

conscience, morality and common sense come into heavy play on a daily basis in Chambers as well as in Court.

Following the President's address, the Judicial oath was administered; Judges Walker, Kaye and Herman extended their own congratulations and best wishes and Franklin County gained its fourth Judge.

The editor and staff at the Legal Journal join in these sentiments and wish Judge Walsh a long and productive career. We also look forward to publishing his first significant Opinion in these pages

SOSAN LAHDU, a minor, by ELIAS LAHDU, her guardian,
Plaintiff vs. BLANCHE L. MARTIN, ESTHER RICKER,
SHAWN DILLER, and ELDON and JOYCE DILLER, husband
and wife, Defendants, FRANKLIN COUNTY BRANCH, CIVIL
ACTION - LAW A.D. 1992 - 642

Lahdu v. Martin

Delay damages - indigent defendant

1. Delay damages shall be awarded for the period of time commencing one year after serving of original process until time of award, not including the time the defendant made a settlement offer, if plaintiff recovers an award of more than 125% of the settlement offer.
2. Exception to award of delay damages may be made if defendant was indigent.
3. Defendant must offer at least policy limits of his insurance, but need not contribute personal assets to that offer if he is indigent, even if settlement offer is not a "reasonable" offer.
4. Here, defendants did not have insurance and did not have any assets or money; under those circumstances, they did not have to make a settlement offer. No delay damages will be awarded.

David R. Breschi, Esquire, counsel for plaintiff

Joseph A. Macaluso, Esquire, counsel for Defendant Ricker

John N. Keller, Esquire, counsel for Defendant Shawn Diller

OPINION AND ORDER

Walker, P.J., December 17, 1997:

Factual and Procedural Background

The issue before the court today concerns the imposition of delay damages. On February 27, 1991, defendant Esther Ricker had taken Plaintiff Sosan Lahdu, age 15, and her sister to a church service at the Rowe Mennonite Church ("RMC"), with permission of their parents. After the service, an altercation took place between Sosan Lahdu and Defendant Shawn Diller, age 12. As a result, Plaintiff Sosan Lahdu suffered injuries to her wrist and coccyx. Plaintiff filed a complaint on December 18, 1992, against RMC, Ellis and Blanche Martin (the church's pastor and his wife), Esther Ricker, and Shawn Diller and his parents, Eldon and Joyce Diller. Summary judgment was granted in favor of Defendant Ellis Martin on September 23, 1994, and to RMC on May 30, 1995.

A jury trial was held in May 1997, where a verdict was entered in favor of plaintiff against Defendants Esther Ricker and Shawn Diller in the amount of \$239,004.31. Esther Ricker was assessed with 40% of the liability, and Shawn Diller with 60%. Eight days after the verdict, on May 29, 1997, plaintiff filed a petition for delay damages in the amount of \$70,407.75. Plaintiff bases her petition on the fact that no settlement offer was made by either of the defendants. Both defendants filed a response to this petition opposing the imposition of delay damages. An evidentiary hearing was held on this matter on September 18, 1997, at which both defendants testified to their income and assets during the pendency of this suit.

Discussion

Under Pa.R.C.P. 238, in a case involving damages for bodily injury, delay damages shall be awarded for the period of time commencing one year after the date original process was served in the action up to the date of the award. Pa.R.C.P. 238(a)(1) and (2)(ii). Any period of time in which the defendant has made a settlement offer which remained open for at least ninety days must be excluded from the period of time for which delay damages may be awarded. Pa.R.C.P. 238(b)(1). Additionally, it is required that at trial, the plaintiff recovered an amount of more than 125% of defendant's settlement offer. Pa.R.C.P. 238(b)(1). Furthermore, any delay caused by the plaintiff must be excluded from the damages period. Pa.R.C.P. 238(b)(2). However, this provision is not at issue in this case.

In the underlying case, neither Esther Ricker nor Shawn Diller had made a settlement offer to the plaintiff during the pendency of the case. Defendants argue that they could not make a such an offer because they did not have any money or assets to pay for it. Plaintiff contends that delay damages must be imposed against defendants, because they did not make any offer when they had some assets which they could have offered as a settlement.

The Superior Court has previously ruled on the issue of indigent defendants with regard to delay damages. *Berry v. Anderson*, 348 Pa. Super. 618, 502 A.2d 717 (1986). In that case, the defendant offered to settle the case for the full amount of her insurance policy, \$100,000. The plaintiff rejected the offer and obtained a verdict in the amount of \$2,000,000. After trial, the plaintiff requested the

imposition of delay damages, arguing that defendant did not make a reasonable settlement offer. Defendant objected, arguing that she never could have made a settlement offer of such an amount, nor could she pay the delay damages of \$528,000 because she was impoverished. *Berry*, at 620-621. The Superior Court looked at the primary purpose of Rule 238, which is the encouragement of early settlement. *Id.*, at 623. The court found that this goal is not furthered by penalizing defendants who are incapable of making a reasonable settlement offer. *Id.*, at 624-625. The court noted that Rule 238 was intended to apply to defendants who have sufficient assets to offer a reasonable settlement figure but choose, for whatever reason, not to make such an offer. *Id.*, at 627. Therefore, the court concluded that a plaintiff shall not be awarded delay damages when the court determines that, because of the defendant's indigence, the offer made was the full amount available for payment of the plaintiff's claim and it was impossible for the defendant to have offered more. *Id.*

In another case the Superior Court has recognized that the defendant's indigence constitutes an exception to the rule that delay damages must be paid under Rule 238. *Krysmalski by Krysmalski v. Tarasovich*, 424 Pa. Super. 121, 622 A.2d 298 (1993). In that case, the defendant also offered the limits of his insurance policy as a settlement offer, which was refused. The plaintiff argued that the defendant had personal assets he could have offered in addition to the insurance policy. *Krysmalski*, at 136. The court pointed out that in *Berry*, an exception was carved. "We held that where a defendant is precluded by his impecunious condition from contributing to a settlement offer, he will not be expected to do so." *Id.*, at 138. The court stressed that "requiring defendant to offer non-existent assets would serve no purpose of Rule 238." *Id.* To comply with Rule 238, a defendant must offer all assets available to him, and must at least offer any insurance coverage he has. *Id.*, at 140.

Thus, this court must determine whether Defendants Esther Ricker and Shawn Diller have offered all available assets to plaintiff as a settlement proposal. At the evidentiary hearing, Esther Ricker testified that she is 38 years old and unmarried. She has an eighth grade education and has been primarily employed as a household helper for a handicapped woman for the past ten years, earning \$5.38 per hour. Her gross income has been between \$10,000 and \$12,000 per year. In 1988, before the commencement of this suit, she

purchased a used mobile home. After her father died in 1995, she sold the mobile home for \$1,500 and moved in with her mother. The highest balance she has had in her checking account was \$1,600. She also has an IRA worth approximately \$1,116. The highest balance she has had in her savings account was in 1993, when she had a balance of between \$5,000 and \$6,000. She used more than half of this money in 1993 to buy a used car for \$3,500. In 1996, she had to undergo surgery, for which she had to pay 20% of the expenses. Her insurance through Mennonite Insurance covered the rest. She owns no personal assets other than her clothes and a sewing machine. She also had no liability insurance. The Mennonite church has volunteered to pay for her legal expenses, and reached an agreement with counsel for a reduced fee.

Shawn Diller was twelve years old at the time of the incident. In 1996, he lived with his cousin for a few months, until he could no longer afford the rent. Other than that period, he has always lived with his parents. At age 16, Shawn dropped out of school and started working in landscaping and as a laborer. He now earns approximately \$200 to \$300 per week. He has had a savings account for five years, but it never contained more than \$500 to \$1,000. He has never owned a car, but pays his parents some money to use their truck. Shawn's parents borrowed money from his grandmother to pay for his legal fees. He also did not have insurance coverage for his liability.

It appears to this court, from all the evidence presented at the hearing, that neither defendant had any assets to offer as a settlement. Both defendants make just enough money to sustain themselves and pay for their necessary expenses. Neither of them owns any real estate, bonds, stock, or any other property of value. Both of them have bank accounts, but with low balances. The only time Defendant Esther Ricker had more money in her bank account, she used most of it to purchase a necessity of life, a used car. At no time during this litigation did the defendants have any meaningful assets which were available to be used for a settlement offer. If the defendants had had insurance coverage, they would have been required to offer the policy limits of such insurance. However, since they did not, and since they also did not have any assets available to them to offer for settlement, defendants were not required to make a such an offer. It would not have served the purposes of Rule 238 to require defendants to make a

settlement offer which they could not pay. Therefore, this court will not impose any delay damages on the defendants.

ORDER OF COURT

December 17, 1997, the court having considered all the evidence presented at the evidentiary hearing, finds that the defendants did not have any assets to offer for settlement prior to trial, and therefore denies plaintiff's petition to impose delay damages on the defendants.