

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2008AP2002

Cir. Ct. No. 2005CV272

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CRAIG M. WILLE AND MARY K. WILLE,

PLAINTIFFS-RESPONDENTS,

V.

ROBERT A. MACK AND MT. MORRIS MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Robert Mack and his insurer appeal from a judgment awarding Craig and Mary Wille \$27,500 for property losses resulting from a fire. The jury found Mack liable because his employee negligently caused a fire that destroyed two sheds and the Willes' personal property. Mack argues:

(1) the circuit court should have granted his motion for summary judgment because the Willes had no expert witness to establish the cause of the fire;¹ (2) the Willes failed to present sufficient evidence to support the valuation of the property destroyed in the fire; and (3) the court improperly exercised its discretion when it gave the Absent Witness Instruction. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 During construction of a new house, the Willes stored their belongings in two sheds at the construction site. All of the construction workers left the premises by 6:30 p.m. on the day of the fire. At 8:00 p.m., a fire was reported to the Adams County Sheriffs' Department. Sergeant Jim Wehinger arrived at 8:09 p.m. and observed a small shed fully engulfed in flames. He indicated the flames moved from the southwest to the north and east across the building. When the fire was ultimately extinguished, Wehinger learned that the fire actually destroyed two separate small buildings.

¶3 Wehinger later interviewed Mack and his employees. One of Mack's employees, Anthony Danek, recalled dropping a cigarette in tall grass near the shed. Danek indicated he dropped a cigarette near the southwest corner of the shed where the fire started. Danek told Wehinger he "felt bad and that he was of the belief that he was likely the cause of the fire." The fire chief indicated there was no other source of ignition.

¹ Lack of an expert witness is also the basis for Mack's arguments regarding a motion to dismiss, a motion to change the special verdict answer and a motion for a new trial. Because we conclude that expert testimony is not required in this case, we need not review the issue in each of those contexts.

¶4 Mack's expert witness, William Lundy, opined that a cigarette could not have caused the fire based on the humidity and the lack of very dry vegetation. [R.54:229-31] He noted the lack of conifer trees in the area and assumed from photographs that green grass was the only fuel source. Lundy was unable to identify any cause of the fire.

¶5 In rebuttal, Craig Wille testified that the area where the fire started had been used for storing small dead branches, especially for kindling. He had no personal knowledge of what flammable materials were on the ground where Danek dropped his cigarette into what appeared to be tall green grass. Wille estimated the value of the sheds and their belongings at \$52,770. The jury awarded \$27,500 damages.

DISCUSSION

¶6 The circuit court properly denied Mack's motion for summary judgment because the supporting papers showed a genuine issue of material fact. *See* WISCONSIN. STAT. § 802.08(2) (2007-08).² Although Lundy opined that a cigarette could not have caused the fire, he did not identify the cause of the fire and the supporting papers included Wehinger's report in which Danek admitted responsibility.³ A jury would not be required to accept Lundy's opinion. *See Krueger v. Tappan Co.*, 104 Wis. 2d 199, 203, 311 N.W.2d 219 (Ct. App. 1981).

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ Mack describes the police report of Danek's statement as hearsay. The report was submitted by Mack, attached to an affidavit. Due to the lack of an objection at that time, the circuit court did not make findings necessary to determine whether any hearsay exceptions would apply. Therefore, the hearsay issue is not properly preserved for appeal.

His opinion did not consider the possibility of debris or other combustibles in the grass. Wehinger's lay opinion, supported by his observations at the scene and his subsequent investigation, provides sufficient evidence to support a finding that Danek's cigarette started the fire.

¶7 It was not necessary for the Willes to present expert testimony on the cause of the fire. "[E]xpert testimony *is required* only if the ... jury [question] is beyond the general knowledge and experience of the average juror." *State v. Whitaker*, 167 Wis. 2d 247, 255, 481 N.W.2d 649 (Ct. App. 1992). No witness suggested that the fire was caused by complex factors that would require expert testimony. The common experience of jurors would be sufficient in this case to determine that Danek's discarded cigarette started the fire.

¶8 Cases cited by Mack do not support his argument that expert testimony is always required to establish the cause of a fire. In cases where the issue is whether the fire started from an electrical short, expert testimony may be required because the jury lacks sufficient knowledge about electricity and wiring. That does not suggest an expert is necessary to establish the cause of every fire. In *City of Cedarburg Light & Water Commission v. Allis-Chalmers Manufacturing Co.*, 33 Wis. 2d 560, 568, 148 N.W.2d 13, *on rehearing*, 149 N.W.2d 661 (1967), the court noted that "[t]here may be cases where the issue of causation ... involves technical, scientific or medical matters which are beyond the common knowledge or experience of jurors," concluding that "lack of expert testimony in such cases results in an insufficiency of proof." "Such cases" do not include all cases involving fire, but only cases where the cause of the fire is beyond the common experience of average jurors. In this case, the Willes were not required to present expert testimony to establish the cause of the fire.

¶9 The Willes presented sufficient evidence to establish the valuation of the property destroyed in the fire. An owner can testify to the value of goods. *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 187, 168 N.W.2d 148 (1969). Expert testimony is not required to establish the value of common personal property. Mack argues that the Willes' estimates did not account for depreciation or prior damage. However, the jury awarded only \$27,500 damages despite the Willes' estimate of \$52,770 damages. The jury appropriately discounted the Willes' failure to consider depreciation and prior damage.

¶10 Finally, Mack argues that the court improperly exercised its discretion when it gave the jury instruction WIS JI—CIVIL 410, the Absent Witness Instruction. That instruction is appropriate when “failure to call a witness leads to a reasonable conclusion that the party who would ordinarily call that witness is unwilling to allow the jury to have the full truth.” *Featherly v. Continental Ins. Co.*, 73 Wis. 2d 273, 282, 243 N.W.2d 806 (1976). Neither Mack nor Danek appeared at trial. Mack contends there was no showing of a relationship between the failure to produce these witnesses and the inference that their testimony would have been unfavorable to Mack. We disagree. Mack offered no evidence regarding his absence. Mack and Danek could have been in a position to testify whether the grassy area where Danek discarded his cigarette contained debris or other combustible materials. The court properly exercised its discretion by informing the jury that it could draw an adverse inference from their absence at trial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

