COURT OF APPEALS
DECISION
DATED AND RELEASED

February 22, 1996

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

NOTICE

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No. 95-1142

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KELLY GILMORE AND
HEALTH INSURANCE PLAN OF GREATER NEW YORK,

Plaintiffs-Respondents,

v.

LAURICE WESTERMAN,

Defendant-Co-Appellant,

CAPITOL INDEMNITY CORPORATION,

Defendant-Third Party Plaintiff-Appellant,

TIMOTHY HUTZLER,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed in part; reversed in part and cause remanded*.

Before Eich, C.J., Dykman and Vergeront, JJ.

VERGERONT, J. Capitol Indemnity Corporation and Laurice Westerman appeal from a judgment on a jury verdict awarding Kelly Gilmore $404,620.38 for injuries he received when another patron at a tavern owned by Westerman pushed him out the door of the tavern causing him to fall from the fire escape. The issues are: (1) does the assault and battery exclusion in Capitol Indemnity's policy insuring the tavern exclude coverage for the injuries; (2) did the trial court err in denying the motion to dismiss at the close of plaintiffs' case on Gilmore's claim that Westerman negligently failed to protect Gilmore from another patron; (3) was the evidence sufficient to support the jury's verdict that Westerman negligently failed to protect Gilmore from another patron; (4) was the trial court correct in determining that, as a matter of law, there was a violation of the safe place statute; and (5) did the trial court make evidentiary errors which, together with certain conduct of Gilmore's counsel, warrant a new trial in the interest of justice.

We conclude that the assault and battery exclusion in Capitol Indemnity's policy excludes coverage for Gilmore's injuries, and we therefore reverse the trial court's ruling that there was coverage. On all other issues, we affirm the trial court's rulings.

BACKGROUND

Gilmore was injured when he fell from the fire escape leading from the rear door of The Dump, a tavern owned by Westerman. He had been pushed or shoved out of the door by another patron, Timothy Hutzler. This occurred in the early morning hours of January 1, 1992. Gilmore asserted two claims against Westerman: (1) she and her agents were negligent because they knew or should have known of the assaultive behavior about to take place and failed to use reasonable precautions to protect Gilmore, and (2) the railings on the fire escape from which Gilmore fell failed to meet building code standards.

At the close of plaintiffs' case, Capitol Indemnity moved to dismiss the claim that Westerman and her agents were negligent for failing to protect Gilmore from the assault. The trial court denied the motion.

At the close of all of the evidence, the trial court found as a matter of law that Hutzler "did ... assault, batter, or assault and batter" Gilmore and that all of Gilmore's injuries arose out of that assault, battery, or assault and battery. The jury found that Westerman was negligent in failing to protect Gilmore (special verdict question no. 3) and that this negligence was a cause of Gilmore's injuries. The trial court answered "yes" to special verdict question no. 5: "[W]as defendant Laurice Westerman negligent in failing to keep the premises as safe as the nature of the business would reasonably permit?" The jury determined that this negligence was a cause of Gilmore's injuries. The jury found Gilmore not negligent with respect to the incident complained of.

One of Capitol Indemnity's motions after verdict requested a dismissal on the ground that its policy does not provide coverage due to the assault/battery exclusion. Both Capitol Indemnity and Westerman requested that the trial court change the "yes" answer to verdict question no. 3 to "no"; grant a new trial on the issue of Westerman's negligence with regard to the safety of the premises; and grant a new trial because of evidentiary errors and the misconduct of Gilmore's counsel. The trial court denied these motions and entered judgment on the verdict.

INSURANCE COVERAGE

The court determined that, because of the assault/battery exclusion in Capitol Indemnity's policy,[1] there was no coverage for the claim that Westerman was negligent in failing to protect Gilmore, but that there was coverage for the claim under the safe place statute. Capitol Indemnity argues that there is no coverage for either claim, while Gilmore argues there is coverage for both. The interpretation of an insurance contract is a question of law, which we review de novo. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis.2d 206, 212, 341 N.W.2d 689, 691 (1984).

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[1] The policy's endorsement on assault/battery provides:

> This insurance does not apply to bodily injury or property damage or personal injury arising out of assault, battery or assault and battery.

In finding no coverage for the claim that Westerman was negligent in failing to protect Gilmore, the trial court relied on ***Berg v. Schultz***, 190 Wis.2d 170, 526 N.W.2d 781 (Ct. App. 1994). In ***Berg***, we held that an assault and battery exclusion applied because the plaintiff's injury "[arose] out of" an assault or battery, regardless of the theory of liability. ***Id.*** at 176, 526 N.W.2d at 783. In ***Berg***, as in this case, there was a claim that a tavern owner breached the duty to protect patrons from injuries caused by other patrons. ***Id.*** at 173, 526 N.W.2d at 782. We held that the assault and battery exclusion excluded that claim from coverage. ***Id.*** at 179, 526 N.W.2d at 784.

Gilmore concedes that under ***Berg***, some assault and battery exclusions preclude coverage for a negligence claim for failure to protect someone from assault by another. However, he argues that the exclusion in Capitol Indemnity's policy is so poorly drafted that it should be given no effect. This argument has no merit. In ***Berg***, we found that an almost identical exclusion was not ambiguous and applied to a bar fight between two patrons. ***Berg***, 190 Wis.2d at 179, 526 N.W.2d at 784. We agree with Gilmore that Hutzler's actions toward him did not constitute an "assault" within the meaning of the policy because harm *was* done. However, we do not agree that Hutzler's actions did not constitute a "battery." "Battery" is defined in the policy endorsement as "[a]ny battering or beating inflicted on a person without his or her consent." The use of "battering" in the definition does not make the definition ambiguous or meaningless. Gilmore offers no reasonable explanation for why "battering ... inflicted on a person" does not include the forceful pushing or shoving Hutzler inflicted on Gilmore. We conclude that it does. We

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Definitions: Assault: A willful attempt or offer with force or violence to harm or hurt a person without the actual doing of the harm or hurt.

Battery: Any battering or beating inflicted on a person without his or her consent.

Assault & Battery: For purposes of this insurance, this term includes assault and battery, and specifically includes the ejection or exclusion with force or violence, or attempt thereof, of any person from the premises by the insured and his/her/its employees or agents.

(Emphasis in original.)

agree with the trial court that, under ***Berg***, there is no coverage for Westerman's negligence in failing to protect Gilmore.

The trial court's conclusion that there was coverage for the violation of the safe place statute was based on its understanding of "concurrent causes." The court decided that because the jury had found that Westerman's negligence in failing to keep the premises safe had caused Gilmore's injuries, there were two concurrent causes--the assault, battery, or assault and battery which was excluded under the policy, and the violation of the safe place statute, which was not.

At the time the trial court decided the post-verdict motion on coverage, ***Smith v. State Farm Fire & Casualty Co.***, 192 Wis.2d 322, 531 N.W.2d 376 (Ct. App. 1995), had just been released and was not yet published. In ***Smith***, we interpreted prior case law to hold that an independent concurrent cause must provide the basis for a cause of action in and of itself and must not require the occurrence of the excluded risk to make it actionable. ***Id.*** at 332, 531 N.W.2d at 380. In ***Smith***, a child was killed while a passenger on a snowmobile. The driver's homeowner's policy contained an exclusion for bodily injuries arising out of the operation of a snowmobile off an insured location. The child's mother argued that the driver's intoxication and failure to put a helmet on the child were independent concurrent causes of the accident, separate from the operation of the snowmobile, and there was coverage for that negligence. We rejected this argument, concluding that without the operation of the snowmobile off the insured location, there would have been no injury. ***Id.*** at 332, 531 N.W.2d at 380. The intoxication and the lack of a helmet were irrelevant without the operation of the snowmobile. ***Id.***

In ***Smith***, we stated that the concept of independent concurrent cause is distinct from the concept of substantial factor used in determining causation for liability purposes. ***Id.*** at 332-33, 531 N.W.2d at 380-81. We noted there could be several substantial factors contributing to the same result, but that did not mean those factors were independent concurrent causes for purposes of defining the risks for which coverage is afforded. ***Id.***

Smith is dispositive of the issue of coverage for violation of the safe place statute. Although that violation, as the jury determined, was a cause

of Gilmore's injuries for liability purposes, it does not follow that it was an independent concurrent cause for coverage purposes. The safe place violation was not actionable in the absence of Hutzler's pushing or shoving Gilmore out of the door and onto the fire escape. The safe place violation is therefore not an independent concurrent cause, and there is no coverage for the safe place violation.[2]

SUFFICIENCY OF EVIDENCE

Capitol Indemnity and Westerman contend that at the close of plaintiffs' case, there was insufficient evidence to submit to the jury the claim that Westerman was negligent in failing to protect Gilmore.[3]

A motion challenging the sufficiency of the evidence at the close of a plaintiff's case may not be granted unless, considering all credible evidence in the light most favorable to the plaintiff, there is no credible evidence to sustain a verdict in the plaintiff's favor. ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). This standard applies both to the trial

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[2] Gilmore argues that Capitol Indemnity cannot rely on the exclusion because the insurance policy is not in the record. He states that the existence of the policy is "conclusively established" in Capitol Indemnity's answer to the complaint. Apparently, Gilmore means that the answer conclusively establishes coverage. That is incorrect. In its answer, Capitol Indemnity admits that it issued a policy to Westerman d/b/a The Dump, but denies that she was at all times insured for the acts and omissions alleged in the complaint except as provided in the policy and subject to the terms, conditions, limitations and exclusions of the policy. The logical application of Gilmore's argument is that we cannot decide the coverage issue at all. However, the parties agree on the relevant terms of the policy. They argued the application of the exclusion twice before the trial court, once on Capitol Indemnity's summary judgment motion and again on post-verdict motions. On no occasion did Gilmore object because the policy was not part of the record. We choose to decide the issue.

[3] In addition to the standard instruction on ordinary negligence, the jury was instructed that Westerman was negligent for failing to protect patrons at her business if she or her agents "could have discovered that the acts were being done or were about to be done, and she could have protected plaintiff Kelly Gilmore by controlling the conduct of the third person or by giving a warning adequate to enable plaintiff Kelly Gilmore to avoid harm."

court and to the appellate court reviewing the trial court's ruling. ***Id.*** In ruling on a motion at the close of plaintiff's case, a trial court may not grant the motion unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn from them, and that there is no credible evidence to support a verdict for the plaintiff. ***Id.*** Because the trial court is in a better position to decide the weight and relevancy of the testimony, an appellate court must also give substantial deference to the trial court's better ability to assess the evidence. ***Id.***

Gilmore, Hutzler, the disc jockey, and two patrons testified as part of plaintiffs' case. Gilmore had grown up in Cambria and was visiting his family for the holidays. He had been at The Dump on numerous prior occasions over the past twenty years. On this visit to Cambria, he came with his companion. The two of them had been to The Dump two or three times before New Year's Eve. On New Year's Eve, he arrived at The Dump at approximately 10:00 or 10:30 p.m.

All of plaintiffs' witnesses to the incident, including Hutzler, agreed that some time in the early morning of January 1, 1992, Hutzler grabbed the microphone and began to sing "Roll out the queers" to the tune of "Roll out the Barrel," which the disc jockey was playing. Gilmore's testimony was that he was in the men's room when he heard Hutzler singing, and when he came out, Hutzler came toward him. Gilmore does not remember anything after that except that he was next out on the fire escape and then on the ground below.

The two patrons and the disc jockey differ on the details, but they agree that Hutzler pushed Gilmore out the door and onto the fire escape. One of the patrons testified that fifteen minutes passed between the singing of the song and the physical altercation; the other witnesses put that time interval at thirty to forty-five seconds, a few seconds, and a few minutes. The witnesses all agreed that once Hutzler and Gilmore made physical contact, there was no time to intervene before Gilmore was out the door and then lying on the ground.

The trial court determined, and Gilmore appears to concede, that, based on the evidence presented by Gilmore, there was no opportunity for intervention once Hutzler and Gilmore made physical contact. The precise question, then, is whether a reasonable jury could find that, based on Hutzler's

singing of the "roll out the queers" song, the bartender on duty should have reasonably foreseen that a patron was at risk of injury and taken some action to control his conduct. We agree with the trial court that this is a very close question. Since the bartender on duty first testified as part of the defense, at the close of plaintiffs' case there was no evidence of what he heard or what he knew about Hutzler or Gilmore. However, as the trial court pointed out, there was testimony that Hutzler sang loud enough for everyone in the bar to hear. Therefore, it is a reasonable inference that the bartender also heard Hutzler sing. There was also testimony from one patron that the song was sung fifteen minutes before the altercation. While Gilmore's other witnesses put this time interval at seconds or a few minutes, the trial court found this patron's testimony credible. If the jury believed her testimony, there would have been sufficient opportunity for the bartender to take some action.

The more difficult question is whether a jury could reasonably find that Hutzler's song indicated a threat or risk to a patron or patrons. Keeping in mind the substantial deference we owe the trial court, we cannot say as a matter of law that no reasonable jury could so find. The words Hutzler sang, as Gilmore recounted them, were: "Roll out the queers, we'll have a barrel of fun. Roll out the queers, we'll have the queers on the run. Everybody, the gang's all here." Gilmore testified that Hutzler went on singing and sang a verse or two. These words could reasonably be interpreted as a desire to remove homosexuals from the bar, asking others to join in. We do not agree with the defendants that there had to be evidence that the bartender knew there was a homosexual in the bar. A jury could reasonably infer that Hutzler was singing the song because he knew there was one or more homosexuals in the bar and he wanted them out.

It is true that Gilmore's witnesses who heard the song all testified that they did not perceive the song as a physical threat to anyone in the bar. And Gilmore testified that he did not perceive it as a physical threat to himself, although it made him a little nervous. However, we agree with the trial court that a reasonable jury could nevertheless find that the song should have alerted the bartender on duty that a patron or patrons could be at risk.

It appears that, in addition to challenging the sufficiency of the evidence at the close of plaintiffs' case, Capitol Indemnity is also challenging the

sufficiency of the evidence to sustain the verdict.[4] In considering whether the trial court properly denied the motion to change the answer to the question of Westerman's negligence for failure to protect Gilmore, we look at all the evidence presented to the jury. The issue in this context is whether the evidence presented to the jury is sufficient to sustain the jury's answer "yes." As in evaluating the evidence at the close of plaintiffs' case, we consider the credible evidence and reasonable inferences drawn therefrom in the light most favorable to the plaintiffs, and we affirm if there is any credible evidence supporting the jury's answer. *See* ***Weiss***, 197 Wis.2d at 388, 541 N.W.2d at 761.

We have already discussed the evidence presented by Gilmore that supports the jury's verdict. In addition, evidence presented by the defense supports the verdict. The bartender on duty at the time of the incident, Dan McCormick, testified that he had known both Gilmore and Hutzler for many years, and that he knew that Hutzler made jokes about gays. However, Hutzler, in his presence, had never caused any person physical injury because of that person's sexual orientation. On this New Year's Eve, he was not aware of any problems between Hutzler and Gilmore and Gilmore did not ask for his assistance. He heard the "roll out the queers" song when he was serving beer at the bar, but he did not know who was singing. He stated:

> I thought it was---I didn't know it was [Hutzler] singing. I thought it was somebody else. And I thought, well, I just--I remember shaking my head and saying, oh, this is stupid. And I couldn't understand that it---the guy I thought it was was [Gilmore's] friend and classmate. And I thought, well, I just couldn't figure that out, because I didn't know [Hutzler] was back in the bar at the time.

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[4] The motion after verdict was brought under § 805.14(5)(c), STATS., and requested that the court change the jury's "yes" answer to special verdict question no. 3 to "no." Section 805.14(5)(c) governs a motion "to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer." Defendants characterized this motion, before the trial court, as renewing their motion for dismissal at the close of plaintiffs' case. However, in the arguments and decision on this motion, the parties and the trial court did refer to evidence presented by defendants. The briefs on appeal also refer to some evidence presented by defendants.

McCormick knew Gilmore had been in the bar shortly before, but he did not know if he was still there. The song did not suggest to him an impending physical confrontation and it did not occur to him that he should call the police. He did think he should find out what was happening. He did not leave the bar to check. A couple of minutes later, another bartender, who was off duty, came to use the phone to call 911. That is how he learned what happened to Gilmore. He was the only bartender on duty at that time.

A reasonable inference from McCormick's testimony is that he thought the song was or might be directed at Gilmore. A jury could reasonably infer from McCormick's testimony that he thought he should investigate what was going on, but did not because he was busy at the bar and was the only bartender on duty. It is true that he testified that the altercation happened a couple of minutes later and he would not have had time to leave the bar to check things out. But the jury could have believed Gilmore's witness who testified that the time interval was fifteen minutes and decided that McCormick did have time to investigate. We conclude the trial court did not err in denying the motion to change the jury's answer.

SAFE PLACE STATUTE

Capitol Indemnity argues that the trial court erred in ruling as a matter of law that Westerman was negligent in failing to keep the premises as safe as the nature of the business would reasonably permit. As the court explained in instructing the jury, it answered special verdict question no. 5 "yes" because it determined that the railings on the fire escape did not comply with the heights required by the building code.

Robert Schoof, a safety engineering consultant, testified for the plaintiffs and his testimony was not controverted. He testified that the guard railing around the upper platform of the fire escape and the guard railing around the lower or middle level platform was only thirty-five inches high, and the building code requires that they be forty-two inches high. Based on Hutzler's statement that Gilmore went over the railing on the lower intermediate level platform, it was Schoof's opinion that the additional seven inches on the railing on that platform would have prevented the fall. Another code violation was the lack of a railing on the right-hand side, descending. However, Schoof could not say that railing would have prevented the fall

because the exact path of Gilmore falling down the stairs was not known. Also, the railing on the left side of the stairway was one inch lower than required by the code. Schoof described this as a technical violation, but just "at the range of tolerance" and therefore acceptable from a safety engineering approach.

Capitol Indemnity contends that in order for a violation of the code to be negligence "per se," the injured person must be within the class of persons the code was intended to protect. Gilmore was not within that class, Capitol Indemnity contends, pointing to Gilmore's expert's concession that fire escapes are not designed with the thought in mind that someone is going to be taken out to that fire escape and forcefully thrown off it.[5]

Resolution of this issue requires an interpretation of the safe place statute, § 101.11, STATS. The construction of a statute is a question of law, which we review de novo. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 778 (1989).

Section 101.11(1), STATS.,[6] requires employers to maintain the premises so as to provide employees and frequenters a place as safe or free from

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[5] Schoof also testified that the safety standards for the railings on the fire escape platform are to protect the public; that they are designed to protect people who are disabled, inebriated, off balance; and that there are rigorous requirements for fire escapes because they are supposed to accept people fleeing in panic, people running, and people falling.

[6] Section 101.11(1), STATS., provides:

> Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same

danger as the nature of the premises reasonably permits. *See* ***Anderson v. Joint School Dist. No. 3***, 24 Wis.2d 580, 583-84, 129 N.W.2d 545, 547 (1964). The statute does not create a new cause of action but it does establish an increased standard of care, the violation of which is negligence. ***Gould v. Allstar Ins. Co.***, 59 Wis.2d 355, 361, 208 N.W.2d 388, 391 (1973). Failure to comply with a general safety order applying to places of employment promulgated by the Department of Industry Labor and Human Relations constitutes a violation of the safe place statute. ***Sampson v. Laskin***, 66 Wis.2d 318, 331, 224 N.W.2d 594, 600 (1975).[7]

The issue is whether Gilmore was a "frequenter" of The Dump. If he was, Westerman owed a duty to him under the safe place statute. *See* ***Monsivais v. Winzenried***, 179 Wis.2d 758, 764, 508 N.W.2d 620, 623-24 (Ct. App. 1993), and ***Nordeen v. Hammerlund***, 132 Wis.2d 164, 169, 389 N.W.2d 828, 830 (Ct. App. 1986). A frequenter is defined under the safe place statute as "every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render such person other than a trespasser." Section 101.01(2)(d), STATS. Gilmore was a frequenter, not a trespasser, because he was at all times in areas of the tavern maintained for use by patrons. *See* ***Monsivais***, 179 Wis.2d at 769-772, 508 N.W.2d at 623-27 (tavern patron lost frequenter status and became trespasser when, after receiving directions to the restroom, he went in another direction and entered area of tavern not maintained for public use, without express or implied invitation).

Capitol Indemnity does not dispute that Gilmore was a frequenter within the meaning of the safe place statute. Indeed, it does not even refer to this statute in its argument. Instead, it relies on cases that decide whether violations of regulations and ordinances that have nothing to do with the safety of buildings should be considered "safety statutes," such that a violation is negligence per se. *See, e.g.,* ***McGarrity v. Welch Plumbing Co.***, 104 Wis.2d 414, 312 N.W.2d 37 (1981) (administrative regulation governing employment of minors); ***Burke v. Milwaukee & Suburban Transp. Corp.***, 39 Wis.2d 682, 159 N.W.2d 700 (1968) (ordinance regulating bus loading zones). However, the

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safe.

[7] WISCONSIN ADMINISTRATIVE CODE ch. ILHR 50 contains the building standards established "for all public buildings and places of employment" to protect the "health, safety and welfare of the public and employes." WIS. ADM. CODE § ILHR 50.01.

language of the safe place statute itself provides a plain expression of legislative intent to protect the safety of frequenters of places of employment. ***Nordeen***, 132 Wis.2d at 168-69, 389 N.W.2d at 830.

Since there is no dispute that Gilmore was a frequenter of the tavern and no dispute that the railings violated the building code, the trial court correctly determined that, as a matter of law, Westerman violated the statute and was therefore negligent. Whether that negligence was a cause of Gilmore's injuries is a separate question. *See* ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 226, 270 N.W.2d 205, 209 (1978). Since there was conflicting testimony on where and how Gilmore came into contact with the fire escape railings, the trial court properly submitted the question of cause to the jury.[8]

NEW TRIAL

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[8] Capitol Indemnity makes two related arguments regarding special verdict question no. 5, both of which we reject. First, it argues that "[t]he great weight of the evidence established" that Gilmore went over the railing that ran along the side of the stairs, and Schoof testified that the non-compliance of that railing was "technical" because it was only an inch less than the required height. The court interpreted this testimony as going to cause, rather than to whether there was a violation of the code. In any case, there was also testimony that Gilmore went over on the railing of the lower platform, and Schoof testified unequivocally that the height of that railing did not comply with code and was a significant deviation.

Capitol Indemnity's second argument is that the form of the special verdict question no. 5 was improper because the underlined phrase implies causation: "With respect to the incident complained of herein, was defendant Laurice Westerman negligent in failing to keep the premises as safe as the nature of the business would reasonably permit." (Underline added.) Gilmore points out in his responsive brief, with appropriate cites to the record, that this introductory phrase was contained in the questions on negligence submitted by both Capitol Indemnity and Westerman. The court modified the questions, but kept this phrase. Gilmore argues that, because the phrase was proposed by Capitol Indemnity, it is foreclosed from arguing that it is error. Since Capitol Indemnity does not dispute this point in its reply brief, we take it as conceded. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). In any event, we fail to understand how the underlined phrase implies causation, particularly since the court, after telling the jury that it was answering question no. 5 "yes," specifically said it was the jury's duty to determine if that negligence caused Gilmore's injuries. The court also instructed the jury that in considering the cause question, or any other question in the verdict, the jury was not to attach any greater or lesser importance to the court's findings than to a similar finding made by the jury.

Defendants contend that they are entitled to a new trial in the interest of justice because of evidentiary errors and conduct of Gilmore's attorney. A trial court's ruling on a motion for a new trial in the interest of justice under § 805.15(1), STATS.,[9] is highly discretionary and will not be reversed on appeal in the absence of a clear showing of erroneous exercise of discretion or an erroneous application of law. ***Suhaysik v. Milwaukee Cheese Co.***, 132 Wis.2d 289, 303, 392 N.W.2d 98, 104 (Ct. App. 1986). Since defendants do not claim that the real controversy was not tried, they are not entitled to a new trial in the interest of justice unless there is a likelihood of a different result on retrial without the evidentiary errors and misconduct. *See* ***State v. Harp***, 161 Wis.2d 773, 777-782, 469 N.W.2d 210, 211-14 (Ct. App. 1991).

The first evidentiary issue is the trial court's refusal to admit into evidence a letter in Schoof's file from a building inspector for the Department of Industry, Labor and Human Relations, Buildings and Safety Division, Mr. Gothard. The letter contained one sentence: "Upon looking at the stairway leading from the rear exit of the Dump Tavern, I was unable to find any code violations." Defendants argue that on cross-examination, an adverse party may introduce what would otherwise be inadmissible hearsay to show that the data relied on by an expert does not support the expert's opinion or that the expert ignored certain data.

A trial court's decision to admit or exclude evidence is discretionary. We will not reverse it on appeal if it has a reasonable basis and was made in accordance with the facts of record and accepted legal standards. ***State v. Weber***, 174 Wis.2d 98, 106, 496 N.W.2d 762, 766 (Ct. App. 1993).

Schoof answered yes, on cross-examination, to the question whether he was provided with and relied on materials given to him concerning earlier investigations by Gothard. However, in *voir dire* by the court, Schoof testified that he misspoke because it was a multiple question and that he did not

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[9] Section 805.15(1), STATS., provides in part:

> A party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice.

rely on the letter in formulating his opinions. Schoof explained that Gilmore's counsel gave him a collection of correspondence containing the letter from Gothard; that he read the letter but did not agree with it; and that he therefore did not rely on it.

Capitol Indemnity argues that Schoof read the letter "very critically, so as to form opinions contrary to those expressed in the letter" and, therefore, although it is otherwise inadmissible hearsay,[10] it is admissible on cross-examination. Capitol Indemnity relies on ***Karl v. Employers Ins. of Wausau***, 78 Wis.2d 284, 254 N.W.2d 255 (1977), and ***Weber***. These cases hold that facts relied on by an expert may be admitted on cross-examination for the limited purpose of impeachment and verbal clarity; fair play requires that the opponent may show that the data did not support the conclusions of the expert or contained information ignored by the expert. ***Weber***, 174 Wis.2d at 107 n.6, 496 N.W.2d at 766; ***Karl***, 78 Wis.2d at 300, 254 N.W.2d at 262.

The court considered Schoof's testimony to be that he did not rely on the letter in formulating his opinion. The court also noted that the letter was only one sentence and contained no data on which Schoof could rely. The court expressed its concern that admitting the letter would, in effect, be admitting the opinion of another expert, without any foundation and without anything in the letter itself that permits a fair evaluation of Gothard's opinion.

The trial court properly exercised its discretion in excluding the letter. ***Karl*** and ***Weber*** do not support Capitol Indemnity's position. Schoof's letter contains no data or facts. Forming an opinion contrary to that expressed in the letter cannot reasonably be construed as relying on the letter to form an opinion, given the content of the letter. The purpose of cross-examination in this context is to test the reliability of Schoof's opinion by examining him on the way his opinion was reached. The purpose is not to permit admission through hearsay of another expert's opinion.

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[10] The facts or data upon which an expert bases an opinion, if of a type reasonably relied on by experts in the field in forming opinions, need not be admissible in evidence. Section 907.03, STATS. That a fact or data meets this criteria does not make it automatically admissible by the proponent. ***State v. Weber***, 174 Wis.2d 98, 106, 496 N.W.2d 762, 766 (Ct. App. 1993). It is inadmissible hearsay if used for the truth of the matter asserted, unless otherwise admissible under a recognized exception to the hearsay rule. ***Id.*** at 107, 496 N.W.2d at 766.

The second evidentiary issue is the trial court's decision to admit the testimony of Pamela Bloom, a bartender on duty earlier in the evening. Bloom testified that she had been directed by Westerman, before that evening, not to call the police unless it was absolutely necessary, an emergency. Defendants objected at trial on the ground of relevancy. The court permitted the testimony after hearing extensive argument. According to the defendants, Bloom's testimony was irrelevant because the evidence established that there was no time to intervene once Hutzler and Gilmore made physical contact and that the song was not perceived as physically threatening.

A trial court's decision on relevancy is discretionary. ***Chart v. General Motors Corp.***, 80 Wis.2d 91, 102, 258 N.W.2d 680, 684 (1977). Relevancy is a function of whether the evidence tends to make the existence of a material fact more or less probable than it would be without the evidence. ***State v. Denny***, 120 Wis.2d 614, 623, 357 N.W.2d 12, 16 (Ct. App. 1984). The evidence need not prove a fact in a "`substantial way', but it must do more than `simply afford[] a possible ground of suspicion against another person....'" ***In re Michael R. B.***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993).

At the hearing on motions after verdict, the court explained its views on the relevancy of Bloom's testimony. It agreed that there was no time to intervene to protect Gilmore once the physical altercation began. It noted that, based on the testimony that there were fifteen minutes between the song and the physical altercation, there was time to intervene then. Whether the song could be interpreted as something requiring action, such as calling the police, the court considered "problematic" but possible. It noted in this context that McCormick, who had greater knowledge of Hutzler and Gilmore, testified that he thought he should investigate when he heard the song. Although the court expressed reservations about the relevancy of the testimony, it concluded it was relevant "in a limited sense."

In our view the probative value of Bloom's testimony is slight, but we cannot say the trial court's decision that it was relevant was unreasonable. We have already held that a jury could reasonably infer from the singing of the song that it indicated a threat to a patron or patrons such that some action was required by the bartender. A policy that the police are not to be called unless there is an emergency could make it more probable that the bartender on duty would minimize the potential for disruption signaled by the song.

The defendants did not object at trial to Bloom's testimony on the ground that, even if relevant, it was unduly prejudicial.[11] But they did make this argument in support of their motion for a new trial and they make this argument on appeal. The trial court concluded that because of the manner in which the testimony came in and the manner in which the balance of the testimony came in, this testimony did not result in prejudice to the defense sufficient to justify a new trial. McCormick and two off-duty bartenders testified that they understood they were to call the police if they could not handle a problem themselves. Westerman testified that calling the police was within the bartenders' discretion. The defendants do not explain how Bloom's testimony, in light of this other testimony, might have unfairly influenced the jury. Their argument on prejudice is general and brief. It does not persuade us that the trial court erroneously exercised its discretion in denying a new trial on this ground.

Finally, defendants argue that Gilmore's trial counsel's questions about two individuals being previously injured on the fire escape were improper and warrant a new trial. After asking the questions, Gilmore's counsel acknowledged to the court and opposing counsel that he had no evidence to present that others had been injured on the fire escape. As soon as the jury was reconvened, the court instructed the jury that "[t]here is absolutely no evidence to support these questions" and the jury was to "disregard the questions entirely."

The court stated that "if there was a clear ethical violation in this trial, this is it." However it did not believe a new trial was warranted both because of the prompt, curative instruction and because the questions went to the issue of Westerman's negligence regarding the safety of the fire escape, which the trial court decided as a matter of law based on noncompliance with the building code. We conclude the trial court properly exercised its discretion in denying the motion for a new trial on this ground.[12]

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[11] Section 904.03, STATS., provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ....

[12] It is not clear if, in addition to appealing the trial court's denial of their motion for a

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

(..continued)
new trial under § 805.15(1), STATS., the defendants are also requesting that we exercise our power of discretionary reversal under § 752.35, STATS., on the ground that it is "probable that justice has for any reason been miscarried." We decline to do so. The exclusion of Gothard's letter was not error. And, for the reasons stated by the trial court, we are not persuaded that either Bloom's testimony or Gilmore's trial counsel's improper conduct prejudiced the defendants such that a new trial would likely produce a different result. *See* ***State v. Harp***, 161 Wis.2d 773, 777, 469 N.W.2d 210, 211-12 (Ct. App. 1991).