IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER M. BURNS and TRINA BURNS,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2000-07-219
CRAIG B. PANZIER and PETER B. PANZIER,	)	
Defendants.	)	

Date Submitted: January 10, 2002
Date Decided: January 17, 2002

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FINAL OPINION AND ORDER

Trial took place in the above-captioned matter on January 10, 2002. Following the receipt of testimony and evidence, the Court reserved decision. This is the Court's Final Decision and Order.

Christopher M. Burns ("Burns") contends defendant, Craig B. Panzier ("Panzier") was negligent and the proximate cause of his injuries sustained as a result of an automobile accident on or about June 23, 1999 at 10:15 p.m. at Lancaster Pike and Loveville Road.[1]

[1] See, plaintiff's Exhibit "2" (pages 6-14).

Burns has plead numerous counts of negligence as applicable through the Motor Vehicle Code, Title 21, including but not limited to, violations of 21 Del. C. § 4164(c); 21 Del. C. § 4176(a) and (b); 21 Del. C. § 4168(a) and 21 Del. C. § 4303(a); (Complaint, Counts I, II and III). Co-defendant Peter B. Panzier, is defendant's father and is the owner of the motor vehicle operated by Panzier. (Count III; Negligent Entrustment). Count IV of the Complaint alleges Burns sustained loss of earnings, comfort, society, companionship and consortium by plaintiff's wife, Trina Burns.

Defendants have denied liability in their Answer and has set forth approximately 12 affirmative defenses.

For the reasons which follow, the Court enters judgment in favor of the plaintiff in the amount of Eleven Thousand Dollars ($11,000.00) plus pre- and post-judgment interest and costs.

The Facts

The facts indicate that on June 23, 1999 at approximately 10:15 p.m., Burns was involved in an accident with Panzier. Panzier is a high school student, 17 years old and was traveling in his motor vehicle to a friend's house in a chain of approximately three to five (3-5) cars. Panzier made a left hand turn on to Loveville in front of the plaintiff. Defendant was "not 100% confident" of where he was traveling to because he was following a car directly in front of him driven by his friend, "Allison." Austin Brown, another friend, was directly behind Panzier in another motor vehicle. After Panzier's friend Allison made a

left hand turn on to Loveville Road, Panzier came to a full stop but then made a fairly quick left hand turn on to Loveville Road. Panzier had an "amber light" and when he made the left turn on to Loveville Road at approximately 45 degrees, he struck Burns' motor vehicle.

At trial Panzier indicated he misjudged the distance from the light of the traffic signal at Lancaster Pike and Loveville Road. After his turn, Panzier conceded the accident was then "unavoidable." The weather was clear and it was dusk. Panzier was in the middle of the intersection when he attempted to make the left turn and knew the light was amber.

Panzier admitted that he was not an experienced driver and "should not have assumed or guessed what plaintiff was going to do." Panzier conceded at trial but for his left turn there would have been no accident with Burns. Panzier "had no idea" of the speed of the plaintiff, and the weather was dry.

A diagram was marked as an Exhibit at trial but not offered into evidence depicting the location of the cars involved in the accident in question.

Burns testified at trial. He lives in Hockessin with wife and three (3) children and has been married for nine (9) years. Burns owns a hardware/flooring company and "spends much time" with his children. Burns was traveling through the intersection as he previously done approximately 100 times. Burns also testified at trial it was a "clear, dry

day" and there was street lamps lighting the intersection. There was also "light traffic" as Burns was traveling from the Hockessin Post Office towards Wilmington. Burns was approximately 400 feet from the hill to the intersection and "had a green light." He made a decision to go through the intersection at Loveville Road and Lancaster Pike and it turned amber. Burns was hit "strong" head on by the defendant and "knocked out." Burns was driven by ambulance to the hospital and "felt dizzy" before arriving at Christiana Hospital.[2] Burns was placed in an observation room, given some ex-rays and released with pain medicine. Burns felt horrible, sore, and his body ached for several days.[3] Burns saw Dr. Hershon, who advised him to soak in the tub and take medicine. Burns remained was very sore and uncomfortable the next few days.

Burns "did a follow up visit with Dr. Hershon" two to three (2-3) weeks later and was "still sore" and his "head was bothering him." Two months after the accident Burns felt bad and in February 2000 Burns went to the Emergency Room because of stomach pain. Burns later found he had a "disc-like tumor" on his spleen and he became "petrified." Burns also visited other doctors who recommended a spleenlectomy.[4] When initially diagnosised Dr. Hershon could not be specific about the etiology of the cyst near his spleen with the calcified

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[2] See, plaintiff's Exhibit "3" (Delaware Ambulance report; Christiana Care attending Emergency Room Physician's notes).
[3] See, plaintiff's Exhibit "4" (. . . sprain neck, contusions, head, elbow and legs, concussion).
[4] All the trial exhibits set forth the medical information in the record including plaintiff's Exhibit "7," "8," "9," "10," and "11,"

wall. Dr. Hershon indicated that a "differential diagnosis includes a post-traumatic cyst related to his automobile accident in June 1999, developmental cyst, mesophiliama, [and that] pertoma although the latter seems unlikely." See plaintiff's Exhibit "7." The Court gives this testimony great weight. Dr. Hershon recommended two (2) "plans of action to take." The first was to repeat the CT scan in three (3) months and look for any change in the cyst. Dr. Hershon concluded "A post-traumatic cyst may gradually resolve over time." Second, Dr. Hershon recommended as an alternative plan "exploratory laparotomy and cyst removal which may also result in spleenectomy."

Later Burns visited Dr. James Tikellis, who recommended Burns undergo a spleenletomy.[5] On December 11, 2001 Dr. Tikellis wrote to counsel and concluded "the etiology of the cystic mass of the spleen in my opinion is traumatic."[6] Next, plaintiff visited Dr. Keith Lillimore who concluded that the plaintiff was "very anxious" and had been seen by a local surgeon who recommended a spleenlectomy because the cyst could rupture.[7] However, these subsequent diagnosis clearly conflict with Dr. Hershon's conclusions.

Burns testified at trial that the cyst systems are still "asymtomatic." He has had three (3) CAT scans performed and one (1) ultrasound and has experienced psychological problems because of his

[5] See plaintiff's Exhibit "8."
[6] See plaintiff's Exhibit "8."
[7] See, plaintiff's Exhibit "10."

"constant focus" on the cyst. As of the date of trial, Burns has not had the operation performed by any of the treating physicians he visited.

On cross-examination, Burns conceded he was put only on "light restrictions" and could scuba dive, but contact physical sports "were out of the picture." Burns testified he did not wish the operation because of the fear of surgery and currently has no pain on his left side.

All the trial exhibits were moved into evidence. A picture of the automobiles after the accident was admitted by stipulation as well as DRE 801(d)(1)(B) and DRE 803(3)(1).

The Law

"To establish a cause of action for negligence, the plaintiff must prove not only that the defendant's conduct was negligent, but also, inter alia, that the defendant's negligent conduct was the proximate cause of plaintiff's injuries." *Smith v. Calverese,* Del. Supr., 1995 Del. Lex 276, Holland J. (July 21, 1995); *Culver v. Bennett,* Del. Supr., 588 A.2d 1094, 1097 (1991). This Court has defined proximate cause as being a cause "which is natural and continuous sequence . . . produces the injury and without which the result would not have occurred." *James v. Krouse,* Del. Super., 45 Del. 404, 75 A.2d 237, 241 (1950); *Moffet v. Carroll,* Del. Supr., 640 A.2d 169, 174 (1994). The Delaware Courts have adopted the "but for" rule. *Russell v. K-Mart Corp.,* Del. Supr., 761 A.2d 1 (September 13, 2000).

Discussion

There are several issues for this Court to resolve following trial. First, defendants assert comparative and/or contributory negligence as a defense because defendants allege it was dark and plaintiff had an "extra duty of care" to proceed through the intersection. Based upon the clear evidence presented at trial, the Court concludes there was not a scintilla of evidence presented that Burns was in any negligent on the day in question or in anyway breached his duty of care while operating his motor vehicle. Panzier conceded at trial he was an "inexperienced driver" and made the mistake of prejudging plaintiff's distance from the traffic light as well as assuming Burns' movement. Defendant also conceded at trial that once he made a left turn on to Loveville Road it was an unavoidable accident which he caused.

Second, as to Counts I, II and III of the Complaint, it is clear based upon the totality of circumstances in the total record that Panzier breached his duty of care as alleged in the Complaint which was the proximate cause of Burns' injuries. Panzier conceded that he was clearly negligent when he made a left turn on Loveville Road in front of Burns. Panzier clearly failed to yield the right of way; acted in a careless and impudent manner; failed to give full time and attention to his motor vehicle; failed to maintain a proper lookout; and failed to operate his motor vehicle as a reasonable and prudent person all proven by a preponderance evidence. Counts I, II and III. The Court finds defendant

was negligent and no comparative or contributory negligence can be imputed to the plaintiff.

Third, the Court must reconcile the medical evidence introduced at trial. Clearly, Burns had injuries and soreness to his knee, elbow, hip and shoulders and experienced suffering, anxiety, and nervousness as a result of the accident. Such was proven by a preponderance of the evidence. The Court finds plaintiff failed to prove by a preponderance of evidence that the cyst that is attached to Burns' spleen was a traumatic injury which developed and was proximately caused by Panzier's negligent operation of his motor vehicle. A careful review of all the trial exhibits stipulated into evidence causes the Court to conclude by a preponderance of evidence that the cyst attached to plaintiff's spleen was not proven by a preponderance of evidence as "traumatically" caused by the motor vehicle accident. Taken as a whole, a reading of all these medical reports require this Court to conclude there was not clear causation of proximate between the cyst on plaintiff's spleen and the motor vehicle accident by a preponderance of the evidence. The medical evidence is, at best, conflicting.

With regards to the loss of consortium in Court IV, the Court finds plaintiff has not proven by a preponderance of evidence the society, companionship and consortium on behalf of Trina Burns and awards judgment in her favor. No evidence or legal argument was presented at trial as to this count of the Complaint.

Opinion and Order

The Court therefore enters judgment in favor of the plaintiff in the amount of Eleven Thousand Dollars ($11,000.00) with pre- and post-judgment interests and costs.

IT IS SO ORDERED this 17th day of January, 2002.

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JOHN K. WELCH
ASSOCIATE JUDGE