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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-106

DECEMBER TERM, 2002

Sandra Neronsky	}	APPEALED FROM:
v.	}	Windsor Superior Courtt
Pamela Sutowski	}	DOCKET NO 248-5-99 Wrcv
	}	Trial Judge: Stephen B. Martin

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

Plaintiff appeals from a favorable jury verdict in this action for personal injuries plaintiff sustained in an automobile accident with defendant. She alleges the court erred by (1) granting defendant a directed verdict on her claim for future medical expenses, pain, and suffering; (2) instructing the jury on comparative negligence; and (3) denying, in part, her request for costs. We affirm.

Viewing the evidence in the light most favorable to the jury' s verdict, Foster v. Bittersweet Experience, Inc., ___ Vt. ___, ___, 796 A.2d 483, 485 (2002) (mem.), the record shows that plaintiff was traveling east on Route 11 in Chester, Vermont on May 24, 1996. She was using her cruise control at the time, and was traveling approximately fifty miles per hour in a fifty mile per hour zone. Defendant was exiting her driveway on her way to school, intending to head west. Defendant pulled out onto Route 11, turning west in front of plaintiff. Defendant did not see plaintiff' s vehicle until it was about thirty feet away. Upon seeing plaintiff, defendant increased her speed as she turned to get out of plaintiff' s way. Plaintiff first saw defendant' s vehicle after defendant had begun pulling into plaintiff' s lane. Plaintiff steered to the left, crossing the centerline, and hit defendant in the westbound travel lane. Plaintiff' s airbag deployed, and she later complained of severe pain in her chest. Plaintiff also received other minor injuries. Plaintiff received treatment for her chest pain first by her family physician and subsequently by a pain specialist.

In May 1999, plaintiff sued defendant for her injuries in superior court. In March 2001, defendant made an offer of judgment in accordance with V.R.C.P. 68 in the amount of $8,500. Plaintiff did not accept the offer and proceeded to trial. After hearing the evidence, the jury awarded plaintiff $7,500, reduced to $4875 due to the jury' s finding that plaintiff was thirty-five percent comparatively negligent. Plaintiff and defendant both asked the court to award them their costs of litigation. Plaintiff sought to recover all of her costs under V.R.C.P. 54(d)(1), and defendant asked for costs she incurred after plaintiff rejected her $8,500 settlement offer in accordance with V.R.C.P. 68. The court awarded plaintiff costs up to the date of defendant' s offer of judgment, with an offset for costs defendant incurred after plaintiff rejected defendant' s settlement offer. The court entered final judgment for plaintiff in the amount of $5,048.08, and plaintiff timely appealed.

Plaintiff' s first argument relates to the trial court' s decision to direct a verdict for defendant on plaintiff' s claim for future medical expenses, pain, and suffering. We review the trial court' s decision on a motion for a directed verdict by examining the evidence in the light most favorable to the nonmoving party, excluding the effect of any modifying evidence. Lussier v. N. Troy Eng' g Co., 149 Vt. 486, 490 (1988). If any evidence exists that fairly and reasonably supports the nonmoving party's claim, the case should go to the jury, and a directed verdict is improper. Id.

Plaintiff argues that the court should have submitted her claims for future medical expenses, pain, and suffering to the jury because she testified that she expected to continue taking medication for her chest pain in the future. Our cases do not support plaintiff' s argument that her lay testimony alone was enough to give the issue to the jury. We have long held that competent expert medical testimony is essential to lay the foundation for claims for future medical expenses, pain, and suffering. Hebert v. Stanley, 124 Vt. 205, 210 (1964); Howley v. Kantor, 105 Vt. 128, 133 (1933). The rule prevents the jury from engaging in conjecture and speculation about plaintiff' s prospective damages. See Moore v. Grand Trunk Ry. Co., 93 Vt. 383, 392 (1919) (mere speculation and conjecture may not form basis for prospective damages). Thus, we generally require expert testimony on the reasonable certainty or reasonable probability that the plaintiff will incur the claimed future medical expenses, Howley, 105 Vt. at 133, and expert testimony on the existence of objective symptoms of future pain and suffering. See Benoit v. Marvin, 120 Vt. 201, 207-08 (1958) (where medical expert testified about plaintiff' s objective symptoms of future pain and suffering, it was proper for jury to decide question of plaintiff' s future damages).

The record in this case is devoid of any expert medical evidence supporting plaintiff' s claims for future damages. The only medical expert to testify was a physician who treated plaintiff for her chest pain. The doctor testified, however, that he had not examined plaintiff or spoken to her since November 1999, approximately two years prior to trial. He testified that he was not familiar with her current status and could not know what the future holds for her. The physician could not comment on plaintiff' s need for pain medication presently or in the future. He explained that chronic pain is unpredictable, but he did not testify that plaintiff presently suffers from chronic pain. In the absence of expert medical testimony, plaintiff did not lay the necessary foundation to withstand defendant' s motion for a directed verdict on her claims for future pain, suffering, or medical expenses.

Plaintiff nevertheless asserts that our decision in Benoit v. Marvin supports her contention that expert testimony was not needed in this case. We disagree. In contrast to this case, the injured plaintiff' s treating physician in Benoit testified that as of the time of trial, " he could say with reasonable certainty that there were objective symptoms that presently caused pain and that he expected her pain to continue until such time as more surgery or some other method is attempted to relieve the pain." Id. at 207. Given the lack of similar expert evidence in this case, the court' s decision to grant defendant a directed verdict on plaintiff' s claims for future medical expenses, pain, and suffering was appropriate.

Plaintiff next argues that the court should not have instructed the jury on comparative negligence or the requirements of certain motor vehicle safety statutes. As to the latter claim, plaintiff failed to preserve the issue because she did not object to the instructions on the safety statutes after the court charged the jury, but before it retired to deliberate. V.R.C.P. 51(b); Winey v. William E. Dailey, Inc., 161 Vt. 129, 137-38 (1993). Moreover, we find plaintiff' s argument on the court' s comparative negligence instruction unpersuasive given the evidence.

A party appealing a jury instruction has the burden to establish that the instruction was erroneous and prejudicial. Mobbs v. Cent. Vt. Ry., Inc., 155 Vt. 210, 218 (1990). It is the trial court' s duty to instruct the jury upon every point material to the matter which the admitted evidence raises. Id. In this case, the record contains evidence that plaintiff could have avoided the accident if she had turned her vehicle to the right instead of to the left. By swerving her car to the left as she did, plaintiff directed her vehicle toward the same lane into which defendant' s vehicle was moving. The court therefore acted properly by including the comparative negligence instruction.

Finally, plaintiff claims the court erred by denying a portion of the costs she requested pursuant to V.R.C.P. 54(d)(1). She claims that she was entitled to all of her costs, but cites no case law supporting her argument. Rule 54(d)(1) allows the court to award costs to the prevailing party " unless the court otherwise specifically directs." V.R.C.P. 54(d)(1). We have interpreted the rule as granting the trial court discretion to decide whether to award costs. Peterson v. Chichester, 157 Vt. 548, 553 (1991). We find no abuse of discretion here. The costs the court denied were incurred after plaintiff rejected defendant' s offer to settle the matter. The settlement offer was greater than the jury award. Under V.R.C.P. 68, defendant was therefore entitled to recoup the costs she incurred to defend plaintiff' s claim at trial. The court' s decision to deny plaintiff costs related to prosecuting the action after defendant' s offer of judgment was consistent with the spirit of Rule 68, and was within the court' s discretion under Rule 54(d)(1).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice