**[J-230-99]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| ELIZABETH A. ALLEN, | : | Nos. 44 and 45 MAP 1999 |
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| Appellant | : | Appeal from the Order of Commonwealth Court entered August 20, 1998 at Nos. 2408 CD 1997 and 2310 CD 1997 |
| v. | : | affirming the judgment of the Court of Common Pleas of Lebanon County, Civil Division entered July 9, 1997, at Nos. 89-01668 and 89-01623 |
| KENNETH E. MELLINGER AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, | : | |
| | : | |
| Appellee | : | ARGUED: November 15, 1999 |

## OPINION

**MR. JUSTICE ZAPPALA** **DECIDED: November 20, 2001**

In this appeal, we re-examine the interplay between the procedural rule governing delay damages in civil actions (Pa.R.C.P. 238) and the statutory provisions governing sovereign immunity (42 Pa.C.S. § 8521 et seq.) and joint and several liability (42 Pa.C.S. § 7102(b).

On May 31, 1989, Appellant Elizabeth A. Allen commenced a personal injury action against Appellees Kenneth E. Mellinger and the Commonwealth of Pennsylvania, Department of Transportation, seeking damages related to severe injuries which she

suffered in a collision between automobiles driven by herself and Mellinger.[1] Neither defendant made a written offer of settlement. Following trial, the jury rendered a verdict finding that all three parties were negligent, apportioning the fault twenty percent to Allen and forty percent each to Mellinger and the Department, and awarding total monetary damages of $2,883,366. Allen filed a motion seeking $1,430,077.07 in delay damages pursuant to Pa.R.C.P. 238 for the approximately seven-year period commencing with the filing of the complaint and ending on March 16, 1996, the date on which the verdict was rendered. Subsequently, Allen entered into a written agreement with Mellinger providing that, in exchange for payment of the limits of Mellinger's automobile liability insurance policy ($300,000), Allen would not undertake to execute against Mellinger's personal assets to satisfy the judgment. The agreement further specified that its terms were not intended either to reduce the amount of the verdict for which the Department would be liable, or to release Mellinger from liability to the Department for contribution with respect to either the verdict or delay damages.[2]

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[1] Specifically, Allen alleged that, on December 13, 1987, her vehicle was struck by Mellinger's on Route 501 in Lebanon County as she was turning across traffic into the parking lot of a shopping establishment. Allen alleged that Mellinger was traveling at an excessive rate of speed and that the Department had recently painted lines on the highway which directed her to turn at an unsafe location.

[2] The pertinent term of the agreement is as follows:

> This agreement is not intended to be a pro rata or joint tortfeasor release of Mr. Mellinger's liability for either the verdict or delay damages, nor is it intended to affect in any way his liability to PennDot for contribution on either the amount of the verdict or delay damages, other than: (1) to reduce, by the amount of the $300,000 payment referred to above, the amount of the verdict for which Mellinger and PennDot are jointly and severally liable; and (2) to end, as of the date the payment of $300,000 is received by Ms. Allen's

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The trial court denied the Department's motions for new trial and judgment notwithstanding the verdict, granted the Department's motion to mold the general liability verdict to conform to the statutory cap of $250,000 imposed by 42 Pa.C.S. § 8528(b), and granted Allen's motion for delay damages on a limited basis. The limitation imposed by the trial court resulted in assessment of delay damages against the Department calculated only upon its forty-percent share of the verdict, rather than on the entire $2.9 million verdict, yielding a delay damages award of $501,654.11. In imposing this limitation, the trial court acknowledged this Court's holding in Woods v. Commonwealth, Dep't of Transp., 612 A.2d 970 (Pa. 1992), that an award of delay damages against a Commonwealth party is to be calculated on the basis of the entire verdict rather than on a maximum of $250,000. Nevertheless, the court ruled that the Department was not jointly and severally liable for the entire amount of delay damages pursuant to the holding of the Commonwealth Court in United States Fidelity & Guaranty Co. v. Royer Garden Center and Greenhouse, Inc., 598 A.2d 583 (Pa. Cmwlth. 1991), alloc. denied, 609 A.2d 170 (Pa. 1992). Additionally, the court noted that as part of the settlement agreement, Allen had agreed to forego any attempt to collect delay damages from Mellinger.

On appeal, the Commonwealth Court affirmed, also relying upon the rationale of Royer Garden. With regard to Woods, the Commonwealth Court stated that the decision:

> simply stands for the proposition that an award of delay damages against the Commonwealth be calculated on the entire verdict against the Commonwealth party and not just the amount of the statutory cap. Woods does not stand for the proposition that the Commonwealth shall be liable for the entire amount of delay damages against all defendants.

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(…continued)

> attorney, the period for which delay damages may be sought on the amount of that payment ($300,000).

Memorandum Opinion at 7-8 (emphasis in original). The Commonwealth Court did not refer to the settlement agreement between Allen and Mellinger in its analysis.

Allen argues that the Commonwealth Court's holding in Royer Garden is inconsistent with the Superior Court's holding in cases such as Reilly v. Southeastern Pennsylvania Transportation Authority, 479 A.2d 973 (Pa. Super. 1984), aff'd, 489 A.2d 1291 (Pa. 1995), and Tindal v. Southeastern Pennsylvania Transportation Authority, 560 A.2d 183 (Pa. Super. 1989), and that we should resolve the conflict in favor of the Superior Court's analysis.

In Tindal, Superior Court wrote:

> Liability normally follows verdict. Therefore, appellants are jointly and severally responsible for the entire amount of delay damages because they are jointly and severally liable for the entire amount of the verdict. This result logically obtains from the new Rule [238] which, while labeled "delay damages," is really in the nature of pre-judgment interest to be added to compensatory damages awarded at verdict. Moreover, the express language of Rule 238 requires that damages for delay "become part of the verdict, decision or award."

Tindal, 560 A.2d at 189.

Royer Garden established that in accordance with the language of Rule 238, delay damages should be calculated for each defendant based on the compensatory damages assessed against that defendant according to the jury's apportionment of negligence. Rule 238(a)(1) provides, in relevant part:

> 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.

The Royer Garden opinion emphasized the phrase "damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant." See Royer Garden, 598 A.2d at 592. Since the jury apportioned negligence 40% to the Township, 40% to another defendant, and 20% to the plaintiff, delay damages against the Township should be calculated on the Township's 40% share of the total molded damage verdict, and delay damages against the other defendant on its share of the molded damage verdict.

To this extent, Royer Garden does not conflict with Reilly, Tindal, et al. Apportionment of liability for damages among defendants in this fashion, whether compensatory damages or delay damages, does not in and of itself conflict with application of the rule of joint and several liability. Likewise, allowing a plaintiff to recover from any defendant more than that defendant's pro rata share of damages, whether compensatory damages or delay damages, pursuant to the rule of joint and several liability, is not inconsistent with determining the percentage share of liability to each defendant. Indeed, calculating each defendant's share would be a prerequisite to determining a defendant's entitlement to contribution for having paid more than his share.

It appears, however, that the Royer Garden opinion went beyond simply approving the calculation of each defendant's share of liability for delay damages in accordance with the jury's allocation of fault. The court dismissed the plaintiffs' argument on appeal that the trial court's apportionment of damages prevented them from recovering the full amount of damages from any defendant under the principle of joint and several liability. See 598 A.2d at 593-94. The court's reasons for disallowing joint and several liability were not clearly stated, but since the facts suggest that the defendants were joint tortfeasors, this aspect

of the decision must be disapproved. Compare Glomb by Salopek v. Glomb, 530 A.2d 1362, 1365 n. 2 (Pa. Super. 1987) (distinguishing between "'apportionment' of separate liabilities between separate tort-feasors and 'equitable apportionment' of a joint liability between joint tort-feasors.")

Thus, we hold that as a general precept Rule 238 damages awarded against all defendants in a negligence action are properly aggregated with the verdict such that the defendants are jointly and severally liable for the aggregated delay damages. The fact that delay damages under Rule 238 may be calculated in the first instance on an individualized basis before being aggregated with the general liability verdict does not alter the analysis.

This, however, does not complete the inquiry in this case. The rule of joint and several liability is stated in 42 Pa.C.S. § 7102(b) as follows:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery **from any defendant against whom the plaintiff is not barred from recovery.** Any defendant who is so compelled to pay more than his percentage share may seek contribution.

(Emphasis added.) Pursuant to the Sovereign Immunity Act, 42 Pa.C.S. § 8521 et seq., sovereign immunity is "a **bar** to an action against Commonwealth parties" that has been waived in specified circumstances "to the extent set forth in [the] subchapter and **within the limits set forth in section 8528 (relating to limitations on damages)**. 42 Pa.C.S. § 8522(a) (emphasis added). Since with respect to amounts in excess of the statutory cap, the Commonwealth party is a defendant "against whom the plaintiff is barred from recovery," under the terms of 42 Pa.C.S. § 7102(b) the plaintiff is not permitted to "recover the full amount of the allowed recovery from" the Commonwealth party. In other words, the

Sovereign Immunity Act serves to limit the Commonwealth party's exposure to joint and several liability. Where the limitation on compensatory damages has been reached, the plaintiff can recover from the Commonwealth party only those delay damages attributable to the Commonwealth.

This in turn implicates the parties' discussion of the manner in which delay damages against a Commonwealth party are to be calculated, in particular the Department's argument that we should overrule Woods. In that case, where the Department was the sole defendant, the jury returned a verdict of $1.5 million, which the common pleas court molded to $250,000 pursuant to 42 Pa.C.S. § 8528(b). In ruling on the plaintiff's post-trial motion under Rule 238, the court calculated delay damages on $250,000 rather than the jury verdict of $1.5 million. Commonwealth Court affirmed. This Court reversed.

The first part of the analysis focused on the language of Rule 238(a)(1). After setting out the text in its entirety, the Court stated: "Rule 238 provides that delay damages shall be added to the '*verdict of the jury*, . . . the decision of the court in a nonjury trial or . . . the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. § 7361, and shall become part of the verdict, decision or award.'" Woods, 612 A.2d at 971. The Court placed emphasis on the phrase "verdict of the jury" and concluded that it was "indicative of the intent to have damages apply to the verdict or award itself, which represents the actual factfinder's assessment of the plaintiff's damage, as opposed to the amount the plaintiff is legally entitled to recover." Id. at 972. The second part of the analysis focused on the previously identified purposes of Rule 238, i.e., to compensate the plaintiff for delay in receiving his or her recovery and to encourage settlements. The Court

concluded that these purposes would be frustrated if delay damages were computed on the statutory cap.

> Not only would there be no incentive for a Commonwealth agency to seek a settlement of a major suit, there would be a distinct disincentive since the delay damages would be based upon a predictable constant and there would be no unknown which would motivate the Commonwealth to discuss settlement. The same disincentive would encourage the prolonging of litigation as well as the filing of appeals. Additionally, the plaintiff who statutorily has already been denied the full compensation due him or her would once again be deprived of money to which he or she would be otherwise entitled, with only a minimum sanction being imposed on the defendant.

Id.

Given the opportunity presented by this case to reexamine the holding in Woods, we are compelled to acknowledge that this reasoning was fundamentally flawed and the decision must be overruled. First, the analysis of the language of the Rule proceeded from a misleading paraphrase of the text. The actual language of the rule states "damages for delay shall be added **to the amount of compensatory damages awarded against each defendant or additional defendant** found liable to the plaintiff in the verdict of a jury, in the decision of the court . . . or in the award of arbitrators . . . and shall become part of the verdict, decision or award." (Emphasis added.) The Woods opinion, however, ignored the emphasized language and declared that the Rule "provides that delay damages shall be added to the 'verdict of the jury . . . decision of the court . . . or award of arbitrators . . . .'" 612 A.2d at 971. When the text is read in full, delay damages are added to the compensatory damages awarded against each defendant and then become part of the verdict. According to the Woods paraphrase, delay damages are simply added to the verdict. The difference in meaning is readily apparent and all the more critical because the next step of the Woods analysis characterized the "verdict or award" as representing the

factfinder's assessment of the plaintiff's damage and contrasted it with the amount the plaintiff is legally entitled to recover.

The Woods opinion is similarly inadequate in its analysis of the purposes underlying Rule 238. With respect to the rule's purpose of compensating the plaintiff for delay in receiving his or her recovery, it defies reason to suggest that the basis for calculating such compensation could be anything other than the amount the Commonwealth party could actually be responsible for paying to the plaintiff. Since a plaintiff's compensatory damages can never exceed the statutory cap, there can be no delay in receiving amounts in excess of that cap. And if there is no delay, the stated justification for compensating the plaintiff with delay damages is illusory. Simply put, the hardships which may befall plaintiffs who seek damages against Commonwealth parties occur as a direct consequence of the statutory limitations upon damages, which have been upheld against constitutional challenge as within the province of the General Assembly. See, e.g., Lyles v. Commonwealth, Dep't of Transp., 516 A.2d 701, 703 (Pa. 1986).

Further, in its treatment of the rule's purpose of encouraging settlements, the Woods rationale suffers from a failure to give *any* consideration to other valid interests. When this Court first rejected the argument that Rule 238 exceeded our rulemaking authority because it enlarged the substantive rights of plaintiffs, Laudenberger v. Port Authority of Allegheny County, 436 A.2d 147 (Pa. 1981), we acknowledged that the rule had both substantive and procedural elements but concluded that the effect on substantive rights was merely collateral. Id. at 155. In Craig v. Magee Memorial Rehabilitation Center, 515 A.2d 1350, (Pa. 1986), faced with "a different set of facts viewed from a different perspective," id. at 1352, we recognized that the same rule had more than a collateral effect on substantive

duties, and violated due process as well, to the extent that it imposed responsibility for delay on defendants without regard to fault. As a result we suspended the rule as it was then written and ultimately replaced it with the present rule in 1988.

Unfortunately, when presented with yet another set of facts in Woods, the Court failed to recognize the need to view the matter from another perspective, as it had in Craig v. Magee. Instead of recognizing that the Sovereign Immunity Act creates a unique relationship of rights and duties between plaintiffs and Commonwealth parties, and then analyzing whether the application of Rule 238 in that setting still has only a collateral effect on substantive rights and duties, the Court simply treated the Commonwealth party the same as any other party. The Court reasoned that if delay damages were computed on the statutory cap "there would then be no unknown which would motivate the Commonwealth to discuss settlement," Woods, 612 A.2d at 972. In doing so, the Court failed to perceive that the absence of an "unknown" originates in and cannot be separated from the statutory cap. The Woods rationale allows the Court to *create* an uncertainty of outcome to motivate settlement where no uncertainty otherwise exists. This is far different from channeling the uncertainty of outcome that exists in the case of private litigants not subject to limitations on liability. In the latter situation, the procedural rule may be said to have only a collateral effect on substantive rights and duties. In the former situation, the effect is plainly more than collateral and thus exceeds the bounds of our rulemaking authority.

For the foregoing reasons, we overrule Woods v. Commonwealth, Dep't of Transp., 612 A.2d 970 (Pa. 1992), and hold that delay damages recoverable from Commonwealth parties are limited to those calculated based upon the statutory cap. Additionally, we hold that as is the case with compensatory damages, Commonwealth parties are not jointly and

severally liable for delay damages which exceed those calculated on the statutory cap. These holdings better comport with the procedural justification for Rule 238 and eliminate the substantive overtones of the former interpretations. Accordingly, the order of the Commonwealth Court is reversed, the order of the common pleas court is vacated, and the case is remanded to the common pleas court for recalculation of delay damages recoverable from the Department in accordance with this opinion.

Mr. Justice Saylor files a concurring opinion joined by Mr. Justice Castille, who also joins the majority opinion.

Mr. Justice Cappy files a concurring and dissenting opinion in which Mr. Justice Nigro and Madame Justice Newman join.