack weld which was the cause of the steel crossbeam falling on the plaintiff. Since Sordoni had delegated to Berlin Steel its duty under its contract with Pitney Bowes to inspect the welds and ensure the safety of the structural steel, the plaintiff is seeking to hold Sordoni vicariously liable for the negligence of Berlin Steel. This it cannot do. *Pelletier v. Sordoni/Skanska Construction Co.*, supra, 264 Conn. at 518 ("[A] general contractor is not liable for the torts of its independent subcontractors").

\*\*\*

The plaintiff further argues that this court's entry of summary judgment for Sordoni was in error because I neglected to consider Sordoni's regulatory obligations pursuant to the Connecticut Basic Building Code, Regs., Conn. State Agencies § 29-252-1a, to inspect the welds on the steel fabricated by Berlin Steel. I agree that in my prior decision \*\*\* I did not address Sordoni's obligations under the Connecticut Basic Building Code. I

did not do so because the plaintiff failed to raise this precise issue in his opposition to Sordoni's motion for summary judgment.

Further explication of the Connecticut Basic Building Code is necessary to fully understand the plaintiff's claim. Section 29-252-1a of the regulations of Connecticut State Agencies adopted the BOCA National Codes of 1987 as modified by the BOCA 1988 Supplement (BOCA National Codes).<sup>2</sup> FN4 as the Connecticut Basic Building Code. Section 1307.1 et seq. of the BOCA National Codes mandates "special inspections" of the work related to the construction of the building and Section 1307.3.3.2 requires that weld inspections shall be in conformance with Section 6 of AWS D1.1 (Structural Welding Code), which is issued by the American Welding Society, Inc., and establishes standards related to welding.

The plaintiff now asserts that the requirements of the BOCA National Codes and Section 6 of the Structural Welding Code impose inspection duties upon Sordoni that it negligently failed to fulfill. \*\*\* The plaintiff did not argue before me that the Connecticut Basic Building Code imposed inspection duties on Sordoni. That is the reason the issue was not addressed by me in my decision of August 6, 2004.

The failure of the plaintiff to previously raise the issue of Sordoni's obligations under the Connecticut Basic Building Code begs the question as to whether it is appropriate for the court to consider it now. \*\*\* Every court however has the inherent authority, as long as it retains jurisdiction, to reconsider a prior ruling. *Steele v. Stonington*, 225 Conn. 217, 219 n. 4 (1993). "If a court is not convinced that its initial ruling is correct, then in the interests of justice it should reconsider the order, provided it retains jurisdiction over the subject matter and the parties." *Id.* \*\*\*.

Although the plaintiff previously failed to raise the issue it now seeks to advance, I find it appropriate for this court to consider the issue at this time for the following reasons. First, Sordoni did not object to reargument. . . on the grounds that the issue was not previously raised by the plaintiff. Rather, it objected. . . on the grounds that the claim lacked merit. Second, this issue does not come as a surprise to the defendant. The third amended complaint. . . specifically states in its first

count that Sordoni negligently breached its duties under the BOCA National Codes and under Section 6 of the code of the American Welding Society to conduct inspections of all steel welds. In addition, our Supreme Court noted in its decision remanding the case to this court that the issue of Sordoni's duties under the state building code may be addressed, if necessary, by the trial court on remand. *Pelletier v. Sordoni/Skanska Construction Co.*, supra, 264 Conn. 517 n. 5. Finally, and most importantly, I find it appropriate to reconsider my previous ruling \*\*\* because I am convinced\*\*\* that my previous decision, is incorrect. \*\*\* Accordingly, it is in the interests of justice that I reconsider that decision. Cf. *Statewide Grievance Committee v. Ankerman*, 74 Conn.App. 464, 470 (2003) ("A court, in the interest of justice, after the close of evidence, may exercise its discretion to open the case for the purpose of permitting the introduction of additional evidence") \*\*\*.

Turning to the merits of the plaintiff's claim \*\*\* that he has asserted a viable negligence cause of action against Sordoni based on [Sordoni's alleged] violat[ions of] its duties under the Connecticut Basic Building Code, Regs., Conn. State Agencies § 29-252-1a; specifically, its duty as permit applicant to conduct an inspection of all steel welds. Sordoni contends that the building code did not impose upon it a duty to conduct either fabrication or verification inspections. It argues that, pursuant to the building code, Berlin Steel possessed the duty to perform fabrication inspections and the owner had the prerogative, but not the obligation, to conduct verification inspections. I agree with the plaintiff that he has raised a disputed issue of material fact that precludes the granting of summary judgment for the defendant.

As noted previously, Section 29-252-1a of the regulations of Connecticut State Agencies adopted the BOCA National Codes as the Connecticut Basic Building Code. Section 1307.1 of the BOCA National Codes mandates that "the permit applicant" shall provide "special inspections" of the work related to the construction of the building. The plaintiff has submitted evidence in the form of a document entitled "Statement of Special Inspections" that Sordoni was the permit applicant with respect to the Pitney Bowes project. Pursuant to § 1307.3, the special inspections for steel elements of buildings and structures shall be as required by § 1307.3.1 through §

1307.3.3.3. Section 1307.3.3.2 provides that “Weld inspections shall be in conformance with Section 6 of AWS D1.1.” Section 6 of AWS D1.1 makes a distinction between fabrication/erection inspections which shall be performed by the contractor, in this case Berlin Steel, and verification inspections which are the “prerogatives” of the owner. Section 6.1 of AWS D1.1. Section 6 further provides that when the term inspector is used without further qualification, it applies equally to inspection and verification inspections. Section 6.1.2. The inspector shall ascertain that all fabrication and erection by welding is performed in accordance with the requirements of the contract documents, Section 6.1.4, and make certain that the size, length, and location of all welds conform to the requirements of the structural welding code and to the detail drawings, Section 6.5.1. The inspector is further obligated to “examine the work to make certain that it meets the requirements of Section. . . 8.15. . . as applicable. Section 8.15 governs the quality of welds in new buildings and provides that “all welds shall be visually inspected.”

The plaintiff maintains that these provisions impose upon Sordoni as the permit applicant the duty to conduct special inspections of all steel welds to ensure their compliance with code requirements and detail drawings. Sordoni contends that the special inspection requirements of the BOCA National Codes incorporate not only the distinction between fabrication inspections and verification inspections of Section 6 of the Structural Welding Code but its placement of responsibility for those inspections on the contractor, i.e. Berlin Steel, and the owner, i.e. Pitney Bowes, respectively. In other words, Sordoni claims that the BOCA National Codes incorporate from Section 6 not only the nature and extent of the inspections to be done but who is to do them. I agree with the plaintiff that the BOCA National Codes impose a separate and distinct obligation on the permit applicant to conduct special inspections of all steel welds to confirm that they meet contract and code specifications.

The express language of the BOCA National Codes states that “The permit applicant shall provide special inspections . . .” Section 1307.1. It further provides that the permit applicant shall submit a statement of special inspections as a condition for permit issuance. Section 1307.1.1. The statement shall include a complete list of materials and work requiring special inspection, the inspec-

tions to be performed and a list of the individuals, agencies and firms intended to be retained for conducting such inspections. *Id.* In fact, Sordoni as the permit applicant submitted a statement of special inspections in which it stated that shop and field review of welding would be conducted by Professional Service Industries, Inc. A final report is also required of inspections documenting completion of all required special inspections. Section 1307.1.2. These obligations are consistent with the imposition on the permit applicant of an independent duty to conduct special inspections.

The BOCA National Codes further require the special inspection of fabricated items where the fabrication of structural load-bearing members and assemblies is being performed on the premises of a fabricator’s shop, Section 1307.2, and for steel elements of buildings and structures, Section 1307.3. With respect to the special inspections for steel elements of buildings and structures, Section 1307.3.3.2 provides that “Weld inspections shall be in conformance with Section 6 of AWS D1.1.” These provisions impose upon the permit applicant the duty to provide for special inspections of the welds for the steel elements of the buildings and structures.

Sordoni argues that since section 6.1 of the Structural Welding Code provides that fabrication/erection inspection is the responsibility of the contractor and verification inspection is the prerogative of the owner, it had no duty as the permit applicant to inspect the welds for the steel elements of the Pitney Bowes building. The problem with Sordoni’s claim is that it sweeps away the obligation imposed on the permit applicant by various sections of the BOCA National Codes to provide for special inspections. Sordoni can point to no language in the BOCA National Codes as support for its assertion that incorporation of Section 6 of the structural welding code was intended to eliminate the permit applicant’s duty generally to provide special inspections pursuant to Section 1307.1, or to eliminate the permit applicant’s specific duties to conduct special inspections of the fabrication of structural load-bearing members pursuant to Section 1307.2 and the steel elements of buildings pursuant to Section 1307.3.<sup>3</sup>

A general contractor may be sued in negligence “if he is under a legal duty to see that the work is properly performed” *Pelletier v. Sordoni/Skanska Construction Co., supra*, 264 Conn. at 518. Here, the plaintiff has submitted evidence that

Sordoni was the permit applicant for the Pitney Bowes project and as such it had the duty pursuant to the Connecticut Basic Building Code to provide special inspections to confirm that all the welds in the structural steel fabricated by Berlin Steel complied with code requirements and contract documents. The plaintiff has also submitted evidence that Sordoni violated that duty by failing to ensure that all welds were inspected and that the plaintiff was seriously injured as a result. Accordingly, Sordoni’s motion for summary judgment was improvidently granted by this court on August 6, 2004. That decision is hereby vacated and the defendant’s motion for summary judgment is denied.

<sup>2</sup> The BOCA National Codes are national building codes that are issued by the Building Officials and Code Administrators International, Inc.

<sup>3</sup> The fact that Sordoni had the regulatory duty to conduct special inspections does not mean that it lacked the authority to contract out the performance of its duty. It does mean that it may not contract out its ultimate legal responsibility. Cf. *Gazo v. Stamford*, 255 Conn. 245, 255 (2001).



# Digitally Processed Images in Connecticut Courts After *Swinton*

Lisa Podolski & Neal Feigenson

## Introduction

Modern courtrooms are being transformed by a profusion of digital images and multimedia offered as evidence and during arguments. From digital photos and videos to trial presentation software such as Sanction and Trial Director, from PowerPoint to computer animations and simulations to custom-designed multimedia systems, lawyers now have at their disposal an array of new technologies that permit them to create and display to judges and jurors highly probative and persuasive images. The pace of technological change confronts judges with difficult questions as they decide whether to admit particular kinds of digital images. It similarly challenges lawyers to anticipate and understand the evidentiary issues that new digital imaging technologies raise, so that the lawyers can prepare and present their cases most effectively.

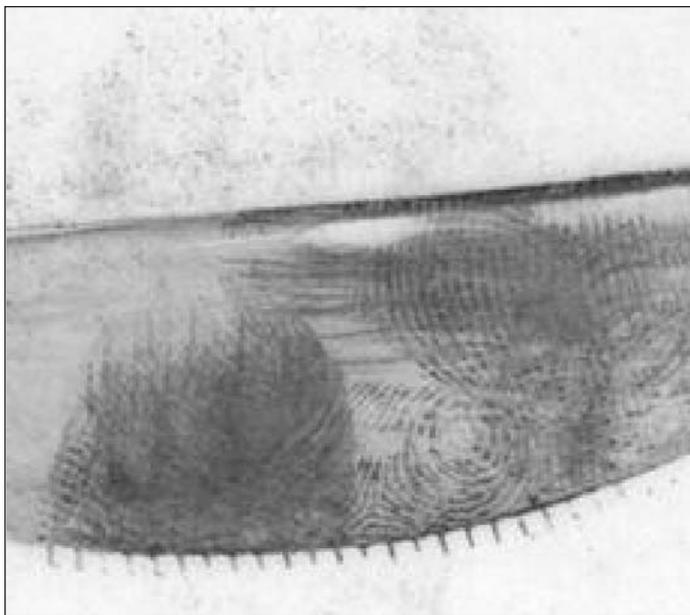
Photoshop was used to superimpose images of the defendant's teeth (dental molds and tracings of dentition) on those photographs of the bite mark. Together, these images provided compelling visual evidence to support expert testimony that the defendant's dentition matched the bite marks, and therefore, that the defendant had committed the crime.

But were the digitally processed images sufficiently reliable to be considered by the jury? The *Swinton* Court developed a new general test for determining the admissibility of computer generated visual evidence, requiring adequate foundational testimony from a witness who is experienced with and knowledgeable about the methods used to create the evidence and who can testify as well to the reliability of the technology, including its degree of acceptance in the relevant forensic or scientific field. *Swinton's* approach to digital-

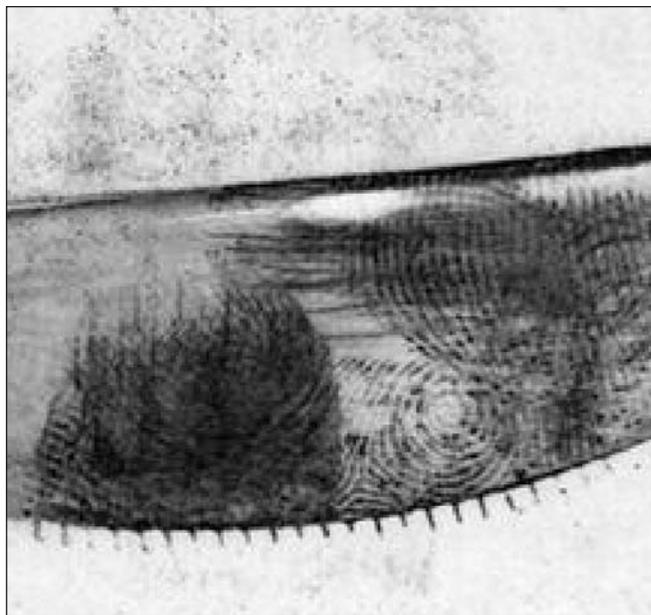
Lucis and Photoshop and indicating some of their potential benefits and drawbacks as litigation tools. Next, we discuss *Swinton* and the law that now governs the admissibility of digitally processed images in Connecticut. We then analyze the implications of the case for future proffers of digitally processed images and provide a checklist of admissibility concerns. We conclude with some general remarks, including larger ethical concerns prompted by the increasing use of digital imaging technologies in court.<sup>2</sup>

## Two digital image processing technologies: *Lucis* and *Adobe Photoshop*

*Lucis*. *Lucis* software, made by Image Content Technology, employs a patented image-processing algorithm, Differential Hysteresis Processing (DHP), to extract and highlight variations in pixel intensities within a digital image. This capability



Original image of fingerprints



Lucis-enhanced image of fingerprints

In *State of Connecticut v. Swinton*,<sup>1</sup> the Connecticut Supreme Court analyzed the admissibility of exhibits created by means of two digital imaging software programs, *Lucis* and *Adobe Photoshop*. Both programs allow users to manipulate digital images in order to produce visuals that are more informative of legally relevant facts, rather than more “realistic” in the sense of faithfully representing reality as perceived by the naked eye. In *Swinton*, *Lucis* was used to enhance photographs of a bite mark on a murder victim's body, making the bite mark pattern clearer; *Adobe*

ly processed images is of course binding authority in Connecticut, and it may prove to be influential outside the state as well. In addition, the Court's application of its test to the evidence at bar — upholding the trial court's admission of the *Lucis* enhanced photographs but deciding that the trial court erred in admitting the *Photoshop* overlays — offers further guidance to lawyers seeking to admit (or to challenge) these and other types of digitally processed images in the future.

We begin this article by describing

can be used to enhance and reveal image detail that would otherwise be undetectable to the human eye. The program is extremely simple to use, involving the operation of just two cursors or sliders.

*Lucis* enhances variations in image intensity by mathematically processing the image as a two-dimensional array of numeric data, selectively detecting and emphasizing certain aspects of the visual information, and converting the result back into an image.<sup>3</sup> *Lucis* processes color images by first “reading” each pixel in a color image for its three values: hue, sat-

uration, and luminance.<sup>4</sup> Lucis then performs DHP on the luminance information in the image, as luminance represents the contrast information in the image. After DHP is done, Lucis recombines the original hue and saturation information for each pixel with the new luminance value, and translates these values back into the original image format. Since Lucis does not alter the hue and saturation information, the output from Lucis contains the same color information as the original image. A change in color appears, however, because the intensity or brightness of the pixel has been shifted.<sup>5</sup> This change in pixel intensity makes visible details that would otherwise be undetectable or unclear.

Lucis is a standard image processing program in forensic sciences utilizing pattern identification, including the identification of bite marks, fingerprints, footwear, and tire impressions.<sup>6</sup> But the program is potentially useful in any case in which bringing out image detail is important. For instance, Lucis can make faint handwriting or other inscriptions more legible, enhancing the usefulness of documentary evidence.<sup>7</sup> It can be used to bring out details in X-rays and CT scans, which may be probative in medical malpractice cases or to prove injuries in any sort of case. Lucis is helpful in stress analysis, which may be relevant in products liability, construction, and environmental litigation. And it can bring out differences in particulate detail in the composition of materials, which may be relevant in patent or other litigation.<sup>8</sup>

The main benefits of Lucis to forensic experts and the clients for whom they testify are that it makes visible and salient case-critical features of photographs that would otherwise remain invisible or doubtful, and that it does so without any loss of data, so that it should be relatively easy to persuade judges and jurors that the enhanced image has not been manipulated in any improper way. (Most image processing methods discard data so that viewers can more clearly see the data that remain; Lucis shifts the relative emphasis of variations in pixel intensity without discarding image information.) Furthermore, Lucis enhances images globally (the program affects the entire image rather than pinpointing certain areas for enhancement), thereby adding to its reliability in producing a trustworthy image. Of course, while Lucis can enhance variations in contrast in an image, if the variations are not present in the original version, Lucis cannot do anything about it.<sup>9</sup> One

drawback is that Lucis is prone to create one visual artifact: a shadowing or highlighting at the edge of a sharp discontinuity which can obscure some of the information in a narrow band near the discontinuity. This artifact, however, is easy to identify, and other imaging processing programs are prone to multiple artifacts.<sup>10</sup>

*Adobe Photoshop.* Photoshop is used by more professionals working with digital images than any other software program in the world. Photoshop users can retouch photos, reduce unwanted “red eye,” easily correct common lens distortions, sharpen blurred images, replace and match colors, and crop images to the desired size, among many other features. Changes can be made globally (i.e., to the entire image, such as contrast, color saturation, and so on) or to selected areas.

Photoshop permits users to build a final, composite image from many layers. (Some commands — e.g., cutting and pasting or copying of image data from one part of an image to another or from a different image — automatically generate layers.) An image on any layer can be repositioned and scaled or transformed in a variety of ways. And because any given layer above the background layer can be made partially transparent, Photoshop allows images to be superimposed on each other for purposes of making comparisons.

Ordinarily the layers are helpful to the user as he or she creates and edits images, but do not affect the final output; indeed, users can either merge layers or flatten all of them into a single layer. And when a Photoshop file is saved in the file formats in which pictures are typically exchanged (e.g., .jpeg or .giff), the layers are automatically flattened. This is important because an unflattened Photoshop file (with the suffix “.psd”) allows the user or another person (including opposing counsel or the court) to “unpack” the file and review most of the steps taken to produce the image. Should an unflattened file not be available, however, other methods of detecting some manipulations of the image are available. For instance, zooming in to magnify views of pixels can reveal inconsistencies in light, color, edges of forms, and so on that indicate local alterations; opening up particular functions (e.g., brightness/contrast) and previewing the effects of changes can reveal certain global changes in those parameters.<sup>11</sup>

According to experts<sup>12</sup> and forensic textbooks,<sup>13</sup> Photoshop is a standard program used by forensic odontologists to compare casts and overlays of a suspect’s teeth to a bite mark. Photoshop has also

been used in fingerprint identification<sup>14</sup> and handwriting examination.<sup>15</sup> The program’s tremendous flexibility and range of image manipulation make it potentially useful to litigators in many scientific and non-scientific applications — indeed, whenever enhancing an image to increase the signal-to-noise ratio is a valid and effective courtroom strategy. (Photoshop may also be used to create purely illustrative images for use in clarifying testimony or enhancing argument rather than to represent reality faithfully; Swinton does not address the uses of digitally processed images as illustration or in argument, nor do we in this article.) That same flexibility, however, can raise questions about the trustworthiness of forensic images processed in Photoshop.<sup>16</sup> Because the final output of the Photoshop process may be the result of a complex sequence of operations that need not be automatically logged and preserved,<sup>17</sup> the proponent of visual evidence created or manipulated in Photoshop should be prepared to provide a record of all changes made to the image. (We explain this in more detail below.<sup>18</sup>)

### **Swinton: *The Court articulates and applies a new test for authenticating digitally processed images***

*The case and the foundations offered for the State’s digital images.* The strangled body of a 28-year old woman was found in 1991 on an abandoned road in Hartford, Connecticut. When the paramedics found the victim they tried to revive her, took her to a local hospital, and cleaned her body, which possibly destroyed significant forensic evidence. There was no evidence connecting the suspect, Alfred Swinton, to the body except for bite marks on the victim’s breast.<sup>19</sup> The State offered the testimony of Dr. Constantine (Gus) Karazulas, a “highly qualified” forensic odontologist, to prove that the bite marks were made by Swinton.<sup>20</sup> Karazulas illustrated his testimony with (among other things) two types of digital images: digitally enhanced photographs of the bite mark on the victim’s body, produced using Lucis, and overlays of images of the defendant’s teeth and dentition on the photos of the bite mark, created in Adobe Photoshop. The defendant challenged the admission of both sorts of images.<sup>21</sup> The trial court admitted both.<sup>22</sup> The defendant was convicted of murder and sentenced to sixty years’ imprisonment.<sup>23</sup>

To introduce the Lucis enhancements, the State offered the testimony of Major

*(Continued on page 34)*

Timothy Palmbach, overseer of the division of scientific services in the state's Department of Public Safety. Palmbach testified that experts had used Lucis in forensic settings. In this case, Palmbach had obtained the original photographs from Karazulas and, because his office did not possess the hardware and software required to produce the enhanced images, Palmbach personally made them at Lucis's manufacturer's offices. Palmbach testified generally about how Lucis enables one to increase or decrease the layers of contrast in a photographic image, and hence to bring out details that would otherwise remain invisible to the naked eye while reducing visual "noise" to an acceptable level. Then, using a laptop, Palmbach demonstrated to the judge and jury exactly how the original bite mark photograph had been enhanced: first, the photograph was scanned without enhancement into the computer<sup>24</sup>; next, a particular part of the image was selected for enhancement; and finally, "contrast ranges" were defined by manipulating a pair of cursors. Once the cursors were set to particular values, the computer performed an algorithm and produced an image in a "one-to-one" format (*i.e.*, the same size as the unenhanced photograph). Palmbach emphasized that Lucis neither adds nor takes away any data from the original image.<sup>25</sup> Palmbach was not qualified, however, as an expert in computer programs, and thus could not explain the Lucis algorithm or how it worked to create the enhanced images.<sup>26</sup>

To introduce the exhibits created with Photoshop, the State offered the testimony of Dr. Karazulas, the forensic odontologist, describing the process by which the overlays were created. First, Karazulas placed the upper and lower molds previously taken of the defendant's teeth (by Lester Luntz, another forensic odontologist, about two months after the crime<sup>27</sup>) on a photocopier and printed out an image of the molds. He then placed a piece of paper over that image and manually traced the biting edges of the teeth. The tracings were then photocopied onto clear acetate, yielding a transparent overlay depicting the edges of the defendant's dentition. These tracings, together with both enhanced and unenhanced bite mark photos, were then scanned into a computer so that they could be used in

Photoshop.<sup>28</sup>

Karazulas then testified that he himself did not use Photoshop to create the overlays in which images of the defendant's teeth or dentition were superimposed on the enhanced and unenhanced bite mark photographs. Instead, he had a Fairfield University chemistry professor who was more proficient in Photoshop operate the program to create the superimpositions. Karazulas testified that over the course of two days, he spent seven to eight hours watching his colleague make the overlays, instructing him not to alter the original images. Karazulas could not testify as to whether proper procedures were followed in inputting the data into Photoshop, whether the person who operated the program was sufficiently qualified, or whether that person operated the program correctly. He could not explain precisely how Photoshop allowed operators to manipulate images or possibly altered images in some respects as a program default.<sup>29</sup> Nor could Karazulas testify as to whether Photoshop was accepted as a standard and competent imaging technology in the field of odontology.<sup>30</sup> Palmbach, on the other hand, testified that he was "personally aware of uses [of Photoshop] within the odontology field" and that he had read "several papers" referring to the use of Photoshop in bite mark analysis.<sup>31</sup> But Palmbach also testified that Photoshop, unlike Lucis, "was capable of actually altering photographs."<sup>32</sup>

*Swinton's test for determining the admissibility of digital images.* At the heart of any inquiry into the admissibility of scientific or other expert evidence, including the forensic odontology testimony introduced in *Swinton*, is the requirement that the evidence be sufficiently relevant and reliable for the jury and the court to consider. The law that governs this inquiry in federal courts and in the courts of many states, including Connecticut, was set out by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*.<sup>33</sup> In a nutshell, *Daubert* requires trial judges to determine "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue."<sup>34</sup> In addition, when images are offered as demonstrative evidence to accompany the expert testimony, those images themselves

must be properly authenticated so as to assure the court that they, too, are sufficiently reliable to be considered by the trier of fact.<sup>35</sup> In *Swinton*, the Connecticut Supreme Court's main concern was the reliability and hence admissibility of the Lucis and Photoshop images rather than that of the science underlying the bite mark expert testimony itself.<sup>36</sup>

The Court recognized that traditional approaches to visual evidence would not resolve the question of whether these new forms of digital images should be admitted. The Court began by treating the Lucis enhancements and the Photoshop overlays as demonstrative evidence. This characterization by itself did not much advance the analysis, however, because demonstrative evidence in general is treated sometimes as merely illustrative evidence, admissible upon the minimal showing that "it will assist the jury in understanding the expert's testimony," and sometimes as substantive evidence, subject at least to verification by a competent witness that it is "a fair and accurate representation of what it depicts," and possibly to much more.<sup>37</sup> In this case the Court rejected the State's description of the digitally processed images as merely illustrative of the expert witness's testimony, treating them instead as demonstrative and therefore substantive.<sup>38</sup> Relatedly, the Court chose not to base its decision on the often-made distinction between computer "animations" and "simulations," the former usually being considered merely illustrative evidence and thus warranting the lowest threshold for admissibility.<sup>39</sup> The Court avoided this distinction for two reasons: First, neither the Lucis enhancements nor the Photoshop overlays clearly fell into the category of either animations or simulations; and second, the overlays, which the Court thought more closely resembled animations, had actually been used as substantive evidence, and thus were particularly ill-suited for the minimal foundation ordinarily applied to illustrative evidence.<sup>40</sup>

Having classified the Lucis and Photoshop images as substantive evidence, the Court then had to determine whether to treat these "computer enhanced" items the same as it would enlargements or reproductions of photographs — admissible if shown to be fair and accurate representations of what they depict — or to subject them to a more demanding standard.<sup>41</sup> The Court recognized that the images digitally processed through either Lucis or Photoshop were

more than mere photographic enlargements, but what were they, exactly?<sup>42</sup> Finding no clear guidance in the case law, the Court decided to treat both the Lucis photo enhancements and the Photoshop overlays as “computer generated evidence” and, “let[ting] caution guide our decision,” sought to formulate a single, broad, “fairly stringent” standard applicable to both and, indeed, to *all* computer generated images.<sup>43</sup>

The Court then sought to articulate the specific foundational requirements for the authentication of computer generated images. In the absence of Connecticut authority specifically on point, the Court turned to cases from other jurisdictions regarding the admissibility of enhancements of photos and videos, to Federal Rule of Evidence 901(b)(9), which governs the authentication of a process or system, and to secondary sources. Ultimately the Court decided on a six-factor test borrowed from a leading commentary on Rule 901(b)(9), providing that authentication of computer generated images “can generally be satisfied by evidence that

- (1) the computer equipment is accepted in the field as standard and competent and was in good working order,
- (2) qualified computer operators were employed,

- (3) proper procedures were followed in connection with the input and output of information,
- (4) a reliable software program was utilized,
- (5) the equipment was programmed correctly, and
- (6) the exhibit is properly identified as the output in question.”<sup>44</sup>

In sum, “[r]eliability must be the watchword in determining the admissibility of computer generated evidence,”<sup>45</sup> and these six factors allow courts to address all of the important concerns going to the reliability of such evidence: the witness’s familiarity with the type of evidence and the method used to create it, as well as the reliability of the underlying technology and the adequacy of the hardware and software used to generate the evidence.<sup>46</sup> The Court acknowledged that at some point computer programs like Lucis and Photoshop might be considered “inherent[ly] reliab[le]” and thus no longer subject to these more stringent foundational requirements,<sup>47</sup> but that that day had not yet arrived. Hence, the Court’s next task was to apply its general admissibility standards to the proffers made in the case at bar.

*The Court’s application of its new test to the Lucis enhanced photos and the Photoshop*

*overlays.* The Court ruled that the testimony of the State’s forensic expert witness, Timothy Palmbach, laid an adequate foundation for the admission of the Lucis photo enhancements. First, Palmbach testified that Lucis was used and relied upon in forensic pattern analysis, including the identification of fingerprint patterns, bloodstain patterns, footwear and tire impressions, and bite marks.<sup>48</sup> Second, he testified that not only was he himself a well trained and highly experienced forensic analyst, but also that he had knowledge and experience in using Lucis to create digitally enhanced images of footprints, tire prints, and, on two occasions, dental imprints on breasts.<sup>49</sup> Third, Palmbach testified “accurately, clearly, and consistently” regarding the input and output of data, including the initial digitization of the original autopsy photos and the use of Lucis to select contrast points, array them into layers, and then diminish certain layers to make the bite mark more salient.<sup>50</sup> Crucially, Palmbach used his laptop during trial to demonstrate to the jury how Lucis is used, and compared the enhanced with the unenhanced photos in front of the jury.<sup>51</sup> He was able to testify that there was nothing in the enhanced image that was not present in the original photograph.<sup>52</sup> Fourth, Palmbach attested to the accuracy and reliability of Lucis, pointing out that (i) Lucis (unlike



Original X-Ray image



Lucis-enhanced X-Ray image

(Continued on page 36)

Photoshop, for instance) does not have image editing functions (other than global contrast adjustment) and so cannot be used to manipulate images in any other way; (ii) Lucis's "marketing papers and an article that had been written concerning Lucis" claimed that the program did not create artifacts,<sup>53</sup> which if present might increase the program's error rate<sup>54</sup>; and (iii) he had personally tested the program's accuracy by enhancing an image of a bite mark which Karazulas had made on his own arm.<sup>55</sup> And while Palmbach, not being a computer programmer or computer expert, was unable to testify, pursuant to the fifth factor of the Court's test, that "the equipment was programmed correctly," the Court appeared to find Palmbach's testimony on the first four factors sufficient to establish the reliability of Lucis and the visual evidence it was used to generate.

In contrast, the State failed to offer foundational testimony sufficient to authenticate the Adobe Photoshop dental overlays (both those that used the tracings of the defendant's dentition and those that used scans of his dental molds). First, neither Palmbach nor forensic odontology expert Constantine Karazulas was able to testify that Photoshop was sufficiently accepted in the field to be considered "competent" or "standard practice."<sup>56</sup> Second, Karazulas could not testify that a qualified computer operator was employed; he could only testify that he had someone else operate the program because he did not know enough to do it himself.<sup>57</sup> Third, and for the same reason — he did not operate the program himself — Karazulas could not testify whether proper procedures were followed in connection with the input and output of information. Fourth, the State did not persuade the Court that Photoshop was sufficiently reliable for purposes of forensic odontology; even though the defendant's own expert testified that the American Board of Forensic Odontology considers Photoshop to be an "appropriate aid" in bite mark identification, the Court found that this alone "does not satisfy our multifaceted standard."<sup>58</sup> And although the Court did not specifically address the remaining factors in its test, it explained at some length why Karazulas did not know enough about how Photoshop works to be subject to meaningful cross-examination as to how the overlays were

produced, including, most importantly, how the superimposition of the image of the defendant's translucent teeth over the bite mark was produced and whether the exhibits had been altered or otherwise impermissibly manipulated in the Photoshop process.<sup>59</sup>

To the casual reader it might at first seem anomalous that the Court disallowed the digital images created using Photoshop, a standard and widely available software program used by millions, while admitting the images created using Lucis, a much less familiar program. One might think that Photoshop, due to its ubiquity, would be closer to achieving the sort of "inherent reliability" that would obviate more onerous foundational requirements,<sup>60</sup> much as unenhanced analog and digital photography have. The anomaly disappears, however, when one considers the specific shortcomings in the foundational testimony offered to authenticate the Photoshop overlays in *Swinton*.<sup>61</sup> Each of these may well be addressed by advocates seeking to use Photoshop (or, by extension, other digital image processing technologies) in future cases. In the next section of this article, we offer a checklist to guide proponents (and opponents) of digital visual evidence.

### ***Getting digital images admitted under Swinton: A checklist***

What should proponents of Photoshop images or any other digitally processed images do to increase the likelihood that the images will be admitted into evidence? There is little by way of case law to guide practitioners; for instance, there do not appear to be any reported opinions or decisions on motions in limine regarding the admissibility of Photoshop. As the *Swinton* Court itself noted, there have been few basic foundational challenges to computer generated photo enhancements and to computer generated visual displays more generally.<sup>62</sup> Perhaps lawyers have not yet made a habit of challenging the admissibility of digital images because, like the public at large, they have tended to defer to such images as sufficiently trustworthy, or perhaps they have felt that they lack the visual intelligence and vocabulary to raise appropriate challenges. Whatever the reason, now that *Swinton* has called the Connecticut bar's attention to the issue of the reliability of digital visual evidence,

proponents of this evidence can expect more challenges in the future.

With this in mind, we offer litigators the following general checklist for producing digitally processed images using programs like Lucis or Photoshop and getting those images admitted into evidence:

- (1) Have the alterations made by a person with sufficient experience and skill in using the software.
- (2) Have that person be available to testify sufficiently on direct, and be cross-examined, regarding:
  - (a) His/her level of experience making such alterations,
  - (b) The enhancement procedure of the alterations,
  - (c) The reliability of the computer software utilized for that purpose, and
  - (d) The accuracy of the resulting image in depicting the original thing or events recorded.
- (3) Be sure that the computer software program is accepted in the field for which it is being used.
- (4) Create and maintain a trail of all changes made.
- (5) Be able to offer the original (unaltered) version of the image for comparison.

Further explanations of these items follow:

(1) *Have the alterations made by a person with sufficient experience and skill in using the software.* Only someone with experience and skill in the use of the digital imaging software will be able to testify sufficiently as to checklist items (2)(a) and (b). In addition, it will surely be more efficient for the proponent of the evidence to have the same witness testify both as to the processes used to generate the images in question and the reliability of the software more generally (item (2)(c)), so it makes sense for the image processing to be done by that same knowledgeable person.<sup>63</sup>

(2) *Have that person be available to testify sufficiently on direct, and be cross-examined, regarding (a) his/her level of experience making such alterations, (b) the enhancement procedure of the alterations, (c) the reliability of the computer software utilized for that purpose, and (d) the accuracy of the resulting image in depicting the original thing or events recorded.* The proponent

must be prepared to offer a person who, based on personal knowledge, “can testify accurately as to the reliability of the evidence and the processes used to generate it.”<sup>64</sup> The Court in *Swinton* explicitly noted that the chemistry professor who actually made the overlays might have been able to testify sufficiently about how Photoshop works and the procedures used to create the particular images in question.<sup>65</sup> In particular, only the person who made the displays would be likely to be in a position to testify as to whether the images had been altered or improperly manipulated during the process. This addresses items (2)(a) and (b). Note that even in the case of a more complex image processing program like Photoshop, the witness need not be a professional graphic artist (and thus an “expert” in Photoshop); rather, any sufficiently experienced and knowledgeable user of the software ought to be able to testify adequately as to these matters.

How much computer expertise need the witness have to be able to testify adequately as to item (2)(c), the reliability of the software? *Swinton* stated that the witness must be someone with “some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer,” but need not be the programmer of the software.<sup>66</sup> Thus, a working knowledge of the program is necessary, but the witness need not be able to explain the algorithm or the complex computer code the program employs.<sup>67</sup>

Finally, item (2)(d) echoes the basic, simpler foundational requirement for photographs and other non-computer generated visual evidence, that it fairly and accurately represent what it purports to depict.<sup>68</sup> This requirement is augmented but not obviated by the more stringent test announced in *Swinton*. And it may well be problematic with regard to an image processing system like Photoshop, which allows users to alter images in myriad ways that may be pleasing for aesthetic or other purposes but more questionable when used to depict legally relevant reality, whether associated with forensic expert testimony or not. Thus it remains important for a person with knowledge to be able to satisfy the court that the processed image is accurate. Someone other than the person who made the alterations to the original image could in theory testify as to the modified image’s accuracy, as Karazulas did with regard to the various dental images of which the

Photoshop overlays were composed,<sup>69</sup> but the person who processed the image could very well provide more convincing testimony on this point.

(3) *Be sure that the computer software program is accepted in the field for which it is being used.* As discussed above, where digitally processed images are used in conjunction with scientific or other expert testimony, a knowledgeable witness should be able to testify that the imaging program is considered “standard and competent” in the relevant field.<sup>70</sup> There does not appear to be any clear guide as to how accepted a given program must be to meet this test; *Swinton* seemed to set a high bar, finding insufficient even the defendant’s own expert’s concession that the American Board of Forensic Odontology considered Adobe Photoshop to be “an appropriate aid” in bite mark identification,<sup>71</sup> although this conclusion may have been traceable to the Court’s generally negative view of the State’s foundational testimony regarding the Photoshop images. It is also seems that a program’s acceptance in forensic or non-forensic fields other than the particular one in which the expert in the case at bar is testifying would not satisfy a court attempting to follow *Swinton*, even though a strong track record of reliance and reliability in other forensic fields arguably ought to suffice. References in widely recognized textbooks in the field to the program’s reliability, however, should help establish this part of the foundation.

Note finally that this requirement probably should not apply at all where the digitally processed image is not offered as substantive evidence in conjunction with scientific or expert testimony. The requirement derives from the first of *Swinton*’s six factors, that “the computer equipment [be] accepted in the field as standard and competent,” but if there is no “field” in which the witness claims expertise, the factor would seem to be irrelevant.

(4) *Create and maintain a trail of all changes made.* Whether or not the software program itself generates a log or history of the operations performed to create the modified image, it is important for the proponent of such evidence to establish such a record. There should be no better way of convincing the court that the image in question has not been improperly altered. Lucis, for instance, does not automatically generate a record, but since the processing is typically very simple — one toggling operation using the two cursors or sliders — the operator can easily

record the settings manually.

Photoshop, in contrast, permits users to create and maintain a digital record of all operations performed on the original material in the program. Simply offering the opponent (and the court) an unflattened .psd file so that the steps can be reviewed, however, is suboptimal because, for this method of disclosure to be effective, the opponent (and the court) must (i) have a computer running the version of Photoshop in which the file was made to be able to open the file; (ii) be able to run the software; and (iii) know what to look for — any of which may be a dubious assumption in any given case. Instead, it is recommended that for each change to the image made during the use of the software, the operator (i) print out that version of the image, and (ii) save the digital file from which the version was printed.<sup>72</sup> The proponent can then disclose to court and adversary both the image and file for each processing step, and can display each of the steps in court so that the judge and jury can see for themselves that the image was not transformed in any impermissible or inappropriate fashion. Indeed, courts may be well advised to permit the opponents of Photoshop or other digitally processed visual evidence to require this sort of documentation of the image creation process, or to require it themselves *sua sponte*. This requirement would satisfy the third element of *Swinton*’s six-factor test (that proper procedures were followed in connection with the input and output of information) and the demand for reliability in general.

(5) *Be able to offer the original (unaltered) version for comparison.* A proponent who can compare the original and enhanced or processed images in court can help persuade both judge and jury that nothing of significance has been added to or taken away from the original image. The *Swinton* Court found it “important” that expert witness Palmbach compared the enhanced with the unenhanced photographs in front of the jury.<sup>73</sup> Courts in other jurisdictions, both before and after *Swinton*, that have admitted enhanced versions of digital visual evidence have also placed great emphasis on the proponent’s ability to compare the original and enhanced versions, thus persuading those courts that the enhanced images were accurate and trustworthy.<sup>74</sup>

In addition, although probably not strictly required, a demonstration of the technology in court would enhance the images’ prospects for admissibility. The

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## Digitally Processed Images in Connecticut Courts After *Swinton*

(Continued from page 37)

*Swinton* Court seems to have been particularly impressed with expert witness Palmbach's in-court demonstration of the Lucis enhancement process, culminating with a comparison of the unenhanced and enhanced images.<sup>75</sup> A witness trained and experienced in the use of Photoshop ought to be able to perform a similar demonstration of how images can be digitally altered in that program, helping to demystify the process for judge and jurors. This would appear to pose few if any of the problems that sometimes lead courts to exclude demonstrations, such as unfairly appealing to jurors' emotions or exaggerating one party's version of events central to the trial, or running a risk of fabrication (especially if the output of the demonstration is compared to the visual offered as an exhibit).<sup>76</sup> In any event, whether to allow a demonstration of the technology is within the broad discretion of the trial court.<sup>77</sup>

### Conclusion

The Connecticut Supreme Court's opinion in *Swinton* goes a considerable way toward clarifying the evidentiary treatment of digitally processed images, an increasingly often used and very important type of evidence. By subjecting those images to fairly rigorous authentication requirements, the Court sought to allay some of the most pressing concerns regarding the ease with which digital images can be altered and triers of fact misled. The Court has thus made it likelier that trials in our digital age will be resolved on the basis of reliable visual evidence.

Important questions regarding the routine use of digital images in court remain unanswered. As noted earlier, *Swinton* did not address the use of digital visual and multimedia displays in opening statements and closing arguments, as opposed to the evidentiary phase of proceedings. These overtly argumentative uses of digital technology, especially PowerPoint, are also becoming common, and their persuasive impact can be at least as great as that of evidentiary exhibits.<sup>78</sup> In *State of Connecticut v. Skakel*,<sup>79</sup> the Court recently upheld the State's use of an interactive multimedia program in closing argument, but it did so largely on the basis of advocates' general right to use visual aids to assist their summations and

a broad conclusion that the State's presentation was not confusing, prejudicial, or deceptive. The Court did not attempt to analyze the distinctive rhetorical effects that the digital multimedia program made possible. In other words, the caution that led the Court in *Swinton* to treat Lucis and Adobe Photoshop images as "computer generated" and thus subject to a heightened foundational threshold did not seem to play any role in its evaluation of the decidedly more adventuresome technology deployed in the summation in *Skakel*. At some point courts in Connecticut and elsewhere will have to engage the argumentative as well as the evidentiary uses of digitally processed images.

Larger ethical issues raised by the use of digital visual and multimedia technology in court also need to be confronted. Perhaps the most commonly expressed concern goes to inequality of resources: Is it fair if one side has access to the most sophisticated image processing tools but the other side does not? Certainly this is a troubling issue with regard to some kinds of digital imaging, but the concern may be overstated with regard to programs such as Lucis and Photoshop. First, these programs are not very costly in the overall context of law practice, running to several hundred dollars each<sup>80</sup> (although the cost in terms of the time required for someone inexperienced in image processing to become both experienced and skillful in the use of Photoshop is not insignificant; alternatively, the out-of-pocket cost of hiring an experienced and skilled operator in each case in which the software may be useful is also not negligible). Second, no out-of-pocket expense is required to become sufficiently knowledgeable about the range and possibilities of digital imaging to become an astute critic of one's adversaries' attempts to use those programs, and thus to be able to raise more convincing challenges to proffers of those images before and at trial. To this point (as *Swinton* noted<sup>81</sup>) lawyers have generally not done a good enough job of articulating objections to the use of digital visual displays in court. By learning how to do this, lawyers can not only serve their own clients better but can also assist courts in refining their understanding of the persuasive effects of the new visual technologies. And in so doing, lawyers can help to reas-

sure both the profession and the public that legal judgments need not become less accurate and reliable simply because the law, like the culture at large, is going digital.

*NOTE:* Lisa Podolski is a third-year student and Neal Feigenson is Professor of Law at Quinnipiac University School of Law. The authors would like to thank Adam Freeman, Gregory Golden, Brian Matsumoto, and especially Barbara Williams for sharing their knowledge about Lucis, and Christina Spiesel for advising us regarding Photoshop.

<sup>1</sup> 268 Conn. 781 (2004).

<sup>2</sup> We discuss only Lucis and Photoshop in this article; it would take far too long to address all of the forms of digital visual and multimedia displays being used in court. Much of what we have to say about the evidentiary treatment of these two digital image processing technologies, however, is likely to apply more broadly. For discussions of other new digital imaging technologies and their evidentiary and rhetorical significance, see, e.g., Brian Carney & Neal Feigenson, "Visual Persuasion in the Skakel Trial: Enhancing Advocacy through Interactive Multimedia Presentations," 19(1) Crim. Justice 22-35 (2004); Frederic I. Lederer, "The Road to the Virtual Courtroom? A Consideration of Today's — and Tomorrow's — High-Technology Courtrooms," 50 S. Car. L. Rev. 799 (1999); Richard K. Sherwin, Neal Feigenson, & Christina Spiesel, "Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law" (B.U.J. Sci. & Tech. L., forthcoming 2006); see generally "Digital Evidence," 19(1) Crim. Justice (2004) (symposium issue); "Courtroom Technology," 28(2) Law & Pol'y (2006) (symposium issue).

<sup>3</sup> "Lucis DHP Algorithm Technical Overview" by Image Content Technology LLC; Copyright (c) 2003, pg. 4.

<sup>4</sup> "Hue" represents the specific color of the pixel, "saturation" indicates how strong the color is, and "luminance" indicates how bright the picture is. *Id.* at 11.

<sup>5</sup> *Id.*

<sup>6</sup> See *infra* (testimony of Palmbach in *Swinton*); see also <http://www.imagecontent.com/lucis/applications/forensics/for1.for1.html> (visited 3/10/06).

<sup>7</sup> Dr. Gregory S. Golden, DDS, Chief Odontologist, County of San Bernardino, CA (e-mail 3/10/06); interview with Brian Matsumoto, Associate Adjunct Professor, University of California at Santa Barbara, Department of Molecular, Cellular, and Developmental Biology, 3/10/06.

<sup>8</sup> Interview with Matsumoto, *supra* note 7.

<sup>9</sup> Arguably this is not a limitation of the pro-

gram at all, but rather a strength: It confirms that Lucis does not show viewers anything that was not in the original image.

<sup>10</sup> Interviews with Barbara Williams, CEO, Image Content Technology LLC (makers of Lucis), 1/17/06 and 2/27/06.

<sup>11</sup> Nicholas Wade, "It May Look Authentic; Here's How to Tell It Isn't," *The New York Times*, p. F1 (January 24, 2006) (editors of scientific journals use Photoshop and other programs to detect manipulations of images in submitted papers).

<sup>12</sup> Interview with Dr. Adam J. Freeman, DDS, Forensic Odontologist, 3/4/06. According to Freeman, Photoshop is generally more widely used because of its affordability versus Lucis, which is a more expensive software option and relatively new (*but cf. infra* note 80).

<sup>13</sup> Michael Bowers, *Forensic Dental Evidence* (2004); Raymond J. Johansen & Michael Bowers, *Digital Analysis of Bite Mark Evidence Using Adobe Photoshop* (2000).

<sup>14</sup> Kasey Wertheim, "Adobe Photoshop for Demonstrating Latent Print Uniqueness," 53 *J. Forensic Identification* 707 (2003).

<sup>15</sup> Charles E. H. Berger et al., "Color Separation in Forensic Image Processing," 51 *J. Forensic Sci.* 100 (2006); Alan Chaikovsky et al., "Color Separation of Signature and Stamp Inks to Facilitate Handwriting Examination," 48 *J. Forensic Sci.* 1396 (2003).

<sup>16</sup> See, e.g., Rebecca Parrott Waldren, "Expectations and Practical Results in Fingerprinting Technology: Where Is the Line Drawn?," 31 *J. Legis.* 397, 405-06 (2005) (asserting that "many fingerprint experts have become wary of using [Adobe Photoshop because t]hey realize that if such a program is employed, their findings could easily be attacked for possible manipulation because of [the program's image manipulation] capabilities").

<sup>17</sup> At least the most recent versions of Photoshop include a "history bar" that shows all changes made to the image, but the history bar does not reopen with a flattened image, so someone bent on concealing his or her steps can avoid this method of detection.

<sup>18</sup> See *infra* at 38.

<sup>19</sup> See Dr. Constantine (Gus) Karazulas, Chief Forensic Odontologist, Connecticut State Police Forensic Science Lab, *New Forensic Odontology Tools* (unpublished article dated March 28, 2001). The defendant also made several incriminating statements which the State offered against him at trial. *Swinton*, 268 Conn. at 788-94.

<sup>20</sup> *Swinton*, 268 Conn. at 787, 828 ("highly qualified").

<sup>21</sup> *Id.* at 794-95.

<sup>22</sup> *Id.* at 794 (Lucis), 826 (Photoshop).

<sup>23</sup> *Id.* at 794.

<sup>24</sup> Most scanners automatically enhance the image as it is scanned, which may make the image more visually appealing but removes

data. The scanner used to create the images in *Swinton* was set to scan without enhancing the image. (We thank Barbara Williams for this observation.)

<sup>25</sup> *Id.* at 799-800.

<sup>26</sup> *Id.* at 801.

<sup>27</sup> *Id.* at 786-87 & n. 4.

<sup>28</sup> *Id.* at 822-23. Although the opinion is not entirely clear about this, it appears that Karazulas created some of the dentition tracings by placing the molds taken of the defendant's teeth directly on a scanner, scanning the image, and then creating the tracings as above (*id.* at 822 n. 36, 823 n. 39).

<sup>29</sup> *Id.* at 828-29.

<sup>30</sup> *Id.* at 827-28.

<sup>31</sup> *Id.* at 827 n. 43.

<sup>32</sup> *Id.* at 828 & n. 46.

<sup>33</sup> 509 U.S. 579 (1993). Connecticut adopted the *Daubert* standard in *State v. Porter*, 241 Conn. 57 (1997), cert. denied 523 U.S. 1058 (1998).

<sup>34</sup> *Daubert*, 509 U.S. at 592-93, quoted in *Swinton*, 268 Conn. at 795.

<sup>35</sup> *Swinton* explains that evidence must be reliable in order to satisfy confrontation clause requirements. 268 Conn. at 796-77.

<sup>36</sup> The Court rejected the defendant's argument on appeal that bite mark evidence in general is unreliable, *id.* at 796-97 n. 14, and there does not appear to have been any challenge to Dr. Karazulas's qualifications to testify as an expert in this regard (*cf. id.* at 820-21 (Karazulas's qualifications)). Karazulas's opinion that the defendant was the one who made the bite marks on the victim's body was based on his examination of the molds made from the defendant's teeth by Lester Luntz, another forensic odontologist (*see id.* at 786, 787 & n. 4), the unenhanced bite mark photographs, and a comparison of the two (*id.* at 821-22), as well as his creation and examination of the Photoshop overlays discussed in the text (*id.* at 822-25).

<sup>37</sup> *Id.* at 802 & n. 20. The instability of the category of demonstrative evidence is well known; see, e.g., Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* § 10.4, at 332-35 (3d ed. 2005); Christopher Mueller & Laird Kirkpatrick, *Evidence* § 9.4, at 1003 (3d ed. 2003). Jennifer Mnookin, "The Image of Truth: Photographic Evidence and the Power of Analogy," 10 *Yale J. L. & Hum.* 1 (1998), traces this instability to the origin of the category in the late 19th century as a response to a new form of visual evidence, photography, and an attempt to negotiate the tension between photographs' exceptional power, their seeming ability to transcribe nature directly, and their status as human artifact, susceptible of being manipulated to mislead viewers.

<sup>38</sup> *Id.* at 802 n. 20, 827 & n. 41. The Court (*id.* at 802 n. 20) quoted Tait, *Connecticut Evidence* (3d ed. 2001) for the proposition that "demonstrative evidence is not merely 'illustrative'; it is just as much substantive evi-

dence of the facts it depicts or portrays as is real or testimonial evidence." This would support categorizing all demonstrative evidence as substantive, not necessarily just visual evidence offered and admitted as such (as was the case with the Lucis enhancements and Photoshop overlays in *Swinton*).

<sup>39</sup> *Id.* at 803, 817-18 & n. 30. The Court, however, explicitly reserved judgment on the validity of the animation/simulation distinction (*id.* at 803 & n. 21).

<sup>40</sup> *Id.* at 803, 817-18 & nn. 30-31.

<sup>41</sup> *Id.* at 802-05.

<sup>42</sup> The State's use of Lucis, for instance, seemed to blur the difference between merely *presenting* (traditional photographic) evidence and *creating* new visual evidence, undermining the usefulness of that distinction in helping the Court select the appropriate rule (*id.* at 804-05).

<sup>43</sup> *Id.* at 804, 818. The Court seemed especially concerned that "[d]igital images are easier to manipulate than traditional photographs and digital manipulation is more difficult to detect" (*id.* at 805 n. 24, quoting Jill Witkowski, "Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images," 10 *Wash. U. J. L. & Pol'y* 267, 271 (2002)). On the detection of digital image manipulation, *see* Wade, *supra* note 11. Note that although simple, unenhanced digital photographs (and videos) are literally "computer generated evidence," it would seem that the Court would not subject them to the more demanding foundational requirements of *Swinton*, but only to the basic requirements applied to analog photographs. Such a conclusion might be justified on the ground that for the digital image to be manipulated, it has to be processed through some other program (which itself will be subject to the more stringent requirements), and/or that digital photography is already considered to have achieved sufficient "inherent reliability" to obviate a more demanding foundation (*see Swinton*, 268 Conn. at 831 n. 51).

<sup>44</sup> *Id.* at 811-12 (quoting Christopher Mueller & Laird Kirkpatrick, *Evidence* (2d ed. 1999)).

<sup>45</sup> *Id.* at 812 (quoting *Nooner v. State*, 322 Ark. 104 (1995)).

<sup>46</sup> *Id.* at 813-14.

<sup>47</sup> *Id.* at 831 n. 51; *see also* 818.

<sup>48</sup> *Id.* at 814-15.

<sup>49</sup> *Id.* at 815.

<sup>50</sup> *Id.* at 815-16.

<sup>51</sup> *Id.* at 816.

<sup>52</sup> *Id.*

<sup>53</sup> In fact, as noted *supra*, Lucis is capable of generating one artifact, a shadowing that can obscure some information in a narrow band near a sharp discontinuity, although none of the Lucis images in *Swinton* featured this artifact.

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<sup>54</sup> Palmbach testified that he was not aware of error rates regarding Lucis (*Swinton*, 268 Conn. at 816), but the Court apparently inferred from what Palmbach did testify to (that Lucis's marketing papers and "an article" claimed that the program was "artifact-free" (*id.*)) that the error rate was low enough. The Court's somewhat flexible attitude toward error rate might not be what one would have expected given *Daubert's* emphasis on error rate as one of the four factors to be considered in its (non-exclusive) test of the reliability of scientific evidence, and it does not seem entirely consistent with what some experts believe to be an imminent reevaluation of traditional forensic identification sciences due to newly found (or newly reported) significant error rates (see Michael J. Saks & Jonathan J. Koehler, "The Coming Paradigm Shift in Forensic Identification Science," 309 Science 892 (August 5, 2005)).

<sup>55</sup> *Id.* at 816-17.

<sup>56</sup> *Id.* at 827-28 & n. 43.

<sup>57</sup> *Id.* at 828.

<sup>58</sup> *Id.* at 828 & n. 45.

<sup>59</sup> *Id.* at 829-31. The State argued that the admission of the Adobe Photoshop overlays constituted harmless error because the jury was able to test the accuracy of what the computer had generated by taking the original exhibits and manually laying one over the other to replicate the computer's results. The Court held that only the admission of the few exhibits composed of tracings of the defendant's dentition superimposed over photographs of the bite mark constituted harmless error, reasoning that it would be impossible for anyone to manually recreate those overlays depicting translucent images of the defendant's teeth superimposed over the bite mark. *Id.* at 840. The Court further concluded that the expert's properly admitted testimony regarding exhibits other than those created using Adobe Photoshop went "a long way in rendering harmless the improperly admitted evidence." *Id.* at 842.

<sup>60</sup> *Id.* at 831 n. 51.

<sup>61</sup> The outcome in *Swinton* is also not anomalous in light of the fact that Photoshop permits digital images to be altered in many ways that may be problematic in terms of the accuracy and integrity needed for forensic uses. Because Karazulas did not offer testimony sufficient to describe how the particular Photoshop overlays had been created, however, the Court did not need to analyze in depth whether Photoshop, if competently and properly operated, would have been a reliable enough program for this purpose.

<sup>62</sup> *Id.* at 807-08 & n. 25. Anecdotally, Dr. Gregory Golden (*supra* note 7) reports that he has introduced Lucis enhanced images in "at least two trials" without any challenge from the opponents.

<sup>63</sup> To ensure that the person engaged to process the images is sufficiently experienced and skilled, the lawyer should first ask for and review a portfolio of the person's previous work using that software program. The lawyer should also talk with the person to gauge whether the person will be able to explain clearly on the witness stand everything that he or she needs to explain about how the program works and how it was used to make the images in question (see item (2) below). Finally, if the person operating the software program is not also the scientific or forensic expert who will be testifying about the matters illustrated by the images or lacks extensive experience in processing these particular kinds of images (e.g., dental overlays), then the person should process the images in consultation with the scientific or forensic expert so that the latter can offer supporting testimony as to the accuracy of the images (see item (2)(d) below). All of these steps will be helpful in reducing the chance that a design professional skilled in the use of Photoshop or other digital imaging software who may be unfamiliar with the constraints of producing accurate images for courtroom use may process the image in ways that strike him or her as effective but risk undermining the veracity, and hence admissibility, of the resulting image.

<sup>64</sup> *Id.* at 830.

<sup>65</sup> *Id.* at 831. The Court was careful to note that the testimony of the person who created the overlays might or might not have been sufficient in itself to establish their reliability. *Id.* at 831 n. 50.

<sup>66</sup> *Id.* at 810, quoting *American Oil Co. v. Valenti*, 179 Conn. 359 (1979).

<sup>67</sup> Regarding the reliability of Photoshop, proponents should note that the software is a standard program which individual users cannot customize through (re)programming. Thus, the only issue in this regard is whether the operator used a computer with sufficient computing resources to run the particular version of Photoshop properly.

<sup>68</sup> *Id.* at 802. Of course, when a visual display is offered not as a depiction of reality but simply to illustrate and thus clarify testimony (e.g., a chart or diagram), then there is no similar need to authenticate the display as a fair and accurate representation of what it purports to depict, although the display may still be excluded if it creates risks of unfair prejudice, confusion, or misleading the jury that outweigh its probative value (here, to help the jury in understanding the testimony which the display accompanies (Connecticut Code of Evidence 4-3 (2006)).

<sup>69</sup> See *supra*.

<sup>70</sup> *Swinton*, 268 Conn. at 827 & n. 43.

<sup>71</sup> *Id.* at 828 n. 45.

<sup>72</sup> The file can be saved as a standard .jpeg

file and printed or brought into PowerPoint for later courtroom display (even in the latter case, a printed copy should be prepared for the record).

<sup>73</sup> *Id.* at 816. With regard to the Photoshop overlays, expert witness Karazulas testified that the manual and computer copies of the tracings of the defendant's dentition and the scans of the defendant's teeth molds that appeared in the overlays were "fair and accurate portrayals of their original corresponding evidence," but the Court opined that this "visual inspection of the separate pieces [of the overlays] . . . was not enough to ensure the reliability of the superimpositions," because "odontological matching depends on millimeters, [so that] a millimeter or two either way could make the difference between a point of concordance and a point of discordance" (*id.* at 829 n. 47). It is unclear just what sort of further (necessarily visual) comparison would have satisfied the Court on this point. Possibly, had the State offered testimony that provided greater reassurance regarding the creation of the overlays in Photoshop, the Court would not have been quite as critical regarding the comparison testimony; perhaps also the Court was indicating here its concerns regarding the fairly complicated series of steps prior to the Photoshop process in which Karazulas started with the molds taken of the defendant's teeth and ended with a photocopy on acetate of manual tracings that was digitized (when scanned into the computer) and only then amenable to processing in Photoshop.

<sup>74</sup> See *United States v. Beeler*, 62 F. Supp. 2d 136 (D. Maine 1999) (digitally enhanced surveillance videotape); *United States v. Siefert*, 351 F. Supp. 2d 926 (D. Minn. 2005) (same). Whether or not visual comparison of original and enhanced images ought to provide such reassurance (see note 73 *supra*), it seems that the few courts to deal with these questions have generally considered them favorably.

<sup>75</sup> *Swinton*, 268 Conn. at 816.

<sup>76</sup> See Christopher Mueller & Laird Kirkpatrick, *Evidence* § 9.34, at 1055 (3d ed. 2003).

<sup>77</sup> *Id.*

<sup>78</sup> See Carney & Feigenson, *supra* note 2; Sherwin, Feigenson, & Spiesel, *supra* note 2.

<sup>79</sup> SC 16844 (January 24, 2006).

<sup>80</sup> As of this writing, Adobe Photoshop CS2 retails for about \$550-\$600 ([http://www.pricegrabber.com/p\\_Adobe\\_Photoshop\\_CS2\\_8097441](http://www.pricegrabber.com/p_Adobe_Photoshop_CS2_8097441)) (visited 3/13/06) and Lucis for about \$500 (e-mail from Barbara Williams 3/9/06).

<sup>81</sup> *Supra* at 62.

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