Can Unretained Experts Be Compelled To Give Opinion Testimony?

by Katherine Hsu Hagmann

For years, Connecticut's trial courts have debated an important question: whether individuals, who have not been hired and disclosed as expert witnesses, may still be compelled to express their opinions under oath. Any person who possesses particular training and expertise could find herself in this quandary. Although treating physicians, nurses, and other health care providers are most often confronted with this dilemma, real estate appraisers, engineers, and other professionals may face it as well. The Appellate Court's recent decision in *Redding Life Care, LLC v. Town of Redding*, 174 Conn. App. 193, ___ A.3d ___ (2017) sheds light on the debate. In *Redding*, the Appellate Court explicitly recognized a qualified testimonial privilege for individuals who are experts in their field. Although the *Redding* privilege has limitations, which are addressed below, it is an important protection for anyone who does not want to serve as an unwilling, uncompensated expert witness.

In its 1968 decision in *Town of Thomaston v. Ives*, the Connecticut Supreme Court concluded that: "Undeniably, there is a distinction between the duty of a witness to testify to factual matters within his knowledge and the imposition of a requirement that he voice his opinion concerning a subject with which he is conversant as an expert."[1] In *Ives*, the trial court compelled a state-hired appraiser to testify against his will as to value during an eminent domain hearing, the Supreme Court required the witness to testify. The Supreme Court affirmed, but explained that its decision should not be taken to mean that every expert witness is subject to the same requirement.

After *Ives*, an unretained expert privilege evolved in Connecticut's trial courts. For example, in *Drown v. Markowitz*, the trial court ruled that a treating physician could not be compelled to give opinion testimony regarding care rendered by her colleagues.[2] Likewise, the courts in *Hill v. Lawrence & Memorial Hospital*[3] and *Baker v. Mongelluzzo*[4] recognized that treating physicians cannot be compelled to serve as unwilling, uncompensated plaintiff's experts. There was, however, a split of authority on the issue.[5]

Other jurisdictions explicitly adopted a testimonial privilege for unretained experts. For example, in 1999, the Wisconsin Supreme Court held that, absent a showing of compelling circumstances, an expert cannot be required to give opinion testimony.[6] The court reasoned: "A person who has expended resources to attain specialized knowledge should not be forced to part with that knowledge upon demand, absent compelling circumstances."[7] The Iowa Supreme Court had also recognized a qualified expert privilege, observing that "[i]n a technical society, many individuals possess some expertise. … Theoretically, parties, regardless of the size of their claim or its potential merit, could routinely issue subpoenas compelling expert discovery."[8]

In Wisconsin and Iowa, the privilege is not absolute. An expert's testimony can be compelled if a party affirmatively demonstrates a compelling necessity for the expert's testimony.[9] Iowa's Supreme Court also opined that an adequate plan for compensation must be presented, and the expert cannot be required to do any out-of-court preparation. New York and Rhode Island go further in that both states provide absolute immunity for unretained experts. In New York, a real estate appraiser could not be forced to opine regarding the value of property. He was required only to describe its physical condition.[10] The Rhode Island Supreme Court considered a case where the plaintiff's treating physician refused to opine on her prognosis in a motor vehicle accident suit. The court recognized an absolute privilege, likening compelled expert testimony to involuntary servitude.[11]

It was against this backdrop that the Appellate Court decided *Milliun v. New Milford Hospital* in 2011.[12] In *Milliun*, a patient who allegedly sustained hypoxia at New Milford Hospital sought subsequent treatment at the Mayo Clinic. Without their consent, plaintiff's counsel disclosed the Mayo Clinic treating physicians as expert witnesses in a medical malpractice lawsuit, and sought to introduce, as evidence, portions of their progress notes that addressed the issue of causation. The plaintiff's attorney also sought, and received, a commission to depose the treating physicians in Minnesota. After one Mayo Clinic

1 156 Conn. 166, 172, 239 A.2d 515 (1968).

2 No. CV05-4010740, 2006 WL 2604986 (Conn. Super. Aug. 18, 2006).

3 No. HHD-X04-CV-4034622S, 2008 WL 2802907 (Conn. Super. June 30, 2008). In *Hill*, the plaintiff disclosed nonparty treating physicians as expert witnesses without their consent, and the physicians moved for protective orders to prevent questioning on causation or damages.

4 No. UWY-CV12-6016555S, 2016 WL 9462318 (Conn. Super. June 28, 2016).

5 *See, e.g., Kekelik v. Hall-Brooke Hosp.*, No. X05-CV98-0169297S, 2000 WL 1918016 (Conn. Super. Dec. 15, 2000).

6 *Burnett v. Alt*, 589 N.W.2d 21, 27 (Wisc. 1999).

7 *Id.*

8 *Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983).

9 *Burnett*, 589 N.W.2d at 27; *Mason*, 340 N.W.2d at 242.

10 *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 72 N.E.2d 165, 165 (1947).

11 See *Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985).

12 129 Conn. App. 81 (2011), *aff'd on other grounds*, 310 Conn. 711 (2013).

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