CATHERINE O. DUNCAN *v.* MILL MANAGEMENT COMPANY OF GREENWICH, INC., ET AL.
(SC 18722)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued October 31, 2012—officially released February 19, 2013

Victoria de Toledo, with whom was *Benjamin Pomerantz*, for the appellant (plaintiff).

Richard A. Roberts, with whom, on the brief, were *Angeline N. Ioannou* and *Kelly B. Gaertner*, for the appellees (defendants).

Opinion

ZARELLA, J. This appeal arises from a negligence action brought by the plaintiff, Catherine O. Duncan, against the defendants, Mill Management Company of Greenwich, Inc. (management company), and the Greenwich Chateau Condominium Association (condominium association), after the plaintiff fell and was injured when stepping down from the roof deck of the Greenwich Chateau Condominiums (condominium building), where she resided.[1] After the jury returned a verdict in favor of the plaintiff, the defendants appealed to the Appellate Court, which reversed the judgment of the trial court, concluding that the trial court improperly had admitted evidence of subsequent remedial measures taken by the defendants following the plaintiff's injury, and that such evidence was sufficiently harmful to require a new trial. *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 124 Conn. App. 415, 418, 424–25, 4 A.3d 1268 (2010). The plaintiff then filed a petition for certification to appeal to this court, which we granted, limited to the following question: "Did the Appellate Court properly conclude that the trial court's admission into evidence of subsequent remedial measures requires reversal of the judgment and remand for a new trial?" *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 299 Conn. 918, 10 A.3d 1050 (2010).[2] The plaintiff claims that the Appellate Court should have concluded that the admission of evidence of subsequent remedial measures taken following her injury was within the trial court's discretion and that, even if it was improper, it was harmless error. The defendants respond that the Appellate Court correctly concluded that the admission of the evidence was both improper and harmful. We reverse the judgment of the Appellate Court.

The jury reasonably could have found the following facts relevant to the plaintiff's appeal. The plaintiff, who also was the president of the board of directors of the condominium association, brought this negligence action after she sustained injuries from a fall while stepping down from the roof deck of the condominium building in which she resided. Residents of the condominium building accessed the roof deck by stepping onto a single concrete step measuring ten inches deep and ten inches high, which led to a door that opened onto the roof deck. On April 17, 2005, the plaintiff's foot missed the step as she descended from the roof deck, and she slipped, sustaining a fractured left ankle and other injuries. Subsequently, the plaintiff instructed the management company's property manager, Richard Deutsch, to do "something . . . to remedy the [step] . . . ." *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 418. Deutsch then arranged for a contractor to build replacement stairs over the original concrete step. The plaintiff thereafter com-

menced the present action, alleging, inter alia, that the defendants negligently had maintained the original step in violation of the building code.[3] In their answer, the defendants raised as special defenses that, to the extent the plaintiff had been injured, the plaintiff's own negligence proximately caused her fall, and that the plaintiff's status as the president of the condominium association meant that the failure to ensure safe access to the roof deck constituted a breach of her fiduciary duty to the condominium association.

In its opinion, the Appellate Court set forth the following additional procedural history relevant to our resolution of this appeal. "The defendants filed a motion in limine to preclude the introduction of any evidence [regarding two] replacement stairs [constructed by the defendants after the plaintiff's injury]. On April 3, 2009, the court denied the motion without prejudice. On April 7, 2009, the plaintiff, through the testimony of Deutsch . . . introduced evidence that the new stairs were built after the plaintiff's fall.[4] 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' counsel] objected to that line of questioning, arguing that the evidence concerning the replacement stairs, [which consisted of] Deutsch's testimony and the accompanying photographs, was evidence of a subsequent remedial measure and, therefore, [was] precluded by [§ 4-7 of] the Connecticut Code of Evidence. The court overruled the . . . objection as to the question concerning the actual construction of the new stairs because 'the problem is that [when asked about whether he could have fixed the stairs without the approval of the board of directors, Deutsch] answered . . . 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 [counsel] 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.' " Id., 419–20.

After the court overruled the objections, Deutsch described the postaccident repairs. During his testimony, the trial court also admitted into evidence, over objection, two photographs, which were marked as exhibits 5a and 5b, that depicted in part the postaccident repairs. The trial court sustained counsel's objections to two other photographs, exhibits 4a and 4b, which depicted more fully the replacement stairs.[5]

On April 14, 2009, the plaintiff's expert witness, Michael E. Shanok, a consulting engineer, was asked to describe the building code and to give his opinion regarding whether the step on which the plaintiff was

injured deviated from the building code. Shanok explained that, in his view, the step on which the plaintiff was injured violated the building code, primarily because the riser exceeded seven inches, the tread was less than eleven inches in depth, and there were no handrails. In explaining the manner in which he conducted his inspection of the accident scene, Shanok testified that the layout of the area had been changed following the plaintiff's injury, and that a new stairway had been constructed over the original concrete step after the accident.[6] During Shanok's testimony, the trial court again sustained the objections by the defendants' counsel to exhibits 4a and 4b, the two photographs that depicted the postaccident repairs. At that time, the trial court instructed the jury that, "outside of your presence, I sustained the objection to exhibits 4a and 4b. . . . It's not necessary to bring to your attention the particulars of my ruling. But I want to make you understand that subsequent remedial measures are not evidence of negligence."

During summation, the plaintiff's counsel highlighted Shanok's testimony regarding the building code violations. The plaintiff's counsel likewise alluded to Deutsch's testimony by reminding the jury that, after the plaintiff's injury, Deutsch "was able to go right out, get someone to come in within just a few weeks . . . to build a system, an alternate system, in just that amount of time, within an amount of money that he didn't have to go back to the board [of directors] to discuss in order to get it done." Subsequently, during rebuttal argument, the plaintiff's counsel advised the jury that "we know [that] for less than $1000, [the defendants] were able to take care of this really quickly, so they had ample, ample opportunity in more than a year to get this fixed."

The trial court then charged the jury and specifically cautioned: "Some evidence may have been admitted for a limited purpose only. During the course of the trial, if I told you that certain evidence was being admitted for a limited purpose, you must consider it for that purpose and no other." As the jury deliberated, it sent notes to the trial court with questions. Among those questions were a request to hear a specific portion of Shanok's cross-examination[7] and an inquiry about whether "the term 'defective condition' mean[t] that it was not in compliance with the . . . current building code." After the court addressed these questions and replayed a portion of Shanok's cross-examination testimony for the jury, the jury resumed its deliberations.

On April 17, 2009, the jury returned a verdict in favor of the plaintiff and awarded her economic and noneconomic damages of $235,000 and $500,000, respectively. These amounts were reduced to reflect the plaintiff's comparative fault of 25 percent, resulting in a total award of $551,250. In its responses to the jury interroga-

tories, the jury indicated that the plaintiff had failed to prove her common-law negligence claims because she failed to establish proximate cause as to either defendant but had prevailed with respect to her negligence per se claims against the defendants, having proven that a violation of the building code proximately caused her injuries.

After the trial court denied the defendants' posttrial motions, the defendants appealed to the Appellate Court, claiming that the trial court improperly enabled evidence of subsequent remedial measures to be introduced when it allowed the jury to hear testimony about and see photographs of the construction of the replacement stairs that had been carried out by the defendants following the plaintiff's fall. *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 418. The plaintiff maintained that the evidence was properly offered for purposes other than to prove negligence and that, even if it had been admitted improperly, its admission was harmless. See id., 418, 424. The Appellate Court agreed with the defendants, reversed the judgment of the trial court and remanded the case for a new trial. Id., 418, 425. This certified appeal followed.

I

The plaintiff first claims that the trial court properly admitted the evidence of the replacement stairs, through Deutsch's testimony and two photographs, because it was used for purposes other than those prohibited by the general rule precluding the admission of evidence of subsequent remedial measures. The plaintiff argues, therefore, that the admission of such evidence was within the trial court's discretion. See Conn. Code Evid. § 4-7 (a). The plaintiff seeks to justify the admission of the evidence on the ground that it tended to prove the feasibility of repairs to the step and the defendants' control, which are permissible purposes if controverted. The plaintiff also claims that Deutsch's testimony regarding the postaccident repairs was admissible for impeachment purposes. With respect to the photographs of the original step that showed a portion of the subsequent modifications, the plaintiff claims that the evidence was properly admitted to show the layout of the scene where the plaintiff's injury occurred. The plaintiff alternatively claims that, even if the trial court's evidentiary ruling was improper, the admission of the disputed evidence was harmless and, therefore, does not warrant a new trial.

The defendants respond that the evidence of the replacement stairs was improperly admitted because it was offered to prove negligence rather than for some other permissible purpose. The defendants argue that the issue of control was not raised at trial and thus is not properly before the court on appeal. In addition, the defendants maintain that, even if the issue of control had been properly preserved, neither the feasibility of

repairs nor control over the step and replacement stairs was controverted, and, accordingly, these issues could not form the basis for the admissibility of such potentially prejudicial evidence. The defendants also contend that the evidence of subsequent remedial measures was not properly admitted for impeachment purposes because there was no basis on which to impeach Deutsch[8] and because the trial court did not appropriately balance the probative value of such evidence against its prejudicial effect under § 4-3 of the Connecticut Code of Evidence.[9] Finally, the defendants assert that the admission of such evidence to depict the layout of the accident scene was an inadequate justification for the admission of the two photographs of the original step that also depicted a portion of the postaccident repairs. The defendants thus argue that the admission of the evidence of subsequent remedial measures was harmful and that the Appellate Court appropriately concluded that a new trial was warranted. We agree with the defendants that the evidence of subsequent remedial measures was improperly admitted but do not agree that the admission of such evidence, although improper, was harmful.

A

We begin by examining whether the trial court properly exercised its discretion in admitting the evidence of the defendants' postaccident repairs. "It is well established that [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 342, 907 A.2d 1204 (2006), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). When reviewing a decision to determine whether the trial court has abused its discretion, we "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.) *Hicks* v. *State*, 287 Conn. 421, 439, 948 A.2d 982 (2008), quoting *Desrosiers* v. *Henne*, 283 Conn. 361, 365–66, 926 A.2d 1024 (2007).

Section 4-7 of the Connecticut Code of Evidence, which is an exception to the general rule of admissibility of relevant evidence; see Conn. Code Evid. § 4-2;[10] reflects the "settled rule in this [s]tate that evidence of subsequent repairs is inadmissible to prove negligence or [as] an admission of negligence at the time of the accident." *Carrington* v. *Bobb*, 121 Conn. 258, 262, 184 A. 591 (1936); see *Nalley* v. *Hartford Carpet Co.*, 51 Conn. 524, 531–32 (1884). Section 4-7 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 other 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." Conn. Code Evid. § 4-7 (a).

Historically, we have justified the exclusion of subsequent remedial measures evidence under two principal theories. First, we have observed that such evidence is likely to be of relatively minor probative value. See, e.g., *Hall* v. *Burns*, 213 Conn. 446, 457–58 and n.3, 569 A.2d 10 (1990). As we reasoned in *Nalley*, in which we first announced the rule excluding evidence of subsequent remedial measures, "[t]he fact that an accident has happened and some person has been injured, immediately puts a party on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back [on] the prior one, although it is done [on] the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time." *Nalley* v. *Hartford Carpet Co.*, supra, 51 Conn. 531–32. But see *Rokus* v. *Bridgeport*, 191 Conn. 62, 67 n.1, 463 A.2d 252 (1983) (maintaining that exception is premised "on narrow public policy grounds, not on an evidentiary infirmity").

Our more recent cases instead have focused on a second, public policy based justification, namely, that allowing evidence of subsequent remedial measures to prove negligence "discourages alleged tortfeasors from repairing hazards, thereby perpetuating the danger." *Rokus* v. *Bridgeport*, supra, 191 Conn. 67 n.1; accord *Hall* v. *Burns*, supra, 213 Conn. 457. A broad exclusionary rule prohibiting the use of such evidence to prove negligence therefore "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." *Rokus* v. *Bridgeport*, supra, 67 n.1.

Despite these strong justifications supporting the exclusion, we nevertheless have recognized that evidence of subsequent remedial measures may be introduced when the party seeking to introduce the evidence can demonstrate that it is not being used as evidence of negligence but is instead offered to prove another material issue. See, e.g., *Hall* v. *Burns*, supra, 213 Conn. 463–64. "The central question is the [proponent's] purpose in introducing the evidence. The doctrine bars evidence of subsequent repairs when offered to prove negligence. It does not exclude such evidence when offered to prove some other material issue." (Internal quotation marks omitted.) *Smith* v. *Greenwich*, 278 Conn. 428, 448, 899 A.2d 563 (2006), quoting *Rokus* v. *Bridgeport*, supra, 191 Conn. 66.

In *Rokus*, for example, in which the plaintiff, Albert Rokus, brought a negligence action after being struck by a vehicle, we determined that the evidence of subsequent repairs was "introduced solely to show the configuration of the streets and adjacent sidewalks rather than to show negligence." *Rokus* v. *Bridgeport*, supra, 191 Conn. 66. The evidentiary ruling in that case hinged on the fact that "the exact point of impact was critical to [Rokus'] case . . . ." Id. Rokus, who was crossing the street on foot, claimed that he had reached the curb when the incident occurred and that the vehicle struck him while he was on the sidewalk, whereas the defendant countered that Rokus was still in the street at the time of the accident and that his injuries therefore resulted from his own negligence. Id., 64. Accordingly, given the nature of the factual dispute, we concluded that it was "entirely reasonable for the plaintiff to use illustrations of the accident scene" to show the layout; id., 66; even though the illustrations also depicted post-accident repairs. Id., 65.

Similarly, in *Smith*, we upheld the trial court's decision to allow photographs of subsequent remedial measures, which were admitted to prove control, when that issue was controverted. See *Smith* v. *Greenwich*, supra, 278 Conn. 446, 448–49. The plaintiff in *Smith* was injured after slipping on an icy sidewalk, which was caused by runoff from a melting snow pile over which control was disputed. See id., 431–32. Because the defendants denied responsibility for the snow pile, we concluded that photographic evidence of a defendant's removal of the snow pile after the accident was admissible to prove control. Id., 448–49.

Before evidence of subsequent remedial measures may be admitted to prove control or another material issue, however, the issue for which the evidence is being offered must be controverted. See, e.g., id., 448. Whereas "repairs made after an accident tend to prove that the party conducting them retains control over the area in question . . . if the defendant has admitted . . . that it controlled the premises on which the injury occurred, no reference in testimony to subsequent repairs should be made." (Citation omitted.) Id.

In the present case, neither control nor the feasibility of repairs was controverted. In their pretrial motion in limine, in which the defendants sought to preclude evidence of the subsequent remedial measures, they expressly conceded these issues, explaining that "there is no issue as to what entity controlled the stairway at issue. The defendants have not contested this issue and will not contest it at trial. Furthermore, the defendants are not contesting that alternat[ive] stairway designs were feasible for the roof deck and stairway at issue." Moreover, unlike in *Rokus*, the layout of the accident scene in the present case was not a critical issue, and the plaintiff's stated intention of admitting the photo-

graphs for layout purposes, such as to demonstrate to the jury that the step was made out of concrete, could have been accomplished in a far less prejudicial manner. See *Rokus* v. *Bridgeport*, supra, 191 Conn. 66. Accordingly, the Appellate Court properly determined that the admission of Deutsch's testimony and the photographs regarding the postaccident repairs could not be justified on those grounds.

In addition to the exceptions relating to control, feasibility and layout, we also have recognized that otherwise inadmissible evidence of subsequent remedial measures may be introduced into evidence for purposes of impeachment. See, e.g., *Baldwin* v. *Norwalk*, 96 Conn. 1, 8, 112 A. 660 (1921); see also Conn. Code Evid. § 4-7, commentary. In *Baldwin*, for instance, in which an employee of the defendant testified that he would not have removed a pile of debris from a roadway and that the debris would not have impeded travel, evidence that he had in fact ordered the debris to be removed following the accident on which the case was premised was admissible to impeach his credibility. *Baldwin* v. *Norwalk*, supra, 8.

In the present case, the trial court determined that evidence of the subsequent remedial measures taken by the defendants likewise could serve to impeach Deutsch's credibility. Unlike in *Baldwin*, however, the purported basis for impeachment in the present case was not a clear inconsistency in Deutsch's testimony and behavior but, instead, hinged on whether Deutsch (1) was required to obtain approval from the board of directors before making the repair to the step, and (2) actually obtained such approval after the plaintiff—whom Deutsch claims was acting in her capacity as president of the board—ordered him to repair the step.[11] We agree with the Appellate Court's assessment that "[t]he 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 [trial] court should have weighed that limited probative value against the prejudicial effect of admitting evidence of a subsequent remedial measure." *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 423.

Moreover, to the extent the plaintiff's counsel sought to impeach Deutsch regarding whether he needed board approval to make the repair, there were other, less prejudicial means by which to do so without introducing evidence of the subsequent remedial measures, such as through testimony of other witnesses or the introduction of the management contract between the condominium association and the management company, which purportedly contradicted Deutsch's testimony. The trial court, however, did not appear to consider

such options in determining whether to allow testimony about the subsequent repairs over the objections of the defendants' counsel. The trial court explained that "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 [counsel] 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." (Internal quotation marks omitted.) Id., 419–20. It is clear from this colloquy that the court did not balance the probative value of the testimony against its prejudicial effect. See Conn. Code Evid. § 4-3.

As we previously have explained, "unfair prejudice is that which unduly arouse[s] the jury's emotions of prejudice, hostility or sympathy . . . or tends to have some adverse effect [on the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence. . . . Section 4-3 also recognizes the court's authority to exclude relevant evidence when its probative value is outweighed by factors such as confusion of the issues or misleading the jury . . . ." (Citations omitted; internal quotation marks omitted.) *Ancheff* v. *Hartford Hospital*, 260 Conn. 785, 804–805, 799 A.2d 1067 (2002). Because the trial court did not take such considerations into account in this instance, the Appellate Court correctly determined that the trial court had abused its discretion in admitting the disputed evidence without applying the balancing test required under § 4-3 of the Connecticut Code of Evidence.

In sum, although the plaintiff's counsel sought to justify the admission of the disputed evidence under a number of theories, we are not persuaded that such evidence was introduced for any purpose other than to prove negligence. See *Hall* v. *Burns*, supra, 213 Conn. 464. Neither control nor feasibility was controverted, and even if there was a proper basis for impeachment, we agree with the Appellate Court that the trial court did not appropriately balance the probative value of the evidence against its prejudicial effect when it allowed the jury to hear Deutsch's description of the postaccident repairs and to view the corresponding photographs.[12] *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 423. Accordingly, we conclude that the Appellate Court correctly determined that the trial court had abused its discretion in allowing this evidence to be admitted.

B

Because we conclude that the trial court's ruling on the subsequent remedial measures evidence was improper, we turn next to the question of whether the Appellate Court properly concluded that the defendants were entitled to a new trial. "We have often stated that

before a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful." (Internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 327, 736 A.2d 889 (1999). "[A]n 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." (Citation omitted; emphasis added; internal quotation marks omitted.) *Ryan Transportation, Inc.* v. *M & G Associates*, 266 Conn. 520, 530, 832 A.2d 1180 (2003); accord *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 358.

"A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial. . . . Thus, our analysis includes a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . The overriding question is whether the trial court's improper ruling affected the jury's perception of the remaining evidence." (Citations omitted; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 489–90, 927 A.2d 880 (2007). Addressing these factors in turn, we agree with the plaintiff that the admission of the subsequent remedial measures evidence, although improper, was insufficiently harmful to warrant a new trial.

We first note that we agree with the defendants that the improper evidence of the subsequent remedial measures related to a central issue in the case. See, e.g., *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 360–61. Although the jury's interrogatories revealed that the plaintiff had not proven the element of proximate causation with respect to her claim that the defendants had failed to remedy the defective step, the interrogatories did establish that the plaintiff had proven that her injury had been proximately caused by the defendants' violation of the building code. Evidence that the step was replaced following the accident is probative of whether the step that was in place when the plaintiff sustained her injuries complied with the building code, particularly in view of the manner in which the plaintiff's attorney questioned Deutsch. Immediately before the improperly admitted evidence of the subsequent repairs was first presented to the jury, the plaintiff's counsel connected the building code and the repair of the step by asking Deutsch whether he "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 . . . ?" (Internal quotation marks omitted.) *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 419 n.2. Thus, the improperly admitted evidence of the replacement stairs related to the central issue of whether the original step complied with the building code.

The centrality of the issue does not end our inquiry, however, because even improperly admitted evidence of this nature may not prove to be harmful when the court takes adequate corrective measures.[13] See, e.g., *Hayes* v. *Camel*, supra, 283 Conn. 493–94; *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 334–35, 838 A.2d 135 (2004). The plaintiff correctly observes that when a jury has received an instruction, it is presumed to have followed such instruction "unless the contrary appears." *Hall* v. *Burns*, supra, 213 Conn. 468. As we noted previously, during direct examination of Shanok on April 14, 2009, one week after the jury heard the improper evidence regarding the construction of the replacement stairs during Deutsch's testimony, the defendants' counsel objected to the admission of exhibits 4a and 4b, which depicted the replacement stairs, and requested that the trial court issue a limiting instruction to the jury regarding subsequent remedial measures evidence. After sustaining the objection outside the jury's presence, the trial court instructed the jury that "subsequent remedial measures are not evidence of negligence."[14] Although this instruction may have been more effective if the court had given it when the remedial measures evidence was first admitted during Deutsch's testimony, and if the court had provided a more detailed explanation about the purposes for which such evidence could be considered, nothing in the record indicates that the jury did not heed the instruction; accordingly, we presume that it did.[15] See, e.g., *Hall* v. *Burns*, supra, 468.

Finally, the plaintiff claims that the improperly admitted evidence is "merely cumulative of other validly admitted testimony"; (internal quotation marks omitted) *Hayes* v. *Camel*, supra, 283 Conn. 489; because Shanok testified at length about the building code violations relating to the original step,[16] which likewise concerned the central issue of building code compliance that underlay the jury's finding of negligence per se. The defendants, however, claim that the evidence was not cumulative because, although it related to compliance with the building code, like Shanok's testimony, it was qualitatively different because it described the stairway repairs. We agree with the plaintiff.

In determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy. See, e.g., *Fink* v. *Golenbock*, 238 Conn. 183, 211, 680

A.2d 1243 (1996). In *Fink*, we determined that the admission of an expert's report, even if improper, was nevertheless harmless because it was merely cumulative of that expert's testimony at trial. Id. Similarly, in *Swenson* v. *Sawoska*, 215 Conn. 148, 575 A.2d 206 (1990), we determined that the admission of a police narrative, a portion of which should have been excluded under the hearsay rule, was harmless error when "the overwhelming evidence properly admitted in the case" provided strong support for the issue of which the improper evidence was probative. Id., 155. By contrast, in *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 971 A.2d 676 (2009), in which an expert witness was improperly precluded from testifying; see id., 161; the proposed testimony would have addressed an issue for which no other testimony was proffered, rendering its exclusion harmful. Id., 163–64. Likewise, in *Prentice* v. *Dalco Electric, Inc.*, supra, 280 Conn. 336, in which improperly admitted expert testimony "was the only evidence to support the plaintiff's principal theory of liability"; id., 359; and was described as " 'critical' " by counsel in summation; id., 360; the admission of such evidence was harmful. See id., 359.

In the present case, we are persuaded that, with respect to the question of compliance with the building code, the improperly admitted evidence was cumulative of evidence that properly was introduced during the examination of other witnesses by the plaintiff's counsel because it was similarly probative of whether the building code was violated, which formed the basis for the jury's finding of a breach of duty under the negligence per se counts. Negligence per se, the claim on which the jury found in favor of the plaintiff, "serves to superimpose a legislatively prescribed standard of care on the general standard of care." *Staudinger* v. *Barrett*, 208 Conn. 94, 101, 544 A.2d 164 (1988). A violation of the statute or regulation thus establishes a breach of duty when (1) the plaintiff is within the class of persons intended to be protected by the statute, and (2) the injury is the type of harm that the statute was intended to prevent. E.g., *Gore* v. *People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995). Although the plaintiff still must demonstrate the remaining elements of negligence,[17] "the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. [It] merely decide[s] whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law." Id., 376.

With respect to the issue of building code compliance, in addition to Deutsch's testimony, the jury also heard the testimony of the plaintiff's expert witnesses. Shanok offered his opinion about the specific step at issue in the case, which he had analyzed before trial, and explained his conclusion that it violated the building

code.[18] Unlike the evidence at issue in *Sullivan*, which provided the only proof for an issue in that case; see *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 164; there was significant testimony in the present case from expert witnesses regarding the issue of the building code violation, and that testimony focused on the issue in greater detail than the passing reference to the building code during Deutsch's testimony. Shanok's uncontroverted testimony regarding the building code was that the step that existed at the time of the accident violated the building code in a number of specific ways. Thus, even if the jury took the improperly admitted evidence to its impermissible conclusion—namely, that the original step likely violated the building code—such an implication nevertheless would be cumulative of Shanok's testimony as both support the establishment of a building code violation, the same element of negligence per se that Shanok's testimony tended to prove. Accordingly, this fact counsels against a finding of harm. Cf. *Swenson* v. *Sawoska*, supra, 215 Conn. 157 ("[T]he plaintiff's version of the accident conflicted with the police officer's testimony, his diagram and the physical evidence. On the basis of this record, all unfavorable to the plaintiff, it is difficult to conceive of how the admission of the [improperly admitted evidence] could have been anything but harmless error.").

Weighing the totality of the evidence at trial, we are not persuaded that the improper introduction of the evidence of subsequent remedial measures likely would have affected the result in this case. Accordingly, we conclude that the admission of such evidence, although improper, was not harmful. Therefore, the Appellate Court improperly concluded that a new trial was warranted.

II

Having concluded that the Appellate Court improperly reversed the judgment of the trial court and remanded the case for a new trial, we turn to the defendants' alternative grounds for affirmance of the Appellate Court's judgment. See *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 417 n.1. The defendants first claim that the trial court improperly denied their motion to preclude the testimony of William J. Marr, who was disclosed as an expert witness several months after the expert discovery scheduling deadline and one week before jury selection began, because such a late disclosure, coupled with the denial of their request for a continuance, prejudiced the defendants and was harmful. The plaintiff counters that the trial court properly exercised its discretion and permitted Marr to testify, and that, even if the admission of such testimony constituted an abuse of discretion, it was not harmful. We agree with the plaintiff that the trial court did not abuse its discretion in permitting

Marr to testify.

The following additional facts and procedural history are relevant to our resolution of this issue. The trial court's scheduling order set December 1, 2008, as the deadline for the disclosure of the plaintiff's expert witnesses. On March 16, 2009, without first seeking to amend the deadline, the plaintiff announced her intention to call Marr to testify about the applicability of the building code to the condominium building.[19] The following day, the defendants filed a motion to preclude such testimony, asserting that the disclosure, which occurred several months after the time established by the trial court's scheduling order and approximately one week before trial was scheduled to commence, was prejudicial because the defendants likely would be unable to find a rebuttal witness on such short notice.[20] In the same motion, the defendants also requested a continuance as an alternative to precluding Marr's testimony altogether.[21] The plaintiff filed an objection to the motion to preclude on April 2, 2009, claiming that Marr's disclosure became necessary as rebuttal only after the defendants filed a motion in limine calling into question Shanok's capacity to testify about the building code, and that Marr's testimony would not inject any new issues into the case.

On April 3, 2009, during oral argument on the motion to preclude Marr's testimony, the plaintiff's attorney attributed the delay of disclosure to his extenuating personal circumstances and further reiterated the plaintiff's belief that Marr would be testifying as a fact witness. The trial court determined that the "there were good reasons for the late filing" and that the defendants instead should have filed a motion for a continuance that "would have been brought to the [court's] attention . . . prior to jury selection." The trial court also considered the fact that Marr was scheduled to be deposed on the following business day. Accordingly, the trial court denied the motion without prejudice and declined to grant a continuance. Marr testified at trial on April 8, 2009. After being qualified as an expert witness, Marr opined that a hypothetical step with dimensions like the one at issue in the plaintiff's case would violate the building code. On cross-examination, Marr explained that he had not personally analyzed the scene of the plaintiff's accident.

We first consider the defendants' claim that the trial court's denial of their motion to preclude Marr's testimony and their request for a continuance constituted an abuse of discretion. "A trial court's decision on whether to impose the sanction of excluding the testimony of a party's expert witness rests within the court's sound discretion. . . . The action of the trial court is not to be disturbed unless it has abused its broad discretion, and in determining whether there has been such abuse every reasonable presumption should be made

in favor of its correctness." (Internal quotation marks omitted.) *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 548–49, 733 A.2d 197 (1999).

The rules of practice in effect at the time of trial[22] supplied principles under which the trial court was to exercise such discretion when an expert witness who was expected to testify at trial was not disclosed "within a reasonable time prior to trial" or was "retained or specially employed after a reasonable time prior to trial . . . ." Practice Book (2008) § 13-4 (4). Specifically, Practice Book (2008) § 13-4 (4) provided that an expert witness not timely disclosed "shall not testify if, upon motion to preclude such testimony, the judicial authority determines that the late disclosure (A) will cause undue prejudice to the moving party; or (B) will cause undue interference with the orderly progress of trial in the case; or (C) involved bad faith delay of disclosure by the disclosing party."

In the present case, making every reasonable presumption in favor of upholding the trial court's ruling, we are not persuaded that the denial of the motion to preclude Marr's testimony was an abuse of the trial court's discretion. During the hearing at which the motion to preclude was denied, the trial court appeared to have considered the factors set forth in Practice Book (2008) § 13-4 (4) but did not find that they were applicable under the circumstances. With respect to undue prejudice, the defendants' counsel conceded that Marr's testimony would likely be cumulative of Shanok's, which weighs against a finding of prejudice because Shanok had been timely disclosed and the defendants had deposed him on issues relating to the building code. See Practice Book (2008) § 13-4 (4) (A). Similarly, with respect to the issue of whether the late disclosure would have unduly interfered with the orderly progress of trial, the trial court appeared to accord some weight to the fact that Marr would be deposed on the business day following the hearing on the motion, which, along with other assurances, indicated that commencement of the trial would not have been delayed as a result of the late disclosure. See Practice Book (2008) § 13-4 (4) (B). Finally, the trial court, taking into account the personal circumstances of the plaintiff's attorney, determined that there were "good reasons for the late filing," implicitly rejecting a finding of bad faith.[23] See Practice Book (2008) § 13-4 (4) (C). Accordingly, because the trial court did not determine that any of the factors that mandate preclusion under Practice Book (2008) § 13-4 (4) were applicable, and the record provides support for this determination, we conclude that the trial court did not abuse its discretion in allowing Marr to testify and in denying the defendants' request for a continuance.

III

Finally, we address the defendants' second alterna-

tive ground for affirmance of the Appellate Court's judgment, namely, whether the trial court abused its discretion in denying the defendants' motion for remittitur. The defendants claim that the trial court improperly denied their motion for remittitur because the jury's economic damages award was excessive and unsupported by the evidence. Specifically, the defendants claim that the evidence adduced at trial did not support an award of damages for future lost earnings or future medical treatment and that the economic damages award should be reduced to the amounts to which the parties stipulated for past medical expenses and lost earnings. The plaintiff contends that the jury reasonably could have awarded such economic damages above the amounts stipulated for medical bills and lost wages by attributing the excess to loss of future earnings capacity and the costs associated with potential future surgeries. The plaintiff further asserts that the award was neither shocking nor inconsistent with the evidence that had been adduced at trial. We agree with the plaintiff.

Before addressing this claim, we set forth the following additional facts and procedural history relevant to its resolution. The plaintiff underwent three surgeries following her injuries. Prior to trial, the parties stipulated that the plaintiff had incurred $61,042.28 in medical expenses as a result of her injuries, and that her lost wages attributable to the injuries were $46,328. At trial, the plaintiff testified about her business earnings before and after the injuries, and introduced into evidence copies of her state and federal income tax returns from 2003 through 2008. The plaintiff also testified that she had suffered a lasting diminution in productivity of between 20 and 25 percent attributable to the injuries, and that the injuries also had negatively affected her efforts to expand her client base.

In addition, the plaintiff called Michael Clain, an orthopedic surgeon, who provided expert testimony about the plaintiff's injuries and the likelihood that the plaintiff might require future surgical or other medical treatment. Clain opined that, as a result of the injuries, the plaintiff had a "15 percent permanent partial disability" of her left, lower extremity. Clain further described the plaintiff's likely future medical treatment, which he believed would include additional surgical procedures and physical therapy. On the basis of his assessment of the plaintiff's injuries, Clain estimated that the plaintiff faced a 70 to 80 percent chance of requiring future arthroscopic surgery, whereas the probability that ankle fusion surgery would be necessary was between 10 and 20 percent.[24] Clain also provided estimates of the surgeon's fee for both types of surgeries and explained that the plaintiff's prior surgeries could be used to predict the hospital charges associated with potential future surgeries.

During summation, the plaintiff's attorney estimated

the plaintiff's loss of earnings potential at $351,000 and future medical expenses at a minimum of $29,000. When combined with the stipulated amounts for past medical expenses and lost earnings, the amount of economic damages that the plaintiff's counsel requested totaled $487,990. The defendants' counsel, however, urged the jury to limit its award of economic damages to the stipulated amounts if it found the defendants liable. During the trial court's jury charge, the court provided specific instructions regarding economic damages including medical bills, future medical expenses, loss of earnings, and loss of earnings capacity.

The jury returned a verdict in favor of the plaintiff and awarded her $500,000 in noneconomic damages and $235,000 in economic damages, which was approximately $127,630 above the amount stipulated by the parties for past medical expenses and lost wages.[25] Subsequently, the defendants filed several posttrial motions, including motions to set aside the verdict and for remittitur. On May 11, 2009, after hearing the parties' arguments on the motions, the trial court denied the motions to set aside the verdict and for remittitur, determining that the jury "could have reasonably reached this verdict and the amount found." The trial court further explained that "[t]he amount falls within the necessarily uncertain limits of fair and reasonable damages," and that "[t]he jury was not bound by the limited stipulations [of lost earnings and past medical expenses] but was entitled to review the [income] tax returns and the loss of productivity and to allow further amounts for future [medical expenses] and the like."

"We review the verdict in this case in the light of certain principles. First, the amount of an award is a matter peculiarly within the province of the trier of facts. . . . Second, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . Third, the ruling of the trial court on the motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness. . . . Likewise, in ordering a remittitur, a fair appraisal of compensatory damages, and not the limit of legitimate generosity, is the rule . . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has] included items of damage which are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions. . . . Again, the relevant inquiry is whether the verdict falls within the necessarily uncertain limits of fair and rea-

sonable compensation or whether it so shocks the conscience as to compel the conclusion that it was due to partiality, prejudice or mistake." (Citations omitted; internal quotation marks omitted.) *Earlington* v. *Anastasi*, 293 Conn. 194, 206–207, 976 A.2d 689 (2009); see also *Tomczuk* v. *Alvarez*, 184 Conn. 182, 187, 439 A.2d 935 (1981).

Nevertheless, in limited circumstances, we previously have ordered that a plaintiff accept a remittitur or submit to a new trial on damages when the record, viewed in the light most favorable to the plaintiff, does not support the jury's award. See, e.g., *Earlington* v. *Anastasi*, supra, 293 Conn. 207–208; *Gaudio* v. *Griffin Health Services Corp.*, supra, 249 Conn. 555–56. In *Gaudio*, for instance, in which the jury awarded economic damages of $100,000 but the record supported damages of approximately $60,000, we ordered a remittitur of the excess of nearly $40,000. See *Gaudio* v. *Griffin Health Services Corp.*, supra, 555–56. The plaintiff in *Gaudio* could not "identif[y] anything in the record from which the jury reasonably could have concluded that he incurred nearly $40,000 in economic damages," relying instead on "speculative and vague hypotheses" concerning which no evidence or jury instruction had been provided. Id., 555. Similarly, in *Earlington*, in which the plaintiffs' experts estimated the plaintiffs' economic damages at $1,045,874, and the plaintiffs' attorney, during closing argument, asked the jury to award economic damages of $1,020,117, we determined that the trial court improperly had denied the defendants' motion for remittitur when the jury awarded $1,588,000 in economic damages. *Earlington* v. *Anastasi*, supra, 206–208. We concluded that there simply was "no evidentiary support for the jury's award . . . ." Id., 208.

Applying these principles, we turn first to the defendants' claims regarding the plaintiff's future medical expenses. We previously have observed that, "[b]ecause . . . [f]uture medical expenses do not require the same degree of certainty as past medical expenses . . . [i]t is not speculation or conjecture to calculate future medical expenses based [on] the history of medical expenses that have accrued as of the trial date . . . when there is also a degree of medical certainty that future medical expenses will be necessary." (Citation omitted; internal quotation marks omitted.) *Marchetti* v. *Ramirez*, 240 Conn. 49, 54–55, 688 A.2d 1325 (1997). Accordingly, we examine the record to determine whether the jury reasonably could have awarded future medical expenses on the basis of the evidence before it.

As the defendants correctly observe, "the jury's determination must be based [on] an estimate of reasonable probabilities, not possibilities." (Internal quotation marks omitted.) Id., 54. Nevertheless, we have cautioned that "[d]amages for the future consequences of

an injury can never be forecast with certainty. . . . Moreover, [t]he cost and frequency of past medical treatment . . . may be used as a yardstick for future expenses if it can be inferred that the plaintiff will continue to seek the same form of treatment in the future." (Citation omitted; internal quotation marks omitted.) Id., 56. In *Marchetti*, for instance, in which we determined that the Appellate Court had applied an incorrect standard for determining such future medical expenses; see id., 53–54; we nevertheless concluded that the plaintiff had demonstrated a sufficient likelihood of the need for future medical treatment to satisfy the more stringent standard that should have been applied when the plaintiff introduced expert testimony from a physician that he would require future medical treatment, the cost of which could be estimated on the basis of his prior treatments. Id., 55–57.

In the present case, the jury reasonably could have found that the plaintiff would require significant, future medical treatment. Clain's testimony, which indicated a high likelihood of future surgery, was unopposed, and the plaintiff's prior medical bills also were admitted into evidence. Thus, the jury could have used the prior medical expenses in the manner suggested by Clain, coupled with the probabilities of future procedures, to arrive at an estimate of future medical expenses. See id., 55–56.

Finally, with respect to the damages that the jury may have awarded for loss of earnings capacity, we do not agree with the defendants that there was no reasonable basis for such an award. Loss of earnings capacity must be supported by more than speculation; see *Mazzucco* v. *Krall Coal & Oil Co.*, 172 Conn. 355, 360, 374 A.2d 1047 (1977); but need not "be established with exactness [as] long as the evidence affords a basis for a reasonable estimate by the jury." *Delott* v. *Roraback*, 179 Conn. 406, 411, 426 A.2d 791 (1980); cf. *Hicks* v. *State*, supra, 287 Conn. 463–64. In *Mazzucco*, we determined that the issue of lost earnings capacity was too speculative to have been submitted to the jury when the plaintiff testified that quantifying his loss of earnings capacity attributable to the injury was very difficult and could not be done without speculation because several other unrelated factors contributed to the loss. *Mazzucco* v. *Krall Coal & Oil Co.*, supra, 359–61.

In the present case, by contrast, the jury reasonably could have credited the plaintiff's testimony that she became up to 25 percent less productive as a result of her injuries and that her injuries adversely affected her efforts to expand her client base, as well as her ability to travel and undertake other activities necessary to obtain clients for her consulting business. See, e.g., *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 646–47, 904 A.2d 149 (2006) ("if a plaintiff presents testimonial evidence with respect to damages, it is

solely within the province of the jury to assess the credibility of the plaintiff and to weigh the value of his or her testimony"). In light of such testimony, coupled with the plaintiff's income tax returns and Clain's testimony regarding her permanent partial disability, the jury reasonably could have attributed a portion of the contested economic damages to this loss of earnings capacity.

Construing the evidence in the light most favorable to sustaining the verdict; see *Oakes* v. *New England Dairies, Inc.*, 219 Conn. 1, 12, 591 A.2d 1261 (1991); we conclude that the jury reasonably could have found that the plaintiff was entitled to economic damages to compensate her for her future medical expenses and loss of earnings capacity, in addition to the amounts stipulated for lost earnings and medical expenses that she already had incurred. Unlike the awards in *Gaudio* and *Earlington*, the award of economic damages in the present case is supported by the evidence adduced at trial. The jury reasonably could have relied on the plaintiff's own testimony regarding her diminished productivity, along with her income tax returns and Clain's testimony regarding her permanent partial disability, to establish her loss of earnings capacity. Likewise, Clain's testimony regarding the plaintiff's likelihood of requiring future surgery and other medical treatment, coupled with the records of the plaintiff's previous medical expenses, which had been introduced into evidence, provided adequate support for the jury's award of economic damages on this basis. Taken together, the jury's award of economic damages does not exceed "the necessarily uncertain limits of fair and reasonable compensation or . . . so [shock] the conscience as to compel the conclusion that it was due to partiality, prejudice or mistake." (Internal quotation marks omitted.) *Earlington* v. *Anastasi*, supra, 293 Conn. 207. We therefore conclude that the trial court did not abuse its discretion in denying the defendants' motion for remittitur.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's judgment.

In this opinion the other justices concurred.

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

[1] The management company was retained by the condominium association to manage the common areas of the condominium building.

[2] After we granted certification to appeal, the plaintiff moved to address additional issues on appeal that had been raised before the Appellate Court but that the court declined to address in its decision. See *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 417 n.1. These additional issues concerned (1) whether the trial court properly permitted the plaintiff to make a late disclosure of an expert witness, namely, William J. Marr, and (2) whether the trial court properly denied the defendants' motion for remittitur. After we granted the plaintiff's motion, the defendants briefed these issues as alternative grounds for affirmance; we likewise refer to them as such throughout this opinion. Because we ultimately reverse the judgment of the Appellate Court, we address these alternative grounds for affirmance in parts II and III of this opinion.

[3] The plaintiff relied primarily on provisions of the model national building

code established by Building Officials and Code Administrators International, Inc., on which the state building code is based. We hereinafter refer to the state building code as the building code.

[4] "The plaintiff's attorney . . . 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 [that] 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 [of directors], 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." (Internal quotation marks omitted.) *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, supra, 124 Conn. App. 419 n.2.

"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.' " Id.

[5] After the trial court sustained the objection to exhibits 4a and 4b, the following exchange between the plaintiff's counsel and Deutsch occurred, which led to the introduction of exhibits 5a and 5b, which depicted a portion of the replacement stairs:

"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 [of directors], you . . . indicated that work had been bid on successfully by Bank Brothers Contracting to replace that [step] 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, [that is] what this reflects.

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

"A. That's 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 [Contracting]."

[6] The following exchange occurred during direct examination of Shanok:

"Q. Could you tell the members of the jury how you went about conducting your analysis?

"A. Yes. I met with [the plaintiff] back in December of 2006 and visited the location where she fell, and observed the conditions there, took photographs and measurements.

"Q. And when you visited the site, were you able to determine if the conditions at the site were the same as the conditions that existed when [the plaintiff] fell on April 17, 2005?

"A. I was.

"Q. And what did you determine as to whether . . . the conditions were the same?

"A. Well, I asked [the plaintiff], and she stated that there was a stairway that had been built over the original step at which she fell.

"Q. And when you took the measurements that you took, how did you go about taking measurements in an effort to recreate what was there without that stairway that had been built?

"A. I crawled under the stairway and measured the concrete—we'll call

it a concrete block that was at the doorway."

Later in the examination, the plaintiff's counsel questioned Shanok further about the replacement stairs:

"Q. All right. Now, you took some photographs when you were at the scene doing your investigation, and I think you already testified that there were already steps that were built over the concrete [step] that was there previously. Is that right?

"A. Yes.

"Q. And I'm showing you what's been marked for identification, exhibits 4a and 4b, and ask you if you recognize what's depicted in those photographs.

"A. Yes.

"Q. And what's depicted in those photographs?

"A. This is the set of steps that was subsequently installed over that concrete [step]." The defendants' counsel then objected to the photographs as evidence of subsequent remedial measures.

[7] Specifically, the jury's note contained the following request: "We would like to hear the portion of [Shanok's] testimony . . . where the defense asked . . . Shanok a series of questions regarding the possibility of a condition that was not code compliant but was safe." In addition, the jury requested clarification of the meaning of "proximate cause."

[8] The defendants further assert that the subsequent remedial measures evidence could not properly be introduced through the testimony of Deutsch, who was a witness for the plaintiff, because our rules of evidence prohibit a party from calling a witness "primarily for the purpose of introducing otherwise inadmissible evidence" by impeaching its own witness. Conn. Code Evid. § 6-4. Because we conclude that the trial court did not conduct an appropriate balancing of the evidence under § 4-3 of the Connecticut Code of Evidence, however, we do not decide whether a proper basis for impeachment existed or whether § 6-4 provided a basis for the exclusion of the subsequent remedial measures evidence.

[9] Section 4-3 of the Connecticut Code of Evidence provides: "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

[10] Section 4-2 of the Connecticut Code of Evidence provides: "All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of this state, the Code [of Evidence] or the General Statutes. Evidence that is not relevant is inadmissible."

[11] See footnote 4 of this opinion.

[12] See footnote 5 of this opinion.

[13] An example of an inadequate limiting instruction appears in *Williams Ford, Inc.* v. *Hartford Courant Co.*, 232 Conn. 559, 657 A.2d 212 (1995). In that case, we concluded that the trial court improperly had admitted evidence of unrelated conduct between the defendant and nonparty automobile dealerships on three occasions during the trial; id., 567; and that this impropriety was not cured by the court's "brief and cryptic limiting instructions." Id., 574. Specifically, when the trial court admitted the evidence of the nonparty dealerships' interactions with the defendant, it instructed the jury that "the arrangements between [the nonparty dealerships] and [the defendant are] not before us"; id., 568; and that the "case involves fifteen automobile dealerships, it does not involve seventy-two. We are not here to try the issues in the other cases, we just don't know what those cases are about. We just heard a statement, and it's just a statement, but that's not what this case is about." (Internal quotation marks omitted.) Id.

[14] As we noted previously, the trial court, in charging the jury, also reminded the jury that certain evidence was to be admitted for limited purposes and, therefore, could be considered only for those purposes.

[15] We also note that the defendants' counsel, who requested the instruction, neither objected to the trial court's instruction nor requested that the trial court elaborate on it. Under similar circumstances in *Hayes* v. *Camel*, supra, 283 Conn. 475, we did not find harm when "the plaintiff specifically agreed with the correctness of [the] limiting charge when it first was proposed by the trial court, and [the plaintiff] did not request a more specific instruction on this topic either before or after the trial court's charge to the jury, and did not take an exception to this aspect of the charge as given." Id., 492–93.

[16] Another witness, William J. Marr, also testified regarding the building code. Our analysis does not depend on Marr's testimony, however, which is the subject of the claim that we address in part II of this opinion, and which the defendants conceded at trial was cumulative of Shanok's testimony.

[17] "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 593, 945 A.2d 388 (2008).

[18] William J. Marr, who had not personally observed the accident scene and the step, testified about the building code in hypothetical terms.

[19] The plaintiff's disclosure indicated that she "believe[d] that [Marr was] a fact witness" but filed the expert disclosure "in case the defendant[s] [believed] otherwise . . . ." During Marr's testimony, however, the plaintiff's attorney moved to qualify Marr as an expert witness, which the trial court allowed.

[20] The defendants also expressed concern that they would be unable to depose Marr with only one week remaining before trial was scheduled to begin but ultimately were able to do so. The defendants maintain, however, that the late disclosure left them with no time to obtain Marr's deposition transcript or to secure a rebuttal witness.

[21] The trial court explained that the request for a continuance should have been presented as a separate motion, which could then have been addressed prior to jury selection rather than at the April 3, 2009 hearing, after the jury had been selected and less than one week before the trial was scheduled to begin.

[22] Because this case was commenced before December 31, 2008, the revisions to Practice Book § 13-4 that took effect on January 1, 2009, are inapplicable. See Practice Book § 13-4 (i) ("[t]he version of this rule in effect on December 31, 2008, shall apply to cases commenced on or before that date").

[23] The defendants' reliance on our decision in *Pool* v. *Bell*, 209 Conn. 536, 551 A.2d 1254 (1989), to support their claim is misplaced. In *Pool*, we upheld the trial court's decision to preclude an expert witness who was disclosed belatedly when "the trial court could reasonably have viewed the late date at which the defendant disclosed [the expert] as the sort of 'cat and mouse' game that the rules of discovery and production were designed to discourage"; id., 541; but the court's specific rationale was not available because the hearing had not been transcribed. Notably, however, the court in *Pool* reasserted the proposition that "[a] trial court's decision on whether to impose the sanction of excluding the testimony of a party's expert witness rests within the court's sound discretion"; id.; and this court made all reasonable presumptions in favor of upholding the trial court's ruling as a result. See id., 541–42. In the present case, we also must afford great deference to the trial court's discretionary determination, and with no evidence to suggest that the late disclosure was motivated by bad faith, we cannot say that the trial court abused its discretion in concluding that exclusion was not warranted.

[24] We are not persuaded by the defendants' argument that the plaintiff's testimony that she would "like to have no further surgeries" necessarily undermines Clain's predicted probabilities of future surgery, given that there is no indication that the plaintiff intended to decline such surgeries if they should become medically necessary. Viewed in the light most favorable to upholding the verdict; see, e.g., *Oakes* v. *New England Dairies, Inc.*, 219 Conn. 1, 12, 591 A.2d 1261 (1991); we are not persuaded that the jury was required to interpret the plaintiff's testimony in this manner.

[25] These damages were not allocated among the various sources of economic damages at issue in the case, such as past and future medical expenses and past and future diminished earnings capacity. The defendants have since conceded that the jury could have allocated $19,118 to the cost of future arthroscopic surgery, leaving approximately $108,512 in controversy.