LESLIE MILLIUN *v.* NEW MILFORD HOSPITAL ET AL.
(SC 18845)

Rogers, C. J., and Norcott, Zarella, Eveleigh and McDonald, Js.*

Argued September 27—officially released December 31, 2013

Michael G. Rigg, for the appellant (named defendant).

David S. Golub, with whom were *Jonathan M. Levine* and, on the brief, *Marilyn J. Ramos*, for the appellee (substitute plaintiff).

Opinion

McDONALD, J. In the present case, we principally examine the circumstances under which a treating physician's medical records can be admitted as expert evidence of causation in a medical malpractice action. The trial court rendered summary judgment in favor of the defendant New Milford Hospital[1] on the ground that the plaintiff, Lynnia Milliun, the conservator of her sister, Leslie Milliun (Leslie),[2] had failed to offer the requisite expert testimony to create an issue of material fact regarding the defendant's alleged negligence as the proximate cause of Leslie's injuries. The Appellate Court reversed that judgment, rejecting the trial court's conclusions that: (1) certain medical records of Leslie's treating physicians were inadmissible as expert opinion on causation because statements in the reports on that matter were both hearsay and made by lay witnesses; and (2) its order granting the plaintiff's motion for the appointment of a commission so that Leslie's out-of-state treating physicians could be deposed should be withdrawn because the physicians could not be compelled to offer expert opinion on causation. *Milliun* v. *New Milford Hospital*, 129 Conn. App. 81, 20 A.3d 36 (2011). Upon our grant of certification, the defendant appeals from the Appellate Court's judgment challenging both of these determinations. We affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following undisputed factual and procedural history. "Prior to [July, 2002, Leslie] had been a patient in the defendant's care in connection with the treatment of her stiff man syndrome (SMS) [a rare, disabling neurological disorder characterized by progressive, severe muscle stiffness or rigidity as well as painful muscle spasms triggered by sensory stimuli.[3] From July 9, 2002 to July 14, 2002, Leslie was admitted to the defendant for treatment relating to that condition.] In her amended complaint, the plaintiff alleged that, while in the defendant's care, Leslie suffered severe respiratory dysfunction, during which time her rate of breathing was reduced to two breaths per minute for a period of four minutes. As a result of this anoxic[4] incident, the plaintiff further alleged, Leslie had suffered severe injury to her cognitive functioning, including memory loss, loss of motor function and speech impairment. The plaintiff claimed that Leslie's brain injury was caused by the defendant's negligence, namely, failure to monitor Leslie properly, failure to respond to her respiratory dysfunction and the administration of medication that is known to cause respiratory dysfunction [when combined with other medications such as Valium].

"In April, 2003, prior to the commencement of this action, Leslie had sought treatment at the Mayo Clinic in Rochester, Minnesota, [seeking a second opinion regarding her diagnosis of SMS and expressing con-

cerns about, inter alia, diminished cognitive function since the previous July]. At the Mayo Clinic, she first was seen by Kathleen M. McEvoy, a physician. McEvoy reported that Leslie had brought extensive outside records with her, along with an investigative report from the department of health [state board] regarding the anoxic incident that occurred while she was in the care of the defendant. McEvoy's admittance notes indicated that the plaintiff also reported this event to her. At that time, McEvoy reported in her evaluation that Leslie was suffering from a severe neurological disorder, and, although some manifestations suggested SMS, 'she obviously has additional deficits and involvement that would not be expected with [SMS] alone.'

"In February, 2005, Leslie returned to the Mayo Clinic to address [concerns about her SMS and diminished cognitive functioning following the July, 2002 hospitalization]. In her evaluation report, McEvoy stated her impressions of Leslie's condition as follows: 'It is still my clinical impression based on the temporal profile of the onset of her symptoms, that [Leslie] has a primary autoimmune disorder consistent with [SMS], which by history was associated with dysarthria[5] but no cognitive impairment, along with a superimposed anoxic encephalopathy[6] which developed by her report of July 10, 2002 . . . .'

"McEvoy then referred Leslie to physicians Keith A. Josephs and Stefan A. Dupont at the Mayo Clinic's behavioral neurology unit for the purpose of assessing her cognitive functions. Upon his neurological examination, Dupont, a resident at the Mayo Clinic [under Josephs' supervision], reported in his neurology consult that her 'cognitive dysfunction appears to be multidomain in nature, and based on the recounted temporal events, this all seems to have occurred because of anoxic encephalopathy suffered during her respiratory arrest in 2002.'

"Josephs' evaluation echoed Dupont's conclusion. He reported as follows: 'It is my opinion that [Leslie's] cognitive impairment is secondary to whatever event occurred or whatever transpired in 2002. The family member tells me that there was anoxia and that there was a change after that. Therefore, one must conclude that her cognitive impairment was secondary to the event that occurred in 2002. Arguing for this being the process of her cognitive impairment also is the fact that she has not had any significant progression since 2002. The cognitive impairment in my opinion is not related to the patient's diagnosis [of SMS] and is not in keeping with a neurodegenerative syndrome given the lack of progression.' Josephs went on to diagnose her as suffering from 'cognitive impairment (static encephalopathy secondary to anoxic brain damage).'

"In July, 2008, the plaintiff filed the underlying amended complaint in which she alleged that the defen-

dant was negligent in its care and treatment of Leslie. The court scheduled trial to commence on January 21, 2009, and the plaintiff was required to disclose all of her expert witnesses by September 15, 2008. On that date, the plaintiff disclosed nine expert witnesses, [five of whom were Mayo Clinic physicians or neuropsychologists] including McEvoy and Josephs. All [of the Mayo Clinic providers] were identically disclosed on the issues of causation and damages.

"In November, 2008, the defendant filed a motion to preclude the plaintiff from calling any of her expert witnesses at trial, contending that she had failed to make them available for depositions and, therefore, that it would be prejudiced by having to conduct pretrial discovery so close to the forthcoming trial date. At a subsequent hearing before the court on the motion to preclude, counsel for both parties indicated that they were experiencing difficulty deposing the plaintiff's experts, as the Mayo Clinic had an internal policy that limited the depositions of its treating physicians. In response to the court's concerns, the plaintiff represented that none of the witnesses from the Mayo Clinic had been retained as experts to be called at trial but instead had been disclosed as experts for the purpose of introducing their medical records. At the conclusion of the hearing, the parties agreed to take the depositions by teleconference, limited to questions concerning the information contained in the treating physicians' medical reports.

"On January 26, 2009, the court held a hearing on the status of the depositions. At the hearing, the defendant again expressed concern over not having had the opportunity to depose all of the plaintiff's experts. The court thereafter stressed to the parties that the defendant had the right to obtain the deposition testimony of any treating physicians on whose medical reports the plaintiff intended to rely at trial. The plaintiff then explained that, because the witnesses were not within her control, the most appropriate action would be to have a commission appointed in order to compel the experts to attend their depositions in Minnesota in accordance with General Statutes § 52-148c.[7] The following day, the plaintiff filed a motion for the appointment of a commission to summon by subpoena and to obtain the depositions of the treating physicians [which the trial court granted].

"On January 29, 2009, the parties reported back to the court that no additional depositions for the plaintiff's Mayo Clinic witnesses had been taken. The defendant thereafter repeated its request that, because of undue prejudice and delay in the taking of their depositions, the plaintiff should be precluded from relying on the medical reports of the treating physicians on the issue of causation. [The defendant further contended that the depositions would be pointless because none of the witnesses thus far deposed had offered opinions

that the defendant's conduct had caused Leslie's injuries.] In response, the plaintiff asserted that the medical records themselves were sufficient evidence to establish the cause of Leslie's cognitive impairments and, on the court's request, she identified the portions of the medical reports [of both McEvoy and Josephs] that she claimed contained adequate opinions on causation. . . .

"At that point, the court expressed concern over the fact that [the physicians'] impressions appeared to be based exclusively on the plaintiff's and Leslie's own reports of the anoxic incident. After much discussion, the court ruled that the Mayo Clinic records, without any supporting testimony, were insufficient to establish a proper foundation for expert medical opinion on causation because they were predicated on layperson opinion and inadmissible hearsay. [Nonetheless, the court denied without prejudice the defendant's motion in limine to preclude the reports or testimony of the Mayo Clinic physicians.] The court, over objection from the defendant, proceeded to grant in part the plaintiff's motion for the appointment of a commission to permit the taking of McEvoy's and Josephs' depositions, and indicated that if those physicians did not testify adequately to support the basis of the plaintiff's theory on causation, their records would only be admissible insofar as they reflected Leslie's treatment at the Mayo Clinic, with any portions connected to the causation of her injuries being redacted.

"On February 2, 2009, the parties went forward with Josephs' deposition. At the outset, counsel for the Mayo Clinic, appearing on behalf of Josephs, stated that he would not be opining on the issues of standard of care or causation and that he would only testify as to his care of Leslie as a treating physician. Upon his initial examination by the defendant, Josephs testified, consistent with his counsel's opening remarks, that it was not his intent to give an opinion as to whether the defendant's care and treatment of Leslie led to an anoxic event and that he was unaware of what in fact caused the anoxia. Additionally, Josephs stated that he had not reviewed the defendant's records of Leslie's hospitalization, and that the circumstances surrounding her anoxic event were relayed to him by Leslie and the plaintiff.

"During the plaintiff's examination, however, Josephs testified that there was information available to him that indicated that while Leslie was in the care of the defendant her rate of breathing was reduced to somewhere between one and four breaths per minute and that upon his review of the materials available to him he concluded that her cognitive deficits were caused by this anoxic event. Although both sides, and the court, were under the assumption that Josephs' examination would last four hours, counsel for the Mayo Clinic unilaterally terminated the deposition after the second

hour of questioning [each party having approximately equal time].

"The following day, the plaintiff issued subpoenas seeking to compel the continued deposition of Josephs and the deposition of McEvoy, and counsel for the Mayo Clinic filed a motion for a protective order seeking to preclude the plaintiff from completing Josephs' deposition and from conducting McEvoy's deposition, contending that these examinations constituted an annoyance and were unduly burdensome. The defendant joined in the Mayo Clinic's motion and, in its supplemental brief in opposition to the continued depositions, argued that neither Josephs nor McEvoy could be compelled to testify as to their expert medical opinions on causation. [In light of the plaintiff's objection that the Mayo Clinic's motion could not properly be accepted by the court without its counsel having filed an appearance, the court decided, without objection, to address the defendant's renewed objection to the depositions.] The court agreed [with the defendant] and vacated its previous order [appointing a commission] for the depositions of Josephs and McEvoy. Accordingly, the court advised counsel for the Mayo Clinic that Josephs and McEvoy were no longer under subpoena.

"On February 6, 2009, the defendant filed a motion for permission to file a motion for summary judgment. The court granted the motion for permission on February 9, 2009, and the defendant filed its motion for summary judgment that day. The court also ordered the plaintiff to file her opposition to the motion the following day.

"On February 17, 2009, the court heard oral argument on the defendant's motion for summary judgment. The defendant claimed that it was entitled to summary judgment because the plaintiff could not establish the element of causation by expert testimony. Specifically, it argued that the treating physicians' opinions contained within their medical reports were insufficient to establish that the alleged injuries were caused by the defendant. The court agreed and granted the defendant's motion for summary judgment." (Footnotes altered.) Id., 85–92.

The plaintiff appealed from the judgment to the Appellate Court, claiming that the trial court improperly had: (1) deemed the opinions of the treating physicians in the medical records inadmissible on the issue of causation; and (2) precluded the continuation of Josephs' deposition and the taking of McEvoy's deposition in toto, effectively affording the treating physicians a testimonial privilege that is not recognized under Connecticut law. Id., 84. The Appellate Court agreed with both claims. Id.

With respect to the first claim, the Appellate Court determined that the trial court's ruling that the medical

records were inadmissible because the physicians' statements were predicated on hearsay and recitations of lay opinions was based on a misapprehension of the law rather than a reasoned exercise of discretion. As such, the Appellate Court held that the trial court's decision could not stand as a proper use of its discretion. Id., 95–99. In so holding, the Appellate Court posited that "our case law is clear that a physician's medical opinion is not inadmissible because it is formed, in whole or in part, on the basis of hearsay statements made by a patient." Id., 96. The court rejected the proposition that it was fatal to the admission of the physicians' reports that Leslie and the plaintiff had reported the anoxic incident. Id., 97. In doing so, the court concluded that the information available to the physicians—including the results of comprehensive testing of Leslie's cognitive functioning at the Mayo Clinic and the investigative report from a state board regarding Leslie's 2002 hospitalization—demonstrated that the "detailed conclusions of the treating physicians . . . were sufficiently reliable to establish that the medical conclusions recorded in the treaters' reports were more than mere recitations of lay opinions." Id., 97–98. The Appellate Court also rejected alternate grounds raised by the defendant that the treating physicians had not opined on causation with a reasonable degree of medical probability; id., 99–102; and that the defendant had been unable to fully cross-examine the physicians. Id., 102–103.

With respect to the plaintiff's second claim regarding the termination of the commission, the Appellate Court concluded that the trial court had abused its discretion by precluding McEvoy's deposition after instructing the plaintiff that she could not meet her evidentiary burden without expert testimony.[8] Id., 105. In so concluding, the court rejected the defendant's contention that treating physicians enjoy an absolute privilege not to be pressed into service as experts. Id., 106–109. Accordingly, the Appellate Court reversed the trial court's judgment in favor of the defendant and remanded the case with direction to deny the defendant's motion for summary judgment and for further proceedings. Id., 109.

Thereafter, this court granted the defendant's petition for certification to appeal, limited to the following question: "Did the Appellate Court properly conclude that the trial court abused its discretion in its failure to admit certain statements contained within medical records to establish a causal connection between [Leslie's] injuries and the alleged negligence?" *Milliun* v. *New Milford Hospital*, 302 Conn. 920, 28 A.3d 338 (2011). For the reasons that follow, we answer that question in the affirmative.

I

The defendant claims that the Appellate Court misinterpreted the trial court's decision and failed to identify

what law the trial court had misapprehended when it deemed the reports by McEvoy and Josephs inadmissible. According to the defendant, the trial court did not conclude that a physician is precluded from forming an expert opinion regarding the causes of a patient's condition on the basis of out-of-court statements made by a *patient*, but, rather, that a physician may not rely on such statements from someone *other than the patient* in forming such an opinion. The defendant therefore contends that the trial court properly concluded that the proffered causation opinions were unreliable on the grounds that the report of the anoxic incident was impermissible hearsay because it was supplied by the plaintiff, not Leslie, and because the reports reflected the treating physicians' uncertainty as to the essential facts relating to the alleged anoxic incident. In response, the plaintiff contends that the defendant itself has mischaracterized the basis of the trial court's ruling and that the Appellate Court properly concluded that the trial court had abused its discretion in precluding the reports as evidence of causation. We agree with the plaintiff.[9]

Certain established principles guide our resolution of the defendant's claims. In a medical malpractice action, "[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." (Internal quotation marks omitted.) *Poulin* v. *Yasner*, 64 Conn. App. 730, 738, 781 A.2d 422, cert. denied, 258 Conn. 911, 782 A.2d 1245 (2001); accord *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 567, 864 A.2d 1 (2005). Such expert opinion may be provided through a signed report of a treating physician in lieu of live testimony, as long as the defendant is afforded an opportunity to cross-examine the author of the report. See General Statutes § 52-174 (b); Practice Book § 13-4 (a) and (d) (1); *Struckman* v. *Burns*, 205 Conn. 542, 552, 534 A.2d 888 (1987).

Under the rules of evidence governing expert opinions generally, "[t]he facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on . . . are not substantive evidence, unless otherwise admissible as such evidence." Conn. Code Evid. § 7-4 (b). "[I]nadmissible 'facts' upon which experts customarily rely in forming opinions can be derived from sources such as conversations, informal opinions, written reports and data compilations. . . . Subsection (b) [of § 7-4 of the Connecticut Code of Evidence] expressly forbids the facts upon which the expert based his or her opinion *to be admitted for their truth* unless otherwise substantively admissible under

other provisions of the Code. Thus, subsection (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code." (Emphasis added.) Conn. Code Evid. § 7-4 (b), commentary; see *State* v. *Copas*, 252 Conn. 318, 328, 746 A.2d 761 (2000) ("[a]lthough some of the facts considered by the experts . . . may not [be] substantively admissible . . . the parties [are] not precluded from examining the experts about those facts insofar as they related to the basis for the experts' opinions" [citations omitted]). Thus, "[w]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." (Internal quotation marks omitted.) *In re Barbara J.*, 215 Conn. 31, 43, 574 A.2d 203 (1990).

Therefore, "an expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration by the jury."[10] (Internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 321, 736 A.2d 889 (1999). The fact that a physician's report includes hearsay statements, whether from a patient or someone else, would not bar the report's admission on that basis unless those statements were being offered for substantive purposes, i.e., the truth of the matter asserted.[11] Compare *Farrell* v. *Bass*, 90 Conn. App. 804, 816–19, 879 A.2d 516 (2005) (concluding that trial court properly precluded plaintiffs' expert from testifying regarding contents of article written by another physician because article was not being used as factual basis of expert's opinion but instead to prove truth of matter asserted in article), with *State* v. *Henry*, 27 Conn. App. 520, 529–30, 608 A.2d 696 (1992) (rejecting claim that trial court improperly admitted prejudicial hearsay by allowing into evidence eyewitness' statement through psychiatrist's testimony because statement was introduced not for its truth but to show basis of expert opinion).

In the present case, the plaintiff was not offering her own statements and those of Leslie in the reports relaying the 2002 anoxic incident as substantive evidence of the fact that Leslie had in fact suffered anoxia while in the defendant's care and due to the defendant's negligence. Rather, she was offering those statements as evidence of the information on which Josephs and McEvoy had based their respective diagnoses of anoxic encephalopathy arising from the 2002 incident as the cause of Leslie's cognitive deficits. Therefore, to the extent that the trial court deemed the reports not to be competent evidence due to the inclusion of hearsay statements, the Appellate Court properly concluded

that this determination was predicated on a misapprehension of the controlling legal principles.

With respect to the reliability of those statements as a basis on which to form a medical opinion, which is a proper consideration; *George* v. *Ericson*, supra, 250 Conn. 322; the *only* concern articulated by the trial court that might have any bearing on this matter was the court's view that the physicians' reports contained nothing more than impermissible expert opinion from lay witnesses on the issue of causation. We find several defects in this reasoning. It appears that the trial court focused exclusively on the fact that the reports indicated that Leslie or the plaintiff had reported the "anoxia," or "anoxic" incident, to the physicians and assumed: (1) that Leslie and the plaintiff actually used this diagnostic term, as opposed to the indicia of that term, to characterize the 2002 incident in their meetings with the physicians; and (2) that the reports' recitation of those statements reflected the physicians' obsequious acceptance of that "diagnosis" without ascertaining the underlying facts and without bringing any independent judgment to bear on the question of whether an anoxic incident during Leslie's July, 2002 hospitalization had caused her cognitive impairments. Given the Mayo Clinic's well established reputation as a preeminent medical facility, such assumptions, devoid of factual predicates that would support them, seem dubious. More importantly, however, these assumptions are contradicted by the reports when reviewed in their entirety.[12]

"Expert opinions must be based upon reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation.[13] . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability . . . *does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony.* . . . [*Similarly, when*] *reports are the substitute for testimony, the entire report should be examined, not only certain phrases or words.*" (Citations omitted; emphasis added; footnote added.) *Struckman* v. *Burns*, supra, 205 Conn. 554–55.

Thus, the trial court was obliged to consider the reports in their totality to determine whether they were competent evidence as to whether the defendant's acts or omissions had caused Leslie's cognitive impairment rather than focus on a particular word or phrase. Cf. *Mather* v. *Griffin Hospital*, 207 Conn. 125, 134–36, 540 A.2d 666 (1988) (concluding that testimony of three expert witnesses collectively was sufficient to establish causation). When considered in the fullness of their content, those reports reflect the following information. The plaintiff and Leslie had provided the Mayo Clinic

with information that, prior to Leslie's 2002 hospitalization, she had been on considerable amounts of Valium without any decline in cognitive functioning. While an in-patient at the defendant and while still taking Valium, Leslie went for a period of time breathing at a rate of somewhere between one and four breaths per minute. This event was witnessed by a nurse, but was not treated aggressively.[14] Although Leslie's cognitive function appeared normal up to one hour before this period of respiratory dysfunction, almost immediately thereafter her family noticed severe cognitive deficits.[15] By 2005, Leslie and the plaintiff described Leslie's cognitive functioning as static or slightly improved from the substantial decline in functioning that occurred in July, 2002. McEvoy's February, 2005 report stated: "It is *still my clinical impression based on the temporal profile of the onset of her symptoms*, that [Leslie] has a primary autoimmune disorder consistent with [SMS], which by history was associated with dysarthria but no cognitive impairment, along with a superimposed anoxic encephalopathy which developed by her report of July 10, 2002, in [a] hospital in Connecticut at the time of uncontrolled muscle spasms from her SMS. Her cognitive function, by her and [the plaintiff's] report, has improved and pretty much stabilized, as might be expected after an anoxic [incident]." (Emphasis added.)

These records further reflect that McEvoy thereafter directed Leslie to various clinicians for extensive cognitive and neurological testing. Following his own testing and physical examination of Leslie, as well as a review of the history obtained by Dupont, Josephs' March, 2005 report stated more definitively: "*It is my opinion* that [Leslie's] cognitive impairment is secondary to whatever event occurred or whatever transpired in 2002. The family member tells me that there was anoxia and that there was a change after that event. Therefore, *one must conclude that her cognitive impairment was secondary to the event that occurred in 2002*. Arguing for this being the process of her cognitive impairment also is the fact that she has not had any significant progression since 2002. The cognitive impairment in my opinion is not related to [Leslie's] diagnosis [of SMS] and is not in keeping with a neurodegenerative syndrome given the lack of progression." (Emphasis added.) In the "Diagnoses" section of the report, Josephs listed "[c]ognitive impairment (static encephalopathy secondary to anoxic brain damage)." Following her review of the diagnostic impressions of Josephs and others who had examined and tested Leslie, McEvoy similarly adopted as her diagnosis in her March, 2005 report "Cognitive impairment (static encephalopathy secondary to anoxic brain damage)."

These records reflect that McEvoy and Josephs concluded that they had sufficient, reliable information to diagnose Leslie's condition and the cause of that condition with the requisite degree of confidence. The physi-

cians ruled out Leslie's SMS or some other neurodegenerative condition as the cause of those injuries and apparently concluded that the anoxic incident, *as described*, was the presumptive cause of Leslie's cognitive deficits because such a causal relationship was consistent with the timing of the onset of symptoms, the symptoms manifested and the results of comprehensive examination and testing. Such a deductive process is a proper method on which to base an opinion as to causation. See *Struckman* v. *Burns*, supra, 205 Conn. 554 ("[t]he causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, *by his deduction by the process of eliminating causes other than the traumatic agency*, or by his opinion based upon a hypothetical question" [emphasis added]); see also *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 252, 9 A.3d 364 (2010) ("differential diagnosis is a method of diagnosis that involves a determination of which of a variety of possible conditions is the probable cause of an individual's symptoms, often by a process of elimination" [internal quotation marks omitted]). Although there may be other possible causes that the physicians did not consider, such matters go to weight, not admissibility.[16] See *Eisenbach* v. *Downey*, 45 Conn. App. 165, 176, 694 A.2d 1376 (concluding that defendants' argument that trial court improperly admitted medical reports to establish causal connection because reports did not consider and eliminate plaintiffs' prior injuries as cause, went to weight and not admissibility), cert. denied, 241 Conn. 926, 696 A.2d 1264 (1997).

The defendant contends, however, that Josephs' use of the phrase "whatever event occurred or whatever transpired in 2002" and McEvoy's recitation of "an apparent anoxic event" reflect uncertainty as to the essential facts on which any purported causation opinion was predicated. We note that the trial court identified no such concerns as a basis for its decision. Moreover, we view these terms simply as the physicians' acknowledgment that, because they did not have independent verification of the facts provided, they were assuming the truth of those facts for the purpose of rendering a diagnosis.

Indeed, in this regard the trial court's reasoning and the defendant's positions in support thereof suffer from a similar defect. Neither the trial court nor the defendant has brought any authority to our attention, and we are aware of none, that would require the plaintiff to establish the truth of all of the foundational facts on which the expert relies through the expert's testimony. There is, however, authority to the contrary. See *Hally* v. *Hospital of St. Raphael*, 162 Conn. 352, 358–59, 294 A.2d 305 (1972) (citing authority for proposition that jury is not obligated to accept ultimate opinion of expert witnesses "since the jury might reject the opinion . . . because the opinion was based on subordinate facts

which they do not find proven"); see also Conn. Code Evid. § 7-4 (a), commentary ("Subsection [a] contemplates that disclosure of the 'foundational' facts will, in most cases, occur during the examination undertaken by the party calling the expert and before the expert states his or her opinion. The requirement of preliminary disclosure, however, is subject to the trial court's discretionary authority to admit evidence upon proof of connecting facts, or subject to later proof of connecting facts."). The plaintiff readily acknowledges that she will have to establish, through witnesses with personal knowledge of the circumstances, that the defendant's acts or omissions actually caused Leslie to suffer respiratory distress. Accordingly, we conclude that the Appellate Court properly determined that the trial court had misapprehended the law in concluding that the reports did not contain competent evidence to create a material issue of dispute as to causation.

II

The defendant asserts a second ground on which it claims that the Appellate Court improperly concluded that the trial court's decision to preclude the reports was an abuse of discretion. This claim, variously stated, challenges the Appellate Court's conclusions relating to the trial court's decision to withdraw its previous order granting the plaintiff's motion for the appointment of a commission, which effectively quashed the subpoenas compelling Josephs and McEvoy to submit to the depositions. Analyzing this claim through a slightly different framework than applied by the Appellate Court, the defendant contends that: (1) the trial court properly determined that the Mayo Clinic physicians had a testimonial privilege against being compelled to testify as expert witnesses on causation; (2) as a result of their effective invocation of that privilege, the defendant was deprived of an opportunity to cross-examine the plaintiff's experts; and (3) the trial court properly conditioned the admission of the reports on the availability of the plaintiff's experts in part due to prejudice to the defendant if such an opportunity was not afforded.[17] In defense of the trial court's decision regarding the testimonial privilege, the defendant contends that case law from our Superior Court as well as from other jurisdictions supports the conclusion that compelling a physician to serve the interests of a private litigant is tantamount to involuntary servitude prohibited under the thirteenth amendment to the United States constitution because it requires the physician to provide for free a commodity that has value, namely, the physician's expertise. The defendant further contends that, in order to justify abrogating this privilege in light of these substantial interests, there must be a compelling necessity for the testimony. Because there is no basis in the record on which to conclude that the plaintiff could not have procured any experts other than her treating physicians to opine on causation to demonstrate such a compelling

necessity, the defendant contends that the trial court properly terminated the commission.

We conclude that the defendant was not deprived of an opportunity for cross-examination. In light of the facts in the record supporting that conclusion and representations from counsel at oral argument before this court, we further conclude that it is unnecessary to examine the Appellate Court's determination that the trial court improperly ruled that Leslie's treating physicians could not be compelled to provide expert testimony with regard to opinions expressed in the reports.

We begin by noting that the trial court did not cite this ground as a basis for rendering summary judgment in the defendant's favor. The sole stated basis for the judgment was that there was "nothing in the records, nor any other evidence, to indicate that the person(s) who had made the comments to the treating physicians, advocating a causal connection between [Leslie's] symptoms and her stay at the [defendant], were qualified to give expert testimony regarding causation." Even if we were to consider the defendant's claim as a properly raised alternate ground for affirmance, however, the defendant cannot prevail.

The record reveals the following additional facts. At the outset of Josephs' deposition, the defendant elicited responses indicating that Josephs had neither been retained by the plaintiff to provide expert testimony nor been informed that his opinions and records would be used as expert testimony. Immediately thereafter, the defendant reiterated for the record its objections to the depositions as burdensome, expensive and prejudicial. It further stated an objection on the ground that a physician cannot be compelled to provide expert testimony, citing Superior Court case law as support.[18] In response, Joanne L. Martin, counsel for the Mayo Clinic, stated that Josephs and the Mayo Clinic had the understanding that Josephs was there solely to testify as to "his care and treatment of [Leslie] and not to render expert opinions that go to standard of care [or] causation . . . ." The defendant then elicited responses from Josephs indicating that he did not intend to offer testimony outside the scope of the matters reflected in Leslie's medical records as regard to her care and treatment or to offer any opinion as to the cause of any problems she claims to have suffered as a result of the defendant's conduct. Thereafter, the defendant examined Josephs at length about the substance of his report and the basis for statements therein, including the sources of information. The defendant obtained direct answers to questions as to: whether Josephs' stated opinion that Leslie's cognitive impairment is secondary to whatever event occurred or whatever transpired in 2002, was based on information provided by the plaintiff and Leslie; whether Josephs had any idea as to what events had transpired while she was in the care of the defendant;

whether he had intended to give an opinion as to whether the 2002 event triggered the anoxic incident; and whether he had any idea what had caused the anoxia, if in fact anoxia had been caused. The plaintiff thereafter questioned Josephs with regard to the same matters. Martin objected to questions only insofar as they were directed to the standard of care, went beyond Josephs' expertise, or were irrelevant to Josephs' care and treatment of Leslie. Martin terminated the deposition at the end of two hours, divided equally between the parties, a period one half as long as the court had authorized. She indicated that additional time requested by the plaintiff would need to be scheduled with the deposition coordinator at the Mayo Clinic.

Two days later, Martin participated in a telephonic conference with the trial court and the parties, at which time the court discussed a motion for a protective order filed by Martin on behalf of the Mayo Clinic as well as a renewed objection to the appointment of a commission and the continuation of the depositions asserted by the defendant. Martin stated that she had filed the motion because the depositions had been loud, disruptive and argumentative, and had extended beyond the time she had anticipated for a normal deposition. Following the plaintiff's objection that the court could not consider Martin's motion because she had not filed an appearance, the court declined to rule on that motion and it was never docketed as part of the court record. The court instead considered the defendant's renewed objection to the depositions. The defendant began by recounting Josephs' deposition testimony indicating that he had neither formed an opinion as to whether the defendant had caused Leslie's cognitive injuries nor intended to offer an expert opinion as to that matter. The defendant contended that this testimony, as well as the plaintiff's failed efforts to get Josephs to "bootstrap his testimony onto the records of other record keepers," demonstrated that the plaintiff could not elicit the requisite evidence from Josephs to support the admission of the reports as expert opinion on causation. It further contended that continuing the depositions would be an abuse of the discovery process because, under Superior Court case law, physicians cannot be pressed into service as experts against their will.[19] In response, the plaintiff argued that the testimony that she thus far had elicited demonstrated that further deposition testimony would be fruitful and that the authority cited by the defendant did not address the examination of a treating physician with regard to an opinion previously expressed. After the court ascertained from Martin that McEvoy similarly would refuse to offer an expert opinion as to standard of care or causation, the trial court sustained the defendant's objection to the continuation of the depositions and withdrew its approval of the plaintiff's request for the appointment of a commission on the ground that the

physicians could not be compelled to be expert witnesses.

In light of these facts, we readily can dispose of the defendant's claim that the trial court properly precluded the reports because the defendant had been unable to fully cross-examine the plaintiff's proposed experts. It is evident that whatever limits the Mayo Clinic placed on the testimony of its physicians had no impact on the defendant's ability to cross-examine Josephs. Josephs answered every question that was posed to him by the defendant. Indeed, Josephs' testimony provided the defendant with substantial evidence to impeach, potentially, the reports as an expert opinion that the defendant's conduct had caused Leslie's cognitive injuries. There is no reason to conclude that the defendant would not be afforded a similar opportunity to fully cross-examine McEvoy.

The depositions reveal that, if anyone was hampered by the limits placed on testimony by the Mayo Clinic, it was the plaintiff. At oral argument before this court, however, the plaintiff's counsel represented that, after having obtained clarification of the Mayo Clinic's policy, he does not foresee any obstacle to obtaining relevant testimony from the physicians if the depositions were to be continued. In particular, he represented that, although the Mayo Clinic precludes its physicians from providing expert testimony as to standard of care, causation and damages generally, its policy does not preclude its physicians from testifying regarding the basis of opinions previously expressed in the course of treatment. Thus, contrary to the Appellate Court's suggestion; *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 104 n.15; the assertion of privilege as an obstacle to the depositions no longer appears to be an issue likely to arise on remand.

The plaintiff suggested at oral argument, however, that it would be useful to the bench and bar for this court to address questions that have arisen in the trial courts with regard to whether physicians have a testimonial privilege against being compelled to provide expert testimony under various circumstances. To do so, however, would contravene this court's jurisprudential rule against rendering advisory opinions. See *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 419, 880 A.2d 882 (2005) ("[w]here the question presented is purely academic, we must refuse to entertain the appeal" [internal quotation marks omitted]); *State* v. *McElveen*, 261 Conn. 198, 204–205, 802 A.2d 74 (2002) ("[t]he first factor relevant to a determination of justiciability—the requirement of an actual controversy—is premised upon the notion that courts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law"). We underscore that the narrow issue that was raised in the present case is

whether a treating physician can be compelled to testify as an expert regarding an opinion previously *expressed* by that physician. As we have explained, there is no need to resolve that question under the particular circumstances of this case. The plaintiff has never claimed that she is entitled to compel expert opinion regarding matters on which Leslie's treating physicians had expressed no opinion in their reports. Indeed, the Appellate Court's opinion did not address that broader issue.[20] Accordingly, we need not address that issue either.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] The revised complaint also named as defendants Associated Family Physicians, P.C., and Janice Lynn Sumner, a physician. Prior to the commencement of trial, Sumner successfully moved to dismiss the complaint as to her, and thereafter the trial court granted a motion for summary judgment in favor of the professional corporation. Accordingly, because New Milford Hospital is the sole remaining defendant in the case, we refer to it as the defendant in this opinion.

[2] Leslie was named as the plaintiff in this action when it originally was commenced in 2004. In 2006, her attorney withdrew from the case. In 2007, the Probate Court for the district of Washington appointed her twin sister, Lynnia Milliun, as conservator over Leslie's person and estate after finding that Leslie was incapable of managing her affairs or caring for herself, including exercising her civil and personal rights, by reason of stiff man syndrome, cognitive impairment and ataxic dysarthria. Thereafter, Leslie successfully moved, through counsel, to have Lynnia Milliun substituted as the plaintiff in this action, and new counsel appeared in the action. For convenience, we refer to Lynnia Milliun as the plaintiff in this opinion.

[3] See Mayo Clinic, "Paraneoplastic Syndromes of the Nervous System," available at http://www.mayoclinic.com/health/paraneoplastic-syndromes/DS00840/DSECTION=symptoms (last visited December 11, 2013); see also The Dictionary of Modern Medicine (J. Segen ed., 1992) p. 695 (defining syndrome as rare motor dysfunction disorder that can cause muscle stiffness, painful muscle spasms and motor and gait abnormalities).

[4] Anoxia is the "[a]bsence or almost complete absence of oxygen from inspired gases, arterial blood, or tissues." Stedman's Medical Dictionary (28th Ed. 2006) p. 98. As we explain later in this opinion, the use of the terms "anoxic" or "anoxia" have particular significance in the issues in this appeal because the trial court focused on statements in the reports at issue suggesting that the plaintiff or Leslie may have used such medical terminology. We therefore note that, except when such terms are specifically attributed to a declarant, we use these terms simply for convenience to characterize the alleged incident and its effect. The plaintiff did not use either term in her complaint.

[5] Dysarthria is "[a] disturbance of speech" due to various causes including stiffness of the muscles used for speaking. Stedman's Medical Dictionary (28th Ed. 2006) p. 595.

[6] Encephalopathy is "[a]ny disorder of the brain." Stedman's Medical Dictionary (28th Ed. 2006) p. 636.

[7] "General Statutes § 52-148c allows a party to apply to the court for a commission to take the deposition of an out-of-state witness. Once the commission is granted by the court in this state, a subpoena can be obtained in the proposed deponent's state to force the deponent to attend a deposition in his [or her] state." *Struckman* v. *Burns*, 205 Conn. 542, 552, 534 A.2d 888 (1987). We note that there is conflicting information in the record as to whether the plaintiff applied for the commission because the trial court indicated that she was obligated to make her experts available to the defendant for cross-examination or because the trial court deemed the records insufficient without supporting testimony from the experts.

[8] The Appellate Court did not specifically address whether the trial court abused its discretion in issuing its order withdrawing its permission for the commission with respect to further deposing Josephs, whose deposition had been prematurely terminated by Mayo Clinic counsel but after both

parties had been afforded essentially equal time to question him.

[9] With regard to the standard of review, we note that the Appellate Court reviewed the trial court's decision to preclude the reports under the abuse of discretion standard that this court has deemed applicable to decisions regarding the admission of medical records under General Statutes § 52-174 (b). See *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 95, citing *Rhode* v. *Milla*, 287 Conn. 731, 742, 949 A.2d 1227 (2008) (reviewing decision to admit reports). The Appellate Court acknowledged that, in *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 610–12, 2 A.3d 963 (2010), it had concluded that plenary review applies to a trial court's ruling regarding the admissibility of expert testimony when such a ruling is rendered in the course of a summary judgment proceeding. *Milliun* v. *New Milford Hospital*, supra, 95 n.11. Noting that a certified appeal to this court was then pending in *DiPietro* on this and other issues, the Appellate Court concluded that it need not decide whether the *DiPietro* standard would apply in the present case because the trial court had misapprehended the law, which in any event constitutes an abuse of discretion. Id.; see *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010) ("a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law" [internal quotation marks omitted]). We note that this court ultimately did not need to reach the standard of review issue in the certified appeal in *DiPietro*. See *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 111 n.2, 49 A.3d 951 (2012). We also note that it is well settled that "when the trial court's decision to exclude evidence is premised on a *correct view of the law*, our standard of review is for an abuse of discretion." (Emphasis added.) *State* v. *Annulli*, 309 Conn. 482, 491, 71 A.3d 530 (2013). Because we agree with the Appellate Court that the trial court misunderstood the governing legal principles in the present case, we need not now consider whether the court in *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 583, correctly decided that plenary review applies to an evidentiary ruling rendered in the course of a summary judgment proceeding.

[10] We note that the Appellate Court stated the more limited principle that "a *physician's* medical opinion is not inadmissible because it is formed, in whole or in part, on the basis of hearsay statements made by a *patient*." (Emphasis added.) *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 96. In support of this more limited principle, the Appellate Court relied on the following statements in *George* v. *Ericson*, 250 Conn. 312, 320, 736 A.2d 889 (1999): "[I]t is the general rule that an expert's opinion is inadmissible if it is based on hearsay evidence. . . . One exception to this rule . . . is the exception which allows a physician to testify to his opinion even though it is based, in whole or in part, on statements made to him by a patient for the purpose of obtaining from him professional medical treatment or advice incidental thereto." (Citation omitted; internal quotation marks omitted.) See *Milliun* v. *New Milford Hospital*, supra, 96. The Appellate Court in *Milliun* appears to have overlooked the fact that *George* cited this "general rule" in the context of overruling the case that had articulated the rule. Specifically, in *George*, this court considered whether to overrule *Brown* v. *Blauvelt*, 152 Conn. 272, 205 A.2d 773 (1964), which had precluded the admission of a nontreating physician's opinion premised in part on the aforementioned "general rule." In concluding that *Brown* must be overruled, this court explained: "[O]ur holding in *Brown*, even at the time that it was rendered, *was based on a faulty premise, namely, that* '[*i*]*t* [*was*] *the general rule that an expert's opinion is inadmissible if it is based on hearsay evidence.*' Id., 274. *This proposition was incorrect when it was stated, and it remains incorrect today.* Although in *Brown* we cited to *Vigliotti* v. *Campano*, [104 Conn. 464, 465, 133 A. 579 (1926)], as support for this proposition, *Vigliotti* actually stands for the opposite proposition, namely, that an expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as 'to come to a conclusion which the trial court might well hold worthy of consideration by the jury.' " (Emphasis added.) *George* v. *Ericson*, supra, 321. Accordingly, we underscore that no such general rule or limited exception thereto exists.

[11] Because the hearsay nature of the statements at issue is irrelevant, we have no occasion to consider whether, in light of Leslie's disabilities and other circumstances, the statements made by the plaintiff to Leslie's treating physicians would fall within the hearsay exception for statements made for the purpose of medical treatment. See Conn. Code Evid. § 8-3 (5). We note,

however, that the plaintiff's statements regarding the 2002 anoxic incident reflected in the 2005 medical reports appear to be substantively indistinguishable from Leslie's statements reflected in the Mayo Clinic's 2003 medical reports. Moreover, despite the defendant's claims to the contrary, the trial court made no distinction between statements of the plaintiff and those of Leslie, treating both as suffering from the same defects throughout the proceedings. Therefore, we see no basis on which to conclude that the plaintiff's statements were insufficiently trustworthy for the physicians to consider them for purposes of forming an opinion.

[12] Although the parties were not permitted to depose Dupont, the resident working under Josephs' supervision in connection with Josephs' treatment of Leslie, we note the following comments in Dupont's report that undermine a conclusion that Leslie or the plaintiff came to the Mayo Clinic presenting that Leslie had suffered an "anoxic" incident. Dupont noted: "[Josephs and I] spoke with [Leslie] and [the plaintiff] at length about what *we think had happened to her*. Even though they had heard this before, it seemed as though they appreciated being involved in the thinking process that was being put into this diagnosis [of anoxic encephalopathy]." (Emphasis added.)

[13] We note that it is the expert's ultimate opinion as to causation that must be expressed in terms of a reasonable probability, not the underlying facts on which that opinion is predicated. Indeed, expert opinion may be predicated on hypothetical facts. See Conn. Code Evid. § 7-4. As we later explain, the plaintiff must produce evidence to prove the underlying facts on which such an opinion is based, but such proof may be, and often is, derived from sources other than the expert. See *Viera* v. *Cohen*, 283 Conn. 412, 449, 927 A.2d 843 (2007) ("[t]he established rule is that, on direct examination, the stated assumptions on which a hypothetical question is based must be the essential facts established by the evidence").

[14] McEvoy's 2003 report mentions that Leslie had "an investigative report from a state board regarding the incident." The state board's report was not made a part of the trial court record, and nothing in the Mayo Clinic reports disclose the substance of that report. Therefore, although this reference suggests that at least some of the plaintiff's allegations were substantiated in the state board's report, we have no way of knowing which allegations were documented in that report.

[15] The various ways in which those deficits had manifested were described in some detail in Dupont's report. Josephs' report indicated that he had "reviewed the history as given to me by my resident, Dr. Dupont . . . ."

[16] Similarly, Josephs' deposition testimony denying having formed an opinion as to causation may be submitted to the trier, along with testimony acknowledging awareness of certain historical facts when making a diagnosis, to determine what weight to give the conclusions in Josephs' report.

[17] We note that, because the defendant has contended that its myriad claims all fall within the scope of the certified question, we have slightly recast its varied arguments so as to give them greater coherence as they relate to the certified question.

[18] The defendant cited *Hill* v. *Lawrence & Memorial Hospital*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X04-CV-05-4034622-S (June 30, 2008) (45 Conn. L. Rptr. 789), a case that the defendant had brought to the trial court's attention before the court granted the plaintiff's request for appointment of a commission.

[19] We note that the Appellate Court raised legitimate questions as to whether: (1) the defendant actually asserted the privilege, which raises concerns as to its standing to assert a privilege that would seem to be personal to the Mayo Clinic physicians; *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 107; and (2) the defendant took inconsistent positions by seeking to discontinue the depositions and then claiming on appeal that it was deprived of an opportunity to cross-examine McEvoy. Id., 103. Nonetheless, we assume that the limitations on the depositions asserted by the Mayo Clinic should be viewed effectively as the assertion of a purported privilege, as the defendant seems to suggest, and that the defendant's opposition to the depositions was aimed at avoiding additional expense and inconvenience when it believed that the Mayo Clinic's position precluded the plaintiff from eliciting the expert opinion necessary to support admission of the reports.

[20] The Appellate Court stated: "[T]he idea that an expert witness who already has expressed an opinion in connection with the material facts of a case cannot be called to testify as to the basis for such opinion is inconsistent with the very nature of a trial as a search for truth . . . and in stark contrast to the fundamental maxim that the public . . . has a right to every

man's evidence. . . . Although we do not hold that a person may be compelled to offer expert testimony in a case simply because he is an expert in a particular field . . . that does not mean that a treating physician cannot be compelled to testify at a deposition as to opinions documented in his medical records and the statements made therein. In this connection, we emphasize that both Josephs and McEvoy were disclosed as experts by the plaintiff because, during the course of their care as treating physicians, each offered a tangible opinion as to the causal connection between the defendant's alleged negligence and Leslie's injuries. Because [t]here is no justification for a rule that would wholly exempt experts from placing before a tribunal factual knowledge relating to the case in hand [*or*] *opinions already formulated* . . . we decline to accept the defendant's invitation to create a testimonial privilege that would prevent such witnesses from being deposed in the present case." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, supra, 129 Conn. App. 108–109.