COURT OF APPEALS DECISION DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2603

Cir. Ct. No. 2006CV2251

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

CHARLOTTE CARINI AND LEONARD CARINI,

PLAINTIFFS-APPELLANTS,

UNITED HEALTHCARE SERVICES, INC.,

INVOLUNTARY-PLAINTIFF,

V.

ACUITY, A MUTUAL INSURANCE COMPANY AND CHANTICLEER INN, INC.,

DEFENDANTS-RESPONDENTS,

MICHAEL O. LEAVITT,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Reversed and cause remanded with directions*.

Before Fine, Kessler, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. Charlotte and Leonard Carini (collectively, Charlotte Carini) appeal from an order dismissing Carini's claims for damages based on negligence; violations of Wisconsin's safe place statute, *see* WIS. STAT. § 101.11 (2005-06);[1] and loss of society and companionship. A jury determined that Carini, who was injured when she fell at the Chanticleer Inn, Inc., was seventy percent liable for her injury. Thus, Carini was not allowed to recover damages and the claims were dismissed. Carini seeks a new trial on liability, on the ground that the trial court erroneously allowed the owner of the Chanticleer to testify about inspections of the restaurant. We conclude that the testimony was erroneously admitted and that there is a reasonable possibility the error contributed to the outcome of the case. Therefore, we reverse and remand for a new trial on liability.

BACKGROUND

¶2 Carini joined her extended family for dinner at the Chanticleer in Eagle River, Wisconsin. This was Carini's first time visiting the restaurant. Carini entered the restaurant, walked to the host podium, and told the host that her party was ready to be seated. She was told her table was not ready. Carini's brother and his wife, who had been in the bar area, came to the area in front of the podium to greet Carini. Carini greeted these relatives, then took a step and fell down an open stairwell that was adjacent to the podium. She sustained serious injuries as a result of her fall down the stairwell.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Carini filed suit against the Chanticleer and its insurer, Acuity, (collectively, Chanticleer), alleging claims based on negligence, safe place statute violations and loss of society and companionship. With respect to the alleged safe place statute violation, Carini asserted that the Chanticleer had failed to safely maintain the premises.

¶4 The case proceeded to trial. Extensive testimony was presented concerning the conditions in the restaurant. Carini testified that when she arrived, there were ten to fifteen people in the area where the host podium was located. The top of the open stairwell (which Carini testified she did not see), was four feet, six inches from the podium. The overhead lights in the adjacent bar had been substantially dimmed, and the fluorescent light near the open stairwell had been turned off. Half walls screened the stairwell from view on two sides.

¶5 The owners of the Chanticleer, Sue and Jake Alward, both testified. Sue said, and Jake confirmed, that about six years before Carini fell, another woman fell at the restaurant. Apparently the fall was down the same stairs where Carini fell, because Sue agreed that the first fall put her "on notice that someone could fall down the stairs." This raised questions for Sue as to "whether or not the stairs were safe" and as a result she suggested to her husband that they put a rope or some type of gate in front of the stairwell. Chanticleer did not object to any of this testimony.[2]

[2] Prior to trial, Chanticleer filed a motion in limine to prohibit testimony about the earlier fall. According to Wisconsin Circuit Court Access (CCAP) records, one month before trial and on the day the motion was scheduled for a hearing, the parties informed the trial court that the parties had "an agreement" and the hearing was cancelled. What that agreement was is not in the record.

¶6 Jake acknowledged that he was the person responsible for safety at the Chanticleer in the restaurant and lobby area. Jake agreed that after the incident Sue testified about, he knew "it was foreseeable that someone else would fall." Jake said he decided where to place the podium. He said he also made the decision to create the desired ambiance by dimming the lights, and turning off lights in the waiting area, even though he knew less lighting would make it more difficult to see the stairwell area. Jake acknowledged that there were a number of things he could have done after the first fall, such as increase the lighting, move the host podium station, or put up a warning sign, but he chose to make no changes in the layout of the restaurant.

¶7 At trial, Carini's expert witness, Richard Stelmacher, apparently opined that there were building code violations and other safety problems in the area of the stairwell.[3] Stelmacher is a licensed architect and registered professional engineer. He expressed the opinion in his report that the Wisconsin Building Code required more light at the top of the stairwell than was provided, and required non-slip, three-inch treads on the stairs. In addition, although he did not cite it as a code violation, Stelmacher concluded that the placement of "half walls" around the area of the stairwell made it hard for a customer to detect the stairwell. He also found that the lack of warning signs and the constricted area of

[3] We use the word "apparently" because although Stelmacher's affidavit and deposition are part of the record, his trial testimony was not transcribed and is therefore not available for our review. His opinion, which is in the record, is summarized here to provide background; it is not crucial to our decision.

We note the difficulty of reviewing cases where only partial transcripts are included. The process of review is especially difficult when transcripts are segmented and are not put in chronological order in the record. In this case, it was necessary to take apart the appellate record in order to reassemble the transcripts in a useful order.

only four and one-half feet between the host podium and the open stairwell were additional safety concerns. He described the stairwell as a "hidden hazard."

¶8 In obvious response to Stelmacher's reference to specific building code violations, Chanticleer attempted to elicit testimony concerning a lack of code citations. It is this testimony, offered by Jake, which is the focus of this appeal. Thus, we set out that portion of Jake's testimony in detail:

> [DEFENSE COUNSEL]: [D]o you know whether or not the state required an inspection of the property prior to the time that you occupied it?
>
> [PLAINTIFF COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained. New question.
>
> [DEFENSE COUNSEL]: Does the restaurant ever get regular inspections every year?
>
> [PLAINTIFF COUNSEL]: Same objection.
>
> THE COURT: I was going to ask what kind of inspector but I'm going to sustain the objection regardless of the kind of inspector.
>
> [DEFENSE COUNSEL]: The first question is does the restaurant undergo regular inspections from the fire department?
>
> [PLAINTIFF COUNSEL]: Your Honor, I object. I thought the objection was sustained.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Does the property undergo regular inspections from the State of Wisconsin?
>
> [PLAINTIFF COUNSEL]: Objection, Your Honor.
>
> THE COURT: Sustained. Let's have a side bar, counsel.

After the sidebar discussion, which was neither transcribed nor contemporaneously summarized, the trial court allowed Jake to answer questions

about the inspections, without providing the jury with any explanation for the change. The testimony and continued objections from Carini's counsel included the following:

> [DEFENSE COUNSEL]: Mr. Alward, has this property ever been inspected by the state?
>
> [PLAINTIFF COUNSEL]: Just so the record is clear, I'm making my objection.
>
> THE COURT: That's understood.
>
> [JAKE ALWARD]: Yes. Annually.
>
> [DEFENSE COUNSEL]: And has it ever been inspected by the local fire department?
>
> [JAKE ALWARD]: Yes.
>
> [PLAINTIFF COUNSEL]: I'll—
>
> THE COURT: You can have a continuing objection to that. I'll permit that question and answer. Go ahead.
>
> [DEFENSE COUNSEL]: And at any time during any of these inspections, were you ever advised that your property was in violation with regard to the building code concerning the safety or any kind of safety treads or steps on the stairway in question?
>
> [JAKE ALWARD]: No.
>
> [DEFENSE COUNSEL]: Were you ever advised that the property—that you were in code violation with regard to the location of the podium, not making the area wide enough for—
>
> [PLAINTIFF COUNSEL]: Objection.
>
> [JAKE ALWARD]: No.
>
> THE COURT: I noted that continuing objection in the line of questions. It's overruled. The answer stands.

Defense counsel then turned to other areas of questioning.

¶9 When all testimony was completed, the trial court explained Carini's duty of ordinary care and gave the other jury instructions. Then, just before oral arguments began, the following colloquy occurred in which Carini's counsel reminded the trial court that it had neglected to give a particular instruction about the questions involving State and local fire department inspections.

> [PLAINTIFF COUNSEL]: I have a question regarding the instructions.
>
> THE COURT: Are you referring to the limitation instruction we discussed?
>
> [PLAINTIFF COUNSEL]: Yes.
>
> THE COURT: All right. Thank you. One moment.
>
> Members of the jury, today toward the end of the trial, I did receive evidence in the form of testimony from Mr. Alward about an inspection and what, if anything, resulted from any building inspections or fire department inspections of the Chanticleer Inn. *I received that evidence only on the issue of the extent to which the Chanticleer Inn, or people who work there, did or did not have notice of any particular problems.* That evidence was not received on the issue of whether there was or not. [sic] In fact, there was or wasn't in fact a code violation, [sic] and you may not consider that evidence on the question of whether there was or was not a code violation. *You may only consider it for the limited purpose I identified and that is the extent to which there may have been noticed [sic] of a problem or issue for the Chanticleer Inn.*

(Emphasis added.)

¶10 Jury confusion on this particular testimony and with the trial court's instruction quickly became apparent. After beginning deliberations, the jury sent a note stating: "The jury wants to know if the evidence of the yearly fire/state inspectors from 1983-2004, was that evidence stricken?" Carini's counsel again expressed the view that the evidence should never have been admitted, but agreed

that he had asked for a limiting instruction. Ultimately the court responded to the jury question in writing as follows:

> Members of the Jury:
>
> This evidence was not stricken. However, it was received for the limited purpose as described in one of your written instructions (page 11):
>
> Testimony was received from Mr. Jake Alward indicating that certain inspections were done and that he was not told that there were any code violations. This evidence was received only on the issue of whether the Chanticleer Inn had notice of a safety problem relevant to this trial. This evidence was not received for the purpose of establishing whether there was in fact any particular code violation, and you must not consider it for that purpose.

¶11 The jury returned a verdict apportioning causal negligence as follows: Carini, seventy percent; Chanticleer, thirty percent. Damages were assessed at $589,858.44. Carini moved for a new trial on liability.[4] *See* WIS. STAT. § 895.045(1). The trial court denied Carini's motion for a new trial and dismissed Carini's complaint, for reasons detailed below. This appeal follows.

STANDARD OF REVIEW

¶12 At issue is the admission of evidence concerning inspections of the Chanticleer. A trial court "'has broad discretion in determining the relevance and admissibility of proffered evidence.'" ***State v. Oberlander***, 149 Wis. 2d 132, 140,

[4] Chanticleer moved to change the jury's answer for future loss of business earnings from $330,000 to $0. However, after the trial court denied Carini's motion for a new trial on liability, Chanticleer's counsel told the trial court that the issue was moot and did not seek a ruling on the motion. Based on Chanticleer's withdrawal of its motion, only the liability issues will be retried. *See* ***State v. Neuaone***, 2005 WI App 124, ¶¶8, 12, 284 Wis. 2d 473, 700 N.W.2d 298 (where party filed motion and then told trial court he did not want to pursue it, motion deemed abandoned).

438 N.W.2d 580 (1989) (citation omitted). We review a trial court's decision to admit or exclude evidence using the erroneous exercise of discretion standard. ***State v. Walters***, 2004 WI 18, ¶13, 269 Wis. 2d 142, 675 N.W.2d 778. "An appellate court will uphold an evidentiary ruling if it concludes that the [trial] court examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.***, ¶14. Therefore, this court will not find an erroneous exercise of discretion if there is a reasonable basis for the trial court's determination. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

¶13 Our supreme court has recognized that not all errors concerning the admission of evidence justify a new trial. In ***Martindale v. Ripp***, 2001 WI 113, 246 Wis. 2d 67, 629 N.W.2d 698, the court explained:

> An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial. The appellate court must conduct a harmless error analysis to determine whether the error "affected the substantial rights of the party." If the error did not affect the substantial rights of the party, the error is considered harmless.

Id., ¶30. "The substantial rights of the parties are affected only if there is a reasonable possibility that the error contributed to the outcome of the case." ***Estate of Hegarty v. Beauchaine***, 2006 WI App 248, ¶152, 297 Wis. 2d 70, 727 N.W.2d 857; *see also* WIS. STAT. §§ 805.18 and 901.03.[5] "If the error at issue is

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[5] WISCONSIN STAT. § 805.18 provides:

> **Mistakes and omissions; harmless error. (1)** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.

(continued)

not sufficient to undermine the reviewing court's confidence in the outcome of the proceeding, the error is harmless." ***Evelyn C.R. v. Tykila S.***, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768.

DISCUSSION

¶14 This case requires us to determine whether the trial court erroneously admitted evidence related to alleged safe place statute violations. We begin our analysis with a review of the relevant safe place law. Next, we conclude that the evidence was erroneously admitted, and that there is a reasonable possibility the error contributed to the outcome of the case. Therefore, Carini is entitled to a new trial on liability.

I. Wisconsin's safe place statute.

¶15 Wisconsin's safe place statute, WIS. STAT. § 101.11, requires every employer and owner of a public building to provide a place that is safe for employees and for frequenters of that place, and to "construct, repair or maintain

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> **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

WISCONSIN STAT. § 901.03 provides, in relevant part:

> **Rulings on evidence.** **(1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]

such place of employment or public building as to render the same safe." Sec. 101.11(1). This duty imposes a higher standard of care than that imposed by common-law negligence. ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. "The safe place statute does not create a distinct cause of action, but provides a higher duty than the duty of ordinary care regarding certain acts by employers and owners of places of employment or public buildings." ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶20, 291 Wis. 2d 132, 715 N.W.2d 598.

¶16 The safe place statute "addresses unsafe conditions, not negligent acts." ***Megal***, 274 Wis. 2d 162, ¶9. "What constitutes a safe place depends on the facts and conditions present, and the use to which the place was likely to be put." ***Id.***, ¶10 (citations and two sets of quotation marks omitted). Just because a place could be made more safe does not necessarily mean that an employer or owner has breached the duty of care established by the safe place statute; "[r]ather, the duty set forth by the statute requires an employer or owner to make the place 'as safe as the nature of the premises reasonably permits.'" ***Id.*** (citation omitted).

¶17 The safe place statute makes owners of public buildings "liable for (1) structural defects; and (2) unsafe conditions associated with the structure of the building." ***Rizzuto v. Cincinnati Ins. Co.***, 2003 WI App 59, ¶11, 261 Wis. 2d 581, 659 N.W.2d 476. "The classification of the hazardous property condition is often crucial in safe place cases because of the differing notice requirements for each." ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶22, 245 Wis. 2d 560, 630 N.W.2d 517. Specifically, there is no notice requirement for a structural defect. ***Mair***, 291 Wis. 2d 132, ¶22. Conversely, "[t]he duty of the owner to repair or maintain the public building or place of employment arises when the owner has actual or constructive notice of the defect," ***id.***, ¶23, except if the

"dangerous condition is caused by the affirmative acts of the owner or his agent, he needs no notice because he has knowledge of his acts creating the hazard," ***Low v. Siewert***, 54 Wis. 2d 251, 254, 195 N.W.2d 451 (1972).

¶18 At issue in this case is an alleged "unsafe condition associated with the structure," which arises when an originally safe structure is not properly repaired or maintained.[6] *See* ***Barry***, 245 Wis. 2d 560, ¶¶25, 27. "[D]efects in the lighting or paint color or a lack of warning signs could be considered unsafe conditions associated with [a] structure." ***Mair***, 291 Wis. 2d 132, ¶12.

II. Admission of Jake's testimony.

¶19 When Jake was initially asked about inspections conducted at the Chanticleer, the trial court sustained Carini's objections to the testimony. Although it did not state its reasons on the record during the trial, the court explained at the post-trial motion hearing that it sustained the objections because it did not believe the evidence was admissible to show the restaurant had not violated any building codes, because that would allow the restaurant owner to essentially offer an expert opinion. It would also, the trial court said, require the jury to infer that the inspectors who inspected the restaurant were qualified to do so and actually considered the alleged safety issues and determined that the

[6] Carini's complaint alleged that her safe place claim was based on the Chanticleer's failure to maintain the premises. However, after discovery, Chanticleer moved for partial summary judgment dismissing Carini's safe place claim, on grounds that Carini was actually alleging defects that relate to structure and design that were time-barred by Wisconsin's ten-year statute of repose, WIS. STAT. § 893.89. Although there was no written order granting partial summary judgment, and no transcript of the hearing at which the trial court granted partial summary judgment has been provided, it appears undisputed that the trial court dismissed any claims related to alleged structural or design defects, but allowed Carini to proceed on her safe place claim alleging failure to maintain the premises.

restaurant was in compliance (as opposed to simply overlooking a potential violation). Because the testimony had the potential to imply the stairwell was safe because the inspectors did not cite the Chanticleer for code violations, and to allow such an implication through the introduction of hearsay evidence that was also lacking in foundation, we agree with the trial court that such testimony would be improper.

¶20 However, we disagree with the trial court's subsequent decision to allow the same testimony to show that Jake did not have notice of unsafe conditions.[7] The trial court explained, at the post-trial motion hearing, that the testimony was admissible on the question "regarding notice and the extent of the defendant's blameworthiness and because I felt that the probative value outweighed any potential prejudice on the first issue, I allowed the testimony in and gave a limiting instruction." There are numerous problems with this justification for allowing Jake's testimony.

¶21 First, notice of the condition of the stairwell and potential code violations was not at issue. Owners must have either actual or constructive notice of unsafe conditions arising from maintenance of the premises, *see* ***id.***, ¶23, and in this case, it was undisputed that the owners of the Chanticleer had actual notice of the conditions surrounding the stairwell. The defense, as Jake testified, was that

[7] Chanticleer argues that Carini waived its right to contest the admission of this testimony by not objecting "to these questions on a foundation basis … in a manner sufficient to preserve the issue for appeal." We reject this argument. Carini's objections were initially sustained. Then, after the sidebar conference, the testimony was admitted for reasons not immediately put on the record. Carini objected on the record numerous times, and was assured it had a continuing objection to the testimony. There is no question that the trial court was given notice of Carini's objections, during the sidebar and during the testimony, and had an opportunity to rule on them. We reject Chanticleer's suggestion that the error was waived.

the owners knew one woman had fallen down the stairs and had considered putting up a barrier or a notice, but had chosen to make no changes because they did not believe the stairwell was dangerous. Thus, notice of the conditions surrounding the stairwell was undisputed and the jury was not asked to decide if the Chanticleer had notice of those conditions.

¶22 Second, the trial court believed that Chanticleer's "blameworthiness" was at issue. On appeal, Chanticleer echoes this assertion, stating: "Whether the owner had notice of a safety or code violation can be relevant to what the trial court called 'blameworthiness.'" Chanticleer, like the trial court, provides no authority for the suggestion that the concept of blameworthiness—which is often cited in cases involving crime and discovery sanctions—has any relevance in a safe place case. The jury was asked to determine if the Chanticleer was "negligent in failing to maintain the premises as safe as the nature of the premises would reasonably permit" and, if so, whether that negligence was a cause of injury to Carini. Determining negligence does not include a determination of whether the actor is "blameworthy." *See* WIS JI—CIVIL 1005.[8]

¶23 Third, compounding the problem with the trial court's use of the term "notice" and references to code violations was the fact that the jury was not

[8] WISCONSIN JI—CIVIL 1005 provides, in relevant part:

> A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

instructed on the relevance of either notice of an unsafe condition or of code violations. Further, the jury was given the limiting instruction differently on two occasions. As noted, notice of the condition of the stairwell was not in dispute, so the first time the jury heard anything about "notice" was when, just before closing arguments, the trial court gave the following limiting instruction concerning Jake's testimony:[9]

> Members of the jury, today toward the end of the trial, I did receive evidence in the form of testimony from Mr. Alward about an inspection and what, if anything, resulted from any building inspections or fire department inspections of the Chanticleer Inn. *I received that evidence only on the issue of the extent to which the Chanticleer Inn, or people who work there, did or did not have notice of any particular problems.* That evidence was not received on the issue of whether there was or not. [sic] In fact, there was or wasn't in fact a code violation, [sic] and you may not consider that evidence on the question of whether there was or was not a code violation. *You may only consider it for the limited purpose I identified and that is the extent to which there may have been noticed [sic] of a problem or issue for the Chanticleer Inn.*

(Emphasis added.) This instruction introduced the jury to two concepts—notice and code violations—without explaining how those concepts affected the questions they were being asked to answer. The instruction also did not explain why the evidence had been initially stricken, but then allowed. As a result, the jury asked for clarification on that point.

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[9] Although WIS JI—CIVIL 1900.4 concerning the safe place statute was given in part, the paragraphs on notice were not read, presumably because notice of the condition of the stairwell was undisputed.

¶24 In response to the jury's inquiry, the trial court gave the limiting instruction again, including somewhat different information. The jury was told, in writing, that the

> evidence was received only on the issue of whether the Chanticleer Inn had *notice of a safety problem relevant to this trial.* This evidence was not received for the purpose of establishing whether there was in fact any particular code violation, and you must not consider it for that purpose.

(Emphasis added.) The use of different terms in the limiting instruction and clarifying instruction ("any particular problems," "a problem or issue" and "notice of a safety problem relevant to this trial") made discussion of the irrelevant issue of notice all the more confusing for the jury, because, as we have explained, notice was not an issue in this case. *See* ¶21, *supra.* Thus, the limiting instruction compounded the original error because it told the jury to consider something that was not disputed and not relevant to their deliberations ("notice"), exacerbated the problem by repeatedly referring to "code violations" in the context of this "notice," and improperly linked "notice" and "code violations." In short, the jury never got a clear and accurate explanation of what it was properly supposed to consider with respect to Jake's testimony about "code violations," and the jury should not have heard this irrelevant and inadmissible information in the first place.

¶25 The ultimate problem with the admission of Jake's testimony was that it allowed Jake to offer hearsay expert testimony, without a foundation. The jury was allowed to infer that the lack of citations for code violations meant that the stairwell was safe. The limiting instruction did little to remove that inference and was obviously confusing. For all of these reasons, we conclude that the trial

court erroneously exercised its discretion when it admitted Jake's testimony concerning inspections from the State and the local fire department.

III. Harmless error.

¶26 Next, we must consider whether there is a reasonable possibility that the error contributed to the outcome of the case. *See* ***Beauchaine***, 297 Wis. 2d 70, ¶152. We conclude that there is such a reasonability possibility, and that the error is therefore not harmless. *See* ***id.***

¶27 Specifically, we conclude there is a reasonable possibility that the irrelevant inspection testimony and the confusing and inaccurate limiting instructions led to the jury's verdict. It is apparent from the limited record before us that the testimony and the later instructions regarding the testimony were confusing to the jury. Their first question to the court after retiring to deliberate showed the jury did not understand whether they could, or could not, consider Jake's hearsay testimony because, in spite of the limiting instruction, the jury was unsure whether it had been stricken. Thus, the jury was obviously considering the testimony which, we have concluded, should not have been admitted.

¶28 The multiple layers of error involving the hearsay inspection testimony lead us to conclude that there is a reasonable possibility that the error contributed to the outcome of the case. *See* ***id.*** Thus, we reverse and remand for a new trial on liability.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.