

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2011

A. John Voelker
Acting 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. 2010AP2751

Cir. Ct. No. 2007CV138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TIMOTHY M. GUSTAFSON,

PLAINTIFF-RESPONDENT,

V.

STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANT-APPELLANT,

**HUMANA INSURANCE COMPANY AND UNUM LIFE INSURANCE COMPANY
OF AMERICA,**

INVOLUNTARY-DEFENDANTS.

APPEAL from a judgment of the circuit court for Marinette County:
TIM A. DUKET, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. State Farm Fire and Casualty Company appeals a judgment, entered on a jury verdict, holding its insured fifty percent responsible for negligence in Timothy Gustafson’s personal injury action. State Farm argues Gustafson’s expert witness was not qualified to testify regarding causation; accident reconstruction expert testimony was required to establish causation; and the verdict was not supported by sufficient evidence. We reject State Farm’s arguments and affirm.

BACKGROUND

¶2 Gustafson injured his ankles when he fell from a ladder while cutting tree limbs at his girlfriend’s house.¹ His girlfriend, Cassie Erdmann, was State Farm’s insured. Erdmann and Gustafson both lifted the ladder onto the tree and placed it in position. Erdmann held the ladder while Gustafson was standing on it and using a chainsaw to cut down the branches. When Gustafson cut the last branch, the ladder got knocked out from under him and he fell.

¶3 Gustafson did not see the ladder get knocked out from underneath him. After his fall, he asked Erdmann what happened. As Erdmann later explained to a State Farm employee: “[H]e was cutting that down and I was

¹ Both parties’ recitations of facts are deficient. Neither provides sufficient facts, supported by proper citations to the trial transcripts, to paint an adequate picture of the events necessary to resolve this appeal. *See* WIS. STAT. RULE 809.19(1)(d)-(e), (3)(a)2. Specifically, State Farm omits material facts and cites to the complaint, while Gustafson cites substantially to pretrial statements. The appellate issues directly concern the adequacy of the trial testimony. Therefore, the facts set forth in the parties’ briefs should come from the trial record. Because neither party objects to the other’s deficiencies, we recite the facts without regard to their origin, and assume they do not conflict with trial facts unless so noted in the briefs.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

holding the ladder. And when he cut the branch down, it came down and I let go of the ladder and it hit the sidewalk, hit the ladder and knocked him out from underneath the ladder.” Erdmann acknowledged that Gustafson had asked her to hold the ladder and she agreed to do so. Erdmann also stated it was her opinion that the branch hitting the ladder caused the ladder to fall, not Gustafson losing his balance. Erdmann further stated that she believed the accident was her fault.

¶4 Prior to the filing of this action, Gustafson and Erdmann ended their relationship. Subsequently, Erdmann stated in an affidavit that she had not been asked to hold the ladder, and did not do so at any time. Erdmann asserted she only claimed she held the ladder because an attorney told her she had to lie to have a claim against the insurance company. However, Erdmann was later deposed and retracted her accusation against the attorney, stating she and Gustafson had concocted the story on their own.

¶5 At trial, Erdmann stated Gustafson acted alone setting up the ladder and doing the trimming. She testified that not only had she not agreed to hold the ladder, she was not even in the vicinity while Gustafson was trimming the tree. Further, Erdmann insisted she had urged Gustafson to stop trimming the tree before he sustained his injury, after he dropped a branch on her birdfeeder. Erdmann was impeached with her prior inconsistent statements.

¶6 An expert witness testified for each side. Gustafson’s expert, David Villeneuve, had been trained in the proper use of ladders and worked for fifteen years trimming trees, sometimes as a full-time business and sometimes as a side job. Villeneuve opined that if Erdmann had continued holding the ladder when it was struck with the branch, the accident would “probably have been prevented.”

¶7 On cross-examination, Villenaue acknowledged that Erdmann and Gustafson violated basic safety rules in the tree trimming methods they employed. Villenaue also acknowledged that if Erdmann had been holding the ladder but was unable to react in time, the accident would not have been prevented. Villenaue stated he did not perform an accident reconstruction and did not have the qualifications to do so.

¶8 State Farm's expert, Jon Ver Halen, was an engineer. He examined the tree and ladder involved in the accident, making several measurements and calculations. He also conducted an experiment to determine how much force it would take to knock the ladder out from under Gustafson. Ver Halen also conducted a strength test with Erdmann.

¶9 Ver Halen testified that if struck with a significant force the ladder would have a visible impact mark, but he found none. Based on his calculations, Ver Halen concluded it would take a force of several hundred pounds—the type that would leave a mark—to knock the ladder out from under Gustafson. Ver Halen concluded that the thirty-pound branch that fell and bounced into the ladder could not strike the ladder with sufficient force to knock the ladder out from under Gustafson. Additionally, Ver Halen opined that even if the ladder was struck with sufficient force to knock it from beneath Gustafson, Erdmann would not have sufficient arm strength to hold the ladder in place. Ver Halen further testified that numerous safety violations were made in the tree trimming process, including failures to tie Gustafson to the tree, tie the top of the ladder to the tree, or tie off the branch so it would not hit the ground.

¶10 The jury found Erdmann and Gustafson each fifty percent causally negligent. State Farm renewed an earlier motion for dismissal, arguing that expert

testimony was necessary to prove causation and that Gustafson had failed to present such evidence from a properly qualified expert. State Farm also moved to change the answer to the verdict question on causation. The court denied the motions, and State Farm now appeals.

DISCUSSION

¶11 We observe at the outset that State Farm’s arguments rely largely on evidence—primarily its expert’s opinions—that the jury evidently did not embrace to the extent State Farm continues to do. Of course, “[t]he opinion of an expert even if uncontradicted need not be accepted by the jury.” *State v. Sarinske*, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979).

¶12 State Farm first argues that Villenaue was not qualified to testify regarding causation. Trial courts have broad discretion in admitting opinion evidence of expert witnesses. *Kreyer v. Farmers’ Co-op Lumber Co.*, 18 Wis. 2d 67, 75, 117 N.W.2d 646 (1962). Any expert who is qualified by “knowledge, skill, experience, training or education, may testify thereto in the form of opinion or otherwise.” WIS. STAT. § 907.02. Thus, Wisconsin recognizes “lay expert witnesses,” whose expertise or skill is based upon experience working in a particular field rather than from degrees or certifications. *Black v. General Elec. Co.*, 89 Wis. 2d 195, 212, 278 N.W.2d 224 (Ct. App. 1979).

¶13 State Farm contends Villenaue is unqualified to testify regarding the ladder accident because, although he is experienced in the areas of tree trimming and safe ladder use, he “did not have a field of experience with ladder accidents caused by falling branches[.]” Specifically, State Farm argues that because Villenaue had never witnessed a branch knocking a ladder out from under someone, he was not qualified to state an opinion as to whether holding the

ladder might have prevented the accident. State Farm's view of expert qualifications is overly narrow. We are aware of no requirement that an expert witness must have previously encountered the precise factual scenario at issue in order to qualify as an expert in a field.

¶14 Villeneuve's opinions regarding safe tree trimming procedures and ladder use are properly within his scope of expertise. "Opinion evidence of lay witnesses regarding matters within their field of experience is generally held to be competent, and the probative force of such testimony is for the trier of fact." *State v. Sarabia*, 118 Wis. 2d 655, 667, 348 N.W.2d 527 (1984). Therefore, the jury was properly tasked with assessing the evidentiary value of Villeneuve's opinions.

¶15 State Farm next argues that accident reconstruction expert testimony was necessary to prove causation because otherwise the jurors could not understand the physics involved. Whether expert testimony is required in a given case is a question of law subject to our independent review. *Grace v. Grace*, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995). Requiring expert testimony is an extraordinary measure, and a trial court should do so only when necessary for a jury to understand unusually complex or esoteric issues. *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 374, 379, 541 N.W.2d 753 (1995). It is well understood that some matters are difficult for a jury to understand without the benefit of expert testimony. *See id.* at 378-79. Nonetheless, "[b]efore expert testimony is required the circuit court must find that the matter involved is '... not within the realm of the ordinary experience of mankind ...'" *Id.* at 379 (quoting *Cramer v. Theda Clark Mem'l Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969)).

¶16 We reject State Farm’s suggestion that the jurors were unable to comprehend the straightforward issue of whether Erdmann’s failure to hold the ladder was a substantial factor contributing to Gustafson’s fall. That issue is not beyond the realm of the ordinary experience of mankind. Further, contrary to State Farm’s assertion, Gustafson was not required to prove with mathematical precision “how and to what extent” Erdmann’s failure to hold the ladder contributed to the fall. He was required only to prove that her acts or omissions were a substantial factor contributing to the accident. There is nothing esoteric about the potential causal link between failing to hold a ladder and a ladder falling down.

¶17 Finally, State Farm argues the jury’s verdict is not supported by sufficient evidence of causation. State Farm premises this argument on its position that Villeneuve’s causation opinion was erroneously admitted. We have already rejected that underlying premise.

¶18 Moreover, the jury was not limited only to considering Erdmann’s failure to hold the ladder. Gustafson testified, and his attorney argued to the jury, that he and Erdmann jointly undertook the tree trimming process. Thus, the jury could also consider whether the couple’s failures to tie off the ladder, the branch, or Gustafson were substantial factors contributing to the accident. In any event, even ignoring both Gustafson’s expert opinion and the additional safety violations, Erdmann herself stated at one point that she believed the accident was her fault. The jury was permitted to take her at her word. There was sufficient evidence supporting the jury’s finding that Erdmann and Gustafson were each fifty percent causally negligent.

By the Court.—Judgment affirmed.

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

