

February 4, 2002

Robert Pasquale
Doroshow, Pasquale, Krawitz
Siegel & Bhaya
1202 Kirkwood Highway
Wilmington, DE 19805

Thomas P. Leff
Casarino, Christman & Shalk, P.A.
Conectiv Building
800 N. King Street, Suite 200
P. O. Box 1276
Wilmington, DE 19899

**RE: *Christopher M. Burns and Trina Burns vs.
Craig B. Panzier and Peter B. Panzier
Civil Action Number 2000-07-219***

Letter Opinion - Cross Motions for Re-argument

Dear Counsel:

The parties have filed cross motions for re-argument pursuant to Court of Common Pleas Civil Rule 59(e). This is the Court's decision on both motions.

First, defendant has filed a motion with the Clerk of the Court alleging inter alia that the current version of the particular statute does not allow pre-judgment interest because it is not available for plaintiff's claim for bodily injury. While counsel has initially briefed the issue and specifically the amendments to 6 Del. C. §2301(d), in a letter dated February 1, 2002, Mr. Pasquale noted no objection to the proposed order being amended to strike the award of pre-judgment interest. The Court shall deem Mr. Leff's Motion for Re-argument as unopposed and hereby strikes the award of pre-judgment interest as set forth in the Court's opinion decided January 17, 2002.

Second, Mr. Pasquale has filed a Motion for Re-argument addressing the Court's finding in its written opinion that the splenic cyst had not been proven, by a preponderance of evidence to be causally related to the accident. Mr. Pasquale moves for re-argument on the limited issue of causation of the splenic cyst.

Mr. Leff has filed an answer outlining the trial record and exhibits which were stipulated into evidence by the parties. Mr. Leff's client takes the position that proximate causation was not proven or amply supported by the medical records stipulated into evidence by a preponderance of evidence. (Paragraph 4-14 answer).

Mr. Pasquale relies on *Amalfitano v. Baker*, Del. Supr., No. 594, 2000, 2001 WL 1293263 (Oct. 16, 2001 at 2). However in the instant proceedings, it is clear to the Court that while the defendant provided no independent expert witnesses, plaintiff's own exhibits stipulated into evidence failed to convince the Court by a preponderance of evidence that the cyst was causally or proximately related to the motor vehicle accident in question. At best, as indicated in the Court's opinion, the evidence was conflicting among all the various medical personnel that examined the plaintiff. The CT scan of November 24, 2000 concluded; "Presumably on the basis of nonspecific pseudocyst, perhaps post inflammatory or post traumatic." The follow-up CT scan taken on July 18, 2001 describes the cyst as "a splenic cyst or possibly a pancreatic pseudo cyst which is chronic." Dr. Ira Lobis concluded; "I cannot be certain about the etiology of the cyst . . . Differential diagnosis includes a post traumatic cyst related to his automobile accident in June 1999, developmental cysts, mesophilioma, peritoma although the latter seems unlikely . . . There is no definitive way to know how long the cyst has been there nor the nature of the cyst." (Tr. Exh. 6 at 43). Dr. Ruffini concluded in his notes, "? post traumatic." (Tr. Exh. 7 at 44). In Dr. Tikellis's December 6, 2000 assessment he noted, "most likely scenario . . . is a traumatic cyst . . . I cannot say with absolute certainty that this cyst is traumatic. . . I also cannot exclude a malignant etiology." (Tr. Exh. 8 at 46-47). Dr. Tikellis in his December 2001 report also noted "there are possibilities including congenital cystic mass of the spleen." (Tr. Exh. 8 at 48). Other doctors also set forth their opinions in the record which failed to convince this Court by a preponderance of evidence that the splenic cyst was proximately related or traumatically caused by the plaintiff's automobile argument. While plaintiff provides a chart detailing which doctor was asked, or not asked, for an opinion, plaintiff was the party who put the records before the Court. Thus, it is plaintiff's own records which are dispositive of the issue.

While plaintiff may be correct that the evidence is not, in fact, "conflicting" as stated in plaintiff's Motion for Re-argument in paragraph 14, the evidence still did not rise to a level of preponderance of evidence after being carefully reconsidered by the Court in this motion. The Court hereby amends the language set forth in its January 17, 2002 opinion to strike the word "conflicting" and

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substitute “*that the evidence was not proven in the trial record through the oral testimony or exhibits that the splenic cyst was proximately caused by the automobile accident with the defendant by a preponderance of evidence.*” While normally, since no defense expert testified absent unusual circumstances, Court’s give “conclusive” weight to the medical testimony, the citations to the record above convince the Court that even absent a defendant’s expert or rebuttal that a preponderance of evidence does not exist for the finding that defendant’s splenic cyst was traumatically caused by the accident.

Therefore, pursuant to Court of Common Pleas Civil Rule 59(e) the Court denies plaintiff’s Motion for Re-argument. *Hessler, Inc. v. Farrell, Del. Supr., 260 A.2d 701(1969).*

IT IS SO ORDERED this 4th day of February, 2002.

Very truly yours,

John K. Welch
Associate Judge

JKW/eb