COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

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No. 94-1721

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

JASON R. DRESEL, RANDALL DRESEL AND LINDA DRESEL,

Plaintiffs-Respondents,

v.

MIDWAY MOTOR LODGE INC. OF MADISON, AND AMERICAN EMPLOYERS INSURANCE COMPANY,

Defendants-Appellants,

TIME INSURANCE COMPANY,

Defendant,

BENJAMIN BOOS, DONALD BOOS, JANET BOOS, REGENT INSURANCE COMPANY, CARL MUELLER, ERIC MUELLER,

Third Party Defendants-Respondents,

THRESHERMEN'S MUTUAL INSURANCE COMPANY,

Third Party Defendant.

ERIC F. MUELLER AND CARL MUELLER,

Plaintiffs-Respondents,

v.

MIDWAY MOTOR LODGE INC. OF MADISON AND AMERICAN EMPLOYERS INSURANCE COMPANY,

Defendants-Third Party Plaintiffs-Appellants,

BENJAMIN BOOS, DONALD BOOS, JANET BOOS, REGENT INSURANCE COMPANY, JASON R. DRESEL, AND RANDALL DRESEL,

Third Party Defendants-Respondents,

THRESHERMEN'S MUTUAL INSURANCE COMPANY,

Third Party Defendant.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

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

EICH, C.J. This is an action for personal injuries incurred by two teen-age boys, Jason Dresel and Eric Mueller, when one of them fell through a glass wall near the indoor swimming pool at the Midway Motor Lodge in Madison. The boys and their parents sued Midway and its insurer, claiming that Midway was negligent in maintaining the wall. They also alleged that Midway had failed to provide a safe-place in violation of the safe-place law.

The trial court dismissed the safe-place claim, and the jury found in the plaintiffs' favor on the remaining negligence claim, awarding both compensatory and punitive damages. After denying Midway's postverdict motions, the trial court entered judgment on the verdict.

Midway appeals, claiming that the trial court committed reversible error in: (1) failing to grant Midway's motions to dismiss the plaintiffs' cause of action for negligence; (2) allowing the issue of punitive damages to go to the jury; (3) allowing one of Mueller's experts to testify that Midway's conduct was "negligent" and "outrageous"; (4) improperly instructing the jury on Midway's duty to maintain reasonably safe premises; (5) allowing the jury to view the pool area after subsequent remedial measures had been taken; (6) prohibiting Midway's expert witness from testifying with respect to industry customs and standards relating to the use and replacement of plate-glass windows and panels; (7) declining to permit Midway to use one of Mueller's depositions for impeachment purposes; and (8) directing a verdict in Dresel's favor on the issue of his alleged contributory negligence.

We conclude that the trial court erred in two respects: allowing plaintiff Mueller's expert witness to testify that Midway's conduct was "negligent" and "outrageous," and denying Midway's request to use Mueller's deposition to attempt to impeach his testimony. We also conclude, however, that the errors were harmless. We reject Midway's other arguments and affirm the judgment in its entirety.

Jason Dresel and Eric Mueller were members of a boys' hockey team staying at the Midway Motor Lodge with their families during a 1990 hockey tournament in Madison. After one of the games, a group of players and their families gathered around the pool area. Several of them, including Dresel, Mueller, and a third boy, Benjamin Boos, were engaging in horseplay around the pool, at times pushing and pulling one another into the pool. At some point, Mueller fell into a large (9 feet by 4½ feet) plate-glass panel, causing the glass to break and severely injuring both him and Dresel.

As indicated, Dresel and Mueller (and their parents) sued Midway and its insurer, claiming that Midway was negligent in maintaining plate-glass panels in the pool area and that by so doing, Midway also violated the Wisconsin Safe-Place Law. With the court's permission, the plaintiffs amended their complaints to allege claims for punitive damages. The trial court eventually dismissed the plaintiffs' safe-place claims.

At the conclusion of the evidence, the trial court denied Midway's motions to dismiss the plaintiffs' negligence claims and granted Dresel's motion for a directed verdict on Midway's allegations that he had been contributorily negligent. The court also ruled that the evidence warranted submitting the plaintiffs' claims for punitive damages to the jury.

The jury found that Midway was causally negligent in maintaining the plate-glass panel in the pool area and awarded $327,531.21 compensatory damages to Dresel and his parents and $57,406.44 to Mueller and his mother. The jury also found that Midway had acted outrageously and in wanton, willful and reckless disregard of both boys' rights and awarded each of them $250,000 in punitive damages. The trial court denied Midway's postverdict motions and this appeal followed. Additional facts will be discussed below.

I. Denial of Midway's Motions to Dismiss

Midway's challenges to the trial court's denial of its various motions to dismiss the negligence claims have a common thread: the trial court's decision to dismiss the plaintiffs' safe-place law claim requires dismissal of their negligence claim as a matter of law.

In order to raise the safe-place claim, said the court, "plaintiffs would have to produce evidence showing that Midway is not in compliance with the applicable building code," and because the state building code in effect at the time the hotel was built made no mention of safety glass, the claim must be dismissed.

The question raised is one of law, which we review independently, owing no deference to the trial court's decision. ***Nottelson v. DILHR***, 94 Wis.2d 106, 115-16, 287 N.W.2d 763, 768 (1980); ***Green Scapular Crusade, Inc. v. Town of Palmyra***, 118 Wis.2d 135, 138, 345 N.W.2d 523, 525 (Ct. App. 1984).

Characterizing the trial court's decision as declaring that it was in full compliance with state building codes, Midway cites ***Bent v. Jonet***, 213 Wis.

635, 644-45, 252 N.W. 290, 293 (1934), for the proposition that "once a building is found to be in compliance with a provision of the building code that specifically addresses the particular device or condition challenged by plaintiff, this compliance conclusively establishes the safety of that condition under the Safe Place Statute."[1] It may well be that compliance with specific provisions of the building code trumps any claim under the safe-place law, but the question here is whether the absence of a code violation--or the code's silence on the subject--precludes any determination of negligence on Midway's part for maintaining plate-glass panels in the pool area.

We first consider Midway's assertion that it was in compliance with the code. When the poolside plate-glass panels were installed in 1964, no building code provision required--or even dealt with--the use of safety glass in such locations. Several years later, the legislature added provisions to the state building code (effective in 1976) requiring the use of safety glass in "hazardous impact" locations. Section 101.125(3)(a), STATS. The Department of Industry, Labor and Human Relations (DILHR) later adopted regulations detailing the requirements for compliance with this section. WIS. ADM. CODE § ILHR 51.14. Another chapter dealing generally with administration and enforcement of the code contains a section stating that the provisions of the fourteen chapters of the code dealing with safety in public buildings and places of employment "are not

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[1] The court stated in ***Bent v. Jonet***:

> When the [agency having power to adopt orders to secure the safety of employees and frequenters of public buildings] does make a lawful order, and it is complied with, the safety of the place involved is conclusively established, at least in so far as the subject matter of the order is concerned. Thus when an order of the commission is claimed to be applicable, the sole question is whether the structure conforms to the order. If it does, the jury may not substitute its conclusions as to its safety for those of the body vested by statute with the power to determine this matter. Where there is no proper evidence of an order by the commission applicable to the situation, the jury must be left to determine the issue ....

Bent v. Jonet, 213 Wis. 635, 645, 252 N.W. 290, 293 (1934).

retroactive unless specifically stated in the ... rule." WIS. ADM. CODE § ILHR 50.02.

According to Midway, the "grandfather" provisions of § 50.02 constitute a declaration by DILHR that "conclusively establishe[s]" that the use of plate glass is safe and thus negates any claim of negligence for its use in the pool area. Midway surmises that had the department felt otherwise, it would have ordered the immediate replacement of plate glass, rather than simply requiring safety glass upon replacement of existing installations.

As our discussion of ***Bent*** indicates, there is authority for the proposition that where a governmental body (*e.g.*, DILHR), in the exercise of its statutory charge to ensure the safety of public buildings, sets safety standards, and when those standards are complied with in a specific location--when the structure in question "conforms to the order"--the safety of the place is "conclusively established," and "the jury may not substitute its conclusions as to its safety for those of the body vested by statute with the power to determine this matter." ***Bent***, 213 Wis. at 645, 252 N.W. at 293; *see* ***Balas v. St. Sebastian's Congregation***, 66 Wis.2d 421, 425-26, 225 N.W.2d 428, 430 (1975).

As we also have noted, however, when the Midway Motor Lodge was constructed there were no code provisions dealing in any manner with plate glass or safety-glass installations. And we do not agree with Midway's assertions that application of the "grandfather" provisions of the code to its 1976 safety-glass requirements must be read as "conclusively establishing" the safety of maintaining forty-square-foot plate-glass panels in the area of a swimming pool in 1990.

There is no question that where the claim is made that a building built after 1976 is not reasonably safe because of the use or location of safety glass, the safety of the building would be conclusively established if it complied with the code's safety-glass requirements, because DILHR had spoken to the subject and declared that in certain installations the use of safety glass promotes public safety. In the circumstances presented by this case, however, we agree with the plaintiffs: it would be illogical to conclude that the grandfather provision alone renders the code provision which *requires safety glass* instead of plate glass in hazardous locations equivalent to a declaration that, regardless of

the facts or the location, *plate glass is categorically safe* and thus, as a matter of law, its use in a hotel pool area may never be found to present a danger or hazard to hotel guests. We decline Midway's invitation to read such a conclusion into either the code or the law of Wisconsin.

The purpose of the state building code is to "protect the health, safety and welfare of the public and employe[e]s by establishing minimum standards for the design, construction ... [and] quality of materials ... for all public buildings and places of employment." WIS. ADM. CODE § ILHR 50.01. We can read no other purpose into the provisions of WIS. ADM. CODE § ILHR 51.14 requiring the use of safety glass in various hazardous locations. Those provisions establish that, at least for post-1976 installations, use of safety glass in such situations will accomplish the safety objectives of the code, and use of ordinary plate glass will not. We cannot and do not read them--as Midway would have us do--as establishing that plate glass was safe prior to 1976 and, further, that courts should not countenance any claim that it was not safe in 1990. We think the trial court aptly summarized the situation when it stated at the postverdict hearing:

> While Wisconsin law has held that compliance with applicable building codes establishes per se compliance with the safe place statute, application of this principle under these facts seems illogical. *The only compliance under these circumstances is that the law allows ongoing noncompliance* until such time as the windows need replacing. This does not seem to me like a safety standard which should necessarily be automatically applied to constitute compliance with the safe place statute.

(Emphasis added.)

Nor, we would add, should it work to preclude a finding of negligence for maintaining plate-glass panels in a hotel pool area in 1990. The trial court properly denied Midway's motions.

II. Punitive Damages

Midway argues that its conduct could in no way be considered so "outrageous" as to warrant an award of punitive damages.[2]

Punitive damages may be awarded where the jury finds the defendant's conduct was "outrageous." WIS J I—CIVIL 1707 (1995). A defendant's conduct is "outrageous" when he or she acts either "maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights," ***id.***, and it is the latter definition that is applicable here. The jury instruction goes on to state that "[a] person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury." ***Id***.

Under these standards, while an intent to injure is not required, "some type of aggravated conduct (knowledge, at the least) is a needed component." ***Walter v. Cessna Aircraft Co.***, 121 Wis.2d 221, 227, 358 N.W.2d 816, 819 (Ct. App. 1984). It is conduct

> "[which] the defendant knows, or should have reason to know, not only that [it] creates an unreasonable risk of harm, but also that there is a strong probability, although not a substantial certainty, that the harm will result but, nevertheless, he proceeds with his conduct in reckless or conscious disregard of the consequences."

Brown v. Maxey, 124 Wis.2d 426, 433, 369 N.W.2d 677, 681 (1985) (quoting J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE, ch. 5, sec. 5.01, at 8-9 (1984)).

We will uphold an award of punitive damages if there is any evidence from which the jury could reasonably conclude that the defendant's conduct was outrageous, and in making that determination we consider the

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[2] Midway also argues that because its use of plate glass "fully complied" with the state building code, it would be "illogical" to permit the jury to consider punitive damages. As the preceding discussion indicates, we do not agree with the underlying premise of the argument: that Midway was in full compliance with the state building code.

evidence in the light most favorable to the jury's verdict. ***Mulhern v. Outboard Marine Corp.***, 146 Wis.2d 604, 622, 432 N.W.2d 130, 137 (Ct. App. 1988).

Considering the evidence in this case in light of those principles, we believe a jury could reasonably conclude from that evidence--considered in a manner most favorable to the verdict--that Midway's conduct in maintaining a large plate-glass panel adjacent to the pool under the circumstances of this case was "outrageous," as that term is defined in the law.

For example, despite Midway's testimony to the contrary, there was evidence that a guest on the premises had been seriously injured in an accident involving one of the glass panels at least once before. In that instance, the person collided with a companion while walking down a hallway and fell through a panel virtually identical to the panel at issue here, nearly severing his arm. Other testimony pointed out other incidents of breakage, and each time Midway's glass supplier replaced a panel, its invoice carried a "disclaimer" stating that the supplier had recommended the use of safety glass in such hazardous locations and that "[t]he customer [Midway] acknowledges that Lake City Glass, Incorporated, is not responsible for choice of materials ...." The president of the glass-supply company testified at trial that, given the risk of impact, the pool area was a "risk" area.

There was also expert testimony concerning the hazards presented by the use of plate glass in locations such as the pool area. One of the witnesses characterized the Midway location as "a double hazardous situation" because of the danger of people slipping and falling in the pool area. Another stated his opinion that, given the use of the pool and adjacent areas, the plate-glass panels presented a "fundamental hazard" that most people would recognize, and that it was plainly foreseeable that people on either side of the panels--in the pool or the adjacent hallways--could slip or fall into the glass.

On that evidence of the risks involved, and Midway's knowledge of past breakage and serious injury, we cannot say that no reasonable jury could find its conduct to be "outrageous" under the principles discussed above. We thus reject Midway's challenge to the punitive damage awards.

III. Expert Testimony That Midway's Conduct Was "Outrageous"

In a related argument, Midway contends that it was reversible error for the trial court to allow an expert witness to testify that, in his opinion, Midway's use of the plate-glass panels in the pool area was "negligent" and "outrageous."

The rejection or admission of evidence is a discretionary determination by the trial court which we generally will not reverse if the record shows that discretion was exercised "and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

We acknowledge that testimony on an ultimate fact to be ascertained by the jury is not per se inadmissible. ***Rabata v. Dohner***, 45 Wis.2d 111, 124, 172 N.W.2d 409, 415-16 (1969). Plaintiffs have pointed us to no Wisconsin cases, however, holding that an expert's opinion that a defendant's conduct is "negligent" or "outrageous"--inquiries specifically made in the special verdict and defined in the jury instructions--is admissible. To the contrary, we noted in ***Lievrouw v. Roth***, 157 Wis.2d 332, 352, 459 N.W.2d 850, 857 (Ct. App. 1990), that opinion testimony that someone was "negligent," unlike testimony that an "emergency" existed, was inadmissible because "unlike `emergency,' which the law does not define for juries, `negligence' has prerequisite terms-of-art elements about which the jury must be instructed." (Citation omitted.)

Beyond that, we have not been referred to any place in the record where the trial court stated its reasons for overruling Midway's objections to the questions. We are thus unable to ascertain the basis for the court's exercise of discretion.

Assuming, therefore, that it was error to allow the questions, our inquiry is not at an end, for we will reverse for error in the admission of evidence only where that error is prejudicial. Trial court error is prejudicial "only when it reasonably could be expected to affect the outcome of the case," and we thus will not reverse for such error "unless it appears probable from the entire evidence that the result [of the trial] would have been different had the error not occurred." ***McCrossen v. Nekoosa Edwards Paper Co.***, 59 Wis.2d 245, 264, 208 N.W.2d 148, 159 (1973) (citation omitted). It does not so appear in this case.

We have outlined in the preceding section of this opinion some of the evidence that persuaded us that submission of a punitive damage question to the jury was justified. That evidence, coupled with extensive testimony on the dangers of plate-glass installations in locations such as Midway's pool area, satisfies us that any error in admitting the witness's two brief comments does not suggest the probability of a different result on a retrial without the testimony. The error was harmless.[3]

IV. The Jury Instruction

Midway next argues that the trial court erred in instructing the jury on its duty to maintain the premises "as safe as the nature of the place reasonably permitted." The instruction, with the portions of which Midway complains highlighted, reads as follows:

> Evidence has been presented to you regarding the relative safety of plate glass versus safety glass. However, I have now made legal rulings which make[] that evidence *irrelevant to the questions you must answer*. You will not be asked to determine

[3] We note in this regard that the witness explained in considerable detail the reasons underlying the many unchallenged opinions he offered on the plaintiffs' behalf in this case, as well as his statements that Midway's conduct was both "negligent" and "outrageous." We agree with the reasoning of the 10th Circuit Court of Appeals in ***Karns v. Emerson Elec. Co.***, 817 F.2d 1452, 1459 (10th Cir. 1987), where the court held that it would be unlikely for a jury to be misled by similar testimony--in ***Karns***, testimony that a product was "unreasonably dangerous" and the manufacturer "acted recklessly" in distributing it--where the witness "explained the bases for his opinions in sufficient detail to permit the jury to independently evaluate his conclusions." The ***Karns*** court also noted that, as is the case here, the trial court instructed the jury that it was not bound by an expert's opinion. ***Id***.

Finally, Midway suggests that prejudice is shown by the fact that, while allowing this testimony, the trial court sustained an objection to a question to one of its own expert witnesses asking whether compliance with a building code was the threshold for the reasonable standard of care. Plaintiffs point out, however, that Midway did not argue the issue in the trial court and we have often held that "as a general rule [we] will not consider issues not raised in the trial court but raised for the first time on appeal." ***County of Columbia v. Bylewski***, 94 Wis.2d 153, 171, 288 N.W.2d 129, 138-39 (1980).

> anything regarding the choice of plate versus safety glass. You should *disregard entirely all the evidence you heard regarding the relative merits of plate versus safety glass.* You are instructed that the Wisconsin Building Code did not require Midway to replace all the glass wall panels when one had to be replaced. The decision to use plate glass in the initial construction or not to replace all of the glass later with a material other than glass are decisions by Midway and must be considered together with all other evidence in determining whether Midway met its duties as follows.
>
> To find that Midway failed to construct, repair or maintain the premises in question *as safe as the nature of the place reasonably permitted,* you must find that Midway had actual notice of the alleged *defect* in time to take reasonable precautions to remedy the situation or that the *defect* existed for such a length of tine before the accident that Midway or its employe[e]s in the exercise of *reasonable diligence* (this includes the duty of inspection) should have discovered the *defect* in time to take *reasonable precautions* to remedy the situation.

(Emphasis added.)

Midway first argues that the instruction is misleading and prejudicial because it instructs the jurors to ignore evidence of the relative safety of plate glass and safety glass after they had heard lengthy testimony on that very subject.

The trial court has broad discretion in instructing the jury, and a challenge to an allegedly erroneous instruction will lead to reversal only if the error was prejudicial. ***Fischer v. Ganju***, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). In this instance, an error is prejudicial if it "probably"--not merely "possibly"--misled the jury. ***Id***. at 850, 485 N.W.2d at 16.

Midway does not delineate in its brief how the jury was misled by the instruction, other than to suggest that the instruction was "an exercise in futility" because "[t]he jury could not evaluate this case without consciously considering the relative merits of plate glass [and safety glass]." As plaintiffs point out, however, there was testimony as to other options available to Midway to reduce or eliminate the hazard represented by the plate-glass panels: replacing the glass with material other than safety glass, building a protective wall around the pool, enclosing the pool area, using guards, or installing decorative barriers. The jury was also instructed as to the independent duty of hotelkeepers to "exercise reasonable care to provide ... guests with safe premises," and of a property owner's duty to "discover conditions or defects in the premises which expose a person to an unreasonable risk of harm."

On this record, we cannot say that the challenged instruction, while arguably confusing, probably misled the jury.[4]

V. The Jury View

By the time the case came to trial, Midway had replaced the plate glass in the pool area with safety glass, and had installed railings around the perimeter of the window area. Conceding that the jury probably would not have been able to tell that the glass had been replaced,[5] Midway argues that its view of the area with the railings in place violates both the letter and spirit of § 904.07, STATS., which states that evidence of subsequent remedial measures--"measures ... which, if taken previously, would have made the event less likely to occur"--is inadmissible.[6]

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[4] Midway argues separately that it was error to instruct the jury as to whether the building was as safe as its nature reasonably permits because that is a safe-place type of inquiry which is permissible only in cases where "there is no building code provision directly applicable to the condition in issue." The argument simply recasts the contentions made earlier in Midway's brief that its plate-glass panels were in "full compliance" with the DILHR building code--contentions we have rejected.

[5] Midway complains, for example, that "[t]he jury's view of the pool area, which by necessity included a view of the railings, *if not the change in glass type*," was improper. (Emphasis added.)

[6] The statute allows such evidence, however, when it is "offered for another purpose,

Midway acknowledges that a court may permit a jury view "where there have been changes in the premises," as long as a record is made of the changes, but it maintains that "this rule does not permit a plaintiff to introduce evidence of subsequent remedial measures to prove negligence." We do not doubt the correctness of that statement, but it does not describe what occurred in this case.

Whether to permit a jury view is committed to the "sound discretion" of the trial court. ***American Family Mut. Ins. Co. v. Shannon***, 120 Wis.2d 560, 567, 356 N.W.2d 175, 179 (1984). In this case, Midway objected to the view on grounds (a) that it was unnecessary in that photographs and a videotape already in evidence provided an adequate depiction of the area, and (b) the jury would see the guardrail installed after the accident.

In its decision on Midway's objections, the trial court explained in detail why the photographs and videotape were inadequate to show the "spatial relationships" at the scene and, with respect to the railings, the court believed a cautionary instruction would meet any possible problem and asked counsel to draft an instruction on the point. Both attorneys submitted proposed instructions and, after comparing them and concluding that they "contain[ed] the same ideas with just slightly different language," the court decided to use the plaintiffs' counsel's version and Midway's attorney did not object. Accordingly, the court instructed the jury, among other things, that

> the view is taken for the purpose of enabling you ... to understand the evidence introduced and not for the purpose of furnishing original evidence upon which to base a verdict. You may use the knowledge gained at the view in finding ultimate facts which are supported by the evidence.

As we noted above, we will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised "and we can perceive a reasonable basis for the court's decision." ***Prahl***, 142 Wis.2d at 667, 420 N.W.2d at 376. "Indeed, `[b]ecause the exercise of

(..continued)

such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment or proving a violation of [the safe-place law]."

discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions.'" ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991) (quoted source omitted).

The trial court adequately explained the reasons for its decision: (1) the other evidence of the scene would not adequately apprise the jury of its actual appearance, and (2) instructing the jury that the view did not constitute independent evidence of negligence would cure any danger that the guardrail would be so considered. The court plainly exercised its discretion in granting the view, and we cannot say that in doing so it reached an unreasonable result. We reject Midway's challenge to the jury view.

VI. Expert Testimony on Industry Standards

During the trial, Midway sought to have Don Paske, the manager of the glass company that originally installed the plate-glass panels in 1965, testify as an expert. In an offer of proof, Midway's counsel stated what he expected Paske to testify to.

> He will testify that quarter inch plate glass [was] very commonly used then [in 1965] and is still very commonly used. That quarter inch plate glass and other plate glass is the majority of glass that is used in commercial buildings throughout the State of Wisconsin. That the glass company, when called upon to replace glass in an existing building, it ... compl[ies] with code ... and puts in the ... appropriate glass ....

In addition, Midway's counsel represented to the court that he wanted to have Paske testify as an expert on business practices in the glass industry in Wisconsin and that it "is the normal thing for [a building] owner to do and that is to rely upon the glass company who knows the codes to put in the appropriate glass."

The trial court rejected the offer of proof, pointing out that: (1) the issue in the case was Midway's conduct, not the conduct of one or more glass

suppliers; (2) in any event, Paske had not been qualified as an expert as to how other suppliers conduct their business; and (3) another expert witness had already testified on that subject "[s]o, you already got that in the record [and] don't need to call someone else ...."

Given our limited review of discretionary decisions of the trial court as discussed in a preceding section of this opinion, we cannot say that the court erroneously exercised its discretion in rejecting Midway's offer of proof and declining to allow Paske's testimony.[7]

VII. Mueller's Impeachment by a Prior Deposition

Midway next complains that the trial court committed reversible error when it declined to permit it to use a deposition statement given by Eric Mueller to an insurance adjuster shortly after the accident, in which Mueller stated that he had been "fooling around" just prior to the incident and had been pushed into the window.

At trial, Mueller stated that he could not remember the deposition and when Midway's counsel attempted to impeach him with a copy of the deposition, counsel for the third-party defendant, Benjamin Boos,[8] objected on grounds that, at the time the deposition was taken, Boos was not yet a party to the action and did not have the opportunity to attend the deposition.

The statute under which the trial court denied Midway's request is § 804.07, STATS., which provides as follows:

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[7] We also agree with the plaintiffs that what may have been common commercial practice in the glass industry in 1965--or even in 1975 or 1995--is not the issue. The issue in this case is whether it was reasonable conduct for a hotelkeeper to ring a swimming pool with large plate- glass panels when the hotel was built in 1965, and to maintain the windows in subsequent years in light of subsequent events.

[8] Boos was impleaded by Midway pursuant to allegations that his participation in the "horseplay" prior to the accident constituted negligence which contributed to the accident and the plaintiffs' injuries. Midway sought contribution and/or indemnification from Boos, his parents and their insurer.

> (1) ... At the trial ... any part ... of a deposition, so far as admissible under the rules of evidence ... may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> (a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

The trial court ruled that the provisions of subsection (a) come into play *only* if the requirements of (1) are met, and because Boos was not present at, and did not have notice of, Mueller's deposition, it makes no difference whether the evidence was offered for substantive purposes or for impeachment: it is inadmissible because Boos was not present.

The parties have referred us to no Wisconsin cases on the precise point. We do note, however, that several cases from other jurisdictions considering either similar state statutes or the companion federal rule, FED. R. CIV. P. 32(a), hold that where a deposition is not used as substantive evidence but for the limited purpose of impeaching the deponent as a witness, the witness's responses may be admitted as prior inconsistent statements even if the opposing party was not represented at the deposition and did not have notice of it.[9] A text commenting on the federal rule reaches a similar conclusion:

> A deposition may be used as substantive or original evidence against only [a party] who [was] present or represented at the taking of the deposition or who had due notice of the deposition. However, a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness,

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[9] *See* ***Lebeck v. William A. Jarvis, Inc.***, 145 F. Supp. 706, 730 n.5 (E.D. Pa. 1956), *aff'd in part and rev'd in part on other grounds*, 250 F.2d 285 (3d Cir. 1957); ***Appel v. Sentry Life Ins. Co.***, 739 P.2d 1380, 1382-83 (Col. 1987); ***Grocers Wholesale Coop., Inc. v. Nussberger Trucking Co.***, 192 N.W.2d 753, 755 (Iowa 1971); ***Osborne v. Bessonette***, 508 P.2d 185, 189 (Or. 1973).

> regardless of which party is seeking to introduce the witness' testimony.

4A MOORE'S FEDERAL PRACTICE, par. 32.02[2](3) (1995) (footnotes omitted).

Assuming, then, that it was error for the trial court to disallow Midway's use of the deposition,[10] the question becomes whether it appears probable from the entire evidence in the case that, had Mueller's deposition testimony been allowed into evidence, the result of the trial would have been different. *See* ***McCrossen v. Nekoosa Edwards Paper Co.***, 59 Wis.2d 245, 264, 208 N.W.2d 148, 159 (1973). We are satisfied it would not.

First, the error is but a flyspeck in the context of an eight-day trial with a record measured in feet, not inches. An error that is only *de minimis* is not grounds for reversal. ***Laribee v. Laribee***, 138 Wis.2d 46, 51, 405 N.W.2d 679, 681 (Ct. App. 1987).

Second, while Mueller did state that he did not recall making the particular statement, he also testified that he did recall the deposition and that he was telling the truth when he gave it. It also appears that Midway's counsel had him read into the record aspects of his statement that the boys had been "fooling around" before the accident and that he had been pushed into the window. Given that evidence, together with all the other testimony about events preceding the accident, we do not see how allowing further discussion of Mueller's deposition could possibly--much less probably--lead to a different result in this case.

VIII. Dresel's Contributory Negligence

Finally, Midway argues that the court erred in directing a verdict in favor of Dresel on the question of his contributory negligence.

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[10] While the admission or rejection of evidence is, as we have noted above, a discretionary determination by the trial court, it is a well-recognized rule that if a discretionary decision rests upon an error of law, the decision is beyond the limits of the court's discretion. ***State v. Wyss***, 124 Wis.2d 681, 734, 370 N.W.2d 745, 770 (1985).

In considering a motion for directed verdict, the trial court must view the credible evidence in the light most favorable to the party against whom the directing is sought and then determine "whether there is any credible evidence which under a reasonable view would support a verdict contrary to that which is sought." ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 154, 311 N.W.2d 658, 666 (Ct. App. 1981). However, "[a] verdict ought to be directed if, taking into consideration all of the facts and circumstances as they appear in evidence, there is but one inference or conclusion that can be reached by a reasonable [person]." ***City of Milwaukee v. Bichel***, 35 Wis.2d 66, 68, 150 N.W.2d 419, 421 (1967). Stated another way, "a verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion." ***Millonig v. Bakken***, 112 Wis.2d 445, 451, 334 N.W.2d 80, 83 (1983).

Midway points to the following evidence in support of its argument: (1) Dresel, while at the hospital, told an officer that he, along with twenty or thirty fellow hockey players, "were all horsing around" prior to the accident when "[s]omeone shoved him into [Mueller]" and both of them "fell into the window"; (2) a witness named Bookhout testified, "I talked to [Boos] and he said someone pushed someone, and I asked him who and he didn't give me a specific name, but his gestures indicated it was Jason Dresel"; and (3) another witness, Nikki Cohen, overheard Mueller state that he had been pushed that evening, and that he "implicated" Dresel.

Midway argued the same evidence to the trial court at the motion hearing, and when the court inquired of counsel what Dresel did or did not do that could be considered negligence, counsel responded: "The horsing around. He is engaged in pushing and shoving," and "[Dresel] pushed [Mueller] through the window." The trial court, after reviewing the evidence, concluded that, viewing it in a light most favorable to Midway's position, there was no credible evidence from which a jury could conclude that Dresel was negligent. The court reasoned:

> In viewing the evidence most favorably to the defendant, what the evidence tends to show is that from an unknown cause [Dresel] fell into or pushed [Mueller]. There is no evidence of any activity [Dresel] participated in that was negligence. The activity that [counsel for Midway] argued yesterday

> demonstrates negligence is [Dresel]'s statement that 20 to 30 of them were horsing around. I think that is too ambiguous to be proof of negligence.
>
> The gesture that Sheila Bookhout says [Boos] made at [Dresel] could be construed either as when [Boos] said somebody pushed somebody and gestured at [Dresel], it is not clear whether he was saying that [Dresel] pushed or got pushed. And it would be pure speculation to conclude one way or the other.
>
> The testimony of [Cohen] regarding [Mueller], even if you took it in the light most favorable to the defendant, that would be to conclude that [Mueller] said that [Dresel] pushed him.
>
> You would still have to find some activity that [Dresel] engaged in that was negligent, and the evidence at best supports a finding of unavoidable accident which is not negligen[ce]. There is no testimony--no one saw [Dresel] do anything that was negligent and at best one can [only] speculate from the evidence that perhaps he did something negligent. That type of speculation is not permissible.

We have set forth the trial court's reasoning at length because, while our review of the court's decision is de novo,[11] we reach the same conclusion as the trial court, and for the same reasons. Eyewitnesses to the accident uniformly placed Dresel some distance from both Mueller and Boos at the time of the accident, and Midway does not dispute that, in its aftermath, he was found lying next to the pool some seven to eight feet from the shattered

[11] We review a trial court's direction of a verdict on questions of negligence as a question of law, and consider the record independently. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 525-26, 331 N.W.2d 357, 360-61 (1983) (whether the facts fulfill a legal standard is a determination of law); *see* ***Millonig v. Bakken***, 112 Wis.2d 445, 450, 334 N.W.2d 80, 83 (1983) (on appeal of a trial court decision on a motion for directed verdict, appellate court independently evaluates the facts to determine whether a verdict should have been directed).

panel. In contrast, the evidence advanced by Midway is, as the trial court noted, wholly speculative. Cohen did not, as Midway asserts in its brief, testify that Mueller "implicated ... Dresel." Indeed, when Cohen was talking to the injured Mueller, she was not even aware that another injured boy was lying near the pool, and she did not know to whom Mueller was referring when he said he had been pushed.[12] Bookhout's testimony that Boos had indicated to her that Dresel had pushed someone prior to the accident was based not on what Boos said--he said nothing about who had done the pushing--but was based on her own interpretation of Boos's gestures during their conversation. Finally, a police officer's statement that Dresel told him that someone had "shoved him into [Mueller] at which time he and [Mueller] fell into the window" is refuted by the undisputed physical fact that Dresel had *not* fallen into and through the window with Mueller but was, as indicated, found lying next to the pool several feet away.

Beyond that, even if one were to accept the facts relied on by Midway--that Dresel and the others had been "horsing around" prior to the accident and that someone had "shoved him into [Mueller]," causing them both to fall "into the window"--and even if some negligence on someone's part might be inferred from those facts, there simply is no evidence from which to find or infer that Dresel had failed to conform his conduct to the "duty to exercise ordinary care for his or her own safety" which is the hallmark of contributory negligence. *See* WIS J I—CIVIL 1007, CONTRIBUTORY NEGLIGENCE: DEFINED.

In many ways the situation here is similar to that in ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis.2d 455, 267 N.W.2d 652 (1978), a case in which the supreme court overturned a jury finding of causal negligence on the part of a company employed to provide burglar alarm services to a business. For reasons unnecessary to consider here, the alarm was not activated on a night when a burglary occurred and, from the evidence presented, "the trier of fact could ... fairly conclude" both that the alarm company's negligence was a cause of the loss and that its negligence had "no causal connection to the loss." ***Id***. at 460, 267 N.W.2d at 655. From this, the court concluded:

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[12] It is equally unclear to us from the single page of the transcript to which Midway refers us in support of its argument precisely who Mueller was referring to in the conversation.

> The cause of Merco's loss could be attributed to a condition to which no liability attaches or to one for which liability does attach. Because there is no credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences, any finding of causation would be in the realm of speculation and conjecture. "Speculation and conjecture apply to a choice between liability and nonliability when there is no reasonable basis in the evidence upon which a choice of liability can be made." "*A mere possibility of ... causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant*."

Id. at 460, 267 N.W.2d at 655 (citation and quoted sources omitted; emphasis added). Midway has not persuaded us that the trial court erred in directing a verdict on its assertion that Dresel was contributorily negligent.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.