

**Update on Evidence 2009**  
by Bob Adelman and Neil Sutton

*“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.”*  
John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials,  
December 1770.

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## ***Introduction***

This Update covers civil cases and, to the extent useful in civil cases, criminal cases, published from November 11, 2008 through September 8, 2009.

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

However, as stated in the commentary to CCE §1-2 (b): “Although the Code will address most evidentiary matters, it cannot possible address every evidentiary issue that might arise during trial.” In addition, the authors have included a few cases dealing not with evidence, but with trial practice and procedure, which may be of use to trial lawyers. Therefore, in addition to the articles outlined in the Code, the Table of Contents contains six additional headings: Expert Disclosures, Final Argument, Sufficiency of Evidence, Jury Selection, Juror Misconduct and Hearing in Damages.

## ***IV. Relevancy***

§ 4-1           EXTRINSIC EVIDENCE ADMISSIBLE TO EXPLAIN AMBIGUITY IN AGREEMENT – ISHAM V. ISHAM, 292 Conn. 170 (2009); Katz, J.; Trial Judge – Harrigan, J.

**RULE:**           Where an agreement is susceptible of more than one interpretation, evidence regarding the parties’ intent is admissible.

**FACTS:**        The parties’ separation agreement provided that the defendant would initially pay \$150,000 per year in alimony with an automatic adjustment based on fluctuations in the defendant’s “salary.”

At the time of the dissolution, the defendant received an annual salary of \$500,000 and no bonuses. His compensation package was later changed to include bonuses and stock options. His 1997 W-2 reflected total compensation of \$1.3 million, of which defendant claimed only \$646,000 was salary. By 2003, his W-2 indicated total compensation of \$6.58 million, of which defendant claimed only \$900,000 was salary. While the defendant increased his alimony payments, he did so based upon the “salary” alone.

Plaintiff filed a motion for contempt, claiming that “salary”, as used in the separation agreement, was intended by the parties to include bonus compensation.

The trial court held that “salary” was clear and unambiguous, and did not include bonuses, and therefore refused to allow testimony as to the intended meaning of “salary.”

The Supreme Court reversed.

**REASONING:**

At the court hearing at which the parties’ marriage was dissolved, the separation agreement was put on the record orally. During that recitation, plaintiff’s counsel referred interchangeably to the defendant’s “salary” and his “income”. The written agreement did not define the term “salary”. The Court ordered that the transcript of the hearing be placed in the file and be treated as the separation agreement.

In light of counsel’s interchangeable use of the terms “salary” and “income”, the Supreme Court held that both interpretations of the term salary, with or without bonuses, were plausible. Therefore, the Court held, extrinsic evidence of the parties’ intent should have been admitted.

§ 4-3 POST ACCIDENT TRANSFER OF HOME – STATE V. COCCOMO,  
115 Conn. App. 384 (2009); Bishop, J.; Trial Judge – Devlin, J.

**RULE:** Evidence that defendant transferred ownership of her home ten days after a collision is inadmissible in a criminal case, where its probative value is outweighed by its unfair prejudicial effect. (This type of evidence is admissible in a civil case.)

**FACTS:** The defendant, a second grade school teacher, attended a work-related dinner at which sangria was served. Defendant testified she drank between one and two glasses of sangria. As she was driving home, she came around a curve, crossed three feet over the center line, and collided head-on with another vehicle, killing its three occupants.

Defendant's blood was drawn in the ambulance on the way to the hospital. Her blood alcohol was reported as 0.241. However, there was substantial evidence to support the defendant's claim that there had been a mix-up of blood samples, and that the blood which revealed this blood alcohol content was not hers. In addition, there was uncontradicted evidence that her actions at the scene and afterwards were inconsistent with someone whose blood alcohol content was 0.241 - she did not appear "sloppy drunk".

The State offered three documents as evidence of consciousness of guilt: (1) an excerpt from defendant's medical records documenting that she received a printout of her blood alcohol content result three days after the collision; (2) a certified copy of a quitclaim deed showing that 10 days after the collision the defendant transferred ownership of her house to her mother for one dollar; and (3) a certified copy of a City of

Stamford tax card showing that the house an appraised value of more than \$500,000. The trial court admitted the documents. The defendant was convicted.

The Appellate Court reversed.

**REASONING:**

The trial court had relied on Batick v. Seymour, 186 Conn. 632 (1982), where the Supreme Court held that in a civil case evidence of such a transfer of property was admissible against the defendant. However, the Appellate Court held that, in a criminal case, the unfair prejudicial effect of such evidence outweighs its probative value:

“The evidence admitted was likely to lead the jury to believe that the defendant transferred her property in an attempt to evade any responsibility she may have had in the accident. Because there were three fatalities resulting from the collision in this case, evidence of such an effort by the defendant to protect her assets was likely to inflame the jury and distract it from the issues at hand. On this basis, we conclude that the consciousness of guilt evidence was more prejudicial than probative, and, therefore, was admitted improperly.”

115 Conn. App. At 401.

**COMMENT:** Although each case turns on its specific facts, this type of evidence is generally admissible in a civil case.

§ 4-3           PROBATIVE VALUE OF MEDICAL PAMPHLET OFFERED ON CREDIBILITY OUTWEIGHED BY PREJUDICIAL EFFECT – COSTANZO V. GRAY, 112 Conn. App. 614, *cert. denied*, 291 Conn. 905 (2009); Beach, J.; Trial Judge – Shaban, J.

**RULE:**           The probative value of a pamphlet issued by a medical equipment manufacturer, which describes a procedure at variance with the procedure used by the defendant physician, is outweighed by its unfair prejudicial effect when offered only on credibility.

**FACTS:** Plaintiff went to Dr. F. Scott Gray with lower back pain. An MRI revealed a left herniated lumbar disc. Gray recommended surgery. The plaintiff signed a consent form authorizing a “left L4-L5 microdiscectomy” using the METRx retractor.

In a pre-surgical medical history form Gray submitted to Danbury Hospital, he described the plaintiff’s chief complaint as “right leg discomfort with a large right-sided L4-L5 disc herniation by MRI scan.”

Gray operated on the right side of the plaintiff’s disc. In his operative report, Gray’s pre-op and post-op diagnosis was “right-sided herniated disc L4-L5.”

Following a post-op office visit, Gray wrote that he had operated on the right side of the plaintiff’s back “because so many of his symptoms were on the right side....”

The surgery did not relieve plaintiff’s symptoms, and he required an additional surgery. Plaintiff sued Gray, claiming he negligently operated on the wrong side of the disc and failed to obtain informed consent to the surgery.

At trial, Gray admitted that the plaintiff had never had any right-sided symptoms, and conceded that the MRI showed the herniation to be on the left side. However, Gray claimed that he did not operate on the wrong side, and testified that he removed material from the right side to create space for the bulge on the left to sink back into place.

Gray’s expert testified that, although Gray operated on the right side, this was a left microdiscectomy with “a contralateral approach.”

Gray had performed the surgery using a METRx retractor system, which allows the surgeon to access the disc by splitting muscles instead of peeling them back layer by layer.

The manufacturer of the METRx system, Medtronic, had issued a pamphlet which included diagrams depicting how the system works. The diagrams showed that when one operated on a left-sided herniated disc, one operated on the left side of the disc. The pamphlet did not show or mention the “contralateral approach” described by Gray and his expert.

Plaintiff’s counsel attempted to introduce the pamphlet during the cross-examination of Dr. Gray. Gray testified that “most of the time” he did not give the METRx pamphlet to his patients, and that there were no useful documents available to help him describe the METRx procedure to his patients.

Plaintiff sought to cross examine Gray on whether he had given the pamphlet to another patient, claiming that this impeached Gray’s testimony that “most of the time” he did not use the pamphlet with his patients, and that he did not think there was a useful pamphlet from the manufacturer to give to patients.

Defendant objected, because the other patient had a pending lawsuit against Gray, so the examination would lead to unfairly prejudicial questions about the other lawsuit.

The defendant objected to the admission of the pamphlet on the basis that there was a high likelihood that the jury would misuse the pamphlet as evidence of what the manufacturer of the METRx system thought was the proper approach for the procedure. In other words, the jury might infer from the diagrams that it was the opinion of the manufacturer that when removing a left-sided herniated disc, a surgeon should operate on the left side.

The trial court sustained the objections to both the patient’s testimony and the pamphlet. There was a defendant’s verdict. The Appellate Court affirmed.

**REASONING:**

“The court acted within its discretion to balance the use of the pamphlet for credibility purposes against the concern that the diagram in the pamphlet would be unduly prejudicial and subject to misuse by the jury”. 112 Conn. App. at 620-21.

**COMMENT:** The danger of unfair prejudice would have been greatly reduced by offering the pamphlet through plaintiff’s own expert, pursuant to CCE §8-3(8), as evidence of the standard of care.

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

§ 7-2 QUALIFICATIONS OF EXPERTS: IN RAILROAD STATION PREMISES SECURITY CASE, SPECIFIC RAILROAD EXPERTISE NOT NECESSARY – SUPERSEDING CAUSE LIVES - SULLIVAN V. METRO-NORTH COMMUTER RAILROAD COMPANY, 292 Conn. 150 (2009); Vertefeuille, J.; Trial Judge – Frankel, J.

**RULE:** In an inadequate security case against a railroad involving one of its stations, plaintiff is not required to produce an expert with “railroad expertise.”

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

Sullivan’s estate sued Metro-North, claiming that his death was a result of inadequate security at the station.

Plaintiff disclosed a premises security expert, a former police officer with a substantial premises security background, but no specific experience, training or knowledge in security at railroad stations.

The defendant filed a motion to preclude his testimony on the ground that the expert was not qualified to render an opinion on security at a railroad station. The motion was granted by the trial court. The jury returned a verdict for the defendant. The Appellate Court affirmed.

The Supreme Court reversed the Appellate Court.

**REASONING:**

The trial court precluded the testimony principally because of the expert's lack of experience with railroad station security. The Supreme Court held that this was too narrow a focus:

“Resolution of the issue before us turns on whether the issue before the jury involved premises security generally or railroad security in particular. The plaintiff's decedent first encountered Hines and his companions on Monroe Street, a public street not far from the railroad station. Hines and the men followed the decedent as he ran to the stairway underneath the railroad trestle. There was a physical altercation on the stairway and Hines then shot the decedent on those stairs, which led up to the railroad platform. On these facts, we conclude that the jury was called upon to decide an issue of premises security in general. We see no distinction between security on a stairway that happens to lead to a railroad platform and security on any other public stairway in a high crime area. The stairwell in which the attack against the decedent occurred is open to and accessible by the public at all times. Although it provides access to the railroad platform, there is nothing about this stairway that is unique to railroads. The stairs simply connect the building and platforms to sidewalks and streets in the immediate vicinity of the railroad station. The fact that the stairway leads to a railroad platform is incidental to the issue of security in that stairwell. The matter at issue here had nothing to do with safety specific to railroads, such as boarding or deboarding a train or installation of safety signals along the tracks. See, e.g. *Maguire v. National Railroad Passenger Corp.*, United States District Court, Docket No.99 C 3240, 2002 U.S. Dist. LEXIS 5226, \*16 (N.D. Ill. March 28, 2002) (safety measures regarding boarding train are specific to railroad for purpose of admissibility of expert testimony). In other words, the negligence alleged by the plaintiff is not specific to railroad stations.”

292 Conn. at 159-160.

**SUPERSEDING CAUSE:**

This case also considers another issue of critical interest to plaintiff’s lawyers: whether or not the doctrine of superseding cause survived Barry v. Quality Steel Products, Inc., 263 Conn. 424 (2003). The answer is that the doctrine still applies in three situations: (1) an unforeseeable intentional tort; (2) a force of nature; or (3) a criminal act.

Fortunately, Justice Katz’s concurring opinion specifically instructs the trial court to instruct the jury “that the doctrine applies only when the intentional attack was unforeseeable.” 292 Conn. at 169. Since in a negligent security case, it is necessary to prove that the criminal act was reasonably foreseeable to the defendant, plaintiff’s counsel should be able to carry this burden.

§ 7-2            QUALIFICATIONS OF EXPERTS:    INSURANCE ADJUSTER  
QUALIFIED TO TESTIFY ON COST OF REPAIR - SOVEREIGN  
BANK V. LICATA, 116 Conn. App. 483 (August 18, 2009); Bishop, J.;  
Trial Judge – Tyma, J.

**RULE:**        An insurance adjuster with experience adjusting property damage claims is qualified to offer an opinion on the cost to repair damage to a home, despite the fact that he is not a contractor or engineer.

**FACTS:**       Plaintiff filed an action to foreclose the defendant’s property. The defendant filed counterclaims, including a claim of negligent misrepresentation. Defendant alleged that as a result of the plaintiff’s actions, she moved out of her home and that while the home was vacant, pipes burst, resulting in water and mold damage. The negligent misrepresentation counterclaim was tried to a jury.

Defendant offered the testimony of Anthony Parise, an insurance adjuster specializing in property damage claims to estimate the cost of repair. Plaintiff objected on the ground that the adjuster lacked the necessary expertise on the cost of repairs. The trial court allowed the insurance adjuster to testify. The Appellate Court affirmed.

**REASONING:**

“On the basis of our careful review of the record, we conclude that the court correctly permitted Parise to testify as a property damage expert. At the time of trial, he had sixteen years of experience as a property damage adjuster, making him particularly suited for the task of determining the cost to repair the defendant’s home. We are not persuaded by Seven Oaks’ argument that Parise is unqualified as a property damage expert because he is not a contractor or an engineer, for this court has long found that “it is not essential that an expert witness possess any particular credential, such as a license, in order to be qualified to testify, so long as his education or experience indicate that he has knowledge on a relevant subject significantly greater than that of persons lacking such education or experience.” (Internal quotation marks omitted.) *Pettit v. Hampton & Beech, Inc.*, 101 Conn. App. 502, 514, 922 A.2d 300 (2007); *Conway v. American Excavating, Inc.*, 41 Conn. App. 437, 448-49, 676 A.2d 881 (1996).

116 Conn. App. at 510.

§ 7-2 CAUSATION TESTIMONY HELD ADMISSIBLE AFTER PORTER INQUIRY IN BREAST CANCER CASE – SAWICKI V. NEW BRITAIN GENERAL HOSPITAL, 115 Conn. App. 25 (2009); Bishop, J.; Trial Judge – Tanzer, J.

**RULE:** In the context of a motion in limine, the court conducted a Porter inquiry concerning plaintiff’s causation expert. Testimony by the expert regarding prognosis based upon tumor size, rate of growth, and number of positive lymph nodes, with appropriate references to medical literature, was held admissible.

**FACTS:** On August 2, 2000, plaintiff had a regularly scheduled mammogram with the defendant radiology group, Mandell & Blau, M.D.’s, P.C. A radiologist employed by

the group noticed new masses, found the mammogram inconclusive and recommended further evaluation with an ultrasound.

Plaintiff returned a week later for the ultrasound. A different radiologist decided to do another mammogram instead. He interpreted the mammogram as inconclusive, and recommended plaintiff return on “the normal schedule”. Whether that meant she should return in four months or a year was disputed.

Defendant alleged the plaintiff failed to return for a follow-up appointment in December 2000.

A mammogram done when plaintiff returned on June 4, 2001 revealed two highly suspicious masses. A biopsy done two days later confirmed cancer. The cancer had spread to the plaintiff’s lymph nodes.

Defendant filed a motion to preclude plaintiff’s causation expert pursuant to State v. Porter, 241 Conn. 57 (1997) on the ground that the testimony of expert, Dr. Gerald Sokol, was not supported by any scientifically reliable methodology. The trial court denied the motion in limine. The Appellate Court affirmed this part of the trial court’s ruling.

**REASONING:**

“The court held a *Porter* hearing at which Sokol testified that as a result of the defendant’s failure to diagnose the plaintiff’s cancer in August, 2000, her chance of recovery was diminished. Sokol testified that the most significant factor in determining survivability is the number of cancer positive lymph nodes or the volume of the tumor. He opined that if the plaintiff’s cancer had been found in August, 2000, instead of June, 2001, the plaintiff would have had far fewer positive nodes and a greater than 50 percent chance of survival. Sokol based his opinion on the number of positive lymph nodes found in July, 2001, the rate of growth of the plaintiff’s tumor and the fact that the number of positive nodes has a linear relation with the volume of cancerous tumors. In support of his opinion, Sokol cited several medical journal articles that he provided to the court.

“The court denied the defendant’s motion to preclude. In doing so, the court indicated that it considered Sokol’s testimony, the written materials that he provided to the court and the affidavit of the defendant’s expert witness. The court found that Sokol’s opinions were reliable and were “based on scientific knowledge rooted in methods and procedures of science [including] articles in peer reviewed literature pertinent to his opinions.” The court further found that there is “a general acceptance of the tumor mode metastasis staging, that is, tumor, size, node involvement and prognostication of the outcome.... [T]he relation between tumor size, lymph node status and outcome has been qualitatively known for many years. Numerous studies have shown the value of using tumor size and nodal status to estimate prognosis in breast cancer.... [The articles relied on by Sokol] also pertain to a relationship between tumor size, be it primary or multifocal or centric, and the number or percentage of nodes involved... indicating a linear relationship between [the] diameter of [the] primary tumor and [the] percent [of] positive lymph nodes.” In further support of its conclusion that Sokol’s opinion was based on appropriate methodology, the court referred to a statement contained in the affidavit of the defendant’s expert witness in which he, too, relied on peer reviewed literature in opining as to the plaintiff’s chance of survival if she had commenced the recommended treatment in June, 2001. The court further found that Sokol’s testimony was relevant because it related to the plaintiff and the facts of her case and her disease. The court stated that it based its conclusions on the principles and methodology underlying Sokol’s opinions, not the substance of his conclusions, because the jury is entitled to give those conclusions whatever weight it deems appropriate.”

115 Conn. App. at 44-45.

The Appellate Court reversed the defendant’s verdict on the ground of juror misconduct (discussed below), but addressed the Porter issue because it will arise on retrial.

**COMMENT:**

In light of the great weight the Appellate Court accorded Judge Tanzer’s decision below, a Porter hearing may not be necessary in future breast cancer cases in which the expert’s opinion is based upon tumor size, rate of growth, and number of positive lymph

nodes, and is supported by medical literature. A similar issue is addressed in the next case.

§ 7-2            PORTER APPLIES TO HORIZONTAL GAZE NYSTAGMUS TEST BUT HEARING NO LONGER REQUIRED - STATE V. POPELESKI, 291 Conn. 769 (2009); *Per Curiam*; Trial Judge – Olear, J.

**RULE:**            Although the horizontal gaze nystagmus test is the type of scientific evidence which requires a Porter inquiry, because a number of cases have held that the test satisfies Porter's requirements for the admission of scientific evidence, trial courts no longer need conduct Porter hearings before admitting the evidence.

**FACTS:**            In this drunk driving prosecution, the police officer administered the horizontal gaze nystagmus test, and the defendant flunked. The defendant objected to the admission of the horizontal gaze nystagmus test because the officer did not test in strict accordance with the National Highway Traffic Safety Administration (NHTSA) protocol. The trial court held that the officer was properly trained in administering the test and interpreting the result. The officer had complied substantially with the standard of the NHTSA and any variance from those standards went to weight, not admissibility.

The Supreme Court affirmed.

**REASONING:**

The Supreme Court endorsed a series of Appellate Court decisions holding that since the horizontal gaze nystagmus test has previously passed muster after a Porter inquiry, it is no longer necessary for the trial courts to hold additional Porter hearings:

“Although this court never has addressed the standards required for the admissibility of evidence of a horizontal gaze nystagmus test, the Appellate Court has “consistently expressed [the] view that horizontal gaze nystagmus evidence is the type of scientific evidence that may

mislead a jury in the absence of a proper foundation... [and has] enunciated [a] three part test that must be satisfied before such evidence is admissible. The test required that the state (1) satisfy the criteria for admission of scientific evidence, (2) lay a proper foundation with regard to the qualifications of the individual administering the test and (3) demonstrate that the test was conducted in accordance with relevant procedures.” (Citation omitted.) *State v. Balbi*, 89 Conn. App. 567, 573-74, 874 A.2d 288, cert. denied, 275 Conn. 919, 883 A.2d 1246 (2005). In addition, the Appellate Court has concluded that because the horizontal gaze nystagmus evidence satisfies the requirements of *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), the trial court is not required to hold a *Porter* hearing in every case in which horizontal gaze nystagmus evidence is proffered. *State v. Balbi*, supra, 576-77. “The state still must lay a proper foundation with regard to the qualifications of the individual administering the test and demonstrate that the test was conducted in accordance with generally accepted standards such as those specified in the relevant section of the [traffic safety administration’s] manual.” *Id.*, 577.”

291 Conn. at 774-5 (footnote omitted).

§ 7-3(a) CREDIBILITY OF WITNESSES AND THE ULTIMATE ISSUE – STATE V. BEAVERS, 290 Conn. 386 (2009); Norcott, J.; Trial Judge – Gold, J.

**RULE:** An expert cannot express an opinion on an ultimate issue when the opinion is founded not upon scientific investigation, but rather, on an assessment of the credibility of witnesses.

**FACTS:** Defendant resided at a town house with his son, his mother, and the mother’s boyfriend. Defendant was accused of setting a fire at the town house in an attempt to kill the mother’s boyfriend, but which ended up killing his mother.

During the investigation statements were taken from the defendant, the defendant’s son, and from the mother’s boyfriend. These statements conflicted. Most importantly, the defendant claimed that his son had told him that he had been smoking in

the basement and had knocked over an ash tray which started the fire. The son denied ever smoking in the basement and denied ever making such a statement to his father.

A state trooper and certified fire marshal, Kevin McGurk, testified as an expert for the State. McGurk was asked his opinion as to the cause of the fire. The defendant objected that the question called for an opinion as to the ultimate issue in the case. The objection was overruled. McGurk testified that he felt the fire was intentionally set. He testified that in reaching his opinion he considered the interviews with the defendant and his son. He testified that the interviews eliminated accidental ignition as a cause of the fire.

The trial court admitted the opinion. The defendant was convicted of arson murder. The Supreme Court found error, though harmless.

**REASONING:**

The interviews would support McGurk's opinion that accidental ignition was eliminated as a cause of the fire only if he concluded that the defendant was lying and the son was telling the truth.

CCE §7-3(a) only allows opinion testimony on the ultimate issue "where the trier of fact needs expert assistance in deciding the issue." (Example: breach of the standard of care in a medical malpractice case.) The Supreme Court held that the jury did not need McGurk's assistance in determining whether the defendant or his son was telling the truth.

"Put differently, McGurk's ultimate conclusion that the fire was intentionally set was founded not on his scientific investigation, but rather, on an assessment of the defendant's credibility with respect to his explanation of how the fire started, as well as the other circumstantial evidence proffered by the state, such as the defendant's motive and history of starting fires. Allowing McGurk to testify as to this conclusion,

therefore, improperly invaded the province of the jury. Accordingly, we conclude that the trial court abused its discretion when it permitted McGurk to give an opinion about the ultimate issue in this case.”

290 Conn. at 418-19.

§ 7-4 FAILURE OF COURT TO RECOGNIZE BREACH AND CAUSATION ISSUES INTERTWINED – KLEIN V. NORWALK HOSPITAL, 113 Conn. App. 771, *cert. granted*, 292 Conn. 913 (2009); West, J.; Trial Judge – Tobin, J.

**RULE:** Preclusion of expert’s opinion on causation, although inextricably intertwined with expert’s opinion on breach, found harmless when jury found no breach.

**FACTS:** Plaintiff alleged that a nurse inserting an intravenous line negligently hit a nerve in his arm, causing nerve palsy.

Plaintiff’s expert, an anesthesiologist, was disclosed on the standard of care and causation.

The defendant’s expert, an orthopedic surgeon, opined that the nerve palsy was caused not by the insertion, but by Parsonage Turner Syndrome.

In anticipation of this testimony, plaintiff attempted to elicit from his expert his opinion that the plaintiff’s nerve palsy was not caused by Parsonage Turner Syndrome<sup>1</sup>. Defendant objected on the ground that plaintiff’s expert disclosure did not state that the expert would be offering an opinion that the nerve palsy was not caused by Parsonage Turner Syndrome. The objection was sustained.

As expected, defendant’s expert later testified that the nerve palsy was caused by Parsonage Turner Syndrome.

Interrogatories were submitted to the jury. The first interrogatory asked whether or not the defendant breached. The jury answered “no”, and returned a defendant’s

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<sup>1</sup> Not to be confused with Parsonage Turner Overdrive. (Please delete this footnote before publication.)

verdict. The plaintiff's motion to set aside the verdict was denied. The Appellate Court affirmed.

**REASONING:**

The Appellate Court never reached the issue of whether the ruling precluding the plaintiff's expert from testifying that plaintiff's nerve palsy was not caused by Parsonage Turner Syndrome was error.

The Appellate Court ignored the logical necessity that, if the jury accepted the defense expert's opinion that the nerve palsy was caused by Parsonage Turner Syndrome, they also accepted that the nurse did not negligently hit a nerve – and there was no breach of the standard of care.

The Supreme Court has granted cert.

**COMMENT:** An accepted method of proving negligence is eliminating non-negligent causes of an injury.

***VIII. Hearsay***

§ 8-8            HEARSAY DECLARANT MAY BE IMPEACHED WITH EVIDENCE OF BIAS OR PREJUDICE - STATE V. CALABRESE, 116 Conn. App. 112 (2009); Gruendel, J.; Trial Judge –Levin, J.

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

**FACTS:** Defendant was accused of assaulting his 72-year old mother. On the night of the alleged assault, the mother gave a statement to the police that the defendant “grabbed me by the arm and the hair and pulled me out of the bathroom.”

At trial, the mother testified for the defendant and denied that her son grabbed her. Her police statement was placed in evidence pursuant to CCE §8-5(1).

Defendant sought to demonstrate to the jury his mother’s bias and prejudice against him by playing for the jury statements she left on his answering machine almost three years before.

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

In its entirety, the answering machine recording contained a string of separate messages from the complainant as follows:

“Edan.

“Please pick up Edan.

“Would you pick up please?

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

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

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

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

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

“Pick up. Won’t you pick up?

“I asked for a goddamn sandwich and I never got it and I had a call from the victim’s advocate and you are in a hell of a lot of trouble if you don’t bring me my sandwich – cheeseburger! You better bring it here and leave it right on the doorstep you son of a bitch<sup>2</sup> you bastard!

“Pick up. [PAUSE] Please pickup.”

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

116 Conn. App. at 406 n. 17.

The trial court did not allow the defendant to play the recording.

The Appellate Court found error and reversed.

### **REASONING:**

This was the second case in which the defendant was convicted of assaulting his mother. In State v. Calabrese, 279 Conn. 393 (2006) the Supreme Court reversed the first conviction because the trial court did not allow the defendant to play the same recording. The trial of this second case took place before the Supreme Court’s decision.

The Appellate Court considered itself bound by the Supreme Court opinion. The State argued that the fact that the recording was made almost three years before the second assault should lead to a different result. The Appellate Court disagreed: “This is the type of evidence that a jury may fairly consider to be not necessarily affected by the passage of time.” 116 Conn. at 128.

### ***IX. Authentication***

§ 9-1a            TEST FOR AUTHENTICATION OF COMPUTER-ENHANCED AND SLOWED VIDEO FOOTAGE – TRANSFER FROM VIDEO TO DVD - STATE V. MELENDEZ, 291 Conn. 693 (2009); Palmer, J.; Trial Judge – Alexander, J.

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<sup>2</sup> Apparently, Mom didn’t pick up on the irony of using this particular expletive.

**RULE:** The Supreme Court applied the test for computer generated evidence set forth in State v. Swinton, 268 Conn. 781 (2004) to the parts of a DVD which slowed and/or enhanced videotaped images transferred to a DVD. However, the court held that no such foundation was required for a recording merely transferred from a videotape to a DVD and which constituted an exact copy.

**FACTS:** Prosecution for the sale of narcotics. An informant purchased narcotics from the defendant on October 8 and October 14, 2004. The informant was outfitted with a surveillance device hidden in his jacket, which captured audio and video and transmitted it to a nearby surveillance vehicle where it was recorded on videotape.

Before trial, Special Agent John Rubinstein of the DEA delivered the videotape to Detective Brunetti of the West Haven Police Department. Brunetti transferred the contents of the 8 mm videotape to his computer's hard drive.

Brunetti then made four separate video segments of the October 8 drug buy: (1) an exact copy of the buy; (2) the same footage slowed to 10% of normal speed; (3) "enhanced" footage at normal speed; and (4) enhanced footage at 10% of normal speed. The same process was repeated for the October 14, 2004 transaction, for a total of eight segments.

Rubinstein testified at trial that he had hand-delivered the original videotape to Brunetti. Rubinstein further testified that he was present when the DVD copies were made, but that Brunetti did the work. Brunetti did not testify. William Hoffman, the police officer who was in the van operating the videotape equipment, testified that the "enhanced" real time footage was an accurate representation of what he had seen in the surveillance van.

The defendant objected to the playing of the DVD on the basis that the State had not laid the foundation for “computer generated evidence” as set forth in State v. Swinton. The trial court allowed all eight segments of the DVD in evidence.

The Supreme Court found error as to six of the segments.

**REASONING:**

State v. Swinton was a lengthy opinion which set forth the guidelines for the admission of computer-enhanced photos or video and computer-generated images.

“In addition to the reliability of the evidence itself, what must be established is the reliability of the procedures involved, as defense counsel must have the opportunity to cross-examine the witness as to the methods used. We note that “[r]eliability problems may arise through or in: (1) the underlying information itself; (2) entering the information into the computer; (3) the computer hardware; (4) the computer software (the programs or instructions that tell the computer what to do); (5) the execution of the instructions, which transforms the information in some way--for example, by calculating numbers, sorting names, or storing information and retrieving it later; (6) the output (the information as produced by the computer in a useful form, such as a printout of tax return information, a transcript of a recorded conversation, or an animated graphics simulation); (7) the security system that is used to control access to the computer; and (8) user errors, which may arise at any stage.”

Swinton, 268 Conn. at p. 813.

At issue in Swinton were computer-generated images of the defendant’s teeth which were then overlaid, or superimposed, upon photographs of bite marks on the victim’s breast.

The State argued in State v. Melendez that images copied from a videotape onto DVD, even when slowed and/or “enhanced”, did not require the same type of foundation. The Supreme Court agreed with the State regarding the segments which were merely copied without slowing or enhancement, but disagreed regarding the segments which were slowed and/or enhanced:

“In *Swinton*, we acknowledged the difficulty in establishing a precise definition of what constitutes “computer generated” evidence. *Id.*, 804. We did, however, draw a distinction between technologies that may be characterized as merely *presenting* evidence and those that are more accurately described as *creating* evidence. *Id.* With that fundamental distinction in mind, we conclude that the portions of the DVD containing the exact duplicates of the original, unenhanced footage played in real time, simply do not constitute computer generated evidence for purposes of *Swinton*. Thus, to the extent that Brunetti merely transferred a copy of the contents of the original eight millimeter videotape to the DVD, that process, which Rubinstein witnessed, does not implicate the foundational standard that we adopted in *Swinton*. Although it is true, of course, that generating such a copy required the use of technology, that technology, which is widely used and readily available, involves nothing more than the reproduction of video footage from one medium to another. Indeed, the defendant has provided no reason why the admissibility of copies that are produced by that process—copies that have not been enhanced, altered or changed in any way—should be subject to the more rigorous requirements of *Swinton*. We conclude, therefore, that compliance with *Swinton* was not a prerequisite for admission of the unmodified video clips contained on the DVD.

“Of course, that evidence nevertheless was subject to the same foundational requirements for admission as any other demonstrative evidence. “Such evidence should be admitted only if it is a fair and accurate representation of that which it attempt to portray.” *Tripp v. Anderson*, 1 Conn. App. 433, 435, 472 A.2d 804 (1984). Rubinstein testified that the footage contained on the DVD was the same as the footage contained on the eight millimeter videotape on which the drug transactions were captured as they were taking place. Moreover, Hoffman, who operated the equipment when those recordings were made, testified that the footage contained on the DVD was the same as the footage that he observed when it originally was captured. This testimony was sufficient to authenticate the unmodified video footage on the DVD. Consequently, that footage properly was introduced into evidence and considered by the jury.”

Melendez, 291 Conn at pp. 709-11 (footnotes omitted).

As to the “enhanced” real-time computer-generated footage, the testimony of Hoffman (the officer in the van) that this footage was an accurate representation of what he saw on his monitor was insufficient.

Nonetheless, the Supreme Court found the error in admitting the slowed and enhanced segments to be harmless and affirmed the conviction.

### ***Expert Disclosures***

**SECTION COMMENT:** One overarching principle emerges from the cases that follow: our appellate courts do not reverse trial judges for allowing experts to testify despite technical errors, but do reverse trial judges for precluding experts from testifying because of such technicalities.

PRECLUSION OF EXPERT DISCLOSED SEVEN MONTHS BEFORE TRIAL REVERSED - GIBLEN V. GHOGAWALA, 111 Conn. App. 493 (2008); Bishop, J.; Trial Judge - Karazin, J.

**RULE:** Preclusion of plaintiff's expert seven months before trial for failure to comply with discovery order, where plaintiff did not act in bad faith, held to be an abuse of discretion.

**FACTS:** Medical malpractice action in which the plaintiff was ordered to disclose her expert by June 2, 2006. On June 12, 2006, the defendant filed a motion to preclude. The plaintiff did not file an objection or any other response to the motion to preclude. On August 7, 2006, the court granted the motion to preclude.

On November 21, 2006 the plaintiff filed a motion to modify the scheduling order and disclosed her expert witness. In the motion to modify the scheduling order the plaintiff stated that her expert resided and practiced medicine in Peru. On December 18, 2006 the court denied the motion to modify.

On January 4, 2007, the plaintiff filed a motion to reargue her motion to modify the scheduling order and indicated that her expert in Peru had been involved in a personal

injury which interfered with his communication with the plaintiff and plaintiff's counsel. Counsel represented that she had traveled to Peru to obtain the necessary opinion from her expert, and offered to transport her expert to the New York area, at plaintiff's expense, for deposition. The trial was scheduled for July 2007.

On January 23, 2007, the court denied the plaintiff's motion to reargue. Defendant then filed a motion for summary judgment which was granted.

The Appellate Court reversed.

**REASONING:**

On appeal the plaintiff argued that the court's sanction was disproportionate to her violation. The Appellate Court agreed:

“Although we have previously upheld sanctions when expert disclosures were delayed and interfered with the orderly progress of trial, in this case, there was no claim by the defendant and no finding by the court that the late disclosure of the plaintiff's expert would interfere with the trial date. We therefore conclude that the preclusion of the plaintiff's expert was disproportionate to her violation of the scheduling order and that the court, therefore, improperly rendered summary judgment in favor of the defendant.”

111 Conn. App. at 499.

FACT TESTIMONY, RELATING TO STANDARD OF CARE, MAY BE GIVEN BY DEFENDANT PHYSICIAN ALTHOUGH NOT DISCLOSED AS EXPERT - WYZOMIERSKI V. SIRACUSA, 290 Conn. 225 (2009); Rogers, C.J.; Trial Judge – Sferrazza, J.

**RULE:** A defendant physician who has not been disclosed as an expert may give fact testimony as to his reasons for pursuing the particular course of treatment he chose for the patient.

**FACTS:** Medical malpractice action. The decedent had a history of early stage cirrhosis, but stopped drinking in 1980. In 1995 he had an episode of acute pancreatitis.

On July 5, 2001 he had another episode and was referred to a surgeon, Dr. Francis Siracusa, for evaluation of the pancreatitis.

Siracusa ordered a CT scan and ultrasound which revealed gallstones in the decedent's gall bladder. He recommended a laparoscopic cholecystectomy (removal of the gall bladder) and intraoperative cholangiogram (exploration of the bile ducts with dye).

Siracusa performed the surgery on July 25, 2001. The gall bladder was removed. The cholangiogram revealed a gallstone in the decedent's common bile duct, which Siracusa was unable to flush out. He therefore recommended an endoscopic retrograde cholangiogram pancreatography (ERCP) with a papillotomy to eliminate the gallstone. The ERCP was done on July 30, 2001 by a gastroenterologist, who found no gallstone in the common bile duct and concluded that it must have passed on its own.

About a week later, decedent began to ooze blood from the crevice under the liver where the gall bladder had been removed, and began a steady decline. His liver and kidneys failed, and he died.

Plaintiff sued Siracusa alleging that the ERCP should have been done before the cholecystectomy because if the ERCP had been successful in eliminating the gallstone in the common bile duct, it would have resolved the pancreatitis without the need for the surgical removal of the gall bladder. The removal of the gall bladder was the cause of the bleeding, liver failure, and death.

The case was tried to the court. The defense did not disclose an independent expert or file an expert disclosure as to the defendant himself.

Siracusa testified as the only defense witness. Before he testified, the plaintiff moved that Siracusa be precluded “from providing explanations or justifications for his course of treatment of the decedent and any other matter beyond factual discussions or factual events.” 290 Conn. at 232.

The trial judge did not allow Siracusa to testify about the standard of care. However, he did allow Siracusa to testify about the reasons for his actions - why he did what he did. The Supreme Court affirmed.

**REASONING:**

“The purpose of Practice Book § 13-4(4) is to assist the parties in the preparation of their cases, and to eliminate unfair surprise by furnishing the opposing parties with the essential elements of a party’s claim. See *Wexler v. DeMaio*, 280 Conn. 168, 188-89, 905 A.2d 1996 (2006).”

290 Conn. at 234.

The trial court found, and the Supreme Court agreed, that the plaintiff could not be surprised that the defendant would testify not only about what he did, but the reasons he chose this course of treatment. Plaintiff’s claim that because Siracusa was not disclosed as an expert, counsel decided as a matter of strategy not to inquire into those matters during Siracusa’s deposition, failed to sway the trial court or the Supreme Court.

**COMMENT:**

Footnote 8 creates some confusion about whether or not a treating physician’s testimony constitutes expert opinion subject to the rules of disclosure applicable to experts. The authors’ opinion is that a treating physician’s opinion is subject to the expert disclosure rules. The recent expert disclosure rules, applicable to cases filed after January 1, 2008, resolve any ambiguity and outline exactly what expert disclosures are required for treating physicians.

## *Final Argument*

COMMENTING ON FAILURE TO CALL ANY EXPERT PERMITTED – STURGEON V. STURGEON, 114 Conn. App. 682, *cert. denied*, 293 Conn. 903 (2009); Lavine, J.; Trial Judge – Pittman, J.

**RULE:** Although a party cannot argue that the jury should draw an adverse inference from an opponent's failure to call a specific witness (without proof that the witness is available<sup>3</sup>) a party can comment on the opponent's failure to produce any expert testimony on an issue.

**FACTS:** The plaintiff and the defendant are brothers. On August 10, 2005, the plaintiff, a professional carpenter, was helping the defendant repair damage on the defendant's house.

The plaintiff, on a ladder 14 to 15 feet high, alleged that his brother was supposed to be holding the bottom of the ladder. In fact, he had walked away. The ladder kicked out and the plaintiff fell on a fence surrounding a dog pen.

After the plaintiff's case, the defendant moved for a directed verdict on the basis of the plaintiff's failure to provide expert testimony on the standard of care for use of a ladder and on causation. The court concluded that expert testimony was not required and denied the motion.

During closing argument defendant's counsel pointed out that the plaintiff had not produced any expert testimony on causation – whether or not, if the defendant had held

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<sup>3</sup> § 52-216c provides: **Failure to call a witness. Jury instruction prohibited; argument by counsel permitted.** No court in the trial of a civil action may instruct the jury that an inference unfavorable to any party's cause may be drawn from the failure of any party to call a witness at such trial. However, counsel for any party to the action shall be entitled to argue to the trier of fact during closing arguments, except where prohibited by section 52-174, that the jury should draw an adverse inference from another party's failure to call a witness who has been proven to be available to testify.

the ladder, it would have kicked out anyway. Defendant's counsel suggested that the plaintiff should have produced an engineer to provide the jury with evidence on this point.

The plaintiff objected to the argument. The trial court ruled that it would allow both sides to argue regarding what evidence was necessary to prove the case. The Appellate Court affirmed.

**REASONING:**

This opinion makes clear, in footnote 4, that C.G.S. §52-216(c), which prohibits counsel from arguing an adverse inference as to a witness unless that witness has been proved to be available, only applies to a specific witness, not to commenting on a lack of evidence or the failure to produce a type of evidence.

Thus, in the previous case Wyzomierski, plaintiff would have been entitled to comment on defendant's failure to produce an independent expert. (See, Pederson v. Vahidy, 209 Conn. 510 (1989).)

This argument is also permitted where the defense does not avail itself of the opportunity to obtain an independent medical examination.

***Sufficiency of Evidence***

CAUSATION - PLAINTIFF NOT REQUIRED TO ELIMINATE CONCLUSIVELY ALL NONNEGLIGENT CAUSES OF ACCIDENT - BURTON V. STAMFORD, 115 Conn. App. 47 (2009); Gruendel, J.; Trial Judge – Jennings, J.

**RULE:** To establish causation, a plaintiff is not required to remove from the realm of possibility all nonnegligent causes of an accident. Instead, the plaintiff is required only to prove that it is more likely than not that the negligence on which the plaintiff relies was a proximate cause. Eyewitness testimony from the defendant, accident

reconstruction, the police accident report and photographic evidence regarding the vehicles immediately after the collision are sufficient evidence for the jury to infer the defendant's negligent conduct caused the collision.

**FACTS:** The plaintiff, who had no memory of the collision, had been traveling east on Main Street in Stamford. The last thing he remembered was heading to a Jamaican restaurant on Main Street.

The defendant police officer had been traveling on Main Street, responding to a call on Clinton Avenue. The roadway was wet. The defendant testified he saw the plaintiff's car "at rest" on Main, facing the opposite direction, in front of the Jamaican restaurant. The defendant testified he started his left turn from Main onto Clinton Avenue and then suddenly the plaintiff's car was in front of him and he collided with it. The collision took place completely within the plaintiff's lane of travel.

In other words, the defendant turned left and collided with the plaintiff's car, which was proceeding straight through the intersection.

In addition to the defendant's testimony, the plaintiff put in evidence: 24 photographs of the accident scene; the police accident report; and accident reconstruction testimony from the investigating police officers.

After the close of the plaintiff's case, the defendant moved for a directed verdict on two grounds: governmental immunity and evidentiary insufficiency. The trial court initially granted the motion on the basis of governmental immunity.

After receiving supplemental briefs the court decided it had made a mistake in granting a directed verdict based on governmental immunity. However, the trial court granted the motion, relying principally on Winn v. Posades, 281 Conn. 50 (2007), and

finding that the evidence was insufficient to establish that the defendant's negligence caused the plaintiff's injuries.

The Appellate Court reversed.

**REASONING:**

This brilliant Appellate Court decision by Judge Gruendel is the most comprehensive review in 40 years of what constitutes evidence sufficient to prove causation in a car accident case.

The opinion begins with this simple statement: "Directed verdicts are disfavored in this state." Burton, at p. 66. It then traces the case law, through Terminal Taxi v. Flynn, 156 Conn. 313 (1968) and Toomey v. Danaher, 161 Conn. 204 (1971), before turning to Winn v. Posades and finally Hicks v. State, 287 Conn. 421 (2008), in which the Supreme Court backtracked on the draconian holding in Winn.

The opinion holds that the plaintiff presented enough circumstantial evidence for the jury to infer that it was the defendant's negligence, and not some other unknown cause, that was a proximate cause of the collision:

"In concluding that the evidence was insufficient as a matter of law as to causation, the trial court speculated as to other possible causes of the collision. For example, the court posited that the plaintiff's vehicle could have suffered a mechanical malfunction, that its windshield wipers were inoperable or even that a purchase from the Jamaican restaurant may have slipped off of the seat, distracting the plaintiff. The jury was presented with no evidence of such events. In addition, noting that there was evidence that the left front tire of the plaintiff's vehicle "was flat after the collision," the court questioned whether a tire blowout had transpired. The invocation of such alternatives implicates a central precept articulated in *Hicks* and *Terminal Taxi Co.* regarding the proper evidentiary burden to be placed on a plaintiff in such cases. We repeat that "[t]he standard is not the plaintiff must remove from the realm of possibility all other potential causes of the accident; rather, it is that the plaintiff must establish that it is more likely than not that the cause on which the plaintiff relies was in fact a proximate cause of the accident." *Hicks v. State*, supra 287 Conn. 438;

see also *Terminal Taxi Co. v. Flynn*, supra, 156 Conn. 318 (plaintiff's proof need not "negate all possible circumstances which would excuse the defendant" or "rise to that degree of certainty which excludes every reasonable conclusion other than that reached by the jury"). As the Supreme Court has explained, "[i]t may be conceded that the plaintiff's evidence did not exclude the [alternate causation] hypothesis.... But she was not required to prove beyond a reasonable doubt that the defendant [was the cause]. This being a civil case, it was enough if the evidence induced in the minds of the jurors a reasonable belief that the fact was so.... The purpose of the circumstantial evidence was to show that it was more probable that the defendant [was the cause], and to satisfy the jury in view of all the testimony that the defendant probably did it. If it was sufficient for this purpose it was enough." (Citation omitted) *Bradbury v. South Norwalk*, 80 Conn. 298, 301-302, 68 A. 321 (1907); see also *Engengro v. New Haven Gas Co.*, 152 Conn. 513, 517, 209 A.2d 174 (1965) ("[w]e do not required that the plaintiff's evidence exclude every other hypothesis but her own"); W. Prosser & W. Keeton, *Torts* (5th Ed. 1984) § 41, p. 269. Although it is conceivable that the plaintiff's vehicle suffered a tire blowout in the moments prior to the collision, the evidence suggests that it is more likely that the flat tire was a casualty of a head-on automobile collision. Indeed, the court's finding that (1) the plaintiff's vehicle "had gone through the... intersection proceeding straight on Main Street" just prior to the collision, (2) the plaintiff's vehicle came to rest "parallel to the double yellow line and well within [its] lane" following the collision and (3) "[t]he bumper of the police car had crumpled the front bumper and left front fender of the [plaintiff's vehicle] back approximately to the point of its left front tire" tend to undermine that hypothetical."

115 Conn. App. at 85-86.

REMITTITUR REQUIRED WHERE JURY AWARD EXCEEDS EXPERTS' ESTIMATE OF FUTURE ECONOMIC LOSS – EARLINGTON V. ANASTASI, 293 Conn. 194 (2009); McLachlan, J.; Trial Judge – Tanzer, J.

**RULE:** If a jury awards future economic damages in excess of the plaintiff economist's estimate, the amount of the award in excess of that estimate must be remitted.

**FACTS:** As a result of an improper delivery, Omar Earlington, Jr. suffered from Erb's Palsy, a paralysis of the arm resulting from an injury to the brachial plexus nerve bundle.

Plaintiff called two experts regarding plaintiff's future economic damages: (1) a life care planner, who estimated plaintiff's future care costs at \$14,367.66 per year; (2) an economist, who estimated the present value of those costs at \$524,355, and the present value of the plaintiff's loss earning capacity at \$565,519. Thus, the estimate for both items was \$1,045,874.<sup>4</sup> The jury awarded \$1,588,000. The trial court affirmed the verdict.

The Supreme Court ordered a remittitur of the \$542,126 that exceeded the experts' estimate.

**REASONING:**

Plaintiff argued that the estimates of the experts were based upon picking the mid points of a range of values, and that the jury should be permitted to award an amount within those margins. The Supreme Court rejected this argument on the ground that the ranges in question were not placed in evidence.

**COMMENT:**

Consider having your economist testify about the whole range of values.

***Jury Selection***

BATSON CHALLENGE – REQUIREMENT OF PATTERN OF DISCRIMINATION – STATE V. COLLAZO – 115 Conn. App. 752, *cert. denied*, 293 Conn. 904 (2009); Pellegrino – J.; Trial Judge – Thim, J.

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<sup>4</sup> The math does not work. There appears to be an error in the Supreme Court opinion.

**RULE:** The fact that a party previously accepted two members of the class in question is strong evidence that there was not a pattern of discrimination.

**FACTS:** Assault prosecution in which the defendant was Hispanic. The State exercised a preemptory challenge against B, also Hispanic. The defendant raised a challenge pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). The prosecutor responded that he was challenging the juror because she was a teacher and because she had never heard of the Latin Kings. The trial court denied the Batson challenge. The Appellate Court affirmed.

**REASONING:**

The Appellate Court was clearly impressed by the fact that the prosecutor had already accepted two Hispanic jurors. In addition, the Appellate Court pointed out that use of preemptory challenges on the basis of employment has been held permissible.

***Juror Misconduct***

JURORS' EXPOSURE TO EXTRINSIC EVIDENCE REQUIRES COURT TO CONDUCT IMMEDIATE INQUIRY - STATE V. KAMEL, 115 Conn. App. 338 (2009); Lavine, J.; Trial Judge – Grogins, J.

**RULE:** When a jury is exposed to extrinsic evidence, the court must hold an inquiry to determine whether harm has occurred.

**FACTS:** The defendant ran a store in Norwalk. When a state marshal went to the premises to take possession, take an inventory, and change the locks, he found a black bag which the defendant said was his. When the defendant refused to leave, police officers arrived. They arrested the defendant for criminal trespass and interfering with an officer. They took him to the police station with his black bag.

In the bag, the police found drugs and a pair of brass knuckles. Defendant was charged with drug possession, but not with possession of the brass knuckles.

At trial, the arresting officer testified as to the contents of the black bag, including the brass knuckles. The State moved to introduce the brass knuckles into evidence. The defendant objected on the ground that the brass knuckles were not relevant. The court sustained the objection.

The jury returned a verdict of guilty on all charges. The trial judge went into the jury room to thank the jurors and saw that the brass knuckles had been in the jury room during the jury deliberations. The judge did not inform counsel at that time and it was not put on the record.

Three months later, the court summoned the prosecutor and the defendant (who was representing himself) and informed them that she had seen the brass knuckles in the jury deliberation room. She further informed them that the jurors understood they were not suppose to consider the brass knuckles and did not.

The defendant filed a motion for a new trial. The trial judge denied the motion. The Appellate Court reversed.

**REASONING:**

The Appellate Court held that the trial court was required to conduct an inquiry immediately after discovering the brass knuckles. It further held that the failure to conduct the inquiry immediately required reversal, and that under the circumstances a remand was an insufficient remedy.

**COMMENT:**

Given the popularity and availability of the internet, more information is easily accessible to jurors, for whom the temptation to investigate or research a case may be hard to resist.

JUROR MISCONDUCT EVALUATED ON OBJECTIVE STANDARD - SAWICKI V. NEW BRITAIN GENERAL HOSPITAL, 115 Conn. App. 25 (2009); Bishop, J.; Trial Judge – Tanzer, J.

**RULE:** The test for evaluating juror misconduct is an objective standard: whether or not a reasonable person would conclude the misconduct probably affected the verdict. The test is not whether in fact the misconduct did affect the verdict. Therefore, statements by jurors that the misconduct did not affect their deliberations or decision are irrelevant and should not be elicited or considered.

**FACTS:** See §7-2, above. Affidavits and testimony taken after the verdict made clear that the jurors had discussed the evidence before the case was submitted to them and that some jurors had expressed opinions regarding the likely outcome of the case before the case was submitted to them.

In a comprehensive hearing after the verdict, most of the jurors confirmed that the misconduct occurred, but testified that it did not affect the deliberations or their decision in the case. The trial judge relied on that testimony in denying the motion for a mistrial. The Appellate Court reversed.

**REASONING:**

A trial court should not inquire as to the jurors' mental processes, or as to whether or not the misconduct affected their decision. Rather, the trial court should ascertain what the misconduct was, and then, based on an objective evaluation of the extent of the misconduct, decide whether or not the misconduct probably affected the result.

“Here, the court did not follow the analytical path set forth by this decisional law. Rather than focus on the nature and quality of the jury misconduct, the court fastened its decision on responses by the jurors that they followed the court’s jury instructions notwithstanding their predeliberation discussions of the evidence and expressions of opinion regarding the plaintiff’s case. Specifically, the court found that the jurors followed the court’s instructions not to decide the issue before hearing all of the evidence. The court focused on the testimony of the jurors and the assertions they made during the hearing as to the actual impact the misconduct had on them.”

115 Conn. App. At 39 (footnote omitted).

“In other words, the court employed an incorrect legal analysis in determining whether the plaintiff was prejudiced by focusing its attention on the mental processes of the jurors and drawing conclusions from their testimony as to the *actual effect* of the misconduct, and not the *probable effect* of their misconduct as objectively judged by its nature and quality.”

Id. at 40.

The Appellate Court held that the trial court abused its discretion by concluding that it was not probable that the misconduct prejudiced the plaintiff’s case.

### ***Hearing in Damages***

DEFENDANT DEFAULTED FOR DISCIPLINARY REASON MAY NOT AVAIL SELF OF PRACTICE BOOK SEC. 17-34(a) – PETERSON V. WOLDEYOHANNES, 111 Conn. App. 784 (2008); Gruendel, J.; Trial Judge – Wagner, J.

**RULE:** Where a disciplinary default has entered against a defendant and the defendant has failed to cure the underlying cause of the default, the defendant is not permitted to take advantage of Conn. Pract. Book Section 17-34(a).

**FACTS:** Plaintiff sued defendant to enforce an alleged partnership regarding the purchase of six condominium units. Plaintiff alleged that she and the defendant had agreed to buy the units together and instead the defendant purchased them alone.

During discovery, plaintiff requested that the defendant produce telephone records which she thought would reflect contacts between the plaintiff and the defendant, the defendant and attorneys involved in the sale of the units, and the defendant and the sellers of the units. The court ordered the defendant to turn over the records, and she did not do so. She was defaulted.

On the day before a hearing in damages, the defendant partially complied with the discovery order. On the second day of the hearing, the court allowed the defendant to file a notice pursuant to Practice Book §17-34(a), which provides:

“(a) In any hearing in damages upon default, the defendant shall not be permitted to offer evidence to contradict any allegations in the plaintiff’s complaint, except such as relate to the amount of damages, unless notice has been given to the plaintiff of the intention to contradict such allegations and of the subject matter which the defendant intends to contradict, nor shall the defendant be permitted to deny the right of the plaintiff to maintain such action, nor shall the defendant be permitted to prove any matter of defense, unless written notice has been given to the plaintiff of the intention to deny such right or to prove such matter of defense.”

Prior case law established that the entry of the default shifts the burden of proof on the allegations in the complaint to the defendant, and entitles the plaintiff to nominal damages.

After the hearing in damages, the court entered judgment for the defendant. The Appellate Court reversed.

**REASONING:**

The Appellate Court noted that the plaintiff was prejudiced by the defendant’s continuing failure to provide the telephone records”

“The plaintiff argues, therefore, that because she never received much of the requested discovery, the court should have prevented the defendant from filing a notice of defenses pursuant to Practice Book § 17-34(a) and

from actually presenting defenses to the underlying claims of liability. This is a novel argument that has not before been considered by an appellate court in Connecticut. Essentially, the plaintiff asserts that when a disciplinary default has been entered against a defendant for failure to comply with a discovery order, it should not be permitted to avail itself of Practice Book § 17-34(a) until it has demonstrated compliance with the underlying court order. We agree.”

111 Conn. App. at 792.

“In this case, the defendant’s noncompliance may have caused the plaintiff’s inability to rebut the defendant’s defenses. We conclude, therefore, that when a defendant has failed to cure the underlying cause of the disciplinary default, it will not be permitted to take advantage of its behavior and of the opportunity to defend on the merits provided by Practice Book § 17-34(a) during the hearing in damages.”

Id. at 793.