

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MELVIN A. LITZ, SR.,	:	
Plaintiff	:	DOCKET NO.: 10-00398
	:	CIVIL ACTION – LAW
vs.	:	
	:	
JERSEY SHORE STATE BANK,	:	
Defendant	:	

**OPINION**  
**Issued Pursuant to Pa.R.A.P. 1925(a)**

On March 11, 2008, Plaintiff Melvin A. Litz, Sr., tripped over a curb and fell onto the ground in front of Defendant Jersey Shore State Bank’s Bridge Street office, located in Jersey Shore, Lycoming County, Pennsylvania. On March 2, 2010, Plaintiff filed a suit in negligence against Defendant.

On August 8, 2011, Defendant filed its Pre-Trial Statement. In Defendant’s Pre-Trial Statement, Defendant listed “Representatives from Jersey Shore State Bank” as its possible witnesses. Statement, 3. On August 15, 2011, the Honorable Marc F. Lovecchio issued a Civil Pretrial Conference Order in the above-captioned matter. That order did not provide for the exchange of supplemental witness lists prior to trial, nor did it address any problems with the parties’ pre-trial witness lists.

On October 12, 2011, this Court held a civil non-jury trial in the above-captioned matter. On October 19, 2011, this Court entered a verdict in favor of Defendant. On October 31, 2011, Plaintiff filed a Motion for Post-Trial Relief. On November 4, 2011, this Court issued an order denying Plaintiff’s Motion for Post-Trial Relief. On November 16, 2011, Defendant filed a Praecipe to Enter Final Judgment with the Lycoming County Prothonotary. On November 16, 2011, judgment was entered against Plaintiff and in favor of Defendant.

On December 15, 2011, Plaintiff filed his Notice of Appeal. In Plaintiff's Concise Statement of Matters Complained of on Appeal, Plaintiff raises the following three issues:

1. the trial court committed an abuse of discretion by when it admitted the testimony of Defendant's witnesses;
2. the trial court committed an abuse of discretion when it found Defendant's witnesses to be credible; and
3. the trial court committed either an abuse of discretion or an error of law when it based its verdict upon Plaintiff's prior use of the premises.

For purposes of this appeal, this Court relies upon its October 19, 2011 Verdict, and respectfully requests our Superior Court to affirm that verdict. However, Plaintiff raises issues in his Statement of Matters Complained of on Appeal that this Court did not fully address in its verdict, such as the trial court's discretion in admitting evidence and determining credibility. Therefore, this Court will supplement its verdict and address each of issues in turn. Additionally, this Court will supplement its verdict to address Plaintiff's failure to abide by Pa. R.C.P. 227.1(c) in the filing of his post-trial motion as well as Plaintiff's failure to abide by Pa. R.A.P. 903 in the filing of the instant appeal.

1. **Admission of Defense Witnesses' Testimony**

This Court did not abuse its discretion when it admitted the testimony of Defendant's witnesses at trial. The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Jacobs v. Chatwani*, 922 A.2d 950, 960 (Pa. Super. Ct. 2007). All relevant evidence is generally admissible. Pa. R.E. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pa. R.E. 401.

Plaintiff argues that the defense witnesses’ testimony should not have been admitted into evidence because Defendant identified only “representatives of Jersey Shore State Bank” as its possible witnesses in its pre-trial memorandum. Plaintiff raised this issue in his Motion for Post-Trial Relief, and cited to the Lycoming County Local Rule L212 and to the case of *Gill v. McGraw Electric Co.*, 399 A.2d 1095 (1979). This Court believes that Plaintiff’s reliance on these two sources is misplaced.

Plaintiff’s reliance on Lycoming County Local Rule L212 is misplaced because the rule does not provide that parties will be limited to calling only those witnesses listed on their pre-trial statement. Lycoming County Local Rule L212 provides that “[e]ach party *may* be limited to calling witnesses or using exhibits listed on the pretrial statement.” (emphasis added). This rule, in and of itself, does not bar the admission of the defense witness testimony in this case. In fact, Defendant listed as its possible witnesses “[r]epresentatives of Jersey Shore State Bank” on its pre-trial statement in August 2011. Plaintiff was put on notice that Defendant intended to call representatives from its bank as fact witnesses. Therefore, this Court believes that the defense witnesses’ testimony could not be barred on that the basis of the rule alone.

Additionally, Plaintiff’s reliance on the *Gill* case is misplaced. The facts of that case and of the case at bar differ greatly. The issue in *Gill* pertained to the defendant calling two expert witnesses who were not listed in his pretrial statement, despite a direct order requiring these experts to be identified. In *Gill*, after a pre-trial conference was held in that matter, the President Judge issued an order stating in pertinent part that:

[p]laintiff will make available to defendant a copy of the report of plaintiff’s expert witnesses together with the evidence that serves as the basis of the witnesses opinion as

to the cause of the fire. Defendant will furnish plaintiff a copy of any oral or written report and opinion of its expert or experts. This should be done at least 10 days in advance of trial. Defendant will also furnish plaintiff with a list of all defense witnesses and any physical evidence that may be offered.

*Gill*, 399 A.2d at 1097. Despite this order, defense counsel failed to provide the names of his expert witnesses, let alone their reports, to either opposing counsel or the court. *Id.* at 1098. During trial, the trial judge permitted defense counsel to call two expert witnesses to testify, despite opposing counsel's objections. *Id.* at 1099.

On appeal, our Superior Court held that “[i]f the pretrial conference judge enters an order pursuant to the rule, the order will bind the subsequent course of the trial. The trial judge should hold the parties to the terms of the pre-trial conference order except in those cases where it appears that the order must be modified to prevent manifest injustice.” *Id.* at 1101-02 (citations omitted). In its holding, the Superior Court adopted the rationale of the Third Circuit's interpretation of Rule 16 of the Federal Rules of Civil Procedure by quoting the basic considerations that courts should consider when determining whether to permit or exclude witness testimony. These basic considerations include:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith of the witnesses in failing to comply with the court's order.

*Id.* at 1102.

However, in the case at bar, the witnesses that Defendant called during trial were not expert witnesses. This Court believes that the fact that Defendant's witnesses were lay persons, as opposed to experts, is almost dispositive of this issue. Additionally, Defendant listed on its pretrial statement that it would possibly call as witnesses representatives from the bank. Plaintiff alleges that the pre-trial judge in this matter orally ordered the parties to exchange witness lists.

However, there is no documentation of record that shows this oral order was made to the parties. The pre-trial conference order contains no such command, as in *Gill*, that the parties exchange final witness lists. Additionally, by letter dated October 7, 2011, Defense counsel provided this Court and Plaintiff's counsel with the names of the two bank representatives that would be testifying. Therefore, this Court does not believe that it abused its discretion when it allowed Defendant to call two of its employees as witnesses in the Defendant's case-in-chief.

## 2. Credibility of Defendant's Witnesses

This Court did not abuse its discretion when it held that the testimony of Defendant's witnesses was credible. Our Supreme Court has long held that:

questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts.... As long as sufficient evidence exists in the record which is adequate to support the finding found by the trial court, as factfinder, we are precluded from overturning that finding and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility.

*Commonwealth v. O'Connell*, 555 A.2d 873, 875 (Pa. 1989) (citations omitted); *see also Commonwealth v. Meyers*, 722 A.2d 649, 651-52 (Pa. 1988). This rule of law is "rooted in concepts of fairness, common sense and judicial economy." 555 A.2d at 875. Therefore, if the reviewing court can find evidence in the record to support the trial court's credibility determinations, these determinations should be upheld. *Id.*

This Court believes that the record illustrates that the defense witnesses were credible. Additionally, this Court notes that on its verdict and its order regarding Plaintiff's Motion for Post-Trial Relief, the Court specifically found that Plaintiff did not provide any credible evidence to infer negligence on the part of Defendant bank and that Plaintiff was not a credible witness.

Therefore, this Court does not believe that it abused its discretion when it found that the two defense witnesses were credible.

3. **Improper Basis for Verdict**

This Court did not commit an abuse of discretion or an error of law when it entered verdict in favor of Defendant. This Court assumes that by this issue Plaintiff is alleging that the verdict is against the weight of the evidence. Our Superior Court has held that when it reviews a claim that the lower court's verdict is against the weight of the evidence, an abuse of discretion standard shall be used. *J.F. Walker Co. Inc. v. Excalibur Oil Group, Inc.*, 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002). In particular, that Court held that:

[a] challenge to the weight of the evidence requires the assessment of the credibility of testimony offered by the verdict winner, and requires that the verdict be so contrary to the evidence as to shock one's sense of justice. In addition, this court has held that "We are not free to answer the underlying question of whether we believe that the verdict is against the weight of the evidence...."

*Id.* (citations omitted).

The underlying action in this matter is a negligence claim. Our Supreme Court has held that in order to prevail in a negligence action, "the plaintiff must establish the defendant owed a duty of care to the plaintiff, that duty was breached, the breach resulted in the plaintiff's injury, and the plaintiff suffered an actual loss or damages." *Merlini v. Gallitzin Water Auth.*, 980 A.2d 502, 506 (Pa. 2009). Therefore, in this matter, the burden of proof was on Plaintiff. During trial, Plaintiff did not provide this Court with any credible evidence. This Court found that the alleged deficient curb was not within the pedestrian walkway and that the only way that Plaintiff could have encountered the curb was through Plaintiff's departure from the walkway. Based on this evidence and the applicable case law, this Court entered a verdict on behalf of Defendant. After

reviewing the lack of evidence provided by Plaintiff, this Court does not believe that its verdict “shocks one’s sense of justice.” *See* 792 A.2d at 1272. Therefore, this Court does not believe that it abused its discretion when it entered its verdict against Plaintiff and in favor of Defendant.

4. **Timeliness of Plaintiff’s Motion for Post-Trial Relief and Appeal**

This Court would like to address the timeliness of Plaintiff’s post-trial motion and subsequent appeal. Pursuant to Pa. R.C.P. 227.1(c), Plaintiff failed to file a timely post-trial motion. Pa. R.C.P. 227.1(c) requires post-trial motions to be filed within ten (10) days after verdict. *See Krystal Dev. Corp. v. Rose*, 704 A.2d 1102, 1103 (Pa. Super. Ct. 1997). In this matter, the verdict was entered against Plaintiff on October 19, 2011; however, Plaintiff filed his Motion for Post-Trial Relief on October 31, 2011. This Court denied Plaintiff’s motion on November 4, 2011. Thus, no issues were preserved for review by the appellate court because Plaintiff did not file a timely motion for post trial review subsequent to the non-jury trial. *See id.*

Additionally, Plaintiff untimely appealed to our Superior Court. Pa. R.A.P. 903(a) provides that “the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken.” Plaintiff’s time period for filing with the appellate court began to run on the date verdict was entered, i.e. October 19, 2011, due to Plaintiff’s failure to timely file a motion for post-trial relief. Thus, Plaintiff had thirty days from October 19, 2011 to file his appeal with this Superior Court. However, Plaintiff did not file his Notice of Appeal until December 15, 2011. Even if Plaintiff’s appeal could be construed to be appealing this Court’s denial of his post-trial motion, the time period for filing an appeal would have commenced on November 4, 2011, and Plaintiff’s motion should still be deemed untimely.

Therefore, this Court respectfully requests our Superior Court to affirm this Court's  
October 19, 2011 Verdict.

BY THE COURT,

\_\_\_\_\_  
Date

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Richard A. Gray, J.

RAG/abn

cc: R. Thom Rosamilia, Esquire  
Michael H. Collins, Esquire  
Gary L. Weber, Esquire, Lycoming County Reporter