

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2003

Cornelia G. Clark
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. 01-2414

Cir. Ct. No. 99-CV-438

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CINDY FAYERWEATHER AND JAMES FAYERWEATHER,

PLAINTIFFS-APPELLANTS,

FORTIS INSURANCE COMPANY,

INTERVENOR,

v.

MENARD, INC.,

DEFENDANT,

KELLER INDUSTRIES AND U.S. INDUSTRIES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Cindy and James Fayerweather appeal a judgment dismissing their claims against Keller Industries and U.S. Industries, Inc. The Fayerweathers argue the trial court erred by refusing to give either a modified or standard jury instruction on custom and usage. We reject the Fayerweathers' argument and affirm the judgment.

BACKGROUND

¶2 In August 1999, the Fayerweathers filed suit against Menard, Inc., Keller and U.S., alleging that Cindy sustained serious injuries following her fall from what she claimed was a defective eight-foot stepladder manufactured by Keller and sold by Menard. After a trial, the jury returned a verdict finding that neither Keller nor Cindy were negligent. The jury also found that the ladder, when it left Keller's possession, was not "in such defective condition to be unreasonably dangerous to prospective users." The trial court denied the Fayerweathers' motions after verdict and entered judgment on the verdict, dismissing the Fayerweathers' claims. This appeal follows.

ANALYSIS

¶3 The Fayerweathers argue that the trial court erred by not giving either the pattern or modified jury instruction on custom and usage. We disagree. A trial court has "broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case." *Nowatske v. Osterloh*, 198 Wis. 2d 419, 428, 543 N.W.2d 265 (1996). When a trial court has given an erroneous instruction or has erroneously refused to give an instruction, "a new trial is not warranted unless the error is prejudicial." *Id.* at 429. An error is prejudicial only if it appears that, but for the error, the

result would have been different. *Anderson v. Alfa-Laval Agri, Inc.*, 209 Wis. 2d 337, 345, 564 N.W.2d 788 (Ct. App. 1997).

¶4 Here, the jury heard testimony that the Fayerweathers had the ladder for about nine months prior to the accident, during which Cindy used it at least twenty times. On the day of her fall, Cindy was using the ladder to install insulation, ascending and descending the ladder each time she moved it. Just before her fall, Cindy was pushing insulation into the ceiling with one hand when she stopped and stated that she “forgot her stick.” Cindy testified that she put both hands on the ladder and began to step down when the ladder “kicked out.”

¶5 John Morse, the Fayerweathers’ expert, testified that the ladder caused the fall because its rear legs inadvertently “racked” or elevated off the ground before Cindy climbed it. He further testified that Keller was liable because the ladder had no instructions or warnings regarding “inadvertent racking.” John VerHalen, Keller’s expert, opined that the ladder was not unreasonably dangerous or defective and that the ladder’s instruction and caution labels were not problematic. During the course of their respective testimonies, Morse and VerHalen discussed the American National Standards Institute (ANSI) and how its standards relate to the design and manufacture of the ladder.

¶6 Morse agreed that the ANSI standard is “intended to provide the manufacturer of ... ladders with a set of minimum performance and dimensional requirements against which his product may be compared.” He testified that although the ANSI standard can assist manufacturers in making a safe ladder, compliance with the minimum requirements of ANSI would not mean that a ladder is automatically safe. Morse agreed that Keller’s design met the ANSI standard, including ANSI’s “racking” test. Morse opined, however, that ANSI’s

racking test is inadequate because it allows a greater degree of racking than he believes is safe. Morse also concluded that the ladder's instructions were defective because they did not separate "climbing instructions" from "setup instructions" and failed to address the possibility of inadvertent racking.

¶7 In turn, VerHalen, an ANSI member, described the ANSI ladder committee as one-third industry people and one-third users, with the remaining members of the committee composed of people chosen from the Consumer Product Safety Commission, OSHA, various labor organizations and outside specialists. VerHalen testified that there was no scientific study supporting Morse's theory that inadvertent racking occurs in normal ladder use. With respect to the Fayerweathers' case, VerHalen opined that Cindy's accident could not have been the result of racking. VerHalen ultimately concluded Cindy lost her balance either because she was reaching too far to get the insulation or because she was in that "in between" stage of holding onto the rafters and descending while trying to grasp the top cap of the ladder.

¶8 Based on the experts' references to the ANSI standards, the Fayerweathers requested both a standard and modified version of WIS JI—CIVIL 1019, entitled "Negligence: Evidence of Custom and Usage." On appeal, the Fayerweathers have failed to brief their argument for a modified jury instruction and have therefore abandoned that issue. *See Reiman Assocs., Inc. v. R/A Advertising, Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned). Rather, the Fayerweathers focused on the trial court's failure to give the standard jury instruction on custom and usage, claiming it resulted in prejudicial error.

¶9 The standard jury instruction provides:

Evidence has been received as to the (practice in the community) (custom in the trade or work operation) (practice in the industry) with respect to (e.g., the use of 2 x 4's for rafters) (installations of 3/8" plywood for subflooring) (standing on running board to guide truck backing into shale pit). You should consider this evidence in determining whether (defendant) acted with ordinary care. This evidence of practice is not conclusive as to what meets the required standard for ordinary care or reasonable safety. What is generally done by persons engaged in a similar activity has some bearing on what an ordinarily prudent person would do under the same or like circumstances. Custom, however, cannot overcome the requirement of reasonable safety and ordinary care. A practice which is obviously unreasonable and dangerous cannot excuse a person from responsibility for carelessness. On the other hand, a custom or practice which has a good safety record under similar conditions could aid you in determining whether (defendant) was negligent.

Wis JI—CIVIL 1019.

¶10 The Fayerweathers argue that the ANSI standards are evidence of custom and usage, as the standards are “an industry consensus of the practice in the ladder industry for voluntary use by establishments that use, manufacture or evaluate ladders.” The Fayerweathers further claim that although evidence of ANSI standards is useful in determining whether a defendant acted with ordinary care, the evidence of industry practice, consistent with Wis JI—CIVIL 1019, is not conclusive as to what meets the required standard for ordinary care or reasonable safety. To that end, the Fayerweathers contend that the trial court’s failure to “give the jury the legal framework upon which to judge the evidence of [ANSI] was a failure to fully inform the jury of the rules and principles of law [that] were applicable to this case.” We are not persuaded.

¶11 The ANSI standards, as presented in this case, were intended for voluntary use as industry guidelines for the design and manufacture of ladders. Trial testimony established that these standards are created by people both within and outside of the ladder manufacturing industry. They provide ladder manufacturers with a set of minimum performance and dimensional requirements against which their product may be compared. As such, the standards are not evidence of “custom and usage” within an industry as contemplated under WIS JI—CIVIL 1019.

¶12 In any event, even were we to assume that the trial court erred by not giving the custom and usage jury instruction, we conclude that the error was harmless. *See State v. Dyess*, 124 Wis. 2d 525, 547, 370 N.W.2d 222 (1985) (stating that an error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the outcome of the case); *see also Town of Geneva v. Tills*, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986) (applying the *Dyess* prejudice formulation to civil cases). The Fayerweathers cite the jury’s confusion regarding ANSI as evidence that they were prejudiced by the trial court’s failure to give the instruction.

¶13 During jury deliberations, the jury asked whether the “code” in the ANSI report was considered a law and further inquired about the meaning of “standard.” The court replied “no” to whether the “code” in the ANSI standard was law and referred the jury to the ANSI standard for an explanation of the term “standard.” The ANSI standard itself states that it is “intended for voluntary use by establishments that use or manufacture ladders” and its purpose is to provide manufacturers “with a set of performance and dimensional requirements against which [the manufacturer’s] product may be compared.” Because the trial court

properly answered the jury's questions, the Fayerweathers have failed to establish prejudice.

¶14 Moreover, we conclude there was sufficient evidence to support the jury's verdict, even absent references to the ANSI standards. The jury heard the expert witness's competing opinions on the cause of the accident. Specifically, VerHalen opined that Cindy's accident could not have been the result of racking and ultimately concluded that Cindy simply lost her balance and fell off the ladder. Morse, in fact, agreed that people sometimes fall off ladders without the ladder being racked. With respect to the labeling issue, again both experts differed in their opinions regarding whether the ladder's label was acceptable. The weight and credibility of testimony by an expert witness is uniquely within the province of the jury. *Milbauer v. Transport Emp. Mut. Benefit Society*, 56 Wis. 2d 860, 867, 203 N.W.2d 135 (1973). The verdict reflects the jury's apparent conclusion that Cindy's injuries were the result of pure accident. Our supreme court has recognized: "If the jury, by their answers, have found an accident, without negligence on either side, the defendant is entitled to the benefit of that conclusion." *Miller v. Town of Casco*, 116 Wis. 510, 515-16, 93 N.W. 447 (1903).

¶15 Because the Fayerweathers have failed to establish that they were prejudiced by the trial court's claimed error in failing to give the custom and usage jury instruction, we affirm the judgment.

By the Court.—Judgment affirmed.

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

