

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

HAROLD GETTING and
VERONICA GETTING,
Plaintiffs,

vs.

MARK SALES AND LEASING, INC.
d/b/a MARK'S SALES & LEASING,
and LEMUEL SCOTT BARGER,
Defendants,

: No. 18-1228

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: CIVIL ACTION - LAW

: *Plaintiffs' Motion to Mold Verdict*

: *and for Delay Damages*

OPINION AND ORDER

AND NOW, following argument held November 30, 2020, on the *Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238* filed by Plaintiffs Harold Getting ("Mr. Getting") and Veronica Getting ("Mrs. Getting," collectively "Plaintiffs"), the Court hereby issues the following ORDER.

Plaintiffs initiated this action on August 21, 2018, by the filing of a Complaint. The Complaint alleges that Defendants Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing ("Mark's Sales"), and Mark's Sales employee, Lemuel Scott Barger ("Mr. Barger," collectively "Defendants") were negligent for purportedly recommending and leasing to Plaintiffs a model of riding lawn mower unsuitable for Plaintiffs' sloped property. In consequence, the riding lawn mower tipped as Mr. Getting operated it down a slope, and the blades struck and partially amputated Mr. Getting's left foot. Following a trial held from August 31, 2020 through September 4, 2020, the jury returned a verdict in favor of Plaintiffs and against Defendants in the amount of \$2,300,000.00. The jury allocated 85% liability to Defendants, and 15% liability to Mr. Getting.

Plaintiffs filed this Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 ("Motion") on September 11, 2020. Defendants filed a Response to this Motion, along with an accompanying Brief in Support, on September 28, 2020. Plaintiffs filed a Reply to this Response on October 6, 2020. Plaintiffs then filed a Supplemental Brief on November 13, 2020. Having had the benefit of briefing and argument on these

issues, the Court will now address the Motion to Mold the Verdict and the Motion for Delay Damages Pursuant to Pa.R.C.P. 238 *in seriatim* below.

A. **Motion to Mold the Verdict**

Plaintiffs explain within their Motion to Mold the Verdict that the Special Verdict Questions, to which Defendants' counsel agreed, identified Defendants as "Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger." However, Plaintiffs note that Defendants within their filings have variously identified Mark's Sales as "Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing,"¹ and "Mark Buys and Sells, Inc. d/b/a Mark Sales and Leasing."² Plaintiffs request that the verdict be molded as to be also against Defendant "Mark Buys and Sells, Inc. d/b/a Mark Sales and Leasing."

Defendants in their Reply to the Motion to Mold Verdict deny that they consented to the Special Verdict Questions form, contending that Defendants' counsel specifically objected to the form.³ Defendants also assert that Plaintiffs should be barred by the statute of limitations from molding the verdict, as Plaintiffs failed to timely move to amend either the case caption or the verdict form.⁴ Within their supportive brief, Defendants cite the case of *Heldring v. Lundy Beldecos & Milby, P.C.*, for the proposition that a plaintiff cannot amend a verdict against a party that was not named or present at trial, nor included on the verdict form submitted to the jury.⁵ In *Heldring*, plaintiff Pencoyd Iron Works filed a post-trial motion for clarification, requesting that the verdict against defendant "Grasso Holdings," which plaintiff realized was merely a trade name encompassing various related entities, be amended to include Grasso Holdings' affiliates. The trial court denied this motion, noting that plaintiff's request required the

¹ Plaintiffs point to the cover sheet for Defendants' Motion for Summary Judgment, attached as Exhibit A to Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238.

² Plaintiffs point to the cover sheet for Defendants' Answer to the Complaint, attached as Exhibit B to the Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238.

³ See Response of Defendants, Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger, to Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 ¶ 3 (Sept. 28, 2020) ("Defendants' Response").

⁴ See Defendants' Response ¶ 4.

⁵ See Brief in Support of Defendants' Response to Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 at pg. 2 (Sept. 28, 2020) ("Brief in Support of Defendants' Response") (citing *Heldring v. Lundy Beldecos & Milby, P.C.*, 151 A.3d 634 (Pa. Super. 2016)).

court to “chang[e] its factual determinations regarding the entities sued. . . . Essentially, plaintiff requests the court to reexamine the evidence and further reconsider the judgment entered.”⁶

Heldring is distinguishable from this matter, as in that case the proposed amended verdict would potentially have encompassed entities that were not parties to the original suit. Plaintiff’s Supplemental Brief attaches a printout from the Pennsylvania Department of State’s web page, which indicates that “Mark Buys and Sells, Inc.” is merely the prior business name for “Mark Sales and Leasing, Inc.”⁷ The Court finds it unambiguous that the proposed amendment to the verdict would not change the parties to the suit, but would rather encompass the same entity under differing business names, names used variously by Defendants throughout the suit. Further, in *Heldring* the plaintiff filed its motion for clarification some eight months after the jury entered the verdict. The trial court therefore identified the motion for clarification as untimely. In contrast, Plaintiff’s Motion to Mold the Verdict was timely filed post-trial in this action. The Court may mold the verdict to make the record in accord with the clear intention of the jury, “to make the record accord with the facts, or to cause the verdict to speak the truth.”⁸ In this case, the Court finds that molding the verdict will ensure that judgment can be carried out against the corporate Defendant Mark’s Sales, under any business or trade name, and would be in accord with the intention of the jury.⁹ Therefore, Plaintiff’s Motion to Mold the Verdict is GRANTED. The Court shall enter judgment including “Mark Buys and Sells, Inc. d/b/a Mark Sales and Leasing” as a named Defendant.

⁶ *Heldring*, 151 A.3d at 639. While Defendants cite this case with authority as a decision of the Superior Court, the excerpted passage actually derives from the Philadelphia County Court of Common Pleas’ order dismissing plaintiff’s motion for clarification, which the Superior Court quotes as background for the suit before it, a malpractice action filed by Pencoyd Iron Works against their attorneys.

⁷ Plaintiff’s Supplemental [sic] Brief in Support of Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 (Ex. C – Pa. Dept. of State Webpage) (Nov. 13, 2020). (“Plaintiffs’ Supplemental Brief”).

⁸ *Krock v. Chroust*, 478 A.2d 1376, 1381 (Pa. Super. 1984) (quoting *House of Pasta, Inc. v. Mayo*, 449 A.2d 697, 701 (Pa. Super. 1982)).

⁹ Plaintiffs request that the verdict be molded because Mark’s Sales insurance coverage is under the “Mark Buys and Sell, Inc.” name. Defendants’ counsel indicated at argument that molding the verdict would be unnecessary, as Defendants do not dispute that the verdict would be covered by their insurance plan. However, if this is indeed the case, then molding the verdict should in no way harm or inconvenience Mark’s Sales.

B. Motion for Delay Damages Pursuant to Pa.R.C.P. 238

Plaintiffs' Motion for Delay Damages Pursuant to Pa.R.C.P. 238 ("Motion for Delay Damages") seeks statutorily prescribed delay damages for 2019 and 2020. Pursuant to Pa.R.C.P. 238:

At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury. . .and shall become part of the verdict, decision or award.

Damages for delay shall be awarded for the period of time 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.

Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.¹⁰

Delay damages will not be available "after the defendant made a written offer which complied with the requirements of subdivision (b)(2),¹¹ provided that the plaintiff obtained a recovery which did not exceed the amount described in subdivision (b)(3),"¹² or in situations where "the plaintiff caused delay of the trial."¹³ Plaintiffs attach as Exhibit C to their Motion for Delay Damages the Sheriff's Writ of Service demonstrating that service was effectuated on both Defendants on September 6, 2018.¹⁴ Plaintiffs note that the total jury verdict of \$2,300,000.00 would be reduced by the jury's finding that Plaintiffs were 15% comparatively negligence to \$1,955,000.00. Using \$1,955,000.00 as a base number, Plaintiffs therefore calculate that \$61,622,67 in delay

¹⁰ Pa.R.C.P. 238(a)(1)-(3).

¹¹ Pa.R.C.P.(b)(2)(i)-(ii) ("The written offer of settlement required by subdivision (b)(1)(i) shall contain an express clause continuing the offer in effect for at least ninety days or until commencement of trial, whichever occurs first, and shall either be in a specified sum with prompt cash payment, or contain a structured settlement plus any cash payment. An offer that includes a structured settlement shall disclose the terms of payment underwritten by a financially responsible entity, the identity of the underwriter and the cost."). Defendants concede that they made no such written offer of settlement.

¹² Pa.R.C.P.(b)(3) ("The plaintiff's recovery required by subdivision (b)(1)(i), whether by award, verdict or decision, exclusive of damages for delay, shall not be more than 125 percent of either the specified sum or the cost of the structured settlement plus any cash payment to the plaintiff.").

¹³ Pa.R.C.P. 238(b)(1)(i)-(ii). Defendants do not contend that Plaintiffs contributed to a delay of trial.

¹⁴ Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 (Ex. C – Sheriff's Return of Service) (Sept. 11, 2020) ("Consolidated Motions").

damages are due for 2019, and \$76,378.90 are due for delay damages in 2020, with the outstanding delay damages equaling \$138,001.57.¹⁵ Plaintiffs request that the verdict therefore be molded against all Defendants to total \$2,093,001.57.

Within their Response to Plaintiffs' Motion to Mold Verdict, Defendants contend that Plaintiffs have miscalculated the delay damages. Defendants first note that delay damages may not be awarded on a jury's award for loss of consortium, which comprised \$500,000.00 of the total award in this case.¹⁶ Plaintiffs further contend that delay damages must be subtracted for the period during which the courts were closed to the public pursuant to the Pennsylvania's Order of March 16, 2020 declaring a statewide judicial emergency, during which all time calculations were suspended.¹⁷ Defendants also assert that Plaintiffs' calculations erroneously provided delay damages for 177 days in 2019, when the proper calculation between September 6, 2019 and December 31, 2019 would be 117 days.¹⁸

Within their Reply to Defendants' Response, Plaintiffs acknowledge that the 177 day figure applied to the delay damages for 2019 was in error, and further note that, pursuant to Pa.R.C.P. 106, which requires that the first day of any time period be excluded for time computation purposes, September 7, 2020 would in fact be regarded as day one for the delay damages calculation. As a result, only 116 days would apply in 2019 for delay damages purposes.¹⁹ Plaintiffs also concede that delay damages are not available for loss of consortium claims, and indicate that the portion of the verdict subject to calculation would be the award of \$1,800,000.00 to Mr. Getting, reduced by the 15% comparative negligence calculation to \$1,530,000.00.²⁰ However, Plaintiffs strongly oppose Defendants position that the time calculation should subtract the period

¹⁵ See Consolidated Motions ¶ 13.

¹⁶ Response of Defendants, Mark Sales and Leasing, Inc. d/b/a Mark's Sales and Leasing and Lemuel Scott Barger, to Plaintiffs' Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 ¶ 6 (Sept. 28, 2020) ("Defendants' Response") (citing *Marlette v. State Farm Mut. Auto. Ins. Co.*, 57 A.3d 1224, 1226 n.3 (Pa. 2012)).

¹⁷ See Defendants' Response ¶ 6.

¹⁸ See Defendants' Response ¶ 14. Defendants also raised a challenge as to the constitutionality of Pa.R.C.P. 238 in their Response, but Defendant's counsel provided at argument that he would withdraw this challenge.

¹⁹ See Plaintiff's Reply in Support of Motion to Mold the Verdict and for Delay Damages Pursuant to Pa.R.C.P. 238 at pgs. 2-3 (Oct. 6, 2020) ("Plaintiffs' Reply") (citing Pa.R.C.P. 106).

²⁰ See Plaintiffs' Reply at pgs. 2-3.

during which the Pennsylvania courts were subject to a statewide emergency and closed to the public.

On March 16, 2020, the Pennsylvania Supreme Court entered an administrative order authorizing the President Judge of each of the State's judicial districts to declare a judicial emergency within their district.²¹ On the same day, President Judge Nancy L. Butts entered a declaration of judicial emergency in the 29th Judicial District, which encompasses Lycoming County.²² On March 18, 2020, the Pennsylvania Supreme Court entered a follow-up administrative order declaring a statewide judicial emergency and closing the courts to the public for all non-essential functions from March 19, 2020 through April 3, 2020. The March 18, 2020 order provided that "all time calculations for purposes of time computation relevant to court cases or other judicial business, as well as time deadlines, are SUSPENDED through April 3, 2020."²³ The Pennsylvania Supreme Court's Administrative Order of April 28, 2020 extended the suspension of calculation deadlines through May 11, 2020.²⁴ The Supreme Court otherwise extended the statewide judicial emergency several times, until declaring by Administrative Order dated May 27, 2020 that the statewide judicial emergency would cease on June 1, 2020. However, the Pennsylvania Supreme Court provided that locally declared emergencies could continue past that date.²⁵ President Judge Butts, in an Administrative Order issued May 29, 2020, extended the declaration of emergency in the 29th judicial district and continued all jury trials to, at a minimum, the August-September 2020 trial term.²⁶

Defendants argue that, because the Pennsylvania Supreme Court suspended all time calculations during the period that the courts were under judicial emergency, delay damages should be excluded from the period between March 16, 2020 through August 30, 2020. Defendants therefore contend that delay damages for 2020 would only be

²¹ See Brief in Support of Defendants' Response at pg. 4 (citing *In re Gen. Statewide Judicial Emergency*, 228 A.3d 1281 (Pa. March 16, 2020)).

²² Declaration of Judicial Emergency, No. MD-20-00006 (March 16, 2020).

²³ See Brief in Support of Defendants' Response at pg. 4 (citing *In re Gen. Statewide Judicial Emergency*, 228 A.3d 1283, 1285 (Pa. March 18, 2020)).

²⁴ See *In re Gen. Statewide Judicial Emergency*, 230 A.3d 1015, 1017 (Pa. April 28, 2020).

²⁵ See Brief in Support of Defendants' Response at pg. 5 (*In re Gen. Statewide Judicial Emergency*, 234 A.3d 408 (Pa. May 27, 2020)).

²⁶ Administration Order, MD-20-00006 (May 29, 2020).

available from January 1, 2020 through March 15, 2020 and from August 31, 2020 through September 4, 2020, totaling only 80 days of delay damages due in 2020.²⁷ Defendants also cite Pa.R.C.P. 126, which provides, [t]he court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties[,]" for the proposition that Pa.R.C.P. 238 should not be applied inflexibly in light of the ongoing COVID pandemic.²⁸

Plaintiffs within their Reply in Support of their Motion for Delay Damages, contend that the suspension of deadlines referenced in the Supreme Court's administrative order of March 16, 2020, suspended only the deadlines for court filings, which was necessary because the closure of the courts to the public made filing difficult. However, Plaintiffs maintain that nothing within that order closed the practice of law or prevented parties from continuing to negotiate settlements, noting that the parties in this case did in fact participate in a settlement conference on June 17, 2020 under Court supervision. Plaintiffs further assert that the March 16, 2020 Administrative Order did not undermine the policy underlying Rule 238, encouraging pre-trial settlement to reduce court congestion and delay.²⁹ Plaintiffs consequently assert that Defendants citation to Pa.R.C.P. 126 is misguided, as Rule 126 allows the rules of civil procedure to be liberally construed "to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable."³⁰ Plaintiffs assert that this would be antithetical to a finding that Rule 238, which is specifically designed to encourage speedy and efficient resolutions to lawsuits, should be inapplicable because of exterior factors causing a delay in court proceedings.³¹

The Court is unaware of any other cases that have touched upon this specific issue. However, the Court finds the argument set forth by Plaintiffs persuasive. The Court does not believe that the suspension of deadlines established by the Pennsylvania Supreme Court's Administrative Order of March 16, 2020 was intended to

²⁷ See Brief in Support of Defendants' Response at pg. 6.

²⁸ See Brief in Support of Defendants' Response at pg. 5 (quoting Pa.R.C.P. 126).

²⁹ See Plaintiffs' Reply at pg. 4 (citing *Laudenberger v. Port Auth. of Allegheny County*, 436 A.2d 147 150-51 (Pa. 1981)).

³⁰ See Plaintiffs' Reply at pgs. 4-5 (quoting Pa.R.C.P. 126).

³¹ See Plaintiffs' Reply at pgs. 4-5.

toll the accrual of delay damages. The declaration of statewide emergency specifically limited certain filings or proceedings within the courts, but did not restrict parties from negotiating a settlement.

Further, assuming *arguendo* that the Pennsylvania Supreme Court's suspension of deadlines was meant to apply to the accrual of delay damages, of those orders cited by Defendants, only the Pennsylvania Supreme Court's Administrative Orders of March 16, 2020 and April 28, 2020 suspended filings, time limitations, and deadlines, and only through May 11, 2020. Thereafter, the Pennsylvania Supreme Court's Administrative Order of May 27, 2020 did not suspend filing deadlines. It instead provided, "extant administrative orders issued by the intermediate courts and local emergency orders and directives, including any provisions of these affecting time calculations or deadlines, SHALL REMAIN IN FULL FORCE AND EFFECT until they expire or are rescinded by this Court, by an intermediate court, or locally."³² However, none of the Administrative Orders issued by the 29th district addressed a suspension of time calculations or deadlines, so at most, Defendants could argue that March 16, 2020 through May 11, 2020 should not be included in the calculation for delay damages.

Defendants' chief argument that delay damages should not extend to the date of trial is this Court's Administrative Order of May 29, 2020, which continued all jury trials proceeding before this Court to the August-September 2020 trial term. While the May 29, 2020 Administrative Order did indeed protract proceeding on this case, which was initially scheduled for the June-July 2020 trial term, the Pennsylvania courts have generally held that delay damages will not be reduced due to circumstances beyond the control of either party. For example, numerous courts have held that delay damages will not be reduced because congestion of the court's docket contributed to the delay.³³ Even in a situation where the delay was caused by the untimely death of the original trial judge, necessitating the scheduling of a new trial, the Superior Court found that it lacked the discretion under Rule 238, which it characterized as "mandatory," to remit

³² *In re Gen. Statewide Judicial Emergency*, 234 A.3d 408 (May 27, 2020).

³³ See *Schrock v. Albert Einstein Medical Center, Daroff Div.*, 562 A.2d 875 (Pa. Super. 1989), order aff'd, 589 A.2d 1103 (Pa. 1991); *King v. Se. Pennsylvania Transp. Auth.*, 557 A.2d 11, 13 (Pa. Super. 1989) (citation and quotations omitted) ("The drafters of [Pa.R.C.P. 238] have not allowed for the exclusion of periods of delay not caused by either party.").

delay damages for the period between the first and second trial.³⁴ By this authority, the Court finds it cannot reduce delay damages because trial was continued pursuant to a local judicial emergency, even though the fault was not attributable to Defendants. Pursuant to the foregoing, Plaintiffs' Motion for Delay Damages is GRANTED. Plaintiffs' delay damages for 2019 are: $\$1,530,000 \times 116/365 \times 0.0650 = \$31,606.03$.

Plaintiffs' delay damages for 2020 are: $\$1,530,000 \times 248/365 \times 0.0575 = \$59,611.48$.³⁵ These delay damages total $\$92,217.51$, which will be added to the $\$1,955,000.00$ judgment entered in favor of Plaintiffs, taking into account the 15% reduction for Plaintiffs' comparative negligence. The Court shall therefore enter judgment in favor of Plaintiffs in the total amount of $\$2,047,217.51$.

Conclusion

In summary, Plaintiffs' Motion to Mold the Verdict is GRANTED. The Court shall enter judgment, including "Mark Buys and Sells, Inc. d/b/a Mark Sales and Leasing" as a Defendant. Plaintiffs' Motion for Delay Damages is GRANTED. The Court will add the delay damages to the jury's verdict and enter judgment in favor of Plaintiffs in the total amount of $\$2,047,217.51$.

IT IS SO ORDERED this 12th day of February 2021.

³⁴ See *J.W.S. Delavau, Inc. v. E. Am. Transp. & Warehousing, Inc.*, 810 A.2d 672, 687 (Pa. Super. 2002) (internal citations omitted) ("Here, it is undisputed that [defendant] Eastern did not make a qualifying offer of settlement and that the delay, due to the sudden death of Judge Caesar, was not the fault of either party. Nevertheless, the fact that the delay was not caused by Eastern does not relieve Eastern of liability for delay damages. The language in Rule 238 is mandatory. It does not extend discretion to the trial court to exclude a period of time from the calculation of delay damages where the defendant was not at fault.").

³⁵ The $\$59,611.48$ figure is supplied by Plaintiffs in their Reply. By the Court's own calculation, this figure should actually be $\$59,774.79$. However, as this miscalculation is in Defendants' favor, the Court will award what Plaintiffs have requested. See *Barris v. Bob's Drag Chutes & Safety Equip. Inc.*, 717 F.2d 52, 55 (3d Cir. 1983) (finding no abuse of discretion on appeal when District Court awarded plaintiff the amount of delay damages she had requested, even though plaintiff later realized that she had miscalculated in defendant's favor).

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: *James J. Waldenberger, Esq.*

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