Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-297

NOVEMBER TERM, 2004

Sheila Snaith and Lawrence Snaith	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Superior Court
	}	
Lucien Godin, Executor of the Estate of	}	
Rejane Godin	}	DOCKET NO. S132-00 Fc
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals a jury verdict in favor of defendant in this personal injury action, arguing that the trial court erred (1) by not excluding the testimony of defendant's accident reconstruction expert; (2) by denying plaintiff's motion for judgment as a matter of law; and (3) by failing to instruct the jury that a pedestrian's miscalculation of the danger presented by an oncoming vehicle does not necessarily establish the pedestrian's negligence. We find no error and thus affirm the superior court's judgment.

This lawsuit arose after plaintiff was struck by a car as she was crossing a pedestrian crosswalk. The driver of the vehicle died before commencement of the action, which named the executor of the driver's estate as the defendant. Following a four-day jury trial in which three accident reconstruction experts testified, two on behalf of plaintiff and one on behalf of defendant, the jury determined that plaintiff was 78% negligent and the driver 22% negligent. Accordingly, the superior court entered judgment for defendant. See 12 V.S.A. § 1036 (contributory negligence shall not bar recovery by plaintiff in negligence action unless plaintiff's negligence is greater than total negligence of defendants).

On appeal, plaintiff first argues that the trial court erred by denying her motion to exclude the testimony of defendant's accident reconstruction expert. In plaintiff's view, the expert employed unfounded assumptions and data with no known error rate to such a degree that the testimony failed to qualify as scientific or technical expert testimony under V.R.E. 702. Specifically, plaintiff contends that the expert's pedestrian-throw formula—which estimated the speed of the driver's car based on plaintiff's estimated position at the time of impact and the distance she traveled after impact—was so inherently speculative as to compel its exclusion. According to plaintiff, because

she was flipped up against the windshield of the vehicle that struck her and carried along until she bounced off of a parked car, the throw formula used was wholly speculative and unreliable. Plaintiff further contends that the expert's unsupported estimates of plaintiff's walking rate and the level of force required to snap back the parked car's side-view mirror exacerbated the speculative nature of the expert's calculations.

Under V.R.E. 702,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Vermont rule is identical to its federal counterpart, F.R.E. 702, which "relaxed the traditional barriers to admission of expert testimony" by establishing "a flexible standard governed by two principles: reliability and relevance." State v. Streich, 163 Vt. 331, 342 (1995) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588-89, 595 (1993)). Under that standard, "[r]eliability is assured if the expert testimony is supported by 'scientific knowledge,' defined as information that is more than a subjective belief or unsupported speculation, and that is grounded in the methods and procedures of science." Streich, 163 Vt. at 343 (citing Daubert, 509 U.S. at 589-90). Among the nonexclusive factors cited by Daubert to assist the trier of fact in determining whether expert testimony is sufficiently rooted in scientific knowledge is "the known or potential rate of error associated with the scientific technique." Id. (citing Daubert, 509 U.S. at 594).

Here, defendant's expert assumed that the driver could not see plaintiff until she emerged from beyond the parked cars lining the street, and concluded that plaintiff stepped out into the crosswalk at a point when it became impossible for the driver to avoid the accident. The expert estimated plaintiff's position at impact based upon the testimony of the only eyewitness, who was approaching from the opposite direction. The expert also estimated the driver's reaction time based on plaintiff's estimated walking speed, which was derived from standard data on walking speeds. Further, the expert estimated the speed of the driver's vehicle based upon the distance that plaintiff was thrown and the time that it took the driver to stop her vehicle after impact. On cross-examination, when questioned about whether he had taken into account the fact that plaintiff had struck a parked car before landing, the expert testified that the contact with the parked car was minimal and, more likely than not, would have vaulted her further from the point of impact, thereby exaggerating the estimated speed at which defendant was traveling. The expert also testified that the amount of force necessary to push back a retractable side-view mirror is minimal.

We find no abuse of discretion in admitting the expert's testimony and allowing the jury to determine its weight after considering plaintiff's cross-examination of the expert and the testimony

of plaintiff's own experts. See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152-53 (1999) (trial court has wide latitude in assessing what factors to apply in determining reliability of proffered expert testimony and in making ultimate determination of reliability); Daubert, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); see also Miles v. Gen. Motors Corp., 262 F.3d 720, 724-25 (8th Cir. 2001) (challenge to expert's methodology concerning injury causation went more to weight than admissibility of testimony, and therefore was proper subject of cross-examination rather than basis for exclusion); McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of [expert witness's] credentials, faults in his use of differential etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."). Plaintiff's reliance on J.B. Hunt Transp., Inc. v. Gen. Motors Corp., 243 F.3d 441(8th Cir. 2001) is misplaced. There, the court affirmed exclusion of the testimony of an expert who conceded that there was not enough evidence to reconstruct the accident according to his theory. Id. at 444.

Next, plaintiff argues that the trial court erred by not granting his motion for judgment as a matter of law. We disagree. Factual discrepancies concerning plaintiff's use of headphones, her actions before crossing the street, the speed of the driver's car, her visibility from the driver's perspective, and the distance she walked beyond the parked cars before impact suggest that this was a case for the jury to decide. See Haynes v. Golub Corp., 166 Vt. 228, 233 (1997) (in addressing motion for judgment as matter of law, evidence is viewed in light most favorable to nonmoving party, excluding effect of any modifying evidence). Compare 23 V.S.A. § 1051(b) ("No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for a driver to yield.") with English v. Myers, 142 Vt. 144, 152 (1982) (trial court's refusal to charge jury on § 1051(b) was warranted, given that plaintiff did not walk into path of vehicle, there was no evidence of plaintiff's sudden departure from curb, and it was undisputed that plaintiff was three-quarters of way across street before he was struck).

Finally, plaintiff argues that the trial court erred by not instructing the jury that a pedestrian's miscalculation of the speed of an oncoming vehicle does not necessarily establish the pedestrian's negligence. Plaintiff elicits this precept from Colburn v. Frost, 111 Vt. 17 (1939), in which this Court stated that "[t]he plaintiff was not obliged to use constant vigilance and he had the right to assume that the defendant would exercise the care which the law required of him and that he would be given some warning before he was run down." Id. at 22. According to plaintiff, because defendant argued at trial that plaintiff negligently stepped in front of the oncoming vehicle based on her assumption that the driver saw her and would stop, the court was required to instruct the jury on the above-quoted principle. In plaintiff's view, without the instruction, the jury lacked a sufficient legal framework to evaluate defendant's invitation for the jury to find plaintiff negligent if she miscalculated the speed of the oncoming vehicle or assumed that the vehicle would stop for her.

"The trial court has the 'duty to instruct the jury on all issues essential to the case,' including 'the standard of care that applies in a negligence action.' " Malaney v. Hannaford Bros. Co., 2004 VT 76, ¶ 21, 15 Vt. L.W. 229 (quoting Coll v. Johnson, 161 Vt. 163, 164 (1993)). Nevertheless, as

long as the charge as a whole does not mislead the jury, "the trial court has some discretion regarding the degree to which it elects to elaborate on the points charged." Id.; see Currier v. Letourneau, 135 Vt. 196, 204 (1977) ("[T]he court is not required to make every comment that conceivably could be made on the issues and evidence."). Indeed, it is often appropriate for the trial court to state the law generally and leave it for the parties to argue the application of the facts to the law. Malaney, 2004 VT 76, ¶ 22.

Here, in addition to giving the jury comprehensive instructions on negligence and comparative negligence, the trial court charged the jury on the reciprocal and concurrent duties owed by drivers and pedestrians, including that drivers must yield to pedestrians crossing a street, exercise due care to avoid hitting pedestrians, give proper warning to pedestrians by sounding a horn when necessary, and drive at a prudent speed to avoid hitting pedestrians. The court also instructed the jury that drivers have a duty to maintain a proper lookout and keep their vehicles under control at all times to avoid injury to others. In addition, the court instructed the jury that a pedestrian using a designated crosswalk may exercise less vigilance than a person in an unrestricted part of the road. These instructions adequately apprised the jury of the driver's obligations with respect to pedestrians. Haynes v. Golub Corp., 166 Vt. 228, 237 (1997) (to secure new trial based on challenge to trial court's instructions, party must show that charge was erroneous or inadequate, and that error or omission was prejudicial).

At the charge conference, however, plaintiff requested that the trial court also instruct the jury as follows:

> The pedestrian involved is to be judged by the situation as it appeared to her at the time. The fact that there was a collision does not mean there was a lack of due care on her part. If the Plaintiff used her eyes and miscalculated the danger, she may still be free from fault.

The trial court felt that, given plaintiff's testimony that she may have miscalculated the speed of the driver, use of the same terms in the instruction might imply to the jury that she was entitled to a verdict in her favor despite any miscalculation on her part. The court noted that in Colburn this Court held only that a miscalculation might amount to negligence in one case but not another. See Colburn, 111 Vt. at 23 ("What we have said is not to be taken as implying that there might not be cases where the evidence disclosed great speed known to the plaintiff or such close proximity of the approaching car, or other circumstances, as to warrant a holding of contributory negligence as a matter of law on the part of a pedestrian . . . .").

While we recognize that the instruction requested by plaintiff was not contrary to the law and could have been charged under the circumstances of the case, we cannot conclude that the trial court abused its discretion by refusing to give it. The court's instructions that plaintiff need not be as vigilant crossing a crosswalk and that drivers have a duty to be on the lookout for pedestrians imparted the correct standard to the jury and implied that a miscalculation on plaintiff's part did not necessarily establish her responsibility for the accident. The statement that plaintiff relies upon in

Colburn was made in connection with the particular facts of that case and represented only a nuance of the general duties described therein rather than a specialized duty requiring a separate instruction. Cf. Malaney, 2004 VT 76, ¶ 22 (trial court's general negligence instruction was inadequate to apprise jury of specialized duty owed by self-service grocery stores, as set forth in previous case law).

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Paul L. Reiber, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned