DOCKET NO.: UWY-CV17-6036311-S	:	SUPERIOR COURT
LUIS OCASIO	:	J. D. OF WATERBURY
VS.	:	AT WATERBURY
VERDURA CONSTRUCTION, LLC	:	APRIL 25, 2024

MEMORANDUM OF DECISION RE: MOTION TO SET ASIDE VERDICT (#188.00)

Pursuant to General Statute § 52-228b and Practice Book § 16-35, the plaintiff, Luis Ocasio ("plaintiff") filed a February 12, 2024 motion to set aside the jury verdict returned on February 2, 2024. There the jury found in favor of the defendant. The plaintiff claims that the court erred in two ways: 1.) by not allowing the plaintiff to use evidence of Steven Verdura's prior inconsistent testimony regarding the condition of the railing when he inspected it and, 2.) by continuing to prohibit plaintiff's counsel from questioning Steven Verdura on his subsequent repair of the railing, or to introduce inconsistent deposition testimony, for the purpose of impeachment. The plaintiff reserved the right to supplement this motion once the trial transcripts are received. However, no request was ever made by the plaintiff. This was provided for by the court's order denying the plaintiff's motion for extension of time to file post-verdict motions (#187.00).

The defendant filed a February 28, 2024 objection to the motion to set aside the verdict (#189.00) asserting that there is ample evidence to support the jury verdict, and the motion is without merit. The plaintiff countered with an April 5, 2024 reply to the objection (#191.00).

BACKGROUND CLAIMED BY PLAINTIFF

The plaintiff, a tenant of the defendant, filed a defective railing premises liability claim. The plaintiff testified by transcript that he was caused to fall when he lost his balance as a result of a railing. The railing had been loose, and it gave way. He then fell down the icy stairs, breaking the two bones in his left lower leg. The plaintiff's first witness was Steven Verdura, principal of

the defendant, who testified that he arrived at his property approximately one hour after Mr. Ocasio's fall and he, Mr. Verdura, was told by the carpenter he had hired to work on his property that day. The carpenter was the first to find the plaintiff after he fell and was injured. Despite his stated belief that the fall was caused by ice on the stairs, Mr. Verdura then testified that he decided to check the railing in question. While he admitted it was only very slightly loose, he denied that the metal base of the railing, which was screwed into the wooden front porch, was loose or the cause of the railing being loose. Mr. Verdura denied that any screws were missing from the base, and denied that the wood on the front porch was not solid as a result of rot.

The plaintiff made an offer of proof outside the presence of the jury, arguing to allow admission of the inconsistent testimony from Mr. Verdura's deposition regarding the repair, for the purpose of impeachment. Although the plaintiff argued that the testimony was relevant and probative as to Mr. Verdura's credibility, the court refused to allow the evidence. When the jury returned, the plaintiff inquired of Mr. Verdura as to the actual cause of the railing being "slightly loose." Instead of answering the question directly, Mr. Verdura emphasized that the railing was only very slightly loose, and no other landlord would have done anything to fix the railing. He claimed he had great concern for his tenants, and he went above and beyond. He then spontaneously volunteered that that was why he "did the repair like it was in the picture, in the horizontal and vertical." After another offer of proof outside the presence of the jury, the court continued to prohibit the plaintiff from further inquiry regarding Mr. Verdura's admitted repair of the railing or to publish the photo of the repair mentioned in his testimony. Mr. Verdura testified that the "slight looseness of the railing was due to the upper wooden bracket having expanded and contracted in the weather over the years." As a result of the defendant's immediate repair, the plaintiff was unable to provide any photographic evidence of the broken railing.

PLAINTIFF'S POSITION

"[A trial court may] set aside a verdict where it finds it has made, in its instructions, rulings on evidence, or otherwise in the course of the trial, a palpable error which was harmful to the proper disposition of the case and probably brought about a different result in the verdict." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 276, 828 A2d 64 (2003). "The setting aside of a verdict because of an error of the trial court should be exercised with great caution and never done unless the reviewing court is satisfied entirely that the error is unmistakable and unquestionably must have been harmful." *Message Center Management, Inc.* v. *Shell Oil Products Co.*, 85 Conn. App. 401, 416, 857 A.2d 936 (2004).

On January 23, 2019, prior to the first trial of this case, the defendant filed a motion in limine to preclude any evidence of subsequent remedial repairs (#129.00) The court granted that motion on July 25, 2019 (#129.10). Significantly, the subsequent remedial measures evidentiary rule merely states that evidence of subsequent repairs is inadmissible to prove negligence or as an admission of negligence at the time of the accident. Conn. Code Evid. Rule 4-2. Further, Rule 4-7 provides in 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. Rule 4-7(a). Subsequent remedial measures evidence also may be offered for impeachment purposes. *Baldwin* v. *Norwalk*, 96 Conn.1. 8, 112 A. 660 (1921), cf. *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn.1, 17-18, 60 A.3d 222 (2013) (post-accident photograph of subsequent remedial measure improperly admitted for impeachment purposes in absence of balancing probative value of evidence against it its prejudicial effect).

Evidence of subsequent remedial measures has been allowed to impeach the credibility of a witness. *Hicks* v. *State*, 287 Conn. 421, 948 A.2d 982 (2008); *Rokus* v. *Bridgeport*, 191 Conn. 62, 463 A.2d 252 (1983); *Koskoff* v. *Goldman*, 86 Conn. 415, 85 A. 588 (1912). In *Hicks*, the plaintiff was injured when the truck he was driving came around a curve in the highway and encountered a state dump truck in the road. He tried to swerve to avoid the truck and in so doing, his vehicle flipped and he sustained serious injuries. The jury returned a verdict in favor of the plaintiff and the state appealed. One of its grounds for appeal was that the court had admitted evidence that the state truck had been moved after the accident and that that was inadmissible evidence of subsequent remedial measures. Our Supreme Court disagreed, stating:

> "This court, however, has admitted evidence of subsequent remedial measures if offered for other purposes . . . . [T]he rule barring evidence of subsequent repairs in negligence actions is based on narrow public policy grounds, not on an evidentiary infirmity. . . ." *Hicks*, at 440.
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> "Even in negligence actions, however, we have held proof of subsequent remedial measures admissible if offered for a purpose other than to show culpable conduct on the part of a defendant. . . . The existence of these exceptions to the general rule illustrates that the strength of the public policy supporting the rule is not so great as to demand the exclusion *where there is a strong probative use for the evidence, as contrasted with the somewhat dubious legal relevance of subsequent repairs to the question of negligence itself.* (Citations omitted; internal quotation marks omitted.) *Smith* v. *Greenwich*, 278 Conn. 428, 447-48, 899 A.2d 563 (2006).' (Emphasis added.) *Hicks*, at 440.
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> "Moreover, the evidence was relevant to issues other than negligence: (1) *to impeach Rodrigues' credibility generally by impeaching his testimony that he had come to the plaintiff's aid immediately after the accident occurred*; (2) to explain why the police photographs of the scene, the accompanying sketch of the accident scene and accounts of the accident by emergency responders did not reflect that the truck was at the scene; and (3) to address a contested fact, namely, whether the truck was in the road, not whether it was negligent to be there. See *Rokus* v. *Bridgeport*, 191 Conn. 62, 66, 463 A.2d 252 (1983) (The bar on subsequent repairs precludes such evidence 'when offered to prove negligence. It does not exclude such evidence when offered to prove some other material issue.'). Therefore, the trial court did not abuse its discretion in admitting this evidence." (Emphasis added.) *Hicks* at. 441-442.

In *Rokus*, the plaintiff was struck by a city truck as he was crossing the street. A critical issue at trial was the exact point of impact. The plaintiff claimed that he had reached the curb when the truck mounted the curb and struck him on the sidewalk. The defendants denied that the truck had mounted the curb and claimed that the plaintiff's injuries resulted from his own negligence. The jury found for the plaintiff, and the city appealed, claiming that a photograph of the curb after it had been repaired should not have been admitted because it showed subsequent remedial measures. Our Supreme Court disagreed and held that the map was admissible to show the layout of the area of the accident as the point of impact was a contested issue. The court stated, "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*." (Emphasis added.) *Rokus* at 66.

In *Smith* v. *Town of Greenwich*, 278 Conn. 428, 899 A.2d 563 (2006), the plaintiff fell on ice, which she claimed had been formed from runoff from a large snow pile on the defendant's property. The jury found against the defendant, and the defendant appealed. One of the appeal grounds was that the court allowed the plaintiff to introduce evidence that the defendant, through its snow removal contractor, had performed subsequent remedial measures by removing snow from the sidewalk after the plaintiff's fall, in violation of the rule against subsequent remedial measures. The Supreme Court disagreed, stating:

> "In the present case, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence as probative on the issue *of control over the snow pile*. Although [defendant] conceded at trial that the plaintiff fell on the sidewalk abutting its land, *it did not concede that it was the party responsible*, if any party was responsible, for creating the snow pile. Indeed, the trial court directed the jury to determine which of the defendants, [defendant] or 19 West Elm Street, if either, was liable for creating the snow pile. Thus, the jury could have used photographs of Passerelli clearing the pile shortly after the accident as evidence that [defendant] controlled the pile and caused the dangerous conditions on the sidewalk." *Smith*, at 448-49.

During direct examination, Mr. Verdura testified that when he is informed of a condition at his rental property that requires repair, if it is something like a leaky faucet, it can wait a week or so. However, he testified that if it is something hazardous, he fixes it right away or as soon as possible. At his deposition, Mr. Verdura testified that when he arrived at his property on the day Mr. Ocasio fell "And I did see that right rail appeared loose for my likings." He also testified at deposition that he repaired it, either "that day or the next day."

In addition, at trial, Mr. Verdura insisted that the railing was only very slightly loose. He claimed the wood on the porch was solid and there were no missing screws in the base that held the vertical railing post to the porch. Yet, at his deposition, Mr. Verdura testified he undertook an extensive repair,

> "we pulled the rail off. And then I put, like a 2 by 12 as the base in order to allow the escutcheon that supports the rail vertically, a solid wood anchor into it. Then because the vertical rail was 6 or 8 inches away from the vertical wall, we infilled that with two by sixes to allow us to strap the vertical rail to that wood to solidify both - the rail from going in either direction, front, back, or side to side." (Emphasis added).

The court had previously ruled that the court's ruling on the defendant's motion in limine regarding subsequent repairs during the first trial was the law of the case. During the direct examination of Mr. Verdura, at the request of plaintiff's counsel, the court excused the jury to discuss the use of the plaintiff's use of Mr. Verdura's inconsistent testimony regarding the subsequent repair of the railing for the purposes of impeachment. The plaintiff argued that although the evidence of subsequent repairs could not be used to prove negligence, based on the facts of this case, evidence of Mr. Verdura's repair of the railing was highly relevant and should be admitted for the purposes of impeaching his credibility, based on his testimony that he believed the plaintiff's fall resulted from the accumulation of ice on the steps, and not from the defective railing.

First, the plaintiff pointed out that Mr. Verdura's trial testimony, that he fixes hazardous conditions on his rental property right away, or as soon as possible, juxtaposed with his deposition testimony that he fixed the railing "either that day or the next," was relevant to impeach his testimony that the railing was only slightly loose on February 6, 2017, when he arrived about an hour after the plaintiff's fall. The plaintiff argued that Mr. Verdura's deposition testimony regarding how he prioritizes conditions on his property in need of repair, was relevant and probative, as it strongly suggested that he believed at the time that the condition of the railing was a hazard. Second, the plaintiff argued that Mr. Verdura's deposition testimony regarding the scope and methodology of his subsequent repair of the railing was highly inconsistent with his trial testimony, that the rail was only very slightly loose, and highly relevant impeachment evidence.

Mr. Verdura testified at deposition that they pulled the rail off the porch, He testified at deposition, and pictures of the repair clearly show, that he then screwed 2" by 12" board, cut square into the porch as a platform in which to screw the base of the vertical railing support post, "in order to allow the escutcheon that supports the rail vertically, a solid wood anchor into it." If the railing was only slightly loose, the wood porch was solid and no screws were missing where the railing base screwed into the porch, as he testified at trial, why would he need a square piece of board to create a solid anchor for the railing base to be screwed into? Defense counsel objected to the admission of any evidence of subsequent repairs for any purpose, and the court sustained the objection and denied the plaintiff's use of any of the relevant and probative evidence of Mr. Verdura's inconsistent testimony on the subsequent repair for the purpose of impeachment.

When the jury returned, the plaintiff asked Mr. Verdura why the railing was loose. Instead of answering the question, Mr. Verdura emphasized that the railing was only slightly loose; and that no other landlord would have even considered fixing it, but because he was the landlord, he

was he would go above and beyond when it came to making sure his tenants were safe. He then volunteered "that's when I did the repairs like you showed in that photo, horizontal and vertical."

As the court had just ruled that the plaintiff could not use any evidence of subsequent repairs as impeachment evidence, the plaintiff suggested we should again discuss the matter outside the presence of the jury. The jury then was excused, and the plaintiff argued that Mr. Verdura had opened the door to the use of evidence of subsequent repairs, by voluntarily telling the jury that he repaired the railing horizontally and vertically. The plaintiff argued further that questions regarding subsequent repairs and photographic evidence of those repairs, was relevant and probative as to Mr. Verdura's credibility, given his inconsistent prior testimony. Therefore, the plaintiff contended it should now be allowed into evidence for the purpose of impeachment.

The defendant argued that the response from Mr. Verdura in which he acknowledged that he repaired the railing was unresponsive to the question posed and therefore should be stricken. The court ruled that the testimony would stand. However, the court ruled the plaintiff could ask no further questions on the matter of subsequent repairs, could not use the inconsistent testimony about the repairs to impeach Mr. Verdura, nor could the plaintiff show the jury the photograph of the repair that Mr. Verdura referred to during his testimony.

As a result of the defendant's immediate repair of the railing, the plaintiff had no photographic evidence of the broken railing. With no evidence of the railing's condition prior to the fall, its failure on the day in question, or its subsequent repair, beyond the testimony of the plaintiff, the jury returned a defense verdict. The defendant's testimony regarding the subsequent repair of the railing was undeniably inconsistent with his deposition and trial testimony that the railing was only slightly loose when he arrived an hour after the plaintiff's fall. The evidence was highly relevant and probative as to the credibility of Mr. Verdura, the principal of the defendant,

State v. *Fernando V.*, 331 Conn. 201, 223–24, 202 A.3d 350 (2019) "[A]n error affecting the jury's ability to assess a [witness'] credibility is not harmless error."

The court's exclusion of Mr. Verdura's inconsistent testimony on the condition of the railing and the subsequent repair was harmful error, even after he opened the door by voluntarily testifying to the fact that he made a repair. Consequently, the verdict should be set aside, and the plaintiff respectfully requests that the court grant his motion to set aside the verdict.

DEFENDANT'S POSITION

Mahoney v. *Smith*, 174 Conn. App. 639, 645, 166 A.3d 778 (2017). (A trial court may set aside a verdict where it finds it has made, in its instructions, or rulings in evidence a palpable error, which was harmful to the proper disposition of the case and probably brought about a different result in the verdict.) A verdict will be set aside only if the court can determine that the jury could not reasonably and legally have reached its conclusion. The evidence must be given the most favorable construction support of the verdict of which it is reasonably capable. *Kalleher* v. *Orr*, 183 Conn. 125, 126-127, 438 A.2d 843 (1981). In other words, a verdict should not be set aside, where it is apparent that there was some evidence on which the jury might reasonably have reached its conclusion. Id.

During closing argument, the defense argued to the jury all the different ways that the jury could find for the defendant. While not having viewed the trial transcripts, it is counsel's recollection that he argued that a jury could have found that the railing did not cause the accident, that the railing was not defective, and that plaintiff's negligence was greater than the defendant's and, therefore, plaintiff's claim was barred under the doctrine of contributory negligence.

Against this backdrop, the plaintiff claims that evidence of subsequent remedial repairs should have been admitted. However, evidence of subsequent remedial repairs was admitted into

evidence. Mr. Verdura testified that he repaired the railing after the incident, the defendant moved to strike this testimony and the court denied the defendant's motion to strike this evidence. The issue is not that evidence of subsequent remedial repairs should have been allowed, but whether the plaintiff should have been permitted to offer additional evidence regarding the nature and scope of subsequent remedial repairs. Even if Mr. Verdura opened the door, a trial court must balance the right of the opponent to inquire into a matter opened against the responsibility to exclude evidence that is more prejudicial than probative. The court should balance the harm to one party in limiting the inquiry with the prejudice suffered by the other party and allowing the rebuttal. *State* v. *Brown*, 309 Conn. 469, 72 A.3d 48 (2013). The court engaged in this exact balancing process in the case of *Feral* v. *Johnson & Johnson*, 184 Conn. 607, 685, 440 A.2d 810 (1981), affirmed on other grounds 335 Conn. 398, 238 A.3d 698 (2020).

In this case, the court performed such a balancing process by allowing to stand Mr. Verdura's testimony regarding the subsequent remedial repairs. The court did provide a factual basis for plaintiff to challenge Mr. Verdura's credibility. The correctness of the court's decision is especially true, as it is well established that subsequent remedial repairs are not admissible to prove negligence. The only reason to permit such testimony was for the limited purpose of impeaching Mr. Verdura, which the court, despite plaintiff's claims to the contrary, did by permitting Mr. Verdura's testimony subsequent of remedial repairs to remain in the case, thereby providing a factual basis to challenge the defendant's credibility.

In reaching its decision, the court based referenced *State* v. *Paulino*, 223, Conn. 461, 467, 613 A.2d 720, (1992.) Similarly, in *Tiplady* v. *Maryles*, 158 Conn. App. 680, 695, 120 A.3d 828 (2015), cert denied 319 Conn. 946, 125 A.3 528 (2015), the court stated:

> "The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit only to the extent

necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence."

Said another way, if a party opens the door slightly, the opposing party should not be permitted to drive a Mac © truck through it. Taits Handbook of Connecticut Evidence 1.27.3 (Ed.)

There would be significant prejudice if the plaintiff was permitted to engage in submitting additional evidence regarding the nature and extent of subsequent remedial repairs. Such evidence increases the likelihood that such evidence would be misused by the jury when considering issues of negligence, as opposed to its limited purpose. Further, the plaintiff's testimony indicated that the railing moved during the incident. Accordingly, any repairs made to the railing after the incident were not reflective of the condition of the railing at the time of the incident, but instead its condition after the incident.

Additionally, the defendant admitted possession and control of the premises and, therefore, the subsequent remedial repairs were inadmissible to prove those issues. With regard to credibility, the plaintiff was permitted to use the testimony of Mr. Verdura stating that he made repairs horizontally and vertically after the incident. The plaintiff is essentially claiming that he should've been able to offer even more evidence regarding the subsequent remedial repairs to address this issue. There is no merit to the claim. The court exercised its discretion in performing the balancing process approved by our Supreme Court. This process permitted some evidence of remedial repairs while at the same time balancing the prejudice of permitting additional evidence on the issue.

Here, there was ample evidence for the jury to find in favor of the defendant. First, the court charged the jury on the legal doctrine of false in one false in all. Based on Mr. Ocasio's testimony, and the numerous inconsistencies that were raised in his testimony as well as in the the medical records regarding the cause of the incident and how it occurred, the jury was free

if it chose to completely disregard the plaintiff's testimony. Since the incident was unwitnessed and there was no other evidence regarding how the incident occurred, if the jury rejected the plaintiff's testimony, then the plaintiff would not have been able to meet his burden of proof as to any of the issues alleged in the complaint.

Further, there was ample evidence that the plaintiff was contributorily negligent. The plaintiff testified that he knew that frozen precipitation was falling, nevertheless, he went outside wearing shoes that were inappropriate for the conditions. In addition, he was holding a bag of garbage. In fact, there was evidence before the jury that Mr. Ocasio told one medical provider that he went outside and thought it was rain, but it turned out to be ice, as indicated in the VNA records. There is ample evidence for the jury to return the verdict on behalf of the defendant, and the court should not disturb the jury verdict, and the motion to set aside the verdict should be denied.

PLAINTIFF'S REPLY POSITION

The evidence that the plaintiff submitted with his offer of proof at trial was admissible for two independent reasons. First, as set forth in prior, the evidence went directly to the defendant's credibility, and should have been admitted. A complete ability to explore the credibility of the defendant's witness and principal, Steven Verdura, was crucial in this case, particularly because the plaintiff's condition prevented the plaintiff from testifying in person. The law is clear that evidence of subsequent remedial measures is admissible to impeach the defendant's credibility. The defendant's position was that the plaintiff fell on ice and the porch railing was only "slightly loose." The plaintiff claimed that he fell when the railing he was holding on to broke and gave way, causing him to lose his balance, slip, and fall on the icy stairs.

Mr. Verdura had testified at trial that he could take a week or more to repair a problem on his property that was not hazardous, but at his deposition, he testified that even though the railing

on the porch on the day the plaintiff fell was only "slightly loose," he repaired it the very same day, not because it was hazardous, but because he was such a good landlord. As the plaintiff was not allowed to inquire as to the method and extent of the repair, the jury did not hear evidence from which it could have concluded that Mr. Verdura made the repair because he deemed hazardous the condition of the railing, contrary to his trial testimony.

Mr. Verdura's inadvertent trial testimony was only that the repair was "horizontal and vertical like the picture (which he was shown outside the presence of the jury during and offer of proof)," while his deposition testimony, about which the plaintiff was prevented from questioning him, described in detail, an extensive repair which involved the insertion of a 2' by 12' piece of lumber. In addition, the plaintiff was precluded from showing the jury the picture of the completed repair, which the defendant referenced during his testimony about the repair. The plaintiff was harmfully prevented from cross examining the defendant on the critical issue in the case, the credibility of the defendant.

Second, even if the evidence had not been affirmatively admissible, the defendant opened the door at trial, during which time the defendant took the opportunity to congratulate himself for being a great landlord. He told the jury he had repaired the railing, and let the jury know that a photograph of the repair existed. By doing so, the defendant left the jury with an erroneous impression about the initial defect in the railing and the extent of the repairs necessary to address the defect. The defendant opened the door to the appropriately tailored evidentiary response that the plaintiff requested at trial. It is well established that "a party who delves into a particular subject . . . cannot object if the opposing party later questions the witness on the same subject. . . .The party who initiates discussion on the issue is said to have 'opened the door' to rebuttal by the opposing party." (Internal citations omitted.) *Tiplady* v. *Maryles*, 158 Conn. App. 680, 691-92, 202

A.3d 350 (2015). That doctrine permits responsive evidence even when it "would ordinarily be inadmissible" because it is important to ensure that the opposing party is not unfairly prejudiced when the opponent "has made unfair use of the evidence." Id.

In *Blinn* v. *Sindwani*, 192 Conn. App. 525, 218 A.3d 114 (2019), the plaintiff objected to the defendant's introduction of evidence of his prior misconduct. The plaintiff had introduced the subject, and the court upheld the ruling of the trial court that the plaintiff had opened the door to such evidence, stating:

> "Our Supreme Court has noted that '[t]he party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. . . . The purpose of allowing the introduction of such evidence is not to give the opposing party a license to introduce unreliable or irrelevant evidence but to allow the opposing party to put the initial offer of evidence into its proper context.' (Citation omitted; internal quotation marks omitted.) *Somers* v. *LeVasseur*, 230 Conn. 560, 565, 645 A.2d 993 (1994)." *Blinn* at 535.

The plaintiff's proffered evidence would have been appropriately limited to a fair response to Mr. Verdura's testimony, in that the plaintiff sought to offer the photograph that Mr. Verdura had mentioned, as well as limited testimonial context for the repair that Mr. Verdura had discussed. Such evidence was plainly necessary so as to "prevent [the defendant] from . . . selectively introducing pieces of [certain] evidence for his own advantage, without allowing the [plaintiff] to place the evidence in its proper context." (Internal quotation marks omitted.) *Tiplady* 692. Connecticut law prohibits the defendant from introducing this topic to the jury, but then preventing the plaintiff from a fair response. This error is an independent ground that also compels a new trial.

The refusal to permit this evidence – either affirmatively, or after the defendant threw open the door – materially affected the outcome of the case. The existence of the defect was a (perhaps the) critical issue for the jury to determine. Because the court did not permit the plaintiff to introduce this evidence, the plaintiff's closing argument was hamstrung, in that he was not allowed

to rebut the defendant's misleading testimony about the extent and nature of repairs. For these reasons and those expressed at trial and in the initial post-trial motion, a new trial is necessary.

LEGAL STANDARD

"We begin by setting forth the standard of review that governs the review of a trial court's denial of a motion to set aside the verdict. Such review involves a determination of whether the trial court abused its discretion, according great weight to the action of the trial court and indulging every reasonable presumption in favor of its correctness; since the trial judge has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. [A trial court may] set aside a verdict where it finds it has made, in its instructions, rulings on evidence, or otherwise in the course of the trial, a palpable error which was harmful to the proper disposition of the case and probably brought about a different result in the verdict." (Citations omitted; internal quotation marks omitted.) *Bovat* v. *City of Waterbury*, 258 Conn. 574, 583, 783 A.2d 1001 (2001).

"[T]he role of the trial court on a motion to set aside the jury's verdict is . . . to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Citations omitted; internal quotation marks omitted.) *Mahoney* v. *Smith*, 174 Conn. App. 639, 644-45, 166 A.3d 778 (2017).

"The setting aside of a verdict because of an error of the trial court should be exercised with great caution and never done unless the reviewing court is satisfied entirely that the error is unmistakable and unquestionably must have been harmful." *Message Center Management, Inc.* v. *Shell Oil Products Co.*, 85 Conn. App. 401, 416, 857 A.2d 936 (2004).

LEGAL ANALYSIS

Forty years ago, our Supreme Court gave us the standard to begin review. "Our review of a trial court's refusal to set aside a jury verdict is limited. If, on the evidence, the jury could reasonably have decided as they did, we will not find error in the trial court's acceptance of the verdict. *A jury verdict should not be disturbed 'unless it is against the evidence or its manifest injustice is so plain as to justify the belief that the jury or some of its members were influenced by ignorance, prejudice, corruption or partiality.*' Upon review, by the trial court on a motion to upset the jury's verdict and in this court, 'the evidence must be given the *most favorable construction* in support of the verdict of which it is reasonably capable.'" (Citations omitted; emphasis added; internal quotation marks omitted.) *Kalleher* v. *Orr*, 183 Conn. 125, 126-27, 438 A.2d 843 (1981).

Additionally, our Appellate Court opined further that "'[T*]he role of the trial court on a motion to set aside the jury's verdict is . . . to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did.*' (Internal quotation marks omitted.) Id. Additionally, '[a trial court may] set aside a verdict where it finds it has made, in its instructions, rulings on evidence, or otherwise in the course of the trial, a palpable error which was harmful to the proper disposition of the case and probably brought about a different result in the verdict.' (Internal quotation marks omitted.) *Bovat* v. *City of Waterbury*, 258 Conn. 574, 583, 783 A.2d 1001 (2001)." *Mahoney* v. *Smith*, 174 Conn. App. 639, 644-45, 166 A.3d 778 (2017).

The position of the plaintiff is clear and need not be repeated here. The court will need to examine the evidence in the light most favorable to the defendant as required. The issue is not that evidence of subsequent remedial repairs should have been allowed - some evidence was in fact

allowed over the defendant's motion to strike Mr. Verdura's testimony - but whether the plaintiff should have been permitted, as he contends, to offer additional evidence regarding the nature and scope of subsequent remedial repairs made by Mr. Verdura. In its analysis, the trial court must balance the right of the opponent to inquire into a matter opened, against it's responsibility to exclude evidence that is more prejudicial than probative. The court should balance the harm to one party in limiting the inquiry with the prejudice suffered by the other party and allowing the rebuttal. *State* v. *Brown*, 309 Conn. 469, 72 A.3d 48 (2013). The court engaged in this balancing process. This court performed such a balancing process by allowing to stand Mr. Verdura's testimony regarding the subsequent remedial repairs. The court provided a factual basis for plaintiff to challenge Mr. Verdura's credibility. The court's decision was that it is well-established that subsequent remedial repairs are not admissible to prove negligence. The only reason to permit such testimony would have been for the limited purpose of impeaching Mr. Verdura credibility. The court, despite plaintiff's contentions, permitted Mr. Verdura's testimony subsequent of remedial repairs to remain in the case, providing a factual basis to challenge the defendant's credibility. There was no need to allow further evidence of remedial repairs.

In reaching its decision, the court referenced *State* v. *Paulino*, 223 Conn. 461, 467, 613 A.2d 720, (1992.) The court's actions were correct given *Tiplady* v. *Maryles*, 158 Conn. App. 680, 695, 120 A.3d 828 (2015), cert denied 319 Conn. 946, 125 A.3 528 (2015), where our Appellate Court gave its instruction that a

> "The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence."

As noted by the defendant, if a party opens the door slightly, the opposing party should not be permitted to drive a Mac © truck through it. Tait's Handbook of Connecticut Evidence 1.27.3 (Ed.)

The court felt that it would be of significant prejudice to the defendant if the plaintiff were permitted to engage in submitting additional, more detailed, evidence regarding the nature and extent of subsequent remedial repairs. Such evidence increases the likelihood that such evidence would be misused by the jury when considering issues of negligence, as opposed to its limited purpose. The plaintiff's previous testimony indicated that the railing moved during the incident. Any subsequent repairs made to the railing after the incident were not reflective of the existing condition of the railing at the time of the incident, but instead its condition after the incident.

The plaintiff was permitted to use the testimony of Mr. Verdura stating that he made repairs horizontally and vertically after the incident. The plaintiff's assertion that he should have been able to offer even more evidence regarding the subsequent remedial repairs is without merit. The court exercised its discretion in performing the balancing process approved by our Supreme Court. This process permitted some evidence of remedial repairs while at the same time balancing the prejudice effect of permitting additional evidence on the issue.

There was ample evidence for the jury to find in favor of the defendant. Mr. Ocasio's previous testimony had significant inconsistencies that were raised regarding his testimony as well as in the introduction of medical records regarding the cause of the incident. In his previous testimony, Mr. Ocasio gave two completely different causes of the fall. One was that he fell as a result of a loose stair railing as he attempted to descend the stairs. The other was that he slipped on ice while carrying a bag of garbage and was not wearing the proper footware. Since the incident was unwitnessed and there was no other evidence regarding how the incident

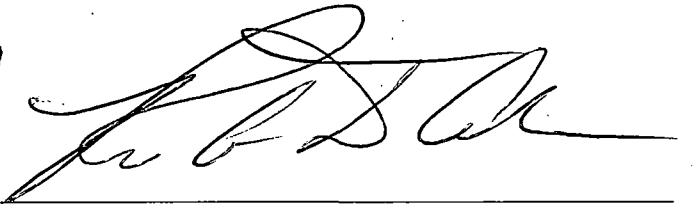
occurred, the jury could have easily rejected Mr. Ocasio's previous testimony that he fell because of a loose railing, and the jury could have easily believed that he slipped on ice wearing shoes that were inappropriate for the conditions while attempting to traverse the icy stairs with a bag of garbage in hand.

The jury was further presented independent evidence from one of Mr. Ocasio's medical provider's report, in which the provider said in his medical appointment that he went outside and thought it was rain, but it turned out to be ice, as indicated in the VNA records in evidence. This medical report evidence was given by Mr. Ocasio much closer in time to the actual fall, as compared to the previous testimony given, much later, that was presented to the jury. This court finds that there was more than ample evidence for the jury to return the verdict on behalf of the defendant, and this court will not disturb the jury verdict. The motion to set aside the verdict should be denied.

CONCLUSION

Based on the foregoing, the plaintiff's February 12, 2024 motion to set aside the jury verdict is hereby DENIED, and the defendant's February 28, 2024 objection thereto is hereby SUSTAINED.

BY THE COURT,



D'ANDREA, Robert A., Judge
Juris #439597

A JDNO was sent on April 25, 2024 notifying all counsel of record of the availability of this Memorandum of Decision in the electronic file and sent by electronic Means to RJD.

By the Clerk,
Matthew P. Stevens, TAC
4/25/2024