CATHERINE O. DUNCAN *v.* MILL MANAGEMENT COMPANY OF GREENWICH, INC., ET AL.
(AC 31125)

Robinson, Flynn and Sullivan, Js.

Argued June 3—officially released October 12, 2010

(Appeal from Superior Court, judicial district of Stamford-Norwalk, Karazin, J.)

Richard A. Roberts, with whom were *Angeline N. Ioannou* and, on the brief, *Stephen J. Leary*, for the appellants (defendants).

Stewart M. Casper, with whom were *Benjamin H. Pomerantz* and, on the brief, *Victoria de Toledo*, for the appellee (plaintiff).

Opinion

SULLIVAN, J. The defendants, Mill Management Company of Greenwich, Inc., and Greenwich Chateau Condominium Association, Inc., appeal from the judgment rendered after a jury trial, in favor of the plaintiff, Catherine O. Duncan. The dispositive issue in this appeal is whether the trial court improperly admitted evidence of a subsequent remedial measure taken by the defendants after the plaintiff was injured on a stairway.[1] We agree with the defendants and, accordingly, reverse the judgment of the trial court.

The following facts are relevant to the resolution of the defendants' appeal. On April 17, 2005, the plaintiff went to a roof deck common area on the top floor of the Greenwich Chateau Condominium building. The deck was accessed by a single step concrete riser measuring ten inches high by ten inches wide leading up to a door that opened to the outside. After spending some time on the deck, the plaintiff reentered the building, and as she attempted to descend the stairs, her foot missed the concrete riser and she fell, resulting in a broken ankle. The plaintiff, who was the president of the board of directors for the condominium association, later contacted Richard Deutsch, a representative of Mill Management Company of Greenwich, Inc., and requested that something be done to remedy the stair situation.

On April 9, 2007, the plaintiff filed a complaint against the defendants, alleging negligence because the access to the roof deck did not comply with the town building code and constituted an unsafe condition. The defendants in their answer denied the allegations of negligence and asserted three special defenses: (1) failure to state a claim on which relief can be granted, (2) contributory negligence and (3) breach of fiduciary duty by the plaintiff in her capacity as president of the board of directors of the condominium association. The jury returned a verdict in favor of the plaintiff on her negligence claims but found that she was 25 percent at fault. The defendants have appealed.

The defendants claim that the court improperly admitted evidence that they constructed a new stairway at the site of the plaintiff's fall, a subsequent remedial measure. The plaintiff argues that she offered the evidence concerning the replacement stairs to prove the feasibility of the construction and for impeachment purposes. The defendants argue that because they conceded the issue of feasibility and no basis existed for impeachment, the evidence was admitted improperly as a subsequent remedial measure to show negligence. We agree with the defendants.

As a preliminary matter, we set forth the well established standard of review. "[T]he trial court has broad discretion in ruling on the admissibility . . . of evi-

dence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 365, 926 A.2d 1024 (2007).

The following procedural history is relevant to the resolution of the defendants' appeal. The defendants filed a motion in limine to preclude the introduction of any evidence of the replacement stairs. On April 3, 2009, the court denied the motion without prejudice. On April 7, 2009, the plaintiff, through the testimony of Deutsch, the building manager for the defendants, introduced evidence that the new stairs were built after the plaintiff's fall.[2] In response to questioning by the plaintiff's counsel, Deutsch testified that he could not have had new stairs built without the approval of the condominium association's board of directors. The plaintiff's counsel then sought to ask about the circumstances of the actual construction of the new stairs following the plaintiff's fall. The defendants objected to that line of questioning, arguing that the evidence concerning the replacement stairs, both Deutsch's testimony and the accompanying photographs, was evidence of a subsequent remedial measure and, therefore, precluded by the Connecticut Code of Evidence. The court overruled the defendants' objection as to the question concerning the actual construction of the new stairs because "the problem is that [Deutsch] answered a question no, and [the plaintiff] says that the real answer is [that] he should have said yes. And that would have closed this discussion down. . . . So, I'm not going to preclude him from moving into that area as long as that answer remains a no. And I'm going to let him inquire into that because that opens doors."

The plaintiff subsequently offered two photographs, exhibits 4a and 4b, depicting the newly constructed stairs. The court sustained the defendants' objection and did not allow the jury to see the photographs. The plaintiff then offered two other photographs, exhibits 5a and 5b, depicting the side view of the cement riser as it existed at the time of the plaintiff's accident.[3] Those photographs depicted only a portion of the new staircase. The court allowed those photographs to be shown to the jury.

Section 4-7 (a) of the Connecticut Code of Evidence provides in relevant part that "evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures."

"The general rule is that evidence of subsequent repair is not admissible on the issue of negligence. . . . We have said that [i]t has long been the settled rule in this State that evidence of subsequent repairs is inadmissible to prove negligence or an admission of negligence at the time of the accident. . . . This court, however, has admitted evidence of subsequent remedial measures if offered for other purposes such as: (1) to establish the defendant's control of the premises where a defect was located . . . (2) to show feasibility of repair in product liability cases . . . and (3) to show the general area or scene of the injury. . . .

"The rule of exclusion is based on narrow public policy grounds, not on an evidentiary infirmity. . . . In *Rokus* v. *Bridgeport*, [191 Conn. 62, 67 n.1, 463 A.2d 252 (1983)], this court stated that the exclusion of subsequent remedial measures based on public policy grounds presupposes that to admit evidence of subsequent repairs to an identified hazardous condition as proof of negligence penalizes the defendant for taking remedial measures. This discourages alleged tortfeasors from repairing hazards, thereby perpetuating the danger. This policy fosters the public good by allowing tortfeasors to repair hazards without fear of having the repair used as proof of negligence, even though it requires the plaintiff to make a case without the use of evidence of the subsequent repairs. The rule's purposes are furthered, however, only when the excluded evidence relates to repairs of a hazardous condition." (Citations omitted; internal quotation marks omitted.) *Hall* v. *Burns*, 213 Conn. 446, 456–57, 569 A.2d 10 (1990).

The plaintiff argues that evidence of the construction of a new staircase at the site of her fall was necessary because Deutsch claimed that he could not have had the construction done without the approval of the condominium association's board of directors. The court agreed that the plaintiff could use the evidence of the new staircase in order to counter Deutsch's claim, and the plaintiff argues that the evidence was, therefore, admissible to show feasibility of construction, an exception under § 4-7 of the Connecticut Code of Evidence.

The plaintiff sought to prove that the defendants could have had a new staircase built, which goes directly to the issue of culpability, not feasibility of construction as claimed by the plaintiff. The plaintiff elicited testimony from Deutsch concerning the replacement staircase in order to prove that the defendants were negligent because they did not do all that they could have done in order to make the entryway safe. The plaintiff could have used other evidence to prove that the defendants did not need the approval of the board of directors to construct the new staircase, including the testimony of the plaintiff. The admission of evidence indicating that the defendants fixed the stairs on which the plaintiff fell was highly prejudicial

and not necessary to show feasibility of construction.

The plaintiff also argues that the testimony elicited from Deutsch was admissible for impeachment purposes, however, no balancing was done by the court on the probative value versus the prejudicial effect of the evidence. "The trial court has a duty to exclude evidence which, if admitted, would have a greater prejudicial than probative effect." (Internal quotation marks omitted.) *State* v. *Periere*, 186 Conn. 599, 609, 442 A.2d 1345 (1982). The disagreement between the plaintiff and the defendants, as reflected in the questioning of Deutsch, over whether approval by the president of the board of directors constituted the necessary board approval offers limited probative value on the issues of credibility and truthfulness of the witness. The court should have weighed that limited probative value against the prejudicial effect of admitting evidence of a subsequent remedial measure.

As to the photographs that were admitted, the plaintiff argues that they were necessary in order to show the cement riser as it existed at the time of the plaintiff's fall. Under other circumstances, such photographs might have been admissible for the purpose that the plaintiff offered them because they show very little of the subsequent remedial measure. In the present case, however, the plaintiff introduced the photographs through a colloquy with Deutsch that detailed the construction of the new staircase. See footnote 3 of this opinion. It is, therefore, impossible to differentiate between the improper admission of Deutsch's testimony concerning the staircase and the admission of the photographs.

"We acknowledge that [e]ven when a trial court's evidentiary ruling is deemed to be improper, [as is the case here] we [still] must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . [T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result. . . . *Ryan Transportation*, *Inc.* v. *M & G Associates*, 266 Conn. 520, 530, 832 A.2d 1180 (2003); see also *Swenson* v. *Sawoska*, 215 Conn. 148, 153, 575 A.2d 206 (1990) (rejecting standard that would have required treating as harmless error any evidentiary ruling, regardless of its effect on verdict, so long as evidence not implicated by ruling was sufficient as matter of law to sustain verdict). Additionally, we have held that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative of other validly admitted testimony." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric*, *Inc.*, 280 Conn. 336, 358, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494,

167 L. Ed. 2d 230 (2007).

In the present case, the defendants were harmed by the admission of the subsequent remedial measure because the question of whether the stairs were properly constructed was a central issue in the case. Evidence that a new staircase was constructed that complied with the town building code, as the testimony of Deutsch suggested, is probative of whether the original stairs complied with the code, the central theory on which the plaintiff prevailed. We, therefore, conclude that the improper admission of evidence of subsequent remedial measures likely affected the result in this case.

The plaintiff argues that even if the evidence was improperly admitted, it was harmless error because the court gave a limiting instruction. We disagree. The limiting instruction given by the court came after the court sustained, for the second time, the defendants' objection to the admission of the photographs, exhibits 4a and 4b, depicting the new staircase. The instruction occurred on April 14, 2007, one week after the testimony by Deutsch concerning the new staircase. In *Smith* v. *Greenwich*, 278 Conn. 428, 451, 899 A.2d 563 (2006), as the plaintiff notes, the court held that when subsequent remedial measures are admitted properly, "[t]he court should . . . caution the jury . . . about the limited purpose of the exhibit." (Internal quotation marks omitted.) At the time that the contested testimony and exhibits were admitted, on April 7, 2009, the court gave no such limiting instruction.

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

In this opinion the other judges concurred.

[1] Because the first issue is dispositive of the appeal, we decline to address the defendants' remaining claims that the court improperly allowed the late disclosure of expert testimony and improperly denied the defendants' motion for remittitur due to lack of evidence of future lost earnings or need for future surgery.

[2] The plaintiff's attorney, Stewart M. Casper, questioned Deutsch about the time it would have taken to bring the stair access to the roof in compliance with the town building code, and the following exchange occurred:

"Q. And you could have—you'd agree with me you could have secured a replacement for the single step, that single concrete step from the original building in two to three weeks, in a way that was code compliant, that is complied with the letter of the law of the building code, correct?

"A. If directed by the board, I think that's probably correct.

"Q. You could have done that even without a direction of the board, correct?

"A. No. That's really a project that we would not have done without the direction of the board."

After a colloquy outside the presence of the jury, the court had the following question played back to Deutsch: "You secured a contractor to replace the stair system to the roof deck without specific board approval. Isn't that true?" Deutsch replied that "[t]he answer is that we secured a contractor to install the steps once we were instructed by the president of the board of directors."

[3] Prior to the introduction of the two photographs, the following exchange between the plaintiff's counsel and Deutsch occurred:

"Q. Now, and in fact, it was just a matter of two or three weeks after [the plaintiff] fell that that condition that existed when she fell was covered

over and replaced by something else, correct?

"A. That's correct.

"Q. And, in fact, I believe by April 25 of 2005 in a manager's report to the board, you—indicated that work had been bid on successfully by Bank Brothers Contracting to replace that stair with new stairs and a railing to address safety issues, and that was all accomplished within that window of time; correct?

"A. If that's the date on the manager's report, I would say that's correct.

"Q. Showing you what's been marked as exhibit 25, and if you look at the second page, the minutes of the meeting seem to reflect that you were bringing the board up to speed about where you stood in terms of getting that stair system resolved?

"A. Right. This said the work scheduled—the work is scheduled to be done, yes, what this reflects.

"Q. And the contract price to get the job done was $895?

"A. That what it says here, yes.

"Q. And again, you don't have any documentation that reflects that the board actually passed a resolution or took a vote to say that you could go ahead and do that project; correct?

"A. That's correct.

"Q. Now, I'm showing you what's been marked to start with exhibit 5A. Can you identify what's in that photograph?

"A. This appears to be a concrete step underneath the wood step that was installed by Banks Brothers."