Filippelli v. St. Mary's Hosp.

Supreme Court of Connecticut

December 2, 2014, Argued; October 13, 2015, Officially Released

SC 19148

Reporter

319 Conn. 113 *; 124 A.3d 501 **; 2015 Conn. LEXIS 281 ***

PHILIP FILIPPELLI III ET AL. v. SAINT MARY'S HOSPITAL ET AL.

Prior History: [*1]** Action to recover damages for, inter alia, medical malpractice, brought to the Superior Court in the judicial district of Waterbury, where the action was withdrawn as to the plaintiff Linda Filippelli and as against the named defendant; thereafter, the court, Ozalis, J., granted in part the motions in limine to preclude certain evidence filed by the defendant Waterbury Orthopaedic Associates, P.C., et al.; subsequently, the court vacated its previous order admitting certain evidence; thereafter, the matter was tried to the jury before the court, Ozalis, J.; verdict and judgment for the defendant Waterbury Orthopaedic Associates, P.C., et al., from which the named plaintiff appealed to the Appellate Court, Lavine, Espinosa and Borden, Js., which affirmed the trial court's judgment, and the named plaintiff, on the granting of certification, appealed to this court.

Filippelli v. St. Mary's Hosp., 141 Conn. App. 594, 61 A.3d 1198, 2013 Conn. App. LEXIS 163 (2013)

Disposition: Affirmed.

Syllabus

The plaintiff F, who had fractured his leg while playing basketball, sought to recover damages from the defendant physician, R, and the defendant medical group, W Co., for medical malpractice, claiming that R negligently failed to timely diagnose and treat compartment syndrome resulting in severe and permanent injuries. **[***2]** At trial, F sought to impeach R's credibility by introducing an article published in a medical journal that R had mentioned in his deposition. Specifically, F argued that R's deposition testimony suggested that the article was consistent with R's medical opinions when, in fact, the article was inconsistent in several respects. The trial court ruled that the article was inadmissible for that purpose, concluding that it was hearsay and did not fall within the learned treatise exception because R was not testifying as an expert witness. F subsequently sought to introduce the same article under the learned treatise exception during his cross-examination of an expert witness, B. Specifically, F argued that another expert witness, K, had testified that the journal where the article was published was considered a standard authority in the field of orthopedic surgery. R and W Co. argued that the article was inadmissible because K did not identify the article itself as a standard authority. The trial court concluded that B could be questioned about the article, but that F's counsel could not read from it directly, and that only those portions referenced would be provided to the jury. F also **[***3]** sought to question B about his previous experience as an expert witness in other medical malpractice cases against R. Specifically, F argued that he should be allowed to impeach B's credibility through such questions because B's deposition testimony indicated that he had not previously worked with R. The trial court concluded that, because evidence of other malpractice claims against R would be unduly prejudicial, F could ask B whether he had a prior working relationship with R, but not whether B had previously served as an expert witness on R's behalf. Thereafter, F

requested permission to make an offer of proof and to introduce a certification page from a deposition of B in a previous case as an exhibit for identification. The trial court denied F's request, but allowed the certification page to be read into the record. The jury subsequently returned a verdict in favor of R and W Co., and the trial court rendered judgment in accordance with that verdict. Thereafter, F appealed to the Appellate Court, which concluded, inter alia, that the trial court did not abuse its discretion by precluding use of the article during the cross-examination of R, limiting use of the article during **[***4]** the cross-examination of B, or precluding F from questioning B about his previous experience as an expert witness for R. The Appellate Court affirmed the judgment of the trial court and F, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court properly concluded that the trial court did not abuse its discretion in precluding F from introducing the article for the purpose of impeaching R's credibility; although the learned treatise exception to the rule against hearsay had no bearing on the admissibility of the article for the nonhearsay purpose of impeaching R's credibility, the article was nonetheless inadmissible under the applicable rule of evidence (*§ 6-6 [b] [2]*) prohibiting the use of extrinsic evidence for the purpose of proving conduct tending to demonstrate a witness' lack of veracity.

2. F could not prevail on his claim that the trial court abused its discretion in limiting the use of the article during the cross examination of B, this court having previously determined that trial courts may minimize the risk of misunderstanding or misapplication by the jury through exercising discretion regarding which items ought to be admitted as full exhibits under the **[***5]** learned treatise exception to the hearsay rule; although this court generally agreed with the approach adopted by the Appellate Court in *Musorofiti v. Vlcek (65 Conn. App. 365, 783 A.2d 36)*, which indicated that evidence demonstrating a journal is particularly esteemed within a field may justify a presumption in favor of admitting an article accepted for publication therein as a learned treatise, even assuming that the article in this case was admissible as a learned treatise, the trial court was well within its discretion to preclude F from reading directly from the article and to redact the version of the article provided to the jury.

3. The Appellate Court properly determined that the trial court did not abuse its discretion by excluding evidence regarding B's previous work as an expert witness for R in other medical malpractice cases: the trial court permitted F to inquire as to whether B had a previous working relationship with R, and properly weighed F's interest in impeaching B's credibility with respect to his allegedly false deposition testimony against the substantial likelihood of prejudice to R and W Co. from evidence of other malpractice cases; although the trial court, for the purpose of preserving the trial record for **[***6]** appellate review, should have allowed F to make an offer of proof regarding B's previous work as an expert on behalf of R and to mark the certification page from B's previous deposition as an exhibit for identification, neither impropriety was harmful to F because the certification page was read into the record and was available for appellate review.

Counsel: Stephanie Z. Roberge, for the appellant (named plaintiff).

Ellen M. Costello, for the appellees (defendant Waterbury Orthopaedic Associates, P.C., et al.).

Judges: Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Robinson and Vertefeuille, Js. PALMER, J. In this opinion ROGERS, C. J., and ZARELLA and ROBINSON, Js., concurred.

Opinion by: PALMER

Opinion

[504]** **[*116]** PALMER, J. The plaintiff, Philip

Filippelli III,[1] brought this medical malpractice action against the defendants, Dennis M. Rodin and Waterbury Orthopaedic Associates, P.C.,[2] claiming that Rodin negligently failed to timely diagnose and treat the plaintiff's compartment syndrome,[3] resulting in severe and permanent injuries to the plaintiff's lower left leg. Following a trial, the jury found that the defendants had not breached the standard of care and returned a verdict in favor of the defendants. The trial court rendered **[***7]** judgment in accordance with the jury verdict, and the plaintiff appealed to the Appellate Court, which affirmed the trial court's judgment. *Filippelli v. Saint Mary's Hospital, 141 Conn. App. 594, 597, 61 A.3d 1198 (2013)*. On appeal to this court following our grant of certification; *Filippelli v. Saint Mary's Hospital, 308 Conn. 947, 67 A.3d 289 (2013)*; the plaintiff claims that he is entitled to a new trial because the Appellate Court improperly concluded that the trial court did not abuse its discretion in (1) restricting his use of an article from a medical **[*117]** journal to impeach certain witnesses, and (2) precluding him from (a) questioning the defendants' expert witness about his previous work as an expert on behalf of Rodin, and (b) making an offer of proof and marking a document for identification in connection with that proffered questioning. We disagree with the plaintiff's claims and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the relevant facts and procedural history in detail. See *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 597-600*. To briefly summarize, the plaintiff sustained a comminuted tibial plateau fracture[4] while playing basketball on March 4, 2005. At approximately 10 p.m. that evening, he was taken to the emergency department of Saint Mary's Hospital, where he was treated and released. The plaintiff returned at approximately 7:30 a.m. the following morning complaining of severe pain in his left leg, and Rodin admitted the plaintiff for observation. At approximately 6:45 p.m. that evening, Rodin diagnosed the plaintiff with compartment syndrome and treated it by performing a four compartment fasciectomy.[5] Thereafter, the plaintiff commenced this action alleging that Rodin was **[**505]** negligent in failing to diagnose and treat his compartment syndrome on the morning of March 5, 2005, and that the delay in treatment caused, among other things, severe and permanent injuries. **[***9]** Following a trial, in response to an **[*118]** interrogatory, the jury found that the defendants had not breached the standard of care. The jury returned a verdict for the defendants and the trial court rendered judgment in accordance with that verdict.

On appeal to the Appellate Court, the plaintiff claimed that the trial court abused its discretion in barring him from using an article from a medical journal for the purpose of impeaching Rodin's credibility, and in limiting his use of the same article in his cross-examination of Andrew Bazos, the defendants' **[***10]** expert witness. *Id., 605-607*. In addition, the plaintiff claimed that the trial court improperly precluded him from questioning

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[1] Philip Filippelli's wife, Linda Filippelli, initially alleged claims for loss of consortium, but withdrew those claims prior to trial. All references to the plaintiff in this opinion are to Philip Filippelli III.

[2] The plaintiff withdrew his claims against Saint Mary's Hospital prior to trial. We therefore refer to Rodin and Waterbury Orthopaedic Associates, P.C., as the defendants.

[3] Compartment **[***8]** syndrome is "a condition in which increased pressure in a confined anatomic space adversely affects the circulation and threatens the function and viability of the structures therein." Stedman's Medical Dictionary (28th Ed. 2006) pp. 1894-95.

[4] A comminuted fracture occurs when "the bone is broken into more than two fragments." Stedman's Medical Dictionary (28th Ed. 2006) p. 769. "A tibial plateau fracture occurs at the top of the shin bone, and involves the cartilage surface of the knee joint." J. Cluett, "Tibial Plateau Fractures," (last modified May 16, 2014), available at http://orthopedics.about.com/od/brokenbones/a/tibia_2.htm (last visited September 22, 2015).

[5] A fasciectomy is the "[e]xcision of strips of fascia." Stedman's Medical Dictionary (28th Ed. 2006) p. 706. The fascia is "[a] sheet of fibrous tissue that envelops the body beneath the skin; it also encloses muscles and groups of muscles and separates their several layers or groups." Id., p. 700

Bazos about his previous work as an expert on behalf of Rodin in other malpractice actions. *Id., 623*. With respect to the plaintiff's attempt to ask Bazos about his prior work on behalf of Rodin, the plaintiff also contended that the trial court precluded him from creating an adequate record of that claim for appellate review by denying him the opportunity to make an offer of proof and to mark a particular document for identification. The Appellate Court concluded that none of the challenged evidentiary rulings constituted an abuse of the trial court's discretion. *Id., 600-601*. The Appellate Court further concluded that, although the trial court should not have barred the plaintiff from making a record as requested, that impropriety was harmless.[6] *Id., 623-26*. Accordingly, the Appellate Court affirmed the judgment of the trial court. *Id., 626*. On appeal to this court, the plaintiff challenges the Appellate Court's conclusions with respect to each of these issues. Additional facts and procedural history will be set forth as necessary.

Before turning to the merits of the plaintiff's claims, we briefly set forth the standard of review applicable **[*119]** to those claims. It is well settled that "[w]e review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion." *State v. Saucier, 283 Conn. 207, 218, 926 A.2d 633 (2007)*. Under the abuse of discretion standard, "[w]e [must] make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Hurley v. Heart Physicians, P.C., 298 Conn. 371, 402, 3 A.3d 892 (2010)*. Moreover, "[b]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . [A]n evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not **[***12]** affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial. . . . [Finally, our] review of the Appellate Court's conclusions of law, including the determination that any evidential **[**506]** improprieties were harmless, is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Klein v. Norwalk Hospital, 299 Conn. 241, 254-55, 9 A.3d 364 (2010)*.

I

The plaintiff first claims that the Appellate Court improperly determined that the trial court did not abuse its discretion in (1) prohibiting him from using the journal article to impeach Rodin, who had read the article prior to his deposition, and (2) limiting his use of the article during his cross-examination of Bazos. We reject both of these contentions.

[*120] A

We first address the plaintiff's claim concerning the trial court's ruling precluding him from using the article to impeach Rodin's credibility. Specifically, the plaintiff maintains that, although Rodin suggested during his deposition that the article in question supported his testimony concerning the diagnosis and treatment of compartment syndrome, the article actually contradicts his deposition testimony in **[***13]** several respects. According to the plaintiff, he was entitled to use the article to establish that Rodin did not testify truthfully during his deposition.

The following facts and procedural history, some of which is set forth in the opinion of the Appellate Court, are relevant to this claim. "Counsel for the

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[6] The plaintiff also claimed on appeal to the Appellate Court that the trial **[***11]** court improperly precluded him from using the article to confirm the opinion of Ronald M. Krasnick, the plaintiff's expert witness. See *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 605-607*. The Appellate Court rejected that claim, and it is not before us in the present appeal.

plaintiff deposed Rodin in March, 2009. At that time, Rodin testified that, in preparation for his deposition, he had reviewed an article in the Journal of the American Academy of Orthopaedic Surgeons, but that he had not brought the journal article to the deposition.[7] Later, the plaintiff's counsel undertook a literature search and found an article published in the subject journal that she believed to be the one Rodin reviewed. On March 6, 2011, as trial was about to begin, the plaintiff filed a supplemental list of exhibits that included, among other things, '[S. Olson & R. Glasgow, "Acute Compartment Syndrome in Lower Extremity Musculoskeletal Trauma," 13 J. Am. Acad. Orthopaedic Surgeons, No. 7 (November, 2005)].'

"The defendants filed an objection to the plaintiff's supplemental list **[***14]** of exhibits, including the journal article. The defendants claimed prejudice due to the plaintiff's late disclosure of the journal article and sought to preclude its use at trial. . . . On May 10, 2011, the **[*121]** court held a hearing regarding the defendants' objection to putting the journal article into evidence at trial. The plaintiff's counsel argued that Rodin had referred to the journal article during his deposition . . . . [The defendants] . . . contended that Rodin had referred in general to a journal article, not to a specific journal article, and that the plaintiff had failed to demonstrate that the article found by the plaintiff's counsel was, in fact, the one Rodin had reviewed. Moreover, [the defendants argued that the article was not admissible pursuant to the learned treatise exception to the hearsay rule; see *Conn. Code Evid. § 8-3 (8)*;[8] because] Rodin was **[**507]** a fact witness, not an expert witness, and no expert had testified that the journal article was a standard authority in accordance with *§ 8-3 [8] of the Connecticut Code of Evidence*. . . . The court . . . conditionally overruled the defendants' objection with respect to Rodin." (Footnotes added.) *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 602-603*.

At trial, the court instructed plaintiff's counsel that, before questioning Rodin about the article in the presence of the jury, she would be required to make an offer of proof. Outside the presence of the jury,[9] "Rodin **[*122]** testified that he did not recall reading a journal article before his deposition. . . . [He] acknowledged [however] that, during his deposition, he testified that he had reviewed a journal article. [The] [p]laintiff's counsel presented Rodin with a copy of the journal article that she had located and asked him if it was the article he had reviewed. Rodin did not recognize the journal article nor did he remember reading it. [The] [p]laintiff's counsel then presented Rodin with copies of what she represented were the tables of contents of the Journal **[***16]** of the American Academy of Orthopaedic Surgeons for [2004 through 2009]. The table[s] of contents disclosed only one article concerning compartment syndrome, which was published in November, 2005.

"Following the plaintiff's offer of proof with respect to the tables of contents, the court found that the journal article discovered by the plaintiff's counsel published in the Journal of the American Academy of Orthopaedic Surgeons in November, 2005,

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[7] At that time, plaintiff's counsel did not ask Rodin or Rodin's counsel to produce the article.

[8] ***Section 8-3 of the Connecticut Code of Evidence*** provides in relevant part: "The following are not excluded by the hearsay rule, even though the **[***15]** declarant is available as a witness . . . "(8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in the field by the witness, other expert witness or judicial notice."

[9] The opinion of the Appellate Court indicates that the plaintiff questioned Rodin in the presence of the jury as to whether he remembered reading the article. See *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 608*. Our review of the record, however, indicates that the plaintiff questioned Rodin about the article only in connection with the offer of proof, which was conducted outside the presence of the jury. As we explain hereinafter, this discrepancy does not alter our conclusion that the trial court did not abuse its discretion in precluding the plaintiff from introducing the article to impeach Rodin's credibility.

entitled 'Acute Compartment Syndrome in Lower Extremity Musculoskeletal Trauma,' was the article reviewed by Rodin prior to his deposition. The court [initially indicated that it would admit] **[***17]** into evidence a copy of the journal article because Rodin testified that 'he relied on this journal article in preparation for his deposition . . . .'" *Id., 608-609*. After additional argument on the issue, however, the court indicated that it would reconsider its ruling based on arguments provided by the parties prior to the next trial day.

"Prior to the next trial day, the defendants submitted a memorandum of law in opposition to the admission of the journal article through a nonexpert witness to impeach the credibility of that witness. Rodin had not been disclosed as an expert witness. The defendants argued that the journal article was hearsay and the learned treatise exception to the hearsay rule did not apply because the article had not been identified as **[*123]** authoritative nor was it relied upon by an expert witness. The defendants further argued that the plaintiff intended to use the journal article for substantive purposes. Counsel for the plaintiff [argued] that Rodin's deposition testimony was untruthful as it was at odds with the substance of the journal article, although Rodin had testified that his testimony was consistent with the journal article." *Id., 609*. The plaintiff made clear that he was **[***18]** not offering the **[**508]** article under the learned treatise exception or for the truth of the matter asserted in the article. Rather, the plaintiff explained that he intended to use the article for the nonhearsay purpose of impeaching Rodin's credibility by establishing that Rodin had been untruthful in his deposition testimony. Specifically, the plaintiff pointed to the following exchange between the plaintiff's counsel and Rodin during Rodin's deposition:

"Q. Did you review any literature in preparation for your deposition today?

"A. I did look at one . . . article.

"Q. What did you look at?

"A. Journal of American Academy of Orthopaedic Surgery.

"Q. What article did you review?

"A. An article on compartment syndrome.

"Q. When was that article published?

"A. I believe 2005; I'm not sure exactly.

"Q. What did the article say?

"A. Just a review about what compartment syndrome is, and diagnosis and treatment.

"Q. What did it list in there about diagnosis and treatment?

[*124] "A. Similar to things I've already mentioned in terms of specific things to look at on clinical examination."

The plaintiff claimed that this portion of Rodin's deposition testimony suggested that the article was consistent with his opinion **[***19]** concerning the diagnosis and treatment of compartment syndrome when, in fact, the article was inconsistent with his testimony in several respects.[10] To demonstrate that Rodin's deposition testimony was false in that regard, the plaintiff's counsel sought to question Rodin about his deposition testimony describing the diagnosis and treatment of compartment syndrome, to confront Rodin with portions of the article that

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[10] We note that it is questionable whether the portion of Rodin's deposition testimony on which the plaintiff relies would have been construed by the jury to suggest that the article supported his testimony regarding the diagnosis and treatment of compartment syndrome. Rather, it seems much more likely that, when Rodin testified that the information in the article **[***20]** was "[s]imilar to things I've already mentioned in terms of specific things to look at on clinical examination," he meant only that the article covered similar subject matter, not that it necessarily was consistent with his testimony. The trial court, in the exercise of its discretion, reasonably could have excluded the evidence on that ground. Cf. *State v. Annulli, 309 Conn. 482, 496, 71 A.3d 530 (2013)* (fact that testimony was unclear as to whether witness gave false statement weighed against its admission). As discussed hereinafter, however, it is clear that the article also was inadmissible because it constituted extrinsic evidence offered to prove an act of misconduct.

contradicted his testimony on certain points, and to introduce those excerpts from the article into evidence.[11] The trial court vacated its order from the previous day and ruled that the article was inadmissible. **[*125]** The court did allow the **[**509]** plaintiff's counsel to supplement her offer of proof on this issue and, for that purpose, she confronted Rodin with the contradictions between his deposition testimony and the article.[12]

On appeal to the Appellate Court, the plaintiff claimed that the trial court improperly precluded him from using the journal article to impeach Rodin's credibility. The plaintiff maintained that Rodin had not been truthful in testifying that his deposition testimony was consistent with the journal article, and that he "was entitled to bring . . . Rodin's lack of candor to the attention of the jury." *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 607*. The plaintiff further maintained that the learned treatise exception to the hearsay rule was inapplicable to his claim because he had not sought admission of the article as substantive evidence but, rather, merely to impeach Rodin's credibility by demonstrating that he was untruthful when he suggested in his deposition testimony that the article supported his opinion. The Appellate Court rejected the plaintiff's claim, concluding that the trial court **[***23]** did not abuse its discretion in precluding him from using the article to **[*126]** cross-examine Rodin because "[t]he trial court has discretion to limit the admissibility of a learned treatise when used to undermine or bolster credibility dependent on the facts of a particular case." *Id., 611*. In support of its conclusion, the Appellate Court further observed that Rodin had not been disclosed as an expert witness and that "no expert in this case had identified the article as standard authority . . . ." Id. The Appellate Court, believing that the plaintiff had questioned Rodin in front of the jury about his failure to recall at trial that he had reviewed an article in preparation for his deposition; see footnote 9 of this opinion; also concluded that, even if the trial court had abused its discretion in precluding the plaintiff from introducing the article to impeach Rodin's credibility, any such impropriety was harmless. *Filippelli v. Saint Mary's Hospital, supra, 611-12*.

On appeal to this court, the plaintiff challenges the Appellate Court's conclusion that the trial court properly exercised its discretion in refusing to admit the article pursuant to the learned treatise exception because that was not the theory on which **[***24]** he relied in seeking to introduce the article at trial. The plaintiff also contends that the Appellate Court's conclusion was predicated on the mistaken belief that the plaintiff had questioned Rodin in the presence of the jury with respect to his failure to recall that he had reviewed the article in preparation for his deposition. We agree with the plaintiff both that the learned **[**510]** treatise exception has no bearing on whether the article was admissible for the purpose of impeaching Rodin's

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[11] Specifically, the plaintiff's counsel underscored the following discrepancies between Rodin's testimony and the journal article: Rodin testified that compartment pressures are used only to confirm a diagnosis of compartment syndrome and are not taken to make a diagnosis in questionable cases, whereas the article recommends that compartment pressures be taken in order to make a diagnosis under such circumstances; Rodin testified that a patient with compartment syndrome will experience extreme pain upon passive range of motion of the big toe, whereas the article indicates that pain **[***21]** is merely aggravated in such circumstances; and Rodin testified that irreversible tissue damage can occur in two hours, whereas the article indicates that such damage takes eight hours.

[12] In ruling that the article was inadmissible to impeach Rodin, the trial court explained: "The grounds on which the court is not allowing the [article] in is based on the fact that the court finds the journal article to be hearsay. And I've had no satisfactory exception provided to the court for that hearsay." The court further explained that the article "is a learned treatise," that, under our Code of Evidence, "the witness to which this article would be presented would have to be an expert witness," and that the plaintiff could not attack Rodin's credibility because "Rodin has not been designated as an expert witness . . . ." Finally, the court noted that "the article is dated eight months after the care and treatment of [the plaintiff]" and that "Rodin testified he did not review . . . this article in preparation for the care and treatment of [the plaintiff]." The plaintiff, however, did not offer the article pursuant to the learned treatise exception or for the truth of its contents but, rather, to **[***22]** impeach Rodin's credibility by demonstrating that his alleged statement that the article supported his deposition testimony was false. As explained hereinafter, despite the trial court's failure to squarely address the plaintiff's arguments, it is clear that the article was not admissible for the purpose for which the plaintiff offered it.

credibility and that the record indicates that the questioning at issue took place outside the presence of the jury. We nevertheless conclude that the trial court did not abuse its discretion in precluding the plaintiff from using the article to impeach Rodin's credibility. Even if Rodin did suggest during his deposition that the article supported **[*127]** his testimony; but see footnote 10 of this opinion; the article was inadmissible for that purpose because extrinsic evidence generally is not admissible to impeach a witness by proving that he or she engaged in an act of misconduct.[13]

Although our rules of evidence generally prohibit evidence of misconduct to prove the character of a witness; see *Conn. Code Evid. § 4-5*; one exception to that rule allows a party to impeach the credibility of a witness **[*128]** by asking about particular acts of misconduct that tend to demonstrate the witness' lack of veracity. *Conn. Code Evid. § 6-6 (b) (1)*.[14] As we previously **[***27]** have recognized, "[a] claim that [a] witness gave false testimony [under oath] in a prior [proceeding] is directly relevant to a witness' credibility." *Weaver v. McKnight, 313 Conn. 393, 427, 97 A.3d 920 (2014)*. Our evidentiary rules also provide, however, that extrinsic evidence generally may not be used to establish that a witness engaged in such misconduct.[15] *Conn. Code Evid. § 6-6 (b) (2)*. **[**511]** Rather, "the only way to prove misconduct of a witness for impeachment purposes is through examination of the witness. See, e.g., *Martyn v. Donlin, 151 Conn. 402, 408, 198 A.2d 700 (1964)*. The party examining the witness must accept the witness' answers about a particular act of misconduct and may not use extrinsic evidence to contradict the witness' answers. *State v. Chance, [236 Conn. 31, 60, 671 A.2d 323 (1996)]*."[16] *Weaver v. McKnight, supra, 427*. This limitation on the use of extrinsic evidence to prove specific acts of misconduct "prevents a trial within a trial on the collateral question of whether the witness did, in fact, commit the alleged misconduct." *Id., 430*; see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.32.5, pp. 400-401.

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[13] As noted previously; see footnote 12 of this opinion; the trial court did not rely on this reasoning in ruling that the article **[***25]** was inadmissible to impeach Rodin. The court concluded, rather, that the article was hearsay, that the plaintiff had offered "no satisfactory [hearsay] exception" pursuant to which the article was admissible, and the article was not otherwise admissible under the learned treatise exception. Although at trial the defendants principally argued that the article was inadmissible because it did not meet the requirements of the learned treatise exception, the defendants also asserted that, to the extent it was offered for impeachment purposes, the article related to "a collateral issue." Similarly, in their brief to this court, the defendants argue primarily that the article was inadmissible under the learned treatise exception, but also claim that "there was no other way for the [journal] article to be used against the defendant, a fact witness . . . ." To the extent the defendants have not expressly renewed their contention that the article was inadmissible as extrinsic evidence offered to impeach Rodin on a collateral matter, we note that "[w]here the trial court reaches a correct decision but on mistaken grounds, this court has repeatedly sustained the trial court's action if proper grounds **[***26]** exist to support it." (Internal quotation marks omitted.) *State v. Ruffin, 206 Conn. 678, 683, 539 A.2d 144 (1988)*; see also *State v. Henry, 253 Conn. 354, 363-66, 752 A.2d 40 (2000)* (although trial court admitted testimony under coconspirator exception to hearsay rule, this court affirmed on ground that testimony was not hearsay); *State v. John, 210 Conn. 652, 679-80, 557 A.2d 93* (affirming trial court's ruling admitting out-of-court statement on different grounds than articulated by trial court, noting that "this court is free to sustain a ruling on a different basis from that relied upon by the trial court"), cert. denied, *493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989)*; *State v. Badgett, 200 Conn. 412, 433, 512 A.2d 160* ("this court may . . . consider grounds for affirming a judgment that may have been overlooked by counsel in an appeal to this court"), cert. denied, *479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986)*. Because it is clear from the record that the plaintiff sought to use the article for the improper purpose of demonstrating by use of extrinsic evidence that Rodin had engaged in an act of misconduct, we affirm the judgment of the Appellate Court on that basis.

[14] *Section 6-6 (b) (1) of the Connecticut Code of Evidence* provides: "A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness."

[15] Extrinsic evidence may be used for such purposes, however, "[w]here . . . prior acts of misconduct are relevant **[***28]** to a substantive or material issue in the case . . . ." (Internal quotation marks omitted.) *State v. Annulli, 309 Conn. 482, 492 n.7, 71 A.3d 530 (2013)*.

[16] We note that the plaintiff does not claim that the trial court improperly precluded him from asking Rodin whether he testified falsely at his deposition. He claims, rather, that the trial court improperly precluded him from using the article only to demonstrate that Rodin did, in fact, testify falsely.

In the present case, the plaintiff sought to introduce the article for the improper purpose of proving through **[*129]** extrinsic evidence that Rodin testified falsely in response to questioning at his deposition. A review of the transcript from the plaintiff's offer of proof demonstrates that allowing the plaintiff to use the article for this purpose would have created a "trial within a trial" on the collateral issue of whether Rodin had, in fact, testified falsely at his deposition. See *Weaver v. McKnight, supra, 313 Conn. 430*. First, because the plaintiff did not request the article at the time of the deposition, and because Rodin testified in connection with the offer of proof that he could not recall reading the article, the plaintiff would have had to present extensive evidence merely to establish that the article in question was the article **[***29]** that Rodin had read prior to the deposition. In attempting to do so in his first offer of proof, the plaintiff confronted Rodin with his deposition testimony in which he indicated that he had read an article from the Journal of American Academy of Orthopaedic Surgery about the diagnosis and treatment of compartment syndrome that he believed was published in 2005. The plaintiff then asked Rodin whether the article in question was the article that he had reviewed. Because Rodin could not recall reading the article prior to his deposition, the plaintiff then introduced the tables of contents from all of the issues of that journal that had been published between 2004 and 2009 for the purpose of establishing that the 2005 article was the only one dealing with compartment syndrome. All of this evidence was offered to establish that the article in question was the article that Rodin had reviewed prior to his deposition. In support of the plaintiff's supplemental offer of proof, he adduced additional evidence to demonstrate that the information contained in the article was inconsistent with Rodin's deposition testimony. To that end, the plaintiff's counsel asked Rodin several questions about **[***30]** the contents of the article, and Rodin responded to each one that he could **[*130]** not answer without first reading the article. Finally, counsel confronted Rodin with several portions of his deposition testimony wherein he had provided information concerning the diagnosis and treatment of compartment syndrome that differed from the information contained in the article.

The plaintiff sought to introduce all of this evidence solely for the purpose of establishing that, despite Rodin's alleged suggestion to the contrary, the article on **[**512]** which he relied to prepare for his deposition was inconsistent with his deposition testimony. Because Rodin was a fact witness and not an expert witness, however, he testified only about his own treatment of the plaintiff, and did not offer an expert opinion on the standard of care for the diagnosis and treatment of compartment syndrome.[17] Thus, whether the article and Rodin's deposition testimony were consistent was collateral to the substantive issue of whether he was negligent in his diagnosis and treatment of the plaintiff. See *Martyn v. Donlin, supra, 151 Conn. 407-408* (in wrongful death action, trial court properly excluded documents offered for collateral issue of whether defendant police officer **[***31]** lied on job application). We have long recognized that "[s]uch a minitrial about a collateral issue distracts from the main issues at trial, wastes the court's and the jury's time, and is frequently based on hearsay evidence of questionable value." *Weaver v. McKnight, supra, 313 Conn. 430*; see also *State v. O'Neill, 200 Conn. 268, 277, 511 A.2d 321 (1986)*; *State v. Horton, 8 Conn. App. 376, 380-81, 513 A.2d 168*, cert. denied, *201 Conn. 813, 517 A.2d 631 (1986)*. As the plaintiff's offers of proof demonstrate, allowing the plaintiff to introduce the article to impeach Rodin's credibility would have resulted in extended, potentially confusing testimony about an issue that was not relevant to any substantive issue to be decided by the jury. **[*131]** Under *§ 6-6 (b) (2) of the Connecticut Code of Evidence*, extrinsic evidence was inadmissible for that purpose.[18]

[17] The parties agree that Rodin did not testify as an expert witness.

[18] The plaintiff makes two additional arguments to support his claim that the trial court abused its discretion in precluding him from introducing the article to impeach Rodin's credibility. Neither of these claims has merit. First, the plaintiff argues that, because Rodin

Accordingly, we conclude that the Appellate Court properly concluded that the trial court did not abuse **[**513]** its discretion in precluding the plaintiff from introducing the journal article to impeach Rodin's credibility.

B

The plaintiff next claims that the Appellate Court incorrectly concluded that the trial court did not abuse **[*132]** its discretion in limiting his use of the same journal article in connection with his cross-examination of the defendants' expert, Bazos. We reject this contention as well.

The following additional **[***34]** facts and procedural history are relevant to this claim. At trial, Ronald M. Krasnick, an orthopedic surgeon, testified as an expert witness on behalf of the plaintiff. Krasnick testified that the Journal of the American Academy of Orthopaedic Surgery is "a standard authority in the field of orthopedic surgery."[19] When Bazos later testified as an expert on behalf of the defendants, the plaintiff sought, during cross-examination, to introduce portions of the article that contradicted Bazos' testimony regarding the standard of care for the diagnosis and treatment of compartment syndrome. The plaintiff argued that the article was admissible under the learned treatise exception to the hearsay rule because Krasnick had identified the Journal of the American Academy of Orthopaedic Surgery, in which the article was published, as a standard authority in the field of orthopedic surgery. See *Conn. Code Evid. § 8-3 (8)*. The defendants objected, arguing that the article was inadmissible because, although Krasnick had testified that the Journal of the American **[*133]** Academy of Orthopaedic Surgery was a standard authority, he did not identify the specific article in question as a standard authority. The defendants further argued **[***35]** that, if the article was admitted under the learned treatise exception, only the portions of the article that the plaintiff used to impeach Bazos' testimony should be admitted as a full exhibit. The trial court concluded that the

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would have testified at trial that **[***32]** he did not recall reviewing the article prior to his deposition, his deposition testimony that he had reviewed the article was a prior inconsistent statement, and the article and the tables of contents therefore were admissible to demonstrate that Rodin was lying when he testified that he did not remember reading the article. This claim fails because whether Rodin reviewed the article prior to his deposition was a collateral issue, and extrinsic evidence is not admissible to impeach a witness regarding an inconsistent statement on a collateral matter. See *State v. Diaz, 237 Conn. 518, 548, 679 A.2d 902 (1996)*.

Second, the plaintiff argues that the article was relevant to demonstrate that Rodin was untruthful when he sought to explain the meaning of certain statements contained in his medical records. Specifically, on the morning of March 5, 2005, after Rodin first examined the plaintiff upon his return to the emergency department, Rodin documented that there was a "question of compartment syndrome" and that "[t]his may very well be an impending compartment syndrome . . . ." According to the article, "[o]n diagnosis of impending . . . compartment syndrome, immediate measures must be taken," and "measuring compartment pressures is recommended" in **[***33]** questionable cases. Rodin testified at trial that he was certain that the plaintiff did not have compartment syndrome when he examined him that morning, and that his notation in the medical records merely reflected his concern that the plaintiff "was at risk for the development of compartment syndrome." The plaintiff claims that Rodin came up with this explanation about the meaning of his medical records only after reading the article, and that he should have been allowed to introduce the article and ask Rodin whether he reviewed it prior to his deposition to impeach his credibility on that issue. The plaintiff never argued at trial that the article was admissible for that purpose and we, therefore, will not consider it on appeal. *Travelers Ins. Co. v. Namerow, 257 Conn. 812, 831, 778 A.2d 168 (2001)* ("[o]ur review of evidentiary rulings made by the trial court is limited to the specific legal ground raised [at trial]" [internal quotation marks omitted]).

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[19] In response to questioning from counsel for the plaintiff, Krasnick testified as follows:

"Q. . . . [D]o you subscribe to any medical journals or any other medical literature?

"A. Primarily two . . . the Journal of Bone and Joint Surgery and the Journal of the American Academy of Orthopaedic Surgery. . . .

"Q. And is the Journal [of the American Academy of Orthopaedic Surgery] generally used as a reference tool by orthopedic surgeons?

"A. All journals are used as reference tools by orthopedic surgeons.

"Q. Is the Journal of the American Academy of Orthopaedic Surgery used in that capacity as well?

"A. Absolutely.

"Q. And is that publication a standard authority in the field of orthopedic surgery?

"A. Yes."

plaintiff would be allowed to cross-examine Bazos about the article, but that only those portions that the plaintiff used during his cross-examination would be admitted as a full exhibit and published to the jury.

After the trial court's ruling, the plaintiff initially **[***36]** attempted to read certain statements directly from the article during his questioning of Bazos. The defendants objected to the plaintiff reading from the article, however, and the trial court sustained the objection and directed the plaintiff to ask questions without reading from the article. Thereafter, without reading from the article, the plaintiff incorporated portions of the article into his questions by asking Bazos whether he agreed with certain statements. The plaintiff also twice approached Bazos and directed him to certain statements in the article on which the plaintiff's questions were based. After questioning Bazos and directing him to the **[**514]** statements in the article, the plaintiff sought permission to read those statements into the record, but the trial court denied the plaintiff's request. After the completion of the plaintiff's cross-examination, the trial court ruled that the portions of the article on which the plaintiff had not questioned Bazos would be redacted, with the redacted version being admitted as a full exhibit.

On appeal to the Appellate Court, the plaintiff claimed that the trial court had improperly limited his use of the article in connection with his **[***37]** cross-examination of Bazos. The plaintiff argued that the trial court had **[*134]** admitted the entire article as a full exhibit, and that it was improper for the court to prohibit him from reading directly from the article and directing Bazos' attention to certain portions of the article during his cross-examination. The plaintiff also claimed that the trial court improperly permitted only a redacted version of the article to be published to the jury after admitting the entire article as a full exhibit. The Appellate Court concluded that the trial court did not abuse its discretion in limiting the plaintiff's cross-examination of Bazos because the plaintiff had failed to meet the requirements of *§ 8-3 (8) of the Connecticut Code of Evidence* regarding the admission of a learned treatise. Specifically, the Appellate Court explained that "[b]oth Krasnick and Bazos testified that there is no standard authority regarding the diagnosis of compartment syndrome and that their knowledge of the care and treatment of such a condition is based on their reading of the whole of orthopedic literature and their education, training and experience as orthopedic surgeons." *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 613*. The Appellate Court also concluded that the trial court did not abuse its discretion **[***38]** in admitting only those portions of the article on which Bazos was questioned. *Id., 613 n.18*.

The plaintiff now claims that the Appellate Court improperly determined that the trial court did not abuse its discretion by limiting his use of the journal article during his cross-examination of Bazos because, contrary to the conclusion of the Appellate Court, the plaintiff had met the foundational requirements of the learned treatise exception. The plaintiff maintains that, because the trial court found that the article was admissible as a learned treatise under *§ 8-3 (8) of the Connecticut Code of Evidence*, it was improper for the trial court to limit his use of the article. The defendants contend to the contrary that the article should not have been admitted into evidence for any purpose because **[*135]** the plaintiff failed to meet the foundational requirements of the learned treatise exception and, in the alternative, that the trial court had the discretion to limit the plaintiff's use of the article on cross-examination. We reject the plaintiff's claim because, even if the plaintiff did meet the requirements for the admission of the article as a learned treatise, the trial court properly exercised its discretion in limiting the plaintiff's use of the **[***39]** article during cross-examination.

Under *§ 8-3 (8) of the Connecticut Code of Evidence*, "a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art" may be

admitted into evidence as an exception to the hearsay rule if two foundational requirements are satisfied. "First, the work must be recognized as a standard authority in the field by the witness, other expert witness or judicial notice, and, second, the work must either be brought to the attention of the witness on cross-examination or have been relied on by that expert during direct examination." (Internal quotation marks **[**515]** omitted.) *Pestey v. Cushman, 259 Conn. 345, 367, 788 A.2d 496 (2002)*. Connecticut's learned treatise rule "differs from that of most other jurisdictions, including the federal rule, in that we allow the material to be taken into the jury room as a full exhibit. . . . Most other jurisdictions bar such material from the jury room, limiting their use to an oral reading in connection with an expert witness' testimony. . . . This limitation seeks to avoid the danger of misunderstanding or misapplication by the jury and ensures that the jurors will not be unduly impressed by the text or use it as a starting point for reaching conclusions untested by **[***40]** expert testimony. . . . The Connecticut rule, on the other hand, has the advantage of allowing the jurors to examine more fully the text of what frequently is a technical and complicated discussion that may be unfathomable to a nonexpert juror who merely **[*136]** heard a single oral recitation. Although the concerns which underlie the federal rule cannot be completely obviated when the materials are allowed in the jury room, the dangers can be minimized by the judicious exercise of discretion by the trial court in deciding which items ought to be admitted as full exhibits." (Internal quotation marks omitted.) *State v. Gupta, 297 Conn. 211, 239, 998 A.2d 1085 (2010)*; see also C. Tait & E. Prescott, supra, § 7.11.3, pp. 478-79.

As stated previously, for a writing to be admissible under the learned treatise exception, it must be identified as a "standard authority in the field," either by an expert witness or by judicial notice. *Conn. Code Evid. § 8-3 (8)*. The question arises, however, whether admissibility under the learned treatise exception requires testimony by the expert witness that the particular *article* is a standard authority, or whether it is sufficient, as occurred in the present case, that the expert merely identify the *journal* as such authority.

Although we have not had occasion to do so, the Appellate **[***41]** Court previously addressed this issue in *Musorofiti v. Vlcek, 65 Conn. App. 365, 382-85, 783 A.2d 36*, cert. denied, *258 Conn. 938, 786 A.2d 426 (2001)*. In that case, after the plaintiff's treating physician identified the Journal of the American Dental Association as a standard authority in the dental profession, the trial court allowed the defendants to introduce an article from that journal pursuant to the learned treatise exception. *Id., 382-83*. On appeal, the plaintiffs claimed that "acceptance of the journal that contained the article [as a standard authority in the field] was insufficient to qualify the article contained therein as a learned treatise." *Id., 384*. In support of this claim, the plaintiffs relied on *Meschino v. North American Drager, Inc., 841 F.2d 429, 434 (1st Cir. 1988)*, in which the United States Court of Appeals for the First Circuit, addressing a similar claim, stated that it "would not accept [the] **[*137]** plaintiff's argument that the contents of all issues of a periodical may be qualified wholesale under [r]ule 803 (18) [of the Federal Rules of Evidence] by testimony that the magazine was highly regarded. In these days of quantified research, and pressure to publish, an article does not reach the dignity of a 'reliable authority' merely because some editor, even a most reputable one, sees fit to circulate it. Physicians engaged in research may write **[***42]** dozens of papers during a lifetime. Mere publication cannot make them automatically reliable authority."

The Appellate Court generally agreed with the reasoning of the court in *Meschino*, stating that it "would not accept that *all* articles in a periodical may be qualified as learned through the mere demonstration that the periodical itself is highly regarded." (Emphasis in original.) *Musorofiti v. Vlcek, supra, 65 Conn. App. 384*. **[**516]** The Appellate Court further observed, however, that *Meschino* should not be read as creating a per se

rule, and that there may be circumstances in which a particular periodical is so highly regarded within a field that all articles published therein would be admissible as a learned treatise. Thus, the Appellate Court endorsed the approach taken by the United States Court of Appeals for the Second Circuit in *Costantino v. Herzog, 203 F.3d 164, 172 (2d Cir. 2000)*, wherein the court stated that "[p]ublication practices vary widely, and an article's publication by an esteemed periodical which subjects its contents to close scrutiny and peer review, obviously reflects well on the authority of the article itself. Indeed, because the authoritativeness inquiry is governed by a 'liberal' standard, good sense would seem to compel recognizing some periodicals—provided there is a **[***43]** basis for doing so—as sufficiently esteemed to justify a presumption in favor of admitting the articles accepted for publication therein." The Appellate Court concluded in *Musorofiti* that, under the circumstances **[*138]** of that case, the trial court did not abuse its discretion in admitting the article based on testimony that the journal "was widely read, recognized and accepted in the dental profession as authoritative." *Musorofiti v. Vlcek, supra, 382-83*; see *id., 385*. We agree generally with the approach adopted by the Appellate Court in *Musorofiti*.

In the present case, it is questionable whether Krasnick's testimony provided an adequate foundation for establishing the admissibility of the article under *§ 8-3 (8) of the Connecticut Code of Evidence.* Although we agree, as the Appellate Court recognized in *Musorofiti v. Vlcek, supra, 65 Conn. App. 385*, that evidence that a journal is particularly esteemed within a field may "justify a presumption in favor of admitting the [article] accepted for publication therein," it is by no means clear that Krasnick's testimony met that standard with respect to the Journal of the American Academy of Orthopaedic Surgery. Indeed, Krasnick testified that "[a]ll journals are used as reference tools by orthopedic surgeons." Krasnick's testimony that the Journal of the American **[***44]** Academy of Orthopaedic Surgery is one publication among many relied on by orthopedic surgeons as a general reference tool does not provide a particularly firm basis for concluding that that publication is regarded as so authoritative and respected within the field of orthopedic surgery that all articles published therein merit learned treatise status.

Even assuming that the plaintiff satisfied the requirements of *§ 8-3 (8) of the Connecticut Code of Evidence* for admission of the article as a learned treatise, however, the trial court did not abuse its discretion in limiting the plaintiff's use of the article on cross-examination. The essence of the plaintiff's claim is that the trial court unduly limited his use of the article by requiring him to incorporate portions of it into his questions, rather than allowing him to read directly from **[*139]** the article, because it had been marked as a full exhibit. Significantly, however, the plaintiff's assertion that the trial court had marked the entire article as a full exhibit is belied by the record. Although the trial court initially indicated that the entire article would be admitted as a full exhibit, after hearing further argument from the defendants, the court indicated that only the **[***45]** portions of the article on which the plaintiff questioned Bazos would be marked as a full exhibit and published to the jury.[20] Moreover, the mere fact **[**517]** that the trial

[20] Before the plaintiff questioned Bazos on the article, the trial court initially indicated that the entire article would be admitted as a full exhibit. The defendants argued, however, that only the portions used for impeachment should be admitted, and the trial court responded, "[w]ell, I'm going to wait and see what [plaintiff's counsel] brings up on cross, it'll be marked in full and will not be published to the jury and then we'll . . . see what she brings out." At the conclusion of the plaintiff's cross-examination of Bazos, the defendants again inquired as to which portions of the article would be admitted as a full exhibit, and the trial court stated, "my ruling on what should and shouldn't come in is everything that [Bazos] was questioned on. . . . And I want you to work with [the plaintiff's] counsel on that, everything else is redacted." Consistent **[***47]** with the transcript, a review of the exhibits reveals that only the redacted version of the article was marked as a full exhibit. Thus, although the trial court's initial ruling may have suggested that the entire article would be admitted in full, the court ultimately admitted only the redacted version, and did so only after the plaintiff had completed his cross-examination of Bazos.

court found that the article met the requirements for admissibility under the learned treatise exception does not mean that the court was required to allow the plaintiff unfettered use of the article. *Section 8-3 (8)* merely provides that materials which meet the foundational requirements of the learned treatise exception are "not excluded by the hearsay rule," and does not mandate the admission of such materials or otherwise "purport to circumscribe the discretion generally afforded to a trial court to determine the admissibility of evidence in light of the facts of record." *Harlan v. Norwalk Anesthesiology, P.C., 75 Conn. App. 600, 607, 816 A.2d 719*, cert. denied, *264 Conn. 911, 826 A.2d 1155 (2003)*. As **[*140]** discussed previously, we have long recognized that this state's approach to the learned treatise exception, which allows materials admitted under the rule to be treated as full exhibits and taken into the jury room during deliberations, carries "the danger of misunderstanding or misapplication by the jury" that other jurisdictions seek to avoid by precluding the admission of such materials as full exhibits. *Cross v. Huttenlocher, 185 Conn. 390, 396, 440 A.2d 952 (1981)*. We therefore have explained that trial **[***46]** courts may minimize the risks posed by the rule by use of "the judicious exercise of discretion . . . in deciding which items ought to be admitted as full exhibits." *Id., 396-97*; see also *id., 397-98* (trial court properly exercised discretion in excluding portions of medical texts recognized as standard authority in field that were likely to confuse or mislead jury).

In the present case, it was well within the trial court's discretion to preclude the plaintiff from reading directly from the article during his cross-examination of Bazos, and to admit as a full exhibit only the portions of the article about which Bazos was questioned. The trial court did not, as the plaintiff argues, preclude him from "engaging in any cross-examination of [Bazos] with the article . . . ." Rather, the record reveals that the plaintiff's counsel questioned Bazos extensively as to whether he agreed with the information contained in the article and, in many instances, counsel quoted the article verbatim in connection with his questioning.[21] On at least two occasions, counsel approached Bazos, **[*141]** directed him to the portion of the **[**518]** article on which the question was based, and asked whether he agreed **[***48]** with a particular statement. Finally, the redacted version of the article that the trial court admitted as a full exhibit contained all of the sections of the article that the plaintiff's counsel had incorporated into her questions. Thus, although the trial court did not allow the plaintiff to read the article into the record, the jury was able to read the article for itself and compare it to Bazos' testimony.

Additionally, it bears emphasis that, contrary to the plaintiff's claim, the article was not a full exhibit until *after* he completed his cross-examination and the trial court was able to redact the portions of the article on which the plaintiff **[***49]** did not rely. It was not an abuse of discretion for the trial court to preclude the plaintiff from reading from a document that was not yet a full exhibit; see *Kaplan v. Mashkin Freight Lines, Inc., 146 Conn. 327, 334-35, 150 A.2d 602 (1959)*; and to postpone admitting the article as a full exhibit until after the plaintiff had finished his cross-examination, when the court could determine which portions of the article were relevant to Bazos' testimony. See *State v. Wade, 96 Conn. 238, 251, 113 A. 458 (1921)* ("The question of the cross-examiner [confronting a witness with a learned treatise] must be confined to such parts of the authority as tend to contradict the opinion as expressed by the witness. It cannot be based upon some illustration or isolated case used by the authority to explain or illustrate his opinion."). Accordingly, the Appellate Court properly concluded that the trial court did not abuse

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[21] For example, the plaintiff asked Bazos whether he agreed that "pain out of proportion to the injury aggravated by passive stretching of muscle groups in the corresponding compartment is one of the earliest and most sensitive clinical signs of compartment syndrome," and that "[p]eripheral pulses are palpable and, unless a major arterial injury is present, capillary refill is routinely present." This and other language used by the plaintiff in his questioning of Bazos is identical to that appearing in the article. See S. Olson & R. Glasgow, supra, 13 J. Am. Acad. Orthopaedic Surgeons 436.

its discretion in limiting the plaintiff's use of the article while cross-examining Bazos.

II

The plaintiff also claims that the Appellate Court improperly concluded that the trial court did not abuse its discretion in precluding him from questioning Bazos **[*142]** about his previous experience as an expert on behalf of Rodin. The plaintiff maintains that this evidence was relevant because Bazos falsely testified at his deposition **[***50]** that he had never worked with Rodin and that the only other case in which he remembered giving deposition testimony was one in which Rodin was not a party. According to the plaintiff, he should have been allowed to ask Bazos about this prior experience with Rodin for the purpose of impeaching Bazos' credibility. Finally, the plaintiff asserts that, contrary to the determination of the Appellate Court, the trial court's failure to permit him to make an offer of proof and to mark an exhibit for identification prevented him from making an adequate record of this claim. We reject each of these contentions.

The following additional facts and procedural history are relevant to this claim. On April 4, 2011, approximately one month prior to the commencement of trial, counsel for the plaintiff deposed Bazos. During the deposition, the plaintiff's counsel briefly questioned Bazos about his prior experience serving as an expert witness, and whether he had ever heard of or worked for Rodin. When asked whether he remembered the names of any physicians for whom he previously had provided expert deposition testimony, Bazos stated, "[t]he only one I remember, because it was relatively recent, was [a physician **[***51]** named] Geiger." When asked whether he had ever heard of Rodin before his involvement in this case, Bazos testified, "I've seen his name; I've not worked with him, but Waterbury is not that far away, and we'll occasionally see patients that live there and may have been treated out there in the past."

[519]** Prior to trial, the defendants filed a motion in limine to preclude evidence relating to other malpractice actions against Rodin. At a pretrial hearing on the motion, the plaintiff indicated that, although he did not intend to question Rodin with respect to other malpractice **[*143]** claims, he did intend to ask Bazos whether he had served as an expert witness on behalf of Rodin in any other cases. The plaintiff claimed that Bazos had testified falsely during his deposition when asked about his relationship with Rodin, and that he intended to impeach Bazos' credibility by bringing that false testimony to the jury's attention. Specifically, the plaintiff indicated that, prior to the present case, Bazos had been disclosed as an expert witness on behalf of Rodin in two other medical malpractice cases. The plaintiff argued that Bazos intentionally concealed his relationship with Rodin when he stated **[***52]** that he only remembered testifying as an expert witness on behalf of Geiger and suggested that he had no knowledge or familiarity with Rodin other than having come across his name in the course of his practice. The plaintiff maintained that he should be allowed to question Bazos regarding his previous work as an expert on behalf of Rodin to show that Bazos lied during his deposition. The defendants argued that Bazos did not testify falsely at his deposition, but simply had misunderstood the questions asked by the plaintiff's counsel,[22] and that Bazos intended to submit an errata sheet to clarify his answers. The defendants further argued that allowing the plaintiff to present evidence that Bazos had served as an expert on behalf of Rodin in other malpractice cases would be unfairly prejudicial because it

[22] Specifically, although acknowledging that the plaintiff's counsel had asked Bazos at his deposition whether he "remember[ed] the names of any of the physicians for which [he had] given *deposition* testimony"; (emphasis added); the defendants explained that Bazos had responded that he only recalled testifying on behalf of Geiger because he mistakenly thought that the plaintiff's counsel was merely seeking to ascertain whether he had previously testified as an expert at trial, and Bazos had not previously testified at trial on behalf of Rodin. Counsel for the defendants also argued that Bazos' deposition testimony that he had not previously worked with or met Rodin was not false because, although he had served as an expert on Rodin's behalf, his relationship was with Rodin's counsel and her firm, rather than with Rodin himself.

would reveal that Rodin **[*144]** previously had been sued by other patients. The trial court agreed with the defendants that evidence of other malpractice claims against Rodin would be unduly prejudicial, but also concluded that the plaintiff should be allowed to ask Rodin whether he lied under oath at his deposition. The trial court therefore granted in part the defendants' motion in limine, **[***53]** ruling that the plaintiff could ask Bazos whether he had a prior "working relationship" with Rodin, but not whether he had previously served as an expert witness on Rodin's behalf.

At trial, the plaintiff renewed his request to question Bazos about his prior work for Rodin. As an additional basis for the plaintiff's belief that Bazos had testified falsely at his deposition when **[***54]** he claimed only to remember testifying as an expert on behalf of Geiger, the plaintiff indicated that Bazos gave deposition testimony on behalf of Rodin in another case just two months prior to his deposition in the present case, whereas his deposition testimony on behalf of Geiger was given approximately one year earlier. The plaintiff also claimed that, just five days before his deposition in this case, Bazos signed an errata sheet for a deposition he had given on behalf of Rodin in another case. The plaintiff then requested the opportunity to make an offer of proof outside **[**520]** the presence of the jury. The trial court reaffirmed its original ruling and denied the plaintiff's request to make an offer of proof.

Following Bazos' testimony, the plaintiff asked to mark for identification the certification page of a deposition Bazos had given on behalf of Rodin in another case. The trial court denied the plaintiff's request, but allowed the plaintiff to read the certification page into the record.

On appeal to the Appellate Court, the plaintiff claimed that the trial court had abused its discretion both by precluding him from questioning Bazos about his work **[*145]** as an expert on behalf of Rodin **[***55]** and by denying his request to make an offer of proof and mark the certification page as an exhibit for identification. With respect to the first claim, the Appellate Court concluded that the trial court reasonably precluded the plaintiff from introducing evidence of other medical malpractice actions in which Bazos had testified on behalf of Rodin on the ground that such evidence was more prejudicial than probative. *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 622*. With respect to the plaintiff's second contention, the Appellate Court concluded that, although the trial court improperly denied the plaintiff's request to make an offer of proof and mark an exhibit for identification, both errors were harmless. *Id., 623-26*.

As discussed in part I of this opinion, our evidentiary rules allow a party to impeach a witness by asking about specific acts of misconduct that are probative of the witness' lack of veracity; *Conn. Code Evid. § 6-6 (b) (1)*; and false testimony given under oath is a classic example of misconduct that may be used for such purposes. See *Weaver v. McKnight, supra, 313 Conn. 427*. We have long recognized, however, that the right to cross-examine a witness with respect to such acts is not unlimited. "First, cross-examination may only extend to specific acts of misconduct other than a felony conviction **[***56]** if those acts bear a special significance upon the issue of veracity . . . . Second, extrinsic evidence of such acts is generally inadmissible [unless the prior acts of misconduct are relevant to a material or substantive issue in the case]. *Conn. Code Evid. § 6-6 (b) (2)*." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State v. Annulli, 309 Conn. 482, 492, 71 A.3d 530 (2013)*. Finally, consistent with the broad leeway that trial courts have in regard to rulings pertaining to the admissibility of evidence, "[w]hether to permit cross-examination as to particular acts of misconduct . . . **[*146]** lies largely within the discretion of the trial court." *Id., 492-93*; see also C. Tait & E. Prescott, supra, § 6.32.4, p 399 ("[c]ross-examination into the misconduct of a witness for impeachment purposes is discretionary with the trial judge, as to both

allowance and extent").

In the present case, it is apparent that the trial court properly exercised its discretion in precluding the plaintiff from questioning Bazos as to whether he previously had testified as an expert on behalf of Rodin. First, whether Bazos previously served as an expert on behalf of Rodin was a collateral matter because it was relevant only to Bazos' credibility and not to any substantive issue in the case. See *State v. Annulli, supra, 309 Conn. 494-95* ("[a]n issue is collateral if it is not relevant **[***57]** to a material issue in the case *apart from its tendency to contradict the witness*" [emphasis in original; internal quotation marks omitted]). In other words, although Bazos' alleged false deposition testimony bore on his veracity, his relationship with Rodin was not relevant to the plaintiff's claim that Rodin was negligent **[**521]** in failing to timely diagnose and treat the plaintiff's compartment syndrome.[23] Furthermore, for obvious reasons, evidence **[*147]** of prior claims of professional negligence against Rodin, which were not otherwise admissible, would have been highly prejudicial to the defendants. Thus, as the trial court concluded, allowing the plaintiff unrestricted inquiry into Bazos' work as an expert for Rodin would have injected a collateral issue into the case that was extremely prejudicial to the defendants.

More importantly, the trial court did not bar the plaintiff from questioning Bazos whether he had testified falsely during his deposition, but simply precluded the plaintiff from asking Bazos about the nature of his relationship with Rodin, because allowing the plaintiff to do so would have revealed to the jury that other patients had filed malpractice actions against Rodin. As the trial court recognized, allowing the plaintiff to conduct this line of inquiry would have created a substantial risk **[*148]** that the jury might infer that Rodin was negligent in the present case because he had been a defendant in other medical malpractice actions. See *Lai v. Sagle, 373 Md. 306, 323, 818 A.2d 237 (2003)* ("similar **[**522]** acts of prior malpractice litigation should be excluded to prevent a jury from concluding that a doctor has a propensity to commit medical malpractice"); cf. *Conn. Code Evid. § 4-5 (a)*

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[23] The dissent maintains that Bazos' previous relationship with Rodin was not collateral because it "was relevant to the issue of his potential bias or interest in the outcome of the case" and that "evidence tending to show a witness' bias, prejudice or interest is never collateral." (Internal quotation marks omitted.) To the extent the plaintiff preserved this claim at trial and has **[***58]** raised it on appeal, we disagree that the mere fact that an expert witness previously served as an expert on behalf of the same party in an unrelated matter is admissible to demonstrate bias. It is well established that, although a trial court may not unduly restrict a party from impeaching a witness with evidence of bias, the court maintains the discretion to limit the scope of such evidence when it is of limited probative value; see *State v. Lee, 229 Conn. 60, 69-70, 640 A.2d 553 (1994)*; C. Tait & E. Prescott, supra, § 6.30.6 (b), p. 393; and to exclude relevant evidence that will result in unfair prejudice to the opposing party. *Conn. Code Evid. § 4-3* ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice"); see also *Cousins v. Nelson, 87 Conn. App. 611, 622-24, 866 A.2d 620 (2005)*. Thus, in addressing the identical issue in *Cousins*, the Appellate Court concluded that the trial court did not abuse its discretion in precluding the plaintiff from questioning the defendant's expert about other cases in which he had served as an expert on the defendant's behalf and, instead, limiting the plaintiff to asking whether the expert had a "personal relationship" with the defendant. (Internal quotation marks omitted.) *Cousins v. Nelson, supra, 623-24*. As the Appellate Court observed in that case, evidence that an expert witness previously **[***59]** served as an expert on behalf of the same party in an unrelated case "could not [reveal] any potential personal stake on the part of [the expert] in the outcome of the trial." *Id., 623*.

As in *Cousins*, the trial court in the present case did not completely bar the plaintiff from asking Bazos about his previous relationship with Rodin, but merely precluded him from asking Bazos whether he had worked as an expert for Rodin in other cases. It bears noting, moreover, that although the trial court indicated that the plaintiff could ask Bazos whether he had a "working relationship" with Rodin, the court also expressly informed the plaintiff's counsel that it was willing to consider other suggestions as to how the relationship could be described without alerting the jury to the other cases in which Rodin was named as a defendant. Of course, the plaintiff also was free to explore Bazos' potential bias in favor of Rodin by asking whether he was being compensated for his work in the present case. Testimony about previous cases, however, would have had little or no probative value and would have been extremely prejudicial to the defense because it would have revealed that Rodin had been a defendant in **[***60]** other medical malpractice actions. Thus, the trial court properly exercised its discretion in precluding this evidence to forestall the serious risk that the jury would conclude that Rodin likely was negligent in the present case merely because he had been a defendant in other malpractice actions.

("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character **[***61]** or criminal tendencies of that person"); 1 K. Broun, McCormick on Evidence (7th Ed. 2013) § 189, pp. 1025-26. The court also recognized, however, that the plaintiff had a legitimate interest in impeaching Bazos' credibility by questioning him about his allegedly false or misleading deposition testimony. The court sought to balance these concerns by allowing the plaintiff to confront Bazos with the portion of his deposition testimony in which he stated that he was only familiar with Rodin's name because he had seen it in his patients' medical records and to ask whether Bazos had a "working relationship" with Rodin, but precluded the plaintiff from inquiring more specifically about other malpractice cases against Rodin.

Thus, on cross-examination, the plaintiff asked Bazos whether he had "an ongoing working relationship with [Rodin] since about 2008," which was three years before his deposition testimony, and Bazos responded in the affirmative. The plaintiff then confronted Bazos with the portion of his deposition testimony in which, when counsel for the plaintiff asked whether he had ever "heard of [Rodin] before being involved in this case," Bazos stated that he had "seen [Rodin's] name" **[***62]** but had "not worked with him . . . ." Bazos testified that he did, in fact, have a working relationship with Rodin, but that he had met Rodin for the first time the day before the trial. At that time, the plaintiff expressly underscored the contradiction between Bazos' deposition **[*149]** testimony and his admission that he had an ongoing relationship with Rodin for about three years, and suggested that Bazos' deposition testimony "made it appear as though [Bazos] may have come across [Rodin's] name . . . in one of [his] patient's records."

Although this cross-examination likely would have been more damaging to Bazos' credibility had the plaintiff been permitted to ask about his prior work as an expert on behalf of Rodin, the trial court properly weighed the plaintiff's interest in impeaching Bazos against the substantial likelihood of prejudice to the defendants had such questioning been permitted. The record reveals that the trial court carefully considered the arguments of the parties[24] in the interest of fashioning a solution that gave the plaintiff an opportunity to bring the alleged false testimony to the jury's attention without the high risk of unfairness to the defendants that have would **[***63]** resulted from evidence revealing other **[**523]** malpractice actions against Rodin. The decision on how best to preserve the fairness and integrity of the trial in this situation is precisely the kind of determination best left to the discretion of the trial court, and that **[*150]** decision will not be disturbed on appeal unless it was arbitrary or unreasonable.[25] *State v.*

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[24] For example, at the pretrial hearing on the defendants' motion in limine, in response to the defendants' argument that the plaintiff should not be permitted to question Bazos about his prior relationship with Rodin, the court explained: "It's not as if he's walking into this not knowing anything about [Rodin], he's had prior experience with [Rodin] on two previous occasions. And **[***64]** what I'm trying to get from you is a way counsel can bring out that there is this preexisting relationship between the parties . . . without going into what it was." The court further explained that "[t]he fact that there has been previous malpractice claims against [Rodin] is highly prejudicial and its prejudicial value outweighs is probative value. However, the plaintiff is entitled to bring out the fact that . . . there's some sort of relationship here between these parties, this is not someone who is blindly looking at [Rodin] for the first time." At trial, following the plaintiff's contention that asking Bazos about his work as an expert for Rodin in other cases was necessary to put the alleged false testimony in its proper context, the court responded, "you're going to be given an opportunity to attack his credibility on that issue, just not in the direction you want to take it on the other issues."

[25] The plaintiff's reliance on *Hayes v. Manchester Memorial Hospital, 38 Conn. App. 471, 661 A.2d 123*, cert. denied, *235 Conn. 922, 666 A.2d 1185 (1995)*, is misplaced. In *Hayes*, the Appellate Court concluded that the trial court had abused its discretion by precluding the plaintiff in a medical malpractice action from cross-examining the defendant's expert witness concerning an action pending **[***65]** against *the expert himself* that included claims of medical negligence similar to those at issue in *Hayes*. *Id., 473-76*. The Appellate Court reasoned that, because the allegations against the expert resembled the allegations against the defendant, the expert had a motive to testify that the defendant's actions conformed to the standard of care. *Id., 473*. *Hayes* is readily distinguishable because the plaintiff in that case sought to introduce evidence of other

Annulli, supra, 309 Conn. 495. Because the trial court carefully weighed the competing interests and afforded the plaintiff the opportunity to impeach Bazos' credibility by asking him about his allegedly false deposition testimony, the trial court's handling of the issue was fair and reasonable. Accordingly, we agree with the Appellate Court that the trial court did not abuse its discretion in precluding the plaintiff from questioning Bazos about his work on behalf of Rodin in other cases.

Finally, we also agree with the Appellate Court that, although the trial court should have allowed the plaintiff both to make an offer of proof regarding Bazos' previous work as an expert on behalf of Rodin and to mark for identification the certification page from Bazos' deposition in one of those previous cases, neither such impropriety was harmful to the plaintiff. See *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 623-26*. As a general matter, a trial court should *always* allow a party to make an offer of proof and mark an item as **[***66]** an exhibit for identification, for both practices generally are necessary to preserving the trial record for appellate **[*151]** review. See *State v. Silva, 201 Conn. 244, 253, 513 A.2d 1202 (1986)* ("the general rule has evolved that the trial court *must* mark as an exhibit for identification *anything* offered by counsel" [emphasis in original]); *State v. Zoravali, 34 Conn. App. 428, 433, 641 A.2d 796* ("The appellant bears the burden of providing an adequate appellate record through the offer of proof, among other vehicles. . . . A trial court cannot prevent a defendant from doing so." [Citation omitted.]), cert. denied, *230 Conn. 906, 644 A.2d 921 (1994)*; C. Tait & E. Prescott, Connecticut Appellate Practice and Procedure (4th Ed. 2014) § 8-2:1.1, p. 437 ("[i]f necessary [to properly preserve a claim for appellate review], the appellant also must make an offer of proof or offer an exhibit for identification"). In the present case, however, the record is adequate for review of the plaintiff's claims despite the trial court's denial of his request to make an offer of proof and to mark the document for identification. As the Appellate Court observed, "although the court improperly failed to permit the plaintiff's counsel to make an offer of proof, the court permitted the plaintiff's counsel to argue extensively, on more than one occasion, the legal basis **[***67]** on which she wanted to present evidence of other medical malpractice actions in which Bazos testified as an expert witness . . . ." **[**524]** *Filippelli v. Saint Mary's Hospital, supra, 624*. In addition, "[t]he [trial] court permitted the plaintiff's counsel to read the document [she had sought to mark for identification] into the record, which is available for our review." *Id., 626*. Accordingly, neither of the improper rulings prejudiced the plaintiff in any way.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and ZARELLA and ROBINSON, Js., concurred.

Dissent by: EVELEIGH

Dissent

EVELEIGH, J., with whom McDONALD and VERTEFEUILLE, Js., join, dissenting. I respectfully dissent **[*152]** from the majority opinion. First, unlike the majority's conclusion that the testimony at issue was "collateral," I would adhere to our long-standing jurisprudence that "evidence tending to show a witness' bias, prejudice or interest is never collateral . . . ." (Citation omitted.) *Conn. Code Evid. § 6-5*, commentary; see also *State v. Chance, 236 Conn. 31, 58, 671 A.2d 323 (1996)*. In my view, the evidence did relate to a substantial issue in the present case—namely, the credibility of Andrew Bazos, the only expert witness presented by the defendants Dennis M. Rodin and Waterbury Orthopaedic Associates,

malpractice claims that had been filed against the defendant's expert, not against the defendant himself, and, therefore, there was no risk that the jury would presume that the defendant was negligent merely because he was a defendant in separate medical malpractice action.

P.C.[1] Second, **[***68]** unlike the majority, I would conclude that instead of weighing the "competing interests," the trial court not only unnecessarily restricted the ability of the plaintiff Philip Filippelli III[2] to cross-examine Bazos, but also provided a solution that was without meaning and which was potentially confusing to the jury. Thus, in my view, the plaintiff's right to cross-examine Bazos regarding motive, interest, bias and prejudice was unduly restricted. See *Vasquez v. Rocco, 267 Conn. 59, 66, 836 A.2d 1158 (2003)*.

The present appeal arises from a medical malpractice action. In my view, the dispositive issue in this appeal is whether the trial court properly **[***69]** precluded the plaintiff from cross-examining Bazos with allegedly misleading and inconsistent deposition testimony.[3] The trial court **[*153]** precluded the plaintiff's cross-examination on the ground that the deposition testimony at issue was more prejudicial than probative. The trial court reached this conclusion because the proffered evidence revealed that Rodin was a defendant in two other medical malpractice cases. After a jury trial, the trial court rendered judgment in favor of the defendants. The plaintiff then appealed to the Appellate Court, which affirmed the trial court's judgment. *Filippelli v. Saint Mary's **[**525]** Hospital, 141 Conn. App. 594, 597-600, 61 A.3d 1198 (2013)*. This certified appeal followed. *Filippelli v. Saint Mary's Hospital, 308 Conn. 947, 67 A.3d 289 (2013)*.

I recognize that a trial court has broad discretion in ruling on the admissibility of evidence and that we will not disturb such a decision in the absence of an abuse of discretion. See, e.g., *Statewide Grievance Committee v. Burton, 299 Conn. 405, 415, 10 A.3d 507 (2011)*. "Nevertheless, [t]he exercise of discretion to omit evidence in a civil case should be viewed more critically than the exercise of discretion to include evidence. It is usually possible through instructions or admonitions to the jury to cure any damage due to inclusion of evidence, whereas it is impossible to cure any damage due to the exclusion of evidence." (Internal quotation marks omitted.) *Hayes v. Manchester Memorial Hospital, 38 Conn. App. 471, 474, 661 A.2d 123*, cert. denied, *235 Conn. 922, 666 A.2d 1185 (1995)*. It is through the lens of a more critical analysis that I would conclude that the trial court's decision improperly limited the cross-examination of the defendants' single expert witness harmed the plaintiff. Accordingly, I would reverse the judgment of the Appellate Court and remand the case for a new trial.[4]

[*154] The Appellate Court opinion sets forth the following procedural history regarding the plaintiff's claim. **[***71]** [5] "Bazos was deposed by the plaintiff's counsel on April 4, 2011, approximately one month prior to the start of trial. He testified, in part, that he had been disclosed as an expert witness in three or four unrelated medical malpractice actions, but that he could recall the name of only one of those cases, an action that did not involve Rodin. Bazos also testified that he did not know Rodin. When the plaintiff's counsel asked Bazos if he had heard of Rodin previously, Bazos

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[1] As noted by the majority, all claims against Saint Mary's Hospital were withdrawn before trial. See footnote 2 of the majority opinion. For the sake of simplicity, I refer to Rodin and Waterbury Orthopaedic Associates, P.C., collectively as the defendants. Where necessary, I refer to these parties individually by name.

[2] I also note that, although Linda Filippelli was originally a plaintiff in the underlying action, she withdrew her claims prior to trial. See footnote 1 of the majority opinion. For the sake of simplicity, all references to the plaintiff in this opinion are to Philip Filippelli III.

[3] The plaintiff also claims that the trial court improperly refused to allow him to make an offer of proof regarding Bazos' misleading and inconsistent testimony. I note that a trial court always should allow a party to make an offer of proof in order to preserve a claim for appellate review. I do not reach the plaintiff's claim regarding the offer of proof, however, because I would conclude that the trial court improperly precluded the plaintiff from offering evidence regarding Bazos' allegedly misleading and inconsistent testimony and remand the matter for a new trial. **[***70]**

[4] Because I would remand the case for a new trial, I do not address the other evidentiary claims relating to the use of the academic journal article, which the plaintiff raised on appeal.

[5] I agree with the facts and procedural history as set forth in the majority opinion and, therefore, include only those additional facts that are relevant to my analysis.

testified that he may have seen Rodin's name on medical records that came across his desk in the course of his medical practice, as Rodin practices in a community near to the one in which Bazos practices.

"On May 6, 2011, the court held a hearing on numerous motions in limine filed by the parties. One of the defendants' motions in limine sought to preclude the plaintiff from presenting evidence of other medical malpractice actions in which Rodin was a defendant, arguing that such evidence is irrelevant to the question of whether Rodin had breached the **[***72]** standard of care in his care and treatment of the plaintiff and was more prejudicial than probative. The defendants' motion in limine cited the relevancy section of our [C]ode of [E]vidence. See *Conn. Code Evid. § 4-1 et seq.*

"In opposing the defendants' motion in limine, the plaintiff's counsel stated that she did not intend to question Rodin about prior or pending medical malpractice actions against him, but that she planned to question Bazos about the number of times he had given expert testimony on Rodin's behalf. She also stated that Bazos had been deposed in another action involving Rodin **[*155]** approximately one month prior to his being deposed in [the present] case, but Bazos was unable to recall that fact when the plaintiff deposed him. According to the plaintiff's counsel, Bazos' deposition testimony in this case was untruthful. . . . The plaintiff intended to use the **[**526]** deposition transcript to impeach Bazos' credibility and to demonstrate his bias.

"Counsel for the defendants argued that, when testifying at the subject deposition, Bazos had misunderstood the question from the plaintiff's counsel, believing that she was asking him about testimony given at trial, not at a deposition. Counsel for the defendants stated that Bazos **[***73]** was truthful in that he had never met Rodin and that his relationship is with her and her firm, not Rodin. Moreover, Bazos intended to use an errata sheet to amend his deposition testimony in this case to indicate the number of times he had given testimony on behalf of Rodin. Counsel for the defendants argued that evidence of the number of times Bazos served as an expert witness for Rodin was a backdoor way of getting the number of malpractice actions against Rodin before the jury, regardless of the merits of those actions.

"The court agreed that evidence regarding other medical malpractice claims against Rodin was more prejudicial than probative, but stated that the plaintiff was entitled to inquire whether Bazos was 'looking at . . . Rodin for the first time.' The court therefore granted the defendants' motion in limine in part, but denied it in part to permit the plaintiff's counsel to inquire of Bazos as to any prior working relationship he had with Rodin.

"At trial, prior to cross-examining Bazos, the plaintiff's counsel requested a sidebar conference. Thereafter, the court excused the jury and asked Bazos to step outside the courtroom. [The] [p]laintiff's counsel stated her desire to question **[***74]** Bazos about other deposition **[*156]** testimony he had given on behalf of Rodin. She stated that, during his deposition in this case, Bazos testified that he did not know Rodin but that he may have seen his name in medical records. Moreover, Bazos could recall the name of only one case in which he had testified as an expert. [The] [p]laintiff's counsel stated that Bazos gave a deposition on Rodin's behalf in the case of *George v. Rodin*, Superior Court, judicial district of Waterbury, Docket No. CV-09-5014966-S, approximately two months prior to the day he was deposed in this action. Five days prior to the deposition in this case, Bazos signed the deposition errata sheet in *George* . . . but testified that he could not recall the names of any other cases in which he had testified. [The] [p]laintiff's counsel argued that Bazos' deposition testimony, therefore, was not truthful.

"The court pointed out that, if it were to permit the plaintiff to question Bazos about *George* . . . in

front of the jury and Bazos admitted that he is an expert in that case, evidence of another medical malpractice claim against Rodin would be before the jury. [The] [p]laintiff's counsel argued that Bazos denied, under oath, knowing the names of the cases **[***75]** in which he had been disclosed as an expert witness and that such evidence was necessary for the jury to determine Bazos' credibility, which went to the heart of his veracity and whether he was truthful.

"The court denied the plaintiff's request to make an offer of proof, ruling that the plaintiff could ask Bazos whether he had a working relationship with Rodin and that he could challenge Bazos' credibility, but not with evidence of other medical malpractice claims against Rodin, as its prejudicial value far outweighs its probative value.

"At the end of the court day, after Bazos had completed his testimony and the jury had been excused, **[*157]** the plaintiff sought to mark a document for identification. The court declined the plaintiff's request, but **[**527]** permitted counsel to make an oral record.[6] Plaintiff's counsel identified the document as 'the witness certification for [a] deposition that was taken on January 21, 2011. The certification was witnessed on March 29, 2011, by . . . Bazos in . . . *George* . . . .'" (Citation omitted; footnotes altered.) *Filippelli v. Saint Mary's Hospital, supra, 141 Conn. App. 614-19*.

Although I agree generally with the standard of review set forth in the majority opinion, I set forth our well established standard of review to frame my analysis of the plaintiff's claim. "The standard under which we review evidentiary claims depends on the specific nature of the claim presented. . . . To the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee v. Burton, supra, 299 Conn. 415*; see also *State v. Saucier, 283 Conn. 207, 218, 926 A.2d 633 (2007)*.

"Nevertheless, '[t]he exercise of discretion to omit evidence in a civil case should be viewed more critically than the exercise of discretion to include evidence. It is usually possible through instructions or admonitions to the jury to cure any damage due to inclusion of evidence, whereas it is impossible to cure any damage due to the exclusion of evidence.' *Larensen v. Karp, 1 Conn. App. 228, 237, 470 A.2d 715 (1984)* (*Dupont, J.*, dissenting); see also *Batick v. Seymour, 186 Conn. 632, 637, 443 A.2d 471 (1982)* (**[*158]** suggesting that standard for admitting evidence that is challenged as prejudicial should be lower in civil case than in criminal case); C. Tait **[***77]** & J. LaPlante, [Connecticut Evidence (2d Ed. 1988)] § 8.1.3. 'To be excluded the evidence must create prejudice that is undue and so great as to threaten an injustice if the evidence were to be admitted.' . . . *Chouinard v. Marjani, [21 Conn. App. 572, 576, 575 A.2d 238 (1990)]*; see also *Richmond v. Longo, 27 Conn. App. 30, 39, 604 A.2d 374*, cert. denied, *222 Conn. 902, 606 A.2d 1328 (1992)*." (Emphasis omitted.) *Martins v. Connecticut Light & Power Co., 35 Conn. App. 212, 217-18, 645 A.2d 557 (1994)*; see also *Hayes v. Manchester Memorial Hospital, supra, 38 Conn. App. 474*.

In the present case, Bazos testified at his deposition that he had testified as an expert in three or four other medical malpractice cases over a period of six years prior to his deposition. When asked whether he knew the names of any of the physicians for whom he had been disclosed as a witness and given testimony, Bazos testified "[t]he only one I remember, because it was relatively recent, was [a physician named] Geiger . . . ."

When asked if he knew any of the physicians that subsequently treated the plaintiff, Bazos testified that he did not know them personally and had not

[6] I note that a trial judge should always allow counsel to mark a document for identification purposes in order to preserve any appellate claims with **[***76]** an appropriate record.

worked with any of them. When asked if he had ever heard of Rodin before being involved in this case, Bazos testified that "I've seen his name; I've not worked with him, but Waterbury is not that far away, and we'll occasionally see patients that live there and may have been treated out there in the past."[7] During his entire deposition, **[*159]** **[**528]** Bazos never mentioned **[***78]** that he had been retained by the defendants' counsel as an expert witness in other medical malpractice cases in which Rodin was named as a defendant.

Contrary to his testimony at his deposition, a review of the record indicates that of the four medical malpractice cases for which Bazos had been retained and given testimony, he testified on behalf of Rodin in three of them. In each of those matters, Bazos had also been retained by the defendants' counsel. Bazos had given a deposition approximately two months before his deposition in this case in another case involving Rodin. Indeed, while meeting with the defendants' counsel to prepare for his deposition in the present case, Bazos signed an errata sheet for his deposition in that other case involving Rodin.

On the basis of the foregoing, the plaintiff asserts that Bazos lied under oath at his deposition and that the **[*160]** trial court improperly precluded him from impeaching Bazos at trial with the allegedly untruthful testimony from his deposition. The defendants respond that Bazos' testimony was not misleading and that, even if it was, it was proper for the trial **[***80]** court to exclude it because it was more prejudicial than probative. I agree with the plaintiff and would conclude that evidence regarding Bazos' misleading testimony at his deposition was admissible as both evidence of bias and a specific incident of misconduct relating to veracity.

The majority concludes that "whether Bazos previously served as an expert on behalf of Rodin was a collateral matter because it was relevant only to Bazos' credibility and not to any substantive issue in the case." I disagree. It is well established that "evidence tending to show a witness' bias, prejudice or interest is never collateral . . . ." (Citation omitted.) *Conn. Code Evid. § 6-5*, commentary. "'[C]ross-examination is the principal means by which the credibility of witnesses and the truth of their testimony is tested.' *State v. Lee, 229 Conn. 60, 69, 640 A.2d 553 (1994)*. Although only relevant evidence may be elicited through cross-examination; *State v. Kelley, 229 Conn. 557, 562, 643 A.2d 854 (1994)*; '[e]vidence tending to show motive, bias or interest of an important witness is never collateral or irrelevant. [Indeed, it] may be . . . the **[**529]** very key to an intelligent appraisal of

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[7] Specifically, the following colloquy between the plaintiff's counsel and Bazos occurred during Bazos' deposition:

"Q. . . . How many medical malpractice cases would you say you've given testimony in?

"A. Maybe three or four.

"Q. Over what period of time?

"A. Probably the past six years.

"Q. Do you know the names of any of the parties that you have given deposition testimony on behalf of? In other words, I take it you were disclosed as an expert on behalf of a physician, correct?

"A. Yes.

"Q. Do you remember the names of any of the physicians for which you have given deposition testimony as a disclosed expert on their behalf?

"A. The only one I remember, because it was relatively recent, was . . . Geiger . . . .

* * *

"Q. The other two, maybe three cases in which you have given deposition testimony as an expert; who have you worked with on those cases? What firm; do you know?

"A. I believe with [counsel for the defendants] . . . .

* * *

"Q. Do you know . . . Rodin?

"A. No.

* * *

"Q. Had you ever heard of . . . Rodin before being involved in this case? **[***79]** You said you hadn't worked with him before.

"A. I've seen his name; I've not worked with him, but Waterbury is not that far away, and we'll occasionally see patients that live there and may have been treated out there in the past."

the testimony of the [witness].' . . . *State v. Colton, 227 Conn. 231, 248, 630 A.2d 577 (1993)*." *State v. Chance, supra, 236 Conn. 58*. As this court explained in *Vasquez v. Rocco, supra, 267 Conn. 66-67*, "the risk of undue prejudice to the defendant resulting from the introduction of such evidence **[***81]** must be weighed against the plaintiff's right of cross-examination regarding motive, interest, bias or prejudice, a right that may not be unduly restricted. E.g., *Pet v. Dept. of Health Services, 228 Conn. 651, 663, 638 A.2d 6 (1994)*; see also *General Statutes § 52-145 (b)* ('[a] person's interest in **[*161]** the outcome of the action . . . may be shown for the purpose of affecting his credibility'); *Conn. Code Evid. § 6-5* ('[t]he credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely'). Furthermore, '[a] basic and proper purpose of cross-examination of an expert is to test that expert's credibility.' . . . *State v. Copas, [252 Conn. 318, 327, 746 A.2d 761 (2000)]*."

"'The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining [a] previous relationship, feeling and conduct of the witness . . . . [O]n cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out.' [*Henson v. Commonwealth, 165 Va. 821, 825-26, 183 S.E. 435 (1936)*; see also] *Norfolk & Western Railway Co. v. Birchfield, 105 Va. 809, 812, [54 S.E. 879] (1906)* (repeating the general rule but concluding under the circumstances of that case that it was harmless error not to permit a particular question because the information sought by the **[***82]** questioner was developed by other evidence)." (Emphasis omitted.) *Henning v. Thomas, 235 Va. 181, 188, 366 S.E.2d 109, 4 Va. Law Rep. 2124 (1988)*.

In the present case, the fact that Bazos had been retained by the defendants' counsel in two other matters on behalf of Rodin was relevant to the issue of his potential bias or interest in the outcome of the case. In *Vasquez v. Rocco, supra, 267 Conn. 65*, this court addressed a similar issue. In *Vasquez*, the plaintiff sought to cross-examine the defendant's expert regarding his connection to the defendant's liability insurance carrier. *Id., 64*. The trial court precluded the plaintiff from cross-examining the defendant's expert on the ground that the probative value of the evidence would **[*162]** be outweighed by its prejudicial effect. *Id., 64-65*. This court concluded that the trial court improperly precluded the plaintiff from cross-examining the expert because the expert's connection to the insurance carrier "was substantial enough to warrant the admission of evidence of that connection for the purpose of demonstrating [the expert's] potential interest in the outcome of the case." *Id., 69*. Indeed, this court has recognized that "'[i]t is usually held that it is permissible for plaintiff's counsel, when acting in good faith, to show the relationship between a witness and [the] defendant's **[***83]** insurance company where such evidence tends to show the interest or bias of the witness and affects the weight to be accorded his testimony.' Annot., 4 A.L.R.2d 761, [§ 7 (1949)]." *Magnon v. Glickman, 185 Conn. 234, 242, 440 A.2d 909 (1981)*.

This view is consistent with the approach of other jurisdictions that allow cross-examination of medical experts as to specific prior referrals from attorneys involved in the present case and testimony on behalf of clients of the attorney. Indeed, **[**530]** the Supreme Court of Illinois has explained the rationale for allowing such cross-examination as follows: "The modern personal injury trial often becomes a battle between expert witnesses. This is particularly true in a case [in which the cause of the] injury is beyond the knowledge of the average person, and a jury must ordinarily rely on the testimony of experts in reaching a verdict. . . . An expert medical witness is an important part of the technique of personal injury litigation. He generally is a persuasive, fluent, impressive witness, able to make the jury understand that what he is telling them is the

product of years of educational preparation and medical experience, with particular reference to and emphasis on the specialty involved. He will name his colleges and universities, **[***84]** his degrees, the medical societies to which he belongs, the national specialty groups to **[*163]** which he has been admitted, the hospitals in which he has interned or externed, and the hospital staffs on which he has held positions. . . . That he is being paid by one side is always skillfully lost in casual answers to cross-examining cynical questions, by a modest shrug indicating that a charge is made per hour or day, which seems wholly inconsequent to the large proportions from which his great capacities emerge." (Internal quotation marks omitted.) *Sears v. Rutishauser, 102 Ill. 2d 402, 406, 466 N.E.2d 210, 80 Ill. Dec. 758 (1984)*. Accordingly, the Supreme Court of Illinois explained that "[i]t is competent to show that a witness . . . is in the employ of one of the litigants regularly or frequently as an expert witness, or to prove facts and circumstances which would naturally create a bias in the mind of the witness for or against the cause of either of the litigants." (Internal quotation marks omitted.) *Id., 407*. "A medical expert can be questioned about fee arrangements, prior testimony for the same party, and financial interest in the outcome of the case." *Id., 408*.

In *Sawyer v. Comerci, 264 Va. 68, 77-80, 563 S.E.2d 748 (2002)*, the Supreme Court of Virginia addressed a very similar issue to the present case—whether a trial court properly precluded **[***85]** the plaintiff in a medical malpractice action from cross-examining the defendant's expert to show that he had previously testified on behalf of the defendant and had been compensated for his testimony. The Supreme Court of Virginia concluded that the trial court abused its discretion in refusing to permit the plaintiff to elicit testimony from the defendant's expert related to his testimony in an unrelated action. *Id., 79-80*. The Supreme Court of Virginia explained as follows: "[I]n this case the plaintiff was entitled to cross-examine the defendant's expert witness . . . to show that he had previously testified as an expert witness on behalf of [the defendant] and that he had been compensated. The amount of money that **[*164]** [the defendant] paid [the defendant's expert] in a prior case was a relevant area of inquiry because that testimony may have indicated to the jury that he was biased in her favor. The probative value concerning this potential bias outweighed any prejudice to [the defendant] resulting from the jury's knowledge that she had been a defendant in an unrelated [action]. Therefore, the circuit court abused its discretion in failing to permit the plaintiff to elicit this testimony." Id. Accordingly, **[***86]** the Supreme Court of Virginia reversed the judgment of the trial court and remanded the case for a new trial. *Id., 80*.

Furthermore, the plaintiff in the present case should have been allowed to cross-examine Bazos regarding his inconsistent testimony at the deposition because prior inconsistent testimony was relevant to his **[**531]** credibility. It is axiomatic that "[a] witness may be impeached by specific acts of misconduct that evidence a lack of veracity." C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.32.2, p. 397. This court has repeatedly concluded that "[t]o attack the credibility of a witness, inquiry may be made, in the discretion of the trial court, as to particular acts of misconduct tending to show a lack of veracity even though such evidence may be irrelevant to the issues in the case." *State v. Sharpe, 195 Conn. 651, 658, 491 A.2d 345 (1985)*. "In an attack on his credit, inquiry may be made, in the discretion of the court, as to particular acts of misconduct tending to show a lack of veracity, even though such evidence might be irrelevant to the issues in the case. *Vogel v. Sylvester, [148 Conn. 666, 675, 174 A.2d 122 (1961)]*; *Shailer v. Bullock, [78 Conn. 65, 69, 61 A. 65 (1905)]*; [C. McCormick, Evidence (1954)] § 42." *Martyn v. Donlin, 151 Conn. 402, 408, 198 A.2d 700 (1964)*.

Lying under oath is a clear example of lack of veracity. *State v. Suarez, 23 Conn. App. 705, 709, 584 A.2d 1194 (1990)*. Indeed, this court recently

concluded that **[*165]** "[a] claim that the witness gave **[***87]** false testimony in a prior case is directly relevant to a witness' credibility. See, e.g., *State v. Bova, 240 Conn. 210, 223, 690 A.2d 1370 (1997)*." *Weaver v. McKnight, 313 Conn. 393, 427, 97 A.3d 920 (2014)*. Nevertheless, "[b]efore a witness may be asked about his or her prior acts of misconduct, the questioner must have a good-faith basis for believing that the witness has committed the act inquired about." C. Tait & E. Prescott, supra, § 6.32.4, p. 400.

"Cross-examination is an indispensable means of eliciting facts that may raise questions about the credibility of witnesses and, as a substantial legal right, it may not be abrogated or abridged at the discretion of the court to the prejudice of the party conducting that cross-examination. *Richmond v. Longo, [supra, 27 Conn. App. 38]*. It is well settled that the credibility of an expert witness is a matter to be determined by the trier of fact. *In re Juvenile Appeal, 184 Conn. 157, 170, 439 A.2d 958 (1981)*." *Hayes v. Manchester Memorial Hospital, supra, 38 Conn. App. 474*.

In the present case, the parties do not dispute that, at the time of his deposition in the present case, Bazos had been retained by counsel for the defendants to be an expert witness on behalf of Rodin in two other medical malpractice cases. The parties also do not dispute that Bazos had testified at a deposition in one of the other medical malpractice cases involving Rodin approximately two months prior to his deposition in the present case. Further, it is undisputed that on the day **[***88]** Bazos met with counsel for the defendants to prepare for the deposition in the present case, five days before the deposition in the present case, he signed an errata sheet for a deposition in another case in which Rodin was named as the defendant.

At his deposition, Bazos testified that he had given testimony in three or four other medical malpractice **[*166]** cases. Bazos was asked the following question: "Do you remember the names of any of the physicians for which you have given deposition testimony as a disclosed expert on their behalf?" Bazos replied, "[t]he only one I remember, because it was relatively recent, was . . . Geiger . . . ." Indeed, when explicitly asked if he had ever heard of Rodin before, Bazos replied as follows: "I've seen his name; I've not worked with him, but Waterbury is not that far away, and we'll occasionally see patients that live there and may have been treated out there in the past." This testimony by Bazos implies that his only knowledge of Rodin **[**532]** was through records of patients that Bazos treated. Such testimony completely omits the fact that he had reviewed records in other medical malpractice cases in which Rodin was named as a defendant and that Bazos was hired **[***89]** as an expert in those cases. Given the fact that it is undisputed that Bazos gave deposition testimony in a case where Rodin was the named defendant approximately two months prior to his deposition in the present case, and the fact that the deposition in the case involving Geiger was approximately one year before, I conclude that the plaintiff had a good faith belief that Bazos had lied under oath.[8]

The majority states that the trial court "also recognized . . . that the plaintiff had a legitimate interest in impeaching Bazos' credibility by questioning him about **[*167]** his allegedly false or misleading deposition testimony. The court sought to balance these concerns by allowing the plaintiff to confront Bazos with the portion of his deposition testimony in which he stated that he was

[8] The defendants assert that the alleged false testimony was "clarified in his errata sheet." The errata sheet referred to by the defendants was completed on May 9, 2011, approximately three days after the trial court heard argument on the motions in limine in this matter and determined that the plaintiff would not be allowed to introduce any evidence of other medical malpractice actions in which Rodin was named as a defendant. In his errata sheet, Bazos testified: "I have never met . . . Rodin but [the defendants' counsel] retained me as an expert witness in two other cases for . . . Rodin." The existence of the errata sheet, however, did not preclude the plaintiff's right to cross-examine Bazos. The defendants would have been free to offer the errata sheet during his direct examination of **[***90]** Bazos and explore it during his redirect testimony.

only familiar with Rodin's name because he had seen it in his patients' medical records and ask whether Bazos had a 'working relationship' with Rodin, but precluded the plaintiff from inquiring more specifically about other malpractice cases against Rodin." I disagree. By limiting the plaintiff to being able to ask only about a "prior working relationship" with Rodin, it did not enable the plaintiff to elicit the fact that Bazos had not been forthcoming about his relationship with Rodin. The vague notion of "prior working relationship" did not convey the extent to which the testimony Bazos gave at his deposition may have been misleading and not forthright. Specifically, the trial court precluded the plaintiff from questioning Bazos regarding whether he **[***91]** had falsely testified during his deposition. Specifically, the trial court allowed the plaintiff to inquire into whether Bazos had a "working relationship" with Rodin, but precluded the plaintiff from introducing evidence that Bazos had omitted from his deposition testimony that he had been disclosed as an expert and testified on behalf of Rodin in other cases. The trial court precluded the plaintiff from introducing evidence that Bazos may have lied at his deposition about being disclosed as an expert in two other actions involving Rodin on the ground that information regarding the other medical malpractice actions involving Rodin would have been more prejudicial than probative. The exact nature of this "prior working relationship" was never explained to the jury and was potentially a source of confusion. What exactly does it mean? Were they partners? Did one work for the other and refer patients? Did they share one mutual patient at a given time? Were they residents in the same hospital? The fact was potentially very confusing to the jury and of limited **[*168]** evidentiary value. It certainly cannot compare to the potential of suggesting to the jury that Bazos may have lied under oath and **[***92]** may have had a bias and interest to testify in favor of Rodin.

[533]** At trial, the plaintiff was allowed to question Bazos about whether he had an ongoing working relationship with Rodin. Bazos testified that he had an indirect ongoing relationship with Rodin, but that he met him for the first time the previous day.[9] By being limited to questioning

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[9] At trial, the following colloquy occurred:

"[The Plaintiff's Counsel]: And it's true . . . isn't it, that you've had an ongoing working relationship with . . . Rodin since about 2008 . . . ?

"[Bazos]: Yes.

"[The Plaintiff's Counsel]: And, in fact, you've been working with him on several independent matters since that time, correct?

"[Bazos]: No, I've not worked with him, I've worked . . . indirectly with him through another person.

"[The Plaintiff's Counsel]: So you have not had a working relationship with him—

"[Bazos]: On—

"[The Plaintiff's Counsel]: —since 2008?

"[Bazos]: I have. It **[***93]** depends how you define working relationship?

"[The Plaintiff's Counsel]: And that—one—actually, one of those relationships continues, presently; isn't that right?

"[Bazos]: Yes.

"[The Plaintiff's Counsel]: So at least since 2008 you've had had a working relationship with him, correct?

"[Bazos]: Yes.

"[The Plaintiff's Counsel]: Now, do you remember being asked at your deposition, which was taken just about a month ago on April 4, 2011, as to whether you've ever heard of . . . Rodin?

"[Bazos]: I'd have to see the—how you asked it. I think you asked me if I knew him.

"[The Plaintiff's Counsel]: Okay. Did you recall testifying that you had not worked with him?

"[Bazos]: I'd have to see it. I don't have an independent recall, no.

"[The Plaintiff's Counsel]: You don't have an independent recall?

"[The Plaintiff's Counsel]: No. . . .

"[The Plaintiff's Counsel]: Can I have the . . . deposition transcript. Exhibit 23 for [identification], Your Honor.

"The Court: Thank you.

"[Bazos]: Thank you.

"[The Plaintiff's Counsel]: I'm going to direct your attention to page 142, line 20.

"[Bazos]: I have it.

"[The Plaintiff's Counsel]: The question was, had you ever heard of . . . Rodin before being involved in this **[***94]** case? You said, you

Bazos **[**534]** only about their "working relationship," **[*169]** the plaintiff was never able to introduce evidence that, at his deposition, Bazos had omitted any reference to testifying on behalf of Rodin at other depositions or being named as an expert on Rodin's behalf in other matters.

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hadn't worked with him before. And what was your answer?

"[Bazos]: I'm reading from my deposition. I've seen his name, I've not worked with him, but Waterbury is not that far away and will occasionally see patients that live there and may have been treated out there in the past.

"[The Plaintiff's Counsel]: So this deposition that you gave was on April 4, 2011, just a little over a month ago, correct . . .?

"[Bazos]: That's correct, yes.

"[The Plaintiff's Counsel]: And you had seen his name before that deposition, correct?

"[Bazos]: That's what I said. I said—I just read—I'll read it again. I said, I've seen his name.

"[The Plaintiff's Counsel]: Right. You had a working relationship that dated back to 2008 and this deposition was given on April 4, 2011; isn't that right?

"[Bazos]: I met . . . Rodin yesterday for the first time in my life.

"[The Plaintiff's Counsel]: So your testimony [is that] you did not have a working relationship with him or that you did?

"[Bazos]: I just said earlier that I did have a working relationship. I met him yesterday for the first time.

"[The Plaintiff's Counsel]: And according to the answer that you gave at your deposition you made it appear **[***95]** as though you may have come across his name by—in one of your patient's records; isn't that the gist of your testimony?

"[Bazos]: No. Apparently, that's your interpretation. Maybe I should just read it again. I said, I've seen—

"[The Plaintiff's Counsel]: Yes, why don't you read it again.

"[Bazos]: I've seen his name, I've not worked with him, but Waterbury is not that far away and will occasionally see patients that live there and may have been treated out there in the past.

"[The Plaintiff's Counsel]: So you have a working relationship with him that began in 2008, but you have not worked with him; is that your testimony?

"[Bazos]: Yeah. I met him yesterday for the first time.

"[The Plaintiff's Counsel]: Okay. But you've had a working relationship with him that dates back to 2008—

"[The Defendants' Counsel]: Objection, Your Honor. Asked and answered.

"[The Plaintiff's Counsel]: —isn't that right . . . ?

"[The Defendants' Counsel]: —like, four or five times now. Can we have a sidebar, please?

"The Court: Yes."

Indeed, once Bazos testified at trial that he had "an indirect working relationship with Rodin," Bazos' deposition testimony became a potential inconsistent statement under oath. It is **[***96]** well established that "[a] witness can be impeached by proof that he or she has made **[*170]** prior statements, either out-of-court or in a former proceeding, that are inconsistent with the [witness'] in-court testimony." C. Tait & E. Prescott, supra, § 6.35.2, p. 417. "Inconsistencies may be shown not only by contradictory statements but also by omissions, in other words, failures to mention certain facts. Thus, if the prior statement fails to mention a material fact presently testified to that it should have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent. *State v. Reed, [174 Conn. 287, 302-303, 386 A.2d 243 (1978)]*." (Internal quotation marks omitted.) *Falls v. Loew's Theatres, Inc., 46 Conn. App. 610, 615, 700 A.2d 76 (1997)*; id. (concluding it was improper for trial court to exclude witness' prior inconsistent statement for impeachment purposes).

In the present case, Bazos' omission in his deposition testimony that he had testified on behalf of Rodin when that testimony occurred approximately two months prior to his deposition and he signed an errata sheet approximately five days before the deposition in a case in which Rodin was the named defendant was relevant to his veracity and possible inconsistency. I recognize that, "even if the conduct does relate to veracity, the court still has discretion to exclude **[***97]** it if the evidence has slight relevance due to remoteness in time or other considerations . . . or if it has a tendency to confuse or impede the litigation by interjecting collateral issues . . . ." (Citations omitted.) C. Tait & E. Prescott, supra, § 6.32.4, pp. 399-400. Nevertheless, in the present case, Bazos' conduct at his deposition was not remote in time—it occurred one month before trial. Moreover,

although the trial court was worried about the prejudicial effect of evidence regarding the other medical malpractice actions, I would conclude that any prejudicial effect could have been resolved by a limiting instruction to the jury as to its use of the evidence and a further appropriate limitation that allowed the plaintiff to introduce **[*171]** only evidence that Bazos had not revealed that he testified on behalf of Rodin approximately one month prior to his deposition and had been retained in other actions without getting into the merits of those other actions. "Evidence may be admitted for impeachment purposes even though it is inadmissible as substantive evidence on the merits of the case. See [*Conn. Code Evid.] § 1-4* . . . . In admitting such evidence, the jury should be instructed as to the proper and limited purpose for which it was received. **[***98]** . . . That the evidence might be misused by the jury in violation of the court's instructions is not grounds for excluding it." (Citations omitted.) C. Tait & E. Prescott, supra, § 6.27.6, pp. 385-86.

As the Supreme Court of Illinois explained: "The principal safeguard against errant expert testimony is cross-examination. **[**535]** Generally, opposing counsel may probe bias, partisanship or financial interest of an expert witness on cross-examination. . . . It is competent to show that a witness . . . is in the employ of one of the litigants regularly or frequently as an expert witness, or to prove facts and circumstances which would naturally create a bias in the mind of the witness for or against the cause of either of the litigants." (Citation omitted; internal quotation marks omitted.) *Sears v. Rutishauser, supra, 102 Ill. 2d 407*. In the present case, the plaintiff was not given the opportunity to employ this important safeguard.

Accordingly, I would conclude that the trial court abused its discretion by precluding the plaintiff from inquiring into, and introducing evidence relevant to, whether Bazos had given misleading and inconsistent testimony at his deposition about his relationship with Rodin, and by limiting the plaintiff to only inquiring into the "working relationship" **[***99]** between Bazos and Rodin.

Having concluded that the trial court abused its discretion, I must now determine whether the evidentiary **[*172]** impropriety was harmless. "[A]n evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Hayes v. Camel, 283 Conn. 475, 488-89, 927 A.2d 880 (2007)*.

"'A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial. *Vasquez v. Rocco, [supra, 267 Conn. 72]*. Thus, [my] analysis includes a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . *Prentice v. Dalco Electric, Inc., [280 Conn. 336, 358, 907 A.2d 1204 (2006)*, cert. denied, *549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007)]*; see also *id., 360-61* (noting that during summation, plaintiff described issue encompassing improperly admitted scientific evidence **[***100]** as critical and emphasized that evidence); *Hayes v. Caspers, Ltd., 90 Conn. App. 781, 800, 881 A.2d 428* (cautionary instruction addressed prejudicial impact of expert's testimony that included arguably improper discussion of pending federal action), cert. denied, *276 Conn. 915, 888 A.2d 84 (2005)*; *Raudat v. Leary, 88 Conn. App. 44, 52-53, 868 A.2d 120 (2005)* (improperly admitted expert testimony was harmful error when it related to central issue in case, namely, condition of purchased horse); *DeMarkey v. Fratturo, [80 Conn. App. 650, 656-57, 836 A.2d 1257 (2003)]* (improperly admitted hearsay evidence about cause of motor vehicle

accident was harmless because **[*173]** it was cumulative of properly admitted testimonial and diagram evidence). The overriding question is whether the trial court's improper ruling affected the jury's perception of the remaining evidence. *Swenson v. Sawoska, 215 Conn. 148, 153, 575 A.2d 206 (1990)*.' . . . *Hayes v. Camel, supra, 283 Conn. 489-90*." *Sullivan v. Metro-North Commuter Railroad Co., 292 Conn. 150, 162-63, 971 A.2d 676 (2009)*; see also *Kortner v. Martise, 312 Conn. 1, 28-29, 91 A.3d 412 (2014)*.

In the present case, an evaluation of these factors demonstrates that the trial court's improper exclusion of evidence **[**536]** bearing on Bazos' credibility was harmful. First, Bazos' credibility was essential to the case. Bazos was the only expert who testified for the defendants. His testimony was essential to the key issue in the case—namely, whether the defendants had breached the standard of care. Bazos' testimony contradicted the testimony of the plaintiff's only expert, Ronald Krasnick. Therefore, the jury was left to determine **[***101]** which of the two experts it believed—a battle of the experts.

It is well established that "[t]he success of much litigation—both criminal and civil—is dependent upon the effectiveness of a litigant's expert witness. Generally, the cross-examination of an expert allows for wide-ranging questioning which touches on all matters testified to in chief, or which tends to test the qualifications, skill, or knowledge of the witness and the accuracy or value of his or her opinion." Annot., 11 A.L.R.5th 1 (1993). Indeed, this court has repeatedly stated that "[w]hen experts' opinions conflict, as often happens in medical malpractice cases, '[i]t is the province of the jury to weigh the evidence and determine the credibility and the effect of testimony . . . . [T]he jury is free to accept or reject each expert's opinion in whole or in part.'" *Grondin v. Curi, 262 Conn. 637, 657 n.20, 817 A.2d 61 (2003)*. In the present case, the experts' opinions did conflict and the jury was left to determine which **[*174]** expert it believed. In such a case, the credibility of the defendants' expert was essential to the jury's ultimate resolution of the case—it had to decide whether to accept or reject his opinion. Therefore, Bazos' credibility was central to this case.

Second, the trial court did not attempt to cure any possible **[***102]** prejudice caused by the improper exclusion of the testimony. To the contrary, as explained previously in this opinion, although the trial court allowed the plaintiff to inquire into Bazos' working relationship with Rodin, such inquiry was not sufficient and did not allow the plaintiff to impeach the credibility of Bazos. Furthermore, the trial court could have cured any possible prejudice to the defendants created by the introduction of evidence that Bazos was involved in other litigation on behalf of Rodin by instructing the jury regarding the limited purpose of impeachment evidence and not allowing any inquiry into the details of those other cases.

Third, the particular evidence of the allegedly misleading and inconsistent testimony by Bazos was not cumulative of any other evidence at trial. Indeed, the defendants were allowed to introduce Bazos as an expert, discuss his qualifications and offer his testimony as an expert. The plaintiff was not allowed to impeach his credibility and show that Bazos may have offered misleading and inconsistent testimony during the course of the litigation.

My review of the entire record in the present case, in light of these considerations, compels **[***103]** the conclusion that there is no fair assurance that the evidentiary impropriety did not affect the jury's verdict because the improperly excluded testimony was essential to weighing the testimony of the defendants' only expert witness who was testifying regarding the central issue in this case—whether the defendants breached the standard **[*175]** of care. Moreover, the exclusion of this evidence was not wholly cumulative of other testimony or evidence. Accordingly, I would conclude that the trial court's decision to preclude the plaintiff from cross-examining Bazos with regard to his

potentially misleading and inconsistent testimony harmed the plaintiff and that, therefore, the plaintiff is entitled to a new trial.

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