IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

RAMONA K. HATTEN, Administratrix of the Estate of George Fisher, Deceased, Plaintiff, v. ROGER A. SHOLL, Defendant.	))))))))))	CIVIL ACTION NO. 3:01CV00031 MEMORANDUM OPINION JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's motion for summary judgment, filed December 5, 2001. This matter was referred to United States Magistrate Judge B. Waugh Crigler for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. §§ 636(b)(1)(B)(West 1993 & Supp. 2001). On January 16, 2002, the Magistrate Judge issued his Report and Recommendation, wherein he recommended that the court deny the defendant's summary judgment motion. The defendant filed timely objections. The court has reviewed *de novo* those portions of the Report and Recommendation as to which objections were made. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Having thoroughly considered the entire case and all relevant law, the court shall accept the recommendation of the Magistrate Judge and deny the defendant's summary judgment motion.

I.

The following facts are undisputed, unless otherwise noted. This is a wrongful death action filed by the administratrix of the estate of the decedent, George Fisher, who was struck and killed by a tractor rig driven by the defendant, Roger Sholl.

On August 16, 1999, the defendant drove a load of stereo components from Columbus, Ohio to the Best Buy Distribution Center in Staunton, Virginia arriving at approximately 3:00 a.m. Accompanying him in the cab of his tractor rig were his 11 year old son and 9 year old daughter. The defendant unhooked his tractor from his trailer, leaving the trailer in a loading dock bay at the distribution center at around 6:00 a.m. The defendant then drove his children in the tractor rig to get something to eat.

At about 3:00 p.m., the defendant and his children returned to the distribution center. The defendant's son was riding in the passenger seat of the tractor, while his daughter was in the sleeper. The 1990 Peterbilt tractor, which the defendant was driving, does not have a rear window nor was the truck equipped with a back-up alarm. The defendant entered the parking lot of the distribution center from the north side with the intent to line up the tractor and reconnect it to the trailer. The loading dock bays were along the western side of the parking lot. In the meantime, the decedent, Mr. Fisher, was walking back to his rig carrying a snack cake and a can of soda pop which he had purchased from a vending machine area in the northwest corner of the parking lot. The defendant states that along the right hand side of his truck, he noticed Mr. Fisher walking in the same southerly direction as he was driving. The defendant inadvertently pulled past his loading dock bay and decided to reverse his tractor to get into proper position to rehook the trailer.

The defendant represents that he blew his horn, put on his flasher lights, and looked in both sets of mirrors on the driver's side and passenger side doors of his rig before he started to back up. The defendant also states that he leaned over the passenger seat to get a better view from the passenger side mirror. The defendant then proceeded to back up his tractor at 3 to 4

miles per hour until he reached a point just past his trailer. The defendant shifted his tractor out of reverse and pulled forward and slightly to the left to align the tractor with the trailer. Before shifting back into reverse to recouple his trailer, the defendant saw in his driver's side mirror a person lying on the pavement. The defendant exited his truck and ran to the person. The victim was Mr. Fisher, who died from his injuries.

No dispute exists over the cause of death, namely, that Mr. Fisher died from being run over by the defendant's trailer rig. Similarly, the parties agree that the actions of the defendant were not intentional. The plaintiff, however, contends that the defendant was negligent in his operation of the truck. According to the plaintiff's expert, David Stopper, the defendant did not back up his tractor in a straight line; rather, he veered to the right before beginning the alignment maneuver. Furthermore, the plaintiff's expert offers his opinion that based on the facts of the case, the defendant did not undertake normal safety procedures while he was backing up his rig.

In response, the defendant has filed a motion to exclude testimony of plaintiff's expert witness. Among other arguments, the defendant maintains that the basis on which the plaintiff's expert concludes that a standard of care exists for the trucking industry fails to meet the *Daubert* requirements. The plaintiff in turn has filed her own motions in limine to exclude the testimony of the defendant's expert witnesses.

On March 28, 2001, the plaintiff filed a three count complaint for wrongful death and damages against the defendant pursuant to Virginia Code § 8.01-50. Jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The defendant moved for summary judgment on all counts on December 5, 2001. In reply, the plaintiff indicated that she does not

oppose the defendant's motions for summary judgment on punitive damages or on negligence of the common carrier. As such, all that remains of the original complaint is the plaintiff's negligence count. The court referred this case for proposed findings of fact and a recommended disposition to the presiding United States Magistrate Judge. The Magistrate Judge took up both the summary judgment motion and the defendant's motion in limine to exclude the testimony of the plaintiff's expert and recommended the denial of both.

II.

A party is entitled to summary judgment when the pleadings and discovery show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See* 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

III.

The defendant objects to the Magistrate Judge's recommendation that the court deny his motion to exclude the testimony of the plaintiff's expert. The defendant contends that the testimony of Mr. Stopper and the material and data on which his testimony is based do not meet the requirements put forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Specifically, the defendant disagrees with Mr. Stopper's assertion that a standard of care exists for the trucking industry. The defendant also objects to allowing Mr. Stopper to tell the jury that he found no evidence of contributory negligence by the decedent, Mr. Fisher.

A determination of whether expert opinion testimony may be introduced is governed by Federal Rule of Evidence 702 which provides:

> 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.

These last three factors were added to Rule 702 in codify the Supreme Court's holding in *Daubert*. Under *Daubert*, the district court assumes the role of a gatekeeper in that it must make an initial determination as to whether an expert's testimony is reliable and relevant. *See e.g.*, *Westberry v. Ab*, 178 F.3d 257, 260 (4th Cir. 1999) (citing *Daubert*, 509 U.S. at 590-92 & n.9.)

The trial judge is given substantial discretion to decide how to make this determination. *See* 178 F.3d at 261; *see also United States v. Alatorre* , 222 F.3d 1098, 1101-05 (9th Cir. 2000); *United States v. Nichols*, 169 F.3d 1255, 1262-63 (10th Cir. 1999), *cert. denied*, 526 U.S. 1007 (1999). For example, in *Daubert*, the Supreme Court suggested factors such as testing, peer review, error rates and the general acceptance of the theory. However, the *Daubert* factors "are meant to be helpful, not definitive," *Kumho Tire*, 526 U.S. at 149-150. Because the object of the Court's opinion in *Daubert* was the reliability of "scientific" theory

and scientific methods, the expansion of *Daubert's* "gatekeeping" principle to technical and other specialized knowledge, in *Kumho Tire v. Carmichael*, 526 U.S. 137 (1992), may merit the consideration of factors other than those set forth in *Daubert*. In fact, as the Supreme Court held in *Kumho Tire*, the *Daubert* factors "do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Kumho Tire*, 526 U.S. at 149. The ultimate objective of the court's preliminary determination is to ensure that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152 (1992).

Mr. Stopper will testify, based on his experience and based on various professional materials, that a standard of care exists for truck driving, specifically in this case, for backing up tractor rigs. The materials on which Mr. Stopper based his opinion include the Virginia Commercial Driver's License Manual, the Ohio Commercial Driver's License Manual, and the Federal Highway Administration's Student Manual with a model curriculum for training tractor-trailer drivers. In addition, Mr. Stopper refers to various driving training manuals and training videos.

The court finds that Mr. Stopper's testimony about proper backing up procedures is based on sufficient facts and data. The court finds it reasonable for an expert on truck safety and accident reconstruction to look to federal, state, and commercial publications on the subject. Furthermore, the defendant is not challenging the substance of the manuals or other publications upon which the plaintiff's expert relies. The defendant instead argues that even if all these materials upon which Mr. Stopper relied indicate a proper method for backing up a tractor rig,

they are still only generalized guidelines and not standards. Thus, the jury should not be allowed to hear the opinion that the defendant failed to comply with these standards. The court believes that the defendant is troubled by semantics. For Mr. Stopper himself indicated that his testimony will lay out the scene of the accident, explain what blind side backing is and discuss safe backing practices. (Stopper Dep. at 39.) Under Virginia law, negligence is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under existing circumstances." *Moore v. Virginia Transit Co.*, 188 Va. 493, 498, 50 S.E.2d 268, 271 (1948). In this case, the inquiry centers on the care a reasonable truck driver would have used under the circumstances of this case. If federal, state and commercial materials on truck driving all discuss proper practices for backing up a truck, it is reasonable for an expert to use those practices as the basis, or standard of care, upon which to measure the actions and testimony of the defendant. Of course, the defendant may challenge the expert's opinion, but no argument raised by the defendant warrants declaring the opinion unreliable. Moreover, the court finds that this testimony would assist the trier of fact who, as the Magistrate Judge pointed out, is unlikely to have knowledge of the special procedures involved in reversing a 50,000 ton tractor.

Mr. Stopper, as an accident reconstruction expert, applies his knowledge to the facts of this case and opines that based on the police reports, security videotapes and deposition testimony, the defendant failed to carry out certain precautionary practices, such as posting a lookout or leaning out the driver's side door while reversing the truck. In addition, Mr. Stopper disputes the defendant's contention that he leaned over his passenger seat to get a better look at that side of his truck. It is Mr. Stopper's opinion that had the defendant done so, the decedent

should have been visible. The defendant indicates in his objections that he will offer expert testimony to counter Mr. Stopper's opinion and that a cross examination of Mr. Stopper will raise questions about his version of the accident. The court reads this with approval. Mr. Stopper will not be on the stand to tell the jury what happened; rather, he will be on the stand to offer his expert opinion as to what happened. The defendant will have every opportunity to challenge this testimony and to present contrary evidence and expert opinion of his own in as much his experts survive any *Daubert* challenges raised by the plaintiff. Indeed, the Supreme Court confirmed in *Daubert* that expert testimony may be tested by "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. Accordingly, the court finds that the testimony of the plaintiff's expert is sufficiently reliable and relevant to be admissible under Federal Rule of Evidence 702.

IV.

The defendant also objects to the recommendation of the Magistrate Judge that the court deny the defendant's summary judgment claim. The defendant maintains that the plaintiff has failed to prove by a preponderance of the evidence that the defendant was negligent and that this negligence was a proximate cause of the accident. Thus, according to the defendant, this case should not reach a jury.

The law on negligence is well settled in Virginia:

> Negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff to produce evidence of preponderating weight from which trier of fact can find that the defendant was guilty of negligence which was a proximate cause of the accident. The evidence must prove more than a probability of negligence. The plaintiff must show how and why the accident happened. And if the cause of the accident is left to conjecture, guess, or random judgment, the plaintiff cannot recover.

Farren v. Gilbert, 224 Va. 407, 411, 297 S.E.2d 668, 670 (1982). It is only when reasonable minds cannot differ that the issue of negligence becomes one of law. *See Artrip v. E.E. Berry Equipment Co.*, 240 Va. 354, 357, 397 S.E.2d 821, 823 (1990).

The defendant's objections focus on the Magistrate Judge's application of *Farren* to the facts of this case. The *Farren* case involved an appeal from a judgment confirming a jury verdict for the defendant in a wrongful death action. The defendant in that case struck and killed the decedent while backing up his truck in a nursing home parking lot. The plaintiff argued that the defendant was negligent because he failed to maintain a proper lookout. *See* 224 Va. at 411. The court found that to establish a *prima facie* case of primary negligence and proximate cause, circumstantial evidence "'must show more than that the accident resulted from one of two causes, for one of which the defendant is responsible and for the other of which she is not.'" *Id*. at 411 (quoting *Sneed v. Sneed*, 219 Va. 15, 18, 244 S.E.2d 754, 755 (1978). According to the *Farren* court, the evidence failed to establish that negligence was the proximate cause of the decedent's death. *Id*. at 412. In particular, the plaintiff did not show that the defendant could have seen the decedent before the accident. *See Hoffner v. Kreh*, 227 Va. 48, 53, 313 S.E.2d 656, 659 (1984) (discussing the holding in *Farren*). The court therefore found that the trial court should not have submitted the case to the jury. *See* 224 Va. at 412.

In contrast, the plaintiff in this case has produced an expert witness to testify that the defendant should have seen the decedent and that if he did not, it was because he had not complied with the standard backing up practices in his industry. The plaintiff in this case has filled the gap which proved fatal to the plaintiff in *Farren*. Namely, the plaintiff has made a

showing that the accident may have resulted from a cause, for which the defendant's negligence might be responsible. In the end, however, the jury will resolve these issues in its verdict. For now, the court concludes that the plaintiff has offered sufficient evidence, challenged though it may be, to justify submitting these issues for jury resolution. The court finds that the plaintiff has met her burden to produce evidence which could allow a jury to conclude that negligence was the proximate cause of the decedent's death. Thus, summary judgment is inappropriate.

V.

For the foregoing reasons, the court denies the defendant's motion to exclude the plaintiff's expert testimony as well as the defendant's motion for summary judgment. Accordingly, the court accepts the Report and Recommendation of the Magistrate Judge and overrules the defendant's objections to that report.

An appropriate order shall this day issue.

ENTERED: _____
Senior United States District Judge

_____
Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

RAMONA K. HATTEN, Administratrix of the Estate of George Fisher, Deceased,	)	CIVIL ACTION NO. 3:01CV00031
Plaintiff,	)	
	)	ORDER
v.	)	
ROGER A. SHOLL,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the presiding United States Magistrate Judge's January 16, 2002 Report and Recommendation on the parties' cross motions for summary judgment. The defendant has timely filed objections. Accordingly, the court has performed a *de novo* review of the Magistrate Judge's Report and Recommendation. *See* 28 U.S.C § 636(b)(1); Fed. R. Civ. P. 72(b). Upon thorough consideration of the Report and Recommendation, all relevant memoranda of the parties, the entire record, and the applicable law, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The Magistrate Judge's Report and Recommendation, filed January 16, 2002, shall be, and it hereby is, ACCEPTED;

2. The defendant's objections, filed January 28, 2002, shall be, and they hereby are, OVERRULED;

3. The defendant's motion for summary judgment, filed December 5, 2001, shall

be, and it hereby is DENIED; and

4. The defendant's "Motion to Exclude Testimony of Plaintiff's Expert Witness," filed December 5, 2001, shall be, and it hereby is, DENIED.

The Clerk of the Court is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

_____
Date