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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-289

MARCH TERM, 2008

Kathy Murphy	}	APPEALED FROM:
	}	
v.	}	Washington Superior Court
	}	
Ursula Landry	}	DOCKET NO. 67-2-06 Wncv
		Trial Judge: Mary Miles Teachout

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

Plaintiff appeals from a jury verdict in favor of defendant in this negligence case. She argues that the court erred in charging the jury. We affirm.

Plaintiff sued defendant, her landlord, in January 2006, for negligence. Plaintiff alleged that she was injured after stepping into a hole on the lawn of her new residence. At trial, defendant argued, in part, that a small depression in the grass was not an "unreasonably dangerous" condition, particularly given that there were safe and suitable stairs that provided access to the property immediately adjacent to the lawn. At the charge conference, plaintiff requested certain instructions regarding defendant's knowledge of the "dangerous condition" of the lawn, including an instruction that "voluntary ignorance" may constitute negligence if the detection of the dangerous condition could have been accomplished by reasonable vigilance. The court did not adopt plaintiff's proffered instructions, instead instructing the jury in relevant part as follows:

> [A] business owner has a duty of active care to make sure that its premises are in a safe and suitable condition for property users. This means that a business owner has a duty to use reasonable care to provide facilities that do not expose users to unnecessary or unreasonable risks of harm. A tenant arriving at rental premises has a right to assume that the premises, aside from obvious dangers, are reasonably safe for the purpose, and that the proper precautions have been taken to make them so.
>
> To prove her claim for negligence, Plaintiff must prove to you, by a preponderance of the evidence, each of the following elements: (1) that Defendant knew or should have known, on the day of the incident, that there was a risk of an unreasonably dangerous or unsafe condition on the lawn, (2) that Defendant failed to exercise reasonable care in preventing or warning of the condition or not allowing it to remain, and (3) that such unreasonably dangerous condition or failure to warn was in fact the proximate cause of Plaintiff's injuries. . . .

The jury returned a verdict in defendant's favor, and this appeal followed.

On appeal, plaintiff argues that the court erred by failing to adopt her proposed jury instructions concerning knowledge and "voluntary ignorance." We find no error. "A court has wide discretion in framing language used in a charge, and its failure to adopt text proffered by a party—or even language agreed upon by all—does not constitute reversible error as long as the instruction actually delivered was without error." Chater v. Cent. Vt. Hosp., 155 Vt. 230, 236 (1990). The court's instructions in this case were accurate and complete and they covered the material points raised by the evidence. As set forth above, the court instructed the jury that defendant had a "duty of active care" to ensure that the premises were in a "safe and suitable condition for property users," and that she could be held liable if she "knew or should have known, on the day of the incident, that there was a risk of an unreasonably dangerous or unsafe condition on the lawn." See, e.g., Dalury v. S-K-I, Ltd., 164 Vt. 329, 334-35 (1995) (business owner has duty to keep its premises reasonably safe, and business invitee has right to assume that premises, aside from obvious dangers, are reasonable safe and that proper precaution has been taken to make them so). Defendant had a duty to actively ensure that the premises were free from unreasonable risks, and the court so instructed the jury. Counsel for defendant did not err in citing essentially this same standard to the jury in his closing argument. Even assuming that counsel misstated the law, any error was harmless. See Malaney v. Hannaford Bros., 2004 VT 76, ¶ 20, 177 Vt. 123 ("A party's misstatement of the law during closing argument does not generally require reversal of a jury verdict as long as the trial court corrects the misstatement during its charge to the jury . . . .").

This case is not like those cited by plaintiff that address premises liability in retail stores with self-service operations. See, e.g., Malaney, 2004 VT 76, ¶ 11 (recognizing modification of premises liability law in context of retail stores displaying and selling goods through self-service operations, and ruling that (1) store has duty of "active care" to protect its invitees from foreseeable risks; (2) store's modern self-service operation imposed a corresponding duty upon store to use reasonable measures to anticipate and address risks associated with operation; and (3) store's duty increased in degree proportionate to foreseeable risks of operation). The specific duty applicable to self-service retail operations is not applicable to defendant in this case, and plaintiff was not entitled to an instruction that reflected such a duty. See id. at ¶ 22 (explaining that where law imposes a particular duty in a negligence case, jury instructions must describe this duty to the jury, and describing specific duty of care applicable to store operator, including duty to use reasonable measures to discover and remove from the floor debris which may have been dropped or knocked to the floor and imposing obligation of greater vigilance if store owner is to meet the standard of care). The court's instructions in this case properly imparted "the spirit of the law," and they did not mislead the jury. Id. at ¶ 21. Plaintiff's claim of error is without merit.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice