APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 42493

JUDITH KISSEL

v.

CENTER FOR WOMEN'S HEALTH, P.C., ET AL.

APPENDIX PART ONE AND PART TWO TO BRIEF OF DEFENDANT-APPELLANT CENTER FOR WOMEN'S HEALTH, P.C.

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RETURN DATE: APRIL 24, 2012	:	SUPERIOR COURT
JUDITH KISSEL	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	MARCH 30, 2012

COMPLAINT

COUNT ONE:
JUDITH KISSEL v. CENTER FOR WOMEN'S HEALTH P.C.

1. At all times mentioned herein, the defendant, CENTER FOR WOMEN'S HEALTH P.C. was a professional corporation organized and existing under the laws of the State of Connecticut comprised of medical professionals practicing in Stamford, Connecticut.

2. At all times mentioned herein, the co-defendant, REED WANG was a servant, agent, apparent agent and/or employee of the defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, diagnosing, monitoring and supervision of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, the plaintiff, JUDITH KISSEL, suffered severe, serious, painful and permanent injuries as hereinafter set forth in paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, to exercise reasonable care under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

c. left the plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp;

d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs;

f. did not provide the plaintiff with acupuncture personnel who possessed the requisite knowledge, skill, and experience to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff;

g. did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff.

6. As a result of the carelessness and negligence of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes;

j. physiological, psychological and neurological sequelae.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

COUNT TWO:
JUDITH KISSELL v. REED WANG

1. At all times mentioned herein, the defendant, REED WANG, held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut.

2. At all times mentioned herein, the defendant, REED WANG, was a servant, agent, apparent agent and/or employee of the co-defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, REED WANG undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, monitoring, diagnosing and supervision of the defendant, REED WANG and his servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered serious, severe, painful and permanent injuries, as hereinafter set forth in Paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, REED WANG and his servants, agents, apparent agents and/or employees and those under his supervision and control, to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

c. left the plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp;

d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs.

6. As a result of the carelessness and negligence of the defendant, REED WANG and his servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes;

j. physiological, psychological and neurological sequelae.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

WHEREFORE, THE PLAINTIFF, JUDITH KISSEL, HEREBY CLAIMS MONETARY DAMAGES IN EXCESS OF FIFTEEN THOUSAND & 00/100 DOLLARS ($15,000.00), EXCLUSIVE OF INTEREST AND COSTS, STATES THAT THIS MATTER IS WITHIN THE JURISDICTION OF THIS COURT, AND FURTHER REQUESTS THE FOLLOWING RELIEF:

a. Compensatory damages;

b. Interest;

c. Expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs;

d. Such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

Of this writ, with your doings thereon, make due service and return.

Dated at Bridgeport, Connecticut this 30th of March 2012

THE PLAINTIFF,

BY:_____

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PLEASE ENTER THE APPEARANCE OF:

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RETURN DATE: APRIL 24, 2012	:	SUPERIOR COURT
JUDITH KISSEL	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	MARCH 30, 2012

CERTIFICATE

I, SEAN K. MCELLIGOTT, hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the care and treatment of the plaintiff, JUDITH KISSEL. This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants, REED WANG and his servants, agents, apparent agents and/or employees; and CENTER FOR WOMEN'S HEALTH, P.C. and its servants, agents, apparent agents and/or employees.

THE PLAINTIFF,

BY:_____

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DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	MAY 24, 2012

MOTION TO DISMISS

The defendant Center for Women's Health, P.C., hereby moves to dismiss the plaintiff's complaint on the grounds that the court lacks personal jurisdiction over the defendant because the plaintiff has failed to comply with Connecticut General Statute §52-190a. This is a medical malpractice action and the plaintiff has failed to attach to her complaint a written opinion of a similar health care provider. Pursuant to Conn. Gen. Stat. §52-190a(c) the complaint must be dismissed. A Memorandum of Law in Support of this Motion is attached hereto.

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CERTIFICATION

This is to certify that on 5/24/12 a copy of the foregoing was mailed, postage prepaid to all counsel and pro-se parties of record to:

Sean McElligott, Esq.
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue
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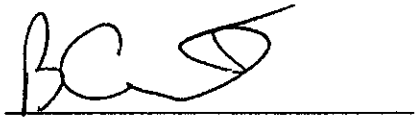

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D.N. FST CV 12 6013562 S

SUPERIOR COURT
STAMFORD - NORWALK
JUDICIAL DISTRICT
2012 SEP -6 A 10: 56

:SUPERIOR COURT

JUDITH KISSEL

:STAMFORD/NORWALK JUDICIAL
:DISTRICT AT STAMFORD

VS

CENTER FOR WOMEN'S HEALTH, P.C. :SEPTEMBER 6, 2012

MEMORANDUM OF DECISION
RE MOTION TO DISMISS # 105.00 AND 109.00

The plaintiff, Judith Kissel, commenced this medical malpractice action by way of in-hand service of process on the Center for Women's Health, P.C. (Center) on April 4, 2010 and on Reed Wang on April 6, 2010. The plaintiff filed a two-count complaint against the defendants, and each count is directed at a different defendant. The counts are substantially similar, and the plaintiff makes the following allegations in them. Beginning on April 22, 2010, the plaintiff began receiving acupuncture and related treatment from Reed Wang, who was an employee of the Center. While under the care and supervision of the defendants, the plaintiff suffered severe and serious permanent injuries. These injuries were caused by the failure of the Center to exercise reasonable care and by the failure of Reed Wang to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists in that the defendants, failed to protect adequately the plaintiff from contact with a heat lamp during her acupuncture procedure, left the plaintiff unattended during the course of her acupuncture treatment, failed to utilize a safe heating system during the acupuncture procedure and failed to care adequately and properly for the plaintiff for her acupuncture treatment needs.

On May 24, 2012, the Center filed a motion to dismiss the plaintiff's complaint (105.00) on the ground that the court lacks personal jurisdiction over the defendant because the plaintiff failed

to comply with General Statutes § 52-190a. The Center filed a memorandum of law in support of its motion. On June 8, 2012, by motion to dismiss (109.00) Reed Wang joined in the Center's motion to dismiss and its accompanying memorandum of law (109.00). On June 28, 2012, the plaintiff filed a request for leave to file an amended complaint (112.00) and also a memorandum of law in opposition to the defendants' motions to dismiss, to which she attached an affidavit by her attorney. The Center filed an objection to the plaintiff's request for leave on July 9, 2012, as well as a memorandum of law in reply to the plaintiff's opposition to the motions to dismiss. The plaintiff, in turn, filed a reply to the Center's objection to the plaintiff's request for leave, to which the Center filed a surreply. The matter was heard at the short calendar on July 16, 2012 before me.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Bacon Construction Co.* v. *Dept. of Public Works*, 294 Conn. 695, 706, 987 A.2d 348 (2010). "The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . Where, however . . . the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint." (Internal quotation marks omitted.) *Ferreira* v. *Pringle*, 255 Conn. 330, 346-47, 766 A.2d 400 (2001). "Because a lack of personal jurisdiction may be waived by the defendant, the rules of practice require the defendant to challenge that jurisdiction by a motion to dismiss." (Internal quotation marks omitted.) *Golodner* v. *Women's Center of Southeastern Connecticut, Inc.*, 281 Conn. 819, 825, 917 A.2d 959 (2007).

The defendants make the following arguments in support of their motions. Because the plaintiff's claims sound in medical malpractice, the plaintiff is required to comply with § 52-190a. Pursuant to § 52-190a (a), the plaintiff was required to obtain and file a written opinion letter of a similar health care provider. The failure to obtain and file such a written opinion letter constitutes insufficient process and, therefore, does not subject the defendants to the jurisdiction of the court. Further, § 52-190a (c) provides the remedy of dismissal for any defendant who is subject to a legal action in which the written opinion letter is not attached to the complaint. The court must first resolve the jurisdictional question raised in the motion to dismiss before considering the plaintiff's request for leave to amend the complaint. The defendants conclude that because the court lacks personal jurisdiction over the defendants, their motion to dismiss should be granted and, accordingly, the court does not have discretion to permit an amendment to attach the written opinion letter.

In opposition to the motions, the plaintiff argues the following. She obtained a written opinion letter from a similar health care provider prior to her filing of the complaint but inadvertently did not attach it to the complaint. The plaintiff has filed a request for leave to file an amended complaint, to which she has attached the written opinion letter. The Appellate Court has held that in instances where the written opinion letter existed at the time of the commencement of the action but was inadvertently not attached to the complaint, the trial court has discretion to deny a motion to dismiss and to allow an amendment. Because the plaintiff obtained a written opinion letter prior to the commencement of the action but did not attach the written opinion letter to the original complaint through inadvertence and oversight, this court denies the defendants' motion to dismiss and grants her request for leave to file the amended

complaint. A dismissal of the plaintiff's suit would elevate form over substance and would violate Connecticut public policy of allowing a trial on the merits.

Section 52-190a (a) provides in relevant part: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . [T]he claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [General Statutes §] 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." See *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 396, 21 A.3d 451 (2011).

"Section 52-190a requires that the written opinion letter must have been obtained prior to filing the action and that the good faith certificate and opinion letter must be filed when the action commences. Section 52-190a (c) provides: 'The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.' It is the failure to obtain and file the opinion letter which serves as a basis for the dismissal. . . . The plain language of the statute clearly provides that the legislature contemplated a dismissal being filed early in the proceedings." Id., 396-97. "[T]he written opinion letter, prepared in accordance with the dictates of § 52-190a . . . is akin to a pleading that must be attached to the complaint in order to commence properly the action. Id., 398.

In addition to holding that dismissal of an action is the proper remedy for when a plaintiff in a medical malpractice case fails to attach to her complaint a written opinion letter that complies with § 52-190a (a), the courts also have held that such a failure to comply with § 52-190a (a) is a sufficient ground for bringing a motion to dismiss. "Failure to comply with the statutory requirements of service renders a complaint subject to a motion to dismiss on the ground of lack of personal jurisdiction." Id., 401. "[T]he attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court. . . . Accordingly . . . because the written opinion letter of a similar health care provider must be attached to the complaint in proper form, the failure to attach a proper written opinion letter pursuant to § 52-190a constitutes insufficient service of process . . . . Because . . . the absence of a proper written opinion letter is a matter of form, it implicates personal jurisdiction. It is in the nature of a pleading that must be attached to the complaint." (Citation omitted.) Id., 401-02.

Although the law is explicit that a written opinion letter complying with § 52-190a (a) must be attached to the complaint in a medical malpractice case in order to subject the defendant to the jurisdiction of the court and to avoid dismissal of the action, the law is less clear as to the legal consequences when a plaintiff obtained a statutorily valid written opinion letter prior to commencing the action but failed to attach it to her original complaint and subsequently seeks to amend her complaint to attach that written opinion letter. This is the precise issue with which this court is faced. The appellate court addressed this question directly: "Given the fallibility

existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in doing so, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers." *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009). It is important to note that the court restricted the possible discretionary power of trial court judges to allow amendments to a complaint to attach a written opinion letter only to instances in which the written opinion letter existed prior to the commencement of the action. "The plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider *that did not exist at the commencement of the action.*" (Emphasis added.) Id., 586.

The Superior Court is split over the precedential value of the language in *Votre* recognizing the potential discretion of trial court judges to deny a motion to dismiss to permit a plaintiff to amend its complaint to attach a written opinion letter that existed prior to the commencement of the action.[1] Some cases have characterized this language as dicta; see,

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[1]The Supreme Court has declined to rule on the issue of whether the trial court has discretion to permit a plaintiff to amend his complaint in a medical malpractice case to attach a written opinion letter that was obtained prior to the commencement of the action. In a footnote, the court noted the relevant language in *Votre*, but declined to take a position on the issue. Because the plaintiff never sought to amend his complaint, the court concluded that it was "not presented with an opportunity to resolve a division in Superior Court authority concerning whether amendment of the defective pleading, including the substitution of a new opinion letter for one that appears not to comply with § 52-190a (a) or one that was not filed at all, is an appropriate response to a pending motion to dismiss pursuant to § 52-190a (c), in light of the

Bradley v. *Yale New Haven Hospital*, Superior Court, judicial district of New Haven, Docket No. CV 10 5033272 (January 28, 2011, *Burke, J.*) and *Lohnes* v. *Hospital of St. Raphael*, Superior Court, judicial district of New Haven, Docket No. CV 09 5031448 (April 6, 2010, *Wilson, J.*) (49 Conn. L. Rptr. 594); while at least one case has explained why the ruling is not dicta. *Squeo* v. *Norwalk Hospital Ass'n.*, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 09 5012548 (January 22, 2010, *Tierney, J.T.R.*) (49 Conn. L. Rptr. 346, 347). In *Squeo*, the court held that the above-quoted language from *Votre* "is not dictum. Although *Votre* did not involve a preexisting health care provider opinion letter, it did involve the plenary review of [General Statutes] § 52-190a. . . . *Votre* also discussed the purpose of [General Statutes] § 52-190a. . . . '[I]t is not dictum . . . when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy. . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision.' *Cruz* v. *Montanez*, 294 Conn. 357, 377 (2009); *Red II, LLC* v. *Conservation Commission*, 117 Conn. App. 630, 647 (2009)." (Citations omitted.) Id. The court proceeded to deny the defendant's motion to dismiss on the basis that the plaintiff had obtained a valid written opinion letter prior to the commencement of the action and had attached it to an amended complaint. Id., 348. Without analyzing the precedential value of the above-referenced language in *Votre*, other courts have quoted it as authority to consider a plaintiff's amended complaint that contained a written opinion letter that existed prior to the

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Appellate Court's statement in *Votre* . . . . Inasmuch as this issue is not presented by this certified appeal, we take no position on the continuing viability of this aspect of *Votre* . . . which already has been the subject of some question." (Citations omitted.) *Bennett* v. *New Milford Hospital*, 300 Conn. 1, 30 n.17, 12 A.3d 865 (2011).

commencement of the action. See, e.g., *Xicohtencatl* v. *Yale New Haven Hospital*, Superior Court, judicial district of New Haven, Docket No. CV 11 6018319 (October 18, 2011, *Burke, J.*) (considering the plaintiff's amended complaint to which an opinion letter was attached, but ultimately dismissing the amended complaint because the opinion letter was not written by a similar healthcare provider) and *Dilling* v. *Leckowicz*, Superior Court, judicial district of New Britain, Docket No. CV 09 5013972 (December 15, 2009, *Pittman, J.*) (denying the defendant's motion to dismiss on the basis that the plaintiff had attached to his amended complaint a written opinion letter that existed prior to the commencement of the action).

Without taking a position on the viability of the language at issue in *Votre*, this court holds, in the absence of any appellate authority to the contrary, that to the extent that the written opinion letter existed prior to the commencement of this action, then the court, in the exercise of its discretion, may deny the defendants' motions to dismiss and consider the written opinion letter that is attached to the amended complaint.

The issue, then, becomes whether the plaintiff's written opinion letter was in existence prior to the commencement of the action. This case is complicated by the fact that the written opinion letter is not dated. Relying on the affidavit of her attorney, the plaintiff argues that the written opinion letter, in fact, did exist prior to the commencement of the action. (See Memorandum in Opposition to Motion, Exhibit A, # 113.00.) Nevertheless, the defendants dispute this fact. In their reply memorandum, the defendants argue that the Attorney Affidavit filed by the plaintiff contains controverted facts, including whether a similar health care provider wrote the opinion letter prior to the commencement of the action and whether the failure to attach the written opinion letter was inadvertent or an oversight. The defendants assert that the

written opinion letter is undated and does not given any indication that it was written prior to the commencement of the action. Therefore, the defendants reason, an evidentiary hearing is required to resolve the disputed facts before the court determines whether it has personal jurisdiction over the defendants. This court does not agree.

"[Practice Book Section 17-46] sets forth three requirements necessary to permit the consideration of material contained in affidavits submitted in a summary judgment proceeding. The material must: (1) be based on 'personal knowledge'; (2) constitute facts that would be admissible at trial; and (3) affirmatively show that the affiant is competent to testify to the matters stated in the affidavit." *Barrett* v. *Danbury Hospital*, 232 Conn. 242, 251, 654 A.2d 748 (1995). The court may consider not only the facts presented by the parties' affidavits and exhibits, but also the "inferences which could be reasonably and logically drawn from them . . . ." *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 381, 260 A.2d 596 (1969). In this case, the plaintiff submits the duly sworn and notarized affidavit of her attorney. Although "[g]enerally an affidavit by a party's attorney should not be used to oppose a summary judgment motion . . ."; (citation omitted) *2830 Whitney Avenue Corp.* v. *Heritage Canal Development Associates, Inc.*, 33 Conn. App. 563, 567, 636 A.2d 1377 (1994); here, the attorney's affidavit is not being used to establish the existence of a genuine issue of material fact. Rather, the purpose of the affidavit is to verify the date that it received a written opinion letter and attached it to the complaint for purposes of opposing a motion to dismiss and establishing compliance with § 52-190a. Cf. *Mahoney* v. *Bridgeport Hospital*, Superior Court, judicial district of Fairfield, Docket No. CV 09 5025134 (August 8, 2011, *Bellis, J.*) ("An attorney's affidavit can be accepted . . . if it does not attest to facts of the case but it merely

authenticates other proffered documents.") and *Daniels* v. *Ericson*, Superior Court, judicial district of New London, Docket No. CV 06 5001423 (July 17, 2007, *Hurley, J.T.R.*) ("The remaining documents submitted by Daniels are multiple police reports from the New London police department. While none of the police reports are certified and, therefore, would normally be inadmissible, the affidavit by Daniels' attorney properly authenticates them."). The attorney's attestations are directed not at creating a genuine issue of triable fact, but as to the steps taken in the preparation for the filing of the complaint that he witnessed or of which he was aware. Therefore, the attorney's attestations are based on his personal knowledge and clearly indicate that he is competent to testify to the matters stated in the affidavit. Accordingly, the court finds that the affidavit can be considered in deciding the defendants' motions to dismiss. See *Dilling* v. *Leckowicz*, supra, Superior Court, Docket No. CV 09 5013972 (in denying the defendant's motion to dismiss on the basis that the plaintiff had attached to an amended complaint a written opinion letter, considering the pro se plaintiff's "Good Faith Certificate" that claims that the written opinion letter was obtained prior to the commencement of the action).

Turning, then, to the attestations made in the affidavit, the attorney claims that he signed the complaint in this action on March 30, 2012 and that at the time he filed the complaint, the signed, written opinion letter of the similar health care provider existed and was retained in the plaintiff's file. He further attests that his failure to attach the written opinion letter was inadvertent and an oversight. Such attestations are based on the attorney's personal knowledge, and constitute facts that would be admissible at trial and indicate that the attorney is competent to testify to the matters stated in the affidavit. The defendants do not submit any evidence to rebut the attorney's attestations, but rather make conclusory statements challenging the evidence.

Cf. *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996) (A party's conclusory statements, "in the affidavit and elsewhere . . . do not constitute evidence sufficient to establish the existence of disputed material facts.") and *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 360, 660 A.2d 877 (1995) (Averments contained in an affidavit that are merely denials of the allegations in a complaint "are an insufficient basis for the rendition of summary judgment."). Therefore, in the absence of counter-evidence by the defendants, the court finds that the written opinion letter existed prior to the commencement of this action and that the attorney's failure to attach it to the original complaint was inadvertence or an oversight. Accordingly, the court, in the exercise of its discretion, denies the Motions to Dismiss 105.00 and 106.00.

Accordingly, Motions to Dismiss 105.00 and 106.00 are denied. The objection to the request to amend 114.00 is overruled.

SO ORDERED.

EDWARD R. KARAZIN, JR.
JUDGE TRIAL REFEREE

Decision entered in accordance with the foregoing. All parties of record notified
9/6/2012

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	MAY 24, 2012

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The defendant Center for Women's Health, P.C., hereby submits this Memorandum of Law in support of its motion dismiss the complaint filed by the plaintiff, Judith Kissel.

I. FACTS

Plaintiff, Judith Kissel, initiated this action by way of complaint dated March 30, 2012. The plaintiff's complaint alleges that Reed Wang, who "held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut" was a servant agent, apparent agent and/or employee of Center for Women's Health, P.C. [Complaint, Count Two, ¶ 1] It is alleged that commencing on or about April 22, 2010 and thereafter, the defendants Center for Women's Health P.C and Reed Wang undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, Judith Kissel, for the purpose of providing acupuncture and related services. [Complaint, Count One ¶ 3, Count Two ¶ 3]. The plaintiff further alleges that while under the care, treatment, diagnosing, monitoring and supervision of the defendant Center for Women's Health P.C and Reed Wang,

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she suffered severe, serious, painful and permanent injuries. [Complaint, Count One ¶ 4, Count Two ¶ 4] Plaintiff claims that the defendants did not protect her from contact with a heat lamp during acupuncture, did not properly place heat lamps during the acupuncture, left the plaintiff unattended during acupuncture, and failed to use a safe heating system during the acupuncture. [Complaint, Count One ¶ 5(a)-(g), Count Two ¶ 5(a)-(e)] Plaintiff alleges that Center for Women's Health P.C and its servants, agents, apparent agents and/or employees failed "to exercise reasonable care under all of the circumstances then and there present." [Complaint, Count One ¶ 5] Plaintiff alleges that Reed Wang failed "to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists." [Complaint, Count Two, ¶ 5]

Plaintiff alleges, *inter-alia*, that Center for Women's Health P.C and Reed Wang "failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs." [Complaint, Count One ¶ 5(e), Count Two ¶ 5 (e)] Plaintiff further alleges, *inter-alia*, that Center for Women's Health P.C "did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff." [Complaint, Count One ¶ 5]

Plaintiff claims that the care and treatment described in the complaint resulted in injuries and damages including burns to her left foot and toes, skin graft surgeries, debriding,

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broken toe, infection in the bone of her toe, permanent deformity and scarring of her left toes, foot, and leg, permanent pain in her left foot, loss of sensation/numbness in her left foot and toes, as well as a hospital admission, and medical expenses. [Complaint, Count One ¶¶ 6-8]

The Civil Summons[1] signed by plaintiff's counsel contains the case code of T 28 which is the code for Medical Malpractice. Appended to the complaint is a document entitled "Certificate," which is signed by the plaintiff's attorney and which states in part, "I, Sean K. McElligott, hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the care and treatment of the plaintiff, Judith Kissel. This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants..." Presumably, this document is meant to be to the certificate required by Conn. Gen. Stat. § 52-190a to be filed in medical malpractice cases. Absent from the complaint is the written and signed opinion of a similar health care provider to the defendant that there appears to be evidence of medical negligence, which is required by Conn. Gen. Stat. § 52-190a.

II. LAW AND ARGUMENT

A. Legal Standard For A Motion To Dismiss

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[1] The Summons and Complaint are attached as Exhibit A.

A. Standard of Review

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) Caruso v. Bridgeport, 285 Conn. 618, 627 (2008). "[T]he attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court." Morgan v. Hartford Hospital, et al, 301 Conn. 388, 401(2011). "[A] motion to dismiss pursuant to § 52-190a [c] is the only proper procedural vehicle for challenging deficiencies with the opinion letter." Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 29 (2011). "Dismissal pursuant to [§ 52-190a (c)] is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint." Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn. App. 569, 583-84, cert. denied, 292 Conn. 911 (2009).

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Prejudice to the plaintiff is not a consideration when deciding a motion to dismiss because a trial court is required to dismiss the case regardless of whether it prejudices any party. See America's Wholesale Lender v. Pagano, 87 Conn. App. 474, 480 (2005).

B. Plaintiff Has Alleged Medical Negligence Against a Health Care Provider and Was Required to Comply With Conn. Gen. Stat. § 52-190a

As set forth above, the plaintiff claims that the defendant was negligent with respect to the care and treatment of the plaintiff during the performance of acupuncture on the plaintiff by the defendant or its agents, servants, or employees.

As the Court explained in Gold v. Greenwich Hosp. Ass'n, 262 Conn. 248, 254 (2002), "the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment."

Here, the defendants were clearly sued in their capacity as medical professionals. Plaintiff claims that the Center for Women's Health, P.C. and those under its control undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, Judith Kissel, for the purpose of providing acupuncture and related services. [Complaint, Count One ¶ 3, Count Two ¶ 3]. Plaintiff claims that the defendant's agent, servant, or employee, Reed

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Wang, a licensed acupuncturist, was negligent in his care of the plaintiff with respect to performing acupuncture on plaintiff. Plaintiff clearly envisioned that the acupuncturist involved in performing the procedure would be held to the standard of care for licensed acupuncturists in the State of Connecticut as she specifically alleged that Reed Wang was a licensed acupuncturist and that the defendants "failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs." [Complaint, Count One ¶ 5(e), Count Two ¶ 5 (e)] The alleged negligence is clearly of a specialized medical nature involving the performance of acupuncture treatment and involved the exercise of the professional judgment of a licensed acupuncturist. [Complaint, Count One ¶ 5 (a) – (g)]

Certainly, a medical expert, qualified pursuant to §52-184 (c)[2], will be required to testify as to the acupuncture technique employed by the defendant and whether it was

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[2] Con. Gen. Stat § 52-184c. states:

(a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who: (1) Is licensed by the appropriate regulatory agency of this state or

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performed in a manner consistent with the standard of care. This knowledge is beyond the scope of the ordinary lay juror and requires expert testimony pursuant to Con. Gen. Stat. § 52-184c. As will be discussed below, the State of Connecticut requires certain education, examination, and training in order to be licensed as an acupuncturist and the performance of acupuncture involves medical judgment and decision making outside the ken of the lay juror.

Conn. Gen. Stat. § 52-190a (a) requires that in actions "in which it is alleged that such injury...resulted from the negligence of a health care provider" the plaintiff's attorney "shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c...that there appears to be evidence of medical negligence and includes a detailed basis

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another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

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

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

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for the formation of such opinion" and the plaintiff's attorney "shall attach a copy of such written opinion" to the complaint.

A "health care provider" is defined as any person, corporation, facility or institution licensed by this state to provide health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment. Conn. Gen. Stat. § 52-184b. Conn. Gen. Stat. § 20-206aa (3) defines acupuncture as "the treating, by means of mechanical, thermal or electrical stimulation effected by the insertion of needles or by the application of heat, pressure or electrical stimulation at a point or combination of points on the surface of the body predetermined on the basis of the theory of physiological interrelationship of body organs with an associated point or combination of points for diseases, disorders and dysfunctions of the body for the purpose of achieving a therapeutic or prophylactic effect but shall not include the practice of physical therapy."

Conn. Gen. Stat. § 20-206bb (a) provides that "[n]o person shall perform acupuncture without a license," and that such license will be issued by the State of Connecticut Department of Public Health only upon providing evidence that the applicant has completed certain education, examination, and training requirements set forth in Conn. Gen. Stat. § 20-206bb. For example, an applicant for a license to practice acupuncture must present the Department of Public Health with evidence that the applicant has completed sixty semester

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hours of postsecondary study, has successfully completed a course of study in acupuncture which includes a minimum of 1,350 hours of didactic and clinical training, (500of which are clinical), and must have passed an examination and completed a course in clean needle technique prescribed by the Department of Public Health. Conn. Gen. Stat. § 20-206bb (j) provides that "[n]o person shall use the title 'acupuncturist', or use in connection with his or her name, any letters, words or insignia indicating or implying that such person is a licensed acupuncturist or advertise services as an acupuncturist, unless such person holds a license as an acupuncturist issued pursuant to this section." Conn. Gen. Stat. § 20-206cc provides that the Department of Public Health may discipline a licensed acupuncturist for the failure to conform to the accepted standards of profession conduct in the practice of acupuncture.

In addition to the above, on April 30, 2012, the plaintiff filed a Motion for Extension of Time (Docket Entry 102.00) to respond to the defendant's interrogatories and requests for production. In the Motion, the plaintiff's counsel characterizes this case as a "complex medical malpractice action" in order to justify a request for a sixty day extension of time to respond to discovery request. See Plaintiff's Motion for Extension of Time attached as Exhibit B. As discussed above, the Civil Summons signed by plaintiff's counsel contains the case code of T 28 which is the code for Medical Malpractice.

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For the foregoing reasons, the plaintiff's Complaint clearly sounds in medical malpractice and plaintiff was required to comply with Conn. Gen. Stat. §52-190a.

C. Plaintiffs' Complaint Must Be Dismissed As It Fails to Comply With Conn. Gen. Stat. § 52-190a

Conn. Gen. Stat. § 52-190a (a) provides in part:

> No civil action ...shall be filed to recover damages resulting from personal injury ...whether in tort or in contract, in which it is alleged that such injury...resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint...shall contain a certificate of the attorney or party filing the action ...that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant...***To show the existence of such good faith, the claimant or the claimant's attorney ... shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.*** (emphasis added)

Section 52-190a (c) provides that "[T]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

Our Supreme Court has ruled that "the attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written

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opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court." Morgan v. Hartford Hospital, et al, 301 Conn. 388, 401(2011).

Furthermore, the Appellate Court has explained, "dismissal pursuant to [§ 52-190a (c)] is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint." Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn. App. 569, 583-84, cert. denied, 292 Conn. 911 (2009). See also Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 29 (2011).

There is no question that the failure to attach a written opinion of a similar health care provider to a complaint in a medical malpractice action requires dismissal of the action.

IV. CONCLUSION:

Plaintiff has failed to attach to her complaint the required written opinion of a similar health care provider pursuant to Conn. Gen. Stat. § 52-190a. Accordingly, the complaint must be dismissed.

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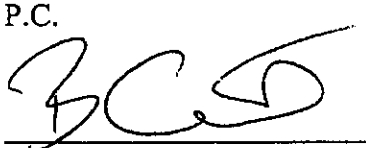
THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH,
P.C.



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CERTIFICATION

This is to certify that on 5/24/12 copy of the foregoing was mailed, postage prepaid to all counsel and pro-se parties of record to:

Sean McElligott, Esq.
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue
Bridgeport, CT 06604

BCS

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EXHIBIT A

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SUMMONS - CIVIL

JD-CV-1 Rev. 6-11
C.G.S. §§ 51-346, 51-347, 51-349, 51-350, 52-45a, 52-48, 52-259, P.B. Secs. 3-1 through 3-21, 8-1

STATE OF CONNECTICUT
SUPERIOR COURT
www.jud.ct.gov

See page 2 for instructions

☐ "X" if amount, legal interest or property in demand, not including interest and costs is less than $2,500.
☒ "X" if amount, legal interest or property in demand, not including interest and costs is $2,500 or more.
☐ "X" if claiming other relief in addition to or in lieu of money or damages.

TO: Any proper officer; BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to make due and legal service of this Summons and attached Complaint.

Address of court clerk where writ and other papers shall be filed *(Number, street, town and zip code)* *(C.G.S. §§ 51-346, 51-350)*	Telephone number of clerk *(with area code)*	Return Date *(Must be a Tuesday)*
123 Hoyt Street, Stamford 06905	**(203) 965-5308**	**April** (Month) **24** (Day), **2012** (Year)

☒ Judicial District ☐ Housing Session ☐ G.A. Number:	At *(Town in which writ is returnable) (C.G.S. §§ 51-346, 51-349)* **Stamford**	Case type code *(See list on page 2)* Major: **T** Minor: **28**

For the Plaintiff(s) please enter the appearance of:

Name and address of attorney, law firm or plaintiff if self-represented *(Number, street, town and zip code)*	Juris number *(to be entered by attorney only)*
Sean K. McElligott, Koskoff, Koskoff & Bieder, 350 Fairfield Avenue, Bridgeport, CT 06604	**032250**

Telephone number *(with area code)*	Signature of Plaintiff *(If self-represented)*
(203) 336-4421	

Number of Plaintiffs: **1** | Number of Defendants: **2** | ☐ Form JD-CV-2 attached for additional parties

Parties	Name *(Last, First, Middle Initial)* and Address of Each party *(Number; Street; P.O. Box; Town; State; Zip; Country, if not USA)*	
First Plaintiff	Name: **KISSEL, JUDITH** Address: **34 Lawrence Drive, North White Plains, NY 10603**	P-01
Additional Plaintiff	Name: Address:	P-02
First Defendant	Name: **CENTER FOR WOMEN'S HEALTH, P.C.** Address: **1011 High Ridge Road, Stamford, Connecticut 06905**	D-50
Additional Defendant	Name: **WANG, REED** Address: **1011 High Ridge Road, Stamford, Connecticut 06905**	D-51
Additional Defendant	Name: Address:	D-52
Additional Defendant	Name: Address:	D-53

Notice to Each Defendant

1. **YOU ARE BEING SUED.** This paper is a Summons in a lawsuit. The complaint attached to these papers states the claims that each plaintiff is making against you in this lawsuit.
2. To be notified of further proceedings, you or your attorney must file a form called an "Appearance" with the clerk of the above-named Court at the above Court address on or before the second day after the above Return Date. The Return Date is not a hearing date. You do not have to come to court on the Return Date unless you receive a separate notice telling you to come to court.
3. If you or your attorney do not file a written "Appearance" form on time, a judgment may be entered against you by default. The "Appearance" form may be obtained at the Court address above or at *www.jud.ct.gov* under "Court Forms."
4. If you believe that you have insurance that may cover the claim that is being made against you in this lawsuit, you should immediately contact your insurance representative. Other action you may have to take is described in the Connecticut Practice Book which may be found in a superior court law library or on-line at *www.jud.ct.gov* under "Court Rules."
5. If you have questions about the Summons and Complaint, you should talk to an attorney quickly. **The Clerk of Court is not allowed to give advice on legal questions.**

Signed *(Sign and "X" proper box)*	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Name of Person Signing at Left	Date signed
		Sean K. McElligott	**03/30/2012**

If this Summons is signed by a Clerk:
a. The signing has been done so that the Plaintiff(s) will not be denied access to the courts.
b. It is the responsibility of the Plaintiff(s) to see that service is made in the manner provided by law.
c. The Clerk is not permitted to give any legal advice in connection with any lawsuit.
d. The Clerk signing this Summons at the request of the Plaintiff(s) is not responsible in any way for any errors or omissions in the Summons, any allegations contained in the Complaint, or the service of the Summons or Complaint.

For Court Use Only
File Date

I certify I have read and understand the above:	Signed *(Self-Represented Plaintiff)*	Date

Name and address of person recognized to prosecute in the amount of $250
Carol McLachlan of Fairfield, Connecticut 06824

Signed *(Official taking recognizance, "X" proper box)*	☒ Commissioner of the Superior Court ☐ Assistant Clerk	Date	Docket Number
		03/30/2012	

A03

Instructions

1. *Type or print legibly; sign summons.*
2. *Prepare or photocopy a summons for each defendant.*
3. *Attach the original summons to the original complaint, and attach a copy of the summons to each copy of the complaint. Also, if there are more than 2 plaintiffs or more than 4 defendants prepare form JD-CV-2 and attach it to the original and all copies of the complaint.*
4. *After service has been made by a proper officer, file original papers and officer's return with the clerk of court.*
5. *The party recognized to pay costs must appear personally before the authority taking the recognizance.*
6. *Do not use this form for the following actions:*

   (a) Family matters (for example divorce, child support, custody, paternity, and visitation matters).
   (b) Summary process actions.
   (c) Applications for change of name.
   (d) Probate appeals.
   (e) Administrative appeals.
   (f) Proceedings pertaining to arbitration.
   (g) Any actions or proceedings in which an attachment, garnishment or replevy is sought.

Case Type Codes

Major Description	Codes Major/ Minor	Minor Description
Contracts	C 00	Construction - All other
	C 10	Construction - State and Local
	C 20	Insurance Policy
	C 30	Specific Performance
	C 40	Collections
	C 90	All other
Eminent Domain	E 00	State Highway Condemnation
	E 10	Redevelopment Condemnation
	E 20	Other State or Municipal Agencies
	E 30	Public Utilities & Gas Transmission Companies
	E 90	All other
Miscellaneous	M 00	Injunction
	M 10	Receivership
	M 20	Mandamus
	M 30	Habeas Corpus (extradition, release from Penal Institution)
	M 40	Arbitration
	M 50	Declaratory Judgment
	M 63	Bar Discipline
	M 66	Department of Labor Unemployment Compensation Enforcement
	M 68	Bar Discipline - Inactive Status
	M 80	Foreign Civil Judgments - C.G.S. 52-604 & C.G.S. 50a-30
	M 82	Housing Civil Matters
	M 83	Small Claims Transfer to Regular Docket
	M 84	Foreign Protective Order
	M 90	All other
Property	P 00	Foreclosure
	P 10	Partition
	P 20	Quiet Title/Discharge of Mortgage or Lien
	P 30	Asset Forfeiture
	P 90	All other

Major Description	Codes Major/ Minor	Minor Description
Torts (Other than Vehicular)	T 02	Defective Premises - Private - Snow or Ice
	T 03	Defective Premises - Private - Other
	T 11	Defective Premises - Public - Snow or Ice
	T 12	Defective Premises - Public - Other
	T 20	Products Liability - Other than Vehicular
	T 28	Malpractice - Medical
	T 29	Malpractice - Legal
	T 30	Malpractice - All other
	T 40	Assault and Battery
	T 50	Defamation
	T 61	Animals - Dog
	T 69	Animals - Other
	T 70	False Arrest
	T 71	Fire Damage
	T 90	All other
Vehicular Torts	V 01	Motor Vehicles* - Driver and/or Passenger(s) vs. Driver(s)
	V 04	Motor Vehicles* - Pedestrian vs. Driver
	V 05	Motor Vehicles* - Property Damage only
	V 06	Motor Vehicle* - Products Liability Including Warranty
	V 09	Motor Vehicle* - All other
	V 10	Boats
	V 20	Airplanes
	V 30	Railroads
	V 40	Snowmobiles
	V 90	All other
		*Motor Vehicles include cars, trucks, motorcycles, and motor scooters.
Wills, Estates and Trusts	W 10	Construction of Wills and Trusts
	W 90	All other

RETURN DATE: APRIL 24, 2012	:	SUPERIOR COURT
JUDITH KISSEL	: :	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C.; REED WANG	: :	 MARCH 30, 2012

COMPLAINT

COUNT ONE:
JUDITH KISSEL v. CENTER FOR WOMEN'S HEALTH P.C.

1. At all times mentioned herein, the defendant, CENTER FOR WOMEN'S HEALTH P.C. was a professional corporation organized and existing under the laws of the State of Connecticut comprised of medical professionals practicing in Stamford, Connecticut.

2. At all times mentioned herein, the co-defendant, REED WANG was a servant, agent, apparent agent and/or employee of the defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, diagnosing, monitoring and supervision of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, the plaintiff, JUDITH KISSEL, suffered severe, serious, painful and permanent injuries as hereinafter set forth in paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, to exercise reasonable care under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

c. left the plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp;

d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs;

f. did not provide the plaintiff with acupuncture personnel who possessed the requisite knowledge, skill, and experience to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff;

g. did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff.

6. As a result of the carelessness and negligence of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes;

j. physiological, psychological and neurological sequelae.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

COUNT TWO:
JUDITH KISSELL v. REED WANG

1. At all times mentioned herein, the defendant, REED WANG, held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut.

2. At all times mentioned herein, the defendant, REED WANG, was a servant, agent, apparent agent and/or employee of the co-defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, REED WANG undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, monitoring, diagnosing and supervision of the defendant, REED WANG and his servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered serious, severe, painful and permanent injuries, as hereinafter set forth in Paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, REED WANG and his servants, agents, apparent agents and/or employees and those under his supervision and control, to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

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d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

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d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

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h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes;

j. physiological, psychological and neurological sequelae.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

WHEREFORE, THE PLAINTIFF, JUDITH KISSEL, HEREBY CLAIMS MONETARY DAMAGES IN EXCESS OF FIFTEEN THOUSAND & 00/100 DOLLARS ($15,000.00), EXCLUSIVE OF INTEREST AND COSTS, STATES THAT THIS MATTER IS WITHIN THE JURISDICTION OF THIS COURT, AND FURTHER REQUESTS THE FOLLOWING RELIEF:

a. Compensatory damages;

b. Interest;

c. Expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs;

d. Such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

Of this writ, with your doings thereon, make due service and return.

Dated at Bridgeport, Connecticut this 30th of March 2012

THE PLAINTIFF,

BY:_____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, PC
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO. (203) 336-4421
JURIS NO. 032250

PLEASE ENTER THE APPEARANCE OF:

KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO. (203) 336-4421
JURIS NO. 32250

RETURN DATE: APRIL 24, 2012	:	SUPERIOR COURT
JUDITH KISSEL	:	JUDICIAL DISTRICT OF
	:	STAMFORD/NORWALK
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	MARCH 30, 2012

CERTIFICATE

I, SEAN K. MCELLIGOTT, hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the care and treatment of the plaintiff, JUDITH KISSEL. This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants, REED WANG and his servants, agents, apparent agents and/or employees; and CENTER FOR WOMEN'S HEALTH, P.C. and its servants, agents, apparent agents and/or employees.

THE PLAINTIFF,

BY:_____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, PC
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO. (203) 336-4421
JURIS NO. 32250

EXHIBIT B

LAW OFFICES
HEIDELL, PITTONI,
MURPHY & BACH, LLP
55 MAIN STREET, SUITE 1100
BRIDGEPORT, CT 06604
(203) 382-9700
JURIS NO. 103041

DOCKET NO.: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	JUDICIAL DISTRICT
	:	OF STAMFORD
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., et al	:	APRIL 30, 2012

MOTION FOR EXTENSION OF TIME

Pursuant to Practice Book Section 13-7(a)(3), the Plaintiff, Judith Kissel, moves for a sixty (60) day extension of time until July 23, 2012 for which to respond and/or object to Defendant's Interrogatories and Requests for Production dated April 24, 2012. This matter is a complex medical malpractice action and additional time is required to fully and properly respond.

THE PLAINTIFF

BY:_____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 Fairfield Avenue -5th Floor
Bridgeport, Connecticut 06604
Tel. No.: (203) 336-4421
Juris No.: 32250

CERTIFICATION

This is to certify that a copy of the foregoing was sent, via electronic mail, on this 30th day of April 2012, to counsel of record as follows:

David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

And via certified mail to:

Reed Wang
Holistic Health Center of Westport
Willows Medical Complex
129 Kings Highway North, Top Level
Westport, Connecticut 06880

SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT OF** **STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.; **REED WANG**	: :	 **JUNE 28, 2012**

REQUEST FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

The Plaintiff hereby requests leave to file the First Amended Complaint attached as Exhibit A. The purpose of the requested amendment is to attach a written and signed opinion of a similar health care provider in order to comply with Conn. Gen. Stat. § 52-190a in this medical malpractice action. As discussed in the Attorney Affidavit attached as Exhibit B hereto, the similar health care provider opinion existed at the time the complaint was originally filed but was inadvertently not attached to the original complaint.

THE PLAINTIFF

By _____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO.: (203) 336-4421
JURIS NO.: 32250

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 28th day of June 2012 to all counsel of record, to wit:

David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

Mary Alice Moore Leonhardt
12 Oak Street
Hartford, Connecticut 06106

SEAN K. MCELLIGOTT

EXHIBIT A

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT OF**
	:	**STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	**JUNE 28, 2012**

AMENDED COMPLAINT

COUNT ONE:
JUDITH KISSEL v. CENTER FOR WOMEN'S HEALTH P.C.

1. At all times mentioned herein, the defendant, CENTER FOR WOMEN'S HEALTH P.C. was a professional corporation organized and existing under the laws of the State of Connecticut comprised of medical professionals practicing in Stamford, Connecticut.

2. At all times mentioned herein, the co-defendant, REED WANG was a servant, agent, apparent agent and/or employee of the defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, diagnosing, monitoring and supervision of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, the plaintiff, JUDITH KISSEL, suffered severe, serious, painful and permanent injuries as hereinafter set forth in paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, to exercise reasonable care under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

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d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs;

f. did not provide the plaintiff with acupuncture personnel who possessed the requisite knowledge, skill, and experience to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff;

g. did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff.

6. As a result of the carelessness and negligence of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

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g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes;

j. physiological, psychological and neurological sequelae.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

COUNT TWO:
JUDITH KISSELL v. REED WANG

1. At all times mentioned herein, the defendant, REED WANG, held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut.

2. At all times mentioned herein, the defendant, REED WANG, was a servant, agent, apparent agent and/or employee of the co-defendant, CENTER FOR WOMEN'S HEALTH P.C.

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WHEREFORE, THE PLAINTIFF, JUDITH KISSEL, HEREBY CLAIMS MONETARY DAMAGES IN EXCESS OF FIFTEEN THOUSAND & 00/100 DOLLARS ($15,000.00), EXCLUSIVE OF INTEREST AND COSTS, STATES THAT THIS MATTER IS WITHIN THE JURISDICTION OF THIS COURT, AND FURTHER REQUESTS THE FOLLOWING RELIEF:

a. Compensatory damages;

b. Interest;

c. Expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs;

d. Such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 28th day of June 2012 to all counsel of record, to wit:

David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

Mary Alice Moore Leonhardt
12 Oak Street
Hartford, Connecticut 06106

SEAN K. MCELLIGOTT

RETURN DATE: APRIL 24, 2012	:	SUPERIOR COURT
JUDITH KISSEL	: :	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C.; REED WANG	: :	 MARCH 30, 2012

CERTIFICATE

I, SEAN K. MCELLIGOTT, hereby certify that I have made reasonable inquiry, as permitted by the circumstances, to determine whether there are grounds for a good faith belief that there has been negligence in the care and treatment of the plaintiff, JUDITH KISSEL. This inquiry has given rise to a good faith belief on my part that grounds exist for an action against the defendants, REED WANG and his servants, agents, apparent agents and/or employees; and CENTER FOR WOMEN'S HEALTH, P.C. and its servants, agents, apparent agents and/or employees.

THE PLAINTIFF,

BY:_____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, PC
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO. (203) 336-4421
JURIS NO. 32250

OPINION
PURSUANT TO C.G.S., SECTION 52-190a

Dear Mr. Lichtenstein:

Thank you for asking me to review the case of Judith Kissel. As you know, I am a licensed acupuncturist. In my role as a licensed acupuncturist, I am familiar with the standard of care as it relates to the practice of acupuncture in the United States. At your request, I have read and reviewed the following medical records of Judith Kissel:

- Records from the Center for Women's Health
- Records from the Stamford Hospital

Based upon my review of the medical records, it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang, L.Ac on April 22, 2010 at the Center for Women's Health. The standard of care dictates that patients receiving acupuncture must be positioned a safe distance from any piece of equipment that has the potential to injure the patient. In addition, the patient needs to be appropriately monitored to ensure that the patient remains safe throughout the acupuncture procedure. In this case, Ms. Kissel's left foot was burned on a heat lamp while she was receiving acupuncture from Reed Wang, L.Ac. Mr. Wang was negligent in his placement and/or monitoring of Ms. Kissel during the acupuncture procedure. Mr. Wang's departure from the standard of care was a substantial factor in causing the thermal burn to Ms. Kissel's left foot.

My opinion that there was negligence on the part of Mr. Wang is based upon my review of the medical records as well as my education, training, and experience. The opinion stated herein is based upon the information available to me at this time. Should other information and evidence become available, I reserve the right to supplement and/or amend this opinion.

EXHIBIT B

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT**
	:	**OF STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	**JUNE 28, 2012**

ATTORNEY AFFIDAVIT

STATE OF CONNECTICUT	:	
	:	**Bridgeport, Connecticut**
COUNTY OF FAIRFIELD	:	

I, SEAN K. MCELLIGOTT, being duly sworn, depose and say that:

1. I am over the age of 18 and believe in the obligations of an oath.

2. I am an attorney for the plaintiff in the above-captioned matter.

3. I consulted with an expert licensed acupuncturist (hereinafter "Similar Health Care Provider") beginning on November 16, 2011 in order to comply with the good faith inquiry requirements of Conn. Gen. Stat. § 52-190a in this medical malpractice action.

4. On November 16, 2011, the Similar Health Care Provider was sent a copy of plaintiff's medical records from the defendants Reed Wang and the Center for Women's Health, P.C. *See* Transmittal Letter dated November 16, 2011 attached as Exhibit 1.

5. Between November 16, 2011 and February 19, 2012, the Similar Health Care Provider I consulted for purposes of compliance with §52-190a reviewed the relevant medical records of the plaintiff including the records from the defendants Reed Wang and the Center for Women's Health, P.C.

6. On February 19, 2012, the Similar Health Care Provider signed a letter opining that there appears to be evidence of medical negligence in the care and treatment of the plaintiff and providing a detailed basis for the formation of such opinion. *See* Opinion Pursuant C.G.S. Section 52-190a, attached as Exhibit 2.

7. Specifically, the Similar Health Care Provider opined that "it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang L.Ac on April 22, 2010." See *Id.* at 1.

8. The signed opinion letter of the Similar Health Care Provider was scanned and delivered to my assistant Lindsey Hanson via e-mail on February 19, 2012. *See* Transmittal E-mail attached as Exhibit 3. The letter has been retained in the file since that time.

9. As of February 19, 2012 I had made reasonable inquiry and determined that there were grounds for a good faith belief that there had been negligence in the care and treatment of the plaintiff Judith Kissel.

9. On March 30, 2012, I signed the complaint in this action. I inadvertently failed to attach to the complaint the signed opinion letter of the Similar Health Care Provider attached as Exhibit 2 hereto.

10. At the time I failed to attach the signed opinion letter of the Similar Health Care Provider, such letter existed and was retained in the client's file.

11. My failure to attach the signed opinion letter of the Similar Health Care Provider was inadvertent and an oversight.

SEAN K. MCELLIGOTT

Subscribed and sworn to before me this 28th day of June 2012.

Notary Public
My commission expires:

Seal

EXHIBIT 1

Koskoff
Koskoff
&
Bieder PC

Law Offices

P.O. Box 1661
Bridgeport, CT 06601

350 Fairfield Avenue
Bridgeport, CT 06604

(203) 336-4421
FAX (203) 368-3244

e-mail: kkb@koskoff.com
www.koskoff.com

Theodore I. Koskoff
(1913-1989)
Michael P. Koskoff
Richard A. Bieder
Joel H. Lichtenstein
John D. Jessep
Christopher D. Bernard*
Carey B. Reilly
James D. Horwitz
Joshua D. Koskoff
Regina M. Murphy
Antonio Ponvert III
Kathleen L. Nastri
William M. Bloss
J. Craig Smith
Gertrude A. Kiaunis
Cynthia C. Bott
Sean K. McElligott
Alinor C. Sterling
David M. Bernard
*Certified Civil Trial Advocate
National Board of Trial Advocacy

Of Counsel
James Wu, LLC
Preston C. Tisdale

Paralegals
Linda Grossberg
Barbara Larocca
Beth Vogler
Diana V. Orozco
Patricia M. Harris, R.N
Marge Esposito
Wendy Grosso
Diane C. Rivera, R.N
Diane L. Zalewski
Terri L. Beatty
Janet E. Mitchell
Julie A. Alleyne
Diana C. Coppola
Karen M. Jacobs, R.N.
Evelyn McGrath, R.N.

November 16, 2011

Via Federal Express

Re: Judith Kissel

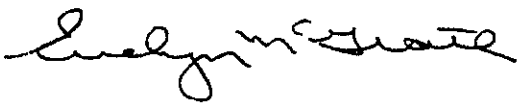
Dear

Thank you for agreeing to review this case. It involves a 52 y/o who scheduled her first acupuncture session with Dr. Reed Wang who provides his service at the OB/GYN office of Center for Women's Health in Stamford. During this session on April 22, 2010, a heat lamp was set up and Dr. Wang exited the room. At some point, this heat lamp fell onto Ms. Kissel's left foot. Dr. Wang and obstetrician, Dr. Joel Evans took Ms. Kissel to Stamford ED where she was diagnosed with 3rd degree and 2nd degree burns to the left great toe as well as the dorsum aspect of the foot and the left second toe. She has had multiple surgeries and skin grafts as a result.

The medical records are skimpy because Dr. Wang did not write a note in her chart pertaining to this incident. Only Dr. Evans made a notation after the fact. We are looking to you for comment on this incident and Dr. Wang's care and treatment as an acupuncturist.

When you have completed your review, please call Attorney Joel Lichtenstein at your earliest convenience to discuss.

Very truly yours,



Evelyn McGrath RN/Paralegal

emc
Enc (medicals)
mmp\blues\experts\kissel to wan

EXHIBIT 2

OPINION
PURSUANT TO C.G.S., SECTION 52-190a

Dear Mr. Lichtenstein:

Thank you for asking me to review the case of Judith Kissel. As you know, I am a licensed acupuncturist. In my role as a licensed acupuncturist, I am familiar with the standard of care as it relates to the practice of acupuncture in the United States. At your request, I have read and reviewed the following medical records of Judith Kissel:

- Records from the Center for Women's Health
- Records from the Stamford Hospital

Based upon my review of the medical records, it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang, L.Ac on April 22, 2010 at the Center for Women's Health. The standard of care dictates that patients receiving acupuncture must be positioned a safe distance from any piece of equipment that has the potential to injure the patient. In addition, the patient needs to be appropriately monitored to ensure that the patient remains safe throughout the acupuncture procedure. In this case, Ms. Kissel's left foot was burned on a heat lamp while she was receiving acupuncture from Reed Wang, L.Ac. Mr. Wang was negligent in his placement and/or monitoring of Ms. Kissel during the acupuncture procedure. Mr. Wang's departure from the standard of care was a substantial factor in causing the thermal burn to Ms. Kissel's left foot.

My opinion that there was negligence on the part of Mr. Wang is based upon my review of the medical records as well as my education, training, and experience. The opinion stated herein is based upon the information available to me at this time. Should other information and evidence become available, I reserve the right to supplement and/or amend this opinion.

EXHIBIT 3

Lindsey Hanson

From:
Sent: Sunday, February 19, 2012 3:24 PM
To: Lindsey Hanson
Subject: Re: Opinion letter- Kissel
Attachments: Acudoc.PDF; ATT00001.htm

I scanned it and attached it for you. Please let me know if you still need a hard copy.
Thanks,

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C., ET AL	: :	**JUNE 28, 2012**

CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

I. INTRODUCTION

Plaintiff submits this consolidated opposition to the motions to dismiss filed by defendant Center for Women's Health, P.C. on May 24, 2012 and joined by defendant Reed Wang on June 8, 2012. Defendants correctly point out that plaintiff failed to attach a written and signed opinion of a similar health care provider pursuant to Conn. Gen. Stat. § 52-190a to her complaint dated March 30, 2012. As discussed in the Attorney Affidavit attached as Exhibit A hereto, a letter complying with § 52-190a was obtained from a similar health care provider prior to the complaint being filed, but was inadvertently not attached to the original complaint. Plaintiff requested leave to file a First Amended Complaint on June 28, 2012, attaching the opinion letter of the similar health care provider that existed at the time of commencement of this action. The Appellate Court has held that where the opinion letter exists at the time of the commencement of the action, but is inadvertently not attached to the complaint, a trial court has discretion to allow the amendment and deny a motion to dismiss.

> Given the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and,

> in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers.

Votre v. County Obstetrics and Gynecology Group, P.C., 113 Conn. App. 569, 585 (2009).

Accordingly, the plaintiff requests that the defendants' motions to dismiss be denied and her request for leave to file an amended complaint attaching the opinion letter (that existed prior to the commencement of the action) be granted. A dismissal of this action elevates form over substance and will prevent a trial on the merits of plaintiff's meritorious claims in contravention of long standing policy in Connecticut.

II. FACTUAL BACKGROUND

In this medical malpractice action, plaintiff Judith Kissel suffered severe third degree burns to her left foot and toe when her foot came in contact with a heat lamp utilized by the defendant Reed Wang during an acupuncture procedure. *See* Complaint at ¶ 5. Ms. Kissel spent five days in the burn unit of the Westchester Medical Center and underwent multiple skin graft surgeries. *Id.* at ¶ 6. She has a permanent deformity of her foot and daily pain from her burn injuries. *Id.*

Beginning on November 16, 2011, Plaintiff's Attorney Sean K. McElligott consulted with an expert licensed acupuncturist (hereinafter "Similar Health Care Provider") in order to comply with the pre-suit good faith inquiry requirements of Conn. Gen. Stat. § 52-190a. See Attorney Affidavit of Sean K. McElligott, attached as Exhibit A, at ¶ 3. Between November 16, 2011 and February 19, 2012, the Similar Health Care Provider reviewed the relevant medical records of the plaintiff including the records from the defendants Reed Wang and the Center for Women's Health, P.C. *Id.* at ¶ 6.

On February 19, 2012, the Similar Health Care Provider signed a letter opining that there appears to be evidence of medical negligence in the care and treatment of the plaintiff and providing a detailed basis for the formation of such opinion. *See* Opinion Pursuant C.G.S. Section 52-190a, attached as Exhibit 1 to the Attorney Affidavit. Specifically, the Similar Health Care Provider opined that "it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang L.Ac on April 22, 2010." See *Id.* at 1.

The signed opinion letter of the Similar Health Care Provider was scanned and delivered to Attorney McElligott's assistant Lindsey Hanson via e-mail on February 19, 2012. *See* Transmittal E-mail attached as Exhibit 2 to the Attorney Affidavit. The letter has been retained in the file since that time. Attorney Affidavit at ¶ 9. On March 30, 2012, Attorney McElligott signed the complaint in this action but inadvertently failed to attach to the complaint the signed opinion letter of the Similar Health Care Provider that existed in the file. *Id.* at ¶ 11. The failure to attach the signed opinion letter of the Similar Health Care Provider to the complaint was inadvertent and an oversight. *Id.* at ¶ 12.

III. ARGUMENT

A. Legal Standard For Challenging A Written Opinion Letter Under Conn. Gen. Stat. § 52-190a.

Section 52-190a of the General Statutes requires a medical malpractice plaintiff to perform a "reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." Conn. Gen. Stat. § 52-190a (a). The complaint must include a certificate of the attorney bringing the action that such

reasonable inquiry gave rise to a good faith belief that "grounds exist for an action against each named defendant..." *Id.*

Under § 52-190a, as amended in 2005 by Public Act 05-275, a plaintiff must attach a written opinion of a similar health care provider to demonstrate the good faith inquiry:

> To show the existence of such good faith, the claimant or the claimant's attorney, ... shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.

Conn. Gen. Stat. § 52-190a (a).

The Supreme Court recently emphasized the purpose of the written opinion requirement. "The purpose of the requirement...was to eliminate those claims that are so lacking in merit that no similar health care provider would be willing to express even a preliminary opinion that the plaintiff's injuries were the result of medical negligence." *Wilcox v. Schwartz,* 303 Conn. 630, 652. (Emphasis added.) A party opposing a motion to dismiss under § 52-190a may file an affidavit supporting her position as to facts not apparent on the record. *See* P.B. § 10-31 (b); *Jaboin v. Bridgeport Hospital,* 2009 Conn. Super. LEXIS 2442 (Conn. Super. Ct. Sept. 11, 2009) (Bellis, J.)[1] (considering an affidavit filed in opposing a § 52-190a motion to dismiss).

B. A Written Opinion Of A Similar Health Care Provider Existed When The Action Was Commenced, Satisfying The Statutory Purpose Of § 52-190a.

Where an opinion letter exists at the commencement of the action, but is inadvertently not attached to the complaint, the Appellate Court has held that an amended complaint satisfies the purpose

[1] A copy of all unreported Superior Court decisions are attached as Exhibit B in alphabetical order.

of § 52-190a. The Appellate Court has stated:

> [g]iven the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers.

Votre, 113 Conn. App. at 583-84;

Following *Votre*, the important dividing line is whether the opinion letter existed at the time the lawsuit was commenced or whether it was created after commencement. There are good reasons to treat the two situations differently. Where an opinion letter exists prior to the commencement of the action, the relevant pre-suit inquiry regarding the viability of the case was actually conducted. Accordingly, the purpose of the statute, which is to prevent groundless medical malpractice lawsuits from being filed in the first instance, has been satisfied in fact. In contrast, where an amended complaint contains a previously non-existent opinion letter, it is possible that the relevant good faith inquiry was not accomplished until after the lawsuit was commenced. Accordingly, the rule in *Votre*, which provides a safe harbor when the opinion letter exists prior to commencement of the lawsuit, comports with the purpose of § 52-190a and common sense.

Even where the opinion letter did not exist at the time suit was commenced, however, many Superior courts have still allowed an amendment to cure a § 52-190a defect. *See Dixon v. Med Now Family Walk–In & Industrial Medical Center*, 2010 WL 1233884, Docket No. CV–08–5014898–S (February 25, 2010) (permitting plaintiff to file previously non-existing opinion letter obtained after

commencement of action); *Gorneault v. Colson,* 2011 Conn. Super. LEXIS 1226 (May 6, 2011) (Martin, J.) (same).[2]

Given the existence of these Superior Court cases, the Supreme Court, in *Bennett v. New Milford Hospital*, 300 Conn. 1, 30, n.17 (2011), considered the issue of whether the rule in *Votre* was in fact too harsh because it prevented a plaintiff from attaching an opinion letter that did not exist at the time of commencement of the action. The Court ultimately declined to rule on this issue, but it noted that Superior Courts have allowed such amendments even after *Votre*. In a lengthy footnote, the Court stated as follows:

> [W]e are not presented with an opportunity to resolve a division in Superior Court authority concerning whether amendment of the defective pleading, including the substitution of a new opinion letter for one that appears not to comply with § 52–190a (a) or one that was not filed at all, is an appropriate response to a pending motion to dismiss pursuant to § 52–190a (c), in light of the Appellate Court's statement in *Votre v. County Obstetrics & Gynecology Group, P.C.*, . . . that, "[g]iven the fallibility existing in the legal profession ... it is possible that a written opinion of a similar health care provider, *existing at the time of commencement of an action,* might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss." *See also id.* . . . ("[t]he plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at

---

[2] *See also Noel v. Lawrence & Memorial Hosp.*, 2010 Conn. Super. LEXIS 2289, at *8-9 (Conn. Super. Ct. Sept. 9, 2010) (Cosgrove, J.) (considering amended complaint, which attached a second opinion letter, in denying the motion to dismiss count three of the complaint); *Ward v. Ramsey*, 2010 Conn. Super. LEXIS 873 (Conn. Super. Ct. Apr. 12, 2010) (Corradino, J.) (denying motion to dismiss and granting request to amend to add a second opinion clarifying the negligence addressed in the opinion was that of the defendant doctor); *Dixon v. Med. Now Family Walk-In & Indust. Med. Ctr.*, 2010 Conn. Super. LEXIS 460, at *15 (Conn. Super. Ct. Feb. 25, 2010) (Gilardi, J.) (denying defendant's motion to reargue and allowing plaintiff to amend by adding a new opinion letter obtained after suit was filed, because plaintiff's original complaint had included a letter that "reasonably complied with the statute," although it was not from a health care provider of the correct specialization); *Ortiz v. Mabri Convalescent Center*, 2010 Conn. Super. LEXIS 137 (Conn. Super. Ct. Jan. 15, 2010) (Matasavage, J.) (denying motion to dismiss and granting request to amend to add a revised opinion letter with the author's qualifications).

> the commencement of the action"). *Compare, e.g., Patenaude v. Norwalk Hospital. . .* 2010 Conn. Super. LEXIS 1854 (July 19, 2010) (court lacks "discretion to entertain to the plaintiff's attempts to amend her complaint while a motion to dismiss is pending"), and *Morgan v. Hartford Hospital . . .* 2009 Conn. Super. LEXIS 1324 (May 21, 2009) (in action against vascular surgeon, plaintiff could not respond to motion to dismiss based on fact that initial opinion letter was authored by internist by filing amended complaint with new letter authored by surgeon that "was not in existence when the original complaint was filed"), with *Dixon v. Med Now Family Walk–In & Industrial Medical Center . . .* 2010 Conn. Super. LEXIS 460 (Feb. 25, 2010) (permitting plaintiff to file new opinion letter authored by advanced practical registered nurse, obtained after start of action arising from nursing malpractice, in response to motion to dismiss on ground that initial letter improperly was authored by physician). Inasmuch as this issue is not presented by this certified appeal, we take no position on the continuing viability of this aspect of *Votre v. County Obstetrics & Gynecology Group, P.C. . .* , which already has been the subject of some question. *See Sestito v. Mandara . . .* 2010 Conn. Super. LEXIS 1908 (Aug. 2, 2010) (criticizing *Votre,* particularly in context of amendment as of right within first thirty days under Practice Book § 10–59, because "the purpose of [§] 52–190a is not thwarted when a good faith certificate and opinion letter are available in such a short time after the filing of the initial complaint"); *Dixon v. Med Now Family Walk–In & Industrial Medical Center,* supra (to defeat motion to dismiss based action wherein new letter accompanies amended complaint, plaintiff must have "attached a good faith certificate and a letter from a reasonably appropriate health care provider to the initial complaint"); cf. *Borger v. Eighth Judicial District Court,* 120 Nev. 1021, 1029–30 . . . (2004) (concluding that dismissal without prejudice mandated only for "complete failure to attach an affidavit to the [medical malpractice] complaint," and that trial court "within its sound discretion and considering the need for judicial economy, may grant leave to amend malpractice complaints supported by disputed affidavits under circumstances where justice so requires").

The dispute noted by the Supreme Court in *Bennett* is not applicable to this case because plaintiff satisfied the *Votre* test in that the opinion letter existed prior to the commencement of the action. Nevertheless, it is relevant that in considering *Votre*, the Supreme Court did not question the propriety of an amendment to add an existing but previously unfiled opinion letter.

The precise factual situation here was present in *Squeo v. Norwalk Hosp. Ass'n*, 2010 WL 628314 2010, at * 1 (Conn. Super. Ct. Jan. 22, 2010) (Tierney, J.). In that case, "two health care

provider opinion letters attached to the amended complaint existed prior to the commencement of [the] action" but were not attached to the original complaint. *Id.* Following *Votre*, the Court denied the defendant's motion to dismiss and granted plaintiff's request for leave to amend. *Id.*

A dismissal under the circumstances of this case would be harsh. Plaintiff conducted a reasonable good faith inquiry and obtained an opinion letter from a similar health care provider prior to the commencement of the action. This is clearly a not a frivolous medical malpractice lawsuit as the plaintiff was badly burned by a heat lamp while lying on an acupuncture table. Accordingly, the purpose of § 52-190a was satisfied in this case. Having brought a meritorious malpractice action, the plaintiff should have her day in court. The well-settled policy of our state is to bring about a trial on the merits. *Snow v. Calise*, 174 Conn. 567, 574 (1978); *Johnson v. Atlantic Health Services, P.C.*, 83 Conn. App. 268, 278 (2004). The dismissal of the plaintiff's medical malpractice action would elevate form over substance, and violate this important public policy.

IV. CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss should be denied, and the plaintiff's objection sustained.

THE PLAINTIFF

By _____

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO.: (203) 336-4421
JURIS NO.: 32250

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 28th day of June 2012 to all counsel of record, to wit:

David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

Mary Alice Moore Leonhardt
12 Oak Street
Hartford, Connecticut 06106

SEAN K. MCELLIGOTT

EXHIBIT A

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT**
	:	**OF STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	**JUNE 28, 2012**

ATTORNEY AFFIDAVIT

STATE OF CONNECTICUT	:	
	:	**Bridgeport, Connecticut**
COUNTY OF FAIRFIELD	:	

I, SEAN K. MCELLIGOTT, being duly sworn, depose and say that:

1. I am over the age of 18 and believe in the obligations of an oath.

2. I am an attorney for the plaintiff in the above-captioned matter.

3. I consulted with an expert licensed acupuncturist (hereinafter "Similar Health Care Provider") beginning on November 16, 2011 in order to comply with the good faith inquiry requirements of Conn. Gen. Stat. § 52-190a in this medical malpractice action.

4. On November 16, 2011, the Similar Health Care Provider was sent a copy of plaintiff's medical records from the defendants Reed Wang and the Center for Women's Health, P.C. *See* Transmittal Letter dated November 16, 2011 attached as Exhibit 1.

5. Between November 16, 2011 and February 19, 2012, the Similar Health Care Provider I consulted for purposes of compliance with §52-190a reviewed the relevant medical records of the plaintiff including the records from the defendants Reed Wang and the Center for Women's Health, P.C.

6. On February 19, 2012, the Similar Health Care Provider signed a letter opining that there appears to be evidence of medical negligence in the care and treatment of the plaintiff and providing a detailed basis for the formation of such opinion. *See* Opinion Pursuant C.G.S. Section 52-190a, attached as Exhibit 2.

7. Specifically, the Similar Health Care Provider opined that "it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang L.Ac on April 22, 2010." See *Id.* at 1.

8. The signed opinion letter of the Similar Health Care Provider was scanned and delivered to my assistant Lindsey Hanson via e-mail on February 19, 2012. *See* Transmittal E-mail attached as Exhibit 3. The letter has been retained in the file since that time.

9. As of February 19, 2012 I had made reasonable inquiry and determined that there were grounds for a good faith belief that there had been negligence in the care and treatment of the plaintiff Judith Kissel.

9. On March 30, 2012, I signed the complaint in this action. I inadvertently failed to attach to the complaint the signed opinion letter of the Similar Health Care Provider attached as Exhibit 2 hereto.

10. At the time I failed to attach the signed opinion letter of the Similar Health Care Provider, such letter existed and was retained in the client's file.

11. My failure to attach the signed opinion letter of the Similar Health Care Provider was inadvertent and an oversight.

SEAN K. MCELLIGOTT

Subscribed and sworn to before me this 28th day of June 2012.

Notary Public
My commission expires: MY COMMISSION EXPIRES 2/30/20

YAFFA S. PORAT
NOTARY PUBLIC

Seal

EXHIBIT 1

Koskoff
Koskoff
&
Bieder PC

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J. Craig Smith
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National Board of Trial Advocacy

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Diana V. Orozco
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Marge Esposito
Wendy Grosso
Diane C. Rivera, R.N
Diane L. Zalewski
Terri L. Beatty
Janet E. Mitchell
Julie A. Alleyne
Diana C. Coppola
Karen M. Jacobs, R.N.
Evelyn McGrath, R.N.

November 16, 2011

Via Federal Express

Re: Judith Kissel

Dear

Thank you for agreeing to review this case. It involves a 52 y/o who scheduled her first acupuncture session with Dr. Reed Wang who provides his service at the OB/GYN office of Center for Women's Health in Stamford. During this session on April 22, 2010, a heat lamp was set up and Dr. Wang exited the room. At some point, this heat lamp fell onto Ms. Kissel's left foot. Dr. Wang and obstetrician, Dr. Joel Evans took Ms. Kissel to Stamford ED where she was diagnosed with 3rd degree and 2nd degree burns to the left great toe as well as the dorsum aspect of the foot and the left second toe. She has had multiple surgeries and skin grafts as a result.

The medical records are skimpy because Dr. Wang did not write a note in her chart pertaining to this incident. Only Dr. Evans made a notation after the fact. We are looking to you for comment on this incident and Dr. Wang's care and treatment as an acupuncturist.

When you have completed your review, please call Attorney Joel Lichtenstein at your earliest convenience to discuss.

Very truly yours,

Evelyn McGrath RN/Paralegal

emc
Enc (medicals)
mmp\blues\experts\kissel to wan

EXHIBIT 2

OPINION
PURSUANT TO C.G.S., SECTION 52-190a

Dear Mr. Lichtenstein:

Thank you for asking me to review the case of Judith Kissel. As you know, I am a licensed acupuncturist. In my role as a licensed acupuncturist, I am familiar with the standard of care as it relates to the practice of acupuncture in the United States. At your request, I have read and reviewed the following medical records of Judith Kissel:

- Records from the Center for Women's Health
- Records from the Stamford Hospital

Based upon my review of the medical records, it is my opinion that there was negligence in the care and treatment of Judith Kissel by Reed Wang, L.Ac on April 22, 2010 at the Center for Women's Health. The standard of care dictates that patients receiving acupuncture must be positioned a safe distance from any piece of equipment that has the potential to injure the patient. In addition, the patient needs to be appropriately monitored to ensure that the patient remains safe throughout the acupuncture procedure. In this case, Ms. Kissel's left foot was burned on a heat lamp while she was receiving acupuncture from Reed Wang, L.Ac. Mr. Wang was negligent in his placement and/or monitoring of Ms. Kissel during the acupuncture procedure. Mr. Wang's departure from the standard of care was a substantial factor in causing the thermal burn to Ms. Kissel's left foot.

My opinion that there was negligence on the part of Mr. Wang is based upon my review of the medical records as well as my education, training, and experience. The opinion stated herein is based upon the information available to me at this time. Should other information and evidence become available, I reserve the right to supplement and/or amend this opinion.

EXHIBIT 3

Lindsey Hanson

From:
Sent: Sunday, February 19, 2012 3:24 PM
To: Lindsey Hanson
Subject: Re: Opinion letter- Kissel
Attachments: Acudoc.PDF; ATT00001.htm

I scanned it and attached it for you. Please let me know if you still need a hard copy.
Thanks,

EXHIBIT B

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.
Victoria Mack DIXON et al.
v.
MED NOW FAMILY WALK-IN and Industrial Medical Center, aka Med Now, P.C. et al.

No. CV085014898S.
Feb. 25, 2010.

Stratton Faxon, New Haven, for Victoria Mack Dixon et al.

Cooney Scully & Dowling, Hartford, for Med Now Family Walk-In and Industrial Medical Center, aka Med Now, P.C. et al.

GILARDI, J.T.R.

*1 This litigation is based on a medical malpractice claim arising out of events which occurred on April 7, 2006. The initial complaint, filed March 28, 2008, is based on the following facts:

On April 7, 2006, the plaintiff, Victoria Mack Dixon,[FN1] went to Med Now Family Walk-In and Industrial Medical Center, P.C. (Med Now) and received treatment from Eileen T. Tarpey, an Advanced Practice Registered Nurse (APRN).[FN2] On the day in question, Victoria Dixon complained of an ongoing severe headache. She had been previously diagnosed with acute sinusitus at the Norwalk Medical Group on March 25, 2006 where they had prescribed an antibiotic. Tarpey noted the history and diagnosed Victoria Dixon with sinusitis. In fact, plaintiff was actually suffering from a subarachnoid hemorrhage with venous sinus thrombosis and intraventricular for hemorrhage, which ultimately led to a stroke, coma and numerous other injuries. It is alleged that the ultimate injuries suffered by Victoria Dixon could have been prevented had the defendants at Med-Now treated her properly by ordering proper tests, performing a detailed neurological examination and referring Victoria Dixon to an emergency room or arranging that she be evaluated by a physician.

FN1. Stephanie Mack Dixon was appointed power of attorney for Victoria Mack Dixon on July 24, 2006.

FN2. The plaintiff claims that it was unclear who treated Victoria Dixon because it appeared that the medical report had been written by several health care providers.

On May 15, 2008, the defendants filed a motion to dismiss on the ground that the plaintiff attached a letter from a board-certified internist rather than an APRN to the initial complaint. The court initially granted the defendants' motion to dismiss on September 9, 2008. The plaintiffs then filed a motion to reargue the ruling on September 26, 2008. The parties presented oral arguments before the court on October 27, 2008. The court denied the defendants' motion to dismiss without prejudice, and instructed the plaintiffs to file a letter from a similar health care provider. On March 24, 2009, the defendants filed a supplemental motion to dismiss, which the court also denied without prejudice on June 8, 2009. On April 30, 2009, the plaintiffs filed a request to amend the complaint, along with the amended complaint, which the court granted on May 19, 2009. The amended complaint was accompanied by letter from a nurse who is certified by American Nurses Credentialing Center (ANCC) as a family nurse practitioner, and who teaches graduate courses to prepare Advanced Practice Nurses (APNs).[FN3] On May 6, 2009, the defendants filed a motion in opposition to the plaintiffs' request to file the amended complaint. On June 8, 2009, the defendants filed a second motion to dismiss, which

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this court denied on August 10, 2009. The current motion before the court is the defendants' motion to reargue (# 140), which was filed on August 19, 2009. In deciding whether to grant the defendants' motion to reargue the motion to dismiss, the court must address: Whether the plaintiff may file an amended complaint with an opinion letter from a similar health care provider when the opinion letter attached to the original complaint was from a board-certified internist rather than an APRN.

> FN3. "An Advanced Practice Nurse (APN) is a Registered Nurse (RN) who has completed an advanced nursing educational program and has achieved national certification from an approved certifying body ... APNs and APRNs (Advanced Practice Registered Nurse[s]) are generally the legally recognized terms used by State Boards of Nursing." Andrea Easom, *Which credentials should nursing adopt as standard? APN and APRN are the appropriate credentials,* Nephrology Nursing Journal (Jan.-Feb.2005).

***2** "A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Caruso v. Bridgeport,* 285 Conn. 618, 627, 941 A.2d 266 (2008); *R.C. Equity Group, LLC v. Zoning Commission,* 285 Conn. 240, 248, 939 A.2d 1122 (2008). "The motion to dismiss ... admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone ... Where, however ... the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue ..." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co.,* 282 Conn. 505, 516, 923 A.2d 638 (2007). "When a [trial] court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from all the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *State v. Marsh & McLennan Cos.,* 286 Conn. 454, 464, 944 A.2d 315 (2008).

"In order to determine whether to grant the [motion] to [d]ismiss, this court must first review the statutes in question." *Santorso v. Bristol Hospital,* Superior Court, judicial district of New Britain, Docket No. CV 06 5001663 (January 25, 2007, Prestley, J.) [42 Conn. L. Rptr. 724]. "Effective October 1, 2005, a party who files a medical malpractice action is required to file both a certificate of good faith and a written opinion from a similar health care provider stating 'that there appears to be evidence of medical negligence ... includ[ing][the] detailed basis for the formation of such opinion.' General Statutes § 52-190a(a)." *Robbins v. Physicians for Women's Health, LLC,* Superior Court, judicial district of New London, Docket No. 5002633 (October 16, 2007, Hurley, J.T.R.) [44 Conn. L. Rptr. 315]. Subsection (c) of § 52-190a provides that "[t]he failure to obtain and file a written opinion required by subsection (a) [of § 52-190a] shall be grounds for the dismissal of the action." The Supreme Court has explained that "the general purpose of § 52-190a is to discourage the filing of baseless lawsuits against health care providers." *LeConche v. Elligers,* 215 Conn. 701, 710, 579 A.2d 1 (1990).

"[A] 'similar health care provider' is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' " General Statutes §

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52-184c(c).

*3 The plaintiffs' amended complaint of April 30, 2009 was accompanied by letter from a certified family nurse practitioner, who teaches graduate courses to prepare APNs. In their motion to reargue of August 19, 2009, the defendants claim that an amended complaint that includes a new expert report generated after the filing of the lawsuit violates General Statutes § 52-190a, because such opinion letters must be obtained pre-suit.[FN4] The defendants have not raised the issue of whether the second letter writer is a "similar health care provider" pursuant to the statute. Rather, they simply argue that the plaintiffs' claim should be dismissed on the ground that § 52-190a precludes the plaintiffs from filing an amended complaint with a letter from a similar health care provider that was obtained *after* filing the lawsuit.

FN4. Practice Book § 10-59 provides that "[t]he plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day." While § 10-59 applies in most instances, in medical malpractice claims our Appellate Court has found that when a plaintiff fails to attach a certificate of good faith and a letter from a healthcare provider to the initial complaint, that plaintiff is not entitled to amendment as of right. See *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn.App. 569, 966 A.2d 813 (2009) (granting the defendants' motion to dismiss because the plaintiff failed to attach a good faith certificate and letter from a similar health care provider to the original complaint); see also *Rios v. CCM Corp.*, 106 Conn.App. 810, 943 A.2d 544 (2008) (same).

In support of their argument, the defendants cite to *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn.App. 569, 966 A.2d 813 (2009) (granting the defendants' motion to dismiss because the plaintiff failed to attach a good faith certificate and letter from a similar health care provider to the original complaint), and *Santorso v. Bristol Hospital*, Superior Court, judicial district of New Britain, Docket No. CV 06 5001663 (April 3, 2008, Pittman, J.) [45 Conn. L. Rptr. 294] (granting the defendants' motion to strike because the plaintiff failed to attach a good faith certificate and letter from a similar health care provider to the original complaint).[FN5] Connecticut courts granted the defendants' motion to dismiss and motion to strike, respectively, in those cases because the plaintiffs failed to attach a certificate of good faith and a letter from any health care provider to their original complaints. *Votre* and *Santorso*, however, can be distinguished from the present case because the plaintiffs in this case did attach a certificate of good faith and a letter from a health care provider in the initial complaint, albeit not a similar health care provider.

FN5. The defendants could have also cited to *Rios v. CCM Corp.*, 106 Conn.App. 810, 943 A.2d 544 (2008), in support of their argument, but did not do so.

In instances in which the plaintiff attaches a letter from a health care provider, even if it is not a "similar health care provider" for purposes of the statute, Connecticut courts have allowed the plaintiffs to amend their complaints in order to comply with the "similar health care provider" requirement of § 52-190a. In *Sicignano v. Mid-Town Auto Body, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV 08 6000611 (July 31, 2009, Tyma, J.), the apportionment defendant, Yale New Haven Hospital, Inc., asserted "that the written opinion of a 'similar health care provider' filed by the apportionment plaintiffs with their apportionment complaint ... as is required by § 52-190a, [was] insufficient in that it contain[ed] the opinion of an emergency room registered nurse and not an emergency room physician." Nevertheless,

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the court denied the defendants' motion to dismiss because "[g]iven the early stage of this litigation and the limited information presently available to the apportionment plaintiffs prior to discovery, the written opinion provided by the apportionment plaintiffs [was] sufficient to satisfy the requirements, spirit and intent of § 52-190a." *Id.* The court explained that "[i]t would be unwieldy at best, not to say unnecessary and unhelpful, to have a blizzard of opinion letters from a physician, a physician's assistant and a nurse all opining, probably hypothetically, about evidence of negligence. While [§]52-190a as amended was intended to add a significant hurdle there is no indication of an intent to make the hurdle to filling a medical malpractice case insurmountable, or unnecessarily difficult." *Sicignano v. Mid-Town Auto Body, Inc., supra,* Superior Court, Docket No. CV 08 6000611.

*4 Similarly, in *Crowell v. Pito,* Superior Court, judicial district of New Britain, Docket No. CV 08 5008149 (January 7, 2009, Pittman, J.) [46 Conn. L. Rptr. 876], the court denied the defendants' motion to dismiss on the ground that the opinion letter was not from a similar health care provider. The court explained: "[A]t [the] early stage[s] of ... litigation, before the opportunity for discovery and before the lines of authority and the relationships of the defendants to one another can be fully developed, that level of specificity may present an impossible obstacle for any plaintiff, and even more so, to the author to the medical opinion letter ..." *Crowell v. Pito, supra,* Superior Court, Docket No. CV 08 5008149.

Both *Sicignano* and *Crowell* involved medical malpractice claims that allegedly took place in hospitals, where it was unclear exactly which health care providers treated the plaintiffs. In both of those cases, the plaintiffs attached letters from heath care providers to the initial complaints. The defendants argued that the complaints should be dismissed because the letters were not written by similar health care providers. The courts denied the defendants' motions to dismiss because they found that the attached letters, although not from similar health care providers, were sufficient to comply with the statute and could be remedied by amendment.

The cases above demonstrate that a grant or denial of a defendant's motion to dismiss or motion to strike depend upon whether the plaintiff attached a good faith certificate and a letter from a reasonably appropriate health care provider to the initial complaint. The plaintiffs in *Votre* and *Santorso* failed to attach a certificate of good faith and a letter from any health care provider to the original complaint. In those cases, the courts explained that a case must be dismissed or stricken when a plaintiff fails to attach a certificate of good faith and a letter from a similar health care provider to a complaint at the time that a case is initially filed. Conversely, in *Sicignano* and *Crowell,* the courts explained that in a case in which the true identity of the medical provider is ambiguous, a plaintiff may file an amended complaint to include a letter from a similar health care provider after the claim has been brought, as long as the plaintiffs, in good faith, included a letter from a health care provider who reasonably could have treated the plaintiff at the time the injury occurred. The courts found that the fact that the letters attached to the original complaints were written by non-similar health care providers did not warrant dismissal, and could be remedied by amendment.

It is the opinion of this court that the conclusions found in *Sicignano* and *Crowell* equally apply to the present case. Although the defendant medical center is not a hospital, as in *Sicignano* and *Crowell,* the identities of the treating medical personnel were ambiguous at the time that the plaintiffs filed the lawsuit. Similarly, in the present dispute it is unclear who was responsible for the treatment of Victoria Dixon on the day in question because it appeared that several different individuals had made notations on her medical chart. Further, the medical clinic is staffed by a number of medical personnel who possess different professional qualifications. It is reasonable that any number of medical profes-

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sionals could have attended to Victoria Dixon on the day in question. The plaintiffs' counsel, operating under the information that they had at the time that they filed the lawsuit, made a good faith effort to obtain a letter from a similar health care provider. Apparently, the plaintiffs' counsel obtained a letter from a board-certified internist because they believed that a board-certified internist was responsible for treating Victoria Dixon on the day in question. The plaintiffs only became aware of the deficiency of the letter when they received responsive pleadings from the defendant. After this court ordered that the plaintiffs file an amended complaint with an opinion of a similar health care provider on October 29, 2008, the plaintiffs did so.

***5** The defendants have not challenged the sufficiency of the new opinion letter attached to the plaintiffs' amended complaint. The defendants simply seek to reargue the motion to dismiss, which this court denied on August 10, 2009, on the ground that the letter attached to the amended complaint was obtained after the lawsuit was filed. As the courts explained in *Sicignano* and *Crowell,* in cases where the identity of a health care provider is ambiguous, a plaintiff may file an amended complaint with a letter from a similar health care provider as long as the original complaint included a letter that reasonably complied with the statute. This court stands by its decision of August 10, 2009, denying the defendants' motion to dismiss, and denies defendants' motion to reargue the matter.

Conn.Super.,2010.
Dixon v. Med Now Family Walk-In
Not Reported in A.2d, 2010 WL 1233884 (Conn.Super.), 49 Conn. L. Rptr. 407

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Annie Gorneault v. Sean Colsen, D.P.M.

CV106004786

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW LONDON AT NEW LONDON

2011 Conn. Super. LEXIS 1226

May 6, 2011, Decided
May 6, 2011, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Robert A. Martin, J.

OPINION BY: Robert A. Martin

OPINION

MEMORANDUM OF DECISION RE MOTION FOR RECONSIDERATION. No. 122 MOTION TO SET ASIDE DISMISSAL, No. 126

This court, *Martin, J.*, granted the defendants' motion to dismiss the plaintiff's complaint on February 18, 2011. On February 25, 2011, the plaintiff filed a motion for reconsideration of the court's decision. The defendants filed an objection to the plaintiff's motion on March 1, 2011. In addition, the plaintiff filed a motion to set aside this court's judgment of dismissal on March 14, 2011; the defendants filed an objection on March 16, 2011. The plaintiff also filed a request to amend her complaint on April 1, 2011, to which the defendants objected on April 4, 2011. Oral argument was heard on this matter on April 4, 2011.

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court . . . [A] motion to reargue [however] is not to be used as an opportunity to [*2] have a second bite of the apple." (Citations omitted; internal quotation marks omitted.) *Opoku v. Grant, 63 Conn.App. 686, 692-93, 778 A.2d 981 (2001).*

In her motion for reconsideration, the plaintiff argues that *General Statutes §52-190a* does not provide for dismissal as a consequence of an inadequate written opinion if written by a similar health care provider. In response, the defendants cite the most recent Supreme Court decision interpreting *§52-190a, Bennett v. New Milford Hospital, Inc., 300 Conn. 1, 12 A.3d 865 (2011)*, for the proposition that dismissal is mandatory when an opinion letter is deficient and does not comply with *§52-190a(c).*

At the outset, it must be emphasized that the plaintiff continues to assert, erroneously, that dismissal of a case is not proper so long as a plaintiff attaches a letter by a similar health care provider to his or her complaint. Under the plaintiff's view, as long as any letter is attached, the case cannot be dismissed. This view is incorrect for three reasons: (1) it is contrary to the plain language of *§52-190a*; (2) [*3] it goes against direct appellate authority on this matter; and (3) it is in contradiction with the legislative intent of the statute.

First, *§52-190a* unequivocally requires the opinion letter of a similar health care provider to contain a detailed basis for the health care provider's opinion, and failure to comply with the statute renders the case subject to dismissal. *Section 52-190a(a)* provides in relevant part: "[T]he claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." *Section 52-190a(c)* provides:

"The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." Thus, the plain language of the statute dictates that an opinion letter must include a detailed basis for the formation of the similar health care provider's opinion and the failure to obtain and file an opinion letter that complies with subsection (a) is grounds for dismissal.

Further, the Supreme Court, in line with previous Appellate Court authority, [*4] has declared that dismissal is mandatory in the event that a plaintiff does not comply with *§52-190a*. Indeed, the most recent Supreme Court case addressing the myriad issues concerning *§52-190a*, *Bennett v. New Milford Hospital, supra, 300 Conn. 1*, confirms that dismissal was procedurally proper in this case because of the deficiency of the original letter that was attached to the complaint. The plaintiff in *Bennett* made the same argument as the plaintiff in the present case, namely "that dismissal was not appropriate because that remedy is limited to the situation wherein a plaintiff fails to attach any opinion letter at all . . ." *Id., 24*. The court rejected this argument after concluding that "the legislative history [of *§52-190a(c)*] indicates that a motion to dismiss pursuant to *§52-190a(c)* is the only proper procedural vehicle for challenging deficiencies with the opinion letter, and that dismissal of a letter that does not comply with *§52-190a(a)* is mandatory . . ." *Id., 29*.

Moreover, the plaintiff's argument that a court cannot dismiss a case where an opinion letter lacks a detailed basis for its opinion actually contradicts the statute's policy of preventing frivolous claims, especially [*5] if plaintiffs are allowed to circumvent the statute's requirements and mandate of dismissal by merely attaching a letter, no matter how short, vague or conclusory, so long as it is written by a similar health care provider. "The . . . purpose of the original version of *§52-190a* was to prevent frivolous medical malpractice actions." (Internal quotation marks omitted.) *Bennett v. New Milford Hospital, supra, 300 Conn. 18*. The requirement of an opinion letter from a similar health care provider was added in Public Act 05-275, "in order to help [e]nsure that there is a reasonable basis for filing a medical malpractice case under the circumstances and . . . eliminate some of the more questionable or meritless cases filed under the present statutory scheme." (Internal quotation marks omitted.) *Id., 20*. If a defendant is not permitted to challenge the sufficiency of an opinion letter through the remedy called for in *§52-190a(c)*, dismissal, then the statute's underlying policy would be rendered meaningless.

In her motion for reconsideration, the plaintiff has not shown that the court, in dismissing her action, overlooked a controlling principle of law or misapprehended the facts of this case. [*6] Indeed, the Supreme Court case that was released one month prior to this court's judgment of dismissal confirms the original decision to grant the defendants' motion to dismiss. Therefore, the court hereby denies the plaintiff's motion for reconsideration.

Notwithstanding the conclusion that this court was correct in granting the defendants' motion to dismiss, the court is acutely aware and mindful of the Connecticut judiciary's policy of avoiding dismissal on procedural, curable technicalities and of finding jurisdiction whenever reasonably possible. The court also recognizes that the plaintiff would likely succeed in reviving this case through the accidental failure of suit statute, *General Statutes §52-592*. In *Plante v. Charlotte Hungerford Hospital, 300 Conn. 33, 56, 12 A.3d 885 (2011)*, the Supreme Court held that "a plaintiff may bring a subsequent medical malpractice action pursuant to the matter of form provision of *§52-592(a)* only when the trial court finds as a matter of fact that the failure in the first action to provide an opinion letter that satisfies *§52-192a(a)* was the result of mistake, inadvertence or excusable neglect, rather than egregious conduct or gross negligence [*7] on the part of the plaintiff or his attorney." In the interest of judicial economy, however, *Practice Book §17-4* and *General Statutes §52-212a* authorize a trial judge to set aside a dismissal as long as a motion to set aside the judgment is filed within four months. Whether to set aside the dismissal pursuant to such a motion is entirely within the court's discretion. See *Celanese Fiber v. Pic Yarns, Inc., 184 Conn. 461, 467, 440 A.2d 159 (1981)*.

It is significant to note that the circumstances warranting dismissal in the Supreme Court's two most recent cases on this subject are not present in the case at bar. In *Plante v. Charlotte Hungerford Hospital, supra, 300 Conn. 57*, "the plaintiffs' lack of diligence in selecting an appropriate person or persons to review the case for malpractice [for *§52-190a* purposes] can only be characterized as blatant and egregious conduct . . ." In *Bennett v. New Milford Hospital, supra, 300 Conn. 25*, the opinion letter was clearly not written by a similar health care provider, in the present case, the opinion letter was in fact written by a similar health care provider, a doctor who has already been disclosed as an expert witness. In addition, the doctor [*8] has provided the plaintiff and her attorney with a much more detailed letter to establish that there was a good faith basis for instituting this action against the defendants.

Section 52-190a was intended to be a gatekeeper statute, designed to curb frivolous medical malpractice cases that had become a drain on the judicial system and a significant distraction to the medical community. In *Bennett v. New Milford Hospital, supra, 300 Conn. 31*,

the Supreme Court "emphasize[d] that, given the purpose of *§52-190a*, which is to screen out frivolous medical malpractice actions, plaintiffs are not without recourse when facing dismissal occasioned by an otherwise minor procedural lapse . . . First, the legislature envisioned the dismissal as being without prejudice . . . and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute, *General Statutes §52-592*." Further, in a footnote, the *Bennett* court quoted a recent decision where the Appellate Court stated in dictum that "it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion . . ." *Id., 30 n.17*, quoting *Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 585, 966 A.2d 813*, [*9] cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*. It is clear that the present case is not one that *§52-190a* intended to prohibit. Further, forcing the plaintiff to proceed under the accidental failure of suit statute would be costly to both the plaintiff and the defendants, as well as a waste of judicial resources. Thus, in the interests of public policy and judicial economy, the court will use its discretion given the circumstances of this particular case to set aside the dismissal. The plaintiff will be permitted to amend her complaint with an attached opinion letter that complies with *§52-190a(a)*.

CONCLUSION

In summary, the plaintiff's motion for reconsideration is denied. The plaintiff's motion to set aside the dismissal is granted. The court also grants the plaintiff's request to amend her complaint and overrules the defendants' objection.

Martin, J.

Thomy Jaboin, Administrator of the Estate of Lydia Jaboin v. Bridgeport Hospital et al.

FBTCV095023443S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD, AT BRIDGEPORT

2009 Conn. Super. LEXIS 2442

September 10, 2009, Decided
September 11, 2009, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Barbara N. Bellis, J.

OPINION BY: Barbara N. Bellis

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS # 102

FACTS

In this wrongful death action, the plaintiff, Thomy Jaboin, in his capacity as administrator of the estate of Lydia Jaboin (the decedent), has brought suit against the defendants, Bridgeport Hospital (the hospital), Brian D. Baxt, Justin C. Cahill and Michael J. Werdmann. The complaint alleges the following facts. On March 24, 2007, the decedent became a patient of the emergency department of the hospital with complaints which included left calf pain without any previous history of trauma. At the request of a "Med-Now" walk-in clinic, the decedent went to the hospital in order to rule out deep venous thrombosis. At the time of the decedent's admission to the hospital, Baxt, Cahill and Werdmann held themselves out as specialists in emergency medicine and were "servants, agents, apparent agents and/or employees" of the hospital. The complaint alleges that each of the individual defendants "had concurrent control and acted in concert with each other herein as to the care, treatment, monitoring, diagnosing and supervision of the plaintiff's decedent . . ."

On April 24, 2007, the decedent died as [*2] a result of a massive pulmonary embolus caused by deep vein thrombosis. Consequently, the plaintiff alleges that the defendants failed to exercise reasonable care during the decedent's March 24, 2007 hospital visit, in that, *inter alia*, they failed to properly treat the decedent's deep venous thrombosis, incorrectly relied on a negative ultrasound to rule out deep venous thrombosis, misdiagnosed the decedent with a muscle strain, failed to take account of the decedent's symptoms that indicated deep venous thrombosis including an elevated d-dimer, failed to obtain a consultation with an internal medicine specialist and failed to administer the correct medication. Attached to the plaintiff's complaint are a certificate of reasonable inquiry, along with two medical opinion letters. The first letter, from J. Stephen Bohan, M.D., discusses the standard of care, whereas the second letter, from H. Brandis Marsh, M.D., addresses causation.

On May 14, 2009, the defendants filed a timely motion to dismiss and a memorandum of law in support. [1] The defendants move on the basis that the plaintiff's complaint fails to adhere to the requirements of *General Statutes § 52-190a*. In response, the plaintiff [*3] filed a memorandum of law in opposition on June 17, 2009, which attaches copies of the decedent's medical records from the subject hospitalization, the Bohan and Marsh opinion letters, and numerous Superior Court cases. On the same date, the plaintiff also filed a "supplement to objection to motion to dismiss," which attaches a notarized affidavit from Bohan. On July 10, 2009, the defendants filed a reply memorandum, which provided the

court with copies of Superior Court case law. This matter was argued at short calendar on July 13, 2009.

1 Counsel filed an appearance on behalf of all defendants on April 17, 2009.

DISCUSSION

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, 282 Conn. 130, 134, 918 A.2d 880 (2007).* "When a court . . . decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations [*4] of the complaint in their most favorable light . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone . . . Where, however . . . the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue . . ." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co., 282 Conn. 505, 516, 923 A.2d 638 (2007).*

The defendants move to dismiss this action on two grounds, both involving the plaintiff's alleged failure to adhere to the requirements of *§ 52-190a*. First, the defendants argue that this action must be dismissed as to Baxt and Cahill because the attached medical opinion letters do not contain any expert opinion as to alleged deviations from the standard of care by Baxt or Cahill. Secondly, the defendants contend that dismissal is appropriate as to all defendants because the attached opinion letters do not discuss a causal connection between the defendants' alleged negligence and the death of the decedent. As a result of our Supreme Court's recent decision in *Dias v. Grady, 292 Conn. 350, 972 A.2d 715 (2009),* [*5] where the Supreme Court held that *§ 52-190a* only requires a plaintiff to attach an opinion letter as to the standard of care, the defendants withdrew the lack of causal connection ground at oral argument. Accordingly, the court need only address the first ground raised in the defendant's motion to dismiss.

The plaintiff argues in response that the defendants' motion should be denied because (1) a motion to dismiss is not the proper procedural vehicle to challenge the sufficiency of an opinion letter from a similar health care provider, (2) the attached opinion letters are sufficient to maintain a cause of action against the hospital and its agents, including all of the individually named defendants, (3) the hospital records are unclear as to precisely which doctor misinterpreted the blood clotting study so the plaintiff has asserted this claim against all of the physicians who were listed as attending to the plaintiff and (4) *§ 52-190a* does not implicate subject matter jurisdiction so the court should not dismiss this case when the attached opinion letters are lengthy and provide an exact basis for the expert's opinions. Additionally, the plaintiff has also provided an affidavit from [*6] Bohan, where he attests that his opinion letter was meant to apply to all of the individual defendants, as it is unclear from the hospital's records which of the physicians incorrectly failed to rule out deep venous thrombosis.

The defendants respond to the plaintiff's arguments by contending that (1) a motion to dismiss is the correct procedural device to challenge the sufficiency of an opinion letter from a similar health care provider, (2) the court cannot consider the Bohan affidavit as it is outside the face of the complaint and (3) this case must be dismissed as to Baxt and Cahill because the plaintiff has failed to attach an opinion letter regarding the actions of these physicians.

Before addressing the defendants' substantive arguments, it is first necessary to determine whether a challenge to the sufficiency of an opinion letter can properly be raised by a motion to dismiss. As I have previously noted, "Connecticut's appellate courts have not yet had occasion to address whether a motion to dismiss is the proper vehicle where the written opinion has in fact been filed, but the claim is that the opinion is insufficient." *Shankar v. Midstate Medical Center, Superior Court, judicial* [*7] *district of New Haven, Docket No. CV 07 6001269 (November 28, 2007, Bellis, J.) (44 Conn. L. Rptr 595, 596, 2007 Conn. Super. LEXIS 3068).* In *Shankar*, I reviewed the legislative history for Public Act 05-275, which amended *§ 52-190a* effective October 1, 2005, and determined that the legislative history provided little guidance on the issue. In short, I found that while the legislative history includes discussions that a failure to file the written opinion would be grounds for a dismissal, the only reference in the legislative history with respect to the procedure to be filed where the written opinion is inadequate is found in the testimony of Attorney Mike Neubert to the Judiciary Committee. When this question was before me in 2007, I noted that, while there was a split in the Superior Court regarding this question, "[t]he majority of the trial courts that have decided the issue have held that a motion to dismiss should not be used to attack the sufficiency of the written opinion." *Id.* [2] *In their memorandum of law, the defendants argue that this split in authority was settled by the Appellate Court in Rios v. CCMC Corp., 106 Conn.App. 810, 943 A.2d 544 (2008).* A close examination of *Rios*, however, reveals that [*8] the plaintiff in that case failed to attach an opinion letter, and, therefore, that

holding does not necessarily address the present situation which involves the issue of sufficiency.

2 *In Shankar v. Midstate Medical Center, supra, 44 Conn. L. Rptr. 595, 2007 Conn. Super. LEXIS 3068*, the court did not directly address the issue of whether the sufficiency of a medical opinion letter should be challenged on a motion to dismiss or on a motion to strike. Although raised in a motion to dismiss, the parties in *Shankar* agreed that the matter could be resolved by either a motion to dismiss or a motion to strike. *Id., 597, 2007 Conn. Super. LEXIS 3068.*

In its subsequent discussion of *§ 52-190a*, the Appellate Court, in a case involving the plaintiff's failure to attach an opinion letter from a similar health care provider, stated that "[a] plaintiff's failure to comply with the requirements of *§ 52-190a (a)* does not destroy the court's subject matter jurisdiction over the claim . . . However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*." *Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 583, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*. This language suggests [*9] that the Appellate Court would uphold the dismissal of a case where the plaintiff has failed to adhere to the requirements of *§ 52-190a*, which would include an insufficient opinion letter. Moreover, recently in *Dias v. Grady, supra, 292 Conn. 350*, the Connecticut Supreme Court considered a challenge to the sufficiency of an opinion letter in the context of a motion to dismiss. In *Dias*, the Supreme Court, while not called upon to address the issue of whether the defendants properly raised the issue in a motion to dismiss as opposed to a motion to strike, did not suggest that the issue was not correctly before them. As our Supreme Court has both addressed the sufficiency of an opinion letter in the context of a motion to dismiss, in the *Dias* case, and indicated that a failure to comply with the requirements of *§ 52-190a(a)* renders the complaint subject to dismissal in the *Votre* case, it appears that the court may resolve this matter on the motion that is currently before it.

I will now address the defendants' argument that this case should be dismissed as to the defendants Baxt and Cahill because the attached opinion letters do not specifically reference their actions in treating the [*10] decedent. In both their memorandum of law and reply memorandum, the defendants urge this court to construe this case as if there were no letter from a similar health care provider, arguing that dismissal is therefore mandated. There are, however, two opinion letters attached to this complaint which must first be analyzed. See, e.g., *Wood v. Caldwell, Superior Court, complex litigation docket at Waterbury, Docket No. X10 CV 07 500584, 2008 Conn. Super. LEXIS 339 (January 23, 2008, Scholl, J.)* (rejecting the defendant's argument that motion to dismiss should be analyzed as if no opinion letter attached when defendant not referenced therein).

General Statutes § 52-190a(a) provides in relevant part: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial [*11] pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in *section 52-184c* . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

The plain language of *§ 52-190a(a)* sets forth two requirements. The plaintiff, or his attorney, is required to provide a certificate of reasonable inquiry that states there is a good faith basis to believe that there are grounds for suit against each of the defendants, and, in order to show this good faith, the plaintiff must provide a signed opinion of a similar health care provider. The statutory language does not expressly mandate that the opinion letter specifically reference the conduct of each of the defendants, as suggested by the [*12] defendants. The clause "against each named defendant" follows only the requirement of the certificate of reasonable inquiry, not the requirement of an opinion letter. The plaintiff's certificate of reasonable inquiry states that "reasonable inquiry has given rise to a good faith basis that grounds exist for an action against the named defendants, BRIDGEPORT HOSPITAL, its agents, apparent agents, servants and/or employees and BRIAN D. BAXT, JUSTIN CAHILL, AND MICHAEL J. WERDMANN." Accordingly, the plaintiff's certificate of reasonable inquiry conforms with the requirements of *§ 52-190a*, as it attests that there is a good faith basis for this lawsuit against each of the named defendants. In addition, the plain statutory language of *§ 52-190a* suggests that as long as the opinion letter provides a sufficient basis for a

good faith belief that there has been medical negligence, then the statutory mandate has been met.

Multiple Superior Court opinions also suggest this result. In a case that is procedurally analogous to the present matter, *Sarfatti v. Hoffman, Superior Court, judicial district of New Britain, Docket No. CV 06 5000903, 2006 Conn. Super. LEXIS 3933 (August 18, 2006, Robinson, J.)*, the court held that "[i]f [*13] a health care provider's statement demonstrates that grounds exist for an action against a defendant without specifically naming such defendant, the statement establishes the requisite foundation for the attorney's certificate, and, therefore comports with the statute." *Id.* In *Sarfatti*, the plaintiff brought suit against two doctors, VNA Health Care, and a nurse employed by VNA Health Care named Witzke. The medical opinion letter only detailed alleged negligence on the part of VNA Health Care, and failed to reference any of the individual defendants by name. Referencing the motion to dismiss brought by nurse Witzke, Judge Robinson wrote that "[i]n ruling on a motion to dismiss, the court must consider the complaint's allegations, as well as reasonable inferences that arise from such allegations, in the light most favorable to the pleader . . . Based on the allegations that Witzke was a VNA nurse and that she was 'continuously' responsible for the care of the decedent until the date of the decedent's death, the court finds that it is reasonable to infer that Witzke was the VNA nurse primarily, if not solely, responsible for the decedent's care and that the potential negligence of the [*14] VNA referenced in the nurse's opinion provides a basis for the assertion in the attorney's certificate that 'injury has given rise to a good faith belief . . . that grounds exist for a negligence action against . . . Witzke.'" (Citation omitted.) Accordingly, Judge Robinson denied Witzke's motion to dismiss.

Similarly, many Superior Court judges, including this court, have held that an opinion letter that only discusses alleged negligence on the part of a doctor is sufficient to withstand a motion to dismiss brought by a defendant hospital. In *Shankar v. Midstate Medical Center, supra, 44 Conn. L. Rptr. 595, 2007 Conn. Super. LEXIS 3068*, the plaintiffs brought suit against a hospital and its employee doctor. The plaintiffs' opinion letter only referenced the actions of the doctor. On the hospital's motion to dismiss, the court held that "[t]here is no requirement in the statute that the plaintiff in the complaint or in the certificate of good faith, or the similar health care provider, in the written opinion letter, must identify each agent, servant or employee of an institutional defendant." *Id., 598, 2007 Conn. Super. LEXIS 3068*. As a result, the court held that "[t]he opinion letter required by *§ 52-190a* need not serve as a template for the [*15] complaint, nor must it provide such detail that a defendant will have no need for any further discovery. The plaintiffs in this case have served the purposes of the statute, by filing with the complaint a written opinion letter which identifies and provides details for the basis of their claims. The threshold requirement that there is a basis for a medical malpractice claim has been satisfied by virtue of the written opinion which also serves the purpose of identifying the basis of the claim for defense counsel at the inception of the suit." See also *Guido v. Hughes, Superior Court, complex litigation docket at Waterbury, Docket No. X10 CV 06 5004889 (October 17, 2007, Scholl, J.) (44 Conn. L. Rptr 347, 2007 Conn. Super. LEXIS 2665)* (in context of motion to dismiss, certificate of good faith and opinion letter discussing doctor's negligence sufficient to allege liability of a hospital); *DeMaio v. John Dempsey Hospital, Superior Court, complex litigation docket at Hartford, Docket No. X07 CV 5010472 (August 5, 2008, Berger, J.) (46 Conn. L. Rptr. 121, 2008 Conn. Super. LEXIS 1996)* (in context of motion to dismiss, no requirement for separate opinion letters for each defendant); *Ellegard v. Hennessey, Superior Court, complex litigation docket* [*16] *at Hartford, Docket No. X03 CV 06 5008281 (March 28, 2007, Lagenbach, J.) (43 Conn. L. Rptr. 195, 2007 Conn. Super. LEXIS 889)* (same).

In the present case, the opinion letter written by Bohan provides a detailed discussion of the alleged negligence of the hospital and its employees. The letter states that "[t]he treatment received by Lydia Jaboin at Bridgeport Hospital fell below the standard of care. The physician and hospital failed to rule out deep vein thrombosis as a diagnosis and thus had the duty to provide or recommend a definitive course of follow-up care and diagnosis. First, the patient's pain was localized in her calf. The ultrasound only examines the *upper leg*. Therefore, based upon this patient's clinical presentation, the ultrasound done had very very limited negative predictive value . . . Secondly, the D-dimer test was markedly positive--*more than seven times the cut-off point* . . . Based upon the foregoing, it can be said with a reasonable degree of medical probability that the Bridgeport Hospital and Dr. Michael J. Werdmann deviated from the applicable standard of care in attempting to rule out a diagnosis of deep vein thrombosis in this patient." (Emphasis in original.) Furthermore, the complaint [*17] specifically alleges that "the defendant, BRIDGEPORT HOSPITAL, and its servants, agents, apparent agents, and/or employees, including the co-defendants, BRIAN D. BAXT, JUSTIN C. CAHILL, and MICHAEL J. WERDMANN, had concurrent control and acted in concert with each other herein as to the care, treatment, monitoring, diagnosing and supervision of the plaintiff's decedent, LYDIA JABOIN." Read together, the allegations of the complaint and the opinion letter suggest that all of the defendants were negligent, including Baxt and Cahill. Accordingly, the plaintiff has satisfied the re-

quirements of *§ 52-190a*, in that the plaintiff has submitted an opinion letter that shows there is a good faith belief to bring this action as to all of the defendants. As a result, the motion to dismiss is denied. [3]

3 Having decided that the attached opinion letters satisfy the requirements of *§ 52-190a*, it is unnecessary to determine whether the court can examine the Bohan supplemental affidavit. I would note, however, that *Practice Book § 10-31(b)* provides that "[a]ny adverse party who objects to [a motion to dismiss] shall . . . file and serve in accordance with *Secs. 10-12 though 10-17* a memorandum of law **[*18]** and, where appropriate, supporting affidavits as to facts not apparent on the record." Therefore, when responding to a motion to dismiss, our rules of practice expressly authorize the filing of an affidavit to explain facts that are unclear from in the record. While this affidavit was filed as a supplemental document, and not technically attached to the plaintiff's memorandum of law in opposition, it was filed the same day as the plaintiff's memorandum of law, and it would appear that the court has the authority to consider it. Moreover, our Appellate Court has recently taken the position that since a plaintiff's failure to adhere to *§ 52-190a* does not divest the court of subject matter jurisdiction, a court has discretion to allow a plaintiff to attach an opinion letter after the complaint has been filed. The Appellate Court has stated that "[g]iven the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach **[*19]** the opinion, and, in so doing, deny a pending motion to dismiss." *Votre v. County Obstetrics & Gynecology Group, P.C., supra, 113 Conn.App. 585*. If the Appellate Court has given a trial court the authority to allow a plaintiff to amend the complaint to add an opinion letter, it seems reasonable that the court could consider an affidavit that explains the existing opinion letter.

BELLIS, J.

Donald Noel v. Lawrence & Memorial Hospital

CV106002479

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW LONDON AT NEW LONDON

2010 Conn. Super. LEXIS 2289

September 9, 2010, Decided
September 9, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Emmet L. Cosgrove, J.

OPINION BY: Emmet L. Cosgrove

OPINION

MEMORANDUM OF DECISION

These motions challenge the sufficiency of the opinion letter attached to and supporting the plaintiff's complaint as to counts three and four. The plaintiff argues that the letters are sufficient and the motion must be denied.

FACTS

On January 6, 2010, the plaintiffs, Donald and Donna Noel, [1] filed a six-count complaint against the defendants, Lawrence and Memorial Hospital, Inc. ("L&M"), Emergency Medicine Physicians of New London County, LLC ("EMP") and Thomas Marchiondo, DO, alleging the following facts. [2] On December 15, 2008, Noel went to L&M, complaining of left arm numbness and slurred speech. A triage nurse examined Noel and found weakness in his left upper extremity. Marchiondo, who was on duty as an emergency room physician at the time diagnosed Noel with left cervical radiculopathy and sent him home.[3] Thereafter, on December 22, 2008, Noel returned to the hospital complaining of left arm numbness and slurred speech. Noel was admitted to the hospital with a diagnosis of transient ischemic attack. The next day, Noel was transferred to Yale New Haven Hospital and, on December 24, 2008 surgery was performed on Noel to restore [*2] circulation through his right internal carotid artery. Count one of the complaint alleges negligence against Marchiondo. Count two of the complaint alleges loss of consortium. Counts three and four of the complaint allege negligence against L&M and EMP, respectively. Counts five and six allege negligence against L&M and EMP, respectively, under the doctrine of respondeat superior. The complaint was accompanied by a certificate of reasonable inquiry and good faith, along with an opinion letter from a medical expert.

1 Donald and Donna Noel will be referred to collectively as the Noels. Donald Noel will be referred to individually as Noel.

2 L&M was served on December 15, 2009. EMP was served on December 30, 2009. Marchiondo was served, pursuant to *General Statutes 52-59b*, via the secretary of state on December 16, 2009. All parties have filed appearances in the present matter.

3 According to the complaint, Marchiondo was allegedly "employed by, was an agent of, and/or was the apparent agent" of both L&M and EMP.

On February 5, 2010, L&M filed a motion to dismiss the complaint's third count on the ground that the medical opinion letter failed to satisfy the requirements of *General Statutes § 52-190a*. The Noels moved for a continuance in order to cure the alleged deficiencies in the medical opinion letter and their motion was granted by the court, Devine, J., on February 18, 2010. On March 12, 2010, EMP filed a motion to dismiss the fourth count

of the complaint on the ground that such count was deficient under *§ 52-190a*. The Noels objected to EMP's motion on March 13, 2010 and EMP replied thereto on March 19, 2010. The court, Cosgrove, J., entered an order on April 5, 2010, continuing [*3] argument on EMP's motion.

The Noels subsequently filed a request to amend their complaint on April 20, 2010, and attached to that filing a second medical expert opinion letter. [4] Argument on the motions to dismiss of both L&M and EMP was heard by the court on May 24, 2010.

4 As no objection to the amended complaint was filed within the time proscribed by *Practice Book §10-60*, the amended complaint is the operative complaint in the present matter. The body of the amended complaint is identical to that of the original complaint, thus the recitation of allegations outlined above is consistent with the operative complaint's allegations.

DISCUSSION

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Caruso v. Bridgeport, 285 Conn. 618, 627, 941 A.2d 266 (2008)*. "In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Villager Pond, Inc. v. Darien, 54 Conn.App. 178, 183, 734 A.2d 1031 (1999)*.

Nonetheless, "motions to dismiss are not limited to jurisdictional challenges." *Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 582, 966 A.2d 813*, [*4] cert denied, *292 Conn. 911, 973 A.2d 661 (2009)*. "A plaintiff's failure to comply with the requirements of *§ 52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear [the plaintiff's] medical malpractice action. However, the legislature has provided that such a failure does render [the plaintiff's] complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading." *Id., 583-84*. Compliance with *§ 52-190a(c)* is required for the court to exercise personal jurisdiction over the defendant health care providers.

I

L&M's Motion to Dismiss

L&M initially moved to dismiss count three of the Noels' complaint for failing to satisfy the requirements of *§ 52-190a(a)*. In particular, L&M argued that the medical opinion letter attached to the complaint contained only a conclusory allegation that L&M [*5] deviated from the standard of care. The letter failed to provide a detailed basis for the formation of such opinion, as required under the statute.

The Noels subsequently filed an amended complaint. Attached thereto was the original opinion letter (the "first letter"), along with a second opinion letter (the "second letter") addressing alleged instances of misconduct on the part of L&M in its treatment of Noel.

L&M now argues that the second letter is likewise insufficient under the Appellate Court's decision in *Wilcox v. Schwartz, 119 Conn.App. 808, 815-16, 990 A.2d 366*, cert. granted, *296 Conn. 908, 993 A.2d 469 (2010)*, because it does not identify specific policies that should have been in place at the time of the subject incident. [5] The Noels counter that the second letter sets out specific procedures that were improperly administered by L&M.

5 This portion of L&M's argument was raised at the May 24, 2010, hearing and was not referenced in their original motion papers. L&M's original motion to dismiss argued that the first letter failed to include a detailed basis for the opinion that L&M deviated from the applicable standard of care. The parties have agreed that the amended complaint and letters attached thereto should be considered by the court in resolving the pending motions to dismiss.

"[*General Statutes §]52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make *'a reasonable inquiry as permitted by the circumstances* to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . .' To [*6] show good faith, the complaint . . . is required to contain a certificate of the attorney or party filing the action stating that 'such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . .' *General Statutes § 52-190a(a)*." (Italics added.) *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 542, 979 A.2d 1066*, cert. granted, *294 Conn. 916, 983 A.2d 849 (2009)*.

"[I]n order to fulfill the requirement of *§ 52-190a(a)* and to provide assurance that 'there appears to be evidence of medical negligence,' a claimant's written opin-

ion from a similar health care provider need not address the issue of causation. Further, the opinion must indicate that there appears to be evidence of a breach of the standard of care . . . The ultimate purpose of this requirement is to demonstrate the existence of the claimant's good faith in bringing the complaint by having a witness, qualified under *General Statutes § 52-184c*, state in written form that there appears to be evidence of a breach of the applicable standard of care. So long as the good faith opinion sufficiently addresses the allegations of negligence pleaded in the complaint . [*7] . . the basis of the opinion is detailed enough to satisfy the statute and the statute's purpose." *Wilcox v. Schwartz, supra, 119 Conn.App. 815-16.*

In *Wilcox*, the Appellate Court considered a written medical opinion that stated, "to a reasonable degree of medical probability, that there were deviations from the applicable standards of care by [a physician] and that the care and treatment provided to [the injured party] by [the physician] was not provided in a manner consistent with the standards of care that existed among general surgeons at the time of the alleged incident." (Internal quotation marks omitted.) *Wilcox v. Schwartz, supra, 119 Conn.App. 815.* Furthermore, that opinion stated that the physician "failed to prevent injury to [the injured party's] billiary structures during laparoscopic [gallbladder] surgery and failed to accurately document the surgical procedure." *Id.* In finding the written opinion sufficiently detailed, the *Wilcox* court reasoned that "the structure of the document reveals the author's statement of the prevailing standard of care: protecting the billiary structures during laparoscopic gallbladder surgery. It is this standard of care, the author opines, that [*8] [the physician] breached in performing the surgery on [the injured party]." *Id.*

Count three of the present complaint alleges negligence on the part of L&M. In particular, count three alleges that L&M failed to have appropriate policies, procedures and protocols in place to guide hospital staff in the proper treatment of patients exhibiting weakness or numbness of an extremity. In addition, count three alleges that L&M failed to follow existing procedures in its treatment of Noel and, furthermore, that it failed to supervise emergency room physicians, so as to ensure safe medical practices.

The second letter, authored by a board certified emergency physician and based upon a review of the medical records related to Noel's care, states that the author is "familiar with the standard of care for hospitals and emergency departments in 2008 as it relates to the symptoms, signs and condition that Mr. Noel presented with on December 15, 2008." The second letter goes on to state "that [L&M] in New London, Connecticut deviated from the standard of care expected of the average qualified hospital." The second letter further states that such deviation resulted from L&M "either failing to have in [*9] place or failing to comply with an adequate policy or procedure for the evaluation and care of patients presenting ischemic stroke symptoms and signs on December 15, 2008. Had these deviations from the standard of care not occurred, Mr. Noel's subsequent stroke and resultant neurologic disability would, more likely than not, have been prevented."

Applying the textual analysis of *Wilcox* to the second letter, the present author has opined that the prevailing standard of care is the maintenance of, or compliance with, an adequate policy or procedure for evaluating patients presenting signs of ischemic stroke. In failing to maintain or comply with such adequate policy or procedure, the author opines that L&M has breached the prevailing standard of care. Thus, the second letter suffices to notify the reader that a similar health care provider is of the opinion that the medical negligence alleged consisted of a failure to maintain or comply with an adequate policy or procedure for evaluating and treating patients presenting symptoms of ischemic stroke on December 15, 2008. As the Noels' amended complaint alleges that L&M failed to have in place or follow appropriate procedures to guide hospital [*10] staff in the treatment of patients exhibiting extremity weakness or numbness and alleges, by reference, that Noel went to L&M on December 15, 2008, complaining of "left arm numbness and slurred speech," all alleged symptoms of ischemic stroke, the second letter sufficiently addresses the allegations of negligence pleaded in count three of the amended complaint.

II

EMP's Motion to Dismiss

EMP moves to dismiss count four of the Noel's complaint on the ground that the attached medical opinion letters fail to satisfy the requirements of *52-190a(a)*. Count four of the complaint contains allegations against EMP substantially similar to those raised against L&M in count three. In particular, count four alleges that EMP failed to maintain proper procedures and/or follow proper procedures with regard to Noel's treatment and symptomatic manifestations. Moreover, count four alleges that EMP failed to supervise emergency room physicians so as to ensure they practiced in a safe manner.

EMP argues that the first and second letters do not set forth any opinions regarding EMP's conduct. In particular, the letters fail to state that there was evidence of medical negligence on the part of EMP. The Noels [*11] respond that the extent of EMP's control in the present matter is unclear; thus, EMP should be bound by the same law, and held to the same standard, as L&M.

Neither the first nor the second letter contain any mention of EMP. The first letter states that L&M and Marchiondo "deviated from the standard of care expected of the average qualified hospital and emergency care physician in the care of [Noel]." The first letter goes on to describe specific instances where Marchiondo allegedly breached the standard of care. The second letter, as described above, concerns itself with the adequacy of L&M's policies and procedures. Neither letter alleges that EMP breached the applicable standard of care and neither letter outlines instances of conduct that would allow for an inference of such breach. Thus, the medical opinion letters offered by the Noels are insufficient under *§ 52-190a(a)* as against EMP.

CONCLUSION

Based on the foregoing, L&M's motion to dismiss count three of the amended complaint is denied; EMP's motion to dismiss count four of the amended complaint is granted.

Cosgrove, J.

Francisco Ortiz v. Mabri Convalescent Center

CV095005414S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN AT MERIDEN

2010 Conn. Super. LEXIS 137

January 15, 2010, Decided
January 15, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Paul Matasavage, J.

OPINION BY: Paul Matasavage

OPINION

MEMORANDUM OF DECISION

This is a decision on a motion to dismiss, dated August 27, 2009, filed by the defendant Mabri Convalescent Center, Inc. The plaintiff, Francisco Ortiz, [1] commenced this action by service of process against the defendant, Mabri Convalescent Center, Inc. dba Meriden Center, on July 6, 2009, which claimed money damages as a result of a fall down in the defendant's facility.

1 The plaintiff, Francisco Ortiz is now deceased. On August 27, 2009, Dolores Ortiz, as administratrix of the estate of Francisco Ortiz, Jr., filed a motion to be cited into this action as a party plaintiff. The court, B. Fischer, J., granted her motion on September 17, 2009.

The plaintiff alleged the following facts in the one-count complaint. On or about April 5, 2007, the defendant, a duly organized public nursing home, admitted the sixty-three-year-old decedent for monitoring, recovery and rehabilitative purposes related to bronchitis, congestive heart failure and pneumonia. On or about April 6, 2007, at approximately 1:05 p.m., the decedent fell in the bathroom adjacent to his room in the defendant's facility and sustained injuries. The complaint alleges that [*2] he was unattended and unsupervised at the time.

The decedent's cause of action sounded in negligence. He alleged that the defendant's staff members, including nurses, nurse practitioners, physicians and physician assistants participated in the care and treatment rendered to the plaintiff. He further alleges that those staff members and other agents, employees and/or servants failed to do the following: take adequate steps to prevent the plaintiff from falling; adequately assess the plaintiff as an individual likely to fall given his present medical condition; adopt policies and procedures, such as direct and/or indirect supervision; adequately train and supervise staff to ensure that said staff adequately supervised patients who were likely to fall; adopt and execute a plan that was adequate to prevent the plaintiff from falling even though they knew or should have known that he was a candidate likely to fall; and properly observe and oversee the plaintiff to prevent the plaintiff from falling.

Attached to the decedent's original complaint was a letter whose author stated an opinion that there was evidence of medical negligence. The decedent did not attach, however, a certificate by [*3] his attorney attesting to a reasonable inquiry that gave rise to a good faith belief of grounds existing for the present action.

The defendant filed a motion to dismiss and an accompanying memorandum of law on August 27, 2009. The plaintiff filed an objection to the defendant's motion to dismiss with an accompanying memorandum of law on October 22, 2009. The plaintiff then filed a request to amend the complaint on November 19, 2009. [2] The

amendment that the plaintiff seeks to make to the complaint is the attachment of a good faith certificate and a written opinion that has been revised to include a paragraph describing the author's qualifications. According to the paragraph, the author is a senior physician assistant at three hospitals, specifically in the emergency medicine departments of two, and serves as a "Quality Assurance Reviewer" at one. This is a role in which the author "review[s] . . . procedures and/or update[s] the same on a regular basis to assure that the appropriate procedures are in place concerning fall prevention." The defendant objected to the request on November 20, 2009. On the same day, the defendant also filed a reply regarding the motion to dismiss. The court [*4] heard the matter at short calendar on November 23, 2009. On the same day, the plaintiff filed a supplemental memorandum of law in support of its objection to the motion to dismiss.

2 The plaintiff previously filed a request to amend the complaint on October 6, 2009. Attached to the proposed amended complaint was a good faith certificate. The defendant filed an objection to the request on October 16, 2009, which it withdrew on November 23, 2009.

I.

Even though this case is barely five months old, it already has a tortured procedural history. The court, therefore, must first address the plaintiff's second request to amend the complaint. The plaintiff argues in the request that the amendment will not change the substance of the complaint or the letter. It further contends in its supplemental memorandum that the request does not prejudice the defendant because the action is "no more than three and a half months old." The defendant objects on the ground that the revised written opinion cannot relate back to the original complaint. *General Statutes § 52-190a* requires a written opinion to be attached to a good faith certificate, and the defendant argues that the absence of the certificate from [*5] the original complaint precludes the relation back of the revised written opinion. It further contends in its reply memorandum that the plaintiff improperly seeks to submit a second written opinion by a similar health care provider under the guise of the amendment.

Practice Book § 10-60(a)(3) provides in relevant part: "[A] party may amend his or her pleadings . . . at any time subsequent to [the thirty-day period after the return date in which a plaintiff may amend a complaint as of right] . . . [b]y filing a request for leave to file such amendment, with the amendment appended, after service upon each party . . . and with proof of service endorsed thereon. If no objection thereto has been filed by any party within fifteen days from the date of the filing of said request, the amendment shall be deemed to have been filed by the consent of the adverse party." A party has timely filed an objection here. "It is [nonetheless] within the discretion of the trial court to grant or deny an amendment" and "the trial court's decision will not be disturbed unless there is a clear abuse of discretion." *Lord v. Mansfield, 50 Conn.App. 21, 31, 717 A.2d 267 (1998).*

The defendant in the present case [*6] has not demonstrated that it will be prejudiced by the amendment and has even referenced the amended complaint in its reply memorandum. The court therefore overrules the defendant's objection without prejudice because the objection essentially raises the same issue as the motion to dismiss, i.e., the statutory compliance of the plaintiff's written "similar health care provider" opinion. Accordingly, the operative complaint is the second amended version filed on November 19, 2009.

II.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Caruso v. Bridgeport, 285 Conn. 618, 627, 941 A.2d 266 (2008).* A court deciding a motion to dismiss "must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *State v. Marsh & McLennan Cos., 286 Conn. 454, 464, 944 A.2d 315 (2008).*

Section 52-190a(a) [*7] provides in relevant part: "The complaint [or] initial pleading [in a personal injury action] . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [*General Statutes §]52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." According to *§ 52-190a(c)*, "[t]he failure to obtain and file the written opinion required by *subsection (a)* of this section shall be grounds for dismissal of the action." The underlying purpose of the legislature in enacting . . . *§ 52-190a* was to discourage the filing of baseless lawsuits against health care providers, *LeConche v. Elligers, 215 Conn. 701, 710-11, 579 A.2d 1 (1990).*

III.

The principal claim in defendant's motion is that the plaintiff failed to provide an opinion [*8] from a similar health care provider. Two recent Connecticut appellate court have discussed the sufficiency of opinion letters in medical negligence cases. The first case is *Votre v. County Obstetrics & Gynecology Group, 113 Conn.App. 569, 583-84, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*, in which the Appellate Court determined that "a failure ["to comply with the requirements of *§ 52-190a(a)*"] does render [a] complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading." The second case is *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 545, 979 A.2d 1066 (2009)*, in which the Appellate Court again determined that "[a] plain reading of *[§ 52-190a(c)]* indicates that the letter must comply with *subsection (a)* to avoid potential dismissal. Thus, an action is subject to dismissal under *subsection (c)* if the written opinion is not from a similar health care provider or does not give a detailed basis for the opinion."

In the instant case, however, the plaintiff [*9] has brought an action against an institutional defendant, the Mabri Convalescent Center, Inc. The plaintiff alleges negligence of the "defendant's staff members, including nurses, nurse practitioners, physicians and physician assistants (who) participated in the care and treatment rendered to the plaintiff," which resulted in a fall on April 6, 2007. In a medical malpractice action in which the named defendant was an institutional entity, the Supreme Court held that the "relevant health care provider" under *§ 52-184c* "could have been either the defendant, as the corporate entity providing health care services to the plaintiff, or [a nurse-midwife], as the individual caregiver and an employee of the defendant." *Ali v. Community Health Care Plan, Inc., 261 Conn. 143, 152-53, 801 A.2d 775 (2002).*

The Appellate Court in *Bennett v. New Milford Hospital, Inc., supra, 117 Conn.App. 535*, also touched upon the issue of defining an institutional defendant as a "health care provider." It limited its statement that "the similar health care provider contemplated in *§ 52-190a(a)* is one defined in either *subsection (b)* or *(c) of § 52-184c*" by virtue of "the plain language of the statutes" to "a defendant [*10] health care provider who is a physician." *Id., 548-49*. It then noted in dicta that "there may be a gap in *§ 52-190a* regarding [institutional] defendants appropriate for the legislature to address because this is an area that, to the extent possible, should be addressed by specific statutory language rather than by judicial interpretation." *Id.*, n.10.

In interpreting the applicable statute for this case, the court is faced with the question as to who is qualified to author an opinion letter of a similar convalescent center or nursing home. This is certainly an unworkable requirement confronted by plaintiff's attorneys, because, as stated by Judge Adams in *Behling v. Aronow, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV 06 5001692S, 2007 Conn. Super. LEXIS 683 (March 12, 2007, Adams, J.)*, nursing homes "do not issue written opinions."

In this matter, the written opinion author is a senior physician assistant who works at three hospitals. At two, he or she works in the emergency medicine department, and at one, he or she has been a "Quality Assurance Reviewer" since 2000, a role in which he or she has the "responsibility to review the quality assurance for the nurses and the PA's at the hospital [*11] which includes fall prevention procedures." The allegations of the complaint allege a fall and negligence by the facility, its servants agents and employees, which includes physician's assistants. The statute does not require, under these circumstances, individual opinion letters from an administrator, physician, nurse, various aids, and maintenance personnel which would document all of the allegations of negligence contained in the complaint. The opinion letter from a physician's assistant qualified in quality assurance and fall prevention is sufficient to satisfy the underlying purpose of the legislature in enacting *§ 52-190a.*

Accordingly, the motion to dismiss is denied.

Matasavage, J.

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.
Agnes SQUEO, Fiduciary of the Estate of Stephen J. Sequeo et al.
v.
The NORWALK HOSPITAL ASSOCIATION et al.

No. FSTCV095012548S.
Jan. 22, 2010.

Tooher Wocl & Leydon LLC, Stamford, for Plaintiff.

Danaher Lagnese & Sacco P.C., Hartford, for Defendant.

KEVIN TIERNEY, Judge Trial Referee.

*1 The court finds that it has discretion to act on the Request for Leave to Amend under Gen.Stat. § 52-190(a)(a) and (c). The court finds that the two health care provider opinion letters attached to the amended complaint existed prior to the commencement of this action. *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn. 569, 585 (2009), cert. denied 292 Conn. 911 (2009). The court exercises its discretion and grants the Request for Leave to Amend dated November 18, 2009 (# 115.00). *Dow & Condon, Inc. v. Brookfield Development Corp.*, 266 Conn. 572. 583 (2003); *Alswanger v. Smego*, 257 Conn. 58, 64-65 (2001); *Moore v. Sergi*, 38 Conn.App. 829, 835-36 (1995). The court has applied the factors set forth in the above three cases in granting the Request for Leave to Amend.

The plaintiffs are ordered to file with the clerk of the Superior Court and serve on all defendants pursuant to P.B. §§ 10-12 and 10-13 an original signed amended complaint consistent with this court order so that the court computer file will contain the document entitled Amended Complaint together with the attached exhibits.

Conn.Super.,2010.
Squeo v. Norwalk Hosp. Ass'n
Not Reported in A.2d, 2010 WL 628314 (Conn.Super.)

END OF DOCUMENT

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Albert Ward, Administrator of Estate of Albert Ward v. William Ramsey, M.D. et al.

CV095028840S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW HAVEN AT NEW HAVEN

2010 Conn. Super. LEXIS 873

April 12, 2010, Decided
April 12, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

JUDGES: [*1] Thomas J. Corradino, Judge Trial Referee.

OPINION BY: Thomas J. Corradino

OPINION

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO DISMISS

Before the court is a motion to dismiss pursuant to *Practice Book § 10-30* and *§ 52-190a(c)* of the general statutes filed by the defendants based on lack of jurisdiction over the subject matter. The basic argument is that the good faith certificate does not comply with the requirements of *§ 52-190a* "in that the good faith opinion letter fails to specify exactly which health care provider allegedly deviated from the standard of care in providing care and treatment to Mr. Ward." It is also argued that counts three and four fail to state a legitimate cause of action.

1.

The court will first discuss what it perceives to be the law to be applied when a motion to dismiss is made pursuant to *§ 52-190a*. The relevant portions of the statute for the purposes of this motion read as follows:

> (a) No civil action . . . shall be filed to recover damages resulting from personal injury . . . occurring on or after October 1, 1987 . . . in which it is alleged that such injury . . . resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has [*2] made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that here has been negligence in the care or treatment of the claimant. The Complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . .
>
> (c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

Leading cases discussing the motion to dismiss under the statute are *Rios v. CCMC Corp., 106 Conn.App. 810, 943 A.2d 544 (2008)*; *Votre v. County Obstetrics &*

Gynecology Group, 113 Conn.App. 569, 966 A.2d 813 (2009) and *Bennett v. New Milford Hospital, 117 Conn.App. 535, 979 A.2d 1066 (2009)*.

What was suggested in Footnote 8 of *Rios, 106 Conn.App. at page 821* [*3] was made absolutely clear in *Votre. At 113 Conn.App. page 583* the court said:

> A plaintiff's failure to comply with the requirements of *§ 52-190a* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading.

The court referred to *Rios 943 A.2dat page 812* in explaining its position by saying, as noted in that case, "motions to dismiss are not limited to jurisdictional challenges."

The foregoing being the case some of the strictures to be applied in a subject matter jurisdiction scenario do not apply. Thus in *FDIC v. Peabody, 239 Conn. 93, 99, 680 A.2d 1321 (1996)* the court said: "It is axiomatic that once the issue of subject matter jurisdiction has been raised, it must be immediately acted upon by the court" or, more to the point for the purposes of this analysis: "Whenever the absence [*4] of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction," *Id.*

The court in *Votre*, of course recognized that an *FDIC v. Peabody* analysis does not apply because a § 52-190a motion to dismiss enforces the statutory intent of the legislature and has nothing to do with subject matter jurisdiction. *Votre* thus made clear that in an appropriate case, where the statutory purpose of *§ 52-190a* is not thereby ignored, a trial court does have discretion not to dismiss a malpractice case where the literal requirements of that statute have not been met. All of this is not the result of an interpercetive invention of this court but is based on the explicit language of *Votre at 113 Conn.App. 585, 586* where the court says:

> The court here determined properly that the plaintiff's claim sounded in medical malpractice. The plaintiff clearly did not attach to her complaint the written opinion of a similar health care provider. Because the purpose of *§ 52-190a* is to require the opinion prior to commencement of an action, allowing a [*5] plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires.
>
> *Given the fallibility existing in the legal profession once noted by Justice David M. Shea, [fn 10] it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss.* Such a discretionary action would not be at variance with the purpose of *§ 52-190a*, to prevent groundless lawsuits against health care providers. See *LaConche v. Elligers, supra, 215 Conn. 710, 579 A.2d 1*. However, the plaintiff here made the claim in her brief to the trial court that her complaint did not sound in medical malpractice and in oral argument before this court made clear that such a written opinion did not exist. Although we would entertain a remand in a case in which we determined that the trial court improperly failed to exercise its discretion [*6] when it was properly called on to do so; see *Higgins v. Karp, 243 Conn. 495, 504, 706 A.2d 1 (1998)*; we do not in the present case because it is clear that no opinion existed at the time the action was commenced, and, therefore, there was no room for discretion to be employed. (Emphasis by this Court.)

Under *FDIC v. Peabody, supra*, the exercise and implementation of such discretion would not be permitted. The controlling factor in determining the propriety of a trial court's discretion in this regard and any appellate review of that discretion is the purpose of the legislation to require the mandated opinion of a similar

healthy care provider *prior* to bringing suit, otherwise as *Votre* notes, the statute's purpose would be vitiated. The Court will discuss what that purpose is in the next section.

All of the foregoing does not mean that if a motion to dismiss pursuant to *§ 52-190a* is filed that the court need not address it immediately--any other course would not show appropriate deference to the legislature's intent. It simply means that how such a motion is addressed is not controlled by subject matter jurisdiction analysis.

2.

The question remains as to how a § 52-190a motion to dismiss **[*7]** should be applied. The court believes this must be answered by examining the purpose behind the requirements that a written opinion of a similar health care provider be attached to malpractice claims. *Votre* makes that purpose clear--a defendant should not be subjected to a claim without the proper substantiation of the claim that the statute requires (see quote *supra at 113 Conn.App. Page 586*). The recent case of *Wilcox v. Schwartz, 119 Conn.App. 808, 990 A.2d 366 (2010)* is even more explicit. It says at page 816 that "the purpose of the statute is to discourage frivolous lawsuits against health care providers." Speaking of the written opinion requirement authored by a similar health care provider the court goes on to say, "the ultimate purpose of this requirement is to demonstrate the existence of the claimant's good faith is bringing the complaint by having a witness, qualified under general statutes *§ 52-184c*, state in written form that there appears to be evidence of a breach of the applicable standard of care. So long as the good faith opinion sufficiently addresses the allegations of the negligence pleaded in the complaint, as this opinion does, the basis of the opinion is detailed enough **[*8]** to satisfy the statute and the statute's purpose."

Or as said in *Bennett v. New Milford Hospital, 117 Conn.App. 535, 543, 979 A.2d 1066 (2009)*,

> The written opinion now required, like the certificate, provides the defendant with some evidence that the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent.

It was with the recognition of this purpose behind the written opinion requirement of *§ 52-190a* that the court in *Wilcox* could say, that as noted above, that if a lawyer in fact had made a proper substantiation of a malpractice claim by obtaining the opinion, but inadvertently failed to attach it, the court may allow an amendment attaching the opinion in the exercise of its discretion. Why not? The purpose of the statute in effect has been accomplished, the lawyer just mistakenly omitted verification of this through the failure to attach the opinion. It seems to this court that if in fact the proper inquiry and substantiation had been made prior to the filing of the complaint, counsel for the plaintiff should be allowed to show this. What rational purpose would be served by not allowing such a showing--certainly **[*9]** not a statutory one, since there merely would be an attempt to show the statutory purpose was accomplished. These requirements were established by the legislature and the legislation should not be modified by enforcing procedural rules having to do with subject matter jurisdiction and its determination.

The Court will now to apply these observations to the issues presented by the motion to dismiss now before the court.

3.

The constant theme of the defendant's efforts to have this case dismissed is set forth in several briefs that were filed. In its first memorandum the argument is set forth:

> In the instant matter, the opinion letter is insufficient and not sufficiently detailed pursuant to *§ 52-190a* because it does not specify which physician allegedly deviated from the standard of care. Mr. Ward's subject admission to St. Raphael's Hospital lasted eighteen days. During this time period, he was seen by numerous physicians and nursing staff. The defendants are left to wonder whether the plaintiff claims that another physician(s) was allegedly negligent and if so, what specialty said physician(s) were. The opinion letter makes no mention of Dr. Ramsey deviating from the standard of care **[*10]** provided subsequent to the insertion of the PEG tube deviated from the standard of care and is void of any language stating that the actual insertion of the PEG tube by Dr. Ramsey was negligent.

This is the only basis advanced for the defendant's argument that the opinion letter is not sufficiently detailed to comply with *§ 52-190a*. The reasons offered in the letter setting forth the actual medical negligence leading to injury to the deceased and his eventual death are not challenged as lacking in detail--a difficult position for the defendants to prevail upon given the recent decision of *Wilcox v Schwartz, 119 Conn.App. 108, 990*

A.2d 366 (2010) which overruled a trial court decision the defendants have relied upon. Neither is there any challenge on the basis that the doctor given the opinion is not a similar health care provider.

Let us examine the letter attached to the original complaint in light of the statutory purpose for requiring the opinion letter in the first place--does it indicate "the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent." The letter references this case in the heading: [*11] "Re *Estate of Elbert Ward v. William Ramsey M.D.*" who else would the doctor who wrote the opinion letter think he was talking about in detailing the medical negligence he found but "William Ramsey M.D.?" And how would plaintiff's counsel interpret his opinion letter in any other way? True the letter uses the plural "physicians" but Ramsey is a physician and logically has to be at least one of the physicians who acted in the negligent way described. Why else head the letter "*Estate of Elbert Ward v. William Ramsey M.D.*"

Even if the above observations are not convincing as allowing a conclusion that the purposes of the statute have been met, it is also true that shortly after the motion to dismiss was filed plaintiff's counsel filed a request to amend the complaint in which the third and fourth count were removed and a new opinion letter was attached. It reads exactly the same as the first opinion letter attached to the complaint but adds as a second to last sentence. "Dr. William Ramsey, in his follow up care and treatment of Elbert Ward following his placement of the P&G feeding tube, deviated from the standard of care." This makes clear that Dr. Ramsey in the letter writer's opinion [*12] was a physician who deviated from the standard of care.

The defendants object to the request to amend. In the normal practice such a request can be granted in the court's discretion when it is filed beyond the thirty-day grace period, see PB *§§ 10-59* and *10-60*. The defendants cite *FDIC v. Peabody, supra* for the proposition that once a motion to dismiss is filed based on lack of subject matter jurisdiction the court must move directly to that motion and base its decision on the complaint as filed and cannot permit an amendment. But as previously discussed, the case law makes clear that a § 52-190a motion to dismiss does not raise the spectre of subject matter jurisdiction. As noted in *Votre* itself the court said it would be within the discretionary power of a judge to allow an amendment attaching an opinion of a similar health care provider inadvertently not attached to the complaint. The court said: "Such a discretionary action would not be at variance with the purpose of *§ 52-190a* to prevent groundless law suits against health care providers," *113 Conn.App. at page 586.*

So, again, the question is whether allowing the amendment here would be at variance with the purpose of *§ 52-190a* [*13] to prevent roundless law suits because as per *Bennett* there is reason to believe an inquiry was conducted prior to the lawsuit which would have given plaintiff's counsel a good faith belief that the health care provider was negligent.

The court concludes that the failure to specifically refer to Dr. Ramsey in the first opinion letter was inadvertent and at the time the original opinion letter was composed and sent to plaintiff's attorney the writer of that letter and the attorney would have had reason to know and did know that the letter referred to the negligence of Dr. Ramsey. Common sense would seem to indicate this--the original letter which in the heading referred to the suit against Ramsey said the doctor reviewed the records on the above referenced patient from 7/12/07 to 8/13/08 and the autopsy report. Obviously this record review formed the basis of the opinion and who else would have given the records to this doctor, Dr. Bisordi, but plaintiff's counsel? Dr. Bisordi's second letter, sought to be attached to the amended complaint, relied on the very same records noted in the first letter so the second letter's explicit notation that Ramsey breached the standard of professional [*14] care can hardly be considered an after the fact invention. If the defendants seriously claim these records are devoid of any reference to Dr. Ramsey, a hearing may be requested and the court will inspect those records upon filing of a motion to reargue. Also plaintiff's counsel should, in any event, submit an affidavit indicating whether he sent the records referred to in the letter to Dr. Bisordi and familiarized himself with these records prior to forwarding them.

However, based on the foregoing the motion to dismiss is denied and the request to amend is granted. [1]

1 The Court notes the second amended complaint withdraws the third and forth count which are also subject to the motion to dismiss.

Thomas J. Corradino

Judge Trial Referee

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JULY 9, 2012

OBJECTION TO REQUEST FOR LEAVE TO AMEND COMPLAINT DATED JUNE 28, 2012

Pursuant to Practice Book § 10-60(3), the defendant, Center for Women's Health P.C. hereby objects to the plaintiff's Request for Leave to Amend Complaint dated June 28, 2012.

I. Relevant Factual and Procedural History

This is a medical malpractice action initiated by plaintiff, Judith Kissel, by way of complaint dated March 30, 2012 bearing a Return Date of April 24, 2012. The undersigned attorneys appeared on behalf of the defendant Center for Women's Health P.C. on April 24, 2012. On May 24, 2012, the defendant Center for Women's Health P.C. moved to dismiss the complaint based upon lack of personal jurisdiction over the defendant due to the plaintiff's failure to attach the written opinion of a similar health care provider to the defendant's alleged agent, servant, or employee, Reed Wang, to the complaint as required by Conn. Gen. Stat. § 52-190a. On June 7, 2012, counsel appeared on behalf of Reed Wang, and joined the Motion to Dismiss filed by the undersigned. On June 28, 2012, the plaintiff filed her Opposition to the Defendants' Motions to Dismiss ("Opposition"). In the Opposition, plaintiff's counsel admits that he failed to attach the required written opinion of a similar health care provider to the defendant to the complaint. The plaintiff's counsel asserts that the court should grant his Request for Leave to File an Amended Complaint, dated June 28, 2012, to which he has attached an undated opinion letter in purported compliance with Conn. Gen. Stat. § 52-190a.

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No other amendments to the complaint have been made except the attachment of the undated opinion letter. The court should not grant the plaintiff's Request for Leave to File an Amended Complaint.

II. Law and Analysis

i. Plaintiff may not amend her complaint to include the opinion letter attached as Exhibit 2 to the Attorney Affidavit.

In Morgan v. Hartford Hospital, et al, 301 Conn. 388 (2011), the Supreme Court explained:

> [T]he attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with §52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court.
>
> Id. at 22.

Even if the opinion letter was in existence when the complaint was filed, which the defendant disputes, the Morgan case, which was conspicuously ignored in plaintiff's Opposition, mandates that the attachment of the written opinion is a statutory prerequisite to filing an action for medical malpractice. "[W]e recognize that the written opinion letter, prepared in accordance with the dictates of § 52-190a...is akin to a pleading that must be attached to the complaint in order to commence properly the action." Morgan, supra, at 398. Here the plaintiff has failed to fulfill the statutory prerequisite to filing an action for medical malpractice. This constitutes insufficient process and, thus, the defendant is not subject to the jurisdiction of the court.

It is well settled that when a motion to dismiss based upon lack of personal jurisdiction is filed, the court must resolve the jurisdictional question first. Here, the court may not

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consider the Request for Leave to Amend the Complaint prior to resolving the Motion to Dismiss. "[A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made." Gurliacci v. Mayer, 218 Conn. 531, 545 (1991) (concluding that the trial court should have ruled on the motion to dismiss prior to a motion to amend). See also Federal Deposit Ins. Corp v. Peabody, N.E., Inc., 239 Conn, 93, 99 (1996) ("Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction . . . The point has been frequently made.")

In Bennett v. New Milford Hospital, et al 300 Conn. 1 (2011), which is referenced in the plaintiff's Opposition, the Supreme Court had an opportunity to adopt the position of the Connecticut Trial Lawyers Association that "we should interpret § 52-190a(c) to permit the free amendment of challenged opinion letters to ensure their compliance with the statute." Id. at 24. The Supreme Court declined to adopt this position. See Id. Thus, it is clear that in a case such as this, where the plaintiff has failed to fulfill the statutory prerequisite to filing an action for medical malpractice, and the defendant has moved to dismiss the matter, the jurisdictional question must be resolved prior to considering an amendment to the complaint.

The plaintiff argues that the court should consider the opinion letter attached as Exhibit 2 to the Attorney Affidavit. However, there is no objective evidence that this undated letter was in existence prior to the commencement of this action. The defendant disputes the assertions of fact contained in paragraphs 3 through 11 of the Attorney Affidavit. There is no evidence that the plaintiff's counsel consulted with a similar health care provider to the defendant prior to the commencement of this action, that he made a

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reasonable inquiry that there were grounds for a negligence action against the defendant, that a similar health care provider to the defendant reviewed this matter prior to the commencement of this action, that a similar health care provider wrote the opinion letter attached as Exhibit 2 to the Attorney Affidavit prior to the commencement of this action, or that the failure to attach an opinion letter to the complaint was "inadvertent" or "an oversight." In fact, Attorney McElligott did not write the November 16, 2011 letter attached to the Attorney Affidavit, it was written by Evelyn McGrath, RN/paralegal. The person to whom the letter is directed is asked to call Attorney Joel Lichtenstein upon completion of his or her review. The undated letter attached as Exhibit 2 to the Attorney Affidavit is then directed to Mr. Lichtenstein. While it would appear that members of the firm other than Attorney McElligott were involved in writing to the purported expert and obtaining his opinions they have not presented affidavits as to when the informed was received.

In Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn. App. 569, 585, *cert. denied*, 292 Conn. 911 (2009), the Appellate Court instructed that, "[b]ecause the purpose of § 52-190a is to require the [written] opinion prior to the commencement of an action, allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires." The Appellate Court further explained that, "[t]he plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." Id. at 586.

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As the Supreme Court explained in Morgan v. Hartford Hospital, et al, 301 Conn. 388, 399 (2011), "*Votre* supports the proposition that the failure to attach a sufficient written opinion letter of a similar health care provider involves in personam jurisdiction." In Plante v. Charlotte Hungerford Hosp., 300 Conn. 33, 37-38 (2011), the companion case to Bennett, supra, the Supreme Court explained, "the legislature...has in effect made the prelitigation inquiry pursuant to § 52-190a (a) a significant aspect of the medical malpractice action. This is particularly so given that... § 52-190a (a) requires that the opinion letter be attached to the complaint..."

In Caplin v. Laser Center of Northeastern Connecticut[1], Superior Court, judicial district of Windham, Docket No CV 09 5003976S, (April 27, 2009, *Riley, J.*), the court held, [e]ven if the plaintiff had filed her amendment within the thirty-day deadline imposed by Practice Book §10-59, or had otherwise filed her amendment in compliance with the Practice Book, the Votre decision does not allow a plaintiff to rely on an opinion letter obtained after the filing of a medical negligence action." Id. at *8. In Simmons v. CVS Pharm., Inc. Superior Court, judicial district of Fairfield at Bridgeport, Docket No: CV 08 5021084S (June 15, 2009, *Hiller, J.*), Judge Hiller explained, "*Votre* and *Caplin* make clear that the court does not have discretion to consider an amended complaint that annexed an opinion letter which had not been obtained at the time the action was commenced." Id. at *19.

In Duran v. Alias, Superior Court, judicial district of Waterbury, Docket No. CV 09 5014109 S (February 25, 2010, *Gallagher, J.*), the Court granted the defendant's Motion to Dismiss despite the plaintiff filing an amended complaint as of right which appended to the complaint a written opinion letter that was not obtained prior to the commencement of the action. The Court held, "Under that circumstance, the plaintiff could not have complied with

[1] Unreported decisions attached as Exhibit A.

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the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under Votre, the court has no discretion to permit an amendment." Id. at *9-10.

In Sestito v. Mandara, Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. CV 09 6002437 S (August 2, 2010, *Adams, J.*), while a motion to dismiss based on the failure to attach a §52-190a opinion letter was pending, the plaintiff amended her complaint to include an opinion letter of a similar health care provider to the defendant. The Court explained that "the state of the law in Connecticut requires a dismissal of the amended complaint...where there is no evidence that the letter regarding [the defendant health care provider] was received prior to the filing of the original complaint." Id. at *12-13. The Court granted the motion to dismiss.

See also Patenaude v. Norwalk Hospital, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 09 5029048S (July 19, 2010, *Arnold, J.*) (granting a motion to dismiss on the basis that *§ 52-190a* requires that the certificate of good faith signed by the plaintiff's attorney and the written opinion of a similar health care provider be attached and contained within the initial complaint filed with the clerk.); Kirkpatrick v. New Britain Gen. Hosp., Superior Court, judicial district of New Britain, Docket No. CV-064011523S, (December 14, 2006, *Pittman, J.*) (The court granted defendant's motion to dismiss despite the plaintiff's filing of a request for leave to amend the complaint to append a written opinion obtained soon after the commencement of the action. The court explained, "[i]n enacting...52-190a...which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion

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was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.")

As set forth above, the court has no discretion to permit an amendment to attach the written opinion required by Conn. Gen. Stat. § 52-190a. The purpose of the requirement to attach the written opinion letter to the original complaint is to assure the defendant that a comprehensive pre-litigation inquiry has been completed. In this case, there can be no such assurance.

ii. The court may not permit amendment until the jurisdictional issues are resolved in an evidentiary hearing.

The law is clear that the court may look to the content of affidavits containing undisputed facts, for determination of jurisdictional issues raised in a motion to dismiss. In this case, the defendant disputes the assertion of facts in the Attorney Affidavit submitted by the plaintiff. If the court accepts the plaintiff's argument that she should be allowed to amend her complaint to include an opinion letter that was in existence at the time the complaint was filed, but which her attorney did not attach to the complaint, then the facts asserted in the Attorney Affidavit are critical to the determination of personal jurisdiction as the defendant disputes that the letter was actually in existence before the complaint was filed. The court may not resolve a critical fact on the basis of the complaint and affidavits if they contained controverted facts. An evidentiary hearing is required to resolve disputed facts. Coughlin v. City of Waterbury, 61 Conn. App. 310 (2001)

See also Garden Mutual Benefit Association v. Levy, 37 Conn. Supp. 790, 792 (1981) (trial court must hold an evidentiary hearing prior to determining personal jurisdiction questions when the parties have submitted affidavits presenting factual issues); Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 56 (1983) (trial court erred in not holding trial-like

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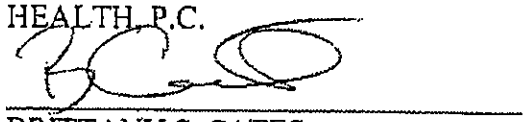
hearing when issues of fact were necessary to the determination of the court's jurisdiction); Lampasona v. Steve Jacobs, 7 Conn. App. 639, 642 (1986), *aff'd*, 209 Conn. 724 (1989), *cert. denied*, 492 U.S. 919 (1989) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.")

Here, there is no objective evidence that the plaintiff's counsel consulted with a similar health care provider to the defendant prior to the commencement of this action, that he made a reasonable inquiry that there were grounds for a negligence action against the defendant, that a similar health care provider to the defendant reviewed this matter prior to the commencement of this action, that a similar health care provider wrote the opinion letter attached as Exhibit 2 to the Attorney Affidavit prior to the commencement of this action, or that the failure to attach an opinion letter to the complaint was "inadvertent" or "an oversight." As set forth above, the court may not make a determination of personal jurisdiction over the defendant based on a self-serving and contested affidavit. An evidentiary hearing must be held before the court may make this determination.

WHEREFORE, the defendant respectfully requests that the court sustain this Objection to the Request for Leave to File an Amended Complaint.

THE DEFENDANT,
CENTER FOR WOMEN'S
HEALTH, P.C.



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CERTIFICATION

This is to certify that on 7/9/12 a copy of the foregoing was mailed, postage prepaid to all counsel and pro-se parties of record to:

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EXHIBIT A

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Rachel Caplin v. Laser Center of Northeastern Connecticut

CV095003976S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WINDHAM AT PUTNAM

2009 Conn. Super. LEXIS 1077

April 27, 2009, Decided
April 27, 2009, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient sued defendants, a medical practice, a doctor, and another, alleging claims for lack of informed consent, breach of contract, and violation of the Connecticut Unfair Trade Practices Act (CUTPA) against all defendants, and gross negligence against the doctor. Defendants filed a motion to dismiss. The patient filed an amended complaint, including an opinion letter signed by a similar medical provider.

OVERVIEW: The patient alleged that defendants provided dermatological care to the patient and that the patient's face was disfigured and scarred after a microdermabrasion procedure. The court first concluded that the patient's lack of informed consent claims were sufficient to withstand the motion to dismiss, as no opinion letter was required for such claims and the patient averred that she was not aware of the risks involved and would not have consented to the treatment if she had been aware. The breach of contract claim also survived, as it was a separate claim from the patient's negligence claim, did not require an opinion letter, and alleged that the doctor promised results that were not achieved. The CUTPA claim was also sufficient, as it did not allege medical negligence and thus, contrary to defendants' claim, did not required an opinion letter either. The gross negligence claim, however, failed to survive because an opinion letter was required where the allegations concerned whether the doctor was negligent in her treatment of the patient, and the opinion letter filed by the patient was not filed with the original complaint and was filed over 30 days after the original complaint.

OUTCOME: Defendants' motion to dismiss was granted as to the negligence claim and denied as to all other claims.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN2] A motion to dismiss properly attacks the jurisdiction of a court, essentially asserting that a plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] *Conn. Gen. Stat. § 52-190a(a)* provides that a party who files a medical malpractice action, or an apportionment complaint therein, is required to file both a certificate of good faith and a written opinion from a similar health care provider stating that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Pursuant to of *§ 52-190a(c)*, the failure to obtain and file the written opinion required by *§ 52-190a(a)* shall be grounds for the dismissal of the action.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN4] *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59* allows a plaintiff to amend a complaint, as of right, within thirty days of the return date. Otherwise, a plaintiff seeking to amend the complaint must follow the procedures in *Conn. Gen. Prac. Book, R. Super. Ct. § 10-60*, which may include by order of the court, by consent of the parties or by filing for a request to amend.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN5] Failure to comply with *Conn. Gen. Stat. § 52-190a* does not deprive a court of subject matter jurisdiction. *Section 52-190a* provides a remedy to the defendants in medical malpractice actions and does not impact the competence of the court to hear claims based on a common-law right of action for medical malpractice.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN6] A trial court has discretion to allow the amendment of a complaint in order to attach the opinion letter required for medical negligence claims if the letter was obtained prior to the filing of the original complaint. Given the fallibility existing in the legal profession, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *Conn. Gen. Stat. § 52-190a*, to prevent groundless lawsuits against health care providers. However, a plaintiff cannot turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action.

Evidence > Relevance > Relevant Evidence
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN7] The existence of expert testimony is not relevant where the issue is whether a plaintiff's action sounds in medical malpractice or in ordinary negligence.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN8] The question of whether expert testimony is required does not resolve whether, under *Conn. Gen. Stat. § 52-190a*, a plaintiff must submit an opinion letter from a similar healthcare provider.

Healthcare Law > Treatment > Patient Consent > Informed Consent
[HN9] The lay standard for informed consent requires a physician to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark on a contemplated course of therapy.

Healthcare Law > Treatment > Failures to Disclose & Warn > Medical Procedures
Healthcare Law > Treatment > Patient Consent > Informed Consent
Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Healthcare Providers
[HN10] The distinction between a duty to exercise due care in the performance of requisite medical procedures and a duty to exercise due care in informing a patient of medical risks is not merely linguistic. It reflects, instead, the fundamental difference between the appropriate performance of professional skills and the proper engagement of a patient in decision making about his or her professional care. A claim against a physician for negligence based on lack of informed consent is separate from a claim based on negligence in medical treatment, because it is based on information communicated by the physician to the patient before the procedure or treatment. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient.

Healthcare Law > Treatment > Patient Consent > Informed Consent
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN11] The distinction between informed consent and medical negligence is not whether the lay standard or the professional standard applies; rather, the relevant inquiry is whether the allegations involve the diagnosis and treatment of the patient.

Contracts Law > Breach > Causes of Action > General Overview
[HN12] A breach of contract claim is a distinct claim that may arise from the same facts and may exist where the physician and patient contract for a specific result. Thus, a medical malpractice action is a tort action unless the physician by express contract agrees to effect a cure or warrant that a particular result will be obtained. When determining whether a complaint sets forth an independent breach of contract claim or merely dresses a malpractice claim in contract language, a court examines the pleadings to ascertain whether the breach of contract alleged is based on substandard care or exists irrespective of adherence to or deviation from the standard of care.

Torts > Business Torts > Unfair Business Practices > General Overview
[HN13] Although physicians and other health care providers are subject to the Connecticut Unfair Trade Practices Act (CUTPA), they may be liable only for unfair, unconscionable, or deceptive methods, act, or practices in the conduct of the entrepreneurial, commercial, or business aspect of the practice of medicine. The practice of medicine may give rise to a CUTPA claim only when the actions at issue are chiefly concerned with entrepreneurial aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by a defendant.

Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > General Overview
[HN14] The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. The relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals; (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

JUDGES: [*1] Michael E. Riley, J.

OPINION BY: Michael E. Riley

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS # 102

On December 15, 2008, the plaintiff, Rachel Caplin, filed a complaint alleging that the defendants, Laser Center of Northeastern Connecticut, Nita Chatterjee, MD and Marie Corey, performed a dermatological procedure that caused damage to the plaintiff's skin. The return date for the action was January 6, 2009. The plaintiff alleges lack of informed consent, breach of contract and unfair trade practices against all three defendants and gross negligence against Chatterjee. The plaintiff attached to the original complaint a "Certificate of Good Faith," signed by her attorney, which states that grounds exist for a good faith belief that there was negligence in the care of the plaintiff.

On January 16, 2009, the defendants filed a motion to dismiss arguing that the court does not have jurisdiction over the complaint because the plaintiff failed to attach an opinion letter by a similar medical provider as required by *General Statutes §52-190a.* [1] On February 6, 2009, the plaintiff filed an amended complaint including an opinion letter signed by a similar medical provider. On February 17, 2009, the plaintiff [*2] objected to the motion to dismiss and filed a memorandum of law.

1 *General Statutes §52-190a* provides, in relevant part, that: [HN1] "(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . (c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

In the complaint, the plaintiff alleges the following facts. The defendants provided dermatological [*3] care to the plaintiff, including "TCA peels" and "microdermabrasion" on the plaintiff's face. The day after the microdermabrasion was performed, the plaintiff developed "a severed acneiform reaction" and her face was "disfigured and scarred." The plaintiff would not have consented to the procedures had she been advised of the risks of worsening acne and searring. The procedures were contraindicated for various reasons, including her skin condition and the frequency and proximity in time of the treatments. The defendants specifically promised "a baby soft feel of the face as well as better overall skin tone and skin clarity for the plaintiff." Finally, the defendants sold the plaintiff skin care products without warning her to wait before using the products, and they also performed the skin treatments too close together in time, despite having constructive knowledge of the plaintiff's sensitive skin.

[HN2] "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, [*4] the court is without jurisdiction." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut, 282 Conn. 130, 134, 918 A.2d 880 (2007).*

General Statutes §52-190a(a) [HN3] provides that a party who files a medical malpractice action, or an apportionment complaint therein, is required to file both a certificate of good faith and a written opinion from a similar health care provider stating "that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." Pursuant to *subsection (c) of §52-190a*, "[t]he failure to obtain and file the written opinion required by subsection (a) [of 52-190a] shall be grounds for the dismissal of the action."

In *Rios v. CCMC Corp., 106 Conn.App. 810, 822, 943 A.2d 544 (2008)*, the court concluded that "[t]he plain language of this new statutory subsection [i.e., *§52-190a(c)*], expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§52-190a(a)*. Accordingly, the [trial] court properly considered and granted the defendants' motion to dismiss."

The plaintiff argues that she cured [*5] any defect by filing an amended complaint with the opinion letter attached; furthermore, the plaintiff asserts that her claims for lack of informed consent, breach of contract and gross negligence do not require an opinion letter from a similar health care provider. The defendants argue that the failure to attach the opinion letter to the complaint deprives the court of subject matter jurisdiction. [2] The defendants also argue that the plaintiff's claims sound in medical malpractice, even where couched in the language of informed consent, breach of contract and gross negligence.

2 The arguments in the case were filed prior to the publication of *Votre v. County Obstetrics & Gynecology Group, 113 Conn.App. 569, 966 A.2d 813 (2009).*

The amended complaint was filed electronically on February 5, 2009 at 6:43p.m. The filing date, therefore, is recorded as February 6, 2009, thirty-one days after the original complaint was filed. *Practice Book §10-59* [HN4] allows a plaintiff to amend a complaint, as of right, within thirty days of the return date. Otherwise, a plaintiff seeking to amend the complaint must follow the procedures in *Practice Book §10-60*, which may include by order of the court, by consent of the parties [*6] or by filing for a request to amend. The original complaint, therefore, is the operative complaint for the motion to dismiss.

Before considering whether the plaintiff's claims in the original complaint must be dismissed for failure to include the opinion letter, the court must first address the issue of subject matter jurisdiction. The parties dispute whether, under *Rios v. CCMC Corp., supra, 106 Conn.App. 810*, the plaintiff's failure to attach an opinion of a similar health care provider under *General Statutes*

§52-190a(a) requires dismissal for lack of subject matter jurisdiction over a complaint for medical negligence.

The Appellate Court recently addressed the requirements of *§52-190a*; *Votre v. County Obstetrics & Gynecology Group, 113 Conn.App. 569, 966 A.2d 813 (2009)*; and ruled that [HN5] failure to comply with *§52-190a* does not deprive the court of subject matter jurisdiction. The court held that *§52-190a* provides a remedy to defendants in medical malpractice actions and does not impact the competence of the court to hear claims based on a common-law right of action for medical malpractice. The court noted that the General Statutes create other nonjurisdictional bases for dismissal of an action.

In [*7] *Votre v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 585*, the court explained that the [HN6] trial court has discretion to allow the amendment of a complaint in order to attach the opinion letter if the letter was obtained prior to the filing of the original complaint. "Given the fallibility existing in the legal profession once noted by Justice David M. Shea, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers." *Id.* The court makes clear, however, that "[t]he plaintiff [can] not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." *Id., 586.*

In the present case, the written opinion that is attached to the amended complaint filed by the plaintiff on February [*8] 6, 2009, is dated February 5, 2009. The plaintiff did not attach an opinion letter of a similar medical provider to her original complaint, filed on December 15, 2008, and the amended complaint includes an opinion letter apparently obtained after the filing of the original complaint. The plaintiff does not claim that she inadvertently failed to attach the opinion letter to the original complaint. Thus, even if the plaintiff had filed her amendment within the thirty-day deadline imposed by *Practice Book §10-59*, or had otherwise filed her amendment in compliance with the Practice Book, the *Votre* decision does not allow a plaintiff to rely on an opinion letter obtained after the filing of a medical negligence action. Any of the plaintiff's claims based on medical negligence are dismissed; however, the court must also consider the plaintiff's argument that the counts listed in the original complaint do not require an opinion letter under *General Statutes §52-190a(a)*. Each of the plaintiff's claims are considered in turn.

Count one and count two are claims for lack of informed consent. The plaintiff argues that claims based on informed consent require only lay testimony and, therefore, do [*9] not require an opinion of a similar medical provider. Even if the court assumes, without deciding, that the claims for lack of informed consent do not require expert testimony, [3] the inquiry does not end there. [HN7] "The existence of expert testimony is not relevant where the issue is whether the plaintiff's action sounds in medical malpractice or in ordinary negligence." (Internal quotation marks omitted.) *Peterson v. Griffith, Superior Court, judicial district of Windham, Docket No. CV 07 5001959 (February 4, 2009, Riley, J.) [47 Conn. L. Rptr. 181, 2009 Conn. Super. LEXIS 283]*. Similarly, [HN8] the question of whether expert testimony is required does not resolve whether, under *§52-190a*, the plaintiff must submit an opinion letter from a similar healthcare provider.

> 3 [HN9] "[T]he lay standard for informed consent requires a physician to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark on a contemplated course of therapy." (Internal quotation marks omitted.) *Duffy v. Flagg, 279 Conn. 682, 692, 905 A.2d 15 (2006)*. But see *Mason v. Walsh, 26 Conn.App. 225, 230, 600 A.2d 326 (1992)* (requiring that expert testimony be used to establish which, if [*10] any, of group of specialists assisting surgeon had duty to obtain plaintiff's informed consent).

The defendant argues that although the plaintiff labels her claims as "lack of informed consent," she has actually alleged medical negligence. The defendant relies on *Votre v. County Obstetrics & Gynecology Group, Superior Court, judicial district of New Haven, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380 (May 24, 2007, Hohlen, J.)*, aff'd, *113 Conn.App. 569, 966 A.2d 813 (2009)*, arguing that, like the claims in *Votre*, the plaintiff's claims for lack of informed consent center only around allegations that the defendants violated the standard of care. The plaintiff in *Votre* did not, however, allege lack of informed consent, and so neither decision directly addresses whether informed consent constitutes a separate claim from medical negligence.

[HN10] "The distinction between a duty to exercise due care in the performance of requisite medical procedures and a duty to exercise due care in informing a patient of medical risks is not merely linguistic. It reflects, instead, the fundamental difference between the appropriate performance of professional skills and the proper

engagement of a patient in decision making about his or her professional [*11] care . . . A claim against a physician for negligence based on lack of informed consent is separate from a claim based on negligence in medical treatment, because it is based on information communicated by the physician to the patient before the procedure or treatment. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient." (Citations omitted; internal quotation marks omitted.) *Sherwood v. Danbury Hospital, 278 Conn. 163, 180-81, 896 A.2d 777 (2006).*

The majority of Superior Court opinions addressing the distinction between lack of informed consent claims and medical negligence claims have ruled that no opinion letter is required for informed consent claims. *Rodriguez v. Yale New Haven Hospital, Superior Court, judicial district of New Haven, Docket No. CV 08 5021657, 2009 Conn. Super. LEXIS 702 (March 12, 2009, Robinson, J.)*; *Thiel v. Fine, Superior Court, judicial district of Hartford, Docket No. CV 08 50214685, 2009 Conn. Super. LEXIS 579 (February 26, 2009, Wagner, J.T.R.)*; *Lumbry v. Zhurowski, Superior Court, judicial district of Tolland, Docket No. CV07 6000211, 2007 Conn. Super. LEXIS 2880 (October 26, 2007, Vacchelli, J.) (44 Conn. L. Rptr. 452)*; *Pafka v. Gibson, Superior Court, complex litigation docket at Hartford, Docket No. X03 CV 05 5008249 (August 6, 2007, Langenbach, J.) (43 Conn. L. Rptr. 871, 2007 Conn. Super. LEXIS 2152)* [*12] ; *Stevens v. Spector, Superior Court, judicial district of Fairfield, Docket No. CV 06 5001000 (October 25, 2006, Hiller, J.) (42 Conn. L. Rptr. 244, 2006 Conn. Super. LEXIS 3229)*. But see *Brown v. Gulakis, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 06 5000424 (July 24, 2006, Wiese, J.) (41 Conn. L. Rptr. 695, 697, 2006 Conn. Super. LEXIS 2192)* ("where a patient seeks recovery against a physician based upon a lack of informed consent, he is bringing a malpractice action . . . [t]he fact that the physician's duty of disclosure is measured by a lay, as opposed to a professional, standard does not affect the substantive nature of the cause of action . . .")

In *Vatre v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 569*, the court found that claims labeled as infliction of emotional distress, breach of contract and misrepresentation all arose from the treatment of the patient and required that the plaintiff show a violation of the duty of care in the medical treatment and, therefore, were claims for medical negligence regardless of the label used by the plaintiff. Unlike the [*13] claims in *Vatre*, informed consent stands as a distinct claim because a plaintiff could bring it even in the absence of negligent treatment by the physician. Many cases holding that a plaintiff bringing an informed consent claim need not comply with *§52-190a* rely on a determination that no expert testimony is necessary to prove the claim; *Rodriguez v. Yale New Haven Hospital, supra, Superior Court, Docket No. CV 08 5021657, 2009 Conn. Super. LEXIS 702*; however, the language in *Sherwood v. Danbury Hospital, supra, 278 Conn. 181*, quoted above, provides a better analysis for distinguishing between informed consent claims and medical negligence claims.

A claim for lack of informed consent focuses exclusively on the communication with the patient, rather than on the treatment of the patient. The court in *Brown v. Gulakis, supra, Superior Court, Docket No. CV 06 5000424, 2006 Conn. Super. LEXIS 2192*, though it reaches an opposite conclusion from this court, correctly asserts that [HN11] the distinction between informed consent and medical negligence is not whether the lay standard or the professional standard applies; rather, as in *Sherwood*, the relevant inquiry is whether the allegations involve the diagnosis and treatment of the patient. Here, the plaintiff, [*14] in counts one and two, alleges that she was not aware of the risks involved in the dermatological treatment performed by the defendants. The plaintiff alleges that if she had been made aware of the risks, she would not have consented to the treatment. The treatment itself may have been conducted with the highest level of care, but the plaintiff could still maintain a cause of action for lack of informed consent. The motion to dismiss as to counts one and two is, therefore, denied. This outcome is consistent with the ruling in *Vatre v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 569*, where the plaintiff's claims involved the treatment of the plaintiff's medical condition and the fundamental question was whether the standard of care in rendering that treatment was upheld.

Count three alleges breach of contract by the defendants in that they promised a particular result and failed to achieve it. The plaintiff argues that her allegation that the defendants promised a "baby soft feel" and "better skin tone and skin clarity" resulting in damages due to the breach of the agreement to provide those results, rather than from medical negligence. The defendants argue that the plaintiff's [*15] claim for breach of contract arises solely from the claims for medical negligence and, therefore, require the plaintiff to file an opinion letter from a similar healthcare provider.

In *Vatre v. County Obstetrics & Gynecology Group, supra, Superior Court, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380*, the court found that the plaintiff's claims labeled as "breach of contract" were actually claims for medical negligence and required that the plaintiff file an opinion letter. The Appellate Court agreed that "[a]lthough the plaintiff here denominated the claims in her complaint as sounding in ordinary tort and

breach of contract, the factual allegations underlying the claims require proof of the defendants' deviation from the applicable standard of care of a health care provider . . ." *Votre v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 580.* Consistent with the reasoning in *Votre*, in the present case, the plaintiff has stated a claim for breach of contract in count three separate from her claim of medical negligence.

[HN12] "A breach of contract claim is a distinct claim that may arise from the same facts and may exist where the physician and patient contract for a specific result . . . Thus, a medical [*16] malpractice action is a tort action *unless the physician by express contract agrees to effect a cure or warrant that a particular result will be obtained* . . . When determining whether a complaint sets forth an independent breach of contract claim or merely dresses a malpractice claim in contract language, the court examines the pleadings to ascertain whether the breach of contract alleged is based on substandard . . . care or exists irrespective of adherence to or deviation from the standard of care." (Citations omitted; emphasis added; internal quotation marks omitted.) *Votre v. County Obstetrics & Gynecology Group, supra, Superior Court, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380.*

In the present case, the plaintiff's breach of contract claim does not require proof of a deviation from the standard of care. The plaintiff alleges that an agreement existed with the defendants to make her skin have a certain look and feel, a result that the plaintiff alleges was not achieved. She further alleges that she performed her obligations under the contract. This claim, therefore, does not require an opinion letter under *§52-190a* because it is distinct from a claim based on medical negligence. The motion to dismiss [*17] count three is denied.

The fourth count of the complaint alleges violations of the Connecticut Unfair Trade Practices Act (CUTPA) by the defendants in that Chatterjee referred the plaintiff, a pharmaceutical representative, to the Laser Center for treatment in exchange for doing business with the plaintiff and other pharmaceutical representatives. [4] [HN13] "[A]lthough physicians and other health care providers are subject to CUTPA, they may be liable only for unfair, unconscionable, or deceptive methods, act, or practices in the conduct of the entrepreneurial, commercial, or business aspect of the practice of medicine . . . The practice of medicine may give rise to a CUTPA claim only when the actions at issue are chiefly concerned with entrepreneurial aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the . . . defendant." (Citation omitted; internal quotation marks omitted.) *Jankauskas v. Fiebman, 264 Conn. 796, 808-09, 826 A.2d 1066 (2003).*

4 In the amended complaint, the plaintiff does not pursue this claim; however, the court must still address this claim because the original complaint [*18] is the operative complaint for deciding this motion to dismiss.

The plaintiff's CUTPA claim relates to the entrepreneurial aspects of the practice of medicine and does not rely on any underlying medical negligence. While the court does not rule on whether count four sufficiently alleges a claim under CUTPA, count four does not allege a claim for medical negligence requiring an opinion letter of a similar health care provider. The motion to dismiss count four is denied.

The plaintiff alleges in count five that the defendant, Chatterjee, knew or should have known that the type of microdermabrasion procedure conducted on the plaintiff was contraindicated due to the plaintiff's active acne. The plaintiff argues that the allegations in count five are sufficient to constitute the kind of gross negligence that would not require expert testimony.

Even if the court assumes, without deciding, that the plaintiff's claim for gross negligence will not require expert testimony, such a determination does not fully resolve the question of whether the plaintiff's claim is for medical negligence requiring the submission of a written opinion letter from similar health care provider under *General Statutes §52-190a.* [*19] [HN14] *Peterson v. Griffith, supra, Superior Court, Docket No. CV 07 5001959, 2009 Conn. Super. LEXIS 283.* "The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred . . . [T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Citations omitted; internal quotation marks omitted.) *Gold v. Greenwich Hospital Ass'n., 262 Conn. 248, 254, 811 A.2d 1266 (2002).*

In the present case, the first factor is easily met. The plaintiff is suing Chatterjee in her capacity as a physician. The allegations concerning whether the skin treatments were contraindicated and too close in time and whether Chatterjee knew or should have known not to proceed with the treatments meet the second factor. Finally, the alleged negligence [*20] directly relates to

the treatment of the plaintiff and involved the exercise of medical judgment. Indeed, Chatterjee's medical judgment is at the heart of the plaintiff's claim in count five. Unlike the previous counts in the complaint, addressed above, the claim for "gross negligence" requires that the plaintiff show that the defendant Chatterjee deviated from the standard of care. It is not obvious or apparent that the skin treatments were contraindicated or too close in time. Count five sounds in medical negligence and is, therefore, dismissed because the plaintiff failed to obtain a letter by a similar medical provider prior to filing the complaint.

The defendant's motion to dismiss is denied as to counts one, two, three and four and granted as to count five.

BY THE COURT

JUDGE RILEY

Minnie Grant Simmons v. CVS Pharmacy, Inc. et al.

CV085021084S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD AT BRIDGEPORT

2009 Conn. Super. LEXIS 1658

June 15, 2009, Decided
June 17, 2009, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consumer sued defendants, an unidentified pharmacist and his or her employer, alleging she was provided an improper dosage of a prescription medication. Defendants moved to dismiss the action for plaintiff's failure to comply with *Conn. Gen. Stat. § 52-190a*. Plaintiff moved to amend the complaint and attached a certificate of good faith and an opinion letter to her proposed amended complaint.

OVERVIEW: Plaintiff alleged defendants improperly filled her prescription for five mcg tablets of a particular medication with 25 mcg tablets, and that she was injured as a result of ingesting 500 percent of the prescribed amount of the medication. The court held that as the complaint alleged defendants departed from accepted pharmaceutical practices, pl's claims sounded in medical malpractice rather than ordinary negligence. Therefore, pursuant to *Conn. Gen. Stat. § 52-190a*, a written opinion letter and certificate of good faith had to be attached to the complaint. The complaint did not set forth a claim for negligent supervision against the employer that was separate and distinct from, rather than founded on or at least derived from, the underlying allegations of negligence in the pharmaceutical care of plaintiff. The court did not have discretion to consider plaintiff's amended complaint that annexed an opinion letter which had not been obtained at the time the action was commenced.

OUTCOME: Defendants' motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] See *Conn. Gen. Stat. § 52-190a(c).*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] A plaintiff's failure to comply with the requirements of Conn. *Gen. Stat. § 52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to *§ 52-190a(c)* is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading. Accordingly, the plaintiff's failure to attach the documents to her original complaint as required by *§ 52-190a* renders her action subject to dismissal.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN4] Whether a certificate of good faith under Conn. *Gen. Stat. § 52-190a* is required is not determined merely by a determination of whether the defendant is a health care provider, but also by whether the claim sounds in negligence or medical malpractice.

Civil Procedure > Pleading & Practice > Pleadings > General Overview
Civil Procedure > Trials > Jury Trials > Province of Court & Jury
[HN5] The interpretation of pleadings is always a question of law for the court.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN6] The fact that an action is against a health care provider or a health care facility, in and of itself, is insufficient to transform a case involving ordinary negligence, into a claim of malpractice.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Vicarious Liability > Employers > General Overview
[HN7] An action brought against a medical provider in its capacity primarily as an employer does not require a certificate of good faith.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN8] The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. Professional negligence or malpractice is defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill or the failure to exercise requisite medical skill. The relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions

Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN9] The characterization of a claim as ordinary negligence or medical malpractice does not turn on whether expert testimony is required. The rule of law that distinguishes between medical malpractice and ordinary negligence requires a determination of whether the injury alleged occurred during treatment because of a negligent act or omission that was substantially related to treatment.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN10] Given the fallibility existing in the legal profession, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, may be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *Conn. Gen. Stat. § 52-190a*, to prevent groundless lawsuits against health care providers. The plaintiff may not, however, turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN11] The court does not have discretion to consider an amended complaint that annexes an opinion letter, as required by *Conn. Gen. Stat. § 52-190a*, which had not been obtained at the time the action was commenced.

JUDGES: [*1] Arthur A. Hiller, J.

OPINION BY: Arthur A. Hiller

OPINION

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION TO DISMISS

This is an action, with a return date of December 30, 2008, against an unidentified pharmacist and his or her employer, CVS Pharmacy, Inc. (CVS), for providing to the plaintiff an improper dosage of a prescription medication causing injuries as a result of ingesting a 400% increase over the dosage which she had been prescribed. The plaintiff did not include with the complaint a good faith certificate and a written opinion of a similar health care provider. The defendants moved to dismiss the action for failure to comply with *General Statutes §52-190a* [1] because the good faith certificate and a written opinion of a similar health care provider were not attached to the complaint.

1 *General Statutes §52-190a(a)* provides in relevant part: [HN1] "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry [*2] as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in *section 52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . The claimant or the claimant's attorney, and any apportionment com-

plaintiff or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy [*3] of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . ."

On March 10, 2009, the plaintiff filed a motion to amend the complaint together with a proposed amended complaint. The proposed amended complaint reiterates the allegations of the original complaint and attaches a certificate of good faith and an opinion letter. Subsequently, the plaintiff filed a second amended complaint, dated March 27, 2009, which purports to recast and "clarify" her claims as sounding in ordinary negligence, products liability, and negligent hiring and supervision.

The plaintiff asserts that the court should consider her proposed amended complaints because they will render the motion to dismiss moot and the defendants will not suffer any prejudice. The plaintiff contends that "the mere fact that defendants have filed a motion to dismiss does not preclude the court from granting the plaintiff's motion to amend." The court does not agree. The motion to dismiss must be addressed first. " '[O]nce the question of lack of jurisdiction of a court is raised . . . [it] must be disposed of no matter in what form it is presented and the court must fully [*4] resolve it before proceeding further with the case.' (Internal quotation marks omitted.) *D'Eramo v. Smith, 273 Conn. 610, 616, 872 A.2d 408 (2005)*. For this reason, it is improper for the court to consider a motion to amend prior to ruling on a motion to dismiss for lack of subject matter jurisdiction. *Gurliocci v. Mayer, 218 Conn. 531, 545, 590 A.2d 914 (1991)* ('[b]y considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made')." *Reed v. Danbury Hospital, Superior Court, judicial district of Danbury, Docket No. CV 07 5003254 (May 13, 2008, Shaban, J.) (45 Conn. L. Rptr. 501, 2008 Conn. Super. LEXIS 1234)*.

General Statutes §52-190a(c) provides that [HN2] "[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." Superior Courts have had different opinions regarding whether failure to comply with the requirements of *§52-190a(a)* means that the court does not have subject [*5] matter jurisdiction. Compare *Cassala v. Coccomo Memorial Health Care Center, Superior Court, judicial district of New Haven, Docket No. 085022319, 2009 Conn. Super. LEXIS 582 (February 19, 2009, Curtralino, J.)* [2] (holding that failure to attach written opinion of similar health care provider does not affect subject matter jurisdiction); with *Goulis v. Saint Mary's Hospital, Superior Court, judicial district of Waterbury, Docket No. 08 5009513, 2008 Conn. Super. LEXIS 3288 (December 16, 2008, Alvord, J.)* [3] (holding that failure to attach written opinion of similar health care provider deprives the court of subject matter jurisdiction). This issue was, however, recently resolved by the appellate court in *Vaire v. Conway Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813 (2009)*. [4] In *Vaire*, the court held that [HN3] "[a] plaintiff's failure to comply with the requirements of *§52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant [*6] who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading." *Id., 583-84*. Accordingly, the plaintiff's failure to attach the documents to her original complaint as required by *§52-190a* renders her action subject to dismissal.

2 Judge Corradino explained that "this court does not believe a failure to comply with *§52-190a* means the court does not have subject matter jurisdiction of one of these malpractice cases. *Subsection (c)* does not use the language of subject matter jurisdiction--it does not say failure to file the required opinion *shall* result in dismissal. The language simply says 'The failure to obtain and file the written opinion required by *subsection (a)* of this section *shall be grounds for* the dismissal of the action . . .' How on earth could that language be construed as referring to subject matter jurisdiction in a jurisdiction that exercises every presumption in favor of jurisdiction." *Cassala v. Coccomo Memorial Health Care Center, Superior Court, judicial district of New Haven, Docket No. 085022319, 2009 Conn. Super. LEXIS 582 (February 19, 2009, Curtralino, J.)*.

3 Judge Alvord explained that "[t]o permit a plaintiff to overcome [*7] a clear violation of *§52-190a(a)* by amendment of a pending complaint thwarts the obvious purpose of *§52-190a(a)* as explicated by Public Act 05-275, S.2. Such an interpretation reads out of the statute the language contained in *subsection (a)* that '[n]o civil action . . . shall be filed,' and the language of *subsection (c)* that 'failure to obtain and file the written opinion . . . shall be grounds for the dismissal of the action.' " *Goulis v. Saint Mary's Hospital, Superior Court, judicial district of Waterbury, Docket No. 085009513, 2008 Conn. Su-*

per. LEXIS 3288 (December 16, 2008, Alvord, J.).

4 The court notes that the appellate court's decision in *Vove v. Conway Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813 (2009)*, was officially released subsequent to the parties' briefing and oral arguments in this matter.

In the present action, it must first be determined if a good faith certificate and written opinion of a health care provider were required.[HN4] Whether a certificate of good faith under *§52-190a* is required is not determined merely by a determination of whether CVS is a health care provider, but also by whether the claim sounds in negligence or medical malpractice.

[HN5] "[T]he interpretation of [*8] pleadings is always a question of law for the court." (Internal quotation marks omitted.) *Bonne v. William W. Backus Hospital, 272 Conn. 551, 559, 864 A.2d 1 (2005)* [HN6] " 'The fact that an action is against a health care provider or a health care facility, in and of itself, is insufficient to transform a case involving ordinary negligence, into a claim of malpractice.' *Bayford v. Derma Clinic, Inc., Superior Court Judicial district of Fairfield, Docket No. CV 04 4000265 (September 1, 2005, Radcliffe, J.) (39 Conn. L. Rptr. 875, 2005 Conn. Super. LEXIS 2394)*. See also *Badrigian v. Elmcrest Psychiatric Institute, Inc., 6 Conn. App. 383, 386, 505 A.2d 741 (1986)*; *Shaw v. Caldor, Inc., Superior Court, judicial district of Stamford, Docket No. CV94 0135645 (February 23, 1995, Lewis, J.) (13 Conn. L. Rptr. 524, 1995 Conn. Super. LEXIS 567)*. In addition, [HN7] an action brought against a medical provider in its capacity primarily as an employer does not require a certificate of good faith. *Nieves v. Bridgeport Hospital, Superior Court, judicial district of Fairfield, Docket No. CV 03 0402055, 2003 Conn. Super. LEXIS 3347 (December 1, 2003, Dewey, J.)*." *Jolly v. Smudin, Superior Court, judicial district of Waterbury, Docket No. CV 065000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.)*.

[HN8] "The classification [*9] of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. Professional negligence or malpractice . . . [is] defined as the *failure of one rendering professional services* to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . Furthermore, malpractice presupposes some *improper conduct in the treatment or operative skill* [or] . . . the failure to exercise requisite medical skill . . . From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Citations omitted; emphasis [*10] in original; internal quotation marks omitted.) *Boone v. William W. Backus Hospital, supra, 272 Conn. 562-63*; *Thimel v. Lawrence & Memorial Hospital Rehabilitation Center, 61 Conn.App. 353, 357-58, 764 A.2d 203*, cert. denied, *258 Conn. 711, 784 A.2d 889 (2001)*. Moreover, [HN9] "[t]he characterization of a claim as ordinary negligence or medical malpractice . . . does not turn on whether expert testimony is required." *Thimel v. Lawrence & Memorial Hospital Rehabilitation Center, supra, 61 Conn.App. 360*. "The rule of law that distinguishes between medical malpractice and ordinary negligence requires a determination of whether the injury alleged occurred during treatment because of a negligent act or omission that was substantially related to treatment." *Id.*

In her original complaint, dated November 26, 2008, the plaintiff alleged the following facts. From October 2005 through February 2007, the defendants filled the plaintiff's prescriptions. On December 6, 2006, the defendants improperly filled her prescription for 5 mcg tablets of a particular medication with 25 mcg tablets. The label on the bottle stated that it contained 5 mcg tablets. After receiving the medication, the plaintiff noticed [*11] that the pills appeared to be different than those she had previously received when CVS had filled her prescriptions in the past. She contacted the defendants regarding the apparent discrepancy and was told that the manufacturer was utilizing a new formulation and that the pills were correct and acceptable to take. The plaintiff ingested the medication in accordance with the instructions on the bottle until February 2007. As a result of ingesting 500% of the prescribed amount of the medication, she suffered injuries.

The plaintiff's complaint further set forth the following allegations. The defendants were or represented themselves to be, qualified to render proper and adequate pharmaceutical care to the plaintiff and undertook to provide her with such care in accordance with accepted standards and to use reasonable care, skill and judgment. The defendants departed from accepted pharmaceutical practices in the care of the plaintiff and failed to follow good practice. All defendants were negligent, careless, reckless and/or grossly indifferent in the filling of the plaintiff's prescription, and CVS was negligent in the training and supervision of its technicians and assistants, including [*12] the pharmacist who filled plaintiff's

prescription. In addition, the defendants breached implied warranties that they used due care in filling the prescription and express warranties that the label accurately reflected what the bottle contained.

In this case, a fair reading of the complaint reveals that the plaintiff's claims do sound in medical malpractice rather than ordinary negligence. The allegations of the complaint, which were repeated throughout the counts, stated that the defendants undertook to provide pharmaceutical care to the plaintiff and deviated from the appropriate standards of care. Significantly, the plaintiff also alleged that she specifically consulted with CVS' pharmacists regarding whether the tablets she received were proper and in conformance with her prescription. It is clearly alleged that the defendants were providing professional services, namely pharmaceutical care, in the course of a medical professional-patient relationship by providing prescription medication and consultation regarding that medication. The negligent acts of providing the wrong prescription medication and assuring the plaintiff that she had received the appropriate medication were, at [*13] the very least, substantially related to the pharmaceutical care she received from the defendants. See *Trimel v. Lawrence & Memorial Hospital Rehabilitation Center, supra, 61 Conn.App. 360* (distinguishing factor between ordinary negligence and malpractice is whether negligent act causing injury was "substantially related to treatment"). The defendants exercised specialized medical judgment and skill by assuring the plaintiff that she had received the proper medication. Although the defendants' acts may be obviously negligent to the trier of fact, the distinction between ordinary negligence and malpractice does not hinge on whether expert testimony would be required to establish a standard of care and breach. *Id.* Therefore, the plaintiff's claims sound in medical malpractice and a written opinion letter and certificate of good faith are required pursuant to *General Statutes §52-190a.*

The court also disagrees with the plaintiff's contention that she has stated a claim for negligent supervision that is not subject to the requirements of *§52-190a.* The only allegations which may even be generously construed as pertaining to a claim for negligent supervision are limited to two paragraphs [*14] in the first count stating that CVS and its agents, servants and employees were negligent, careless, and reckless in the training and supervision of its technicians and assistants. These allegations, however, were interspersed amongst the other allegations of negligent and reckless conduct by both CVS and its pharmacists and they were repeated and realleged in every count of the complaint, including those which the plaintiff now contends sound in products liability, misrepresentation, and breach of warranty. Therefore, it is impossible for the court to read these allegations as setting forth a claim for negligent supervision that is separate and distinct from, rather than founded upon or at least derived from, the underlying allegations of negligence in the pharmaceutical care of the plaintiff.

Moreover, this case is distinguishable from those cited by the plaintiff, specifically *Jolly v. Smudin, Superior Court, judicial district of Waterbury, Docket No. CV 065000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.).* In *Jolly*, the plaintiff suffered injuries as a result of ingesting medications obtained from a pharmacist on prescriptions that he forged and filled through improper means. *Id.* The plaintiff [*15] brought claims of negligence against the pharmacist and his employer, and medical malpractice against the pharmacist only. [5] *Id.* The allegedly negligent conduct of the employer was the failure to supervise its employee and have monitoring procedures in place to prevent the conduct of the pharmacist. *Id.* The court found that the claims against the employer sounded in ordinary negligence because the allegations of negligence only pertained to the employer's relationship with the employee. *Id.* In contrast, the plaintiff in this case fails to set forth a separate count and specific facts pertaining to negligent supervision. Rather, the plaintiff merely alleges that CVS failed to supervise and train its employees and imbeds these allegations in all of its claims against both defendants amidst allegations that CVS undertook to provide pharmacy services to the plaintiff.

5 The plaintiff attached a good faith certificate and written opinion letter that only addressed the negligent conduct of the pharmacist. *Jolly v. Smudin, Superior Court, judicial district of Waterbury, Docket No. CV 06 5000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.).*

Likewise, the other claims set forth in the original complaint, regardless [*16] of how the plaintiff now attempts to characterize them, are derived from the underlying negligence of providing the wrong medication to the plaintiff. This conclusion is bolstered by the fact that the basic allegations that the defendants were negligent in filling the prescription and assuring the plaintiff that she had received the proper medication are initially set forth in the first count, and repeated in every single count thereafter.

Having found that the plaintiff's claims sound in medical malpractice and, therefore, a written opinion letter and a certificate of good faith are required, the court must determine whether the amended complaint which annexed these documents should properly be considered. In *Vure v. County Obstetrics & Gynecology Group, P.C., supra, 113 Conn.App. 585*, the court stated that it is within the court's discretion to permit the

amendment of a complaint in order to attach the opinion letter if the opinion letter was obtained prior to the filing of the original complaint. See also *Caplin v. Laser Center of Northeastern Connecticut, Superior Court, judicial district of Windham at Putnam, Docket No. CV 095003976, 2009 Conn. Super. LEXIS 1077 (April 27, 2009, Riley, J.).* [HN10] "Given the fallibility [*17] existing in the legal profession once noted by Justice David M. Shea, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers." *Voire v. County Obstetrics & Gynecology Group, P.C., supra, 113 Conn.App. 585.* The plaintiff may not, however, "turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." *Id., 586.* In *Voire*, the appellate court affirmed the dismissal of the plaintiff's medical malpractice claims because it was clear that no opinion letter was attached to the complaint and none existed when the action was commenced. *Id.* Acknowledging the plaintiff's argument that dismissal was a harsh result under the circumstances, the court noted that it was "bound to uphold [*18] the laws the legislature adopts [and] [a]ny change to the dismissal remedy when the required written opinion is not annexed to the complaint would require a legislative remedy, not a judicial one." *Id., 584.*

In *Caplin v. Laser Center of Northeastern Connecticut, supra, Superior Court, Docket No. CV 09 5003976, 2009 Conn. Super. LEXIS 1077*, the court applied the ruling announced in *Voire*. In *Caplin*, the plaintiff did not file an opinion letter with her complaint, but she did file an amended complaint with an opinion letter after the period within which she could amend her complaint as of right. In opposition to the defendants' motion to dismiss, she contended that her medical malpractice claims should not be dismissed for failure to attach the opinion letter because she had cured any defect by filing the amended complaint with the opinion letter. The court, relying on *Voire*, disagreed and dismissed the claims because it was evident that the letter had not been inadvertently omitted from the initial filing, but rather had not been obtained until after the action had been commenced.

In this case, the plaintiff admitted in her memorandum of law in opposition to the motion to dismiss, dated March 10, 2009, that she did [*19] not obtain a written opinion of a health care provider until after she had commenced this action. *Voire* and *Caplin* make clear that [HN11] the court does not have discretion to consider an amended complaint that annexed an opinon letter which had not been obtained at the time the action was commenced. Accordingly, the defendant's motion to dismiss is granted.

HILLER, J.

Lajla Duran v. Amy Alias et al.

CV095014109S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WATERBURY AT WATERBURY

2010 Conn. Super. LEXIS 515

February 25, 2010, Decided
February 25, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff administratrix filed a wrongful death action against defendants, two physicians and a hospital. Physician one and the hospital filed a motion to dismiss the complaint pursuant to *Conn. Gen. Stat. § 52-190a(c)* due to plaintiff's failure to attach a written opinion of a similar health care provider. Plaintiff filed an amended complaint, a revised certificate of good faith, and written statement from a board-certified physician.

OVERVIEW: The revised certificate of good faith plaintiff filed was accompanied by an undated document prepared by a board-certified physician attesting, pursuant to *§ 52-190a(a)*, that good cause existed for plaintiff's belief that medical negligence had been committed. The court held that because plaintiff conceded that this document was created after the filing of the initial complaint, she could not have complied with *§ 52-190a(a)*'s requirements for bringing a medical malpractice action when the action was initiated. Therefore, the court had no discretion to permit an amendment.

OUTCOME: The motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN1] Generally, a ruling on a motion to dismiss pertains to jurisdiction and is not a ruling on the merits of the action. However, motions to dismiss are not limited to jurisdictional challenges.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] A plaintiff's failure to comply with the requirements of *Conn. Gen. Stat. § 52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to *§ 52-190a(c)* is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading.

Civil Procedure > Jurisdiction > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN3] The motion to dismiss admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. Where, however, the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Tort > Malpractice & Professional Liability > Healthcare Providers
[HN4] *Conn. Gen. Stat. § 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Tort > Malpractice & Professional Liability > Healthcare Providers
[HN5] To demonstrate good faith, plaintiffs or their counsel, prior to filing a medical malpractice suit, shall obtain a written and signed opinion of a similar health care provider that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. *Conn. Gen. Stat. § 52-190a(a).* Plaintiffs or their counsel shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. *§ 52-190a(a). Section 52-190a(c)* provides that the failure to obtain and file the written opinion required by *§ 52-190a(a)* shall be grounds for the dismissal of the action. The plain language of *§ 52-190a(c)* expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Tort > Malpractice & Professional Liability > Healthcare Providers
[HN6] Where a written opinion of a similar health care provider attached to a plaintiff's amended medical malpractice complaint was not obtained and did not exist prior to the commencement of the action, the plaintiff could not have complied with the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under Votre v. County Obstetrics & Gynecology Group, P.C., the court has no discretion to permit an amendment.

JUDGES: [*1] Elizabeth A. Gallagher, J.

OPINION BY: Elizabeth A. Gallagher

OPINION

MEMORANDUM OF DECISION

On June 1, 2009, the plaintiff, Lajla Duran, administratrix of the estate of Marianne Duran, commenced this action for wrongful death by service of process on the defendants, Dr. Amy Alias, M.D., St. Mary's Hospital, Inc. d/b/a The Children's and Family Health Center and Dr. Gretelten Berland, M.D. The plaintiff alleges that the defendants negligently prescribed a contraindicated medication to the plaintiff's decedent which caused her death. The plaintiff attached to her complaint a certificate of good faith, signed by the plaintiff's attorney, but did not attach a written opinion of a similar health care provider, as required by *General Statutes §52-190a(a).*

On July 15, 2009, the movants, St. Mary's Hospital and Alias, filed a motion to dismiss the complaint, pursuant to *General Statutes §52-190a(c)* for the failure to attach the written report. On July 23, 2009, the plaintiff responded by filing an amended complaint as a matter of right, along with a memorandum of law in opposition to the motion. In her notice of amendment, the plaintiff stated that the written opinion of a similar health care provider was inadvertently [*2] omitted from her initial complaint. The plaintiff attached to the amended com-

plaint a revised certificate of good faith accompanied by an undated document prepared by a board-certified physician attesting that good cause existed for the plaintiff's belief that medical negligence had been committed. The defendants objected to the notice of amendment on the ground that the plaintiff did not state that she had obtained the written opinion prior to commencement of the action.

At oral argument on December 7, 2009, counsel for the plaintiff conceded that the written opinion that the plaintiff had attached to her amended complaint had not been obtained before the initial filing and that it did not exist at that time.

DISCUSSION

[HN1] Generally, a ruling on a motion to dismiss pertains to jurisdiction and is not a ruling on the merits of the action. *Villager Pond, Inc. v. Darien, 54 Conn.App. 178, 182, 734 A.2d 1031 (1999)*. As noted in the recent Appellate Court decision, *Vaire v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 583-84, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*, however, motions to dismiss are not limited to jurisdictional challenges: [HN2] "A plaintiff's [*3] failure to comply with the requirements of *§52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading."

[HN3] "The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone . . . Where, however . . . the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue . . ." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co., 282 Conn. 505, 516, 923 A.2d 638 (2007)*.

The defendants argue that, pursuant to *General Statutes §52-190a(c)*, the plaintiff's complaint must be dismissed because she is unable to amend a complaint for medical negligence that did not include a *§52-190a(a)* [*4] written opinion where she has not provided any indication that the written opinion she seeks to have attached via amendment existed prior to its commencement of the action. Defendants argue that dismissal is mandatory pursuant to *Vaire v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813, supra*. Defendants alternatively argue that the plaintiff's complaint should be dismissed because the opinion letter she has attached to her amended complaint is insufficient to meet the requirements of *§52-190a(a)*.

Plaintiff argues that, by amending as of right, pursuant to *Practice Book §10-59*, the defect in the initial complaint is irrelevant inasmuch as the amended complaint which meets the standards of *§52-190a(a)* is now the operative complaint for purposes of the court's evaluation of the defendants' motion to dismiss. Plaintiff points out that, in *Vaire*, the plaintiff never moved to amend the complaint to attach the statutorily required documentation and took the position at argument that no certificate or written opinion was necessary. Plaintiff argues that *Vaire* does not support dismissal because, although the written opinion in this case was not obtained prior to the commencement [*5] of suit, an investigation had been undertaken and an oral report had been obtained. Lastly, the plaintiff disputes the defendants' contention that the written opinion has not been authored by a health care provider that is sufficiently similar to the named defendants.

[HN4] "*Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make 'a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . .' To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that 'such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . .' General Statutes *§52-190a(a)*. Prior to its amendment in 2005 by Public Acts 2005, No. 05-275, §2, the statute did not require a plaintiff to include with the complaint a written opinion of a similar health care provider attesting to a good faith basis for an action." (Internal quotation marks in original.) [*6] *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 542, 979 A.2d 1066*, cert. granted, *294 Conn. 916, 983 A.2d 849 (2009)*.

"Effective October 1, 2005, the statute was amended by P.A. 05-275 to require, [HN5] to demonstrate good faith, that plaintiffs or their counsel, prior to filing suit, "shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . *General Statutes §52-190a(a)*. The amended statute also provides that plaintiffs or their counsel "shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . ." *General Statutes §52-190a(a)*. *Subsection (c) of §52-190a*, which was added by P.A. 05-275, §2, provides

that "[t]he failure to obtain and file the written opinion required by *subsection (a)* of this section shall be grounds for the dismissal of the action." *Beinen v. New Milford Hospital, Inc., supra, 117 Conn.App. 543.* It is *subsection (c)* which requires the written opinion to avoid dismissal: "The plain language of [*§52-190a(c)*] . . . expressly provides [*7] for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§52-190a(a)*."

After passage of the 2005 amendment to *§52-190a*, but before the Appellate Court's decision in *Vaire*, a significant number of Superior Court decisions gave plaintiffs who had filed suit, but failed to attach a *§52-190a(a)* written opinion to their initial complaint, the opportunity to amend when confronted with a motion to dismiss filed under *§52-190a(c)* See, e.g., *Peloso v. Walgreen Eastern Co., Superior Court, judicial district of New Haven, Docket No. CV 06 5002136 (February 16, 2007, Holden, J.) (42 Conn. L. Rptr. 838, 2007 Conn. Super. LEXIS 536)* (complaint amended pursuant to *Practice Book §10-60*); *Landi v. Wertheim, Superior Court, judicial district of Stamford-Norwalk in Stamford, Docket No. 06 5001608, 2006 Conn. Super. LEXIS 2953 (October 2, 2006, Adams, J.)* (complaint amended "as of right").

In *Vaire*, the Appellate Court clearly distinguished a case in which an existing written report was inadvertently not attached and that in which a written report did not exist. *Subsection (c)* of the statute plainly states that a failure to file the written opinion required by *subsection (a)* [*8] "shall be grounds for the dismissal of the action." Any change to the dismissal remedy when the required written opinion is not annexed to the complaint would require a legislative remedy, not a judicial one. *113 Conn.App. at 584.* "[I]t is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers . . . [but] allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires." *113 Conn.App. at 585.*

Two recent Superior Court cases, *post-Vaire*, have dealt with this issue. See *Moore v. Southern Connecticut Internal Medicine, Superior Court, judicial district of New Haven, Docket No. CV 09 5028093, 2009 Conn. Super. LEXIS 2965 (November 6, 2009, Zemski, J.)* [*9] ; and *Caplin v. Laser Center of Northeastern Connecticut, Superior Court, judicial district of Windham, Docket No CV 09 5003976, 2009 Conn. Super. LEXIS 1077 (April 27, 2009).* In *Caplin*, the plaintiff omitted the written opinion from her initial complaint, and then attempted to amend pursuant to *§10-59*. Notwithstanding the fact that the court determined that her amendment was filed too late to qualify under *§10-59*, the court stated that, even if plaintiff had amended as of right, *Vaire* would not have allowed her to rely on an opinion letter obtained after the filing of an action for medical negligence. *Id.* In *Moore*, the court dismissed the action because, notwithstanding the sufficiency of the plaintiff's amended complaint, the opinion letter dated after the filing of the initial complaint indicated that the plaintiff "failed to ensure that there was a proper foundation for a medical malpractice action prior to commencing litigation."

CONCLUSION

The plaintiff's counsel conceded at oral argument that the [11N6] written opinion attached to the plaintiff's amended complaint was not obtained and did not exist prior to the commencement of the action. Under that circumstance, the plaintiff could not have complied with the [*10] statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under *Vaire*, court has no discretion to permit an amendment. Accordingly, the motion to dismiss is granted. Because the complaint is dismissed, the court need not address the issue of whether the "written opinion of a similar health care provider" attached to the plaintiff's amended complaint is sufficient according to the standards of *§52-190a(a)*.

GALLAGHER, J.

Laura Sestito v. Silvia A. Mandara et al.

FSTCV096001243 7S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2010 Conn. Super. LEXIS 1908

August 2, 2010, Decided
August 2, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient sued defendants, a doctor and others, for malpractice. Pursuant to *Conn. Gen. Stat. § 52-190a(c)*, the doctor filed a motion to dismiss the complaint against him due to plaintiff's failure to file a written opinion by a similar healthcare provider concerning his alleged negligence. After the motion was granted, plaintiff filed an amended complaint; the doctor filed a second motion to dismiss under *§ 52-190a(c)*.

OVERVIEW: The doctor argued that plaintiff could not cure the defect by filing the required opinion letter after commencement of the action. The court held that although plaintiff had the right under *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59* to amend her complaint without leave of court, and filed an opinion letter of a similar healthcare provider with the amended complaint, the claim against the doctor already existed in the initial complaint, and it appeared that no significant changes were made to the complaint as asserted against him. As the opinion letter was not dated as of the commencement of the action, it could not fulfill the showing of good faith at the commencement of the action that plaintiff truly had a legitimate claim against the doctor. The opinion letter, while sufficient otherwise under *§ 52-190a*, could not ward off the doctor's motion to dismiss under *§ 52-190a(c)* because it was not in existence prior to the filing of the initial complaint.

OUTCOME: The doctor's motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
[HN2] See *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59.*

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN3] A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. A motion to dismiss

tests, inter alia, whether, on the face of the record, the court is without jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN4] See *Conn. Gen. Prac. Book, R. Super. Ct. § 10-31(a).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN5] In establishing the requirements of the prelitigation opinion letter, *Conn. Gen. Stat. § 52-190a(a)* specifically requires that the opinion be authored by a similar health care provider as defined in *Conn. Gen. Stat. § 52-184c. Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. *§ 52-190a(a).* To demonstrate good faith, *§ 52-190a* requires that plaintiffs or their counsel, prior to filing suit, shall obtain a written and signed opinion of a similar health care provider that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. *§ 52-190a(a). Section 52-190a(a)* also provides that plaintiffs or their counsel shall attach a copy of a written opinion, with the name and signature of the similar health care provider expunged, to the certificate.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Comply
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN6] See *Conn. Gen. Stat. § 52-190a(c).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN7] The written opinion required by *Conn. Gen. Stat. § 52-190a(a)* provides the defendant with some evidence that the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent. The plain language of *§ 52-190a(c)* expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN8] *Conn. Gen. Stat. § 52-190a* requires a written opinion of a similar health care provider "prior to" filing an action in malpractice against a health care provider.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN9] In the context of a medical malpractice claim, there is no express requirement in *Conn. Gen. Stat. § 52-190a* that the qualifications of the similar healthcare provider must be cited in the opinion letter.

JUDGES: [*1] TAGGART D. ADAMS, SUPERIOR COURT JUDGE.

OPINION BY: TAGGART D. ADAMS

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS (115.00)

I. FACTS

On November 12, 2009, the plaintiff, Laura Sestito, filed a four-count complaint with a return date of November 24, 2009 against the defendants Silvio A. Mandara, Vincent J. Tumminello, Allyson M. Servoss, and the Stamford Hospital sounding in medical malpractice. On November 30, 2009, the defendant Tumminello moved to dismiss the complaint against him pursuant to *General Statutes § 52-190a* [1] for failure to file a written opinion by a similar healthcare provider concerning Dr. Tumminello's alleged negligence. That motion was granted on January 4, 2010. Meanwhile, on December 9, 2009, the plaintiff filed a request to amend her complaint, and an amended complaint. [2] This complaint included an opinion letter regarding Dr. Tumminello. The defendant Tumminello filed another motion to dismiss pursuant to *Section 52-190a* on January 11, 2010, to which the plaintiff filed an opposition and a memorandum in support on February 8, 2010. The matter was heard at short calendar on May 17, 2010.

1 *General Statutes § 52-190a* provides in relevant part: [HN1] "The complaint [or] initial pleading [*2] [in a personal injury action] . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [*General Statutes §]52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

2 The request described itself as "pursuant to *§ 10-60(a)* "of the Connecticut Practice Book, but qualified as an amendment as of right, pursuant to *Practice Book § 10-59*, which provides: [HN2] "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. (See *General Statutes § 52-128* and annotations.)"

II. DISCUSSION

[HN3] "A motion to dismiss . . . properly [*3] attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Wilcox v. Webster Ins., Inc., 294 Conn. 206, 213, 982 A.2d 1053 (2009)*. According to *Practice Book § 10-31(a)*, [HN4] "a motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person . . . and (5) insufficiency of service of process." The motion, however, "is not designed to test the legal sufficiency of a complaint in terms of whether it states a cause of action." *Pratt v. Old Saybrook, 225 Conn. 177, 185, 621 A.2d 1322 (1993)*.

In *Rius v. CCMC Corp., 106 Conn. App. 810, 943 A.2d 544 (2008)*, the Appellate Court held that a medical malpractice case was dismissable for failure to attach a written opinion. The defendant argues that the plaintiff may not cure the defect by filing the required opinion latter after commencement of the action, and further, that the new written opinion remains deficient as it does not identify that the author is a similar [*4] health care provider. In response, the plaintiff argues that the plaintiff's operative complaint is the December 9, 2009 amended complaint and that both, the amended complaint and the attached opinion letter, comply with *§ 52-190a(a)*.

[HN5] "In establishing the requirements of the prelitigation opinion letter, *§ 52-190a(a)* specifically requires that the opinion be authored by a similar health care provider as defined in *§ 52-184c* . . . *Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make 'a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . .' To show good faith, the complaint, initial pleading or apportionment complaint is required tit contain a certificate of the attorney or party filing the action stating that 'such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . .' *General Statutes § 52-190a(a)*." *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 542, 979 A.2d 1066*, cert. granted in part, *294 Conn. 916, 983 A.2d 849 (2009)*. [*5] To demonstrate good faith, the statute requires, "that plaintiffs or their counsel, prior to filing suit, 'shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical

negligence and includes a detailed basis for the formation of such opinion . . . *General Statutes § 52-190a(a)*. The amended statute also provides that plaintiffs or their counsel 'shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . .' *General Statutes § 52-190a(a). Subsection (c) of § 52-190a* . . . provides that [HN6] '[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.' " (Citation omitted.) *Id., 543*. [HN7] "The written opinion . . . provides the defendant with some evidence that the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent. As this court held in *Rios v. CCMC Corp., 106 Conn.App. 810, 822, 943 A.2d 544 (2008)*, '[t]he plain language of *[§ 52-190a(c)]* . . . expressly provides [*6] for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a)*.' " *Id.*

The Appellate Court has also noted that "[g]iven the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, *existing at the time of commencement* of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss." (Emphasis added.) *Vutre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 585, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*.

Regarding the substance of the letter, the Superior Courts are split as to whether the written opinion must state the opinion expert's credentials. Holding that *§ 52-190a* does not specifically require the physician's credentials stated in the letter, the court in *Tufillo v. Day Kimball Hospital, Superior Court, complex litigation docket at Hartford, Docket No. X03 CV 06 5009722 (November 26, 2007, Langenbach, J.) (44 Conn. L. Rptr. 570, 2007 Conn. Super. LEXIS 3088)*, [*7] reasoned that "[w]ith respect to the defendants' claim that the court should dismiss the plaintiff's action on the ground that a written opinion that does not provide a description of the qualifications or credentials of the author, the court notes that *§ 52-190a* explicitly provides that the claimant's attorney shall attach to the good faith certificate a copy of the written opinion, with the name and signature of the similar health care provider expunged. The court agrees with the decisions in *Rodriguez v. Norniella, Superior Court, judicial district of New Haven, Docket No. CV 06 5001779 (June 1, 2007, Robinson, J.) [46 Conn. L. Rptr. 40, 2007 Conn. Super. LEXIS 1408]*, *Vicenzi v. Abbott Terrace Health Center, Inc., Superior Court, judicial district of Waterbury, Docket No. CV 07 5004413 (October 29, 2007, Roche, J.) [44 Conn. L. Rptr. 363, 2007 Conn. Super. LEXIS 2771]*, and several other cases cited therein, in which the court denied motions to dismiss based upon a claim of insufficiency for the lack of a description of the qualifications or credentials of the author of the opinion letter. As stated in *Rodriguez:* 'Neither the language of *§ 52-190a*, nor the holding of any case, mandates that the similar health care provider opinion letter [*8] state in the letter itself that its author is a similar health care provider. Although the . . . defendants correctly point out that one of the main goals of *§ 52-190a* is to prevent frivolous lawsuits, *§ 52-190a* achieves this goal by relying on the complainant's attorney's good faith efforts, as evidenced through certification requirement, and enforced through the possibility of "appropriate sanctions" against the signing attorney.' *Rodriguez v. Norniella, supra, Superior Court, Docket No. CV 06 5001779, 2007 Conn. Super. LEXIS 1408.*" *Id., 571-72, 2007 Conn. Super. LEXIS 3088*. See also *Pitcher v. Arnon, Superior Court, judicial district of Fairfield, Docket No. CV 07 5011425, 2008 Conn. Super. LEXIS 1085 (May 5, 2008, Hiller, J.)* (stating that "[n]othing in the statute's language, as recently amended, requires the qualifications of the author to be stated in the opinion letter"); *Crowell v. Pito, Superior Court, judicial district of New Britain, Docket No. CV 08 5008149 (January 7, 2009, Pittman, J.) (46 Conn. L. Rptr. 876, 877, 2009 Conn. Super. LEXIS 21, *2)* (reasoning that "[t]he statute does not contain a specific requirement that the author provide *in the letter* a detailed description of how the author purports to be a 'similar health care provider' " [emphasis in original]); but see, [*9] *Ribeiro v. Elfenbein, Superior Court, judicial district of Danbury, Docket No. CV 09 5006155, 2009 Conn. Super. LEXIS 2844 (October 16, 2009, Shaban, J.)* (granting motion to dismiss, court found opinion letter to be "completely devoid of any reference to the qualifications of the author. There is no mention of the author's area of practice, level of experience, or degree of education. As submitted, the letter could have been authored by a medical school student or someone other than a physician employed in the medical field. There is simply no way to know, or even infer, from the text of the letter whether it was authored by a similar health care provider").

This court has previously denied a motion to dismiss the complaint in *Lengyel-Horner v. Immediate Healthcare, LLC, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 08 6000915, 2008 Conn. Super. LEXIS 2571 (October 9, 2008, Adams, J.)*, discussing the issue whether "the written opinions must be attached to the original complaint and opinions attached to an amended complaint may not be considered." The court stated that "this court has pre-

viously held that the operative complaint for analysis pursuant to *General Statutes § 52-190a* may be an amended complaint filed as [*10] of right pursuant to *Practice Book § 10-59. Landi v. Wertheim, Superior Court, judicial district of Stamford-Norwalk at Stamford, CV 06 5001608, 2006 Conn. Super. LEXIS 2953 (October 2, 2006, Adams, J.).* This holding was based on the language of *Practice Book § 10-59* and *General Statutes § 52-128* ('may amend any defect') as well as the holdings in *Sheehan v. Zoning Commission, 173 Conn. 408, 413, 378 A.2d 519 (1977)* (pleading amended as of right is effective 'ab initio') and *Dinti v. Stop & Shop Supermarket Co., 90 Conn. App. 626, 639-40, 879 A.2d 507,* cert. denied, *276 Conn. 902, 884 A.2d 1025 (2005).* Defendants contend that Superior Court cases decided after *Rios v. CCMC Corp., supra,* have rejected decisions such as *Landi,* but such is not the case."

In *Duran v. Alias, Superior Court, judicial district of Waterbury, Docket No. CV 09 5014109 (February 25, 2010, Gallagher, J.) (49 Conn. L. Rptr. 394, 2010 Conn. Super. LEXIS 515),* the court granted the defendant's motion to dismiss based on an omitted opinion letter at the commencement of the action, which was amended as of right to provide an opinion letter. The court concluded that "[t]he plaintiff's counsel conceded at oral argument that the written opinion attached to the plaintiff's amended [*11] complaint was not obtained and did not exist prior to the commencement of the action. Under that circumstance, the plaintiff could not have complied with the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under *Votre, [supra, 113 Conn.App. 569]* [the] court has no discretion to permit an amendment." *Id., 396, 2010 Conn. Super. LEXIS 515.*

In the present case, the action was commenced in four counts against Silvio A. Mandara, Vincent Tumminello, Allyson Servoss, and Stamford Hospital. This original complaint already contained count two, the claim of negligence against the defendant Tumminello. Thereafter, the complaint was amended as of right within thirty days, thus automatically becoming the operative complaint of the present action. The present case differs factually from the situation in *Lengyel-Horner,* as, in that case, a claim was added and thus the opinion letter regarding that particular defendant was not yet appropriate for the initial complaint. In the present case, however, although the plaintiff similarly filed an opinion letter of a similar healthcare provider with the amended complaint, the claim against Tumminello already existed in the initial [*12] complaint, and it appears that no significant changes were made to the relevant count. [1] Additionally, the undated letter was attached to the certificate of good faith, which was dated the same day as the amended complaint. In line with the reasoning in *Duran,* as the opinion letter was not dated as of the commencement of the action, it may not fulfill the showing of good faith at the commencement of the action that the plaintiff truly does have a legitimate claim against the named defendant.

> 3 The plaintiff made changes to paragraph twelve, added new paragraph thirteen, added a phrase to paragraph seventeen, subparagraph d, which was previously mislabeled as g, and added new subparagraph e.

The court is reluctant to dismiss a claim on a technicality. However, in light of two unequivocal Appellate Court statements, if not holdings, to the effect that [HN8] *Section 52-190a* requires a written opinion of a similar health care provider "prior to" filing an action in malpractice against a health care provider; see *Bennett, supra, 117 Conn.App. 543; Votre, supra, 113 Conn.App. 585;* the court believes the state of the law in Connecticut requires a dismissal of the amended complaint in this case as [*13] to Dr. Tumminello where there is no evidence that the letter regarding Dr. Tumminello was received prior to the filing of the original complaint against him. In coming to this determination, the court notes its disagreement with the Appellate Court cases noted above. First, there is no express requirement in *Section 52-190a* that the case be dismissed if the good faith certificate and opinion letter are not attached to the initial complaint. The statute says "shall be grounds for the dismissal." There is no "prior to" language in the statute. Second, *General Statutes § 52-128* and *Practice Book Section 10-59* allow the curing of "any defect or mistake" in a complaint within thirty days of the return date. These amendments as of right provisions have been interpreted to mean that the amended complaint shall be effective *ab initio,* from the beginning of the case. It seems to this court that the meaning of "any defect" and the concept of *ab initio,* are being overlooked by the Appellate Court. Third, the court finds it unjustifiable to distinguish so severely between the scenario in *Votre* where the Appellate Court opined that if the letter existed prior to initiation of the lawsuit, but [*14] was inadvertently not attached to the initial complaint, dismissal was not mandated and the scenario in this case where an opinion letter, apparently not existing on November 12, 2009, but clearly existing less than a month later. Fourth, as *Votre* noted, the purpose of *Section 52-190a* is not thwarted when a good faith certificate and opinion letter are available in such a short time after the filing of the initial complaint.

[HN9] There is no express requirement in the statute that the qualifications of the similar healthcare provider must be cited in the opinion letter. The letter in this case, however, while sufficient otherwise, is not enough to

ward off a motion to dismiss because it was not in existence prior to the filing of the initial complaint.

III. CONCLUSION

As the opinion letter was not properly filed at the time of the commencement of the action as to the defendant Tumminello, count two of the plaintiff's complaint is dismissed.

TAGGART D. ADAMS

SUPERIOR COURT JUDGE

Randy Kirkpatrick v. New Britain General Hospital

HHBCV064011523

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2006 Conn. Super. LEXIS 3778

December 14, 2006, Decided
December 14, 2006, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: In a medical malpractice action, defendant hospital made a motion to dismiss plaintiff's complaint on the basis that plaintiff failed to obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a.*

OVERVIEW: Plaintiff opposed the dismissal on the basis that he had now filed a request for leave to amend his complaint and had appended a proper written opinion to the proposed amended complaint. Plaintiff indicated that an oral opinion had been rendered before the issuance of the original complaint but was reduced to writing later. Upon consideration, the court granted the motion to dismiss. The court concluded that Conn. Gen. Stat. § 52-109a required that the written opinion from a similar healthcare provider had to be obtained prior to filing suit; therefore, plaintiff's attempt to amend his complaint could not prevent dismissal of the action.

OUTCOME: The court granted the hospital's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] The statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Comply
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] In enacting 2005 Conn. Acts 275, which was codified into *Conn. Gen. Stat. § 52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed.

JUDGES: Patty Jenkins Pittman, Judge.

OPINION BY: Patty Jenkins Pittman

OPINION

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The plaintiff Randy Kirkpatrick brings this medical malpractice action against the defendant New Britain General Hospital. The defendant moves to dismiss, claiming that the plaintiff's action must fail because the plaintiff did not obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a*. The plaintiff opposes dismissal on the grounds that he has now filed a request for leave to amend his complaint and has appended to the proposed amended complaint a proper written opinion. For reasons stated below, the court finds that the action must be dismissed.

THE STATUTORY REQUIREMENTS

Conn. Gen. Stat. § 52-190a, the effective date of which was October 2005, contains specific prerequisites for the filing of a medical malpractice [*2] action. The statute states:

> (a) [HN1] No civil action . . . shall be filed to recover damages . . . in which it is alleged that such injury or death resulted from the negligence of a healthcare provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar healthcare provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar healthcare provider expunged, to such certificate . . .
>
> (e) The failure [*3] to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

THE WRITTEN OPINION IN THIS CASE

With the original filings in this action was only the attorney's certificate. There was no written opinion from a similar healthcare provider attached to the certificate and filed with the complaint. Moreover the plaintiff admits in his Memorandum of Law in Opposition to Motion to Dismiss that "in the present case, the opinion was orally rendered prior to issuance of the original complaint and reduced to writing later." *Plaintiff's Memorandum of Law, October 4, 2006, pages 4-5*. It is clear therefore that the plaintiff did not obtain the written opinion prior to the filing of the complaint. It would appear that this would trigger *subsection (e)* of the statute so that the court would be compelled to dismiss the complaint.

THE EFFECT OF THE PROPOSED AMENDED COMPLAINT

The plaintiff argues that the court need not dismiss the action but may instead allow the amended complaint to be filed, to which is attached the written opinion. The defendant argues that such a procedure undermines the letter and the spirit [*4] of the statute. Indeed [HN2] the statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a*. Here plaintiff's counsel obtained only an oral opinion before instituting this action.

Finally the plaintiff argues that the court should allow the amended complaint to be filed because the defendant will not be prejudiced in any way. In fact it seems to be true that at this early stage of the case there is no prejudice to this defendant. [HN3] In enacting P.A. 05-275, which was codified into *52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.

CONCLUSION

Under the circumstances presented here, the failure to obtain the written opinion of medical negligence before suit was brought mandates dismissal of this action.

Patty Jenkins Pittman, Judge

Randy Kirkpatrick v. New Britain General Hospital

HHBCV064011523

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2006 Conn. Super. LEXIS 3778

December 14, 2006, Decided
December 14, 2006, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: In a medical malpractice action, defendant hospital made a motion to dismiss plaintiff's complaint on the basis that plaintiff failed to obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a.*

OVERVIEW: Plaintiff opposed the dismissal on the basis that he had now filed a request for leave to amend his complaint and had appended a proper written opinion to the proposed amended complaint. Plaintiff indicated that an oral opinion had been rendered before the issuance of the original complaint but was reduced to writing later. Upon consideration, the court granted the motion to dismiss. The court concluded that Conn. Gen. Stat. § 52-109a required that the written opinion from a similar healthcare provider had to be obtained prior to filing suit; therefore, plaintiff's attempt to amend his complaint could not prevent dismissal of the action.

OUTCOME: The court granted the hospital's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] The statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Comply
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] In enacting 2005 Conn. Acts 275, which was codified into *Conn. Gen. Stat. § 52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed.

JUDGES: Patty Jenkins Pittman, Judge.

OPINION BY: Patty Jenkins Pittman

OPINION

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The plaintiff Randy Kirkpatrick brings this medical malpractice action against the defendant New Britain General Hospital. The defendant moves to dismiss, claiming that the plaintiff's action must fail because the plaintiff did not obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a*. The plaintiff opposes dismissal on the grounds that he has now filed a request for leave to amend his complaint and has appended to the proposed amended complaint a proper written opinion. For reasons stated below, the court finds that the action must be dismissed.

THE STATUTORY REQUIREMENTS

Conn. Gen. Stat. § 52-190a, the effective date of which was October 2005, contains specific prerequisites for the filing of a medical malpractice [*2] action. The statute states:

> (a) [HN1] No civil action . . . shall be filed to recover damages . . . in which it is alleged that such injury or death resulted from the negligence of a healthcare provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar healthcare provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar healthcare provider expunged, to such certificate . . .
>
> (c) The failure [*3] to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

THE WRITTEN OPINION IN THIS CASE

With the original filings in this action was only the attorney's certificate. There was no written opinion from a similar healthcare provider attached to the certificate and filed with the complaint. Moreover the plaintiff admits in his Memorandum of Law in Opposition to Motion to Dismiss that "in the present case, the opinion was orally rendered prior to issuance of the original complaint and reduced to writing later." *Plaintiff's Memorandum of Law, October 4, 2006, pages 4-5.* It is clear therefore that the plaintiff did not obtain the written opinion prior to the filing of the complaint. It would appear that this would trigger *subsection (c)* of the statute so that the court would be compelled to dismiss the complaint.

THE EFFECT OF THE PROPOSED AMENDED COMPLAINT

The plaintiff argues that the court need not dismiss the action but may instead allow the amended complaint to be filed, to which is attached the written opinion. The defendant argues that such a procedure undermines the letter and the spirit [*4] of the statute. Indeed [HN2] the statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a*. Here plaintiff's counsel obtained only an oral opinion before instituting this action.

Finally the plaintiff argues that the court should allow the amended complaint to be filed because the defendant will not be prejudiced in any way. In fact it seems to be true that at this early stage of the case there is no prejudice to this defendant. [HN3] In enacting P.A. 05-275, which was codified into *52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.

CONCLUSION

Under the circumstances presented here, the failure to obtain the written opinion of medical negligence before suit was brought mandates dismissal of this action.

Patty Jenkins Pittman, Judge

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JULY 9, 2012

REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

The defendant, Center for Women's Health P.C. hereby replies to the plaintiff's Opposition to Motion to Dismiss dated June 28, 2012.

I. Relevant Factual and Procedural History

This is a medical malpractice action initiated by plaintiff, Judith Kissel, by way of complaint dated March 30, 2012 bearing a Return Date of April 24, 2012. The undersigned attorneys appeared on behalf of the defendant Center for Women's Health P.C. on April 24, 2012. On May 24, 2012, the defendant Center for Women's Health P.C. moved to dismiss the complaint based upon lack of personal jurisdiction over the defendant due to the plaintiff's failure to attach the written opinion of a similar health care provider to the defendant's alleged agent, servant, or employee, Reed Wang, to the complaint as required by Conn. Gen. Stat. § 52-190a. On June 7, 2012, counsel appeared on behalf of Reed Wang, and joined the Motion to Dismiss filed by the undersigned. On June 28, 2012, the plaintiff filed her Opposition to the Defendants' Motions to Dismiss ("Opposition"). In the Opposition, plaintiff's counsel admits that he failed to attach the required written opinion of a similar health care provider to the defendant to the complaint. The plaintiff's counsel asserts that the court should grant his Request for Leave to File an Amended Complaint, dated June 28, 2012, to which he has attached an undated opinion letter in purported compliance with Conn. Gen. Stat. § 52-190a.

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The defendant has concurrently filed an objection to the plaintiff's Request for Leave to File an Amended Complaint.

The plaintiff's counsel attached an "Attorney Affidavit" as Exhibit B to the Opposition, in which he attests that the opinion of the similar health care provider (Exhibit 2 to the Attorney Affidavit) was in existence prior to the commencement of this action. The defendant disputes this assertion of fact. The plaintiff's counsel has not provided any evidence that the opinion letter attached to the Attorney Affidavit was in existence prior to the commencement of this action. The letter is undated and its contents do not give any indication that it was written prior to the commencement of this action. See Exhibit 2 to the Attorney Affidavit.

The plaintiff's counsel also asserts in the Attorney Affidavit that a letter signed by Evelyn McGrath RN/Paralegal of Koskoff Koskoff & Bieder, P.C. (Exhibit 1 to the Attorney Affidavit) indicates that a similar health care provider was sent a copy of the plaintiff's medical records. The defendant disputes this assertion of fact. The letter does not indicate the recipient and does not give any indication that the opinion letter (Exhibit 2 to the Attorney Affidavit) was written by the recipient of the letter or that the opinion letter was written prior to the commencement of this action. The letter attached as Exhibit 1 to the Attorney Affidavit merely indicates that records appear to have been sent to an unknown person at an unknown location. Even if the records were sent to an acupuncturist on November 16, 2011, there is no way to determine that this is the author of the opinion and that the opinion letter was written prior to the commencement of this action.

The plaintiff's counsel also asserts in the Attorney Affidavit that a copy of an email sent to Lindsey Hanson (Exhibit 3 to the Attorney Affidavit) indicates that the opinion letter

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(Exhibit 2 to the Attorney Affidavit) was emailed to Ms. Hanson on February 19, 2012. The defendant disputes this assertion of fact. The email does not indicate the sender of the email and it is impossible to determine this from the contents of the copy of the email. The email does not give any indication that the opinion letter (Exhibit 2 to the Attorney Affidavit) was written by a similar health care provider to the defendant or that the opinion letter was written prior to the commencement of this action.

In sum, the defendant disputes the assertions of fact contained in paragraphs 3 through 11 of the Attorney Affidavit. There is no evidence that the plaintiff's counsel consulted with a similar health care provider to the defendant prior to the commencement of this action, that he made a reasonable inquiry that there were grounds for a negligence action against the defendant, that a similar health care provider to the defendant reviewed this matter prior to the commencement of this action, that a similar health care provider wrote the opinion letter attached as Exhibit 2 to the Attorney Affidavit prior to the commencement of this action, or that the failure to attach an opinion letter to the complaint was "inadvertent" or "an oversight."

II. Law and Analysis

i. The court may not resolve a critical fact on the basis of the complaint and affidavits if they contain controverted facts.

The law is clear that the court may look to the content of affidavits containing *undisputed facts*, for determination of jurisdictional issues raised in a motion to dismiss. In this case, the defendant disputes the assertion of facts in the Attorney Affidavit submitted by the plaintiff. If the court accepts the plaintiff's argument that she should be allowed to amend her complaint to include an opinion letter that was in existence at the time the complaint was

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filed, but which her attorney did not attach to the complaint, then the facts asserted in the Attorney Affidavit are critical to the determination of personal jurisdiction as the defendant disputes that the letter was actually in existence before the complaint was filed. The court may not resolve a critical fact on the basis of the complaint and affidavits if they contained controverted facts. An evidentiary hearing is required to resolve disputed facts. Coughlin v. City of Waterbury, 61 Conn. App. 310 (2001)

See also Garden Mutual Benefit Association v. Levy, 37 Conn. Supp. 790, 792 (1981) (trial court must hold an evidentiary hearing prior to determining personal jurisdiction questions when the parties have submitted affidavits presenting factual issues); Standard Tallow Corp. v. Jowdy, 190 Conn. 48, 56 (1983) (trial court erred in not holding trial-like hearing when issues of fact were necessary to the determination of the court's jurisdiction); Lampasona v. Steve Jacobs, 7 Conn. App. 639, 642 (1986), *aff'd*, 209 Conn. 724 (1989), *cert. denied*, 492 U.S. 919 (1989) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.")

Here, there is no objective evidence that the plaintiff's counsel consulted with a similar health care provider to the defendant prior to the commencement of this action, that he made a reasonable inquiry that there were grounds for a negligence action against the defendant, that a similar health care provider to the defendant reviewed this matter prior to the commencement of this action, that a similar health care provider wrote the opinion letter attached as Exhibit 2 to the Attorney Affidavit prior to the commencement of this action, or that the failure to attach an opinion letter to the complaint was "inadvertent" or "an oversight." As set forth above, the court may not make a determination of personal

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jurisdiction over the defendant based on a self-serving and contested affidavit. An evidentiary hearing must be held before the court may make this determination.

ii. **Plaintiff may not amend her complaint to include the opinion letter attached as Exhibit 2 to the Attorney Affidavit.**

In Morgan v. Hartford Hospital, et al, 301 Conn. 388 (2011), the Supreme Court explained:

> [T]he attachment of the written opinion letter of a similar health care provider is a statutory prerequisite to filing an action for medical malpractice. The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with §52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court.
>
> Id. at 22.

Even if the opinion letter was in existence when the complaint was filed, which the defendant disputes, the Morgan case, which was conspicuously ignored in plaintiff's Opposition, mandates that the attachment of the written opinion is a statutory prerequisite to filing an action for medical malpractice. "[W]e recognize that the written opinion letter, prepared in accordance with the dictates of § 52-190a...is akin to a pleading that must be attached to the complaint in order to commence properly the action." Morgan, supra, at 398. Here the plaintiff has failed to fulfill the statutory prerequisite to filing an action for medical malpractice. This constitutes insufficient process and, thus, the defendant is not subject to the jurisdiction of the court.

It is well settled that when a motion to dismiss based upon lack of personal jurisdiction is filed, the court must resolve the jurisdictional question first. Here, the court may not consider the Request for Leave to Amend the Complaint prior to resolving the Motion to Dismiss. "[A]s soon as the jurisdiction of the court to decide an issue is called into question,

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all other action in the case must come to a halt until such a determination is made." Gurliacci v. Mayer, 218 Conn. 531, 545 (1991) (concluding that the trial court should have ruled on the motion to dismiss prior to a motion to amend). See also Federal Deposit Ins. Corp v. Peabody, N.E., Inc., 239 Conn, 93, 99 (1996) ("Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction . . . The point has been frequently made.")

In Bennett v. New Milford Hospital, et al 300 Conn. 1 (2011), which is referenced in the plaintiff's Opposition, the Supreme Court had an opportunity to adopt the position of the Connecticut Trial Lawyers Association that "we should interpret § 52-190a(c) to permit the free amendment of challenged opinion letters to ensure their compliance with the statute." Id. at 24. The Supreme Court declined to adopt this position. See Id. Thus, it is clear that in a case such as this, where the plaintiff has failed to fulfill the statutory prerequisite to filing an action for medical malpractice, and the defendant has moved to dismiss the matter, the jurisdictional question must be resolved prior to considering an amendment to the complaint.

The plaintiff argues that the court should consider the opinion letter attached as Exhibit 2 to the Attorney Affidavit. As set forth above, there is no objective evidence that this undated letter was in existence prior to the commencement of this action. In Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn. App. 569, 585, *cert. denied*, 292 Conn. 911 (2009), the Appellate Court instructed that, "[b]ecause the purpose of § 52-190a is to require the [written] opinion prior to the commencement of an action, allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper

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substantiation that the statute requires." The Appellate Court further explained that, "[t]he plaintiff could not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." Id. at 586.

As the Supreme Court explained in Morgan v. Hartford Hospital, et al, 301 Conn. 388, 399 (2011), "*Votre* supports the proposition that the failure to attach a sufficient written opinion letter of a similar health care provider involves in personam jurisdiction." In Plante v. Charlotte Hungerford Hosp., 300 Conn. 33, 37-38 (2011), the companion case to Bennett, supra, the Supreme Court explained, "the legislature...has in effect made the prelitigation inquiry pursuant to § 52-190a (a) a significant aspect of the medical malpractice action. This is particularly so given that... § 52-190a (a) requires that the opinion letter be attached to the complaint..."

In Sestito v. Mandara[1], Superior Court, judicial district of Stamford/Norwalk at Stamford, Docket No. CV 09 6002437 S (August 2, 2010, *Adams, J.*), while a motion to dismiss based on the failure to attach a §52-190a opinion letter was pending, the plaintiff amended her complaint to include an opinion letter of a similar health care provider to the defendant. The Court explained that "the state of the law in Connecticut requires a dismissal of the amended complaint...where there is no evidence that the letter regarding [the defendant health care provider] was received prior to the filing of the original complaint." Id. at *12-13. The Court granted the motion to dismiss.

In Caplin v. Laser Center of Northeastern Connecticut, Superior Court, judicial district of Windham, Docket No CV 09 5003976S, (April 27, 2009, *Riley, J.*), the court held, [e]ven if the plaintiff had filed her amendment within the thirty-day deadline imposed by Practice Book

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[1] Unreported cases attached as Exhibit A.

§10-59, or had otherwise filed her amendment in compliance with the Practice Book, the Votre decision does not allow a plaintiff to rely on an opinion letter obtained after the filing of a medical negligence action." Id. at *8. In Simmons v. CVS Pharm., Inc. Superior Court, judicial district of Fairfield at Bridgeport, Docket No: CV 08 5021084S (June 15, 2009, *Hiller, J.*), Judge Hiller explained, "*Voire* and *Caplin* make clear that the court does not have discretion to consider an amended complaint that annexed an opinion letter which had not been obtained at the time the action was commenced." Id. at *19.

In Duran v. Alias, Superior Court, judicial district of Waterbury, Docket No. CV 09 5014109 S (February 25, 2010, *Gallagher, J.*), the Court granted the defendant's Motion to Dismiss despite the plaintiff filing an amended complaint as of right which appended to the complaint a written opinion letter that was not obtained prior to the commencement of the action. The Court held, "Under that circumstance, the plaintiff could not have complied with the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under Votre, the court has no discretion to permit an amendment." Id. at *9-10.

See also Patenaude v. Norwalk Hospital, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 09 5029048S (July 19, 2010, *Arnold, J.*) (granting a motion to dismiss on the basis that *§ 52-190a* requires that the certificate of good faith signed by the plaintiff's attorney and the written opinion of a similar health care provider be attached and contained within the initial complaint filed with the clerk.); Kirkpatrick v. New Britain Gen. Hosp., Superior Court, judicial district of New Britain, Docket No. CV-064011523S, (December 14, 2006, *Pittman, J.*) (The court granted defendant's motion to dismiss despite the plaintiff's filing of a request for leave to amend the complaint to append a written opinion

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obtained soon after the commencement of the action. The court explained, "[i]n enacting...52-190a...which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.")

As set forth above, the court has no discretion to permit an amendment to attach the written opinion required by Conn. Gen. Stat. § 52-190a. The purpose of the requirement to attach the written opinion letter to the original complaint is to assure the defendant that a comprehensive pre-litigation inquiry has been completed. In this case, there can be no such assurance.

WHEREFORE, the defendant respectfully requests that the court grant its Motion to Dismiss.

THE DEFENDANT,
CENTER FOR WOMEN'S
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CERTIFICATION

This is to certify that on 7/9/12 a copy of the foregoing was mailed, postage prepaid to all counsel and pro-se parties of record to:

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EXHIBIT A

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Rachel Caplin v. Laser Center of Northeastern Connecticut

CV095003976S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WINDHAM AT PUTNAM

2009 Conn. Super. LEXIS 1077

April 27, 2009, Decided
April 27, 2009, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient sued defendants, a medical practice, a doctor, and another, alleging claims for lack of informed consent, breach of contract, and violation of the Connecticut Unfair Trade Practices Act (CUTPA) against all defendants, and gross negligence against the doctor. Defendants filed a motion to dismiss. The patient filed an amended complaint, including an opinion letter signed by a similar medical provider.

OVERVIEW: The patient alleged that defendants provided dermatological care to the patient and that the patient's face was disfigured and scarred after a microdermabrasion procedure. The court first concluded that the patient's lack of informed consent claims were sufficient to withstand the motion to dismiss, as no opinion letter was required for such claims and the patient averred that she was not aware of the risks involved and would not have consented to the treatment if she had been aware. The breach of contract claim also survived, as it was a separate claim from the patient's negligence claim, did not require an opinion letter, and alleged that the doctor promised results that were not achieved. The CUTPA claim was also sufficient, as it did not allege medical negligence and thus, contrary to defendants' claim, did not required an opinion letter either. The gross negligence claim, however, failed to survive because an opinion letter was required where the allegations concerned whether the doctor was negligent in her treatment of the patient, and the opinion letter filed by the patient was not filed with the original complaint and was filed over 30 days after the original complaint.

OUTCOME: Defendants' motion to dismiss was granted as to the negligence claim and denied as to all other claims.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN2] A motion to dismiss properly attacks the jurisdiction of a court, essentially asserting that a plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] *Conn. Gen. Stat. § 52-190a(a)* provides that a party who files a medical malpractice action, or an apportionment complaint therein, is required to file both a certificate of good faith and a written opinion from a similar health care provider stating that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Pursuant to of *§ 52-190a(b)*, the failure to obtain and file the written opinion required by *§ 52-190a(a)* shall be grounds for the dismissal of the action.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN4] *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59* allows a plaintiff to amend a complaint, as of right, within thirty days of the return date. Otherwise, a plaintiff seeking to amend the complaint must follow the procedures in *Conn. Gen. Prac. Book, R. Super. Ct. § 10-60*, which may include by order of the court, by consent of the parties or by filing for a request to amend.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN5] Failure to comply with *Conn. Gen. Stat. § 52-190a* does not deprive a court of subject matter jurisdiction. *Section 52-190a* provides a remedy to the defendants in medical malpractice actions and does not impact the competence of the court to hear claims based on a common-law right of action for medical malpractice.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN6] A trial court has discretion to allow the amendment of a complaint in order to attach the opinion letter required for medical negligence claims if the letter was obtained prior to the filing of the original complaint. Given the fallibility existing in the legal profession, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *Conn. Gen. Stat. § 52-190a*, to prevent groundless lawsuits against health care providers. However, a plaintiff cannot turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action.

Evidence > Relevance > Relevant Evidence
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN7] The existence of expert testimony is not relevant where the issue is whether a plaintiff's action sounds in medical malpractice or in ordinary negligence.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN8] The question of whether expert testimony is required does not resolve whether, under *Conn. Gen. Stat. § 52-190a*, a plaintiff must submit an opinion letter from a similar healthcare provider.

Healthcare Law > Treatment > Patient Consent > Informed Consent
[HN9] The lay standard for informed consent requires a physician to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark on a contemplated course of therapy.

Healthcare Law > Treatment > Failures to Disclose & Warn > Medical Procedures
Healthcare Law > Treatment > Patient Consent > Informed Consent
Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Negligence > Duty > Affirmative Duty to Act > Special Relationships > Healthcare Providers
[HN10] The distinction between a duty to exercise due care in the performance of requisite medical procedures and a duty to exercise due care in informing a patient of medical risks is not merely linguistic. It reflects, instead, the fundamental difference between the appropriate performance of professional skills and the proper engagement of a patient in decision making about his or her professional care. A claim against a physician for negligence based on lack of informed consent is separate from a claim based on negligence in medical treatment, because it is based on information communicated by the physician to the patient before the procedure or treatment. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient.

Healthcare Law > Treatment > Patient Consent > Informed Consent
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN11] The distinction between informed consent and medical negligence is not whether the lay standard or the professional standard applies; rather, the relevant inquiry is whether the allegations involve the diagnosis and treatment of the patient.

Contracts Law > Breach > Causes of Action > General Overview
[HN12] A breach of contract claim is a distinct claim that may arise from the same facts and may exist where the physician and patient contract for a specific result. Thus, a medical malpractice action is a tort action unless the physician by express contract agrees to effect a cure or warrant that a particular result will be obtained. When determining whether a complaint sets forth an independent breach of contract claim or merely dresses a malpractice claim in contract language, a court examines the pleadings to ascertain whether the breach of contract alleged is based on substandard care or exists irrespective of adherence to or deviation from the standard of care.

Torts > Business Torts > Unfair Business Practices > General Overview
[HN13] Although physicians and other health care providers are subject to the Connecticut Unfair Trade Practices Act (CUTPA), they may be liable only for unfair, unconscionable, or deceptive methods, act, or practices in the conduct of the entrepreneurial, commercial, or business aspect of the practice of medicine. The practice of medicine may give rise to a CUTPA claim only when the actions at issue are chiefly concerned with entrepreneurial aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by a defendant.

Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > General Overview
[HN14] The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. The relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals; (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

JUDGES: [*1] Michael E. Riley, J.

OPINION BY: Michael E. Riley

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS # 102

On December 15, 2008, the plaintiff, Rachel Caplin, filed a complaint alleging that the defendants, Laser Center of Northeastern Connecticut, Nita Chatterjee, MD and Marie Corey, performed a dermatological procedure that caused damage to the plaintiff's skin. The return date for the action was January 6, 2009. The plaintiff alleges lack of informed consent, breach of contract and unfair trade practices against all three defendants and gross negligence against Chatterjee. The plaintiff attached to the original complaint a "Certificate of Good Faith," signed by her attorney, which states that grounds exist for a good faith belief that there was negligence in the care of the plaintiff.

On January 16, 2009, the defendants filed a motion to dismiss arguing that the court does not have jurisdiction over the complaint because the plaintiff failed to attach an opinion letter by a similar medical provider as required by *General Statutes §52-190a.* [1] On February 6, 2009, the plaintiff filed an amended complaint including an opinion letter signed by a similar medical provider. On February 17, 2009, the plaintiff [*2] objected to the motion to dismiss and filed a memorandum of law.

1 *General Statutes §52-190a* provides, in relevant part, that: [HN1] "(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . (c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

In the complaint, the plaintiff alleges the following facts. The defendants provided dermatological [*3] care to the plaintiff, including "TCA peels" and "microdermabrasion" on the plaintiff's face. The day after the microdermabrasion was performed, the plaintiff developed "a severed acneiform reaction" and her face was "disfigured and scarred." The plaintiff would not have consented to the procedures had she been advised of the risks of worsening acne and scarring. The procedures were contraindicated for various reasons, including her skin condition and the frequency and proximity in time of the treatments. The defendants specifically promised "a baby soft feel of the face as well as better overall skin tone and skin clarity for the plaintiff." Finally, the defendants sold the plaintiff skin care products without warning her to wait before using the products, and they also performed the skin treatments too close together in time, despite having constructive knowledge of the plaintiff's sensitive skin.

[HN2] "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, inter alia, whether, on the face of the record, [*4] the court is without jurisdiction." (Internal quotation marks omitted.) *Berchem v. Mohegan Tribe of Indians of Connecticut, 282 Conn. 130, 134, 918 A.2d 880 (2007).*

General Statutes §52-190a(a) [HN3] provides that a party who files a medical malpractice action, or an apportionment complaint therein, is required to file both a certificate of good faith and a written opinion from a similar health care provider stating "that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." Pursuant to *subsection (c) of §52-190a*, "[t]he failure to obtain and file the written opinion required by subsection (a) [of 52-190a] shall be grounds for the dismissal of the action."

In *Rios v. CCMC Corp., 106 Conn.App. 810, 822, 943 A.2d 544 (2008)*, the court concluded that "[t]he plain language of this new statutory subsection [i.e., *§52-190a(c)*], expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§52-190a(a)*. Accordingly, the [trial] court properly considered and granted the defendants' motion to dismiss."

The plaintiff argues that she cured [*5] any defect by filing an amended complaint with the opinion letter attached; furthermore, the plaintiff asserts that her claims for lack of informed consent, breach of contract and gross negligence do not require an opinion letter from a similar health care provider. The defendants argue that the failure to attach the opinion letter to the complaint deprives the court of subject matter jurisdiction. [2] The defendants also argue that the plaintiff's claims sound in medical malpractice, even where couched in the language of informed consent, breach of contract and gross negligence.

2 The arguments in the case were filed prior to the publication of *Vitre v. Cutting Obstetrics & Gynecology Group, 113 Conn.App. 569, 966 A.2d 813 (2009).*

The amended complaint was filed electronically on February 5, 2009 at 6:43p.m. The filing date, therefore, is recorded as February 6, 2009, thirty-one days after the original complaint was filed. *Practice Book §10-59* [HN4] allows a plaintiff to amend a complaint, as of right, within thirty days of the return date. Otherwise, a plaintiff seeking to amend the complaint must follow the procedures in *Practice Book §10-60*, which may include by order of the court, by consent of the parties [*6] or by filing for a request to amend. The original complaint, therefore, is the operative complaint for the motion to dismiss.

Before considering whether the plaintiff's claims in the original complaint must be dismissed for failure to include the opinion letter, the court must first address the issue of subject matter jurisdiction. The parties dispute whether, under *Rios v. CCMC Corp., supra, 106 Conn.App. 810*, the plaintiff's failure to attach an opinion of a similar health care provider under *General Statutes*

§52-190a(a) requires dismissal for lack of subject matter jurisdiction over a complaint for medical negligence.

The Appellate Court recently addressed the requirements of *§52-190a*; *Vorre v. County Obstetrics & Gynecology Group, 113 Conn.App. 569, 966 A.2d 813 (2009)*; and ruled that [HN5] failure to comply with *§52-190a* does not deprive the court of subject matter jurisdiction. The court held that *§52-190a* provides a remedy to defendants in medical malpractice actions and does not impact the competence of the court to hear claims based on a common-law right of action for medical malpractice. The court noted that the General Statutes create other nonjurisdictional bases for dismissal of an action.

In [*7] *Vorre v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 585*, the court explained that the [HN6] trial court has discretion to allow the amendment of a complaint in order to attach the opinion letter if the letter was obtained prior to the filing of the original complaint. "Given the fallibility existing in the legal profession once noted by Justice David M. Shea, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers." *Id.* The court makes clear, however, that "[t]he plaintiff [can] not turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." *Id., 586.*

In the present case, the written opinion that is attached to the amended complaint filed by the plaintiff on February [*8] 6, 2009, is dated February 5, 2009. The plaintiff did not attach an opinion letter of a similar medical provider to her original complaint, filed on December 15, 2008, and the amended complaint includes an opinion letter apparently obtained after the filing of the original complaint. The plaintiff does not claim that she inadvertently failed to attach the opinion letter to the original complaint. Thus, even if the plaintiff had filed her amendment within the thirty-day deadline imposed by *Practice Book §10-59*, or had otherwise filed her amendment in compliance with the Practice Book, the *Vorre* decision does not allow a plaintiff to rely on an opinion letter obtained after the filing of a medical negligence action. Any of the plaintiff's claims based on medical negligence are dismissed; however, the court must also consider the plaintiff's argument that the counts listed in the original complaint do not require an opinion letter under *General Statutes §52-190a(a)*. Each of the plaintiff's claims are considered in turn.

Count one and count two are claims for lack of informed consent. The plaintiff argues that claims based on informed consent require only lay testimony and, therefore, do [*9] not require an opinion of a similar medical provider. Even if the court assumes, without deciding, that the claims for lack of informed consent do not require expert testimony, [3] the inquiry does not end there. [HN7] "The existence of expert testimony is not relevant where the issue is whether the plaintiff's action sounds in medical malpractice or in ordinary negligence." (Internal quotation marks omitted.) *Petersen v. Griffith, Superior Court, judicial district of Windham, Docket No. CV 07 5001959 (February 4, 2009, Riley, J.) [47 Conn. L. Rptr. 181, 2009 Conn. Super. LEXIS 283]*. Similarly, [HN8] the question of whether expert testimony is required does not resolve whether, under *§52-190a*, the plaintiff must submit an opinion letter from a similar healthcare provider.

> 3 [HN9] "[T]he lay standard for informed consent requires a physician to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark on a contemplated course of therapy." (Internal quotation marks omitted.) *Duffy v. Flagg, 279 Conn. 682, 692, 905 A.2d 15 (2006)*. But see *Mason v. Walsh, 26 Conn.App. 225, 230, 600 A.2d 326 (1992)* (requiring that expert testimony be used to establish which, if [*10] any, of group of specialists assisting surgeon had duty to obtain plaintiff's informed consent).

The defendant argues that although the plaintiff labels her claims as "lack of informed consent," she has actually alleged medical negligence. The defendant relies on *Vorre v. County Obstetrics & Gynecology Group, Superior Court, judicial district of New Haven, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380 (May 24, 2007, Holden, J.)*, aff'd, *113 Conn.App. 569, 966 A.2d 813 (2009)*, arguing that, like the claims in *Vorre*, the plaintiff's claims for lack of informed consent center only around allegations that the defendants violated the standard of care. The plaintiff in *Vorre* did not, however, allege lack of informed consent, and so neither decision directly addresses whether informed consent constitutes a separate claim from medical negligence.

[HN10] "The distinction between a duty to exercise due care in the performance of requisite medical procedures and a duty to exercise due care in informing a patient of medical risks is not merely linguistic. It reflects, instead, the fundamental difference between the appropriate performance of professional skills and the proper

engagement of a patient in decision making about his or her professional [*11] care . . . A claim against a physician for negligence based on lack of informed consent is separate from a claim based on negligence in medical treatment, because it is based on information communicated by the physician to the patient before the procedure or treatment. A physician can be liable for failure to obtain informed consent before treatment without being negligent in the actual treatment of the patient." (Citations omitted; internal quotation marks omitted.) *Sherwood v. Danbury Hospital, 278 Conn. 163, 180-81, 896 A.2d 777 (2006).*

The majority of Superior Court opinions addressing the distinction between lack of informed consent claims and medical negligence claims have ruled that no opinion letter is required for informed consent claims. *Rodriguez v. Yale New Haven Hospital, Superior Court, judicial district of New Haven, Docket No. CV 08 5021657, 2009 Conn. Super. LEXIS 702 (March 12, 2009, Robinson, J.); Thiel v. Fine, Superior Court, judicial district of Hartford, Docket No. CV 08 50214685, 2009 Conn. Super. LEXIS 579 (February 26, 2009, Wagner, J.T.R.); Landry v. Zhurowski, Superior Court, judicial district of Tolland, Docket No. CV07 6000211, 2007 Conn. Super. LEXIS 2880 (October 26, 2007, Vacchelli, J.) (44 Conn. L. Rptr. 452); Pafka v. Gibson, Superior Court, complex litigation docket at Hartford, Docket No. X03 CV 05 5008249 (August 6, 2007, Langenbach, J.) (43 Conn. L. Rptr. 871, 2007 Conn. Super. LEXIS 2152)* [*12] ; *Stevens v. Spector, Superior Court, judicial district of Fairfield, Docket No. CV 06 5001000 (October 25, 2006, Hiller, J.) (42 Conn. L. Rptr. 244, 2006 Conn. Super. LEXIS 3229).* But see *Brown v. Gulukis, Superior Court, judicial district of New Haven at Meriden, Docket No. CV 06 5000424 (July 24, 2006, Wiese, J.) (41 Conn. L. Rptr. 695, 697, 2006 Conn. Super. LEXIS 2192)* ("where a patient seeks recovery against a physician based upon a lack of informed consent, he is bringing a malpractice action . . . [t]he fact that the physician's duty of disclosure is measured by a lay, as opposed to a professional, standard does not affect the substantive nature of the cause of action . . .")

In *Farr v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 569,* the court found that claims labeled as infliction of emotional distress, breach of contract and misrepresentation all arose from the treatment of the patient and required that the plaintiff show a violation of the duty of care in the medical treatment and, therefore, were claims for medical negligence regardless of the label used by the plaintiff. Unlike the [*13] claims in *Farr*, informed consent stands as a distinct claim because a plaintiff could bring it even in the absence of negligent treatment by the physician. Many cases holding that a plaintiff bringing an informed consent claim need not comply with *§52-190a* rely on a determination that no expert testimony is necessary to prove the claim; *Rodriguez v. Yale New Haven Hospital, supra, Superior Court, Docket No. CV 08 5021657, 2009 Conn. Super. LEXIS 702*; however, the language in *Sherwood v. Danbury Hospital, supra, 278 Conn. 181,* quoted above, provides a better analysis for distinguishing between informed consent claims and medical negligence claims.

A claim for lack of informed consent focuses exclusively on the communication with the patient, rather than on the treatment of the patient. The court in *Brown v. Gulukis, supra, Superior Court, Docket No. CV 06 5000424, 2006 Conn. Super. LEXIS 2192,* though it reaches an opposite conclusion from this court, correctly asserts that [HN11] the distinction between informed consent and medical negligence is not whether the lay standard or the professional standard applies; rather, as in *Sherwood*, the relevant inquiry is whether the allegations involve the diagnosis and treatment of the patient. Here, the plaintiff, [*14] in counts one and two, alleges that she was not aware of the risks involved in the dermatological treatment performed by the defendants. The plaintiff alleges that if she had been made aware of the risks, she would not have consented to the treatment. The treatment itself may have been conducted with the highest level of care, but the plaintiff could still maintain a cause of action for lack of informed consent. The motion to dismiss as to counts one and two is, therefore, denied. This outcome is consistent with the ruling in *Farr v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 569,* where the plaintiff's claims involved the treatment of the plaintiff's medical condition and the fundamental question was whether the standard of care in rendering that treatment was upheld.

Count three alleges breach of contract by the defendants in that they promised a particular result and failed to achieve it. The plaintiff argues that her allegation that the defendants promised a "baby soft feel" and "better skin tone and skin clarity" resulting in damages due to the breach of the agreement to provide those results, rather than from medical negligence. The defendants argue that the plaintiff's [*15] claim for breach of contract arises solely from the claims for medical negligence and, therefore, require the plaintiff to file an opinion letter from a similar healthcare provider.

In *Farr v. County Obstetrics & Gynecology Group, supra, Superior Court, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380,* the court found that the plaintiff's claims labeled as "breach of contract" were actually claims for medical negligence and required that the plaintiff file an opinion letter. The Appellate Court agreed that "[a]lthough the plaintiff here denominated the claims in her complaint as sounding in ordinary tort and

breach of contract, the factual allegations underlying the claims require proof of the defendants' deviation from the applicable standard of care of a health care provider . . ." *Pure v. County Obstetrics & Gynecology Group, supra, 113 Conn.App. 580.* Consistent with the reasoning in *Pure*, in the present case, the plaintiff has stated a claim for breach of contract in count three separate from her claim of medical negligence.

[HN12] "A breach of contract claim is a distinct claim that may arise from the same facts and may exist where the physician and patient contract for a specific result . . . Thus, a medical [*16] malpractice action is a tort action *unless the physician by express contract agrees to effect a cure or warrant that a particular result will be obtained* . . . When determining whether a complaint sets forth an independent breach of contract claim or merely dresses a malpractice claim in contract language, the court examines the pleadings to ascertain whether the breach of contract alleged is based on substandard . . . care or exists irrespective of adherence to or deviation from the standard of care." (Citations omitted; emphasis added; internal quotation marks omitted.) *Pure v. County Obstetrics & Gynecology Group, supra, Superior Court, Docket No. CV 06 5005430, 2007 Conn. Super. LEXIS 1380.*

In the present case, the plaintiff's breach of contract claim does not require proof of a deviation from the standard of care. The plaintiff alleges that an agreement existed with the defendants to make her skin have a certain look and feel, a result that the plaintiff alleges was not achieved. She further alleges that she performed her obligations under the contract. This claim, therefore, does not require an opinion letter under *§52-190a* because it is distinct from a claim based on medical negligence. The motion to dismiss [*17] count three is denied.

The fourth count of the complaint alleges violations of the Connecticut Unfair Trade Practices Act (CUTPA) by the defendants in that Chatterjee referred the plaintiff, a pharmaceutical representative, to the Laser Center for treatment in exchange for doing business with the plaintiff and other pharmaceutical representatives. [HN13] "[A]lthough physicians and other health care providers are subject to CUTPA, they may be liable only for unfair, unconscionable, or deceptive methods, act, or practices in the conduct of the entrepreneurial, commercial, or business aspect of the practice of medicine . . . The practice of medicine may give rise to a CUTPA claim only when the actions at issue are chiefly concerned with entrepreneurial aspects of practice, such as the solicitation of business and billing practices, as opposed to claims directed at the competence of and strategy employed by the . . . defendant." (Citation omitted; internal quotation marks omitted.) *Jankauskas v. Fichman, 264 Conn. 796, 808-09, 826 A.2d 1066 (2003).*

4 In the amended complaint, the plaintiff does not pursue this claim; however, the court must still address this claim because the original complaint [*18] is the operative complaint for deciding this motion to dismiss.

The plaintiff's CUTPA claim relates to the entrepreneurial aspects of the practice of medicine and does not rely on any underlying medical negligence. While the court does not rule on whether count four sufficiently alleges a claim under CUTPA, count four does not allege a claim for medical negligence requiring an opinion letter of a similar health care provider. The motion to dismiss count four is denied.

The plaintiff alleges in count five that the defendant, Chatterjee, knew or should have known that the type of microdermabrasion procedure conducted on the plaintiff was contraindicated due to the plaintiff's active acne. The plaintiff argues that the allegations in count five are sufficient to constitute the kind of gross negligence that would not require expert testimony.

Even if the court assumes, without deciding, that the plaintiff's claim for gross negligence will not require expert testimony, such a determination does not fully resolve the question of whether the plaintiff's claim is for medical negligence requiring the submission of a written opinion letter from similar health care provider under *General Statutes §52-190a.* [*19] [HN14] *Pearson v. Griffith, supra, Superior Court, Docket No. CV 07 5001959, 2009 Conn. Super. LEXIS 283.* "The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred . . . [T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Citations omitted; internal quotation marks omitted.) *Gold v. Greenwich Hospital Ass'n., 262 Conn. 248, 254, 811 A.2d 1266 (2002).*

In the present case, the first factor is easily met. The plaintiff is suing Chatterjee in her capacity as a physician. The allegations concerning whether the skin treatments were contraindicated and too close in time and whether Chatterjee knew or should have known not to proceed with the treatments meet the second factor. Finally, the alleged negligence [*20] directly relates to

the treatment of the plaintiff and involved the exercise of medical judgment. Indeed, Chatterjee's medical judgment is at the heart of the plaintiff's claim in count five. Unlike the previous counts in the complaint, addressed above, the claim for "gross negligence" requires that the plaintiff show that the defendant Chatterjee deviated from the standard of care. It is not obvious or apparent that the skin treatments were contraindicated or too close in time. Count five sounds in medical negligence and is, therefore, dismissed because the plaintiff failed to obtain a letter by a similar medical provider prior to filing the complaint.

The defendant's motion to dismiss is denied as to counts one, two, three and four and granted as to count five.

BY THE COURT

JUDGE RILEY

Minnie Grant Simmons v. CVS Pharmacy, Inc. et al.

CV085021084S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD AT BRIDGEPORT

2009 Conn. Super. LEXIS 1658

June 15, 2009, Decided
June 17, 2009, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff consumer sued defendants, an unidentified pharmacist and his or her employer, alleging she was provided an improper dosage of a prescription medication. Defendants moved to dismiss the action for plaintiff's failure to comply with *Conn. Gen. Stat. § 52-190a*. Plaintiff moved to amend the complaint and attached a certificate of good faith and an opinion letter to her proposed amended complaint.

OVERVIEW: Plaintiff alleged defendants improperly filled her prescription for five mcg tablets of a particular medication with 25 mcg tablets, and that she was injured as a result of ingesting 500 percent of the prescribed amount of the medication. The court held that as the complaint alleged defendants departed from accepted pharmaceutical practices, pf's claims sounded in medical malpractice rather than ordinary negligence. Therefore, pursuant to *Conn. Gen. Stat. § 52-190a*, a written opinion letter and certificate of good faith had to be attached to the complaint. The complaint did not set forth a claim for negligent supervision against the employer that was separate and distinct from, rather than founded on or at least derived from, the underlying allegations of negligence in the pharmaceutical care of plaintiff. The court did not have discretion to consider plaintiff's amended complaint that annexed an opinion letter which had not been obtained at the time the action was commenced.

OUTCOME: Defendants' motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a*.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] See *Conn. Gen. Stat. § 52-190a(c)*.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] A plaintiff's failure to comply with the requirements of *Conn. Gen. Stat. § 52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to *§ 52-190a(c)* is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading. Accordingly, the plaintiff's failure to attach the documents to her original complaint as required by *§ 52-190a* renders her action subject to dismissal.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN4] Whether a certificate of good faith under *Conn. Gen. Stat. § 52-190a* is required is not determined merely by a determination of whether the defendant is a health care provider, but also by whether the claim sounds in negligence or medical malpractice.

Civil Procedure > Pleading & Practice > Pleadings > General Overview
Civil Procedure > Trials > Jury Trials > Province of Court & Jury
[HN5] The interpretation of pleadings is always a question of law for the court.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN6] The fact that an action is against a health care provider or a health care facility, in and of itself, is insufficient to transform a case involving ordinary negligence, into a claim of malpractice.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Vicarious Liability > Employers > General Overview
[HN7] An action brought against a medical provider in its capacity primarily as an employer does not require a certificate of good faith.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN8] The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. Professional negligence or malpractice is defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill or the failure to exercise requisite medical skill. The relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions

Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Actions > General Overview
[HN9] The characterization of a claim as ordinary negligence or medical malpractice does not turn on whether expert testimony is required. The rule of law that distinguishes between medical malpractice and ordinary negligence requires a determination of whether the injury alleged occurred during treatment because of a negligent act or omission that was substantially related to treatment.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN10] Given the fallibility existing in the legal profession, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, may be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *Conn. Gen. Stat. § 52-190a*, to prevent groundless lawsuits against health care providers. The plaintiff may not, however, turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN11] The court does not have discretion to consider an amended complaint that annexes an opinion letter, as required by *Conn. Gen. Stat. § 52-190a*, which had not been obtained at the time the action was commenced.

JUDGES: [*1] Arthur A. Hiller, J.

OPINION BY: Arthur A. Hiller

OPINION

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION TO DISMISS

This is an action, with a return date of December 30, 2008, against an unidentified pharmacist and his or her employer, CVS Pharmacy, Inc. (CVS), for providing to the plaintiff an improper dosage of a prescription medication causing injuries as a result of ingesting a 400% increase over the dosage which she had been prescribed. The plaintiff did not include with the complaint a good faith certificate and a written opinion of a similar health care provider. The defendants moved to dismiss the action for failure to comply with *General Statutes §52-190a* [1] because the good faith certificate and a written opinion of a similar health care provider were not attached to the complaint.

1 *General Statutes §52-190a(a)* provides in relevant part: [HN1] "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry [*2] as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or pany filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in *section 52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . The claimant or the claimant's attorney, and any apportionment com-

plainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy [*3] of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . ."

On March 10, 2009, the plaintiff filed a motion to amend the complaint together with a proposed amended complaint. The proposed amended complaint reiterates the allegations of the original complaint and attaches a certificate of good faith and an opinion letter. Subsequently, the plaintiff filed a second amended complaint, dated March 27, 2009, which purports to recast and "clarify" her claims as sounding in ordinary negligence, products liability, and negligent hiring and supervision.

The plaintiff asserts that the court should consider her proposed amended complaints because they will render the motion to dismiss moot and the defendants will not suffer any prejudice. The plaintiff contends that "the mere fact that defendants have filed a motion to dismiss does not preclude the court from granting the plaintiff's motion to amend." The court does not agree. The motion to dismiss must be addressed first. " '[O]nce the question of lack of jurisdiction of a court is raised . . . [it] must be disposed of no matter in what form it is presented and the court must fully [*4] resolve it before proceeding further with the case.' (Internal quotation marks omitted.) *D'Ermo v. Smith, 273 Conn. 610, 616, 872 A.2d 408 (2005)*. For this reason, it is improper for the court to consider a motion to amend prior to ruling on a motion to dismiss for lack of subject matter jurisdiction. *Gorlacci v. Mayer, 218 Conn. 531, 545, 590 A.2d 914 (1991)* ('[b]y considering the motion to amend prior to ruling on the challenge to the court's subject matter jurisdiction, the court acted inconsistently with the rule that, as soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made')." *Reed v. Danbury Hospital, Superior Court, judicial district of Danbury, Docket No. CV 07 5003254 (May 13, 2008, Shaban, J.) (45 Conn. L. Rptr. 501, 2008 Conn. Super. LEXIS 1234)*.

General Statutes §52-190a(c) provides that [HN2] "[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action." Superior Courts have had different opinions regarding whether failure to comply with the requirements of *§52-190a(a)* means that the court does not have subject [*5] matter jurisdiction. Compare *Castala v. Greenwich Memorial Health Care Center, Superior Court, judicial district of New Haven, Docket No. 08U022319, 2009 Conn. Super. LEXIS 582 (February 19, 2009, Corradino, J.)* [2] (holding that failure to attach written opinion of similar health care provider does not affect subject matter jurisdiction); with *Gowlis v. Saint Mary's Hospital, Superior Court, judicial district of Waterbury, Docket No. 08 5009513, 2008 Conn. Super. LEXIS 3288 (December 16, 2008, Alvord, J.)* [3] (holding that failure to attach written opinion of similar health care provider deprives the court of subject matter jurisdiction). This issue was, however, recently resolved by the appellate court in *Vitre v. Gunny Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813 (2009)*. [1] In *Vitre*, the court held that [HN3] "[a] plaintiff's failure to comply with the requirements of *§52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant [*6] who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading." *Id., 583-84*. Accordingly, the plaintiff's failure to attach the documents to her original complaint as required by *§52-190a* renders her action subject to dismissal.

2 Judge Corradino explained that "this court does not believe a failure to comply with *§52-190a* means the court does not have subject matter jurisdiction of one of these malpractice cases. *Subsection (a)* does not use the language of subject matter jurisdiction--it does not say failure to file the required opinion *shall* result in dismissal. The language simply says 'The failure to obtain and file the written opinion required by *subsection (a)* of this section *shall be grounds for* the dismissal of the action . . .' How on earth could that language be construed as referring to subject matter jurisdiction in a jurisdiction that exercises every presumption in favor of jurisdiction." *Cassale v. Greenwich Memorial Health Care Center, Superior Court, judicial district of New Haven, Docket No. 085022319, 2009 Conn. Super. LEXIS 582 (February 19, 2009, Corradino, J.)*.

3 Judge Alvord explained that "[t]o permit a plaintiff to overcome [*7] a clear violation of *§52-190a(a)* by amendment of a pending complaint thwarts the obvious purpose of *§52-190a(a)* as explicated by Public Act 05-275, S.2. Such an interpretation reads out of the statute the language contained in *subsection (a)* that '[n]o civil action . . . shall be filed,' and the language of *subsection (c)* that 'failure to obtain and file the written opinion . . . shall be grounds for the dismissal of the action.' " *Gowlis v. Saint Mary's Hospital, Superior Court, judicial district of Waterbury, Docket No. 08 5009513, 2008 Conn. Su-*

per. LEXIS 3288 (December 16, 2008, Alvord, J.).

4 The court notes that the appellate court's decision in *Vitre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813 (2009)*, was officially released subsequent to the parties' briefing and oral arguments in this matter.

In the present action, it must first be determined if a good faith certificate and written opinion of a health care provider were required.[HN4] Whether a certificate of good faith under *§52-190a* is required is not determined merely by a determination of whether CVS is a health care provider, but also by whether the claim sounds in negligence or medical malpractice.

[HN5] "[T]he interpretation of [*8] pleadings is always a question of law for the court." (Internal quotation marks omitted.) *Brune v. William W. Backus Hospital, 272 Conn. 551, 559, 864 A.2d 1 (2005)* [HN6] " 'The fact that an action is against a health care provider or a health care facility, in and of itself, is insufficient to transform a case involving ordinary negligence, into a claim of malpractice.' *Bryant v. Derma Clinic, Inc., Superior Court Judicial District of Fairfield, Docket No. CV 04 4000265 (September 1, 2005, Radcliffe, J.) (39 Conn. L. Rptr. 875, 2005 Conn. Super. LEXIS 2394)*. See also *Bairrigin v. Elmcrest Psychiatric Institute, Inc., 6 Conn. App. 383, 386, 505 A.2d 741 (1986)*; *Shaw v. Cubbin, Inc., Superior Conn, judicial district of Stamford, Docket No. CV94 0135645 (February 23, 1995, Lewis, J.) (13 Conn. L. Rptr. 524, 1995 Conn. Super. LEXIS 567)*. In addition, [HN7] an action brought against a medical provider in its capacity primarily as an employer does not require a certificate of good faith. *Nieves v. Bridgeport Hospital, Superior Court, judicial district of Fairfield, Docket No. CV 03 0402055, 2003 Conn. Super. LEXIS 3347 (December 1, 2003, Dewey, J.)*" *Jolly v. Somlin, Superior Court, judicial district of Waterbury, Docket No. CV 065000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.)*.

[HN8] "The classification [*9] of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. Professional negligence or malpractice . . . [is] defined as the *failure of one rendering professional services* to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . Furthermore, malpractice presupposes some *improper conduct in the treatment or operative skill* [or] . . . the failure to exercise requisite medical skill . . . From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Citations omitted; emphasis [*10] in original; internal quotation marks omitted.) *Brune v. William W. Backus Hospital, supra, 272 Conn. 562-63*; *Thimel v. Lawrence & Memorial Hospital Rehabilitation Center, 61 Conn.App. 353, 357-58, 764 A.2d 203*, cert. denied, *258 Conn. 711, 784 A.2d 889 (2001)*. Moreover, [HN9] "[t]he characterization of a claim as ordinary negligence or medical malpractice . . . does not turn on whether expert testimony is required." *Thimel v. Lawrence & Memorial Hospital Rehabilitation Center, supra, 61 Conn.App. 360*. "The rule of law that distinguishes between medical malpractice and ordinary negligence requires a determination of whether the injury alleged occurred during treatment because of a negligent act or omission that was substantially related to treatment." *Id.*

In her original complaint, dated November 26, 2008, the plaintiff alleged the following facts. From October 2005 through February 2007, the defendants filled the plaintiff's prescriptions. On December 6, 2006, the defendants improperly filled her prescription for 5 mcg tablets of a particular medication with 25 mcg tablets. The label on the bottle stated that it contained 5 mcg tablets. After receiving the medication, the plaintiff noticed [*11] that the pills appeared to be different than those she had previously received when CVS had filled her prescriptions in the past. She contacted the defendants regarding the apparent discrepancy and was told that the manufacturer was utilizing a new formulation and that the pills were correct and acceptable to take. The plaintiff ingested the medication in accordance with the instructions on the bottle until February 2007. As a result of ingesting 500% of the prescribed amount of the medication, she suffered injuries.

The plaintiff's complaint further set forth the following allegations. The defendants were or represented themselves to be, qualified to render proper and adequate pharmaceutical care to the plaintiff and undertook to provide her with such care in accordance with accepted standards and to use reasonable care, skill and judgment. The defendants departed from accepted pharmaceutical practices in the care of the plaintiff and failed to follow good practice. All defendants were negligent, careless, reckless and/or grossly indifferent in the filling of the plaintiff's prescription, and CVS was negligent in the training and supervision of its technicians and assistants, including [*12] the pharmacist who filled plaintiff's

prescription. In addition, the defendants breached implied warranties that they used due care in filling the prescription and express warranties that the label accurately reflected what the bottle contained.

In this case, a fair reading of the complaint reveals that the plaintiff's claims do sound in medical malpractice rather than ordinary negligence. The allegations of the complaint, which were repeated throughout the counts, stated that the defendants undertook to provide pharmaceutical care to the plaintiff and deviated from the appropriate standards of care. Significantly, the plaintiff also alleged that she specifically consulted with CVS' pharmacists regarding whether the tablets she received were proper and in conformance with her prescription. It is clearly alleged that the defendants were providing professional services, namely pharmaceutical care, in the course of a medical professional-patient relationship by providing prescription medication and consultation regarding that medication. The negligent acts of providing the wrong prescription medication and assuring the plaintiff that she had received the appropriate medication were, at [*13] the very least, substantially related to the pharmaceutical care she received from the defendants. See *Trimel v. Lawrence & Memorial Hospital Rehabilitation Center, supra, 61 Conn.App. 360* (distinguishing factor between ordinary negligence and malpractice is whether negligent act causing injury was "substantially related to treatment"). The defendants exercised specialized medical judgment and skill by assuring the plaintiff that she had received the proper medication. Although the defendants' acts may be obviously negligent to the trier of fact, the distinction between ordinary negligence and malpractice does not hinge on whether expert testimony would be required to establish a standard of care and breach. *Id.* Therefore, the plaintiff's claims sound in medical malpractice and a written opinion letter and certificate of good faith are required pursuant to *General Statutes §52-190a.*

The court also disagrees with the plaintiff's contention that she has stated a claim for negligent supervision that is not subject to the requirements of *§52-190a.* The only allegations which may even be generously construed as pertaining to a claim for negligent supervision are limited to two paragraphs [*14] in the first count stating that CVS and its agents, servants and employees were negligent, careless, and reckless in the training and supervision of its technicians and assistants. These allegations, however, were interspersed amongst the other allegations of negligent and reckless conduct by both CVS and its pharmacists and they were repeated and realleged in every count of the complaint, including those which the plaintiff now contends sound in products liability, misrepresentation, and breach of warranty. Therefore, it is impossible for the court to read these allegations as setting forth a claim for negligent supervision that is separate and distinct from, rather than founded upon or at least derived from, the underlying allegations of negligence in the pharmaceutical care of the plaintiff.

Moreover, this case is distinguishable from those cited by the plaintiff, specifically *Jolly v. Smulin, Superior Court, judicial district of Waterbury, Docket No. CV 065000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.).* In *Jolly*, the plaintiff suffered injuries as a result of ingesting medications obtained from a pharmacist on prescriptions that he forged and filled through improper means. *Id.* The plaintiff [*15] brought claims of negligence against the pharmacist and his employer, and medical malpractice against the pharmacist only. [5] *Id.* The allegedly negligent conduct of the employer was the failure to supervise its employee and have monitoring procedures in place to prevent the conduct of the pharmacist. *Id.* The court found that the claims against the employer sounded in ordinary negligence because the allegations of negligence only pertained to the employer's relationship with the employee. *Id.* In contrast, the plaintiff in this case fails to set forth a separate count and specific facts pertaining to negligent supervision. Rather, the plaintiff merely alleges that CVS failed to supervise and train its employees and imbeds these allegations in all of its claims against both defendants amidst allegations that CVS undertook to provide pharmacy services to the plaintiff.

> 5 The plaintiff attached a good faith certificate and written opinion letter that only addressed the negligent conduct of the pharmacist. *Jolly v. Smulin, Superior Court, judicial district of Waterbury, Docket No. CV 06 5000597, 2007 Conn. Super. LEXIS 952 (April 16, 2007, Upson, J.).*

Likewise, the other claims set forth in the original complaint, regardless [*16] of how the plaintiff now attempts to characterize them, are derived from the underlying negligence of providing the wrong medication to the plaintiff. This conclusion is bolstered by the fact that the basic allegations that the defendants were negligent in filling the prescription and assuring the plaintiff that she had received the proper medication are initially set forth in the first count, and repeated in every single count thereafter.

Having found that the plaintiff's claims sound in medical malpractice and, therefore, a written opinion letter and a certificate of good faith are required, the court must determine whether the amended complaint which annexed these documents should properly be considered. In *Kime v. Canny Obstetrics & Gynecology Group, P.C., supra, 113 Conn.App. 585*, the court stated that it is within the court's discretion to permit the

amendment of a complaint in order to attach the opinion letter if the opinion letter was obtained prior to the filing of the original complaint. See also *Caplin v. Laser Center of Northeastern Connecticut, Superior Court, judicial district of Windham at Putnam, Docket No. CV 095003976, 2009 Conn. Super. LEXIS 1077 (April 27, 2009, Riley, J.)*. [HN10] "Given the fallibility [*17] existing in the legal profession once noted by Justice David M. Shea, it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers." *Vorre v. County Obstetrics & Gynecology Group, P.C., supra, 113 Conn.App. 583*. The plaintiff may not, however, "turn back the clock and attach by amendment an opinion of a similar health care provider that did not exist at the commencement of the action." *Id., 586*. In *Vorre*, the appellate court affirmed the dismissal of the plaintiff's medical malpractice claims because it was clear that no opinion letter was attached to the complaint and none existed when the action was commenced. *Id.* Acknowledging the plaintiff's argument that dismissal was a harsh result under the circumstances, the court noted that it was "bound to uphold [*18] the laws the legislature adopts [and] [a]ny change to the dismissal remedy when the required written opinion is not annexed to the complaint would require a legislative remedy, not a judicial one." *Id., 584*.

In *Caplin v. Laser Center of Northeastern Connecticut, supra, Superior Court, Docket No. CV 09 5003976, 2009 Conn. Super. LEXIS 1077*, the court applied the ruling announced in *Vorre*. In *Caplin*, the plaintiff did not file an opinion letter with her complaint, but she did file an amended complaint with an opinion letter after the period within which she could amend her complaint as of right. In opposition to the defendants' motion to dismiss, she contended that her medical malpractice claims should not be dismissed for failure to attach the opinion letter because she had cured any defect by filing the amended complaint with the opinion letter. The court, relying on *Vorre*, disagreed and dismissed the claims because it was evident that the letter had not been inadvertently omitted from the initial filing, but rather had not been obtained until after the action had been commenced.

In this case, the plaintiff admitted in her memorandum of law in opposition to the motion to dismiss, dated March 10, 2009, that she did [*19] not obtain a written opinion of a health care provider until after she had commenced this action. *Vorre* and *Caplin* make clear that [HN11] the court does not have discretion to consider an amended complaint that annexed an opinon letter which had not been obtained at the time the action was commenced. Accordingly, the defendant's motion to dismiss is granted.

HILLER, J.

Lajla Duran v. Anty Alias et al.

CV095014109S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WATERBURY AT WATERBURY

2010 Conn. Super. LEXIS 515

February 25, 2010, Decided
February 25, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff administratrix filed a wrongful death action against defendants, two physicians and a hospital. Physician one and the hospital filed a motion to dismiss the complaint pursuant to *Conn. Gen. Stat. § 52-190a(a)* due to plaintiff's failure to attach a written opinion of a similar health care provider. Plaintiff filed an amended complaint, a revised certificate of good faith, and written statement from a board-certified physician.

OVERVIEW: The revised certificate of good faith plaintiff filed was accompanied by an undated document prepared by a board-certified physician attesting, pursuant to *§ 52-190a(a)*, that good cause existed for plaintiff's belief that medical negligence had been committed. The court held that because plaintiff conceded that this document was created after the filing of the initial complaint, she could not have complied with *§ 52-190a(a)*'s requirements for bringing a medical malpractice action when the action was initiated. Therefore, the court had no discretion to permit an amendment.

OUTCOME: The motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN1] Generally, a ruling on a motion to dismiss pertains to jurisdiction and is not a ruling on the merits of the action. However, motions to dismiss are not limited to jurisdictional challenges.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] A plaintiff's failure to comply with the requirements of *Conn. Gen. Stat. § 52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§ 52-190a(c)*. Dismissal pursuant to *§ 52-190a(c)* is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading.

Civil Procedure > Jurisdiction > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN3] The motion to dismiss admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. Where, however, the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN4] *Conn. Gen. Stat. § 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN5] To demonstrate good faith, plaintiffs or their counsel, prior to filing a medical malpractice suit, shall obtain a written and signed opinion of a similar health care provider that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. *Conn. Gen. Stat. § 52-190a(a).* Plaintiffs or their counsel shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. *§ 52-190a(a). Section 52-190a(c)* provides that the failure to obtain and file the written opinion required by *§ 52-190a(a)* shall be grounds for the dismissal of the action. The plain language of *§ 52-190a(c)* expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Prelitigation Notices
Healthcare Law > Actions Against Facilities > Standards of Care > Medical Malpractice Actions
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN6] Where a written opinion of a similar health care provider attached to a plaintiff's amended medical malpractice complaint was not obtained and did not exist prior to the commencement of the action, the plaintiff could not have complied with the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under Votre v. County Obstetrics & Gynecology Group, P.C., the court has no discretion to permit an amendment.

JUDGES: [*1] Elizabeth A. Gallagher, J.

OPINION BY: Elizabeth A. Gallagher

OPINION

MEMORANDUM OF DECISION

On June 1, 2009, the plaintiff, Lajla Duran, administratrix of the estate of Marianne Duran, commenced this action for wrongful death by service of process on the defendants, Dr. Amy Alias, M.D., St. Mary's Hospital, Inc. d/b/a The Children's and Family Health Center and Dr. Gretchen Berland, M.D. The plaintiff alleges that the defendants negligently prescribed a contraindicated medication to the plaintiff's decedent which caused her death. The plaintiff attached to her complaint a certificate of good faith, signed by the plaintiff's attorney, but did not attach a written opinion of a similar health care provider, as required by *General Statutes §52-190a(a).*

On July 15, 2009, the movants, St. Mary's Hospital and Alias, filed a motion to dismiss the complaint, pursuant to *General Statutes §52-190a(c)* for the failure to attach the written report. On July 23, 2009, the plaintiff responded by filing an amended complaint as a matter of right, along with a memorandum of law in opposition to the motion. In her notice of amendment, the plaintiff stated that the written opinion of a similar health care provider was inadvertently [*2] omitted from her initial complaint. The plaintiff attached to the amended com-

plaint a revised certificate of good faith accompanied by an undated document prepared by a board-certified physician attesting that good cause existed for the plaintiff's belief that medical negligence had been committed. The defendants objected to the notice of amendment on the ground that the plaintiff did not state that she had obtained the written opinion prior to commencement of the action.

At oral argument on December 7, 2009, counsel for the plaintiff conceded that the written opinion that the plaintiff had attached to her amended complaint had not been obtained before the initial filing and that it did not exist at that time.

DISCUSSION

[HN1] Generally, a ruling on a motion to dismiss pertains to jurisdiction and is not a ruling on the merits of the action. *Villager Pond, Inc. v. Darien, 54 Conn.App. 178, 182, 734 A.2d 1031 (1999)*. As noted in the recent Appellate Court decision, *Vitre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 581-84, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*, however, motions to dismiss are not limited to jurisdictional challenges: [HN2] "A plaintiff's [*3] failure to comply with the requirements of *§52-190a(a)* does not destroy the court's subject matter jurisdiction over the claim; it does not affect the power of the court to hear her medical malpractice action. However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to *§52-190a(c)*. Dismissal pursuant to this section is a statutory remedy for any defendant who is subject to a legal action in which the statutorily required written opinion is not annexed to the complaint or initial pleading."

[HN3] "The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone . . . Where, however . . . the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue . . ." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co., 282 Conn. 505, 516, 923 A.2d 638 (2007)*.

The defendants argue that, pursuant to *General Statutes §52-190a(c)*, the plaintiff's complaint must be dismissed because she is unable to amend a complaint for medical negligence that did not include a *§52-190a(a)* [*4] written opinion where she has not provided any indication that the written opinion she seeks to have attached via amendment existed prior to its commencement of the action. Defendants argue that dismissal is mandatory pursuant to *Vitre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 966 A.2d 813, supra*. Defendants alternatively argue that the plaintiff's complaint should be dismissed because the opinion letter she has attached to her amended complaint is insufficient to meet the requirements of *§52-190a(a)*.

Plaintiff argues that, by amending as of right, pursuant to *Practice Book §10-59*, the defect in the initial complaint is irrelevant inasmuch as the amended complaint which meets the standards of *§52-190a(a)* is now the operative complaint for purposes of the court's evaluation of the defendants' motion to dismiss. Plaintiff points out that, in *Vitre*, the plaintiff never moved to amend the complaint to attach the statutorily required documentation and took the position at argument that no certificate or written opinion was necessary. Plaintiff argues that *Vitre* does not support dismissal because, although the written opinion in this case was not obtained prior to the commencement [*5] of suit, an investigation had been undertaken and an oral report had been obtained. Lastly, the plaintiff disputes the defendants' contention that the written opinion has not been authored by a health care provider that is sufficiently similar to the named defendants.

[HN4] "*Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make 'a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . .' To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that 'such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . .' General Statutes *§52-190a(a)*. Prior to its amendment in 2005 by Public Acts 2005, No. 05-275, §2, the statute did not require a plaintiff to include with the complaint a written opinion of a similar health care provider attesting to a good faith basis for an action." (Internal quotation marks in original.) [*6] *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 542, 979 A.2d 1066*, cert. granted, *294 Conn. 916, 983 A.2d 849 (2009)*.

"Effective October 1, 2005, the statute was amended by P.A. 05-275 to require, [HN5] to demonstrate good faith, that plaintiffs or their counsel, prior to filing suit, "shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion . . . *General Statutes §52-190a(a)*. The amended statute also provides that plaintiffs or their counsel "shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . ." *General Statutes §52-190a(a). Subsection (c) of §52-190a*, which was added by P.A. 05-275, §2, provides

that "[t]he failure to obtain and file the written opinion required by *subsection (a)* of this section shall be grounds for the dismissal of the action." *Benner v. New Milford Hospital, Inc., supra, 117 Conn.App. 543.* It is *subsection (c)* which requires the written opinion to avoid dismissal: "The plain language of [*§52-190a(c)*] . . . expressly provides [*7] for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§52-190a(a).*"

After passage of the 2005 amendment to *§52-190a*, but before the Appellate Court's decision in *Vorre*, a significant number of Superior Court decisions gave plaintiffs who had filed suit, but failed to attach a *§52-190a(a)* written opinion to their initial complaint, the opportunity to amend when confronted with a motion to dismiss filed under *§52-190a(c)* See, e.g., *Pelusi v. Walgreen Eastern Co., Superior Court, judicial district of New Haven, Docket No. CV 06 5002136 (February 16, 2007, Holden, J.) (42 Conn. L. Rptr. 838, 2007 Conn. Super. LEXIS 536)* (complaint amended pursuant to *Practice Book §10-60*); *Lundi v. Wertheim, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. 06 5001608, 2006 Conn. Super. LEXIS 2953 (October 2, 2006, Adams, J.)* (complaint amended "as of right").

In *Vorre*, the Appellate Court clearly distinguished a case in which an existing written report was inadvertently not attached and that in which a written report did not exist. *Subsection (c)* of the statute plainly states that a failure to file the written opinion required by *subsection (a)* [*8] "shall be grounds for the dismissal of the action." Any change to the dismissal remedy when the required written opinion is not annexed to the complaint would require a legislative remedy, not a judicial one. *113 Conn.App. at 584.* "[I]t is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of *§52-190a*, to prevent groundless lawsuits against health care providers . . . [but] allowing a plaintiff to obtain such opinion after the action has been brought would vitiate the statute's purpose by subjecting a defendant to a claim without the proper substantiation that the statute requires." *113 Conn.App. at 585.*

Two recent Superior Court cases, *post-Vorre*, have dealt with this issue. See *Moore v. Southern Connecticut Internal Medicine, Superior Court, judicial district of New Haven, Docket No. CV 09 5028093, 2009 Conn. Super. LEXIS 2965 (November 6, 2009, Zoarski, J.)* [*9] ; and *Caplin v. Laser Center of Northeastern Connecticut, Superior Court, judicial district of Windham, Docket No. CV 09 5003976, 2009 Conn. Super. LEXIS 1077 (April 27, 2009).* In *Caplin*, the plaintiff omitted the written opinion from her initial complaint, and then attempted to amend pursuant to *§10-59.* Notwithstanding the fact that the court determined that her amendment was filed too late to qualify under *§10-59*, the court stated that, even if plaintiff had amended as of right, *Vorre* would not have allowed her to rely on an opinion letter obtained after the filing of an action for medical negligence. *Id.* In *Moore*, the court dismissed the action because, notwithstanding the sufficiency of the plaintiff's amended complaint, the opinion letter dated after the filing of the initial complaint indicated that the plaintiff "failed to ensure that there was a proper foundation for a medical malpractice action prior to commencing litigation."

CONCLUSION

The plaintiff's counsel conceded at oral argument that the [HN6] written opinion attached to the plaintiff's amended complaint was not obtained and did not exist prior to the commencement of the action. Under that circumstance, the plaintiff could not have complied with the [*10] statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under *Vorre*, court has no discretion to permit an amendment. Accordingly, the motion to dismiss is granted. Because the complaint is dismissed, the court need not address the issue of whether the "written opinion of a similar health care provider" attached to the plaintiff's amended complaint is sufficient according to the standards of *§52-190a(a).*

GALLAGHER, J.

Laura Sestito v. Silvio A. Mandara et al.

FSTCV056002437S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF STAMFORD-NORWALK AT STAMFORD

2010 Conn. Super. LEXIS 1908

August 2, 2010, Decided
August 2, 2010, Filed

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patient sued defendants, a doctor and others, for malpractice. Pursuant to *Conn. Gen. Stat. § 52-190a(c)*, the doctor filed a motion to dismiss the complaint against him due to plaintiff's failure to file a written opinion by a similar healthcare provider concerning his alleged negligence. After the motion was granted, plaintiff filed an amended complaint; the doctor filed a second motion to dismiss under *§ 52-190a(c)*.

OVERVIEW: The doctor argued that plaintiff could not cure the defect by filing the required opinion letter after commencement of the action. The court held that although plaintiff had the right under *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59* to amend her complaint without leave of court, and filed an opinion letter of a similar healthcare provider with the amended complaint, the claim against the doctor already existed in the initial complaint, and it appeared that no significant changes were made to the complaint as asserted against him. As the opinion letter was not dated as of the commencement of the action, it could not fulfill the showing of good faith at the commencement of the action that plaintiff truly had a legitimate claim against the doctor. The opinion letter, while sufficient otherwise under *§ 52-190a*, could not ward off the doctor's motion to dismiss under *§ 52-190a(c)* because it was not in existence prior to the filing of the initial complaint.

OUTCOME: The doctor's motion to dismiss was granted.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
[HN2] See *Conn. Gen. Prac. Book, R. Super. Ct. § 10-59.*

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN3] A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. A motion to dismiss

tests, inter alia, whether, on the face of the record, the court is without jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
Civil Procedure > Pleading & Practice > Service of Process > General Overview
[HN4] See *Conn. Gen. Prac. Book, R. Super. Ct. § 10-31(a).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN5] In establishing the requirements of the preliminary opinion letter, *Conn. Gen. Stat. § 52-190a(a)* specifically requires that the opinion be authored by a similar health care provider as defined in *Conn. Gen. Stat. § 52-184c. Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant. *§ 52-190a(a).* To demonstrate good faith, *§ 52-190a* requires that plaintiffs or their counsel, prior to filing suit, shall obtain a written and signed opinion of a similar health care provider that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. *§ 52-190a(a). Section 52-190a(a)* also provides that plaintiffs or their counsel shall attach a copy of a written opinion, with the name and signature of the similar health care provider expunged, to the certificate.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Comply
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN6] See *Conn. Gen. Stat. § 52-190a(c).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN7] The written opinion required by *Conn. Gen. Stat. § 52-190a(a)* provides the defendant with some evidence that the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent. The plain language of *§ 52-190a(c)* expressly provides for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a).*

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN8] *Conn. Gen. Stat. § 52-190a* requires a written opinion of a similar health care provider "prior to" filing an action in malpractice against a health care provider.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Evidence > Testimony > Experts > General Overview
Healthcare Law > Actions Against Healthcare Workers > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN9] In the context of a medical malpractice claim, there is no express requirement in *Conn. Gen. Stat. § 52-190a* that the qualifications of the similar healthcare provider must be cited in the opinion letter.

JUDGES: [*1] TAGGART D. ADAMS, SUPERIOR COURT JUDGE.

OPINION BY: TAGGART D. ADAMS

OPINION

MEMORANDUM OF DECISION RE MOTION TO DISMISS (115.00)

I. FACTS

On November 12, 2009, the plaintiff, Laura Sestito, filed a four-count complaint with a return date of November 24, 2009 against the defendants Silvio A. Mandara, Vincent J. Tumminello, Allyson M. Servoss, and the Stamford Hospital sounding in medical malpractice. On November 30, 2009, the defendant Tumminello moved to dismiss the complaint against him pursuant to *General Statutes § 52-190a* [1] for failure to file a written opinion by a similar healthcare provider concerning Dr. Tumminello's alleged negligence. That motion was granted on January 4, 2010. Meanwhile, on December 9, 2009, the plaintiff filed a request to amend her complaint, and an amended complaint. [2] This complaint included an opinion letter regarding Dr. Tumminello. The defendant Tumminello filed another motion to dismiss pursuant to *Section 52-190a* on January 11, 2010, to which the plaintiff filed an opposition and a memorandum in support on February 8, 2010. The matter was heard at short calendar on May 17, 2010.

1 *General Statutes § 52-190a* provides in relevant part: [HN1] "The complaint [or] initial pleading [*2] [in a personal injury action] . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [*General Statutes §]52-184c*, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

2 The request described itself as "pursuant to *§ 10-60(a)* "of the Connecticut Practice Book, but qualified as an amendment as of right, pursuant to *Practice Book § 10-59*, which provides: [HN2] "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. (See *General Statutes § 52-128* and annotations.)"

II. DISCUSSION

[HN3] "A motion to dismiss . . . properly [*3] attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . A motion to dismiss tests, *inter alia*, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Wilcox v. Webster Ins., Inc., 294 Conn. 206, 213, 982 A.2d 1053 (2009)*. According to *Practice Book § 10-31(a)*, [HN4] "a motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person . . . and (5) insufficiency of service of process." The motion, however, "is not designed to test the legal sufficiency of a complaint in terms of whether it states a cause of action." *Pratt v. Old Saybrook, 225 Conn. 172, 185, 621 A.2d 1322 (1993)*.

In *Rios v. CCMC Corp., 106 Conn. App. 810, 943 A.2d 544 (2008)*, the Appellate Court held that a medical malpractice case was dismissable for failure to attach a written opinion. The defendant argues that the plaintiff may not cure the defect by filing the required opinion letter after commencement of the action, and further, that the new written opinion remains deficient as it does not identify that the author is a similar [*4] health care provider. In response, the plaintiff argues that the plaintiff's operative complaint is the December 9, 2009 amended complaint and that both, the amended complaint and the attached opinion letter, comply with *§ 52-190a(a)*.

[HN5] "In establishing the requirements of the prelitigation opinion letter, *§ 52-190a(a)* specifically requires that the opinion be authored by a similar health care provider as defined in *§ 52-184c* . . . *Section 52-190a(a)* provides that before filing a personal injury action against a health care provider, a potential plaintiff must make 'a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant . . .' To show good faith, the complaint, initial pleading or apportionment complaint is required to contain a certificate of the attorney or party filing the action stating that 'such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . .' *General Statutes § 52-190a(a)*." *Bennett v. New Milford Hospital, Inc., 117 Conn.App. 535, 542, 979 A.2d 1066*, cert. granted in part, *294 Conn. 916, 983 A.2d 849 (2009)*. [*5] To demonstrate good faith, the statute requires, "that plaintiffs or their counsel, prior to filing suit, 'shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical

negligence and includes a detailed basis for the formation of such opinion . . . *General Statutes § 52-190a(a)*. The amended statute also provides that plaintiffs or their counsel 'shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate . . .' *General Statutes § 52-190a(a)*. *Subsection (c) of § 52-190a* . . . provides that [HN6] '[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.' " (Citation omitted.) *Id., 543*. [HN7] "The written opinion . . . provides the defendant with some evidence that the plaintiff conducted an inquiry prior to filing the complaint and that the inquiry gave the plaintiff a good faith belief that the defendant was negligent. As this court held in *Rios v. CCMC Corp., 106 Conn.App. 810, 822, 943 A.2d 544 (2008)*, '[t]he plain language of *[§ 52-190a(c)]* . . . expressly provides [*6] for dismissal of an action when a plaintiff fails to attach a written opinion of a similar health care provider to the complaint, as required by *§ 52-190a(a)*.' " *Id.*

The Appellate Court has also noted that "[g]iven the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, *existing at the time of commencement* of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss." (Emphasis added.) *Votre v. County Obstetrics & Gynecology Group, P.C., 113 Conn.App. 569, 585, 966 A.2d 813*, cert. denied, *292 Conn. 911, 973 A.2d 661 (2009)*.

Regarding the substance of the letter, the Superior Courts are split as to whether the written opinion must state the opinion expert's credentials. Holding that *§ 52-190a* does not specifically require the physician's credentials stated in the letter, the court in *Tuttle v. Day Kimball Hospital, Superior Court, complex litigation docket at Hartford, Docket No. X03 CV 06 5009722 (November 26, 2007, Langenbach, J.) (44 Conn. L. Rptr. 570, 2007 Conn. Super. LEXIS 3088)*, [*7] reasoned that "[w]ith respect to the defendants' claim that the court should dismiss the plaintiff's action on the ground that a written opinion that does not provide a description of the qualifications or credentials of the author, the court notes that *§ 52-190a* explicitly provides that the claimant's attorney shall attach to the good faith certificate a copy of the written opinion, with the name and signature of the similar health care provider expunged. The court agrees with the decisions in *Rodriguez v. Norniella, Superior Court, judicial district of New Haven, Docket No. CV 06 5001779 (June 1, 2007, Robinson, J.) [46 Conn. L. Rptr. 40, 2007 Conn. Super. LEXIS 1408]*, *Vicenzi v. Abbott Terrace Health Center, Inc., Superior Court, judicial district of Waterbury, Docket No. CV 07 5004413 (October 29, 2007, Roche, J.) [44 Conn. L. Rptr. 363, 2007 Conn. Super. LEXIS 2771]*, and several other cases cited therein, in which the court denied motions to dismiss based upon a claim of insufficiency for the lack of a description of the qualifications or credentials of the author of the opinion letter. As stated in *Rodriguez*: 'Neither the language of *§ 52-190a*, nor the holding of any case, mandates that the similar health care provider opinion letter [*8] state in the letter itself that its author is a similar health care provider. Although the . . . defendants correctly point out that one of the main goals of *§ 52-190a* is to prevent frivolous lawsuits, *§ 52-190a* achieves this goal by relying on the complainant's attorney's good faith efforts, as evidenced through certification requirement, and enforced through the possibility of "appropriate sanctions" against the signing attorney.' *Rodriguez v. Norniella, supra, Superior Court, Docket No. CV 06 5001779, 2007 Conn. Super. LEXIS 1408*." *Id., 571-72, 2007 Conn. Super. LEXIS 3088*. See also *Pitcher v. Amin, Superior Court, judicial district of Fairfield, Docket No. CV 07 5011425, 2008 Conn. Super. LEXIS 1085 (May 5, 2008, Hiller, J.)* (stating that "[n]othing in the statute's language, as recently amended, requires the qualifications of the author to be stated in the opinion letter"); *Criswell v. Pito, Superior Court, judicial district of New Britain, Docket No. CV 08 5008149 (January 7, 2009, Pittman, J.) (46 Conn. L. Rptr. 876, 877, 2009 Conn. Super. LEXIS 21, *2)* (reasoning that "[t]he statute does not contain a specific requirement that the author provide *in the letter* a detailed description of how the author purports to be a 'similar health care provider' " [emphasis in original]); but see, [*9] *Ribeiro v. Elfenbein, Superior Court, judicial district of Danbury, Docket No. CV 09 5006155, 2009 Conn. Super. LEXIS 2844 (October 16, 2009, Shaban, J.)* (granting motion to dismiss, court found opinion letter to be "completely devoid of any reference to the qualifications of the author. There is no mention of the author's area of practice, level of experience, or degree of education. As submitted, the letter could have been authored by a medical school student or someone other than a physician employed in the medical field. There is simply no way to know, or even infer, from the text of the letter whether it was authored by a similar health care provider").

This court has previously denied a motion to dismiss the complaint in *Lengyel-Horner v. Immediate Healthcare, LLC, Superior Court, judicial district of Stamford-Norwalk at Stamford, Docket No. CV 08 6000915, 2008 Conn. Super. LEXIS 2571 (October 9, 2008, Adams, J.)*, discussing the issue whether "the written opinions must be attached to the original complaint and opinions attached to an amended complaint may not be considered." The court stated that "this court has pre-

vinously held that the operative complaint for analysis pursuant to *General Statutes § 52-190a* may be an amended complaint filed as [*10] of right pursuant to *Practice Book § 10-59. Laudi v. Wertheim, Superior Court, judicial district of Stamford-Norwalk at Stamford, CV 06 5001608, 2006 Conn. Super. LEXIS 2953 (October 2, 2006, Adams, J.)*. This holding was based on the language of *Practice Book § 10-59* and *General Statutes § 52-128* ('may amend any defect') as well as the holdings in *Sheehan v. Zoning Commission, 173 Conn. 408, 413, 378 A.2d 519 (1977)* (pleading amended as of right is effective 'ab initio') and *Dauti v. Stop & Shop Supermarket Co., 90 Conn. App. 626, 639-40, 879 A.2d 507, cert. denied, 276 Conn. 902, 884 A.2d 1025 (2005)*. Defendants contend that Superior Court cases decided after *Rios v. CCMC Corp., supra*, have rejected decisions such as *Laudi*, but such is not the case."

In *Duran v. Aliax, Superior Court, judicial district of Waterbury, Docket No. CV 09 5014109 (February 25, 2010, Gallagher, J.) (49 Conn. L. Rptr. 394, 2010 Conn. Super. LEXIS 515)*, the court granted the defendant's motion to dismiss based on an omitted opinion letter at the commencement of the action, which was amended as of right to provide an opinion letter. The court concluded that "[t]he plaintiff's counsel conceded at oral argument that the written opinion attached to the plaintiff's amended [*11] complaint was not obtained and did not exist prior to the commencement of the action. Under that circumstance, the plaintiff could not have complied with the statutory requirements for bringing a medical malpractice action when the action was initiated. Thus, under *Votre, [supra, 113 Conn.App. 569]* [the] court has no discretion to permit an amendment." *Id., 396, 2010 Conn. Super. LEXIS 515*.

In the present case, the action was commenced in four counts against Silvia A. Mandara, Vincent Tumminello, Allyson Servoss, and Stamford Hospital. This original complaint already contained count two, the claim of negligence against the defendant Tumminello. Thereafter, the complaint was amended as of right within thirty days, thus automatically becoming the operative complaint of the present action. The present case differs factually from the situation in *Longyel-Horner*, as, in that case, a claim was added and thus the opinion letter regarding that particular defendant was not yet appropriate for the initial complaint. In the present case, however, although the plaintiff similarly filed an opinion letter of a similar healthcare provider with the amended complaint, the claim against Tumminello already existed in the initial [*12] complaint, and it appears that no significant changes were made to the relevant count. [3] Additionally, the undated letter was attached to the certificate of good faith, which was dated the same day as the amended complaint. In line with the reasoning in *Duran*, as the opinion letter was not dated as of the commencement of the action, it may not fulfill the showing of good faith at the commencement of the action that the plaintiff truly does have a legitimate claim against the named defendant.

> 3 The plaintiff made changes to paragraph twelve, added new paragraph thirteen, added a phrase to paragraph seventeen, subparagraph d, which was previously mislabeled as g, and added new subparagraph e.

The court is reluctant to dismiss a claim on a technicality. However, in light of two unequivocal Appellate Court statements, if not holdings, to the effect that [HN8] *Section 52-190a* requires a written opinion of a similar health care provider "prior to" filing an action in malpractice against a health care provider; see *Bennett, supra, 117 Conn.App. 543*; *Votre, supra, 113 Conn.App. 585*; the court believes the state of the law in Connecticut requires a dismissal of the amended complaint in this case as [*13] to Dr. Tumminello where there is no evidence that the letter regarding Dr. Tumminello was received prior to the filing of the original complaint against him. In coming to this determination, the court notes its disagreement with the Appellate Court cases noted above. First, there is no express requirement in *Section 52-190a* that the case be dismissed if the good faith certificate and opinion letter are not attached to the initial complaint. The statute says "shall be grounds for the dismissal." There is no "prior to" language in the statute. Second, *General Statutes § 52-128* and *Practice Book Section 10-59* allow the curing of "any defect or mistake" in a complaint within thirty days of the return date. These amendments as of right provisions have been interpreted to mean that the amended complaint shall be effective *ab initio*, from the beginning of the case. It seems to this court that the meaning of "any defect" and the concept of *ab initio*, are being overlooked by the Appellate Court. Third, the court finds it unjustifiable to distinguish so severely between the scenario in *Votre* where the Appellate Court opined that if the letter existed prior to initiation of the lawsuit, but [*14] was inadvertently not attached to the initial complaint, dismissal was not mandated and the scenario in this case where an opinion letter, apparently not existing on November 12, 2009, but clearly existing less than a month later. Fourth, as *Votre* noted, the purpose of *Section 52-190a* is not thwarted when a good faith certificate and opinion letter are available in such a short time after the filing of the initial complaint.

[HN9] There is no express requirement in the statute that the qualifications of the similar healthcare provider must be cited in the opinion letter. The letter in this case, however, while sufficient otherwise, is not enough to

ward off a motion to dismiss because it was not in existence prior to the filing of the initial complaint.

III. CONCLUSION

As the opinion letter was not properly filed at the time of the commencement of the action as to the defendant Tutmonello, count two of the plaintiff's complaint is dismissed.

TAGGART D. ADAMS

SUPERIOR COURT JUDGE

1 of 1 DOCUMENT

Randy Kirkpatrick v. New Britain General Hospital

HHBCV064011523

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2006 Conn. Super. LEXIS 3778

December 14, 2006, Decided
December 14, 2006, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

PROCEDURAL POSTURE: In a medical malpractice action, defendant hospital made a motion to dismiss plaintiff's complaint on the basis that plaintiff failed to obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a.*

OVERVIEW: Plaintiff opposed the dismissal on the basis that he had now filed a request for leave to amend his complaint and had appended a proper written opinion to the proposed amended complaint. Plaintiff indicated that an oral opinion had been rendered before the issuance of the original complaint but was reduced to writing later. Upon consideration, the court granted the motion to dismiss. The court concluded that Conn. Gen. Stat. § 52-109a required that the written opinion from a similar healthcare provider had to be obtained prior to filing suit; therefore, plaintiff's attempt to amend his complaint could not prevent dismissal of the action.

OUTCOME: The court granted the hospital's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN2] The statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a.*

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Comply
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] In enacting 2005 Conn. Acts 275, which was codified into *Conn. Gen. Stat. § 52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed.

JUDGES: Patty Jenkins Pittman, Judge.

OPINION BY: Patty Jenkins Pittman

OPINION

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The plaintiff Randy Kirkpatrick brings this medical malpractice action against the defendant New Britain General Hospital. The defendant moves to dismiss, claiming that the plaintiff's action must fail because the plaintiff did not obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a*. The plaintiff opposes dismissal on the grounds that he has now filed a request for leave to amend his complaint and has appended to the proposed amended complaint a proper written opinion. For reasons stated below, the court finds that the action must be dismissed.

THE STATUTORY REQUIREMENTS

Conn. Gen. Stat. § 52-190a, the effective date of which was October 2005, contains specific prerequisites for the filing of a medical malpractice [*2] action. The statute states:

> (a) [HN1] No civil action . . . shall be filed to recover damages . . . in which it is alleged that such injury or death resulted from the negligence of a healthcare provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar healthcare provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar healthcare provider expunged, to such certificate . . .
>
> (c) The failure [*3] to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

THE WRITTEN OPINION IN THIS CASE

With the original filings in this action was only the attorney's certificate. There was no written opinion from a similar healthcare provider attached to the certificate and filed with the complaint. Moreover the plaintiff admits in his Memorandum of Law in Opposition to Motion to Dismiss that "in the present case, the opinion was orally rendered prior to issuance of the original complaint and reduced to writing later." *Plaintiff's Memorandum of Law, October 4, 2006, pages 4-5.* It is clear therefore that the plaintiff did not obtain the written opinion prior to the filing of the complaint. It would appear that this would trigger *subsection (c)* of the statute so that the court would be compelled to dismiss the complaint.

THE EFFECT OF THE PROPOSED AMENDED COMPLAINT

The plaintiff argues that the court need not dismiss the action but may instead allow the amended complaint to be filed, to which is attached the written opinion. The defendant argues that such a procedure undermines the letter and the spirit [*4] of the statute. Indeed [HN2] the statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a*. Here plaintiff's counsel obtained only an oral opinion before instituting this action.

Finally the plaintiff argues that the court should allow the amended complaint to be filed because the defendant will not be prejudiced in any way. In fact it seems to be true that at this early stage of the case there is no prejudice to this defendant. [HN3] In enacting P.A. 05-275, which was codified into *52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.

CONCLUSION

Under the circumstances presented here, the failure to obtain the written opinion of medical negligence before suit was brought mandates dismissal of this action.

Patty Jenkins Pittman, Judge

Randy Kirkpatrick v. New Britain General Hospital

HHBCV064011523

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN

2006 Conn. Super. LEXIS 3778

December 14, 2006, Decided
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OVERVIEW: Plaintiff opposed the dismissal on the basis that he had now filed a request for leave to amend his complaint and had appended a proper written opinion to the proposed amended complaint. Plaintiff indicated that an oral opinion had been rendered before the issuance of the original complaint but was reduced to writing later. Upon consideration, the court granted the motion to dismiss. The court concluded that Conn. Gen. Stat. § 52-109a required that the written opinion from a similar healthcare provider had to be obtained prior to filing suit; therefore, plaintiff's attempt to amend his complaint could not prevent dismissal of the action.

OUTCOME: The court granted the hospital's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
[HN1] See *Conn. Gen. Stat. § 52-190a*.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
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[HN2] The statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a*.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
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Torts > Malpractice & Professional Liability > Healthcare Providers
[HN3] In enacting 2005 Conn. Acts 275, which was codified into *Conn. Gen. Stat. § 52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed.

JUDGES: Patty Jenkins Pittman, Judge.

OPINION BY: Patty Jenkins Pittman

OPINION

MEMORANDUM OF DECISION ON MOTION TO DISMISS

The plaintiff Randy Kirkpatrick brings this medical malpractice action against the defendant New Britain General Hospital. The defendant moves to dismiss, claiming that the plaintiff's action must fail because the plaintiff did not obtain a written opinion of negligence in advance of filing suit and did not attach to his complaint such a written opinion from a similar healthcare provider as mandated by *Conn. Gen. Stat. § 52-190a*. The plaintiff opposes dismissal on the grounds that he has now filed a request for leave to amend his complaint and has appended to the proposed amended complaint a proper written opinion. For reasons stated below, the court finds that the action must be dismissed.

THE STATUTORY REQUIREMENTS

Conn. Gen. Stat. § 52-190a, the effective date of which was October 2005, contains specific prerequisites for the filing of a medical malpractice [*2] action. The statute states:

> (a) [HN1] No civil action . . . shall be filed to recover damages . . . in which it is alleged that such injury or death resulted from the negligence of a healthcare provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar healthcare provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar healthcare provider expunged, to such certificate . . .
>
> (c) The failure [*3] to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

THE WRITTEN OPINION IN THIS CASE

With the original filings in this action was only the attorney's certificate. There was no written opinion from a similar healthcare provider attached to the certificate and filed with the complaint. Moreover the plaintiff admits in his Memorandum of Law in Opposition to Motion to Dismiss that "in the present case, the opinion was orally rendered prior to issuance of the original complaint and reduced to writing later." *Plaintiff's Memorandum of Law, October 4, 2006, pages 4-5.* It is clear therefore that the plaintiff did not obtain the written opinion prior to the filing of the complaint. It would appear that this would trigger *subsection (c)* of the statute so that the court would be compelled to dismiss the complaint.

THE EFFECT OF THE PROPOSED AMENDED COMPLAINT

The plaintiff argues that the court need not dismiss the action but may instead allow the amended complaint to be filed, to which is attached the written opinion. The defendant argues that such a procedure undermines the letter and the spirit [*4] of the statute. Indeed [HN2] the statute requires that the written opinion not only be attached to the complaint but that the written opinion must have been obtained prior to filing suit. *Conn. Gen. Stat. § 52-190a*. Here plaintiff's counsel obtained only an oral opinion before instituting this action.

Finally the plaintiff argues that the court should allow the amended complaint to be filed because the defendant will not be prejudiced in any way. In fact it seems to be true that at this early stage of the case there is no prejudice to this defendant. [HN3] In enacting P.A. 05-275, which was codified into *52-190a* and which added the necessity of obtaining a pre-suit written opinion, the legislature, did not create an exception to dismissal for situations in which the written opinion was obtained soon after suit was filed. The court is bound by the plain and specific language of the statute.

CONCLUSION

Under the circumstances presented here, the failure to obtain the written opinion of medical negligence before suit was brought mandates dismissal of this action.

Patty Jenkins Pittman, Judge

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT**
	:	**OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH,	:	
P.C., ET AL	:	**JULY 12, 2012**

REPLY TO DEFENDANT'S OBJECTION TO REQUEST FOR LEAVE TO AMEND COMPLAINT

Plaintiff submits this reply to the Objection to Request for Leave to Amend Complaint filed by Defendant Center for Women's Health, P.C. on July 9, 2012. Defendant's Objection, and its concurrently filed Reply to Plaintiff's Consolidated Opposition to Defendants' Motions to Dismiss, rest upon an erroneous reading of *Morgan v. Hartford Hospital,* 301 Conn. 388 (2011). The Defendant argues that "the Court may not consider the Request for Leave to Amend complaint prior to resolving the Motion to Dismiss [under §52-190a]," citing *Morgan*. *See* Defendant's Objection to Request for Leave to Amend Complaint, at 3. This holding is nowhere to be found in *Morgan*. Indeed, such a reading of *Morgan* is utterly inconsistent with *Votre v. County Obstetrics and Gynecology Group, P.C.*, 113 Conn. App. 569, 585 (2009), which was cited with approval in *Bennett v. New Milford Hospital*, 300 Conn. 1, 30, n.17 (2011) and *Morgan* itself. The *Votre* Court held that where the opinion letter exists at the time of the commencement of the action, but is inadvertently not attached to the complaint, a trial court has discretion to allow the amendment and deny a motion to dismiss.

> Given the fallibility existing in the legal profession . . . it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and,

> in so doing, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers.

Votre, 113 at 585.

It should be beyond question, therefore, that the Court has the discretion "to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss." That is precisely what Plaintiff requests here. The concept that the Court must address the motion to dismiss in isolation is utterly contradicted by the case law.

Defendant's second argument is that it "disputes" the factual assertions in the Attorney Affidavit submitted with Plaintiff's Consolidated Opposition to Defendants' Motions to Dismiss filed on June 28, 2012. *See* Defendant's Objection to Request for Leave to Amend Complaint, at 3. ("The defendant disputes the assertions of fact contained in paragraphs 3 through 11 of the Attorney Affidavit.") Defendant argues that a hearing is necessary to determine "controverted facts." *Id.* at 7. Defendant, however, submits absolutely no affidavits or other evidence creating an issue of fact. The key factual assertion in the Attorney Affidavit is that good faith opinion letter existed prior to the complaint being filed. *See* Attorney Affidavit at ¶ 6-8 (attached to Consolidated Objection). The Defendant has absolutely no basis to dispute this fact. Simply stating in a brief that this fact is "disputed," based on no evidence whatsoever, does not necessitate this Court holding a hearing. Where only one party submits affidavits in connection with a motion to dismiss, the Court can correctly accept the facts in that affidavit as uncontroverted. *Jaboin v. Bridgeport Hosp.*, 2009 WL 3286121, 5 (Conn. Super. 2009) (accepting sole affidavit submitted in connection with motion to dismiss under § 52-190a as setting forth undisputed facts) (attached as Exhibit A).

THE PLAINTIFF

By _____

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CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 12th day of July 2012 to all counsel of record, to wit:

David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

Mary Alice Moore Leonhardt
12 Oak Street
Hartford, Connecticut 06106

_____
SEAN K. MCELLIGOTT

EXHIBIT A

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Fairfield.
Thomy **JABOIN**, Administrator of the Estate of Lydia **Jaboin**
v.
BRIDGEPORT HOSPITAL et al.

No. FBTCV095023443S.
Sept. 11, 2009.

West KeySummary**Health 198H** ⚷**804**

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(G) Actions and Proceedings
198Hk804 k. Affidavits of Merit or Meritorious Defense; Expert Affidavits. Most Cited Cases

Doctor's opinion letter submitted by decedent's estate was sufficient to meet the statutory certificate of good faith requirement for negligence actions against health care providers. The opinion letter in question was submitted by a physician concluded that the treatment received by decedent at the hospital fell below the standard of care required by failing to rule out the eventual cause of death. The complaint and opinion letter suggested that all named defendants were negligent as employees or agents of the hospital. C.G.S.A. § 52-190a.

Kocian Nicholas T. Law Offices, Hartford, for Thomy Jaboin, Administrator of the Estate of Lydia Jaboin.

Danaher Lagnese & Sacco P.C, Bridgeport, for Bridgeport Hospital et al.

BELLIS, J.

FACTS

*1 In this wrongful death action, the plaintiff, Thomy Jaboin, in his capacity as administrator of the estate of Lydia Jaboin (the decedent), has brought suit against the defendants, Bridgeport Hospital (the hospital), Brian D. Baxt, Justin C. Cahill and Michael J. Werdmann. The complaint alleges the following facts. On March 24, 2007, the decedent became a patient of the emergency department of the hospital with complaints which included left calf pain without any previous history of trauma. At the request of a "Med-Now" walk-in clinic, the decedent went to the hospital in order to rule out deep venous thrombosis. At the time of the decedent's admission to the hospital, Baxt, Cahill and Werdmann held themselves out as specialists in emergency medicine and were "servants, agents, apparent agents and/or employees" of the hospital. The complaint alleges that each of the individual defendants "had concurrent control and acted in concert with each other herein as to the care, treatment, monitoring, diagnosing and supervision of the plaintiff's decedent ..."

On April 24, 2007, the decedent died as a result of a massive pulmonary embolus caused by deep vein thrombosis. Consequently, the plaintiff alleges that the defendants failed to exercise reasonable care during the decedent's March 24, 2007 hospital visit, in that, *inter alia*, they failed to properly treat the decedent's deep venous thrombosis, incorrectly relied on a negative ultrasound to rule out deep venous thrombosis, misdiagnosed the decedent with a muscle strain, failed to take account of the decedent's symptoms that indicated deep venous thrombosis including an elevated d-dimer, failed to obtain a consultation with an internal medicine specialist and failed to administer the correct medication. Attached to the plaintiff's complaint are a certificate of reasonable inquiry, along with two medical opinion letters. The first letter, from J. Stephen Bohan, M.D., discusses the standard of care, whereas the second letter, from H. Brandis Marsh, M.D., addresses causation.

On May 14, 2009, the defendants filed a timely motion to dismiss and a memorandum of law in support.[FN1] The defendants move on the basis that the plaintiff's complaint fails to adhere to the requirements of General Statutes § 52-190a. In response, the plaintiff filed a memorandum of law in opposition on June 17, 2009, which attaches copies of the decedent's medical records from the subject hospitalization, the Bohan and Marsh opinion letters, and numerous Su-

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perior Court cases. On the same date, the plaintiff also filed a "supplement to objection to motion to dismiss," which attaches a notarized affidavit from Bohan. On July 10, 2009, the defendants filed a reply memorandum, which provided the court with copies of Superior Court case law. This matter was argued at short calendar on July 13, 2009.

FN1. Counsel filed an appearance on behalf of all defendants on April 17, 2009.

DISCUSSION

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court ... A motion to dismiss tests, *inter alia,* whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut,* 282 Conn. 130, 134, 918 A.2d 880 (2007). "When a court ... decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light ... The motion to dismiss ... admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone ... Where, however ... the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue ..." (Internal quotation marks omitted.) *Cogswell v. American Transit Ins. Co.,* 282 Conn. 505, 516, 923 A.2d 638 (2007).

***2** The defendants move to dismiss this action on two grounds, both involving the plaintiff's alleged failure to adhere to the requirements of § 52-190a. First, the defendants argue that this action must be dismissed as to Baxt and Cahill because the attached medical opinion letters do not contain any expert opinion as to alleged deviations from the standard of care by Baxt or Cahill. Secondly, the defendants contend that dismissal is appropriate as to all defendants because the attached opinion letters do not discuss a causal connection between the defendants' alleged negligence and the death of the decedent. As a result of our Supreme Court's recent decision in *Dias v. Grady,* 292 Conn. 350, 972 A.2d 715 (2009), where the Supreme Court held that § 52-190a only requires a plaintiff to attach an opinion letter as to the standard of care, the defendants withdrew the lack of causal connection ground at oral argument. Accordingly, the court need only address the first ground raised in the defendant's motion to dismiss.

The plaintiff argues in response that the defendants' motion should be denied because (1) a motion to dismiss is not the proper procedural vehicle to challenge the sufficiency of an opinion letter from a similar health care provider, (2) the attached opinion letters are sufficient to maintain a cause of action against the hospital and its agents, including all of the individually named defendants, (3) the hospital records are unclear as to precisely which doctor misinterpreted the blood clotting study so the plaintiff has asserted this claim against all of the physicians who were listed as attending to the plaintiff and (4) § 52-190a does not implicate subject matter jurisdiction so the court should not dismiss this case when the attached opinion letters are lengthy and provide an exact basis for the expert's opinions. Additionally, the plaintiff has also provided an affidavit from Bohan, where he attests that his opinion letter was meant to apply to all of the individual defendants, as it is unclear from the hospital's records which of the physicians incorrectly failed to rule out deep venous thrombosis.

The defendants respond to the plaintiff's arguments by contending that (1) a motion to dismiss is the correct procedural device to challenge the sufficiency of an opinion letter from a similar health care provider, (2) the court cannot consider the Bohan affidavit as it is outside the face of the complaint and (3) this case must be dismissed as to Baxt and Cahill because the plaintiff has failed to attach an opinion letter regarding the actions of these physicians.

Before addressing the defendants' substantive arguments, it is first necessary to determine whether a challenge to the sufficiency of an opinion letter can properly be raised by a motion to dismiss. As I have previously noted, "Connecticut's appellate courts have not yet had occasion to address whether a motion to dismiss is the proper vehicle where the written opinion has in fact been filed, but the claim is that the opinion is insufficient." *Shankar v. Midstate Medical Center,* Superior Court, judicial district of New Haven, Docket No. CV 07 6001269 (November 28, 2007, Bellis, J.) (44 Conn. L. Rptr 595, 596). In *Shankar,* I reviewed the legislative history for Public Act 05-275, which amended § 52-190a effective October 1, 2005,

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and determined that the legislative history provided little guidance on the issue. In short, I found that while the legislative history includes discussions that a failure to file the written opinion would be grounds for a dismissal, the only reference in the legislative history with respect to the procedure to be filed where the written opinion is inadequate is found in the testimony of Attorney Mike Neubert to the Judiciary Committee. When this question was before me in 2007, I noted that, while there was a split in the Superior Court regarding this question, "[t]he majority of the trial courts that have decided the issue have held that a motion to dismiss should not be used to attack the sufficiency of the written opinion." *Id.*[FN2] In their memorandum of law, the defendants argue that this split in authority was settled by the Appellate Court in *Rios v. CCMC Corp.*, 106 Conn.App. 810, 943 A.2d 544 (2008). A close examination of *Rios*, however, reveals that the plaintiff in that case failed to attach an opinion letter, and, therefore, that holding does not necessarily address the present situation which involves the issue of sufficiency.

FN2. In *Shankar v. Midstate Medical Center, supra*, 44 Conn. L. Rptr. at 595, the court did not directly address the issue of whether the sufficiency of a medical opinion letter should be challenged on a motion to dismiss or on a motion to strike. Although raised in a motion to dismiss, the parties in *Shankar* agreed that the matter could be resolved by either a motion to dismiss or a motion to strike. *Id.*, at 597.

***3** In its subsequent discussion of § 52-190a, the Appellate Court, in a case involving the plaintiff's failure to attach an opinion letter from a similar health care provider, stated that "[a] plaintiff's failure to comply with the requirements of § 52-190a (a) does not destroy the court's subject matter jurisdiction over the claim ... However, the legislature has provided that such a failure does render her complaint subject to dismissal pursuant to § 52-190a(c)." *Votre v. County Obstetrics & Gynecology Group, P.C.*, 113 Conn.App. 569, 583, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009). This language suggests that the Appellate Court would uphold the dismissal of a case where the plaintiff has failed to adhere to the requirements of § 52-190a, which would include an insufficient opinion letter. Moreover, recently in *Dias v. Grady, supra*, 292 Conn. at 350, 972 A.2d 715, the Connecticut Supreme Court considered a challenge to the sufficiency of an opinion letter in the context of a motion to dismiss. In *Dias*, the Supreme Court, while not called upon to address the issue of whether the defendants properly raised the issue in a motion to dismiss as opposed to a motion to strike, did not suggest that the issue was not correctly before them. As our Supreme Court has both addressed the sufficiency of an opinion letter in the context of a motion to dismiss, in the *Dias* case, and indicated that a failure to comply with the requirements of § 52-190a(a) renders the complaint subject to dismissal in the *Votre* case, it appears that the court may resolve this matter on the motion that is currently before it.

I will now address the defendants' argument that this case should be dismissed as to the defendants Baxt and Cahill because the attached opinion letters do not specifically reference their actions in treating the decedent. In both their memorandum of law and reply memorandum, the defendants urge this court to construe this case as if there were no letter from a similar health care provider, arguing that dismissal is therefore mandated. There are, however, two opinion letters attached to this complaint which must first be analyzed. See, e.g., *Wood v. Caldwell*, Superior Court, complex litigation docket at Waterbury, Docket No. X10 CV 07 500584 (January 23, 2008, Scholl, J.) (rejecting the defendant's argument that motion to dismiss should be analyzed as if no opinion letter attached when defendant not referenced therein).

General Statutes § 52-190a(a) provides in relevant part: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death ... in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney ... shall

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obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c ... that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

***4** The plain language of § 52-190a(a) sets forth two requirements. The plaintiff, or his attorney, is required to provide a certificate of reasonable inquiry that states there is a good faith basis to believe that there are grounds for suit against each of the defendants, and, in order to show this good faith, the plaintiff must provide a signed opinion of a similar health care provider. The statutory language does not expressly mandate that the opinion letter specifically reference the conduct of each of the defendants, as suggested by the defendants. The clause "against each named defendant" follows only the requirement of the certificate of reasonable inquiry, not the requirement of an opinion letter. The plaintiff's certificate of reasonable inquiry states that "reasonable inquiry has given rise to a good faith basis that grounds exist for an action against the named defendants, BRIDGEPORT HOSPITAL, its agents, apparent agents, servants and/or employees and BRIAN D. BAXT, JUSTIN CAHILL, AND MICHAEL J. WERDMANN." Accordingly, the plaintiff's certificate of reasonable inquiry conforms with the requirements of § 52-190a, as it attests that there is a good faith basis for this lawsuit against each of the named defendants. In addition, the plain statutory language of § 52-190a suggests that as long as the opinion letter provides a sufficient basis for a good faith belief that there has been medical negligence, then the statutory mandate has been met.

Multiple Superior Court opinions also suggest this result. In a case that is procedurally analogous to the present matter, *Sarfatti v. Hoffman*, Superior Court, judicial district of New Britain, Docket No. CV 06 5000903 (August 18, 2006, Robinson, J.), the court held that "[i]f a health care provider's statement demonstrates that grounds exist for an action against a defendant without specifically naming such defendant, the statement establishes the requisite foundation for the attorney's certificate, and, therefore comports with the statute." *Id.* In *Sarfatti*, the plaintiff brought suit against two doctors, VNA Health Care, and a nurse employed by VNA Health Care named Witzke. The medical opinion letter only detailed alleged negligence on the part of VNA Health Care, and failed to reference any of the individual defendants by name. Referencing the motion to dismiss brought by nurse Witzke, Judge Robinson wrote that "[i]n ruling on a motion to dismiss, the court must consider the complaint's allegations, as well as reasonable inferences that arise from such allegations, in the light most favorable to the pleader ... Based on the allegations that Witzke was a VNA nurse and that she was 'continuously' responsible for the care of the decedent until the date of the decedent's death, the court finds that it is reasonable to infer that Witzke was the VNA nurse primarily, if not solely, responsible for the decedent's care and that the potential negligence of the VNA referenced in the nurse's opinion provides a basis for the assertion in the attorney's certificate that 'injury has given rise to a good faith belief ... that grounds exist for a negligence action against ... Witzke.' " (Citation omitted.) Accordingly, Judge Robinson denied Witzke's motion to dismiss.

***5** Similarly, many Superior Court judges, including this court, have held that an opinion letter that only discusses alleged negligence on the part of a doctor is sufficient to withstand a motion to dismiss brought by a defendant hospital. In *Shankar v. Midstate Medical Center, supra*, 44 Conn. L. Rptr. at 595, the plaintiffs brought suit against a hospital and its employee doctor. The plaintiffs' opinion letter only referenced the actions of the doctor. On the hospital's motion to dismiss, the court held that "[t]here is no requirement in the statute that the plaintiff in the complaint or in the certificate of good faith, or the similar health care provider, in the written opinion letter, must identify each agent, servant or employee of an institutional defendant." *Id.*, at 598. As a result, the court held that "[t]he opinion letter required by § 52-190a need not serve as a template for the complaint, nor must it provide such detail that a defendant will have no need for any further discovery. The plaintiffs in this case have served the purposes of the statute, by filing with the complaint a written opinion letter which identifies and provides details for the basis of their claims. The threshold requirement that there is a basis for a medical malpractice claim has been satisfied by virtue of the written opinion which also serves the purpose of identifying the basis of the claim for defense counsel at the inception of the suit." See also *Guido v. Hughes*, Superior Court, complex litigation docket at Waterbury, Docket No. X10 CV 06 5004889 (October 17, 2007, Scholl, J.) (44 Conn. L. Rptr 347) (in context of motion to dismiss, certificate of good faith and opinion letter discussing doctor's negligence sufficient to allege liability of a hospital);

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DeMaio v. John Dempsey Hospital, Superior Court, complex litigation docket at Hartford, Docket No. X07 CV 5010472 (August 5, 2008, Berger, J.) (46 Conn. L. Rptr. 121) (in context of motion to dismiss, no requirement for separate opinion letters for each defendant); *Ellegard v. Hennessey*, Superior Court, complex litigation docket at Hartford, Docket No. X03 CV 06 5008281 (March 28, 2007, Lagenbach, J.) (43 Conn. L. Rptr. 195) (same).

In the present case, the opinion letter written by Bohan provides a detailed discussion of the alleged negligence of the hospital and its employees. The letter states that "[t]he treatment received by Lydia Jaboin at Bridgeport Hospital fell below the standard of care. The physician and hospital failed to rule out deep vein thrombosis as a diagnosis and thus had the duty to provide or recommend a definitive course of follow-up care and diagnosis. First, the patient's pain was localized in her calf. The ultrasound only examines the *upper leg*. Therefore, based upon this patient's clinical presentation, the ultrasound done had very very limited negative predictive value ... Secondly, the D-dimer test was markedly positive-*more than seven times the cut-off point* ... Based upon the foregoing, it can be said with a reasonable degree of medical probability that the Bridgeport Hospital and Dr. Michael J. Werdmann deviated from the applicable standard of care in attempting to rule out a diagnosis of deep vein thrombosis in this patient." (Emphasis in original.) Furthermore, the complaint specifically alleges that "the defendant, BRIDGEPORT HOSPITAL, and its servants, agents, apparent agents, and/or employees, including the co-defendants, BRIAN D. BAXT, JUSTIN C. CAHILL, and MICHAEL J. WERDMANN, had concurrent control and acted in concert with each other herein as to the care, treatment, monitoring, diagnosing and supervision of the plaintiff's decedent, LYDIA JABOIN." Read together, the allegations of the complaint and the opinion letter suggest that all of the defendants were negligent, including Baxt and Cahill. Accordingly, the plaintiff has satisfied the requirements of § 52-190a, in that the plaintiff has submitted an opinion letter that shows there is a good faith belief to bring this action as to all of the defendants. As a result, the motion to dismiss is denied. [FN3]

FN3. Having decided that the attached opinion letters satisfy the requirements of § 52-190a, it is unnecessary to determine whether the court can examine the Bohan supplemental affidavit. I would note, however, that Practice Book § 10-31(b) provides that "[a]ny adverse party who objects to [a motion to dismiss] shall ... file and serve in accordance with Secs. 10-12 though 10-17 a memorandum of law and, where appropriate, supporting affidavits as to facts not apparent on the record." Therefore, when responding to a motion to dismiss, our rules of practice expressly authorize the filing of an affidavit to explain facts that are unclear from in the record. While this affidavit was filed as a supplemental document, and not technically attached to the plaintiff's memorandum of law in opposition, it was filed the same day as the plaintiff's memorandum of law, and it would appear that the court has the authority to consider it. Moreover, our Appellate Court has recently taken the position that since a plaintiff's failure to adhere to § 52-190a does not divest the court of subject matter jurisdiction, a court has discretion to allow a plaintiff to attach an opinion letter after the complaint has been filed. The Appellate Court has stated that "[g]iven the fallibility existing in the legal profession ... it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in so doing, deny a pending motion to dismiss." *Votre v. County Obstetrics & Gynecology Group, P.C., supra*, 113 Conn.App. at 585, 966 A.2d 813. If the Appellate Court has given a trial court the authority to allow a plaintiff to amend the complaint to add an opinion letter, it seems reasonable that the court could consider an affidavit that explains the existing opinion letter.

Conn.Super.,2009.
Jaboin v. Bridgeport Hosp.
Not Reported in A.2d, 2009 WL 3286121 (Conn.Super.), 48 Conn. L. Rptr. 469

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DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JULY 13, 2012

RESPONSE TO PLAINTIFF'S REPLY TO DEFENDANT'S OBJECTION TO REQUEST FOR LEAVE TO AMEND COMPLAINT

The defendant hereby responds to the various misrepresentations made in the plaintiff's July 12, 2012 Reply to Defendant's Objection to Request for Leave to Amend Complaint.

Amendment Is Not Permitted

The plaintiff begins by misrepresenting the defendant's argument in opposition to her request for leave to amend. The plaintiff quotes language from the defendant's brief as follows:

> The Court may not consider the Request for Leave to Amend Complaint prior to resolving the motion to dismiss [under 52-190a].

Plaintiff's brief at page 1.

The plaintiff follows that quote with the words, "Citing Morgan."

The entire quote from the defendant's brief found at pages 2 and 3 is as follows:

> It is well settled that when a motion to dismiss based upon lack of personal jurisdiction is filed, the court must resolve the jurisdictional question first. Here, the court may not consider the Request for Leave to Amend the Complaint prior to resolving the Motion to Dismiss. "[A]s soon as the jurisdiction of the court to decide an issue is called into question, all other action in the case must come to a halt until such a determination is made."

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> Gurliacci v. Mayer, 218 Conn. 531, 545 (1991) (concluding that the trial court should have ruled on the motion to dismiss prior to a motion to amend). See also Federal Deposit Ins. Corp v. Peabody, N.E., Inc., 239 Conn, 93, 99 (1996) ("Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction . . . The point has been frequently made.")

It is obvious that the defendant did not cite Morgan as the plaintiff misrepresents, but cited Gurliacci v. Mayer, 218 Conn. 531, 545 (1991) and Federal Deposit Ins. Corp v. Peabody, N.E., Inc., 239 Conn, 93, 99 (1996), for the proposition that a Motion to Dismiss must be considered and ruled on before the consideration of an amendment to the complaint.

The plaintiff states, "This holding [referring to the first quote above] is nowhere to be found in Morgan." Plaintiff's brief at page 1. That is precisely why the defendant did not cite Morgan for that proposition.

The plaintiff is trying to mislead the court with regard to binding Connecticut Supreme Court precedent. In Morgan v. Hartford Hospital, 301 Conn. 388 (2011) the Connecticut Supreme Court determined for the first time that the requirements of Connecticut General Statutes Section 52-190a implicate issues of personal jurisdiction. Based upon cases which existed before Morgan was decided, the law in Connecticut is that when jurisdictional issues are raised, everything else must stop and the court must adjudicate the jurisdictional issue. Here, the plaintiff did not comply with Conn. Gen. Stat. Sec. 52-190a because she failed to attach an opinion letter. As a result, the defendant, by way of its May 24, 2012 motion to dismiss, challenged personal jurisdiction asserting that the case must be dismissed due to the

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plaintiff's defective complaint which has no opinion letter attached to it. After the defendant's motion to dismiss was filed, the plaintiff on June 28, 2012 then sought to amend her complaint to add the missing letter. The defendant is objecting to that amendment as a means to cure the jurisdictional defect because it cannot be considered until the jurisdictional question raised by the pending motion to dismiss has been resolved. That is the teaching of Gurliacci v. Mayer. Rather than acknowledging and addressing this applicable binding precedent presented by the defendant, the plaintiff chose instead to misrepresent the defendant's argument.

The plaintiff's statement that the court has discretion to permit an amendment is a blatant misstatement of existing Connecticut law. The plaintiff is improperly attempting to lead the court into error by arguing that the court has "discretion" to allow an amendment when a motion to dismiss challenging the court's jurisdiction is pending. The plaintiff's unsupported statement that, "the concept that the Court must address the motion to dismiss in isolation is utterly contradicted by case law", is clearly designed to mislead the court. In fact, the law is that the motion to dismiss must be considered and ruled on first before the plaintiff's amendment can be considered. See, Gurliacci.

Factual Assertions In the Affidavit

The plaintiff's second argument also has no legal support.

The defendant's position remains that there is no objective evidence to support the plaintiff's claim that the expert opinion letter was received prior to the filing of the complaint. The crucial fact that the defendant is clearly aware of, which is what led to the filing of the

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Motion to Dismiss, is that no opinion letter was attached to the complaint that was served in this case. Since the plaintiff knows that such a letter is required, the fact that one was not attached raises the presumption that it did not exist as of the date of service. The plaintiff has admitted the fact that a letter was not attached, so that fact is undisputed. That fact and the lack of objective evidence showing the letter existed are what would necessitate the hearing if the court were to consider the amendment. However, based on the law, it is unnecessary in that the court should decide the motion to dismiss based on the complaint that the plaintiff served on the defendant and nothing more.

The plaintiff misrepresents to the Superior Court the holding in Jaboin. In Jaboin the defendant moved to dismiss because the plaintiff's opinion letter failed to meet the requirements of 52-190a. The defendant claimed that the opinion letter failed to set forth specific deviations from the standard of care by two of the doctors sued in the action.[1] After analyzing the law, the trial court judge looked at the letter and the complaint and concluded that the requirements of 52-190a were met and that the opinion letter showed that there was a good faith belief to bring the action against all of the defendants.

In the course of opposing the defendant's motion to dismiss, the plaintiff filed a "supplement to the objection to the defendant's motion to dismiss" which attached a notarized affidavit from the plaintiff's expert who had authored the letter. In the affidavit the expert averred that the letter was intended to apply to all of the defendants. It is clear from the trial

[1] The defendants raised a second issue as well, lack of an opinion on causation, but the Dias v. Grady opinion was released and this basis was withdrawn at oral argument.

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judge's opinion that she did not in any fashion rely upon that affidavit in rendering her decision. She nonetheless wrote in a footnote that she believed under the provision of Practice Book Section 10-31 (b) that an affidavit would be allowed and that she believed the court had the authority consider such an affidavit. She also noted that appellate court decision in Votre and the Appellate Court's statement that the plaintiff's failure to adhere to 52-190a does not divest the court of subject matter jurisdiction. The decision was written in 2009. Of course now, it is clear that the Supreme Court has said in Morgan that non-compliance with 52-190a fails to confer personal jurisdiction. That would certainly change the rationale in the trial judge's footnote. Beyond that, however, the plaintiff cites the Jaboin decision for the following:

> Where only one party submits affidavits in connection with a motion to dismiss, the Court can correctly accept the facts in that affidavit as uncontroverted. Jaboin v. Bridgeport Hospital, 2009 WL 328121, 5 (Conn. Super. 2009) (accepting sole affidavit submitted in connection with motion to dismiss under Section 52-190a as setting forth undisputed facts)

Plaintiff's brief, page 2.

The Jaboin decision which the plaintiff attached to her motion says absolutely nothing about the court accepting the facts in an affidavit as "uncontroverted". It also says nothing about a "sole affidavit" setting forth "undisputed facts". The question, pondered in dicta, was whether the court had the authority to consider additional evidence from an expert in the form of an affidavit to shore up a defect in his opinion letter raised in the defendant's motion to dismiss. There were no issues about

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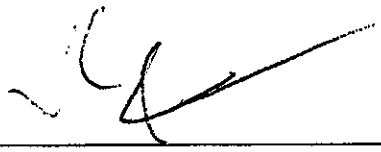
"uncontroverted" or "undisputed" facts. Here, plaintiff's counsel is not trying to add facts to an opinion letter for the court to consider, he is trying to convince the court to allow him to amend the defective complaint to add a missing opinion letter. There is absolutely no support for the proposition that what is written in an affidavit presented to support an amendment to a complaint or to oppose a motion to dismiss has to be accepted by the court as something that is true.

For all of the reasons set forth in the objection to the request for leave to amend the complaint, the plaintiff's request should not be considered in light of the pending motion to dismiss or, if it is considered, it should be denied.

THE DEFENDANT,
CENTER FOR WOMEN'S
HEALTH, P.C.



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CERTIFICATION

This is to certify that on this 13th day of July, 2012, a copy of the foregoing was mailed, postage prepaid to all counsel and pro-se parties of record to:

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DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	SEPTEMBER 18, 2012

MOTION TO REARGUE

Pursuant to Section 11-12 of the Practice Book, the defendant, Center for Women's Health, P.C., hereby moves this court, *Karazin, J.T.R.*, for reargument of the court's decision dated September 6, 2012 denying the defendant's Motion to Dismiss the plaintiff's complaint for lack of personal jurisdiction.

The basis for this Motion to Reargue is that, 1) the court overlooked controlling Supreme Court precedent that requires that the motion to dismiss be adjudicated prior to the plaintiff's request for leave to amend the complaint, 2) that the court overlooked a current Supreme Court precedent that the failure to attach an opinion letter is a jurisdictional defect which deprives the court of personal jurisdiction over the defendant and 3) that if this case is permitted to proceed when the court lacks personal jurisdiction over the defendant, the only judgment that may be rendered is one that is void. Since the court overlooked controlling principles of law, reargument is appropriate. A Memorandum of Law in Support of this motion is attached.

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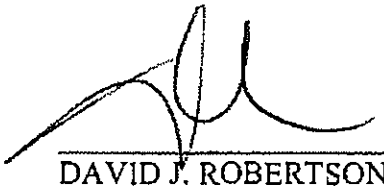
ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH,
P.C.



DAVID J. ROBERTSON
BRITTANY S. CATES
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& BACH, LLP

CERTIFICATION

This is to certify that on this 18th day of September, 2012 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

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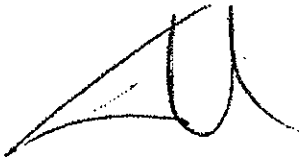

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(203) 362-9700
JURIS NO 103041

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	SEPTEMBER 18, 2012

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REARGUE

Brief History of the Case

This is a medical malpractice case. Conn. Gen. Stat. §52-190a requires that a plaintiff filing a complaint alleging negligence against a health care provider shall obtain a written opinion of a similar health care provider to the defendant and attach a copy of such opinion letter to the complaint. It is undisputed that the plaintiff's attorney in this case did not append the required opinion letter to the complaint prior to service of process on the defendant, and as a consequence no opinion letter was attached to the complaint served on the defendant health care provider.

Law and Argument

"The purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law

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that the [movant] claimed were not addressed by the court." Internal citations/quotations omitted. Opoku v. Grant, 63 Conn. App. 686 (2001).

There Is Controlling Preeedent Holding That A Request to Amend May Not Be Considered While A Motion to Dismiss As to Jurisdiction Is Pending

The Connecticut Supreme Court's holdings in Gurliacci v. Meyer, 218 Conn. 531 (1991) and Federal Deposit Insurance Company v. Peabody, N.E., Inc., 239 Conn. 93 (1996) make clear that when an issue of jurisdiction is raised by way of a motion to dismiss, that the jurisdictional issue that has been raised must be addressed before the issue of an amendment to the complaint. The defendant cited those cases; however the court overlooked them, neither citing them nor distinguishing them. Instead, it addressed the request to amend and the motion to dismiss concurrently. By not following the Gurliacci and Federal Deposit Insurance Company v. Peabody holdings, the court did not consider the fact that it was making a decision about an amendment, when in fact there was no personal jurisdiction over the defendant due to the defect in the process served upon the defendant. It is for this very reason that the Supreme Court has ruled that jurisdictional issues must be decided first.

The court should permit reargument so that this issue may be addressed.

There Is Controlling Precedent on the Need to Append an Opinion Letter to a Complaint to Confer Jurisdiction

In Morgan v. Hartford Hospital, 301 Conn. 388 (2011) the Supreme Court made clear that attaching an opinion letter to the complaint was required for the court to obtain personal jurisdiction over the defendant.

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> The failure to provide a written opinion letter, or the attachment of a written opinion letter that does not comply with § 52-190a, constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court.
>
> Morgan at 401.

In this case, within 30 days of the appearance of counsel, the defendant filed a Motion to Dismiss asserting lack of personal jurisdiction. Despite the undisputed fact that no opinion letter was attached to the complaint and the clear language of Morgan requiring same, the trial court denied the defendant's motion to dismiss.

The court relied in large part on language in the Votre v. County Obstetrics and Gynecology, 113 Conn. App. 569 (2009); however that appellate court decision from 2009 is inapplicable to this situation, since in 2011 the Supreme Court in Morgan made clear that where an opinion letter has not been appended to a complaint, there is no personal jurisdiction over the defendant. As a result, there is no ability for the court to exercise discretion to allow an amendment to the complaint once a motion to dismiss has been filed. The court is simply without the power to do so. Under the facts presented here, the defendant was not served with proper process; therefore the superior court has no personal jurisdiction over the defendant.[1] The court cannot consider an amendment to correct the defect.

---

[1] Morgan makes clear that in a medical malpractice case "process" includes the summons, the complaint and the mandatory opinion letter. "[T]he absence of a proper written opinion letter is a matter of form, it implicates personal jurisdiction. It is in the nature of a pleading that must be attached to the complaint. Thus we construe the term "process" to include both the summons, the complaint and any requisite attachments thereto." Morgan at 402.

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The defendant requests that this court grant reargument to consider this controlling law.

Any Judgment In This Case Will Be Void

"Proper service of process is not some mere technicality. Proper service of process gives a court power to render a judgment which will satisfy 'due process' under the 14th amendment to the federal constitution and equivalent provisions of the Connecticut constitution and which will be entitled to recognition under the 'full faith and credit' clause of the federal constitution." 1 R. Bollier, N. Cioffi, K. Emmett, J. Kavanewsky & L. Murphy, Stephenson's Connecticut Civil Procedure (3d Ed. 1997) § 11 (b), p. 20." Hibner v. Bruening, 78 Conn. App. 456, 458 (2003).

"The Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction." (Citations omitted.). Kim v. Magnotta, 249 Conn. 94, 101-102 (1999).

The Morgan court left no doubt as to the need to have an opinion letter attached to the original complaint served upon the defendant in order to confer jurisdiction when it stated, "[The legislature] establish(ed) a mandatory attachment to the complaint in the form of a written opinion letter from a similar health care provider. This certificate, therefore, serves as a precondition to effective service of process for the initiation of a medical malpractice action." Morgan at 400-401.

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Here it is undisputed that the defendant was not served with a complaint to which was appended a written opinion letter. There is also no question that due to this defect the defendant has not consented to the court's jurisdiction and has objected by filing a timely motion to dismiss this action. In Waterman v. United Caribbean, Inc., 215 Conn. 288, the Connecticut Supreme Court determined that the trial court lacked of personal jurisdiction because the judge's decision was rendered more than 120 days after submission of the briefs and no consent was given to allow a late decision to be rendered. As a result, the judgment in that case was determined to be void. If this decision, at this early stage of this case, is not reconsidered and is instead allowed to stand, the only judgment that may ever issue here is one that is void. That would not serve either the interests of justice or the interests of any of the parties to this case.

Wherefore, the defendant respectfully requests that the court grant this Motion to Reargue.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH,
P.C.

DAVID J. ROBERTSON
BRITTANY S. CATES
HEIDELL, PITTONI, MURPHY
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CERTIFICATION

This is to certify that on this 18th day of September, 2012 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

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Bridgeport, CT 06604

Mary Alice Moore Leonhardt
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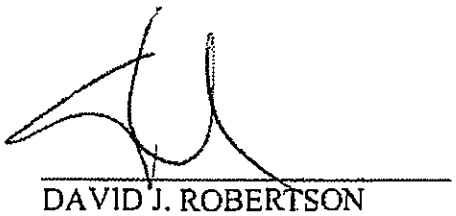

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JURIS NO 103044

DOCKET NO: FSTCV126013562S

SUPERIOR COURT

KISSEL, JUDITH
V.
CENTER FOR WOMEN'S HEALTH, P.C. Et Al

JUDICIAL DISTRICT OF STAMFORD
AT STAMFORD

9/21/2012

ORDER

ORDER REGARDING:
09/18/2012 129.00 MOTION TO REARGUE/RECONSIDER

The foregoing, having been considered by the Court, is hereby:

ORDER: DENIED

Judicial Notice (JDNO) was sent regarding this order.

402358

Judge: EDWARD R KARAZIN
Processed by: EILEEN CONDRON

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JANUARY 22, 2013

ANSWER TO REVISED COMPLAINT DATED NOVEMBER 16, 2012

FIRST COUNT

1. The allegations in paragraph 1 are admitted.

2-8. The allegations in paragraphs 2 through 8 are denied.

SECOND COUNT:

The defendant does not respond to the allegations in the Second Count as they are not directed to it. To the extent any claims in the second court are made concerning the undersigned defendant, those claims are denied.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/s/ 417457

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TELEPHONE NO.: (203) 382-9700
JURIS NO.: 103041

CERTIFICATION

This is to certify that on this 22nd day of January 2013 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

Counsel for Plaintiff:
Sean McElligott, Esq.
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Bridgeport, CT 06604

Counsel for Reed Wang, L.Ac.:
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
102 Oak Street
Hartford, CT 06106

Counsel for Health Body World Supply Inc., a/k/a The Wabbo Company
NON-APPEARING

/s/ 417457

Keith M. Blumenstock

NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	MARCH 1, 2013

PLAINTIFF'S COMPLAINT AS TO THIRD PARTY DEFENDANT

COUNT ONE: JUDITH KISSEL V. HEALTH BODY WORLD SUPPLY INC., A/K/A/ THE WABBO COMPANY

1. Pursuant to Connecticut General Statutes, §52-102a(c), the Plaintiff brings this complaint to assert claims against the Third-Party Defendant, Health Body World Supply Inc., a/k/a The WABBO Company, hereinafter referred to as "WABBO".

2. In a third-party complaint with a return date of February 19, 2013, the Defendant Reed Wang, LAC as Third-Party Plaintiff, brought a complaint against WABBO for liability.

3. In the third-party complaint, the Defendant Reed Wang LAC, hereinafter "Wang" has asserted the following allegations, incorporated herein, against WABBO:

4. The Defendant/Third-Party Plaintiff is presently, and was at all times material hereto a resident of the Statement of Connecticut, and was a servant, agent, apparent agent and/or employee of the Co-Defendant, Center for Women's Health, P.C., hereinafter referred to as the "Center".

5. The Third-Party Defendant, WABBO, is presently and was at all times material hereto, a foreign corporation organized and existing under the laws of the State of California, having its principal place of business at 474 W. Esplanade Avenue, San Jacinto, CA 92583, and authorized to do business in,

and in fact transacting business in or contracted to supply good or services to, Connecticut, in satisfaction of Connecticut General Statutes §33-929.

6. The Plaintiff, Judith Kissel, filed her original complaint on March 30, 2012 and filed her Revised Complaint on November 16, 2012.

7. Count Two of the Plaintiff's Revised Complaint alleges, in part, the following: (1) commencing on or about April 22, 2010 and thereafter, the Defendant/Third-Party Plaintiff Wang, undertook the care, treatment, diagnosing, monitoring and supervision of the Plaintiff for the purpose of providing acupuncture and related services; (2) while under the care, treatment, monitoring, diagnosing and supervision of the Defendant/Third-Party Plaintiff Wang and his servants, agents, apparent agents and/or employees, the Plaintiff suffered serious, severe, painful and permanent injuries; (3) the said injuries suffered by the Plaintiff were caused by the failure of the Defendant/Third-Party Plaintiff Wang and his servants, agents apparent agents and/or employees and those under his supervision and control, to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists under all of the circumstances then and there present in that they (a) did not adequately protect the Plaintiff from contact with a heat lamp during her acupuncture procedure (b) did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the Plaintiff, (c) left the Plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp, (d) failed to utilize a safe heating system during the acupuncture procedure that would not contact the Plaintiff and/or cause burns to the Plaintiff, and (e) failed to adequately and properly care for, treat, monitor, diagnose and supervise the Plaintiff for her acupuncture treatments needs; (4) as a result she suffered serious, severe, painful and permanent injuries, has been

permanently deprived of her full ability to carry on and enjoy life's activities, and has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

8. The Third-Party Defendant WABBO manufactures, sells and distributes the CQ-36 Teding Diancibo Pu ("TDP") Dual Heat Lamp ("the lamp or "this lamp").

9. On March 10, 2008, Defendant/Third-Party Plaintiff Wang purchased the lamp from the Third- Party Defendant WABBO.

10. Upon receiving the lamp from Third-party Defendant WABBO, The Defendant Third-Party Plaintiff Wang examined the product and noted that no instruction manual was provided.

11. The Defendant/Third-Party Plaintiff Wang thereafter began using one (1) side of the dual lamp as part of the regular acupuncture services he provides at the Defendant Center.

12. On or about April 22, 2010, The Defendant/Third Party Plaintiff Wang furnished acupuncture treatment to the Plaintiff.

13. After the Defendant/Third-Party Plaintiff Wang initiated heat lamp therapy on the Plaintiff during the acupuncture treatment, the Plaintiff told the Defendant/Third-Party Plaintiff Wang that the lamp had fallen on her left foot.

14. As a result of the lamp falling on her, the Plaintiff has suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot;

i. loss of sensation/numbness in left foot and toes; and

j. physiological, psychological and neurological sequelae.

15. As a result of her injuries, the Plaintiff has been permanently deprived of her full ability to carry on and enjoy life activities.

16. As a result of her injuries, the Plaintiff has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

17. The Plaintiff sustained injuries for which she is seeking:(a) compensatory damages; (b) interest; (c) expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs; (d) such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

18. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

COUNT TWO: VIOLATION OF THE CONNECTICUT PRODUCTS LIABILITY ACT (CPLA), CONNECTICUT GENERAL STATUTES §52-572m

1-18. Paragraphs 1 through 17 of the First Count are hereby incorporated in this Count Two as if fully set forth herein.

19. The Third-Party Defendant WABBO is the manufacturer, seller and distributor of the CQ-36 TDP Dual Heat Lamp that is the subject of this Third-Party Complaint, where the sale is for resale or for use or consumption.

20. The Third-Party Defendant WABBO manufactured, sole and distributed the lamp which it knew or should reasonably have known was in a defective condition unreasonably dangerous to a consumer or user.

21. The defect in the lamp caused the injury for which compensation has been sought by the Plaintiff.

22. The lamp was in a defective condition unreasonably dangerous to the consumer or user at the time at which it sold and distributed the lamp to the Defendant/Third-Party Plaintiff Wang.

23. The lamp was expected or could reasonably have been expected to reach the Defendant/Third-Party Plaintiff Wang without substantial change in the condition once it left the Third-Party Defendant WABBO.

24. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

COUNT THREE: BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY, CONNECTICUT GENERAL STATUTE §42a-2-314.

1-18. Paragraphs 1 through 18 of Count One are hereby incorporated in the Court three as if fully set forth herein.

19. The Third-Party Defendant WABBO is and was at the time a merchant that manufactured, sold and distributed goods, including the lamp that is the subject of this Third-Party Complaint.

20. The lamp was not merchantable at the time of sale in that it as in defective condition unreasonably dangerous to a consumer or user as evidenced by the clamp coming loose, falling and causing injury to the Plaintiff.

21. The injuries and damages to the Plaintiff were caused approximately and in fact by the defective nature of the lamp.

22. Notice was given to the Third-Party Defendant WABBO of injury.

23. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

COUNT FOUR: BREACH OF IMPLIED FITNESS FOR A PARTICULAR PURPOSE, CONNECTICUT GENERAL STATUTES §42a-2-315

1.-18. Paragraphs 1 through 18 of Count One are hereby incorporated in this Count Four as if fully set forth herein.

19. The Third-Party Defendant WABBO is in the business of manufacturing, selling and distributing acupuncture supplies, has a website address of www.buyacuuncture.com, and claims to be the "#1Choice Acupuncture & Natural Herbal Supplies."

20. The Third-Party Defendant WABBO therefore knew or had reason to know of the intended purpose of the lamp that is the subject of this Third-Party Complaint.

21. The Defendant/Third-Party Plaintiff Wang, in purchasing the lamp, actually relied on the Third-Party Defendant WABBO and its representations, statements and warranties of fitness for use in conjunction with acupuncture treatments.

22. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

COUNT FIVE: FRAUDULENT MISRERESENTATION

1.-18. Paragraphs 1 through 18 of Count One are hereby incorporated in this Count Five as if fully set forth herein.

19. The Third-Party Defendant WABBO made a false representation that proper use of the lamp is safe and may be beneficial, which was made as a statement of fact.

20. The representation was untrue and known to be untrue by the Third-Party Defendant WABBO in that it knew that the lamp was defective and likely to cause injury.

21. The representations of safety and the associated benefits of use were made to induce Defendant/Third-Party Plaintiff Wang to act upon it and purchase the lap for use at the Defendant Center.

22. The Defendant/Third-Party Plaintiff Wang did so reasonably rely and act upon the false representation in purchasing the lamp from Third-Party Defendant WABBO.

23. The Third-Party Defendant WABBO intended or knew or should have known, and/or acted with reckless indifference to the likelihood that the Plaintiff or Defendant/Third-Party Plaintiff Wang would be injured by its actions of selling and distributing a defective lamp.

24. The Third-Party Defendant WABBO has been unjustly enriched by virtue of its misrepresentation of the true nature of the lamp as being without defect.

25. The Plaintiff has suffered damages, physical injuries, psychological and emotional distress.

26. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

COUNT SIX: NEGLIGENT MISREPRESENTATION

1-18. Paragraphs 1 through 18 of Count One are hereby incorporated in this Count Six as if fully set forth herein.

19. The Third-Party Defendant WABBO made a false representation that proper use of the lamp is safe and may be beneficial, which was made as a statement of fact.

20. The Third-Party Defendant WABBO also made negligent misrepresentations in failing to speak on the defective nature of the lamp when it should have done so, thereby failing to exercise reasonable care and competence in both obtaining and communicating information.

21. The representation was untrue and known or reasonably should have been known to be untrue b the Third-Party Defendant WABBO in that it knew or reasonably should have known that the lamp was defective and likely to cause injury at the time the misrepresentations were made.

22. The representations of safety and associated benefits of use were made to induce the Defendant/Third-Party Plaintiff Wang to act upon it and purchase the lamp for use at the Defendant Center.

23. The Defendant/Third-Party Plaintiff Wang did so reasonably rely and act upon the false representation in purchasing the lamp from the Third-Party Defendant WABBO.

24. The Third-Party Defendant WABBO intended or knew or should have known, and/or acted with reckless indifference to the likelihood that the Plaintiff or Defendant/Third-Plaintiff Wang would be injured by its actions of selling and distributing a defective lamp.

25. The Third-Party Defendant WABBO has been unjustly enriched by virtue of its misrepresentation of the true nature of the lamp as being without defect.

26. The Plaintiff has suffered damages, physical injuries, psychological and emotional distress.

27. For the foregoing reasons, the Third-Party Defendant WABBO is liable to the Plaintiff for the injuries and damages set forth above.

WHEREFORE, THE PLAINTIFF, JUDITH KISSEL, HEREBY CLAIMS MONETARY DAMAGES IN EXCESS OF FIFTEEN THOUSAND & 00/100 DOLLARS ($15,000.00), EXCLUSIVE OF INTEREST AND COSTS, STATES THAT THIS MATTER IS WITHIN THE JURISDICTION OF THIS COURT, AND FURTHER REQUESTS THE FOLLOWING RELIEF:

a. Compensatory damages;

b. Interest;

c. Expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs;

d. Such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

THE PLAINTIFF

BY: /s/

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 Fairfield Avenue -5th Floor
Bridgeport, Connecticut 06604
Tel. No.: (203) 336-4421
Juris No.: 32250

CERTIFICATION

This is to certify that a copy of the foregoing was sent, via electronic mail, on this 1st day of March 2013, to counsel of record as follows:

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One Goodwin Square
225 Asylum Street
Hartford, CT 06103

/s/
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT OF** **STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.; **REED WANG**	: :	 **MARCH 14, 2014**

REQUEST FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

The Plaintiff hereby requests leave to file her Second Amended Complaint attached hereto to conform to the facts of the case.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
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JURIS NO.: 32250

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 14th day of March 2014 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
102 Oak Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT OF**
	:	**STAMFORD/NORWALK**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C.;	:	
REED WANG	:	**MARCH 14, 2014**

SECOND AMENDED COMPLAINT

COUNT ONE:
JUDITH KISSEL v. CENTER FOR WOMEN'S HEALTH P.C.

1. At all times mentioned herein, the defendant, CENTER FOR WOMEN'S HEALTH P.C. was a professional corporation organized and existing under the laws of the State of Connecticut comprised of medical professionals practicing in Stamford, Connecticut.

2. At all times mentioned herein, the co-defendant, REED WANG was a servant, agent, apparent agent and/or employee of the defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, diagnosing, monitoring and supervision of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees and those under its supervision and control, the plaintiff, JUDITH KISSEL, suffered severe, serious, painful and permanent injuries as hereinafter set forth in paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, to exercise reasonable care under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

c. left the plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp;

d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs;

f. did not provide the plaintiff with acupuncture personnel who possessed the requisite knowledge, skill, and experience to adequately and properly care for, treat, diagnose, monitor and supervise the plaintiff;

g. did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff.

6. As a result of the carelessness and negligence of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot; and

i. loss of sensation/numbness in left foot and toes.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

COUNT TWO:
JUDITH KISSELL v. REED WANG

1. At all times mentioned herein, the defendant, REED WANG, held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut.

2. At all times mentioned herein, the defendant, REED WANG, was a servant, agent, apparent agent and/or employee of the co-defendant, CENTER FOR WOMEN'S HEALTH P.C.

3. Commencing on or about April 22, 2010 and thereafter, the defendant, REED WANG undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, JUDITH KISSEL, for the purpose of providing acupuncture and related services.

4. While under the care, treatment, monitoring, diagnosing and supervision of the defendant, REED WANG and his servants, agents, apparent agents and/or employees, the plaintiff,

JUDITH KISSEL, suffered serious, severe, painful and permanent injuries, as hereinafter set forth in Paragraph 6.

5. The said injuries suffered by the plaintiff, JUDITH KISSEL, were caused by the failure of the defendant, REED WANG and his servants, agents, apparent agents and/or employees and those under his supervision and control, to exercise that degree of care and skill ordinarily and customarily used by licensed acupuncturists under all of the circumstances then and there present in that they:

a. did not adequately protect plaintiff from contact with a heat lamp during her acupuncture procedure;

b. did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff;

c. left the plaintiff unattended during the course of the acupuncture procedure and failed to promptly respond to her cries for help while she was being burned by the heat lamp;

d. failed to utilize a safe heating system during the acupuncture procedure that would not contact the plaintiff and/or cause burns to the plaintiff;

e. failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs.

6. As a result of the carelessness and negligence of the defendant, REED WANG and his servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot; and

i. loss of sensation/numbness in left foot and toes.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

WHEREFORE, THE PLAINTIFF, JUDITH KISSEL, HEREBY CLAIMS MONETARY DAMAGES IN EXCESS OF FIFTEEN THOUSAND & 00/100 DOLLARS ($15,000.00), EXCLUSIVE OF INTEREST AND COSTS, STATES THAT THIS MATTER IS WITHIN THE JURISDICTION OF THIS COURT, AND FURTHER REQUESTS THE FOLLOWING RELIEF:

a. Compensatory damages;

b. Interest;

c. Expenses and costs of prosecuting this action to which the plaintiff is entitled, including, but not limited to, experts' fees and costs;

d. Such other relief to which the plaintiff is entitled, either in law or equity, which the court deems just and proper.

THE PLAINTIFF,

BY: /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, PC
350 FAIRFIELD AVENUE
BRIDGEPORT, CONNECTICUT 06604
TELEPHONE NO. (203) 336-4421
JURIS NO. 32250

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 14th day of March 2014 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
102 Oak Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C., ET AL	: :	**MARCH 31, 2014**

PLAINTIFF'S DISCLOSURE OF EXPERT

Pursuant to Practice Book § 13-4, the Plaintiff in the above-entitled matter hereby discloses the following expert:

A. NAME AND ADDRESS OF EXPERT:

Simone Wan Moran
163 Edge Hill Road
Fairfield, CT 06824

B. FIELD OF EXPERTISE and SUBJECT MATTER OF TESTIMONY:

Ms. Wan Moran is a licensed acupuncturist and is familiar with the standard of care for licensed acupuncturists for the year 2010 and procedures used in providing acupuncture and related services.

C. EXPERT OPINIONS:

It is anticipated that Ms. Wan Moran will testify that the actions of Reed Wang, represented a breach of the prevailing professional standard of care applicable to him, in that while the plaintiff was receiving acupuncture he should have positioned her a safe distance away from any piece of equipment that had the potential to injure her. Moreover, when using a heat lamp with an articulated arm, the acupuncturist must ensure that the lamp is secure and will not collapse onto the patient. In addition, Mr.

Wang should have appropriately monitored the plaintiff to ensure that she remained safe throughout the entire procedure. It is further anticipated that Ms. Wan Moran will likely refute the opinions of defense experts; however, since the defendant has not yet disclosed his experts, the Plaintiff can be no more specific at this time.

D. SUBSTANCE OF GROUNDS FOR EACH OPINION:

Ms. Wan Moran is expected to testify based upon her education, training and experience as well as her review of the following records:

1. The Center for Women's Health; and
2. Stamford Hospital 4/22/10.

The Plaintiff reserves the right to update, supplement, alter or amend this disclosure as the case may be.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
JURIS NO. 32250
TELEPHONE: 203-336-4421
FAX: 203-368-3244

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 31st day of March 2014 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
102 Oak Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	AUGUST 27, 2014

DISCLOSURE OF EXPERT WITNESS

Pursuant to Practice Book § 13-4, the defendant, Center for Women's Health, (the "Center"), hereby discloses the following expert witness who will testify at trial.

1. Name & Address of Expert

Jennifer Brett, ND, L.Ac.
Director, University of Bridgeport Acupuncture Institute
60 Lafayette Street, Room 601
Bridgeport, CT 06604

A. The subject matter on which the expert is expected to testify:

Dr. Brett is a licensed acupuncturist and will testify as an expert in the field of acupuncture. She will testify regarding the prevailing standard of care as it pertained to Reed Wang, L.Ac. and the Center for the year 2010 and procedures used in providing acupuncture and related services.

B. The substance of the facts and opinions to which the expert may be expected to testify:

Dr. Brett will testify that Dr. Wang complied with the standard of care in the treatment of Judith Kissel on April 22, 2010. Specifically, Dr. Brett will refute the allegations of negligence as alleged in the plaintiff's Complaint.

LAW OFFICES
HEIDELL, PITTONI,
JRPHY & BACH, LLP
5 MAIN STREET, SUITE 1100
IDGEPORT, CT 06604
(203) 382-9700
JURIS NO. 103041

It is also anticipated that Dr. Brett will respond to and rebut the testimony of plaintiff's expert(s) with regard to these subjects and issues and will dispute the allegations made by the plaintiff at trial.

C. **Summary of the grounds for each opinion of the expert:**

Dr. Brett will base her opinions, findings, and conclusions upon her education, training, research, knowledge and experience. Her opinions will also be based on her review of the medical records, medical literature, pleadings, deposition testimony of the parties and witnesses, as well as any and all testimony adduced at the time of trial.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/s/ 417457

KEITH M. BLUMENSTOCK, ESQ.
DAVID J. ROBERTSON, ESQ.
HEIDELL, PITTONI, MURPHY
& BACH, LLP
855 MAIN ST., STE 1100
BRIDGEPORT, CT 06604

LAW OFFICES
HEIDELL, PITTONI,
MURPHY & BACH, LLP
855 MAIN STREET, SUITE 1100
BRIDGEPORT, CT 06604
(203) 382-9700
JURIS NO. 103041

CERTIFICATION

This is to certify that on this 27th day of August 2014 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

Counsel for Plaintiff:
Sean McElligott, Esq.
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue
Bridgeport, CT 06604

Counsel for Reed Wang, L.Ac.:
Mary Alice Moore Leonhardt, Esq.
Rome McGuigan, PC
1 State St.
Hartford, CT 06103

Counsel for Health Body World:
Paul David Meade, Esq.
Halloran & Sage
One Goodwin Square
225 Asylum Street
Hartford, CT 06103

/s/ 417457

KEITH M. BLUMENSTOCK

LAW OFFICES
HEIDELL, PITTONI,
URPHY & BACH, LLP
MAIN STREET, SUITE 1100
IDGEPORT, CT 06604
(203) 382-9700
JURIS NO. 103041

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	DECEMBER 23, 2015

DISCLOSURE OF EXPERT WITNESS

Pursuant to Practice Book § 13-4, the defendant, Center for Women's Health, P.C. (the "Center"), hereby discloses the following expert witness who will testify at trial.

1. **Name & Address of Expert**

Glenn Vallee, Ph.D., P.E.
194 Meadow Lark Lane
Westbrook, CT 06498

A. **The subject matter on which the expert is expected to testify:**

Dr. Vallee is a mechanical engineer and university professor. Dr. Vallee will testify regarding the absence of a design defect in the subject lamp, as well as the absence of any mechanical evidence that a malfunction of the subject lamp occurred as alleged by Judith Kissel in this matter. In addition, he will testify that nothing Reed Wang, L.Ac. and the Center for Women's Health did, or failed to do, was the proximate cause of Ms. Kissel's alleged injuries in this matter.

B. **The substance of the facts and opinions to which the expert may be expected to testify:**

Dr. Vallee will testify that the subject lamp is not and was not defective; that following the subject incident and at the present time, the arm mechanism and hardware for

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RIDGEPORT, CT 06604
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the subject lamp were and are active and functioning properly and providing appropriate resistance; that the mechanical design and condition of the subject lamp are such that the lamp was stable and did not "lower spontaneously"; that the incident could not have occurred due to an allegedly "defective designed friction joint" as claimed; and that nothing Reed Wang, L.Ac. and the Center For Women's Health did, or failed to do, was the proximate cause of Ms. Kissel's alleged injuries.

It is also anticipated that Dr. Vallee will respond to and rebut the testimony of plaintiff's expert(s) with regard to these subjects and issues and will dispute the allegations made by the plaintiff at trial.

C. **Summary of the grounds for each opinion of the expert:**

Dr. Vallee will base his opinions, findings, and conclusions upon his education, training, research, knowledge and experience in the fields of mechanical engineering and product design. His opinions are further based upon his examination of the subject lamp, his review of the pleadings, deposition testimony of the parties and witnesses, as well as any and all testimony adduced at the time of trial.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/s/ 417457

KEITH M. BLUMENSTOCK, ESQ.
DAVID J. ROBERTSON, ESQ.
HEIDELL, PITTONI, MURPHY
& BACH, LLP
855 MAIN ST., STE 1100
BRIDGEPORT, CT 06604

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URPHY & BACH, LLP
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RIDGEPORT, CT 06604
(203) 382-9700
JURIS NO 103041

CERTIFICATION

This is to certify that on this 23rd day of December 2015 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

Counsel for Plaintiff:
Sean McElligott, Esq.
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue
Bridgeport, CT 06604

Counsel for Reed Wang, L.Ac.:
Mary Alice Moore Leonhardt, Esq.
Rome McGuigan, PC
1 State St.
Hartford, CT 06103

Counsel for Health Body World:
Paul David Meade, Esq.
Halloran & Sage
One Goodwin Square
225 Asylum Street
Hartford, CT 06103

/s/ 417457

KEITH M. BLUMENSTOCK

LAW OFFICES
HEIDELL, PITTONI,
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(203) 382-9700
JURIS NO 103041

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, **P.C., ET AL**	: :	 **OCTOBER 12, 2016**

PLAINTIFF'S DISCLOSURE OF EXPERT

Pursuant to Practice Book § 13-4, the Plaintiff in the above-entitled matter hereby discloses the following expert to testify at trial:

A. NAME AND ADDRESS OF EXPERT:

Jennifer Brett, ND, L.Ac.
University of Bridgeport Acupuncture Institute
60 Lafayette Street, Room 601
Bridgeport, CT 06604

B. FIELD OF EXPERTISE and SUBJECT MATTER OF TESTIMONY:

Ms. Brett is a licensed acupuncturist and will testify as to standard of care and causation.

C. EXPERT OPINIONS:

It is anticipated that Ms. Brett will testify in accordance with her deposition dated September 14, 2016.

D. SUBSTANCE OF GROUNDS FOR EACH OPINION:

Ms. Brett is expected to testify based upon her education, training and experience.

The Plaintiff reserves the right to update, supplement, alter or amend this disclosure as the case may be.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
JURIS NO. 32250
TELEPHONE: 203-336-4421

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 12TH day of October 2016 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
102 Oak Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT**
	:	**OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH,	:	
P.C., ET AL	:	**MAY 15, 2017**

PLAINTIFF'S AMENDED DISCLOSURE OF EXPERT

The Plaintiff in the above-entitled matter hereby amends the prior disclosure of January 6, 2017 of the following expert pursuant to Practice Book § 13-4

A. NAME AND ADDRESS OF EXPERT:

Victor A. Popp, PE
V. Popp, Inc.
75 Gardner Street
Hingham, MA 02043

B. FIELD OF EXPERTISE and SUBJECT MATTER OF TESTIMONY:

Mr. Popp is a licensed professional engineer. Mr. Popp's Professional Biographical Outline is attached. Mr. Popp will testify regarding whether the CQ-36 Teding Diancibo PU Dual Heat Lamp ("the Heat Lamp") was in a defective condition unreasonably dangerous to consumers when it was sold to defendant Reed Wang and when it was used in the acupuncture treatment of Judith Kissel. Mr. Popp will testify further that the defective conditions present in the lamp were more likely than not a substantial factor resulting in the injuries to the Plaintiff.

C. EXPERT OPINIONS:

Mr. Popp will testify that the Heat Lamp was defective and unreasonably dangerous to consumers in that 1) the stabilizing hardware and pneumatic mechanisms for the lamp head and arms of the Heat Lamp were designed and/or manufactured in a defective manner; 2) the Heat Lamp head lacked a safety guard; and 3) the lamp head had an unsafe thumbscrew design

causing the lamp head to release from the housing. Mr. Popp will further testify that the arms of the lamp lacked proper stabilizing hardware for locking the lamp into place. The lack of a locking mechanism at each joint of the arm assembly resulted in an unreasonably dangerous propensity for the Heat Lamp to lower while in use. Mr. Popp is expected to testify that the Heat Lamp was never recalled by its manufacturer despite its dangerous design and/or manufacture. Mr. Popp is expected to testify further that, while the primary defective condition was an improper design, the Heat Lamp was sold without proper warnings or instructions regarding its safe use. Mr. Popp is expected to testify that the incident alleged by the Plaintiff would not have occurred if the Heat Lamp hadn't been defectively designed. He will also testify that the defective condition of the Heat Lamp was a substantial factor leading to the injuries claimed by the Plaintiff, Judith Kissel.

D. SUBSTANCE OF GROUNDS FOR EACH OPINION:

Mr. Popp is expected to testify based upon his education, training and experience as well as his inspection of the Heat Lamp and his review of the following:

1. Amended Complaint dated March 14, 2014;
2. Second Amended Third-Party Complaint dated August 24, 2015;
3. Product purchase insert produced by defendant Reed Wang;
4. Exhibits marked at the deposition of John Orlowski
5. Sketches drafted by John Orlowski;
6. Photographs taken during Mr. Orlowski's inspection of the Heat Lamp;
7. Depositions Transcripts of Judith Kissel dated June 17, 2014; Reed Wang dated August 18, 2014 and January 23, 2015; Joel Evans, M.D. dated February 26, 2015; John Orlowski dated August 18, 2015; Glenn Vallee dated November 25, 2015;

Simone Wan Moran dated March 10, 2016; Jennifer Brett dated September 14, 2016; and Marc Richman dated January 16, 2017.

The Plaintiff reserves the right to update, supplement, alter or amend this disclosure as the case may be.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
JURIS NO. 32250
TELEPHONE: 203-336-4421
FAX: 203-368-3244

CERTIFICATION

This is to certify that a copy of the foregoing has been electronically served this 15th day of May, 2017 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
67 Russ Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C., ET AL	: :	 **JUNE 16, 2017**

PLAINTIFF'S AMENDED DISCLOSURE OF EXPERT

The Plaintiff in the above-entitled matter hereby amends the prior disclosure dated March 31, 2014 of the following expert pursuant to Practice Book § 13-4

A. NAME AND ADDRESS OF EXPERT:

Simone Wan Moran
163 Edge Hill Road
Fairfield, CT 06824

B. FIELD OF EXPERTISE and SUBJECT MATTER OF TESTIMONY:

Ms. Wan Moran is a licensed acupuncturist and is familiar with the standard of care for licensed acupuncturists for the year 2010 and procedures used in providing acupuncture and related services.

C. EXPERT OPINIONS:

It is anticipated that Ms. Wan Moran will testify that the actions of Reed Wang, represented a breach of the prevailing professional standard of care applicable to him, in that while the plaintiff was receiving acupuncture he should have positioned her a safe distance away from any piece of equipment that had the potential to injure her. Moreover, when using a heat lamp with an articulated arm, the acupuncturist must ensure that the lamp is secure and will not collapse onto the patient. In addition, Mr. Wang should have appropriately monitored the plaintiff to ensure that she remained safe throughout the entire procedure. It is further anticipated that Ms. Wan Moran will testify in accordance with her deposition dated March 10, 2016.

D. SUBSTANCE OF GROUNDS FOR EACH OPINION:

Ms. Wan Moran is expected to testify based upon her education, training and experience as well as her review of the following records:

1. The Center for Women's Health/Dr. Evans; and
2. Stamford Hospital Emergency Department 4/22/10;
3. Westchester Medical Center 4/23/10 – 4/30/10;
4. New York Surgical Group 4/26/10 – 8/23/12;
5. Visiting Nurse of Hudson Valley 5/1/10 – 8/4/10;
6. Coram Specialty Infusion Services 8/2/10 – 8/16/10;
7. Mount Kisco Medical Group 5/9/05 – 3/24/14;
8. Westchester Urology/Dr. Fleischmann (Advanced Urology);
9. CVS Pharmacy 4/25/10 – 4/11/14;
10. Health Choice Pharmacy 4/12/10 – 4/1/14;
11. Deposition testimony and exhibits of:
    a. Judith Kissel 6/17/14;
    b. Reed Wang, Vol. I 8/18/14;
    c. Reed Wang, Vol. II 1/23/15;
    d. Reed Wang, Vol. III 4/10/15;
    e. Joel Evans, M.D. 2/26/15;
    f. John Orlowski 8/18/15;
    g. Glenn Vallee 11/25/15;
    h. Jennifer Brett, N.D. 9/14/16;
    i. March Richman 1/16/17; and
    j. Victor Popp 5/26/17.

The Plaintiff reserves the right to update, supplement, alter or amend this disclosure as the case maybe.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
JURIS NO. 32250
TELEPHONE: 203-336-4421
FAX: 203-368-3244

CERTIFICATION

This is to certify that a copy of the foregoing has been e-filed and mailed this 16th day of June 2017 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Assoc.
67 Russ Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, **P.C., ET AL**	: :	 **JUNE 16, 2017**

PLAINTIFF'S AMENDED DISCLOSURE OF EXPERT

The Plaintiff in the above-entitled matter hereby amends the prior disclosure of January 6, 2017 of the following expert pursuant to Practice Book § 13-4:

A. NAME AND ADDRESS OF EXPERT:

Victor A. Popp, PE
V. Popp, Inc.
75 Gardner Street
Hingham, MA 02043

B. FIELD OF EXPERTISE and SUBJECT MATTER OF TESTIMONY:

Mr. Popp is a licensed professional engineer. Mr. Popp's Professional Biographical Outline is attached. Mr. Popp will testify regarding whether the CQ-36 Teding Diancibo PU Dual Heat Lamp ("the Heat Lamp") was in a defective condition unreasonably dangerous to consumers when it was sold to defendant Reed Wang and when it was used in the acupuncture treatment of Judith Kissel. Mr. Popp will testify further that the defective conditions present in the lamp were more likely than not a substantial factor resulting in the injuries to the Plaintiff.

C. EXPERT OPINIONS:

Mr. Popp will testify that the Heat Lamp was defective and unreasonably dangerous to consumers in that 1) the stabilizing hardware and pneumatic mechanisms for the lamp head and arms of the Heat Lamp were designed and/or manufactured in a defective manner; 2) the Heat Lamp head lacked a safety guard; and 3) the lamp head had an unsafe thumbscrew design

causing the lamp head to release from the housing. Mr. Popp will further testify that the arms of the lamp lacked proper stabilizing hardware for locking the lamp into place. The lack of a locking mechanism at each joint of the arm assembly resulted in an unreasonably dangerous propensity for the Heat Lamp to lower while in use. Mr. Popp is expected to testify that the Heat Lamp was never recalled by its manufacturer despite its dangerous design and/or manufacture. Mr. Popp is expected to testify further that, while the primary defective condition was an improper design, the Heat Lamp was sold without proper warnings or instructions regarding its safe use. Mr. Popp is expected to testify that the incident alleged by the Plaintiff would not have occurred if the Heat Lamp hadn't been defectively designed. He will also testify that the defective condition of the Heat Lamp was a substantial factor leading to the injuries claimed by the Plaintiff, Judith Kissel.

D. SUBSTANCE OF GROUNDS FOR EACH OPINION:

Mr. Popp is expected to testify based upon his education, training and experience as well as his inspection of the Heat Lamp and his review of the following:

1. Amended Complaint dated March 14, 2014;
2. Second Amended Third-Party Complaint dated August 24, 2015;
3. Product purchase insert produced by defendant Reed Wang;
4. Exhibits marked at the deposition of John Orlowski;
5. Sketches drafted by John Orlowski;
6. Photographs taken during Mr. Orlowski's inspection of the Heat Lamp;
7. Depositions Transcripts of Judith Kissel dated June 17, 2014; Reed Wang dated August 18, 2014 and January 23, 2015; Joel Evans, M.D. dated February 26, 2015; John Orlowski dated August 18, 2015; Glenn Vallee dated November 25, 2015;

Simone Wan Moran dated March 10, 2016; Jennifer Brett dated September 14, 2016; and Marc Richman dated January 16, 2017.

It is further anticipated that Mr. Popp will testify in accordance with his deposition dated May 26, 2017.

The Plaintiff reserves the right to update, supplement, alter or amend this disclosure as the case may be.

THE PLAINTIFF

By /s/ SEAN K. MCELLIGOTT

SEAN K. MCELLIGOTT
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 FAIRFIELD AVENUE
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JURIS NO. 32250
TELEPHONE: 203-336-4421
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CERTIFICATION

This is to certify that a copy of the foregoing has been electronically served this 16th day of June, 2017 to all counsel of record, to wit:

On behalf of Center for Women's Health, P.C.
David J. Robertson, Esq.
Heidell, Pittoni, Murphy & Bach, LLP
855 Main Street, Suite 1100
Bridgeport, Connecticut 06604

On behalf of Reed Wang, L.Ac.
Mary Alice Moore Leonhardt, Esq.
Moore Leonhardt & Associates, LLC
67 Russ Street
Hartford, Connecticut 06106

On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
Paul D. Meade
Halloran & Sage, LLP
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103

/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

DOCKET NO: FST-CV-12-6013562S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	DECEMBER 14, 2017

PROPOSED JURY CHARGE

Pursuant to *Practice Book* § 16-20 et seq., the defendant, Center for Women's Health, P.C., respectfully submits the following request to charge the jury as follows:

1. Burden of Proof/ Preponderance of the Evidence:

The plaintiff has alleged in her complaint that the Center for Women's Health, through the actions of its servant, agent, apparent agent and / or employee Dr. Wang, was negligent and that his negligence caused Judith Kissel's injuries. The defendant has denied that Dr. Wang was its servant, agent, apparent agent and /or employee, and denied that Dr. Wang was negligent in his care and treatment of Ms. Kissel and denied that that Dr. Wang caused her alleged injuries.

Now, in a case such as this, the plaintiff has the burden of proving by a fair preponderance of the evidence (1) that the defendant was negligent and (2) this negligence proximately caused the plaintiff's claimed injuries and damages. Thus, Ms. Kissel has the burden of proving each essential element of the cause of action upon which she relies. I will review those elements with you in a moment.

The defendant Center for Women's Health does not have to present evidence to disprove the plaintiff's claim.

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Any finding of the defendant's liability must be based upon substantial evidence and not upon mere surmise, conjecture or sympathy.

A fair preponderance of the evidence means this: the plaintiff must prove her case by the better and weightier evidence. You will take all the evidence that is offered here, and consider the various circumstances that are involved; you will weigh them and balance them, and then if you find that the evidence fairly tips in favor of the plaintiff, she will have proved the particular issue you have before you. If, on the other hand, the evidence does not fairly tip in her favor, if the better and the weightier evidence does not seem to you to establish her position, then she has failed in her duty to prove to you the facts upon which she relies; and in case it happens that the evidence is evenly balanced or in equipoise so that you cannot say it inclines this way or that way, then upon the issue in question your decision must be for the defendant and the plaintiff can have no recovery, because it is for the plaintiff to prove it and not for the defendant to disprove it.

The plaintiff is bound by her evidence to remove the cause from the realm of speculation and to establish facts affording a logical basis for any inferences that she daims.

In civil actions such as the one here presented, the plaintiff's burden of proving all material elements of her case by a fair preponderance of the evidence does not change, but rests upon the plaintiff throughout the course of the trial. Thus, where the plaintiff fails to make out a prima facie case, the defendant is not obligated to produce any evidence in support of their own case. In such a situation, the defendant is entitled to rely upon the insufficiencies of the plaintiff's case.

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If the plaintiff does no more than set up a possibility that the defendant's actions may have resulted in harm to the plaintiff, she has not established her claim by a fair preponderance of the evidence. Causation must be removed from the realm of speculation

The plaintiff, if she is to prevail at all, must prevail because of the strength of her own case. She cannot prevail by reason of weakness of the defendant's case. I repeat the burden of proof in this proceeding, as in other actions of this sort, is upon the plaintiff to prove the material allegations of her complaint by a fair preponderance of the evidence.

Authority:

Mankert v. Elmatco Products, Inc., 84 Conn. App. 456-463-64, cert. denied. 271 Conn. 925 (2004); Gulycz v. Stop & Shop Co., 29 Conn. App. 519, 523, cert. denied. 224 Conn. 923 (1992); Donovan v. Conn. Company, 84 Conn. 531, 535 (1911); Braithwaite v. Lee, 125 Conn. 10, 14 (1938); Dunn v. Santamauro, 119 Conn. 307, 309 (1934); Thaw v. Fairfield, 132 Conn. 173, 179 (1945); Darrow v. Fleischer, 117 Conn. 518 (1933); and

Connecticut Civil Jury Instructions § 2.6-1.

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2. Hypothetical Questions:

Sometimes an expert provides testimony that is not as to facts which he has firsthand knowledge, but as to his opinion based upon his expertise and upon facts which he was asked to assume by way of a hypothetical question. A hypothetical question is one in which the witness is asked to assume that certain facts are true and to give an opinion based on those assumptions. An expert witness may state an opinion in response to a hypothetical question, and the experts have done so in this case.

The value of the opinion given by an expert in response to a hypothetical question depends on the relevance, validity and completeness of the facts he/she was asked to assume. The weight that you give to the opinion of an expert will depend on whether you find that the facts assumed were proven and whether the facts relied on in reaching the opinion were complete or whether material facts were omitted or not considered. Like all other evidence, an expert's answer to a hypothetical question may be accepted or rejected, in whole or in part, according to your best judgment.

You as the jury are not obliged to accept the ultimate opinion of an expert witness. If for example, you do not find the expert witness credible, you should reject his opinions regardless of whether you believe or disbelieve the subordinate facts on which the opinion is based.

And, you must reject the opinion of an expert to the extent that it is based on subordinate facts which you do not find proven.

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Authority:

Nash v. Hunt, 166 Conn. 417, 425-27 (1974); Floyd v. Fruit Industries, 144 Conn. 659, 666-67 (1957); Van Detti v. Parsons Bros., Inc., 146 Conn. 282, 286 (1959); Sibley v. Middlefield, 143 Conn. 10, 108 (1963); Graybill v. Plant, 138 Conn. 397, 402 (1951); and Connecticut Civil Jury Instructions § 2.5-4.

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3. **Medical Malpractice / Standard of Care:**

The plaintiff claims that she has been injured through the professional negligence of Dr. Wang. Negligence is the violation of a legal duty which one person owes to another.

In the present case we are concerned with the obligation imposed upon a certified acupuncturist. The duties imposed upon Dr. Wang and the manner in which he would be required to act is not matters which either you as a jury, or I as a judge, are qualified to pass upon. Thus, expert testimony is necessary to establish any want of care, skill or diligence on the part of Dr. Wang.

The legal duty that a heath care provider, such as Dr. Wang, owes a patient, such as Ms. Kissel, has been established by our legislature.

We have a statute which provides that "in any civil action to recover damages resulting from personal injury... in which it is alleged that such injury resulted from the negligence of a health care provider... the claimant shall have the burden of proving by a preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all the relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

Because the health care provider in this case, Dr. Reed Wang, has been certified by the appropriate American Acupuncture board as a specialist, a "similar health care provider: in this

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case is, according to our statute, "one who: 1) is trained and experienced in the same specialty; and 2) is certified by the appropriate American board in the same specialty."

In this case, Dr. Wang's specialty is acupuncture. The prevailing professional standard of care that applies to all of Dr. Wang's conduct in providing acupuncture services including utilization of the subject heat lamp is thus the level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent board certified acupuncturists. This standard applies to both diagnosis and treatment.

In order to establish liability, the plaintiff must through expert testimony prove by a fair preponderance of the evidence that Dr. Wang's conduct represented a breach of the prevailing professional standard of care, and that breach was the proximate cause of the plaintiff's alleged injuries.

The standard of care is the standard prevailing at the time of the treatment in question. The treatment in question occurred in 2010.

An acupuncturist such as Dr. Wang is held to the same prevailing professional standard of care applicable to acupuncturists across the nation. For this reason, the particular state in which an expert witness has practiced is unimportant. You should consider the testimony of both expert acupuncturists (Dr. Jennifer Brett and Simone Wan-Moran, L.Ac.) in light of their familiarity or lack of familiarity with the standard of care to which I have referred.

An acupuncturist does not guarantee a good result; a poor result is not, in itself, evidence of any wrongdoing by Dr. Wang. The question on which you must focus is whether the

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defendant has breached the prevailing professional standard of care. There is no duty upon an acupuncturist to go beyond the standard of care. The law does not expect from licensed acupuncturists the utmost degree of care or skill know or obtainable to the profession. The standard of care is not concerned with what may be the ideal care and treatment in a particular case. In fact, in the absence of evidence to the contrary, the law presumes from an acupuncturist's license to practice that he has not violated his duty to exercise the requisite skill and care applicable to acupuncturists in this case.

As I have already mentioned, the plaintiff has the burden of proving by a fair preponderance of the evidence that Dr. Wang's conduct represented a breach of the prevailing professional standard of care. Under our law, the plaintiff must prove this by expert testimony. More specifically, she must establish through expert testimony both what the standard of care is and she must establish through expert testimony, that the breach of that standard of care was the proximate cause of the injuries that she claims.

Thus, lay witnesses or even expert witnesses who are not board certified acupuncturists, i.e., engineers, cannot offer testimony concerning Dr. Wang's conformity to the standard of care during Ms. Kissel's treatment session including reference to Dr. Wang's use of the subject heat lamp.

Authority:

General Statutes § 52-184c;

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Jarmie v. Troncale, 306 Conn. 578, 587-88 (2012); Carrano v. Yale-New Haven Hospital, 279 Conn. 622, 659 n.31 (2006); and Boone v. William W. Backus Hospital, 272 Conn. 551, 573-75 (2005).

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4. **Proximate Cause:**

As I told you at the outset of this charge, the plaintiff has a two-fold burden of proof. She must first establish by a fair preponderance of the evidence that the defendant failed to exercise that care, skill and diligence ordinarily had and exercised by certified acupuncturists practicing in 2010. Secondly, the plaintiff must also prove a causal connection between the alleged malpractice, which she claims the evidence establishes, and her injuries. In other words, the plaintiff must establish that the alleged failure of the defendant to comply with the standard of care was the proximate cause of her injuries.

I have used the words, "proximate cause", so I will say to you that proximate cause is a direct cause. It is an act or failure to act followed in a natural sequence by a result, without the intervention of any other superseding cause. Where the sequence of events is unbroken by an intervening cause, an act or failure to act is the proximate cause of the result. Probably the best definition of proximate cause is that it is an act or failure to act that is a substantial factor in producing a result.

Thus, the plaintiff must prove that the defendant's negligence, which she claims the evidence establishes, was the proximate cause of her injuries and such proximate cause must be shown again by expert testimony.

If the plaintiff does no more than set up a possibility that the defendant's actions may have resulted in harm, she has not established her claim by a fair preponderance of the evidence. Causation must be removed from the realm of speculation.

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If the plaintiff should prove the defendant's negligence in the manner alleged but should fail to prove by a fair preponderance of the evidence that such negligence was a material or essential cause of Judith Kissel's injuries then the plaintiff would not be entitled to a verdict by your hands.

Authority:

Green v. Stone, 119 Conn. 300, 306 (1934); Ardoline v. Keegan, 140 Conn. 552, 556 (1954); Hurley v. Johnston, 143 Conn. 364, 366 (1956); Ooms v. Ooms, 164 Conn. 49, 51-52 (1972); Monroe v. Hartford St. Ry. Co., 76 Conn. 201, 207 (1903); Santini v. Levin, 110 Conn. 248, 252 (1929); Lombardi v. Wallad, 98 Conn. 510, 517 (1923); and Corey v. Phillips, 126 Conn. 246, 255 (1939).

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5. **Product Liability - Comparative Responsibility:**

The defendant Health Body World, a/k/a WABBO has raised a special defense that the harm suffered was caused by the professional negligence of Dr. Wang in his use of the subject heat lamp during Ms. Kissel's treatment session.

In order to establish Dr. Wang's liability towards the plaintiff, WABBO must prove by a fair preponderance of the evidence that Dr. Wang's conduct represented a breach of the prevailing professional standard of care.

The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all the relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

In this case, Dr. Wang's specialty is acupuncture. The prevailing professional standard of care that applies to all of Dr. Wang's conduct in providing acupuncture services including his utilization of the subject heat lamp is thus the level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent board certified acupuncturists. This standard applies to both diagnosis and treatment.

In order to establish Dr. Wang's liability, WABBO must prove by a fair preponderance of the evidence that Dr. Wang's conduct represented a breach of the prevailing professional standard of care that I have just described.

WABBO has the burden of proving by a fair preponderance of the evidence that Dr. Wang's conduct which caused plaintiff's injuries represented a breach of the prevailing

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professional standard of care. Under our law, WABBO must prove this by expert testimony. More specifically, WABBO must establish through expert testimony both what the standard of care is and it must establish through expert testimony, that Dr. Wang's breach of that standard of care was the proximate cause of the injuries that plaintiff claims.

Thus, lay witnesses or even expert witnesses who are not board certified acupuncturists, i.e., engineers, cannot offer testimony concerning Dr. Wang's conformity to the standard of care during Ms. Kissel's treatment session including reference to Dr. Wang's use of the subject heat lamp.

In determining the comparative responsibility of the parties for the plaintiff's alleged injuries, you must consider on a comparative basis, both the nature and the quality of each party's proven conduct. Factors for assigning percentages of responsibility to each party whose legal responsibility has been established include the nature of the party's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct, as well as the strength of the causal connection between the party's risk-creating conduct and the harm. The nature of a responsible party's risk-creating conduct included such things as how unreasonable the conduct was under the circumstances, in light of the extent to which it deviated from the legal standard applicable to it in this case; the circumstances surrounding the conduct; each party's abilities and disabilities; and each party's awareness, intent, or indifference with respect to the risks. The comparative strength of the causal connection and the harm depends on how attenuated the causal connection was, the timing of each person's conduct in causing the

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harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff. Your task, after considering the responsible parties' proven conduct in light of these factors, is to assign to each party a percentage representing his/ her/ its proportion of the combined responsibility of all parties for the plaintiff's proven injuries, with the total of such individual percentages of responsibility equaling 100%.

Authority:

General Statutes § 52-584c;

General Statutes § 52-572o;

Barry v. Quality Steel Products, Inc., 280 Conn. 1, 21 (2006) (prescribing the manner in which a jury should be instructed as to a party's negligence when it is pleaded as a basis for asserting the special defense of comparative responsibility); and

Restatement (Third) Torts § 17, Apportionment of Responsibility Between or Among Plaintiff, Sellers and Distributors of Defective Products and Others.

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6. **Agency:**

The plaintiff claims that the Center for Women's Health is liable because Dr. Wang is the defendant's agent. The common-law "agency" or "right of control" test is generally applied by the Connecticut courts to distinguish between employees and independent contractors. Under that test, "[o]ne is an employee of another when he renders a service for the other and when what he agrees to do, or is directed to do, is subject to the will of the other in the mode and manner in which the service is to be done and in the means to be employed in its accomplishment as well as in the result to be attained."

To find that Dr. Wang is in fact the defendant's agent you must find that three things have occurred between the Center for Women's Health and Dr. Wang.

First, the Center for Women's Health must have in some way communicated its intention to Dr. Wang that he would act for it in connection with the providing of acupuncture services.

Second, Dr. Wang must have agreed to act for the Center for Women's Health in connection with the undertaking; and

Third, the Center for Women's Health and Dr. Wang must have agreed or understood that the Center for Women's Health would be in control of the mode and manner in which Dr. Wang provided the acupuncture service and in the means to be employed in its accomplishment as well as in the result to be attained.

The controlling consideration in the determination whether the relationship of employer and employee exists or that of independent contractor exists is: Has the employer

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the general authority to direct what shall be done and when and how it shall be done—the right of general control of the work?

If you find that the plaintiff failed to prove any of the three elements by a preponderance of the evidence, then you must find that Dr. Wang was not the Center for Women's Health's agent and the Center for Women's Health cannot be liable to the plaintiff for Dr. Wang's actions.

Authority:

National Publishing Co., v. Hartford Fire Ins. Co., 287 Conn. 664, 677-78 (2008); and McLaughlin v. Chicken Delight, Inc., 164 Conn. 317, 322 (1973); Comm'n on Human Rights & Opportunities v. Echo Hose Ambulance, 156 Conn. App. 239, 248 (2015); Compassionate Care, Inc. v. Travelers Indemnity Co., 147 Conn. App. 380, 391 (2013).

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7. **Apparent Agency:**

The plaintiff claims that the Center for Women's Health is liable for her injuries because Dr. Wang is the defendant's apparent agent. To find that Dr. Wang is in fact the defendant's apparent agent you must find:

(1) the principal (Center for Women's Health) held the apparent agent or employee (Dr. Wang) out to the public as possessing the authority to engage in the conduct at issue (acupuncture services), or knowingly permitted the apparent agent or employee (Dr. Wang) to act as having such authority;

(2) the plaintiff knew of these acts by the principal (Center or Women's Health), and actually and reasonably believed that the agent or employee or apparent agent or employee (Dr. Wang) possessed the necessary authority; and

(3) the plaintiff detrimentally relied on the principal's (Center for Women's Health's) acts, i.e., the plaintiff would not have dealt with the tortfeasor (Dr. Wang) if the plaintiff had known that the tortfeasor (Dr. Wang) was not the principal's (Center for Women's Health) agent or employee.

If you find that the plaintiff failed to prove any of the three elements by a preponderance of the evidence, then you must find that Dr. Wang was not the Center for Women's Health's apparent agent and the Center for Women's Health cannot be liable to the plaintiff for Dr. Wang's actions.

Authority:

Cefaratti v. Aranow, 321 Conn. 593 (2016).

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8. **Damages:**

Now, unless you come to the conclusion that the defendant was negligent, and that such negligence was the proximate cause of Judith Kissel's injuries, you have no occasion whatsoever to consider the question of damages. I speak of damages only because there is law in connection therewith which I must give in the event that you get that far in your considerations. You are, therefore not to draw any inferences one way or another from the fact that I charge you on the issue of damages.

The rule of damages is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for all injuries and losses, past and future, which is proximately caused by the defendant's proven negligence.

In respect to the damages, as in respect to every other matter before you, you can award only such damages as are justified by the pleadings and the proof. It is incumbent upon the plaintiffs to satisfy you by a fair preponderance of the evidence as to the extent and nature of the injuries suffered as a result of this incident and the amount that they ought to receive as damages. It is not the defendants' burden to disprove the claimed injuries.

You must not speculate or guess as to the nature and extent of the injuries. You cannot award any damages for any injury which may only possibly have resulted from the incident. Damages can only be awarded for those injuries which the plaintiffs have proved, by a fair preponderance of the evidence, as having resulted from the incident with reasonable probability.

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Once the plaintiff has proven the nature and extent of their compensable injuries and losses, it becomes your job to determine what is fair, just and reasonable compensation for those injuries and losses. There is often no mathematical formula in making this determination. Instead, you must use human experience and apply sound common sense in determining the amount of your verdict.

The plaintiff must prove by a fair preponderance of the evidence that her claims for all physical pain and suffering, loss of the ability to engage in life's activities and permanent impairment or loss of function were proximately caused by the defendants' negligence.

The purpose of an award of damages is not to punish or penalize the defendants for their negligence but to compensate the plaintiffs for the resulting injuries and losses.

Authority:

Tuite v. Stop & Shop Co., 45 Conn.App. 305, 310-11 n.2 (1997);

Court (Povodator, J) June 28, 2017 transcript pp. 47-49.

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9. **Plaintiff Cannot Recover More Than Once For Same Loss:**

The plaintiff cannot recover more than once for the same loss, even if she prevails on two or more causes of action.

The rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for her just damages for the same injury. . . . Plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint tortfeasors. The possible rendition of multiple judgments does not, however, defeat the proposition that a litigant may recover just damages only once. Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments.

I have provided you with a verdict form, and I will go through it with you to make sure you understand where there is a potential for the plaintiff to recover more than once for the same loss. <Explain verdict form>.

Authority:

Haynes v. Yale New Haven Hosp., 243 Conn. 17 (1997); Gionfriddo v. Gartenhaus Café, 211 Conn. 67, 71-73 (1989).

Evidence:

Ms. Kissel's damage claims are quoted verbatim in the Negligence case against Dr. Wang (#192.00) and in the Product's case towards WABBO #238.00.

Kissel claims of damages against Dr. Wang (Complaint 3-14-14 #192.00)

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6. As a result of the carelessness and negligence of the defendant, CENTER FOR WOMEN'S HEALTH P.C. and its servants, agents, apparent agents and/or employees, the plaintiff, JUDITH KISSEL, suffered the following serious, severe, painful and permanent injuries:

a. third degree burns to left foot and toes;

b. five day admission to Westchester Medical Center Burn Unit;

c. multiple skin graft surgeries;

d. multiple painful debriding procedures;

e. broken toe;

f. infection in bone of toe;

g. permanent deformity and scarring of left toes, foot and leg;

h. permanent pain in left foot; and

i. loss of sensation/numbness in left foot and toes.

7. As a result of the aforementioned injuries, the plaintiff, JUDITH KISSEL, has been permanently deprived of her full ability to carry on and enjoy life's activities.

8. As a further result of her injuries, the plaintiff, JUDITH KISSEL, has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

Kissel towards WABBO (Product's Liability) (2nd Amend Complaint 8-24-15 #238.00)

19. As a result of the lamp falling on her, the Plaintiff has suffered the following serious, severe, painful and permanent injuries:

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a. third-degree burns to left foot and toes,

b. five day admission to Westchester Medical Center Burn Unit,

c. multiple skin graft surgeries,

d. multiple painful debriding procedures,

e. broken toe,

f. infection in bone of toe,

g. permanent deformity and scarring of left toes, foot and leg,

h. permanent pain in left foot, and

i. loss of sensation/numbness in the left foot and toes.

20. As a result of her injuries, the Plaintiff has been permanently deprived of her full ability to carry on and enjoy life's activities.

21. As a result of her injuries, the Plaintiff has incurred and will continue to incur expenses for medical care and treatment, all to her financial loss.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/s/ 417457

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CERTIFICATION

This is to certify that on this 14th day of December 2017 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

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(203) 382-9700
JURIS NO. 103041

SUPERIOR COURT
STAMFORD - NORWALK
JUDICIAL DISTRICT
2017 DEC 21 P 4 53

FST CV12 6013562S : CONNECTICUT SUPERIOR COURT

JUDITH KISSEL : JUDICIAL DISTRICT OF STAMFORD/

VS. : NORWALK AT STAMFORD

CENTER FOR WOMEN'S HEALTH P.C. : December 19, 2017

JURY INTERROGATORIES

[These interrogatories should be answered before you reach a verdict. The foreperson should complete the answers in ink by circling or checking the correct answer, filling in numbers as required, and then signing and dating where indicated. (Instructions are inside brackets.) Just as you must be unanimous in reaching your verdict, you also must be unanimous in your answers to these interrogatories.]

1. Did the plaintiff prove, by a preponderance of the evidence, the standard of care applicable to the acupuncture treatment rendered by Dr. Reed Wang to his patient, Judith Kissel, on April 22, 2010?

✓ YES _____ NO _____

[If the answer is "YES", go to interrogatory #2; if the answer is "NO", sign and date the defendant's verdict form for defendant Wang and defendant Center for Women's Health and then go to interrogatory #6.]

2. Did the plaintiff prove that defendant Wang's care and treatment of plaintiff on April 22, 2010, constituted a breach of the requisite standard of care for an acupuncturist treating a patient such as plaintiff, under the circumstances then existing?

✓ YES _____ NO _____

[If the answer is "YES", go to interrogatory #3; if the answer is "NO", sign and date the defendant's verdict form for defendant Wang and defendant Center for Women's Health and then go to interrogatory #6.]

3. Did plaintiff prove that defendant's breach of the applicable standard of care proximately caused some or all of the injuries she claimed?

✓	
YES	NO

[If the answer is "YES", go to interrogatory #4; if the answer is "NO", sign and date the defendant's verdict form for defendant Wang and defendant Center for Women's Health and then go to interrogatory #6.]

4. Did defendant Wang prove that the plaintiff's own negligence, as alleged by the defendant in his special defense, was also a proximate cause of the plaintiff's injuries?

	✓
YES	NO

[If the answer is "YES", go to interrogatory #5; if the answer is "NO," go to interrogatory #6]

5. The parties proved that the respective negligence of the parties with respect to the events of April 22, 2010, is as follows (must add up to 100%):

Negligence of defendant Wang _____%

Negligence of plaintiff _____%

[If the percentage of negligence of the plaintiff exceeds the negligence of defendant Wang, sign and date the defendant's verdict form for defendant Wang and defendant Center for Women's Health and then go to interrogatory #6. If the percentage of negligence of the plaintiff does not exceed the negligence of defendant Wang, go to interrogatory #6.]

6. Did the plaintiff prove that defendant WABBO was engaged in the business of selling the lamp used by Dr. Wang in his treatment of the plaintiff?

✓ YES _____ NO

[If the answer is "YES", go to interrogatory #7.
If the answer is "NO," date and sign the defendant's verdict form for defendant WABBO and then:
if you already have filled out the defendant's verdict form for defendant Wang and defendant Center for Women's Health, report that you have reached a verdict; or
if you have not filled out the defendant's verdict form for defendants Wang and Center for Women's Health, go to interrogatory #13.]

7. Did the plaintiff prove that the lamp sold to Dr. Wang was in a defective condition unreasonably dangerous to the consumer or user?

✓ YES _____ NO _____

[If the answer is "YES", go to interrogatory #8.
If the answer is "NO," date and sign the defendant's verdict form for defendant WABBO and then:
if you already have filled out the defendant's verdict form for defendant

Wang and defendant Center for Women's Health, report that you have reached a verdict; or

if you have not filled out the defendant's verdict form for defendants Wang and Center for Women's Health, go to interrogatory #13.]

8. Did the plaintiff prove that the defective condition or conditions of the lamp caused the some or all of the injuries claimed by the plaintiff?

✓	
YES	NO

[If the answer is "YES", go to interrogatory #9.
If the answer is "NO," date and sign the defendant's verdict form for defendant WABBO and then:

if you already have filled out the defendant's verdict form for defendant Wang and defendant Center for Women's Health, report that you have reached a verdict; or

if you have not filled out the defendant's verdict form for defendants Wang and Center for Women's Health, go to interrogatory #13.]

9. Did the plaintiff prove that the defect or defects existed at the time of sale of the lamp to Dr. Wang?

✓	
YES	NO

[If the answer is "YES", go to interrogatory #10.
If the answer is "NO," date and sign the defendant's verdict form for defendant WABBO and then:

if you already have filled out the defendant's verdict form for defendant Wang and defendant Center for Women's Health, report that you have reached a verdict; or

if you have not filled out the defendant's verdict form for defendants Wang and Center for Women's Health, go to interrogatory #13.]

10. Did the plaintiff prove that the lamp was expected to and did reach Dr. Wang without substantial change in condition?

✓ YES _____ NO _____

[[If the answer is "YES", go to interrogatory #11.
If the answer is "NO," date and sign the defendant's verdict form for defendant WABBO and then:
if you already have filled out the defendant's verdict form for defendant Wang and defendant Center for Women's Health, report that you have reached a verdict; or
if you have not filled out the defendant's verdict form for defendants Wang and Center for Women's Health, go to interrogatory #13.]]

11. Did defendant WABBO prove, with respect to the plaintiff's product liability claim, that the negligent or other improper conduct of the plaintiff and/or Dr. Wang, as alleged by the defendant in its special defense, was also a proximate cause of the plaintiff's injuries?

✓ YES _____ NO _____

[If the answer is "YES", go to interrogatory #12; f the answer is "NO", go to interrogatory # 13.

12. For purposes of the product liability claim, the parties proved that the respective comparative responsibility of the parties with respect to the events of April 22, 2010, is as follows (must add up to 100%):

Responsibility of defendant WABBO 80 %

Responsibility of defendant Wang 20 %

Responsibility of plaintiff 0 %

13. Plaintiff proved that she sustained the following damages (pain, loss of function, loss of enjoyment of life's activities):

To date of trial $750,000

Future $250,000

Total damages $1,000,000

[You have now determined the total aggregate damages incurred by the plaintiff. The following two interrogatories are required by Connecticut law, in order to determine how liability for some or all of the damages is to be allocated. Under no circumstances would the plaintiff be entitled to recover more that the figure entered on the line for total damages.]

14. With respect to the malpractice claim, the plaintiff proved that she is entitled to damages of

$1,000,000

[If you have filled out the defendant's verdict form for defendants Wang and Center for Women's Health, skip this interrogatory. Multiply the total damages from interrogatory #13 by the percentage of negligence from interrogatory #5 that is attributable to defendant Wang (if that percentage was at least 50%) – enter that figure on the line immediately above and on the plaintiff's verdict form as to Dr. Wang and the Center for Women's Health.]

15. With respect to the product liability claim, the plaintiff proved that she is entitled to damages of

$ 1,000,000

[If you have not already filled out the defendant's verdict form for WABBO, multiply the total damages from interrogatory #13 by the total responsibility from interrogatory #12 that is attributable to the defendants, and enter the figure on the line immediately above and on the plaintiff's verdict form as to defendant WABBO. Skip this interrogatory if you already have filled out the defendant's verdict form for WABBO.

Verify that you have signed and dated two verdict forms (one pertaining to the claim against defendant Wang and defendant Center for Women's Health, and one pertaining to the claim against defendant WABBO), sign and date this form, and then report that you have reached a verdict.]

FOREPERSON
Julius Alexander

12/21/2017
DATE:

[Foreperson must sign in ink and date.]

SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT
2017 DEC 21 P 4:53

FSTCV126013562S : CONNECTICUT SUPERIOR COURT

JUDITH KISSEL : JUDICIAL DISTRICT OF STAMFORD/

VS. : NORWALK AT STAMFORD

CENTER FOR WOMEN'S HEALTH P.C. : December 19, 2017

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendants, REED WANG and CENTER FOR WOMEN'S HEALTH P.C., and awards monetary damages of

$ 1,000,000

Foreperson

12/21/2017
date

[Foreperson must sign in ink and date.]

Verdict accepted and recorded at 4:48pm.
12/21/17 (Povodator, J.)
Elizabeth Bonacci, TPC

295.00

SUPERIOR COURT
STAMFORD - NORWALK
JUDICIAL DISTRICT
2017 DEC 21 P 4:53

FSTCV126013562S	:	CONNECTICUT SUPERIOR COURT
JUDITH KISSEL	:	JUDICIAL DISTRICT OF STAMFORD/
VS.	:	NORWALK AT STAMFORD
CENTER FOR WOMEN'S HEALTH P.C.	:	December 19, 2017

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendant, HEALTH BODY WORLD SUPPLY INC., (WABBO), and awards monetary damages of

$ 1,000,000

Foreperson

12/21/2017
date

[Foreperson must sign in ink and date.]

Verdict accepted and recorded at 4:48pm.
12/21/17 (Povodator, J.)
Elizabeth Bonacci, TAC

DOCKET NO: FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	DECEMBER 22, 2017

MOTION TO SET ASIDE THE VERDICT

Pursuant to *Practice Book* § 16-35, the defendant Center for Women's Health, P.C., hereby moves to set aside the jury verdict rendered in favor of the plaintiff Judith Kissel (Docket # 395.00) for the reasons that the verdict is contrary to the law; it is against the evidence; and it is excessive.

The Court should set aside the verdict because based on the testimony and/ or exhibits adduced at trial the jury could not have reasonably and legally found: in plaintiff's favor on her claim against Reed Wang, L.Ac. for professional negligence; in plaintiff's favor on Defendant Wang's special defense that the plaintiff's own negligence was not a contributing and proximate cause of plaintiff's injuries; in favor of Defendant Health Body World Supply, Inc. a/k/a WABBO on its special defense of comparative responsibility (Conn. Gen. Stat. § 52-572o(c)), against Reed Wang, L.Ac. In addition, the jury could not have reasonably and legally found in favor of the plaintiff on her claim that she sustained damages (based on pain, loss of function, and loss of enjoyment of life's activities) in the amount of $1,000,000, and therefore, the verdict amount is excessive, unjust, unreasonable, and manifestly unfair.

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In support of this motion, the undersigned defendant relies on an accompanying memorandum of law.

WHEREFORE, for all of the foregoing reasons, this Motion should be granted and the verdict be set aside.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/s/ 417457

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CERTIFICATION

This is to certify that on this 22nd day of December 2017 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

Counsel for Plaintiff:
Sean McElligott, Esq.
Koskoff, Koskoff & Bieder, PC
350 Fairfield Avenue, 5th Floor
Bridgeport, CT 06604

Counsel for Reed Wang, L.Ac.:
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Moore Leonhardt & Associates, LLC
67 Russ Street
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Counsel for Health Body World:
Paul David Meade, Esq.
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One Goodwin Square
225 Asylum Street
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/s/ 417457

KEITH M. BLUMENSTOCK

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DOCKET NO: FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	FEBRUARY 1, 2018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SET ASIDE VERDICT

The defendant Center for Women's Health, hereby submits this memorandum of law in support of its Motion to Set Aside the Verdict (Docket # 399.00) for the reasons that the verdict is contrary to law; it is against the evidence; and it is excessive.[1]

I. FACTS AND PROCEDURAL HISTORY

Plaintiff, Judith Kissel, initiated this action by way of complaint dated March 30, 2012. The plaintiff's complaint in this matter alleges that Reed Wang, who "held himself out to the general public as a licensed acupuncturist duly licensed to practice in the State of Connecticut" was a servant agent, apparent agent and/or employee of Center for Women's Health, P.C. It is alleged that commencing on or about April 22, 2010 and thereafter, the defendants Center for Women's Health P.C. by and through Reed Wang undertook the care, treatment, diagnosing, monitoring and supervision of the plaintiff, Judith Kissel, for the purpose of providing acupuncture and related services. Plaintiff alleges inter-alia that Center for Women's Health P.C. and Reed Wang "failed to adequately and properly care for, treat, monitor, diagnose and supervise the plaintiff for her acupuncture treatment needs." Plaintiff

[1] At trial the defendant moved for a directed verdict based on the evidence presented by the plaintiff. The court reserved decision on that motion. The defendant is once again seeking to have the court address those issues.

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further alleges, inter-alia, that Center for Women's Health P.C. "did not promulgate and/or enforce rules, regulations, standards and protocols for the care and treatment of patients such as the plaintiff." Plaintiff claims that the care and treatment described in the complaint resulted in injuries and damages including burns to her left foot and toes, skin graft surgeries, debriding, broken toe, infection in the bone of her toe, permanent deformity and scarring of her left toes, foot, and leg, permanent pain in her left foot, loss of sensation/numbness in her left foot and toes, as well as a hospital admission, and medical expenses.

Thereafter, the plaintiff filed a product's liability action claiming identical injuries against Health Body World Supply, Inc., a/k/a The WABBO Company, which was the distributor of the subject heat lamp. See, Third Amended Third Party Complaint Docket # 381.00.

On June 23, 2014 the plaintiff filed an amended disclosure pursuant to Practice Book § 13-4(b)(2) of her treating physicians as expert witnesses (Docket # 208.00). Dr. Tae Ho Kim was disclosed therein as a treating physician from Westchester Medical Center who is expected to offer expert opinions in accordance with the fair notice given in the produced medical records and reports of care and treatment rendered to the plaintiff Judith Kissel.

Plaintiff disclosed a professional engineer Victor Popp, PE on the issues related to the "product's liability" action. See, Amended Expert Disclosure dated June 16, 2017 (Docket # 304.00).

On December 23, 2015, The Center for Women's Health disclosed Glenn Vallee, P.E. as an expert witness. See, Docket # 262.00. Dr. Vallee was disclosed to provide an opinion

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that to a reasonable degree of engineering probability, that once Dr. Wang placed the lamp head 18" above the plaintiff's foot and left the room, nothing Dr. Wang did or failed to do caused the lamp to fall onto the plaintiff.

On June 16, 2017 the plaintiff amended her disclosure for a standard of care expert Simone Wan Moran, L.Ac. (Docket # 303.00). Ms. Simone Wan Moran was disclosed to testify as to alleged breaches of the standard of care by Dr. Wang. The disclosure was limited in scope to standard of care and did not include opinions on "causation."

The case was tried to a jury from November 15, 2017 through December 19, 2018. On December 21, 2018 the jury returned a verdict in favor of the plaintiff in the amount of $1,000,000 (Docket # 395.00). The jury also returned a verdict in the products liability action holding the product seller 80% responsible for the same $1,000,000 in damages and finding Dr. Wang 20% responsible.

II. LAW & ARGUMENT

A. Legal Standard

A "verdict will be set aside and judgment directed only if [the court finds] that the jury could not reasonably and legally have reached their conclusion." (Internal quotation marks omitted.) Ham v. Greene, 248 Conn. 508, 519 (1999). "In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable." (Internal quotation marks omitted.) Gaudio v. Griffin Health Services Corp., 249 Conn. 523, 534 (1999).

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> The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a broad legal discretion . . . [Courts] must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, support the jury's verdict . . . In making this determination, [t]he evidence must be given the *most favorable* construction in support of the verdict of which it is reasonably capable . . . In other words, [i]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it. (Citations omitted; emphasis in original; internal quotation marks omitted.)

Jackson v. Water Pollution Control Authority, 278 Conn. 692, 702-704 (2006).

The trial court possesses the inherent power to set aside the jury's verdict if the court is of the opinion the verdict is against the law or the evidence. Howard v. MacDonald, 270 Conn. 111, 126 (2004).

"While it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven ... it may not resort to mere conjecture and speculation ... If the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury." Vona v Lerner, 72 Conn. App. 179, 186 (2002), citing, Sheriden v. Desmond, 25 Conn. App. 686, 691, 697 (1997).

B. Judith Kissel's Claim Fails as There has Been Absolutely no Expert Evidence Presented of a Causal Connection that Attributes Dr. Wang's Alleged Deviation from the Standard of Care to the Plaintiff's Alleged Injuries.

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This verdict as to the First Count of the Second Amended Complaint dated March 14, 2014 (Docket # 192.00), must be set aside as Judith Kissel's claim fails as there has been absolutely no expert evidence presented of a causal connection that attributes Dr. Wang's alleged deviation from the standard of care to the plaintiff's alleged injuries. Specifically, the plaintiff has not submitted any expert evidence such that the trier of fact may find that Dr. Wang's failure to perform an inspection of the subject lamp directly prior to Ms. Kissel's treatment session was the proximate cause and/ or substantial factor in causing Ms. Kissel's alleged injuries.

> To prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury." (Internal quotation marks omitted.) Gold v. Greenwich Hospital Assn., 262 Conn. 248, 254-55 (2002). Generally, the plaintiff must present expert testimony in support of a medical malpractice claim because the requirements for proper medical diagnosis and treatment are not within the common knowledge of laypersons. See, e.g., Doe v. Yale University, 252 Conn. 641, 686-87 (2000); Levett v. Etkind, 158 Conn. 567, 573-74 (1969).

Boone v. William Backus Hosp., 272 Conn. 551, 567 (2005).

One of the unique aspects of this case is that the plaintiff failed to ever remove from the realm of speculation how the lamp actually came into contact with her foot. All that was ever presented in the plaintiff's case in chief was speculation on what had occurred. Given that persistent unknown fact, it was improper to permit the jury to attribute the cause to some defect in the lamp that Dr. Wang should have discovered, when there was no evidence that a defect existed. The plaintiff's case was always one premised on speculation at multiple levels and therefore never should never have been submitted to the jury. The defendant believes that

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it should prevail on the basis of the lack of expert testimony on causation set forth below; however the causation chain is actually broken more fundamentally on the failure to remove from the realm of speculation what actually occurred in the room to cause the lamp to contact the plaintiff's foot.

1. Plaintiff's Establishment of the Standard of Care.

Simone Wan Moran, L.Ac. was plaintiff's lone expert witness qualified under Conn. Gen. Stat. § 52-183c as a similar health care provider to offer standard of care testimony.

Ms. Moran testified that with respect to heat lamps, the standard of care required:

> A: You need to check the tension for the articulating arm and then make sure when it moves- or move it to check if it has the propensity to fall. In between every patient.

Trial Trans. Dec. 12, 2017, pp. 105-106. (Attached as Exhibit A).

Her testimony continued that a lamp inspection should occur between each patient:

> Q: [What does] the standard of care require with respect to pre-use testing of CQ-36 style lamp in practice?
>
> A: To assess it between every patient.

Trial Trans. Dec. 12, 2017, p. 133. (Exhibit A).

Lastly, Ms. Wan testified what was required if the lamp failed an inspection.

> Q: In the situation where [acupuncturist] do tests and the lamp fails the test, what does the standard of care require?

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A: To not use it on a patient to take it out of service so that it would not cause harm.

Trial Trans. Dec. 12, 2107, p. 107. (Exhibit A).

Q: If Dr. Wang had done a test any time prior to plaintiff and the lamp failed, the standard of care required him to take it out of service?

A: Yes.

Trial Trans. Dec. 12, 2017, p. 132. (Exhibit A).

Noticeably absent from Ms. Wan Moran's testimony was what a lamp inspection performed by Dr. Wang immediately prior to Ms. Kissel's treatment session would have revealed, if anything; and if those "revelations" were significant to warrant taking the lamp out of service.

2. No Causal Connection Presented Between Dr. Wang's Deviation From The Standard of Care and the Claimed Injury.

A basic premise to any discussion of the issues presented by this motion, and defendant's oral motion for a directed verdict, is that expert testimony is needed to establish causation in a medical malpractice case. A necessary element in any such action is proof by the plaintiff that the medical provider's "act in departing from the standard of care caused the plaintiff's injury... No matter how negligent a party may have been, if his negligence bears no relation to the injury it is not actionable." Gordon v. Glass, 66 Conn.App. 852, 855-56 (2001).

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Additionally, in order to prevail in this medical malpractice claim, the plaintiff is required to establish that the defendant's negligent conduct was a cause in fact and the proximate cause of Ms. Kissel's injuries. See, e.g., Poulin v. Yasner, 64 Conn. App. 730, 735, cert. denied, 258 Conn. 911 (2001). "The test for cause in fact is would the injury have occurred were it not for [the defendant's] negligent . . . conduct . . . Proximate cause is defined as an actual cause that is a substantial factor in the resulting harm . . . . The substantial factor test, in truth, reflects the inquiry fundamental to all proximate cause questions; that is, whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence." (Citations omitted; internal quotation marks omitted.) Purzycki v. Fairfield, 244 Conn. 101, 113 (1998).

In order for legal causation to exist, both actual cause and proximate cause must be present. Coste v. Riverside Motors, Inc., 24 Conn. App. 109, 113 (1991). Actual cause requires evidence that the plaintiff's injury would not have occurred in the precise way that it did without the defendant's conduct. Id. Proximate cause is defined as an actual cause that is a substantial factor in the resulting harm. Doe v. Manheimer, 212 Conn. 748, 757 (1989). The "test" for proximate cause is whether the defendant's conduct was a "substantial factor" in producing the plaintiff's injury. Id., 758. This substantial factor test reflects the inquiry fundamental to all proximate cause questions, namely, "whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence. . . ." (Citations omitted; internal quotation marks omitted.) Id. The issue of proximate cause is ordinarily a question of fact for the trier of fact and becomes a question of law only when" 'the

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mind of a fair and reasonable person could reach only one conclusion . . . .' " Coste v. Riverside Motors, Inc., 24 Conn.App. 109, 114 (1991).

Here, the defendant argues that the plaintiff did not introduce sufficient evidence to allow the jury to find proximate cause because she did not present sufficient expert opinion evidence to show that Dr. Wang's actions were the legal cause and /or a substantial factor in causing of Ms. Kissel's injuries.

i. Simone Wan Moran, L.Ac.

Ms. Moran was not disclosed on the issue of causation. See, Amended Expert Witness Disclosure dated June 16, 2017 (Docket # 303.00). There was no testimony elicited at trial from Ms. Moran that Dr. Wang's failure to perform an examination directly before Ms. Kissel's treatment session would have uncovered a "propensity for the lamp to fall" and that failure caused the plaintiff's injuries. Moreover, plaintiff's counsel stipulated that Ms. Moran would not be presenting any testimony on the issue of "causation." Trial testimony pp. 164 dated December 12, 2017 ("Just very, very briefly, your Honor. Firstly, I don't intend to elicit a causation opinion from this witness because it's not within this witness's expertise as counsel just pointed out to me. It's not disclosed and added to the standard of care.) (Exhibit A).

ii. Victor Popp, P.E.

With respect to the medical malpractice action, Victor Popp, P.E. was not disclosed on the issue of causation. See, Amended Expert Disclosure dated June 16, 2016 (Docket # 304.00). At trial, his testimony was elicited that to a reasonable degree of engineering

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probability, Dr. Wang's actions after setting the lamp 18" above the plaintiff's feet and leaving the room did nothing to cause the lamp to fall onto the plaintiff. The following colloquy occurred:

Q: And you-- there was nothing after Dr. Wang set the lamp at 18 inches above Ms. Kissel's toe, finished his placement of the needles, and left the room, there was nothing he did that would have caused the lamp to fall, right?

A: I don't know. If he was outside the room--

Q: Right. Outside the room.

A. Presumably not.

Trial Trans. Dec. 1, 2017, p. 203. (Exhibit B).

iii. Glenn Vallee, P.E.

Dr. Vallee was disclosed in the "medical malpractice" action to provide an opinion that to a reasonable degree of engineering probability, that once Dr. Wang placed the lamp head 18" above the plaintiff's foot and left the room, nothing Dr. Wang did or failed to do caused the lamp to fall onto the plaintiff. At trial the following colloquy occurred:

Q: Now your opinion is, with a substantial degree of certainty, that the lamp did not lower or move on its own during Ms. Kissel's treatment on April 22nd, 2010. Is that right?

A: That's right.

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Trial Trans. Dec. 7, 2017, pp. 65-66. (Exhibit C).

Q: Mr. Vallee, would you agree that after Dr. Wang set up the lamp at 18 inches above Ms. Kissel's toe, finished his placement of the needles, and left the room, there was nothing physical that you know of, based upon your inspection and review that caused the lamp to fall on her toe?

.....

Q: -- you know of that Dr. Wang did from outside the room or after he left the room that caused the lamp to fall on her toe?

Trial Trans. Dec. 7, 2017, p. 88. (Exhibit C).

Q: Can you answer that question, sir?

A: Yes. I'm not sure exactly what he did after he left the room but based on the testimony and evidence that I saw, I didn't see anything that he did that would have caused the lamp to move.

Q: To fall?

A: To fall. Yes.

Trial Trans. Dec. 7, 2017, p. 89. (Exhibit C).

iv. Tae Ho Kim, M.D.

Dr. Kim is a board certified plastic surgeon who admitted Ms. Kissel to the Westchester Medical Center's burn unit. His expert disclosure was limited to opinions in accordance with the fair notice given in the produced medical records and reports of care and treatment rendered to the plaintiff Judith Kissel. Nothing within the Westchester Medical

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Center records suggested that Dr. Wang's alleged deviation from the standard of care (as testified by Simone Wan Moran, L.Ac.) was the proximate cause of the plaintiff's injury. Similarly, Dr. Kim's trial testimony lacked reference to the legal cause of plaintiff's injury.

Expert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person. Aspiazu v. Orgera, 205 Conn. 623, 631 (1987); Collette v. Collette, 177 Conn. 465, 471 (1979). Expert medical opinion evidence is generally required in all cases involving professional competence and malpractice. Grody v. Tulin, 170 Conn. 443, 449 (1976); Campbell v. Pommier, 5 Conn. App. 29, 32 (1985).

Where expert medical opinion evidence is required in a medical malpractice case, "the causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by opinion based upon a hypothetical question." Boland v. Vanderbilt, 140 Conn. 520, 525 (1953). The expert opinion cannot rest on surmise or conjecture because the trier of fact must determine probable cause, not possible cause. Aspiazu v. Orgera, supra, 632; Hammer v. Mount Sinai Hospital, 25 Conn. App. 702, 718, cert. denied, 220 Conn. 933 (1991). In other words, the expert opinion must be based on reasonable probabilities. Struckman v. Burns, 205 Conn. 542, 555 (1987). An expert, however, need not use "talismanic words" to show reasonable probability. Aspiazu v. Orgera, supra, 632. In other words, formulaic words are not essential when an expert renders an opinion as long as it is

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clear that the opinion of the expert is expressed in terms of probabilities. Struckman v. Burns, supra, 555.

Ms. Kissel's injuries alleged in the complaint include: "Third degree burns to left foot and toes; multiple skin graft surgeries; multiple painful debriding procedures; broken toe; infection of the bone of the toe; permanent deformity and scarring of the left toes; foot and leg; permanent pain in the left foot; and loss of sensation/ numbness in left foot and toes", are beyond the sphere of the common knowledge of the lay person. Second Amended Complaint ¶ 6(a), and (c) through (i). Dr. Kim testified that Ms. Kissel sustained burns of type: first degree; superficial second degree; deep second degree, and third degree. Trial Trans. Nov. 28, 2017, pp. 44-45. (Exhibit D). None of these types of injuries are within the ken of the average juror.

Moreover, Ms. Kissel was admitted to the Westchester Medical Center for wound care observation, surgical debridement and DVT prophylaxis. Trial Exhibit 4 (Bates # 0204). Likewise, wound care and surgical procedures are not within the ken of the average juror. Dr. Kim testified at length concerning the severity of plaintiff's injuries. He published to the jury Exhibit #34 (id only) as a demonstrative example of the layers within the skin of the human body and the classification of burns. In addition, Dr. Kim published to the jury Exhibit #35 (id only) as a demonstrative example of nerve structures in the skin as following along the vascular structures. Dr. Kim's testimony was used to educate the jury about the skin, its function in the human body and about burns and their classifications. Dr. Kim

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learned about the classifications of burns while training as a plastic surgeon. See, Trial Trans. Nov. 28, 2017, pp. 41-42. (Exhibit D).

The complexity of layers of skin, the nerve structures and the impact of varying degrees of burns can be further illustrated from Dr. Kim's testimony:

Q: Where do nerves travel and how do they end up providing a signal to the brain?

A: It's a very complicated network, so nerves whenever there is a stimulus then there's a coordination of the nerve firing and then getting processed up to the spinal cord and the brain.

Trial Trans. Nov. 28, 2017, p. 40. (Exhibit D).

Dr. Kim's testimony was necessary because "the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." Aspiazu v. Orgera, 205 Conn. 623, 631 (1987).

While it is generally known that if a hot object contacts skin it may cause a burn[2]; there was no expert testimony that Dr. Wang's deviation from the standard of care in any way caused the subject injuries. Because Ms. Kissel's injuries are not within the ken of the average juror, expert testimony was required to prove a causal connection between Dr. Wang's deviation from the standard of care and the subject injuries.

Based on the review of the evidence above it is absolutely clear that he plaintiff failed to prove by expert testimony that a breach of the standard of care caused the plaintiff's

[2] Dr. Kim testified "Contact time and temperature has a significant positive correlation." Trial transcript November 28, 2017, pp. 47-48. (Exhibit D).

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injuries. The crucial question as to what an additional inspection by Dr. Wang of the subject lamp between each patient on the day of the incident would have revealed was never answered. Assuming for the sake of argument that these additional inspections would have revealed nothing new about the presence of a defect in the lamp, then how could Dr. Wang's negligence in failing to do these additional inspections have been a cause of the injury? The only way to conclude that they would have revealed a defect is to resort to conjecture. While the plaintiff would like the law to permit the jury to use guesswork or conjecture that some defect would have been revealed to Dr. Wang with these additional inspections that is clearly inappropriate under Connecticut law. The plaintiff has the burden of proving that there was an unbroken sequence of events that tied the injury to the allegedly negligent conduct. This cannot be based on conjecture or surmise. Paige v. St. Andrews Roman Catholic Church Corp., 250 Conn. 14, 25-26 (1999). Here, as this is a medical malpractice case, causation must actually be proven by expert testimony. Milliun v. New Milford Hospital, 310 Conn. 711, 725 (2013). The plaintiff presented evidence of step 1, the need, according to the expert, of additional inspections, but then the ball dropped on proving step 2, which would be identifying what those inspections would have shown that would have changed the outcome. The fundamental problem with the plaintiff's case is that no one knows how the lamp came into contact with her foot. Furthermore, no one ever found that an observable defect in the lamp was present on the date of the incident. Looking to general negligence cases, the burden of proof must be met by the presentation of sufficient evidence to remove the case from the realm of conjecture. See for example Schweiger v. Amica Mutual Ins. Co., 110 Conn. App.

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736 (2008). In Schweiger proof that there was a rear end collision was insufficient to show that the collision was caused by the negligence of the driver who made contact with the plaintiff's car from behind. The same applies here, the plaintiff has to remove the case from the realm of speculation. The evidence presented here failed to do so.

There was no question that the evidence showed that Dr. Wang examined and tested the lamp before seeing patients that day. The plaintiff's new theory, developed after her expert's deposition, and presumably during the course of trial when it became clear that there was no ability to tighten screws/ bolts on this particular model of CQ-36 TDP lamp, was that subsequent inspections of the lamp were required between patients. While this was a creative attempt to get around the problem that arose with Ms. Wan Moran's original opinion, it nonetheless falls short in proving this medical negligence claim because there was absolutely no evidence of how these additional inspections would have revealed a defect in the lamp that would have led to it being taken out of service. In fact, the evidence was to the contrary as: 1) the lamp did not fail when used in treating any of the prior patients and 2) after Ms. Kissel was burned no expert engineer was able to identify a defect in the lamp that would have caused it to suddenly fail. Contrast this new inspection theory with Ms. Wan Moran's original theory that Dr. Wang was required to tighten the lamp between patients to avoid what had occurred here. With the tightening theory it is clear that if the jury found that that particular precaution had not been undertaken, then it follows that the failure to do so could have caused the lamp to fall because it had not been tightened.

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The plaintiff has completely failed to prove causation through expert testimony. As a result, the court must set aside the verdict as to Dr. Wang and enter a verdict for the defendant in his case.

C. The Charge Given was not a Correct Statement of the Law.

Based on the issue in the section above, it is the defendant's position that the charge was in error since the jury should not have been permitted to determine causation without expert testimony. The Court charged as follows:

> Finally, a plaintiff must establish that the breach of that standard of care was the proximate cause of the injuries that she claims - generally that requires expert testimony *unless the causative link is sufficiently obvious to a lay person that expert testimony is not required.*

Later in the charge it stated:

> In order to recover from a defendant, plaintiff must prove that defendant's conduct was, in fact, a proximate cause of the injuries sustained by the plaintiff. With respect to the malpractice claim, the proof generally must be based on expert testimony, *unless the causative link can be discerned by a layperson without the need of expert assistance.*

First, it is the defendant's position that the charge itself is erroneous because it fails to require proof of causation by expert testimony. The facts here certainly did not permit the jury to speculate on their own that some defect was present in the lamp that Dr. Wang would have discovered had additional inspections been performed between patient treatment sessions. That would never be appropriate.

Second, the charge leaves the issue of expert testimony open ended as to what the jury should do if in fact, as laypersons, they were not able to discern the causative link between the

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defendant's deviation from the standard of care and the plaintiff's alleged injuries. Initially, the language requires expert testimony, but then it leaves open the option for the jury to simply reject that requirement. Here, the court should have required proof by expert testimony. The fact that the charge essentially leaves it up to the jury to decide whether or not it would require expert testimony is a problem. Obviously, they did not have expert testimony on causation, but this leaves to the jury to decide whether it is required. That is not a decision the jury is permitted to make.

Based upon these errors in the charge, the verdict should be set aside.

D. Reed Wang L.Ac.'s Duty of Care Toward Ms. Kissel Must be Determined in Light of the Standard of Care Applicable to Licensed Acupuncturists Whether She Seeks Recovery from Him Under a Theory of Medical Negligence or by Comparative Responsibility Pursuant to the CPLA.

The seminal issue before the Court is whether the statutory requisite of Conn. Gen. Stat. § 52-184c that, "the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care[3] " applies with equal force to the jury's consideration of the nature and quality of Dr. Wang's conduct as it pertains to the evaluation and assessment of comparative responsibility for Ms. Kissel's alleged injuries under the Connecticut Product's Liability Act (CPLA). See, Conn. Gen. Stat. § 52-572o(c).

[3] The "prevailing professional standard of care" for a given health care provider is defined by statute as: "that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers." Conn. Gen. Stat. § 52-184c(a).

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The Center submits that, as a party to a product's liability action, the jury should have been tasked to consider both the nature and quality of Dr. Wang's conduct which proximately caused the plaintiff's injury; but the jury must have done so from the perspective of whether Dr. Wang deviated from the prevailing standard of care, and whether that deviation was the proximate cause of the alleged injury. Conn. Gen. Stat. §§ 52-184c and 52-572o(c).

In order to establish Dr. Wang's liability to the plaintiff, the jury should have been charged that WABBO must prove by a fair preponderance of the evidence that Dr. Wang's conduct represented a breach of the prevailing professional standard of care.

The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all the relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

Conn. Gen. Stat. § 52-184c(a), provides,

> In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, *in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider*. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding

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> circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.
> (Emphasis added).

In this case, Dr. Wang's specialty is acupuncture. The prevailing professional standard of care that applies to all of Dr. Wang's conduct in providing acupuncture services, including his utilization of the subject heat lamp, is thus the level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent board certified acupuncturists. This standard applies to both diagnosis and treatment. In no part is this is an "ordinary negligence" case with respect to Dr. Wang.

The court charged the jury in the products liability portion of the charge, in part, as follows:

> In particular, defendant WABBO claims that Dr. Wang used the subject heat lamp in a manner inconsistent with the normal use and application of the product as reasonably anticipated by the manufacturer or seller; failed to follow and undertake the precautions a reasonably careful user of the lamp would ordinarily take under the circumstances then and there existing, including, but not limited to, not placing the head of the heat lamp in extremely close proximity to the plaintiffs foot; failed to monitor or attend to the first-party plaintiff during the course of the acupuncture procedure and failed to promptly respond to the situation; failed to follow the ordinary and customary standards of the acupuncture profession with regard to the use of the subject heat lamp.
>
> Again, the defendant need not prove all of these allegations, but must prove at least one, and must also prove that such claimed negligence was a proximate cause of the plaintiff's injuries for the conduct of Dr. Wang to be considered in connection with the product liability aspects of this case.
>
> If the defendant persuades you by a fair preponderance of the evidence that the plaintiff and/or Dr. Wang engaged in conduct that proximately caused her

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alleged injuries, you must next determine the comparative responsibility of all parties for those injuries.

The undersigned defendant's position at all time was that the claims by WABBO could not change the character of Dr. Wang's duty. His duty was to meet the acupuncture standard of care. The way this charge read, all that WABBO was required to prove was general negligence. By allowing the case to be proven against Dr. Wang if it was found that he, "used the subject heat lamp in a manner inconsistent with the normal use and application of the product as reasonably anticipated by the manufacturer or seller" the court improperly turned Dr. Wang into an ordinary user of the product therefore allowing the jury to hold Dr. Wang liable under a general negligence standard. In Barry v. Quality Steel Products, 263 Conn. 424 (2003) the Supreme Court stated, "(U)nder the approach we adopt herein, the question to be answered by the fact finder is whether the various actors' allegedly negligent conduct was a cause in fact and a proximate cause of the plaintiff's injury in light of all the relevant circumstances. If found to be both, each actor will be liable for his or her proportionate share of the plaintiff's damages." Barry at 446. So here, the question was whether Dr. Wang was negligent in carrying out his duties as an acupuncturist. That is the only "relevant circumstance". It was an error of law to charge the jury that it could consider something other than professional negligence in evaluating Dr. Wang's care. Given the interconnected cases, this error likely infected both the products case and the professional negligence case and how the jury was charged with evaluating them in tandem. This was

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unfair to Dr. Wang, since his only obligation was to his patient under a professional standard of care.

The Center submits that at all times relevant to the "product liability action" Dr. Wang was rendering professional acupuncture services to his patient and therefore his duty of care toward Ms. Kissel had to have been determined in light of the standard of care applicable to licensed acupuncturists. It was wholly improper to allow the jury to have assessed Dr. Wang's liability under two varying standards for plaintiff's alleged injuries resulting from his singular exercise of medical judgment in the application of the subject lamp. Allowing the jury to consider the reasonable person standard with respect to Dr. Wang's use/ misuse of the subject heat lamp for comparative responsibility purposes was improper.

If any party wished to criticize Dr. Wang's handling of the lamp in the context of providing acupuncture services, they had to do so from the lips of an expert in the field of acupuncture. There simply is no circumstance to all Dr. Wang to be judged twice by the jury under two different standards for his singular use of the subject heat lamp during acupuncture treatment.

Thus, in accordance with Barry under the circumstances of this case the Court was obligated to hold all claimants to proving their cases as required by law. Allowing the jury to consider any evidence of "ordinary negligence" against Dr. Wang as it pertains to his rendition of acupuncture services as well as the failure to charge the jury appropriately that only the professional standard applied violated the statutory requisite of Conn. Gen. Stat. § 52-184c.

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Dr. Wang certainly was not a "regular user of the lamp." He was at all times acting as a licensed professional acupuncturist. It was against the legal authority of Gen. Stat. § 52-184c to have the jury charge permit the jury to assess Dr. Wang's rendition of professional acupuncture services twice, once under the professional standard of care, and secondarily under the "general negligence" standard. Dr. Wang was utilizing the lamp in a single capacity; that of an acupuncturist rendering acupuncture care. There is no way to assess his comparative liability toward the plaintiff without resorting to an analysis of whether his actions deviated from the standard of care.

By allowing the jury to evaluate Dr. Wang's acts under the "general negligence" standard was an incorrect application of the law because it fails to address the statutory requisites of Conn. Gen. Stat. § 52-184c in determining a health care professional's liability arising from the rendition of medical services.

E. The Verdicts Are Inconsistent And Should Be Reduced Or Set Aside

The jury here was presented with one set of damages and two separate cases. As to the damages the jury reached a verdict of $1,000,000. As to the case against Dr. Wang and the Center the jury found liability to be 100%. As to WABBO and the its claim concerning Dr. Wang's responsibility for the loss it came back with 80% to WABBO and 20% to Dr. Wang. On the face of the two verdicts it is impossible for Dr. Wang to be both 100% responsible and 20% responsible. Under the facts presented, the jury only had one opportunity to split the liability between the actors and that was in the products case. Despite the legal set up in this case that limited the jury's options, the court, as a matter of equity

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should make the verdicts consistent by reducing the verdict in the negligence case by $800,000. This would lead to a just result as it is impossible to justify an award of the exact same damages as both a 100% award and a 20% award. Reading the verdict forms it is clear what the jury's intention was as to how the damage should be split in the case where they were permitted to do so. While not exactly the same as this issue the superior court case of Reyes v. Shuska, 212 WL 3641643 (Conn. Super. Ct. 2012) is instructive. In that case the court reduced a verdict in a negligence case to allow it to be consistent with another finding of a proportionate share of liability. While the legal issues in the two cases tried here are admittedly different, based on equity and to avoid inconsistent verdicts, the court should reduce the verdict in the negligence case by $800,000 since Dr. Wang cannot be both 100% and then 20% liable for the same damages.[4]

III. CONCLUSION

The Court must set aside the verdict because the plaintiff has not submitted any expert evidence such that the trier of fact may find that Dr. Wang's failure to perform an inspection of the subject lamp directly prior to Ms. Kissel's treatment session was the proximate cause and/ or substantial factor in causing her alleged injuries.

For the reasons discussed above, the verdict must be set aside because the jury was not instructed that if the plaintiff is to recover against Dr. Wang, under either a theory of

[4] Conversely one could look at the outcome and say, that WABBO was separately determined to be 80% responsible for the same set of damages attributed to Dr. Wang at 100%. The jury never would have reached such a conclusion had it been given an alternative. The result here is illogical and inconsistent as it currently stands.

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professional negligence or as a party to a product's liability action, Dr. Wang's duty of care, and thus the nature and quality of his conduct must be considered and assessed as it pertains to the prevailing professional standard of care for licenses acupuncturists with respect to his use/ misuse of the subject lamp. The two verdicts, as they currently stand, are also inconsistent and therefore the verdict in the negligence case should be reduced to make it consistent as to the percentage of responsibility Dr. Wang was assessed for the single set of damages found as to all defendants. As a result it should be reduced to $200,000.

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CERTIFICATION

This is to certify that on this 1st day of February 2018 a copy of the foregoing was emailed and mailed, postage prepaid to all counsel and pro-se parties of record to:

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EXHIBIT A

1 when I would move it I would see the articulating arms start
2 to lower so I would have to tighten the screws to make sure
3 that the tension was good and it wouldn't fall.
4 Q Okay. And when did you do that with respect -- in
5 relationship to each patient treatment?
6 A I would do it before every patient treatment
7 Q Okay. So before every patient treatment, you would
8 tighten the screws and lock the lamp in place?
9 A Yes. I would check the lamp and if I felt like it
10 had the propensity to fall, I would tighten the screws.
11 Q Okay. And that checking, was that something you did
12 before every patient?
13 A Before every patient, before every time I used it.
14 Sometimes if I even moved the lamp I would check it again.
15 Q And I want -- so the first step in terms of your
16 practice when using the CQ-36 lamp was to check the tension
17 in the device, correct?
18 A Yeah. Uh-huh.
19 Q All right.
20 THE COURT: That's a yes?
21 MS. MORAN: Yes.
22 **BY ATTY. MCELLIGOTT:**
23 Q And -- all right. So I want you to assume that Dr.
24 Wang testified that he also had a routine for inspecting and

1 thing about tightening screws because that had a different
2 function on this lamp than your lamp. Okay.
3 A Okay.
4 Q So just focusing on the first two. He testified that
5 would check the tension in the device by moving the lamp
6 heads up and down and that he would gently shake the lamp to
7 see if the lamp heads moved, okay?
8 A Okay.
9 Q Is that the type of test that the standard of care
10 requires in using this type of lamp before every patient
11 treatment?
12 ATTY. ROBERTSON: I'm just going to object.
13 "This type of lamp", we're talking apples and oranges
14 between the two kinds of lamps.
15 ATTY. MOORE LEONHARDT: I join in the objection,
16 Your Honor.
17 MS. MORAN: Can you --
18 ATTY. MCELLIGOTT: I've established what a CQ-36
19 style of lamp is so I can incorporate CQ-36 style
20 into the question, if (indiscernible).
21 THE COURT: All right.
22 ATTY. MCELLIGOTT: Okay.
23 **BY ATTY. MCELLIGOTT:**
24 Q So with respect to the testing of the device that's

1 gently shake the device to see if the heads moved?
2 ATTY. ROBERTSON: I still object. I do not
3 believe that defines the lamp that we're talking
4 about based on all the evidence in this case.
5 ATTY. MOORE LEONHARDT: Join in the objection,
6 Your Honor. And the lamp has already been
7 distinguished as different so the underlying
8 foundation is improper.
9 THE COURT: All right. The objection is
10 overruled. Can you answer the question?
11 A Yes. With this style lamp you need to check the
12 tension for the articulating arm and then make sure when it
13 moves -- or move it to check if it has the propensity to
14 fall. In between every patient.
15 **BY ATTY. MCELLIGOTT:**
16 Q Okay. And so the first step is to test it in the way
17 you just described, right?
18 A Yeah. Either one first.
19 Q Okay. And for the lamp that you have -- well, first
20 of all after you check it, there are one of two
21 possibilities; either it's loose or it's fine. Is that
22 true?
23 ATTY. ROBERTSON: I'm just going to object.
24 Leading.

1 Q Okay. All right. And with the lamp that you had, if
2 it lowered, you would lock it down by tightening, right?
3 A Yes. I would tighten like every screw.
4 Q Okay. And I want you just to know you can't do that
5 with this lamp that two mechanical engineers have studied,
6 you can't do that.
7 A Okay.
8 Q So in the situation where you do the tests and the
9 lamp fails the test and there's no way to adjust it to get
10 it to pass the test, what does the standard of care require
11 when the test of the device fails?
12 A To not use it on a patient, to take it out of service
13 so that it wouldn't cause harm.
14 Q Okay. And these lamps cost $92?
15 ATTY. ROBERTSON: I'm just going to object.
16 It's leading -- I don't know --
17 **BY ATTY. MCELLIGOTT:**
18 Q Do you know --
19 ATTY. ROBERTSON: In this case it might have.
20 THE COURT: I --
21 ATTY. MCELLIGOTT: Well, let me see. Can I see
22 Plaintiff's Exhibit 16.
23 (Pause)
24 THE COURT: All right. The Clerk is telling me

1 ATTY. MOORE LEONHARDT: Yes, Your Honor.
2 THE COURT: All right. Counsel, your next
3 question, please.
4 **DIRECT EXAMINATION BY ATTY. MCELLIGOTT (Continued):**
5 Q Ms. Wan Moran, if Dr. Wang had done a test on the
6 device at any time prior to using the device on Ms. Kissel
7 and the device failed the test, did the standard of care
8 require him to take it out of service at that time?
9 A Yes.
10 Q And why is that?
11 A So that if it had the propensity to fall it wouldn't
12 fall while -- during treatment.
13 Q And talk about what an acupuncturist has to do after
14 a test when there is evidence of a propensity, would you
15 agree with that?
16 A Yes.
17 Q Now I want to talk to you about when the test has to
18 be done on a CQ-36 style lamp, okay?
19 A Okay.
20 Q Dr. Wang testified that he did the test once at the
21 beginning of each day covering his four patients or three
22 patients for that day. Is that sufficient under the
23 standard of care?
24 A No, I don't believe so.

1 A I don't believe so.
2 Q Why not?
3 A Because these lamps, if you move them, they tend to
4 fall. And with time, they tend to fall. So from my
5 experience, even between patients, they would tend to fall.
6 ATTY. MEADE: Move to strike, Your Honor.
7 **BY ATTY. MCELLIGOTT:**
8 Q Let me see if I can ask it more specifically.
9 THE COURT: All right. The last part about her
10 experience is stricken. Is that what people are
11 about to ask for?
12 ATTY. MOORE LEONHARDT: Yes.
13 MS. MORAN: Sorry.
14 THE COURT: So that piece is stricken. Next
15 question.
16 ATTY. MCELLIGOTT: So I'm just asking -- ill ask
17 you about your experience question.
18 Q With respect to the standard of care, what does the
19 standard of care require with respect to pre-use testing of
20 a CQ-36 style lamp in practice?
21 A To assess it between every patient.
22 Q Okay. And by assess it you mean check the tension
23 and make sure it's stable?
24 A Yes.

1 So the way to avoid a claim of I didn't include
2 everything is to include almost literally everything.
3 So that's where I'm going. If anyone wants to
4 briefly be heard, go ahead but we need to get moving.
5 ATTY. MCELLIGOTT: Just very, very briefly, Your
6 Honor. Firstly, I don't intend to elicit a causation
7 opinion from this witness because it's not with in
8 this witness's expertise as counsel just pointed out
9 to me. It's not disclosed and added to the standard
10 of care.
11 The second thing is I just - Plaintiff's Exhibit
12 11, which is Dr. Wang's complaint, I thought that the
13 deposition testimony sounded familiar. Plaintiff's
14 Exhibit 11's full evidence, Dr. Wang's third-party
15 complaint. This is the allegation, paragraph 14:
16 "The lamp was designed, manufactured,
17 distributed, or sold such that the stabilizing
18 hardware and hydraulic mechanisms for the lamp head
19 and arm were deficient and as a result, the arm
20 spontaneously lowered, causing the head to fall onto
21 Kissel's foot thereby causing her alleged injuries."
22 We're marking the deposition, corresponding
23 deposition section about that.
24 I just want to be clear that that alone is

EXHIBIT B

1 Q You have your water bottle next to you, right, with a
2 cap on it? And you had used it for a demonstration earlier.
3 If I were to ask you if your cap was tight on your water
4 bottle or not, you couldn't tell me by just looking at it,
5 right?
6 A Yeah, right, unless it was crooked and—
7 Q Unless it was way off but it was pretty close down on
8 the threads of the cap, you couldn't tell -
9 A Yes, okay.
10 Q And if I ask you to find out if it's tight now, what
11 would you do? You'd try to tighten it a little bit, right?
12 A Or loosen it, right.
13 Q You'd see if it was tight (indiscernible)?
14 A I'd turn it one way or the other and see how tight it
15 was, yeah.
16 Q And you - there was nothing after Dr. Wang set the
17 lamp at 18 inches above Ms. Kissel's toe, finished his
18 placement of the needles, and left the room, there was
19 nothing he did that would have caused the lamp to fall,
20 right?
21 A I don't know. If he was outside the room -
22 Q Right. Outside the room.
23 A Presumably not.

EXHIBIT C

1 THE COURT: All right. Counsel.
2 ATTY. MOORE LEONHARDT: Thank you. May I have
3 the photo of exhibit 604 put on the screen. Thank
4 you.
5 THE COURT: This is exhibit which?
6 ATTY. MOORE LEONHARDT: 604.
7 ATTY. MOORE LEONHARDT: I think it's WABBO's
8 exhibit 604, Your Honor. Now good morning, Mr.
9 Vallee.
10 MR. VALLEE: Morning.
11 ATTY. MOORE LEONHARDT: It's a little before
12 noon.
13 **CROSS EXAM BY ATTY. MOORE LEONHARDT:**
14 Q This photo just so I understand it was something that
15 you took in to consideration prior to rendering your opinion
16 in this case?
17 A That's right.
18 Q Okay. And during the hypothetical set of facts that
19 Attorney Meade reviewed with you, he indicated that he
20 wanted you to assume that there were two patients who Dr.
21 Wang had seen prior to treating Ms. Kissel that day.
22 Would your opinion change in any way if you were to
23 assume that there were three patients that Dr. Wang saw

1 during Ms. Kissel's treatment on April 22nd, 2010. Is that
2 right?
3 A That's right
4 Q And would you agree that nothing Dr. Wang did after
5 he set up the lamp and used it with Judith Kissel and left
6 the room on April 22nd, 2010 was a substantial factor in
7 causing her injuries?
8 ATTY. MCELLIGOTT: Objection. It's way too
9 broad. The ultimate issue --
10 THE COURT: All right. I'm going to sustain the
11 objection to the extent that it treads into areas
12 outside this witness's expertise.
13 **BY ATTY. MOORE LEONHARDT:**
14 Q To the extent that you examined the lamp and
15 evaluated it for the resistance and any sign of wear on the
16 lamp, at your examination of the lamp on June 22nd, 2015,
17 did you find any evidence whatsoever of wear that affected
18 the functionality of the resistance in the arms of the lamp
19 at that time?
20 A I found no evidence of wear, no.
21 Q And when you examined the lamp, did you identify any
22 factors that would have affected the functionality of the
23 lamp when Dr. Wang was using it on April 22nd, 2010 in terms

1 THE COURT: All right.
2 *(Playback)*
3 *Q Mr. Vallee, would you agree that after Dr. Wang set*
4 *up the lamp at 18 inches above Ms. Kissel's toe, finished*
5 *his placement of the needles, and left the room, there was*
6 *nothing physical that you know of, based upon your*
7 *inspection and review that caused the lamp to fall on her*
8 *toe?*
9 *A Based on --*
10 *ATTY. MCELLIGOTT: Objection.*
11 ATTY. MCELLIGOTT: There was another one after
12 that. There's an attempt to rephrase it.
13 *Q -- you know of that Dr. Wang did from outside the*
14 *room or after he left the room that caused the lamp to fall*
15 *on her toe?*
16 *ATTY. MCELLIGOTT: Well, objection, I don't*
17 *think that's the question that we --*
18 *(Playback ends)*
19 ATTY. MCELLIGOTT: Actually, I think that's --
20 that's fine.
21 THE COURT: That's what I'm saying. It's a
22 slight variation.
23 ATTY. MCELLIGOTT: Yes, outside the room.
24 THE COURT: But it's the same wording. That's
25 why I overrule the objection. All right. Do you
26 have the question in mind?
27 MR. VALLEE: Question in mind?

1 THE COURT: In other words, do you still
2 understand what the question is so you can answer it
3 or do we need to play it again --
4 MR. VALLEE: Ah.
5 THE COURT: -- so that you now -- because we
6 play it back and people aren't focusing because you
7 think it's us, not you, and I want to make sure that
8 you have the question in mind so that you can answer
9 it. Or do you need it played back yet again?
10 MR. VALLEE: Yes, Your Honor. I know how to
11 answer the question.
12 THE COURT: All right.
13 **BY ATTY. MOORE LEONHARDT:**
14 Q Can you answer that question, sir?
15 A Yes. I'm not sure exactly what he did after he left
16 the room but based on the testimony and evidence that I saw,
17 I didn't see anything that he did that would have caused the
18 lamp to move.
19 Q To fall?
20 A To fall. Yes.
21 ATTY. MOORE LEONHARDT: Thank you. I have no
22 other questions of this witness.
23 ATTY. ROBERTSON: Just briefly, Your Honor. I
24 have a couple of questions.
25 THE COURT: All right. Just one second, please.
26 All right. Now, yes. Go ahead, please.

EXHIBIT D

1 Nerves?
2 A That's a schematic or representation of nerve.
3 Q Okay. And then where would those nerves -- let's say
4 this is a representation of the skin of the foot. Where
5 would those nerves travel and how do they end up providing a
6 signal to the brain?
7 A Well, I mean, it's a very complicated network. I
8 mean, as it gets more to the surface it branches out more
9 and more. I don't think you could even know how extensive
10 the network -- your entire body has a nervous receptor, you
11 know.
12 Q Okay.
13 A So nerves, whenever there's a stimulus then there's a
14 coordination of the nerve firing and then getting processed
15 up to the spinal card and to the brain.
16 Q So these are -- these could be actively described as
17 nerve endings?
18 A At the top, yes.
19 Q Okay. And the nerve endings send signals up; more,
20 bigger nerves, bigger nerves that all connect to your spinal
21 cord, is that correct?
22 A Right.
23 Q And then the spinal cord connects to your brain, is
24 that right?
25 A Yes.
26 Q And so the nerves in your skin send signals up larger
27 nerves and ultimately to the brain to tell the brain about

1 the sensation, is that right?
2 A Yes.
3 Q So let's go back to plaintiff's exhibit 34.
4 ATTY. MCELLIGOTT: And if you just highlight the
5 top one again.
6 **BY ATTY. MCELLIGOTT:**
7 Q And then what is the green curlicue?
8 A I'm assuming that that's a sweat gland duct.
9 Q Okay. And you can tell that because it reaches the
10 skin?
11 A I guess so, it's not a --
12 Q All right. You didn't draw this?
13 A I didn't draw that.
14 Q And then this is a hair follicle here?
15 A Hair follicle.
16 Q All right. So can you just tell the jury this is a
17 picture -- a drawing of normal skin, is that fair?
18 A It's a representation of the layers of the skin, yes.
19 Q And the skin is the largest organ in the human body?
20 A Yes.
21 Q And what's the function of the skin?
22 A Protection, mainly.
23 Q Okay. And there's such a thing as a classification
24 of burn injuries, is that right?
25 A Yes.
26 Q And can you just describe -- is that something that
27 you learned about in your training as a plastic surgeon?

1 A Yes.
2 Q Can you just describe for the jury the different
3 classifications?
4 A There's first degree, second degree, third degree and
5 fourth degree. We also classify it as partial thickness,
6 full thickness. So there's different way of describing burn
7 injuries.
8 Q Okay. So I just want to focus on what a first-degree
9 burn is. Go to the second block. And does this show a
10 first-degree burn?
11 A So a first-degree burn is injury to the epidermal
12 layer so I guess because it's colored red that it's
13 designating as a first-degree burn, yes.
14 Q Okay. And a first-degree burn, the epidermis which
15 is the top layer stays intact?
16 A Yes, it's like a sunburn.
17 Q Okay. And there's no penetration of the burn or the
18 damage to layers under the epidermis?
19 A No, if that happened then it would be second degree.
20 Q Okay. So let's take a look at second degree. All
21 right. Does this purport to show a second-degree burn?
22 A Yes, that's one type of second-degree burn.
23 Q And what type of second-degree burn is this?
24 A It's what we would consider a superficial second
25 degree. Superficial to medium-depth second degree.
26 Q Okay. And what makes this a second-degree burn?
27 A It goes into the dermis and I think they're trying to

1 illustrate a blister so whenever you see blistering, we know
2 that that's a second degree burn.
3 Q But we know it's not -- how do we know it's not a
4 third-degree burn?
5 A Well, according to your illustration, if you look at
6 just the red part, it doesn't penetrate through the entire
7 dermis. So if it stays within the dermis, the light yellow-
8 colored part then it's a second degree by definition.
9 Q Okay. So now let's look at the next exhibit, the
10 (indiscernible). All right. So what type of burn is this
11 diagram meant to depict?
12 A That would be a third-degree burn.
13 Q And why is it a third degree burn?
14 A Because the epidermis and the entire dermis is drawn
15 to be affected.
16 Q Okay. So it's --
17 THE MONITOR: Can I have that last answer again,
18 please, sir.
19 DR. KIM: The epidermis and the entire dermis
20 are affected.
21 Q Okay. In other words, the top layer and in addition
22 the -- what you said is the dermis which goes from here to
23 here is affected by the burn?
24 A Correct.
25 Q And it looks like it's going into the fatty layer, is
26 that technically fourth degree or is that still third
27 degree?

1 A No that's still third degree.
2 Q And if it gets into the muscle layer, is that fourth
3 degree?
4 A Yes.
5 Q Then if it gets into the bone layer that's also
6 fourth degree?
7 A Bone, tendon. Any other deep important structure.
8 Q So we know from reading records in the case, that Ms.
9 Kissel ultimately had an exposed bone as part of her injury.
10 Does that mean she had a fourth-degree burn?
11 ATTY. ROBERTSON: I'm just going to object,
12 Your Honor. This isn't something that the witness
13 rendered treatment for, for reading records. He's
14 not here to testify about reading records; it's about
15 his care and treatment, that's what he's an expert
16 on. So I'm just concerned about that element of it
17 because that's not part of what we've talked about so
18 far, that first (indiscernible).
19 THE COURT: All right. Counsel, do you want to
20 point to something in the record?
21 ATTY. MCELLIGOTT: Well, not right now. I'll
22 get to the record.
23 THE COURT: Subject to you doing that, the
24 objection's sustained at this time.
25 ATTY. MCELLIGOTT: Okay.
26 **BY ATTY. MCELLIGOTT:**
27 Q So what type of burns did Ms. Kissel have?

1 A She had first degree, superficial second degree, deep
2 second degree and third-degree burns.
3 Q Okay. And let's take a look at plaintiff's exhibit
4 56, Bates label 10000. And the medical record states on
5 exam, patient has full-thickness burns of the medial aspect
6 of the great toe from the MTP joint distal -- I'll stop
7 there. So what does that refer to, that note?
8 A Are you -- do you want me to interpret MTP or?
9 Q
10 Well, okay, so it says -- first of all, what's a full-
11 thickness burn?
12 A A full-thickness burn is what we talked about, a
13 complete injury to the epidermis and entire dermis.
14 Q Okay. So full thickness is synonymous with third
15 degree?
16 A Yes.
17 Q Okay. And what's a full-thickness burn of the medial
18 aspect of the great toe from the MTP joint distally?
19 A So that's describing -- the medial part is on the
20 picture to the right of the toe, the MTP stands for
21 metatarsal phalangeal joint. So if you look at the toe from
22 where it comes out from the foot, that's where the MTP joint
23 would be.
24 Q Okay.
25 A So they're describing the full-thickness burn distal
26 to the foot and up into the toe.
27 Q All right. So I noticed that, for example, on this

1 part of the patient's foot, the wound is red, do you see
2 that?
3 A Yes.
4 Q And on this part of the patient's foot, it appears to
5 be yellow and brown with black at the very tip. Can you
6 describe why that would be?
7 A So the part on the proximal foot, that's what we
8 consider a deep second-degree burn, it still has the
9 vascular network so that's why it's still red.
10 Q So when you say -- you're talking about -- did you
11 say proximal foot?
12 A Well, mid -- where you're pointing there.
13 Q That's a deep second-degree burn?
14 A That's a deep second-degree burn.
15 Q And you say that because it's still -- you can tell
16 it still has that blood supply that we talked about,
17 oxygenated red blood?
18 A Yes.
19 Q Otherwise, if that vascular structure was
20 compromised, it would start to turn color?
21 A It would turn whitish, yes.
22 Q Okay. So just can you describe why there is -- that
23 the top of the toe the white?
24 A Well, that's a classic appearance of a third degree
25 burn, white, you know, yellowish, leathery appearance to the
26 skin because it's lost its blood supply.
27 Q Okay. And are you familiar with -- did you learn in

1 residency or your training how long it takes skin to burn at
2 what temperature?
3 A Yes, I mean, it wasn't extensive but we know
4 generally temperature and causation.
5 Q So essentially, a lower temperature contact with the
6 skin takes longer to burn than a higher temperature contact
7 with the skin, is that right?
8 ATTY. ROBERTSON: I'm just going to object.
9 Beyond the scope of the expert witness disclosure.
10 THE COURT: Overruled.
11 A Yes.
12 **BY ATTY. MCELLIGOTT:**
13 Q So a 527-degree iron plate may take a certain amount
14 of time to create a third-degree burn that a 200-degree
15 plate would take more time, is that fair?
16 ATTY. ROBERTSON: Objection, same objection.
17 Beyond the scope of the expert witness disclosure.
18 ATTY. MEADE: Objection, lack of foundation.
19 Your Honor.
20 ATTY. MOORE LEONHARDT: Join, Your Honor.
21 THE COURT: Overruled.
22 A I mean, after you get beyond 160 degree Fahrenheit,
23 the burn happens very quickly. So I mean, once you get to
24 that high of thermal energy that you're talking about then
25 it's hard to -- whether it's milliseconds or fractions of
26 that I can't tell you but once you get above 160, it
27 literally takes a second to cause that injury.

1 Q Exactly. So -- and milliseconds matter in that,
2 could matter in that context, is that fair?
3 A Yes.
4 Q So for example, if there was a chart, the first
5 second, within that chart might have a difference in how
6 long it takes this burn to happen at different temperatures
7 but they would all happen in under a second, is that
8 correct?
9 ATTY. ROBERTSON: Your Honor, I'm just going to
10 object. Leading and beyond the scope --
11 THE COURT: Sustained and leading.
12 **BY ATTY. MCELLIGOTT:**
13 Q Just describe for the jury the relationship between
14 temperature and amount of time to burn? I know you already
15 have but go through it.
16 A Well, I mean, it's not a perfect science but at 160
17 degree Fahrenheit we know that it takes about a second to
18 cause a significant burn. It all depends on the type of
19 burn it is, whether it's contact burn, flame burn.
20 So there's a lot of variables when we talk about
21 this. But as you get -- lower the temperature, let's say at
22 like 120 degree, it takes many seconds to actually cause
23 significant injuries. We know that contact time and
24 temperature has a significant positive correlation.
25 Q Okay. And this was a contact burn suffered by Ms.
26 Kissel?
27 A Yes.

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	:	**JUDICIAL DISTRICT**
	:	**OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH,	:	
P.C., ET AL	:	**MARCH 1, 2018**

OMNIBUS OBJECTION TO DEFENDANTS MOTIONS TO SET ASIDE THE VERDICT AND FOR REMITTITUR (Doc. 382.00, 396.00, 402.00, 403.00, & 404.00)

The defendants have each filed motions to set aside and reduce the jury's verdict. These motions assert numerous arguments that it was flawed. Some of those arguments are immaterial; all of them are meritless. Ms. Kissel strongly proved that Dr. Wang breached the standard of care and that WABBO distributed a defective product. Because the defendants did not attack many of Ms. Kissel's theories, Ms. Kissel adequately proved them, and the general verdict rule applies, the defendants' arguments on standard of care and product defect are also immaterial to the sufficiency of the verdict. Moreover, Ms. Wan Moran's expert testimony did not rely on faulty assumptions and was not subject to the *Porter* standard. Ms. Kissel proved that Dr. Wang's negligence and a defect in WABBO's product were legal causes of her injury. Causation on these claims was readily discernible to an ordinary person, and therefore she was not required to present expert evidence to do so. Finally, the damages determined by the jury were entirely reasonable and justified by the evidence.

"The right to a jury trial is fundamental in our judicial system[.]" *Howard v. MacDonald*, 270 Conn. 111, 128 (2004). As a result, the standard for disturbing a jury's verdict is exceedingly high. Doing so is only appropriate "where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality." *Id.* at 126–27.

A trial court may reduce a jury's verdict "only in the most exceptional of circumstances." *Saleh v. Ribeiro Trucking, LLC*, 303 Conn. 276, 280 (2011). The defendants do not come close to lifting these heavy burdens. Their motions should be denied.

I. BACKGROUND

On the evening of April 22, 2010, Judith Kissel arrived at the Center for Women's Health for what was supposed to be a simple, routine acupuncture session. Testimony of Judith Kissel, Trial Tr. 103–104, Dec. 7, 2017. Dr. Wang interviewed Ms. Kissel, and had her undress, remove her eyeglasses, and lie down, face-up, on a treatment table. *Id.* at 100–104. Aside from her underwear, she was wearing only a thin paper sheet. *Id.* Dr. Wang placed more than 20 needles in Ms. Kissel's body, including in her pubic area and feet. *Id.* at 105–106. Then he placed a device over Ms. Kissel's foot, and left the darkened room. *Id.* He said nothing about the device. *Id.* The procedure was supposed to be over within 20 minutes.

Things did not go as planned. Ms. Kissel felt her foot getting warmer. She smelled burning hair and felt "painless heat" on her foot. "A few seconds after" she felt the heat increasing, she suddenly felt "excruciating . . . indescribable, awful, shocking pain." Kissel Trial Tr. 106, Dec. 7, 2017. She tried to kick whatever was burning her off her foot, but could not dislodge it. *Id.* at106–107. She called out for help in a "loud voice" that Dr. Wang "should have heard," but she "was all alone"—Dr. Wang did not immediately respond. *Id.* at 107. Finally, Dr. Wang entered the room and saw that the device he had placed over Ms. Kissel's foot had descended, and that it was burning Ms. Kissel's foot. *Id.* at 107–108. He proceeded to "panick[] . . . he didn't know what to do at first, he was walking, then he wasn't, then he was turning." *Id.* at 108. "Then he ran out," leaving Ms. Kissel lying on the treatment table, burning, still covered with needles. *Id.*

The device Dr. Wang had placed over Ms. Kissel's foot—and which was now burning her

flesh—was a WABBO CQ-36 heat lamp. The WABBO CQ-36 heat lamp has what even WABBO admits is a dangerous feature: when the lamp becomes worn, its supporting arms have a propensity to lower inadvertently. Testimony of Sami Woo Kuang Ng, Trial Tr. 30, Nov. 22, 2017; Wang Trial Tr. 37–38, Nov. 15, 2017 (lamp was "unreasonably dangerous"). This propensity is dangerous because the supporting arms carry a heating element that, when used, attains a temperature of at least 572 degrees Fahrenheit. Exh. 2 (User Manual: Gou Gong TDP) at 6018. The lamp does not have any safety shield over the heating element to protect the patient. Woo Trial Tr. 27–28, Nov. 22, 2017. Neither does it have any locking device to prevent the admittedly insufficiently supported lamp head from inadvertently lowering onto a patient, as it did onto Ms. Kissel's foot. *Id.*

At the time, Ms. Kissel could not explain how the lamp's heating element had contacted her foot. She knew, after all, that she had not made any "major movement" or lifted her foot. Kissel Trial Tr. 195, Nov. 7, 2017. But expert engineer Victor Popp's testing and analysis later revealed that one scenario was the most probable one: more likely than not, she had moved on the treatment table, and the table had shifted and contacted the lamp's center shaft, delivering an "excitation" that caused the lamp's head to fall inadvertently onto Ms. Kissel's foot. Testimony of Victor A. Popp, Trial Tr. 162–65, Dec. 1, 2017.

Based on his tests and measurements, Mr. Popp determined that Dr. Wang had placed the lamp head only seven inches above Ms. Kissel's foot—not the 18 inches he claimed, which Mr. Popp found was impossible. *Id.* at 145–50. (The Center's expert, Dr. Jennifer Brett, testified that placing the heat-lamp head less than 12 inches away from the patient represented a breach of the standard of care for an acupuncturist in 2010. Testimony of Jennifer Brett, Trial Tr. 148, Dec. 14, 2017.) Mr. Popp determined that the lamp was defectively designed and unreasonably dangerous.

Popp Trial Tr. 79–80, Dec. 1, 2017. He also provided two alternative proposed designs that would eliminate the danger posed by the lamp's defects, both of which were technically and economically feasible at the time when the lamp was manufactured and distributed. *Id.* at 72–80.

Like the defendants' expert engineer, Dr. Glen Vallee, Mr. Popp determined that the lamp's tendency to lower inadvertently when worn was a gradual process, and one that did not happen suddenly. Popp Tr. 148, Dec. 1, 2017; Testimony of Glen Vallee, Trial Tr. 54–55, Dec. 6, 2017. Dr. Vallee went further, testifying that, if this propensity existed, it would have been readily observable by someone who regularly handled the lamp. Vallee Trial Tr. at 55.

Dr. Wang testified that, despite never having any problem with the lamp before the date of Ms. Kissel's injuries, he conducted extraordinarily intensive daily inspections of the lamp. He twisted and tightened the screws on the lamp's spring pistons every day and tightened them with a screwdriver each week. Wang Trial Tr. 122–24, Nov. 22, 2017. He also tested the lamp each day by shoving its head and gently shaking the device—the exact sort of action Ms. Kissel's expert thought was most likely to have caused the lamp to lower onto Ms. Kissel's foot. Wang Trial Tr. 126, Nov. 30, 2017. He did those inspections because if the lamp is in a loosened condition, a "dangerous action can happen." *Id.* at 127. Indeed, he noted that he did the inspection because a loose lamp could fall. *Id.* at 125. He admitted that he knew that the lamp had a tendency to lower when worn. *Id.* at 147, 153–54. He admitted he performed no such inspection for any other piece of professional equipment. *Id.* at 138. Nevertheless, he claims that he never noticed that the lamp had a propensity to lower inadvertently.

As it turns out, despite the intensiveness of his inspection routine of the lamp, he was not doing the required inspection often enough. As expert acupuncturist Simone Wan Moran testified, the standard of care required him to test the tension of the lamp's supporting arms before each

patient treatment. Testimony of Simone Wan Moran, Trial Tr. 106–107, Dec. 12, 2017. Dr. Wang testified that he only did this test at the beginning of each day. If the lamp ever failed a test—or Dr. Wang ever noticed otherwise that the lamp had a propensity to lower inadvertently—the standard of care required Dr. Wang to take it out of service, and not use it on patients. *Id.* at 132. Dr. Wang never took the lamp out of service. He used it on Ms. Kissel. As a result, when it lowered inadvertently on April 22, 2014, its heating element contacted her exposed flesh.

The heating element caused Ms. Kissel terrible and permanent burn injuries. Wang Trial Tr. 18, Nov. 15, 2017. She had received third-degree burns down to the bone on her big toe, and severe third- and second-degree burns elsewhere on her foot and toes. *Id.* at 15; Testimony of Tae Ho Kim, Trial Tr. 53, Nov. 28, 2017. After Dr. Wang and Dr. Joel Evans, the director of the Center, drove Ms. Kissel to Stamford Hospital, she began an agonizing, two-year-long path of rehabilitation that never led to true recovery. Over those two years, she underwent four skin graft surgeries, numerous excruciating debridements, and countless doctor and nurse visits. See generally Pl.'s Exh. 4, 5, 6, 10 (medical records); Kissel Trial Tr. at 109–11. Her big toe was broken. Exh. 5 (N.Y. Group for Plastic Surgery) at 0510. Her mobility was severely limited. Testimony of Coreen Estrow, Trial Tr. 155–56, Dec. 5, 2017. She was in terrible, constant pain. Kissel Trial Tr. at 109–111. She was forced to be constantly aware of her foot to guard it against further injury. Estrow Trial Tr. 155–56. For multiple multi-week periods, she had to have a "wound-vac" constantly attached her foot to preserve the wound site for grafting. Exh. 5 at 0524; Exh. 6 (Visiting Nurse Serv.) at 0670, 0696. She felt like a burden to her coworkers and friends. Estrow Trial Tr. at 159. For a long period, there was a serious likelihood that it would have to be amputated. Exh. 5 at 0506. And even as she neared the end of this two-year period, the wound would reopen for no apparent reason. *Id.* at 0524; Kissel Trial Tr. at 159–60.

Since finishing her period of "recovery," Ms. Kissel has been faced with the permanent injury inflicted by Dr. Wang's CQ-36 heat lamp. She has constant pain, numbness, and discomfort. Kissel Trial Tr. at 160–61. That discomfort reduces her mobility, and prevents her from walking any significant distance. *Id.* at 163–65. She thinks about her injuries all the time. *Id.* She has permanent, deforming scarring on her foot, toes, and the graft sites on her leg. *Id.* at 162. Her toe "looks like a sausage that's been thrown in the blender and left open." Estrow Trial Tr. at 163. That deformity not only decreases her ability to enjoy work, social, and other activities, but even changes what she can wear, preventing her from wearing the shoes she likes and forcing her to wear ill-fitting shoes due to her feet being different sizes. *Id.* at 99–100, 162–65, 147–48; Estrow Trial Tr. at 166. It limits her dating life. Estrow Trial Tr. at 166. The effects of Ms. Kissel's injuries have reduced her enjoyment of even those activities she can now perform. *Id.* All these losses of enjoyment will last for the rest of her life. *Id.* at 162.

After a month-long trial, the jury was instructed on the law and all Ms. Kissel's allegations as to Dr. Wang's medical negligence and WABBO's strict products liability. Kissel v. Center for Women's Health – Charge [hereinafter "Jury Charge"]. The jury returned a general verdict against each defendant. Verdict for the Plaintiffs, Doc. 395.00; Interrogatories to the Jury, Doc. 394.00. It found that Dr. Wang breached the standard of care; that WABBO was strictly liable for distributing a defective product; and that both defendants' conduct was a legal cause of Ms. Kissel's injuries. *Id.* For the purposes of contribution between the defendants, the jury found WABBO 80 percent at fault and Dr. Wang 20 percent at fault. *Id.* The jury found against the defendants on all their special defenses against Ms. Kissel. *Id.* It awarded Ms. Kissel $1 million in damages. *Id.*

II. ARGUMENT

The right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004); *Howard v. MacDonald*, 270 Conn. 111, 128 (2004) ("The right to a jury trial is fundamental in our judicial system[.]"). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, [the] jury trial is meant to ensure their control in the judiciary." *Id.* Indeed, the U.S. Supreme Court has made clear that "[t]he purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the . . . perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

As a result, "[l]itigants have a constitutional right to have factual issues resolved by the jury." *Ham v. Greene*, 248 Conn. 508, 536 (1999). The U.S. Supreme Court has cautioned that the "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In this case, the defendants' motions do not come close to hoisting this heavy burden. In fact, the general verdict rule makes many of their arguments irrelevant. Their motions should be denied.

A. The Jury's Verdict was Reasonable Based on the Evidence and the Defendants' Motions to Set Aside the Verdict are therefore Meritless

A trial court "should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion." *Howard*, 270 Conn. 126–27 (quoting *Burr v. Harty*, 75 Conn. 127, 129, 52 A. 724 (1902)). "The evidence is viewed in a light most favorable to the prevailing party and to sustaining the verdict." *Ipacs v. Cranford*, 65 Conn. App. 441, 443 (2001). A court should set aside a verdict only "where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality."

Howard, 270 Conn. at 126–27. This strict standard is rooted in the "immovable limitation" of "the constitutional right of trial by jury," which includes the "constitutional right to have disputed issues of fact determined by a jury." *Jacobs v. Goodspeed*, 180 Conn. 415, 415–17 (1980) (citations omitted).

For these reasons, where "there is room for reasonable difference of opinion among fair-minded [people], the conclusion of a jury, if one at which honest [people] acting fairly and intelligently might arrive reasonably, must stand, even though the opinion of the trial court . . . be that a different result should have been reached." *Id.* The jury's verdict here was well founded on the evidence, and there are no indications of prejudice, corruption, or partiality. The jury's verdict—and its prerogatives—should therefore be respected, and the defendants' motions denied by this Court.

1. The Defendants' Defendants' Standard-of-Care and Product-Defect Arguments are Irrelevant and Meritless

a. The General Verdict Rule Renders the Defendants' Standard-of-Care and Product Defect Arguments Irrelevant

Most of the defendants' arguments for setting aside the verdict may be cut off at the pass: the general verdict rule renders them irrelevant. The defendants ignore a number of Ms. Kissel's theories for liability. As a result, even if the their criticisms had merit, they would be legally insufficient: the verdict could stand on the theories they do not address, and the general verdict rule presumes that the jury found for Ms. Kissel on those theories. The defendants' arguments to set aside the verdict on these bases may therefore be dismissed out of hand.

"Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party." *Hall v. Bergman*, 296 Conn. 169, 180–82 (2010). As a result, "if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." *Id.* The rule applies "at both the appellate and trial levels." *Id.* (citation omitted). It

"applies whenever a verdict for one party could reasonably be rendered on one or more distinct causes of action or distinct defenses." *Id.* (internal marks omitted). To avoid the rule, a party must "elicit the specific grounds for the verdict by submitting interrogatories to the jury." *Id.* "Alternatively, if the action is in separate counts, a party may seek separate verdicts on each of the counts." *Id.* (citations omitted).

The jury interrogatories in this case did not ask call for the jury's conclusion on each of Ms. Kissel's causes of action for product liability and negligence. See Interrogatories to the Jury, Doc. 394.00, Dec. 21, 2017. Rather, they asked the jury to state only whether it found each of the elements of liability for product defect for one defendant, and each of the elements for medical negligence for the others. *Id.* Neither did the jury further separate Ms. Kissel's claims into distinct counts. *Id.* The defendants agreed to these aspects of the verdict forms and jury interrogatories in this case. The general verdict rule applies.

This means the defendants' standard-of-care and product-defect arguments fail straight out of the gate. Under the general verdict rule, the court "will presume that the jury found every issue in favor of the prevailing party." *Hall*, 296 Conn. at 180–82. "[O]nly if every ground [for the verdict] is improper does the verdict fall." *Id.* The defendants decline even to address a number of Ms. Kissel's negligence and defect theories. For instance, defendant WABBO addressed only (and only cursorily) Ms. Kissel's warnings and guarding claims, and (even more cursorily) Ms. Kissel's claim related to an alternative design with a locking device. It ignored completely Ms. Kissel's claims that the lamp was defective because (1) the stabilizing hardware and hydraulic mechanisms for its head and arm were deficient and (2) because it lacked proper instructions. Its arguments related to Ms. Kissel's proof of other defects may therefore be dismissed out of hand. Likewise, defendants Wang and CWH failed to address Ms. Kissel's claim that Dr. Wang failed to conform to the standard of care in placing the lamp too close to Ms. Kissel's

foot, causing her injuries. Because that theory would sustain the jury's verdict on its own, defendants Wang and the Center's criticisms of the proof on Ms. Kissel's other theories may be ignored.

b. The Plaintiff Proved that Dr. Wang Breached the Standard of Care

The defendants attack the testimony of Ms. Kissel's expert acupuncturist, Simone Wan Moran. But what they ignore is just as important. Ms. Kissel proved one of her theories for medical negligence through the defendants' expert acupuncturist, Dr. Jennifer Brett. In her testimony, Dr. Brett agreed that "initially placing the lamp less than 12 inches from the skin" was "a violation of the standard of care in 2010." Testimony of Jennifer Brett, Trial Tr. 148, Dec. 14, 2017. Meanwhile, Victor Popp's measurements revealed that based on a 36-inch treatment table—the table height he determined most likely—Dr. Wang placed the lamp-head "7 inches from [Ms. Kissel's] toe." Testimony of Victor A. Popp, Trial Tr. 147–48, Dec. 1, 2017. Ms. Kissel's operative complaint alleged that Dr. Wang was negligent because he "did not properly place heat lamps during the acupuncture procedure such that the lamps remained a safe distance from the plaintiff." Pl.'s 2d Amended Compl. 2, Doc. 192.00, Mar. 14, 2014. The jury was instructed on the claim. See Jury Charge at 15. Under the general verdict rule, the court need inquire no further: the verdict stands on this theory alone.[1]

Neither did Ms. Kissel need Ms. Moran's testimony to prove that Dr. Wang breached the standard of care by using a lamp he knew or should have known had a propensity to lower inadvertently. Dr. Brett testified that "[i]f an acupuncturist knew that a heat lamp had a propensity to spontaneously lower," it

[1] Likewise with the plaintiff's claim that Dr. Wang was liable for not responding immediately to her distress. Dr. Brett agreed in her testimony that "if Ms. Kissel called out for help and Doctor Wang didn't respond immediately, that he violated the standard of care." Trial Tr. 169, Dec. 14, 2017. The plaintiff testified that Dr. Wang did not respond immediately. Testimony of Judith Kissel, Trial Tr. 107, Dec. 7, 2017 ("Q. And did Dr. Wang immediately respond? A. No, he didn't respond. . . . [I]t just seemed like he should have come in sooner."). Dr. Kim, meanwhile testified that "contact time and temperature has a significant positive correlation." Trial Tr. 47–48, Nov. 28, 2017.

would have been "a violation of the standard of care for him to continue using that lamp and treating his patients in 2010." Trial Tr. 147–49. Ms. Kissel presented considerable evidence that Dr. Wang knew that the lamp had an unsafe tendency to lower.

First, there was his extraordinary purported inspection and maintenance routine. Despite supposedly never having experienced any problems with the lamp, Dr. Wang twisted and tightened the screws on the lamp's spring pistons every day and tightened them with a screwdriver once a week. Testimony of Reed Wang, Trial Tr. 122–24, Nov. 22, 2017. He also tested the lamp each day by shoving its head and gently shaking the device—the exact sort of action Ms. Kissel's expert thought was most likely to have caused the lamp to lower onto Ms. Kissel's foot. Trial Tr. 126, Nov. 30, 2017. He did those inspections because if the lamp is in a loosened condition, a "dangerous action can happen." *Id.* at 127. Indeed, he noted that he did the inspection because a loose lamp could fall. *Id.* at 125. He admitted that he knew that the lamp had a tendency to lower when worn. *Id.* at 147, 153–54. He admitted that he performed that inspection to guard against the lamp's propensity to fall. Trial Tr. 139, Nov. 30, 2017 ("Q. Was your maintenance routine, this extensive maintenance routine, designed to guard against that exact propensity? A. First, the last question is, not yesterday, I said so, because you asked me, I saw the first part after long time use become worn. I ask—that's involve two question. The worn, I would say yes."). He admitted he performed no such inspection for any other piece of professional equipment. Trial Tr. 138, Nov. 30, 2017.

Dr. Wang's uniquely intensive inspection routine appeared against a backdrop of expert testimony indicating that a user in Dr. Wang's position would notice the lamp's tendency to lower inadvertently with wear. Dr. Glen Vallee, WABBO's expert engineer, opined that "a condition of instability, that is movement either spontaneously with the application of little or no outside force," would not "just suddenly occur." Testimony of Glen Vallee, Trial Tr. 54–55, Dec. 6, 2017. Indeed, he noted, "If you were manipulating the lamp day after day after day and all of a sudden it started dropping under its own weight,

then you would notice that." *Id.* at 55. Ms. Kissel's expert, Victor Popp, agreed. Popp, Trial Tr. 145–146 (thorough inspection would reveal tendency to lower inadvertently). Even Sami Woo Kang of defendant WABBO testified unequivocally that, based on her experience with the device, she would expect an acupuncturist to have noticed within two years the lamp's propensity to lower inadvertently when worn. Trial Tr. 118–19, Dec. 6, 2017.

And that's not all: Dr. Wang admitted that the lamp was "dangerously loose" at trial. Trial Tr. 124, Nov. 22, 2017. (Despite the undisputed fact that it had not been used since the incident, he claimed its function was markedly different than before; the jury was entitled to disbelieve him.) After the incident in which Ms. Kissel was burned, Wang threw out the lamp of the same design that he had kept in his Westport office. Trial Tr. 4–5, Nov. 15, 2017. And then there was the kicker: the revelation that all Wang's screw- and bolt-tightening did nothing to tighten the lamp's hydraulics or mitigate its propensity to fall. See Popp Trial Tr. 148 (noting that neither the resistance nor the friction in the lamp was "dependent on the user tightening the bolts"). Why would Wang constantly test, manipulate, and tighten the lamp's tightness and screws if doing so had no effect, he never had a problem with the lamp loosening, and never noticed its dangerous tendency to lower inadvertently with slight excitation? The clear answer, based on a mountain of circumstantial evidence, is that he *did* know that the lamp had this dangerous tendency. The jury was entitled to make that common-sense finding.

Ms. Wan Moran's testimony not only amply buttressed this evidence, but was sufficient to sustain the verdict on its own. First, she testified that she had a CQ-36-style lamp that also had a tendency to lower inadvertently when worn. Testimony of Simone Wan Moran, Trial Tr. 109–10, Dec. 13, 2017. ("Q. In the CQ-36 style lamp that you owned, you noticed that when it became worn, it had a propensity to lower, correct? A. Correct."). Based on her education, training, and experience, she testified that the standard of care in 2010 required that an acupuncturist using a CQ-36-style lamp "check the tension for

the articulating arm and then make sure when it moves—or move it to check if it has the propensity to fall. In between every patient." Trial Tr. 106, Dec. 12, 2017. She testified that "in the situation where you do the tests and the lamp fails the test and there's no way to adjust it to get it to pass the test," the standard of care requires that the acupuncturist "not use it on a patient," but rather "take it out of service so that it wouldn't cause harm." *Id.* at 107. Likewise, she testified that "if Dr. Wang had done a test on the device at any time prior to using the device on Ms. Kissel and the device failed the test, . . . the standard of care required him to take it out of service at that time." *Id.* at 132. This process was necessary so "it wouldn't fall . . . during treatment." *Id.*

Dr. Wang failed to test the lamp between each patient. He therefore breached the standard of care. Contrary to the defendants' contentions, this opinion was not "as to what an acupuncturist should do when using a CQ-36 lamp that the acupuncturist knows is worn out to the point of being prone to falling 'inadvertently.'" Def. Wang's Mem., Doc. 396, at 7. Ms. Wan Moran—like Dr. Brett—was clear that if the lamp had manifested that tendency, the acupuncturist should not use the lamp *at all*—there would be no need to test it. Moran Trial Tr. at 162–63; Brett Trial Tr. at 147. Rather, Ms. Wan Moran testified that the standard of care required an inspection routine that Dr. Wang either failed to fulfill or whose results he ignored. See Vallee Tr. at 54–55; Popp Tr. at 145–146. In doing so, Ms. Wan Moran provided an expert acupuncturist opinion that was sufficient—but not necessary—to sustain Ms. Kissel's jury verdict in this case.

Finally, the defendants contend that Ms. Wan Moran's opinion failed to meet the requirements of *State v. Porter*, 241 Conn. 57 (1997). This argument may be discarded easily enough: *Porter* does not apply to Ms. Wan Moran's testimony. *Porter* applies only to opinions based on scientific evidence, and only novel ones: it is "a further hurdle to the admissibility of expert testimony when that testimony is based on *innovative scientific techniques*." *Hayes v. Decker*, 263 Conn. 677, 683–84 (2003) (emphasis

added). The "innovative" nature of the scientific technique at issue is the trigger for when "the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability." *Id.* The Connecticut Supreme Court has firmly rejected *Porter* hearings where the expert opinion relies on "no uniquely scientific and novel scientific theory." *State v. Kirsch*, 263 Conn. 390, 402 (2003) (holding no *Porter* hearing necessary for laboratory blood tests for alcohol intoxication); see also *Hayes*, 263 Conn. at 688–89 (no *Porter* hearing where expert's premises relied upon generally accepted principles of cardiology regarding relationship between oxygen and tissue damage). Ms. Wan Moran testified to the standard of care for an acupuncturist employing a CQ-36-style heat lamp in 2010. Her testimony did not rely on scientific techniques, let alone novel ones. *Porter* does not apply.

2. The Plaintiff Proved that Dr. Wang's Negligence and a Defect in WABBO's Product Caused her Injuries

a. The Plaintiff Proved that Dr. Wang's Negligence and a Defect in WABBO's Product were Actual and Proximate Causes of her Injuries

The defendants' central argument to the jury and the court has remained constant before, during, and after the trial. At essence, it is that because there was no direct eyewitness testimony to how the lamp's heating element contacted Ms. Kissel's toe, Ms. Kissel cannot establish *exactly* what happened in the room, and therefore cannot satisfactorily prove causation. (WABBO has also attempted to recast this argument as one about whether Ms. Kissel proved a defect, but this role is a patently unsuitable one: Ms. Kissel expressly disclaimed the malfunction theory, and specifically alleged a number of defects on which the jury was instructed.) As this Court noted during trial, this cannot be the case. There are three primary problems with this argument. First, it misstates Ms. Kissel's burden: Ms. Kissel must prove that one of the lamp's defects and/or Dr. Wang's negligence caused Ms. Kissel's injuries, not exactly *how* it caused those injuries. Second, it misunderstands the law regarding direct and circumstantial evidence. And third,

Ms. Kissel did exactly what the defendants demand: she proved how, more likely than not, the lamp lowered onto her foot and burned it.

In a negligence or product defect case, legal causation has two components: causation in fact and proximate cause. *Winn v. Posades*, 281 Conn. 50, 56 (2007) (citation omitted). The test for causation in fact is "simply, would the injury have occurred were it not for the actor's conduct." *Id.* The test for proximate cause "is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries." *Id.* "The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection." *Id.* at 56–57. This connection must be based on "more than conjecture and surmise," and Ms. Kissel must prove an "unbroken sequence of events that tied his injuries to the defendant's conduct." *Id.* But there is no requirement that Ms. Kissel prove exactly how those events unfolded. See *Blados v. Blados*, 151 Conn. 391, 395 (1964) (holding causation sufficiently proved where plaintiff establishes that stairs "were in defective condition" and plaintiff was found unconscious at base of stairs and could not recount how he fell); *Rawls v. Progressive N. Ins. Co.*, 310 Conn. 768, 780 (2014) (noting negligence and causation may be established in a motor-vehicle case "by showing, inter alia, that it was broad daylight on a clear day[,] that the road was straight, and that the driver of the car had a full view of the other car and of the traffic ahead" (quoting *Ghent v. Stevens*, 114 Conn. 415 (1932)) (internal marks omitted).

Just as importantly, "[t]here is here is no distinction between direct and circumstantial evidence so far as probative force is concerned." *Rawls*, 310 Conn. at 777–78 (2014) (quoting *State v. Heinz,* 193 Conn. 612, 625 (1984)). "A plaintiff can prove the elements of negligence using either direct or circumstantial evidence." *Id.* "Circumstantial evidence is 'evidence of facts from which the trier is asked to infer the existence of, and, so, to find proven, another fact or [set of] facts.'" *Id.* (quoting *Hennessey v. Hennessey*, Conn. 211, 214 (1958)). It "need not be so conclusive as to exclude every other

hypothesis." *Id.* (quoting *Blados v. Blados,* 151 Conn. 391, 395 (1964)). "Rather, circumstantial evidence must only produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact." *Id.* (citation and quotation marks omitted). Moreover, even in the criminal context, "it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." *State v. Josephs*, 328 Conn. 21, 36 (2018).

Ms. Kissel presented exceedingly strong circumstantial evidence not only that one or more of the lamp's defects and Dr. Wang's negligence caused Ms. Kissel's injuries, but also of how they did so. Ms. Kissel proved that the lamp had an unsafe propensity to lower inadvertently, and that it lacked a guard to protect its heating element from contacting the patient. Both WABBO and Dr. Wang admitted that this propensity was unsafe and existed in the device (at least at the time of the trial). Woo Trial Tr. 52, Nov. 22, 2017; Trial Tr. 124, Nov. 22, 2017 (lamp "dangerously loose" when examined at trial). Victor Popp provided evidence that the lamp's function would change only gradually over time, and that certain screws and bolts that had loosened by the time of trial had no effect on the resistance or tension of the lamp's arms. Popp Trial Tr. 148.

Through Dr. Wang, WABBO, and Victor Popp, Ms. Kissel provided strong circumstantial evidence (much of it listed in Part II.A.2 of this Objection) that this was a defect, it existed at the time that Ms. Kissel was injured, Dr. Wang knew of it, and Dr. Wang used the lamp on Ms. Kissel nonetheless. Ms. Kissel testified that she did not make any knowing movement to bring her foot into contact with the lamp or the lamp into contact with her foot. See Testimony of Judith Kissel, Trial Tr. 194–95, 197, Dec. 7, 2017. This testimony was unrebutted. Clearly, had the defects not existed and/or Dr. Wang, as the standard of care required, not used the lamp on Ms. Kissel, Ms. Kissel would not have been injured. Clearly, they were substantial causes of her injuries. And clearly, it is easily foreseeable that a lamp with whose exposed 572-degrees-Fahrenheit heating element has a propensity to lower inadvertently may burn a patient—

WABBO admitted as much. Woo Trial Tr. 52, Nov. 22, 2017 ("Q. And in addition to knowing that iron plate could badly burn somebody, you knew that the head of the device had a propensity to spontaneously lower after it had been used for some period of time, correct? A. We as sellers know that fact."). That is enough. Circumstantial evidence "need not be so conclusive as to exclude every other hypothesis." *Rawls*, 310 Conn. at 777–78.

But that, in fact, is exactly what Ms. Kissel did. Her expert engineer, Victor Popp, established through his analysis and testing that more likely than not the lamp's head began its descent because of an "excitation" caused by Ms. Kissel's shifting or moving on the treatment table. See Popp, Trial Tr. 162–65, Dec. 1, 2017. He made this determination after testing, in the words of defense counsel, "a whole bunch of other scenarios." *Id.* at 168. The defendants never claimed that there was a possibility he failed to examine. That he made his determination by process of elimination, "a method of deductive reasoning often used by reasonable persons in their day-to-day affairs when they do not have any direct means of achieving epistemological certainty regarding a matter," does not decrease its evidentiary value. *Orlor, Inc. v. Guimond*, No. NNHCV156052942S, 2015 WL 7270614, at *2 (Conn. Super. Ct. Oct. 22, 2015); see also *State v. Ashe*, 74 Conn. App. 511, 525–26 (2003) (holding that it was permissible for jury to rely on process of elimination to reach conclusion in a criminal case); see also *DiLieto v. County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 114 n.13 (2010) (explaining that differential diagnosis in medical context is a method for determining which of variety of possible conditions is the probable cause of patient's symptoms, often based on a process of elimination). Ms. Kissel's testimony that she was "not sure" whether she moved her foot and did not engage in any "major movement" does not conflict with Popp's conclusion, and does nothing to cast it into doubt. See Kissel Trial Tr. 194–95, 197, Dec. 7, 2017.

The defendants have also claimed that Popp's testimony somehow eliminated the scenario that the lamp head lowered inadvertently due to an excitation—that is, the scenario that, minutes earlier, he had

stated was more likely than not. Apart from making no sense, this argument misstates Popp's testimony. On both cross and redirect examination, Popp clarified that when he testified that it was "impossible" that the lamp fell "spontaneously," he meant "spontaneously" to mean "without outside influence" or "in a vacuum." Trial Tr. 166–168, 214–15. This statement is not at all inconsistent with his opinion in the case. Finally, the defendants claim that Popp's theory is flawed because his math doesn't add up: none of his "jiggle" tests caused the lamp head to descend the 18 inches Dr. Wang claimed he put the lamp head above Ms. Kissel's foot. But that argument demands that we trust Dr. Wang's measurement. That would be ill-advised: Mr. Popp found that it was impossible for Wang to place the lamp more than 13 inches from Ms. Kissel's foot; in fact, seven inches was the most likely distance—fewer than the nine inches Popp's jiggle test caused the lamp head to descend. See *id.* at 145–50.

b. No Expert Testimony was Required to Prove that the Plaintiff's Severe Burns were Caused by Placing an Unshielded 572-Degrees-Fahrenheit Object in a Way that it Contacted her Flesh

Ms. Kissel's evidence presented a causation theory so simple and probable that it required no expert testimony. Although medical expert opinion evidence is generally required to prove causation in a medical malpractice case, that is not always the case. "An exception to the general rule with regard to expert medical opinion evidence is when the medical condition is obvious or common in everyday life." *Rosa v. Lawrence & Mem'l Hosp.*, 145 Conn. App. 275, 303–04 (2013) (quoting cases); *State v. Orsini,* 155 Conn. 367, 372 (1967) (same quote). "Similarly, expert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." *Id.*; *Gannon v. Kresge Co.,* 114 Conn. 36, 38 (1931) (same quote).

Legally, causation in a medical malpractice case is no different than causation in any other case. It is just that "[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within

the sphere of the common knowledge of the lay person." *Shegog v. Zabrecky,* 36 Conn. App. 737, 745–46, (1995). Just as in any other case, expert testimony is "required only when the question involved goes beyond the field of the ordinary knowledge and experience of the trier of fact." *Allison v. Manetta*, 284 Conn. 389, 405–06 (2007). "The trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters." *Id.* (citations omitted). For this reason, a variety of potentially specialized topics do not necessarily require proof by expert opinion. See *id.* (noting favorably cases finding expert testimony not required to prove negligent boat operation; the detrimental effects of marijuana; the effect of operating a gasoline station on traffic safety; that injuries to plaintiff's property were caused by neighbor's blasting; negligence in failing to erect porch railing; that a fence erected around blasting area was insufficient to prevent injuries; obscenity of certain materials for minors; and the difficulty of backing out of a parking space).

The evidence and theory in this case fit squarely within that exception. Ms. Kissel's medical malpractice causation case is as follows: (1) the lamp had a dangerous tendency to lower inadvertently; (2) because of Dr. Wang's breach of the standard of care, the lamp was unsafely placed over Ms. Kissel; (3) the lamp's 572-degrees-Fahrenheit-heating element lowered inadvertently onto Ms. Kissel's foot during her acupuncture procedure; (4) the lamp's 572-degrees-Fahrenheit-heating element caused the severe burns to Ms. Kissel's foot and toes. That placing an extremely hot object with a tendency to fall in unsafe relation to a person's flesh actually, foreseeably, and substantially caused her burns does not require expert testimony—it barely requires common sense. Ms. Kissel's products liability causation case is even simpler: (1) one or more of the alleged defects in the lamp caused its 572-degrees-Fahrenheit-heating element to contact Ms. Kissel's foot; and (2) the 572-degrees-Fahrenheit-heating element contact with Ms. Kissel's foot caused her severe burns. The most technically sophisticated link in each of these chains of inferences is the recognition that extraordinarily hot objects will cause severe burns when they contact

human flesh. This principle is perhaps the archetypal "medical condition [that] is obvious or common in everyday life." *Rosa*, 145 Conn. App. at 303–04. Proving it requires no expert testimony.

3. The Defendants' Remaining Arguments are Meritless

The defendants argue that the jury erred in finding that they failed to prove their special defenses that Ms. Kissel was comparatively or contributorily negligent. Considering that they had the burden of proof, *Perley v. Glastonbury Bank & Tr. Co.*, 170 Conn. 691, 698 (1976) (party asserting special defense has burden of proof), and they provided no evidence that Ms. Kissel did anything that could be reasonably conceived of as negligent, this result was both justified and unsurprising.

While the Center quibbles with slight differences in wording of the charge's two descriptions of when expert testimony is not required for the jury to find causation, the phrases have identical meaning and track the language used in the caselaw. See *infra* at Part II.A.2.b. There was no defect in the jury charge.

Likewise, contrary to the Center's contention, the verdicts were not inconsistent; one set of percentages was Dr. Wang's liability in relation to Ms. Kissel for apportionment, while the other was between Dr. Wang and WABBO for contribution. (This argument displays considerable chutzpah, as well: it was the Center that demanded that the court keep the verdict forms and interrogatories they now argue produced a defective result.)

Finally, contrary to WABBO's argument, Ms. Kissel did prove that its proposed alternative designs were technically and economically feasible. See Popp Trial Tr. 79–80 (safety guard and locking device both economically and technically feasible). Indeed, WABBO itself stipulated as much about the

safety guard, and admitted it was aware in 2008 that other companies were using joint-locking mechanisms on similar devices. Woo Trial Tr. 68–69, Nov. 22, 2017.

B. The Jury's Damages Award was Proper and there is no Basis for Reducing It

Under Connecticut law, "[t]he amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury." *Johnson v. Chaves*, 78 Conn. App. 342, 346 (2003). In relevant part, Conn. Gen. Stat. § 52-572h(f) provides that "[t]he jury . . . shall specify: (1) The amount of economic damages; (2) the amount of noneconomic damages; [and] (3) any findings of fact necessary for the court to specify recoverable economic damages and recoverable noneconomic damages." The Connecticut Supreme Court has "consistently . . . held" that remittitur may be exercised "only in the most exceptional of circumstances." *Saleh*, 303 Conn. at 280.

This is no accident. The constitutional right to jury trial "embraces the determination of damages." *Ham*, 248 Conn. at 536; *Johnson*, 78 Conn. App. at 346. "This right is 'one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded [persons] passed upon by the jury and not by the court.'" *Mather v. Griffin Hospital*, 207 Conn. 125, 138 (1998) (quoting *Camp v. Booth*, 160 Conn. 10, 13 (1970)).

Moreover, both the Connecticut and U.S. Supreme Courts have emphasized that courts should pay special deference to jury's determinations of noneconomic damages in personal injury cases. See *Campbell v. Gould*, 194 Conn. 35, 40 (1984) ("The award of damages for pain and suffering is peculiarly within the province of the trier, and will be sustained, even though generous, if it does not shock the sense of justice."); *Dimick*, 293 U.S. at 479–480 (noting that in "personal torts" cases "it was always admitted that in cases where the amount of damages was uncertain their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it"); see also *Sofie v. Fibreboard Corp.*, 112

Wn.2d 636, 647 (Wash. 1989) (noting *Dimick*'s command that "a judge should give more deference to a jury's verdict when the damages at issue concern a noneconomic loss").

As a result, on a motion for remittitur, "[t]he only practical test to apply to [a] verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." *Johnson*, 78 Conn. App. at 346 (quoting *Ham*, 248 Conn. at 536). This "language is intended to convey the extraordinary departure from reasonableness that is required before a court properly may exercise its authority to set aside the jury's award of damages." *Saleh*, 303 Conn. at 283. "The size of the verdict alone does not determine whether it is excessive." *Id.* The Supreme Court has specifically "discountenanced using the special damages as a yardstick by which to measure the general damages." *Campbell v. Gould*, 194 Conn. at 40 (quoting *Camp*, 160 Conn. at 12–13). Noneconomic damages "cannot be computed by mathematical formula." *Birgel*, 163 Conn. at 34. Instead, "[t]he process of evaluation is one of apportionment depending largely upon the sound discretion of the trier." *Campbell*, 194 Conn. at 40 (citing *Kekac v. New York, N.H. & H. R. Co.*, 149 Conn. 731, 732 (1962)). Importantly, in reviewing the verdict, "the trial court is required to review the evidence in the light most favorable to sustaining the verdict." *Saleh*, 303 Conn. at 281 (citing *Wochek v. Foley*, 193 Conn. 582, 587 (1984)).

The Connecticut Supreme Court has long rejected using analogies to other cases in considering motions to reduce personal injury verdicts. See *Birgel v. Heintz*, 163 Conn. 23, 34 (1972) ("It serves no useful purpose to compare a verdict in one personal injury case with the verdicts in other personal injury cases."); *Gorham v. Farmington Motor Inn, Inc.*, 159 Conn. 576, 585 (1970) ("[W]e have held that comparisons with amounts in other verdicts serve little purpose."). That's because, again, "[t]he question [of damages] is one peculiarly within the province of the jury." *Birgel*, 163 Conn. at 34. As a result, juries

"may differ widely in the conclusions which they reach in what may be apparently similar cases, and, in fact, in any given case one jury may arrive at a result substantially different from that of another jury." *Id.* "This flexibility, though it may lead to uncertainty, is a necessary concomitant of the jury system as it operates in cases of this nature." *Id.* The Court has emphasized that "[i]n determining whether the jury's verdict is manifestly unjust the court should not place on the scale its own factual counterweights." *Jacobs*, 180 Conn. at 418.

Into these stiff legal headwinds, the defendants toss a handful of unreported superior court cases, none with facts similar to this one. Of these, only two were handed down since the turn of the millennium, none in the last 15 years. And as previously noted, this form of comparative analysis is precisely the sort the Supreme Court has rejected. See *Birgel*, 163 Conn. at 34.

Even these cases do not survive light scrutiny in today's landscape. None of them include the standard recounted above, or any recognition that remittitur is a "most exceptional" remedy. *Saleh*, 303 Conn. at 280. Indeed, several (two by the same judge trial referee) lack any sort of explanation and, seemingly unaware, run headlong into the Supreme Court's warning not to evaluate a noneconomic damages award by a special-damages yardstick. See *e.g.*, *Terry v. Weinstein*, No. CV-98-0579537S, 2001 WL 194853, at *3 (Conn. Super. Ct. Feb. 5, 2001); (Stengel, Judge Trial Referee) *DiNardo v. Lashgari*, No. 325946, 1991 WL 25786, at *3 (Conn. Super. Ct. Feb. 1, 1991) (Stengel); *Rodriguez v. Pickett*, No. CV 88 0354189 S, 1993 WL 241763, at *1 (Conn. Super. Ct. June 25, 1993); *Yatsenick v. Himes*, No. 64197, 1994 WL 34210, at *4 (Conn. Super. Ct. Feb. 1, 1994) (basing remittitur of noneconomic damages in part on low special damages, *plaintiff's* not providing comparator cases to justify award, and absence of evidence of severity of several weeks of emotional distress where plaintiff's suicide, which was the result of defendant's conduct, was in evidence but not part of damages).

Most importantly, despite the defendants' attempts to minimize them, Ms. Kissel suffered—and proved—very serious and permanent damages. She received third-degree burns down to the bone on her big toe, and severe third- and second-degree burns elsewhere on her foot and toes. *Id.* at 15; Testimony of Tae Ho Kim, Trial Tr. 53, Nov. 28, 2017. She endured an agonizing, two-year-long path of rehabilitation that never led to true recovery. Over those two years, she underwent four skin-graft surgeries, numerous excruciating debridements, and countless doctor and nurse visits. See generally Pl.'s Exh. 4, 5, 6, 10 (medical records); Kissel Trial Tr. at 109–111. Her big toe was broken. Exh. 5 (N.Y. Group for Plastic Surgery) at 0510. Her mobility was severely limited. Testimony of Coreen Estrow, Trial Tr. 155–56, Dec. 5, 2017. She was in terrible, constant pain. Kissel Trial Tr. at 109–111. She was forced to be constantly aware of her foot to guard it against further injury. Estrow Trial Tr. 155–56. For multiple multi-week periods, she had to have a "wound-vac" constantly attached her foot to preserve the wound site for grafting. Exh. 5 at 0524; Exh. 6 (Visiting Nurse Serv.) at 0670, 0696. She felt like a burden to her coworkers and friends. Estrow Trial Tr. at 159. For a long period, there was a serious likelihood that her toe would have to be amputated. Exh. 5 at 0506. And even as she neared the end of this two-year period, the wound would reopen for no apparent reason. *Id.* at 0524; Kissel Trial Tr. at 159–60. She missed large amounts of work, the place from which she draws her senses of community and identity. Estrow Trial Tr. at 150–51.

Since finishing her period of "recovery," Ms. Kissel has been faced with the permanent injury inflicted by Dr. Wang's CQ-36 heat lamp. She has constant pain, numbness, and discomfort. Kissel Trial Tr. at 160–61. That discomfort reduces her mobility, and prevents her from walking any significant distance. *Id.* at 163–65. She thinks about her injuries all the time. *Id.* She must change shoes constantly to avoid additional discomfort. She has permanent, deforming scarring on her foot, toes, and the graft sites on her leg. *Id.* at 162. Her toe "looks like a sausage that's been

thrown in the blender and left open." Estrow Trial Tr. at 163.

That deformity not only decreases her ability to enjoy work, social, and other activities, but even changes what she can wear, preventing her from wearing the shoes she likes and forcing her to wear ill-fitting shoes because her feet are now different sizes. Kissel Trial Tr. at 99–100, 162–65, 147–48; Estrow Trial Tr. at 166. It limits her dating life. Estrow Trial Tr. at 166. Her mobility is reduced—she cannot walk more than a very short distance, and she can no longer go on walks and hikes with friends, as she had previously so enjoyed. *Id.* at 163; Kissel Trial Tr. at 97–99, 139; Kissel Trial Tr. at 33, Dec. 7, 2017. The effects of Ms. Kissel's injuries have reduced her enjoyment of even those activities she can now perform. Kissel Trial Tr. at 97–99. All these losses of enjoyment will continue for the rest of her life. *Id.* at 162. Based on these damages, the jury's verdict is entirely reasonable. Certainly, no one could say it "so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption." *Saleh*, 303 Conn. at 281.

The defendants make several additional arguments that may be quickly dispatched. A few isolated references to Ms. Kissel's pure emotional state did not affect the jury's deliberations. In any event, this Court struck any potentially inadmissible testimony and gave curative instructions. See *Modaffari v. Greenwich Hosp.*, 157 Conn. App. 777, 785 (2015) (noting that jury "presumed to disregard inadmissible evidence brought to its attention unless there is an overwhelming probability that the jury will not follow the trial court's instructions and a strong likelihood that the inadmissible evidence was devastating"). There is no reason to think the jury disregarded the Court's instructions.

Finally, plaintiff's counsel's closing argument was completely proper. Plaintiff's counsel's reference to Bill Gates made only the uncontroversial point that all people's pain, suffering, and

loss of enjoyment of life's activities is equally valuable to them, and that Ms. Kissel's should not be discounted because of her modest means. And plaintiff's counsel did not at any point improperly tell the jury to "send a message" to anyone other than the defendants. His uncontroversial statement that "what you permit is what you promote" merely reminded the jury of one of its bedrock duties in tort cases: "deterrence of wrongful conduct." *Jarmie v. Troncale*, 306 Conn. 578, 599–600 (2012) (noting that in tort cases, courts "are concerned not only with compensation of the victim, but with admonition of the wrongdoer") (quoting W. KEETON ET AL, PROSSER AND KEETON ON LAW OF TORTS § 4, 237–238 (5th ed. 1984)).

III. CONCLUSION

For the foregoing reasons, the defendants' motions to set aside the verdict and for remittitur should be denied.

THE PLAINTIFF

BY:_____/s/_____

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CERTIFICATION

This is to certify that a copy of the foregoing was sent, via electronic mail, on this 1st day of March 2018, to counsel of record as follows:

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DOCKET NO: FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	MARCH 15, 2018

CENTER FOR WOMEN'S HEALTH'S REPLY TO PLAINTIFF'S OMNIBUS OBJECTION

I. Introduction

Plaintiff's objection is convoluted in that it combines arguments about both the negligence and products liability claims. It avoids any direct response to The Center's claims that the causation case against Dr. Wang had not been proven. Plaintiff has failed to point to any evidence to prove causation. As a result, defendant was entitled to a directed verdict because plaintiff failed to prove causation in her case in chief.

II. The General Verdict Rule Does Not Apply

Through its motion to set aside the verdict, defendant is seeking reconsideration of its earlier directed verdict motion. This procedure is authorized by Connecticut Practice Book § 16-37.

In Wood v. City of Bridgeport, 216 Conn. 604 (1990) the court made clear that the moving party on a directed verdict motion has the right to have the motion decided on the basis of the evidence presented as of the time of the motion. Wood at 606.

The general verdict rule is also inapplicable because medical negligence was the only cause of action against Dr. Wang. There were jury interrogatories that determined the issues on that cause of action and the cause of action against the co-defendant sounding in products liability. "The general verdict rule applies whenever a verdict for one party could reasonably be rendered on one or more distinct causes of action . . . or defenses . . ." Hall v. Bergman, 296 Conn. 169, 181 (2009), quoting Curry v. Burns, 296 Conn. 169, 181 (1993).

III. Plaintiff Neither Alleged Nor Proved that the Lamp Was Placed Too Close

Plaintiff asserts, "(D)efendants Wang and CWH failed to address Ms. Kissel's claim that Dr. Wang

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failed to conform to the standard of care in placing the lamp too close to Ms. Kissel's foot, causing her injuries." (Plaintiff's objection pages 9-10.) The jury was not charged about a failure in "placing the lamp too close". It was charged that Dr. Wang, "did not properly place heat lamps during the acupuncture procedure such that the lamps *remained a safe distance* from the plaintiff." (emphasis added). (See, Charge) "Placing the lamp too close" was not a theory supported by any expert so it could not be credited.

IV. There Was No Evidence That The Lamp Was Placed Closer Than 12" Away

Plaintiff's entire case was about the lamp moving down 18". This was the basis for the hypotheticals to her experts. There was no evidence that Dr. Wang had placed the lamp closer to the plaintiff than 12". Plaintiff cites testimony of Mr. Popp discussing the "drop test" that he had done and its results. It was not testimony about Dr. Wang "placing the lamp" a certain distance from the plaintiff. Nowhere does Mr. Popp use the word "place" or give testimony about the initial distance. Mr. Popp admitted that his testing was done without knowing of either the length of the plaintiff's foot or the height of the table. So he had no way to know the initial distance the lamp was placed from plaintiff's foot.

V. Plaintiff's Claim that She Proved Her Case With Circumstantial Evidence Fails

It is difficult to unravel plaintiff's arguments on pages 10-13 about standard of care testimony and its link to causation. The defendant will address the law and plaintiff's supposed proof.

In Rawls v. Progressive N. Ins. Co., 310 Conn 768 (2014) the Connecticut Supreme Court noted that, "The inferences drawn from circumstantial evidence are distinct from conjecture and surmise. Circumstantial evidence requires that 'the trier [find] that the facts from which the trier is asked to draw the inference are proven and that the inference is not only logical and reasonable but strong enough so that it can be found that it is more probable than otherwise that the fact to be inferred is true.'" Rawls at 777, fn. 5 quoting, Hennessey v. Hennessey, 145 Conn. 211, 214-15 (1958). Rawls further compares circumstantial evidence to conjecture and surmise. "(I)mpermissible conjecture and surmise would require a jury to infer a new set of facts from unproven or nonexistent facts. See Black's Law Dictionary (9th Ed. 2009) (defining

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"surmise" as "[a]n idea based on weak evidence; conjecture" and defining "conjecture" as "[a] guess; supposition; surmise"); see also Merriam Webster's Collegiate Dictionary (11th Ed. 2003) (defining "surmise" as "a thought or idea based on scanty evidence" and defining "conjecture" as "[an] inference from defective or presumptive evidence")." Rawls at 777, fn. 5,

There was no direct evidence that the subject lamp had a defect or that Dr. Wang was aware of a propensity for this lamp to spontaneously lower. The post-incident, expert investigation did not find a defect that explained why the lamp lowered during the treatment. Circumstantial evidence, by definition, requires that "the trier [find] that the facts from which the trier is asked to draw the inference are proven and that the inference is not only logical and reasonable but strong enough so that it can be found that it is more probable than otherwise that the fact to be inferred is true." Rawls at 777. It is not logical or reasonable to determine, contrary to the direct evidence, that because some other lamp may have exhibited a problem of lowering at an unspecified time in that lamp's lifespan, that this lamp had that defect on the day of the incident. Nor does circumstantial evidence provide proof that Dr. Wang was aware of a prior problem with the subject lamp. Such a finding amounts to pure speculation about the subject lamp.

VI. This Case Was Not About Dr. Wang Supposedly Knowing About the Lamp Lowering

The directed verdict was not sought on the issue that Dr. Wang "knew or should have known (the lamp) had a propensity to lower inadvertently". That was not the expert opinion in plaintiff's case in chief.

The assertions in plaintiff's brief that, "Dr. Wang breached the standard of care by using a lamp he knew or should have known had a propensity to lower inadvertently" is misdirection away from her failure to prove a breach of the standard of care and causation. This follows the plaintiff's theme throughout trial where she tried to steer the case away from the relevant issue – the actual standard of care and breach testified to by her expert – in favor of her unsupported theory for Dr. Wang's liability.

The jury could not apply this unsupported theory on its own, it needed expert testimony. This unfounded theory plays no role in deciding the directed verdict. The standard of care and breach offered

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through Ms. Moran required testing for the presence of a defect. Without showing a defect that would have been found with such testing, proof of causation fails.

a. Dr. Brett's Testimony

In a strategy born of desperation, the plaintiff is now pursuing the notion that she proved her case through the defendant's standard of care expert Dr. Brett. This assertion is baseless.

Plaintiff's claims in her brief on page 10 that Dr. Brett's testimony, which she now claims to rely on as an expert opinion, was that if an individual lamp is known to have "that problem" meaning a "propensity to spontaneously lower", then an acupuncturist should not use that lamp. In her brief plaintiff improperly attributes the words of the question to Dr. Brett as her "testimony." (December 14, 2017 Testimony, p. 147 l. 19-24 and p. 148 l. 4-6). She has left out the word "spontaneously" which was the basis for Dr. Brett's testimony and uses "unsafe tendency" in her brief. Plaintiff is trying to manipulate this testimony in an unfair way. Dr. Brett did not opine that there was any breach of the standard of care.

b. Plaintiff did not Present Evidence That Subject Lamp Was Known To Lower

In the paragraphs that follow on page 11, plaintiff next tries to make a case that she proved Dr. Wang knew the subject lamp had a propensity to spontaneously fall. The defendant will address each claim.

The inspection by Dr. Wang, as required by the standard of care, did not prove knowledge that the subject lamp had spontaneously lowered. Nothing about completing an inspection lends any credence to the notion that Dr. Wang knew this lamp spontaneously lowered. Plaintiff's next asserts, "He did those inspections because if the lamp is in a loosened condition, 'a dangerous action can happen.'" Id. at 127". The Id. reference is to the November 30 transcript at page 127. Plaintiff attached page 127 to her appendix and nowhere do the quoted words, "a dangerous action can happen" appear.[1] Regardless, this also does not prove Dr. Wang was experiencing the lamp spontaneously lowering. Next she states, "Indeed, he noted that

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[1] A search of the transcript did not reveal them to be anywhere in the November 30, 2017 transcript. The best the defendant can tell this is a made up quote improperly attributed to Dr. Wang.

he did the inspection because a loose lamp could fall. Id at 125." Once again, the plaintiff has attached page 125 from November 30, 2017 and those words do not appear. It is a non-sequitur to use an inspection that did not identify a defect, as proof of a defect. The next sentence states, "He admitted that he knew that the lamp had a tendency to lower when worn. Id at 147, 153-154". None of these pages are under the November 30 tab. On November 28, page 147 there were two questions about lowering. To the first, his answer was "I know it's not", meaning he knew the lamp did not have a propensity to lower when the pistons became worn. (November 28, l. 9). His next response was: "Just very hypothetical. It's not a reality you ask me if that – how much degree. Worn after two years obviously have little. So you're assuming wore; how much? We use one day have minor wore under telescope. So it's a broad question I cannot answer." (November 28, page 147, l. 13-17). So the questions on 147 are certainly not an "admission" that Dr. Wang knew that the subject lamp was lowering due to wear. On page 153 -154, he was asked if he agreed with the "distributor's testimony" about when the pistons become worn the lamp has a tendency to lower inadvertently. On page 154 Dr. Wang stated "I agree with – " and then was intentionally cut off before he finished his answer. (November 28, p. 154, l. 1) "I agree with -" is not an admission of anything. Counsel chose to limit him to a truncated response. Plaintiff goes on to significantly mis-represents the record to the court in her next sentence. It reads, "He admitted that he performed that inspection to guard against the lamp's propensity to fall. Trial Tr. 139, Nov. 30, 2017 ("Q. Was your maintenance routine, this extensive maintenance routine, designed to guard against that exact propensity? A. First, the last question is, not yesterday, I said so, because you asked me, I saw the first part after long time use become worn. I ask—that's involve two question. The worn, I would say yes."). Here the plaintiff, without even including ellipses to show that the answer continued, intentionally left out the remainder of Dr. Wang's answer which was, "But that's not automatically cause propensity to fall. That's I think, correct (indiscernible)" (November 30 at page 139 l. 17-32). Dr. Wang denied that the wearing of the lamp is related to a propensity to fall and

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plaintiff intentionally omitted this statement. This testimony fails to prove plaintiff's claim that there was evidence that the lamp had spontaneously lowered. Also, the fact that Dr. Wang had no other devices like the lamp to inspect in a similar way proves nothing related to this case.

None of Dr. Wang's testimony above proves this lamp had a propensity known to him that it lowered spontaneously. It is also not circumstantial evidence providing prove such knowledge.

Plaintiff next tries on the bottom of page 11 to use other testimony for support. She cites Professor Vallee's testimony completely out of context. The very point of his testimony was that the condition of spontaneous lowering was not present in the lamp. Had it been present, it would have been noticed by Dr. Wang. The plaintiff is aimlessly grasping at straws in trying to use the testimony of the engineer who testified on behalf of the product distributor that the subject lamp had absolutely no defects that made it unreasonably dangerous. As to Mr. Popp, plaintiff has returned to misrepresenting the record. On pages 145 to 146 of the trial transcript of December 1, Mr. Popp never testified to the statement in the plaintiff's parenthetical, "thorough inspection would reveal tendency to lower inadvertently." Ms. Woo is a layperson and had no knowledge of the subject lamp's functioning as she never inspected it before trial.

On page 12 plaintiff tries to cull more remote portions of testimony that she claims support her theory that a jury could find that the lamp had a tendency to lower when Dr. Wang used it. These arguments do not prove her point. The argument that the directed verdict motion should fail because the jury could have found that the lamp's condition in April of 2010 was the same as its condition at trial when Dr. Wang called it "dangerously loose" is wrong. The jury was instructed that it could not do so. Dr. Wang's practice of checking the tightness of the lamp as well as his decision to discard a similar lamp after the incident also provides no information about the subject lamp that would defeat the directed verdict motion. The issue the plaintiff through the reference to Dr. Brett's testimony, was not "dangerous propensity" it was knowledge of the lamp actually having a known propensity to lower. Plaintiff provided no evidence of spontaneous

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lowering, nor did she prove that Dr. Wang had such knowledge. Plaintiff completely misunderstands the concept of circumstantial evidence. Her case had no direct evidence that Dr. Wang knew that the subject lamp ever exhibited a propensity to lower during use. All of the direct evidence was to the contrary, that he never experienced anything of that nature happening with the lamp. The further direct evidence from Professor Vallee was that he tested the lamp and it never demonstrated such a propensity. Mr. Popp also rejected spontaneous lowering due to a defect, in favor of excitation of the pole of the lamp. Plaintiff's so-called circumstantial case could not prove the fact that Dr. Wang was aware of the lamp spontaneously lowering or the fact that it had occurred due to a defect. Half of her so-called circumstantial evidence was testimony about generalities concerning lamps of this type, such as knowing that with an unspecified amount of use there is a likelihood that the lamp will wear and loosen. Or that generally that if a lamp becomes loose, it can fall. Such generalities cannot be applied to the subject lamp. The other half was focused on trying to use Dr. Wang's careful and thorough inspection that her own expert said were not frequent enough, against him to say that his inspections were "circumstantial evidence" that he knew the lamp had a propensity to lower. General knowledge that mechanical devices can fail or the a person's action to inspect a device to make sure it is free of defects is not "circumstantial evidence" of knowledge that a specific product has failed due to a defect. To be credited, the circumstantial evidence to must be not only be logical and reasonable, but also strong enough to make it probable that the fact inferred is true. Rawls at 777, fn. 5. None of these tiny disparate crumbs of evidence that the plaintiff is now trying to scrape together about distant facts, unrelated to the subject lamp, provide the proof that the plaintiff needed, which was that this lamp had a history of spontaneously lowering and that Dr. Wang was actually aware that this lamp had spontaneously lowered previously. Plaintiff also failed to prove through expert testimony, that some discernable defect in the subject lamp would have been revealed to Dr. Wang with the additional inspection required by Ms. Wan Moran. Plaintiff is absolutely incorrect that the jury can just make this "common sense

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finding". She is improperly suggesting that the jury could have speculated that that Dr. Wang was aware that the subject lamp had spontaneously lowered. That is not permitted by our law. See, Rawls at 777, fn. 5. This lay jury could not decide its own, in the absence of expert testimony, that there was a defective condition in this TDP lamp that caused it to spontaneously lower. See, Santopietro v. City of New Haven, 239 Conn. 207, 227 (1996) (standard of care for softball umpire beyond the ken of ordinary fact finder).

VII. Ms. Wan Moran's Opinions

At the bottom of page 12 plaintiff attempts to defend her standard of care expert's opinions claiming that they are "buttressed" by the circumstantial evidence above, but are nonetheless supposedly sufficient on their own. Plaintiff never proved through any expert witness that there was a defect present in the lamp that would have been possible for Dr. Wang to find, in turn leading to the lamp being taken out of service. That is a simple fact. In the middle paragraph on page 13 plaintiff dances around this key issue and never addresses it. She asserts: "Rather, Ms. Wan Moran testified that the standard of care required an inspection routine that Dr. Wang either failed to fulfill or whose results he ignored." She then cites Professor Vallee's transcript on page 54-55 and Mr. Popp's transcript at 145 to 146 to support testimony supposedly give by Ms. Moran. Nowhere is Ms. Wan Moran's testimony found on this point. While plaintiff will not acknowledge the gap in Ms. Wan Moran's testimony, her failure to cite to what she testified to at trial speaks volumes. Ms. Wan Moran never gave the testimony that the plaintiff needed to make out her case. Professor Vallee's testimony on pages 54-55 does not support the plaintiff's assertion on page 13 that Dr. Wang either failed to complete an inspection or ignored its results. In fact, it directly supports that there was no defect, as he testified he found the lamp was not unreasonably dangerous. (Vallee Transcript December 7, 2017 page 55.). Mr. Popp's testimony at page 145-146 also offers no opinions about inspections or finding defects. Moreover, neither engineer could testify on standard of care.

VIX. Response to II. A. 2. a. (Page 14)

The same arguments are being repeated in each section. The paragraph in the middle of page 16,

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makes the same unfounded assertion addressed above about the unsafe propensity to lower.

Plaintiff also intentionally combines the separate theories against WABBO and Dr. Wang on the bottom of page 16 to the top of page 17. Ms. Woo's testimony plays no role in proving the malpractice case.

The plaintiff's arguments about Mr. Popp's opinions and testing on page 17 are vague and unavailing. Plaintiff wants Mr. Popp's testimony that the lamp was contacted and then fell to be credited for what happened in the room, but she fails to recognize that such a theory is inconsistent with negligence against Dr. Wang, which relied on failing an inspection intended to prevent it from falling on its own.

VX. Response to II. A. 2. b. (Page 18)

On page 19, plaintiff lists reasons as to why she did not need expert testimony to prove her malpractice case. She is wrong on the law as well as her supposed proof. On the law, malpractice cases require proof by expert testimony. The four supposed elements of her causation case miss the required elements of the claim.[2] As set forth in detail above, she had to prove that through a breach of the standard of care, Dr. Wang used the lamp in this treatment. The breach was the supposed lack of inspection in between patients. Plaintiff failed to prove had the inspection been done it would have revealed a defect that would have caused the lamp to be taken out of service. "Common sense" does not substitute for proof. The proof had to be through expert testimony.

VXI. Response to II. A. 3. (page 20) and II. B. (page 21)

The defendant will stand on the arguments made in its main brief as to these arguments.

VXII. Conclusion

The general verdict rule does not overcome the fact that plaintiff's case failed for proof of causation. Plaintiff's reliance in this motion on the notion that the defendant's standard of care expert, Dr. Brett, provided her with the evidence to prove her case also fails. Dr. Brett did not find any breach of the standard

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[2] She did not prove the subject lamp had a dangerous tendency to lower inadvertently or that the additional inspection would have reveal a defect causing the lamp to be taken out of service.

of care by Dr. Wang and the jury could not determine a breach without expert testimony. Plaintiff's general claim that she proved a defect in the subject lamp and knowledge on the part of Dr. Wang of that defect fails for multiple reasons including that the testimony was not what she claims it to be what she claims is circumstantial evidence concerning the subject lamp, is instead impermissible conjecture and surmise. Lastly, the plaintiff fails to meet the defendant's argument that she failed to connect her expert's testimony on breach of the standard of care, with causation. She never showed the additional inspections would have identified a defect causing the lamp to be taken out of service. Plaintiff failed to prove the necessary elements of her case against Dr. Wang and The Center. As a result the defendant's motion to set aside the verdict must be granted.

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DOCKET NO: FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL	:	J.D. OF STAMFORD
VS.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JUNE 14, 2018

CENTER FOR WOMEN'S HEALTH'S SUPPLEMENT TO THE MOTION TO SET ASIDE THE VERDICT (DOCKET # 399.00)

The defendant Center for Women's Health, hereby submits this supplement to its Motion to set aside the verdict (Docket # 399.00) to address the holding of Sylvia Keuhl v. Rosalind J. Koskoff, (AC 38128) released June 12, 2018, (Attached as Exhibit A), as it pertains to the legal requirement for expert testimony to establish the element of causation in a malpractice case.

By way of background, Keuhl involved a case to recover damages for alleged legal malpractice in connection with representing the plaintiff in proceedings related to a civil action for injuries arising from a motor vehicle accident and survivor's benefits related to a worker's compensation claim. The Appellate Court held it was error in denying the defendant's motion to set aside the verdict because the plaintiff failed to provide expert testimony as to causation. Id.

The evidence relevant to the determinative issue in the Keuhl appeal concerned the expert testimony presented by Attorney Willcutts, as to the prevailing standard in the legal community, whether the defendant breached that standard while representing the plaintiff and whether the alleged breach proximately caused the plaintiff's alleged losses and damages. "Although Willcutts testified at length about Koskoff's alleged mistakes in handling the plaintiff's claim, he did not testify that her alleged breach of the standard of care proximately caused the plaintiff's alleged losses and damages, that is that the plaintiff would have received survivor's benefits if Koskoff had submitted a claim for such benefits or if she had referred the matter to a lawyer who specializes in worker's compensation claims." Id. The Keuhl

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defendants argued that because the plaintiff claimed that her damages flowed from the loss of her right to pursue survivor's benefits under the act, she needed to present a legal expert to testify that she more likely would have been awarded survivor's benefits if she had submitted a claim. Id. The trial court (Povodator, J) in Keuhl denied the defendant's motion for directed verdict and subsequent motion for judgment notwithstanding the verdict and motion to set aside the verdict. The Appellate Court in Keuhl determined that failure to present expert testimony as to causation was fatal to plaintiff's claim and reversed the trial court and remanded the case with direction to render judgment for the defendants. Id.

The plaintiff's failure to present expert testimony by acupuncturist Simone Wan Moran. L.Ac. mirrors the plaintiff's failure in Keuhl to present expert testimony to establish the element of causation in a malpractice case. Likewise, the legal arguments in support of a motion to set aside the verdict are strikingly similar by the Koskoff defendants in Keuhl and by the Center for Women's Health in the case at bar, which argued it was entitled to a directed verdict because plaintiff failed to prove causation in her case in chief. The parallels among the two plaintiffs' experts' failures to present necessary testimony on the issue of causation will be illustrated below. Therefore, the Appellate Court's opinion in Keuhl should guide this Court in deciding the Motion to Set Aside (Docket #399.00).

> Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services. . .(Internal quotations marks omitted.)
> Updike, Kelly & Spellacy, P.C. v. Beckett, 269 Conn. 613, 649 (2004).

Generally, a plaintiff who alleges malpractice must prove all of the following elements: (1) professional relationship between the parties; (2) defendant's wrongful act or omission; (3) causation; and (4) damages. Grim v. Fox, 303 Conn. 322, 329 (2012). Both the Keuhl and Kissel matters turn on the causation element of malpractice.

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> The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the defendant's conduct...The second component, proximate causation, requires us to determine whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries...That is, there must be an unbroken sequence of events that tied [the plaintiff'] injuries to the [defendant's conduct]...The causal connection must be based [on] more than conjecture and surmise...[N]o matter how negligent a party may have been, if his negligent act bears no [demonstrable] relation to the injury, it is not actionable...
>
> More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment.... To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action. Bozelko v. Papstavros, supra, 323 Conn. 283-84.
> Keuhl v. Koskoff, AC 38128.

While there should be no dispute that the plaintiff is required to present "causation" evidence, this Court must determine if Ms. Kissel was required to do so through expert testimony, and thereafter the sufficiency of that evidence to provide the required "nexus" between the defendant's alleged malpractice and the plaintiff's claimed damages.

Our Supreme Court has explained that,

> Expert testimony is required because to know the outcome if a [professional] had not been negligent is beyond the ken of the ordinary trier of fact. Bozelko v. Papastavros, supra, 323 Conn. 282, 84. Expert testimony provides the required nexus between the [professional's] negligence and the plaintiff's damages. Id. "In complex... malpractice matters, expert testimony is necessary to keep the jury from speculating on how the [plaintiff's] loss or injury is directly linked to that which he claims was the breach of duty by the [defendant]." (Emphasis omitted.) Id., 289.
> Keuhl v. Koskoff, AC 38128.

The plaintiff's malpractice expert in Keuhl was Attorney Willcutts. Attorney Willcutts testified that the defendant "breached the standard of care" because she failed to file a worker's compensation claim. Id. "Nowhere in his testimony however, did he testify that [the defendant's] failure to do so was a proximate cause of the plaintiff's injuries and losses. At no time did he testify that the plaintiff would have prevailed

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on the issues related to the case-within-a-case, namely whether the collision occurred during the course of the decedent's employment and the collisions was a proximate cause of his death." Id. To summarize, Attorney Willcutts' failure to provide the necessary "causation nexus" between the alleged negligence and plaintiff's damage, the Appellate Court noted, "He did not opine that had Koskoff filed a compensation claim, the plaintiff more likely than not would have received survivor benefits. This omission was especially critical in light of the fact that [plaintiff's employer and worker's compensation insurer] were contesting the decedent's claim for worker's compensation benefits." Id.

In the Kissel matter, the plaintiff's expert Simone Wan Moran, L.Ac. testified that Dr. Wang breached the standard of care because he failed to inspect the heat lamp for defects between use with each patient.

Ms. Wan Moran, L.Ac. testified that with respect to heat lamps, the standard of care required:

> A: You need to check the tension for the articulating arm and then make sure when it moves- or move it to check if it has the propensity to fall. In between every patient.

Trial Trans. Dec. 12, 2017, pp. 105-106. (Attached as Exhibit B).

Her testimony continued that a lamp inspection should occur between each patient:

> Q: [What does] the standard of care require with respect to pre-use testing of CQ-36 style lamp in practice?
>
> A: To assess it between every patient.

Trial Trans. Dec. 12, 2017, p. 133. (Exhibit B).

Lastly, Ms. Wan Moran, L.Ac. testified what was required if the lamp failed an inspection.

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Q: In the situation where [acupuncturist] do tests and the lamp fails the test, what does the standard of care require?

A: To not use it on a patient to take it out of service so that it would not cause harm.

Trial Trans. Dec. 12, 2107, p. 107. (Exhibit B).

In the context of setting aside the jury's verdict in Kissel, this Court must find that Ms. Wan Moran, L.Ac. was required to have provided testimony as to the "causation nexus" between Dr. Wang's failure to inspect and the plaintiff's burn injury. Thereafter, this Court must acknowledge that noticeably absent from Ms. Wan Moran's testimony was what a lamp inspection performed by Dr. Wang immediately prior to Ms. Kissel's treatment session would have revealed, if anything; and if those "revelations" were significant to warrant taking the lamp out of service.

Indeed, there was no "causation nexus" testimony elicited at trial from Ms. Wan Moran, L.Ac. that Dr. Wang's failure to perform an examination directly before Ms. Kissel's treatment session would have uncovered a "propensity for the lamp to fall" and that failure caused the plaintiff's injuries. Moreover, plaintiff's counsel stipulated that Ms. Wan Moran, L.Ac. would not be presenting any testimony on the issue of "causation." Trial testimony pp. 164 dated December 12, 2017 ("Just very, very briefly, your Honor. Firstly, I don't intend to elicit a causation opinion from this witness because it's not within this witness's expertise as counsel just pointed out to me. It's not disclosed and added to the standard of care.) (Exhibit B). Based on a review of the evidence adduced at trial, it is absolutely clear that the plaintiff failed to prove by expert testimony that a breach of the standard of care caused the plaintiff's injuries. The crucial question as to what an additional inspection by Dr. Wang of the subject lamp between each patient on the day of the incident would have revealed was never answered. Assuming for the sake of argument that these additional inspections would have revealed nothing

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new about the presence of a defect in the lamp, then how could Dr. Wang's negligence in failing to do these additional inspections have been a cause of the injury? The only way to conclude that they would have revealed a defect is to resort to conjecture. While the plaintiff would like the law to permit the jury to use guesswork or conjecture that some defect would have been revealed to Dr. Wang with these additional inspections that is clearly inappropriate under Connecticut law.

The plaintiff has the burden of proving that there was an unbroken sequence of events that tied the injury to the allegedly negligent conduct. This cannot be based on conjecture or surmise. Paige v. St. Andrews Roman Catholic Church Corp., 250 Conn. 14, 25-26 (1999). Here, as this is a medical malpractice case, causation must actually be proven by expert testimony. Milliun v. New Milford Hospital, 310 Conn. 711, 725 (2013). The plaintiff presented evidence of step 1, the need, according to the expert, of additional inspections, but then the ball dropped on proving step 2, which would be identifying what those inspections would have shown that would have changed the outcome. The fundamental problem with the plaintiff's case- a lack of expert testimony sufficient to allow the jury to determine a causal relationship between the alleged malpractice, if any, and the plaintiff's alleged losses and damages- required reversal by the Appellate Court in Keuhl with direction to render judgment for the defendants.

There was no question that the evidence showed that Dr. Wang examined and tested the lamp before seeing patients that day. The plaintiff's new theory, developed after her expert's deposition, and presumably during the course of trial when it became clear that there was no ability to tighten screws/ bolts on this particular model of CQ-36 TDP lamp, was that subsequent inspections of the lamp were required between patients. While this was a creative attempt to get around the problem that arose with Ms. Wan Moran's original opinion, it nonetheless falls short

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in proving this medical negligence claim because there was absolutely no evidence of how these additional inspections would have revealed a defect in the lamp that would have led to it being taken out of service. In fact, the evidence was to the contrary as: 1) the lamp did not fail when used in treating any of the prior patients; and 2) after Ms. Kissel was burned no expert engineer was able to identify a defect in the lamp that would have caused it to suddenly fail. Contrast this new inspection theory with Ms. Wan Moran's original theory that Dr. Wang was required to tighten the lamp between patients to avoid what had occurred here. With the tightening theory it is clear that if the jury found that that particular precaution had not been undertaken, then it follows that the failure to do so could have caused the lamp to fall because it had not been tightened.

In order to sustain the plaintiff's objection to the motion to set aside the verdict, it is not sufficient that the plaintiff present the minimum evidence needed to support a verdict in favor of the plaintiff. While it is generally known that if a hot object contacts skin it may cause a burn[1]; there was no expert testimony that Dr. Wang's deviation from the standard of care in any way caused the subject injuries. Because Ms. Kissel's injuries are not within the ken of the average juror, expert testimony was required to prove a causal connection between Dr. Wang's deviation from the standard of care and the subject injuries. Similarly, it is not sufficient that the plaintiff present underwhelming "causation" evidence that may have to be pieced or stitched together among the various witnesses. Lastly, the jury is not permitted to discern whether Dr Wang's failure to inspect was the proximate cause of plaintiff's injury by relying on the law of proximate cause in a "non-negligence" personal injury action.

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[1] Dr. Kim testified "Contact time and temperature has a significant positive correlation." Trial transcript November 28, 2017, pp. 47-48. (Exhibit B).

The Kissel plaintiff has completely failed to prove causation through expert testimony as the Keuhl case makes clear. Because she failed to do so, the court must set aside the verdict as to Dr. Wang and the Center for Women's Health and enter a verdict for these defendants in this case.

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EXHIBIT A

SYLVIA N. KUEHL *v.* ROSALIND J. KOSKOFF ET AL. (AC 38128)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney and the defendant law firm for alleged legal malpractice in connection with their representation of the plaintiff in certain proceedings related to an underlying personal injury action that concerned an automobile accident involving the plaintiff's husband, G. In the underlying action, G and the plaintiff signed retainer agreements with the defendants, which stated, inter alia, that the law firm was retained to pursue claims against any party arising out of the collision. In December, 1991, G, on his own behalf, filed a notice of claim for workers' compensation benefits related to the collision, which had occurred while he was driving from his home office to a business appointment, and his employer and the employer's insurance company contested his claim. The defendants thereafter commenced a personal injury action against the operator and owner of the other motor vehicle involved in the collision in November, 1992, and G died shortly thereafter. The personal injury action was eventually settled. At the time of G's death, the defendant attorney did not advise the plaintiff to contact a workers' compensation attorney, and the plaintiff never filed a formal notice of a claim for workers' compensation survivor's benefits within one year of G's death pursuant to statute (§ 31-294c [a]). The plaintiff, however, requested a hearing for survivor's benefits, and following a hearing, the Workers' Compensation Commissioner issued a decision determining that the plaintiff's failure to file a formal notice precluded her from pursuing a claim for survivor's benefits, which was affirmed by the Workers' Compensation Review Board and by our Supreme Court. Thereafter, the plaintiff commenced the present action, claiming that the defendants committed legal malpractice by failing to tell her that she was required to file a notice of claim for survivor's benefits within the one year statute of limitations. After a trial, the jury found in favor of the plaintiff, and the defendants filed certain posttrial motions, including a motion to set aside the verdict, claiming, inter alia, that the plaintiff was required to present expert testimony in a legal malpractice action showing that the defendants' breach of the standard of care proximately caused the plaintiff's alleged damages, which the plaintiff did not do. The trial court denied the defendants' posttrial motions, and the defendants appealed to this court. *Held* that the trial court improperly denied the defendants' motion to set aside the verdict; although the plaintiff presented the testimony of an attorney expert who practiced personal injury litigation and workers' compensation law, the plaintiff failed to provide expert testimony as to causation, as her expert did not testify that the failure of the defendant attorney to file a workers' compensation claim on behalf of the plaintiff was a proximate cause of the plaintiff's damages or that the plaintiff would have prevailed on the issues related to the workers' compensation claim, namely, whether the collision occurred during the course of G's employment and whether the collision was a proximate cause of his death, and the trial court improperly concluded that the jury could discern whether the collision occurred during the course of G's employment and that his death was the result of the collision, as the court did not address the statutory and regulatory rules related to workers' compensation claims, which were complex and not within the ken of the jury, and for which expert testimony was required to enable the jury to determine the causal relationship between any legal malpractice and the plaintiff's alleged damages.

Argued January 5—officially released June 12, 2018

Procedural History

Action to recover damages for, inter alia, legal mal-

practice, and for other relief, brought to the Superior Court in the judicial district of Stamford; thereafter, the court, *Povodator, J.*, granted the motion to substitute Clifford A. Mollo, executor of the estate of the plaintiff, as the party plaintiff; subsequently, the case was tried to the jury; verdict for the substitute plaintiff; thereafter, the court denied the defendants' motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion to set aside the verdict, and rendered judgment in accordance with the verdict, from which the defendants appealed and the substitute plaintiff cross-appealed to this court. *Reversed; judgment directed.*

James J. Healy, with whom, on the brief, was *Matthew W. Naparty*, for the appellants/cross-appellees (defendants).

Ridgely Whitmore Brown, with whom were *David M. S. Shaiken* and *Benjamin E. Gershberg*, and, on the brief, *Mark S. Shipman* and *Austin Sherwood Brown*, legal intern, for the appellee/cross-appellant (substitute plaintiff).

LAVINE, J. Except in obvious situations, expert testimony generally is required to establish the element of causation in a legal malpractice case. See *Bozelko* v. *Papastavros*, 323 Conn. 275, 284–85, 147 A.3d 1023 (2016). "Because a determination of what result should have occurred if the attorney had not been negligent usually is beyond the field of ordinary knowledge and experience possessed by a juror, expert testimony generally will be necessary to provide the essential nexus between the attorney's [alleged] error and the plaintiff's damages." Id., 285.

In this legal malpractice action, the defendants, Rosalind J. Koskoff and the law firm of Koskoff, Koskoff & Bieder, P.C.,[1] appeal from the judgment of the trial court rendered, after a jury trial, in favor of the plaintiff, Sylvia N. Kuehl.[2] To summarize, this protracted litigation concerns the plaintiff's contention that the defendants breached the duty of care they owed her during their representation of her in an underlying personal injury action involving her late husband, Guenther Kuehl (decedent), when the defendants failed to file a claim for survivor's benefits under our Workers' Compensation Act (act), General Statutes § 31-275 et seq., within a year of his death.[3] At trial, the defendants claimed that the plaintiff failed to prove the proximate cause element of a negligence cause of action because she failed to present expert testimony that, more likely than not, she would have been awarded survivor's benefits under the act if the defendants had submitted her claim. On appeal, the defendants claim that the trial court improperly denied their motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion to set aside the verdict.[4] We reverse the judgment of the trial court.[5]

The following facts and procedural history are relevant to the issue on appeal. The events giving rise to this case began on the morning of June 26, 1991, when a squirrel darted across a street in Greenwich causing a motorist to swerve and collide with the motor vehicle operated by the decedent.[6] Later in the day, the decedent went to an emergency room and was diagnosed with a cervical strain. At the time, the decedent was the president and owner of Z-Loda Systems Engineering, Inc. (Z-Loda). *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 527, 829 A.2d 818 (2003). The decedent believed that he had been injured in the course of his employment because, at the time of the collision, he was driving from his Greenwich home, where he had an office in addition to his office at Z-Loda, to a business appointment in Tarrytown, New York. On August 3, 1991, the decedent suffered an aortic dissection that was surgically repaired. The plaintiff and the decedent believed that his aortic dissection was a result of the injuries the decedent suffered in

the collision.

On September 24, 1991, the decedent and the plaintiff each signed a retainer agreement with the firm for their respective claims arising out of the collision. The plaintiff's retainer agreement stated that the firm was retained "to pursue and if warranted to prosecute a claim or claims against any party or parties arising out of the following: Accident to my husband on 6/26/91 in Greenwich, CT."[7] Koskoff was the firm's attorney who assumed responsibility for the case.

On December 16, 1991, the decedent, on his own behalf, filed a notice of claim for workers' compensation benefits (compensation claim). *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, supra, 265 Conn. 528. On January 21, 1992, Z-Loda and Travelers Insurance Company (Travelers), the workers' compensation insurance carrier for Z-Loda, filed a notice contesting the decedent's claim on two grounds: that the collision was not work related and that even if it were, the decedent's injuries were unrelated to the collision.[8] Id., 528–29. On November 1, 1992, Koskoff, on behalf of the plaintiff and the decedent, commenced a personal injury action against the operator and owner of the motor vehicle (tortfeasors) involved in the collision. Id., 529. The decedent alleged claims to recover damages for his personal injuries and losses; the plaintiff alleged a claim to recover damages for loss of consortium.

On November 14, 1992, the decedent died, and the plaintiff, as executrix of his estate, was substituted for him as the plaintiff in the personal injury action. Id. The plaintiff amended the complaint to allege that the decedent's death was a result of his aortic aneurysm, which in turn was a consequence of the injuries he sustained in the collision. Id. The plaintiff sent a copy of the amended complaint to Z-Loda in May, 1993, and Z-Loda moved to intervene in the personal injury action on the ground that it might become obligated to pay large sums to the decedent's estate "and/or to the plaintiff." (Internal quotation marks omitted.) Id. The plaintiff eventually settled the personal injury action and signed a release as to Travelers.[9] At the time of the decedent's death, Koskoff did not advise the plaintiff to contact a workers' compensation attorney because she knew that the decedent had met with an attorney specializing in workers' compensation law,[10] as previously recommended by Richard Bieder of the firm. "Although the decedent previously had filed a notice of claim for compensation in connection with his claim for workers' compensation benefits, the plaintiff did not file a separate notice of claim in connection with her claim for survivor's benefits." Id., 530 n.8.

On July 22, 1998, however, the plaintiff requested a hearing for survivor's benefits pursuant to § 31-306. Id., 530. On August 31, 1998, the Workers' Compensation Commissioner (commissioner) held a hearing on the

plaintiff's claim to determine whether she should be precluded from pursuing a claim for survivor's benefits due to the fact that she had not filed a formal notice of her claim within the statute of limitations pursuant to § 31-294c (a); id.; i.e., one year from the date of the decedent's death. Although the plaintiff presented several arguments as to why her failure to file notice should not be fatal to her claim, the commissioner concluded that her failure to file a formal notice precluded her from pursuing a claim for survivor's benefits. Id., 531–32. The plaintiff took two appeals, but the commissioner's decision was affirmed by the Workers' Compensation Review Board; id., 532; and by our Supreme Court. Id., 539. Our Supreme Court concluded that the plaintiff's failure to file a formal notice of claim pursuant to § 31-294c (a) deprived the commissioner of subject matter jurisdiction. See id., 534–35.

Thereafter, on March 16, 1999, the plaintiff commenced the present action against the defendants, alleging that they had failed to tell her that she was required to file a notice of claim for survivor's benefits within one year of the decedent's death to confer jurisdiction on the commissioner. See *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 806, 12 A.3d 852 (2011). The plaintiff alleged two counts: negligence or legal malpractice and breach of contract. Following the plaintiff's death, Clifford A. Mollo was appointed executor of her estate and substituted as the party plaintiff in the present action.[11]

The operative complaint was filed on May 1, 2014, during trial. It alleged in relevant part that the defendant was an attorney admitted to practice law in Connecticut and was employed by the firm. The plaintiff alleged that the decedent sustained personal injuries in the collision and that the tortfeasors had more than $3 million of insurance coverage. In addition, prior to the collision, Z-Loda had purchased workers' compensation coverage from Travelers that was available to compensate the decedent and the plaintiff for their losses. The plaintiff further alleged that she had retained Koskoff to prosecute "a claim or claims against any party or parties arising out of [the decedent's]" collision of June 26, 1991, and that the defendants accepted the employment and provided "legal representation to the plaintiff," which was continuous from October 19, 1991, until October 1, 1998.

The operative complaint also alleged that the defendants commenced a personal injury action against the tortfeasors on behalf of the decedent and the plaintiff on November 1, 1992. The plaintiff as executrix of the decedent's estate was substituted as the plaintiff after the decedent died. The plaintiff alleged that "Koskoff, in the exercise of the skills ordinarily expected of attorneys in the community practicing law under the same or similar circumstances, knew or reasonably should

have known" that under the act, the plaintiff was entitled to file a claim for survivor's benefits; that the time for filing a written notice of claim for survivor's benefits was one year from the date of the decedent's death; and that the failure to file a written claim for survivor's benefits on or before November 14, 1993, would bar the plaintiff from receiving survivor's benefits under the act. The plaintiff also alleged that the value of her claim for survivor's benefits was in excess of $1 million.

The plaintiff alleged that Koskoff was negligent in multiple ways but principally in that she failed to file a written notice of claim for survivor's benefits within one year of the decedent's death, failed to pursue benefits for the plaintiff when she knew or reasonably should have known that the plaintiff was entitled to them, and failed to advise the plaintiff that she had to file a notice of claim. In addition, she alleged that the defendants' negligent acts constituted legal malpractice that was a substantial factor in proximately causing her damages. On May 5, 2014, the defendants filed an answer and special defense to the amended complaint, in which they denied its material allegations and pleaded the special defense of comparative negligence on the basis of the plaintiff's alleged negligence in failing to consult with other counsel for the purposes of filing for benefits under the act as she had been advised to do, and failure to retain counsel for that purpose.

The parties tried the case to a jury in April and May, 2014. The evidence relevant to the determinative issue in this appeal concerns the expert testimony the plaintiff presented as to the prevailing standard in the legal community, whether Koskoff had breached that standard of care when representing the plaintiff, and whether the alleged breach proximately caused the plaintiff's alleged losses and damages.[12] The plaintiff's expert witness was Thomas Willcutts, an attorney who practices in the areas of personal injury and workers' compensation law. The defendants contend that he did not offer expert testimony as to the prevailing standard of professional care, but instead testified only about his personal preferences, and that he did not offer expert testimony that the defendants' negligence proximately caused the plaintiff's alleged losses and damages.

Willcutts testified in part that Koskoff "does not know workers' comp. She knows some of it, but she would not consider herself someone who would handle a workers' compensation matter, which is okay. You can handle the personal injury side of the case and not the workers' compensation case. So that in itself I don't see as a problem. So I am judging her not as a workers' compensation lawyer and what a workers' compensation [lawyer] should know and should do, but my opinion is based on her being a personal injury lawyer who takes the position that she doesn't know workers' comp., but is handling a case that involves workers' comp. . . .

Well, lawyers can make mistakes and they don't necessarily cause any harm. Part of my opinion is based upon the information in terms of what I expect would occur in this case had it been handled the way I believe it should have been handled." Although Willcutts testified at length about Koskoff's alleged mistakes in handling the plaintiff's claim, he did not testify that her alleged breach of the standard of care proximately caused the plaintiff's alleged losses and damages, that is that the plaintiff would have received survivor's benefits if Koskoff had submitted a claim for such benefits or if she had referred the matter to a lawyer who specializes in workers' compensation claims.

At the conclusion of the plaintiff's case-in-chief, the defendants moved for a directed verdict on the ground that the plaintiff had failed to produce expert testimony to establish that she likely would have prevailed on her claim for survivor's benefits because the complexities of workers' compensation law are not common knowledge to the jurors.[13] The defendants argued that because the plaintiff claimed that her damages flowed from the loss of her right to pursue survivor's benefits under the act, she needed to present a legal expert to testify that she more than likely would have been awarded survivor's benefits if she had submitted a claim. Such an action is proved by presenting what is known as a case-within-a-case. See, e.g., *Grimm* v. *Fox*, 303 Conn. 322, 352, 33 A.3d 205 (2012) (*Palmer*, *J.*, concurring). The plaintiff faced a difficult challenge in proving causation, in that Z-Loda and Travelers had contested the claim that the self-represented decedent filed on the grounds that the injuries he sustained in the collision did not arise in the course of his employment and that his aortic dissection and ensuing death were not proximately caused by the collision. The court denied the defendants' motion for a directed verdict.

The case and certain interrogatories were submitted to the jury on May 13, 2014. The jury found, pursuant to its answers to interrogatories, that the defendants departed from the standard of care that they owed the plaintiff and the departure proximately caused the financial harm that the plaintiff sustained. The jury also found that the defendants had proved that the plaintiff's negligence in failing to follow their advice to consult with an experienced workers' compensation attorney was a proximate cause of the financial harm that she sustained. The jury apportioned 85 percent of the negligence to the defendants and 15 percent of it to the plaintiff. The jury found that the plaintiff's damages were $1.1 million, but reduced that sum by 15 percent to $935,000, due to the plaintiff's comparative negligence, in awarding the plaintiff damages on her legal malpractice claim.[14]

Thereafter the defendants moved for a judgment notwithstanding the verdict and to set aside the verdict.

On July 21, 2014, they filed a memorandum of law in support of their postjudgment motions. In their memorandum of law, the defendants cited numerous cases for the proposition that a plaintiff must present expert testimony in a legal malpractice action that the defendant's breach of the standard of care proximately caused the plaintiff's alleged losses and damages. See *Byrne* v. *Grasso*, 118 Conn. App. 444, 451–52, 985 A.2d 1064 (2009) (to prove damages for alleged malpractice in challenging claim for attorney's fees, plaintiff had to present expert testimony that, without malpractice, fee challenge could have been successful), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010); *Dixon* v. *Bromson & Reiner*, 95 Conn. App. 294, 299–300, 898 A.2d 193 (2006) (in legal malpractice case expert witness is necessary to opine that defendant's alleged breach of standard of care proximately caused plaintiff's alleged loss or damages; judge not expert in every area of law); *DiStefano* v. *Milardo*, 82 Conn. App. 838, 843, 847 A.2d 1034 (2004) (directed verdict proper if plaintiff fails to present expert testimony on issue of proximate causation in legal malpractice actions), aff'd, 276 Conn. 416, 886 A.2d 415 (2005); *Vona* v. *Lerner*, 72 Conn. App. 179, 188–92, 804 A.2d 1018 (2002) (expert testimony serves to assist lay members of jury and presiding judge and to prevail on negligence claim, plaintiff must establish that defendant's conduct proximately caused injuries), cert. denied, 262 Conn. 938, 815 A.2d 138 (2003).[15]

On June 18, 2015, the court issued a lengthy memorandum of decision on the defendants' postverdict motions, as well as the postverdict motions filed by the plaintiff.[16] We need address only that portion of the court's decision with respect to the defendants' claim that the plaintiff was required to provide expert testimony to prove that the defendants' alleged breach of the standard of care proximately caused her alleged damages.

The court outlined the legal complexities of the plaintiff's case. "[I]nstead of the usual trial within a trial format, this case had a trial within a trial within a trial quality. Long before most of the issues in this case had developed, [the decedent] had died. The real workers' compensation issue became not so much the claim that he might have been able to pursue, but rather the [survivor's] benefits which [the plaintiff] might have received, had workers' compensation issues been pursued properly/diligently. That however entails its own trial within a trial element—in order for [the plaintiff] to have had a right to survivor's benefits, [there] first would have to be proof that the injury to [the decedent] was a compensable claim under workers' compensation. In other words, the viability of the survivor's benefit claim was contingent upon the viability of the underlying claim of [the decedent]."

The court summarized the issue presented by the defendants' postverdict motions as follows: "[The]

defendants claim that there was a need for expert testimony as to the likely outcome, had the initial claim by [the decedent], and the later [survivor's] claim of [the plaintiff], been properly and timely submitted to the administrative process of workers' compensation—what would a commissioner have done? The court does not believe that [the] defendants have submitted adequate authority for such a requirement; they have not adequately refuted the suggestion . . . of [the] plaintiff that that would be asking for an opinion as to an ultimate issue for the jury to decide." The court concluded that the jury reasonably could have found that the defendants had breached a duty to take care of all legal matters arising from the collision. It also concluded that there was adequate, if not overwhelming, evidence that the requirements to establish a valid workers' compensation claim by the decedent existed and that it would have been successful if timely filed, which in turn would have led to the awarding of survivor's benefits to the plaintiff if her claim had been submitted.

In other words, the court was of the opinion that the plaintiff had presented sufficient evidence to permit the jury to infer that there was a causal link between the collision and the decedent's injuries. It found that the medical evidence, if considered as presenting a chain of interrelated elements, established a causal connection between the collision and the condition that eventually led to the decedent's death. It found that when they prosecuted the personal injury action, the defendants argued that there was evidence of "medical linkage" between the collision and the decedent's aortic dissection. The court therefore concluded that there was sufficient evidence for the jury to find that the decedent's injury was compensable under the act. In summary, the court believed that "there was adequate evidence presented that would allow a jury to infer that there was a causative link between the injury-causing [collision] and the eventual death of [the decedent]. The appropriate standards were presented through an expert [Willcutts]. There was evidence and discussion of the evidence relating to the employment nexus, including records created by [the] defendants. Again, the court must return to the refrain that even weak evidence, and evidence that must be stitched together, can be sufficient to support a jury verdict." For these and other reasons, the court denied the defendants' postverdict motions and rendered judgment for the plaintiff. The defendants appealed.

The essence of the defendants' claims on appeal concerns legal malpractice. "Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . ." (Internal

quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 649, 850 A.2d 145 (2004). Generally, a plaintiff who alleges legal malpractice must prove all of the following elements: "(1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) *causation*; and (4) damages." (Emphasis added; internal quotation marks omitted.) *Grimm* v. *Fox*, 303 Conn. 322, 329, 33 A.3d 205 (2012). There is no dispute that an attorney-client relationship existed between the parties. The case turns on the causation element of legal malpractice.

"The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the defendant's conduct. . . . The second component, proximate causation, requires us to determine whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . That is, there must be an unbroken sequence of events that tied [the plaintiff's] injuries to the [defendants' conduct]. . . . The causal connection must be based [on] more than conjecture and surmise. . . . [N]o matter how negligent a party may have been, if his negligent act bears no [demonstrable] relation to the injury, it is not actionable . . . .

"The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. This traditional method of presenting the merits of the underlying action is often called the case-within-a-case. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action." (Citations omitted; internal quotation marks omitted.) *Bozelko* v. *Papstavros*, supra, 323 Conn. 283–84.

"Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Card* v. *State*, 57 Conn. App. 134, 138, 747 A.2d 32 (2000). Expert testimony is permitted in many instances, but it is required "only [if] the question involved goes beyond the field of the ordinary knowledge and experi-

ence of a [trier of fact]." *Franchey* v. *Hannes*, 155 Conn. 663, 666, 237 A.2d 364 (1967).

"[Our Supreme Court] has explained that, as a general matter, expert testimony is necessary in legal malpractice cases in order to establish the standard of care, against which the attorney's conduct should be evaluated by the jury." *Bozelko* v. *Papastavros*, supra, 323 Conn. 282–84. Expert testimony is required because to know the outcome if an attorney had not been negligent is beyond the ken of the ordinary trier of fact. Id., 285. Expert testimony provides the required nexus between the attorney's negligence and the plaintiff's damages. Id. "In complex legal malpractice matters, expert testimony is necessary to keep the jury from speculating on how the client's loss or injury is directly linked to that which he claims was the breach of duty by the attorney." (Emphasis omitted.) Id., 289.

In the present case, the plaintiff presented the testimony of Willcutts, an attorney who practices personal injury litigation and workers' compensation law. We carefully have reviewed his testimony as to how he handles workers' compensation cases. He testified that litigating a personal injury case is different from litigating a workers' compensation case. He also testified that Koskoff was a personal injury lawyer, not a workers' compensation lawyer. He identified the decedent's report of the collision that should have put Koskoff on notice of a compensation claim and opined that she should have filed a claim. Nowhere in his testimony, however, did he testify that her failure to do so was a proximate cause of the plaintiff's injuries and loss. At no time did he testify that the plaintiff would have prevailed on the issues related to the case-within-a-case, namely whether the collision occurred during the course of the decedent's employment and the collision was a proximate cause of his death, in the face of Z-Loda and Travelers filing notice that they intended to contest the decedent's claim for benefits. Z-Loda and Travelers contested the decedent's claim on the grounds that the collision did not occur in the course of his employment and that his injuries and death were not proximately caused by the collision.[17] As to whether the collision occurred during the course of the decedent's employment, Willcutts mentioned the coming and going rule that applies to an employee's commute to his place of employment or start of the work day, but he did not opine that had Koskoff filed a compensation claim the plaintiff more likely than not would have received survivor's benefits. This omission was especially critical in light of the fact that Z-Loda and Travelers were contesting the decedent's claim for workers' compensation benefits.

In denying the defendants' motion for judgment notwithstanding the verdict, the court found that "[the] plaintiff produced at least the minimum evidence

needed to present the case to the jury, which in turn was at least the minimum evidence needed to support a possible verdict in favor of [the] plaintiff." The court also found that "the evidence was not overwhelming and may have had to be pieced or stitched together, but that is not an issue to be addressed by way of motion for judgment notwithstanding the verdict or motion to set aside the verdict." It concluded that the jury could discern whether the collision occurred during the course of the decedent's employment and that his death was the result of the collision. In coming to that conclusion, the court found applicable the law related to proximate cause in a personal injury action. It did not, however, address the statutory and regulatory rules related to workers' compensation claims, in particular the coming and going rule that controls whether an injury that was sustained during an employee's commute arose in the course of employment.[18] It can hardly be said that the statutes and regulations regarding workers' compensation are within the ken of the jury. It is for that reason that expert testimony is needed to prove causation in a legal malpractice action.

"It is well settled that, because the purpose of the act is to compensate employees for injuries without fault by imposing a form of strict liability on employers, to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment. . . .

"The determination of whether an injury arose out of and in the course of employment is a question of fact for the commissioner." (Citation omitted; internal quotation marks omitted.) *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220, 225–26, 853 A.2d 597 (2004), aff'd, 274 Conn. 219, 875 A.2d 485 (2005).

"The purpose of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . A commissioner may exercise jurisdiction to hear a claim only under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . The [act] is not triggered by a claimant until he brings himself within its statutory ambit. . . . Although the [act] should be broadly construed to accomplish its humanitarian purpose . . . its remedial purpose cannot transcend its statutorily defined jurisdictional boundaries. . . .

"In order to establish that [the] injury occurred in the course of employment, the claimant has the burden of proving that the accident giving rise to the injury took place (a) within the period of the employment;

(b) at a place [the employee] may reasonably [have been]; and (c) while [the employee was] reasonably fulfilling the duties of the employment or doing something incidental to it. . . . An injury is said to arise out of the employment when (a) it occurs in the course of the employment and (b) is the result of a risk involved in the employment or incident to it or to the conditions under which it is required to be performed. . . .

"Ordinarily, an injury sustained by an employee on a public highway while the employee is going to or coming home from work is not compensable. . . . A principal reason for this rule is that employment ordinarily does not commence until the claimant has reached the employer's premises, and consequently an injury sustained prior to that time would ordinarily not occur in the course of the employment so as to be compensable. Furthermore, in cases falling within the ordinary rule, the employee's means of transportation, as well as his route are entirely within his discretion, unfettered by any control or power of control on the part of the employer. . . .

"A number of exceptions, however, exist to the coming and going rule. Those exceptions are: (1) [i]f the work requires the employee to travel on the highways; (2) where the employer contracts to furnish or does furnish transportation to and from work; (3) where, by the terms of his employment, the employee is subject to emergency calls and (4) where the employee is injured while using the highway in doing something incidental to his regular employment, for the joint benefit of himself and his employer, with the knowledge and approval of the employer." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 227–29.

The standards and legal principles related to our workers' compensation scheme are complex and no amount of factual background presented to a jury would enable them to determine the causal relationship between legal malpractice, if any, and the plaintiff's alleged losses and damages without the assistance of expert testimony, especially when the cause of action involves the presentation of a case-within-a-case. In the present matter, the plaintiff failed to provide expert testimony as to causation, and for that reason the court erred in denying the defendants' motion to set aside the verdict.[19]

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

[1] In this opinion we refer to Rosalind J. Koskoff as Koskoff and to Koskoff, Koskoff & Bieder, P.C., as the firm, and to them jointly as the defendants. Richard Bieder and Travelers Companies were defendants at trial, but they are not parties to this appeal.

[2] The plaintiff died during the pendency of this case, and Clifford A. Mollo, the executor of her estate, was substituted as the plaintiff. In this opinion, we refer to Sylvia N. Kuehl as the plaintiff.

[3] See General Statutes §§ 31-294c, 31-306.

[4] The defendants raised three claims on appeal: (1) the trial court erred in refusing to enter judgment in their favor because the plaintiff failed to offer expert testimony to prove causation; (2) even if the plaintiff had produced expert testimony to show the outcome of the workers' compensation proceeding, she failed to establish a necessary element of her claim for her survivor's benefits claim, i.e., that the decedent's death was work related; and (3) she failed to prove the standard of care and breach of the standard. We resolve the appeal on the basis of the defendants' first claim and, therefore, need not address the others.

[5] The substitute plaintiff filed a cross appeal claiming that the court erred by (1) denying the plaintiff's motion to set aside the verdict and motion for judgment notwithstanding the verdict with respect to the jury's finding her 15 percent comparatively negligent, (2) setting aside the $165,000 verdict on the breach of contract count, (3) striking the failure to notify count of the complaint, and (4) denying the plaintiff prejudgment interest pursuant to General Statutes § 37-3a. Because we reverse the judgment on the ground that the plaintiff failed to present expert testimony that the defendants' alleged omission was a proximate cause of the plaintiff's injuries, we need not address the cross appeal.

[6] The collision indirectly gave rise to two appeals in our Supreme Court. See *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 802, 12 A.3d 852 (2011) (workers' compensation respondent had standing in declaratory judgment action to challenge constitutionality of public act permitting claimant to file claim for survivor's benefits outside statute of limitations); *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, 265 Conn. 525, 527, 829 A.2d 818 (2003) (plaintiff precluded from obtaining survivor's benefits under General Statutes § 31-306 [a] because she failed to file notice of claim for compensation with decedent's employer or workers' compensation commissioner).

[7] In the present action, the plaintiff claims that the retainer obligated the defendants to preserve any workers' compensation rights she and the decedent had. The defendants deny that claim and argue that they were only obligated to pursue a personal injury action.

[8] The trial court quoted from *Kuehl* v. *Z-Loda Systems Engineering, Inc.*, supra, 265 Conn. 529, for the fact that the decedent's compensation claim had not yet been resolved and no benefits had been paid in connection with it.

[9] The trial court in the present case found that Travelers had limited involvement in the personal injury action given the possibility that it could recover compensation benefits paid or payable to the decedent pursuant to General Statutes § 31-293.

[10] The workers' compensation firm of Abate and Fox met with the decedent to discuss his compensation claim but did not prosecute it on behalf of the decedent.

[11] In March, 2000, the plaintiff amended her complaint to add a third count alleging that the defendants were aware of their negligence in failing to advise her to file a timely claim for survivor's benefits but failed to disclose their knowledge to the plaintiff. That count was not submitted to the jury.

[12] During the plaintiff's case in chief, Koskoff testified, in relevant part, that she knew nothing about worker's compensation law. A letter written by Koskoff that was placed in evidence stated that "[o]ur office . . . does not do workers' compensation law."

We note that there is no statute comparable to General Statutes § 52-184c, which is applicable in actions alleging the negligence of a health-care provider, for actions alleging negligence of an attorney. Section 52-184c (a) states in relevant part: "The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers . . . ." There is no issue on appeal concerning the qualifications or legal specialization required to testify as to the standard of care applicable to the type of law practiced by a defendant attorney. We note, however, that the practice of law has become highly specialized.

[13] The defendants specifically argued that "the plaintiff claims the defendants were negligent such that the decedent's ability to pursue a claim for workers' compensation benefits was lost. The original decision maker would have been a workers' compensation commissioner, an individual whose experience and base of knowledge regarding workers' compensation proceedings and law far exceed that of the jury." Moreover, they argued "[i]t is an axiom of [workers'] compensation law that awards are determined by a two-part test. The [claimant] has the burden of proving that the injury

claimed [1] arose out of the employment and [2] occurred in the course of the employment." (Internal quotation marks omitted.) *Perun* v. *Danbury*, 143 Conn. App. 313, 316, 67 A.3d 1018 (2013).

[14] The jury's answers with respect to the plaintiff's breach of contract claim and associated verdict are not relevant to the issue in this appeal.

[15] See also *Davis* v. *Margolis*, 215 Conn. 408, 416, 576 A.2d 489 (1990) (expert testimony must be evaluated in terms of helpfulness to trier of fact on specific issues of standard of care and alleged breach of that standard).

[16] Because we determine that the plaintiff could not prevail on her malpractice claim due to her failure to present expert testimony with respect to causation, we need not address her postverdict motions.

[17] Willcutts testified that there was only one informal hearing on the decedent's compensation claim. There was never a formal denial of the claim. Nonetheless, he did not testify that it was more likely than not that the plaintiff would have prevailed if the claim had been pursued.

[18] See *Labadie* v. *Norwalk Rehabilitation Services, Inc.*, 84 Conn. App. 220, 228–29, 853 A.2d 597 (2004), aff'd, 274 Conn. 219, 875 A.2d 485 (2005) (explaining coming and going rule).

[19] The defendants also argue that the plaintiff failed to establish the standard of care because Willcutts testified as to his preferences and not the baseline standard of care. The case of *Vona* v. *Lerner*, supra, 72 Conn. App 179, is particularly instructive in the present case. In *Vona*, this court reviewed the testimony of the plaintiffs' expert and concluded that "the court properly granted the defendants' motion for a directed verdict. All of [the expert's] responses to the hypothetical questions asked of him with respect to the proximate cause of the plaintiffs' alleged damages were based on his personal belief, as opposed to the standard of care, and were conditional or speculative. As we noted in discussing the standard of review applicable to challenges to directed verdicts, a trial court should direct a verdict in the defendants' favor where there is insufficient evidence to support a verdict favorable to the plaintiffs." (Footnote omitted.) Id., 190–91. Our review of Willcutts' testimony reveals that he opined that the defendants violated the standard of care and deprived the plaintiff of the opportunity to submit a claim for survivor's benefits. He, however, did not opine that, if the plaintiff had submitted a claim, she more likely than not would have prevailed.

EXHIBIT B

1 when I would move it I would see the articulating arms start
2 to lower so I would have to tighten the screws to make sure
3 that the tension was good and it wouldn't fall.
4 Q Okay. And when did you do that with respect -- in
5 relationship to each patient treatment?
6 A I would do it before every patient treatment
7 Q Okay. So before every patient treatment, you would
8 tighten the screws and lock the lamp in place?
9 A Yes. I would check the lamp and if I felt like it
10 had the propensity to fall, I would tighten the screws.
11 Q Okay. And that checking, was that something you did
12 before every patient?
13 A Before every patient, before every time I used it.
14 Sometimes if I even moved the lamp I would check it again.
15 Q And I want -- so the first step in terms of your
16 practice when using the CQ-36 lamp was to check the tension
17 in the device, correct?
18 A Yeah. Uh-huh.
19 Q All right.
20 THE COURT: That's a yes?
21 MS. MORAN: Yes.
22 **BY ATTY. MCELLIGOTT:**
23 Q And -- all right. So I want you to assume that Dr.
24 Wang testified that he also had a routine for inspecting and

1 thing about tightening screws because that had a different
2 function on this lamp than your lamp. Okay.
3 A Okay.
4 Q So just focusing on the first two. He testified that
5 would check the tension in the device by moving the lamp
6 heads up and down and that he would gently shake the lamp to
7 see if the lamp heads moved, okay?
8 A Okay.
9 Q Is that the type of test that the standard of care
10 requires in using this type of lamp before every patient
11 treatment?
12 ATTY. ROBERTSON: I'm just going to object.
13 "This type of lamp", we're talking apples and oranges
14 between the two kinds of lamps.
15 ATTY. MOORE LEONHARDT: I join in the objection,
16 Your Honor.
17 MS. MORAN: Can you --
18 ATTY. MCELLIGOTT: I've established what a CQ-36
19 style of lamp is so I can incorporate CQ-36 style
20 into the question, if (indiscernible).
21 THE COURT: All right.
22 ATTY. MCELLIGOTT: Okay.
23 **BY ATTY. MCELLIGOTT:**
24 Q So with respect to the testing of the device that's

1 gently shake the device to see if the heads moved?
2 ATTY. ROBERTSON: I still object. I do not
3 believe that defines the lamp that we're talking
4 about based on all the evidence in this case.
5 ATTY. MOORE LEONHARDT: Join in the objection,
6 Your Honor. And the lamp has already been
7 distinguished as different so the underlying
8 foundation is improper.
9 THE COURT: All right. The objection is
10 overruled. Can you answer the question?
11 A Yes. With this style lamp you need to check the
12 tension for the articulating arm and then make sure when it
13 moves -- or move it to check if it has the propensity to
14 fall. In between every patient.
15 **BY ATTY. MCELLIGOTT:**
16 Q Okay. And so the first step is to test it in the way
17 you just described, right?
18 A Yeah. Either one first.
19 Q Okay. And for the lamp that you have -- well, first
20 of all after you check it, there are one of two
21 possibilities; either it's loose or it's fine. Is that
22 true?
23 ATTY. ROBERTSON: I'm just going to object.
24 Leading.

1 Q Okay. All right. And with the lamp that you had, if
2 it lowered, you would lock it down by tightening, right?
3 A Yes. I would tighten like every screw.
4 Q Okay. And I want you just to know you can't do that
5 with this lamp that two mechanical engineers have studied,
6 you can't do that.
7 A Okay.
8 Q So in the situation where you do the tests and the
9 lamp fails the test and there's no way to adjust it to get
10 it to pass the test, what does the standard of care require
11 when the test of the device fails?
12 A To not use it on a patient, to take it out of service
13 so that it wouldn't cause harm.
14 Q Okay. And these lamps cost $92?
15 ATTY. ROBERTSON: I'm just going to object.
16 It's leading -- I don't know --
17 **BY ATTY. MCELLIGOTT:**
18 Q Do you know --
19 ATTY. ROBERTSON: In this case it might have.
20 THE COURT: I --
21 ATTY. MCELLIGOTT: Well, let me see. Can I see
22 Plaintiff's Exhibit 16.
23 (Pause)
24 THE COURT: All right. The Clerk is telling me

1 ATTY. MOORE LEONHARDT: Yes, Your Honor.
2 THE COURT: All right. Counsel, your next
3 question, please.
4 **DIRECT EXAMINATION BY ATTY. MCELLIGOTT (Continued):**
5 Q Ms. Wan Moran, if Dr. Wang had done a test on the
6 device at any time prior to using the device on Ms. Kissel
7 and the device failed the test, did the standard of care
8 require him to take it out of service at that time?
9 A Yes.
10 Q And why is that?
11 A So that if it had the propensity to fall it wouldn't
12 fall while -- during treatment.
13 Q And talk about what an acupuncturist has to do after
14 a test when there is evidence of a propensity, would you
15 agree with that?
16 A Yes.
17 Q Now I want to talk to you about when the test has to
18 be done on a CQ-36 style lamp, okay?
19 A Okay.
20 Q Dr. Wang testified that he did the test once at the
21 beginning of each day covering his four patients or three
22 patients for that day. Is that sufficient under the
23 standard of care?
24 A No, I don't believe so.

1 A I don't believe so.
2 Q Why not?
3 A Because these lamps, if you move them, they tend to
4 fall. And with time, they tend to fall. So from my
5 experience, even between patients, they would tend to fall.
6 ATTY. MEADE: Move to strike, Your Honor.
7 **BY ATTY. MCELLIGOTT:**
8 Q Let me see if I can ask it more specifically.
9 THE COURT: All right. The last part about her
10 experience is stricken. Is that what people are
11 about to ask for?
12 ATTY. MOORE LEONHARDT: Yes.
13 MS. MORAN: Sorry.
14 THE COURT: So that piece is stricken. Next
15 question.
16 ATTY. MCELLIGOTT: So I'm just asking -- ill ask
17 you about your experience question.
18 Q With respect to the standard of care, what does the
19 standard of care require with respect to pre-use testing of
20 a CQ-36 style lamp in practice?
21 A To assess it between every patient.
22 Q Okay. And by assess it you mean check the tension
23 and make sure it's stable?
24 A Yes.

1 So the way to avoid a claim of I didn't include
2 everything is to include almost literally everything.
3 So that's where I'm going. If anyone wants to
4 briefly be heard, go ahead but we need to get moving.
5 ATTY. MCELLIGOTT: Just very, very briefly, Your
6 Honor. Firstly, I don't intend to elicit a causation
7 opinion from this witness because it's not with in
8 this witness's expertise as counsel just pointed out
9 to me. It's not disclosed and added to the standard
10 of care.
11 The second thing is I just - Plaintiff's Exhibit
12 11, which is Dr. Wang's complaint, I thought that the
13 deposition testimony sounded familiar. Plaintiff's
14 Exhibit 11's full evidence, Dr. Wang's third-party
15 complaint. This is the allegation, paragraph 14:
16 "The lamp was designed, manufactured,
17 distributed, or sold such that the stabilizing
18 hardware and hydraulic mechanisms for the lamp head
19 and arm were deficient and as a result, the arm
20 spontaneously lowered, causing the head to fall onto
21 Kissel's foot thereby causing her alleged injuries."
22 We're marking the deposition, corresponding
23 deposition section about that.
24 I just want to be clear that that alone is

DOCKET NO.: FST-CV-12-6013562S	:	**SUPERIOR COURT**
JUDITH KISSEL	: :	**JUDICIAL DISTRICT** **OF STAMFORD**
v.	:	**AT STAMFORD**
CENTER FOR WOMEN'S HEALTH, P.C., ET AL	: :	**SEPTEMBER 5, 2018**

OMNIBUS OBJECTION TO DEFENDANTS' SUPPLEMENTS TO POST TRIAL-MOTIONS (Doc. 424.00, 425.00)

Defendants Reed Wang and Center for Women's Health have each filed purported "supplements" their post-trial briefing in this matter. There is no authority in the Practice Book for the filing of a "supplement" to a motion for post-trial relief, particularly after such a motion has been fully briefed and argued to the Court. *See* Practice Book § 11-10. Defendants do not attempt to style their briefs as citations of supplemental authority, a procedure which could potentially be proper by analogy to Practice Book § 67-10. Section 67-10 would require a "concise" statement of the relevance of any supplemental authority presented "without argument." Defendants have certainly not observed this rule. Instead, defendants attempt to use a completely unrelated recent appellate case to re-hash the same causation arguments that were already briefed and argued.[1] Because there is no authority in the Practice Book for the filing of the purported "supplements," and the Court should not consider them or entertain oral argument.

[1] And to the extent new arguments are being presented, such arguments have been waived.

See Teodoro v. City of Bristol, 184 Conn. App. 363, 371 (2018) (upholding trial court's refusal to consider sur-reply filed without permission).

If the Court does consider the purported "supplements," they should be summarily rejected. The holding of the *Kuehl* case is as follows:

> The standards and legal principles related to our workers' compensation scheme are complex and no amount of factual background presented to a jury would enable them to determine the causal relationship between legal malpractice, if any, and the plaintiff's alleged losses and damages without the assistance of expert testimony, especially when the cause of action involves the presentation of a case-within-a-case.

Kuehl v. Koskoff, 182 Conn. App. 505, 525–26 (2018).

This holding has absolutely nothing to do with this this case. This case involves a lamp head which fell on the plaintiff. At the risk of sounding pedantic, there was no worker's compensation commission floating between the lamp head and Ms. Kissel's foot on the day of the injury. There was no regulatory "black box" involved in this case which was beyond the ken of the average juror. There was only gravity and a lamp which had a propensity to fall. The lamp's propensity to fall, and Dr. Wang's knowledge of this propensity, were fully and exhaustively explored at trial. *See* Plaintiff's Omnibus Objection (doc. 417) at 14-18.

Defendants argue that *Kuehl* somehow stands for the proposition that on a motion to set aside "it is not sufficient that the plaintiff present the minimum evidence needed to support a verdict in favor of the plaintiff." *See* Center for Women's Health "Supplement" at 7. If this reading is correct, *Kuehl* overruled decades of Supreme Court case law *sub silentio*. It has long been the law that a trial court "should not set aside a verdict where it is apparent that there was *some evidence* upon which the jury might reasonably reach their conclusion." *Howard v. MacDonald*, 270 Conn. 111, 126 128 (2004) (quoting *Burr v. Harty*, 75 Conn. 127, 129, 52 A2d. 724 (1902)) (emphasis added). Plaintiff has plainly

met that burden here and defendants cannot argue to the contrary (without attempting to change the applicable legal standard.)

For the foregoing reasons, the defendants' motions to set aside the verdict and for remittitur should (still) be denied.

THE PLAINTIFF

BY:_____/s/_____

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CERTIFICATION

This is to certify that a copy of the foregoing was sent, via electronic mail, on this 5th day of September 2018, to counsel of record as follows:

On behalf of Center for Women's Health, P.C.
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On behalf of Reed Wang, L.Ac.
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On behalf of Health Body World Supply, Inc. a/k/a The WABBO Company
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/s/ SEAN K. MCELLIGOTT
SEAN K. MCELLIGOTT

SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT
2019 JAN -3 P 3:43

FSTCV126013562S CONNECTICUT SUPERIOR COURT

JUDITH KISSEL JUDICIAL DISTRICT OF STAMFORD/

VS. NORWALK AT STAMFORD

CENTER FOR WOMEN'S HEALTH P.C. January 3, 2019

MEMORANDUM OF DECISION re: POST-VERDICT MOTIONS[1]

Background

This action originally was commenced as a medical malpractice action, directed to the named defendant and a provider of acupuncture services at the named defendant's facility, Dr. Wang. Product liability claims were later asserted against the distributor of a device that had been used by Dr. Wang in the course of treatment – the distributor was brought into the proceeding initially by defendant Wang for indemnification and then the plaintiff amended her complaint to assert a product liability claim for her injuries. After a trial, the jury found for the plaintiff on both theories of liability.

The core events are not in dispute. It was suggested to the plaintiff that she undergo acupuncture treatments, and she went to Doctor Wang for such a treatment. Dr. Wang worked within the offices of the Center for Women's Health, with an affiliation that was initially in dispute. (The plaintiff had been a long-time patient at the Center.) For most of the life of the case, there was an issue as to whether the Center would acknowledge that Dr. Wang had been acting as an actual

[1] Not including filings that were memoranda in support of motions or objections, and not including exhibits supporting the parties' respective arguments, the post-verdict motions and objections that are before the court appear to be docket entries #396, #399, #402, #403, #404, #424, #426, #429 and #430. The court also was asked to revisit and consider the motions for directed verdict that had been presented to the court during the course of the trial.

or apparent agent such that there would be respondeat superior liability. Prior to submission of the case to the jury, the Center acknowledged that it would be bound by any liability determination directed to Dr. Wang.[2]

In addition to inserting acupuncture needles, Dr. Wang placed a heat lamp in some proximity to the plaintiff's foot. After having inserted all of the needles and having placed the lamp in what he deemed to have been an appropriate location/orientation, he left the room for approximately five minutes (his standard practice). He claims that he was within earshot of the treatment room in which the plaintiff was located – he claimed to have heard nothing prior to his return to the treatment room, whereas the plaintiff claims to have called out without any response. When Dr. Wang returned to the room several minutes later, the head of the heat lamp was resting against the plaintiff's foot, having caused serious injuries to her foot. He removed the lamp from her foot, and he (and the principal of the Center) transported the plaintiff to a hospital for treatment.

One of the core issues in this case was the precise mechanism/manner in which the head of the lamp came into contact with the plaintiff's foot. No one observed whether the head of the lamp had descended (there was a joint allowing the head to me moved up and down) or whether the entire lamp assembly had tipped over. The plaintiff was unaware of what had happened, and when Dr. Wang entered the room, he did not notice or observe whether the lamp assembly had tipped over or whether the arm supporting the lamp head had descended. There was extensive testimony concerning the propensity of the head to descend on its own or with some level of external force having been applied (other than force intended to raise or lower the lamp head) – sometimes informally referred to as

[2] In 2013, defendant Wang had filed a cross complaint directed to defendant Center. The cross complaint was withdrawn/became moot when the Center acknowledged vicarious liability (to the extent defendant Wang might be found liable).

jiggling and referred to by experts as excitation or perturbation. There was substantial testimony concerning the effect of bumping or shaking the vertical post to which the pivoting support for the head of the lamp was attached.

The action was commenced in April 2012. In December of that year, defendant Wang sought to implead the distributor of the heat lamp that caused the injury to the plaintiff giving rise to this proceeding. After the motion was granted, and a third party complaint served on the product distributor, the plaintiff amended her complaint so as to assert a direct claim against the product distributor, defendant Health Body World Supply Inc. (generally referred to as WABBO). Early in the trial, defendant Wang withdrew his complaint directed to defendant WABBO.

As submitted to the jury, then, the case involved a claim of medical malpractice (acupuncture) directed to defendants Wang and Center, and a claim of product liability directed to defendant WABBO. The jury awarded the plaintiff $1 million as to each of the claim/theories of liability presented. With respect to the medical malpractice claim, the jury determined that the plaintiff was not comparatively negligent. With respect to the product liability claim, the jury determined that the plaintiff was not comparatively responsible for her injuries, but pursuant to General Statutes § 52-572o, the jury determined that Dr. Wang, as a party to this action, had been 20% responsible. The plaintiff had not made any claim for economic damages, so the full award was for non-economic damages.

There is no dispute that for purposes of the motions before the court (if at all), the plaintiff was injured as a result of her foot coming into contact with a heat lamp that had been placed in general proximity to her foot, by Dr. Wang, as part of his acupuncture treatment. (The nature of that proximity – the actual distance from the heat lamp to her foot – very much was in issue during the case.) The primary focus of the motions for directed verdict and for judgment notwithstanding the

verdict was on causation, particularly with respect to the medical malpractice claim and the general requirement of expert testimony in that regard. (Defendant WABBO made similar arguments with respect to the product liability claim.) The medical defendants dispute that there was proof of a breach of the appropriate standard of care. There also are claims that the verdict was excessive.

There actually were two "waves" of motions. The first set of motions and objections were filed shortly after the verdict was accepted. After argument on the first set of motions and objections, there was a second round of filings. The court was asked to consider the then-recently issued decision in *Kuehl v. Koskoff,* 182 Conn. App. 505; cert. denied, 330 Conn. 919 (2018) as it pertained to experts and causation.

A more "unusual" post-verdict topic in the second set of filings were motions to reargue two motions to dismiss that had been denied almost 6 years prior to the filing of the motions to reargue (#105.86, filed on September 6, 2012, denying #105.00 and #109.00). The motions to reargue relied upon the then-recently issued decision in *Peters v. United Community and Family Services, Inc.*, 182 Conn. App. 688 (2018). The court heard further argument on the second set of motions on September 6, 2018.

Discussion

I. Motions to reargue

A. Procedural issues

Although the motion to reargue relating to *Peters* (#426.00)[3] was filed relatively late in the post-verdict-motion process (June 26, 2018), the court believes

[3] Technically, the motion was designated a motion for permission to file a motion to reargue/reconsider – to be discussed below.

that it should be addressed at the outset. If the medical malpractice component of this proceeding should be (should have been) dismissed, even at this late juncture, then potentially there would be no need to address the merits of the other post-verdict motions filed by the medical malpractice defendants.[4] Indeed, although generally framed in terms of subject matter jurisdiction (and the motions in question related to aspects of personal jurisdiction/process), the general rule is that when jurisdictional challenges are raised, they must be addressed first, prior to proceeding with other aspects of the dispute between the affected parties. *Honan v. Dimyan*, 85 Conn. App. 66, 69 (2004). In *Baldwin Piano & Organ Co. v. Blake*, 186 Conn. 295, 297–98, 441 A.2d 183, 184 (1982), the principle appears to have been applied in the context of claimed personal jurisdictional defects (a concern discussed in a dissenting opinion).

The record reflects that in 2012, both of the medical malpractice defendants filed motions to dismiss, predicated on the absence of an opinion letter from a similar healthcare provider being attached to the complaint as served and filed, as required by General Statutes § 52-190a. In resisting the motions, the plaintiff had moved to amend so as to submit a letter claimed to have been in possession of counsel when the suit was commenced but which inadvertently had been omitted. In addition to the letter itself, there was an affidavit stating these supporting facts.

In denying both motions, the court concluded that the inadvertent failure to attach an existing opinion letter to the complaint was a curable defect, which had been cured by an amended complaint to which was attached a seemingly-adequate opinion letter. The court identified an absence of any clearly-controlling appellate authority and a division among trial courts on the issue. The court concluded that

[4] During the second round of arguments, the parties urged the court not to adopt such an approach, but to consider the substantive issues even if the court were to conclude that the motions to dismiss should be granted at this late date.

the circumstances warranted denial of the motions. (Although it had been contested, the court accepted the evidence that had been provided (via affidavit) relating to the existence of the opinion letter, at the time of service of process on the defendants.) At the time of the earlier decision, the sole relevant appellate authority was *Votre* v. *County Obstetrics & Gynecology Group, P.C.,* 113 Conn. App. 569, 585, 966 A.2d 813, cert, denied, 292 Conn. 911, 973 A.2d 661 (2009), which contained language – disputed as to whether it was dictum or controlling – relating to the propriety of belated filing of an already-existing opinion letter, and it was the significance of that language that was subject to disagreement by trial courts.

In *Peters*, the decision that was the basis for seeking reargument or reconsideration, the Appellate Court held that corrective action relating to an opinion letter from a similar healthcare provider had to be undertaken within the applicable statute of limitations.

The underlying events, according to the operative complaint, took place on April 22, 2010. On June 28, 2012, the plaintiff filed a request for leave to amend, seeking to correct the inadvertent omission of the letter, accompanied by an affidavit attesting to the existence of the letter at the time of service of process on the parties. Putting aside the existence of an objection to the request to amend (#114.00) which was not overruled until September 6, 2012 (#105.86), the request to amend was filed substantially more than two years after the date of the occurrence. (There does not appear to have been a request or a statutory ninety-day extension of time, pursuant to § 52-190a.) There is no claim that the corrective action taken by the plaintiff occurred prior to expiration of the statute of limitations.

Before addressing the actual merits of the substantive legal contention, the court needs to address two procedural issues: The propriety of addressing the substantive merits of reliance on *Peters* in the context of a motion for permission to

file a motion to reargue, and whether it is proper for the court to address the motions to dismiss some six years after the motions originally were denied.

At the outset of argument on September 6, 2018, the court apologized for a probable lack of clarity when it had scheduled argument – initially for an earlier date, but eventually scheduled for September 6 in order to accommodate schedules of the parties. The court made it clear at the outset that it was intending to address (entertain) the merits of the argument relating to *Peters*, and inquired of counsel for the plaintiff as to whether he was prepared to argue the merits of that issue. The court offered to reschedule argument on that issue for approximately four weeks later, in order to allow counsel an opportunity to prepare for oral argument and/or submit a written memorandum. Counsel properly pointed out that the motion – as captioned/framed – was two steps removed from the substantive argument, as it was a motion for permission to file a motion, which seemingly would initially require granting permission, followed by an order allowing argument on the merits, before reaching the merits. The court recognized the technical issue, but indicated that it was important to address the merits in a timely fashion – but again, specifically offered counsel an opportunity to prepare for argument and/or an opportunity to submit a written opposition. Ultimately, counsel registered his objections to the procedures being followed, but indicated that he was prepared to argue, and did not wish to have an opportunity to submit any written opposition. On that basis, the court entertained substantive argument as to applicability of *Peters*.

An additional issue is whether the undersigned can entertain a motion to reconsider or reargue a decision made by another judge. The judge who had decided the motions in a thorough decision addressing the state of law in 2012, now is unavailable to reconsider that decision (recusal). The undersigned, as the judge who conducted the trial and most of the proceedings leading up to the trial, is the

"obvious" candidate to step into the role of deciding this latest motion. To the extent that the motion is predicated on *Peters* as establishing controlling law, the issue does not require any reevaluation of the rationale of the earlier decision, but rather consideration of whether *Peters* now requires a contrary decision, as a matter of law. (Ordinarily, a motion to reargue is filed within days, not years, of the underlying decision, Practice Book § 11-12, such that there is minimal likelihood of a potentially-material change in the legal landscape.)

A somewhat more difficult question is whether some six years later, and especially after an intervening trial on the merits, the motion to dismiss can be revisited – especially in the trial court. There seems to be no identified impediment to the defendants raising the issue on appeal – notwithstanding the earlier denial of the motions to dismiss, *Peters* is claimed to represent the current accurate state of the law, and no reason has been identified why it would not be applicable prior to final judgment in this case, if in fact that decision controls the jurisdictional issue first raised more than six years ago.

The court recognizes that the concept of "law of the case" could be perceived as a "hurdle" to the court addressing this issue. The law of the case; however, is intended to be a flexible doctrine, not rigidly applied, recognizing that the court should not elevate deference to a prior decision over the goal of reaching the proper decision. (Res judicata would not apply, since no judgment has been entered; cf. *Wells Fargo Bank, N.A., Trustee v. Tarzia*, ___ Conn. App. ___ (2019), where a prior ruling had been the subject of an appeal and therefore was given res judicata effect.

In *City of Bridgeport v. Triple 9 of Broad St., Inc.*, 87 Conn. App. 735, 741, 867 A.2d 851, 855 (2005), the court discussed the interplay between the flexibility of the law of the case doctrine – generally a doctrine articulated in terms of

interlocutory rulings – and a court's general ability to revisit final decisions, including judgments. To the extent that a denial of a motion to dismiss is interlocutory in nature – it is not a judgment – the law of the case would be an appropriate framework. Even if not characterized as interlocutory, the court would still have the ability to revisit and especially correct any errors that may be identified.

> "The court's ability to reconsider prior decisions on its own accord also supports our conclusion not to reverse the court's decision to grant the fire company's motion to reargue. Courts can reconsider a past decision in order to correct mistakes in prior judgments. *United States* v. *Morgan*, 307 U.S. 183, 197, 59 S.Ct. 795, 83 L.Ed. 1211 (1939). 'It is a power inherent in every court of justice ... to correct that which has been wrongfully done by virtue of its process.'" *Fiano v. Old Saybrook Fire Co. No. 1, Inc.*, 180 Conn. App. 717, 732, 184 A.3d 1218, 1227 (2018).

The issue was perhaps best framed in the seminal case of *Breen v. Phelps*, 186 Conn. 86, 99-100 (1992):

> The law of the case is not written in stone but is a flexible principle of many facets adaptable to the exigencies of the different situations in which it may be invoked. In essence it expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912).... Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance.
>
> "A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge.... Nevertheless, if the case comes before him regularly and he becomes convinced that the view of the law previously applied by his coordinate

> predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment.... From the vantage point of an appellate court it would hardly be sensible to reverse a correct ruling by a second judge on the simplistic ground that it departed from the law of the case established by an earlier ruling. In an appeal to this court where views of the law expressed by a judge at one stage of the proceedings differ from those of another at a different stage, 'the important question is not whether there was a difference but which view was right.'" (Citations omitted.)

A remarkably similar situation was addressed in *Torres v. Carrese*, 149 Conn. App. 596, 611–17, 90 A.3d 256, 267-70 (2014), where earlier (denied) motions to dismiss – also based on alleged non-compliance with the similar health care provider opinion requirement of § 52-190a – were revisited several years later, after issuance of an appellate-level decision (*Bennett*) indicated that the basis for the prior denials was not consistent with the requirements of the statute. One difference – perhaps ironic – is that in *Torres*, new motions to dismiss were filed. Addressing the claim that the motions were woefully late (filed years after expiration of the 30 day period in which to file a motion to dismiss addressing non-subject matter jurisdictional issues), the court treated the motions as the functional equivalents of late motions to reargue, which it was within the discretion of the trial court to consider. Here, there is no need to recharacterize the motions filed – they are explicitly designated as motions to reargue or for reconsideration.

Accordingly, the court concludes that it is appropriate to revisit the legal framework for the earlier decision. If controlling appellate authority since 2012 has not changed in any appreciable manner or if the court concludes that there is no other good reason to revisit the earlier determination, the earlier determination should stand. As discussed below, however, there have been significant appellate decisions in this area, and their impact must be assessed and applied as needed.

B. Substantive

1. Motions to dismiss

In simplest terms, the court is being asked to reconcile, or determine the interplay between, two Appellate Court decisions, *Peters* and *Votre*. *Votre* was the linchpin of the earlier decision denying the motions to dismiss, based on language that seemingly was directly applicable to the situation at hand – an inadvertently omitted existing opinion letter from a similar healthcare provider.

In *Votre*, the court had not been presented with this precise issue or even a similar issue relating to curative action – in affirming dismissal of the case before it, the court was attempting to demonstrate that dismissal, as mandated by the statute, was not necessarily draconian in terms of ultimate results. In so doing, the court stated (as quoted in the memorandum of decision denying the motions to dismiss):

> "Given the fallibility existing in the legal profession ... it is possible that a written opinion of a similar health care provider, existing at the time of commencement of an action, might be omitted through inadvertence. In such a scenario, it certainly may be within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in doing so, deny a pending motion to dismiss. Such a discretionary action would not be at variance with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers."

As reflected in the earlier decision in this case denying the motions to dismiss, in the interval between 2009 and 2012, trial court decisions were split as to whether *Votre* was controlling law, some trial court decisions concluding that the above-quoted language was dictum and other decisions treating it as authoritative. As noted in a footnote in the earlier decision, in *Bennett* v. *New Milford Hospital,*

300 Conn. 1, 30 n. 17, 12 A.3d 865 (2011), the Supreme Court also noted (also in a footnote) the division of trial court authority on the issue and the associated question of its (continuing) vitality/authority, but declined to address the issue on the merits, as it was not properly before the court at that time.

In order to determine the binding effect, if any, of *Votre*, it is necessary to consider and appreciate the context for that decision. The plaintiff had sued medical care providers, but had attempted to characterize the claims being asserted as not implicating medical malpractice. The plaintiff had not made any attempt to comply with § 52-190a and its requirement of the attachment of an opinion letter from a similar healthcare provider. The Appellate Court specifically noted that no attempt had been made to amend the complaint to add such a letter as an attachment, 113 Conn. App. 584, the plaintiff instead arguing that no such letter was required.

To the extent that there had been some disagreement as to whether the discussion in *Votre* as quoted in part above was more than dictum, the court must note that that discussion was not directed to the merits of the issues before the court. Rather, it was at least one step removed – part of the explanation as to why the sanction of dismissal, while at least facially harsh, was both part of a legislative directive and potentially subject to cure. The court cannot help but note the highly conditional nature of the above-quoted language – if there were an inadvertently omitted required opinion letter, "it certainly <u>may be</u> within the discretionary power of the trial judge to permit an amendment to attach the opinion, and, in doing so, deny a pending motion to dismiss. Such a discretionary action <u>would not be at variance</u> with the purpose of § 52-190a, to prevent groundless lawsuits against health care providers" (emphasis added). In other words, the court did not say that it "<u>is</u> within the discretionary power of the trial judge to permit an amendment" and observed that such a practice would not inherently conflict with the purpose of the statutory

provision ("would not be at variance"). Somewhat simplistically, the language in question related to curative action that hypothetically could be (could have been) taken, in the context of a case in which there had been no effort to take curative action.

The issue of whether the quoted language is dictum now appears to have been resolved by the Appellate Court. In footnote 10 of the *Peters* decision, the court described the relevant language from *Votre* and the split of authority among trial courts in the following manner: "In *Gonzales v. Langdon,* supra, 161 Conn. App. at 510, 128 A.3d 562, this court sanctioned the use of amended pleadings to correct a defect in an existing opinion letter, largely resolving a split in the Superior Court arising from dicta in *Votre v. County Obstetrics & Gynecology Group P.C.,* 113 Conn.App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009)." *Gonzales v. Langdon*, 161 Conn. App. 497, 128 A.3d 562 (2015), in turn, contained the following language: "In our view, the discussion in *Votre* was entirely dicta because the issue of whether a plaintiff can amend his or her complaint to cure a legally inadequate opinion letter was not before this court." 161 Conn. App. 512. Thus, on two occasions, the Appellate Court has characterized the focal language in *Votre* as dictum.

Thus, while at the time of the earlier decision, *Votre* was the only appellate-level decision appearing to discuss this issue, a number of appellate court decisions since then have indicated the appropriate standard while relegating the quoted language in *Votre* to status as dictum. The appropriate standard, as set forth in *Gonzales* and *Peters* – and see, also, *Doyle v. Aspen Dental of Southern CT, PC,* 179 Conn. App. 485, 179 A.3d 249 (2018) – is that corrective action must be taken within the applicable statute of limitations period. If corrective action (filing an amended complaint to which is attached a proper opinion letter) is attempted within

30 days of the return date, then pursuant to Practice Book § 10-59, the amendment is as of right. If the corrective action is more than 30 days after the return date, then the provisions of Practice Book § 10-60 control, implicitly invoking the discretion of the court.[5]

The requirement of compliance with the statute of limitations arguably was suggested in *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 30-31, 12 A.3d 865 (2011):

> "We agree that the remedy of dismissal may, standing alone, have harsh results for plaintiffs, particularly when the problems with the opinion letter are as relatively insignificant as they present in this case, given the apparently high and relevant qualifications of its author. Thus, we emphasize that, given the purpose of § 52-190a, which is to screen out frivolous medical malpractice actions, plaintiffs are not without recourse when facing dismissal occasioned by an otherwise minor procedural lapse, like that in this case. First, the legislature envisioned the dismissal as being without prejudice; see footnote 15 of this opinion; and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute, General Statutes § 52-592. For additional discussion of this particular relief, see the discussion in the companion case also released today, *Plante v. Charlotte Hungerford Hospital,* 300 Conn. 33, 12 A.3d 885 (2011)."[6]

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[5] Technically, Practice Book § 10-60 authorizes amendment by three mechanisms, filing a request to amend, filing a motion to amend, or consent of adverse parties. Given the likelihood of an objection to a request or motion, and the even greater likelihood of a lack of affirmative consent, the practical effect is that the court will be asked to exercise its discretion with respect to a suitable objection to the proposed amendment, whether proposed by way of request or motion.

[6] Query whether the reference to the statute of limitations was directed to permitting a corrective amendment, or to the ability of a new action to be commenced, since the reference seems to be in the context of a motion to dismiss having been granted.

Of course, the fact that the discussion in *Votre* has been characterized as dictum does not mean that the logic of the discussion/analysis has been rejected or is otherwise not applicable. However, subsequent cases have imposed a "time limit" on corrective action – the applicable statute of limitations. The argument that an omitted but sufficient opinion letter, existing at the time of commencement of the litigation, should be allowed to be attached to an amended complaint, because the purpose of the statute and its requirement for such a letter has been satisfied – ensuring some level of screening of malpractice claims by virtue of the requirement that a similar healthcare provider provide an opinion attesting to the likelihood of negligence – has not been challenged or rejected. That that level of filtering is satisfied as soon as the letter is generated, independent of when the letter actually is made part of the record, also has not been challenged.

However sympathetic and appealing that argument may be, however, the same can be said of a letter actually attached, inadvertently omitting an assertion that the provider of the opinion is a similar healthcare provider as required by statute. That, however, was precisely the situation in *Peters*. In *Peters*, attached to the complaint had been an opinion letter, and the opinion letter had been prepared by a similar healthcare provider, and contained the necessary assertions relating to the probable existence of malpractice, but did not contain a recitation that the author of the letter was, in fact, a similar healthcare provider. That type of omission not only could be characterized as inadvertent, but even reasonably characterized as a scrivener's error rather than a matter of substance.[7] Nonetheless, the court

[7] A letter only omitting the basis on which the author is a similar health care provider would seem to satisfy the language of the statute: "To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of

concluded that there was a requirement of a timely amendment to cure the defect, which was not found to have been done in a timely manner. The statute of limitations was deemed to be the benchmark for timeliness -- an overlay or condition to corrective action.

To the extent that the focus is on the filtering effect of a requirement of an opinion from a similar healthcare provider, the court perceives no material distinction between an inadvertently unfiled letter from a similar healthcare provider, and a filed letter from a similar healthcare provider that inadvertently omits recitation the basis on which the author is (claims to be) a similar healthcare provider. In both instances, prior to service of process, counsel has obtained the necessary threshold opinion of probable existence of medical negligence. In both situations, there is a defect in the process actually served upon the defendants. In both situations, there is technical noncompliance with § 52-190a, and at least with respect to the latter scenario, there is explicit direction from the Appellate Court that any corrective action must be taken within the statute of limitations.

The court must note that this appears to be contrary to a recent trend in Supreme Court decisions, favoring corrective action over dismissal, even in the context of subject matter jurisdictional defects (whereas the defect in this instance is not a matter of subject matter jurisdiction, but rather personal jurisdiction based on insufficiency of process). Thus, in *Kortner v. Martise*, 312 Conn. 1, 9-14 (2014), a conservator who may have lacked standing to bring suit on behalf of the conserved person was allowed to proceed as administratrix of the estate of the conserved person after the conserved person's death (substituting the mother as administratrix

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medical negligence and includes a detailed basis for the formation of such opinion." The court recognizes that appellate decisions uniformly require the credentials to be recited

for the mother as conservator). In *Fairfield Merrittview Ltd. Partnership v. Norwalk*, 320 Conn. 535, 554 (2016), the court allowed substitution – more accurately, addition – of a proper party when it was discovered that the wrong (if similarly named) entity had been named as the plaintiff – and the allowance of addition of the correct party (effectively retroactive to the commencement of the litigation) was largely responsible for the dissenting opinion. Given the leniency in allowing corrective action with respect to subject matter jurisdictional defects involving the wrong party commencing litigation, and with no apparent time limit for corrective action (other than perhaps that corrective action be attempted promptly after the problem is recognized), the failure to include an explicit recitation that the author of an opinion letter is a similar health care provide (when the author is, in fact, a similar health care provider) would appear to be a minimal transgression (*Peters*), and imposing the "hard" deadline of the statute of limitations for corrective action seems to be contrary to such a trend.

Nonetheless, that "hard" deadline has been enunciated in more than one Appellate Court decision. To the extent that these decisions control, they appear to be fatal. But can these decisions be harmonized with the <u>reasoning</u> in *Votre*? Clearly, to the extent that *Votre* seems to suggest that the hard benchmark is whether an appropriate letter existed at the time of service, that has been rejected in favor of a statute of limitations-oriented benchmark. However, in the precise situation hypothesized by *Votre*, where a seemingly sufficient letter existed prior to the time of service <u>and</u> prior to the expiration of the statute of limitations, is it consistent with the liberality of curative action recognized in case law (*Kortner*, *Fairfield Merrittview*) and authorized by statute (General Statutes §§ 52-123 and 52-128; see, also General Statutes § 52-72)? As noted by the court earlier, the "problem" in *Peters* could be characterized as a scrivener's error, but to the extent that the Appellate Court treated it as a substantive matter, the opinion letter actually

utilized was "defective."[8] Here, however, the trial court credited evidence presented to it that the belatedly-filed opinion letter, facially sufficient, actually existed at the time of service of process, but as a pure matter of inadvertence, was not attached to the complaint as served and filed. Particularly given the circumstances presented here – six years after the initial motions had been denied based on the corrective action taken, and after a trial that had lasted several weeks resulting in a verdict for the plaintiff – is it unreasonable to characterize the belated filing of an existing opinion letter as allowable corrective action, notwithstanding the expiration of the statute of limitations prior to such filing?

Although it is a close call, the court concludes that, for the following reasons, the earlier denials of the motions to dismiss must stand. Although *Peters* and *Gonzalez* rejected an "existing at the time of service" standard for curative letters, in favor of a somewhat more widely applicable "prior to expiration of the statute of limitations" standard, they focus on correcting actually defective letters actually submitted ((or non-existent letters). They do not address the pure inadvertence of a failure to attach an existing sufficient letter.

More troubling are the precise circumstances of this case. The defendants have relied upon *Peters*, a decision issued a number of months after the trial and verdict in this case. However, *Gonzalez*, decided two years prior to commencement of this trial, also utilized/articulated a statute of limitations benchmark for timeliness. Still earlier – although relying in part on *Votre*, footnote 14 in *Torres* also alluded to a statute of limitations deadline ("Although the plaintiff may have obtained opinion letters from board certified obstetrician-gynecologists after the action commenced, after the defendants had filed their motions to dismiss, and after the statute of

[8] Both *Peters* and *Gonzalez* frame the issue in terms of amending the opinion letter to conform to the statute; here, there was no need to amend the opinion letter.

limitations had expired, the court may not consider those documents." *Torres v. Carrese*, 149 Conn. App. 596, 611 n.14, 90 A.3d 256, 266 (2014).) Thus, two years prior to this trial, there had been appellate characterization of *Votre* as dictum and appellate authority for a statute of limitations-based benchmark for timely amendments. The trial court in *Peters* expressly relied upon *Gonzalez* and its articulation of a statute of limitations benchmark for corrective action (and rejected the attempted distinction between an amended letter and an explanatory affidavit). *Peters v. United Community & Family Services, Inc.*, No. KNLCV166026050S, 2016 WL 4708525, (Aug. 8, 2016).[9]

The concept of "judicial economy" as mentioned in these cases, e.g., *Gonzalez*, 161 Conn. App. 521; would be turned on its head if, after a trial and verdict, a decision were to be rendered dismissing part of the case, in the face of a judicial determination that the opinion letter existed at the time suit was commenced and in the absence of any meaningful argument that the opinion letter was in some manner deficient. Again, this would run counter to the trend in allowing corrective action to be taken to cure jurisdictional defects – here, corrective action would be nullified based on what is arguably a change in the law that could have been brought to the court's attention years earlier and years before the time and expense of a month-long trial.

The purpose for requiring an opinion letter from a similar healthcare provider was satisfied prior to commencement of this action, but due to inadvertence, it was not served and filed at the outset – screening to make sure that there is a reasonable basis to allow the case to proceed. It would be inequitable and highly wasteful to reverse the earlier decisions in such a belated fashion. Subject matter

[9]The decision also is accessible at
http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=10888841

jurisdictional issues may be raised at any time, but other jurisdictional issues are subject to waiver – and inferentially subject to other equitable considerations. For all these reasons, the motions to reargue are (have been) granted with respect to entertaining reargument and reconsidering the earlier decision, but the equities overwhelmingly dictate against affording any relief.

2, Kuehl v. Koskoff

The other issue raised via motion to reargue was that *Kuehl* warranted revisiting of the issues as already argued and briefed relating to expert testimony and particularly causation.

Unlike *Peters* (and other recent Appellate Court decisions discussed above) which not only articulated "a" or "the" applicable standard for curative action relating to opinion letters from similar health care providers, but also characterized a prior claimed authority as dictum, there is nothing "new" in *Kuehl*. It certainly reinforces the importance of expert testimony as to causation – when needed – but does not address any point not adequately covered in prior authority as discussed by the parties. In Kuehl, the Appellate Court determined that there was a need for expert evidence – which it determined had been lacking – that but for the negligence of the defendants, the outcome of underlying legal proceedings would have been different, a topic that the court concluded was beyond the experience or knowledge of the average juror. As discussed below, there were expert opinions as to standard of care and causation, and at least some of the issues relating to causation do not require expert testimony, especially that contact of skin (the plaintiff's foot) with a surface heated to almost 600° F. will cause severe burn-type injuries.

Accordingly, no further special attention to *Kuehl* is necessary.

II. Causation

A. Product Liability

Regardless of whether the court is correct as to the opinion letter discussed above, the court must address the issue of causation as relates to the product liability claim, framed in terms of a motion to set aside the verdict/motion for judgment notwithstanding the verdict.

> "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence.... The supervision which a judge has over the verdict is an essential part of the jury system.... [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality.... The court has a duty to set aside the verdict where the jury's action is so unreasonable as to suggest that it was the product of such improper influences....
>
> ""We recognize that, [i]n determining whether to set aside the verdict, the trial court walks a thin line....
>
> "Finally, in evaluating the exercise of the trial court's discretion, we are mindful that litigants have a constitutional right to have juries decide issues of fact. The right to a jury trial is fundamental in our judicial system, and this court has said that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fair-minded men passed upon by the jury and not by the court...." *Cheryl Terry Enterprises, Ltd. v. City of*

Hartford, 270 Conn. 619, 637-38 (2004) (internal quotation marks, omitted).

See, also, *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 32, 761 A.2d 1268, 1275 (2000), applying a similar standard to motions for judgment notwithstanding the verdict.

The directed verdict standard, similar to the summary judgment standard, requires the court to view the evidence in a light most favorable to sustaining the verdict. Further, the plaintiff need not prevail on more than one specification of negligence or product defect, in order to sustain the verdict.

Although the court has not attempted to quantify the amount of time devoted in written submissions and argument to the different sub-issues relating to causation, the court's sense is that a clear majority of time and effort has been devoted to the issue of causation in the context of medical malpractice. Thus, the claim that the decision in *Kuehl* was significant to this case, focused on the need for expert testimony both as to standard of care and causation in connection with (most) professional malpractice claims.

The product liability claim being asserted in this case, however, does not implicate professional malpractice per se, and further, the notion that if a device whose surface temperature substantially exceeds 500° comes in contact with human flesh, serious burns can result, such that protective features might be needed to make the device reasonably safe (not unreasonably unsafe) if the device is to be used in proximity to human flesh, is a matter that does not necessarily require professional input. Although many of the allegations in her complaint directed to WABBO address the issue of the supporting structure for the lamp – spontaneous lowering of the lamp head, the failure to use locking mechanisms at the joints, etc. – the plaintiff also alleges a failure to have any protective device over

the heated surface of the lamp itself. See, e.g., ¶ 22(a)(v) in amended complaint (#238.00), and ¶15(a)(iii) and (iv) and ¶15(b)(iii)(B) in the final version of the complaint filed during trial (#381.00). Defendant WABBO does not address whether the evidence was sufficient to allow the jury to conclude that the product was defective for failing to have sufficient protection over the heating element of the lamp, or whether a jury reasonably could conclude that such a defect was the proximate cause of the plaintiff's injuries.

Context, of course, is important. A fan mounted in a wall or ceiling would not likely need any guards on the side not exposed to the room, but is there any question that if the side of a recessed fan facing the room, or both sides of a so-called box fan, did not have any screen or other device preventing contact with the moving blade, the fan likely would be considered unreasonably dangerous, should someone be injured by virtue of contact with the moving blade? Would there need to be an expert to opine that a space heater with exposed heating elements was unreasonably dangerous, or would that be a matter of common sense? (The issue is not whether an expert might be useful but rather whether an expert would be required.) This applies both to the existence of a defect and the proximate causal relationship of the defect to the injury sustained.

Note that these and other common safeguards – which if lacking might readily allow a product to be characterized as unreasonably dangerous – are intended to become operational or necessary precisely in the case of unexpected accidents or negligence. Therefore, the claimed lack of any specific mechanism for the lamp head to come into contact with the plaintiff's foot would not undermine the causative link between failing to protect against a hot surface coming into contact with the skin of a user or a user's client/patient. Accidents, prying fingers, misuse, etc., are all foreseeable, and the purpose of a safeguard is to prevent harm in just

such situations. (Contributory responsibility is a separate issue, and in this instance, the plaintiff was exonerated of any such responsibility by virtue of the interrogatory responses and verdict.) Just as a claim of defective seat belt or airbag does not necessarily require a clear determination of the cause of the accident necessitating reliance on those protective features, how the lamp came into contact with the plaintiff's foot is not the issue when there is a claim that there should have been a protective feature or device which would have prevented an injury however the lamp might come into contact with an individual such as the plaintiff.

WABBO's principal acknowledged that the cost of adding protection over the face of the lamp would be small and it was stipulated that it was technically feasible in 2008, at around the time the device was manufactured and sold. The principal also acknowledged that locking mechanisms for the movable arm were in use in 2008 on other similar lamps.

This, of course, is in addition to the evidence that WABBO, as distributor of the product, was aware of the propensity for such lamps, over time, to lose tension such that the lamp head could spontaneously lower. (A spring piston mechanism holds the arm and lamp head in position, but over time and with usage, the spring loses some of its ability to maintain the position of the lamp as originally set.[10]) As a progression of loss of ability to hold its position, there would be an intermediate loss of tension, whereby some (decreasing over time) disturbance would be sufficient to cause a lowering, which technically would not be "spontaneous." This is the claim that defendant WABBO almost – if not actually – exclusively addressed in

[10] The distributor's principal testified that there were, or should have been, warnings on the arm about the possible loss of tension, but there was some question if the warning stickers were on the lamps as delivered to Dr. Wang. (He had ordered two lamps, one for the office where this accident occurred, and one for his Westport office.)

connection with its post-verdict motions.[11] A plaintiff need prove only one specification of negligence (or by analogy in a product liability claim, one specification of defect), *Barrett v. Cent. Vermont Ry., Inc.*, 2 Conn. App. 530, 534, 480 A.2d 589, 592 (1984). A necessary corollary of that proposition, however, is that for a defendant to prevail in a motion to set aside the verdict, it must establish that there is no specification on which the plaintiff can prevail. Therefore, for the defendant to prevail, it is not enough to challenge the evidence as to one specification – if the challenge is specification-oriented, then it must negate all specifications. ("Since we conclude that he produced enough evidence to establish liability under the specification of unreasonable speed, we need not consider the defendants' argument that the plaintiff failed to establish his other specifications of negligence." Id.)[12]

There was ample evidence that there was no guard or other safety mechanism on the opening of the head of the heat lamp, and that the temperature at the opening was well in excess of 500°. It is common knowledge that water boils at 212°, and it is only slightly less common knowledge – based on an eponymous book (and at least two movies based on the book) – that paper combust at Fahrenheit 451°. Less precisely, anyone who was touched a baking pan coming out of an oven (even at a moderate baking temperature of 350°) knows how quickly a blister can be formed. Here, the temperature was substantially higher and heat was continuously being generated as long as the lamp was "on" and plugged in.

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[11] There was evidence that locking joints was a feasible alternate manner of construction of such lamps.

[12] There could be a challenge to other requirements, requirements that might be applicable to multiple or all specifications, e.g., misuse or alteration, but the challenge here is focused on spontaneous lowering and causation arising from spontaneous lowering.

With respect to the product liability claim, then, the jury was presented with sufficient evidence (lay and expert) that, combined with its own common sense and experience, was sufficient to support a finding that the lamp was defective, and that the defect caused the injuries to the plaintiff.

B. Medical malpractice/negligence

Although the court addressed, above, both the existence of a defect and causation in a combined manner, the court believes that in connection with the claims of medical malpractice, it is necessary to treat the breach of the standard of care separately from the issue of causation.

1. Standard of care

The defendants advance a multi-pronged attack on the sufficiency of evidence relating to standard of care, relating to breach of standard of care, and as will be discussed later, causation.

The court reiterates that it is obligated to view the evidence in a manner favorable to sustaining the verdict, giving the plaintiff the benefit of all reasonable favorable inferences. Part of the challenge to the evidence relating to standard of care, however, asks the court to focus on the extent to which the defendants claim to have undermined the testimony of the plaintiff's expert. Thus, for example they claim that the expert had a pre-determined opinion, even before being apprised of the precise nature of the lamp that had been used. It is not uncommon for additional information to come to the attention of an expert, and the focus is on the opinion actually given and the basis for proffering that opinion.

The defendants also claim that the fact that the opinion had been based on the expert's use of a similar lamp, but with at least some arguably-distinguishing features, again wholly undermined the validity of her opinions. The differences were brought to the jury's attention, and whether to credit the expert's testimony was for the jury to decide. The court cannot conclude that the effect of the efforts to undermine the expert's testimony was to eliminate the evidence from proper consideration by the jury.

The plaintiff also "adopted" the defendants' acupuncture expert. During argument, the defendants contended that that testimony could not be considered in connection with revising the motion for directed verdict because it had not been presented during the plaintiff's case in chief. In a historical sense, that is correct; however, when plaintiff sought to adopt that testimony, she framed it in terms of opening her case to allow such adoption. The court has discretion to allow corrective action to be taken even after granting a motion for directed verdict, *Burton v. City of Stamford*, 115 Conn. App. 47, 971 A.2d 739 (2009); that necessarily implies that corrective action can be permitted while the motion is under advisement (decision reserved). This is in addition to the fact that the court does not recall the defendants having raised this precise issue at the time that the plaintiff sought permission to open her case for this purpose – the court's recollection was that objections were raised when the plaintiff initially stated that she wished to adopt the expert's opinion, but not in the context of a request to open her case for that purpose. (This assumes that there was a need for the additional expert opinion to support the verdict.)

Against this backdrop, there was sufficient evidence to allow the jury to conclude that defendant Wang had breached the applicable standard of care. It was the opinion of the plaintiff's expert that the lamp should have been checked before

each use (each patient), rather than only once, at the beginning of the day, as was the practice of the defendant. (The plaintiff had been the fourth patient that day.) The defendants' expert stated that the standard of care prohibited placement of the lamp head closer than 12 inches from the patient. There also was an expert opinion that if the lamp head had a known propensity to lower, it should not have been used at all.

As noted, Dr. Wang testified that he checked the lamp only at the beginning of the day and not immediately before each patient. The jury could conclude that that was a breach of the standard of care.

Aside from testimony relating to knowledge of a propensity for the lamp head to lower, the fact that defendant Wang engaged in the elaborate checking he described would allow an inference of knowledge. His procedure for checking the apparatus included checking the tightness of screws, even though the lamp he used did not have any locking mechanism or other feature whereby the tightness of the joint allowing movement of the lamp head would be affected by tightness of screws. There also was testimony from the distributor that it was generally known among its customers – acupuncturists – that over time and usage, the lamp head would eventually develop a propensity to lower. The continued use of a lamp known/believed to have been used to the point of propensity to lower would also be a breach of the standard of care.

Additionally, there is the issue of placement-distance. Dr. Wang did not seem to vary in his testimony that the lamp was placed 18" away from the patient or her foot. There was evidence, however, that it would have been impossible to have done so.

The impossibility of such a distance was based on measurements made by the plaintiff's engineering expert. The lamp had a maximum height from the floor. The treatment table was either 30" (2 1/2 feet) or 36" (3 feet) high. Although the court does not recall the expert stating a precise figure for the maximum height of the heat lamp, it must have been approximately 51", because when subtracting a hypothetical 8" for the height of a patient's foot resting on the table, he calculated the distance from the patient's foot to the lamp as no more than 13" if the table were 30" high, and 7" if the table were 36" high.[13] The expert testified that it was his recollection that Dr. Wang's testimony (deposition) seemed to lean towards the higher height for the table – more likely 36" high – which in turn would mean a probability that the separation between lamp and foot was approximately 7" – below the standard of care testimony provided and below the closest distance recommended by the manufacturer.

The defendants have asked the court to reject or disregard such testimony. They claim that this was not encompassed by the expert disclosure filed by the plaintiff. It is well established, however, that an expert disclosure does not require detailed recitation of every aspect of an expert's opinion. *Vitali v. Southern New England Ear, Nose, Throat & Facial Plastic Surgery Group, LLP*, 153 Conn.App. 753, 107 A.3d 422 (2014).

There also is an absence of opinion-quality to the measurements. It is simply a matter of one-dimensional geometry or just simple addition. The height of the table plus the length of a patient's foot provide the elevation of the top of the foot from floor level. The lamp has a maximum height from floor level. The difference between those two figures is the maximum separation between the lamp head and

[13] Similarly, at one point in his testimony, he indicated that a 9" drop lowered the lamp head to a height of 42".

the top of a patient's foot, assuming that the lamp is at maximum height. There was no evidence (that the court recalls) that Dr. Wang actually measured the distance with a ruler when placing it in proximity to a patient, and again, unless the expert utilized an erroneous figure for the maximum height of the lamp, there is a substantial physical impossibility of an 18" separation, which does not require expertise to understand or recognize.

There still remains the issue of proximate cause. The defendants rely on *Winn v. Posades*, 281 Conn. 50, 913 A.2d 407 (2007). The plaintiff counters with *Blados v. Blados*, 151 Conn. 391, 198 A.2d 213 (1964).

Winn involves a motor vehicle accident, in which the surviving operator had been operating his vehicle at an excessive rate of speed. There was no evidence, however, as to how the accident actually occurred. The decision relied essentially exclusively on prior decisions also involving other motor vehicle accidents. Although not suggesting that motor vehicle accidents were to be treated as sui genesis, the court identified numerous variables that would need to be considered, and for which there was no evidence.

Blados, in contrast, involved a fall from a defective flight of stairs. There was no evidence concerning the actual manner in which the decedent had been ascending the stairs, but the court deemed it sufficient that there was evidence that he had been intending to go up the stairs to his living quarters, and that his death had been caused by a fall. The court also noted that when last observed, he appeared to have been sober, and it was no sign of any "scuffle."

The plaintiff has argued that a "rule out" approach such as is typically done in medical diagnosis is an approach that can and should be undertaken here. In *Blados*, that appears to have been part of the analytic approach taken – the cause

of death had been established as a fall, and alternate scenarios had been at least partially addressed and negated (intoxication, a scuffle).

More recently, a similar "rule out" approach was taken in *Paige v. Saint Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 734 A.2d 85 (1999). The court determined that there had been a lack of evidence to support a finding of proximate cause, but that was done after identifying numerous possibilities that had not been ruled out, as well as considering inculpatory possibilities that had been ruled out. Thus while the case is cited by the defendants for the result – causation not established – the court finds the decision more relevant in terms of methodology.

In all of these cases, there is a dearth of evidence relating to how the accident actually occurred, generally because the person or persons directly involved in the incident were unable to testify as to what actually happened. (In *Winn*, the surviving operator of the defendant vehicle was unable to testify as to what actually had happened at the time of collision.) The existence of at least some evidence as to what actually happened is or can be a determining factor; see, e.g., *Terminal Taxi Co. v. Flynn*, 156 Conn. 313, 240 A.2d 881 (1968).

In this case, there are only a limited number of possibilities as to what "actually happened." The entire lamp assembly could have tipped over, either spontaneously or as a result of some disturbance (excitation). The lamp head could have lowered, either spontaneously or as a result of some disturbance (excitation). Finally, at least in theory, the plaintiff intentionally could have caused either of those scenarios to have happened, intentionally bringing the lamp head into contact with her foot.

No one has suggested that the base of the lamp was sufficiently unstable that the lamp could have tipped over without some force having been applied. The plaintiff explicitly denied having come into contact with the lamp assembly while lying on the table, in a knowing/aware manner. that leaves only possibilities of the lamp head lowering spontaneously or due to some inadvertent (and unknowing) contact by the plaintiff, or the assembly itself tipping over due to some inadvertent (and unknowing) contact by the plaintiff.

There was no evidence or even suggestion that the lamp assembly was sufficiently unstable that an inadvertent bumping by a patient, lying on a treatment table, could cause the entire assembly to tip over. The plaintiff's expert considered the various scenarios as to how the lamp head could have come into contact with the plaintiff's foot, and concluded that the only probable – as opposed to possible but implausible – scenario was that there had been some perturbation or excitation applied to the lamp assembly, causing the head to lower. As the plaintiff was the only person in the room, any excitation would have been in the form of some bumping against the lamp assembly, notwithstanding the plaintiff's denial of any awareness of any contact with the lamp assembly.

This scenario actually was confirmed by Dr. Wang himself. In his complaint directed to defendant WABBO, he explicitly stated that the lamp had come into contact with the plaintiff as a result of the lamp head lowering. While the original complaint simply had stated that the lamp had lowered, the three subsequent amended versions of the complaint (#214.00, #232.00, and #241.00) all described the lamp as falling spontaneously (and a copy of that assertion was entered into evidence prior to the withdrawal of the claim against WABBO (Ex. 11)). (The complaint also asserted that the lamp was dangerous and defective, even as

originally distributed/sold.)[14] As an evidentiary admission, defendant Wang was free to explain the circumstances for the filing of that admission, but the fact that the claim against WABBO had been withdrawn at a later time, and that he had no personal involvement in the filing of any such complaint, did not preclude the jury from giving credence to that statement.

This in turn answers, at least in part, the question raised by the defendants as to what would have been discovered had Dr. Wang done an additional inspection, immediately before placing the heat lamp in proximity to the plaintiff's foot. If at the time of use in connection with treatment of the plaintiff, the lamp head assembly was sufficiently precarious that some excitation or perturbation would cause it to lower several inches and come in contact with the plaintiff's foot, that would have been discerned had there been an adequate test immediately before use. Note that to varying degrees this implicates both the standard articulated by the plaintiff's expert and by Dr. Wang. If the lamp already was sufficiently precarious as of that morning to present a risk of spontaneous or near-spontaneous lowering, then each inspection that was or should have been performed would have revealed that tendency. The jury was not required to accept the defendant's testimony as to the thoroughness of his inspection that morning.[15] Given the generally acknowledged slow rate of deterioration of the stability of the joint in question, each inspection that morning would have provided an opportunity to detect the propensity

[14] The third party complaint was withdrawn the day after the excerpt from the third party complaint was admitted as an exhibit and after Dr. Wang was questioned extensively about the statements made in that pleading.

[15] The routine described by Dr. Wang included hand-tightening the screws and occasionally tightening the screws with a screwdriver. The essentially undisputed expert testimony was that the screws on this particular device had no effect on the tightness of the joint – the ability to hold position was solely dependent upon the spring-based mechanism in the arm. Therefore, to the extent that he jiggled or shook the device to test for stability, the test would have been useful, but the tightening of screws (or checking the tightness of screws) was unrelated to any of the issues in this case.

of the lamp to lower with little or no outside force applied. Since there was no user-ability to adjust tension of the joint, the lamp should have been removed from service (as defendant Wang did immediately after this occurrence).

So to the question as to what causative effect might be attributed to the failure to do an inspection immediately prior to treating the plaintiff, the somewhat oversimplified answer is that, given the determination/admission that the lamp was in a condition where it did lower with little or no outside force applied, each inspection would have been an opportunity to detect the problem and remove the lamp from service, and an additional inspection would have been a backup to what, in retrospect, may have been an inadequate inspection earlier in the day. Given the slow rate of deterioration, any defective condition would have been discoverable for some period of time prior to this accident.

Therefore, the jury reasonably could have concluded that Dr. Wang's failure to test the lamp adequately and/or improper placement of the lamp too close to the plaintiff's foot resulted in the lamp coming into contact with her foot, due to perturbed or spontaneous lowering. As with the claim against WABBO, once the lamp came into contact with the foot of the plaintiff, there is no further question relating to causation of the resulting injury from contact with the hot surface of the lamp. All that is necessary for proximate cause is to establish that the conduct of the defendant was a substantial factor in the lamp coming into contact with the plaintiff's foot, and the plaintiff has established that linkage, by direct and circumstantial evidence.

This also addresses the claim that the court improperly charged the jury when it stated that expert testimony as to causation was required "unless the causative link is sufficiently obvious to a lay person that expert testimony is not required." First, that is not an incorrect statement of the law; see, e.g., *Shegog v.*

Zabrecky, 36 Conn.App. 737, 746-47, 654 A.2d 771 (1995), identifying three situations in which expert testimony would not be required. Further – and assuming that the issue was properly presented and preserved – the evidence supports such an application here. The evidence was undisputed that the deterioration of stability of the arm supporting the lamp head (the joint between the arm and the supporting vertical structure) would be slow and use-related. If, as supported by the evidence and defendant Wang's own admission in the pleadings, the lamp did lower spontaneously or with some perturbation/excitation at the time of the plaintiff's acupuncture treatment, that condition virtually certainly did not arise immediately before her treatment. Therefore, any proper examination should have disclosed the problem and each additional test, assuming done properly, also would have disclosed the problem. Again, given the absence of any ability of a user to adjust tension, once a problem was identified, the only proper response would have been removal from service (and although arguably redundant, there was expert testimony to that effect).

The court appreciates that because acupuncture is deemed health care, a claim directed to an acupuncturist arising during treatment is treated as medical malpractice. As a result of that characterization and the existing body of law, everything is framed in terms of the standard of care. But is it a matter of professional expertise and expert-established standard of care to know that if a very hot heat-source is placed in proximity to someone lying down (and there will be no one else present in the room to monitor the situation for a period of time), there is an obligation to make sure that the device is stable? Is an expert needed to explain to a jury that an unstable heating device, in proximity to a prone individual, can and will cause injury if that instability results in direct contact of the hot surface and the prone individual's body?

The defendants have not established any fatal flaw in the plaintiff's evidence as to medical negligence and causation.

III. Remittitur

The standard for remittitur is well-established:

> " First, the amount of an award [of damages] is a matter peculiarly within the province of the trier of facts. . . . Second, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . Third, the ruling of the trial court on the motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has] included items of damage which are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions. . . . The relevant inquiry is whether the verdict falls within the necessarily uncertain limits of fair and reasonable compensation or whether it so shocks the conscience as to compel the conclusion that it was due to partiality, prejudice or mistake. . . . Furthermore, [t]he decision whether to reduce a jury verdict because it is excessive as a matter of law [within the meaning of General Statutes § 52-216a] rests solely within the discretion of the trial court. . . . [Consequently], the proper standard of review of a trial court's decision to grant or deny a motion to set aside a verdict as excessive as a matter of law is that of an abuse of discretion. . . .

"[A]lthough the trial court has a broad legal discretion in this area, it is not without its limits. . . . Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded. . . . The award of damages for pain and suffering is peculiarly within the province of the trier [of fact]. . . . The fact that it is difficult to measure pain and suffering in terms of money does not prevent a recovery . . . as long as there is a reasonable basis in the record for that recovery. . . . Furthermore, [t]he size of the verdict alone does not determine whether it is excessive. . . .

"Thus, [i]n ruling on the motion for remittitur, the trial court was obliged to view the evidence in the light most favorable to the plaintiff in determining whether the verdict returned was reasonably supported thereby. . . . A conclusion that the jury exercised merely poor judgment is an insufficient basis for ordering a remittitur. . . . Proper compensation for noneconomic damages cannot be computed by a mathematical formula, and there is no precise rule for the assessment of damages. . . . The plaintiff need not prove damages with mathematical exactitude; rather, the plaintiff must provide sufficient evidence for the trier to make a fair and reasonable estimate. . . . A generous award of noneconomic damages should be sustained if it does not shock the sense of justice. . . .

"The fact that the jury returns a verdict in excess of what the trial judge would have awarded does not alone establish that the verdict was excessive. . . . [T]he court should not act as the seventh juror with absolute veto power. Whether the court would have reached a different [result] is not in itself decisive. . . . The court's proper function is to determine whether the evidence, reviewed in a light most favorable to the prevailing party, reasonably supports the jury's verdict. . . . In determining whether the court abused its discretion, therefore, we must examine the evidential basis of the verdict itself . . . . [T]he court's action cannot be reviewed in a vacuum. The evidential underpinnings

of the verdict itself must be examined." (Internal quotation marks and citations, omitted.) 150 Conn.App. 456-58

A further overlay – a relatively recent development in remittitur jurisprudence – is that the court, in ordering remittitur, must be able to articulate its rationale for overwriting the determination of the jury:

> "Today we exercise our supervisory authority to require expressly what already has been implicit in our law. In all future cases, a trial court ordering a remittitur must set forth in the memorandum of decision clear, definite and satisfactory reasons for so ordering. Merely stating that an award shocks the conscience or the sense of justice of the court or that the award does not fall within the necessarily uncertain limits of fair and reasonable compensation will not be sufficient. The recitation of these generalities does little to aid appellate review of the trial court's decision, a review that is complicated by the requirement that appellate tribunals must give deference to that decision, which itself was required to give deference to the jury's verdict. In order for us to determine whether the trial court properly reviewed the evidence in the light most favorable to sustaining the verdict, and did not merely substitute its own judgment for that of the jury, a trial court ordering a remittitur must set forth the evidence, viewed in that light, and explain the specific reasons that led the court to conclude that the award shocked the conscience of the court. We set forth this requirement, not to discourage the trial court from granting remittitur in those cases where it is warranted, but rather to aid the reviewing court in its determination of whether the trial court properly exercised its discretion." *Saleh v. Ribeiro Trucking, LLC*, 303 Conn. 276, 283–84, 32 A.3d 318, 323–24 (2011).

Although this discussion of remittitur is of general applicability, the court will focus on the arguments presented in Dr. Wang's detailed submission.

The initial discussion of applicable law as cited by the defendants is generally unexceptional, except to the extent that the defendants rely on older cases, which

lack any reference to the specificity required by *Saleh*. Rather, it is the discussion of specific cases in which remittitur has been ordered that is highly problematic. The general proposition that it is "of particular value to analy[ze] factors such as injuries, specials and permanency, in assessing whether an award falls somewhere within the necessarily uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to conclude that the jury was influenced by partiality, mistake or corruption" (*Dinardo v. Lashgari*, No. 325946, 1991 Conn. Super. LEXIS 250, *9-10 (Conn. Super. Ct. Feb. 4, 1991)) may be generally helpful, but the court must note that the nature of injuries sustained by the plaintiff are highly unusual, there were no claimed medical specials (although clearly there were bills incurred for the hospitalizations and surgeries), and there was no formal permanency evaluation, notwithstanding the obvious permanent nature of the injuries. The court notes that the amount of specials, and a permanency rating, may be of assistance in efforts to "quantify" the seriousness of an injury, but are in no way essential, and their absence in this case make those factors of negligible value.

Before addressing specific cases cited by the defendants, the court will note some generalized observations. The most recent of the cases cited by the defendants reflects a decision more than 15 years ago. In addition to the need to adjust for, or make allowances for, the differences in the injuries sustained or claimed, any reference to specific dollar amounts in other cases would need to be adjusted to reflect likely differences in value over time (inflationary effects) as well as potential differences in prevailing values in different judicial districts. No attempt has been made, however, to suggest how or why the figures were cited in the various cases are meaningful to this case, whether in terms of comparing injuries, timing, or venue (to the extent that the defendants may be suggesting that the dollar amounts, themselves, lend guidance).

The court will not go through all of the cases cited by the defendants, but will discuss at least a few. The defendants cite and discuss *Rodriguez v. Pickett*, No CV-88- 0354189-S, 1993 Conn. Super. LEXIS 1625 (Conn. Super. Ct. Jun. 28, 1993). In that case, the court concluded that some numbness, diminished taste, and other symptoms resulting from extraction of a molar warranted reduction of a jury verdict to $265,000. Since that amount reflected a reduction for comparative negligence, the court effectively concluded that a verdict just under $450,000 was an appropriate value for the injury (without regard to comparative negligence). How does $450,000 as full value for that injury in 1993, compare to the plaintiff's injury award in 2017 –the value of burning of flesh down to the bone, multiple skin graft procedures, etc.?

The defendants cite and discuss at length *Cohen v. Yale-New Haven Hospital*, 2000 Conn. Supp. 10701 (Conn. Super. Ct. Aug. 31, 2000). The defendants characterize the trial court decision as having been affirmed by *Cohen v. Yale-New Haven Hospital,* 260 Conn. 747, 800 A.2d 499 (2002). While that is true in a literal sense, the issue of propriety of remittitur was not an issue on appeal, end the appellate decision actually reflects that the plaintiff had accepted the remittitur. The Supreme Court dismissed the appeal taken by the plaintiff, seeking to obtain additional damages notwithstanding acceptance of the remittitur, and affirmed the judgment with respect to the appeal of the defendant (claiming that the trial court should have directed a verdict in its favor). The fact that the plaintiff accepted the remittitur suggests no issue as to excessiveness. The court must note that the focus was on an award of $1.4 million for what the court concluded was a temporary injury. (The court also found an element of claimed injury – increased risk of mortality – unproven.) There is nothing temporary about the permanent disfigurement of the plaintiff's foot.

The defendants also cite and discuss *Dinardo v. Lashgari*, No. 325946, 1991 Conn. Super. LEXIS 250 (Conn. Super. Ct. Feb. 4, 1991). In that case, from more than a quarter of a century ago, the verdict was reduced to $285,000, the court finding that at least some of the claimed injuries had not been proven. The course of treatment in that case was nowhere near as protracted, and although there was a life-threatening aspect which was claimed to be responsible for persistent mental issues, the only permanent physical effect was the plaintiff's scar from her cesarean (which apparently would have occurred anyway). How does the court apply *Dinardo* to the current case, other than as a recognition that the court can order remittitur if a verdict is perceived to be excessive? What would that $285,000, awarded in early 1991, be worth in 2018 dollars?

Yatsenick v. Himes, No. 64197, 1994 Conn. Supp. 1042 (Conn. Super. Ct. Feb. 1, 1994) can be distinguished due to its age – not quite a quarter of a century ago – as well as the absence of any physical injury and the court-identified paucity of evidence of any significant mental distress, resulting in the court concluding that the jury must have been swayed by the suicide of the plaintiff. Nonetheless, the court allowed compensatory damages of $100,000 for a vexatious suit claim in which the legal expenses in the underlying action had been $3200.

The court finds instructive a recent Appellate Court decision, *Welsh v. Martinez*, 157 Conn. App. 223, 114 A.3d 1231; cert, denied, 317 Conn. 922 (2015). In *Welsh*, the court affirmed the denial of a motion for remittitur where the plaintiff had been awarded $2 million in noneconomic damages in a case lacking any personal injury – the claims were based on invasion of privacy and intentional infliction of emotional distress.

> "In his motion for remittitur, the defendant argued that the plaintiff 'failed to claim any economic damages, and instead claimed pain and

suffering caused by post-traumatic stress disorder for the balance of her life.' The defendant renews that claim in this appeal, and appears to suggest that noneconomic damages alone cannot justify a sizeable award of damages. We disagree. As our Supreme Court has explained, '[c]omparison of verdicts is of little value. No one life is like any other, and the damages for the destruction of one furnish no fixed standard for others.' (Internal quotation marks omitted.) *Katsetos v. Nolan*, 170 Conn. 637, 658, 368 A.2d 172 (1976). The destruction in the present case primarily is psychological, rather than physical, in nature. That does not diminish its degree, as evidenced by [the psychologist's] testimony.

"There exists no precise formula on which a court can instruct a jury as to the computation of compensation for pain and suffering. A jury in such instances necessarily is tasked with quantifying something that is inherently difficult to quantify. In their closing arguments to the jury, the plaintiff requested an award of approximately $20 million in compensation in light of her thirty-seven and one-half year life expectancy; the defendant suggested that an award of $100,000 was more appropriate. The jury rejected both suggestions, and instead concluded that $2 million was proper compensation for the plaintiff's pain and suffering." (Citation and footnote, omitted,) 157 Conn.App. 242-43.

Although not in any way determinative, the court noted in footnote 10 (the footnote omitted from the passage above) that "[c]alculated in light of her life expectancy, the plaintiff's request amounted to approximately $10,000 per week as compared to the defendant's suggestion of $50 per week. The jury's award of damages amounts to approximately $1000 per week." While the court already has identified the non-productive nature of citing dollar amounts without adjustments for differences in situations (and *Welsh* explicitly makes that observation as well), the per-week figure awarded to the plaintiff, based on her statistical life expectancy, is comparable to that in *Welsh* – with the distinction that the plaintiff, here, sustained

serious physical trauma, requiring multiple surgeries and a risk of amputation, as the source of her non-economic damages.[16]

Again, the plaintiff sustained burns on her foot down to the bone, required hospitalization and multiple skin graft procedures. While the long-term functional effects of the injuries were arguably modest (except perhaps to the person who lives with the limitations), there can be no question as to the objective existence of a permanent injury with a permanent impact on everyday activities and recreational activities. Accordingly, the court finds that the defendants have not articulated an adequate basis for remittitur and the court cannot articulate a basis of its own to justify such an intrusion on the jury's determination.

IV. Comparative Responsibility

The Center, in its initial post-verdict brief, frames the issue as follows:

> "The seminal issue before the Court is whether the statutory requisite of Conn. Get Stat. § 52-184c that, ' the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the healthcare provider represented a breach of the prevailing professional standard of care' applies with equal force to the jury's consideration of the nature and quality of Dr. Wang's conduct as it pertains to the evaluation and assessment of comparative responsibility for Ms. Kissel's injuries under the Connecticut Product's Liability Act (CPLA).See, Conn. Get Stat. § 52-572o©."

At the outset, the court must note what is not an issue. There is no claim that the conduct of Dr. Wang was not a proper subject of the process of determining the respective responsibility of the parties in the context of the product liability claim.

[16] Based on the statistical life expectancy as of trial of just over 26 years, $1 million spread over that period of time comes to approximately $740 per week.

The medical defendants do not claim that there is any case law authority for the proposition that as a potentially responsible party in a product liability claim, his conduct must be measured by a malpractice standard.

Seemingly central to this argument is the defendants' reliance upon the language of General Statutes § 52-184c(a). That statute is quoted in the Center's brief, and the court will reproduce it as set forth in that brief, including the emphasis provided by the defendant:

> "In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, *in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider.* The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

Relying on the emphasized language, the argument then proceeds to assert the need to have evidence of a breach of the prevailing professional standard of care. The problem, however, is the language that the defendant chose not to emphasize. in connection with the product liability claim, Dr. Wang and the Center were not parties to a civil action to recover damages in which it was alleged that the injuries were a result of the negligence of the healthcare provider. As to the product liability claim, their role arose solely as a defensive measure undertaken by defendant WABBO.

The position articulated by the medical defendants in this regard have far-reaching if unarticulated consequences. When WABBO filed its third special defense (#259.00), asserting that Dr. Wang had inappropriately used the lamp, failed to heed warnings, etc., was it required to submit a good faith certificate accompanied by an opinion letter from a similar healthcare provider, as is required for medical malpractice claims (General Statutes § 52-190a)? Is a claim that Dr. Wang "used the subject heat lamp in a manner inconsistent with the normal use and application of the product as reasonably anticipated by the manufacturer or seller" to be governed by the standard of care of acupuncturists – even if manufacturers and distributors have no reasonable basis to anticipate such use in marketing a product? Some of the specifications asserted in the special defense do seem to tread into the area of professional standard of care ("failed to follow the ordinary and customary standards of the acupuncture profession with regard to the use of the subject heat lamp") but that hardly is true of all of the specifications. In a product liability context overlapping medical treatment, the medical treatment provides a context, but the defendant product distributor faces potential strict liability arising from the allegedly defective condition of the product, such that the user's use is not measured by his professional standards but rather the standard of conduct expected of a user – with professional status a factor but not necessarily determinative. To put it bluntly – if it is the general practice (standard of care) to misuse a product, does that bar a manufacturer or distributor from alleging such misuse in connection with defending a personal injury product liability claim?

However appealing the defendant's argument might be in other contexts, there is almost a sense of absurdity in this case. WABBO was brought into the case as a result of actions taken by Dr. Wang – as between those parties, there was no claim at all for damages resulting from personal injury or wrongful death but rather a

claim for indemnification. The special defenses asserted with respect to the product liability claims of the plaintiff were virtually identical to the defenses asserted with respect to Dr. Wang's claims (compare #259.00 and #260.00). Prior to the withdrawal of the third-party complaint against WABBO, was it the expectation of the medical defendants that there would be differing standards of proof with respect to the virtually identical defenses asserted by WABBO?

An alternate approach has been proffered by WABBO. Treatment of a patient comes within the scope of medical negligence, but the manner in which defendant Wang examined his equipment, checking for problems such as looseness, is more a matter of ordinary negligence that professional negligence. Determining whether the lamp was stable or prone to lowering – spontaneously or with minimal outside force – does not implicate the exercise of medical judgment. WABBO has cited a number of trial court decisions addressing this perspective, and the court finds *Cortes v. Visiting Nurse Assn. of Cent. Connecticut, Inc.*, J.D. New Britain, CV106006066, 2011 WL 6004438 (November 10, 2011) to be particularly instructive. In that case, the focus was on proper use of a locking mechanism on equipment, which the court noted did not involve the exercise of any medical judgment.

Further in this regard, the court cannot ignore the fact that the jury found against the medical defendants, and as discussed earlier, based on satisfaction of the appropriate burdens placed on a personal injury plaintiff in connection with a medical malpractice case. The medical defendants have not articulated why WABBO, in its defense of the product liability claim, could not rely upon the plaintiff's evidence, compliant with § 52-184c(a), to satisfy its burden in that same regard (assuming that it had such a burden with respect to its defense).

V. Miscellaneous

A. The plaintiff repeatedly disclaimed any intention of proceeding on her product liability claim based on a malfunction theory. The court need not address this issue as discussed by WABBO – the jury was not charged on malfunction and malfunction was not the basis for the plaintiff's claim against WABBO..

B. The court rejects the contention that the verdicts are inconsistent. To an extent, the medical defendants conflate liability and damages. The verdicts are consistent – arguably, necessarily so – in determining that the damages sustained by the plaintiff amount to $1 million. She sustained the exact same injuries for purposes of both the negligence/medical malpractice claim and the product liability claim, and it would be hard to discern a basis on which the damages awards would be different.

The situation with respect to liability is different. There was a difference in the "universe" of parties in the two separate claims asserted by the plaintiff, and the jury acted appropriately. In the medical malpractice claim, where the only other party was, effectively, Dr. Wang (the Center having acknowledged derivative liability), the jury was required, pursuant to General Statutes § 52-572h, to allocate responsibility (negligence) as between the plaintiff and Dr. Wang. The provisions of subsection (o) of that statute explicitly forbid consideration of liability of parties who might be legally responsible on a theory of liability other than negligence, which would preclude consideration of product liability claims. Therefore, given that "universe" of parties, the jury allocated 100% responsibility to defendant Wang (and derivatively, against defendant Center).

The parties do not dispute, however, that for purposes of a product liability claim, General Statutes § 52-572o is the governing statute. As in the case of

negligence actions governed by § 52-572h, a plaintiff's recovery is reduced by her own assigned percentage of responsibility, which as in the negligence case, was determined to be 0%. Section 52-572o requires consideration of the "nature and quality" of the conduct of each party, for purposes of assigning comparative responsibility in the realm of product liability, and with a "universe" of other parties that includes both WABBO and Dr. Wang, the jury undertook its responsibility in assigning responsibility as between those parties.

There is nothing inconsistent in a determination that, as between the plaintiff and Dr. Wang, Dr. Wang bore 100% responsibility, but that determining that if WABBO was added to the list of parties whose conduct was to be considered, Dr. Wang was only 20% responsible as compared to the 80% responsibility of WABBO.

The court recognizes that § 52-572o likely was drafted with a more typical scenario in mind – a plaintiff suing multiple defendants , all under a product liability theory, e.g., suit against the manufacturer, distributor, and perhaps an end-seller. The parties have not disputed, however, the applicability of the statute to this scenario.

The court notes that WABBO has cited a number of cases for the proposition that it was proper to submit to the jury the issue of allocation of responsibility as among all parties, e.g., *Ambro v. Inland Paperboard & Packaging*, J.D. New Haven at Meriden, CV04 0287592-S, 2004 WL 3130537 (December 20, 2004) and *Gazza v. Bandit Industries, Inc.*, J.D. New Britain (complex litigation docket) X03 CV 99 0499931S, 2001 WL 106828 (January 22, 2001), whereas defendants Wang and Center have submitted no authority suggesting that the court should have adopted any approach other than the one taken.

Accordingly, the court rejects the contention that the verdict should be reduced on this basis.

C. Defendant Wang's contention that "the verdict should be set aside because the jury could not have found in plaintiff's favor on Dr. Wang's special defense" was addressed during the course of argument, and for the reasons stated at the time, must be rejected. While the premise of the argument is reasonable, and indeed perhaps even probable – that the plaintiff, herself, may have come into contact with the lamp assembly, providing the outside force necessary for the lamp head to descend – it is a quintessential jury issue as to whether that constituted negligence – a lack of reasonable care for one's own safety. It was for the jury to determine whether such movement (if it occurred) was unreasonable, given the circumstances of a patient, lying on a treatment table with needles inserted at various locations in her foot, being asked to remain totally immobile for several minutes. This argument depends not on a determination that the plaintiff probably moved and probably bumped against the lamp assembly, but the characterization of such a movement as unreasonable under the circumstances. The jury might have determined that she did not move, but if the jury determined that she had moved, it is clear they did not attribute any level of fault to such movement. The jury verdict cannot be disturbed on this basis.[17]

D. Defendant Wang also argues that the jury could not have found for defendant WABBO on its special defense of contributory responsibility, with respect to the product liability claim. Part of this argument relies on the contention that with respect to the product liability claim, the burden on WABBO was the same as on the plaintiff in the medical malpractice claim (proof of breach of the relevant standard of care), an argument already rejected. To the extent that the defendant argues that

[17] Dr. Wang, in his testimony, stated that he did not blame the plaintiff for what happened.

even if that standard does not apply, there was inadequate proof, the discussion of adequacy of evidence in the negligence claim as to negligence and causation necessarily apply equally if not more so when there is no required framework of a standard of care.

F. The defendants also claim that the plaintiff engaged in improper arguments. The parties did not submit any transcript of the offending argument, nor any transcript reflecting any objection of the parties and the court's response, if any. The court will not guess as to what was or was not said, other than to note that the court generally is sensitive to any "send a message" argument, and does not recall such language being used. To the extent that the argument is, in part, that the plaintiff used subtler language to convey the same message, again, the court cannot address the issue without a record – including a record that the matter was brought to the court's attention in a timely manner and that the court's response was prejudicially inadequate. (As often observed by appellate courts in criminal cases in which the defendant claims that there was an improper argument by the prosecution, the fact that no objection was made during the course of argument or immediately thereafter (as far as the court recalls) suggests that the argument was not immediately perceived to be offensive or objectionable.) If truly objectionable, a timely objection could have elicited a suitable corrective instruction or admonition; based on the descriptions of the allegedly offensive language, however, the court cannot conclude that anything that might have been said so undermined the fairness of the proceeding as to warrant setting aside the results of the trial, even absent an objection.

Conclusion

The court has attempted to go through all of the issues raised by the parties in challenging the jury's verdict.

With respect to the earlier decision denying the motions to dismiss relating to the opinion letter, it is not free from doubt as to whether *Peters* and earlier cases mandate dismissal in the event of an inadvertently omitted but otherwise sufficient opinion letter. Under the circumstances of this case, with decisions prior to *Peters* indicating the same statute of limitations benchmark, the court cannot ignore the untimeliness of raising the issue, after a month-long trial to a verdict, in turn after approximately 6 years of pre-trial proceedings. Given the probably-unique circumstances before the court, the court denies the requests that the motions to dismiss be granted at this late date.

The court rejects the argument that there was inadequate expert testimony as to the standard of care and causation with respect to the medical malpractice phase of the proceedings. There was expert testimony in both regards, and the issue of use of a device (heat lamp) and especially the process of ensuring that it was in safe condition, blends not only common experience but also raises the question of whether that truly is medical negligence – ensuring that the device is safe (not unreasonably unsafe or defective) is not part of the actual treatment of a patient.

The court believes the jury was properly charged with respect to the comparative responsibility of Dr. Wang with respect to the product liability claim. The medical defendants have cited no authority for the proposition that customary misuse of a product, if characterized as a standard of care, should immunize a

product user from sharing responsibility when a third party is injured by such misuse.

As to the amount of the verdict, while the defendants may feel that the award was excessive, given the limited scope of injuries being claimed (e.g., no economic damages), they have not demonstrated that it was excessive within the meaning of the law – it did not "shock the conscience of the court." The court would be hard-pressed to come up with a rationale for reducing the verdict, however generous it may appear to be.

In sum, then, the defendants have not identified any basis on which the court should direct a verdict in their favor, set aside the verdict in favor of the plaintiff, order judgment in favor of the defendants notwithstanding the verdict, or reduce the verdict as excessive. Accordingly, all of the motions for directed verdict, motions to set aside the verdict, motions for remittitur, and motions for judgment notwithstanding the verdict, are denied.

POVODATOR, JTR.

JDNO Notice sent
Decision entered in accordance
with the foregoing 1/3/19.
Derrick Woods
Derrick Woods, TAC

STATE OF CONNECTICUT

FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL 94 Grove Street Mount Kisco, New York	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
vs.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C. 1011 High Ridge Road Stamford, Connecticut 06905	:	
REED WANG 129 Kings Highway North Westport, Connecticut 06880	:	
HEALTH BODY WORLD SUPPLY INC. a/k/a THE WABBO COMPANY 17870 Castleton St. #116 Industry, California 91748	:	JANUARY 3, 2019

Present: Hon. Kenneth B. Povodator, J.T.R.

JUDGMENT

This action, by writ and complaint, claiming negligence came to this Court on April 24, 2013, and thence to later dates when Defendants Center for Women's Health (Center) and Reed Wang appeared, and thence to later dates when the Defendants moved to dismiss the complaint, which motions the Court (Karazin, J.T.R.) denied, and thence to later dates when Defendant Reed filed a cross-complaint against Defendant Center and a third-party complaint against Defendant Health Body World Supply Inc. (WABBO), and thence to later dates when the Plaintiff filed a complaint against WABBO, and thence to later dates when Defendant Wang withdrew his cross complaint and third-party complaint, and thence to later dates when the parties were at issue, as on file, and when all the evidence having been submitted to the Jury, which returned its verdict together with the following interrogatories:

JURY INTERROGATORIES

1. Did the plaintiff prove, by a preponderance of the evidence, the standard of care applicable to the acupuncture treatment rendered by Dr. Reed Wang to his patient, Judith Kissel, on April 22, 2010?

2. Did the plaintiff prove that defendant Wang's care and treatment of plaintiff on April 22, 2010, constituted a breach of the requisite standard of care for an acupuncturist treating a patient such as plaintiff, under the circumstances then existing?

3. Did the plaintiff prove that defendant's breach of the applicable standard of care proximately caused some or all of the injuries she claimed?

4. Did defendant Wang prove that the plaintiff's own negligence, as alleged by the defendant in his special defense, was also a proximate cause of the plaintiff's injuries?

5. The parties proved that the respective negligence of the parties with respect to the events of April 22, 2010, is as follows (must add up to 1005):

   Negligence of defendant Wang _____%

   Negligence of plaintiff _____%

6. Did the plaintiff prove that defendant WABBI was engaged in the business of selling the lamp used by Dr. Wang in his treatment of the plaintiff?

7. Did the plaintiff prove that the lamp sold to Dr. Wang was in a defective condition and unreasonably dangerous to the consumer or user?

8. Did the plaintiff prove that the defective condition or conditions of the lamp caused some or all of the injuries claimed by the plaintiff?

9. Did the plaintiff prove that the defect or defects existed at the time of sale of the lamp to Dr. Wang?

10. Did the plaintiff prove that the lamp was expected to and did reach Dr. Wang without substantial change in condition?

11. Did defendant WABBO prove, with respect to the plaintiff's product liability

claim, that the negligent or other improper conduct of the plaintiff and/or Dr. Wang, as alleged by the defendant in its special defenses, was also a proximate cause of the plaintiff's injuries?

12. For purposes of the product liability claim, the parties proved that the respective comparative responsibility of the parties with respect to the events of April 22, 2010, is as follows (must add up to 100%):

Responsibility of defendant WABBO _____%

Responsibility of defendant Wang _____%

Responsibility of plaintiff _____%

13. Plaintiff proved that she sustained the following damages (pain, loss of function, loss of enjoyment of life's activities):

To date of trial $_____

Future $_____

14. With respect to the malpractice claim, the plaintiff proved that she is entitled to damages of

$_____

15. With respect to the product liability claim, the plaintiff proved she is entitled to damages of

$_____

The jury returned its verdict as follows:

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendants, REED WANG and CENTER FOR WOMEN'S HEALTH, P.C., and awards monetary damages of

$1,000,000

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendant, HEALTH BODY WORLD SUPPLY INC. (WABBO), and awards monetary damages of

$1,000,000

The jury at the same time returned their answers to the interrogatories as follows:

Interrogatory No. 1 Yes

Interrogatory No. 2 Yes

Interrogatory No. 3 Yes

Interrogatory No. 4 No

Interrogatory No. 5

Negligence of defendant Wang _____%

Negligence of plaintiff _____%

Interrogatory No. 6 Yes

Interrogatory No. 7 Yes

Interrogatory No. 8 Yes

Interrogatory No. 9 Yes

Interrogatory No. 10 Yes

Interrogatory No. 11 Yes

Interrogatory No. 12

Responsibility of defendant WABBO 80%

Responsibility of defendant Wang 20%

Responsibility of plaintiff 0%

Interrogatory No. 13

To date of trial $750,000

Future $250,000

Interrogatory No. 14

$1,000,000

Interrogatory No. 15

$1,000,000

The Court accepted the verdict and the answers to the interrogatories.

The Defendants duly filed motions that the verdict be set aside, for remittitur, and to reconsider the denial of the motion to dismiss, and the parties were fully heard on the motions.

The Court having heard the parties, finds that the motions should be and the same are denied.

Whereupon it is adjudged that the Plaintiff recover of the Defendants $1,000,000.00 damages and costs, taxed at $_____.

BY THE COURT,

Scott Abel
Assistant Clerk

☒ APPEAL ☐ JOINT APPEAL ☐ CROSS APPEAL ☐ AMENDED APPEAL ☐ CORRECTED FORM

JD-SC-33 Rev. 11-17
P.B. Sections 3-8, 60-7, 60-8, 62-7, 62-8, 63-3, 63-4, 63-10, 72-3
C.G.S. Sections 31-301b, 51-197f, 52-470

All appeals must be filed electronically unless an exemption from the requirements of electronic filing has been granted or you are an incarcerated self-represented party. For further information about e-filing or this form, see the Appeal Instructions, form JD-SC-34.

☐ To Supreme Court ☒ To Appellate Court

Name of case *(State full name of case)*

KISSEL, JUDITH v. CENTER FOR WOMEN'S HEALTH, P.C. Et Al

Type of appellate matter (*If a writ of error, the writ and the signed marshal's return must be filed on the same business day as this form. See Practice Book Section 72-3.*)

Appeal

Trial Court History

Tried to: **Jury**	Trial court location: **123 HOYT STREET Stamford CT 06905**
Trial court judges being appealed: **HON KENNETH B POVODATOR**	List all trial court docket numbers, including location prefixes: **FST-CV-12-6013562-S**
All other trial court judges who were involved with the case: **HON. KEVIN TIERNEY Continued**	Judgment for *(Where there are multiple parties, specify those for whom judgment was rendered)*: **JUDITH KISSEL**
Date of judgment(s) or decision(s) being appealed: **01/03/2019**	Date of issuance of notice on any order on any motion that would render judgment ineffective: Date for filing appeal extended to:
Case type: **Civil**	For Juvenile Cases: ☐ Termination of Parental Rights ☐ Order of Temporary Custody
For Civil/Family Case Types, Major/Minor code: **T28**	☐ Other

Appeal

Appeal filed by *(Party name(s))*: **CENTER FOR WOMEN'S HEALTH P.C.**

From *(the action that constitutes the appealable judgment or decision)*: **Judgment on the verdict following denial of post-verdict motions.**

If this appeal is taken by the State of Connecticut, provide the name of the judge who granted permission to appeal and the date of the order:

Statutory Basis for Appeal to Supreme Court:

By *(Signature of counsel of record)*	Telephone number	Fax number	Juris number *(If applicable)*
▶ **417457**	**203-327-1800**	**203-353-1892**	**417457**

Appearance

Type name and address of counsel of record filing this appellate matter *(This is your appearance; see Practice Book Section 62-8)*:
HEIDELL PITTONI MURPHY & BACH LLP 855 MAIN STREET SUITE 1100
BRIDGEPORT CT 06604

E-mail address: **hpmb@hpmb.com**

"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court.
☐ Counsel or self-represented party who files this appeal is appearing **in place of:**

Name of counsel of record: Juris number *(If applicable)*:

Certification

I certify that a copy of the appeal form I am filing will immediately be delivered to each other counsel of record and I have included their names, addresses, e-mail addresses and telephone numbers; the appeal form has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the appeal form complies with all applicable rules of appellate procedure in accordance with Practice Book Sections 62-7 and 63-3.

Date to be delivered **01/18/2019**

If you have an exemption from e-filing under Practice Book Section 60-8, attach a list with the name, address, e-mail address, and telephone number of each counsel of record and the address where the copy was delivered.

If this appeal is a criminal or habeas corpus matter, I certify that a copy of this appeal form will immediately be delivered to the Office of the Chief State's Attorney Appellate Bureau. Date to be delivered _____

Signed *(Counsel of record)*	Date signed
▶ **417457**	**01/18/2019**

Required Documents

To be filed with the Appellate Clerk within ten days of the filing of the appeal, if applicable. See Practice Book Section 63-4.

1. Preliminary Statement of the Issues
2. Court Reporter's Acknowledgment or Certificate that no transcript is necessary
3. Docketing Statement
4. Statement for Preargument Conference (form JD-SC-28A)
5. Constitutionality Notice
6. Sealing Order form, if any

☒ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge (*enter Judge's name below*)

Judge: Date waived:

Court Use Only
Date and time filed

437-

Print Form Reset Form

Appeal Form (continued)

CASE NAME:
KISSEL, JUDITH v. CENTER FOR WOMEN'S HEALTH, P.C. Et Al

OTHER TRIAL COURT JUDGES
HON. KEVIN TIERNEY
HON. EDWARD R. KARAZIN
William Mottolese
HON. ALFRED J. JENNINGS
HON. ROBERT L. GENUARIO
HON. DONNA N. HELLER
HON. DAVID R. TOBIN
HON. Anthony D. Truglia Jr.

Parties & Appearances

PARTY/PARTIES INITIATING THE APPEAL

CENTER FOR WOMEN'S HEALTH P.C.
Juris: 103041 HEIDELL PITTONI MURPHY & BACH LLP
855 MAIN STREET
SUITE 1100
BRIDGEPORT, CT 06604
Phone: (203) 327-1800 Fax: (203) 353-1892
Email: hpmb@hpmb.com

ALL OTHER PARTIES AND APPEARANCES

JUDITH KISSEL - Judgment For
Juris: 032250 KOSKOFF KOSKOFF & BIEDER PC
350 FAIRFIELD AVENUE
BRIDGEPORT, CT 06604
Phone: (203) 336-4421 Fax: (203) 368-3244
Email: kkb@koskoff.com

REED WANG
Juris: 303506 MARY ALICE MOORE LEONHARDT
67 RUSS STREET
HARTFORD, CT 06106
Phone: (860) 216-6337 Fax:
Email: ma@mooreleonhardt.com

Juris: 038478 HORTON DOWD BARTSCHI & LEVESQUE PC
90 GILLETT STREET
HARTFORD, CT 06105
Phone: (860) 522-8338 Fax: (860) 728-0401
Email: jnye@hdblfirm.com

HEALTH BODY WORLD SUPPLY INC. A/K/A THE WABBO COMPANYAS THIRD-PATY DEFENDANT
Juris: 026105 HALLORAN & SAGE LLP
ONE GOODWIN SQUARE
225 ASYLUM STREET
HARTFORD, CT 06103
Phone: (860) 297-4615 Fax: (860) 548-0006
Email: POGMORE@HALLORAN-SAGE.COM

FILING PARTY CORRECTED INFORMATION
HEIDELL PITTONI MURPHY & BACH LLP Tel: 203-382-9700 Fax: 203-382-9730; email: Kblumenstock@hpmb.com

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Appeal Case Information

AC 42493 JUDITH KISSEL v. CENTER FOR WOMEN'S HEALTH, P.C. ET AL. **Status: Brief Due**

Date Filed:	01/18/2019	**Case Manager :**	MAURILIO AMORIM
Appeal By:	Defendant	**Response to Docket Due Date:**	
Argued Date:		**Disposition Method:**	
Submitted on Briefs Date:		**Disposition Date:**	
		Cite:	
Panel:		**Petition(s) For Certification:**	

Cross Appeal/Amended Appeal

Trial Court Case Information

Docket Number:	FSTCV126013562S		
Judgment For:	Plaintiff	**Court:**	JD COURTHOUSE AT STAMFORD
Trial Judge(s):	HON KENNETH B POVODATOR	**Judgment Date:**	01/03/2019
		Case Type:	CIVIL - MALPRACTICE/MEDICAL
		Other Trial Judge(s):	HON. KEVIN TIERNEY HON. EDWARD R. KARAZIN HON. ALFRED J. JENNINGS HON. ROBERT L. GENUARIO HON. DONNA N. HELLER HON. DAVID R. TOBIN HON. Anthony D. Truglia Jr.

Party/Attorney or Self-Represented Information

Party Name	Trial Court Party Class	Case Affiliation	Appeal Party Class
Party(ies) for: AC 42493			
CENTER FOR WOMEN'S HEALTH P.C. Juris: 103041 HEIDELL PITTONI MURPHY & BACH LLP	Defendant	Defendant	Appellant
JUDITH KISSEL Juris: 032250 KOSKOFF KOSKOFF & BIEDER PC	Plaintiff	Plaintiff	Appellee
REED WANG Juris: 038478 HORTON DOWD BARTSCHI & LEVESQUE PC Juris: 303506 MARY ALICE MOORE LEONHARDT	Defendant	Defendant	Appellee
HEALTH BODY WORLD SUPPLY INC. A/K/A THE WABBO COMPANYAS THIRD-PATY DEFENDANT Juris: 026105 HALLORAN & SAGE LLP	Defendant	Defendant	Appellee

Transcripts and Exhibits

Exhibits Received By Court

Party	Transcripts Ordered	Estimated Delivery Date	Delivered To Party	Pages	Delivered To Court
CENTER FOR WOMEN'S HEALTH P.C.	01/24/2019	02/08/2019	03/06/2019	3720	07/12/2019

Preliminary Papers

Party Name	Preliminary Statement of Issues	Designation Contents of Record	Certificate re Transcript Received	Docketing Statement	PAC Statement	Draft Judgment File	Constitutionality Notice	Sealing Notice
CENTER FOR WOMEN', S HEALTH P.C.	01/24/2019		02/01/2019	01/24/2019	01/24/2019			
JUDITH KISSEL	02/13/2019			02/13/2019				

Briefs

	Type	Original Due Date	Due Date	Filed Dt
CENTER FOR WOMEN'S HEALTH P.C. Appellant	Brief	04/22/2019	07/19/2019	

Case Action

Activity	Number	Date filed	Date filed By	Description	Action
APPEAL	AC 42493	01/18/2019		Direct Appeal	Filed
PRELIMINARY PAPER/APPEAL DOCUMENTS		01/18/2019		Correspondence from Court	Filed
PRELIMINARY PAPER/APPEAL DOCUMENTS		01/24/2019		Docketing Statement	Filed
PRELIMINARY PAPER/APPEAL DOCUMENTS		01/24/2019		Pre Argument Conference Statement	Filed
PRELIMINARY PAPER/APPEAL		01/24/2019		Preliminary Statement of Issues	Filed

A490

DOCUMENTS								
PRELIMINARY PAPER/APPEAL DOCUMENTS		02/01/2019		Appeal Transcript Order Acknowledgement from Court Reporter	Filed			
PRELIMINARY PAPER/APPEAL DOCUMENTS		02/13/2019		Docketing Statement	Filed			
PRELIMINARY PAPER/APPEAL DOCUMENTS		02/13/2019		Preliminary Statement of Issues	Filed			
PRELIMINARY PAPER/APPEAL DOCUMENTS		03/07/2019		Appeal Transcript Order Form with Certificate of Completion	Filed			
PRELIMINARY PAPER/APPEAL DOCUMENTS		03/11/2019		Certificate Regarding Transcripts	Filed			
MOTION FOR EXTENSION	AC 1832724	03/11/2019	CENTER FOR WOMEN'S HEALTH P.C.	Appellant Brief Extension Date:	Granted	03/11/2019	03/11/2019	
ORDER	AC 1832724	03/11/2019		Clerk uploaded Order	Filed			
MOTION FOR EXTENSION	AC 1833358	05/08/2019	CENTER FOR WOMEN'S HEALTH P.C.	Appellant Brief Extension Date:06/19/2019	Granted	05/08/2019	05/08/2019	
MOTION FOR EXTENSION	AC 1833760	06/14/2019	CENTER FOR WOMEN'S HEALTH P.C.	Appellant Brief Extension Date:07/19/2019	Granted	06/19/2019	06/19/2019	
PRELIMINARY PAPER/APPEAL DOCUMENTS		07/12/2019		Appeal Transcript Filing Form to Accompany Transcripts and/or Land Use Regulations	Filed			

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Attorney/Firm: HEIDELL PITTONI MURPHY & BACH LLP (103041) **E-Mail:** drobertson@hpmb.com Logout

FST-CV12-6013562-S KISSEL, JUDITH v. CENTER FOR WOMEN'S HEALTH, P.C. Et Al

Prefix: JYT **Case Type:** T28 **File Date:** 04/10/2012 **Return Date:** 04/24/2012

Case Detail Notices History Scheduled Court Dates Help Manual

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Information updated as of: 07/17/2019

Case Information

Case Type: T28 - Torts - Malpractice - Medical
Court Location: Stamford JD
List Type: JURY (JY)
Trial List Claim: 04/28/2017
Last Action Date: 06/11/2019 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date: 01/03/2019
Disposition: JUDGMENT ON VERDICT-GENERAL
Judge or Magistrate: HON KENNETH POVODATOR

Party & Appearance Information

Party		No Fee Party	Party Category	Party Type
P-01	JUDITH KISSEL		Plaintiff	Person
	Attorney: KOSKOFF KOSKOFF & BIEDER PC (032250), 350 FAIRFIELD AVENUE, BRIDGEPORT, CT 06604 — File Date: 04/10/2012			
D-50	CENTER FOR WOMEN'S HEALTH P.C.		Defendant	Firm or Corporation
	Attorney: HEIDELL PITTONI MURPHY & BACH LLP (103041), 855 MAIN STREET, SUITE 1100, BRIDGEPORT, CT 06604 — File Date: 04/24/2012			
D-51	REED WANG		Defendant	Person
	Attorney: MARY ALICE MOORE LEONHARDT (303506), 67 RUSS STREET, 2ND FLOOR, HARTFORD, CT 06106 — File Date: 03/10/2016			
	Attorney: HORTON DOWD BARTSCHI & LEVESQUE PC (038478), 90 GILLETT STREET, HARTFORD, CT 06105 — File Date: 06/06/2018			
D-52	HEALTH BODY WORLD SUPPLY INC. A/K/A THE WABBO COMPANYAS THIRD-PATY DEFENDANT		Defendant	Firm or Corporation
	Attorney: HALLORAN & SAGE LLP (026105), ONE GOODWIN SQUARE, 225 ASYLUM STREET, HARTFORD, CT 06103 — File Date: 02/15/2013			

Viewing Documents on Civil, Housing and Small Claims Cases:

If there is an in front of the docket number at the top of this page, then the file is electronic (paperless).

- Documents, court orders and judicial notices in electronic (paperless) civil, housing and small claims cases with a return date on or after January 1, 2014 are available publicly over the internet.* For more information on what you can view in all cases, view the Electronic Access to Court Documents Quick Card.
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Motions / Pleadings / Documents / Case Status

Entry No	File Date	Filed By	Description	Arguable
	04/10/2012	P	**SUMMONS**	
	04/10/2012	P	**COMPLAINT**	
	04/10/2012	P	**RETURN OF SERVICE**	
	04/24/2012	D	**APPEARANCE** Appearance	
	06/05/2012		**CLAIM/RECLAIM** Claim/Reclaim	
	06/07/2012	D	**APPEARANCE** Appearance	
	07/05/2012		**CLAIM/RECLAIM** Claim/Reclaim	
	09/27/2012		**ADMINISTRATIVE DOCUMENT**	
	09/27/2012		**ADMINISTRATIVE DOCUMENT**	
	10/16/2012		**CLAIM/RECLAIM** Claim/Reclaim	
	01/04/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	02/15/2013	D	**APPEARANCE** Appearance	
	10/28/2013		**CLAIM/RECLAIM** Claim/Reclaim	
	01/17/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	01/23/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	02/03/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	02/06/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	02/25/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	04/10/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	04/24/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	05/08/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	06/04/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	06/06/2014	D	**APPEARANCE** Appearance	
	10/01/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	11/05/2014		**CLAIM/RECLAIM** Claim/Reclaim	
	01/09/2015		**CLAIM/RECLAIM** Claim/Reclaim	
	12/29/2015		**CLAIM/RECLAIM** Claim/Reclaim	
	03/10/2016	D	**APPEARANCE** Appearance	
	06/06/2018	D	**APPEARANCE** Appearance	
101.00	04/24/2012	D	**NOTICE** re service of interrogatories and production req	No

102.00	04/30/2012	P	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** as to Center for Women's Health 4-24-12 set	No
102.86	05/14/2012	C	**ORDER** *RESULT:* Granted 5/14/2012 HON A MOTTOLESE	No
103.00	05/02/2012	D	**OBJECTION TO MOTION** for Extension of Time	No
103.86	05/14/2012	C	**ORDER** **Last Updated:** Entry Number - 05/16/2012	No
104.00	05/08/2012	P	**OBJECTION TO INTERROGATORIES** as to Center for Women's Health 4-24-12 set *RESULT:* Order 2/24/2014 HON KEVIN TIERNEY	No
104.86	02/24/2014	C	**ORDER** *RESULT:* Order 2/24/2014 HON KEVIN TIERNEY	No
105.00	05/24/2012	D	**MOTION TO DISMISS** *RESULT:* Take Papers 7/16/2012 HON EDWARD KARAZIN **Last Updated:** Result Information - 07/20/2012	Yes
105.86	09/06/2012	C	**MEMORANDUM OF DECISION ON MOTION** RE: Motion to Dismiss Nos. 105.00 and 109.00	No
106.00	05/24/2012	D	**MEMORANDUM IN SUPPORT OF MOTION** of Motion to Dismiss	No
107.00	06/01/2012	P	**MOTION FOR EXTENSION OF TIME** to respond to Mt Dismiss #105&106	No
107.86	06/06/2012	C	**ORDER** *RESULT:* Granted 6/6/2012 BY THE CLERK	No
108.00	06/07/2012	D	**OBJECTION TO INTERROGATORIES** and RFPs *RESULT:* Rejected 10/31/2012 HON A MOTTOLESE	No
108.86	10/31/2012	C	**ORDER** *RESULT:* Rejected 10/31/2012 HON A MOTTOLESE	No
109.00	06/08/2012	D	**MOTION TO DISMISS**	Yes
109.86	09/06/2012	C	**ORDER** *RESULT:* Order 9/6/2012 HON EDWARD KARAZIN	No
110.00	06/18/2012	D	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)**	No
111.00	06/18/2012	P	**CLAIM FOR JURY OF 6**	No
112.00	06/28/2012	P	**AMENDED COMPLAINT** & Request for Leave	No
113.00	06/28/2012	P	**MEMORANDUM IN OPPOSITION TO MOTION** Consolidated Opp to #105, 106, & 109	No
114.00	07/09/2012	D	**OBJECTION TO REQUEST TO AMEND** Complaint dated 6.28.12	No
115.00	07/09/2012	D	**REPLY** to Opposition to Motion to Dismiss	No
116.00	07/12/2012	P	**REPLY** to #114.00	No
117.00	07/13/2012	D	**REPLY** Pl's Reply to Def Obj Req for Leave Amend Cmplaint	No
118.00	07/31/2012	P	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** as to Center for Women's Health 4-24-12 set *RESULT:* Granted 8/13/2012 HON EDWARD KARAZIN	No
118.86	08/13/2012	C	**ORDER** *RESULT:* Granted 8/13/2012 HON EDWARD KARAZIN	No
119.00	08/06/2012	D	**OBJECTION TO EXTENSION OF TIME MOTION** (Mtn #: 118.00)	No
120.00	08/06/2012	D	**MOTION FOR EXTENSION OF TIME**	No
121.00	08/07/2012	P	**AFFIDAVIT OF ATTEMPT TO RESOLVE OBJECTION** as to D, Center for Women's Health's Objs	No
122.00	08/08/2012	P	**REPLY** to Defendant Center's Obj to P's Mot for Time	No
123.00	08/14/2012	D	**OBJECTION TO EXTENSION OF TIME MOTION** Joining 119	No
124.00	08/15/2012	D	**MOTION FOR EXTENSION OF TIME** Joining 120	No

125.00	09/04/2012	D	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** *RESULT:* Granted 9/17/2012 HON A MOTTOLESE	No
125.86	09/17/2012	C	**ORDER** *RESULT:* Granted 9/17/2012 HON A MOTTOLESE	No
126.00	09/04/2012	D	**MOTION - SEE FILE** Expedited Auth to Obtain Protected Health Info	No
127.00	09/13/2012	P	**OBJECTION TO MOTION** #126.00	No
128.00	09/13/2012	P	**REQUEST FOR ARGUMENT (NON-ARG MATTER)** re: #126 & 127	No
129.00	09/18/2012	D	**MOTION TO REARGUE/RECONSIDER** re Mot to Dismiss (Center for Wms Health) *RESULT:* Denied 9/21/2012 HON EDWARD KARAZIN	No
129.86	09/21/2012	C	**ORDER** *RESULT:* Denied 9/21/2012 HON EDWARD KARAZIN	No
130.00	09/20/2012	D	**MOTION TO REARGUE/RECONSIDER** Joining 129 *RESULT:* Denied 9/21/2012 HON EDWARD KARAZIN	No
130.86	09/21/2012	C	**ORDER** *RESULT:* Denied 9/21/2012 HON EDWARD KARAZIN	No
131.00	10/01/2012	D	**REQUEST TO REVISE** Request to Revise Complaint	No
132.00	10/05/2012	D	**MOTION FOR EXTENSION OF TIME** Discovery responses *RESULT:* Granted 10/24/2012 HON ALFRED JENNINGS	No
132.86	10/24/2012	C	**ORDER** *RESULT:* Granted 10/24/2012 HON ALFRED JENNINGS	No
133.00	10/05/2012	D	**REQUEST TO REVISE**	No
134.00	10/17/2012	P	**OBJECTION TO REQUEST TO REVISE** #131 by Defendant Wang *RESULT:* Sustained 10/31/2012 HON A MOTTOLESE	No
134.86	10/31/2012	C	**ORDER** *RESULT:* Sustained 10/31/2012 HON A MOTTOLESE	No
135.00	10/17/2012	P	**OBJECTION TO REQUEST TO REVISE** #133 by Defendant Center for Women's Health *RESULT:* Sustained 10/31/2012 HON A MOTTOLESE	No
135.86	10/31/2012	C	**ORDER** *RESULT:* Sustained 10/31/2012 HON A MOTTOLESE	No
136.00	11/13/2012	P	**WAIVER - GENERAL** Joint Waiver of Mediation	No
136.86	11/13/2012	C	**ORDER** *RESULT:* Order 11/13/2012 HON ROBERT GENUARIO	No
137.00	11/16/2012	P	**REVISED COMPLAINT** and Notice per Court order 11/1/12	No
138.00	11/29/2012	D	**MOTION FOR EXTENSION OF TIME** to Plead re Plaintiff's Revised Complaint *RESULT:* Granted 12/17/2012 HON A MOTTOLESE	No
138.86	12/17/2012	C	**ORDER** *RESULT:* Granted 12/17/2012 HON A MOTTOLESE	No
139.00	11/30/2012	D	**MOTION FOR EXTENSION OF TIME** *RESULT:* Granted 12/17/2012 HON A MOTTOLESE	No
139.86	12/17/2012	C	**ORDER** *RESULT:* Granted 12/17/2012 HON A MOTTOLESE	No
140.00	12/11/2012	P	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** as to D, Wang's 11-28-12 set *RESULT:* Granted 1/2/2013 HON A MOTTOLESE	No
140.86	01/02/2013	C	**ORDER** *RESULT:* Granted 1/2/2013 HON A MOTTOLESE	No
141.00	12/17/2012	D	**MOTION TO IMPLEAD** *RESULT:* Granted 1/2/2013 HON A MOTTOLESE	No
141.86	01/02/2013	C	**ORDER** *RESULT:* Granted 1/2/2013 HON A MOTTOLESE	No
142.00	12/17/2012	D	**MOTION FOR EXTENSION OF TIME** File Responsive Pleading to Revised Complaint dated 11.16.12	No

			RESULT: Granted 1/2/2013 HON A MOTTOLESE	
142.86	01/02/2013	C	**ORDER** *RESULT:* Granted 1/2/2013 HON A MOTTOLESE	No
143.00	12/31/2012	D	**MOTION FOR EXTENSION OF TIME** to respond to Plaintiff's Revised Complaint *RESULT:* Granted 1/14/2013 HON A MOTTOLESE	No
143.86	01/14/2013	C	**ORDER** *RESULT:* Granted 1/14/2013 HON A MOTTOLESE	No
144.00	01/07/2013	P	**OBJECTION TO INTERROGATORIES** Re Wang's Set	No
145.00	01/18/2013	D	**ANSWER AND SPECIAL DEFENSE**	No
146.00	01/22/2013	D	**ANSWER** Revised Complaint dated 11-16-12	No
147.00	02/04/2013	P	**REPLY TO SPECIAL DEFENSE** re: Wang #145.00	No
148.00	02/06/2013	D	**COMPLAINT BY THIRD PARTY**	No
149.00	02/06/2013	D	**SUMMONS AND COMPLAINT** Summons only. Third-Party Complaint filed as Entry No. 148.00.	No
150.00	02/06/2013	D	**RETURN OF SERVICE**	No
151.00	03/01/2013	P	**COMPLAINT** Third Party Complaint	No
152.00	03/05/2013	D	**CROSS COMPLAINT**	No
153.00	03/05/2013	D	**SUMMONS AND COMPLAINT** Summons only. Cross Complaint filed as Entry No. 152.00.	No
154.00	03/05/2013	D	**RETURN OF SERVICE** Re: Cross Complaint (Entry No. 152.00)	No
155.00	04/02/2013	D	**MOTION FOR NONSUIT FOR FAILURE TO PLEAD**	No
156.00	04/02/2013	D	**MOTION FOR NONSUIT FOR FAILURE TO PLEAD** Corrected Motion adding to certification page counsel for Health Body World Supply, Inc.	No
157.00	04/04/2013	D	**MOTION FOR EXTENSION OF TIME TO PLEAD** *RESULT:* Granted 4/23/2013 HON DAVID TOBIN	No
157.86	04/23/2013	C	**ORDER** *RESULT:* Granted 4/23/2013 HON DAVID TOBIN	No
158.00	04/04/2013	D	**MOTION FOR EXTENSION OF TIME** (Center for Women's Health) *RESULT:* Granted 4/23/2013 HON DAVID TOBIN	No
158.86	04/23/2013	C	**ORDER** *RESULT:* Granted 4/23/2013 HON DAVID TOBIN	No
159.00	04/04/2013	D	**MOTION TO STRIKE** from docket (Center for Women's Health)	Yes
160.00	04/05/2013	D	**ANSWER TO THIRD PARTY COMPLAINT**	No
161.00	04/05/2013	D	**MOTION TO STRIKE** *RESULT:* Off 1/26/2015 HON DONNA HELLER	Yes
162.00	04/05/2013	D	**MEMORANDUM IN SUPPORT OF MOTION** to Strike	No
163.00	04/26/2013	P	**MOTION FOR EXTENSION OF TIME** to Respond to Mot #161 & 162 *RESULT:* Granted 5/13/2013 HON A MOTTOLESE	No
163.86	05/13/2013	C	**ORDER** *RESULT:* Granted 5/13/2013 HON A MOTTOLESE	No
164.00	05/06/2013	P	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** as to HBW's 4-11-13 set *RESULT:* Granted 5/24/2013 HON ROBERT GENUARIO	No
164.86	05/24/2013	C	**ORDER** *RESULT:* Granted 5/24/2013 HON ROBERT GENUARIO	No
165.00	05/09/2013	P	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** as to HBW's 4-11-13 requests for production *RESULT:* Granted 5/28/2013 HON A MOTTOLESE	No
165.86	05/28/2013	C	**ORDER** *RESULT:* Granted 5/28/2013 HON A MOTTOLESE	No
166.00	05/09/2013	P	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** as to HBW's 4-11-13 2nd Set Discovery	No

167.00	05/09/2013	P	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** as to HBW's 4-11-13 1st req for production	No
168.00	05/10/2013	D	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)** re: Defendant HBW's 1st and 2nd Sets of Interrogatories/Requests for Production	No
169.00	05/22/2013	D	**OBJECTION TO MOTION** to Strike from Docket (Docket No. 159.00) *RESULT:* Sustained 6/3/2013 HON A MOTTOLESE	No
169.86	06/03/2013	C	**ORDER** *RESULT:* Sustained 6/3/2013 HON A MOTTOLESE	No
170.00	05/28/2013	P	**OBJECTION TO MOTION** WABBO's Mot to Strike #161 & 162	No
171.00	05/29/2013	D	**ANSWER AND/OR OBJECTIONS TO REQUEST FOR ADMISSIONS PB 13-23(a)** by Health Body World Supply, Inc.	No
172.00	06/11/2013	D	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** WABBO's 2nd Set of Discovery Requests to Wang	No
173.00	06/13/2013	D	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** to HBW's 2nd Set of Interrogatories/Requests (w/ Answers)	No
174.00	06/17/2013	D	**MOTION TO STRIKE** cross claim *RESULT:* Granted 11/22/2013 HON DAVID TOBIN	Yes
174.86	11/22/2013	C	**ORDER** *RESULT:* Granted 11/22/2013 HON DAVID TOBIN	No
174.87	11/22/2013	C	**MEMORANDUM OF DECISION ON MOTION**	No
175.00	06/17/2013	D	**MEMORANDUM IN SUPPORT OF MOTION** strike cross claim	No
176.00	06/20/2013	D	**REQUEST TO EXTEND TIME TO RESPOND - MOTION TO STRIKE PB 10-40** *RESULT:* Order 6/25/2013 BY THE CLERK	No
176.86	06/25/2013	C	**ORDER** *RESULT:* Order 6/25/2013 BY THE CLERK	No
177.00	06/28/2013	D	**NOTICE TO ALL PARTIES** IRP 6.27.13	No
178.00	07/19/2013	D	**OBJECTION TO MOTION** Objection to Motion to Strike	No
179.00	07/24/2013	D	**REPLY MEMORANDUM** to Wang's Objection to Center's Motion to Strike Counter-claim (Docket #178)	No
180.00	07/26/2013	D	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)** Defendant Center's First Set of Interrogatories and Requests for Production	No
181.00	08/27/2013	D	**MOTION FOR EXTENSION OF TIME RE DISCOVERY MOTION OR REQUEST PB CH13** Center's First Interrogatories/Requests for Production *RESULT:* Granted 9/9/2013 HON A MOTTOLESE	No
181.86	09/09/2013	C	**ORDER** *RESULT:* Granted 9/9/2013 HON A MOTTOLESE	No
182.00	09/27/2013	D	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** Objection to Defendant Center's Interrogatories and Requests for Production	No
183.00	10/28/2013	D	**AFFIDAVIT OF ATTEMPT TO RESOLVE DISCOVERY OBJECTION** Resolve Kissel's Objections to Center's Discovery	No
184.00	12/03/2013	D	**MOTION TO IMPLEAD** Liability Insurer for Center for Women's Health, P.C.	No
185.00	12/06/2013	C	**ORDER** *RESULT:* Order 12/6/2013 HON ANTHONY TRUGLIA	No
186.00	12/05/2013	C	**SCHEDULING ORDER** *RESULT:* Granted 12/5/2013 HON DAVID TOBIN	No
187.00	01/27/2014	D	**AFFIDAVIT OF ATTEMPT TO RESOLVE DISCOVERY OBJECTION** Kissel's Objections to Wang's Discovery Requests	No
188.00	02/25/2014	D	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** Re: Entry Nos. 144.00 & 187.00	No
189.00	03/11/2014	P	**REQUEST TO EXTEND TIME TO RESPOND TO INTERROGATORIES OR PRODUCTION REQ P.B. 13-7(a)(2)/13-10(a)(2)** As to Wang's Supplemental Set dated 3/4/14	No
190.00	03/12/2014	D	**OBJECTION TO REQUEST** 189.00	No
191.00	03/13/2014	P		No

			OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10 As to Wang's Supplemental Set dated 3/4/14	
192.00	03/14/2014	P	**REQUEST TO AMEND COMPLAINT/AMENDMENT**	No
193.00	03/14/2014	P	**MOTION FOR PROTECTIVE ORDER** *RESULT:* Granted 4/4/2014 HON KEVIN TIERNEY	No
193.86	04/04/2014	C	**ORDER** *RESULT:* Granted 4/4/2014 HON KEVIN TIERNEY	No
193.87	04/04/2014	C	**TRANSCRIPT**	No
194.00	03/17/2014	D	**OBJECTION TO REQUEST** Revised 190.00	No
195.00	03/21/2014	D	**MOTION FOR SUMMARY JUDGMENT** Def/Third Party Def. Health Body World Supply's MSJ as to 3rd Party Complaint of Reed Wang	Yes
196.00	03/21/2014	D	**MEMORANDUM IN SUPPORT OF MOTION** of Motion for Summary Judgment	No
197.00	03/24/2014	D	**OBJECTION TO MOTION** Protective Order # 193	No
198.00	03/26/2014	D	**OBJECTION TO MOTION** Protective Order (193.00), joining Defendant Center's Objection (197.00)	No
199.00	03/31/2014	P	**DISCLOSURE OF EXPERT WITNESS** Simone Wan Moran	No
200.00	04/02/2014	D	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** Objection to Motoin Protective Order #193 Psych records *RESULT:* Granted 4/3/2014 HON KEVIN TIERNEY	No
200.86	04/03/2014	C	**ORDER** *RESULT:* Granted 4/3/2014 HON KEVIN TIERNEY	No
201.00	04/09/2014	P	**OBJECTION TO DEPOSITION** Objection/Response to Production in Notice of Deposition for Judith Kissel	No
202.00	04/23/2014	D	**OBJECTION TO MOTION** WABBO's Motion for Summary Judgment (Entry Nos. 195.00 & 196.00)	No
203.00	04/23/2014	D	**MEMORANDUM IN OPPOSITION TO MOTION** WABBO's Motion for Summary Judgment (Entry Nos. 195.00 & 196.00)	No
204.00	05/16/2014	P	**OBJECTION TO DEPOSITION** Objection/Response to Production in Re-Notice of Deposition for Judith Kissel	No
205.00	05/28/2014	P	**DISCLOSURE OF EXPERT WITNESS** Disclosure of Treating Healthcare Providers	No
206.00	06/16/2014	D	**MOTION - SEE FILE** More Particular Expert Disclosure Re: # 205	No
207.00	06/18/2014	P	**MOTION - SEE FILE** To Compel Deposition of Reed Wang	No
208.00	06/23/2014	P	**DISCLOSURE OF EXPERT WITNESS** Amended Disclosure of Treating Healthcare Physicians	No
209.00	08/27/2014	D	**DISCLOSURE OF EXPERT WITNESS** Dr. Brett	No
210.00	08/28/2014	D	**DISCLOSURE OF EXPERT WITNESS** Disclosure of Expert Witness	No
211.00	09/15/2014	D	**MOTION FOR PROTECTIVE ORDER** (Center for Women's Health)	No
212.00	10/06/2014	D	**MOTION TO PRECLUDE EXPERT TESTIMONY** EXPERT OR OTHER APPROPRIATE ORDER	No
213.00	10/06/2014	D	**MOTION TO PRECLUDE EXPERT TESTIMONY** OR OTHER APPROPRIATE ORDER (WITH CORRECTED CERTIFICATION)	No
214.00	10/09/2014	D	**REQUEST TO AMEND COMPLAINT/AMENDMENT** Third Party Complaint Against WABBO	No
215.00	01/23/2015	P	**REQUEST TO AMEND AND AMENDMENT** Request Leave to Amend Third-Party Complaint & Attached Amendment	No
216.00	02/06/2015	P	**DISCLOSURE OF EXPERT WITNESS** John Orlowski	No
217.00	02/10/2015	D	**ANSWER** to Amended Third-Party Complaint of Reed Wang dated 10/9/14	No
218.00	02/10/2015	D	**ANSWER AND SPECIAL DEFENSE** to Plaintiff's Amended Third-Party Complaint [sic] dated 1/23/15	No
219.00	02/10/2015	D	**MOTION FOR CONTINUANCE**	No

			TMC on 2/18/15 *RESULT:* Order 2/11/2015 HON KENNETH POVODATOR	
219.01	02/11/2015	C	**ORDER** *RESULT:* Order 2/11/2015 HON KENNETH POVODATOR	No
220.00	02/10/2015	D	**MOTION FOR CONTINUANCE** Trial on 3/3/15 *RESULT:* Granted 2/18/2015 HON KENNETH POVODATOR	No
220.01	02/18/2015	C	**ORDER** *RESULT:* Granted 2/18/2015 HON KENNETH POVODATOR	No
221.00	02/18/2015	D	**DISCLOSURE OF EXPERT WITNESS**	No
222.00	02/18/2015	D	**OBJECTION TO MOTION** re: 213.00 - WABBO's Motion to Preclude	No
223.00	03/09/2015	P	**REPLY TO SPECIAL DEFENSE** as to WABBO	No
224.00	03/09/2015	P	**REPLY TO SPECIAL DEFENSE** Plaintiff's Reply to WABBO Ans and Spec Defense	No
225.00	04/07/2015	D	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Order 4/7/2015 HON KENNETH POVODATOR	No
225.01	04/07/2015	C	**ORDER** *RESULT:* Order 4/7/2015 HON KENNETH POVODATOR	No
225.02	04/07/2015	C	**ORDER** *RESULT:* Order 4/7/2015 HON KENNETH POVODATOR	No
226.00	04/15/2015	P	**CASEFLOW REQUEST (JD-CV-116)** re: attending the 4/29/15 status conference via telephone *RESULT:* Order 4/17/2015 HON KENNETH POVODATOR	No
226.01	04/17/2015	C	**ORDER** *RESULT:* Order 4/17/2015 HON KENNETH POVODATOR	No
227.00	04/16/2015	D	**CASEFLOW REQUEST (JD-CV-116)** status conference 4.29.15 *RESULT:* Order 4/17/2015 HON KENNETH POVODATOR	No
227.01	04/17/2015	C	**ORDER** *RESULT:* Order 4/17/2015 HON KENNETH POVODATOR	No
228.00	05/12/2015	D	**CASEFLOW REQUEST (JD-CV-116)** for 5/20/15 Status Conference *RESULT:* Order 5/12/2015 HON KENNETH POVODATOR	No
228.01	05/12/2015	C	**ORDER** *RESULT:* Order 5/12/2015 HON KENNETH POVODATOR	No
229.00	05/14/2015	D	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Order 5/15/2015 HON KENNETH POVODATOR	No
229.01	05/15/2015	C	**ORDER** *RESULT:* Order 5/15/2015 HON KENNETH POVODATOR	No
230.00	05/19/2015	P	**CASEFLOW REQUEST (JD-CV-116)** to attend the 5/20/15 conference telephonically *RESULT:* Order 5/19/2015 HON KENNETH POVODATOR	No
230.01	05/19/2015	C	**ORDER** *RESULT:* Order 5/19/2015 HON KENNETH POVODATOR	No
231.00	05/28/2015	P	**MOTION FOR CONTINUANCE** of Trial *RESULT:* Order 5/29/2015 HON KENNETH POVODATOR	No
231.01	05/29/2015	C	**ORDER** *RESULT:* Order 5/29/2015 HON KENNETH POVODATOR	No
232.00	06/12/2015	D	**REQUEST TO AMEND COMPLAINT/AMENDMENT**	No
233.00	06/25/2015	D	**OBJECTION TO REQUEST** FOR LEAVE TO FILE SECOND AMENDED COMPLAINT *RESULT:* Overruled 7/13/2015 HON A MOTTOLESE	No
233.01	07/13/2015	C	**ORDER** *RESULT:* Overruled 7/13/2015 HON A MOTTOLESE	No
234.00	07/02/2015	D	**REPLY** Reply to Objection to Request for Leave to File Second Amended Complaint	No
235.00	07/15/2015	D	**DISCLOSURE OF EXPERT WITNESS** of Dr. Glenn Vallee	No
236.00	08/18/2015	D	**MOTION FOR DEFAULT-FAILURE TO PLEAD** *RESULT:* Granted 8/25/2015 BY THE CLERK	No
236.01	08/25/2015	C	**ORDER**	No

			RESULT: Granted 8/25/2015 BY THE CLERK	
237.00	08/18/2015	D	**OFFER OF COMPROMISE** DEFENDANT REED WANG, L.Ac.'S OFFER OF COMPROMISE	No
238.00	08/24/2015	P	**AMENDED THIRD PARTY COMPLAINT** Second Amended Third Party Complaint	No
239.00	08/26/2015	D	**ANSWER AND SPECIAL DEFENSE TO THIRD PARTY COMPLAINT** Answer and Special Defenses to Second Amended Third Party Complaint dated 6/12/15	No
240.00	09/09/2015	D	**ANSWER TO AMENDED COMPLAINT** Wang's Answer and Special Defenses re: Plaintiff's Second Amended Complaint dated 3/14/14 (192.00)	No
241.00	09/09/2015	D	**REQUEST TO AMEND COMPLAINT/AMENDMENT** Wang's Request for Leave to file Third Amended Complaint against WABBO	No
242.00	10/22/2015	D	**MOTION FOR ORDER** Compel Deposition (CENTER FOR WOMEN'S HEALTH P.C.)	No
243.00	10/27/2015	D	**MOTION TO STRIKE** 239.00 - Fourth Special Defense	Yes
244.00	10/27/2015	D	**MEMORANDUM IN SUPPORT OF MOTION** Motion to Strike	No
245.00	11/05/2015	D	**NOTICE TO ALL PARTIES** Supplemental (IRP CENTER FOR WOMEN'S HEALTH P.C.)	No
246.00	11/10/2015	P	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** As to Center's Supp Disc dated 11/5/15	No
247.00	11/10/2015	P	**DISCLOSURE OF EXPERT WITNESS** Amended Disclosure of Treating Physicians	No
248.00	11/12/2015	P	**REPLY TO SPECIAL DEFENSE** As to Wang's Special Defenses, #240.00	No
249.00	11/12/2015	D	**TRIAL MANAGEMENT REPORT** Joint Trial Management Order Report	No
250.00	11/17/2015	D	**MOTION RE DEPOSITION** Compel disclosures re: Simone Moran Wan	No
250.01	11/27/2015	C	**ORDER** *RESULT:* Order 11/30/2015 HON KENNETH POVODATOR	No
250.02	11/30/2015	C	**ORDER** *RESULT:* Order 11/30/2015 HON KENNETH POVODATOR	No
251.00	11/23/2015	P	**REQUEST FOR JUDICIAL ALTERNATE DISPUTE RESOLUTION JD-CV-130** *RESULT:* Granted 11/25/2015 HON ROBERT MARTIN	Yes
251.01	11/25/2015	C	**ORDER** *RESULT:* Granted 11/25/2015 HON ROBERT MARTIN	No
252.00	11/23/2015	P	**OBJECTION TO DEPOSITION** to Production Requests Contained in the Notice of Deposition of Simone Wan, LA.c.	No
253.00	11/23/2015	D	**MOTION FOR ORDER** Supp to Motion to Compel Discovery Responses (Center for Wm's Health)	No
254.00	11/25/2015	D	**MOTION FOR CONTINUANCE**	No
255.00	11/25/2015	D	**WITHDRAWAL OF MOTION** for Continuance #254	No
256.00	11/25/2015	D	**MOTION FOR CONTINUANCE** *RESULT:* Order 12/1/2015 HON KENNETH POVODATOR	No
256.01	12/01/2015	C	**ORDER** *RESULT:* Order 12/1/2015 HON KENNETH POVODATOR	No
257.00	11/25/2015	P	**OBJECTION TO MOTION** #253 to compel	No
258.00	11/25/2015	D	**REPLY** to plaintiffs' objection (#277) to defendants' motion to compel	No
259.00	12/11/2015	D	**ANSWER AND SPECIAL DEFENSE** of Health Body World Supply to Reed Wang's Third Amended Third Party Complaint dated 9/9/15	No
260.00	12/11/2015	D	**ANSWER AND SPECIAL DEFENSE** of Def./3rd Party Def Health Body World to Pltf's Second Amended Third Party Complaint dated 8/24/15	No
261.00	12/14/2015	D	**MOTION TO REARGUE/RECONSIDER** and Memorandum in Support thereof (Center for Wm's Health) *RESULT:* Denied 1/26/2016 HON KENNETH POVODATOR	No
261.01	01/26/2016	C	**ORDER**	No

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			RESULT: Denied 1/26/2016 HON KENNETH POVODATOR	
262.00	12/23/2015	D	**DISCLOSURE OF EXPERT WITNESS** (Glenn Vallee, Ph.D., P.E.	No
263.00	01/06/2016	P	**OBJECTION TO MOTION** for Reconsideration, #261.00	No
264.00	01/13/2016	D	**REQUEST FOR ARGUMENT - NON-ARG MATTER (JD-CV-128)** Motion to Re-argue # 261 *RESULT:* Denied 1/26/2016 HON KENNETH POVODATOR	No
264.01	01/26/2016	C	**ORDER** *RESULT:* Denied 1/26/2016 HON KENNETH POVODATOR	No
265.00	03/22/2016	P	**MOTION FOR CONTINUANCE** of Trial Management Conference &Trial *RESULT:* Order 3/22/2016 HON KENNETH POVODATOR	No
265.01	03/22/2016	C	**ORDER** *RESULT:* Order 3/22/2016 HON KENNETH POVODATOR	No
266.00	03/22/2016	P	**CASEFLOW REQUEST (JD-CV-116)** re: #265 - Motion for Continuance of Trial Management Conference 3/23/16	No
267.00	03/28/2016	D	**OBJECTION TO INTERROGATORIES/PRODUCTION PB 13-8 and 13-10** Dr. Jennifer Brett (CENTER FOR WOMEN'S HEALTH P.C.)	No
268.00	05/26/2016	D	**MOTION FOR CONTINUANCE** *RESULT:* Order 5/26/2016 HON KENNETH POVODATOR	No
268.01	05/26/2016	C	**ORDER** *RESULT:* Order 5/26/2016 HON KENNETH POVODATOR	No
269.00	07/27/2016	D	**OBJECTION TO DEPOSITION** Obj to Deposition Production Requests Towards Dr. Jennifer Brett (CENTER FOR WOMEN'S HEALTH PC)	No
270.00	10/12/2016	P	**NOTICE** Disclosure of Expert Jennifer Brett	No
271.00	10/20/2016	P	**MOTION FOR CONTINUANCE** of Trial *RESULT:* Granted 10/21/2016 HON KENNETH POVODATOR	No
271.01	10/21/2016	C	**ORDER** *RESULT:* Granted 10/21/2016 HON KENNETH POVODATOR	No
272.00	10/31/2016	D	**MOTION FOR CONTINUANCE** of Trial scheduled for 1/31/17 *RESULT:* Granted 10/31/2016 HON KENNETH POVODATOR	No
272.01	10/31/2016	C	**ORDER** *RESULT:* Granted 10/31/2016 HON KENNETH POVODATOR	No
273.00	12/20/2016	D	**DISCLOSURE OF EXPERT WITNESS**	No
274.00	12/20/2016	D	**WITHDRAWAL** Withdrawal of Defendant Reed Wang's Disclosure of Expert Witness	No
275.00	12/20/2016	D	**DISCLOSURE OF EXPERT WITNESS**	No
276.00	12/30/2016	D	**MOTION FOR CONTINUANCE** of TMC currently scheduled for 1/11/17 *RESULT:* Order 1/3/2017 HON KENNETH POVODATOR	No
276.01	01/03/2017	C	**ORDER** *RESULT:* Order 1/3/2017 HON KENNETH POVODATOR	No
277.00	01/06/2017	P	**DISCLOSURE OF EXPERT WITNESS** Victor Popp, P.E.	No
278.00	01/17/2017	D	**MOTION TO PRECLUDE EXPERT TESTIMONY** of Victor Popp or Alternative Motion for Continuance of Trial	No
279.00	01/19/2017	P	**TRIAL MANAGEMENT REPORT**	No
280.00	01/26/2017	P	**REQUEST FOR JUDICIAL ALTERNATE DISPUTE RESOLUTION JD-CV-130**	Yes
281.00	01/26/2017	P	**WITHDRAWAL OF MOTION** #280.00	No
282.00	01/26/2017	P	**REQUEST FOR JUDICIAL ALTERNATE DISPUTE RESOLUTION JD-CV-130** corrected Request	Yes
283.00	04/28/2017	D	**REPLY TO SPECIAL DEFENSE** Dr. Wang's Reply to HBW's Special Defenses	No
284.00	04/28/2017	D	**CERTIFICATE OF CLOSED PLEADINGS AND CLAIM FOR TRIAL LIST**	No
285.00	05/02/2017	D	**MOTION FOR CONTINUANCE** of Half Day Suspension of Jury Selection for 5/3/17 until 5/4/17 *RESULT:* Granted 5/2/2017 HON KENNETH POVODATOR	No

285.01	05/02/2017	C	**ORDER** *RESULT:* Granted 5/2/2017 HON KENNETH POVODATOR	No
286.00	05/04/2017	P	**DISCLOSURE OF EXPERT WITNESS** Treating Healthcare Physicians	No
287.00	05/04/2017	P	**TRIAL MANAGEMENT REPORT** Revised	No
288.00	05/15/2017	P	**DISCLOSURE OF EXPERT WITNESS** Amended Disclosure of Victor Popp, P.E.	No
289.00	05/16/2017	D	**MOTION FOR COMMISSION FOR DEPOSITION** *RESULT:* Off 5/30/2017 HON A MOTTOLESE	No
289.01	05/30/2017	C	**ORDER** *RESULT:* Granted 5/30/2017 HON KENNETH POVODATOR	No
289.02	05/30/2017	C	**ORDER** *RESULT:* Off 5/30/2017 HON A MOTTOLESE	No
290.00	05/19/2017	D	**MOTION FOR PROTECTIVE ORDER PB 13-5** and to Quash the Plaintiff's Notice of Depo and Motion for Appointment of Commissioner *RESULT:* Off 6/5/2017 HON A MOTTOLESE	No
290.01	06/05/2017	C	**ORDER** *RESULT:* Off 6/5/2017 HON A MOTTOLESE	No
291.00	05/19/2017	D	**MOTION TO PRECLUDE EXPERT TESTIMONY** Re: Lack of a Safety Guard *RESULT:* Denied 5/30/2017 HON KENNETH POVODATOR	No
291.01	05/30/2017	C	**ORDER** *RESULT:* Denied 5/30/2017 HON KENNETH POVODATOR	No
292.00	05/23/2017	P	**OBJECTION TO DEPOSITION** re: Production contained in the Notice of Deposition of Victor Popp *RESULT:* Denied 5/24/2017 HON KENNETH POVODATOR	No
292.01	05/24/2017	C	**ORDER** *RESULT:* Denied 5/24/2017 HON KENNETH POVODATOR	No
293.00	05/30/2017	P	**OBJECTION TO MOTION** Objection to Motion to Preclude Expert Testimony	No
294.00	05/31/2017	D	**MOTION FOR ORDER** Regarding Inspection of the Subject Heat Lamp	No
295.00	06/06/2017	D	**MOTION IN LIMINE** to Preclude Admission of Clean Needle Technique Manual as Evidence of the Standard of Care	No
296.00	06/06/2017	D	**MOTION IN LIMINE** for Porter Hearing Regarding Simone Wan Moran	No
297.00	06/06/2017	D	**MOTION IN LIMINE** to Preclude Evidence Concerning Any Claimed Emotional or Psychological Harm *RESULT:* Granted 6/29/2017 HON KENNETH POVODATOR	No
297.01	06/29/2017	C	**ORDER** *RESULT:* Granted 6/29/2017 HON KENNETH POVODATOR	No
298.00	06/06/2017	D	**MOTION IN LIMINE** to Preclude Evidence of Any Claimed Future Pain, Suffering, or Emotional Harm	No
298.01	06/28/2017	C	**ORDER** *RESULT:* Granted 6/28/2017 HON KENNETH POVODATOR	No
299.00	06/06/2017	D	**MOTION IN LIMINE** to Preclude Testimony on the Standard of Care	No
300.00	06/07/2017	D	**MOTION IN LIMINE** to Preclude Testimony of Estelle Kissel *RESULT:* Denied 6/28/2017 HON KENNETH POVODATOR	No
300.01	06/28/2017	C	**ORDER** *RESULT:* Denied 6/28/2017 HON KENNETH POVODATOR	No
301.00	06/16/2017	D	**MOTION FOR PROTECTIVE ORDER PB 13-5** and Mtn to Quash re: Re-Notice of Depo and Cross-Notice of Depo of Def. Health Body World Supply	No
302.00	06/16/2017	P	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 6/19/2017 HON KENNETH POVODATOR	No
302.01	06/19/2017	C	**ORDER** *RESULT:* Granted 6/19/2017 HON KENNETH POVODATOR	No
303.00	06/16/2017	P	**DISCLOSURE OF EXPERT WITNESS** Amended Disclosure of Simone Wan Moran	No

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304.00	06/16/2017	P	**DISCLOSURE OF EXPERT WITNESS** Amended Disclosure of Victor Popp, P.E.	No
305.00	06/19/2017	D	**MOTION IN LIMINE** TO PRECLUDE TESTIMONY OF MARC RICHMAN	No
306.00	06/20/2017	P	**MOTION IN LIMINE** re: Apportionment	No
307.00	06/21/2017	D	**REQUEST TO AMEND AND AMENDMENT** Reed Wang's Amended Answer and Special Defenses	No
308.00	06/21/2017	D	**MOTION IN LIMINE** to Preclude Testimony of Jennifer Brett & Alternative Request For Porter Hearing	No
309.00	06/21/2017	D	**MOTION IN LIMINE** to Preclude Testimony of Simone Wan Moran & Alternative Request For Porter Hearing	No
310.00	06/21/2017	P	**MOTION IN LIMINE** re: Prior Medical History	No
310.01	06/28/2017	C	**ORDER** *RESULT:* Order 6/28/2017 HON KENNETH POVODATOR	No
310.02	06/28/2017	C	**ORDER** *RESULT:* Order 6/28/2017 HON KENNETH POVODATOR	No
311.00	06/23/2017	D	**MOTION IN LIMINE** to Preclude Evidence of Alleged Future Pain , Suffering or Emotional Harm *RESULT:* Granted 6/30/2017 HON KENNETH POVODATOR	No
311.01	06/30/2017	C	**ORDER** *RESULT:* Granted 6/30/2017 HON KENNETH POVODATOR	No
312.00	06/23/2017	D	**MOTION IN LIMINE** To Preclude Evidence of Alleged Emotional and Psychological Harm	No
312.01	06/29/2017	C	**ORDER** *RESULT:* Granted 6/29/2017 HON KENNETH POVODATOR	No
313.00	06/23/2017	P	**OBJECTION TO MOTION** #295 re: Clean Needle Technique	No
314.00	06/23/2017	P	**OBJECTION TO MOTION** in Limine #144 to Preclude Estelle Kissel's Testimony *RESULT:* Sustained 6/28/2017 HON KENNETH POVODATOR	No
314.01	06/28/2017	C	**ORDER** *RESULT:* Sustained 6/28/2017 HON KENNETH POVODATOR	No
315.00	06/23/2017	D	**MOTION IN LIMINE** Re: Non-Compliance with FDA Regulations	No
316.00	06/23/2017	P	**OBJECTION TO MOTION** Omnibus Objection to MILs 29, 298, 311, 312	No
317.00	06/23/2017	P	**OBJECTION TO MOTION** #296 Wang's MIL Porter Hearing re: Simone Wan Moran	No
318.00	06/26/2017	D	**MOTION IN LIMINE** Brett's Testbook (CENTER FOR WOMEN'S HEALTH P.C.)	No
319.00	06/26/2017	D	**MOTION IN LIMINE** Preclude Emotional Psychological Injury (CENTER FOR WOMEN'S HEALTH P.C.)	No
319.01	06/29/2017	C	**ORDER** *RESULT:* Granted 6/29/2017 HON KENNETH POVODATOR	No
320.00	06/26/2017	D	**MOTION IN LIMINE** Preclude Claim of Future Emotional Psychological Injury (CENTER FOR WOMEN'S HEALTH P.C.) *RESULT:* Granted 6/28/2017 HON KENNETH POVODATOR	No
320.01	06/28/2017	C	**ORDER** *RESULT:* Granted 6/28/2017 HON KENNETH POVODATOR	No
321.00	06/26/2017	D	**MOTION IN LIMINE** Excessive Photos (CENTER FOR WOMEN'S HEALTH P.C.)	No
322.00	06/26/2017	D	**MOTION IN LIMINE** Motion in Limine (MIEC Excellence Study) (CENTER FOR WOMEN'S HEALTH P.C.)	No
323.00	06/26/2017	D	**MOTION FOR ORDER** Porter Hearing (CENTER FOR WOMEN'S HEALTH P.C.)	No
324.00	06/26/2017	D	**MEMORANDUM IN SUPPORT OF MOTION** Motion for Order re Porter Hearing (CENTER FOR WOMEN'S HEALTH P.C.)	No
325.00	06/26/2017	D	**MOTION IN LIMINE** Re Suggesting Lamp was Disassembled by Dr. Wang (CENTER FOR WOMEN'S HEALTH P.C.)	No
326.00	06/26/2017	D	**MOTION IN LIMINE**	No

			Motion in Limine As To Victor Popp Offering Standard of Care Opinions (CENTER FOR WOMEN'S HEALTH PC)	
327.00	06/26/2017	D	**DISCLOSURE OF EXPERT WITNESS**	No
328.00	06/26/2017	D	**MOTION FOR ORDER** Re: Spoliation of Evidence	No
329.00	06/26/2017	D	**OBJECTION** & Reply of Def. HBW World Supply, Inc./WABBO to Pltf's Mtn In Limine re: Apportionment of Liability	No
330.00	06/26/2017	D	**MOTION IN LIMINE** Daubert/Porter Motion to Preclude Plaintiff's Expert, Victor Popp	No
331.00	06/26/2017	D	**MOTION IN LIMINE** re Pl referring to or offering general negligence opinion as to R.Wang (Center for Wm's Health)	No
332.00	06/26/2017	D	**MOTION IN LIMINE** re Council of College of Acupuncture & Oriental Medicine Clean Needle..(Center of Wm's Health)	No
333.00	06/27/2017	P	**OBJECTION TO MOTION** Center's MIL Excessive Use of Photographs	No
334.00	06/27/2017	P	**OBJECTION TO MOTION** Center's MIL re: MIEC Newsletter	No
335.00	06/27/2017	P	**OBJECTION TO MOTION** WABBO's MIL re: FDA Compliance	No
336.00	06/27/2017	D	**MOTION IN LIMINE**	No
337.00	06/27/2017	D	**MOTION IN LIMINE** Motion in Limine Re: Excessive Use of Photographs	No
338.00	06/27/2017	D	**MOTION IN LIMINE** Motion in Limine Re: Suggestion Lamp was Disassembled by Dr. Wang	No
339.00	06/27/2017	D	**MOTION IN LIMINE** Motion in Limine Re: Victor Popp, PE or any other Expert from Offering Negligence, etc.	No
340.00	06/27/2017	P	**OBJECTION TO MOTION** as to Center's MIL re: Popp Offering Negligence or SOC Opinions	No
341.00	06/27/2017	P	**OBJECTION TO MOTION** as to Center's MIL re: Suggestion Lamp was Disassembled by Wang	No
342.00	06/27/2017	D	**MOTION IN LIMINE** Motion in Limine Re: Medical Insurance Exchange of California's Newsletter (See Entry No. 322)	No
343.00	06/27/2017	D	**MOTION IN LIMINE** Joining Motion in Limine, Entry No. 331	No
344.00	06/27/2017	D	**MOTION IN LIMINE** Joining Motion in Limine, Entry No. 332	No
345.00	06/27/2017	P	**OBJECTION TO MOTION** as to Center's MIL re: General Negligence as to Wang's Acupuncture Care	No
346.00	06/27/2017	D	**MOTION FOR ORDER** re: Spoliation of Evidence (Center for Wm's Health)	No
347.00	06/27/2017	D	**MOTION IN LIMINE** re: Preclude Simone Wan Moran, L.AC.'s testimony (Center for Wm's Health)	No
348.00	06/27/2017	P	**OBJECTION TO MOTION** as to Center's MIL re: Clean Needle Technique Course Material, #332	No
349.00	06/27/2017	D	**OBJECTION** to Pl's MIL re apportionment (#306) (Center for Wm's Health)	No
350.00	06/27/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 6/27/2017 HON KENNETH POVODATOR	No
350.01	06/27/2017	C	**ORDER** *RESULT:* Granted 6/27/2017 HON KENNETH POVODATOR	No
351.00	06/27/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 6/27/2017 HON KENNETH POVODATOR	No
351.01	06/27/2017	C	**ORDER** *RESULT:* Granted 6/27/2017 HON KENNETH POVODATOR	No
352.00	06/27/2017	D	**MOTION IN LIMINE**	No
353.00	06/28/2017	D	**MOTION FOR ORDER** re: Spoliation of Evidence (joining 328 and 346)	No
354.00	06/28/2017	D	**MOTION IN LIMINE**	No

			re: Simone Wan Moran (incorporating 296; joining 347)	
355.00	06/28/2017	D	**OBJECTION TO MOTION** re: Apportionment (joining 329 and 349)	No
356.00	06/28/2017	D	**OBJECTION TO MOTION** in Limine to Preclude Richman Testimony (#305)	No
357.00	06/28/2017	D	**MOTION IN LIMINE** Motion in Limine Preclude "Conscience of the Community" (CENTER FOR WOMEN'S HEALTH P.C.)	No
358.00	06/28/2017	P	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 6/28/2017 HON KENNETH POVODATOR	No
358.01	06/28/2017	C	**ORDER** *RESULT:* Granted 6/28/2017 HON KENNETH POVODATOR	No
359.00	06/30/2017	D	**MOTION IN LIMINE** re: "Conscience of the Community" (see #'s 357 and 352)	No
360.00	07/05/2017	D	**MOTION FOR CONTINUANCE**	No
361.00	07/05/2017	D	**MOTION FOR CONTINUANCE**	No
362.00	07/26/2017	D	**MOTION FOR CONTINUANCE**	No
363.00	07/31/2017	D	**WITHDRAWAL OF MOTION** Withdrawal of Motion for Continuance #362	No
364.00	08/08/2017	D	**MOTION FOR CONTINUANCE** Jury Selection 9.6.17 *RESULT:* Off 8/30/2017 HON KENNETH POVODATOR	No
364.01	08/30/2017	C	**ORDER** *RESULT:* Off 8/30/2017 HON KENNETH POVODATOR	No
365.00	08/24/2017	D	**CASEFLOW REQUEST (JD-CV-116)** *RESULT:* Order 8/25/2017 HON KENNETH POVODATOR	No
365.01	08/25/2017	C	**ORDER** *RESULT:* Order 8/25/2017 HON KENNETH POVODATOR	No
366.00	11/06/2017	P	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 11/6/2017 HON KENNETH POVODATOR	No
366.01	11/06/2017	C	**ORDER** *RESULT:* Granted 11/6/2017 HON KENNETH POVODATOR	No
367.00	11/07/2017	D	**OBJECTION** & Reply to Deft/3rd Party Pltf Wang's Mtn in Limine re: Expert Testimony on the Standard of Care	No
368.00	11/07/2017	D	**MOTION FOR ORDER** Supplement to Mot Seeking Porter Hearing & Motion in Limine to Preclude Simone Wan Moran Testimony	No
369.00	11/08/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 11/9/2017 HON KENNETH POVODATOR	No
369.01	11/09/2017	C	**ORDER** *RESULT:* Granted 11/9/2017 HON KENNETH POVODATOR	No
370.00	11/09/2017	D	**REPLY** Reply to WABBO objection to SOC testimony pertains to Wang's use of lamp (CENTER FOR WOMEN'S HEALTH)	No
371.00	11/09/2017	D	**REPLY** Wang's reply to #367 (joining #370)	No
372.00	11/16/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** on 11/16/17	No
373.00	11/16/2017	D	**WITHDRAWAL OF THIRD PARTY COMPLAINT** Entry Nos. 148, 214, 232 and 241 *RESULT:* Granted 11/16/2017 HON KENNETH POVODATOR	No
373.01	11/16/2017	C	**ORDER** *RESULT:* Granted 11/16/2017 HON KENNETH POVODATOR	No
374.00	11/27/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 11/27/2017 HON KENNETH POVODATOR	No
374.01	11/27/2017	C	**ORDER** *RESULT:* Granted 11/27/2017 HON KENNETH POVODATOR	No
375.00	11/27/2017	D	**REQUEST** For Court To Take Judicial Notice	No

376.00	11/28/2017	D	**MOTION FOR ORDER** Motion to Produce Surveillance (CENTER FOR WOMEN'S HEALTH P.C.)	No
377.00	12/04/2017	P	**MEMORANDUM** Memo re Court's Ruling on Evidence	No
378.00	12/05/2017	D	**OBJECTION** to Memo re Court's Ruling on Evidence re Pl's Mental or Emotional State (Center for Wm's Health)	No
379.00	12/05/2017	D	**OBJECTION** to Memo re Court's Ruling on Evidence re Pl's Mental or Emotional State (Reed Wang L.Ac.)	No
380.00	12/11/2017	D	**REQUEST TO BRING AUDIO/VISUAL EQUIPMENT INTO THE COURTHOUSE (JD-CL-90)** *RESULT:* Granted 12/11/2017 HON KENNETH POVODATOR	No
380.01	12/11/2017	C	**ORDER** *RESULT:* Granted 12/11/2017 HON KENNETH POVODATOR	No
381.00	12/11/2017	P	**REVISED COMPLAINT**	No
382.00	12/13/2017	D	**MOTION FOR DIRECTED VERDICT** of Defendant HBW World Supply, Inc.	No
383.00	12/14/2017	D	**REQUEST TO CHARGE** by Reed Wang L.Ac.	No
384.00	12/14/2017	D	**PROPOSED VERDICT FORMS AND JURY INTERROGATORIES** Proposed Jury Interrogatories by Reed Wang L.Ac.	No
385.00	12/14/2017	D	**PROPOSED VERDICT FORMS AND JURY INTERROGATORIES** Proposed Verdict Form by Reed Wang L.Ac.	No
386.00	12/14/2017	D	**REQUEST TO CHARGE** Proposed Jury Charge (Center for Women's Health)	No
387.00	12/15/2017	P	**PROPOSED PRELIMINARY REQUESTS TO CHARGE**	No
388.00	12/15/2017	P	**WITHDRAWAL OF MOTION** Pf Proposed Request to Charge 387.00	No
389.00	12/15/2017	P	**PROPOSED PRELIMINARY REQUESTS TO CHARGE**	No
390.00	12/15/2017	D	**PROPOSED VERDICT FORMS AND JURY INTERROGATORIES** OF DEFENDANT WABBO	No
391.00	12/18/2017	D	**SUPPLEMENTAL REQUEST TO CHARGE** by Reed Wang L.Ac.	No
392.00	12/18/2017	P	**PROPOSED VERDICT FORMS AND JURY INTERROGATORIES**	No
393.00	12/21/2017	C	**STATEMENT**	No
394.00	12/21/2017	C	**INTERROGATORIES TO THE JURY**	No
395.00	12/21/2017	C	**VERDICT FOR PLAINTIFF(S)** *RESULT:* HON KENNETH POVODATOR	No
396.00	12/22/2017	D	**MOTION TO SET ASIDE VERDICT** Defendant Reed Wang, L.Ac.'s Motion to Set Aside Verdict	No
396.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 HON KENNETH POVODATOR	No
397.00	12/22/2017	D	**MOTION FOR EXTENSION OF TIME** *RESULT:* Granted 12/22/2017 HON KENNETH POVODATOR	No
397.01	12/22/2017	C	**ORDER** *RESULT:* Granted 12/22/2017 HON KENNETH POVODATOR	No
398.00	12/22/2017	D	**MOTION FOR EXTENSION OF TIME** File Legal Memoranda (CWH) *RESULT:* Order 12/22/2017 HON KENNETH POVODATOR	No
398.01	12/22/2017	C	**ORDER** *RESULT:* Order 12/22/2017 HON KENNETH POVODATOR	No
399.00	12/22/2017	D	**MOTION TO SET ASIDE VERDICT** CWH	No
399.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
400.00	12/26/2017	D	**MOTION FOR EXTENSION OF TIME** *RESULT:* Off 1/8/2018 HON A MOTTOLESE	No
400.01	01/02/2018	C	**ORDER** *RESULT:* Granted 1/2/2018 HON KENNETH POVODATOR	No
400.02	01/08/2018	C	**ORDER** *RESULT:* Off 1/8/2018 HON A MOTTOLESE	No

401.00	12/27/2017	D	**MOTION FOR EXTENSION OF TIME** To File Post Verdict Motions and Supporting Memoranda *RESULT:* Off 1/8/2018 HON A MOTTOLESE	No
401.01	01/02/2018	C	**ORDER** *RESULT:* Granted 1/2/2018 HON KENNETH POVODATOR	No
401.02	01/08/2018	C	**ORDER** *RESULT:* Off 1/8/2018 HON A MOTTOLESE	No
402.00	12/29/2017	D	**MOTION FOR REDUCTION** Defendant Reed Wang, L.Ac.'s Motion to Reduce Verdict	No
402.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
403.00	12/29/2017	D	**MOTION TO SET ASIDE VERDICT** of HBW World Supply, Inc.	No
403.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
404.00	01/10/2018	D	**MOTION FOR REMITTITUR** Motion to Reduce Verdict (CENTER FOR WOMEN'S HEALTH P.C.)	No
404.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
405.00	01/31/2018	D	**MEMORANDUM IN SUPPORT OF MOTION** Memo of Law In Support of Motion to Set Aside the Verdict	No
406.00	02/01/2018	P	**BILL OF COSTS**	No
407.00	02/01/2018	P	**MOTION FOR ORDER** Set Briefing Schedule *RESULT:* Granted 2/20/2018 HON KENNETH POVODATOR	No
407.01	02/20/2018	C	**ORDER** *RESULT:* Granted 2/20/2018 HON KENNETH POVODATOR	No
408.00	02/01/2018	D	**MEMORANDUM IN SUPPORT OF MOTION** to Set Aside Verdict (Center for Women's Health)	No
409.00	02/01/2018	D	**MEMORANDUM IN SUPPORT OF MOTION** Motion to Reduce Verdict #402 by Reed Wang L.Ac.	No
410.00	02/01/2018	D	**MEMORANDUM IN SUPPORT OF MOTION** Motion to Set Aside Verdict and Motion Notwithstanding the Verdict #396	No
411.00	02/02/2018	D	**EXHIBITS** Appendix to Reed Wang's Memorandum of Law in Support of Motion to Reduce Verdict	No
412.00	02/05/2018	D	**EXHIBITS** Appendix to Memorandum of Law in Support of Motion to Set Aside Verdict	No
413.00	02/13/2018	D	**OBJECTION TO BILL OF COSTS**	No
414.00	02/14/2018	D	**OBJECTION TO BILL OF COSTS**	No
415.00	02/16/2018	D	**OBJECTION TO BILL OF COSTS**	No
416.00	03/01/2018	D	**REPLY** Brief of Def. HBW World Supply to Memo of Law in Support of Mtn to Set Aside Verdict of CWH & Wang	No
417.00	03/01/2018	P	**OBJECTION TO MOTION** to set Aside the Verdict and For Remittitur	No
418.00	03/02/2018	P	**EXHIBITS** Appendix to (P) Omnibus Obj to (D)s Mo to Set Aside the Verdict & for Rem #417.00	No
419.00	03/15/2018	D	**REPLY** to Plaintiff's Omnibus Objection (Center for Women's Health, PC)	No
420.00	03/15/2018	D	**REPLY** Reed Wang's Reply to Plaintiff's Omnibus Objection to Defendants' Post-trial Motions (Entry No. 417)	No
421.00	03/23/2018	D	**MOTION FOR PERMISSION TO FILE BRIEF** Motion for Permission to File Reply Brief Out of Time	No
422.00	03/23/2018	D	**MOTION FOR EXTENSION OF TIME TO FILE BRIEF** *RESULT:* Granted 4/10/2018 HON KENNETH POVODATOR	No
422.01	04/10/2018	C	**ORDER** *RESULT:* Granted 4/10/2018 HON KENNETH POVODATOR	No
423.00	03/23/2018	D	**BRIEF** Reply Brief of HBW World Supply, Inc. (WABBO)	No
424.00	06/14/2018	D	**MOTION TO SET ASIDE VERDICT** Supplement to Mtn Set Aside Verdict #399 (CENTER FOR WOMEN'S HEALTH P.C.) *RESULT:* Off 7/24/2018 HON KENNETH POVODATOR	No

424.01	07/24/2018	C	**ORDER** *RESULT:* Off 7/24/2018 HON KENNETH POVODATOR	No
424.02	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
425.00	06/14/2018	D	**MEMORANDUM IN SUPPORT OF MOTION**	No
426.00	06/26/2018	D	**MOTION FOR ORDER** Motion for Permission to File Second Motion to Reargue/Reconsider *RESULT:* Off 7/24/2018 HON KENNETH POVODATOR	No
426.01	07/24/2018	C	**ORDER** *RESULT:* Off 7/24/2018 HON KENNETH POVODATOR	No
426.02	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
427.00	08/08/2018	P	**CASEFLOW REQUEST (JD-CV-116)** AS TO ENTRY NOS. 424.00 AND 426.00 *RESULT:* Granted 8/8/2018 HON KENNETH POVODATOR	No
427.01	08/08/2018	C	**ORDER** *RESULT:* Granted 8/8/2018 HON KENNETH POVODATOR	No
428.00	08/14/2018	P	**CASEFLOW REQUEST (JD-CV-116)** AS TO ENTRY NOS. 424.00 AND 426.00 *RESULT:* Order 8/16/2018 HON KENNETH POVODATOR	No
428.01	08/16/2018	C	**ORDER** *RESULT:* Order 8/16/2018 HON KENNETH POVODATOR	No
429.00	09/05/2018	P	**OBJECTION** Omnibus Obj to (D)s' Supplements to Post Trial Motions (Doc. 424.00, 425.00)	No
429.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
430.00	09/12/2018	D	**MOTION FOR ORDER** Motion for Permission to File Second Motion to Reargue (Center for Wm's Health)	No
430.01	01/03/2019	C	**ORDER** *RESULT:* Order 1/3/2019 BY THE CLERK	No
431.00	01/03/2019	C	**MEMORANDUM OF DECISION**	No
432.55	01/03/2019	C	**JUDGMENT ON VERDICT-GENERAL** *RESULT:* HON KENNETH POVODATOR	No
433.00	01/10/2019	D	**DRAFT JUDGMENT FILE** *RESULT:* Rejected 1/11/2019 BY THE CLERK	No
433.01	01/11/2019	C	**ORDER** *RESULT:* Rejected 1/11/2019 BY THE CLERK	No
434.00	01/10/2019	D	**APPEAL TO APPELLATE COURT ALL FEES PAID**	No
435.00	01/14/2019	D	**DRAFT JUDGMENT FILE**	No
436.00	01/14/2019	C	**JUDGMENT FILE**	No
437.00	01/18/2019	D	**APPEAL TO APPELLATE COURT ALL FEES PAID**	No
438.00	01/22/2019	D	**APPEAL TO APPELLATE COURT ALL FEES PAID**	No
439.00	01/24/2019	D	**DRAFT JUDGMENT FILE** Center for Women's Health PC	No
440.00	01/31/2019	D	**DRAFT JUDGMENT FILE**	No
441.00	12/21/2017	C	**EXHIBITS**	No

Scheduled Court Dates as of 07/16/2019

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#	Date	Time	Event Description	Status
			No Events Scheduled	

Judicial ADR events may be heard in a court that is different from the court where the case is filed. To check location information about an ADR event, select the **Notices** tab on the top of the case detail page.

Matters that appear on the Short Calendar and Family Support Magistrate Calendar are shown as scheduled court events on this page. The date displayed on this page is the date of the calendar.

All matters on a family support magistrate calendar are presumed ready to go forward.

The status of a Short Calendar matter is not displayed because it is determined by markings made by the parties as required by the calendar notices and the civil or family standing orders. Markings made electronically can be viewed by those who

have electronic access through the Markings History link on the Civil/Family Menu in E-Services. Markings made by telephone can only be obtained through the clerk's office. If more than one motion is on a single short calendar, the calendar will be listed once on this page. You can see more information on matters appearing on Short Calendars and Family Support Magistrate Calendars by going to the Civil/Family Case Look-Up page and Short Calendars By Juris Number or By Court Location.

Periodic changes to terminology that do not affect the status of the case may be made.
This list does not constitute or replace official notice of scheduled court events.

Disclaimer: For civil and family cases statewide, case information can be seen on this website for a period of time, from one year to a maximum period of ten years, after the disposition date. If the Connecticut Practice Book Sections 7-10 and 7-11 give a shorter period of time, the case information will be displayed for the shorter period. Under the Federal Violence Against Women Act of 2005, cases for relief from physical abuse, foreign protective orders, and motions that would be likely to publicly reveal the identity or location of a protected party may not be displayed and may be available only at the courts.

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STATE OF CONNECTICUT

FST-CV-12-6013562-S	:	SUPERIOR COURT
JUDITH KISSEL 94 Grove Street Mount Kisco, New York	: :	JUDICIAL DISTRICT OF STAMFORD/NORWALK
vs.	:	AT STAMFORD
CENTER FOR WOMEN'S HEALTH, P.C. 1011 High Ridge Road Stamford, Connecticut 06905	: :	
REED WANG 129 Kings Highway North Westport, Connecticut 06880	: :	
HEALTH BODY WORLD SUPPLY INC. a/k/a THE WABBO COMPANY 17870 Castleton St. #116 Industry, California 91748	: : :	JANUARY 3, 2019

Present: Hon. Kenneth B. Povodator, J.T.R.

JUDGMENT

This action, by writ and complaint, claiming negligence came to this Court on April 24, 2013, and thence to later dates when Defendants Center for Women's Health (Center) and Reed Wang appeared, and thence to later dates when the Defendants moved to dismiss the complaint, which motions the Court (Karazin, J.T.R.) denied, and thence to later dates when Defendant Reed filed a cross-complaint against Defendant Center and a third-party complaint against Defendant Health Body World Supply Inc. (WABBO), and thence to later dates when the Plaintiff filed a complaint against WABBO, and thence to later dates when Defendant Wang withdrew his cross complaint and third-party complaint, and thence to later dates when the parties were at issue, as on file, and when all the evidence having been submitted to the Jury, which returned its verdict together with the following interrogatories:

JURY INTERROGATORIES

1. Did the plaintiff prove, by a preponderance of the evidence, the standard of care applicable to the acupuncture treatment rendered by Dr. Reed Wang to his patient, Judith Kissel, on April 22, 2010?

2. Did the plaintiff prove that defendant Wang's care and treatment of plaintiff on April 22, 2010, constituted a breach of the requisite standard of care for an acupuncturist treating a patient such as plaintiff, under the circumstances then existing?

3. Did the plaintiff prove that defendant's breach of the applicable standard of care proximately caused some or all of the injuries she claimed?

4. Did defendant Wang prove that the plaintiff's own negligence, as alleged by the defendant in his special defense, was also a proximate cause of the plaintiff's injuries?

5. The parties proved that the respective negligence of the parties with respect to the events of April 22, 2010, is as follows (must add up to 1005):

   Negligence of defendant Wang _____%

   Negligence of plaintiff _____%

6. Did the plaintiff prove that defendant WABBI was engaged in the business of selling the lamp used by Dr. Wang in his treatment of the plaintiff?

7. Did the plaintiff prove that the lamp sold to Dr. Wang was in a defective condition and unreasonably dangerous to the consumer or user?

8. Did the plaintiff prove that the defective condition or conditions of the lamp caused some or all of the injuries claimed by the plaintiff?

9. Did the plaintiff prove that the defect or defects existed at the time of sale of the lamp to Dr. Wang?

10. Did the plaintiff prove that the lamp was expected to and did reach Dr. Wang without substantial change in condition?

11. Did defendant WABBO prove, with respect to the plaintiff's product liability

claim, that the negligent or other improper conduct of the plaintiff and/or Dr. Wang, as alleged by the defendant in its special defenses, was also a proximate cause of the plaintiff's injuries?

12. For purposes of the product liability claim, the parties proved that the respective comparative responsibility of the parties with respect to the events of April 22, 2010, is as follows (must add up to 100%):

Responsibility of defendant WABBO	_____%
Responsibility of defendant Wang	_____%
Responsibility of plaintiff	_____%

13. Plaintiff proved that she sustained the following damages (pain, loss of function, loss of enjoyment of life's activities):

To date of trial	$_____
Future	$_____

14. With respect to the malpractice claim, the plaintiff proved that she is entitled to damages of

$_____

15. With respect to the product liability claim, the plaintiff proved she is entitled to damages of

$_____

The jury returned its verdict as follows:

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendants, REED WANG and CENTER FOR WOMEN'S HEALTH, P.C., and awards monetary damages of

$1,000,000

Plaintiff's Verdict

In this case, the jury unanimously finds the issues for the plaintiff, JUDITH KISSEL, and against the defendant, HEALTH BODY WORLD SUPPLY INC. (WABBO), and awards monetary damages of

$1,000,000

The jury at the same time returned their answers to the interrogatories as follows:

Interrogatory No. 1 Yes

Interrogatory No. 2 Yes

Interrogatory No. 3 Yes

Interrogatory No. 4 No

Interrogatory No. 5

Negligence of defendant Wang _____%

Negligence of plaintiff _____%

Interrogatory No. 6 Yes

Interrogatory No. 7 Yes

Interrogatory No. 8 Yes

Interrogatory No. 9 Yes

Interrogatory No. 10 Yes

Interrogatory No. 11 Yes

Interrogatory No. 12

Responsibility of defendant WABBO 80%

Responsibility of defendant Wang 20%

Responsibility of plaintiff 0%

Interrogatory No. 13

To date of trial $750,000

Future $250,000

Interrogatory No. 14

$1,000,000

Interrogatory No. 15

$1,000,000

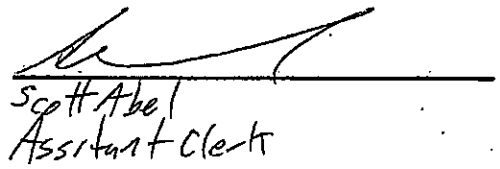
The Court accepted the verdict and the answers to the interrogatories.

The Defendants duly filed motions that the verdict be set aside, for remittitur, and to reconsider the denial of the motion to dismiss, and the parties were fully heard on the motions.

The Court having heard the parties, finds that the motions should be and the same are denied.

Whereupon it is adjudged that the Plaintiff recover of the Defendants $1,000,000.00 damages and costs, taxed at $_____.

BY THE COURT,



Scott Abel
Assistant Clerk

☒ APPEAL ☐ JOINT APPEAL ☐ CROSS APPEAL ☐ AMENDED APPEAL ☐ CORRECTED FORM

JD-SC-33 Rev. 11-17
P.B. Sections 3-8, 60-7, 60-8, 62-7, 62-8, 63-3, 63-4, 63-10, 72-3
C.G.S. Sections 31-301b, 51-197f, 52-470

☐ To Supreme Court ☒ To Appellate Court

All appeals must be filed electronically unless an exemption from the requirements of electronic filing has been granted or you are an incarcerated self-represented party. For further information about e-filing or this form, see the Appeal Instructions, form JD-SC-34.

Name of case *(State full name of case)*

KISSEL, JUDITH v. CENTER FOR WOMEN'S HEALTH, P.C. Et Al

Type of appellate matter *(If a writ of error, the writ and the signed marshal's return must be filed on the same business day as this form. See Practice Book Section 72-3.)*

Appeal

Trial Court History

Tried to: Jury	Trial court location: 123 HOYT STREET Stamford CT 06905
Trial court judges being appealed: HON KENNETH B POVODATOR	List all trial court docket numbers, including location prefixes: FST-CV-12-6013562-S
All other trial court judges who were involved with the case: HON. KEVIN TIERNEY Continued	Judgment for *(Where there are multiple parties, specify those for whom judgment was rendered)*: JUDITH KISSEL
Date of judgment(s) or decision(s) being appealed: 01/03/2019	Date of issuance of notice on any order on any motion that would render judgment ineffective: / Date for filing appeal extended to:
Case type: Civil	For Juvenile Cases: ☐ Termination of Parental Rights ☐ Order of Temporary Custody
For Civil/Family Case Types, Major/Minor code: T28	☐ Other

Appeal

Appeal filed by *(Party name(s))*: CENTER FOR WOMEN'S HEALTH P.C.

From *(the action that constitutes the appealable judgment or decision)*: Judgment on the verdict following denial of post-verdict motions.

If this appeal is taken by the State of Connecticut, provide the name of the judge who granted permission to appeal and the date of the order:

Statutory Basis for Appeal to Supreme Court:

By *(Signature of counsel of record)*	Telephone number	Fax number	Juris number *(If applicable)*
▶ 417457	203-327-1800	203-353-1892	417457

Appearance

Type name and address of counsel of record filing this appellate matter *(This is your appearance; see Practice Book Section 62-8)*:
HEIDELL PITTONI MURPHY & BACH LLP 855 MAIN STREET SUITE 1100
BRIDGEPORT CT 06604

E-mail address: hpmb@hpmb.com

"X" one if applicable
☐ Counsel or self-represented party who files this appeal will be deemed to have appeared **in addition to** counsel of record who appeared in the trial court.
☐ Counsel or self-represented party who files this appeal is appearing **in place of:** Name of counsel of record: / Juris number *(If applicable)*:

Certification

I certify that a copy of the appeal form I am filing will immediately be delivered to each other counsel of record and I have included their names, addresses, e-mail addresses and telephone numbers; the appeal form has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the appeal form complies with all applicable rules of appellate procedure in accordance with Practice Book Sections 62-7 and 63-3.

Date to be delivered 01/18/2019.

If you have an exemption from e-filing under Practice Book Section 60-8, attach a list with the name, address, e-mail address, and telephone number of each counsel of record and the address where the copy was delivered.

If this appeal is a criminal or habeas corpus matter, I certify that a copy of this appeal form will immediately be delivered to the Office of the Chief State's Attorney Appellate Bureau. Date to be delivered _____.

Signed *(Counsel of record)*: ▶ 417457 Date signed: 01/18/2019

Required Documents

To be filed with the Appellate Clerk within ten days of the filing of the appeal, if applicable. See Practice Book Section 63-4.

1. Preliminary Statement of the Issues
2. Court Reporter's Acknowledgment or Certificate that no transcript is necessary
3. Docketing Statement
4. Statement for Preargument Conference (form JD-SC-28A)
5. Constitutionality Notice
6. Sealing Order form, if any

☒ Entry Fee Paid ☐ No Fees Required ☐ Fees, Costs, and Security waived by Judge *(enter Judge's name below)*

Judge: / Date waived:

Court Use Only
Date and time filed

A515

Appeal Form (continued)

CASE NAME:
KISSEL, JUDITH v. CENTER FOR WOMEN'S HEALTH, P.C. Et Al

OTHER TRIAL COURT JUDGES
HON. KEVIN TIERNEY
HON. EDWARD R. KARAZIN
William Mottolese
HON. ALFRED J. JENNINGS
HON. ROBERT L. GENUARIO
HON. DONNA N. HELLER
HON. DAVID R. TOBIN
HON. Anthony D. Truglia Jr.

Parties & Appearances

PARTY/PARTIES INITIATING THE APPEAL

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ALL OTHER PARTIES AND APPEARANCES

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Phone: (860) 297-4615 Fax: (860) 548-0006
Email: POGMORE@HALLORAN-SAGE.COM

FILING PARTY CORRECTED INFORMATION
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A.C. 42493	:	APPELLATE COURT
JUDITH KISSEL	:	
VS.	:	
CENTER FOR WOMEN'S HEALTH, P.C., ET AL.	:	JANUARY 24, 2019

DOCKETING STATEMENT

Pursuant to *Practice Book* § 63-4(a)(3), Defendant Center for Women's Health, hereby submits the following information:

A. PARTIES & COUNSEL:

Plaintiff:

1. Judith Kissel
   94 Grove Street
   Mt. Kisco, NY 10549

Plaintiff's Counsel:

Sean McElligott, Esq.
Matthew Blumenthal, Esq.
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203-684-0212
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mblumenthal@koskoff.com

Defendants:

1. Reed Wang, L.Ac.
   129 Kings Highway North
   Westport, CT 06880

Counsel for Reed Wang, L.Ac.:

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JURIS NO. 103041

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2. Center for Women's Health, P.C.
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Stamford, CT 06905

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B. PENDING APPEALS:

A.C. 42469
A.C. 42505

C. EXHIBITS:

Yes, exhibits were presented at the trial court.

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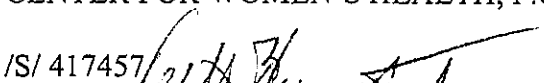
(203) 382-9700
JURIS NO. 103041

D. DEFENDANT'S CONVICTIONS:

Not applicable.

THE DEFENDANT,
CENTER FOR WOMEN'S HEALTH, P.C.

/S/ 417457 

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Drobertson@hpmb.com
Kblumenstock@hpmb.com

CERTIFICATION

Pursuant to *Practice Book* § 62-7, I hereby certify that: (1) on January 24, 2019, the foregoing document was emailed to the counsel of record listed below; (2) the document contains no personally identifiable information or information that is prohibited from disclosure by rule, statute, court order, or decisional law or is being filed under seal pursuant to court order; and (3) the document complies with all applicable rules of appellate procedure.

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/s/ 417457
KEITH M. BLUMENSTOCK

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(203) 382-9700
JURIS NO. 103041

Sec. 52-72. Amendment of process. (a) Upon payment of taxable costs, any court shall allow a proper amendment to civil process which is for any reason defective.

(b) Such amended process shall be served in the same manner as other civil process and shall have the same effect, from the date of the service, as if originally proper in form.

(c) If the court, on motion and after hearing, finds that the parties had notice of the pendency of the action and their rights have not been prejudiced or affected by reason of the defect, any attachment made by the original service and the rights under any lis pendens shall be preserved and continued from the date of service of the original process as though the original process had been in proper form. A certified copy of the finding shall be attached to and served with the amended process.

Sec. 52-184c. Standard of care in negligence action against health care provider. Qualifications of expert witness. (a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a "similar health care provider" is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

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

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

Sec. 52-190a. Prior reasonable inquiry and certificate of good faith required in negligence action against a health care provider. Ninety-day extension of statute of limitations. (a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. The similar health care provider who provides such written opinion shall not, without a showing of malice, be personally liable for any damages to the defendant health care provider by reason of having provided such written opinion. In addition to such written opinion, the court may consider other factors with regard to the existence of good faith. If the court determines, after the completion of discovery, that such certificate was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, the court upon motion or upon its own initiative shall impose upon the person who signed such certificate or a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. The court may also submit the matter to the appropriate authority for disciplinary review of the attorney if the claimant's attorney or the apportionment complainant's attorney submitted the certificate.

(b) Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods.

(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action.

Sec. 52-592. Accidental failure of suit; allowance of new action. (a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment.

(b) When any action has been brought against an executor or administrator or continued against an executor or administrator after the death of the defendant and has failed for any of the causes listed in subsection (a) of this section, the plaintiff, or his executor or administrator in case a cause of action survives, may commence a new action within six months after the determination of the original action.

(c) If an appeal is had from any such judgment to the Supreme Court or Appellate Court, the time the case is pending upon appeal shall be excluded in computing the time as above limited.

(d) The provisions of this section shall apply to any defendant who files a cross complaint in any action, and to any action between the same parties or the legal representatives of either of them for the same cause of action or subject of action brought to any court in this state, either before dismissal of the original action and its affirmance or within one year after the dismissal and affirmance, and to any action brought to the United States circuit or district court for the district of Connecticut which has been dismissed without trial upon its merits or because of lack of jurisdiction in such court. If such action is within the jurisdiction of any state court, the time for bringing the action to the state court shall commence from the date of dismissal in the United States court, or, if an appeal or writ of error has been taken from the dismissal, from the final determination of the appeal or writ of error.

(e) The provisions of this section shall apply to any claim against the state for which a notice of claim has been properly and timely filed with the Office of the Claims Commissioner in accordance with sections 4-147 and 4-148 and which thereafter has been dismissed by the Office of the Claims Commissioner pursuant to section 4-142.

NO: FST-CV12-6013562-S : SUPERIOR COURT

KISSEL, JUDITH : JUDICIAL DISTRICT
OF STAMFORD/NORWALK

V. : AT STAMFORD, CONNECTICUT

CENTER FOR WOMEN'S HEALTH, P.C. : DECEMBER 1, 2017
ET AL

BEFORE THE HONORABLE KENNETH POVODATOR, JUDGE
AND JURY PANEL

A P P E A R A N C E S:

Representing the Plaintiff:

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ATTY. MATT BLUMENTHAL
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Representing the Defendant Center for Women's Health P.C.:

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ATTY. KEITH BLUMENSTOCK
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Representing the Defendant Health Body World Supply Inc.,
AKA The WABBO Company:

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Hartford, Connecticut 06103

Recorded By: Pipina Plakopitas
Transcribed By:
Lynda Scott
Kasey Hirschbeck
Paul McKenna
Court Recording Monitors
123 Hoyt Street
Stamford, Connecticut 06905

1 A Okay. Inadvertent to me would mean that the device
2 is supposed to be in a position and somebody bangs into it
3 and it comes down. You didn't mean to make it come down,
4 all you did was bang into it. So that would be an
5 inadvertent situation.
6 Q All right. Let's define our terms then.
7 A Yeah.
8 Q Would you agree that the scenario in which the head
9 of a lamp drops spontaneously, that is without outside
10 influence, without anybody bumping into it, the empty room
11 situation that you're talking about --
12 A Yeah. Okay.
13 ATTY. MCELLIGOTT: Well, object to the form.
14 Compound.
15 THE COURT: Let him finish the question, I'm not
16 hearing anything compound yet. But go ahead, finish
17 the question.
18 **BY ATTY. MEADE:**
19 Q In your opinion, that scenario -- let me withdraw the
20 question and I'll ask it again.
21 Would you agree, that in your opinion, the scenario
22 of the head of the lamp dropping onto Ms. Kissel's toe
23 without outside influence is unlikely?
24 A In my own opinion, I'd say impossible.
25 Q Thank you.
26 A I do believe in ghosts however I don't think they
27 push lamp heads down when nobody's -- I'd say impossible,

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KISSEL, JUDITH	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
V.	:	AT STAMFORD, CONNECTICUT
CENTER FOR WOMEN'S HEALTH, P.C. ET AL	:	DECEMBER 12, 2017

BEFORE THE HONORABLE KENNETH POVODATOR, JUDGE AND JURY PANEL

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1 thing about tightening screws because that had a different
2 function on this lamp than your lamp. Okay.
3 A Okay.
4 Q So just focusing on the first two. He testified that
5 would check the tension in the device by moving the lamp
6 heads up and down and that he would gently shake the lamp to
7 see if the lamp heads moved, okay?
8 A Okay.
9 Q Is that the type of test that the standard of care
10 requires in using this type of lamp before every patient
11 treatment?
12 ATTY. ROBERTSON: I'm just going to object.
13 "This type of lamp", we're talking apples and oranges
14 between the two kinds of lamps.
15 ATTY. MOORE LEONHARDT: I join in the objection,
16 Your Honor.
17 MS. MORAN: Can you --
18 ATTY. MCELLIGOTT: I've established what a CQ-36
19 style of lamp is so I can incorporate CQ-36 style
20 into the question, if (indiscernible).
21 THE COURT: All right.
22 ATTY. MCELLIGOTT: Okay.
23 **BY ATTY. MCELLIGOTT:**
24 Q So with respect to the testing of the device that's
25 required by the standard of care. As an acupuncturist using
26 a CQ-36 in 2010 you were required to check the tension on
27 the device by moving the heads up and down and also to

1 gently shake the device to see if the heads moved?
2 ATTY. ROBERTSON: I still object. I do not
3 believe that defines the lamp that we're talking
4 about based on all the evidence in this case.
5 ATTY. MOORE LEONHARDT: Join in the objection,
6 Your Honor. And the lamp has already been
7 distinguished as different so the underlying
8 foundation is improper.
9 THE COURT: All right. The objection is
10 overruled. Can you answer the question?
11 A Yes. With this style lamp you need to check the
12 tension for the articulating arm and then make sure when it
13 moves -- or move it to check if it has the propensity to
14 fall. In between every patient.
15 **BY ATTY. MCELLIGOTT:**
16 Q Okay. And so the first step is to test it in the way
17 you just described, right?
18 A Yeah. Either one first.
19 Q Okay. And for the lamp that you have -- well, first
20 of all after you check it, there are one of two
21 possibilities; either it's loose or it's fine. Is that
22 true?
23 ATTY. ROBERTSON: I'm just going to object.
24 Leading.
25 Q Well, what are the two possibilities after you
26 perform these two tests on the lamp?
27 A It either stays where it is or it falls, it lowers.

1 Q Okay. All right. And with the lamp that you had, if
2 it lowered, you would lock it down by tightening, right?
3 A Yes. I would tighten like every screw.
4 Q Okay. And I want you just to know you can't do that
5 with this lamp that two mechanical engineers have studied,
6 you can't do that.
7 A Okay.
8 Q So in the situation where you do the tests and the
9 lamp fails the test and there's no way to adjust it to get
10 it to pass the test, what does the standard of care require
11 when the test of the device fails?
12 A To not use it on a patient, to take it out of service
13 so that it wouldn't cause harm.
14 Q Okay. And these lamps cost $92?
15 ATTY. ROBERTSON: I'm just going to object.
16 It's leading -- I don't know --
17 **BY ATTY. MCELLIGOTT:**
18 Q Do you know --
19 ATTY. ROBERTSON: In this case it might have.
20 THE COURT: I --
21 ATTY. MCELLIGOTT: Well, let me see. Can I see
22 Plaintiff's Exhibit 16.
23 (Pause)
24 THE COURT: All right. The Clerk is telling me
25 16 is not a full exhibit so please take it off. It's
26 not 16, I'm not sure -- I think you're talking
27 about -- oh, it is what you said.

1 ATTY. MOORE LEONHARDT: Yes, Your Honor.
2 THE COURT: All right. Counsel, your next
3 question, please.
4 **DIRECT EXAMINATION BY ATTY. MCELLIGOTT (Continued):**
5 Q Ms. Wan Moran, if Dr. Wang had done a test on the
6 device at any time prior to using the device on Ms. Kissel
7 and the device failed the test, did the standard of care
8 require him to take it out of service at that time?
9 A Yes.
10 Q And why is that?
11 A So that if it had the propensity to fall it wouldn't
12 fall while -- during treatment.
13 Q And talk about what an acupuncturist has to do after
14 a test when there is evidence of a propensity, would you
15 agree with that?
16 A Yes.
17 Q Now I want to talk to you about when the test has to
18 be done on a CQ-36 style lamp, okay?
19 A Okay.
20 Q Dr. Wang testified that he did the test once at the
21 beginning of each day covering his four patients or three
22 patients for that day. Is that sufficient under the
23 standard of care?
24 A No, I don't believe so.
25 Q Why not?
26 THE COURT: You've got to keep your voice up,
27 please.

1 A I don't believe so.
2 Q Why not?
3 A Because these lamps, if you move them, they tend to
4 fall. And with time, they tend to fall. So from my
5 experience, even between patients, they would tend to fall.
6 ATTY. MEADE: Move to strike, Your Honor.
7 **BY ATTY. MCELLIGOTT:**
8 Q Let me see if I can ask it more specifically.
9 THE COURT: All right. The last part about her
10 experience is stricken. Is that what people are
11 about to ask for?
12 ATTY. MOORE LEONHARDT: Yes.
13 MS. MORAN: Sorry.
14 THE COURT: So that piece is stricken. Next
15 question.
16 ATTY. MCELLIGOTT: So I'm just asking -- ill ask
17 you about your experience question.
18 Q With respect to the standard of care, what does the
19 standard of care require with respect to pre-use testing of
20 a CQ-36 style lamp in practice?
21 A To assess it between every patient.
22 Q Okay. And by assess it you mean check the tension
23 and make sure it's stable?
24 A Yes.
25 Q And if an acupuncturist, in this case, Dr. Wang
26 failed to inspect and test the lamp before using it on Ms.
27 Kissel, would that be a violation of the standard of care?

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JUDITH KISSEL : JUDICIAL DISTRICT
OF STAMFORD/NORWALK

v. : AT STAMFORD, CONNECTICUT

CENTER FOR WOMEN'S HEALTH : DECEMBER 19, 2017
P.C., ET AL

BEFORE THE HONORABLE KENNETH POVODATOR,
JUDGE AND JURY

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1 have been proven, and not some ideal level of conduct
2 that one might strive for.
3 As I have already mentioned, the plaintiff has
4 the burden of proving by a fair preponderance of the
5 evidence that Dr. Wang's conduct represented a breach
6 of the prevailing professional standard of care.
7 Under our law, the plaintiff must prove this by
8 expert testimony. More specifically, she must
9 establish through expert testimony both what the
10 standard of care is and that defendant's conduct
11 represented a breach of that standard.
12 Finally, plaintiff must establish that the
13 breach of that standard of care was the proximate
14 cause of the injuries that she claims - generally
15 that requires expert testimony unless the causative
16 link is sufficiently obvious to a lay person that
17 expert testimony is not required.
18 The plaintiff claims that defendant Wang was
19 negligent in that he did not adequately protect
20 plaintiff from contact with a heat lamp during her
21 acupuncture procedure; did not properly place heat
22 lamps during the acupuncture procedure such that the
23 lamps remained a safe distance from the plaintiff;
24 left the plaintiff unattended during the course of
25 the acupuncture procedure and failed promptly -- all

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JUDITH KISSEL : JUDICIAL DISTRICT
OF STAMFORD/NORWALK

v. : AT STAMFORD, CONNECTICUT

CENTER FOR WOMEN'S HEALTH : DECEMBER 20, 2017
P.C., ET AL

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JUDGE AND JURY

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1 to occur, is admissible to prove the existence of a
2 product defect. Therefore, in the product liability
3 case against WABBO, you may consider evidence of
4 subsequent design modifications if they are shown to
5 be related to claimed defects.
6 In order to prevail on her product liability
7 claim against WABBO, the plaintiff must prove each of
8 the elements I have described. If she has failed to
9 prove each and every one, then she has not
10 established a product liability claim against
11 defendant WABBO. However, this requirement applies
12 to the elements I have described as elements of a
13 product liability claim; with respect to the specific
14 claimed deficiencies and dangerous qualities of the
15 lamp, she only needs to prove that at least one such
16 deficiency or hazard satisfies all of those
17 requirements.
18 Proximate cause
19 In order to recover from a defendant, plaintiff
20 must prove that defendant's conduct was, in fact, a
21 proximate cause of the injuries sustained by the
22 plaintiff. With respect to the malpractice claim,
23 the proof generally must be based on expert
24 testimony, unless the causative link can be discerned
25 by a layperson without the need of expert assistance.
26 Before reaching the issue of proximate cause,
27 you must first consider the more general issue of

1 So I requested that at page 15 there would be an
2 instruction that in this case the plaintiff must
3 prove proximate cause through expert testimony and in
4 this case that would be the standard applicable to an
5 acupuncturist. So I take exception to the denial of
6 that request respectfully, Your Honor.
7 Also at page 21 of your charge and it's the same
8 concept, Your Honor, adding in the violation of the
9 professional standard of care applicable to
10 acupuncturists under similar circumstances.
11 THE COURT: I am sorry, where are you looking at
12 21?
13 ATTY. MOORE LEONHARDT: At page 21 it would be
14 inserted in the second full paragraph where it
15 begins, in order to recover damages for any injury,
16 plaintiff must show by a preponderance of the
17 evidence that such injury would not have occurred
18 without the defendant's alleged misconduct. And I
19 would insert after defendant's alleged, violation of
20 the professional standard of care applicable to
21 acupuncturists under similar circumstances and strike
22 misconduct. So that was my request and I understand
23 you denied that.
24 THE COURT: Well, just so it's clear, the
25 problem then is that that's in the discussion of
26 proximate cause and his conduct is involved in the
27 issue of product liability, as well. So that's why

1 I've used the more generalized misconduct because
2 it's not clear that it has to be "negligence" for
3 purposes of the product liability claim.
4 ATTY. MOORE LEONHARDT: Yes, Your Honor and I
5 appreciate your view on that and your decision. And
6 my argument previously and I will just re-state it
7 here very briefly is that in the product liability
8 aspect of the case because the comparative fault of
9 the plaintiff arises from the jury having to find
10 that the defendant Wang was negligent and that
11 finding of negligence is based upon a professional
12 negligence standard, the standard of care violation
13 that is -- Dr. Wang is held to based on a reasonably
14 prudent acupuncturist under similar circumstances
15 then my position is that that same standard should be
16 applied in the context of the product liability
17 action. Thank you, Your Honor.
18 THE COURT: That's it. Alright.
19 ATTY. ROBERTSON: I was going to make the same
20 comments. I also believe that at all times Dr. Wang
21 should be held to a professional standard and I don't
22 think that was clear on page 21, page 15 and that
23 proximate cause needs to be proven by -- on page 15
24 proximate cause needs to be proven by a under
25 professional, by a reasonably prudent acupuncturist
26 and not what the lay jury can determine. I join in
27 those comments.

1 ATTY. MEADE: Your Honor, as with the other
2 exceptions you've already ruled on this but --
3 THE COURT: Well, my point is I don't know what
4 is formally on the record. I want to make sure that
5 anything you want to make sure is on the record is on
6 the record.
7 ATTY. MEADE: That's correct. That's what I am
8 doing putting is putting on the record.
9 As to pages 17 and 18, it's our position that
10 the repetition of the various tests for the standard
11 for unreasonably dangerous twice is prejudicial to my
12 client and the second is that at page 18 it's our
13 position that there simply was not enough evidence to
14 charge the jury on the "manifestly unreasonable
15 standard". I understand Your Honor has added some
16 language concerning the marketing to a particular
17 consumer being Dr. Wang. Our position is that while
18 that is somewhat helpful it does not resolve entirely
19 our exception. Thank you.
20 THE COURT: I don't believe I will -- I
21 shouldn't say I don't believe. I will not be making
22 any corrections other than what I am going to do is,
23 have you had a chance to check all the exhibits?
24 ATTY. MCELLIGOTT: Yes.
25 ATTY. MOORE LEONHARDT: I am just finishing.
26 THE COURT: Because if it's going to take you
27 five minutes or so, what I am proposing to do is I

1 can correct the second half of the charge and give
2 them a relatively clean copy.
3 ATTY. MCELLIGOTT: In that regard, Your Honor,
4 on page 24 I just noticed one thing. I know you
5 caught a lot. I could hear you, see you doing it but
6 last full paragraph third line of that paragraph it
7 says which she claims to have proximate cause.
8 I think that should be defendant.
9 ATTY. MEADE: I think that is correct, Your
10 Honor. I noticed the same. It's just a grammatical
11 glitch.
12 ATTY. MOORE LEONHARDT: Where is that?
13 THE COURT: It's simply -- Actually, it should
14 simply be he. Oh no, it's not he. Okay, I will
15 make that change.
16 ATTY. MCELLIGOTT: And then Your Honor, I think
17 I speak for all counsel when I say in a very
18 difficult case to charge on, this charge is a good
19 charge. So thank you for doing the work. I am not
20 sure we participated much in producing this so thank
21 you.
22 THE COURT: I welcome assistance but it's my
23 job. That's how I look at it.
24 ATTY. MOORE LEONHARDT: Thank you, Judge.
25 ATTY. ROBERTSON: Thank you.
26 ATTY. MEADE: Agreed, Your Honor, thank you.
27 THE COURT: And I hope nobody -- I sensed a