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Experts Should Not Be Allowed To Lie Under Oath

Doctor's false statements were critical to med-mal case

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Lying under oath is a crime against justice and undermines the authority of our courts. There can be no greater blight to the pursuit of justice. Unfortunately, it is apparent that some witnesses do not take the obligation of an oath seriously. Denying knowledge of a known fact, testifying in contradiction to a known fact and testifying that you do not recall a known fact all constitute lying under oath.

The Connecticut Supreme Court, this state's highest court, should be clear that lying under oath is not tolerated and will be punished. And that witnesses who lie will not get away with it; nor will any party to a proceeding be allowed to benefit from it. This proclamation should be clear and emphatic.

The Connecticut Supreme Court failed to do this in its recent decision in *Filippelli v. St. Mary's Hospital,* 319 Conn. 113 (2015). *Filippelli* was a case against an orthopedic surgeon, Dr. Dennis Rodin. It involved the alleged negligent failure to timely diagnose and treat the plaintiff's compartment syndrome after a leg fracture, a condition in which increased pressure in a confined anatomic space adversely affects circulation and threatens the function and viability of the leg.

The only defense expert, Dr. Andrew Bazos, was deposed one month before trial. When asked at deposition whether he remembered the names of any physicians for whom he previously had provided expert deposition testimony, Bazos stated: "The only one I remember, because it was relatively recent, was [a physician named] Geiger." This deposition, apparently on behalf of Dr. Arthur Geiger, was approximately one year prior. When asked whether he had ever heard of the defendant, Rodin, before his involvement in this case, Bazos, who works in New Milford, 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."

This was a lie. In fact,Bazos had testified as an expert in four medical malpractice cases in the prior six years, and three of the four were on behalf of Rodin. In all three cases,. Bazos was retained by the same defense counsel, attorney Ellen Costello of Del Sole & Del Sole. Strikingly, Bazos had testified as an expert on behalf of Rodin just two months prior to his deposition in *Filipelli* (much more recent than the one year prior when he testified on behalf of Geiger). And, while the same defense counsel was preparing Bazos to testify at deposition in *Filipelli* just five days earlier, Bazos had signed the errata sheet for that prior deposition on behalf of Rodin!

The trial judge, Superior Court Judge Sheila Ozalis, refused plaintiff's counsel the opportunity to question Bazos on this obvious lie. Instead, Ozalis only permitted plaintiff's counsel to ask Bazos whether he had a prior "working relationship" with Rodin. Ozalis reasoned that to allow any broader inquiry would unduly prejudice Rodin by having the specter of other prior malpractice claims before the jury. After a defense verdict at trial, the plaintiff appealed, challenging his inability to fairly cross-examine Bazos about this lie. On appeal, the Appellate Court and then the Connecticut Supreme Court deferred to the trial judge's discretion without even a mention of the overwhelming importance of truth to the judicial process. Worse still, the Supreme Court described the lost opportunity for cross-examination on the critical issue of veracity as an inquiry into a "collateral matter."

Persuasive Dissent

What about the lie then? What about the truth? What about allowing Rodin to benefit from a lie being told by his expert? A lie told in the presence of defense counsel? Since when is cross-examination which goes to heart of a witnesses' veracity a "collateral matter"?

A witness' bias (a disposition for one party or even a friendly feeling) may be implied from the relationship of a witness to a party. Bias is critical to deciding how much weight to give that witness' testimony. We know this intuitively from the time we are young children. In fact, the Supreme Court has previously recognized that evidence tending to show bias "may be … the very key to an intelligent appraisal of the testimony of the witness" and that cross-examination about that should not be unduly restricted.

The thoughtful and persuasive dissent in *Filippelli* authored by Justice Dennis Eveleigh (joined by Justice Andrews McDonald and Senior Justice Christine Vertefeuille) concludes that the evidence regarding Bazos' misleading testimony at his deposition should have been admitted as both evidence of bias, and as a specific instance of misconduct relating to veracity.

The dissent observes that plaintiff had a good faith basis for believing that Bazos had lied under oath, and alludes to the potential power of that evidence in front of a jury, coupled with the suggestion he may have had a bias in favor of the defendant.

As the dissent notes (citing Connecticut Code of Evidence §6-5), evidence tending to show a witness' bias, prejudice or interest is never collateral.

Without truth, there can be no justice. Every lawyer, every judge, every court and especially the Connecticut Supreme Court should leave no room for doubt. Tell the truth or else you will be found out. Hide the truth and you will be punished. Abet the hiding of truth and you will be disciplined. All cases should be decided by what the evidence reveals, not by evidence that is concealed. ■

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