DAVID COLEMAN and CONNIE COLEMAN, Plaintiffs vs. J. GARRY BEIDLER, M.D., CHAMBERSBURG DERMATOLOGY ASSOCIATES, P.C., and CHAMBERSBURG DERMATOLOGY ASSOCIATES, Defendants, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1991-603

Coleman v. Beidler et al.

Jury returned a verdict of Seven Hundred and Fourteen Thousand Dollars against Defendant Doctor. Verdict included a Twenty-Five Thousand Dollar award for Plaintiff Connie Coleman's loss of consortium. The Plaintiff's filed a motion for delay damages pursuant to Pa.R.C.P. No. 238.

1. Court cannot award delay damages for claims of loss of consortium.

2. Delay damages must be excluded during any period in which the plaintiff is responsible for delaying trial.

3. Plaintiffs' initiating this suit by a writ of summons did not delay trial.

4. Plaintiffs did not delay the trial in this matter by substituting experts shortly before trial, as the theories and opinions on which the case was based remained the same.

5. Plaintiffs did not delay the trial in this matter by attempting to call as witnesses several of Plaintiff David Coleman's treating physicians. During discovery, the Plaintiffs informally provided the Defendants with the names of those physicians that they intended to call. The Defendants suggested that the case should be taken off the trial list because they needed to conduct depositions of those treating physicians identified by the Plaintiffs. Of interest, the Defendants only deposed one of four physicians identified.

6. The Court found that the Plaintiffs were not responsible for any of the delay and awarded delay damages pursuant to Pa.R.C.P. No. 238.

Terry S. Hyman, Esq., Counsel for the Plaintiffs
S. Walter Foulkrod, III, Esq., Counsel for Defendant, J. Garry Beidler, M.D.

OPINION AND ORDER

WALSH, J., July 14, 1999:

This matter comes before the Court on the Plaintiffs' *Motion for Delay Damages Pursuant to Rule 238* filed on March 31, 1999. On March 29, 1999, the jury empaneled in

this case returned a Plaintiffs' verdict in the amount of Seven-Hundred and Fourteen Thousand Dollars ($714,000.00). The verdict included Six-Hundred Eighty-Nine Thousand Dollars ($689,000.00) as compensation for Plaintiff David Coleman's injuries and losses resulting from Defendant J. Garry Beidler's, M.D. (hereinafter "Defendant"), negligence and Twenty-Five Thousand Dollars ($25,000.00) for Plaintiff Connie Coleman's loss of consortium. Plaintiffs have requested delay damages in the amount of Three-Hundred Seventy-Six Thousand Seventy-One Dollars and Thirty Cents ($376,071.30); they have withdrawn any claims to delay damages with respect to the award of loss of consortium for Plaintiff Connie Coleman. *See Anchorstar v. Mack Trucks, Inc.*, 533 Pa. 177, 620 A.2d 1120 (1993) (Delay damages cannot be awarded in claims involving loss of consortium).

In his *Answer* to Plaintiffs' *Motion*, the Defendant asserts that much of the delay in this matter is clearly attributable to the Plaintiffs themselves. If the Defendant's claims are supported by facts, Rule 238[1] provides that "[t]he period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any, ... during which the plaintiff *caused delay of the trial*." (Emphasis added). The Defendant claims that the Plaintiffs are responsible for delaying the trial in this matter up to February 19, 1999, because it is the very day that their final expert report was served as required by this Court's Pretrial Conference Order. Delay damages may be awarded in civil cases seeking monetary relief for bodily injury, death or property damage. *See* Pa.R.C.P. No. 238(a)(1). The motivating purpose fueling the rule concerning delay damages is twofold; one purpose seeks to alleviate overcrowded court dockets by promoting settlements, and the second seeks to compensate a plaintiff

[1] Pa.R.C.P. No. 238.

for the loss of use of funds to which a jury has determined that he or she is rightfully entitled. *Sun Pipe Line Co. v. Tri-State Telecommunications, Inc.*, 440 Pa. Super. 47, 62, 655 A.2d 112, 119 (1994).

Following a hearing held on June 4, 1999, and the parties' pre-hearing submission of memoranda and calculations of damages, the matter is now ripe for adjudication. The Court makes the following:

FINDINGS OF FACT

1. Original process was served on the Defendant in this matter by writ of summons on November 27, 1991.

2. December 5, 1991, Defendant served his Interrogatories and Request for Production of Documents seeking, *inter alia*, expert reports.

3. Plaintiffs' Complaint was filed on January 6, 1992.

4. Defendant's Preliminary Objections to Plaintiffs' Complaint were filed on January 21, 1992.

5. The parties entered into a stipulation (filed on March 9, 1992) resolving Defendant's Preliminary Objections striking two allegedly objectionable paragraphs from Plaintiffs' Complaint.

6. Plaintiffs' Interrogatories were served upon the Defendant on February 11, 1993.

7. October 5, 1993, Plaintiffs served their responses to Defendant's Interrogatories and Request for Production of Documents identifying Doctor Scaglioli as their expert.

8. The Defendant was deposed on May 31, 1995.

9. The Plaintiffs were deposed on October 9, 1995.

10. On March 13, 1996, the Plaintiffs served a supplemental expert report - that of Doctor Geckler.

11. August 13, 1996, the Defendant served Doctor Lookingbill's expert report dated July 1, 1994.

12. August 19, 1996, Plaintiffs' counsel listed the matter for the next available civil trial term.

13. By stipulation filed October 9, 1996, both parties agreed to remove the case from the civil trial list.

14. October 24, 1996, the Defendant served supplemental Interrogatories and Requests for the Production of Documents concerning those treating physicians that the Plaintiffs expect to call as witnesses at trial.

15. Plaintiffs' counsel responded informally to the Defendant's supplemental discovery requests by letter dated October 25, 1996. Plaintiffs' counsel identified three subsequent treating physicians that were potential candidates as witnesses at trial.

16. One of the Plaintiff's treating physicians, Doctor Alexander, was deposed by the Defendant on February 3, 1997. Defense counsel choose not to depose any of the other treating physicians identified by the Plaintiffs.

17. March 12, 1998, Plaintiffs file a formal response to Defendant's outstanding supplemental discovery requests. Plaintiffs indicate that they have not yet determined those subsequent treating physicians they plan to call as witnesses at trial.

18. March 24, 1998, the Defendant files his *Motion to Compel the Identity of Treating Healthcare Providers who will Testify at Trial and to Compel Service of Expert Reports from such Healthcare Providers.*

19. June 4, 1998, the Court declined to require the production of expert reports from the treating physicians, however, the Court required the Plaintiffs to identify those treating physicians who they expect to testify at trial.

20. July 13, 1998, the Plaintiffs again re-listed the matter for trial.

21. By letter dated July 17, 1998, defense counsel requested that Plaintiffs' counsel remove the matter from the trial list because of his attachment to the Court of Common Pleas of Lackawanna County during the week of September 14, 1998.

22. By letter dated September 8, 1998, Plaintiffs' counsel again informs the Defendant of those healthcare providers that may potentially be called as witnesses at trial.

23. November 17, 1998, the pretrial conference in this matter was held at which the Plaintiffs served the Defendant a second supplemental expert report in the form of Doctor Altieri's deposition dated July 27, 1995.

24. February 19, 1999, as mandated by the Court's Pretrial Conference Order, the Plaintiffs serve their final expert report - that of Doctor Altieri.

25. In this Court's Pretrial Conference Order, the Defendant was given up to February 23, 1999, to depose those treating physicians that the Plaintiffs intended to call as witnesses.

26. The deadline of February 23, 1999, passed without the Defendant taking any further depositions of those treating physicians identified by the Plaintiffs.

27. The Defendant never made a written offer to settle the case at any time between November 27, 1991, and March 29, 1999.

28. By its verdict of March 29, 1999, the jury awarded Plaintiff David Coleman a total of Six-Hundred Eighty-Nine Thousand Dollars ($689,000.00) representing compensation for his injuries and expenses.

The Court will first entertain the Defendant's claim that the Plaintiffs delayed trial by initiating this matter by writ of summons and by filing a complaint that was subject to preliminary objections. The Defendant claims that delay cannot even begin to accrue against him until the stipulation resolving his preliminary objections was signed, because an ***operative complaint*** was not available until that date. *See* Defendant's Verified Answer to Plaintiffs' Motion for Delay Damages ¶ 6(a). Despite Defendant's argument, Plaintiffs' calculations of delay damages do not begin to accrue until ***November 21, 1992***, one year after service of original process and approximately eight months after the filing of the stipulation resolving Defendant's preliminary objections. *See* Plaintiffs' Hearing Memorandum Regarding Rule 238

Delay Damages, Exhibit A. Moreover, the Defendant's first claim of delay by the Plaintiffs belies the plain language of the Pennsylvania Rules of Civil Procedure. Specifically, Rule 238 provides that:

> (2) Damages for delay shall be awarded for the period of time
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> > (ii) in an action commenced on or after August 1, 1989, from a date one year after the date *original process* was first served in the action up to the date of the award, verdict or decision.

(Emphasis added). The rule speaks, not of an operative complaint, but rather of original process which includes the initiation of suit by writ of summons. *See* Pa.R.C.P. No. 1007(1). The purpose of this one-year exclusion is to allow a "defendant [time] in which to investigate and evaluate an action before the damages for delay begin to run, affording a greater opportunity to make an appropriate settlement offer." Pa.R.C.P. No. 238, 1988 Explanatory Comments. Considering the forgoing, the Defendant's attempt to exclude that period of delay extending from November 26, 1991, through January 21, 1992, for the lack of an operative complaint is moot because by the application of Rule 238, this period of time is ***required*** to be excluded from any computation of delay damages.

The Court will next consider the Defendant's claim that the Plaintiffs further delayed trial by failing to timely produce their expert reports during discovery. *See* Defendant's Verified Answer to Plaintiffs' Motion for Delay Damages ¶ 6(b), (d) and (e). The crucial question to be answered in all of our queries concerning delay damages is whether or not the actions of the Plaintiffs actually ***delayed trial***. *See Costa v. Lauderdale Beach Hotel*, 534 Pa. 154, 626 A.2d 566 (1993). Granted, the Defendant served the Plaintiffs with expert interrogatories and requests (***before the existence of an "operative complaint"***) on or about December 5, 1991. It is also factually correct that the

Plaintiffs did not respond to the Defendant's interrogatories and requests until October 5, 1993. Looking at this cold record suggests a delay by the Plaintiffs because of their less than prompt compliance with the discovery rules; however, to assume that Plaintiffs' dilatory responses and answers ***actually delayed trial*** would require the Court to make a enormous leap of logic without any supporting evidence. Although not binding authority, the Explanatory Comments to Rule 238 suggest that "failure by the plaintiff to answer interrogatories within thirty days should not affect the award of damages for delay unless the trial was delayed as a result." Defense counsel has never represented to the Court that had the Plaintiffs made more timely responses to his expert interrogatories, he would have been prepared to try a five-day medical malpractice case sooner than March of 1999.

In their October 5, 1993, responses and answers, the Plaintiffs identified Doctor Scaglioli as their expert for trial. In conjunction with their identification of Doctor Scaglioli, the Plaintiffs produced the transcript of his deposition taken September 3, 1993, and his expert report dated January 18, 1992. Doctor Scaglioli's testimony in his deposition supported the theory of negligence advanced by the Plaintiffs at trial, *to wit*, in his deposition he stated that it was his opinion that Defendant Beidler did not adhere to the standard of care by his failure to employ a clinical test in order to confirm his diagnoses of Plaintiff David Coleman. *See* Scaglioli Deposition, September 3, 1993, at page 22, line 14 (the deposition is attached to Plaintiffs' Hearing Memorandum Regarding Rule 238 Damages at Exhibit B). Doctor Scaglioli's report also supported the same theory. *See* Scaglioli Report dated January 18, 1992, page 3 (the report is attached to *Plaintiffs' Chronology of Relevant Events and Evidentiary Submission* at Exhibit No. 2).

The next significant event in the course of the discovery process of this case was the scheduling of the parties'

depositions. Defendant Beidler was deposed by the Plaintiffs on May 31, 1995, while defense counsel chose to depose the Plaintiffs on October 9, 1995. Following these depositions, the Plaintiffs submitted the supplemental expert report of Doctor Geckler; a copy of Doctor Geckler's report was served on Defendant Beidler on March 13, 1996. It was not until August 13, 1996, that the Defendant served his own expert's report on the Plaintiffs authored by Doctor Lookingbill on July 1, 1994.

Finally, on November 17, 1998, when this matter was pre-tried, the Plaintiffs provided a second supplemental expert report in the form of Doctor Altieri's deposition. Despite the submission of a second supplemental expert report, the basis for the Plaintiffs' claim had not wavered from Doctor Scaglioli's initial expert opinion. Doctor Altieri had opined that Defendant Beidler misdiagnosed Plaintiff David Coleman's condition by not performing any confirmatory tests, specifically a KOH preparation. *See* Altieri's Deposition, July 27, 1995, page 18, line 17. In the Court's Pretrial Conference Order, the parties were given until February 19, 1999, to supply each other with a list of those experts that were to be called to testify and to promptly exchange with each other final expert reports. The Plaintiffs complied with this requirement by providing the Defendants with a copy of Doctor Altieri's final expert report on or before the February 19th deadline. As for the Defendant, he choose to rely on the same expert report previously provided to the Plaintiffs and authored on ***July 1, 1994***, by Doctor Lookingbill. Defendant Beidler's claims that the Plaintiffs delayed trial do not fall upon deaf ears; however, the events concerning Plaintiffs' production of their expert reports appear not to have delayed the trial. The Defendant was able to proceed to trial with the same expert report authored by Doctor Lookingbill on July 1, 1994, despite Plaintiffs' submission of two supplement reports. The Court is unable to conclude that the actions of the Plaintiffs concerning the production of expert reports

caused a delay of trial. Although the Court concludes that the Plaintiffs did not delay trial, one may wonder why this matter was not tried following the Defendant's service of Doctor Lookingbill's expert report. The Defendant's next claim of delay addresses this precise concern.

The Defendant's final contention concerning a delay of trial caused by the Plaintiff surrounds the Plaintiffs' failure to submit ***formal*** responses to Defendant's Supplemental Interrogatories and Requests for Production of Documents served on October 24, 1996. *See* Defendant Beidler's Verified Answer to Plaintiffs' Motion for Delay Damages ¶6 (c) and (f). Before addressing the merits of this claim, the Court is compelled to discuss the preliminary steps leading to these supplemental requests. On August 19, 1996, following the exchange of the expert reports of Doctors Lookingbill and Geckler, Plaintiffs' counsel listed the case for the next civil trial term. Although, shortly after listing the case for trial, counsel for both parties stipulated that the matter could be removed from the list, it is noted that they did so only because the Defendant needed to conduct additional discovery to adequately prepare for trial. Specifically, defense counsel voiced an objection to calling Plaintiff David Coleman's subsequent treating physicians to testify at trial concerning their opinions on the standard of care provided by his client. By letter dated September 24, 1996, Plaintiffs' counsel informally advised defense counsel of the testimony he sought to elicit from these treating physicians and asked whether or not he would still maintain his objection in light of the clarification.[2] In response,

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[2] 2. The language of that letter follows.

I intend to have the treating physician testify that [Plaintiff] David Coleman's problems came from the Griseofulvin and I do not intend to ask the treating physicians any questions regarding the link between that event and [the Defendant]. That issue will be

defense counsel returned to Plaintiffs' counsel a stipulation that his office had drafted removing the case from the trial term. The Court notes that this matter was taken off the trial list because defense counsel choose to conduct additional discovery depositions concerning the subsequent treating physicians identified by the Plaintiffs.

By letter dated October 25, 1996, Plaintiffs' counsel informally identified three subsequent treating physicians that he was considering calling as witnesses at trial.[3] Shortly thereafter, defense counsel began issuing subpoenas to those physicians identified compelling them submit to depositions; defense counsel opted to depose only Doctor Alexander. A formal response to the Defendant's outstanding supplemental discovery requests was finally submitted on March 12, 1998. In these responses, Plaintiffs' counsel indicated that those treating physicians that would be called to testify were "[n]ot yet determined." *See* Plaintiffs' Answers to Supplemental Interrogatories of Defendant J. Garry Beidler attached as Exhibit No. 2 to Defendant's Verified Answer to Plaintiffs' Motion for Delay Damages. Within a few weeks of the Plaintiffs' formal responses, the Defendant filed a *Motion to Compel* the identify of those treating physicians that the Plaintiffs would

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covered by the expert. In light of this clarification, please advise whether you continue to object on this issue.

Plaintiffs' counsel's letter to defense counsel dated September 24, 1996 - found at Exhibit No. 8 to *Plaintiffs' Chronology of Relevant Events and Evidentiary Submission.*

[3] 3. The Plaintiffs identified Roland Alexander, M.D., John P. Stratis, M.D., and Joel Rosenthal, M.D. *See* Plaintiffs' counsel's letter to defense counsel dated October 25, 1996 - found at Exhibit No. 12 to *Plaintiffs' Chronology of Relevant Events and Evidentiary Submission.*

call in order to seek to elicit testimony concerning the Defendant's treatment of Plaintiff David Coleman. Following a hearing held on the Defendant's Motion, the Court issued an Order dated June 4, 1998, directing the Plaintiffs to identify those treating physicians "as soon as Plaintiffs' counsel reasonably makes a determination." *See* June 4, 1998, Order of Court. By that same Order, the Defendant was granted leave to conduct further discovery depositions of those physicians identified by the Plaintiffs. By letter dated September 8, 1998, the Plaintiffs identified six treating physicians and health care providers that were potential witnesses for trial; besides Doctor Alexander, the Defendant choose not to depose any of those persons so identified.[4] In fact, the Court granted defense counsel up to and including February 23, 1999, to conduct any additional depositions of those treating physicians that Plaintiffs planned to call as fact witnesses. *See* Pretrial Conference Order filed November 25, 1998. The February 23rd deadline passed with the Defendant conducting no further depositions.

The Court is unable to conclude that the Plaintiffs delayed trial by not identifying those treating physicians that might be called to testify at trial. The Plaintiffs complied with all the Court ordered directives concerning the discovery and identification of those treating physicians that may potentially testify at trial. And finally, only two treating physicians were called to testify during trial and they were identified by Plaintiffs' counsel by letter dated October 25,

[4] 4. In addition to Roland Alexander, M.D., and John P. Stratis. M.D., the Plaintiffs identified Michael Witticamp, M.D., Howard Hoffman, M.D., Darren Dunn, P.T.A., and Katrina Darnell, OTR/L. See Plaintiffs' counsel's letter to defense counsel dated September 8, 1998 - found at Exhibit No. 18 to *Plaintiffs' Chronology of Relevant Events and Evidentiary Submission.*

1996; one day following the submission of Defendant's supplemental interrogatories.

Finding that no period of delay is attributable to the Plaintiffs, the Court's calculation of delay damages with respect to the jury's verdict in favor of Plaintiff David Coleman in the amount of Six-Hundred Eighty-Nine Thousand Dollars ($689,000.00) follows:

> ***(Editor's Note: See diagram chart, on page 86, hereinafter. This diagram chart is actually included within the original Opinion of the Court, at this, particular point, but had to be inserted at page 86 of the published Opinion, because of technological limitations of our equipment.)***

An appropriate Order is attached to this Opinion.

ORDER

June 14, 1999, this matter having come before the Court on the Plaintiffs' *Motion for Delay Damages* and the Court having found that the Plaintiffs were not responsible for any delay of trial,

IT IS HEREBY ORDERED that delay damages in the amount of Three-Hundred Seventy-Six Thousand Seventy-One Dollars and Thirty Cents ($376,071.30) be entered in favor of Plaintiff David Coleman and against Defendant J. Garry Beidler, M.D.