IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOE ETTA and MICHAEL LEDGERWOOD,

Plaintiffs,

OPINION AND ORDER

04-C-0200-C

v.

DIAL INDUSTRIAL SALES, INC., HULSTEG AB, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY,

Defendants,

HARTFORD CASUALTY INSURANCE COMPANY,

Nominal Defendant.

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In this civil action, plaintiffs Jo Etta and Michael Ledgerwood are suing defendants Dial Industrial Sales, Inc., Hulsteg AB, ABC Insurance Company and DEF Insurance Company for negligence, strict liability and breach of warranty arising out of an accident in which plaintiff Jo Etta Ledgerwood fell from a ladder designed and manufactured by either defendant Dial or defendant Hulsteg. Diversity jurisdiction is alleged. 28 U.S.C. § 1332.

Plaintiffs are citizens of Arizona; defendant Dial is incorporated under the laws of New York and has its principal offices there; defendant Hulsteg is a corporation with its principal offices in Sweden; the two insurance companies are alleged to be fictitious companies that may have provided insurance coverage to defendants Dial and Hulsteg.

The case is before the court on the motion of defendants Dial Industrial Sales and Hulsteg for summary judgment. The motion is actually one to bar the testimony of John Johnson and Lila Laux, experts retained by plaintiff. Defendants are bringing their motion in the form of one for summary judgment because plaintiffs have no evidence other than their experts' testimony to sustain their contention that Jo Etta Ledgerwood's fall was the result of a defect in the ladder. (For the remainder of this opinion, I will refer to Mrs. Ledgerwood as "plaintiff" because her husband's claim is merely derivative of hers.) Plaintiff had no witnesses to her fall and she remembers nothing of it. At the time of the accident, she was working as a claims adjuster. She had recently purchased the ladder at issue and was using it for the first time in order to gain access to the top of a garage. Her goal was to stand on the garage roof and examine the roof of the attached house that was allegedly damaged. Although plaintiff does not remember whether she reached the garage roof, the parties do not suggest that she did not. After she recovered, she found that she had pictures in her camera that she could have taken only from the roof of the garage.

From my review of the parties' arguments, the depositions of the experts and

Johnson's expert report, I conclude that defendants have failed to prove that Johnson is not qualified to give an opinion about the cause of plaintiff's fall. Defendants' challenges to his qualifications are fodder for cross-examination at trial but they do not demonstrate that his opinions fail the requirements of Fed. R. Evid. 702. Therefore, defendants' motion for summary judgment as it relates to Johnson's testimony will be denied. Because Lila Laux's opinions rise or fall on the admissibility of Johnson's testimony, defendants' motion will be denied as to her testimony as well.

Johnson is a licensed professional engineer with a Ph.D. from Purdue University. He taught civil engineering at the University of Wisconsin-Madison from 1965 to 1990 and holds the title of emeritus professor. Among the senior and graduate courses he has taught are Steel Design, Structural Analysis, Construction Methods and Building Systems. He is president of Engineering Forensics & Testing, Ltd. and has testified in a number of cases involving ladders. He is a member of many professional organizations and is chairman of the American National Standards Institute (ANSI) Committee on Code Standards for Fiber Glass Reinforced Ladders. He has written 36 papers alone or with others.

Before coming to any conclusions in this case, Johnson inspected the site of plaintiff's accident, where he made measurements and took photographs of the garage and roof area and a damaged eave and fascia. Later, he performed tests to determine the coefficient of friction between the feet at the bottom of the accident ladder and an asphalt driveway and

the amount of force at the top of the ladder required to cause instability. He then analyzed the ladder accident mechanism, determining that as a horizontal force is applied to the top of the ladder, an elastic curve develops and the ladder is no longer rigid. As this force increases, the force bearing on the fulcrum increases to the point at which it cause the ladder to "partially hang up." Johnson concludes that at some point, as the force bearing on the top increases along with "the magnitude of the elastic curve, the effect of the weight of the ladder times the co-efficient of friction at the bottom of the ladder is reduced enough to cause slippage at the bottom."

Defendants attack Johnson's opinions from a number of angles: first, Johnson does not know where plaintiff was standing when she fell or where her hands or feet were, but is basing his opinion solely on the damage to the gutter, the damage to the fascia and a photograph showing the ladder's yellow end cap on the ground. Second, Johnson's testing of the ladder is flawed because it did not replicate the conditions in which the accident occurred. Defendants point out that Johnson tested the ladder on a garage with a higher roof and therefore cannot state that the ladder was at the same angle at the time of the accident. Moreover, Johnson admitted that less force would have been necessary to make the ladder slip out at the bottom because the angle of the ladder was steeper in the test than it would have been when plaintiff was using it. Third, Johnson did no testing or analysis to determine the exact mechanism by which the ladder could have "pivoted" or "rotated" away

from the gutter and toward the fascia. Fourth, Johnson failed to determine an alternative theory of design that would eliminate the alleged defect.

None of these challenges persuades me that defendants' motion should be granted. Johnson has the education, experience and training to analyze an accident such as plaintiff's. Neither his failure to use a stunt man or dummy on the ladder in order to draw conclusions about the manner in which the ladder failed or his failure to come up with an alternative theory of design makes his conclusions unreliable. He can explain why he thinks the ladder would have pivoted or rotated and he can rely properly on mathematical calculations instead of a re-enactment of the accident. He does not need to propose an alternative design when his opinion is that the one that plaintiff was using was not safe for climbing onto a roof. The marketplace is full of ladders that can be used safely for such a purpose.

To the extent that defendants disagree with Johnson's conclusion, they should concentrate their efforts on rebutting it at trial. I am satisfied that his reasoning is scientifically valid and applicable to the facts in question and that it will be helpful to the jury. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593 (1993). It is not unscientific speculation but an an informed opinion about what happened that will assist the jury in determining whether plaintiff's fall was the result of a defect in the ladder she was using.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Dial Industrial Sales, Inc., and Hultsteg AB is DENIED.

Entered this 17th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge