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DIMITRI PERDIKIS ET AL. *v.* JAY H. KLARSFELD ET AL.
(AC 43955)

Bright, C. J., and Alvord and Prescott, Js.

*Syllabus*

The plaintiff sought to recover damages for the alleged medical malpractice of the defendant ear, nose and throat surgeon, claiming, inter alia, that the defendant had been negligent in the performance of his nasal surgery, which caused him to suffer serious and permanent injuries. During a postoperative appointment with the defendant, at which the plaintiff discussed postsurgical concerns, the defendant observed the plaintiff manipulating the surgical site by pulling on his lip and nose and inserting fingers and tissues into his nose. The defendant told the plaintiff that he was "more than concerned" that these actions could damage the result of the surgery and later noted such concerns in the plaintiff's medical chart. The plaintiff later experienced bleeding from his nose and was diagnosed with a large perforation in his septum. He also experienced, inter alia, persistent nasal septal deviation, diminished and altered sense of smell, congested sinuses, and frequent recurring headaches. At trial, the defendant claimed that the plaintiff was the sole proximate cause of his own injuries due to his alleged manipulation of his fresh surgical wound in the early postoperative period. The plaintiff presented the expert testimony of B, an ear, nose and throat surgeon, who testified, inter alia, that he believed that the defendant had deviated from the appropriate standard of care during the plaintiff's operation and that, with a reasonable degree of medical certainty, it was highly improbable that the plaintiff had caused his own injuries. The defendant did not present any expert testimony. Over the plaintiff's objection, the trial court rejected his proposed jury instructions and, instead, submitted to the jury the defendant's proposed instruction that, if it determined that the plaintiff's actions were the sole proximate cause of his injuries, it must return a verdict for the defendant. During its deliberations, the jury asked the court three questions regarding B's testimony on the structure of the nose and the location of the plaintiff's perforation. No interrogatories were submitted to the jury. The jury returned a defendant's verdict and, thereafter, the trial court denied the plaintiff's motion to set aside the verdict. On the plaintiff's appeal to this court, *held*:

1. The trial court's instructions to the jury on sole proximate cause were improper:

a. The trial court improperly instructed the jury to consider whether the plaintiff's alleged postsurgical conduct was the sole proximate cause of his injuries in the absence of any competent evidence supporting the charge: the defendant presented no expert testimony that established a causal link between the plaintiff's postsurgical manipulations of his lip and nose and his injuries, as whether the plaintiff's actions caused his injuries was outside the common knowledge of laypersons and, thus, required the introduction of competent medical opinion evidence, which the defendant did not offer, to remove it from the realm of speculation and conjecture before the court could issue a sole proximate cause instruction; moreover, the defendant could not prevail on his argument that his own medical opinion testimony as a fact witness and medical records evidence that the plaintiff's actions could have caused his injuries rose to a level of reasonable medical probability and, thus, sufficiently demonstrated causation to warrant the sole proximate cause instruction, as such an opinion, even if it had been proffered as expert testimony, was speculative and did not indicate the probability that the plaintiff had caused his own injuries; furthermore, the defendant could not prevail on his claim that B's testimony in response to a hypothetical was sufficient to establish that the plaintiff's conduct could have caused his injuries, as B testified that such a result was only possible and not probable, and he further testified that he did not believe the plaintiff could have engaged in the type of manipulation possible to cause the injuries he sustained.

b. The trial court erred in failing to instruct the jury in accordance with the plaintiff's proposed charge that it could not consider his alleged postsurgical actions in manipulating his nose and lip as a cause of his injuries; because the defendant had placed the issue of whether the plaintiff's postsurgical conduct was the sole proximate cause of his injuries before the jury without the requisite accompanying expert medical opinion on causation, the plaintiff's proposed charge was a correct statement of the applicable legal principles relevant to the issues of the case and, thus, should have been presented to the jury by the court.

2. The trial court's erroneous instruction regarding sole proximate cause was harmful and the likelihood of actual prejudice to the plaintiff was significant enough to warrant a new trial: the court's instruction that if the jury found that the plaintiff's actions were the sole proximate cause of his injuries, it must find for the defendant, coupled with closing arguments from the defendant's counsel that the plaintiff had caused his own injuries, likely misled the jury that competent evidence existed to support the defendant's theory, although there was no expert testimony to this effect, and caused the jury to speculate, as indicated by its questions to the court during deliberations; moreover, this court declined to apply the general verdict rule to the present case, as previous holdings from the Supreme Court and this court clarified that the rule does not apply to cases such as the present one, in which various grounds were advanced to defeat the claimed cause of action under a general denial, and this court was not at liberty to overrule such precedent.

Argued January 4—officially released May 23, 2023

*Procedural History*

Action to recover damages for alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named plaintiff withdrew the claims against the defendant Advanced Specialty Care, P.C., et al., and the plaintiff Theodora Vogiatzi-Perdikis withdrew her claims as to all defendants; thereafter, the matter was tried to the jury before *Cobb, J.*; verdict for the named defendant; subsequently, the court, *Cobb, J.*, denied the named plaintiff's motion to set aside the verdict and rendered judgment for the named defendant, from which the named plaintiff appealed to this court. *Reversed*; *new trial*.

*Brandon B. Fontaine*, for the appellant (named plaintiff).

*Stuart C. Johnson*, with whom were *Thomas J. Plumridge*, and, on the brief, *Sally O. Hagerty*, for the appellee (named defendant).

*Opinion*

BRIGHT, C. J. In this medical malpractice action, the plaintiff Dimitri Perdikis appeals from the judgment of the trial court, rendered after a jury verdict in favor of the defendant Jay H. Klarsfeld, a physician and surgeon.[1] The plaintiff claims that the court erred by denying his request to charge the jury that it *could not* consider his postsurgical actions as a cause of his injuries and, instead, instructing the jury that it *could* consider his postsurgical actions in its causation analysis. We conclude that, in the context of the present case, the introduction of competent evidence—an expert medical opinion stated with a degree of reasonable medical probability—was required to allow the jury to infer a causal link between the plaintiff's actions and his injury. Because no such evidence was presented at trial, we conclude that the court's jury instruction was improper and harmful and, therefore, reverse the judgment of the trial court and remand the case for a new trial.[2]

The following facts, which the jury reasonably could have found, and procedural history are relevant to our analysis of the plaintiff's claim. The defendant is a Connecticut licensed physician and surgeon who specializes in otolaryngology, colloquially referred to as an ear, nose, and throat doctor (ENT). In June, 2012, the defendant began treating the plaintiff for nasal congestion and chronic sinusitis.[3] On January 2, 2013, the defendant performed nasal surgery on the plaintiff to treat his ailments and reduce his nasal congestion.[4] The surgery involved the removal of infected tissue and bone in the plaintiff's sinuses to improve drainage, enlarging a portion of his sinus cavity, correcting portions of his nasal cavity that were causing difficulty in the plaintiff's breathing, and correcting the plaintiff's deviated septum—the wall, consisting of a cartilage section and a bony section, that divides the nasal cavity into halves—by removing crooked portions of the septal bone and cartilage.[5] The surgery was accomplished in approximately one hour.

On January 3, 2013, the plaintiff reported to the defendant's office for his first postoperative visit. At that visit, the defendant removed surgical packing from the plaintiff's nose. Later that day, the plaintiff called the defendant's office to report swelling of his upper lip, an inability to lift his lip, and a concern that his smile would not be the same postsurgery. On January 4, 2013, the plaintiff returned to the defendant's office to discuss those issues. During that visit, the defendant observed the plaintiff manipulating the surgical site by pulling on his lip and nose and inserting fingers and tissues up into his nose. In response, the defendant "told [the plaintiff that] these actions could damage the result" and reiterated that the plaintiff could use a light ice pack on his lip for twenty-four hours, should use saline nasal spray five times a day, should use bacitracin two

times a day, and should take his antibiotics. The defendant did not examine the plaintiff at that time. The next day, the defendant called the plaintiff and, in an addendum to the plaintiff's patient report, recorded his impression that the plaintiff seemed to be doing "a little better in terms of anxiety." The defendant further wrote in the addendum that the plaintiff was experiencing congestion and had informed the defendant that "when he pulls his nose forward, he can breathe better." The defendant wrote that in response to the plaintiff's statement, he "repeated [his] insistence that [the plaintiff] not try to pull or stretch his nose either to improve breathing or change its shape." The defendant was aware of no further incidents thereafter of the plaintiff manipulating the surgical site.

On January 9, 2013, the plaintiff returned to the defendant's office for another postoperative visit at which time the defendant removed the plaintiff's sutures. Sometime in the early morning hours of January 17, 2013, the plaintiff woke up from his sleep because he was choking on blood in his throat and mouth and was bleeding from his nose. He ran to the shower at which point he turned on the water, felt something choking him in the back of his throat, cleared his throat, and coughed out what he observed to be a mass of something that "could've been a very large blood clot." The bleeding from his nose continued, and the plaintiff called the defendant's office later that morning and reported the prolonged nosebleed. Later that day, he went to the defendant's office and was examined by Doug Bloch, another ENT at the defendant's practice, who located a bleed in the defendant's right nasal cavity and cauterized it with silver nitrate.

On January 21, 2013, the plaintiff was seen by Seth Brown, an ENT at the Connecticut Sinus Institute—Farmington (Sinus Institute), who examined the plaintiff and detected abnormal crusting within the plaintiff's nasal cavity. After Brown removed the crusting, he detected a large septal perforation. The perforation began about three quarters of an inch behind the columella[6] and continued back into the nose toward the posterior of the head and spanned portions of both the cartilage and boney parts of the septum. Although measurements of the perforation varied, the perforation was at least 2.4 centimeters long and was approximately the size of an American quarter coin. In addition to several other issues in the plaintiff's nasal cavities, Brown found scarring in both nostrils and determined that the plaintiff's septum remained deviated. Given that the plaintiff was only three weeks postsurgery, Brown recommended that the plaintiff follow up with the defendant "to see what [the defendant] can do to fix this." On January 22, 2013, however, the plaintiff failed to report to the defendant's office for a scheduled postoperative appointment. From January, 2013, through the time of trial, the plaintiff continued treatment with

Brown and, later, Belachew Tessema, an ENT also of the Sinus Institute.[7] On October 12, 2015, Tessema performed a functional endoscopic sinus surgery on the plaintiff to ameliorate symptoms associated with the plaintiff's chronic sinusitis and to resolve certain nasal issues that remained after the plaintiff's first surgery performed by the defendant.

On January 23, 2015, the plaintiff instituted this medical malpractice action against the defendant. In his complaint, the plaintiff asserted two counts against the defendant. In count one, the plaintiff alleged that the defendant had been negligent in his performance of the plaintiff's surgery.[8] The plaintiff alleged that, as a result of the defendant's malpractice, he suffered severe, serious, painful and/or permanent injuries including a large nasal septal perforation, persistent nasal septal deviation, a diminished and altered sense of smell, congested sinuses, diminished or a sensation of diminished nasal air flow, and frequent recurring headaches. The plaintiff alleged further that he has incurred and will continue to incur medical expenses and treatment, has endured pain and suffering as well as the loss of his ability to carry on and enjoy life's activities, and his earning capacity has been impaired. The plaintiff sought damages for these harms. In count two, the plaintiff sought damages for the defendant's alleged failure to sufficiently inform him of all material medical information related to his treatment, which, if properly done, the plaintiff alleges would have caused him to refuse consent to the surgery. On March 27, 2015, the defendant filed an answer to the complaint and denied the material allegations therein.

A jury trial was held on November 7, 8, 12, 13, 14, and 15, 2019. During opening statements, it became clear that, as part of his general denial, the defendant intended to demonstrate that the plaintiff was the sole proximate cause of his own injuries. The defendant's counsel stated: "I think you will conclude that [the plaintiff] manipulated and disrupted a fresh surgical wound in the early postoperative period and caused disruption of a fresh suture line in the delicate tissue in his nose. I think you will find that there simply is no credible evidence of malpractice. I think you will find that [the defendant] did only what was necessary, no more, no less, and that he took the time necessary to do it.

"I will return to you at the end of the case and ask for a verdict in [the defendant's] favor. . . . Because we don't hold our doctors liable for risks accepted by a patient and complications or suboptimal results that happen in the absence of medical negligence. We also don't hold our doctors accountable for postoperative complications brought about by the patient's own conduct."

The jury heard four days of evidence during which

the plaintiff presented the testimony of John R. Bogdasarian, an ENT surgeon. Bogdasarian served as the plaintiff's medical expert and testified as to the standard of care and the cause of the plaintiff's injuries. He testified that, typically, the nasal surgery that the plaintiff underwent would take approximately ninety minutes to complete. Because the defendant completed the surgery in approximately one hour, Bogdasarian testified that he believed the defendant had deviated from the appropriate standard of care by rushing through the procedure.

Relevant to the plaintiff's claim on appeal, Bogdasarian also testified that there were two possible scenarios that probably caused the plaintiff's septal perforation. "[T]he first one would be if a tear is created in the lining of the septum on each side, kind of in the same location, and if you've taken the cartilage and bone that separate those two areas out, essentially you've created an opening that goes one side to the other, and the septum may heal with a hole rather than healing up and down with the [mucus membrane] intact on each side. So that's one way. Usually, one is all right if there's a tear on one side and the other side's intact, the side that's torn will oftentimes heal, but if there's a hole on each side, there's a good chance you're going to end up with a perforation that goes through.

"The second way, and one that probably is a little more likely given the size of this perforation, would be when [the septal] splints were put in, the plastic, if the stitch that holds them on each side of the nose is too tight, then the blood supply to the lining may be cut off and so that would create a larger area of pressure and a larger defect. So, if I were saying which is more likely, I would think it would be that."[9] Bogdasarian testified that, in the present case, both possible causes of the perforation would be a result of the defendant's deviation from the standard of care. Although Bogdasarian acknowledged that a septal perforation could form over weeks to months from a person picking at a crust on the septum, he further testified with "a reasonable degree of medical certainty" that the plaintiff's postsurgical conduct, i.e., inserting fingers and tissues up his nose, pulling on his lip, and pulling on the tip of his nose, "wouldn't cause [the plaintiff's] septal perforation" or any of the injuries the plaintiff suffered postsurgery. Bogdasarian reiterated this stance on cross-examination when he testified that "it would be extremely unlikely that anything that the patient could do would cause the type of trauma that would result in a big perforation." In addition, in response to a hypothetical situation posed by the defendant's counsel, Bogdasarian stated that, although it was theoretically possible for an individual to manipulate a postsurgical wound such that a large perforation could occur, he did not believe that had occurred in the present case.

The plaintiff also presented his own testimony and that of the defendant as a fact witness.[10] The defendant testified that, at the time of the plaintiff's surgery, he had completed more than 3000 nasal surgeries in which he corrected a deviated septum. Septal perforations occurred in fewer than one half of 1 percent of those surgeries, and none of the perforations were greater than one square centimeter in size.[11] The defendant further testified that, when informing patients of risks attendant to nasal surgery, he typically informs them that a septal perforation may occur, though he does not specify the possible size of such a perforation. Significantly, no one testified that a perforation as large as the plaintiff's was a risk attendant to a properly performed nasal surgery. The defendant also recounted that, on January 4, 2013, he observed the plaintiff with tissues in his nose pulling on his nose and lip. The defendant recalled being "more than concerned" that the plaintiff's actions "might cause problems" with the results of the surgery.

The defendant's case-in-chief consisted of recalling the defendant for further fact testimony on his stitching process. The defendant did not present any expert testimony. The defendant did, however, present the records of several physicians who treated the plaintiff for his nasal congestion and chronic sinusitis both before and after the January 2, 2013 surgery, the defendant's postoperative report from the surgery, the hospital records relating to the surgery, and the records of Richard L. Doty, the director of the Smell and Taste Center at the Perelman School of Medicine at the University of Pennsylvania, on the plaintiff's alleged loss of smell. None of those records expressed any opinion as to the cause of the plaintiff's septal perforation.

On November 12, 2019, the defendant submitted to the court the following proposed jury charge on the sole proximate cause doctrine: "There has been evidence in this case that [the defendant] is not responsible for the injuries suffered by [the plaintiff], and that the sole proximate cause of his injuries is the conduct of the plaintiff. As I just stated, proximate cause is an act or failure to act which is a substantial factor in producing a result. Substantial factors may include the acts or omission of the plaintiff and may include forces other than negligent conduct. If you find that the conduct of [the plaintiff] contributed so powerfully to the creation of the plaintiff's injuries, such that [the defendant's] conduct may be considered trivial or inconsequential, those [alternative] forces are considered the sole proximate cause of the injuries. In that case, [the defendant's] negligence necessarily will not be a substantial factor, or proximate cause of the plaintiff's injuries.

"It is the plaintiff's burden to prove that the negligence of [the defendant] was a proximate cause of the injury alleged by [the plaintiff]. If you find that the

negligence of [the defendant] was a proximate cause of the injury, even if not the sole proximate cause, then you will find in favor of the plaintiff on causation. [The defendant] is liable if he was a proximate cause of the injury, even if you find that there were also other proximate causes.

"The corollary to this rule is that if you find from the evidence that [the defendant's] negligence was not a substantial factor in causing the injury—that is, if the injury was caused only by one or more conditions, persons or factors other than the negligence of [the defendant]—then the [plaintiff] ha[s] not proven [the defendant] liable."

In response, the plaintiff submitted the following proposed instruction: "In this case you have heard some testimony and may see in some of the exhibits some evidence that would indicate that the plaintiff performed some action to his lip and/or nose that the defendant claims may have caused some or all of the plaintiff's injuries. You may NOT consider such evidence on the question of what caused the plaintiff's injuries. There was no evidence from a properly qualified witness that any such claimed actions of the plaintiff were, with reasonable medical certainty, causes of the plaintiff's injuries. It is not enough that [the defendant] may have testified that the plaintiff's actions could cause damage to the work he performed. Nor was it sufficient that he testified that, had the plaintiff returned to his care, he would have provided further services to assist in the plaintiff's healing process. Without testimony from an expert witness that such actions of the plaintiff were, with reasonable medical certainty, a cause of his later injuries, you may not consider such claims of the defendant. The ONLY questions you should concern yourselves with are: Was the defendant negligent (or did he commit malpractice) and, if so, were his actions a proximate cause of any or all of the plaintiff's claimed injuries and harms. You may not consider the plaintiff's actions as a contributing factor." (Emphasis in original.)

On the evening of November 13, 2019, the court, *Cobb, J.*, provided the parties with its intended jury instructions, which included an instruction consistent with the defendant's requested charge on the sole proximate cause doctrine.[12] On the morning of November 14, 2019, the plaintiff objected to the court's sole proximate cause instruction. In response, the defendant argued that he was entitled to a charge on sole proximate cause pursuant to *Mulcahy* v. *Hartell*, 140 Conn. App. 444, 59 A.3d 313 (2013). In particular, the defendant argued that a charge on sole proximate cause was appropriate when, as in the present case, the issue of whether the plaintiff's actions were indeed the sole proximate cause of his injuries is "a factual issue that comes out of [the defendant's] general denial of negligence."

Following this exchange, the court declined to make any further changes to its proposed instructions, and both parties gave their closing arguments. In the plaintiff's closing argument, the plaintiff's counsel argued that the defendant was negligent in rushing through the surgery and that negligence was the proximate cause of the plaintiff's injuries. In addition, the plaintiff's counsel further argued that the plaintiff could not have been the cause of his own injuries, stating: "[Y]ou heard [Bogdasarian] say, look, that area up there is very tender at that point, two days postsurgery, he couldn't . . . imagine somebody pushing something up his nose so hard that it would cause the disruption . . . ." "[T]hose two [medical chart addendum] entries are the only thing[s] in this whole record about [the plaintiff] manipulating his nose. And [Bogdasarian] said it's highly unlikely that would cause these problems." Finally, the plaintiff's counsel stated that "there's only one person who really talked about the cause [of the perforation], really, in terms of more likely than not from a reasonable medical probability: that was [Bogdasarian]. And there's been no counterevidence [indicating] that [Bogdasarian] is wrong."

The defendant's counsel, however, told the jury that, "[i]n order for the plaintiff to prevail, you must believe [Bogdasarian]. In order for [the defendant] to prevail you need only believe him." She then argued "that [the defendant] did [the] procedure with all due care, and that it was actually [the plaintiff's] own postoperative manipulation of his surgical site that resulted in bleeding two weeks postoperatively, the passing of a blood clot or a hematoma, and the development of a two centimeter perforation that was first seen by [Brown] when he removed a scab that revealed a perforation in the nasal septum."

Thereafter, the court instructed the jury on the law of the case. With respect to sole proximate cause, the court instructed the jury in relevant part: "Proximate cause. . . . The plaintiff must prove that any injury for which he seeks compensation from the defendant was caused by the defendant.

"The first issue for your consideration is, 'Was the plaintiff injured?' If the answer is no, you will render a verdict for the defendant. If the answer is yes, you will proceed to the second issue, which is, 'Were such injuries caused by the negligence of the defendant?' This is called 'proximate cause.'

"Negligence is a proximate cause of an injury if it was a substantial factor in bringing the injury about. In other words, if the defendant's negligence contributed materially and not just in a trivial or inconsequential manner to the production of the injury, then the negligence was a substantial factor. If you find that the defendant's negligence was not a substantial factor in

bringing about the injury suffered by the plaintiff, you will render a verdict in favor of the defendant. However, if you find that the defendant's negligence was a substantial factor in causing injury to the plaintiff, you will consider damages.

"Multiple causes. . . . Under the definitions I have given you, negligent conduct can be a proximate cause of an injury if it is not the only cause, or even the most significant cause of the injury, provided it contributes materially to the production of the injury, and thus is a substantial factor in bringing it about. Therefore, when a defendant's negligence combines together with one or more other causes to produce an injury, such negligence is a proximate cause of the injury if its contribution to the production of the injury, in comparison to all other causes, is material or substantial.

"When, however, some other cause contributes so powerfully to the production of an injury as to make the defendant's negligent contribution to the injury merely trivial or inconsequential, the defendant's negligence must be rejected as a proximate cause of the injury for it has not been a substantial factor in bringing about the injury.

"Sole proximate cause. . . . The defendant denies that any of his actions caused the plaintiff's injury. The defendant claims that the plaintiff's postsurgery conduct was the cause of the perforation. Evidence that an actor other than the defendant was the sole proximate cause of the plaintiff's injuries constitutes a factual scenario inconsistent with the plaintiff's allegation that the defendant's actions were the proximate cause of the plaintiff's injuries. If you find that the plaintiff's actions were the sole proximate cause of his injuries, then you will find for the defendant."

The court then provided the jury with two verdict forms, one for the plaintiff and one for the defendant.[13] No jury interrogatories were submitted to the jury. After the jury departed to begin deliberations, the plaintiff's counsel again objected to the court having given the sole proximate cause charge. On November 15, 2019, the jury returned a verdict for the defendant, which the court accepted.

On November 25, 2019, the plaintiff filed a motion to set aside the verdict. The motion alleged, inter alia, that the court improperly had instructed the jury on the issue of sole proximate cause. The motion was heard by the court on February 3, 2020, which summarily denied it in open court.[14] Judgment was rendered for the defendant that same day.

On February 21, 2020, the plaintiff filed the present appeal. On March 13, 2020, the plaintiff filed a notice pursuant to Practice Book § 64-1, asking the court to issue a memorandum of decision stating the reasons for its denial of his motion to set aside the verdict. On

January 21, 2021, the court vacated its prior ruling on the motion to set aside the verdict and entered a new ruling that stated "[d]enied." The plaintiff subsequently filed with this court a motion for permission to file a late motion for articulation in the trial court. In that motion, he represented that he sought to file the motion for articulation to obtain a memorandum of decision on the denial of his motion to set aside the verdict because the court had yet to issue one in accordance with § 64-1. On April 14, 2021, this court denied the motion but ordered, sua sponte, that "the trial court . . . shall articulate the factual and legal basis for the denial of the plaintiff's motion to set aside the verdict." The court thereafter issued a memorandum of decision in accordance with this court's order on October 8, 2021. Additional facts will be set forth as necessary.

I

On appeal, the plaintiff claims that the court erred by (1) instructing the jury that it *could* consider whether the plaintiff's postsurgical actions were the sole proximate cause of his injuries and (2) declining his request to charge the jury that it *could not* consider alleged postsurgical actions of the plaintiff in manipulating his nose as a cause of his injuries. The plaintiff argues that, because the defendant presented no expert evidence causally linking the plaintiff's postsurgical conduct with his injuries, there was no basis for the court to give a sole proximate cause instruction and the issue should not have been submitted to the jury for consideration. The defendant, contrastingly, argues that the court properly instructed the jury that it could consider whether the plaintiff's conduct was the sole proximate cause of his injuries and that any error was harmless. We agree with the plaintiff.

A

We first address the plaintiff's claim that the court improperly instructed the jury on the sole proximate cause doctrine in the absence of any competent evidence supporting the charge. The plaintiff argues that, to give the instruction, an expert had to testify with reasonable medical probability that the plaintiff's postsurgical conduct could cause his injuries. We agree.

The standard of review and principles of law that guide our analysis are well established. "A challenge to the validity of jury instructions presents a question of law. Our review of this claim, therefore, is plenary. . . . We must decide whether the instructions, read as a whole, properly adapt the law to the case in question and provide the jury with sufficient guidance in reaching a correct verdict. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . It is established law that it is error for a court to submit to the jury an

issue [that] is wholly unsupported by the evidence." (Internal quotation marks omitted.) *Ocasio* v. *Verdura Construction, LLC*, 215 Conn. App. 139, 151–52, 281 A.3d 1205 (2022).

In its October 8, 2021 memorandum of decision, the court explained its reasoning for instructing the jury on the sole proximate cause doctrine consistent with the defendant's proposed charge: "Because the defendant did not plead the special defense of contributory negligence, the defendant did not assume any burden to establish that the plaintiff's actions contributed to his injuries. [See] *Juchniewicz* v. *Bridgeport Hospital*, 281 Conn. 29, 45, [914 A.2d 511] (2007). Under a general denial, it is the plaintiff's burden to prove that the defendant's negligence caused the injury. In a medical malpractice case 'evidence of a plaintiff's posttreatment conduct may be offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of [the plaintiff's] injuries.' *Mulcahy* v. *Hartell*, [supra, 140 Conn. App. 446]. The plaintiff's postsurgical actions were not a surprise to the plaintiff, as his conduct was discussed at depositions and in the medical records.

"The court's sole proximate cause charge was approved by the Appellate Court in *Mulcahy* v. *Hartell*, [supra, 140 Conn. App. 446]. . . . In *Mulcahy* . . . the dispositive issue was 'whether evidence of a plaintiff's posttreatment conduct may be offered by a defendant under a general denial for the purpose of showing that the plaintiff's conduct was the sole proximate cause of her injuries.' [Id.] The court held that it could. The pleadings, facts of [the present case], and the court's charge are similar to and consistent with *Mulcahy*. In addition, because this was a general verdict and the plaintiff did not seek any jury interrogatories, it cannot be known whether the jury rendered its verdict for the defendant based on this charge or based on the plaintiff's failure to prove his case that the defendant was negligent as outlined [in] the jury charge as a whole."

We read *Juchniewicz* and *Mulcahy* more narrowly than the trial court and emphasize that there are material differences between the evidence in those cases and the evidence in the present case. In *Juchniewicz*, the plaintiff's decedent died of an untreated bacterial infection that caused her to suffer toxic shock syndrome. *Juchniewicz* v. *Bridgeport Hospital*, supra, 281 Conn. 33. In that case, the defendant physician's "alleged negligence was based entirely on his responses to the plaintiff's decedent's reports of her symptoms to him . . . ." Id., 44. As part of his defense, the defendant sought to present evidence that the decedent had caused her own death. Id. Accordingly, "[t]hrough his *expert witness*, the defendant . . . presented evidence on the decedent's failure accurately to describe her

symptoms [to the defendant].” (Emphasis added.) Id. As a result of this evidence, the court determined that the plaintiff was not entitled to a jury charge that the decedent was presumed to be in the exercise of reasonable care. Id., 31.

Similarly, in *Mulcahy*, the “medical malpractice action [arose] out of a bacterial infection that the plaintiff developed after obtaining acupuncture treatment from the defendant . . . .” *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 446. As part of his general denial, the defendant sought to present evidence that the plaintiff caused her own injuries. “[T]he defendant presented *expert testimony* from Gary Schleiter, a physician who specialized in internal medicine and infectious disease, that the plaintiff’s [infection] was caused by the plaintiff’s wiping of her skin with an unwashed hand or unsterile object in her car after the acupuncture treatment.” (Emphasis added.) Id., 448–49.

Thus, in both *Juchniewicz* and *Mulcahy*, the defendants introduced expert testimony demonstrating a causal link between an injury and the plaintiff’s conduct. The defendant in the present case, contrastingly, introduced no such expert testimony. Therefore, the court’s reliance on *Mulcahy* and *Juchniewicz* to support the sole proximate cause instruction was misplaced in the absence of similar expert testimony of a causal link between the plaintiff’s postsurgical conduct and his injuries. In fact, this distinction between the present case and *Mulcahy* and *Juchniewicz* is central to our analysis.

Connecticut law is clear that, in a medical malpractice case, expert testimony is typically required to establish a causal link between an injury and its alleged cause so that the question of causation can “be removed from the realm of speculation and conjecture.” *Samose* v. *Hammer-Passero Norwalk Chiropractic Group, P.C.*, 24 Conn. App. 99, 103, 586 A.2d 614, cert. denied, 218 Conn. 903, 588 A.3d 1079 (1991). It is well established that, “[w]hen [a] causation issue . . . goes beyond the field of ordinary knowledge and experience of judges and jurors, expert testimony is required.” (Internal quotation marks omitted.) *Hughes* v. *Lamay*, 89 Conn. App. 378, 381, 873 A.2d 1055, cert. denied, 275 Conn. 922, 883 A.2d 1244 (2005). “[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.) *Cockayne* v. *Bristol Hospital, Inc.*, 210 Conn. App. 450, 460, 270 A.3d 713, cert. denied, 343 Conn. 906, 272 A.3d 1128 (2022). Moreover, a “causal connection must rest upon more than surmise or conjecture. . . . A trier is not concerned with possibilities but with reasonable probabilities. . . . The causal relation between an injury and its later

physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Emphasis omitted; internal quotation marks omitted.) Id., 461.

Nevertheless, we recognize that there are circumstances when expert evidence regarding causation is not required. "[E]xpert opinion may not be necessary as to causation of an injury or illness if the plaintiff's evidence creates a probability so strong that a lay jury can form a reasonable belief." (Internal quotation marks omitted.) *Sherman* v. *Bristol Hospital, Inc.*, 79 Conn. App. 78, 89, 828 A.2d 1260 (2003). This exception does not apply in the present case. The jury was presented with conflicting theories as to how the plaintiff suffered an abnormally large postsurgical septal perforation and other complications. The defendant's testimony that he was "more than concerned" that the plaintiff's postsurgical conduct "might cause problems" falls far short of that required to eliminate the need for expert testimony that such conduct did cause, to a reasonable degree of medical probability, the plaintiff's postsurgical complications and injuries. This is particularly true given that the plaintiff's expert witness testified, to a reasonable degree of medical probability, that the plaintiff's postsurgical conduct did not cause the injury.

Put another way, whether the plaintiff's manipulation of his lip and nose disrupted his surgical wounds such that it caused a large perforation, persistent nasal septal deviation, diminished and altered sense of smell, congested sinuses, diminished or a sensation of diminished nasal air flow, and frequent recurring headaches, is outside the common knowledge of laypersons. Compare *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 813, 945 A.2d 955 (2008) (neither cause and effect of infection after spinal surgery nor proper surgical treatment for synovial cyst on spine are matters within common knowledge of laypersons), *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 572–73, 864 A.2d 1 (2005) (expert testimony necessary to establish whether decedent's symptoms, first exhibited after receiving medications, were consistent with uncomfortable but normal reaction to medication or were indicative of serious allergic reaction requiring readmission and treatment), *Krause* v. *Bridgeport Hospital*, 169 Conn. 1, 6–7, 362 A.2d 802 (1975) (expert testimony necessary where decedent's shoulder was dislocated during administrationof barium enema), and *Poulin* v. *Yasner*, 64 Conn. App. 730, 749, 781 A.2d 422 (not within jury's common knowledge to determine whether, if plaintiff had ceased drinking alcohol, acute pancreatitis would not have resulted), cert. denied, 258 Conn. 911, 782 A.2d 1245 (2001), with *Puro* v. *Henry*, 188 Conn. 301, 305, 449 A.2d 176 (1982) (expert testimony was not necessary where circumstantial evidence was sufficient for jury to con-

clude that defendants left needle in plaintiff's abdominal wall during surgery, and needle caused plaintiff's injuries), *State* v. *Orsini*, 155 Conn. 367, 372, 232 A.2d 907 (1967) ("[t]he state of pregnancy is such a common condition that a woman may give her opinion that she herself is pregnant"), and *Sprague* v. *Lindon Tree Service, Inc.*, 80 Conn. App. 670, 676, 836 A.2d 1268 (2003) ("[i]t is sufficiently within common knowledge and ordinary human experience that the lifting of heavy objects, such as wood and brush soaked with water may cause lower back injury, including a ruptured disc, and therefore it was unnecessary for the commissioner to turn to expert testimony to find that such work was the cause of the plaintiff's injury").

Accordingly, although a defendant may rely on a general denial to introduce " 'affirmative evidence tending to establish' "; *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 451; that "an actor other than the defendant was the sole proximate cause of the plaintiff's injuries"; id., 452; in medical malpractice actions such as the present case, in which the causation issue raised by the defendant goes beyond the field of ordinary knowledge and experience of the layperson, the issue of causation must be removed from the realm of speculation and conjecture by the introduction of competent expert medical opinion evidence before the court can instruct the jury that it may consider the plaintiff's conduct as the sole proximate cause of his injuries.[15]

On appeal, although the defendant testified only as a fact witness and called no expert witness on the issue of causation, he argues that his fact testimony on direct examination and his medical records pertaining to the plaintiff "supported an alternative cause of the [plaintiff's] injuries," and constituted "medical evidence regarding the grave concern the [defendant] had about the [plaintiff's] manipulation of the fresh surgical site and the damage it risked. Even more, the [defendant] testified . . . that he was 'more than concerned' that the [plaintiff's] manipulation of the surgical site endangered the integrity of the surgical site. Certainly, a jury would be at liberty to interpret the fact [that] the [defendant] was 'more than concerned' that the [plaintiff] could be doing damage to the surgical site to mean that the [defendant] believed the plaintiff *was* causing damage."[16] (Emphasis in original.)

At oral argument before this court, the defendant's counsel clarified this argument, contending that the defendant's testimony as to his opinion at the time of treating the plaintiff and his contemporaneous medical report rose to a level of reasonable medical probability and, accordingly, sufficiently demonstrated causation to warrant the sole proximate cause instruction.[17] We are not persuaded.

The law is clear as to the requirements for competent expert testimony as to causation. "[A]n expert opinion need not walk us through the precise language of causation . . . . 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 that an event has occurred 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. . . . [S]ee, e.g., *State* v. *Weinberg*, 215 Conn. 231, 245, 575 A.2d 1003 ([a]n expert witness is competent to express an opinion, even though he or she may be unwilling to state a conclusion with absolute certainty, so long as the expert's opinion, if not stated in terms of the certain, is at least stated in terms of the probable, and not merely the possible . . .), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990); *Aspiazu* v. *Orgera*, 205 Conn. 623, 632–33, 535 A.2d 338 (1987) ([w]hile we do not believe that it is mandatory to use talismanic words or the particular combination of magical words represented by the phrase reasonable degree of medical certainty [or probability] . . . there is no question that, to be entitled to damages, a plaintiff must establish the necessary causal relationship between the injury and the physical or mental condition that he claims resulted from it . . .)." (Emphasis omitted; internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 462. The same is true when a party seeks to prove causation through a treating physician's medical records.[18] Our Supreme Court has held that—as with all medical expert opinions—in order for expert opinions within a treating physician's report to be admissible as evidence of causation, they "must be based upon reasonable probabilities rather than mere speculation or conjecture . . . . 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*." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 730, 80 A.3d 887 (2013); see also *Struckman* v. *Burns*, 205 Conn. 542, 554–55, 534 A.2d 888 (1987). We thus review the defendant's report and his trial testimony to see if they meet this standard.

The report on which the defendant relies consists of the medical chart compiled in relation to the plaintiff's visits and treatments with the defendant. The chart described the history and treatment of the plaintiff and included notes and addendums entered by the defendant after certain visits. In particular, the defendant points to an addendum dated January 4, 2013: "[Patient] very distressed/inconsolable over difficulty in elevating upper lip. He has no recollection about our multiple discussions about post-op swelling, congestion, plastic, sutures, etc. I used the analogy of gum swelling after periodontal sur-

gery and how it takes weeks to resolve. . . . He repeatedly stated that I must have elevated the periosteum over his maxilla and disrupted his nasal spine. I assured him repeatedly that this was not done and the tightness he is feeling is the septo columella stitch repositioning his septum and giving support. He wanted a new upper lip sling . . . [p]laced to reposition his lip and nose. During the visit he was trying to stretch the stitch and over move his lip. *I told him these actions could damage the result.*" (Emphasis added.)

On direct examination, when the plaintiff's counsel asked the defendant to clarify the addendum, the following exchange occurred:

"A. [The plaintiff was] trying to move his lip that he was pulling—

"Q. Okay.

"A. —[because] he had trouble with its motion. He kept pulling on this area and putting his fingers up into his nose. . . .

"Q. Okay. Now, and when you say putting his fingers in his nose you mean like this, you know, putting them just inside the nose and pulling?

"A. No, he was pulling with force on his lip and on the columella area.

"Q. *And you were concerned that this might cause problems with your work. Correct*?

"A. *I was more than concerned.*

"Q. Okay. So, did you look to see whether he in fact had damaged anything?

"A. It doesn't matter at that point. If what you're doing is you touch nothing, you've got to let—if there's tears, you let it be. There's nothing to do to fix anything at that point. It's stop, wait, and see what's going to happen. There is no repair, there's nothing more to do.

"Q. Okay. So, any damage he had done, he had already done.

"A. He'd already—or would continue to do. . . .

"Q. . . . do you have a note of him doing this further?

"A. No, I don't.

"Q. Okay. So, you know that he did it, you said don't do it, okay, and he was inconsolable, and had he done damage it was already done at that point. Right?

"A. That is correct.

"Q. Okay. And it would be guesswork on your part to say whether he did it or didn't do it in the future. Correct?

"A. I can't tell.

"Q. Which means you'd be guessing.

"A. Yes." (Emphasis added.)

Assuming, arguendo, that the statements in the defendant's report and testimony could be considered the defendant's expert medical opinion, even though he was never designated as an expert witness, we conclude that they set forth mere possibilities and did not adequately raise a probable causal connection between the plaintiff's postsurgical conduct and his resulting injuries.

Although we are mindful that "talismanic words" are not required to prove causation; (internal quotation marks omitted) *DiNapoli* v. *Regenstein*, 175 Conn. App. 383, 401 n.14, 167 A.3d 1041 (2017); the defendant's testimony and medical report failed to support an argument that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries. The only "opinion" the defendant expressed in his report was that the plaintiff's postsurgical conduct "could damage the result." This statement is speculative and conveys no opinion that the plaintiff's conduct probably caused the injuries of which he complained. Similarly, the defendant's trial testimony that he was "more than concerned" that the plaintiff's postsurgical conduct "might cause problems" merely states a general concern of unspecified possibilities. Nowhere in the totality of the medical report or the defendant's testimony does he opine in any way that the plaintiff's postsurgical conduct *probably* caused his subsequent injuries. Although an expert opinion need not walk us through the precise language of causation, it must "*at least* [*be*] *stated in terms of the probable, and not merely the possible*." (Emphasis added; internal quotation marks omitted.) *State* v. *Weinberg*, supra, 215 Conn. 245; see also *Aspiazu* v. *Orgera*, supra, 205 Conn. 632–33 (expert opinion cannot rest on surmise or conjecture because trier of fact must determine probable cause, not possible cause).

After reviewing the defendant's testimony and medical report, it is clear that the defendant's opinions were stated in terms of possibility rather than probability and were not competent evidence on which the jury could conclude that the plaintiff's postsurgical conduct caused his injuries. See *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 22, 961 A.2d 1016 (2009) (trial court properly precluded expert causation testimony where, although expert stated he believed incident was related to subsequent event, "he did not express it in terms of probabilities, and, therefore, he did not state his opinion with the requisite standard of reasonable medical probability").

The defendant attempts to fill in the gaps left in his report and testimony by arguing that Bogdasarian's testimony in response to a hypothetical scenario posed by the defendant on cross-examination was sufficient to establish, via expert medical opinion, that the plaintiff's alleged postsurgical conduct could cause his subsequent injuries.[19] Specifically, the defendant contends that, given Bogdasarian's answer to the hypothetical, coupled "with the defendant's own testimony about the [plaintiff's] actions, and the contemporaneous medical record, the

jury reasonably could have found that the [plaintiff's] conduct was the sole proximate cause of his own injuries." We disagree.

The following colloquy occurred between Bogdasarian and defense counsel on cross-examination:

"Q. So, when we talked about the potential for trauma to the area on the second postoperative day, one of the things you'd be considering, Doctor, correct, is whether the patient put their fingers up their nose, pushed tissues up their nose, was elevating their lip up over their teeth, because you don't dispute, Doctor, that those splints inside the nose could be manipulated by those sorts of actions, do you?

"A. Well, I think it would depend on with what type of vigor it was carried out. I think those stents are sutured in place so they're not going to be terribly mobile. I don't know as if moving the upper lip would displace them or certainly do enough trauma to cause a big perforation or—and, again, given the location of [the perforation] I think he'd have to have half of his finger in his nose and the stents or splints are there to protect the septum from any kind of trauma. So, I don't—I think in likelihood it would be extremely unlikely that anything that the patient could do would cause the type of trauma that would result in a big perforation. That's my assessment of it.

"Q. Your opinion with reasonable medical probability with regard to the splints is that, if the stitch was too tight over the splints that there was an interruption of blood supply to that area. Correct?

"A. Yes.

"Q. And that would be the mechanism by which a perforation would develop.

"A. Correct.

"Q. So, Doctor, would you agree with me—I'm not asking you to determine the facts of the case, I'm asking you to assume if the patient was able to stuff tissues up the nose to the area of the splints, was able to get his fingers into his nose, was able to lift his lip in a way such that it disrupted those sutures, would you agree with me that that could interrupt the blood supply to that fresh postoperative site?

"A. Well, I think in a hypothetical situation, you're saying leaving aside the facts of this particular case, I suppose if someone stuffed tissues in his nose tightly enough or tugged on his lip vigorously enough, or put his finger to his second knuckle into this nose and wiggled it all around, I suppose those things could potentially cause trauma. Do I think that's what happened? You asked me not to consider that so I'll just say in general hypothetically those things would be possible."

Accordingly, although Bogdasarian stated that a patient stuffing tissue in their nose tightly enough, or tugging on

their lip vigorously enough, or putting their finger to the second knuckle into their nose and wiggling it around, could cause trauma such that a large perforation similar to the plaintiff's was *possible*, because Bogdasarian did not say such a result was *probable*, this testimony was insufficient to establish causation. See *State* v. *Weinberg*, supra, 215 Conn. 245; *Peatie* v. *Wal-Mart Stores*, *Inc.*, supra, 112 Conn. App. 21. Furthermore, Bogdasarain testified that he did not believe that the plaintiff could have engaged in the type of manipulation necessary to make the plaintiff's postsurgical injuries possible. On direct examination, the following exchange took place between the plaintiff's counsel and Bogdasarian:

"Q. Okay. And are you also aware . . . from the notes about the claim that [the plaintiff] stuck his finger up his nose. Is that correct?

"A. Yes.

"Q. And was picking his nose, right, and . . . you're aware of that . . . claim, yes?

"A. Yes.

"Q. Do you have an opinion, with more likely—with a reasonable degree of medical certainty, more likely than not, whether or not . . . first of all, do you believe that someone with the surgery that [the plaintiff] had, picking the nose would cause the problem . . . [i]n the nose, and whether that would more or likely—in a reasonable degree of medical probability, cause the nasal perforation or any other problems?

"A. I would say, to a reasonable degree of medical certainty, number one, that that wasn't done, and number two, that it wouldn't cause a septal perforation.

"Q. Why do you think it wasn't done? . . .

"A. Well, I just think that it—first of all, the opening in the nose is not big enough to allow a finger to get as far up enough in the nose as to [where] this perforation was. And I . . . think you would have to put your finger pretty close to the second knuckle . . . and wiggle it around to make a perforation of this size. And . . . I'd think that'd be very uncomfortable. I don't think your [finger] could reach anyway, so I don't think that that would be the cause. And lastly, there was a splint in place for some time, anyway, that would protect the septum from any manipulation in that area, so I—I don't think that that's a reasonable supposition.

"Q. It's possible but like—likely or unlikely?

"A. Barely possible probably, yeah.

"Q. Okay. Now, are you aware from [the defendant's] notes the fact that [the plaintiff] came in and was upset about something about his lip. You're aware of that, correct?

* * *

"Q. . . . [D]o you believe that . . . assuming [the plaintiff] was pulling on his nose to increase airflow, do you have an opinion, with a reasonable degree of medical probability, as to whether or not that that would cause any of the problems from which [the plaintiff] seemed to suffer after this accident—after this in—surgery?

"A. Right. I don't think it would've caused any of the problems that he had subsequent to his surgery.

"Q. Why not?

"A. Well, first of all, the pulling on the nose would have no influence at all on any of the sinus surgeries. . . . I can't really conceive of how pulling on the nose would create perforation of that size. . . . I just don't think it's possible to tear that amount of tissue just by pulling on the end of your nose.

"Q. And you're also aware . . . of the claim in the note that he pulled on his lip.

"A. Mm-hmm.

"Q. Do you have an opinion, with a reasonable degree of medical probability, whether pulling on the lip would cause any pressure or anything to disrupt . . . the sinus . . . the sutures or anything else?

"A. Right. My opinion, it would be, to a reasonable degree of medical certainty, that it did not have any influence on . . . the outcome of the nasal surgery.

"Q. When you pull on the lip, does it even transmit into the nose?

"A. Perhaps just at the very tip, but not—not enough to cause the kind of problems that he ended up having."

In addition, the following exchange between the plaintiff's counsel and Bogdasarian on redirect examination is of note:

"Q. Now, let me just ask you, if one pulls on the lip as is stated that [the plaintiff] did, if one pulls on the lip, does that put enough pressure in your opinion on the stitches in the area where this perforation occurred toward the back [of the septum], does that put enough pressure to cause any damage to those areas?

"A. No. I think that, again, the septum is a, and even the part that was left, is a rigid structure, so that it's not connected to the upper lip. So, this perforation was higher up. I don't think you would tear stitches in that area or displace anything by pulling on an upper lip.

"Q. Now, you talked on direct exam about why you didn't think sticking a finger up would do it, you know, why—and then on cross you were asked about sticking tissues up there.

"A. Yeah.

"Q. Doctor, do you have an opinion as to, you know,

two days post-op, which is what we're talking about, on [January 4, 2013], whether that would be painful or not to stick enough tissues up there to exert enough pressure to—

"A. Right. I mean—

"Q. —disrupt the stitches?

"A. —a couple of tissues likely wouldn't bother, but if you were putting enough up there to create pressure to cut off the blood supply to the mucus membrane, I think it would be—that would be a lot of packing, be pretty uncomfortable."

Consequently, Bogdasarian's testimony, read in its entirety, indicates that, at best, it was theoretically *possible* that the plaintiff's postsurgical conduct could cause trauma such that a large perforation could result. This hypothetical possibility is far from the reasonable degree of medical certainty required for expert medical opinion to be admissible as evidence of causation. See *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 730.

Thus, at the close of trial, the jury had heard no competent expert medical opinion evidence that would allow them to draw a causal link between the plaintiff's postsurgical conduct and his postsurgical injuries. In the absence of such evidence, any conclusion that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries would be the result of speculation. Consequently, we conclude that the court erred in instructing the jury to consider whether the plaintiff's postsurgical conduct was the sole proximate cause of his injuries. See *Goodmaster* v. *Houser*, 225 Conn. 637, 648, 625 A.2d 1366 (1993) ("[t]he court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding" (internal quotation marks omitted)); *Ocasio* v. *Verdura Construction, LLC*, supra, 215 Conn. App. 155 ("[c]ourts are permitted to instruct juries only when the proposed instructions are supported by the evidence").

B

We now address the plaintiff's similar yet distinct claim that the court erred by declining his proposed jury instruction that the jury *could not* consider alleged postsurgical actions of the plaintiff manipulating his nose as a cause of his injuries. The plaintiff argues that, "[f]aced with two requested charges in direct conflict, the trial court was required to select the one that provided the 'correct statement of the governing legal principles.' [*Levesque* v. *Bristol Hospital, Inc.*, 286 Conn. 234, 248, 943 A.2d 430 (2008)]. The court opted for the principles espoused by the defendant. The court did not use generic language on sole proximate cause, but rather specifically underscored the defendant's theory." The plaintiff thus claims that, because there was no competent evidence that his postsurgical conduct was a proximate cause of his injuries, the court was required to instruct the jury in accordance with his proposed charge. We agree.

"In determining whether the trial court improperly refused a request to charge, [w]e . . . review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . *A request to charge which is relevant to the issues of* [*a*] *case and which is an accurate statement of the law must be given.* . . . If, however, the evidence would not reasonably support a finding of the particular issue, the trial court has a duty not to submit it to the jury. . . . Thus, a trial court should instruct the jury in accordance with a party's request to charge [only] if the proposed instructions are reasonably supported by the evidence. . . .

"The court has a duty to submit to the jury no issue upon which the evidence would not reasonably support a finding. . . . The court should, however, submit to the jury all issues as outlined by the pleadings and as reasonably supported by the evidence. . . .

"Whether the evidence presented by a party reasonably supports a particular request to charge is a question of law over which our review is plenary. . . . Similarly, whether there is a legal basis for the requested charge is a question of law also entitled to plenary review." (Citations omitted; emphasis added; internal quotation marks omitted.) *Garcia* v. *Cohen*, 204 Conn. App. 25, 31–32, 253 A.3d 46 (2021), appeal dismissed, 344 Conn. 84, 277 A.3d 788 (2022).

As discussed in part I A of this opinion, the defendant's requested jury instruction was not supported by the evidence, and the court had a duty not to submit it to the jury. See id., 32. Contrastingly, the plaintiff's proposed charge was a correct statement of the applicable legal principles because the defendant indeed was required to present expert medical testimony that the plaintiff's postsurgical conduct was the sole proximate cause of his injuries to warrant a jury instruction to that effect. Moreover, because the defendant had placed the issue of whether the plaintiff's postsurgical conduct was the sole proximate cause of his own injuries before the jury without the requisite accompanying expert medical opinion on causation, the plaintiff's proposed charge was relevant to the issues of the case. Thus, the court should have instructed the jury in accordance with the plaintiff's proposed charge. See id.

II

Because we conclude that the court's instructions to the jury were improper, we must next consider whether the court's sole proximate cause instruction was harmful. It is well established that "[n]ot every improper jury instruction requires a new trial because not every improper instruction is harmful. [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict. . . .

"In determining whether an instructional impropriety was harmless, we consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (Citation omitted; internal quotation marks omitted.) Id., 36.

The plaintiff argues that the court's erroneous instruction was harmful because it "misled the jury to believe that it could and should decide if the plaintiff's conduct of touching around his surgical site caused a massive nasal perforation."[20] The defendant disagrees and argues that the court's sole proximate cause instruction was harmless because "[the plaintiff] did not submit jury interrogatories at any time during or after the trial. As such, it is pure speculation on the part of the [plaintiff] that the jury found that he was the sole proximate cause of his own injuries. It is equally likely, for instance, that the jury found that the [defendant] complied with the applicable standard of care in the performance of the procedure. Such a finding would have obviated consideration of causation entirely—as the trial court made clear in its charge to the jury." In the alternative, the defendant argues that the general verdict rule should apply because the plaintiff "failed to submit jury interrogatories in this case, and, as a result, the record is silent as to whether the jury addressed the concept of sole proximate cause at all. . . . [T]he jury may have reached its verdict on the issue of standard of care—it is impossible to know on the face of the record." We conclude that the general verdict rule does not apply in this case and, further, that the plaintiff has established that the court's decision to give the defendant's sole proximate cause instruction rather than the plaintiff's was harmful.

We begin with the application of the general verdict rule. "Under the general verdict rule, if a jury renders a general verdict for one party, and [the party raising a claim of error on appeal did not request] interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." (Internal quotation marks omitted.) *Garcia* v. *Cohen*, 335 Conn. 3, 10–11, 225 A.3d 653 (2020).

It is well established that the general verdict rule only applies to the following five situations: "(1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a

specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Internal quotation marks omitted.) Id., 11–12; *Curry* v. *Burns*, 225 Conn. 782, 801, 626 A.2d 719 (1993). Significantly, in *Curry* v. *Burns*, supra, 801, our Supreme Court clarified that the general verdict rule does not apply to cases such as the present one, in which various grounds were advanced to defeat the claimed cause of action under a general denial. See id., 796 ("the [general verdict] rule should not be applied to grounds advanced to defeat the claimed cause of action which are admissible under mere denials of fact alleged in the complaint" (internal quotation marks omitted)); see also *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 450 n.6 (general verdict rule not implicated where defense asserted was admissible under general denial).

"As a procedural matter, it is well established that this court, as an intermediate appellate tribunal, is not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court. . . . Furthermore, it is axiomatic that one panel of [the Appellate Court] cannot overrule the precedent established by a previous panel's holding." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d 73 (2017). Accordingly, we decline the defendant's invitation to overrule *Curry* and *Mulcahy*. Therefore, the general verdict rule does not apply to the present case.

We likewise are unconvinced by the defendant's claim that the court's sole proximate cause instruction was harmless because, "[i]n light of the evidence, the jury reasonably could have concluded that the [plaintiff] did not satisfy his burden to demonstrate that the [defendant] violated the standard of care. In that scenario, any instructional error on causation would not have affected the verdict. In the absence of any indication in the record that the jury resolved the case on causation grounds, the [plaintiff] cannot demonstrate harm, and the jury's verdict must stand."

To determine whether the court's instructional impropriety was harmless, we consider "not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled."[21] (Internal quotation marks omitted.) *Garcia* v. *Cohen*, supra, 204 Conn. App. 36.

First, we review the state of the evidence in this case. At trial, it was undisputed that the plaintiff suffered a large septal perforation. Moreover, at no point was any evidence presented that such a large perforation was a risk attendant to a properly performed nasal surgery. Accordingly, the pertinent question was what caused the

abnormally large perforation. As discussed extensively in part I A, Bogdasarian was the only expert to testify at trial. He testified to a reasonable degree of medical probability that the plaintiff's large septal perforation was caused by the defendant's failure to meet the standard of care. Further, Bogdasarian testified that the postsurgical manipulation of a nose could, at most, be a *possible* cause of a perforation, but he stated with reasonable medical probability that the plaintiff's postsurgical conduct *did not* cause the perforation. The only other evidence as to causation was the defendant's statement that he was "more than concerned" that the plaintiff's postsurgical conduct *could cause* problems with the outcome of the surgery, which is not sufficient to constitute expert medical opinion on causation. Therefore, the state of the evidence was such that the jury would have to rely on speculation to conclude that the plaintiff was the sole proximate cause of his injuries. In effect, the jury was invited to decide the case on the basis of a theory for which there was no evidence. See, e.g., *Faulkner* v. *Reid*, 176 Conn. 280, 281, 407 A.2d 958 (1978) (trial court erred in submitting to jury issue of plaintiff's contributory negligence when no evidential foundation had been established for such instruction).

Second, the court's other instructions failed to minimize or correct the harm of the sole proximate cause instruction. Although the court gave correct statements of the law on proximate cause and multiple causes, those correct instructions did not undo the harm of the improper sole proximate cause instruction. The court correctly instructed the jury to consider whether the defendant's alleged negligence was a substantial factor in bringing about the plaintiff's injuries. Immediately thereafter though, the court instructed the jury that there may be other significant causes of the plaintiff's injuries which contribute so powerfully to the production of the injuries as to make the defendant's negligent contribution to the injuries trivial or inconsequential, underscored the defendant's unsupported theory that the plaintiff's postsurgical conduct was the cause of the perforation, and erroneously instructed the jury that, "if you find that the plaintiff's actions were the sole proximate cause of his injuries, then you will find for the defendant." Thus, the court suggested to the jury that competent evidence existed to support the defendant's theory, and, given the lack of such evidence, the jury was put in the position of speculating as to whether the plaintiff's actions were the sole proximate cause of his injuries.

Third, the arguments of counsel demonstrate that the defendant's sole proximate cause theory played a large role at trial. In her closing argument, the defendant's counsel focused on proving the sole proximate cause theory, stating that "it was actually [the plaintiff's] own postoperative manipulation of his surgical site that resulted in . . . the development of a two centimeter perforation . . . ." In making her argument, the defen-

dant's counsel emphasized that the stitches in the plaintiff's nose were "right at the entrance to the nose and that the sutures that overlie those septal splints go through and through, and . . . they're tied . . . down by the entrance to the nose in an area that clearly can be easily reached and disrupted by stuffed tissues, a finger, a stretching or pulling of the lip, and a pulling on the nose. *The notion that the manipulation two days postoperatively that's recorded in* [*the defendant's*] *detailed office note could not disrupt his handiwork is, in a word, preposterous*." In addition, she argued that the plaintiff's postsurgical conduct constituted the kind of trauma that Bogdasarian acknowledged theoretically could be a possible cause of a perforation, although there was no evidence presented at trial that the plaintiff in fact manipulated his nose in the way Bogdasarian stated could be traumatic.[22] The defendant's counsel then argued: "Ladies and gentlemen, we submit to you that this is exactly what happened. That the events documented by [the defendant relating to the plaintiff's manipulation of his nose and lip] two days postoperatively on January 4, 2013, happened and they happened as [the defendant] documented them." Finally, at the outset of closing argument the defendant's counsel expressly invited the jury to form its own expert opinion by stating that, "[i]n order for the plaintiff to prevail you must believe [Bogdasarian]. In order for [the defendant] to prevail you need only believe him." The plaintiff's counsel, of course, argued that the plaintiff could not have been the cause of his own injuries and further that Bogdasarian had been the only expert to discuss the cause of the perforation in terms of reasonable medical probability and had stated that the plaintiff's actions could not have caused his injuries. Thus, the issue of the plaintiff's postsurgical conduct and whether it was the sole proximate cause of the plaintiff's injuries was a central issue in the case and a particular focus of the defendant's argument to the jury.

Finally, the record reflects that the jury may have been misled by the court's sole proximate cause instruction. During deliberations, the jury asked the court three questions: (1) "Can we see [the] diagram again where [the defendant] showed where he placed stitches?" (2) "Where is [the] perforation in relationship to the stents?" (3) "Can we please obtain testimony from [Bogdasarian] regarding the olfactory structures?" These questions suggest that the jury was considering whether the plaintiff's actions caused his injuries, as the defendant's counsel stated during closing argument that the stitches in the plaintiff's nose were "right at the entrance to the nose and that the sutures that overlie those septal splints go through and through, and . . . they're tied . . . down by the entrance to the nose in an area that clearly can be easily reached and disrupted by stuffed tissues, a finger, a stretching or pulling of the lip, and a pulling on the nose. The notion that the manipulation two days postoperatively that's recorded in [the defendant's] detailed office

note could not disrupt his handiwork is, in a word, preposterous." That the jury asked for Bogdasarian's testimony on the structure of the nose, where the perforation was in relation to the stents, and where exactly the defendant placed the stitches, indicates that it was trying to determine whether the plaintiff's actions interfered with the stitches in his nose and, further, whether those stitches tore to create the perforation. Such an exercise, in the absence of expert testimony supporting such a theory, would amount to speculation by the jury. The jury would not have engaged in such speculation had the court correctly given the plaintiff's proposed sole proximate cause instruction.

For the foregoing reasons, we conclude that the likelihood of actual prejudice to the plaintiff is significant enough to warrant a new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

[1] The complaint was originally comprised of twelve counts against additional named defendants including Advanced Specialty Care, P.C., Danbury Hospital, and Ridgefield Surgical Center, LLC. The plaintiff later withdrew the counts of the complaint as to each of these defendants. The plaintiff's wife, Theodora Vogiatzi-Perdikis, was also originally named as a plaintiff in this case alleging loss of consortium, but she withdrew her claim as to all defendants in November, 2016. Accordingly, the case went to trial only as between Dimitri Perdikis and Jay H. Klarsfeld. We therefore refer to Dimitri Perdikis as the plaintiff and Klarsfeld as the defendant.

[2] The plaintiff also claims that the court erred by denying a motion to withdraw filed by his counsel. Because we agree with the plaintiff's first claim and reverse the judgment on this ground, we do not consider his second claim.

[3] Sinusitis is the "[i]nflammation of the mucous membrane of the nose and paranasal sinuses." Stedman's Medical Dictionary (27th Ed. 2000) p. 1645. The plaintiff also was diagnosed with chronic rhinitis, "a protracted sluggish inflammation of the nasal mucous membrane; in the later stages the mucous membrane with its glands may be thickened (hypertrophic rhinitis) or thinned (atrophic rhinitis)." Id., p. 1566.

[4] The surgery consisted of a bilateral endoscopic ethmoidectomy, bilateral endoscopic antrostomy, endoscopic removal of concha bullosa, septoplasty and valvular repair of nasal stenosis.

[5] The nasal septum "is composed of a central supporting skeleton covered on each side by a mucous membrane." Stedman's Medical Dictionary (27th Ed. 2000) p. 1621. The nasal septum includes the maxillary bone, the perpendicular plate of ethmoid bone, septal nasal cartilage, and the vomer bone. See id., pp. 296, 1620.

[6] The columella is "the fleshy lower margin (termination) of the nasal septum." Stedman's Medical Dictionary (27th Ed. 2000) p. 384. Essentially, it is the bridge of tissue that separates the nostrils at the base of the nose.

[7] From January, 2013, through early 2015, the plaintiff consulted with as many as six other medical practitioners about his nasal ailments and sought their opinions as to the risks and benefits of a second surgery to treat those issues.

[8] The plaintiff alleged that the defendant and/or his servants, agents, apparent agents, and/or employees failed to exercise the degree of care and skill ordinarily and customarily used by other similar medical professionals. Specifically, the plaintiff alleged that the defendant failed to adequately and properly perform the aforementioned procedures, failed to provide reasonable care to avoid exposing the plaintiff to said injuries, extensively and bilaterally tore and/or disrupted the nasal septal mucoperichondrium and periodteum, disrupted and/or obstructed the blood supply to the nasal septal mucosa and underlying bone and cartilage, placed sutures too tightly across the nasal septal splints, lateralized and/or caused excessive trauma to the middle turbinate, lateral nasal walls, and nasal septum, failed to place stenting material to prevent adhesions to the medial orbital wall, failed to provide reasonable care to

prevent the obstruction to drainage of the ethmoid and maxillary sinuses, failed to provide reasonable care to prevent persistent chronic sinusitis, failed to provide reasonable care to prevent a persistent nasal septal deviation, failed to provide reasonable care to correct the nasal valve obstruction, and hastily performed the aforementioned procedures.

[9] Bogdasarian also testified that large septal perforations may be caused by the use of cocaine, a septal hematoma resulting from trauma to an individual's nose—i.e., a broken nose—or "overzealous cauterization" from a doctor cauterizing a nosebleed. Nothing in the record indicates, and the defendant does not argue, that there was any evidence that the plaintiff's septal perforation was the result of any of these potential causes.

[10] The plaintiff also called Richard L. Doty, who holds a Ph.D. in comparative psychology and is the director of the Smell and Taste Center at the Perelman School of Medicine at the University of Pennsylvania, as his expert on his diminished sense of smell. As part of his case-in-chief, the defendant introduced into evidence Doty's records regarding his treatment of the plaintiff. Neither Doty's testimony nor his records are relevant to the plaintiff's claim on appeal. In addition, the plaintiff called Bloch as a fact witness to testify as to his treatment of the plaintiff's heavy nosebleed on January 17, 2013.

[11] In a similar vein, Bogdasarian testified that, in approximately 5 percent of septal surgeries, a septal perforation may result in the absence of any negligence on the part of the surgeon. Those perforations, however, are typically "the diameter of a pencil."

[12] On the morning of November 14, 2019, the parties discussed their respective proposed charges with the court in its chambers before going on the record. On the basis of that discussion, the court made some adjustments to its intended instructions. Although the court's proposed instructions are not in the record before us, it is clear from the plaintiff's objection that the court intended to charge the jury consistent with the defendant's requested instruction on the sole proximate cause doctrine. As the court's original proposed instructions are not part of the record, it is unknown whether any changes were made to the court's proposed sole proximate cause instruction.

[13] The plaintiff's verdict form is not in the record before us and, thus, it is unclear as to what was contained in that form, if anything, as to how the jury should address causation.

[14] No order reflecting the court's denial of the plaintiff's motion to set aside the verdict was entered at or about the time the court denied the motion from the bench. On February 20, 2020, the plaintiff filed a caseflow request, asking the court to enter an order reflecting its February 3, 2020 denial of the plaintiff's motion to set aside the verdict. The court addressed the matter by issuing an order, dated February 20, 2020, stating that the motion to set aside the verdict was denied, "[a]s stated on the record."

[15] Our conclusion is consistent with case law from other jurisdictions that we find persuasive. For example, in *Brdar* v. *Cottrell, Inc.*, 372 Ill. App. 3d 690, appeal denied, 224 Ill. 2d 572 (2007), the Illinois Appellate Court determined that "[a] defendant is only entitled to a sole-proximate-cause instruction if there is competent evidence to support its theory that someone or something other than the defendant was the sole proximate cause of the plaintiff's injuries." Id., 704; see id. (defendant was not entitled to sole proximate cause instruction where potential evidence on sole proximate cause came from fact witness, without any competent expert testimony). Similarly, in *Grauer* v. *Clare Oaks*, 136 N.E.3d 123 (Ill. App. 2019), the Illinois Appellate Court stated: "[A] defendant has the right to endeavor to establish by *competent evidence* that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries. . . . Though what constitutes competent evidence may vary depending on the type of case, in complex cases expert testimony is often necessary to constitute competent evidence that the sole proximate cause of a plaintiff's injury is the conduct of a nonparty or some other cause. . . . This would be true in medical negligence cases such as this. Although it may not be necessary to show that a nonparty's conduct causing the plaintiff's injury amounted to negligence . . . expert testimony on the matter is still necessary before a defendant can argue in closing that a nonparty's conduct was the sole proximate cause of the injury at issue." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 158.

[16] In his appellate brief, the defendant, citing *Argentinis* v. *Gould*, 23 Conn. App. 9, 16–17, 579 A.2d 1078 (1990) ("[a] general denial does not place any burden on the denier . . . and the burden is properly placed on the party seeking recovery" (citation omitted)), rev'd in part on other grounds, 219 Conn. 151, 592 A.2d 378 (1991), argues that "it is not the [defendant's] burden to present expert opinion testimony to support his denial—the defendant can choose to put on some evidence, or simply limit himself to cross-examination of the plaintiff's evidence." The defendant accordingly argues that he was not

required to present *any* evidence in support of his argument that the plaintiff was the sole proximate cause of his own injuries. We disagree.

"[T]he trial court has a duty not to submit any issue to the jury upon which the evidence would not support a finding. . . . Accordingly, the right to a jury instruction is limited to those theories for which there is any *foundation in the evidence*." (Emphasis added; internal quotation marks omitted.) *Farmer-Lanctot* v. *Shand*, 184 Conn. App. 249, 256, 194 A.3d 839 (2018). Thus, in cases where a defendant seeks to establish that another actor was the sole proximate cause of a plaintiff's injuries, there must be *some* evidence in the record establishing that factual scenario. See, e.g., *Bernier* v. *National Fence Co.*, 176 Conn. 622, 630, 410 A.2d 1007 (1979) ("By *introducing evidence* that the state of Connecticut was the sole proximate cause of the decedent's death, the defendant was seeking to establish a set of facts inconsistent with the plaintiff's allegation that the proximate cause of the injuries to the plaintiff's decedent was the negligence, whether sole or concurrent, of the defendant. . . . [W]hile that defense involved *evidence of an affirmative character*, the evidence was inconsistent with a prima facie case and was therefore properly admitted under a general denial." (Emphasis added; footnote omitted.)); *Mulcahy* v. *Hartell*, supra, 140 Conn. App. 451–52 ("[A] party generally *may introduce affirmative evidence* tending to establish a set of facts inconsistent with the existence of a disputed fact. . . . [T]he defendant was entitled, under a general denial, to *present evidence* that the plaintiff caused her own injuries, because this defense constitutes a set of facts inconsistent with the defendant's liability." (Citations omitted; emphasis added; internal quotation marks omitted.)).

At oral argument before this court, the defendant's counsel, despite the argument to the contrary in the defendant's appellate brief, acknowledged that the defendant was required at trial to present competent evidence that the plaintiff's postsurgical conduct caused his injuries. He argued that the defendant's testimony that he was "more than concerned" that the plaintiff's conduct "might cause problems" constituted sufficient evidence to warrant the sole proximate cause instruction. For the reasons stated in this opinion, we conclude that the defendant's testimony was too speculative to meet "the reasonable degree of medical probability" requirement, and was, therefore, insufficient to justify a sole proximate cause instruction.

[17] Specifically, counsel contended: "[The defendant], when he said—when he was asked, 'Were you concerned that this might cause a damage to the surgical results,' he said, 'I was more than concerned.' That, while it's not the talismanic language, was sufficient for the jury to—to have found—to have found that . . . [the plaintiff's] own actions were the cause of his claimed injury."

[18] In medical malpractice actions, "causation may be established by a signed report of a treating physician in place of live [expert medical opinion] testimony, so long as the [opposing party] was afforded the opportunity to cross-examine the author of such a report." *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 477.

[19] "The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Emphasis omitted; internal quotation marks omitted.) *Cockayne* v. *Bristol Hospital, Inc.*, supra, 210 Conn. App. 461; see also Conn. Code Evid. § 7-4 (c).

[20] More specifically, the plaintiff contends that, "[a]t trial, there was no dispute that the plaintiff had a severe septal perforation—the only question was what caused it. For the defendant, the key issue was whether the plaintiff caused his own injuries with his postsurgical conduct. It was the main point of the defendant's arguments to the jury, and central to his examination of witnesses. . . . At the trial's conclusion, the court was faced with two very different choices—the plaintiff's jury charge stating that the lack of expert testimony precluded consideration of whether the plaintiff caused his injury *or* the defendant's charge reinforcing his argument that the plaintiff caused his own injury and instructing the jury to consider it. Only one of these charges could be legally correct, and the [court chose] the defendant's charge. . . . Omitting the plaintiff's instruction was clearly harmful because the jury was not instructed to disregard the sole proximate cause evidence that was central to the [defendant's theory]. Giving the defendant's instruction was clearly harmful because the jury received instruction that specifically emphasized the defendant's theory of the case and required them to consider it. Giving that instruction also allowed the defendant to focus most of his closing argument on that defense theory, using his counsel to claim a causal link between the plaintiff's postsurgery conduct and his injuries, where no witness had done it before." (Emphasis in original.)

[21] In advancing his claim that the court's sole proximate cause instruction

was harmless, the defendant relies on *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 225 A.3d 261 (2020), in which our Supreme Court cited the principle articulated in *Caron* v. *Adams*, 33 Conn. App. 673, 685, 638 A.2d 1073 (1994), that, despite an instructional error, "[a] verdict should not be set aside where the jury reasonably could have based its verdict on the evidence." (Internal quotation marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, supra, 846. In both *Kos* and *Caron*, however, the erroneous jury charges were found to be harmless because they were immaterial to the verdict and thus had no impact on the jury's deliberations or conclusions. See id., 848 ("[b]ecause the jury's finding centered on whether there was a third or fourth degree episiotomy extension, the inclusion of [the erroneous jury] charge, which *had no bearing on* the degree of the extension, would not have confused or misled the jury and, therefore, was harmless" (emphasis added)); *Caron* v. *Adams*, supra, 684–85 ("Under the particular circumstances herein, whether the jury was misled into believing that the plaintiff had three years from the discovery of the injury to file suit, instead of only two years, is immaterial. Because of our conclusion that the limitations period was tolled and that the plaintiff commenced suit within two years of reaching majority, the plaintiff's suit was timely filed."). In the present case, contrastingly, the erroneous instruction was material to the verdict and likely impacted the jury's deliberations and conclusions. In light of those distinct factual differences, we conclude that the defendant's reliance on *Kos* and *Caron* is misplaced.

[22] "[The Defendant's Counsel]: Which brings us to the other possible cause that [Bogdasarian] acknowledges is in the short list of causes of nasal septal perforation after septoplasty, and that is trauma. That testimony came out when he was on direct by [the plaintiff's counsel]. And then I followed up and asked him about that. Let's talk about trauma, [Bogdasarian]. He did not want to consider that as a possibility. Remember those questions, you think if somebody stuffed tissue up their nose, put a finger up their nose, no way, those stitches are up way too high . . . . Where were those stitches? I don't know. What kind of suture material did he use? I don't know. What kind of splints did he use? I don't know. How do you determine how tight he put those sutures in? I don't know. But for sure trauma couldn't have done it in this case.

"Okay. What if trauma does happen to the nasal septum and causes perforation, what's that clinical context? Well, you have trauma and that can be by force, that can be by manipulation. I don't think it happened in this case; I asked him that hypothetical; I don't think it happened in this case but it can do it. If it does it, what happens? A hematoma forms on the septum. Remember that? A hematoma. And I said, A hematoma, is that a blood clot? And he said yes. That didn't happen here, says [Bogdasarian].

"But yesterday you did hear [the plaintiff] talk about what happened to him on the 17th, exactly two weeks post-op. Remember that? He had an episode of bleeding, he got in the shower, and he passed a two inch blood clot. Remember that?"