IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TABETHIA MALONEY,	:	
	:	C.A. No. 08C-09-031 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
CLIFF FIGUEROA, THE CITY AND/OR TOWN OF MILFORD, DELAWARE and the MILFORD POLICE DEPARTMENT,	:	
	:	
Defendants.	:	

Submitted: September 9, 2011
Decided: December 1, 2011

ORDER

Upon Defendants' Motion for Summary Judgment.
Denied.
Upon Defendants' Motion in Limine to Preclude Plaintiff from Presenting Evidence of Her Injuries.
Denied.

Charles E. Whitehurst, Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for Plaintiff.

Scott G. Wilcox, Esquire and Daniel A. Griffith, Esquire of Whiteford Taylor & Preston, LLC; attorneys for Defendants.

WITHAM, R.J.

FACTS

This case arises out of a collision in which one of the Defendants, Milford Police Officer Cliff Figueroa, struck the Plaintiff, Tabethia Maloney, with his marked squad car at roughly 1:30a.m. on September 13, 2006 near northbound Route 1 and Route 113 in Milford, Delaware. Officer Figueroa and then Sgt., now Lt., Edward Huey responded to an emergency call for a single automobile accident in which the Plaintiff had driven under the influence, crashing into a streambed. At the time, they were unaware of the location of the accident. The collision between the person of the Plaintiff and Officer Figueroa's squad car occurred somewhere at or near the end of the merge lane where northbound Route 113 meets Route 1. As Sgt. Huey traveled in the merge area, he braked, stopping short of the Plaintiff. Officer Figueroa overtook his car to the left and struck the Plaintiff.

Standards of Review

Summary Judgment

The entry of summary judgment is appropriate only when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] The facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[3] However, when the facts

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[1] *Health Solutions Network, LLC v. Grigorov*, 12 A.3d 1154 (Del. 2011).

[2] *Id.*

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4]

DISCUSSION

Summary Judgment

The Defendants move for summary judgment stating that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Their central argument is that no reasonable fact finder could conclude on the evidence that Officer Figueroa was not only negligent, but also that his negligence outweighed the negligence of the Plaintiff. It has long been held that the issue of proximate cause is ordinarily a question of fact to be determined by the trier of fact.[5] Further, there may be more than one proximate cause for an injury.[6] In this case, the jury may need to make a determination of comparative negligence. The Delaware Supreme Court has stated:

> Pursuant to the Delaware [comparative negligence] statute, the apportionment of comparative negligence is a 'separate consideration' which should be examined by the trier of fact only after the elements of each actor's individual negligence (duty, breach of duty, and proximate causation) have first been determined. That is, after the trier of fact finds that two or more actors were independently negligent, the amount of negligence attributed 'comparatively' to each actor is determined based upon the extent to which their respective negligent conduct contributed to the occurrence of the harmful event.[7]

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[4] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[5] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 830 (Del. 1995); *Faircloth v. Rash*, 317 A.2d 871, 871 (Del. 1974).

[6] *Moffitt v. Carroll*, 640 A.2d 169, 174 (Del. 1994).

[7] *Id.* at 175.

Viewing the facts in the light most favorable to the non-moving Plaintiff, a reasonable jury could find Officer Figueroa to be a proximate cause of this accident and may also find the Plaintiff's presence in the roadway to be a proximate cause of this accident. The jury would then be required to apportion fault based upon the parties' respective negligent conduct contributing to the occurrence of the accident. The Court finds the facts insufficient to rule out Officer Figueroa as a proximate cause of the accident and inadequate to invade the province of the jury to apportion negligence between the Plaintiff and the Defendant at this juncture. The Court elaborates its reasoning below.

The Plaintiff points out several issues of material fact, which are critical to the case. First, Officer Huey allegedly stated to the father of the Plaintiff, Lt. Eric Maloney, that Officer Figueroa was negligent and that Ms. Maloney was proceeding to the left side of Officer Huey's vehicle in order to speak to him.[8] This account is different than Officer Huey's deposition testimony that Ms. Maloney simply continued to proceed across the road.[9] The difference between going into the roadway to speak to an officer and get help and simply wandering into oncoming traffic could be material to a jury's determination of comparative negligence, and the parties disagree as to what actually transpired.

Second, the facts are disputed with regard to which direction the Plaintiff entered the roadway. In an accident statement, Officer Figueroa claims that she came from the left while the accident reconstruction report states that she came from the right. Importantly, Officer Figueroa did not write of any doubt that the Plaintiff came

[8]Eric Maloney Dep. at 23.

[9]Huey Dep. at 25-26.

from his left in his accident statement. Officer Huey's accounts are inconsistent as he varied from saying that she simply appeared in the roadway[10] to saying that she entered the roadway from the right.[11] Officer Huey's version of events also varies in the distance he stopped from the Plaintiff from 8 feet[12] to 15 or 20 feet.[13] The determination of the Plaintiff's position in the roadway and the direction from which she entered could play a role in determining comparative negligence and the finder of fact's decision regarding the credibility of witnesses.

Third, it is unclear whether Officer Figueroa was operating his vehicle according to the Milford Police Department's Policy and Procedures Manual (hereinafter "Manual"). In a "Code 3" emergency situation, the Manual provided that officers "shall not exceed the posted *or prima fascia* [sic] speed limit by more than twenty (20) miles per hour in a marked car . . . ."[14] The GPS data shows that Officer Figueroa either met or came close to that 20 mile per hour threshold based on a speed limit of 50 miles per hour. Nevertheless, the Plaintiff points out that the Manual includes reference to the prima facie speed for a road. The Plaintiff suggests that the prima facie speed for the area was the 35 mile per hour recommended speed on the ramp. The Plaintiff also alludes to the Manual's requirement that an officer, in

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[10]DELAWARE STATE POLICE REP. at 4 (Dec. 19, 2006). "He was not aware of where the girl came from, she just appeared out of nowhere."

[11]Huey Dep. at 24.

[12]Eric Maloney Dep. at 23; DELAWARE STATE POLICE REP. at 4 (Dec. 19, 2006) ("The girl appeared that she did not think the police car was going to stop, or was moving further right to come and talk to him, jumped further out into the roadway, approx 8' N/O and 8' W/O where his police car came to a stop.").

[13]Huey Dep. at 24.

[14]MANUAL at 4.

making the decision to exceed the posted or prima facie speed, must balance the danger to life and property and the conditions of the road and weather conditions with the necessity to arrive quickly.[15]

Fourth, the Plaintiff asserts the potential applicability of 21 Del. C. § 4134 which requires,

> "Upon approaching a stationary authorized emergency vehicle, when the authorized emergency vehicle is giving a signal by displaying alternately flashing red, blue . . . a person who drives an approaching vehicle shall: (1) proceed with caution and yield right-of-way by making a lane change into a lane not adjacent to that of such vehicle . . . or (2) [p]roceed with caution and reduce the speed . . . if changing lanes would be impossible or unsafe."

In his accident statement, Officer Figueroa states that he was in the left hand lane as he passed Officer Huey who was in the merge lane, which would have been in compliance with the statute with one lane of travel between the two. Other statements by Officer Figueroa and Officer Huey have Officer Figueroa in the right hand lane, which may not be in compliance with the statute. A finder of fact's determination of the Manual's meaning and as to Officer Figueroa's speed and lane of travel could play a role in determining comparative negligence.

Genuine issues of material fact exist in this case such that the Defendants are not entitled to summary judgment.

Motion in Limine

The Defendants' Motion in Limine is essentially a second attempt at dismissing the case by precluding the damages element of negligence as the Defendants are not just seeking to preclude the Plaintiff's testimony of her injuries, but rather all

[15] *Id.* at 6.

testimony of her injuries on the grounds that her injuries from her first accident cannot be distinguished adequately from her second accident. For the reasons mentioned below, the Defendants' motion is denied.

In terms of the Plaintiff's individual testimony, she admits that she has no memory from two days prior to the accident through two weeks after the accident when she woke up in the hospital.[16] The Defendants do not state an evidentiary ground for their motion, but presumably it would be Delaware Rule of Evidence 602–Lack of Personal Knowledge: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself . . . ."[17] While the Plaintiff has no personal knowledge of her condition relevant to her damages from the period in which she suffers from memory loss, she is presumably aware of her condition starting when she regained consciousness. Her testimony regarding her injuries and thus her damages element of negligence does not require her to also testify regarding the causation element of negligence. With evidence to support the inference that her injuries were caused by the second accident, her condition and injuries at the time she regained consciousness and thereafter is relevant for damages.[18]

The Defendants argue that any testimony by the Plaintiff would be tainted because she has no memory to distinguish her injuries, if any, caused by the first

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[16]Tabethia Maloney Dep. at 44.

[17](2011).

[18]*See* D.R.E. 104(b) (2011). "*Relevancy conditioned on fact.* Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id.*

accident with her injuries caused by the second accident. The Court will not rehash its proximate cause analysis *supra* other than to repeat that the issue of proximate cause is ordinarily one for the finder of fact.[19] If the Plaintiff testifies regarding her injuries, it is for the jury to decide, based upon the evidence presented, what injuries are attributable to being struck by Officer Figueroa's squad car and what injuries occurred in the first accident.

There is sufficient evidence for the jury to find, by a preponderance of the evidence, damages attributable to the Plaintiff's second accident with Officer Figueroa. The Plaintiff claims to have sustained injuries to her left knee, right knee, pelvic area, carotid artery, lumbar vertebrae, thoracic vertebrae, tibia and fibula of the lower right leg, and right humerus. In the pretrial stipulation dated September 15, 2011, Thomas Edge is listed as a potential witness. In a second interview by the Delaware State Police, Mr. Edge admits that the Plaintiff called him on his cell phone and asked for help after the first accident.[20] He may be able to testify regarding any injuries from the first accident reported during the call by the Plaintiff. The Plaintiff also states that there is but one reasonable inference to draw from her presence in the roadway: she was able to exit her automobile, climb out of the stream bed, walk across the grass, climb over the guardrail, and walk onto the roadway. Officer Huey was able to observe the Plaintiff's movements for some period of time greater than five seconds.[21] The Court also notes that the Delaware State Police report discusses

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[19] *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 830 (Del. 1995); *Faircloth v. Rash*, 317 A.2d 871, 871 (Del. 1974).

[20] DELAWARE STATE POLICE REP. at 1 (Dec. 20, 2006).

[21] *See* Huey Dep. at 35.

the Plaintiff jumping while in the roadway.[22]

Given the facts at this juncture, the Court does not find sufficient basis to prevent the testimony of the Plaintiff or any other witness on the record as to damages.

CONCLUSION

The Defendants' Motion for Summary Judgment and Motion in Limine are denied. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Counsel

[22] DELAWARE STATE POLICE REP. at 3-4 (Dec. 19, 2006).