

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DONNA BATCHELOR, next friend
of STYVON BURKS, a minor, and
DONNA BATCHELOR,

Plaintiffs,

vs.

EMANUAL REESE,

Defendant.

Case No. 95-CV-70090-DT

Honorable Denise Page Hood
United States District Judge

MEMORANDUM OPINION AND ORDER

Plaintiff Donna Batchelor Coleman brought this cause of action for negligence as next friend of her minor son Styvon Burks, who was seven years old at the time of the accident. The parties do not dispute that this case is based on diversity jurisdiction of this Court. 28 U.S.C. § 1332. A bench trial was held on the matter. The following are the Court's findings of facts and conclusions of law.

I. FINDINGS OF FACTS

On May 22, 1994, between 7:45 and 8:00 p.m. Plaintiff Burks was riding his bicycle with other children on the sidewalk and driveway near 20023 Hartwell in his grandmother's neighborhood. Ms. Willis Davis who resides at 20023 Hartwell saw the vehicle of Defendant Reese enter her driveway and strike Plaintiff Burks. Ms. Davis' vehicle was parked in the driveway behind where Plaintiff Burks was struck. Ms. Davis saw both Defendant Reese and his granddaughter Erica Reese seated behind the steering wheel of Defendant Reese's vehicle directly after Burks was struck and before Defendant Reese exited the vehicle. Ms. Davis and her neighbor Mr. Lewis Jackson, Jr. saw Plaintiff Burks on the ground after the accident. Both Ms. Davis and Mr. Jackson testified that

Plaintiff Burks' leg had a long gash in it and was open revealing the bone. Mr. Jackson noted bone fragments around the wound and testified he thought the boy was in shock. Mr. Jackson immobilized Plaintiff Burks' leg until emergency services arrived some ten minutes later. Plaintiff Burks was conveyed by ambulance to Grace Hospital and then to Children's Hospital of Michigan where he underwent surgery on his leg that night. Plaintiff Burks remained in the hospital several weeks immediately following the accident.

Defendant Reese was clearly negligent in the operation of his vehicle on May 22, 1994, and at fault for the accident. The testimony showed that Plaintiff Burks and other children regularly rode their bicycles in the neighborhood. Plaintiff Burks frequently visited his grandmother at the Hartwell address and had a bicycle at his grandmother's house. Testimony revealed that it was light outside and that the children were riding their bicycles on the sidewalk and turning into the Davis' driveway in the direction of the house.

Defendant Emanuel Reese frequently visited 20016 Hartwell, where his wife, daughters, and grandchildren lived. That day he had been to the park with this granddaughter Chelsea Reese. Shortly before the accident, he backed out of the driveway at 20016 Hartwell and drove in the direction of 20023 Hartwell where the accident occurred. Erica Reese, his 11 year old granddaughter, was in the driver's seat sitting on Defendant Reese's lap. Erica Reese, 14 years old at the time of trial, testified that she was on her grandfather's lap in the driver's seat with her hands on the steering wheel on top of her grandfather's hands so she could drive. At trial Erica Reese testified her grandfather moved the gears and that she did not use the accelerator or brake pedal. However, in her 1995 deposition, Ms. Reese stated she could reach these pedals. After backing out of the Reese's driveway, Defendant Reese's vehicle ran into the Davis' driveway striking Plaintiff

Burks. Ms. Davis testified Defendant Reese's car came into her driveway "real quick" and struck Plaintiff Burks.

Erica Reese testified she saw the children riding their bikes on the sidewalk before the vehicle veered into the driveway. She stated her head was not blocking her grandfather's view. After Plaintiff Burks was struck, Erica Reese said, "Oh my God, is he dead?" Erica Reese had no driver's license or training although she stated she had driven one or two times before the accident. Defendant Reese admitted his granddaughter was sitting on his lap in the driver's seat. He could not recall if her hands were on top of his, nor could he recall if her hands were directly on the steering wheel. Although it is clear he and his granddaughter were the only ones behind the steering wheel, he testified he "didn't know" who was driving his vehicle when the car went into the driveway and hit Plaintiff Burks. He testified neither he nor Erica Reese were driving. Defendant Reese did indicate he was the one who stepped on the car brake after Plaintiff Burks was struck. Defendant Reese knew that Plaintiff Burks was injured but did not want to see him and walked away after the accident.

Following the accident, Plaintiff Burks was transported to Grace Hospital and then to Children's Hospital of Michigan where he underwent surgery that night. Dr. Deborah Stanitski, a board certified pediatric orthopedic surgeon, testified that Plaintiff Burks had an open fracture of the left tibia and fibula. He had a "big open wound" from below the knee to near the ankle, inside to the back of the calf. Plaintiff Burks' calf muscles were cut in half. Several pieces of his leg bone were missing and were removed because there was no soft tissue or muscle attachment and no blood supply. Plaintiff Burks' leg was put into an external fixator made up of pins and a metal bar to hold the leg stable. Staples held his shin closed. Stanitski further testified that the first procedure took

place on May 24 and the second on May 27, 1994. Plaintiff Burks was hospitalized on this occasion until June 6, 1994. On June 20, Plaintiff Burks returned to have the staples, one hundred of them, removed. The external fixator remained in place. On July 11, 1994, Plaintiff Burks began physical therapy, but the fixator was not removed until September. In October, Dr. Stanitski reported the wound looked healed and in November she noted he had a rotated stiff leg gait, and physical therapy continued. Dr. Stanitski noted he had an ugly scar, and she attempted to reduce keloiding of the scar by the use of a pressure stocking.

By May of 1995, Dr. Stanitski noted the bone remained unhealed. She testified the leg was straight, but looked deformed. X-rays revealed a hypertrophic nonunion of the tibia. Dr. Stanitski applied a different external fixator called an "Ilazarov." This device consists of metal rings that circle the leg which is attached to wire. The wire, which has been passed through the bone from one side to the other, can be tightened by turning screws or nuts which in turn pulls the bone together. Plaintiff Burks' mother, Donna Batchelor Coleman, and his grandmother, Bertha Batchelor, testified they kept the wound clean and turned the screws two to three times per day. Plaintiff Burks wore this fixator from June 1995 until November 1995. It was removed under anesthesia because of the pain associated with removing the wires from the bone. Scars remain not only from the injury, but also from the Ilazarov. Throughout Plaintiff Burks' recovery he took medication once or twice a day.

Dr. Stanitski noted that by December 1995, the bone had completely consolidated but testified that Plaintiff Burks has permanent weakness in his leg muscles. His leg will never be normal. She has seen no effect on the growth plates, but leg length discrepancy is not yet known. Plaintiff Burks showed the scar on his leg to the Court. It runs the length of his leg. The scar is

disfiguring and reveals a deformity of the leg.

When he returned home, Plaintiff Burks used a wheelchair, then a walker and/or crutches. He needed assistance dressing and bathing, and was unable to negotiate stairs. Plaintiff Burks missed a significant amount of school, and his grades fell. His mother testified that he was unable to attend school while wearing the Ilazarov because the school could not be responsible. However, his mother noted that he received tutoring and is in the appropriate grade for his age. In February 1995, Plaintiff Burks was having nightmares and had a phobia of cars. His mother took Plaintiff Burks to a psychologist a couple of times but noted that he has done a remarkable job of recovery and has no spiteful feelings about the accident.

Plaintiff Burks, eleven years old at the time of trial, also testified. He fairly bounded up to the witness stand. Plaintiff Burks has no memory of the accident. He does recall missing a significant part of the next school year. He also recalls having five surgeries and wearing the Ilazarov. Plaintiff Burks stated he had a very, very bad scar which he showed to the Court. He noted the scar does not hurt or "feel funny" any more. Plaintiff Burks claimed his leg aches when it is cold. This testimony was supported by the testimony of both his mother and grandmother. Although Plaintiff Burks testified he could do everything he wanted, his grandmother testified he "protects" his wounded leg and favors the other leg. She further noted he is still conscious of his scar.

II. CONCLUSIONS OF LAW

Under Michigan law, a person is subject to tort liability for noneconomic loss caused by his ownership, use, or maintenance of an automobile only if the person injured has suffered death, serious impairment of a body function, or permanent serious disfigurement. Mich. Comp. Laws Ann. § 500.3135(1). As a threshold, the plaintiff must show that plaintiff's injury resulted in death,

serious impairment of a body function, or permanent serious disfigurement. Mich. Comp. Laws Ann. § 500.3135; Esparaza v. Manning, 148 Mich. App. 371, 375, 384 N.W.2d 168, 171 (1986). Once this has been established, plaintiff must prove a traditional negligence claim. Esparaza, 148 Mich. App. at 375, 384 N.W.2d at 171. A plaintiff retains the burden of proving that the defendant was negligent, that the plaintiff was injured, and that the defendant's negligence was the proximate cause of the plaintiff's injury. Id.

III. ANALYSIS

A. Permanent Serious Disfigurement

Based on the testimony at trial and the medical records introduced into evidence, this Court finds that Plaintiff Burks suffered permanent serious disfigurement to his leg. See Earls v. Herrick, 107 Mich. App. 657, 309 N.W.2d 694 (1981). The Court notes that the scar on Plaintiff Burks' leg extends from right below the knee to slightly above the ankle. The scar is not only long but also wide and unsightly. It is obvious, even to a layperson, that tissue and muscle are missing in the area of the scar. Although the scar will often be covered by Plaintiff Burks' trousers, the Court is satisfied that at this time Plaintiff Burks is still somewhat self-conscious about the scar.

B. Serious Impairment of Body Function

The Court also finds that Plaintiff Burks suffered a serious impairment of a body function. To determine if serious impairment of a body function exists, a court must determine what body function, if any, was impaired, and determine if the impairment was serious. DiFranco v. Pickard, 427 Mich. 32, 67, 398 N.W.2d 896, 914 (1986). "The focus of these inquiries is not on the injuries themselves, but how the injuries affected a particular body function." Id. To determine if an impairment is serious, a court should consider the following factors: the extent of the impairment;

the particular body function impaired; the length of time the impairment lasted; the treatment required to correct the impairment; and any other relevant factors. 427 Mich. at 39-40, 398 N.W.2d at 901. An impairment need not be permanent to be serious. Id.; Incarnati v. Savage, 419 Mich. 541, 357 N.W.2d 644 (1984).

In this case, Plaintiff Burks' leg was severely injured from his knee down to his ankle, and his ability to walk, bath, and dress was impaired for over a year. His rehabilitation extended over approximately three years. Plaintiff Burks underwent five surgeries, was hospitalized on numerous occasions, wore two external fixators, and took medication daily. His leg will never look, nor function completely normally. According to his own testimony, Plaintiff Burks' leg aches periodically. Although Plaintiff Burks has no restrictions, expert medical testimony indicated that Plaintiff Burks has permanent weakness in his leg, and the leg length discrepancy is not yet known.

C. Negligence

It is undisputed that Defendant Reese had a duty to operate his automobile in a reasonably safe manner so as not to endanger people or property. Wright v. Crane, 142 Mich. 508, 106 N.W. 71 (1905). What is required of an ordinarily prudent driver varies depending on the circumstances and conditions the motorist encounters. DePriest v. Kooiman, 379 Mich. 44, 149 N.W.2d 449 (1967). The degree of care required of a driver depends on such factors as the size, type, and conditions of the vehicles involved, surface and weather conditions, and the amount of vehicle and pedestrian traffic. Zarecki v. Hatch, 347 Mich. 138, 79 N.W. 2d 605 (1956); Russell v. Szczawinski, 268 Mich. 112, 255 N.W. 731 (1934); Bade v. Nies, 239 Mich. 37, 214 N.W. 170 (1927).

Defendant Reese is clearly negligent in this case. In violation of the Michigan Motor Vehicle Code, he permitted an unlicensed driver to participate in the operation of his vehicle. See Mich.

Comp. Laws Ann. § 257.301. In further violation of the code, he allowed his granddaughter to sit on his lap and obstruct or partially obstruct his view. See Mich. Comp. Laws Ann. § 257.677. He was also unmindful of the amount of pedestrian and bicycle traffic on the street even though it was clear from the testimony that the children in the neighborhood, including Plaintiff Styvon Burks, were riding their bicycles that day as they frequently did. Defendant Reese also breached his duty of care when he allowed his vehicle to run into the Davis' driveway without regard to the whereabouts of Plaintiff Burks and his bicycle.

As a result of his negligent driving, Defendant Reese's vehicle struck Plaintiff Burks and proximately caused the injuries sustained by Plaintiff Burks on that day. Although Defendant Reese claims he does not know who was driving the vehicle when it struck Plaintiff Burks, this Court is satisfied that Defendant Reese was driving and may have been assisted by his unlicensed granddaughter. The Court finds that Defendant Reese proximately caused the injuries to Plaintiff Burks.

D. Noneconomic Damages & Interest

Damages for pain and suffering, mental anguish, fright and shock, denial of social pleasure and enjoyments, embarrassment, humiliation, mortification, and disfigurement are allowed under Michigan law to compensate Plaintiff Burks for his injuries. Samuelson v. Olson Transp. Co., 324 Mich. 278, 36 N.W.2d 917 (1949); Shaw v. Chicago G.T. Ry. Co., 123 Mich. 629, 82 N.W. 618 (1900); Beath v. Rapid R.R. Co., 119 Mich. 512, 78 N.W. 537 (1899). It is clear from the evidence in this case that Plaintiff Burks was in shock at the time of the injury; that he underwent the pain and suffering of several surgeries and hospitalizations; and that he was denied the social pleasure and enjoyments of his youth while he was confined to the Ilazarov device and unable to walk or attend

school. Plaintiff Burks has requested \$400,000.00 for past, present, and future damages, and the Court so awards.

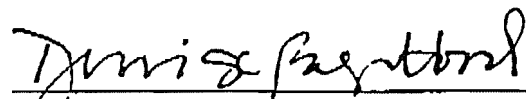
The availability of prejudgment interest in a diversity action is governed by state law. Diggs v. Pepsi-Cola Metro. Bottling Co., 861 F.2d 914, 924 (6th Cir. 1988). The Court finds that Plaintiff Burks is entitled to prejudgment interest as a measure of damages under Michigan law calculated from the date of the injury to the date the Complaint was filed. Vannoy v. City of Warren, 26 Mich. App. 283, 182 N.W.2d 65 (1970); Currie v. Fiting, 375 Mich. 440, 134 N.W.2d 611 (1965). Plaintiff Burks is also entitled to interest on the judgment under Michigan statutory law, which will be calculated from the date the Complaint was filed until the date of the Judgment in this case. See Mich. Comp. Laws. Ann. § 600.6013(5); Vannoy, 26 Mich. App. 283, 182 N.W.2d 65 . The Court awards prejudgment interest at the rate of 5% per annum, as requested by Plaintiff Burks.

IV. CONCLUSION

Based on the above, the Court finds that Plaintiff Burks has met the threshold under Michigan law, Mich. Comp. Laws Ann. § 500.3135(1), to recover noneconomic damages and have established a claim of negligence.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Burks shall recover \$400,000, plus prejudgment interest calculated from May 22, 1994, to the date of the Judgment.



Judge Denise Page Hood
United States District Judge

Dated: SEP 30 1998