IN THE SUPREME COURT OF GUAM

JOSHUA W. FENWICK and ERLINE C. FENWICK,
Plaintiffs-Appellants,

v.

WATABE GUAM, INC., OCEANIC RESOURCES, INC., AMERICAN HOME ASSURANCE COMPANY, FRANK J. MARTIN AIA and MCL/MARTIN CRISTOBAL AND LAGUANA,
Defendants-Appellees,

Supreme Court Case No.: CVA05-020
Superior Court Case No.: CV0426-01

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on February 22, 2007
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; RICHARD H. BENSON, Justice *Pro Tempore*; JOHN A. MANGLONA, Justice *Pro Tempore*.

BENSON, J.:

[1] Plaintiffs-Appellants, Joshua W. Fenwick and Erline C. Fenwick (the "Fenwicks") appeal the trial court's denial of their motion for a new trial and the judgment entered after a jury trial in favor of Defendants-Appellees, Oceanic Resources, Inc. (ORI) and American Home Assurance Company. Specifically, the Fenwicks argue that the trial court erred in: (1) denying their motion for a new trial; (2) providing both a proximate cause jury instruction and a legal cause jury instruction; and (3) excluding a companion photo from exhibit G-13. The trial court did not abuse its discretion in denying the motion for a new trial. Further, while both a proximate cause jury instruction and a legal cause jury instruction should not have been given, this error was not prejudicial. Finally, the trial court did not err in excluding the photo. Accordingly we affirm the Judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

[2] This is a negligence action to recover damages for personal injuries sustained by Mr. Fenwick while at the underground parking area of the Pacific Place Building, owned by Defendant-Appellee Oceanic Resources, Inc. ("ORI"). In October 1999, Mr. Fenwick was employed for almost a month as a driver for Watabe Weddings, whose office is located at the Pacific Place Building. On the day he sustained his injuries, Mr. Fenwick left work early. When he exited the building to his car parked in the underground parking lot, Mr. Fenwick looked toward the walkway between parking stall number 1 and the lattice concrete wall but could not pass because pallets were stacked against the wall. Mr. Fenwick testified seeing four vans owned by Watabe parked in each of the handicap stalls. Mr. Fenwick also testified he could not pass between parking stalls 1 and 2 because the vans were

parked so closely together the mirrors created a barrier for him to pass. He then chose to pass between handicap stalls 2 and 3 and as he headed toward the two vans, he came into contact with the handicap sign and fell on his back and onto the concrete floor. The injuries from the incident caused Mr. Fenwick to have back surgery.

[3] The original complaint for injuries and loss of consortium named Watabe Guam, Inc.; Oceanic Resources, Inc.; Tokio Marine & Fire Insurance Company, Ltd.; and American Home Assurance Company as defendants. Excerpts of Record ("ER"), tab 1 (Compl., Mar. 6, 2001). An amended complaint was later filed to include Frank J. Martin, AIA and MCL/Martin Cristobal and Laguana as additional defendants. ER, tab 4 (First Amended Compl., Dec. 20, 2001). A stipulation and order to dismiss was entered dismissing defendant Frank J. Martin, AIA, without prejudice. Summary Judgment was also granted in favor of Watabe Guam, Inc. and its insurer, Tokio Marine & Fire Insurance Company, Ltd. ER, tab 7 (Stip. & Order, Dec. 3, 2002). The remaining defendants included Oceanic Resources, Inc.; its insurer American Home Assurance Company; and MCL/Martin Cristobal and Laguana ("MCL"). MCL made no appearance in the case and was not represented by counsel at trial. During the trial the Fenwicks argued the placement and design of the handicapped signs failed to comply with Guam law because the signs were not placed in the center of the parking stalls, had pointed sharp edges and were placed too low. The Fenwicks also complained that Mr. Fenwick was not able to adequately see the sign because of inadequate lighting in the parking area.

[4] Following a nine-day jury trial, the jury determined after deliberating only one hour that both ORI and MCL were negligent but did not find their negligence to be the proximate and legal cause of Mr. Fenwick's injuries. Judgment was entered in favor of ORI and its insurer. The Fenwicks moved

for a new trial which the trial court ultimately denied. ER, tab 16 (Mot. New Trial, Dec. 1, 2003). The Fenwicks timely appeal from the judgment and order denying the motion for a new trial.

III. JURISDICTION

[5] This court has jurisdiction over this appeal from a final judgment pursuant to 48 U.S.C. §1424-1(a)(2) (Westlaw 2008), and 7 GCA §§ 3107(b) and 3108(a) (2005).

IV. STANDARD OF REVIEW

[6] Denial of a motion for a new trial by a trial court is reviewed for an abuse of discretion. *B.M. Co. v. Avery*, 2002 Guam 19 ¶ 10. "When reviewing the denial of a motion for a new trial, the inquiry is whether the verdict is either supported by substantial evidence or 'whether the jury's decision is against the clear weight of the evidence.'" *Id.*, (quoting *Leon Guerrero v. DLB Constr. Co.*, 1999 Guam 9 ¶ 21. A trial court's rejection of a proposed jury instruction is reviewed for an abuse of discretion. *Id.* An evidentiary ruling by the trial court is also reviewed for an abuse of discretion and is not reversed unless prejudice affecting the verdict is shown. *J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co., Ltd.*, 1998 Guam 19 ¶ 31. Finally, conclusions of law are reviewed de novo. *Cepeda v. Gov't of Guam*, 2005 Guam 11 ¶ 10.

V. DISCUSSION

A. Denial of a Motion for a New Trial

[7] Review of a trial court's denial of a motion for a new trial requires examination of all the evidence presented to the jury in order to determine whether the evidence was sufficient to support the verdict. *J.J. Moving Servs.*, 1998 Guam 19 ¶ 28. "Such evidentiary issues will almost always require a careful examination of the entire trial transcript." *Id.* Before disturbing a verdict, we must find that the jury's decision was against the clear weight, overwhelming weight, or great weight of

the evidence. *Id.* "This [criterion] suggests [that] a trial judge should not displace a verdict because he or she disagrees with the jury's conclusion." *Id.* Rather, the wrong must be extreme in order for a judge to invade the jury's function, and we cautiously review a trial court's decision denying a new trial. *Id.*

[8] The Fenwicks do not challenge the sufficiency of the evidence to support the verdict but instead allege two errors on appeal. First, they argue that the trial court erred in providing a proximate cause jury instruction which confused the jury because the jury found that ORI and MCL were both negligent but that their negligence was not the proximate cause of the injury. Second, they argue that the trial court erred in excluding a companion photo to exhibit G-13 provided by ORI's counsel. The Fenwicks did not submit the entire trial transcripts and so our review is limited to the transcripts provided on appeal. The transcripts provided, however, which are relevant to the issues presented include the testimonies of Mr. Fenwick, Dr. Frank Perez, Dr. Rick Gill and excerpts of discussions between counsel and the trial court judge on the jury instructions and evidentiary ruling of the photo. We will therefore review the transcripts when analyzing the errors alleged to have been committed by the trial court.

B. Proximate Cause and Legal Cause Instructions

[9] We first address whether the trial court erred in instructing the jury with both a proximate cause instruction and a legal cause instruction. As stated earlier, a trial court's denial of a proposed jury instruction is reviewed for an abuse of discretion. *B.M. Co. v. Avery*, 2002 Guam 19 ¶ 10. "A trial court has wide discretion as to what instruction to give the jury in any case," *Id.* and "[o]n review, the inquiry is whether the jury was likely misled by the instruction given and whether a different outcome would likely have resulted had the proposed instruction been given." *Id.* at ¶ 31.

[10] Normally, to "preserve for appeal a challenge to a jury instruction, the challenging party must have clearly stated to the trial court the matter to which the party objects and the grounds for that objection." *Id.* at ¶ 27. Our review of the record shows that the Fenwicks objected to the trial court giving the proximate cause instruction and while the Fenwicks did not specifically object to the giving of the legal cause instruction, they did argue that it was improper for the court to give both instructions. In our review this was sufficient to preserve for appeal the challenge to the legal cause instruction so we will examine both instructions.

[11] The proximate cause instruction given to the jury here is identical to California's Bar Approved Jury Instruction (BAJI) ("proximate cause") 3.75 (7th ed. 1986).[1] The trial court also instructed the jury on legal cause.[2] The trial transcript further show the trial court, following the proximate cause instruction, gave the jury a concurrent cause instruction.[3]

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[1] The proximate cause instruction given by the trial court is from the Seventh Edition (1986) of BAJI. The proximate cause instruction provided by the trial court read:

> JURY INSTRUCTION NO. 5C PROXIMATE CAUSE - DEFINED
> A proximate cause of injury, damage, loss or harm is a cause which, in natural and continuous sequence, produces the inquiry, damage, loss or harm and without which the injury, damage, loss or harm would not have occurred.

ER, tab 19 (Jury Inst., Nov. 27, 2006).

[2] JURY INSTRUCTION NO. 5B LEGAL CAUSE – DEFINED

> A legal cause of injury, damages, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm.

Supplemental Excerpts of Record ("SER") at 4 (Jury Inst., Jan. 12, 2007).

[3] Neither party provided on appeal a written copy of the concurrent cause instruction. However, it can be inferred that such instruction was instruction no. 5D included in the trial transcript, which read:

> There may be more than one cause of an injury. When negligent conduct of two or more persons, or negligent or wrongful conduct and a defective condition contributes as a cause of an injury, the conduct of each is a cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent or wrongful conduct of a person who is not a party is also a cause of the injury.

Transcript ("Tr."), vol. V at 127 (Jury Trial, Sept. 15, 2003).

[12] The law is well settled that to succeed in a negligence action a plaintiff must prove: (1) "A duty, or obligation, recognized by law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks of harm"; (2) "A breach of that duty, or failure to conform to the required standard"; (3) "Proximate cause (a close and causal connection, also known as 'legal cause')"; and (4) "Actual loss or damage resulting to the interests of another." *Merchant v. Nanyo Realty, Inc.* 1998 Guam 26 ¶ 14 (quoting Keeton, et al., Prosser and Keeton on the Law of Torts § 30 at 165-65 (5th ed. 1984)). Although Prosser and Keeton equate proximate and legal cause, the discussion that follows will show that there is a subtle distinction between these two concepts.

[13] "[T]he 'proximate cause' element of a negligence action embraces, at the very least, a causation-in-fact test, that is, the defendant's negligence must be a cause-in-fact of the plaintiff's claimed injuries." *Stahl v. Metro. Dade County*, 438 So. 2d 14, 17 (Fla. Ct. App. 1983). A defendant's conduct is not a cause-in-fact of an injury when the injury would have occurred even if the conduct had not taken place. *Waste Mgmt., Inc. v. S. Cent. Bell Tel. Co.*, 15 S.W.3d 425, 430 (Tenn. Ct. App. 1997). When determining cause-in-fact, many courts traditionally apply the "but for" test, that is, "to constitute proximate cause there must be such a natural, direct, and continuous sequence between the negligent act [or omission] and the [plaintiff's] injury that it can reasonably be said that *but for* the [negligent] act [or omission] the injury would not have occurred[4]." *Stahl* 438 So. 2d at 17-18 (quotation omitted, emphasis original).

[4] The terms "but for" and "without which" have been used interchangeably when formulating the "but for" test, and the meaning is the same, with "but for" being the preferred terminology. *Stahl*, 438 So. 2d at 18 n.2.

[14] As explained by Prosser and Keeton, the "but for" test states that "[t]he defendant's conduct is a cause in fact of the event if the event would not have occurred but for that conduct; conversely the defendant's conduct is not a cause of the event, if the event would have occurred without it." Keeton § 41, at 266.

[15] Prosser and Keeton further point out the one type of case where the "but for" test does not apply stating:

> Restricted to the question of causation alone, and regarded merely as a rule of exclusion, the 'but for' rule serves to explain the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed. Two motorcycles simultaneously pass the plaintiff's horse, which is frightened and runs away; either one alone would have caused the fright. A stabs C with a knife, and B fractures C's skull with a rock; either wound would be fatal, and C dies from the effects of both. The defendant sets a fire, which merges with a fire from some other source; the combined fires burn the plaintiff's property, but either one would have done it alone. In such cases it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it; and it is equally clear that neither can be absolved from that responsibility upon the ground that the identical harm would have occurred without it, or there would be no liability at all.

Id. at 266-67.

[16] In cases where two independent causes concur to produce an injury that either of them alone could have produced, courts have employed the "substantial factor" test. *Id.* The substantial factor test found in the Restatement (Second) of Torts § 431 states:

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in harm.

Restatement (Second) of Torts § 431 (1965).

[17] The substantial factor test in section 431 does not replace the "but for" test but instead retains the principle as an essential part of the causation-in-fact analysis. *Id.* Section 432(1) explains that: "Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." *Id.* "Thus, the 'substantial factor' test, like the 'but for' test, incorporates the concept that conduct cannot be a [cause-in-fact] of an injury if the injury would still have occurred even if the conduct had never taken place." *Waste Mgmt., Inc.*, 15 S.W.3d at 432. An exception to this basic principle of causation occurs when "two forces are actively operating, one because of any misconduct on his part, and each of itself is sufficient to bring about harm to another . . . ." Restatement (Second) of Torts § 432(2). The "substantial factor" test is broad enough to cover this exception as well. *Id.*

[18] The proximate cause instruction given by the trial court in this case was identical to California's BAJI 3.75 (7th ed. 1986). The Notes following BAJI 3.75 explain that "[w]here injury may have resulted from either of two causes operating alone, this Instruction 3.75 on proximate cause is improper and Instruction 3.76 on legal cause should be given." *Id.* In order to determine whether the trial court erred in instructing the jury on proximate cause we first must ascertain whether the facts of this case involve concurrent "independent" causes making the "but for" test inapplicable. Concurrent independent causes involve "multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the harm.[5]" *Viner v. Sweet*, 70 P.3d 1046, 1051 (Cal. 2003).

[5] A concurrent independent cause should not be confused with a concurrent cause which involves multiple forces operating at the same time. *Viner*, 70 P.3d at 1240 n.3.

[19] In a case involving multiple tortfeasors, the Supreme Court of Missouri in *Callahan v. Cardinal Glennon Hospital* addressed the issue of when the "but for" causation test is applicable. 863 S.W.2d 852, 861 (Mo. 1993). The plaintiff in *Callahan*, filed a medical malpractice action against the hospital, the doctor, the doctor's employer, and the manufacturer of the vaccine.[6] *Id.* at 857. The plaintiff alleged at trial that the failure to properly treat the abscess after the infant received the live polio vaccine caused his immune system to suppress, which caused him to contract paralytic polio. On appeal, plaintiff argued that because the "injury resulted from multiple tortfeasors and more than one cause, the substantial factor causation test should be applied" and not the "but for" test. *Id.* at 860. In explaining the confusion the court stated:

> One reason for the confusion as to when a "but for" test is required is because the Restatement (Second) of Torts uses "substantial factor" in a different way than *Prosser*. Section 430 of the Restatement (Second) requires "legal cause" for liability. Section 431 provides that legal cause is present if the defendant's conduct is a substantial factor in bringing about the harm. Section 432 provides that the conduct is not a substantial factor unless it meets the "but for" test, which is always required except for the very narrow exception where there are two independent torts, either of which by itself would have caused the injury.

Id. at 861.

[20] To show when not to apply the "but for" test, the *Callahan* court gave a law school example of a multiple cause case involving two independent tortfeasors, i.e. the two fires case. *Id.* In the example, two independent tortfeasors set fires on opposite sides of a mountain, the fires burn toward the cabin, and either fire was sufficient to destroy the cabin. *Id.* In this instance, the court said the "but for" test does not "accurately test for causation in fact because the absence of either fire [would] not save the cabin." *Id.*

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[6] At trial however, the only defendants that remained were the hospital and the doctor's employer. *Callahan*, 863 S.W.2d at 857.

[21] The court further explained that:

> Applying the 'but for' causation test to fire number one results in the conclusion that the cabin would have burned even if fire number one had not occurred because fire number two would have burned the cabin. For the same reason, applying the 'but for' causation test to fire number two leads to the conclusion that the cabin would have burned even if fire number two had not occurred because fire number one would have burned the cabin. Nevertheless, it is obvious that both fires are causes in fact. This limited circumstance, called a 'two fires' case, is the only situation where the Restatement (Second) would *not* require a 'but for' test.

Id.

[22] The court ultimately held that the "but for" test for causation applies in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury. *Id.* at 862-63. The "but for" test applies in other cases involving multiple causes because the test "operates only to eliminate liability of a defendant who cannot meet [the 'but for'] test because such defendant's conduct was not casual." *Id.* at 862. "The fact that the conduct of a particular defendant either does or does not meet the 'but for' causation has no impact on the remaining defendants. The remaining defendants rise or fall on their own 'but for' causation test." *Id.*

[23] Application of the "but for" test for causation where multiple causes are present was also addressed in *Stahl*, 438 So. 2d at 22. *Stahl* was a case involving the negligent maintenance of a bicycle path which caused the decedent to veer onto a street and be struck by an oncoming car. *Id.* at 16. The decedent in *Stahl* was riding his bicycle on a path built by the county. The path, made of asphalt was not regularly maintained and the lack of maintenance caused some areas to be bumpy. *Id.* As a result, tree roots started growing from underneath the asphalt. *Id.* While riding on the path, the decedent attempted to avoid an area that was poorly maintained and difficult to ride over, causing the decedent to drive off the path onto a grassy area and into the adjoining street where he was struck and killed by an oncoming car. *Id.* The personal representative of the decedent's estate

filed a wrongful death action against the county, arguing that the failure to maintain the bicycle path was a proximate cause of the decedent's death. *Id.* Applying the "but for" test, the *Stahl* court concluded that it was not a concurring independent cause case where the "but for" test fails. *Id.* at 22.

[24] Instead, the court stated:

> The negligent maintenance of the bicycle path, the act of the plaintiff's decedent in driving into the street, and the act of the oncoming car in striking the plaintiff's decedent could not, acting individually and independently of one another, have struck and killed the said plaintiff's decedent; all of these forces combined in sequence to lead to the decedent's death and all arguable are a cause-in-fact to the said death under the 'but for' test" and therefore, the substantial factor exception did not apply.

Id.

[25] This case involves multiple tortfeasors. At trial there was a factual dispute as to the cause of the accident. The Fenwicks argued that ORI was negligent in failing to maintain the parking area. Specifically, that ORI:

(1) failed to provide adequate lighting in the exit way which would allow Mr. Fenwick to avoid the sign;

(2) failed to clear the walkway between the first stall and the lattice concrete wall where pallets were stacked that would have provided an alternate route for Mr. Fenwick to get to his car;

(3) allowed Watabe Wedding vans to illegally park in the handicap stalls and because the vans were parked so closely together, the mirrors created a barrier for Mr. Fenwick to pass; and

(4) failed to comply with Guam law because the handicap signs had sharp, pointed corners, were not placed in the center of the parking stalls as required, and were positioned too low and not in compliance with the height requirements.

Transcript ("Tr."), vol. V at 16-20 (Jury Trial, Sept. 15, 2003). The Fenwicks further contended that MCL was negligent in not complying with Guam law with respect to the design and placement of the handicap signs. *Id.* at 15. The Fenwicks argued that both MCL and ORI's negligent acts were a

substantial factor in bringing about the harm to Mr. Fenwick. In opposition, ORI maintained that Mr. Fenwick was contributory negligent for failing to see and avoid the sign.

[26] The Fenwicks do not argue that instructing the jury on proximate cause was particularly inappropriate because there were multiple causes contributing to Mr. Fenwick's injuries. Instead, they argue that providing both a proximate cause and legal cause instruction confused the jury. The Fenwicks had requested that the trial court give either instruction but preferred the legal cause instruction which employs the substantial factor test.

[27] We conclude however, that, Mr. Fenwick's injuries were not the result of concurrent independent causes. The record before the court does not show that each of the alleged negligent acts by ORI or MCL independently caused Mr. Fenwick's injuries. The theory of the case as presented by the Fenwicks was that ORI was negligent in its use, maintenance and management of the parking area, MCL was negligent in its design and placement of the signs and this negligence and failure to comply with Guam law in installing the handicap signs caused the accident. The failure of ORI to provide adequate lighting to the exit way, clear the walkway where pallets were stacked, clear the vans from the handicap stalls, and ORI and MCL's non-compliance with Guam law installing the handicap signs, could not acting individually and independently of one another have caused Mr. Fenwick's injuries. Rather, all these concurrent causes lead to the harm and are a cause-in-fact to his injuries under the "but for" test. Because this case is not a case involving concurrent independent causes, a proximate cause instruction was appropriate.

[28] While the substantial factor instruction assists in resolving the problem of independent causes, it is also useful in resolving two other types of cases: (1) "where a similar, but not identical result would have followed without the defendant's act"; and (2) "where one defendant has made a

clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire." *Mitchell v. Gonzales*, 819 P.2d 872, 878-79 (Cal. 1991). Neither of these types of cases is applicable here. For instance, applying the first type of case if the walkway between the first stall and the lattice wall had been clear, Mr. Fenwick would have passed that way, thereby avoiding striking the sign.

[29] We recognize, however, that the California Supreme Court in *Mitchell v. Gonzales* disapproved as misleading the use of the "proximate cause" instruction in any negligence case concluding that "the court erred when it refused to give [a legal cause instruction] and instead gave [a proximate cause instruction]. *Id.* at 879. The court stated the term "proximate cause" was "conceptually and grammatically deficient" because it could mislead the jury into focusing on the cause that as to time and space was nearest to the injury. *Id.* at 878.

[30] However, *Mitchell* can be distinguished from the present case in that one defendant in *Mitchell* was much closer in time and space to the injury than the other defendants. *Id.* at 874-75. In fact, one defendant watched the decedent drown from a few feet away after other defendants on shore had failed to prevent the decedent from entering deeper water. *Id.* In the present case, no single defendant was significantly closer in time and space to Mr. Fenwick's injuries, and there was little danger of the jury misconstruing the legal term "proximate cause."

[31] Having determined that the trial court did not err in giving a proximate cause[7] instruction since this case did not involve independent causes we next address whether it was proper for the trial court to also instruct the jury on legal cause.

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[7] In *Nissan Motor Corp. in Guam v. Sea Star Group Inc.* we stated "[p]roximate cause includes a determination that the negligent conduct of an actor is the cause-in-fact of the injury suffered as well as a determination that the act produced

[32] The court in *Mitchell* reasoned that "BAJI Nos. 3.75 and 3.76 are alternative instructions that should not jointly be given in a single lawsuit." *Id.* at 876. Moreover, the "but for" test should not be employed when two "causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result." *Id.* (quotation omitted). The proper rule in those instances is to apply the substantial factor instruction which subsumes the "but for" test. *Id.* "If the conduct which is claimed to have caused the injury had nothing at all to do with the injuries, it could not be said that the conduct was a factor, let alone a substantial factor, in the production of the injuries." *Id.* at 878 (quotation omitted).

[33] We agree with the *Mitchell* court that the proximate cause instruction and legal cause instruction are mutually exclusive instructions and should not jointly be given. Therefore the trial court erred in giving both instructions to the jury but in order to require reversal, this error must be prejudicial which we now address.

[34] Title 7 GCA section 15802[8] provides "no judgment, decision or decree shall be reversed by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such . . .

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the injury in a natural and continuous sequence unbroken by any new independent cause which supersedes the negligent conduct of the original actor." 2002 Guam 5 ¶ 31 (quotation omitted).

[8] Title 7 GCA § 15802 provides in its entirety:

> Errors and Defects and Reversal of Judgment.
>
> The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. *There shall be no presumption that error is prejudicial, or that injury was done if error is shown.* (emphasis added).

7 GCA § 15802 (2005).

instruction was prejudicial." 7 GCA § 15802 (2005). Section 15802 is identical to California Civil Procedure Code § 475. 7 GCA § 15802, SOURCE. In interpreting CCP 475, California courts have held that the appellant has the burden to not only affirmatively show error but that the error was sufficiently prejudicial to warrant reversal. *San Diego Housing Comm'n v. Indus. Indem. Co.* 80 Cal. Rptr. 2d 393, 404 (Ct. App. 1998) ("Under Code of Civil Procedure section 475, error is grounds for reversal where there was substantial injury from the error and a different result would have been probable absent the error. Appellants have the burden of showing such prejudicial error."); *Red Mountain, LLC. v. Fallbrook Pub. Util. Dist.*, 48 Cal. Rptr. 3d 875, 887 (Ct. App. 2006). ("[A]n appellant has the burden to show not only that the trial court erred but also that the error was prejudicial.").

[35] The Fenwicks argue that the requirements of section 15802 are unconstitutional and contrary to the decisions of the United States Supreme Court, the Ninth Circuit, and possibly our Organic Act, which applies the United States Constitution's Seventh Amendment right to trial by jury to Guam.[9] The Fenwicks submit there should be a presumption of prejudice or reversible error unless the party contending harmless error affirmatively shows otherwise. To support their argument the Fenwicks cite to two United States Supreme Court cases, *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, (1919) and *McCandless v. United States*, 298 U.S. 342 (1936).

[36] In *Fillippon*, the court, citing no authority, stated:

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

250 U.S. at 82.

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[9] *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶13.

[37] Congress that same year enacted an amendment to the federal code section codifying the harmless error doctrine, section 269 of the Judicial Code (28 U.S.C.A. § 391), providing:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

McCandless, 298 U.S. at 347 (quoting 28 U.S.C.A § 391 (1919)).

[38] Years later, the Supreme Court in *McCandless* determined that the harmless error rule as stated in *Fillippon* was unaffected by the 1919 amendment. 298 U.S. at 347. The Court found that the well-settled common-law rule was undisturbed, and an erroneous ruling relating to the substantial rights of a party should be reversed "unless it affirmatively appears from the whole record that it was not prejudicial." *Id.* at 347-48. This rule, however, is not based on the Seventh Amendment but instead is grounded in "the original common-law harmless-error rule [that] put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Chapman v. California*, 386 U.S. 18 (1967). Although the Fenwicks argue that a line of Ninth Circuit cases traces back to this presumption of prejudicial error originating in *McCandless*, none of these cases, *McCandless* included, are based on any Constitutional doctrine construing the right to a civil jury trial under the Seventh Amendment. We must therefore be guided first and foremost by the plain language of our own statute, informed by California case law construing the statute from which section 15802 was derived and not by the federal courts' construction of their federal judicial code. These California cases make clear that appellants have the burden of showing not only error but that the error was prejudicial.

[39] In considering whether an error was harmless the Ninth Circuit in *Haddad v. Lockhead California Co.* recognized "appellate courts have three possible standards of review: harmless

beyond a reasonable doubt; high probability of harmlessness; and more probably than not harmless." 720 F.2d 1454, 1458 n.7 (9th Cir. 1983) (citing R. Traynor, *The Riddle of Harmless Error* (1972)). The court stated that an error instructing the jury in a civil case requires reversal unless the error is more probably than not harmless.

[40] The Supreme Court in *O'Neal v. McAninch* relied on Chief Justice Roger Traynor's articles when explaining harmless error quoting:

> The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" Than for the judge to try to put the same question in terms of proof burdens (*e.g.*, "Do I believe the party has borne its burden of showing . . .?"). As Chief Justice Traynor said:
>
> > [I]t is still the responsibility of the . . . court, once it concludes there was error, to determine whether the error affected the judgment. It must do so without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial.

513 U.S. 432, 436-37 (1995) (quoting Traynor, *supra*).

[41] The language of section 15802 that "[t]here shall be no presumption that error is prejudicial, or that injury was done if error is shown" simply restates Justice Traynor's position requiring the court to make its determination based on the entire record before it. 7 GCA § 15802. Just because the trial court committed error in giving both the proximate cause and legal cause instruction does not, as the Fenwicks argue, suggest the error is presumed to be prejudicial. The Fenwicks' argument that section 15802 is unconstitutional is rejected because they as appellants, must not only show error but prove the error is prejudicial.

[42] We now must proceed with determining the prejudicial effect of the trial court error in giving both the proximate cause and legal cause instructions. When an erroneous instruction is given, judgment will not be reversed, unless it appears from the entire record that the instruction was prejudicial and resulted in substantial injury to the appellant, and that a different outcome would have been probable if the erroneous instruction was not given. *Whitely v. Philip Morris Inc.*, 117 Cal. App. 4th 635 (Cal. App. 2004). "Error is considered prejudicial when it appears probable that an improper instruction misled the jury and affected its verdict." *Krouse v. Graham*, 562 P.2d 1022, 1028 (Cal. 1977).

[43] While there is no precise formula in assessing prejudice from instructional error, the California Supreme Court in *LeMons v. Regents of Univ. of Cal.* outlined five separate factors to be considered: "(1) the degree of conflict in the evidence on critical issues, (2) whether respondent's arguments to the jury may have contributed to the instructions misleading effect, (3) whether the jury requested a rereading of the erroneous instruction or of related evidence, (4) the closeness of the jury's verdict, and (5) the effect of other instructions in remedying the error." 582 P.2d 946, 950 (Cal. 1978) (internal citations omitted). When applying these factors however, the California courts consider these factors as a valid guide and not as providing an exclusive list of relevant factors or requiring that all five factors necessarily be dispositively involved. *See Mitchell v. Gonzales*, 819 P.2d 872 at 880-81; *Weiner v. Fleischman*, 816 P.2d 892, 899-901 (Cal. 1991); *Mock v. Mich. Millers Mut. Ins. Co.*, 5 Cal. Rptr. 2d 594, 612-15 (Ct. App. 1992). We are persuaded by these factors and will apply them to the facts in this case.

[44] The first factor we consider is the degree of conflict in the evidence on the critical issue. Conflict in the evidence describes "the closeness of the case, including the disparity in the parties'

factual presentations and the inferences to be drawn." *Mock*, 5 Cal. Rptr. 2d at 613. In weighing the prejudicial impact of an instruction, we must view the evidence and inferences most favorable to the losing party, and assume the jury might have believed the losing party's evidence and, if properly instructed, might have decided in the losing party's favor. *Henderson v. Harnischfeger Corp.*, 527 P.2d 353, 359-60 (Cal. 1974), *Shell Oil Co. v. Winterthur Swiss Ins. Co.* 15 Cal. Rptr. 2d 815, 852-54 (Ct. App. 1993).

[45] The critical issue in this case was causation. The evidence conflicted on the issue of whether Mr. Fenwick sustained the injuries as alleged. The Fenwicks' claimed at trial that Mr. Fenwick's injuries were caused by ORI's negligent use, maintenance and management of the parking area and MCL's negligent design and placement of the handicap signs. The evidence demonstrated that Mr. Fenwick exited the building to his car but could not pass between the lattice wall and stall number 1 because there were pallets stacked along the wall. Further, two Watabe vans[10] were parked in stalls 1 and 2, and Mr. Fenwick testified that the vans were parked so closely the mirrors touched, preventing him from passing through the stalls. The testimony of Mr. Fenwick on how the vans were parked on the date of the accident however conflicted. Mr. Fenwick testified that the vans in stalls 2 and 3 were not parked within the lines of the stalls but at an earlier deposition testified they were. He later corrected his deposition to reflect that he did not recall whether the vans were in fact parked within the lines. There was also evidence that the height and placement of the handicap signs were not in compliance with Guam law.

[10] Mr. Fenwick testified at trial that the vans parked in stalls 1, 2, and 3 were Nissan Quest vans. Tr., vol. III at 11 (Jury Trial, Sept. 11, 2003).

[46] Mr. Fenwick testified that prior to the incident he worked as a part-time employee for Watabe Weddings for almost a month and was instructed to park the Watabe vans in the handicap stalls. Tr., vol. I at 50 (Jury Trial, Sept. 8, 2003). He admitted to parking the vans in the stalls on other occasions, in particular stalls 2 and 3 and would pass the signs when entering and exiting the building after parking the vans. In fact, Mr. Fenwick stated he saw the sign at least a hundred times. *Id.* at 52-53. Because he could not pass through the walkway between the lattice wall and stall number 1 and the walkway between stalls 1 and 2, he chose to pass through stalls 2 and 3, by stepping off the curb when his chest area hit the sign causing him to fall backwards.[11] On cross-examination when asked whether he could have walked through the diagonal lane between stalls 3 and 4, Mr. Fenwick answered "yes, sir, I could have done that." Tr., vol. III at 15 (Jury Trial, Sept. 11, 2003).

[47] The testimony of ORI's expert witness, Dr. Frank Perez, contradicted Mr. Fenwick's testimony. Dr. Perez testified that, "Based on [Mr. Fenwick's] allegation that the lower part of the sign struck him in the chest area, it was more likely that Mr. Fenwick had slipped and was in the process of falling before he allegedly hit the sign." *Id.* at 114. Dr. Perez further testified that it was his opinion that Mr. Fenwick, who was familiar with the parking area as an employee of Watabe Weddings, chose a poor path of travel in between the vans in stalls 2 and 3. *Id.* at 105. Dr. Perez also testified that the better path to take would have been either the handicap aisle which was twelve

[11] Here again, Mr. Fenwick's testimony about how he stepped off the sidewalk was inconsistent. During cross-examination, it was noted that Mr. Fenwick originally stated at his deposition that he attempted to step from the sidewalk to the parking stop, but later in correcting his deposition testimony stated he was stepping towards the parking curb. Tr., vol. I at 54-55 (Jury Trial, Sept. 8, 2003). Additionally, in Dr. Lombard's medical report from Mr. Fenwick, Mr. Fenwick stated first that he slipped backwards but also stated he may have tripped. At trial however, Mr. Fenwick testified he fell down when he ran into the sign. *Id.* at 24-26.

feet from the sign between stalls 1 and 2 or through the other handicap aisle further down between stalls 3 and 4, almost eight feet from the handicap sign he struck. *Id.* at 108–109.

[48] The Fenwicks' expert witness, Dr. Rick Gill, however disagreed with Dr. Perez's opinion on the path taken testifying instead that Mr. Fenwick chose a reasonable path because the path between stalls 2 and 3 was wider than what existed between stalls 1 and 2. Tr., vol. II at 44-47 (Jury Trial, Sept. 9, 2003). Although Dr. Gill testified that Mr. Fenwick chose a reasonable path between stalls 2 and 3, he later testified on cross-examination that either path, between stalls 1 and 2 or between stalls 2 and 3, was an acceptable path. *Id.* at 84. Even if the van parked in stall 1 was overlapping the walkway between stalls 1 and 2, Dr. Gill testified that such pathway would have been a proper pathway for Mr. Fenwick to have taken provided there was sufficient space for him to fit and that there was sufficient space so that one person could physically fit. *Id.* at 85-86.

[49] To conclude, although Mr. Fenwick stated he could not pass through stalls 1 and 2, the expert testimony of Dr. Perez indicates that the space between stalls 1 and 2 was an acceptable path for Mr. Fenwick. Dr. Gill's testimony also confirmed this was a proper pathway. Fenwick testified however that because he could not pass through stalls 1 and 2, he chose to walk through stalls 2 and 3, and as he was stepping down off the sidewalk his right shoulder came into contact with the handicap sign causing him to fall backwards. A review of the record shows that the conflict in evidence was not great and the case as to causation was not close. Assuming the jury might have believed Mr. Fenwick's significant evidence that he could not pass between the lattice wall and stall 1 or between stalls 1 and 2 we cannot say that the jury if properly instructed would have decided in the Fenwicks' favor because of Mr. Fenwick's conflicting testimony, his familiarity with the parking area and the fact that alternate acceptable routes were available. We therefore conclude in applying this first

factor regarding the degree of conflict in the evidence on the critical issue that the jury was not misled or confused by the erroneous instruction.

[50] Second, we consider whether ORI's closing arguments to the jury contributed to the instruction's misleading effect. The only reference to the proximate cause and legal cause instructions by ORI's counsel was the reading of both instructions to the jury in its argument. ORI strongly argued to the jury that Mr. Fenwick's credibility was at issue because of his inconsistent statements in reporting how the accident occurred. ORI denied causing Mr. Fenwick's injuries and instead argued that it was Mr. Fenwick's negligence that caused his injuries. ORI's counsel did not emphasize the language in the legal cause instruction and therefore, the closing arguments regarding Mr. Fenwick's contributory negligence did not add to the instruction's misleading effect.

[51] Third, we consider whether the jury requested a rereading of the erroneous instruction or of related evidence. The jury had a copy of the instructions to use during deliberations and did not ask for any rereading or clarification on any instructions. The absence of any request or clarification by the jury of either the proximate cause or legal cause instructions suggests that the jury was not misled or confused by giving both instructions.

[52] Fourth, we examine the closeness of the jury's verdict. Trial in this case lasted nine days and after only an hour of deliberation, the jury returned a special verdict unanimously concluding that ORI and MCL were negligent but that the actions of neither ORI nor MCL were a proximate and legal cause of the accident. After reading the verdict the jurors were polled answering affirmatively to the verdict as read. The short deliberation and unanimous verdict tends to show the verdict was not close and that the jury was not misled or confused in determining the cause of Mr. Fenwick's injuries. The evidence showed that Mr. Fenwick had alternate routes he could have taken to his car

to avoid the accident, and the jurors were not confused about whether ORI and MCL were the proximate or legal cause of Mr. Fenwick's injuries. The testimony from the expert witnesses indicated that the pathway between stalls 1 and 2, and between stalls 3 and 4 were acceptable paths, and Mr. Fenwick testified that nothing prevented him from walking further to the pathway between stalls 3 and 4. If properly instructed, the jury could have found ORI and MCL negligent in its failure to properly maintain and manage the parking area or negligent in failing to comply with Guam law with respect to the placement of the handicap sign, but that such negligence was not the proximate cause of the injuries when it was apparent that alternate routes existed.

[53] Finally, we consider the effect of the other instructions in remedying the error. The trial court first instructed the jury on the definitions of legal cause and proximate cause. The remaining and longer instructions relating to cause, used "cause" without an adjective at least six (6) times, including, "[t]here may be more than one cause of an injury." Tr., vol. V at 127 (Jury Trial). These instructions, without more, would have remedied the error of giving a legal cause instruction. The court also instructed the jury with the following:

> (1) Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to the facts determined by you not to exist. Do not conclude that because an instruction has been given, that I am expressing an opinion as to the facts. *Id.* at 119.
>
> (2) A risk of harm is unreasonable if the degree of the risk outweighs the usefulness of a person's conduct. In balancing risk against usefulness, you must consider the extent to which a person's objectives can be adequately advanced or protected by another or less dangerous course. A particular risk is unreasonable if a person reasonably can accomplish the same result by other conduct which involves less opportunity for harm to others. In determining whether an act by a person constituted an unreasonable risk of harm, you should consider all other surrounding circumstances shown by the evidence. *Id.* at 127.

(3) A dangerous condition is a condition of property that created a substantial risk of injury when the property or adjacent property is used with due care, and in a manner in which it is reasonably foreseeable that it will be used. *Id.*

(4) The owner of the premises is under a duty to exercise ordinary care in the use, maintenance or management of such premises in order to avoid exposing persons or other property to an unreasonable risk of harm. . . . *Id.* at 128.

(5) A pedestrian who is exercising ordinary care, and making normal use of a public sidewalk, has a right to assume it is in reasonably safe condition, unless he or she knows of a - - or reasonably should know it is not in that condition. The exercise of ordinary care does not require one to look fixedly at the walk in front, to be on constant lookout for danger; however, one is required to use ordinary care for one's own safety, and in that regard, reasonably to use eyesight and other faculties for one's own safety. *Id.* at 129.

[54] A later jury instruction also asked the jurors to decide whether ORI was negligent and whether the negligence was the proximate and legal cause of the injury sustained by Mr. Fenwick. *Id.* at 128. The jury's decisions were made as special verdicts. On the special verdict form provided to the jury, which was separate from the jury instructions, the jurors also had to record whether ORI's negligence was the proximate and legal cause of the injury. The later jury instruction and the special verdict form did not remedy the error of providing a legal cause instruction but this is only one factor out of the five factors considered, which supports prejudice to the Fenwicks.

[55] We therefore conclude that it is not reasonably probable that a result more favorable to the Fenwicks would have resulted had both the proximate cause and legal cause instructions not been given. Viewing the instructions as a whole in the context of this case the instructions did not mislead or confuse the jury or prejudice the Fenwicks. While the trial court erred in providing both a proximate cause instruction and a legal cause instruction we find, as required under section 15802, that the Fenwicks have failed to show they were prejudiced by the error--that is, that the error affected or would have affected the outcome.

C. Admissibility of Companion Photo

[56] The Fenwicks also argue on appeal that the trial court erred in excluding the companion/pivotal[12] photo to exhibit G-13. Counsel for the Fenwicks mistakenly believed the companion photo was previously admitted during the testimony of ORI's expert witness, Dr. Frank Perez, and first learned it was not admitted when questioning their own expert witness, Dr. Gill. The Fenwicks contend that exhibit G-13 provided by ORI's counsel had two photos on a single sheet. One photo was marked with an "x" on the right side, and that photo, ORI contends, was the photo identified and admitted. Dr. Perez, however, in identifying exhibit G-13, was not presented with the second photo given to Fenwicks' counsel. Fenwicks' counsel then attempted to introduce the companion photo under Rule 106 of the Guam Rules of Evidence ("GRE").

[57] GRE 106, identical to Federal Rule of Evidence 106, allows a party to require an adverse party introducing a portion of a *writing* or recorded statement to introduce "any other part or any other *writing* or recorded statement which ought in fairness to be considered contemporaneously with it." Guam R. Evid. 106 (emphasis added). The rule seeks to avoid (1) "the unfairness inherent in the misleading impression created by taking matters out of context" and (2) inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case." *People v. Turner*, 1993 WL 444305 at * 3 (D. Guam App. Div., 1993). The rule requires contemporaneous introduction of the remainder of the statement to give the fact finder a clear understanding of the evidence.

[12] When referring to the subject photo at issue here the Fenwicks use the terms companion or pivotal photo interchangeably in their opening and reply briefs.

[58] To determine whether the photograph at issue here is admissible under Rule 106, we must decide whether a "writing" under Rule 106 includes photographs. Rule 106 does not define "writing" and the Rules of Evidence do not provide a general definition of a "writing". GRE 106.

[59] Writings are defined however under Rule 1001 which reads:

> For purposes of *this* article the following definitions are applicable: (1) Writings and recordings. 'Writings' and 'recordings' consists of . . . photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."

GRE 1001 (emphasis added).

[60] The definitions found in Rule 1001, however, by its terms is limited to Article X.[13] At least one jurisdiction has held that "all modes of conveying information, including videotapes, constitute writings or recordings" for purposes of Rule 106, even if defined by Rule 1001 as "photographs." *DesJardins v. State*, 759 N.E.2d 1036, 1037 (Ind. 2001). The Fenwicks cite to *DesJardins* for the proposition that the photograph at issue here is admissible under Rule 106 as a "writing." In *DesJardins*, the State introduced a four minute videotape showing defendant committing the offenses charged. *Id.* at 1036. The trial court denied defendant's request under Rule 106 to admit the entire videotape of four hours. *Id.* The court of appeals in affirming the judgment held that the videotape did not constitute a "writing or recording within the meaning of Rule 106 because a videotape is not included in the list of '[w]ritings and recordings' set forth in Rule 1001(1) "and reasoned that 'by definition, Rule 106 [did] not apply to the admission of videotapes.'" *Id.* (quoting *DesJardins v. State*, 751 N.E. 2d 323, 326 (Ind. Ct. App. 2001). The Indiana Supreme Court reversed, holding that the doctrine of completeness embodied in Rule 106 was "wholly independent of the peculiarities of

[13] "[T]his Article" means Article X entitled "Contents of Writings, Recordings and Photographs." GRE 1001.

the technology by which any particular medium transmits information, and applies to any mode of conveying information, including those identified for purposes of Article X as 'photographs.'" *Id.*

[61] In this case, the Fenwicks attempted to introduce a photo which their counsel believed was admitted into evidence. The copy of exhibit G-13 that was provided to Fenwicks' counsel by ORI's counsel showed two photos. As alleged by ORI's counsel, the photo marked with an "x" on that exhibit was the photo identified by Dr. Perez. No testimony was given by Dr. Perez on the other photo and the jury was not shown the photo. The companion photo was a separate photo and not part of the photos introduced and identified by Dr. Perez.

[62] A photograph of a writing which may be admissible under GRE 106 should be distinguished from other photographs. A still photograph of an act also can be both expansive and limited. For instance, a photo can capture a good deal that would be missed in a verbal description but at the same time fail to reveal what might have been seen if photographed from a different position or with a different film or camera setting. In fact, Fenwicks' counsel when questioning Dr. Perez about adjusting the exposure of a camera when taking pictures asked, "[i]f you just rely on the photographs, that may not show you the accurate picture of what was going on that particular day?" Tr., vol. I at 123 (Jury Trial). To which Dr. Perez answered: "Absolutely, yes." *Id.*

[63] Even if we assume a "writing" under GRE 106 includes a photograph, the admission of a photo is proper "to avoid the unfairness inherent in the misleading impression created by taking matters out of context." *Turner*, 1993 WL 444305, at * 3 (App. Div.). The testimony discussing the admission of exhibit G-13 reveals that Dr. Perez identified four individual photos which were exhibits G-11 to G-14 and taken in October 2002, three years after the accident. The photos

admitted were shown to the jury in the form of a composite photo.[14] Dr. Perez testified that the photos were taken to show the lighting of the scene and described that there were vans behind the handicap sign but did not testify that the same vans were in the same place on the date of the incident. The photo on exhibit G-13 was admitted to show the effect of the natural lighting conditions in the parking area. The Fenwicks however intended to offer the companion photo to that exhibit to show it was difficult for Mr. Fenwick to see the sign he hit. The companion photo, a separate photo shows the handicap sign in stall 2 with a van behind it. We are not convinced that excluding this photo would have the effect of misleading the jury by taking matters out of context which Rule 106 is intended to prevent. The trial court did not abuse its discretion in excluding the companion photo under GRE 106.

[64] The Fenwicks also argue that the trial court erred in refusing to admit the photo under Rule 402 which provides: "All relevant evidence is admissible unless otherwise provided." Guam R. Evid. 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Guam R. Evid. 401. "A trial judge has wide latitude in the admission or exclusion of evidence where the question is one of materiality or relevancy." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 773 (9th Cir.1981); *see also United States v. Brannon,* 616 F.2d 413, 418 (9th Cir. 1980). The "tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence." *Hamling v. United States,* 418 U.S. 87, 125 (1974). Absent an abuse of discretion, the trial court's evidentiary rulings will not be disturbed.

[14] The record does not show that the composite photo was admitted into evidence.

[65] The trial court did not abuse its discretion under Rule 402 in excluding the photo. The photo identified in exhibit G-13 by Dr. Perez was admitted for the purpose of showing the natural lighting conditions in the underground parking area and not to re-create the scene on the date of the incident. Although the companion photo showed that the sign was somehow obscured by the parked vans in the stalls, there was no testimony or evidence that the same vans were parked the same way and in the same stalls on the date of the incident. Rulings on relevancy are best left to the trial court which hears the evidence. The trial court did not believe the companion photo was relevant. Although the Fenwicks wanted to compare the companion photo to the photo in exhibit G-13 to show they were taken on the same day, the companion photo was not being introduced as a photo showing what occurred on the date of the incident. In addition, the trial court in its Decision stated that even if relevant, the photo may have been excluded under Rule 403 because it was "potentially cumulative and certainly had [the] potential to mislead to [sic] the jury." ER, tab 21 at 5 (Dec. & Order, Dec. 6, 2005). The trial court is in a better position to determine the relevancy of the photographs when hearing the evidence at trial and we will not disturb the evidentiary ruling absent an abuse of discretion. We cannot say the judge abused his discretion in his ruling on the relevancy under Rule 402.

[66] The Fenwicks conceded at oral argument that the ruling on the admissibility of the photo alone does not warrant reversal, but that the combination of the giving of both jury instructions and denying admissibility of the photo requires a reversal of the judgment. *See* Digital Recording at 2:22:18-2:22:40 (Oral Argument, Feb. 22, 2007). Because the trial court did not err in excluding the photo we do not need to decide whether there was a cumulative effect as contended by the Fenwicks.

Moreover, even if it was error to exclude the photo, the Fenwicks have failed to show they were prejudiced by the exclusion of the photo.

VI. CONCLUSION

[67] The trial court did not err in instructing the jury on proximate cause since this case did not involve concurrent "independent" causes where the "but for" test is not applicable. Although the trial court erred in providing both a proximate cause instruction and a legal cause instruction, the Fenwicks did not show that the error was prejudicial and affected the outcome of the trial. Finally, the trial court did not err in excluding the companion photograph. The judgment is therefore **AFFIRMED**.

Original Signed By: **John A. Manglona**
JOHN A. MANGLONA
Justice *Pro Tempore*

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice *Pro Tempore*

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice