

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-221

Filed: 7 April 2015

Mecklenburg County, No. 11 CVS 21852

TONY HAROLD POPE, ADMINISTRATOR OF THE ESTATE OF SUSAN
LANIER FRIES, Plaintiff,

v.

BRIDGE BROOM, INC., Defendant.

Appeal by plaintiff from judgment entered 19 August 2013 by Judge Eric L.
Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21
May 2014.

*DeVore Acton & Stafford, PA, by Derek P. Adler and Fred W. DeVore, III, for
plaintiff-appellant.*

*McAngus, Goudelock & Courie, P.L.L.C., by Colin E. Scott, for defendant-
appellee.*

GEER, Judge.

Plaintiff Tony Harold Pope, as administrator of decedent Susan Lanier Fries' estate, appeals from a judgment entered on a jury verdict in defendant's favor, finding defendant was not liable in negligence. Mrs. Fries, who was riding on a motorcycle with her husband, was thrown from the motorcycle and died after her husband tried to avoid one of defendant's trucks that was at the rear of a street-sweeping operation. On appeal, plaintiff primarily argues that the trial court erred in denying his motion for a directed verdict against defendant on the grounds that the evidence was

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undisputed that defendant's negligence was at least a proximate cause of Mrs. Fries' death. However, defendant presented evidence materially indistinguishable from the undisputed facts of *Pintacuda v. Zuckeberg*, 159 N.C. App. 617, 624-26, 583 S.E.2d 348, 353-54 (2003) (Timmons-Goodson, J., dissenting), *rev'd for reasons stated in dissent*, 358 N.C. 211, 598 S.E.2d 776 (2004), in which our Supreme Court upheld entry of a directed verdict in *the defendant's favor* because the evidence established intervening negligence by the plaintiff motorcycle driver. Since the undisputed evidence in *Pintacuda* was sufficient to establish intervening negligence as a matter of law, defendant's evidence in this case, if believed by the jury, was sufficient to allow the jury to find that the negligence of Mrs. Fries' husband constituted intervening negligence warranting a verdict in defendant's favor. Consequently, the trial court, in this case, properly denied plaintiff's motion for a directed verdict.

Facts

This case arose out of an accident on Independence Boulevard in Charlotte, North Carolina. In the area around where the accident occurred, there are three northbound lanes and three southbound lanes that are divided by a median. Traveling southbound, the highway curves to the southwest, and there are trees abutting the right shoulder of the highway. The speed limit is 55 m.p.h., and lanes are about 12 feet wide.

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On the evening of 10 September 2011, defendant was performing a street sweeping operation that involved four of defendant's vehicles traveling southbound on the left hand side of Independence Boulevard. Michael Marshall, then employed by defendant, was at the tail of the operation, driving a pickup truck designed to absorb substantial rear end impact. Mounted on the bed of Mr. Marshall's truck was a tall advanced warning sign bearing a large flashing arrow or message indicating to drivers approaching from behind the street sweeping operation that they would have to move over one lane to the right. About 150 feet in front of Mr. Marshall, there was another attenuator truck with a similar mounted sign ("the front attenuator truck"), and in front of that second truck was a sweeping and vacuuming vehicle. There was also a vehicle in front of the sweeping vehicle that was picking up larger debris.

The weather was clear that evening, and sometime after 9:30 p.m. the sweeping operation had crested a hill on Independence Boulevard just south of a bridge over Pecan Avenue, and was moving between five and 20 m.p.h. Mr. Marshall's truck was either partially or completely in the left lane of travel, even though the left shoulder was wide enough for Mr. Marshall to be traveling completely on the shoulder. The other Bridge Broom vehicles were traveling either on the left shoulder or in the left lane.

Yawo Sedjro was also traveling in his car, a green van, southbound in the left lane. As he came up the hill just after the Pecan Avenue bridge, Mr. Sedjro came

quickly upon Mr. Marshall's vehicle obstructing the left lane of travel and slammed on his brakes. Mr. Sedjro first slowed to about 20 to 25 m.p.h. and then came to a complete stop, becoming trapped behind Mr. Marshall's truck. He signaled and waited for an opportunity to safely move over to the center lane. Samuel Flores was traveling southbound in his vehicle when he came upon Mr. Sedjro and defendant's sweeping operation. Mr. Flores also slammed on his brakes to let Mr. Sedjro move over and in case Mr. Flores needed to move over into the right lane.

Darrell Fries was also driving southbound on Independence Boulevard on his motorcycle with Mrs. Fries riding on the back. Mr. and Mrs. Fries were traveling in the left lane when Mr. Fries saw brake lights up ahead and the flashing sign from one of the attenuator trucks. Mr. Fries "wasn't sure what was happening in the left lane," but he believed he "had to move over" and "started making adjustments." After moving over to the center lane, he began to brake, but his motorcycle started sliding. The motorcycle skidded for 195 feet before it fell over. Mrs. Fries was thrown about 30 feet from where the motorcycle fell over, she slammed into the back of Mr. Flores' car, and she died. Mr. Fries suffered serious injury. There were no other injuries or accidents.

At trial, plaintiff offered testimony from, among others, Daren Marceau, who testified as an expert in "traffic engineering and crash investigation, motorcycle operations and human factors with respect to driving in motorway environments."

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Mr. Marceau testified that “the mobile sweeping operation being conducted by Bridge Broom’s employees at the time of the crash was in violation of state and federal standards” as promulgated in the Manual for Uniform Traffic Control Devices (“MUTCD”), primarily because “Mr. Marshall failed to properly position his truck on the shoulder[,] . . . [the driver of the front attenuator truck] failed to properly space the two [attenuator] trucks along the roadway[, and] . . . Bridge Broom failed to place advanced warning signs or changeable message signs before the work zone.” He concluded that “the failure of Bridge Broom to do the[se] things . . . was at least a cause of the crash that killed Susan Fries.” Plaintiff introduced into evidence relevant portions of the MUTCD. However, plaintiff did not offer the testimony of an accident reconstruction expert.

Plaintiff filed a motion in limine to exclude the testimony of defendant’s expert in accident reconstruction, Timothy Cheek. The trial court denied the motion and allowed Mr. Cheek to testify regarding his analysis of the accident. Mr. Cheek did not disagree with Mr. Marceau’s opinions regarding the location of defendant’s vehicles at the time of the accident. However, Mr. Cheek testified that in his opinion, based in large part upon his measurements and calculations at the location of the accident, that the reason for Mrs. Fries’ death was Mr. Fries’ inadequate braking of the motorcycle. Plaintiff cross-examined Mr. Cheek about the accuracy of these measurements and calculations.

At the close of all the evidence, plaintiff made a motion for a directed verdict in his favor. The trial court denied the directed verdict motion and also denied a request by plaintiff for a jury instruction on negligence per se. However, the trial court granted defendant's request for an instruction on intervening negligence.

The trial court submitted two issues to the jury: (1) "Was the negligence of Bridge Broom a proximate cause of the death of Susan Fries?" and (2) if so, "What amount of damages is the Estate of Susan Fries entitled to recovery [sic] for her wrongful death?" The jury answered the first question in the negative. After the verdict was read, plaintiff made a motion for judgment notwithstanding the verdict ("JNOV") on the grounds that the "overwhelming weight of the evidence" supported the conclusions (1) that defendant should be liable based on negligence per se and (2) that Mr. Fries' actions were reasonably foreseeable. After the trial court denied the JNOV motion, plaintiff moved the trial court for "essentially a mistrial" on the same bases as the JNOV. The trial court also denied that motion. Plaintiff timely appealed to this Court.

I

Plaintiff first challenges the trial court's admission of Mr. Cheek's accident reconstruction testimony, arguing that his opinions were inadmissible under Rule 702 of the Rules of Evidence. Mr. Cheek testified that, in his expert opinion, Mr. Fries was "the cause of this accident." According to Mr. Cheek, the accident occurred,

and Mrs. Fries was killed, because Mr. Fries only used his rear brake -- if he had used both his front and rear brakes, Mr. Fries would have been able to safely stop.

We review a trial court's ruling regarding the admission of expert testimony for abuse of discretion. *State v. McGrady*, ___ N.C. App. ___, ___, 753 S.E.2d 361, 365, *disc. review allowed*, 367 N.C. 505, 758 S.E.2d 864 (2014). A trial court abuses its discretion if its decision is “‘manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’” *Id.* at ___, 753 S.E.2d at 365 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The legislature's 2011 amendment to Rule 702(a) of the Rules of Evidence 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 all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Our Rule 702 was amended to mirror the Federal Rule 702, which itself “ ‘was amended . . . to conform to the standard outlined in *Daubert*[*v. Merrell Dow Pharms.*,

Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)].’ ” *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting Committee Counsel Bill Patterson, 2011-2012 General Assembly, *House Bill 542: Tort Reform for Citizens and Business* 2-3 n.3 (8 June 2011)).

In light of our legislature’s amendment, this Court recognized that “it is clear that amended Rule 702 should be applied pursuant to the federal standard as articulated in *Daubert*.” *Id.* at ___, 753 S.E.2d at 367. *Daubert* explained that the touchstone for admissibility is reliability, and “ ‘ “scientific knowledge” establishes a standard of evidentiary reliability.’ ” *Id.* at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795). For cases commenced after the effective date of the Rule 702 amendment, this generally means a departure from the analysis set forth under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004), which was based on the existing law that, under the prior version of Rule 702, “North Carolina [was] not . . . a *Daubert* jurisdiction.”¹

Consistent with the application of Federal Rule 702 in federal courts, under North Carolina’s amended Rule 702, trial courts must conduct a three-part inquiry concerning the admissibility of expert testimony:

Parsing the language of the Rule, it is evident that a proposed expert’s opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by “knowledge, skill,

¹The amended Rule 702 applies here because the complaint was filed about a month after the effective date of the amendment. See 2011 Sess. Laws ch. 283, ss. 1.3, 4.2.

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experience, training, or education.” Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* Third, the testimony must be reliable. *Id.*

In re Scrap Metal Antitrust Litig., 527 F.3d 517, 528-29 (6th Cir. 2008). “While there is inevitably some overlap among the basic requirements . . . they remain distinct concepts and the courts must take care not to conflate them.” *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

In this appeal, plaintiff does not make any challenge to Mr. Cheek’s testimony under the first or second prongs of the Rule 702 inquiry, but instead focuses exclusively on whether Mr. Cheek’s opinions were reliable. With respect to that part of the Rule 702 inquiry,

Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon “sufficient facts or data,” whether the testimony is the “product of reliable principles and methods,” and whether the expert “has applied the principles and methods reliably to the facts of the case.” [Fed. R. Evid. 702.] In addition, *Daubert* provide[s] a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. . . . The test of reliability is “flexible,” and the *Daubert* factors do not constitute a “definitive checklist or test,” but may be tailored to the facts of a particular case. *Kumho [Tire Co. v. Carmichael]*, 526 U.S. [137,] 150, [143 L. Ed. 2d 238, 251], 119 S. Ct. 1167[, 1175 (1999)].

In re Scrap Metal Antitrust Litig., 527 F.3d at 529.

Daubert’s five non-exclusive factors for trial courts to use in assessing the

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reliability of scientific testimony include the following:

1) whether the expert's scientific technique or theory can be, or has been, tested; 2) whether the technique or theory has been subject to peer review and publication; 3) the known or potential rate of error of the technique or theory when applied; 4) the existence and maintenance of standards and controls; and 5) whether the technique or theory has been generally accepted in the scientific community.

United States v. Beverly, 369 F.3d 516, 528 (6th Cir. 2004). Additionally, in applying *Daubert*, federal courts have recognized other factors relevant to determining the reliability of expert testimony, including whether the expert proposes to testify about matters growing naturally and directly out of research the expert has conducted independent of the litigation, or, conversely, whether the expert has developed opinions expressly for purposes of testifying; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; whether the expert has adequately accounted for obvious alternative explanations; whether the expert is as careful in his testimony as he would be outside the context of his paid litigation consulting; and whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments (citing cases in support of factors).

Although this case is only the second time our appellate courts have discussed the application of the *Daubert* standard adopted by our amended Rule 702, federal

and other state courts, of course, have been applying the *Daubert* analysis for more than two decades. Nevertheless, although plaintiff challenges Mr. Cheek's testimony on the basis that it failed to meet the requirements of each of Rule 702's subsections, the only authority plaintiff cites in support of his contentions is Rule 702 and the standard of review. "As defendant fails to cite any legal authority in support of [this] argument, that argument may be deemed abandoned." *State v. Locklear*, 180 N.C. App. 115, 119, 636 S.E.2d 284, 287 (2006); N.C.R. App. P. 28(a). Nonetheless, even considering plaintiff's bare assertions, we hold he has failed to show that the trial court abused its discretion.

At trial, Mr. Cheek testified that the facts and data he used to form his opinion came from (1) the police file, which included statements, reports, and photographs from the scene; (2) physical evidence from and observations of the scene; and (3) the depositions of the witnesses at the scene, including those of Mr. Marshall, Mr. Sedjro, Mr. Chavez, and Mr. Fries. These sources provided Mr. Cheek with the following facts about the case: (1) at the time of the accident, Mr. Marshall's truck was not completely on the left shoulder; (2) the height of the sign on Mr. Marshall's truck was 13 feet; (3) the speed of Mr. Marshall's truck was less than 10 m.p.h.; (4) Mr. Fries' motorcycle was a 2003 Harley Davidson; (5) Mr. Fries "was in the left-hand lane when he came around the curve and saw the arrow board" on Mr. Marshall's truck and moved over to the center lane; and (6) other cars were able to stop without wrecking

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or leaving skid marks. His review of the information available prior to trial also provided him with an understanding of the geography of the area of the accident; the start and end points of the skid marks from Mr. Fries' motorcycle; the point where the motorcycle was laid down and came to a rest; and the positions of Mr. Sedjro's and Mr. Chavez' vehicles.

Mr. Cheek's opinion was primarily based on a comparison of Mr. Fries' sight distance and the distance in which Mr. Fries could have safely braked. Mr. Cheek took two measurements to determine Mr. Fries' sight distance, which Mr. Cheek testified was "more than 660 feet[.]" With one measurement, relying on Mr. Fries' deposition testimony that he saw Mr. Marshall's truck while in the left lane, Mr. Cheek placed his car on the left shoulder of Independence Boulevard at the stipulated location of the accident and walked back on that shoulder to the farthest point where he could still see his car, and he measured a driving distance of 800 feet within which Mr. Fries could "see and react" to any danger posed by Mr. Marshall's truck. As part of the measurement, Mr. Cheek stooped down to mimic Mr. Fries' height while driving the motorcycle. Mr. Cheek explained, given that the sign on the rear of Mr. Marshall's truck was 13 feet, much taller than Mr. Cheek's car which only came up to his chest, this 800 foot estimate was conservative. For the other sight distance measurement, which relied on physical evidence suggesting that Mr. Fries was closer to the right lane when he reacted to Mr. Marshall's vehicle, Mr. Cheek used Google's

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Street View software and determined that if Mr. Fries were traveling in the far right lane, he could have seen Mr. Marshall's truck from at least 580 feet away. Mr. Cheek explained that this estimate was "very conservative."

Mr. Cheek also determined that Mr. Fries' skid marks were caused by Mr. Fries locking his rear brake and failing to apply his front brake. Assuming Mr. Fries was traveling 55 m.p.h., and taking into account Mr. Fries' motorcycle's braking capacity, Mr. Cheek calculated that the distance in which Mr. Fries could have stopped had he used both brakes was 133 feet. Mr. Cheek also testified that the fact that no other automobiles were involved in a wreck supported the conclusion that Mr. Fries could have safely reacted to any danger posed by Mr. Marshall's vehicle and come to a complete stop if he had applied his front brake.

Plaintiff cross-examined Mr. Cheek about the possible hazards posed by Mr. Marshall's truck, his sight distance calculations, his calculation of Mr. Fries' motorcycle's braking capabilities, and proper motorcycle braking technique. In response to a question whether "[a]s a general principle [it is] true that . . . automobiles stop more quickly than motorcycles," Mr. Cheek explained that Mr. Fries' motorcycle can safely brake quicker than the average automobile.

Plaintiff first contends, under Rule 702(a), that the testimony that plaintiff had "800 feet of driving space to see and react" was not based on sufficient facts or data, because the points that Mr. Cheek used to measure that distance -- from one

point on the left shoulder to another point on the left shoulder -- were different from the locations of Mr. Fries' motorcycle and Mr. Marshall's truck prior to the accident. Plaintiff argues that Mr. Fries was actually in the middle lane, while Mr. Marshall was straddling the shoulder and left lane. Plaintiff also contends the measurement was deficient in facts or data because it failed to account for when Mr. Fries "could decipher that the attenuator truck was actually within the left lane" and recognize that it posed a hazard.

Subsection (a)(1) of Rule 702 "calls for a quantitative rather than qualitative analysis." *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. That is, the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology.'" *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) (quoting *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 766 (7th Cir. 2013)). *See also United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Col. 2008) ("[T]he inquiry examines only whether the witness obtained the amount of data that the methodology itself demands.").

Consequently, "[a]s a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007) (quoting *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 372 F.

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Supp. 2d 1104, 1119 (N.D. Ill. 2005)). “In other words, th[is] Court does not examine whether the facts obtained by the witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the *weight* to be given the opinion by the factfinder, not the *admissibility* of the opinion.” *Crabbe*, 556 F. Supp. 2d at 1223.

Additionally, “experts may rely on data and other information supplied by third parties. . . even if the data were prepared for litigation by an interested party. Unless the expert’s opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others.” *Southwire Co.*, 528 F. Supp. 2d at 934 (internal citation omitted). An expert may rely on deposition statements made by other witnesses in developing the factual basis of his opinion. *See Figueroa v. Boston Scientific Corp.*, 254 F. Supp. 2d 361, 367 (S.D. N.Y. 2003) (holding expert’s opinion sufficiently reliable in part where expert “reviewed witness depositions, medical records, and scientific literature in forming his expert opinion in this case”).

Here, Mr. Cheek relied on Mr. Fries’ deposition in which Mr. Fries testified that he was in the left lane when he saw the arrow board on Mr. Marshall’s truck, which was not completely on the left shoulder. Mr. Cheek also relied on the heights of the sign on Mr. Marshall’s truck and of Mr. Fries’ motorcycle, which are undisputed. There is no dispute that these facts were sufficient for Mr. Cheek to calculate a sight distance measurement of 800 feet. Any dispute concerning whether

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Mr. Cheek used the correct data points goes to the quality and therefore the credibility of the measurement and not its admissibility. *See Intellectual Ventures I LLC v. Canon Inc.*, 36 F. Supp. 3d 449, 466 n.11 (D. Del. 2014) (“Using his own selected references, Dr. Fossum disputes the references selected and calculations performed by Dr. Afromowitz, concluding that Dr. Afromowitz’s analysis is . . . not based on sufficient facts or data. The court will not weigh the credibility of the parties’ experts[.]”); *Crabbe*, 556 F. Supp. 2d at 1223 (“The witness’ testimony that he or she obtained a measurement of that distance is sufficient to satisfy the ‘facts and data’ element of Rule 702 for that component of the methodology.”). *See also Glass v. Anne Arundel Cnty.*, 38 F. Supp. 3d 705, 715-16 (D. Md. 2014) (“Because all these facts are supported by the record, the data on which [the expert] relied in writing portions of [his] report based on these three facts are relevant to the case. [The plaintiff’s] objections to [the expert’s] conclusions from his calculations -- and to [the expert’s] failure to take other data into account -- go to the weight of the report, not its admissibility[.]”).

Further, the 800 feet of driving space “to see and react” to any perceived danger posed by Mr. Marshall’s truck does, in fact, take into account the point at which Mr. Fries could decipher that danger, as it takes into account the point when Mr. Fries reacted to Mr. Marshall’s truck. Mr. Cheek testified in his deposition that his calculations considered “the time it takes to recognize that a vehicle is completely

stopped” which is “about a second.” Mr. Cheek also relied upon the fact that Mr. Fries testified he moved over to the center lane when he saw Mr. Marshall’s arrow board, which was partially in the left lane.

Plaintiff next argues that Mr. Cheek’s 800 foot measurement was the product of unreliable principles and methodology, contrary to Rule 702(a)(2), because Mr. Cheek used Google Earth to measure the sight distance. Plaintiff points to an image generated by Google Earth’s line of sight estimator² showing that, from the center lane on the Pecan Avenue bridge to the stipulated point where the accident occurred, the line of sight is obstructed by trees. Plaintiff did not introduce this image at trial.

The requirement that expert testimony must be based on “ ‘scientific knowledge,’ ” *McGrady*, ___ N.C. App. at ___, 753 S.E.2d at 367 (quoting *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795), means that the principles and methods used to form that testimony must be grounded in the scientific method, *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481, 113 S. Ct. at 2795. In other words, the principles and methods must be capable of generating “ ‘testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication.’ ” *Perry v. Novartis Pharms. Corp.*, 564 F. Supp. 2d 452, 459 (E.D. Pa. 2008) (quoting *Caraker v. Sandoz Pharm. Corp.*, 188 F. Supp. 2d 1026, 1030 (S.D. Ill. 2001)).

²Plaintiff apparently showed this image to the trial court during the hearing on the admissibility of Mr. Cheek’s testimony.

We note that plaintiff conceded at trial that the measurement of 800 feet from the left shoulder was accurate, using Google Earth, and on appeal contends that “the approximation does not take into account Google Earth’s additional evidence that the line of sight from the center lane . . . is obstructed.” It appears that the specific contention that Mr. Cheek used unreliable principles and methods to determine the 800 foot sight distance measurement is based on the fact that, had Mr. Cheek measured the sight distance from the center lane on the Pecan Avenue bridge, his conclusion would have been different.

Plaintiff, however, does not suggest that the technique Mr. Cheek used to arrive at the 800 foot measurement is itself the product of unscientific methodology, and given that Mr. Cheek used Google Earth to calculate the distance he could see from the left shoulder, plaintiff rightfully concedes that this measurement is reliable. *See Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculation relying on Google Maps data). Rather, the only reason plaintiff gives that Mr. Cheek’s 800-foot sight distance measurement is unreliable is essentially that qualitatively unreliable data points were used, an attempt to take plaintiff’s prior contention concerning insufficient facts and data and recast it in terms of principles and methods. Because we have concluded

that the trial court did not err in admitting Mr. Cheek's testimony on the basis of insufficient facts or data, we likewise overrule this contention.³

Plaintiff additionally contends that Mr. Cheek's opinion is based on unreliable principles or methods because, according to plaintiff, at his deposition "[Mr.] Cheek admitted that reaction time was NOT factored into his analysis." Although Mr. Cheek stated at his deposition that "reaction time isn't really discussed in here [in my report]," he also explained at his deposition and at trial that, assuming Mr. Fries was traveling 55 m.p.h. when he first saw Mr. Marshall's truck, and assuming he saw the truck at a distance of 800 feet out, he would have had "an available time of [at least] 10 seconds to do something."

At trial, Mr. Cheek testified that "Mr. Fries, as he approached the collision area . . . responded at a certain point in time." Mr. Cheek was able to use skid marks left by Mr. Fries' motorcycle (as measured by the police) to determine the precise point at which Mr. Fries reacted to the vehicles ahead. Mr. Cheek then used that point to determine whether, had Mr. Fries used both his front and his back brakes, he could have avoided the collision. Consequently, even assuming, as plaintiff suggests, that reaction time is an essential part of an accident reconstruction expert's testimony, it was reasonable for the trial court to conclude that Mr. Cheek accounted

³We note that had plaintiff introduced into evidence the Google Earth image showing an obstructed view from the center lane, then the jury could have resolved any discrepancy between the obstructed view that image conveyed and Mr. Cheek's sight distance conclusions.

for Mr. Fries' reaction time when reaching his opinion that Mr. Fries could have avoided the accident by proper braking. *See Dugle ex rel. Dugle v. Norfolk S. Ry. Co.*, 683 F.3d 263, 270 (6th Cir. 2012) ("The district court found the record devoid of evidence that [the defendant's] train crew could have avoided the collision [with the plaintiff-officer's vehicle] after the crew first spotted [the plaintiff's] cruiser. But . . . a reasonable inference arises from both [the investigating officer's] accident report and the testimony of [the defendant's] own experts . . . that [the plaintiff] could have braked in time to avoid the collision if he had been warned when his cruiser first became visible to the train crew.").

Plaintiff also contends that Mr. Cheek's opinion that Mr. Fries was the only direct cause of the accident uses unreliable principles and methods because his opinion was based on the fact that "no other vehicles crashed." In his deposition, Mr. Cheek testified that "you can eliminate [Bridge Broom] as a direct cause of the crash because nobody else had a crash[.]" At trial, however, Mr. Cheek explained that the fact that other vehicles "were able to stop . . . without leaving any skid marks" was important "in terms of the available sight distance [drivers] had, and the available distance that they had to respond to the work zone being out there." He further testified that "there's lots of research that shows that motorcycles can actually stop better than cars." The fact that no other cars wrecked at the scene does not, therefore, itself represent a separate principle or methodology that Mr. Cheek employed to come

to his conclusion, but other data or facts that corroborated his measurements and calculations. Plaintiff has, therefore, failed to show that the principles and methods Mr. Cheek used were unreliable under Rule 702(a)(2).

Lastly, plaintiff's argument under Rule 702(a)(3) -- that Mr. Cheek did not reliably apply the principles and methods to the facts of this case -- reiterates plaintiff's argument under Rule 702(a)(2) that Mr. Cheek improperly based his conclusion that Mr. Fries had enough notice to react to any perceived danger on the fact that there were no other wrecks. This argument is not sufficient to demonstrate that the trial court erred in concluding that Mr. Cheek's opinion did not violate Rule 702(a)(3).

In sum, plaintiff has failed to show that Mr. Cheek's testimony was unreliable. Because plaintiff does not further challenge the admissibility of Mr. Cheek's testimony, we hold that the trial court did not abuse its discretion in admitting the testimony.

II

Plaintiff next argues that the trial court erred in instructing the jury on intervening or superseding negligence. When instructing a jury in a civil case,

“the trial court has the duty to explain the law and apply it to the evidence on the substantial issues of the action.” The trial court is permitted to instruct a jury on a claim or defense only “if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense.”

Estate of Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 151-52, 565 S.E.2d 254, 262 (2002) (quoting *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994)). Plaintiff contends that defendant presented insufficient evidence of intervening or superseding negligence. We disagree.

A negligent act is the proximate cause of injury if the injury is caused by an event which is not “merely possible” but which rather is “reasonably foreseeable” on the part of the negligent actor. *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984). “[I]ntervening negligence[is] also referred to in our case law as superseding or insulating negligence[and] is an elaboration of a phase of proximate cause.” *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998). “ ‘An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question.’ ” *Hairston*, 310 N.C. at 236, 311 S.E.2d at 566 (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462, 54 S.E.2d 299, 301 (1906)). “Insulating negligence means something more than a concurrent and contributing cause.” *Id.*

Our Supreme Court has explained:

The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original

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wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.

Adams v. Mills, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (internal citations omitted).

Initially, we note that plaintiff cites *Adams* for the proposition that the type of accident here -- which plaintiff likens to a chain-reaction collision -- is inherently foreseeable. *Adams* explained that “[i]t is well settled that there may be more than one proximate cause of an injury. Where [a] second actor does not become apprised of the existence of a potential danger created by the negligence of an original tortfeasor until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tortfeasors are contributing causes and proximate factors in the happening of the accident.” *Id.*, 322 S.E.2d at 172 (internal citation omitted).

Although the Court in *Adams* concluded that, in a series of wrecks, the second negligent actor in that case did not insulate the original tortfeasor from liability, that case also limited its holding: “Under the facts of this case, it cannot be said as a matter of law that defendant’s conduct in continuing to drive in a westerly direction down the two-lane paved road while blinded by the bright setting sun was reasonably unforeseeable to one in plaintiff’s position. The risk of the intervention of this or

other similar wrongful conduct is the very risk created by violation of the regulations governing stopping on the highway.” *Id.* at 195, 322 S.E.2d at 173.

Here, on the other hand, Mr. Cheek’s opinion that Mr. Fries caused the accident by failing to use his front brake, if believed by the jury, makes the facts of this case substantially the same as those in *Pintacuda*, in which the Supreme Court ultimately concluded that, as a matter of law, the negligent defendant was insulated from liability.⁴ In *Pintacuda*, it was undisputed that the plaintiff was riding his motorcycle under the speed limit in the left lane on the highway at least three car lengths behind the defendant’s car when the plaintiff “saw the hood of defendant’s car fly up.” 159 N.C. App. at 618, 583 S.E.2d at 349-50. Afraid that he would “crash into defendant’s car and either be thrown over that car or be impaled on the back of the car[,]” the plaintiff made a “split-second” decision to move over to another lane which he knew was clear. *Id.* at 619, 583 S.E.2d at 350. However, as he was attempting to avoid the defendant’s car, “his motorcycle began to skid for unknown reasons and came down in the right-hand lane”; the plaintiff was thrown from his motorcycle and seriously injured. *Id.*

After the plaintiff in *Pintacuda* filed his complaint, the trial court granted summary judgment in favor of the defendant. On appeal, the issue was whether summary judgment was proper on the grounds that (1) the plaintiff was

⁴We note that although *Pintacuda* is obviously pertinent to the issues raised in this case, neither party cited it.

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contributorily negligent or, in the alternative, (2) his actions constituted an unforeseeable cause that insulated defendant from liability. *Id.* at 622, 623, 583 S.E.2d at 351-52. A majority of the panel in *Pintacuda* reversed the summary judgment order after concluding that the evidence gave rise to genuine issues of material fact as to both intervening negligence and contributory negligence.

Then-Judge Timmons-Goodson dissented on the basis that the undisputed facts of that case were indistinguishable from those of *McNair v. Boyette*, 15 N.C. App. 69, 189 S.E.2d 590, *aff'd*, 282 N.C. 230, 192 S.E.2d 457 (1972).

This Court has previously stated that when a plaintiff has become aware that potential dangers have been created by the negligence of another, and then “by an independent act of negligence, brings about an accident,” the defendant is relieved of liability, “because the condition created by [the defendant] was merely a circumstance of the accident and not its proximate cause.” *McNair* . . . , 15 N.C. App. [at] 73, 189 S.E.2d [at] 593 I believe that defendant’s act of stopping his vehicle was merely a circumstance of the accident and not the proximate cause of plaintiff’s injuries.

. . . .

. . . A review of plaintiff’s testimony clearly places responsibility for the accident on him either “skidding on something” or hitting a lane reflector. Moreover, plaintiff’s testimony reveals that he was aware of the potential danger created by defendant’s accident, had sufficient time to apply his breaks [sic], safely merge into a different lane, and in an independent act, failed to maintain control of his motorcycle. Therefore, it is clear that there was an independent cause, apart from defendant’s collision, which resulted in plaintiff sustaining injuries.

Pintacuda, 159 N.C. App. at 624, 626, 583 S.E.2d at 353, 354 (Timmons-Goodson, J., dissenting). The Supreme Court reversed *Pintacuda* based on Judge Timmons-Goodson's dissent. 358 N.C. at 211, 598 S.E.2d at 776.

Here, similar to the undisputed facts in *Pintacuda*, Mr. Cheek's testimony, if found credible and entitled to weight, would permit the jury to find that Mr. Fries had the time, distance, and capability to safely brake and that the accident was due to Mr. Fries' failure to use his front brake. Although plaintiff contends that defendant conceded the positioning of Mr. Marshall's truck "created a foreseeable risk of a rear-end collision" for traffic approaching from behind the truck, such a concession merely provided sufficient facts to support a finding that Mr. Marshall's truck created a foreseeable risk for some type of accident. It was not a concession that the particular accident here could not have been the result of some superseding cause.⁵

The trial court, therefore, did not err in instructing the jury on intervening or superseding negligence. Because the issue was properly submitted to the jury, we also reject plaintiff's contention that the lack of evidence of intervening or superseding negligence entitled plaintiff to a directed verdict, to JNOV, or a new trial.

III

⁵Plaintiff asserts that "[f]or Mr. Fries' actions to supersede the negligence of the Defendant, this Court must rule as a matter of law that a highway driver's failure to properly stop and/or avoid an improperly warned hazard is negligence such that it breaks the causal chain[.]" This assertion, however, mistakes this Court's task on appeal, which is to determine whether there was sufficient evidence for the jury to decide whether any negligence on the part of defendant was insulated by a superseding cause.

Plaintiff further argues that the trial court erred in rejecting his contention that Mr. Marshall violated the requirements of the MUTCD and that such violations constituted negligence per se. Specifically, plaintiff argues that the trial court erred in denying his request for a jury instruction on negligence per se and in denying his motions for a directed verdict, JNOV, and a new trial based on negligence per se.

The standard of review for motions for a directed verdict and JNOV is well established:

“The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine ‘whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.’” *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (internal citation omitted) (quoting *Denson v. Richmond County*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)), *disc. review denied*, 363 N.C. 583, 682 S.E.2d 389 (2009).

“A motion for either a directed verdict or JNOV ‘should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.’” *Id.* (quoting *Branch v. High Rock Realty, Inc.*, 151 N.C. App. 244, 250, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003)). “A ‘scintilla of evidence’ is defined as ‘very slight evidence.’” *Everhart v. O’Charley’s Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (quoting *Scarborough v. Dillard’s Inc.*, 188 N.C. App. 430, 434, 655 S.E.2d 875, 878 (2008), *rev’d on other grounds*, 363 N.C. 715, 693 S.E.2d 640 (2009)).

Springs v. City of Charlotte, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011).

Further, where a trial court's decision pertaining to a motion for a new trial involves a question of law or a legal inference, the standard of review is de novo. *Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 77 (2011).

“[T]he general rule in North Carolina is that the violation of a [public safety statute] constitutes negligence *per se*. A public safety statute is one impos[ing] upon [the defendant] a specific duty for the protection of others.” *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (internal citation and quotation marks omitted). “The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances.” *Cowan v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

Defendant suggests that any violation of the MUTCD by defendant could not be negligence *per se* because “Bridge Broom is a private actor, and North Carolina cases have only recognized a claim against the NCDOT, a government actor.” Although this Court has held that the North Carolina Department of Transportation can be held liable under a theory of negligence *per se* for violating the MUTCD, *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 218-19, 588 S.E.2d 42, 48 (2003), our appellate courts have not yet addressed whether a private actor's noncompliance

with the MUTCD can support a claim of negligence per se. However, even assuming, without deciding, that defendant had a duty to comply with the MUTCD, the portions of the MUTCD that plaintiff suggests were violated did not create specific duties sufficient to be the basis for a claim of negligence per se.

In the version of the MUTCD applicable here, the information regarding use of traffic control devices is categorized into “Standards,” “Guidance,” “Option,” or “Support.” MUTCD § 1A.13. While a “Standard” is “a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device” for which “[t]he verb ‘shall’ is typically used[,]” “Guidance” is “a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate” for which “[t]he verb ‘should’ is typically used.” *Id.*

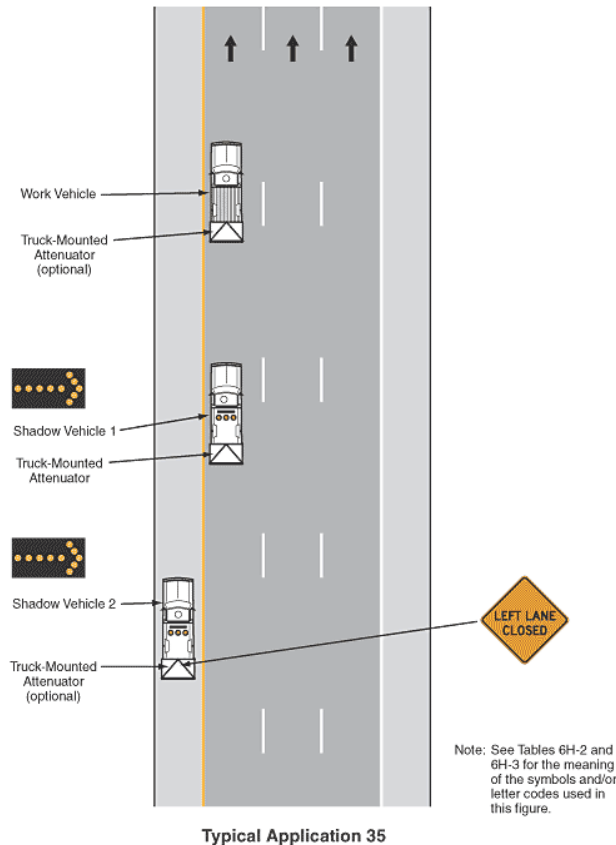
Chapter 6 of the MUTCD provides information for setting up temporary traffic control (“TTC”) activities. *Id.* at § 6A.01. TTC activities include “tapering” -- diverting traffic from or back into its normal path -- to shield workers in mobile work zones from approaching drivers. *Id.* at § 6C.08. An example of tapering is shifting traffic one lane over from its normal route. Part H of Chapter 6 contains “typical applications for a variety of situations commonly encountered.” *Id.* at § 6H.01. “Except for the notes (which are clearly classified using headings as being Standard,

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Guidance, Option, or Support), the information presented in the typical applications can generally be regarded as Guidance.” *Id.*

Plaintiff contends that the typical application depicted in Figure 6H-35 in the MUTCD, reproduced below, required Mr. Marshall’s truck to be completely on the left shoulder, as portrayed by “Shadow Vehicle 2.” The undisputed evidence is that Mr. Marshall was not traveling completely on the left shoulder, and Mr. Marceau testified that this was “a violation of the MUTCD.”

Figure 6H-35. Mobile Operation on Multi-lane Road (TA-35)



Plaintiff also contends that Mr. Marshall violated the MUTCD by failing to maintain a proper tapering length -- the distance given approaching drivers to adjust to a diverted traffic pattern -- as provided by Table 6H-4. Mr. Marceau testified that according to Table 6H-4, which Figure 6H-35 uses to determine tapering lengths, MUTCD § 6H.01, Mr. Marshall's truck should have been traveling 660 feet behind the front attenuator truck. However, the undisputed evidence is that the tapering length was only 150 feet.

Other jurisdictions have recognized that the MUTCD's non-mandatory provisions do not provide specific duties the violation of which constitute negligence per se. For example, in *Esterbrook v. State*, 124 Idaho 680, 682, 683, 863 P.2d 349, 351, 352 (1993), the Idaho Supreme Court held that noncompliance with non-mandatory provisions of the MUTCD could not be the basis for a determination of negligence per se because non-mandatory provisions of the MUTCD were "optional provisions" and did not "clearly define the required standard of conduct." That same Court later held in *Lawton v. City of Pocatello*, 126 Idaho 454, 461, 886 P.2d 330, 337 (1994), that certain provisions in the MUTCD are non-mandatory provisions since the MUTCD describes them as " 'recommended but not mandatory' " and as " 'advisory condition[s].' " As non-mandatory provisions, "they did not define any required standard of conduct." *Id.* at 462, 886 P.2d at 338.

We find the reasoning of *Esterbrook* and *Lawton* persuasive. Because non-mandatory provisions of the MUTCD are optional, they do not provide a duty to be obeyed and, therefore, while noncompliance with non-mandatory provisions may be relevant to a claim of negligence, such noncompliance does not constitute negligence per se.

Although Mr. Marceau testified that Mr. Marshall's truck not being completely on the shoulder was "a violation of the MUTCD," there is no indication in Figure 6H-35 or its notes or Table 6H-4 that they provide anything more than "Guidance" for the location of Mr. Marshall's truck or the taper length. Therefore, assuming that Mr. Marshall's truck location and the taper length did not comply with Figure 6H-35 or Table 6H-4, that evidence is not sufficient to support a claim of negligence per se. Because plaintiff has failed to point to any evidence that defendant violated mandatory provisions of the MUTCD, we conclude that the trial court did not err in denying plaintiff's request for a negligence per se instruction or in denying his motions for directed verdict, JNOV, and new trial on the basis of negligence per se.

NO ERROR.

Judges BRYANT and CALABRIA concur.