

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

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

Before the court is the “Plaintiff’s Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for a New Trial,” filed March 5, 2001. A three day jury trial was held in this wrongful death case 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 February 25, 2002, the jury returned a verdict that the defendant had not been negligent in the operation of his motor vehicle.

I.

Under Federal Rule of Civil Procedure 50, the court may grant a motion for judgment as a matter of law where “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.”<sup>1</sup> The question posed in this case is whether a reasonable jury could find, based on the evidence presented at trial, that defendant Sholl was not negligent

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<sup>1</sup> Under a 1991 amendment to Fed. R. Civ. P. 50, the terms “judgment notwithstanding the verdict” and “directed verdict” were replaced with the term “judgment as a matter of law.”

in backing up his trailer rig when he struck and killed the decedent. Before addressing the sufficiency of the evidence, the court notes a procedural defect in the plaintiff's motion. The prerequisite to making a Fed. R. Civ. P. 50(b) motion, that is, a post-verdict motion for judgment as a matter of law, is that the moving party first make a pre-verdict motion for judgment as a matter of law at the close of evidence in accordance with Fed. R. Civ. P. 50(a). *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 151 F.3d 176, 179 (1998). In this case, the defendant made such a motion, but the plaintiff did not. Instead, the plaintiff raised two motions at the close of evidence - one to strike the testimony of the defendant's expert, and the other to strike the defense of contributory negligence. This oversight alone is grounds for the court to deny the plaintiff's motion. However, even treating the plaintiff's motion as properly filed, the court finds that a sufficient evidentiary basis existed for the jury to find as it did.

## II.

In ruling on a Rule 50(b) motion, "the judge is not to weigh the evidence or appraise the credibility of witnesses, but must view the evidence in the light most favorable to the non-moving party and draw legitimate inferences in its favor." *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106, 107 (4th Cir. 1974). Judgment as a matter of law is proper only if the evidence "supports only one reasonable conclusion as to the verdict." *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 831 (4th Cir. 1999).

A plaintiff bringing a negligence claim in Virginia must show (1) the identification of a legal duty of the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff proximately caused by the breach. *Talley v. Danek Medical, Inc.*, 179 F.3d 154, 157-58 (4th Cir. 1999)(citing *Locke v. Johns-Manville Corp.*, 221 Va. 951, 957, 275 S.E.2d 900, 904

(Va. 1981)). “Under Virginia law, ‘[t]he standard of conduct to which a party must conform to avoid being negligent is that of a reasonable man under like circumstances.’” *Id.* (quoting *Moore v. Virginia Transit Co.*, 188 Va. 493, 497, 50 S.E.2d 268, 271 (1948)). As indicated above, the jury in this case never reached the issue of proximate cause because they found that the defendant had not acted negligently.

The testimony of expert witnesses constituted the majority of the evidence introduced at trial. Each side presented its expert witness to testify *inter alia* as to what proper backing up procedures were and to interpret the plaintiff’s videotape evidence which presented a partial view of the accident. Not surprisingly, the experts presented divergent opinions. For example, the plaintiff’s expert, David Stopper, argued that the videotape revealed that the defendant was negligent, while the defendant’s expert, Lindley Manning, explained to the jury why the videotape demonstrated that the defendant had acted with reasonable care. The jury also heard the defendant describe his actions leading up to the accident. Nothing in the defendant’s testimony constituted an admission of negligence. Viewing the evidence in the light most favorable to the defendant and drawing legitimate inferences in his favor, the court finds that a legally sufficient evidentiary basis existed for a reasonable jury to find that the defendant was not negligent.

The court finds nothing in the cases cited by the plaintiff to alter this conclusion. In *Walsh v. Virginia Housing Development Authority*, 1991 WL 183560 (4th Cir. 1991), a discrimination case, the district court set aside a jury verdict for the plaintiff and granted judgment notwithstanding the verdict in favor of the defendants. In affirming the decision, the Fourth Circuit found that all of the evidence supported the defendants’ arguments. *See id.* at

\*2. Similarly, in *O'Neal v. Celanese*, the court found that the evidence established the defendant's affirmative defense as a matter of law. 10 F.3d 249, 254 (4th Cir. 1993)(affirming a judgment as a matter of law in favor of the defendant in a negligence action based on the sophisticated user defense). In contrast, this court cannot say that there was but one reasonable conclusion as to the verdict in this case. The conflict in the evidence present here posed a classic case for jury resolution. As such, the court denies the plaintiff's motion for judgment notwithstanding the verdict.

### III.

The plaintiff also moves for a new trial pursuant to Fed. R. Civ. P. 59(a). In considering a motion for a new trial, the district court must set aside the verdict and grant a new trial if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir.1998) (quoting *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.1996)). In making this determination, "the district court may weigh the evidence and consider the credibility of the witnesses." *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 200 (4th Cir. 2000).

Each side presented its version of the events leading up to the accident, and the court does not construe the evidence to weigh clearly in favor of the plaintiff. Regarding witness credibility, the plaintiff points out that the defense expert did not visit the scene of the accident until the night before his testimony. Certainly, this is a consideration to be taken into account in assessing his credibility, just as, for example, the fact that the plaintiff's expert never examined the trailer rig could be considered. Nevertheless, the court perceived both experts to

be credible witnesses. Therefore, in weighing the evidence and considering the credibility of the witnesses, the court finds that the verdict is not against the clear weight of the evidence. Moreover, the plaintiff does not challenge any of the evidence as being false. Finally, the plaintiff relies on *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984), to argue that the jury miscarried justice because reasonable persons could not find that the defendant was not negligent. However, in *Abasiekong*, the Fourth Circuit reversed a district court's granting of a new trial on these grounds. *See id.* (finding that "any 'miscarriage of justice' is more seriously threatened by forcing Abasiekong through the rigors of yet a third trial than by allowing the jury verdict to stand"). And contrary to the plaintiff's assertion, the court finds that reasonable persons could find that the defendant did not act negligently. Thus, the court denies the plaintiff's motion for a new trial.

IV.

For the foregoing reasons, the court denies the plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. An appropriate Order this day shall issue.

ENTERED: \_\_\_\_\_  
Senior United States District Judge  
\_\_\_\_\_  
Date

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

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly  
this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The plaintiff's motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial, filed March 5, 2002, shall be, and it hereby is, DENIED;
2. The Clerk of the Court is instructed to enter judgment for the defendant in accordance with the jury's verdict and to strike this case from the docket of the court.

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.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date

