

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-323

MARCH TERM, 2007

Norma J. Poulenkill	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Tammy Bell	}	DOCKET NO. 485-9-03 Wncv
	}	

Trial Judge: Helen M. Toor

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

Plaintiff Norma J. Poulenkill appeals from the trial court's order directing a verdict for defendant Tammy Bell in this negligence action. Plaintiff argues that: (1) she presented sufficient evidence to withstand a directed verdict and (2) the trial court abused its discretion by refusing to allow her to recall a witness. We affirm.

Plaintiff sued defendant in September 2003, alleging that she was injured when defendant negligently struck her with an automobile. The case went to trial, and at the close of plaintiff's evidence, defendant moved for a directed verdict. The trial court granted defendant's request, finding that plaintiff failed to present evidence to establish a causal connection between the accident and plaintiff's alleged injuries since that date. This appeal followed.

Plaintiff argues that she presented sufficient evidence to withstand the directed verdict. In considering this claim, we must view the evidence in the light most favorable to plaintiff, excluding the effect of any modifying evidence. Lussier v. N. Troy Eng'g Co., 149 Vt. 486, 490 (1988). "If there is any evidence fairly and reasonably supporting the nonmoving party's claim, the case should go to the jury, and a directed verdict would be improper." Id.; see also V.R.C.P. 50(a)(1).

Taking the facts in plaintiff's favor, the record indicates the following. Plaintiff has a number of serious medical conditions that predate the alleged accident, including diabetes insipidus, acromegalia (overproduction of growth hormones), and an equinovarus foot deformity, which is essentially a club foot. Plaintiff has had repeated trouble with her ankles—they twist very easily and are often swollen. Plaintiff has also complained in the past of having difficulty walking without pain.

In September 2000, defendant was attempting to back her vehicle out of plaintiff's driveway and she ran over plaintiff's right foot. Plaintiff testified that she was pressed between two cars, and the tire rested on her foot for a little while. Plaintiff was taken to the hospital and examined by a doctor. Plaintiff's medical report indicated that there was no discoloration or swelling noted in the

femur over the lower leg, her ankle movements were intact, her knee movements were slightly intact, her hip movements were intact, and her distal sensation and circulation were intact. The emergency room report also found no bony abnormalities in plaintiff's right femur, right tibia, or right foot.

Six days after the incident, on October 4, 2000, plaintiff visited Dr. Kevin Crowley complaining of pain. Dr. Crowley had been plaintiff's treating physician for many years. His examination showed swelling in plaintiff's leg and he noted that she continued to have ongoing pain and still had an inverted foot. Dr. Crowley stated, however, that he did not see evidence of hemorrhage or tire marks on her foot. He testified that he believed plaintiff had a "ringer injury," which meant that the soft tissue over an extremity was crushed without doing any damage to the bony structures of the extremity. Plaintiff did not visit Dr. Crowley again after October 4, but she saw numerous other doctors after that date for a variety of problems. Since the accident, plaintiff continued to have pain, and testified that the pain worsened after the accident, but she also testified that she suffered from pain before the accident. Plaintiff stated that she was unable to resume certain physical activities after the accident, such as bicycling, basketball, housekeeping, and sleeping, although her testimony connected these difficulties not only to the condition of her right foot and leg after the accident, but also to both of her legs, without particular attribution to her more recently injured right foot.

Dr. Crowley was the only physician to testify at trial. He stated that it would be difficult for him to give an opinion on whether plaintiff's complaints since the incident were related to the automobile accident. He testified that he was unaware of any other event that would account for plaintiff's problems in the five years since the accident. He reiterated, however, that he could not render an opinion regarding whether plaintiff's current complaints were related to the alleged accident.

Shortly thereafter, Dr. Crowley was excused as a witness, and plaintiff's attorney attempted to introduce a summary of plaintiff's medical expenses during the five years since the accident. Defendant objected for lack of foundation, arguing that there was no evidence that the services plaintiff received were in fact related to the claimed incident, and there was no testimony within a reasonable degree of medical certainty that they were fair and reasonable services or fair and reasonable charges. The court sustained defendant's objection. Plaintiff's attorney then indicated that, given the court's ruling, he might need to recall Dr. Crowley and have him address the issue. The trial court informed plaintiff that it did not believe plaintiff had the option of calling Dr. Crowley twice. Counsel stated that he would then either call plaintiff to testify about the bills or Janet Curry, a medical paralegal who helped prepare the bill summary. Defendant objected, arguing that neither witness was qualified to testify within a reasonable degree of medical certainty. The trial court sustained the objection, explaining that Dr. Crowley had not testified that any of the medical services plaintiff received were reasonable, necessary, or related to the accident. Counsel moved to recall Dr. Crowley. The request was denied, and plaintiff rested her case.

Defendant then moved for a directed verdict, asserting that plaintiff failed to present competent evidence to establish the necessary elements of her negligence claim. In response, plaintiff pointed to her own testimony and that of a neighbor who witnessed the incident. The court explained, however, that even assuming that the accident happened as these witnesses described,

there did not appear to be any evidence to show a causal connection between the alleged incident and plaintiff's subsequent and continuing medical problems. In response, counsel cited plaintiff's testimony of what she had experienced and the treatment she sought, Dr. Crowley's testimony and his reference to other medical providers, but the court found this evidence insufficient. It explained that the record showed that plaintiff had rather complicated medical conditions that predated her alleged injury in 2000, and her current health conditions had not been explained in any way by any medical testimony. Dr. Crowley, the only doctor who testified, said that he could not render an opinion that the accident was the cause of her injuries, and his statement that he was unaware of anything specific that happened in the past five years that caused or might have caused plaintiff's ongoing problems was not the same as saying that the accident caused plaintiff's problems. The court thus found that to the extent there was any evidence of causation, it was plainly insufficient for a jury to find by a preponderance of the evidence that the accident caused plaintiff's injuries, and it directed the verdict for defendant.

Plaintiff argues that the court erred in reaching this conclusion. According to plaintiff, the trial court mistakenly likened this case to a medical malpractice claim, and applied an improper standard in evaluating the evidence of causation. Plaintiff states that regardless of her ability to make her case regarding the necessity of subsequent medical treatment, she was entitled to have the jury consider the question of her pain and suffering and her loss of enjoyment of life due to the accident.

We find no error in the court's decision. Plaintiff failed to present evidence that would fairly and reasonably support the causation element of her negligence claim, and thus a directed verdict was appropriate. The trial court did not use an inappropriate standard in evaluating plaintiff's claim. It is well-settled that to establish causation,

[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

W. Keeton et al., *Prosser and Keaton on Torts* § 41, at 269 (5th ed. 1984) (footnotes omitted).

In this case, given the nature of plaintiff's preexisting injuries, which included pain and swelling in her feet, expert testimony was required to establish a causal link between the accident and a specific injury that was directly caused by the accident. See *id.* ("Where the conclusion [as to causation] is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn."); see also *Houghton v. Leinwohl*, 135 Vt. 380, 383-84 (1977) (expert testimony required where causal connection between accident and injury is obscure). This is particularly true in light of plaintiff's medical evaluations at the emergency room and shortly after the accident. The medical notes from other doctors, read into the record by Dr. Crowley, reflected plaintiff's own description of symptoms, and they did not establish the necessary causal link. The reference to "chronic regional pain syndrome" by one doctor was

wholly unexplained. Even assuming that plaintiff suffered some damage to her soft tissue directly after the accident, as Dr. Crowley testified, a jury could not reasonably or fairly discern from the evidence what pain if any was attributable to the accident or to this injury and what pain could be explained by plaintiff's preexisting medical problems. A directed verdict was appropriate.

Given our conclusion, we find no error in the court's refusal to allow plaintiff to recall Dr. Crowley. Dr. Crowley repeatedly testified that he could not offer an opinion on whether plaintiff's current medical problems were related to the accident. Absent a causal connection, any testimony that he could offer on the reasonableness of plaintiff's medical bills was irrelevant.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Brian L. Burgess, Associate Justice