

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

GERALD REMMERT AND  
KATHY REMMERT

Appellees

v.

EDA CONTRACTORS, INC., AND  
WILLIAM J. DIAZ

Appellants

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 975 EDA 2013

Appeal from the Order Entered February 23, 2013  
In the Court of Common Pleas of Philadelphia County  
Civil Division at No(s): 4226 February Term, 2011

BEFORE: BENDER, P. J., LAZARUS, J., and FITZGERALD, J.\*

MEMORANDUM BY LAZARUS, J.

**FILED FEBRUARY 24, 2014**

The appellants, EDA Contractors, Inc. and William J. Diaz (hereafter referred to as "EDA"), appeal from the order of the Court of Common Pleas of Philadelphia County granting Gerald Remmert's<sup>1</sup> motion for post-trial relief in the form of a new trial. After careful review, we vacate the Rule 227.4 judgment,<sup>2</sup> and we affirm the trial court's grant of a new trial.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> Kathy Remmert is also an appellee based on her loss of consortium claim, but because all the facts and the issues involve Gerald, we will refer to Gerald alone as "Remmert."

<sup>2</sup> Pa.R.C.P. 227.4.

This appeal stems from a motor vehicle accident that occurred at the “T-shaped” intersection of Memphis Street and East Somerset Street in Philadelphia. At trial, Remmert testified that at the time of the incident, he was traveling along East Somerset Street and observed a large, parked truck obstructing his view of oncoming traffic from Memphis Street. Because Remmert had the right-of-way, he did not stop or slow down his speed as he proceeded straight along East Somerset Street. The driver for EDA testified that he drove along Memphis Street and as he approached the intersection of Memphis Street and East Somerset Street, stopped at the stop sign, observed the same truck parked at the corner obstructing his view of the oncoming traffic from East Somerset Street, and “inched” out into the intersection. The driver struck Remmert’s vehicle after making a left turn onto East Somerset Street. The jury found Remmert fifty-one percent liable for the motor vehicle accident and injuries he sustained and EDA liable for the remaining forty-nine percent, effectively barring Remmert from any recovery.

On August 13, 2012, Remmert filed a timely post-trial motion requesting one of the following forms of relief: judgment notwithstanding the verdict, a new trial, or a new trial on the issue of damages only. **See** Pa.R.C.P. 227.1. Following oral arguments on October 9, 2012, trial counsel and the court agreed that review of the trial transcript was essential to resolving the outstanding post-trial motion. Due to consistent communications between the court and trial counsel regarding a delay in

receipt of the trial transcript, the trial court anticipated that counsel would await the court's ruling before moving forward. However, on January 9, 2013, EDA moved to enter judgment pursuant to Pa.R.C.P. 227.4(1)(b). Although entry of judgment was timely, it was done without notice to the court, and in direct contravention of the aforementioned agreement. Thereafter, on February 23, 2013, the trial court granted Remmert's request for relief in the form of a new trial. The order of February 23, 2013 was in turn subject to challenge by EDA, and it now forms the basis of the instant appeal.

On appeal, EDA presents the following issues for our review:

1. Whether the trial court erred in entering an Order purporting to grant a new trial 45 days after judgment was entered pursuant to Pa.R.C.P. 227.4(1)(b) because: (a) plaintiffs did not take an appeal from the entry of judgment within 30 days and, as such, all appellate rights were waived and the cases concluded; (b) the trial court had no authority to enter an order granting a new trial after final judgment was entered pursuant to Pa.R.C.P. 227.4(1)(b)?
2. Whether the trial court erred in entering an order granting a new trial because (a) final judgment had been entered pursuant to Pa.R.C.P. 227.4(1)(b), thus the court had no authority to enter such an order and (b) there is no basis to grant a new trial as there was both conflicting evidence and substantial evidence to support the jury's verdict?

Brief of Appellant, at 5.

Both of EDA's questions raise issues that when resolved may substantially curtail the need for further appellate review. Accordingly, we shall first dispose of the question concerning the operation of Pennsylvania Rule of Civil Procedure 227.4.

EDA contends that the court's order of February 23, 2013 granting a new trial in favor of Remmert is a legal nullity because the court entered it beyond the time specified in the Rule, and after judgment was entered on January 8, 2013 pursuant to the Rule. This issue poses a question of law, of which our review is plenary. ***Pentarek v. Christy***, 854 A.2d 970 (Pa. Super. 2004). Upon consideration, we disagree with EDA's assertion.

Rule 227.4 controls the entry of judgment upon praecipe of a party. It provides in pertinent part:

[T]he prothonotary shall, upon praecipe of a party,

(1) enter judgment upon the verdict of a jury or the decision of a judge following a trial without jury, or enter the decree nisi as a final decree, if,

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(b) one or more timely post-trial motions are filed and the court does not enter an order disposing of all motions within one hundred twenty days after the filing of the first motion. A judgment entered pursuant to this subparagraph shall be final as to all parties and all issues and shall not be subject to reconsideration.

Pa.R.C.P. 227.4(1)(b). The comments to the Rule provide, "[t]he rule is optional with the parties. . . . If time is not of the essence, they may await the decision of the trial court. . . . The rule does not provide an automatic limit upon the time in which the court may make its ruling." ***Id.*** Moreover, the trial court may act after the entry of judgment if the parties agree to extend the time limit. ***Kanter v. Epstein***, 866 A.2d 394 (Pa. Super. 2004).

In support of its argument, EDA relies on ***Pentarek, supra***, where this Court reversed a trial court's order granting a new trial after judgment was entered pursuant to Rule 227.4(1)(b).<sup>3</sup> While the facts of ***Pentarek*** are virtually identical to the case at hand, we find one crucial distinction. Here, there was an agreement to extend the time limit, whereas no such agreement existed in ***Pentarek***.

Following oral argument on October 9, 2012, the Honorable Annette M. Rizzo called a sidebar in which she requested all counsel to await her ruling. The discussion and subsequent agreement are evident from the Opinion of July 19, 2013.

Both trial counsel and the court believed review of the trial transcript was essential to resolving the outstanding post-trial motion. Considerable delay in the provision of the trial transcript following oral argument on said motion resulted in several extensions afforded counsel for post-trial briefing. Each extension was requested by counsel and reviewed by this Court as communication with counsel was on a regular basis during this time. The unforeseen delay in the production of the trial transcript as well resulted in a delay of review and ultimate analysis by the Court for decision after oral argument. Counsel knew of these delays and both expressed a need to review the trial transcript to support their own post-trial supplemental memoranda after oral argument. Both took said opportunity

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<sup>3</sup> After a defense verdict, the plaintiff filed post-trial motions alleging that the verdict was against the weight of the evidence. The trial court failed to rule on the motions within 120 days, and defendant filed a praeceipe for entry of judgment under Pa.R.C.P. 227.4(1)(b). Six days after the entry of judgment, the trial court issued an order granting the plaintiff's request for a new trial. This Court ruled that the order was "entirely devoid of legal effect. The clear language of the Rules, its Comment, and subsequent rulings of Courts allow no other conclusion." ***Pentarek***, 854 A.2d at 974.

afforded them by the Court to supplement their original post-trial filings.

Trial Court Opinion, 7/19/13, at 4.

EDA maintains that no such agreement existed, and bases its position on Philadelphia Local Rule 227(e)(3), which requires that any agreement to waive or extend the Rule 227.4 deadline be in writing. EDA contends that no valid extension existed because there was no written agreement.

In this case, the only writing conveying such an agreement is the trial court opinion. In the interest of equity and justice, we will allow the trial court opinion to serve as a memorialization of the off-the-record discussion at sidebar following oral argument on October 9, 2012, in which counsel and Judge Rizzo agreed to extend the time limit of Rule 227.4. **See Hesse v. Peckham**, 159 A.2d 922, 924 (Pa. 1960) (trial judge's recollection of what occurred as set forth in trial court opinion was correct). **See also Commonwealth v. Sullens**, 619 A.2d 1349, 1350 (Pa. Super. 1992) (trial judge's recollection and counsel's statements provided an adequate basis for the court to make a factual finding); **Commonwealth v. Wilder**, 393 A.2d 927 (Pa. Super. 1978) (standing for the proposition that trial judge's recollection governs); **Krywucki v. Trommer**, 184 A.2d 389, 394 (Pa. Super. 1962) (Superior Court bound to accept trial judge's recollection that no additional [jury] charge was made).

Moreover, the court in **Pentarek** acknowledged that the Rule 227.4 deadline is optional and that the parties may elect to wait for the trial court's ruling, as they did here. EDA's entry of judgment was premature and

breached the preexisting agreement to await a ruling by the trial court. For these reasons, we conclude that the trial court's order granting Remmert's post-trial motion after entry of judgment pursuant to Rule 227.4 on February 23, 2013, is valid and the Rule 227.4 judgment is vacated.

In its first issue, EDA also argues that the order of February 23, 2013 is not reviewable by this Court because Remmert waived his appellate rights when he failed to appeal from the entry of judgment within thirty days. **See** Pa.R.C.P. 903(a). This argument is now moot as the Rule 227.4 judgment is null and void.

In its second issue, EDA argues that there was no basis to grant a new trial since there was both conflicting evidence and substantial evidence to support the jury's verdict. Our standard of review of the grant or denial of a motion for a new trial is whether the trial court clearly and palpably abused its discretion or committed an error of law that controlled the outcome of the case. **Stevenson v. Gen. Motors Corp.**, 521 A.2d 413, 422 (Pa. 1987). We will reverse only where the verdict is so contrary to the evidence as to shock one's sense of justice. **Vallone v. Creech**, 820 A.2d 760, 763 (Pa. Super. 2003). A new trial should not be granted where the evidence is conflicting and the jury may have found for either party. **Peair v. Home Ass'n of Enola Legion No. 751**, 430 A.2d 665, 670 (Pa. Super. 1981).

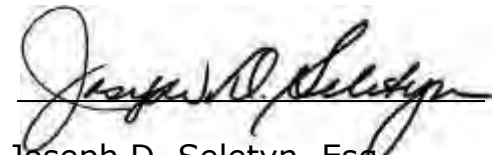
The trial court did not abuse its discretion in determining that the jury's verdict was against the weight of the evidence. The driver for EDA testified that he was making a left hand turn while Remmert had the right of

way. N.T. Trial 8/20/12, at191-123. This was consistent with Remmert's testimony regarding how the accident occurred as well as the testimony of EDA's expert. Therefore, Judge Rizzo properly concluded that, in light of the facts and testimony presented at trial and the relevant statutes<sup>4</sup> and requirements of the Vehicle Code, there was no basis upon which the jury could have found Remmert more negligent than Diaz. Accordingly, the trial court did not abuse its discretion in concluding that the verdict shocked its sense of justice. ***Vallone, supra.*** Moreover, as the evidence was consistent and did not support a finding of negligence for Remmert, the trial court's grant of a new trial was proper. ***Peair, supra.***

Rule 227.4 judgment vacated. Order affirmed.

FITZGERALD., J., Concur in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.  
Prothonotary

Date: 2/24/2014

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<sup>4</sup> 75 Pa.C.S. § 3322 states: "The driver of a vehicle intending to turn left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute a hazard."