Welcome to the first online Forum! CTLA is joining the digital revolution in order to serve you better — and also, of course, to save money and trees. We hope you like the new format, and we encourage you to give us feedback and suggestions.

The online Forum is being introduced to coincide with the launch of CTLA's new website. The new website has a number of exciting features. It will allow you to:

- post and search verdicts and settlements
- purchase and download seminar materials, including audio CDs
- access and download forms
- contribute to and search the IME Bank
- review and participate in member discussion boards
- access and download recent court decisions
- direct non-lawyers and clients to our Public Safety Section
- use the more robust member directory to stay in touch with fellow members
- use the public directory as a marketing and referral tool
- stay informed about legislative news

These changes are indicative of the efforts we've been making this year to improve our member services.

Beginning in September, we held 7 regional meetings. Although I was not able to attend all the meetings, I learned quickly from those I did attend as well as from reports I received from the ones I missed that we are a diverse group with diverse interests. The issues that concern us vary — sometimes dramatically — from region to region, from practice area to practice area, from client base to client base. The diversity of the input we received from the regional meetings has informed our decision-making concerning this year's legislative agenda and has affected our thinking about organizational changes that we might want to consider.

On October 25, 2008, we held an all day Strategic Planning session. We notified the membership and asked for volunteers to participate. The members who attended represented a broad cross-section, including both board and non-board members.
long-term and new members, general practice and personal injury practitioners. The session resulted in a Strategic Planning Report that we are now using to guide our strategic budgeting for the next three years. We are also using the Strategic Plan to set our organizational priorities. For example, we have been focused on improving communication with our members because this was identified as an important goal in the Plan. The redesigned website and the legislative update bulletins that are now being emailed to the membership represent two steps that we have taken to improve communications.

We've formed several new committees this year — in particular, the Employment Committee, the Core Case Committee and the Pro Bono Foreclosure Committee. Members of the Committee has 21 members, some of them new to CTLA. Members of the Committee helped draft and testified in favor of legislation that was proposed this year to strengthen Connecticut's equal pay act.

The Core Case Committee was created to seek input and involvement from members who handle the most common types of personal injury cases. The Committee has been conducting meetings around the state and is seeking members who want to become more actively involved in the organization.

The Pro Bono Foreclosure Committee was formed to provide litigation assistance to needy home owners who are being foreclosed. The Committee has 33 volunteer members. A Seminar was held on March 17, 2009. Fifteen volunteer attorneys and several local housing counselors attended. Our member volunteers will soon be tak-
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INTRODUCTION

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from September 4, 2007 through November 4, 2008.

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

However, as stated in the commentary to CCE §1-2 (b): “Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial.” In addition, the authors have included a few cases dealing not with evidence, but with trial practice and procedure, which may be of use to trial lawyers. Therefore, in addition to the articles outlined in the CCE, the Update contains five headings: New Expert Disclosure Rule, Rebuttal Argument, Sufficiency of Evidence, Affidavit Countered by Circumstantial Evidence, and Status of the Code of Evidence.

IV. Relevancy

§ 4-1 NEGLIGENCE OF DRIVER INADMISSIBLE IN “ENHANCED INJURY” CASE — GIANNINI V. FORD MOTOR COMPANY, U.S.D.C., District of Connecticut, Civil Action No. 3:05cv244(SRU) (2007); Underhill, J.

RULE: Evidence that driver’s negligence caused collision is not relevant in a case alleging seat belt failure.

FACTS: Plaintiff alleged that her vehicle accelerated uncontrollably across a parking lot, hit a concrete barrier and then a lamp post. She also alleged that when she attempted to brake, the brakes did not work. Finally, she alleged that her seat belt did not properly restrain her. Defendant claimed that the plaintiff stepped on the gas, did not brake, was not wearing her seat belt, and was drunk.

The court granted the defendant summary judgment on the allegations that the car accelerated uncontrollably and that the brakes failed. The sole remaining allegation was the alleged failure of the seat belt. The defendant sought to introduce evidence that the plaintiff was negligent in causing the collision by hitting the gas, not braking, and that she was impaired by alcohol.

The court held that evidence offered to prove that the plaintiff was negligent in causing the collision was not admissible.

New Expert Disclosure Rule

Rebuttal Argument

Sufficiency of Evidence

Affidavit Countered by Circumstantial Evidence

Status of the Code of Evidence
The plaintiff’s victory on this evidentiary issue may have been pyrrhic, because the judge also ruled that evidence of the plaintiff’s intoxication was relevant to the plaintiff’s ability to observe and recall the critical events of that night — specifically, whether or not she buckled her seat belt.

§ 4-1 FOUNDATION FOR MAP — STATE V. SKIDD, 104 Conn. App. 46 (2007); H arper, J.; Trial Judge — Wilson, J.

RULE: Map offered to show the layout of a parking lot not relevant absent a showing that it depicts the lot as it existed at the time of the incident.

FACTS: Prosecution for intimidation based on bigotry or bias, threatening, and breach of the peace. On July 12, 2003, a flea market was held in the parking lot of Stamford High School. At the close of the flea market, a man whose property was directly behind the high school got into a dispute with several of the vendors about their leaving garbage in the parking lot. The neighbor was African American. The defendant was accused of using racial epithets toward the neighbor and threatening him.

At trial, defense counsel offered a map of the Stamford High School parking lot. The map was certified in October 2001, almost two years before the incident.

The State objected to the introduction of the map on the ground of relevance, stating that the defendant had not established that the map was a fair and accurate representation of the conditions that existed at the time of the incident. The court sustained the State’s objection. The Appellate Court affirmed.

REASONING: The Appellate Court noted that the admissibility of a map is similar to the admissibility of a photograph: it must be established that the map is a fair and accurate representation of the scene at the time in question. Since the date of the map varied from the date of the incident, the defendant was required to provide foundation testimony that there had been no significant change in the parking lot between October 2001 and 2003. The court suggested to the defendant that he provide a town official to establish this foundation. The defendant did not do so.

QUAERE: Could the defendant himself have provided the necessary foundation?

§ 4-1 BILLING CODE ADMISSIBLE TO ESTABLISH TYPE AND NATURE OF EXAMINATION AND IMPREGNATE PHYSICIAN — T ERI O V. RAM A, 104 Conn. App. 35 (2007), cert. denied, 285 Conn. 912 (2008); West, J.; Trial Judge — Adams, J.

RULE: When the type and nature of the examination undertaken by a physician is in dispute, the billing code, which denotes the type of examination billed to the insurance company, is relevant both to establish what type of examination was actually done and to impeach a physician who testifies that a different examination was done. Furthermore, such evidence is not unduly prejudicial.

FACTS: On June 25, 2001, the defendant did a physical examination of the plaintiff. The plaintiff was over 40, had high cholesterol and was overweight. The defendant did not do an electrocardiogram (EKG). Four months later, the plaintiff had a heart attack and died. The autopsy showed a prior heart attack which would have shown up on the EKG. The issue for the jury was whether the defendant’s failure to do an EKG during the examination was a breach of the standard of care.

In support of his contention that an EKG was not required, the defendant claimed that he had not been asked to do, and had not done, a full, comprehensive examination, but only a “camp physical.” In this regard he introduced evidence that in the summer of 2001, the plaintiff was about to go on a Boy Scout camping trip with his two children and needed a medical evaluation form signed by a physician in order to be allowed to go on the trip. According to the defendant, the plaintiff came to the defendant’s office on June 25, 2001, and asked him to complete the form without any examination. The defendant refused but agreed to give him a “camp physical” that afternoon. The defendant claimed that the plaintiff was told to come back for a full physical and did not return. There was no notation in the chart to that effect.

The plaintiff’s claim was that the June 25, 2001, physical was supposed to be full, comprehensive examination.

The defendant testified that the billing code submitted to the plaintiff’s insurance company listed the physical as a camp physical. The plaintiff attempted to introduce evidence in contradiction to this testimony, that the billing code used by the defendant designated the visit as a comprehensive, preventive care physical. This kind of physical, according to plaintiff’s expert, must include an EKG. The plaintiff also sought to introduce the American Medical Association’s current procedure terminology code book to show the definition of the billing code number used by the defendant.

The trial court excluded the evidence on the basis that the billing code evidence was not relevant on the standard of care and would be unduly prejudicial. The Appellate Court found this ruling to be error, but held that the exclusion was harmless.

REASONING: Actions speak louder than words. The fact that the doctor billed the insurance company for a comprehensive, preventive care physical is a piece of evidence which tends to prove that the physician did what was supposed to be a full and comprehensive, preventive care physical. Therefore, the evidence was relevant and admissible under § 4-1 of the CCE.

The more difficult issue was whether or not the evidence was unduly prejudicial under § 4-3. If the jury believed the doctor’s testimony that he in fact only intended to do a camp physical, his billing the insurance company for a comprehensive, preventive care physical would mean that he was charging the insurance company for work he did not do. However, for admissibility purposes the question is not whether or not the evidence is prejudicial. The question is whether it is “unduly prejudicial.” The Appellate Court concluded it was not.

“We also conclude that the admission of the evidence would not have created undue prejudice. The fact that the evidence would have had an adverse effect on the defendant does not mean that it was overly prejudicial, especially when weighed against its probative value. We have recognized that “[e]vidence that is inadmissibly prejudicial is not to be confused with evidence that is merely damaging... All evidence adverse to a party is, to some degree, prejudicial. To be excluded, the evidence must create prejudice that is undue and so great as to threaten an injustice if the evidence were to be admitted.” (Emphasis in original; internal quotation marks
cated a number of violations and concerns, issued after these visits. The reports indicated surveys and consultations. Reports were defendant’s shop to provide on-site safety table shaper was unsafe.

The defendant conceded at trial that if it had read the maintenance manual, it because of the known risk of kickback. Plaintiff brought suit alleging that the molding. The plaintiff was in the shop to table shaper to cut wood into cabinet weigh by its prejudicial effect.

§ 4-3 PROBATIVE VALUE OF OSHA REPORT OFFERED TO PROVE LACK OF NOTICE OF DANGEROUS CONDITION OUTWEIGHTED BY PREJUDICE — LINGENHELD V. DESJARDINS WOODWORKING, INC., 105 Conn. App. 163 (2008); Berdon, J.; Trial Judge — Pickard, J.

RULE: The probative value of an OSHA report, which did not criticize the dangerous placement of a piece of machinery, and which was offered by the defendant to prove lack of notice, was outweighed by its prejudicial effect.

FACTS: On February 14, 2003, an employee of the defendant was using a table shaper to cut wood into cabinet molding. The plaintiff was in the shop to pick up materials when a piece of wood was ejected from the table shaper, flew 19 or 20 feet across the room and struck the plaintiff’s right hand.

Plaintiff brought suit alleging that the location of the table shaper was unsafe because of the known risk of kickback. The defendant conceded at trial that if it had read the maintenance manual, it would have known that the location of the table shaper was unsafe.

In 1995 and 1996, OSHA visited the defendant’s shop to provide on-site safety surveys and consultations. Reports were issued after these visits. The reports indicated a number of violations and concerns, and made safety recommendations. Neither report mentioned the location of the table shaper as a concern.

Defendant offered the OSHA reports to prove that it did not have knowledge of the danger created by the placement of the table shaper. Plaintiff objected on the basis that the probative value of the reports was outweighed by their prejudicial effect. The trial court did not allow the reports in evidence. The Appellate Court affirmed.

REASONING:

“To permit evidence of the department’s inspections, without any attendant testimony relating to the scope of the investigation or the qualifications of the individual who composed the report, would have been highly prejudicial to the plaintiff.”

105 Conn. App. at 171-72.

§ 4-3 WHETHER INVOCATION OF FIFTH AMENDMENT BY NON-PARTY WITNESS IS MORE PROBATIVE OR MORE PREJUDICIAL TO BE DECIDED ON CASE-BY-CASE BASIS — RHODE V. MILLA, 287 Conn. 731 (2008); Norcott, J.; Trial Judge — Rodriguez, J.

RULE: A non-party witness’s claim of the Fifth Amendment privilege against self-incrimination is not per se inadmissible in a civil case. In the present case, in which the privilege was invoked by the plaintiff’s treating chiropractor, the trial court did not abuse its discretion in holding that its probative value was outweighed by its prejudicial effect.

FACTS: Rear-end collision connective tissue case. Plaintiff was treated by a chiropractor. The chiropractor was the subject of a federal criminal investigation into his patient treatment and billing practices. During the deposition of the chiropractor by the defendant, the chiropractor asserted his Fifth Amendment privilege against self-incrimination. Plaintiff filed a motion in limine to preclude the defendant from eliciting evidence that the chiropractor had claimed the Fifth Amendment. The trial court precluded the evidence. The Supreme Court affirmed.

REASONING: The Supreme Court has already ruled that a party’s invocation of the Fifth Amendment privilege is admissible evidence in a civil proceeding. Olin Corp. v. Castells, 180 Conn. 49 (1980). The defendant sought to extend this rule to non-party witnesses.

“Although this is an issue of first impression in Connecticut, it is settled law in other jurisdictions that a non-party’s invocation of the Fifth Amendment privilege against self-incrimination is admissible evidence so long as it does not unduly prejudice a party to the case.

Thus, we conclude that, in determining whether a nonparty witness’ invocation of the privilege should be admitted into evidence, courts should consider on a case-by-case basis whether the probative value of admitting the privilege exceeds the prejudice to the party against whom it will be used under § 4-3 of the Connecticut Code of Evidence.

“In making this determination, factors that courts should consider include: (1) "the nature of the relationships . . . as invariably . . . the most significant circumstance," examined . . . from the perspective of a non-party witness’ loyalty to the plaintiff or defendant, as the case may be; (2) “the [d]egree of [c]ontrol of the [p]arty [o]ver the [n]on-[p]arty [w]itness,” such as whether the assertion of the privilege may be viewed as a vicarious admission; (3) “the [c]ompatibility of the [i]nterest of the [p]arty and [n]on-[p]arty [w]itness in the [o]utcome of the [l]itigation,” namely, whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interest of both the non-party witness and the affected party in the outcome of the litigation; and (4) “the role of the [n]on-[p]arty [w]itness in the [l]itigation,” such as “[w]hether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects…” 287 Conn. at 737-39.

Applying the test in this case, the Supreme Court held that the chiropractor’s invocation of the Fifth Amendment was properly ruled inadmissible.

COMMENT: The jury in this case returned a verdict of $8,224.50 in economic damages and $1,775.50 in non-economic damages for a total verdict of $10,000. After the collateral source offset, the defendant appealed a judgment of $7,013.70. The plaintiff did not participate in the appeal. The insurance company did not fund this appeal to avoid paying $7,000.00.
§ 4-3    INTERNIST WITH SUBSPECIALTY CERTIFICATION IN CARDIOLOGY PRECLUDED FROM TESTIFYING AGAINST INTERNIST — RUSSO V. PHOENIX INTERNAL MEDICINE ASSOCIATES, PC, 109 Conn. App. 80 (2008); Gruendel, J.; Trial Judge — Bozzuto, J.

RULE: A physician with a subspecialty board certification in internal medicine was not permitted to testify against another physician with a subspecialty board certification in internal medicine, because the expert’s additional subspecialty certification in cardiovascular disease was held to invite confusion and possibly mislead the jury as to the standard of care.

FACTS: Medical malpractice action. Plaintiff began treating with the defendant, an internist, in September 2000 for asthma-related symptoms. On January 19, 2001 she reported new symptoms, including chest tightness, shortness of breath, and ankle swelling. The defendant ordered an echocardiogram.

The defendant ordered an echocardiogram.

On February 13, 2001 the plaintiff telephoned the defendant and reported flu-like symptoms, weakness and a temperature of 103°. The defendant prescribed antibiotics and ordered a chest x-ray, but the chest x-ray was put “on hold.” Although there was no notation in the chart, the defendant testified the chest x-ray was put on hold because the plaintiff refused to have the chest x-ray. The defendant also testified that the plaintiff was offered an appointment to come to the office and did not do so.

Two days later, on February 15, 2001, the plaintiff died. The medical examiner listed the likely causes of death as cardiac arrhythmia or infarction from myocarditis. No autopsy was performed.

Plaintiff disclosed two experts, one with only a subspecialty board certification in internal medicine and Dr. Herskowitz, who had subspecialty board certifications in both internal medicine and cardiology. Defendant moved to preclude Dr. Herskowitz’s testimony, arguing that because of his subspecialty certification in cardiology, his testimony would confuse the standard of care to which the defendant should be held.

The trial court granted the motion in limine. The Appellate Court affirmed.

REASONING AND COMMENT:

To put the court’s ruling in context, the plaintiff had a second expert who was board certified only in internal medicine. So the trial court’s ruling was also based upon the ground that Herskowitz’s testimony was cumulative.

C.G.S. §52-184c controls the admission of expert testimony in a medical malpractice case. The defendant physician was board certified in internal medicine. Section 52-184c(c) provides:

“If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a similar health care provider is one who: (1) is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty.”

There are 24 American boards of medical specialties. Both the defendant and Dr. Herskowitz were certified by the American Board of Internal Medicine. However, the American Board of Internal Medicine grants subspecialty certificates in 20 areas, including internal medicine and cardiovascular disease. The defendant only had a subspecialty certification in internal medicine, while Dr. Herskowitz had subspecialty certifications in internal medicine and cardiovascular disease.

Since Herskowitz was “certified by the appropriate American board in the same specialty” he was qualified to testify under the statute. Nevertheless, the Appellate Court held:

[B]ecause H erskowitz maintained two board certifications, one as an internist and one as a cardiologist, it was paramount for the plaintiff to prove to the court that Herskowitz not only knew the standard of care of a board certified internist but also that he would testify to that standard of care without imposing the standard of care expected of a board certified cardiologist.”

109 Conn. App. at 89.

The problem with this reasoning is that the plaintiff never got the chance to prove that Herskowitz was applying the standard of care of a board certified internist only, because he was precluded from taking the witness stand. The trial court’s ruling was made on the basis of Dr. H erskowitz’s deposition testimony. Apparently, the plaintiff had the burden of proving at deposition that Herskowitz knew the standard of care of a board certified internist under the facts and circumstances of this case and that Herskowitz was not imposing his additional education, training, and experience as a cardiologist on the defendant in reaching his opinion that the defendant breached the standard of care of an internist.

In essence, the court ruled that Herskowitz was overqualified to testify on the standard of care. Ordinarily, such a claim goes to the weight accorded to the testimony rather than its admissibility.

The trial court also refused to allow Dr. H erskowitz to testify on causation because “that testimony would have implicated his improper testimony on the standard of care.” 109 Conn. App. at 92.

Again, it is difficult to understand how the trial court could reach this conclusion without hearing Herskowitz’s testimony. Is it the plaintiff’s burden to elicit testimony during the deposition taken by defense counsel to prove that the causation opinion is independent? Shouldn’t the plaintiff be permitted to rely on the expert disclosure?

These kinds of objections can only be fairly ruled upon when the witness is on the stand and the questions are asked.

PRACTICE POINTER: Plaintiff must either elicit clear opinion testimony during the expert’s deposition, or ask the judge to defer ruling until the doctor takes the stand, and at that point insist on making an offer of proof. If the judge will not wait, insist on bringing the expert to court, put him on the witness stand, and pose the questions to establish that the expert will apply the appropriate and applicable standard of care.

§ 4-7(a) MOVING VEHICLE AFTER ACCIDENT NOT A “SUBSEQUENT REMEDIAL MEASURE” — HICKSV. STATE, 287 Conn. 421 (2008); Katz, J.; Trial Judge — Jones, J.
RULE: Moving a vehicle after an accident, supposedly because it posed a danger to other motorists, was not, under the facts of this case, a subsequent remedial measure. The evidence was relevant to issues other than negligence, and therefore admissible.

FACTS: On November 29, 2001 the defendant State Department of Transportation (DOT) was conducting a mowing operation on Route 94 in Glastonbury. Three DOT workers were using two vehicles, an over-the-fence mower, which is a tractor with an implement on the side that extends over a guard rail or fence to cut the grass, and a large orange dump truck.

According to the plaintiff, the dump truck was following the mower and moving very slowly in the travel lane. The plaintiff came around a curve on Route 94, encountered the dump truck in his lane of travel, and swerved his truck to the right to avoid the dump truck. His truck hit the guard rail on the right side of the road and flipped over onto its left side.

The defendant DOT workers testified that the dump truck was parked off the road, before the curve; that two workers were flagging traffic on either side of the mower while another operated the mower; and that, after the accident, a worker got into the parked dump truck and moved it, because it posed a danger to other motorists.

The plaintiff suffered a head injury and had no memory of the collision. An eyewitness testified that the DOT dump truck was moving slowly in the plaintiff’s travel lane; that when the plaintiff’s truck veered to avoid the DOT dump truck, it struck the guard rail on the right side of the road, flipped onto its left side and slid very close to the still-moving DOT truck; that, although the plaintiff’s truck did not hit the DOT truck, it came very close; and that immediately after the accident, one of the DOT workers yelled to the driver of the DOT truck to move the truck further up the road.

Under state law, sovereign immunity is waived for the operation of a motor vehicle by a state worker, but not if the vehicle is being used as a warning device or protective barrier. C.G.S. §52-556.

There was no dispute that, after the accident, the State worker moved the truck further up the road away from the plaintiff’s truck.

The plaintiff offered the evidence of the sequence of events, including the fact that the DOT worker moved the truck up the road immediately after the accident, to set the scene and to explain why the police photographs of the scene and accompanying sketch did not show the DOT truck close to the plaintiff’s truck.

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

REASONING: The bar against evidence regarding subsequent remedial measures only applies when the evidence is offered to prove negligence. The Supreme Court did not buy the State’s argument that the reason the truck was moved was to protect other motorists:

“We agree with the plaintiff that moving the department truck was not a subsequent remedial measure in light of the plaintiff’s claim and the evidence adduced at trial. The plaintiff produced evidence to support his claim that the truck was in the westbound travel lane as he approached the department’s work site. The evidence established that, after the accident, the plaintiff’s truck was on its side, blocking the entire westbound lane, with the department truck ahead of him in that lane. Accordingly, should any other vehicle have approached the accident scene in the westbound travel lane, it was the plaintiff’s truck that blocked the road and hence posed the danger to oncoming vehicles. Therefore, moving the department truck from its position on the other side of the plaintiff’s vehicle would not have remedied the danger posed by the presence of the department truck prior to the accident. Indeed, removing the department truck from the accident scene entirely, before police arrived, would in any event go beyond a remedial measure and cross over into destruction of relevant evidence. See Leonard v. Commissioner of Revenue Services, 264 Conn. 286; 306, 823 A.2d 1184 (2003) (“we have recognized that an adverse inference may be drawn when relevant evidence is intentionally destroyed”).

287 Conn. at 440-41.

§ 4-7(b) SUBSEQUENT REMEDIAL MEASURE IN ADMISSIBLE IN FEDERAL PRODUCT LIABILITY CASE — HARLEYSVILLE WORCESTER INSURANCE CO. V. BROAN-NUTONE LLC, U.S.D.C., District of Connecticut, Civil No. 3:07cv1317(JBA) (October 10, 2008); Arterton, J.

RULE: In product liability cases, subsequent remedial measures, though admissible in state court, are inadmissible in federal court.

FACTS: Defendant’s ceiling fan-light started a building fire. The product was manufactured in the 1970s. The plaintiff offered evidence that in 1991 the defendant incorporated into its ceiling fan-light a thermal cut-out device. Defendant moved in limine to prohibit this evidence.

Plaintiff argued that the evidence was admissible to prove that the thermal cut-out device was a feasible design. The trial court granted the motion in limine.

REASONING:

Federal Rule of Evidence 407 prohibits subsequent remedial measures in product liability cases to prove a defect in a product or its design, or a need for a warning or instruction.

The plaintiff had other evidence that a thermal cut-out device was a feasible design. The trial court therefore ruled that prejudicial effect of the defendant’s change in design outweighed the probative value to the plaintiff of proving the design’s feasibility. This evidence would have been inadmissible in state court.

§ 4-8(a) HIGH-LOW SETTLEMENT AGREEMENT MUST BE DISCLOSED TO THE COURT AND NONSETTLING DEFENDANT — MONTI V. WENKERT, 287 Conn. 101 (May 27, 2008); Katz, J.; Trial Judge — Teller, J.

RULE: “All verdict contingent settlement agreements promptly must be disclosed to the court and any nonsettling defendants. Congruent with § 4-8 (a) of the Connecticut Code of Evidence, such agreements may not be used to prove liability or damages. The trial court may, however, in the exercise of its discretion, permit these agreements to be used for the limited purpose of showing the bias or prejudice of a witness with an appropriate cautionary instruction, provided that the evidence is not otherwise barred by other rules.” 287 Conn. at 125-26.

FACTS: Medical malpractice action. On November 8, 1996, plaintiff went to the office of Dr. Mark Decker, a family
On November 14, plaintiff returned to the office complaining of a headache, loss of appetite, ear pain, chills, and body aches.

On November 15, plaintiff went to the Emergency Room at Rockville General Hospital with worsening symptoms. The hospital staff told her that they believed she was suffering an adverse reaction to the antibiotics. She was prescribed a different medication and sent home.

She returned to the hospital the next day with worsening symptoms, including increased respiratory rate. She was admitted to the intensive care unit, and Dr. Decker became her attending physician. Four days later he discharged her, telling her and her family that there was nothing medically wrong with her and implying her symptoms might be, at least in part, psychological.

The day after her discharge, November 21, the plaintiff went to see her regular psychiatrist, Dr. Naomi Wenkert. While at Wenkert's office, she collapsed and exhibited symptoms of respiratory distress, including purple lips. Wenkert diagnosed the plaintiff as having a panic attack, prescribed a sedative and sent her home.

She died that night as a result of acute respiratory distress syndrome.

Plaintiff originally sued only the psychiatrist, Dr. Wenkert. Dr. Wenkert filed an apportionment complaint bringing in Dr. Decker as a co-defendant.

During the trial, plaintiff entered into a high-low agreement with Dr. Wenkert as follows: in the event of a defendant's verdict for Dr. Wenkert, the plaintiff would receive $300,000; in the event of a verdict against Dr. Wenkert between $300,000 and $1,000,000, the plaintiff would receive the amount of the verdict; and in the event of a verdict against Dr. Wenkert, the plaintiff would receive $300,000; in the event of a defendant's verdict, the plaintiff would receive the amount of the verdict; and in the event of a defendant's verdict for Dr. Wenkert, the plaintiff would receive $1,000,000. The high-low agreement was not disclosed to Dr. Decker or the court.

The jury returned a defendant's verdict for Dr. Wenkert and a plaintiff's verdict against Dr. Decker in the amount of $1,750,000. After the verdict, Dr. Decker became aware of the high-low agreement, and moved to set aside the verdict against him on the ground that the high-low agreement should have been disclosed to him because its nondisclosure deprived him of the opportunity to challenge and impeach Wenkert's evidence. The trial court refused to set aside the verdict. The Supreme Court held that the high-low settlement agreement should have been disclosed, but that in this case, Dr. Decker did not demonstrate sufficient prejudice to overturn the verdict.

**REASONING:**

In this case, the relationship between Dr. Wenkert and Dr. Decker was adversarial from the beginning. It was Dr. Wenkert, not the plaintiff, who brought Dr. Decker into the case. Therefore, throughout the litigation, Dr. Decker had the incentive and motivation to vigorously challenge Dr. Wenkert's evidence.

Although the Supreme Court ruled that these agreements must be disclosed in the future, it is unclear from the opinion what use, if any, the defendant will be able to make of these agreements during trial. The Court specifically pointed to CCE § 4-8's prohibition of the admission of offers to compromise except under very limited circumstances, and stated that "we caution trial judges to be extremely careful in exercising their discretion when considering any exception." 287 Conn. at 126 n.17.

**PRACTICE POINTER:** The reasoning of this case cuts both ways. Plaintiff's counsel should file pretrial Wenkert motions in multi-defendant cases to ascertain whether there are any off-the-record agreements between defense counsel regarding blaming each other, limiting cross-examination, etc.

**§ 4-10 MINUTES OF MEETING RELATING TO LIABILITY INSURANCE IN ADMISSIBILITY TO PROVE CONTROL OF DOG — AUSTER V. NORWALK UNITED METHODIST CHURCH, 286 Conn. 152 (2008); Palmer, J.; Trial Judge — Reynolds, J.**

**RULE:** Prejudicial effect of reference to liability insurance outweighs the fact that the evidence shows control.

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

Before the plaintiff was injured, Shadow jumped through the broken bottom panel of the door and attacked the plaintiff.

The plaintiff's complaint was in two counts, one under C.G.S. §22-357 (the "dog bite statute"), which imposes strict liability on a "keeper" of a dog, and one in common law negligence.

The defendant's Board of Trustees met to discuss the plaintiff's lawsuit. The minutes of that meeting included a reference to the fact that the defendant's insurance company had demanded that Shadow be removed from the premises, or coverage would be jeopardized. The church thereafter directed Salinas to get rid of the dog, which he did.

Plaintiff offered the minutes to show that the church was able to exercise control over whether Shadow was allowed on the premises. If the church could order Shadow's removal after the plaintiff was bitten, it presumably could have issued such an order after the first person was bitten. The trial court allowed the evidence. The Appellate Court reversed. The Supreme Court affirmed the Appellate Court's ruling.

**REASONING:**

The Supreme Court agreed with the Appellate Court that as a matter of law the church was not a "keeper" of the dog under the statute, despite the facts that the church had determined where on the premises Shadow was permitted, the times Shadow would be allowed out, and, after this second attack, required Salinas to remove Shadow from the premises completely.

The Supreme Court also noted that there was no dispute that the defendant had the authority to require Salinas to remove his dog from the premises; there was no justification for the court to have permitted the plaintiff to present evidence of the defendant's liability insurance coverage." 286 Conn. at 167. Justice Norcott, dissenting, observed...
that “the minutes tend to prove that the board members viewed Shadow and his attendant problems as a matter within their control.” 286 Conn. at 176.

Virginia Auster, the plaintiff in this case, has been bitten thrice. First, on the evening of July 27, 2000, by Shadow, a mixed breed pit bull owned by the defendant Pedro Salinas, the sexton for the named defendant, Norwalk United Methodist Church, while she attended a meeting of a charitable organization held at the defendant’s building. She next was bitten by the Appellate Court’s judgment disturbing the trial court’s discretionary decision not to set aside the jury’s verdict holding the defendant strictly liable to the plaintiff pursuant to the dog bite statute, General Statutes § 22-357. Today, the majority of this court has inflicted the plaintiff’s third, and hopefully final, injury with its affirmation of the Appellate Court’s intrusion.” 286 Conn. at 168.

VII. Opinions and Expert Testimony

§ 7-2 MOTION TO COMPEL CAUSATION TESTIMONY FROM NON-PARTY TREATING PHYSICIAN IN MALPRACTICE CASE DENIED — HILL, RALPH, ADMINISTRATOR V. LAWRENCE & MEMORIAL HOSPITAL, J.D. OF Hartford at Hartford, No. HHD XO 4 CV-05-4034622 S (June 30, 2008); Shapiro, J.

RULE: Absent compelling need, physicians who treated the plaintiff after the malpractice cannot be compelled at deposition to render opinions on causation.

FACTS: Medical malpractice action alleging that the defendant radiologists missed a lung mass on an x-ray on November 28, 2001. The mass turned out to be lung cancer, and the plaintiff died.

After her diagnosis, two oncologists, who were not defendants in the action, treated the plaintiff. Plaintiff filed an expert disclosure stating that the oncologists would testify that if the mass had been detected on November 28, 2001, when the x-ray was taken, the plaintiff could have been successfully treated and would have survived. The oncologists had not agreed to give this testimony.

Plaintiff noticed the depositions of the two oncologists, who filed a motion for protective order seeking to prohibit any questioning on causation. The trial court granted the motion.

REASONING:

The court noted that compelling this testimony would place a strain on the relationships between the defendant radiologists and the treating oncologists who worked at the same hospital. He further noted that the testimony might not be objective. The court rejected the plaintiff’s argument that these treating oncologists “have unique insight concerning the decedent and would therefore be in the best position to testify as to treatment and survivability.” Memorandum at p. 7.

The court focused on whether or not there was compelling need for the testimony. He noted that because other oncologists disclosed by the plaintiff could provide similar testimony, there was no compelling need. There was no discussion of the fact that testimony from the treating oncologists would be much more powerful than testimony from hired experts.

§ 7-2 JURY DETERMINES IF FUTURE ELECTIVE SURGERY IS PROBABLE — LINGENHELD V. DES-JARDINS WOODWORKING, INC., 105 Conn. App. 163 (2008); Berdon, J.; Trial Judge — Pickard, J.

RULE: Because the decision whether or not to have elective surgery is the patient’s, not the physician’s, the plaintiff is not required to produce medical testimony that the surgery is probable in order to claim compensation for future surgery. Whether or not the surgery is probable (and is thus compensable) is a question of fact for the jury. The physician’s testimony that the surgery would improve the plaintiff’s condition, along with the patient’s testimony that he intends to have the surgery, provide a sufficient basis for the claim to go to the jury.

FACTS: See Section 4-3, above. The injury was to the plaintiff’s right hand, involving three fractures, contused tendons, and a partially transected radial sensory nerve.

The plaintiff’s surgeon, Caputo, testified by videotaped deposition that he had discussed with the plaintiff doing a dorsal wrist arthroplasty and arteriogram, and that, more probably than not, these surgeries would improve the plaintiff’s condition and reduce his disability.

Defense counsel moved to strike this testimony, arguing that the surgeon did not testify that it was probable that the plaintiff would undergo the future surgeries.

The trial court denied the motion on the ground that whether or not plaintiff would undergo the future medical procedures was a question of fact for the jury to decide. The surgeon’s testimony was relevant evidence that the jury could consider in deciding that issue. The Appellate Court affirmed.

REASONING:

“In the present case, Caputo testified that he had discussed the possibility of future surgery with the plaintiff and believed that it was reasonably probable that the future surgical procedures would improve the plaintiff’s condition. This testimony was both relevant and probative as to the extent of the plaintiff’s injuries. Therefore, such testimony when considered in conjunction with the plaintiff’s testimony indicating that he would seek the surgeries in the future, aided the jury in determining whether it was reasonably probable that the plaintiff would undergo the dorsal wrist arthroplasty and arteriogram in the future. Accordingly, we conclude that the court did not abuse its discretion in admitting Caputo’s testimony.”

105 Conn. App. at 175.

§ 7-2 ADMISSIBILITY OF “FACT/OPINION” OF TREATING PHYSICIAN IN MEDICAL RECORD — BRENN V. SYNTHESIS STRATEGIC, INC., 108 Conn. App. 105 (2008); Flynn, C. J.; Trial Judge — Eveleigh, J.

RULE: Opinions of treating physicians contained in medical records and rendered in the course of treatment are part of the factual matrix of the case. The distinction between facts and opinions in this context is not a bright-line boundary. It is not an abuse of discretion to allow such “opinions” in evidence, even in the absence of an expert disclosure.

FACTS: On April 14, 2002 the plaintiff broke his left femur. On April 15, his orthopedic surgeon performed an open...
reduction and internal fixation in which he secured the fracture with a plate. Six months later the plate broke. A new plate was implanted. Six months after the second surgery the plate broke. Thereafter a different surgeon implanted a third plate with a bone graft which was successful.

Plaintiff brought a product liability action against Synthes-Stratec alleging that the plates were defective.

The medical records of the orthopedic surgeon who implanted the plates that broke contained two notes the plaintiff sought to redact. The first, dated July 2, 2002, was made after the first surgery and before the first plate failed. It stated: "[the plaintiff] was instructed regarding the lifting of weights to reduce pain in his right arm with the right hand. The fracture was in his right humerus. Due to persistent motion at the fracture, the plate has subsequently failed." 108 Conn. App. at 116.

The second notation was made on November 4, 2002 after the first plate had broken and before the insertion of the second plate. "It is always a race between biological healing and plate failure since this is a load sharing device. Due to persistent motion at the fracture, the plate has subsequently failed." 108 Conn. App. at 117.

The plaintiff argued that because the orthopedic surgeon had not been disclosed by the defense as an expert witness these "opinions" in the medical records should be redacted and the orthopedic surgeon prohibited from testifying regarding these statements. The plaintiff argued that these "opinions" have nothing to do with the care and treatment of the plaintiff.

The defendant argued that these statements constituted statements of fact related to the surgeon’s treatment of the plaintiff. The trial court refused to redact the medical records. The Appellate Court affirmed.

REASONING:

"With respect to the plaintiff’s redaction request, the court noted that the contested records already had been marked in evidence as full exhibits. The court then concluded that the challenged portions of the medical records were part of the plaintiff’s treatment record and that the contested statements were in the nature of treatment. In so concluding, the court implicitly recognized that the facts surrounding a patient’s treatment inevitably involve statements pertaining to diagnosis, treatment and prognosis. Such facts, memorialized in Lena’s treatment record of the plaintiff, are a part of the factual matrix surrounding the plaintiff’s medical treatment, including the fracture of the first plate implanted in the plaintiff’s body. “The distinction between so-called ‘fact’ and ‘opinion’ is not a difference between opposites or contrasting absolutes, but instead a mere difference in degree with no bright line boundary... [I]n a changing world there will constantly be a myriad of new statements to which a judge must apply the distinction. Thus, good sense demands that the trial judge be accorded a wide range of discretion at least in classifying evidence as ‘fact’ or ‘opinion,’ and probably in admitting evidence even where found to constitute opinion.” 1 C. McCormick, Evidence (5th Ed. 1999) § 11, pp. 45-46.

"In light of the inherent difficulties in distinguishing between opinions and facts in the context of a patient’s treatment record, we cannot conclude that the court abused its discretion in determining that the challenged portions of the July 2 and November 4, 2002 medical records concerned Lena’s treatment of the plaintiff and, thus, properly were characterized as the facts of treatment. Accordingly, the court properly denied the plaintiff’s request to redact the July 2 and November 4, 2002 medical records. Although Lena did testify about the statements in the treatment record, she did not offer any opinions about the notations. The court therefore properly permitted testimony from Lena about how those notations appeared in his treatment record of the plaintiff. Thus, we conclude that the court did not abuse its discretion."

108 Conn. App. at 122-23.

PRACTICE NOTE: See also, Conn. Pract. Book §13-4(b)(2), discussed below, about expert disclosures of treating physicians.

§ 7-2  EXPERT TESTIMONY NOT REQUIRED TO PROVE HOW TO PARK TRUCK SAFELY — ALINSON V. MANETTA, 284 Conn. 389, (November 13, 2007); Verteoaffile, J.; Trial Judge — Frazzini, J.

RULE: Because the parking of a motor vehicle on a public roadside is a commonplace activity with which most jurors are familiar, expert “standard of care” testimony is not required as to whether or not the defendant performed this activity safely.

FACTS: Plaintiff was driving east on Route 44 in Salisbury. An employee of the Department of Transportation (DOT) who had been proceeding west on Route 44 parked his dump truck, partially obstructing the westbound lane. A tractor-trailer also going west swerved into the eastbound lane to avoid the DOT dump truck and struck the plaintiff.

Plaintiff sued the driver of the tractor-trailer and the driver of the DOT dump truck. The jury returned a verdict of $2,000,000, apportioning responsibility 11% to the plaintiff, 18% to the driver of the tractor-trailer, and 71% to the driver of the DOT dump truck. The defendant moved to set aside the verdict on the ground that the plaintiff “failed to produce any expert testimony regarding the appropriate standard of care to be exercised when parking a truck along the road to perform maintenance tasks.” 284 Conn. at 404.

The trial court denied the motion to set aside. The Supreme Court affirmed this ruling, although it reversed the case on other grounds.

REASONING:

"We conclude that the factual issues raised in the present case involved a commonplace activity with which most jurors are familiar, namely, the parking of a motor vehicle on a public roadside. Moreover, the jurors heard significant testimony from Richard Binkowski, a state trooper and accident reconstructionist who had investigated the accident; Michael Ce, an accredited accident reconstructionist; and M anetta, the driver of the tractor-trailer that had struck the plaintiff and a former supervisor with the New York department of transportation. Binkowski and Ce both testified about their opinion regarding the cause of the accident, including the role that the placement of the truck played in the accident. Binkowski, Ce
and Manetta all testified that there was adequate room for Zucco to have parked the truck without blocking the roadway. The defendant's expert witness on reconstruction, Stephen Benanti, also confirmed that there was adequate space for Zucco to have parked the truck so as not to block the roadway.

"In addition, several photographs of the accident scene were admitted into evidence at trial. These photographs depicted the roadway, including the space available on the shoulder of the roadway, the curves in the roadway. The photographs also depicted the placement of the truck on the roadway, the road conditions at the time of the accident and the general accident scene. In addition to the testimony of Benanti, Cei and Manetta, these photographs were available for the examination of the jury to assist them in applying their own knowledge to determine whether Zucco had parked the truck negligently." 284 Conn. at 406-07.

§ 7-4 EVIDENCE OF A "LOCAL STANDARD OF CARE" PROVED TO BE CONSISTENT WITH THE NATIONAL STANDARD OF CARE ALLOWED — SMITH V. ANDREWS, 289 Conn. 61 (2008); Schaller, J.; Trial Judge — Adams, J.

RULE: Despite the fact that physicians are held to a national standard of care, evidence establishing a standard of care at a particular hospital is relevant if it is proved to be consistent with an acceptable, applicable national standard of care.

FACTS: On August 6, 2001, the plaintiff underwent a cervical disectomy. During the surgical process, the plaintiff suffered a severe spinal cord injury and was rendered paraplegic.

The plaintiff claimed that the injury was inflicted during his intubation, which was performed by a nurse anesthetist utilizing a standard endotracheal intubation by laryngoscopy. The plaintiff claimed that he had an unstable spine before the surgery, and that the standard of care for intubation of an unstable spine was awake fiber-optic intubation, which requires less physical manipulation of the neck.

The defendants agreed that if the plaintiff had an unstable spine, fiber-optic intubation was required by the standard of care. Thus, the issue in the case was whether or not the plaintiff's neck was unstable.

During preoperative evaluation, the plaintiff's surgeons had diagnosed the plaintiff as having "instability" in his spine. However, they claimed that "instability" did not mean that the spine was "unstable." The treating surgeons testified that the two terms, instability and unstable, are not interchangeable and represent two different degrees of injury. They testified that "instability" is a chronic, less serious condition, whereas, an "unstable" spine is an acute, more serious condition, such as one caused by trauma. The defendant's position was that, while it would have been a breach to use endotracheal intubation for a patient with an "unstable" spine, it was not a breach to use endotracheal intubation on a patient with cervical "instability."

Only witnesses affiliated with St. Vincent's Medical Center, where the surgery was performed, made this distinction between "instability" and "unstable" spines. For instance, the Chairman of the Anesthesiology Department, who was the defendant's partner, testified that there were unwritten protocols at St. Vincent's for anesthesiologists to utilize standard endotracheal intubation with laryngoscopy for patients with spinal "instability." 289 Conn. at 70.

The plaintiff objected to this testimony on the ground that the "unwritten protocol" at St. Vincent's Medical Center was not relevant, because it tended to prove a standard of care at one particular hospital and thus represented a retreat from a national standard of care and toward the locality rule rejected by Connecticut in 1983. The trial court allowed the testimony. The Supreme Court affirmed.

REASONING: "In the absence of expert testimony linking the St. Vincent's practice to a national standard of care, the evidence would be inadmissible as irrelevant." Id. The Supreme Court held that the defendants' expert had testified that the practice at St. Vincent's was in accordance with the national standard of care.

COMMENT: The plaintiff may have had more success arguing that the evidence was confusing and misleading under § 4-3. Compare this ruling with the ruling in Russo v. Phoenix Internal Medicine Associates, above.

§ 7-4 ACCIDENT RECONSTRUCTION EXPERT CAN RELY ON EYEWITNESS TESTIMONY — HICKS V. STATE, 287 Conn. 421 (2008); Katz, J.; Trial Judge — Jones, J.

RULE: Experts are entitled to rely on hearsay if it is of a type customarily relied on by experts in a particular field. Thus, an accident reconstruction expert can rely on and testify about, eyewitness statements upon which the expert relied.

FACTS: See Section 4-7 above. As indicated above, there was an eyewitness to this accident who testified that the DOT truck was moving slowly in the right lane and that the plaintiff was forced to take evasive action to avoid it. The plaintiff's accident reconstruction expert then interviewed the eyewitness and relied on her statements in performing his reconstruction. In explaining his reconstruction he described what the eyewitness had told him. The defendant objected to this testimony on the basis that it was hearsay. The trial court admitted the testimony. The Supreme Court affirmed.

REASONING: The accident reconstruction expert's recitation of what the eyewitness told him was not offered for the truth of its content, but to explain the basis of his opinions.

COMMENT: The trial judge does have the discretion to preclude this hearsay testimony if its probative value in explaining the basis of the expert's opinion is outweighed by its prejudicial effect. If the eyewitness has already testified in a manner consistent with the expert's rendition, there is no prejudice.

In a case where the eyewitness did not testify, the prejudicial effect might well outweigh the probative value.

VIII. Hearsay

§ 8-3(l)(b) TACIT ADMISSION EXCEPTION TO THE HEARSAY RULE — MANN V. REGAN, 108 Conn. App. 566 (2008); Flynn, C. J.; Trial Judge — Miller, J.

RULE: "The failure of one person to contradict or reply to the statement of another person made in his presence and hearing may amount to an admission by adoption of the other's assertion, providing the person remaining silent actually heard and understood the statement and was not disabled or prevented from replying, and the statement, under the circumstances
made, was such as would naturally call for
an answer.” Obermeier v. Nielsen, 158 Conn.
8, 11-12 (1969).

FACTS: The plaintiff and the defendant
had been friends for 30 years. Plaintiff lived in Windsor, Connecticut,
and the defendant lived in Florida. The defendant had a Lhasa Apso dog
Three days later, the defendant left Sam at
the plaintiff’s house while she traveled to
Wisconsin for a wedding. Hours after the
defendant left for Wisconsin, while the plaintiff was attempting to put a blanket
underneath him, Sam bit her in the face.

Two days later, defendant returned to
Connecticut and went to retrieve Sam. Upon seeing the plaintiff’s bandaged face,
the defendant asked her what had happened. The plaintiff told the defendant
that Sam had bitten her. The defendant responded: “What do you mean Sam bit
you? What did you do to him?” 108
Conn. App. at 571. The plaintiff then
explained that she had been attempting to
put a blanket under the dog when he bit
her. The defendant’s daughter, who was
with her mother, then stated: “Well, mom,
you know he bit you.” Id. The defendant
remained silent.

The defendant objected to plaintiff’s
testimony recounting what the daughter
had said on the ground that it was hearsay
The trial judge admitted the defendant
dughter’s statement. The Appellate Court
affirmed.

REASONING:

“The plaintiff, as the proponent of the
tact admission, had to establish that
(1) the defendant comprehended the
statement made, (2) the defendant had
the opportunity to speak, (3) the cir-
cumstances naturally called for a reply
from the defendant and (4) the defen-
dant remained silent.”

108 Conn. App. at 573-74.

The defendant argued that the plaintiff failed to establish the third prong of the
test. She argued that the circumstances did not naturally call for a reply because the
statement was made at “a meeting among long standing friends who gathered
around the holiday season and whose first concern was not the fault of any person,
but the injury that the plaintiff incurred.”

108 Conn. App. at 574. The Supreme
Court held that the circumstances called
for a response if in fact Sam had not bitten
the defendant before he bit the plaintiff.

§ 8-3(2) SPONTANEOUS
UTTERANCE — 40-
MINUTE DELAY
ALLOWED — STATE V.
187, cert. denied, 289
Conn. 929 (2008); MCDonald, J.; Trial Judge —
Devlin, J.

RULE: A 40-minute delay between the
event and the statement is not excessive
if the statement was made under circumstances indicating the absence of opportunity
for contrivance and misrepresentation.

FACTS: Defendant was accused of
assault. On May 8, 2004, the victim was
fumbling with his key at his apartment
door when the defendant approached him.
The two men had words, and the defen-
dant pulled out a handgun and shot the
victim. As the victim ran, the defendant
shot him four more times. The victim
made it out onto the sidewalk before he
collapsed. A police officer arrived and
found the victim lying on the sidewalk.

The victim was taken by ambulance to
the hospital. It was certain whether he
would survive surgery. A police officer
accompanied him in the hospital elevator
to the operating room. When the police
officer asked the victim if he knew who
had shot him, the victim moved his head
up and down.

The State offered this nonverbal state-
ment (the victim shaking his head up and
down indicating that he knew his assailant) at trial. The “statement” was made 40
minutes after he was shot. The defendant
argued that a statement made 30 minutes
after a startling event represented the outer
limits of a spontaneous utterance under
Connecticut case law. The trial court
allowed the statement. The Appellate
Court affirmed.

REASONING: While the amount of
time involved is an important considera-
tion, it is not decisive. Under these cir-
cumstances, the victim did not have the
opportunity to reflect or contrive a story.
Moreover, the fact that the statement was
made in response to a question does not preclude its admission as a spontaneous
utterance.

§ 8-3(2) 911 CALL ADMITTED
AS SPONTANEOUS
UTTERANCE — STATE
V. TORELLI, 103 Conn.
App. 646 (2007); Peters, J.; Trial Judge —
Damiani, J.

RULE: A 911 call from a witness actually
observing the event qualifies as a sponta-
eneous utterance.

FACTS: Drunken driving prosecution.
A citizen informant, Gillis, who was driving
behind the defendant called 911 to report what he believed to be someone
driving under the influence. The call was
recorded. “I called here to report a drunk
driver. I am still following him. He’s all
over the place…” 103 Conn. App. at 651.

The defendant objected to the recording
on the basis that it was hearsay. The trial
court admitted the recording under the business record exception to hearsay
rule.

The Appellate Court found this ruling
to be in error because the citizen inform-
ant had no duty to report to the police.

However, the court went on to find that
the recording was admissible pursuant to
the spontaneous utterance exception to the
hearsay rule.

REASONING:

“[W]e are persuaded that Gillis’ state-
ments to the 911 dispatcher were admissible because they satisfy the cri-
tera for the spontaneous utterance exception to the hearsay rule. Startled
by an erratic driver, Gillis called 911. During the call, he continued to
observe and comment on the defen-
dant’s erratic driving and course of travel.
His declarations were made in the
course of an ongoing urgent situation,
neating the opportunity for deliberation
or fabrication.”

103 Conn. App. at 662.

§ 8-3(2) 911 CALL ADMITTED
AS SPONTANEOUS
UTTERANCE — STATE
V. NELSON, 105 Conn.
App. 393, cert. denied, 286
Conn. 913 (2008); Lavine,
J.; Trial Judge — Vitale, J.

RULE: Recording of 911 telephone
call from victim of assault is admissible as
spontaneous utterance.

FACTS: The defendant, “Sticky” Nelson,
was accused of breaking into the victim’s
apartment, binding his hands and feet,
bruning him with a knife heated on his
stove, driving him around and then dump-
ing him at the Weaver High School in
Hartford.
The victim called 911 and told the operator he was tied up, bleeding, and in need of help. He identified one of the assailants and described their vehicle. The 911 telephone call recording was offered in evidence as a spontaneous utterance. The defendant objected on the ground it was hearsay. The trial court allowed the recording in evidence. The Appellate Court affirmed.

**REASONING:**

The defendant claimed that the recording did not meet the criteria for a spontaneous utterance on two grounds. First, the defendant claimed that since the victim’s eyes had been duct taped, he did not have sufficient opportunity to observe the events that were the subject of the 911 call. However, the victim testified that his vision was not completely obscured by the duct tape.

The defendant then argued that the victim’s statements were “not made under stress sufficient to negate the opportunity for fabrication.” 105 Conn. App. at 406. The Appellate Court found this argument unpersuasive:

“It is clear that Marshall, who had been robbed, burned, beaten, threatened with murder, forcibly removed from his apartment, tied up, driven around for an extended period of time and abandoned in wintry conditions, experienced grave stress during his entire conversation with the 911 operator. ‘I’m still tied up,’ he told the operator. ‘[T]hey burned and cut me... [T]he blood is all over my face and my head right now. Please send help.’” 105 Conn. App. at 407.

**§ 8-3(8) LEARNED TREATISE OR VIDEOTAPE THAT TENDS TO CONFIRM EXPERT’S OPINION CANNOT BE PRECLUDED AS CUMULATIVE OR CONFUSING — STATE V. GUPTA, 105 Conn. App. 237, cert. granted, 286 Conn. 907 (2008); West, J.; Trial Judge — Rodriguez, J.**

**RULE:** Once an expert has testified on direct examination that a medical treatise corroborates her opinion, it is an abuse of discretion to preclude the medical treatise on the ground that it is cumulative of that opinion. Nor does the fact that the medical treatise contains medical terms allow preclusion on the ground that it has the potential to confuse the jury.

A videotape depicting the proper way to conduct a physical examination, offered during the direct examination of an expert, would have assisted the jury in deciding this issue and should not have been precluded as misleading.

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

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

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

Defendant offered the testimony of a pulmonologist that the breast examinations performed by the defendant on the two patients were appropriate. During direct examination, the defendant attempted to introduce a number of excerpts from medical treatises. The excerpts used words, pictures, and diagrams to illustrate the proper method for conducting a pulmonological examination. They were offered to demonstrate that the breast examinations described by the patients were consistent with accepted medical practice.

The State objected to the medical treatises on the ground that the medical texts were cumulative because they essentially repeated what the defense expert had already testified to. The trial court sustained the objection both because the excerpts were cumulative and because they might confuse the jury.

The defendant also offered, during the direct examination of his expert, two videotapes depicting the proper way to conduct a physical examination, to assist the jury in understanding the expert’s testimony. The State objected on the grounds of relevancy and hearsay. The defendant argued that an expert is entitled to rely on hearsay. The court sustained the objection on the ground that the videotapes might confuse the jury.

The Appellate Court found both these rulings to be an abuse of discretion and reversed. The Supreme Court has granted cert.

**REASONING:**

As to the State’s argument that the medical treatises were cumulative, the very purpose of introducing treatises on direct examination is to corroborate the testimony of the expert. Indeed, a learned treatise is admissible if it “tends to confirm” the expert’s opinion. Kaplan v. Mashkin Freight Lines, 146 Conn. 327 (1959). Thus, excerpts from medical treatises are always cumulative when offered on direct examination.

As to the potential to confuse the jury, the court held as follows:

“Although the excerpts do contain various medical terms, there is enough plain language that an average person with no medical background would be capable of understanding the words, pictures and diagrams. Furthermore, the attorneys were able to examine the expert witnesses while referring to the excerpts. Therefore, any confusion that might have arisen from the jurors’ looking at the excerpts during deliberation could have been clarified during direct and cross-examination of the expert witnesses. Because the evidence was relevant, noncumulative and would not tend to confuse the jury, we hold that the court abused its discretion in refusing to admit the excerpts.”

105 Conn. App. at 253.

As to the videotapes, the Appellate Court held that although the entire videotapes were not admissible, parts depicting a proper examination of the lungs and thorax were relevant and should have been admitted. The Court went on to hold that as long as the videotapes were shown during the expert’s testimony, with an opportunity to ask the expert questions regarding the videotapes, the videotapes were not misleading.

**§ 8-4 BILL OF PHYSICIAN CLAIMING FIFTH AMENDMENT IN ADMISSIBLE — RHODE V. MILLA, 287 Conn. 731 (2008); Nocnott, J.; Trial Judge — Rodriguez, J.**

**RULE:** Pursuant to C.G.S. §§ 52-174(b), medical bills of a treating doctor are admitted as a business record without the necessity of calling a witness. However, since the defendant has an “absolute” common law right to cross-examination, the
invocation by the doctor of his Fifth Amendment privilege precludes the application of the statute under these circumstances.

**FACTS:** See Section 4-3 above. In addition to attempting to elicit evidence before the jury that plaintiff’s chiropractor had claimed the Fifth Amendment, the defendant objected to the admission of the chiropractor’s bill, on the ground that his invocation of his Fifth Amendment privilege at his deposition denied them the right to cross-examine him regarding that bill. The trial court allowed the bill in evidence. The Supreme Court found this to be error.

**REASONING:** The Supreme Court began its analysis with Struckman v. Burns, 205 Conn. 542 (1987), wherein the constitutionality of Section 52-174(b) was challenged on the ground that it deprived the defendant of his right of cross-examination. In Struckman, the Supreme Court upheld the constitutionality of the statute, because the defendant had the right to subpoena the doctor to court, or if the doctor was beyond subpoena power, to take his deposition. In the case at bar, after the doctor invoked his Fifth Amendment privilege at deposition, this rationale disappeared. The Supreme Court concluded that the trial court improperly admitted the bills in evidence, but found the error harmless.

§ 8-6(1) **PROVING UNAVAILABILITY — STATE V. WRIGHT,** 107 Conn. App. 85, cert. denied, 289 Conn. 933 (2008); Flynn, D. J.; Trial Judge — Thim, J.

**RULE:** Under the former testimony exception to the hearsay rule, a proponent must satisfy a two-part test: (1) the witness must be unavailable, and (2) the former testimony must be determined to be reliable.

**FACTS:** In an earlier trial, the defendant was acquitted of murder, but convicted of carrying a pistol without a permit and possession of a weapon in a motor vehicle. He appealed that conviction. The defendant was acquitted of murder, but convicted of carrying a pistol without a permit at his deposition denied them the right to cross-examine him regarding that bill. The trial court allowed the bill in evidence. The Supreme Court found this to be error.

**REASONING:** The efforts of the inspector from the State’s attorney to locate the witness were sufficient:

"Inspector Michael Kerwin from the office of the state's attorney testified as to the efforts that he made to procure the witness for this trial. Kerwin looked for the witness over a nine day period, including part of the day he testified. He reviewed databases containing drivers’ license information and vehicle registration information. He checked with the department of correction to determine whether the witness was incarcerated and with the state police to see if there were any pending cases against the witness. He also checked nationwide to see if there were any pending arrests. Kerwin reported that he checked, through the witness’ social security number, to see if the witness was working. Kerwin spoke with prior landlords and went to eight or nine different locations in the Bridgeport area and to one location in New Haven in an attempt to locate the witness. He checked on child support orders and protective orders, of which there were none. Kerwin also attempted to locate the witness’ mother and brother through the drivers’ license and motor vehicle databases to no avail. Kerwin physically went to all the addresses that came up through these searches, but he still was not successful in locating the witness or his family members."

107 Conn. App. at 90-92.

§ 8-9 **STATEMENTS OF CHILDREN ADMITTED UNDER RESIDUAL EXCEPTION TO THE HEARSAY RULE — IN TAYLER F.**, 111 Conn. App. 28 (2008); M. Lachlan, J.; Trial Judge — Graziani, J.

**RULE:** Finding that children would suffer emotional harm if forced to testify was an adequate basis for the court’s ruling that they were unavailable to testify, thus satisfying that requirement of the residual exception to the hearsay rule.

**FACTS:** Action by the Commissioner of Children and Families to adjudicate two minor children as neglected.

In December 2004 the two children, Tayler and Nicholas, were 11 and 9 years old, respectively. They lived with their mother and her live-in boyfriend.

On December 8, 2004 the children’s father contacted the Enfield Police Department to report an incident between the live-in boyfriend and the children the day before. In response, an officer went to the children’s house, interviewed them, and reported the results to the Department of Children and Families.

In addition, a department social worker interviewed the children on December 10, 2004.

After the neglect petitions were filed, the court ordered an examination by a clinical psychologist, who interviewed the children three times in 2005.

The petitioner offered the children’s statements to the police officer, the social worker, and the psychologist in various reports prepared by these witnesses. The respondent objected to the statements as hearsay. The court allowed the statements pursuant to the residual exception to the hearsay rule. The Appellate Court affirmed.

**REASONING:** The issue in dispute on appeal was whether or not the court abused its discretion by finding that the children were unavailable to testify because they would suffer emotional harm. The Appellate Court found that the trial court did not abuse its discretion:

"We conclude that the court properly admitted the children's statements under the residual exception to the hearsay rule. The court was presented with sufficient information to decide that the children would be harmed if called to testify against the respondent in a contested hearing."

111 Conn. App. at 48-49.

The clinical psychologist testified that the children should not be required to testify in court because they would be harmed if forced to testify against their mother.

Judge Lavery, in dissent, pointed out that the court made its decision that the children were unavailable before hearing the testimony of the psychologist.

The dissent also pointed out that the court had never met with the children:

"This case was not a rare or exceptional instance, and it was an abuse of discretion to allow the children's statements..."
The trial judge who was reversed in that case was sufficient in Section 13-4(4) in finding (2006), the court relied upon the term substance as it relates to the expert opinion, gathered them and produced them to the opposing side. This is particularly so in medical malpractice, accident reconstruction or products liability cases. Can we rely on our experts to accomplish this task, or do we need to travel to the expert’s office, which is often out of state, to review the expert’s entire file in order to ensure compliance with this rule? Trial schedules, deposition schedules and the expert’s schedule are such that the 30-day period for compliance is both unrealistic and impractical.

The rule change as stated does not recognize that discovery is and should be ongoing even after an expert disclosure is filed. An expert often obtains and reviews additional material after the disclosure is filed and before the expert’s deposition is taken. In medical malpractice cases, for example, scheduling problems very often arise, preventing the completion of fact witness depositions, including those of the defendant doctors, before the deadline for expert disclosure. In practice, the parties are usually able to deal with these scheduling problems in a civil manner, each side accommodating the other. The expert’s file is then produced at the deposition, where it is reviewed. In those cases in which a party desires to have the expert’s materials before the deposition, case law has evolved permitting a party to obtain such materials on a case-by-case basis. This adaptable, realistic approach has been replaced with a blanket rule, devoid of flexibility, which will create undue and unnecessary hardship on the parties and require frequent court intervention.

The new rule requires disclosure of materials “created” by the expert. In the context of a medical malpractice case this requirement may conflict with the statutory privilege provided in Section 52-190a of the General Statutes. Under that statute, in order to file a medical malpractice action, the plaintiff must obtain a report from a similar health care provider containing an opinion that there appears to be evidence of medical negligence. The report must include a detailed basis for the formation of such opinion. The 2005 amendment to that section requires that the report be appended to, and filed with, the complaint. That statute provides, however, that the name and signature of the author of that report be redacted from the report and further provides that “[s]uch written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate.” The statutory scheme is such that the validity of the written opinion may be questioned only “after completion of discovery.” It seems clear that the statute trumps the new Practice Book Rule, but no doubt there will be some lawyers who will argue otherwise.

Section 13-4(b)(4) specifically provides that “nothing in this section should prohibit any witness disclosed hereunder from offering nonexpert testimony at trial.”

Section 13-4(c) sets forth new rules regarding the depositions of experts and who pays for what.

Section 13-4(d)(1) requires a party to file with the court a list of all documents or records that the party expects to submit in evidence pursuant to any statute or rule permitting admissibility of documentary evidence in lieu of the live testimony of an expert witness.” Clearly, this is aimed at the reports of treating physicians.

Section 13-4(e) requires a party expecting to call an expert disclosed by another expert to disclose the expert’s file in order to ensure compliance with this requirement.

In Weex v. Demiao, 280 Conn. 168 (2006), the court relied upon the term “substance” in Section 13-4(d) in finding that the disclosure in that case was sufficient under that section, and reversing the trial judge for precluding the plaintiff’s expert. The trial judge who was reversed in Weex v. Demiao was Judge Sheldon, the principal architect of the new rule. It will no doubt be argued that the removal of the term “substance” in the new rule renders Weex inapposite and requires the disclosure to have a greater level of detail and specificity than was found by the Supreme Court to be sufficient in Weex.

In addition, the old rule provided for disclosure of “a summary of the grounds for each opinion” whereas the new rule requires disclosure of the “substance of the grounds for each such expert opinion.” Although it is not entirely clear what, if any difference, there may be between “summary” and “substance” in this context, the change will likely engender creative arguments to preclude experts.

The new § 13-4(b)(2) requires disclosure of the “substance of the facts and opinions to which the witness is expected to testify.” The new rule, which went into effect January 1, 2009, significantly changes the prior rule. This is a brief summary of the minefield created by the new rule.

Section 13-4(b)(1) of the old rule required that a party state the “substance of the facts and opinions to which the expert is expected to testify.” The new rule requires disclosure of the “opinions to which the witness is expected to offer expert testimony.” It is unclear what is intended by removing the term “substance” as it relates to the expert opinion, but in Weex v. Demiao, 280 Conn. 168 (2006), the court relied upon the term “substance” in Section 13-4(d) in finding that the disclosure in that case was sufficient under that section, and reversing the trial judge for precluding the plaintiff’s expert. The trial judge who was reversed in Weex v. Demiao was Judge Sheldon, the principal architect of the new rule. It will no doubt be argued that the removal of the term “substance” in the new rule renders Weex inapposite and requires the disclosure to have a greater level of detail and specificity than was found by the Supreme Court to be sufficient in Weex.

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The new § 13-4(b)(2) deals with treating physicians differently from other expert witnesses. If the medical records and reports of the treating physician are disclosed, the treating physician “shall be permitted to offer expert opinion testimony at trial as to any opinion as to which fair notice is given in the disclosed medical records or reports.” Any opinion not disclosed in those records or reports must be separately disclosed in accordance with the new rule.

The new §13-4(b)(3), which deals with disclosure of materials, requires the party disclosing an expert witness to produce “all materials obtained, created, and/or relied upon by the expert in connection with his or her opinions in the case” within 30 days of the date of the disclosure. This section does not apply to treating physicians.

In the context of any complex case, 30 days is not sufficient time to identify the materials obtained, created, and/or relied upon by the expert, gather them and produce them to the opposing side. This is particularly so in medical malpractice, accident reconstruction or products liability cases. Can we rely on our experts to accomplish this task, or do we need to travel to the expert’s office, which is often out of state, to review the expert’s entire file in order to ensure compliance with this rule? Trial schedules, deposition schedules and the expert’s schedule are such that the 30-day period for compliance is both unrealistic and impractical.

The rule change as stated does not recognize that discovery is and should be ongoing even after an expert disclosure is filed. An expert often obtains and reviews additional material after the disclosure is filed and before the expert’s deposition is taken. In medical malpractice cases, for example, scheduling problems very often arise, preventing the completion of fact witness depositions, including those of the defendant doctors, before the deadline for expert disclosure. In practice, the parties are usually able to deal with these scheduling problems in a civil manner, each side accommodating the other. The expert’s file is then produced at the deposition, where it is reviewed. In those cases in which a party desires to have the expert’s materials before the deposition, case law has evolved permitting a party to obtain such materials on a case-by-case basis. This adaptable, realistic approach has been replaced with a blanket rule, devoid of flexibility, which will create undue and unnecessary hardship on the parties and require frequent court intervention.

The new rule requires disclosure of materials “created” by the expert. In the context of a medical malpractice case this requirement may conflict with the statutory privilege provided in Section 52-190a of the General Statutes. Under that statute, in order to file a medical malpractice action, the plaintiff must obtain a report from a similar health care provider containing an opinion that there appears to be evidence of medical negligence. The report must include a detailed basis for the formation of such opinion. The 2005 amendment to that section requires that the report be appended to, and filed with, the complaint. That statute provides, however, that the name and signature of the author of that report be redacted from the report and further provides that “[s]uch written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate.” The statutory scheme is such that the validity of the written opinion may be questioned only “after completion of discovery.” It seems clear that the statute trumps the new Practice Book Rule, but no doubt there will be some lawyers who will argue otherwise.

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Section 13-4(d)(1) requires a party to file with the court a list of all documents or records that the party expects to submit in evidence pursuant to any statute or rule permitting admissibility of documentary evidence in lieu of the live testimony of an expert witness.” Clearly, this is aimed at the reports of treating physicians.

Section 13-4(e) requires a party expecting to call an expert disclosed by another expert to disclose the expert’s file in order to ensure compliance with this requirement. 3

3 In Weex v. Demiao, the court stated, “although the disclosure does not delineate explicitly in the text of the current Section 13-4(d)(1) was modeled on the interrogatory requirements of Practice Book §13-4(1)(A) which was not intended to elicit ‘an overly detailed exposition of the expert’s opinion.’” Id. at 189.

4 As noted in Weex, the text of the current Section 13-4(d)(1) was modeled on the interrogatory requirements of Practice Book §13-4(1)(A) which was not intended to elicit ‘an overly detailed exposition of the expert’s opinion.’” Id. at 189.
party to file a notice within the time parameters of a scheduling order.

Section 13-4(g) requires the parties to file a scheduling order regarding expert disclosure in every case.

**Rebuttal Argument**

RIGHT TO ADDRESS PRECLUDED EVIDENCE AFTER OPPOSITION “OPEN THE DOOR” — CONNECTICUT LIGHT & POWER CO. V. GILMORE. 289 Conn. 88 (October 21, 2008); Zarella, J.; Trial Judge — Radcliffe, J.

**RULE:** When a defendant makes a misleading final argument, the plaintiff has the right to respond, even if it necessitates reference to excluded evidence.

**FACTS:** Action by Connecticut Light & Power Company to collect on a bill for electricity supplied to the defendant's residence. The residence also contained the law practice of her son, who defended the action. The case was tried to a jury.

Over the years, the defendant repeatedly complained about her high electric bills. A number of energy audits and meter tests were performed by the plaintiff. A review officer employed by the plaintiff also conducted an "independent" investigation at the defendant's request. The review officer prepared a report which concluded the billing was correct. This report was sent to the defendant.

After receiving the review officer's report, the defendant requested that the Department of Public Utility Control (DPUC) investigate the review officer's findings.

The DPUC investigated and also issued a report, which concluded the defendant's bill was correct. This report was also sent to the defendant.

At trial, plaintiff's counsel offered copies of both reports in evidence. Defense counsel objected to the review officer's report on hearsay grounds and to the DPUC's report on the ground that the DPUC's conclusions constituted an expert opinion which would invade the province of the jury. The objections were sustained, and neither report was allowed in evidence.

During closing argument, defense counsel stated that the review officer had not prepared a copy of the report issued in connection with the DPUC's investigation. During rebuttal argument, the plaintiff stated: "There was a report. We offered the report of... the review officer. [Defense counsel] objected to it. He didn't want you to see that. And there was another report. It went to the [department]. There's a report. He objected. He didn't want you to see it. Okay? So there have been reports." 289 Conn. at 97.

The trial court instructed the jury that objections of counsel to the admission of evidence should not be held against their clients, that the arguments of attorneys are not evidence, and that the jury should not consider excluded evidence. There was a plaintiff's verdict. Defendant moved to set aside the verdict on the ground that the rebuttal argument was improper. The trial court denied the motion. The Supreme Court affirmed.

**REASONING:**

"In the present case, defense counsel stated during closing argument that the defendant had not been given any reports following the inspections of her residence in 1999 and 2001. The plaintiff's counsel countered during rebuttal argument that reports had been produced by the review officer and the department, respectively, after their investigations and that defense counsel had objected to their admission. The remarks by the plaintiff's counsel were intended to correct defense counsel's misrepresentation to the jury that the defendant had received no reports. Furthermore, counsel for the plaintiff did not disclose the contents of the reports, but limited her remarks to the fact that reports had been made following the investigations and that they had not been admitted into evidence because of defense counsel's objections." 289 Conn. at 99.

**PRACTICE POINTER:** Don’t object — get even.

**Sufficiency of Evidence**

FACT OF REAR-END COLLISION IS NOT ENOUGH TO PROVE NEGLIGENCE — SCHWEIGER V. AMICA MUTUAL INS. CO., 110 Conn. App. 736, cert. denied, 289 Conn. 955 (2008); Beach, J.; Trial Judge — Tanzer, J.

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

**FACTS:** Rear-end collision on Route 44 in Avon. Plaintiff testified she slowed and brought her car to a stop behind a line of traffic. She was stopped for four to five seconds before being struck in the rear by the alleged tortfeasor. Plaintiff testified that she did not observe the car that struck her before she was hit. Plaintiff introduced no other evidence regarding the tortfeasor's negligence.

The trial court granted the defendant's motion for a directed verdict. The Appellate Court affirmed.

**REASONING:**

"In an automobile accident case, '[a] plaintiff cannot merely prove that a collision occurred and then call upon the defendant operator to come forward with evidence that the collision was not a proximate consequence of negligence on his part. Nor is it sufficient for a plaintiff to prove that a defendant operator might have been negligent in a manner which would, or might have been, a proximate cause of the collision. A plaintiff must remove the issues of negligence and proximate cause from the field of conjecture and speculation.' (Internal quotation marks omitted) O'Brien v. Cordova, 171 Conn. 303, 306, 370 A.2d 933 (1976).

"Recently in Winn v. Posades, 281 Conn. 50, 913 A.2d 407 (2007), our Supreme Court affirmed the trial court's judgment of dismissal in an automobile accident case in which no evidence existed regarding liability beyond the fact that the collision had occurred and that the defendant operator had been traveling at an unreasonable, even reckless, speed when he struck the vehicle of the plaintiff's decedent. Id., 52-56. The defendant was the only surviving eyewitness to the accident, and he testified that he recalled nothing of the accident or how it occurred. Id. 52. The Supreme Court concluded that '[a]lthough the plaintiff's evidence showed that [the defendant] had been negligent or reckless in operating his [vehicle] through the intersection at a highly excessive rate of..."
speed, there was no evidence that his speed actually had caused the collision.' Id., 60. The Supreme Court, therefore, concluded that insufficient evidence existed to establish legal cause. Id., 64.

"The plaintiff in the present case similarly failed to present sufficient evidence regarding negligence and proximate cause to remove the issues from the field of speculation or conjecture. The plaintiff introduced no evidence beyond the fact that her vehicle was struck by Blodgett's vehicle, perhaps with some force. The fact that there was a collision by itself is insufficient to establish legal cause. See O'Brien v. Cordova, supra, 171 Conn. 306 ('[c]ommon experience shows that motor vehicle accidents are not all due to driver negligence'). No one testified as to the actual circumstances that caused Blodgett's vehicle to strike the plaintiff's vehicle, and the plaintiff testified that she did not see Blodgett's vehicle strike her vehicle. There remains a number of factual possibilities that could explain how the accident occurred. See Palmieri v. Marcero, 146 Conn. 705, 707-708, 155 A.2d 750 (1959)." 110 Conn. App. at 741-42.

PRACTICE POINTER: How should plaintiff's counsel deal with the reality of this rule? If your client saw the car in her rear-view mirror before impact, she may be able to testify that it was following too closely or estimate its speed. That would be direct evidence of negligence. Scrutinize any statements you have from the defendant to the police, in a written statement to his insurer, or at deposition. There may be some admission there that is enough.

If such evidence is unavailable, use circumstantial evidence to eliminate the non-negligent causes of the collision: sudden mechanical failure, sudden illness, and sudden emergency.

Affidavit Countered by Circumstantial Evidence

DOCTOR'S SWORN AFFIDAVIT NOT CONCLUSIVE — BEDNARZ V. EYE PHYSICIANS OF CENTRAL CONNECTICUT, P.C., 287 Conn. 158 (June 3, 2008); Katz, J.; Trial Judge — Lopez, J.

RULE: The fact that a physician signs an affidavit claiming that he had no knowledge of a test is not conclusive on that point if there is circumstantial evidence to support a contrary inference.

FACTS: On February 16, 1980, plaintiff was referred to Eye Physicians of Central Connecticut, P.C. by her then treating ophthalmologist for evaluation of a puffy area below her right eyebrow which the referring ophthalmologist thought might be a tumor. One of the ophthalmologists at Eye Physicians, David Parke, ordered a CAT scan. The CAT scan, performed on February 25, 1980, showed two meningiomas. A meningioma is a benign brain tumor that nevertheless must be removed because, as it continues to grow, it occupies space and exerts pressure inside the skull. A copy of the 1980 CAT report was in the plaintiff's Eye Physician's chart. The plaintiff was not informed of the results of the CAT scan or the presence of the two meningiomas.

The plaintiff remained a patient of Eye Physicians until 2004, when she began to suffer seizures and memory loss. Tests revealed the two meningiomas, which were removed. However, some brain damage had already occurred, and the surgery was more difficult and extensive than it would have been 24 years earlier.

Plaintiff brought suit against Eye Physicians and two of its individual ophthalmologists, including Dr. Burch, who moved for summary judgment on the statute of limitations. Plaintiff claimed that the statute of limitations in regard to Dr. Burch was tolled by the continuing course of conduct doctrine. That doctrine requires the plaintiff to prove three elements: 1) an initial wrong; 2) a continuing duty; and 3) continued breach of that duty. In this case, the continuing duty and its continued breach could only be established by proving that Burch had actual knowledge of the 1980 CAT scan report and failed to inform the plaintiff.

Burch first saw the plaintiff on January 26, 1988, eight years after the CAT scan was done. He became her principal treating ophthalmologist on February 20, 1990 and he remained her principal treating ophthalmologist until his retirement on June 30, 2000. During that time period he saw the plaintiff approximately ten times.

In support of his motion for summary judgment, Burch filed an affidavit stating that he had no knowledge of the CAT scan performed on the plaintiff in 1980. The trial court granted the motion for summary judgment, finding that although the defendant should have known about the report, there was no evidence that he had actual knowledge of the report. The Supreme Court reversed.

REASONING:

"We agree with the plaintiff that, because she had presented evidence from which a jury reasonably could infer that the defendant had actual knowledge of the 1980 CAT scan and that the jury would not be required to credit the defendant's testimony to the contrary, there existed a genuine issue of material fact with respect to whether the period of repose under § 52-584 was tolled by the defendant's ongoing failure to warn the plaintiff." 287 Conn. at 167.

The plaintiff's expert had filed an affidavit stating that Burch was required to be familiar with the medical records, including the CAT scan report.

"On the basis of this evidence, the plaintiff maintains that there was sufficient direct and circumstantial evidence that, at some stage during the course of his long-standing treatment of her, the defendant had learned about the CAT scan results, and thus, that this knowledge gave rise to a continuing duty to advise the plaintiff, to refer her for further treatment, and to perform follow-up care. The defendant, by way of his self-serving affidavit, maintains that, despite both his ten year relationship with the plaintiff and the notes he made in her medical records pertaining to his treatment of her over the course of that time period, he did not have actual knowledge of the presence of the meningiomas. The defendant suggests that this denial was sufficient to demonstrate the absence of any genuine issue of material fact. We agree with the plaintiff that, based on the evidence she has produced, the defendant has not established that his claimed lack of knowledge was not true." 287 Conn. at 173.

Status of the Code of Evidence

SUPREME COURT HAS THE FINAL SAY — STATE V. DEJESUS, 288 Conn. 418 (2008); Rogers, C. J.; Trial Judge — Lavin, J.
RULE: Despite the adoption of the CCE by the judges of the Superior Court, the Appellate Courts of Connecticut retain the authority to develop and change the rules of evidence through case-by-case common law adjudication.

FACTS: Criminal prosecution in which the defendant was alleged to have sexually assaulted a mentally impaired young woman under his supervision at a grocery store. During the trial, the State sought to introduce testimony from another young woman who also worked under the defendant’s supervision at the store, and was also mentally impaired, that the defendant had sexually assaulted her. The trial court allowed the evidence under the liberal rule of admission for evidence of uncharged sexual misconduct under the common scheme or plan exception in sexual assault cases codified in § 4-5 of CCE. The defendant was convicted. He appealed, claiming that despite the liberal rule’s codification in the CCE, the Supreme Court retained the authority to reconsider and reverse the rule codified in the CCE. The Supreme Court agreed with the defendant that Connecticut Appellate Courts retained the authority to reconsider and reverse a rule codified in the CCE; however, they declined to reverse the rule at issue in this case.

REASONING:

This case resolves an issue which has been hanging over the CCE for the last three years. The majority opinion, by Chief Justice Rogers, holds that when the judges of the Superior Court adopted the CCE, they did not intend to divest the Supreme Court of its inherent common law adjudicative authority to develop and change the rules of evidence on a case-by-case basis. Justice Rogers’ opinion also addresses the role of the Evidence Code Oversight Committee. She divests that Committee of the power to recommend substantive changes in the law of evidence which directly contradict recent Appellate or Supreme Court precedent.

“[W]e conclude that the judges of the Superior Court did not intend for the committee to recommend substantive changes to the common-law evidentiary rules codified in the code, but, rather, intended for the committee simply to recommend revisions reflecting common-law developments in evidentiary law, clarifications of the code to resolve ambiguities and additions to the code in the absence of governing common-law rules.”

288 Conn. at 455.

Justice Palmer’s concurring opinion agrees with the majority that the judges of the Superior Court were not attempting to strip the Supreme Court of its traditional common law role regarding the growth and development of the law of evidence. However, Palmer goes on to state that if the judges acting in their rule making capacity were to attempt such an action, they do not have that power.

Justice Zarella’s concurring opinion directly faces the constitutional issue and holds that “the judges of the Superior Court do not possess authority under our constitution to divest this court of its inherent authority to change and develop the law of evidence.”

288 Conn. at 490.

Justice Katz dissented. “In my view, it is the exclusive purview of the evidence code oversight committee, the rules committee of the Superior Court, and ultimately the judges of the Superior Court to make changes to the Code.”

288 Conn. at 494.

Justice Katz’s opinion clearly sets forth the views of Justice Borden, who was the chairman of the committee that drafted the CCE, as well as her own opinion as Chair of the Evidence Code Oversight Committee, a position from which she resigned after State v. DeJesus was released. Justice Katz’s dissenting opinion ends with the following:

“In conclusion, I note that, in this case, my colleagues have disavowed recent positions taken by this court with respect to both the binding effect of the code and the circumstances under which judgment of acquittal is proper. Understandably, the bench and bar may be somewhat confused by this result, as am I. Like Shakespeare’s Puck, I can only apologize to the audience and suggest that it also pretend that this has all been a bad dream.”

“If we shadows have offended, Think but this, and all is mended, That you have but slumb’red here While these visions did appear. And this weak and idle theme, No more yielding but a dream, Gentles, do not reprehend. If you pardon, we will mend. And, as I am an honest Puck, If we have unearned luck Now to ‘scape the serpent’s tongue, We will make amends ere long; Else the puck a liar call. So, good night until you call. Give me your hands, if we be friends, And Robin shall restore amends”

W. Shakespeare, A Midsummer Night’s Dream, act 5, sc. 1.

288 Conn. at 547.
VERDICT WITH INTEREST
$21,264.55; Auto Accident; 37-Year Old Female

In the case of Katarina Cox v. Kristen Boutilier, et al, Docket No. HHB-CV-05-4007346-S, filed in the Superior Court for the Judicial District of New Britain, before Judge Linda Prestley, a verdict with interest of $21,264.55 was reached in November of 2006.

The plaintiff’s car collided with the defendant’s car when the defendant failed to yield the right-of-way while making a left turn. There was minor property damage. The defendant, a high school student, denied liability and claimed that the plaintiff was traveling too fast. The plaintiff was a 37-year old mother of two, who suffered low back pain. She treated with her primary care physician and had 13 physical therapy sessions.

Allstate offered $6,000 prior to trial.


SETTLEMENT
Medical Malpractice; Failure to Diagnose Post-Operative Bowel Injury; 75-year old female; settlement of $300,000

In the case of Maria Blackwell, Administratrix v. Dr. Doe, Docket No. CV-99-0068341-S, filed in Milford Superior Court, the parties settled for $300,000 after two days of evidence.

On October 20, 1998, 75-year-old Lucy Altarelli was admitted to Griffin Hospital for recurrent hernia repair surgery. The surgeon selected to do the procedure laparoscopically because, among other reasons, the plaintiff’s decedent was elderly and weighed 309 pounds and because a quicker recovery time was anticipated by the laparoscopy.

Following the surgery, the decedent improved for 48 hours and then began to deteriorate. The surgeon’s partner, nevertheless, discharged the decedent to a rehabilitation facility where she worsened and, within 36 hours, was returned to Griffin Hospital. Neither imaging tests nor exploratory surgery was undertaken until the decedent was transferred on October 29th to Yale-New Haven Hospital. Surgery there disclosed a significant intestinal injury and considerable amounts of fecal material in the peritoneum. The decedent died on November 1, 1998.

At trial, no evidence of loss of earning capacity or of medical costs was introduced. After two days of trial, including testimony by the plaintiff’s surgery expert, the parties settled for $300,000.


SETTLEMENT
Medical Malpractice; Confidential Settlement of $1,100,000

In the case of the Estate of John Doe v. Unknown Psychiatrist and Hospital, the parties agreed to settle the claim for $1,100,000.00 following mediation with the Hon. Antonio C. Robaina. The settlement required confidentiality of the parties.

Due to severe depression and insomnia, the plaintiff decedent began treatment with the defendant psychiatrist in 1996. At that time, and continuing throughout the nearly seven-year relationship, the defendant psychiatrist prescribed several medications, including Elavil, Xanax, Paxil, Zoloft, and Neurontin, in various combinations. In addition to battling these afflictions, the plaintiff decedent suffered from alcoholism.

Over a period of five months in 2003, the plaintiff decedent was in and out of hospitals and psychiatric units after attempting suicide and drinking heavily. During the hospital and psychiatric visits, it was found that the plaintiff decedent had overdosed on the prescription drug, Elavil, given to him by the defendant psychiatrist. During this time, the plaintiff decedent continued to seek psychiatric counseling from the defendant, psychiatrist and, despite being aware of repeated hospital visits, which resulted in a diagnosis of Tricyclic overdose, depression, alcohol abuse, and acute alcoholic hepatitis, as well as the Elavil overdose, the defendant psychiatrist continued to prescribe Elavil, Xanax and Neurontin.

On August 8 and August 10, 2003, the plaintiff decedent attempted suicide by carbon monoxide poisoning as a result of severe depression and a four-day drinking binge. A day later, the plaintiff decedent again attempted suicide, this time by overdosing on the Elavil prescription given to him by the defendant psychiatrist. Despite consuming approximately 65 Elavil pills over a one week period and being diagnosed with Tricyclic overdose, depression, alcohol abuse, and acute alcoholic hepatitis at the defendant hospital, the defendant psychiatrist prescribed the plaintiff decedent more Elavil the day after his release. He was again given a prescription for Elavil by the defendant psychiatrist several days later.

On August 25, 2003, nine days after his last visit with the defendant psychiatrist, the plaintiff decedent was found dead in a motel room as a result of an overdose on Elavil mixed with alcohol.

The experts retained by the plaintiffs agreed that the defendant psychiatrist deviated from the standard of care by continuing to prescribe Elavil, despite the plaintiff decedent’s previous suicide attempts, and failing to conduct a complete reassessment of the plaintiff decedent’s suicidal tendencies and psychiatric condition. In addition, the plaintiffs’ experts testified that the defendant hospital deviated from the standard of care by failing to convey information of the plaintiff decedent’s risk of suicide, his previous overdose, his active alcohol use and the recommendation that he be prescribed a less lethal antidepressant.


The plaintiff, a decedent, who was unemployed, left behind a wife and two daughters. After discovery and an interlocutory appeal, the parties agreed to settle following mediation for $1,100,000.00.

Submitted by Robert L. Reardon, Esq. of The Reardon Law Firm, P.C., New London.

SETTLEMENT

Negligent Supervision of Minor;
Defective and Dangerous Premises;
Settlement after Mediation of $220,000

In the case of William Fellerman, ppa Kimberly Fellerman v. Penelope Tortora, the parties settled for the sum of $220,000 after mediation.

The defendant, Penelope Tortora, provided in-home licensed day care to the minor plaintiff and several other children. The minor plaintiff, Kimberly Fellerman, was seven months old at the time of her injury. She had no memory of the incident and could not offer any testimony as to how her injury was sustained. Kimberly's older sister, Amanda, was five years old when this incident occurred and was ten when the case was assigned for trial. She was deposed by defendant's counsel. She testified that when she went to get a drink, she heard Kimberly crying and saw Kimberly at the bottom of the stairs. Amanda told the defendant, who called the plaintiff's father but did not tell him about the fall. Amanda testified, with regard to a collapsible gate at the top of the stairway, that "Penny had a gate to the front door but she didn't have it closed... when [the plaintiff] fell". Based upon the testimony of Amanda Fellerman, the plaintiffs were prepared to try the case based upon the theories of negligent supervision and defective and dangerous premises.

It was not disputed that Kimberly sustained some type of head trauma on August 14, 1995, the date of the incident in question. The defendant claimed that at some point during that day, she noticed a red mark on Kimberly's forehead. When Kimberly's father came to pick her up, he called the defendant's attention to the red mark. The defendant claimed that Kimberly must have hit her head with a toy. The redness and swelling on Kimberly's forehead grew more pronounced. By the time she arrived home, it was approximately the size of a half dollar, a darker color red and noticeably more swollen. X-rays indicated a fracture of the left parietal bone and a CT scan disclosed a small hemorrhage in the left frontal lobe. Full body x-rays also disclosed a fracture to the ulna.

The plaintiff came under the care of Dr. Michael Westerveld, a pediatric neuropsychologist associated with Yale University. He found that Kimberly had sustained a traumatic injury to the left frontal lobe. He testified in a deposition that although the prognosis for her long term function was good, she was at risk for developing learning disabilities and attention deficit disorder.

The plaintiffs also disclosed Dr. Carol Wetzman of Yale University School of Medicine. Dr. Wetzman is Board Certified in pediatrics, with a specialty in behavior and developmental pediatrics. Dr. Wetzman testified in her deposition that, because of the nature of the rapid evolution of the swelling, the injury to Kimberly Fellerman occurred sometime before 4 p.m. This time was significant in that the defendant called the plaintiff's father shortly after 4 p.m. to advise him not to work overtime and come pick up his child since she was feeling sick and "fussy". Dr. Wetzman also testified that it was unlikely that Kimberly hit herself with a toy as claimed by the defendant.

The plaintiff had incurred approximately $10,000 in medical bills. She did not obtain any quantifiable disability rating of the brain from Dr. Westerveld. The defense never conducted an IME or disclosed any expert witnesses. The defendant was covered by a policy of liability insurance issued by Prudential Insurance Company. After a full day mediation session before Judge Samuel Friedman, the case settled for the sum of $220,000.

Submitted by Dennis M. Laccavole, Esq. of Goldstein and Pock, P.C., Bridgeport.

SETTLEMENT

Rear-end Collision; 22-year-old female; C4-C5 and C5-C6 disc herniation; 15% impairment of cervical spine; Liability Settlement of $100,000.00 and UIM Settlement of $115,000.00

On July 22, 2006, the plaintiff, Jocelyn Gunn, a 22-year-old clerk, was the restrained driver of a vehicle stopped for traffic on Route 63 in Bethany, Connecticut. The defendant, Stanley Misiewicz, slammed into the rear of Jocelyn's vehicle and forced her into the rear of the vehicle in front of her. Both vehicles had to be towed from the scene and Jocelyn's vehicle was later deemed a total loss.

Two days after the accident, Jocelyn first presented herself to Advanced Back and Neck in Milford complaining of severe neck and back pain. Jocelyn underwent conservative chiropractic treatment over the next few months, but her cervical symptoms continued. On January 17, 2007, Jocelyn was referred to a neurosurgeon, Dr. Abraham Mintz of Trumbull. Dr. Mintz ordered an MRI, which revealed C4/5 and C5/6 central disc bulges. He recommended she undergo an epidural steroid injection.

Jocelyn reported to Dr. Turgut Berkmen of New Haven Radiology Associates as advised by Dr. Mintz. On March 19, 2007, Jocelyn receive her first ESI. She felt some relief over the next two weeks, but then her symptoms returned. She reported back for a second ESI on June 7, 2007; but her symptoms remained persistent.

On November 2, 2007, Jocelyn reported back to Dr. Mintz. Dr. Mintz advised her that all conservative treatments had failed and that surgical intervention would be necessary. On November 14, 2007, Dr. Mintz performed a plasma disc decompression surgery on Jocelyn at Griffin Hospital. Jocelyn tolerated the procedure well and, within days of the surgery, she was pain free with only residual stiffness. On November 30, 2007, she returned for her post-operative exam and was discharged with a 15% cervical impairment rating.

After settlement discussions with Stanley Misiewicz's insurance company, Travelers, the company tendered the $100,000.00 policy. Negotiations then began with Jocelyn's insurance company, Amica, who offered another $115,000. Because she had $100,000.00 in MedPay, all of Jocelyn's bills were paid in full and the net to client was $143,333.34. Jocelyn had no lost wages from this accident.

Submitted by Robert Gould, Esq. of Carter Mario Injury Lawyers, Milford.
SETTLEMENT

Car v. Pedestrian Motor Vehicle Accident; settlement after mediation of $365,000

In the case of Hector Hernandez v. Ethan Tuchman, et al, Docket No. HHD-CV-06-5007044S, filed in the Hartford Superior Court, the parties settled a week after a day-long mediation held on January 22, 2008, for $365,000.

Mr. Tuchman was driving home and was minutes from home when he struck the plaintiff, Hector Hernandez, who was walking back to a friend’s car following an off-campus party at UConn. Mr. Hernandez was wearing dark clothing and his BAC exceeded the legal limit for operation of a motor vehicle. Mr. Tuchman fled the scene and crashed his vehicle, his last demand to settle was $30,000. The defendant’s insurance carrier offered an offer of judgment for $30,000. The plaintiff, all things considered, has recovered very nicely and is considering going to law school.

Submitted by Kevin Ferry, Esq. of the Law Offices of Kevin C. Ferry, LLC, Hartford.

JURY VERDICT

Motor Vehicle Accident; 29-year old female; 10% pdp of the left hand; Verdict of $60,000

In the case of Jennifer Johnston vs Mark Zapata, et al, Docket No. CV-00-0071480, filed in the Superior Court for the Judicial District of Middletown at Derby, a jury returned a verdict in favor of the plaintiff in the amount of $60,000 on April 22, 2003.

The plaintiff, a 29-year-old female, was rear-ended by the defendant’s box truck on Interstate 95 during heavy stop and go traffic conditions. The collision was low impact, with minimal property damage to the plaintiff’s car and no damage to the defendant’s truck. The plaintiff began to experience numbness, tingling and occasional pain in her left arm and hand two to three days after the accident. These symptoms continued periodically for 2 1/4 months before the plaintiff first went to see a physician for her complaints. The doctor, a hand specialist, diagnosed the plaintiff with carpal tunnel syndrome and eventually performed surgery on the plaintiff.

The doctor related her symptoms and surgery to the accident, stating that the plaintiff’s tight grip of the steering wheel in anticipation of the collision, as well as the lack of any previous symptomatology, made it more likely than not that the motor vehicle accident was the cause of her injury. The doctor assigned a 10% permanent partial disability of her left hand. She also incurred approximately $10,000.00 in medical bills.

Early in the litigation, the plaintiff filed an offer of judgment for $30,000. The defendant’s insurance carrier offered $15,000 to settle the case shortly before trial, which offer was rejected. The plaintiff’s last demand to settle was $30,000.

The defendant hired Dr. Jerold Perlman to perform an I.M.E. on the plaintiff. Dr. Perlman testified at trial that the plaintiff could not have suffered carpal tunnel syndrome from a one-time traumatic event such as the low impact collision which occurred in this case. The defendant also emphasized the significant gap in treatment between the date of the accident and the plaintiff’s first medical treatment 2 1/4 months later.

The jury awarded the plaintiff $10,000 in economic damages for her medical bills and $50,000 in non-economic damages, for a total verdict of $60,000. In addition, the plaintiff is also entitled to offer of judgment interest on the verdict.


SETTLEMENT

Slip and Fall; Settlement at Mediation of $1,000,000

In the case of Nichole Majette, et al, v. New London Housing Authority, et al, Docket No. HHD-CV-04-5015868-S, filed in the Hartford Superior Court, the parties settled for $1,000,000 at mediation with Judge Antonio C. Robaina one week before trial.

On June 8, 2003, plaintiff Nichole Majette, a single mother of five, was severely and permanently injured at the Thames River Apartments, a low-income apartment complex owned and operated by the defendant Housing Authority. The plaintiff was a resident of the complex. She slipped and fell in a puddle of urine while on her way to work at 7:30 a.m. For years, criminals and drug addicts had been loitering in the hallways of this low income complex. Numerous complaints of urination and defecation in the hallways by trespassers had been made to the police and the building had fallen into a state of disrepair. The U.S. Department of Housing and Urban Development had cited the New London Housing Authority for its many violations at this facility. The plaintiff and her co-tenants testified they often found puddles of urine in the hallways when going to work in the morning.

The plaintiff was diagnosed with a non-displaced fracture of her right dominant arm at the hospital emergency room. Two weeks later, as her pain was intolerable, she underwent emergency right forearm fasciotomies with extended carpal tunnel releases to relieve the increasing pressure in her right forearm and elbow. Thereafter, she underwent surgery for scar reduction of her extensive surgical scars.

The following months brought the plaintiff more pain and hospital visits. She underwent more surgery due to the instability and continual breakdown of her fasciotomy scars, and a fourth surgery to clean and disinfect the surgical wound. The plaintiff also underwent extensive pain management therapy, counseling and psychological treatment. According to doctors, as a result of the fall on June 8, she suffered an 80% to 90% permanent impairment rating for loss of use for her right upper extremity and suffered severe reflex sympathetic dystrophy. In addition, she had a 15% impairment of her cervical, thoracic, lumbar and right lower extremity due to the spread of reflex sympathetic dystrophy to her body.

This lawsuit was filed in July of 2004, as a class action on behalf of all the tenants of this apartment complex stemming from the squalid conditions that existed...
VERDICT AND SETTLEMENT REPORT

SETTLEMENT
Medical Malpractice;
Failure to Diagnose Abdominal Aortic Aneurysm; $850,000:

In this medical malpractice case, Estate of John Doe, et al v. ABC Hospital, which was filed in the Superior Court, the parties reached an agreement to settle for $850,000 during jury selection.

The plaintiffs' decedent presented to the defendants, a doctor, an internist, and an urgent care clinic operated by ABC hospital, for emergency medical treatment for severe left back, flank and left lower quadrant pain. At that time, the plaintiffs' decedent informed the defendants that the pain began suddenly and that he had not experienced any fall, trauma, gross hematuria, nausea or vomiting. The defendant doctor thereafter diagnosed the plaintiffs' decedent with a kidney stone, prescribed Vicodin, and released him from his care. In releasing the plaintiffs' decedent, the only instructions he was given was to increase his fluid intake.

Four hours later, after the plaintiffs' decedent returned to his home, he collapsed in the presence of his wife, who then called 911. The plaintiffs' decedent was administered CPR by emergency technicians that arrived on the scene and he was taken by ambulance to the hospital in full cardiac arrest. Shortly thereafter, he was pronounced dead in the emergency department at the defendant hospital. The autopsy revealed that the plaintiffs' decedent died from cardiac arrest following the rupture of an abdominal aortic aneurysm.

The experts retained by the plaintiffs all agreed that the defendants deviated from the standard of care by failing to adequately evaluate, diagnose, and treat the plaintiffs' decedent when he first arrived in the urgent care clinic. These opinions were supported by the defendant doctor's failure to order the appropriate diagnostic tests, which were readily available and necessary given the plaintiff's age, history, and symptoms. The plaintiffs' experts agreed that with a proper diagnosis and with proper treatment, including surgical repairs of his aneurysm, he would have survived and lived his full and normal life expectancy.

At the time of his death, the plaintiffs' decedent was 71 years old. On April 16, 2008, the first day of jury selection, the parties agreed to settle the case for $850,000.

Submitted by Robert I. Reardon, Jr., Esq. of The Reardon Law Firm, P.C., New London.

SETTLEMENT
Personal Injury;
Motor Vehicle Accident;
Settlement After Mediation of $1,850,000:

In the case of Richardo Garcia v. Edward J. Fox, et al, Docket No. CV-03-0178084-5, filed in Waterbury Superior Court, the parties settled after mediation on February 19, 2008 for the amount of $1,850,000.

On August 10, 2001, the plaintiff, who was 35 years old, was a passenger in a truck that was stopped in heavy traffic on I-95 in Fairfield. While the truck was stopped, it was rear-ended by a truck operated by Michael Bittar. M r. Bittar's truck had been struck in the rear by a tractor trailer owned by Logistics Express, Inc. and operated by Edward J. Fox.

Mr. Garcia, who was in the course of his employment at the time, sustained injuries to his neck, right arm and back. Initially, plaintiff was given a 12% permanent partial disability of the lumbar spine resulting in a 10.8% whole person disability. The plaintiff had both chiropractic and physical therapy treatments and was prescribed several forms of medication in an effort to relieve his chronic back pain. His back injuries required surgery consisting of discectomy fusion at L3-4 and L4-5 and eventually surgical placement of an intrathecal narcotic pain pump.

Plaintiff's medical bills exceeded $292,000, with a claim for Workers Compensation Benefits totaling $219,817.41. The case was complicated by plaintiff's prior back complaints and plaintiff's prior work history.

Submitted by D'Amico, Griffin & Pettinici, LLC, Watertown.

COURTSIDE HEARING IN DAMAGES

Enhanced Award for "Close Call" Damages; 10% Cervical Spine; $2,155 in Medicals; $53,000 Award


Thomas Henry's vehicle was hit by a car that lost control on Route 15, while he waited to enter the highway. The vehicle hit the rear quarter panel at high speed and would have hit his door had he not moved forward six feet at the last second. M r. Henry testified that had he not moved his vehicle, he would not be alive, and he thinks about this all the time. His medical bills were $2,155 and he suffered a 10% disability to his cervical spine on top of a pre-existing 10% from an earlier accident. His lost wages were $955.

Judge Robinson awarded his economic damages and $50,000 in non-economic damages citing that:

"... this court finds that the particular pain, anguish and nervousness that the plaintiff suffered as a result of the collision entitled him to more compensation because it was a 'near miss' or 'close call'. Regarding the non-economic award, the court factors the severity of the collision, with its unusual 'near miss' or 'close call'..."
aspect, as well as the after-effects of the plaintiff’s injuries on his ability to carry on and participate in his life as he had previously. Obviously, from the award, the court credited and believed the testimony of the plaintiff regarding how his injuries affected and currently affect his life.


Members should consider a jury charge in cases where physical injuries might not be great, but where there is a “close call,” instructing the jury to consider enhancing the award where the “close call” affects his everyday life. Allstate’s offer was $2,300, taking credit for $20,000 from the primary UIM policy.

Submitted by Anthony S. Bonadies, Esq., of Sette & Bonadies, P.C., Hamden.

SETTLEMENT

Motor Vehicle Accident; 24 Year Old Female; Settlement at Mediation: $4,250,000

On May 4, 2004, the 24-year-old female plaintiff, Alecia M. Howe, who is a Connecticut resident, was involved in a three-vehicle collision on the New Jersey Turnpike. The plaintiff was operating a 2000 Plymouth Neon when she was struck from behind by the defendant, a 2000 Plymouth Neon when she was struck with a conversion van. Plaintiff was struck from behind by the defendant, a 2000 Plymouth Neon when she was struck with a conversion van. Plaintiff was struck with a conversion van. Plaintiff was struck with a conversion van. Plaintiff was struck with a conversion van.

The plaintiff’s injuries were: Traumatic Brain Injury, Major Depressive Disorder, Post-Traumatic Stress Disorder, post-traumatic migraine headaches, Adjustment Disorder, Dysthymic Disorder, loss of consciousness with amnesia secondary to post-concussive syndrome, generalized anxiety disorder, Panic Disorder, Narcolepsy, Nausea, Vertigo with loss of balance, L1 lumbar fracture which will require invasive pain management injections and surgery, left first rib fracture at T1 and pneumothorax of the left lung, open nasal fracture, right scapular fracture, cervical strain with myofascitis resulting in 14% impairment of cervical spine, right shoulder injury resulting in 15% impairment, den- tal-maxillary injury resulting in nerve death of four upper front teeth, thoracic disc protrusion at T10-T11 resulting in 25% impairment to the thoracic spine which will require invasive pain management injections and spinal surgery, eyelid laceration requiring vicryl sutures resulting in permanent scarring, and post traumatic vision syndrome with midline shift affecting balance, with over-focusing and double vision.

The plaintiff has residuals from her traumatic brain injury causing cognitive dysfunction, severe depression and PTSD, as well as suffering from orthopedic disabilities in her thoracic and lumbar spines that have left her unable to attain her prior career goals. Formerly a graduate student on track to obtain a doctoral degree in Clinical Psychology, her functional employment is now limited to less mentally taxing work. Her medical bills totaled approximately $112,000.00 and her predicted future lost wages totaled approximately $1,765,000.00. Suit was brought and settlement was reached at mediation on February 22, 2008 for $4,250,000.

Submitted by D’Amico, Griffin & Pettinich, LLC, Watertown.

SETTLEMENT

Attack By Junkyard Dog; 42-Year Old Salesman; Orthopedic Injuries; Fusion Prognosis; Settlement of $200,000

In the case of H. Joseph Langlois v. Waldemar Bednarzczk and Mansfield Auto Parts, Inc., Docket No. CV-06-5006362-S, filed in the Superior Court for the Judicial District of Hartford at Hartford, a settlement was reached at voluntary mediation, with the assistance of Judge Graham, on the morning the parties arrived to pick the jury, September 9, 2008.

On October 11, 2004, the plaintiff, a salesman for a corporation that supplies necessary equipment to automobile salvage yards, made a sales call at the defendant’s facility. As plaintiff walked across the public portion of the parking lot, a large German shepherd, which was supposed to have been tied in the rear of the building lot during the daytime, attacked him. In an effort to escape the attack of the dog, plaintiff leapt onto a parked truck, slipped and fell on his back, injuring his neck and back. He also sustained bite wounds from the teeth of the German shepherd in his left arm and buttock. He went to Manchester Memorial Hospital that same day.

The plaintiff sued the defendants in statutory strict liability and traditional negligence. The defendants initially answered with a denial as to liability, but filed no special defenses. The pleadings were closed within three months of filing the complaint. A week before jury selection, defendants filed a revised answer admitting liability on all counts, thereby transforming the case into a hearing in damages and protecting themselves from exposure to testimony on liability issues.

From a damages prospective, the case presented interesting issues. The plaintiff delayed treatment for almost a year because the pain in his back was not severe initially. He then sought treatment from his family health physician, physical therapist and chiropractor. Eventually he sought the assistance of an orthopedic surgeon. He is medical specials at the time of trial were approximately $9,000.

Orthopedic surgeon Dr. Lane Spero found that plaintiff needed a two level anterior cervical discotomy fusion due to disc herniations at C5-6 and C6-7. The disability rating of the cervical spine could go up to 28% after the surgery. There was also a possibility of a decompression fusion at L5-S1 to repair the herniated lumbar disc. The projected cost of surgery was in the six figures.

Defendants had a video deposition of Dr. Druckemiller challenging the causal connection from a records review, but without the benefit of a personal exam. Defendants had not disclosed an expert otherwise, but did have an IME by Dr. Becker regarding the lumbar injuries only. In addition, defendants emphasized that plaintiff is an active recreational hockey player and has been and continues to be since the date of the injury.

Plaintiff had filed an Offer of Compromise in the amount of the limits of the Liberty Mutual insurance liability policy disclosed, which was $500,000. The plaintiff decided on the mediated settlement offer of $200,000.

Submitted by John L. Bonee III, Esq., of Bonee Weantrub LLC, West Hartford.
VERDICT OF $3,000,000
Construction Site Accident; Premises Liability

In the case of John Zingrone v. Joseph Ruiz & Troy Tasker dba Construction Concepts, Docket No. KNO CV-05-5100052-S, filed in the Judicial District of New London, the jury returned a verdict for the plaintiff in the amount of $3,000,000.

The defendants were general contractors who had been hired by an insurance company to do a fire rehabilitation job at a home in the Oakdale section of Montville. The plaintiff, John Zingrone, and the company he owned, Just Painting, Inc., was hired by the defendants as a painting subcontractor. Just Painting's job was to remove the smell of smoke from the home by applying what is known as "stain-kill".

On several occasions in May and June of 2003, Mr. Zingrone had been to the premises to apply the stain-kill. Each time he went to the premises, the stairs that led from the kitchen to the basement were present. On July 2, 2003, the defendants removed the stairs from the kitchen to the basement, but failed to place a barrier over the opening or give any sort of warning that the stairs had been removed. On July 11, 2003, Mr. Zingrone went back to the home with one of his employees at about 3 p.m. There was no electricity in the house and it was a dark dreary afternoon. The purpose of the visit was to show the employee what needed to be done to complete the job. As Mr. Zingrone was walking through the house and explaining to his employee what needed to be done,he made his way to the kitchen stairs that led into the basement. When he went to step on the stairs that had been there before, he fell eight feet into the basement onto a concrete floor.

As a result of the fall, Mr. Zingrone sustained heel fractures to both feet, with the right side being more severe than the left. The heel fracture on the right side was a "crush fracture". Mr. Zingrone also severely injured his left knee, resulting in multiple arthroscopic procedures. His left leg is now externally rotated and his knee is permanently bent. Mr. Zingrone also aggravated a prior back injury. The combination of these injuries has caused him to walk with a pronounced limp. Ultimately, Mr. Zingrone was given a 15% disability rating to his left knee and a 15% disability rating to his right heel by Dr. William Cambridge, an orthopedic surgeon from Norwich. Mr. Zingrone had medical expenses of $52,650. Mr. Zingrone is likely to need extensive medical treatment for his legs in the future, including a right ankle fusion and pain management.

Because of the injuries Mr. Zingrone was forced to give up his painting business that he had started in the early 1990's. Dr. Gary Crakes, an economist, testified that based on Mr. Zingrone's past earnings, he would have made somewhere in the range of $800,000 to $1,000,000 from the business.

The highest official offer from the defendants was $150,000. The last official demand was $1,200,000.

The jury deliberated two and a half hours over two days. They compensated Mr. Zingrone with $1,252,000 in economic damages and $1,748,000 in non-economic damages for a total of $3,000,000. The jury did not find any comparative negligence.

Submitted by Patrick J. Kennedy, Esq. and James D. Bartolini, Esq. of RisCassi & Davis, PC, Hartford.

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14 Tips For A Compelling Commercial Plaintiffs Case

Stewart I. Edelstein, Cohen & Wolf, P.C.

As the intrepid and trustworthy guide, you lead the way from Point A (start of trial) to Point B (judgment for plaintiff) along your well-planned route, charted with your theme in mind each step of the way. Here’s how.

**UNLIKE CASES** involving medical malpractice, personal injury, divorce, and alleged criminal acts, commercial cases typically lack drama and can be, well, boring. This article discusses ways to make the plaintiff’s presentation in a commercial case not just engaging, but compelling.

**GETTING THERE** Picture yourself as the intrepid leader of an expedition. Your goal is to get from Point A (the start of the trial) to Point B (a plaintiff’s judgment). You want to arrive there by the most direct route, avoiding swamps, boulder fields, treacherous stream crossings, and the like. Your opponent’s goal is to divert you from that path and, worse yet, to lead the judge (this article assumes a bench trial, except in the last section) from Point A to Point C (a defendant’s judgment) — somewhere you definitely do not want to go. So, how do you get to Point B most effectively? You must begin preparing for this expedition well before trial. Here are some useful tips.

1. **Choose A Compelling Theme**

   From your first client meeting, you should be thinking about the theme that will guide the judge along the path to Point B. As you learn additional facts, and conduct legal research, ask yourself: what theme suits the facts and the law best, and will make the judge want to rule in your favor? Think beyond just establishing the elements of each cause of action you assert. Your theme should be based on common sense — it must ring true — and it should be so succinct that it would fit on a billboard.

   For example, consider these themes, all of which put the dispute in human terms: people should live up to their promises (breach of contract); cheaters should pay the price for their deception (fraud); people should think before they speak, and a victim of someone who doesn’t care about his due (negligent misrepresentation); no one should take unfair advantage of another (unjust enrichment); someone who betrays another’s trust and confidence should suffer the consequences (breach of fiduciary duty); and everyone must play by the rules, or be punished (violation of an unfair trade practices act).

2. **Draft Your Complaint So It Is Consistent With Your Theme**

   In drafting your complaint, you could just mechanically recite the bare-bones facts of your case, without telling the story that promotes your theme. Even though Fed. R. Civ. P. 8(a)(2) provides that a complaint must be “a short and plain statement of the claim showing that the pleader is entitled to relief,” you have some leeway in drafting your complaint. The judge will read it before the trial starts. Within the bounds of proper pleading practice, draft a complaint that tells your client’s story in such a way that, by the time the judge finishes reading it, the conclusion is just about inevitable that your client is entitled to all the relief you seek. As you draft, ask yourself: how does each paragraph promote my theme? In early drafts, add all causes of action that you may want to include; then discard the weaker counts, because they detract from the stronger ones. Write short sentences in simple English, in short numbered paragraphs, with subheadings, as appropriate.

3. **Conduct Discovery To Get Admissions And Streamline The Trial**

   Conduct all pre-trial discovery with an eye toward gathering information and documents that will promote your theme in the courtroom. You can establish facts to establish or corroborate your causes of action by getting admissions of the opposing party. You can also streamline the trial, without the risk of getting answers at trial that divert you from your path, by putting the opposing party’s admissions into the record at trial. Here are some techniques:

   - **Use the deposition of the opposing party not just to gather facts, but to get admissions. Make sure, as you take that deposition, that you have obtained the admissions you need so that you can put them in the record at trial. Putting such admissions into the record at trial goes well beyond their use as impeachment.** Pursuant to Fed. R. Evid. ("FRE") 801(d)(2), such statements are not hearsay, and you can introduce such admissions as the admissions of a party. If the opposing party is an entity, take a FRE 30(b)(6) deposition, in which you can obtain an entity’s admissions. See also Fed. R. Civ. P. 32(a)(2), authorizing use of deposition transcripts of an opposing party — whether an individual or an entity — for any purpose allowed by the Federal Rules of Evidence. A real-time transcript is useful, if the client can pay the expense, so that during the course of the deposition you can be sure you have the admissions you need. If you take a video deposition, the judge at trial can observe your opponent making such admissions more compelling than mere words on a page.

   - **Take advantage of requests for admissions, as provided in Fed. R. Civ. P. 36.** Such admissions are conclusive for purposes of your case, unless the judge permits their withdrawal or amendment. See Fed. R. Civ. P. 36(b). In drafting requests for admissions, remember that they are not limited to facts, but can include admissions pertaining to “the application of law to fact, or opinions about either,” as well as “the genuineness of any described documents.” Fed. R. Civ. P. 36(a)(i). You can include similar but not identical requests for admissions, so that even if the opposing party can figure out a way to deny all or part of one request, you can get an admission on a similar request. You can also use requests for admissions to establish certain documents as business records, so that at trial you do not need to go through the cumbersome and sometimes time-consuming process of establishing that certain documents are within FRE 803(6), the business record exception to the hearsay rule.

   - **Obtain documents from third parties and from the public record.** Do web searches, but keep in mind that not everything you find on the internet is reliable. If your case involves public records, obtain certified copies, so that you can put them into evidence without the need to call any public official as a witness, as provided in FRE 803(8).

   - **When appropriate, seek judicial notice of adjudicative facts, as provided in FRE 201.** A court must take judicial notice of such facts if requested by a party and supplied with the necessary information. FRE 201(d). Such a fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. FRE 201(d). Such facts include, for example, prevailing interest rates, and more.

   (Continued on page 28)
4. Stipulate To Admission Of Documents As Full Exhibits

In most commercial cases, a subset of documents will be admissible at trial, without any bona fide objection. Seek agreement of opposing counsel for the admission of as many of these documents as you can, to streamline the trial. Of course, you must expect that defense counsel will likewise seek your stipulation to documents he or she wants in the record, but that is a small price to pay for the benefits to your client of such a stipulation. Pre-trial orders often include the requirement that parties so stipulate to the extent they can. Read all pre-trial orders carefully to be sure that you comply with this and all other pre-trial requirements.

5. File Motions In Limine On Key Evidentiary Issues

A motion in limine is a useful device that serves several functions. First, it alerts the judge that, during trial, an evidentiary issue will likely arise that will require more careful deliberation (possibly including research by the judge’s clerk) than run-of-the-mill evidentiary issues. Second, it gives you an opportunity to persuade the judge to see that evidentiary issue your way, with the benefit of your analysis of applicable evidentiary rules and precedents. Third, it avoids having the presentation of your case bog down just as you are building up a head of steam, while the judge hears extensive oral argument on a predictable evidentiary issue.

The downside of filing a motion in limine is that it highlights the evidentiary issue for your opponent, and gives your opponent the opportunity to review and analyze your view of that issue and the authorities you rely on, and to file an opposing memo on that issue. But the benefits of filing a motion in limine on key evidentiary issues typically outweigh this downside.

6. Prepare A Trial Notebook

This three-ring notebook will be your bible for the trial. Make separate subsections for key pleadings; chronology; list of plaintiff's exhibits; list of defendant's exhibits; each witness (inserting direct and cross examination notes, and deposition summaries); key exhibits (if not voluminous); and trial notes.

7. File A Pre-Trial Memo, Even If Not Required By The Pre-Trial Order

Keep in mind your role as the intrepid leader of this expedition from Point A to Point B. The pre-trial memo is your map for the judge, showing how to get there. Distill your case down to its essence. Write as few pages as possible. Every sentence should promote your theme. By the time the judge finishes reading your pre-trial memo, the judge should want to rule in your favor, needing only the trial record to justify getting to Point B.

8. Select As Few Witnesses As You Need And Present Them In A Logical Order

Put on only as many witnesses as you need to establish all the elements of each cause of action. With few exceptions (such as strategically important corroboration of key testimony), duplicative testimony may not only violate the rules (see FRE 403) — it can result in inconsistent testimony. Confusion only aids the defendant. Even if duplicative testimony is not inconsistent, consider whether the additional testimony will bog down the trial.

Under the theory of primacy (what we hear first we tend to remember better), your first witness should be very strong. Generally, you should present your witnesses so they can relate the facts in chronological order, although this is not always possible. Under the theory of recency (what we hear last we tend to remember better), end with a strong witness. Put witnesses whose testimony is required, but who either are weaker or whose testimony is less important or unavoidably tedious, in the middle.

9. Prepare Your Witnesses To Avoid Surprises In The Courtroom

If your witnesses have a good idea what to expect in the courtroom, they will be less ill-at-ease when they testify. When preparing your client, ask the same questions you plan to ask in the courtroom, while assuring your client that they are not script. In this respect, the trying case is more like performing jazz than classical music — classical musicians are limited to the notes on the sheet music, whereas jazz musicians can improvise. If you plan to use exhibits or demonstrative exhibits during your client’s testimony, make sure your client is thoroughly familiar with them, and comfortable with their use. Anticipate the cross of your client, and put your client through cross-examination before trial. Depending on your client’s prior courtroom experience and sophistication, it may be appropriate to take your client to the courtroom where the case will be tried, to get the feel of the place and a sense of the judge.

Discuss with your client the theme of your case and the legal theories supporting it, as well as defendant’s theme and theories to get to Point C, so that when your client answers questions on the stand, he or she understands the context. This is especially useful when your client answers questions on cross-examination. Your client will be less likely to be surprised by cross-examination questions that even you didn’t think of if your client has an understanding of the strategy underlying those questions. Your client will then be more likely to give answers to cross examination questions that are consistent with your theme.

When preparing witnesses other than your client, you don’t have the benefit of the attorney/client privilege. So, assume in any conversation you have with a non-client witness that opposing counsel is sitting next to you.

10. Ask Direct Examination Questions To Get To Point B Efficiently And Effectively

Some pointers:

- Keep your questions short. Shorter questions are easier to understand, for the witness and the judge, than long, convoluted questions.
- Ask questions using plain English words.
- Ask questions using a pace that moves things along nicely, but not so fast that the judge will be unable to follow the testimony or take notes. If the judge is taking notes during the testimony, as most judges do, keep an eye on the judge’s writing hand. If you are going too fast for the judge to write, slow down.
- Ask only questions that further your theme.
- Vary the types of your questions to avoid a dull back-and-forth with your witness. Include leading questions for preliminary matters (see FRE 66(c)).
- Use head notes, such as, “Let’s turn to the day you signed the agreement with Jones.” Such head notes are signposts along the trail, guiding the witness and judge to let them know just where you are, and where you are headed.

contents of court records, SEC filing requirements, federal regulations, scientific, technological, and mechanical principles, facts involving history, geography, locations of buildings, distances between places, and topological characteristics.
• Make a preemptive strike by asking the question the answers from the prior question or two. Loop backs reinforce the testimony your witness just gave, provide context for the question you are now asking, and strengthen the flow and logic of your presentation.

• Once you have the answers you need, do not try to “gild the lily” by asking the one question too many that too often results in a bad answer.

• Avoid objectionable questions. Each time you ask an objectionable question, your opponent is presented with an opportunity to place obstacles in your path, transforming a nice, easy trail into one full of rocks, roots, and ruts. If you inadvertently ask an objectionable question, and realize that it is truly objectionable, withdraw it (don’t say “stricken,” which only a judge can do), and ask a proper question.

• If opposing counsel objects to a question as irrelevant, use your response to reinforce your theme, explaining how the answer to your question is relevant to get to Point B.

• Don’t allow opposing counsel to take the judge on a detour off your trail in the guise of voir dire on a document, on competency of a lay or expert witness, or otherwise. When a judge does allow voir dire, make sure you object to the first question beyond the scope of proper voir dire.

• Use your voice like an instrument. Avoid the monotone Q and A that puts everyone to sleep.

• When eliciting key testimony, build up to it. Through the witness, bring out the significance of the event, creating anticipation, so that the judge is eager to hear that testimony.

• Make a pre-emptive strike by asking your own witnesses questions revealing weaknesses in their testimony. This may seem counterintuitive, but far better that you introduce this testimony first, so long as you don’t let it overshadow the helpful testimony. You can insert such testimony in the middle of your witness’s testimony, presenting it in the most favorable light that is reasonable, even though it is negative. You will not be able to explain it away, but you can put opposing counsel at a disadvantage, because by the time the judge hears the cross on this vulnerability, it is old news, with comparatively little impact.

• Before you end your direct examination of each witness, ask for a moment to review your notes. Once you say “no further questions,” it is awkward — and sometimes futile — to ask the court’s permission to ask further questions of that witness. Likewise, review your notes before resting your case, to satisfy yourself that you have put into the record at least a prima facie case.

11. Use Documents To Get To Point B Efficiently And Effectively

Put into evidence only documents that further your theme:

• Know the evidentiary basis for the admission of each document. Be prepared with code of evidence, precedent, and other authorities to support the admission of each document.

• Build up key documents to highlight their significance before introducing them, just as you do with key testimony.

• Introduce into the record the admissions in the transcript of the deposition of the opposing party (see Fed. R. Civ. P. 32(a)(2)) and the admissions in response to your requests for admissions (see Fed. R. Civ. P. 36) and F.R.E. 803(d)(2)). Keep in mind, though, that pursuant to FRE 106, opposing counsel can put in the record any other portions of the transcript of the deposition of the opposing party, or other responses to requests for admissions, which “ought in fairness to be considered contemporaneously with it.”

• Introduce into the record the deposition testimony of anyone (not necessarily a party) within the scope of Fed. R. Civ. P. 32(a)(4), which includes, among others, any witness who is more than 100 miles from the place of trial, any witness unable to attend the trial because of age or infirmity, or anyone whose attendance cannot be procured by subpoena. Be aware that FRE 105, the rule of completeness, applies to this transcript as well as to party admissions.

• To save time, and increase persuasiveness, introduce summaries of documents into evidence, as appropriate, taking advantage of FRE 1006. Remember that you cannot introduce summaries unless you make originals, or duplicates, of all the documents you summarize available for examination or copying, or both, at a reasonable time and place. So, consider the utility of summaries well before trial and comply with FRE 1006.

• Use demonstrative exhibits, as appropriate, to clarify complex testimony or documents. Examples include timelines, organization charts, and flow charts. Limit the amount of information in each demonstrative exhibit, so it is easy to understand. Use such exhibits in a way to avoid being faced with a challenge pursuant to FRE 403 and 6(n)(a), which give the judge discretion to keep out cumulative evidence and evidence that needlessly consumes time. Well before trial, play devil’s advocate by asking yourself how opposing counsel might use your proposed demonstrative exhibits against you, and make any necessary revisions.

• Consider using electronic demonstrative exhibits. If you do so, make sure you have the proper power sources and equipment in the courtroom, and are facile at using such equipment.

• Make an extra set of exhibits for opposing counsel, the judge, and the judge’s law clerk, with an individual tab for each.

• At trial, keep a list of all documents that are made full exhibits, so you know what you and opposing counsel put into the record, and all exhibits marked only for identification.

12. Select An Expert Who Has The Required Background And Experience

To get the best from your expert:

• Select an expert who can speak plain English, and knows how to use effective analogies.

• In establishing your expert’s credentials, intersperse leading questions (see FRE 604(c)) to move the testimony along.

• Anticipate any Daubert issues and make sure they are resolved before trial.

• It is not necessary to ask the judge to find that your expert witness is an expert on the subject for which you offer his opinion testimony. Accordingly, there is no reason to put this obstacle in your path to Point B.

• Do ask your expert his or opinion on the ultimate issue the judge must decide (see FRE 704(a)).

• Use the expert’s report to guide the judge through the expert’s testimony. Even though the expert’s report is hearsay, judges typically allow it as a full exhibit. Your expert is the teacher, the judge the student, and you are the moderator.
1.4 Tips For A Compelling Commercial Plaintiffs Case
(Continued from page 29)

13. Miscellaneous Tips

Here are some more ways to get from Point A to Point B:

- If you expect the judge to follow your lead, you must be trustworthy. In your pre-trial memo, make sure that each fact will be supported in the record, and that each legal authority you cite supports the proposition for which you cite it. During trial, be yourself, and don’t seek to have any witnesses exaggerate anything about themselves, or distort the truth in any way. In your post-trial memo, deal with the entire record, not just a skewed selection from only part of the record while ignoring anything inconsistent or adverse to your position. One misrepresentation taints everything you do. If you lose credibility, you risk losing your case.

- When you get a bad answer from your own witness, don’t panic. Ask yourself if you have asked the question in a way that confused the witness. If so, rephrase the question. If the witness is hopelessly confused at that point, go to a different subject. If the witness is your client; discuss the troublesome testimony during the next break, unless the judge precludes such discussions. If your client was confused, but your discussion clarifies what you were seeking, deal with what will be apparently inconsistent testimony head-on. Make clear on the record, after the break, that your client understood by your earlier question “X,” whereas, reworded, he or she now understands the import of the question is “Y.” This detour off your path is usually avoidable by careful preparation.

- When an activist judge asks your witnesses many questions, they should not be surprised by this turn of events, and should be advised before trial to look the judge squarely in the eye and answer the judge’s questions directly. You should listen carefully to the judge’s questions, and make the most of any follow-up questions you may want to ask on a subject that obviously has the judge’s attention.

- Stay organized. Your space at counsel table should be neat and tidy. You should have on it only what you need, and nothing more.

- If you are trying the case with co-counsel, have a stack of note cards with you at counsel table. They are handy for communication between you and co-counsel without any conversation that could interfere with your undivided attention on the witness, judge, and opposing counsel. Each card should have only one point on it. You can then discard cards (in a recycling bin) as you cover each point.

- Keep in mind your role as leader of this expedition. Even when you are diverted from your planned route to Point B, keep your composure, and remember that there is more than one way of getting from Point A to Point B.

- Don’t burn out during trial. Make the time each day to do something relaxing. Even an intrepid expedition leader needs time to unwind during an arduous trek.


14. Adjust All This Advice For A Jury Trial

All the advice in this article is as useful in a jury trial as in a bench trial, with some modifications:

- Well before trial, get advice from a non-lawyer. Describe the facts of your case, without disclosing whom you represent. Start with the most basic facts, and ask what additional facts would be required to decide who should win. Provide that additional information. Find out what facts make a difference, and why. Then present your theme to determine if it is effective. Brainstorm other themes. More formally, you can do this with a focus group or mock jury.

- As in a bench trial, be trustworthy. In your opening statement, throughout the trial, and in your closing argument, do not promise what you cannot deliver, and do not misrepresent or distort anything.

- Even though you should reinforce your theme throughout the trial, don’t bludgeon the jury with it. Generally, people do not like to be told what to think, and prefer to arrive at their own conclusions. As an analogy, consider Seurat’s pointillist masterpiece, A Sunday Afternoon on the Island of La Grande Jatte, the pixelated paintings of Chuck Close, or the connect-the-dots puzzles you did as a kid. Each is nothing more than dots, but together, the dots form an image. Each dot is a fact, and it is for the jurors to connect those facts to come up with their own image — which is, of course, what they find at Point B.

- Unlike in a bench trial, in a jury trial you risk confusion or worse by using legal terms that a juror will not understand. The judge is a seasoned trekker, who generally knows the territory, although the judge has not been down this particular path. The jurors are novices, just learning the ropes, and need more guidance on the path to Point B.

- Consider using more demonstrative exhibits in a jury trial, to keep the expedition more engaging to lay people.

- Make sure you include the jury as each document is made a full exhibit. Think of effective and creative ways to publish each exhibit to the jury, such as blow ups, copies for each juror, and displays on computer monitors in electronically-enhanced courtrooms.

- Unlike in a bench trial, in a jury trial you make an opening statement and closing argument (both of which you should practice in front of a mirror). Each should be no longer than necessary, in simple English, and promote your theme. Your opening statement is your opportunity to show the jurors the map of the trial along which you will lead them. Your closing argument is a recap of the route you took together, weaving in your theme to explain why the destination you brought them to is where they ought to be. In a jury trial, you also have input on the charge of the jury. Ideally, the jury charge is the judge’s explanation of how the jury can arrive at your destination.

CONCLUSION By implementing all these tips, you enhance the likelihood that you and the judge or jury will arrive together at Point B, having made the trek at a steady pace, on your well-planned route, charted with your theme in mind each step of the way.
PRACTICE CHECKLIST FOR
14 Tips For A Compelling Commercial Plaintiffs Case

__ Choose a compelling, succinct, common-sense theme.
__ Draft your complaint so it is consistent with your theme.
__ Conduct discovery to get admissions and streamline the trial.
__ Get deposition admissions and judicial admissions in response to requests for admissions to promote your theme.
__ Obtain certified copies of public records.
__ Draft your complaint so it is consistent with your theme.
__ Conduct discovery to get admissions and streamline the trial.
__ Get deposition admissions and judicial admissions in response to requests for admissions to promote your theme.
__ Obtain certified copies of public records.

Get judicial notice of adjudicative facts.
__ Stipulate to admission of documents as full exhibits.
__ File motions in limine on key evidentiary issues.
__ Prepare a trial notebook.
__ File a pre-trial memo.
__ Select as few witnesses as you need and present them in a logical order.
__ Prepare your witnesses to avoid surprises in the courtroom.

Ask direct examination questions efficiently and effectively:
__ Ask short questions in plain English at a comfortable pace.
__ Ask only questions that promote your theme.
__ Vary the types of your questions.
__ Use headnotes and loop backs.
__ Don’t ask the one question too many.
__ Avoid objectionable questions.

Counter defense counsel’s objections in a way that reinforces your themes.
__ Cut off voir dire that derails your case.
__ Use your voice like an instrument.
__ Make a pre-emptive strike on weaknesses in your witnesses’ testimony.
__ Review your checklist before ending your questions of each witness, and before resting your case.

Use documents efficiently and effectively:
__ Put into evidence only documents promoting your theme, and know the evidentiary basis for each.
__ Build up significant documents.
__ Put into evidence deposition testimony and responses to requests for admissions.
__ Put into evidence summaries of voluminous documents.
__ Use demonstrative exhibits.
__ Make sufficient copies of documents.
__ Keep track of which documents are in evidence, and which are for identification only.

Select an expert who will support your theme efficiently and effectively:
__ Select an expert with the requisite background and experience who speaks in plain English and who is not subject to a Daubert challenge.
__ Have your expert testify on the ultimate issue.
__ Introduce your expert’s report into evidence.

Miscellaneous tips:
__ Do not misrepresent or distort anything.
__ Be prepared for a bad answer from your own witness.
__ Prepare your witnesses for questioning by the judge.
__ Stay organized during trial.
__ Use note cards to communicate with co-counsel during trial.
__ Be flexible during trial.
__ Avoid burnout during trial.

Adjust all this advice for a jury trial:
__ Workshop your case with a non-lawyer, focus group, or mock jury.
__ Don’t promise more than you can deliver in your opening statement and don’t mischaracterize the record in your closing argument.
__ Don’t bludgeon the jurors with your theme.
__ Try your case at the level of the jurors.
__ Use more demonstrative exhibits than at a bench trial.
__ Publish each exhibit to the jurors in a meaningful way.
__ Promote your theme in opening statement, in closing argument, and in the
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