NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

HERBERT M. HOWELL, JR., Appellee v. MARSHALL VERBIT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2880 EDA 2012

Appeal from the Judgment entered December 19, 2012,
in the Court of Common Pleas of Montgomery County,
Civil Division, at No: 2007-16592

BEFORE: GANTMAN, ALLEN, and PLATT*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JULY 09, 2013**

Marshall Verbit ("Appellant") appeals from the trial court's denial of his post-trial motions for a new trial and judgment NOV, and from the trial court's order granting delay damages to Herbert M. Howell Jr. ("Howell"). We affirm.

The trial court set forth the following factual and procedural history regarding this matter:

> This is a personal injury case. On January 27, 2006, at about 10:00 a.m., [Howell] was employed as a roadside construction site flagman and he was directing traffic on Meetinghouse Road in Upper Dublin, Pennsylvania. He was wearing a safety vest, and a hardhat, and he was using a hand-held Stop/Slow sign to control the flow of traffic past the construction site in coordination with a second flagman down the road.

*Retired Senior Judge assigned to the Superior Court.

> [Appellant] was operating his vehicle on Meetinghouse Road and both flagmen used their signs to indicate that traffic should proceed slowly past the construction site. Instead, [Appellant] speeded toward the construction site -- risking injury to the unsuspecting construction workers -- so [Howell] changed his sign from "slow" to "stop." [Appellant] stopped. Angry words were exchanged and [Appellant] maintained that he had every right to proceed, that he was about to do so, and that [Howell] should move out of his way or he will get hit. [Howell] stood his ground and [Appellant] began driving forward. [Howell] used his Stop/Slow sign to strike [Appellant's] car and [Appellant] ran over [Howell's] foot and knocked him to the ground with the vehicle's side-view mirror on the passenger's side. [Howell] was wearing steel-toed work boots but he suffered an injury to his ankle and left hip. [Howell] was hospitalized for three days and needed hip replacement surgery six months later because of the accident.
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> After hearing the evidence on April 4, 2012 and April 5, 2012, the jury returned a verdict in favor of [Howell] on April 9, 2012. The jury found [Appellant] to be 70 percent negligent and [Howell] to be 30 percent negligent. The jury awarded damages of $190,000, which the court molded to $133,000 by agreement of the parties.
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> On April 18, 2012, [Appellant] filed a motion for post-trial relief requesting the entry of judgment notwithstanding the verdict or a new trial, in the alternative. On April 19, 2012, [Howell] filed a motion for delay damages as authorized by Pa.R.C.P. 238. [Howell] filed his response to [Appellant's] motion on May 1, 2012 and [Appellant] filed his answer with new matter on May 8, 2012. The parties filed briefs and the [trial court] heard oral argument on August 28, 2012.
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> On September 27, 2012, the [trial court] entered an order denying [Appellant's] motion and granting [Howell's] motion. By that order, the court included delay damages of $23,480.87 to the molded jury award of $133,000.
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> [Appellant] filed his notice of appeal on October 12, 2012 and his concise statement of matters complained of on appeal on November 1, 2012, in compliance with the court's order entered October 16, 2012.

Trial Court Opinion, 12/4/12, at 1-2.

Appellant presents the following issues for our review:

> 1. Whether the Trial Court erred in charging the jury on claims for future pain and suffering in a case where [Howell's] expert testified that [Howell's] injuries related to the accident had completely resolved?
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> 2. Whether the Trial Court committed error in awarding delay damages to [Howell] as any delay in trial was the result of [Howell's] actions?
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> 3. Whether the Trial Court erred in denying [Appellant's] request for a new trial and/or judgment notwithstanding the verdict in a case where the verdict in [Howell's] favor was contrary to the facts and the law and against the weight of the evidence?

Appellant's Brief at 5.

Appellant's first and third issues challenge the trial court's failure to grant Appellant's post-trial motions for a new trial, or alternatively a JNOV, following the jury's verdict in Howell's favor. We will address these issues together.

In his first issue, Appellant contends that he is entitled to a new trial because the "trial court erred in giving a jury charge that permitted the jury to consider the awarding of compensation for future pain and suffering when…[Howell's] expert indicated that [Howell's] injury was completely resolved in 2008, four years before trial." Appellant's Brief at 15. We disagree.

> [O]ur standard of review when faced with an appeal from the trial court's denial of a motion for a new trial is whether the trial court clearly and palpably committed an error of law that controlled the outcome of the case or constituted an abuse of discretion. In examining the evidence in the light most favorable to the verdict winner, to reverse the trial court, we must

> conclude that the verdict would change if another trial were granted.

Schmidt v. Boardman, 958 A.2d 498 (Pa. Super. 2008), *affirmed* 11 A.3d 924 (Pa. 2011) (internal citation omitted).

Here, the trial court opined:

> The scope of pain and suffering is broad enough to include "all physical pain, mental anguish, discomfort, inconvenience, and distress." Pa.R.C.P. 223.3. Because of the accident, and the hip replacement surgery it necessitated, [Howell] is under permanent doctor's orders that he must never squat because doing so risks dislocating his artificial hip by popping the ball out of its socket. N.T. 4/4/12, docket no. 82, Exhibit "P-2", p. 28. [Howell] must now use a special toilet and he can only sit in a chair that has arms so he can use them to press himself to his feet. N.T. 4/5/12, docket no. 71, p. 52. [Howell] testified that he continues to experience some of his pre-surgical symptoms when he characterized his surgery as 95 percent successful. N.T. 4/5/12, docket no. 71, pp. 47-48. And [Howell] testified that he must now remain ever-vigilant how he uses his body or else he still continues to experience some degree of discomfort or pain[.] [] In other words, [Howell] testified that his pain is "pretty good" only when he is "careful."
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> From the evidence described above the jury could have reasonably found that [Howell] will continue to experience pain and suffering for the foreseeable future. There was evidence of permanent inconvenience because there was evidence that [Howell] is not allowed to squat and he must take special precautions to avoid dislocating his artificial hip. That evidence of permanent inconvenience was by itself wholly sufficient to justify the court's instruction to the jury regarding future pain and suffering.
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> However, there was also evidence that [Howell] continues to experience pain or discomfort whenever his vigilance lapses. Regarding permanent distress, there was evidence that Howell] faces the possibility that he may someday dislocate his artificial hip. The severity of [Howell's] future pain and suffering was for the jury but clearly there was some evidence of permanent pain and suffering as defined by Rule 223.3. The court properly

instructed the jury that it could award future pain and suffering as an item of noneconomic damages.

[Appellant's] first argument on appeal lacks merit because it is unsupported by the record. [Appellant] failed to identify for the court anywhere in the record where Dr. Gordon testified that [Howell] was "fully recovered." To the contrary, Dr. Gordon testified that [Howell] remains under permanent doctor's orders that he must never squat because doing so risks dislocating his artificial hip by popping the ball out of its socket. N.T, 4/4/12, docket 82, Exhibit "P-2", p. 28. Being forever unable to squat is not at all the same thing as being "fully recovered."

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Contrary to [Appellant's] assertion, in no way did Dr. Gordon testify that [Howell] was "fully recovered." Instead, Dr. Gordon testified that [Howell's] medical care was successful such that [Howell] no longer experiences the severe chronic pain he experienced after the accident. That is why Dr. Gordon testified that [Howell] was doing "fairly well" with his left hip. It is also why Dr. Gordon testified that [Howell's] prior pain had "fully resolved." That was not the same thing as saying that [Howell] is pain-free — only that [Howell] was not feeling the same pain. This understanding of Dr. Gordon's testimony is strengthened by Dr. Gordon's qualified statement that [Howell's] "severe pain" had gotten "much better." Again, saying that severe pain has gotten better is not the same thing as saying there is no pain, whatsoever. Dr. Gordon testified that [Howell] "recovered" but he did not testify that [Howell] fully recovered. Finally, Dr. Gordon testified that "the hip pain resolved completely" but it is clear from the context, consistent with his prior testimony, that Dr. Gordon was saying that the hip pain that resolved completely was the severe, chronic hip pain that [Howell] was experiencing after the accident. It was in that sense that "the hip replacement was a major success."

In sum, Dr. Gordon did not testify that [Howell] was "fully recovered." Instead, Dr. Gordon testified that [Howell] no longer experiences the severe chronic pain he experienced after the accident. [Appellant's] first issue on appeal lacks merit, first, because inconvenience and distress count as pain and suffering, second, because [Howell] testified he continues to experience some pain and discomfort, and third, because Dr. Gordon never testified that [Howell] was "fully recovered."

Trial Court Opinion, 12/4/10, at 4-5, 7-8.

Our review of the record and applicable law comports with the trial court's determination that the jury was properly charged regarding future pain and suffering. "A jury instruction will be upheld if it clearly, adequately, and accurately reflects the law." ***Commonwealth v. Smith***, 956 A.2d 1029, 1034-35 (Pa. Super. 2008) (*en banc*) (internal citation omitted). Further, "[w]hen reviewing a challenge to part of a jury instruction, we must review the jury charge as a whole to determine if it is fair and complete. A trial court has wide discretion in phrasing its jury instructions, and can choose its own words as long as the law is clearly, adequately, and accurately presented to the jury for its consideration. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law." ***Commonwealth v. Roser***, 914 A.2d 447, 455 (Pa. Super. 2006) (internal citation omitted). An issue would warrant a jury instruction where it was raised at trial and the "evidence adduced at trial would support such a charge." ***Commonwealth v. Boczkowski,*** 846 A.2d 75, 98 (Pa. 2004) (internal citation omitted). In this case, the jury charge did not contain any inaccurate statements of law, and the testimony of Howell and Dr. Gordon "supported a charge" regarding Howell's future pain and suffering. ***Id.*** Therefore, Appellant is not entitled to a new trial based on the trial court's jury instructions concerning Howell's future pain and suffering.

In his third issue, Appellant maintains that Howell's "version of the accident should not be believed…[because] it was not supported by the evidence. Therefore, [JNOV] should be entered in favor of [Appellant] and against [Howell]." Appellant's Brief at 28. In reviewing a trial court's denial of a JNOV, we are mindful:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the [fact finder] could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

Am. Future Sys., Inc. v. Better Bus. Bureau of Eastern Pennsylvania, 872 A.2d 1202, 1215 (Pa. Super. 2005) (internal citation omitted), *affirmed* 923 A.2d 389 (Pa. 2007). We will reverse a trial court's denial of a JNOV only where the trial court abused its discretion or committed an error of law that controlled the outcome of the case. ***Ty-Button Tie, Inc. v. Kincel and Co., Ltd.***, 814 A.2d 685, 690 (Pa. Super. 2002).

In denying Appellant's motion for a JNOV, the trial court explained:

> The court could not grant [Appellant's] request for post-trial relief because the jury's verdict did not shock the conscience of the court. [Howell] testified that [Appellant] ignored the two "slow" signs and attempted to speed past the construction site. N.T. 4/5/1.2, docket no. 72, pp. 39-40. That, by itself, was sufficient evidence upon which the jury could find that [Appellant] was 70 percent negligent, because all of the unfortunate events that followed would not have occurred but for [Appellant's] negligence.
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> [Appellant] argued that it should shock the conscience of the court that the jury found [Appellant] to be negligent, to "any degree at all, because there was overwhelming physical and testimonial evidence that [Howell's] own conduct was the cause of this accident and that [Appellant] was not negligent." Brief, filed July 16, 2012, docket no. 68, p. 5. []
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> That argument lacked merit. Despite his representation, [Appellant] directed the court to no physical evidence, whatsoever. Instead, [Appellant] noted that [Howell] made no claim that he suffered a "crush injury to his foot." Brief, filed July 16, 2012, docket no. 68, p. 6. The significance of the absence of a crushed foot was not made clear at all. The jury could have found that [Appellant] ran over [Howell's] foot but that [Howell's] steel-toe work boot protected him. The jury could have found [Howell] was honestly mistaken and sincerely believed that [Appellant] ran over his foot but that the rest of his testimony was accurate. The jury could have found that [Howell] lied when he testified that [Appellant] ran over his foot, but that determination, its weight and its consequences, were squarely within the province of the jury, which could have found that the rest of [Howell's] testimony was both truthful and accurate. [Appellant's] representation to the contrary notwithstanding, it was clear to the [trial court] that there was no "overwhelming" physical evidence in [Appellant's] favor. It was a far stretch for [Appellant] to argue that the absence of a crushed foot meant that he was in no way liable for precipitating the events that lead to [Howell's] ankle and hip injury. There was no merit to [Appellant's] argument that there was overwhelming physical evidence that he was in no way at fault for [Howell's] injuries.
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> [Appellant] also argued that there was overwhelming "testimonial evidence that [Howell's] own conduct was the cause of this accident and that [Appellant] was not negligent." Brief,

> filed July 16, 2012, docket no. 68, p. 5. [] [Appellant's] argument to the court amounted to the assertion that the jury was required to credit his testimony, and that of [Appellant's witness] Julie Jamil, to find that [Howell] injured himself by leaping onto [Appellant's] vehicle, without reasonable cause. This argument was patently lacking in merit because it completely ignored [Howell's] testimony on the events that led up to his injuries. *See* Brief, filed July 16, 2012, docket no. 68, pp. 5-7.
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> It was very much contested how [Howell] came to be injured on January 27, 2006 and the jury was called upon to render its verdict based upon its findings of the credibility of the witnesses. "The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Samuel-Bassett v. Kia Motor America,* [34 A.3d. 1, 39 (Pa. 2011).

Trial Court Opinion, 12/4/12, at 12-14. We agree with the trial court, and affirm its order denying Appellant's motion for JNOV. ***Commonwealth v. Hawkins,*** 701 A.2d 492, 501 (Pa. 1997) (The credibility of witnesses is "solely for the jury to determine.").

Our affirmance acknowledges that "[i]t is the function of the jury to evaluate evidence adduced at trial to reach a determination as to the facts, and where the verdict is based on substantial, if conflicting evidence, it is conclusive on appeal." ***Commonwealth v. Reynolds,*** 835 A.2d 720, 726 (Pa. Super. 2003) (internal citation omitted); ***Watson v. American Home Assurance Company,*** 685 A.2d 194, 198 (Pa. Super. 1996) (An appellant "is not entitled to a new trial where the evidence is conflicting and the [finder of fact] could have decided either way.") (internal citation omitted). Further, we recognize that "the jury [is] not obligated to accept" the

evidence submitted by a party. ***Boczkowski,*** 846 A.2d at 82 ***citing Commonwealth v. Tharp,*** 830 A.2d 519, 527 (Pa. 2003).

Here, the jury reached a compromise verdict. Our Court has previously explained compromise verdicts as follows:

> Compromise verdicts are verdicts where the fact-finder is in doubt as to the defendant's liability *vis á vis* the plaintiff's actions in a given suit but, nevertheless, returns a verdict for the plaintiff in a lesser amount than it would have if it was free from doubt. Compromise verdicts are favored in the law. Although more commonplace in negligence cases tried before juries, such verdicts are equally appropriate in contract cases tried before the bench.

Morin v. Brassington, 871 A.2d 844, 852-853 (Pa. Super. 2005). In ***Morin***, we declined to reweigh the evidence on appeal in a breach of oral contract action, and affirmed the trial court's verdict in plaintiff's favor despite incredible accusations made by both parties regarding the actual existence of the agreement. ***Id.*** We explained that we "[would] not invade the credibility-determining powers of the fact-finder merely because the evidence was conflicting and the fact-finder could have decided the case either way." ***Id.*** at 852. In reaching the compromise verdict in this case and assigning percentages of liability to each party, the jury considered the parties' conflicting versions of the accident, and ascribed to those accounts the weight and apportionment of liability the jury deemed appropriate. Accordingly, here, as in ***Morin***, we will not disturb the jury's verdict nor its determination of the shared liability between Appellant and Howell. Therefore, we affirm the trial court's denial of Appellant's JNOV motion.

Appellant's second issue challenges the trial court's application of Pennsylvania Rule of Civil Procedure 238, which governs the imposition of delay damages, and provides in pertinent part:

> **Rule 238. Damages for Delay in Actions for Bodily Injury, Death or Property Damage**
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> (a)(1) 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, in the decision of the court in a nonjury trial or in 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.
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> (2) 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.
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> (b)(1) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,
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> (ii) during which the plaintiff caused delay of trial.

Pa.R.C.P. 238(a)(1)-(2), and (b)(1)(ii).

Appellant contends that Howell is "solely responsible for any delay from September 23, 2008 until the case was scheduled for trial as [Appellant's] counsel did everything possible to continue to move this case. It was error for the trial court to award [Howell] the entire amount of delay damages." Appellant's Brief at 9.

In reviewing a claim that the trial court erred in awarding delay damages, our scope of review is plenary. ***See Overdorf v. Fonner,*** 748 A.2d 682, 684 (Pa. Super. 2000). We will not disturb an award of delay damages absent an abuse of discretion by the trial court. ***See Miller v. Brass Rail Tavern,*** 702 A.2d 1072, 1083 (Pa. Super. 1997).

In imposing delay damages, the trial court reasoned:

> [Appellant] was served with the complaint seeking damages for bodily injury on July 16, 2007 and the jury rendered its verdict on April 9, 2012, which was molded to $133,000 by the [trial court], by agreement of the parties. []
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> [Howell] filed his motion for delay damages on April 19, 2012 requesting $23,480.87 for the full delay period. [Appellant] filed his answer on May 8, 2012 without contesting [Howell's] arithmetic. Instead, [Appellant] argued that a large portion of the delay period should be excluded by operation of Pa.R.C.P. 238(b)(1)(ii) which provides that "The 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 [Howell] caused delay of the trial."
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> [Appellant's] opposition rested on a letter drafted by [Appellant's] counsel dated September 23, 2008 and mailed to [Howell's] counsel. By that letter, counsel for [Appellant] told [Howell's] counsel that "I would like to list this case for trial, as the medical records are coming in." Brief, filed 5/8/12, docket no. 65, Exhibit "A." [Howell] did not join in listing the case for trial and so [Appellant] argued to the court that [Howell] delayed trial starting September 23, 2008. Brief, filed 5/8/12, docket no. 65, p. 3. [Appellant] also asserted generally that [Howell] delayed trial by his "failure to comply with Discovery Orders, failure to list the case for trial and due to multiple counsel representing [Howell]." Brief, filed 5/8/12, docket no. 65, p. 4.
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> However, [Appellant's] argument lacked merit because it overlooked three very important facts. First, the letter dated September 23, 2008 expressly stated that "the medical records

are coming in" which meant that discovery was not yet complete. Any immediate praecipe to list the case for trial would have been premature and a violation of Local Rule 212.1 (d)(2) which requires a trial praecipe to contain a certification that "no motions are outstanding and that all discovery has been completed."

Second, [Appellant's] argument overlooked the fact that the pre-trial judge assigned to this case, the Honorable Kent H. Albright, heard the defendant's motion to list the case for trial, made pursuant to Local Rule 212.1(d)(4), and ruled that the case was not yet ready for trial. Judge Albright made that ruling when he entered his order dated May 17, 2010 that, among other things, gave [Howell] until September 27, 2010 to produce his expert medical report. Brief, filed 5/8/12, docket no. 65, Exhibit "D." *See also* Order, filed 5/25/10, docket. no. 33. []

Third, [Appellant's] argument overlooked the fact that all delay after September 27, 2010 was chargeable to him, not to [Howell]. On that date, [Howell] had not yet produced his expert report and he was representing himself, pro se. Counsel for [Appellant] was authorized by Local Rule 212,1(d)(1) to certify the case for a trial listing, without [Howell's] consent. Instead, [Appellant] asked Judge Albright for a second Rule 212 conference by letter dated October 20, 2010. Brief, filed 5/8/12, docket no. 65, Exhibit "E." Judge Albright held a second Rule 212 conference on November 17, 2010 and on that same date a unilateral trial praecipe was filed. [Appellant's] Brief, filed 5/8/12, docket no. 65, p. 2. *See also* Trial Praecipe, filed 11/17/12, docket no. 33. Thereafter, the case proceeded to trial in due course and there was no delay chargeable to either party.

From the facts set out above, the court could not find that [Howell] caused delay of trial within the meaning of the exception set out at Pa.R.C.P. 238(b)(1)(ii). [Howell] had no duty to accede to [Appellant's] letter request dated September 23, 2008 because doing so would have violated our local rules of civil procedure. Judge Albright ruled that the case should proceed apace, effective September 27, 2010. All delay thereafter was chargeable to [Appellant] since our Local Rule 212.1*(d)(1) gave [Appellant] the power to accelerate the case to trial, even if the *pro se* plaintiff had objected. Given the state of the record, it would have been arbitrary for the court to guess at what date between September 23, 2008 and November 17,

> 2010 [Howell] had the duty to join with [Appellant] in listing the case for trial.

Trial Court Opinion, 12/4/12, at 8-11 (internal footnote omitted).

The trial court did not err in granting delay damages. We have explained:

> The purpose of Rule 238 "is to alleviate delay in the courts by providing an incentive and encouragement for defendants to settle meritorious claims as soon as reasonably possible." *Krebs v. United Refining Co. of Pennsylvania,* 893 A.2d 776, 794–95 (Pa. Super. 2006). It is the defendant who bears the burden of proof when opposing the imposition of delay damages and may do so by establishing that…the plaintiff was responsible for specified periods of delay. *Shay v. Flight C Helicopter Services, Inc.,* 822 A.2d 1, 20–21 (Pa. Super. 2003).

Sopko v. Murray, 947 A.2d 1256, 1258 (Pa. Super. 2008). In ***Sopko***, we expressed that "[t]he critical question is whether [the defendant] has established that [the plaintiffs] 'caused delay of the trial,'" as required by Rule 238. ***Id.*** at 1260. We determined that the plaintiff had not occasioned the delay of the trial, despite plaintiff's failure to seek prompt relief from defendant's automatic bankruptcy stay, a lapse in plaintiff's provision of medical authorizations to defendant and in plaintiff's hiring of new counsel. ***Id.*** In determining that plaintiffs had not delayed the trial, we cited, *inter alia*, Rule 238's Comment, which states that "not every procedural delay is relevant to the issue of delay damages, but only such occurrences as actually cause delay of trial." ***Id.*** Here, consonant with our decision in ***Sopko***, we do not find that Howell delayed the trial, especially when as reasoned by the trial court, Appellant could have unilaterally listed the case

for trial without Howell's consent. *See* Trial Court Opinion, 12/4/12, at 10. Discerning no abuse of discretion by the trial court, we affirm the trial court's imposition of delay damages on Appellant.

Judgment affirmed.

Judgment Entered.

Prothonotary

Date: 7/9/2013