Control No. 17053337
Control No. 17052720

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Deborah Joers and Ralph D'Abruzzo **Plaintiffs**	:	February Term, 2016
vs.	:	No. 4233
City of Philadelphia and Yvette Leduc **Defendants**	:	

MEMORANDUM in SUPPORT OF ORDER DENYING THE MOTION FOR POST-TRIAL RELIEF and GRANTING THE MOTION FOR DELAY DAMAGES

MASSIAH-JACKSON, J.

October 5th, 2017

I. FACTUAL BACKGROUND and PROCEDURAL HISTORY

On the morning of September 30, 2015, Mrs. Deborah Joers, age 65 years, was walking Northbound across Chestnut Street at the intersection of Juniper Street in Philadelphia. N.T. 76-80, May 15, 2017. As she walked in the crosswalk the light was green, and Police Officer Yvette Leduc was making a left turn onto Chestnut Street. Her SUV vehicle hit Mrs. Joers on the left side of her body causing Mrs. Joers to fall onto the street. N.T. 79-91, 161-164, May 15, 2017.

Mrs. Joers was taken by ambulance to Thomas Jefferson University Hospital. She underwent surgery on her left arm and reconstruction of her left knee and leg. N.T. 91-98, May 15, 2017. Mrs. Joers endured extensive rehabilitation and physical therapy. She continues to suffer from muscle loss, restricted range of motion in her left knee, and post-traumatic arthritis. N.T. 98-130, May 15, 2017; N.T. 24-55, May 16, 2017.

Mrs. Joers and her husband Ralph D'Abruzzo initiated this civil action against Police Officer Leduc and the City of Philadelphia in February, 2016. The claims of negligence and loss of consortium formed the basis of the litigation. On May 17, 2017, the trial jury awarded the Plaintiffs $256,237.70 for economic loss, non-economic loss, and loss of consortium. N.T. 76-78, May 17, 2017.

Following the verdict, the Defendant-City of Philadelphia filed a Motion for Post-Trial Relief, as per Rule 227.1(2) of the Pennsylvania Rules of Civil Procedure, seeking Judgment Notwithstanding the Verdict. Co-Defendant Leduc did not join in the Motion and filed a Memorandum in Opposition.

On May 26, 2017, the Defendant-City presented a two-prong argument:

> **A.** "The City is entitled to JNOV because record facts do not support the conclusion that Officer Leduc acted within the scope of her employment when she hit a pedestrian in her private vehicle merely because she was on her way to work.",
>
> **and,**
>
> **B.** "The Trial Court's Granting of Plaintiff's Motion in Limine precluding City from contesting deemed Responses to Admissions was harmful error which also entitles the City to JNOV."

After careful consideration of all memoranda, and, after oral argument held September 19, 2017, this Court concludes that the Motion for Post-Trial Relief is Denied. Plaintiffs' Motion for Delay Damages in the amount of $2,600.99 is Granted.

II. LEGAL DISCUSSION

In Shuman Estate v. Weber, 419 A.2d 169 (Pa. Superior Ct. 1980), the Appellate Court "elucidated" the test for "judging the appropriateness of awarding the judgment n.o.v." at 419 A.2d 172:

> "The test for judging the appropriateness of awarding judgment n.o.v. was elucidated in *Eldridge v. Melcher, 226 Pa.Super. 381, 313 A.2d 750 (1973)*, wherein it was stated:

> ' '(T)he evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the only one which logically can be reached . . . . The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way.' ' *Id.* at *387, 313 A.2d at 754, quoting Smith v. Bell Telephone Co., 397 Pa. 134, 138-39, 153 A.2d 477, 479-80 (1959).*
>
> Thus, if reasonable support for the verdict is present, judgment n.o.v. should not be granted. Evidence may be sufficient to constitute reasonable support even though it is meager or uncorroborated. *Farmers' Northern Market Co. v. Gallagher, 392 Pa. 221, 139 A.2d 908 (1958).*"

In Fitzgerald v. McCutcheon, 410 A.2d 1270 (Pa. Superior Ct. 1979), it was noted that JNOV should only be entered in a clear case. e.g., Quinby v. Plumsteadville Family Practice, Inc., 907 A.2d 1061, 1974 (Pa. 2006); Sundlun v. Shoemaker, 617 A.2d 1333 (Pa. Superior Ct. 1992); Niles v. Fall Creek Hunting Club, Inc., 545 A.2d 926 (Pa. Superior Ct. 1988). It is an extreme remedy . . . "a drastic remedy," at 928-29. JNOV is not appropriate in this case.

A. The Facts of This Trial Were Conclusively Established and Were Admitted by All Parties That the Officer Was Acting Within the Course and Scope of Her Employment.

Defendant-City's position has been that, "The question as to whether an employee is in the course and scope of employment is ultimately a conclusion of law." City's Motion for Post-Trial Relief, filed May 26, 2017. e.g., ". . . the ultimate legal question . . .", City's Post-Trial Memorandum, filed July 14, 2017, pages 8, 15; ". . . the legal conclusions that

Officer Leduc was acting in the course and scope of her employment . . ."; "The question as to whether an employee is in the course and scope of employment is ultimately a conclusion of law," City's Response to Motion in Limine Control No. 17050314, filed May 11, 2017, pages 1, 4; ". . . the ultimate legal issue . . . the legal argument . . .", City's Sur-Reply to Motion in Limine, Control No. 17050314, filed May 14, 2017, pages 7, 8; "The issues of whether an employee was acting in the course and scope of employment and in furtherance of the City's interests are conclusions of law. Issues of agency are purely legal issues, and not issues of fact." City's Reply Memorandum in Support of Summary Judgment, filed April 7, 2017, page 3; N.T. 10-11, May 15, 2017.

The City contends that there can be no liability because as a matter of law Officer Leduc was not acting within the scope of her employment. It is true that in Workers' Compensation litigation, relied on by the City at trial and as the basis for its Summary Judgment Motion, the issue of whether an employee is acting within the scope of her employment is a question of law determined on the basis of the factual findings made by the Workers' Compensation Judge. Lutheran Senior Services Management Co. v. WCAB, 154 A.3d 892 (Pa. Commonwealth Ct. 2017); Employers Mutual Casualty Co. v. Boiler Erection and Repair Co., 964 A.2d 381 (Pa. Superior Ct. 2009). In this litigation, however, if the facts had been in dispute and with a proper verdict sheet, the jury could have made the factual findings before the legal issue of the Tort Claims Act immunity was determined. See also, **comment d**, Restatement (Second) of Agency §228.

Whether a person acted within the scope of employment is generally a question for the jury. In Kull v. Guisse, 81 A.3d 148, 157-160 (Pa. Commonwealth Ct. 2013), it was the province of the jury to make the initial assessment of scope of employment prior to a determination of the applicability of the Tort Claims Act. See also, Iandiorio v. Kriss & Senko Enterprises, Inc., 517 A.2d 530 (Pa. 1986), finding error when the Trial Court "[wrested] the issue of the employer's acknowledgement and control of the personal act from the jury whether that issue properly lay for resolution." 517 A.2d at 533:

> "Where the facts are in dispute or more than one inference can be drawn therefrom, the issue whether or not the servant was acting for the defendant and within the scope of his employment is for the jury and the surrounding facts and circumstances are to be considered by the jury in this inquiry.
>
> *Davis v. Tredwell,* 347 Pa. at 344, 32 A.2d at 412-13 (citations omitted). The extent of control is a decisive factor in whether or not the personal act may be considered a part of or incident to the employment."

In Shuman Estate v. Weber, supra, 419 A.2d at 173, the Appellate Court reiterated Pennsylvania law and also noted that "determination of the precise nature of the relationship and scope of any employment is generally within the exclusive province of the jury, except when no disputes exist as to material issues of fact and the inferences to be drawn therefrom." (emphasis added). See also, Cesare v. Cole, 210 A.2d 491 (Pa. 1965); Johnson v. Glenn Sand and Gravel, 453 A.2d 1048 (Pa. Superior Ct. 1982).

Our Pennsylvania Appellate Courts look to the formulations of the Restatement of Agency, to consider the inquiry regarding scope of employment. Spitsin v. WGM Transportation, Inc., 97 A.3d 774 (Pa. Superior Ct. 2014). Restatement (Second) of Agency §228 states:

> "(1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."

The circumstances herein are distinguishable because the facts of record were not in dispute and were conclusively established by the deemed admissions, which state in part: 6. "During the week of Sunday, September 27, 2015 through Saturday, October 3, 2015, Leduc's regularly scheduled shift was 7:00 a.m. to 3:00 p.m.; 17. Police officers employed by the City are acting within the scope of their employment when they are traveling to court to provide testimony in criminal matters pursuant to subpoena; 27. At the time Leduc struck Plaintiff Deborah Joers on Wednesday, September 30, 2015,

Leduc was being compensated for her time by the City; 30. If Leduc had not been on her way to the Criminal Justice Center on Wednesday, September 30, 2015 at approximately 7:45 a.m., she would have been working as a patrol officer at the 39th District of the Philadelphia Police Department; 31. On Wednesday, September 30, 2015, Leduc's hours of work were 7:00 a.m. to 3:00 p.m.; 32. At the time Leduc struck Plaintiff Deborah Joers on Wednesday, September 30, 2015, Leduc was acting within the course and scope of her employment with the City; 33. On Wednesday, September 30, 2015, at approximately 7:45 a.m., Leduc was acting in the scope of her employment; 34. On Wednesday, September 30, 2015 at approximately, 7:45 a.m., Leduc was not pursuing an activity unrelated to her employment; 35. On Wednesday, September 30, 2015, at approximately 7:45 a.m., Leduc was acting in furtherance of the City's interests by traveling to the Criminal Justice Center to provide testimony in a criminal matter." N.T. 31-32, May 15, 2017.

In the case at bar, because the City did not file timely answers or objections to the Plaintiffs' Requests for Admissions, the issues relating to scope of employment were deemed admitted. Officer Leduc testified she was acting on behalf of her employer. The City's Motion suggesting that the ". . . record facts do not support the conclusion that Officer Leduc acted within the scope of her employment . . . ." is simply inaccurate. The facts and inferences of the record in this case were uncontroverted and deemed admitted by all parties. In Ferrell v. Martin, 419 A.2d 152 (Pa. Superior Ct. 1980), the Appellate

Court held that where the facts are not disputed the legal question of scope of employment is for the Court to decide; Employers Mutual Casualty Co. v. Boiler Erection and Repair Co., supra, 964 A.2d at 395.

Next, the Defendant-City asserts it was error for this Court to conclude that principles of the "coming and going rule" were not applicable. City Post-Trial Memorandum, filed July 14, 2017, pages 19-25. This Court does not agree. Not only did the Officer's conduct meet all requisites of the Restatement, the conduct also fell within an exception to the "coming and going rule." One of the factors presented in Restatement (Second) of Agency §228 requires consideration of the conduct and whether (1)(b) "it occurs substantially within the authorized time and space limits." The Defendant-City has focused on whether or not Officer Leduc was "on the clock;" whether she had "punched in;" and, whether the computer records indicated her shift started at 7:00 a.m. or 8:00 a.m., N.T. 58-74, May 16, 2017; Motion for Summary Judgment, filed March 6, 2017. **The accident occurred at 7:45 a.m.**

This Court concluded that not only was the accident close in time and space of Officer Leduc's morning shift, she was subpoenaed to be at that criminal court hearing. She was on a special mission to serve her employer -- the City of Philadelphia. N.T. 16, May 15, 2017; Plaintiffs' Post-Trial Memorandum, filed August 2, 2017, pages 21-23; Lutheran Senior Services Management v. WCAB, supra, 154 A.3d at 896-899; Schiavone v. Aveta, 41 A.3d 861, 867-869 (Pa. Superior Ct. 2012); Village Auto Body v. WCAB,

827 A.2d 570, 573-576 (Pa. Commonwealth Ct. 2003). Officer Leduc was not travelling to her station house at her regular place of work. As a Police Officer, she was required, by subpoena, to testify in court, or face contempt of court and also possible discipline by her employer -- the City of Philadelphia.

Under all of the circumstances of this case, the undisputed record and docket in May, 2017, support the Trial Court's conclusion that when the SUV vehicle struck Deborah Joers at 7:45 a.m. on September 30, 2015, Officer Leduc was on a mission to further the business of her employer.

B. The City Was Unable to Provide a Compelling Reason For Its Failure To Respond to Plaintiffs' Requests For Admissions.

Rule 4014 of the Pennsylvania Rules of Civil Procedure states in pertinent part:

> "(a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rules 4003.1 through 4003.5 inclusive set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of any document described in the request. . . .
>
> (b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney; . . . The answer shall admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so. . . . A party who considers that a matter of which an admission has been

> requested presents a genuine issue for trial may not, on that ground alone, object to the request. That party may, subject to the provisions of Rule 4019(d), deny the matter or set forth reasons why he or she cannot admit or deny it.
>
> . . .
>
> (d) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . Any admission by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding."

In a case where, unlike here, attorneys did request permission to file late answers *nunc pro tunc* the Commonwealth Court was not impressed. In Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333, 1336 (Pa. Commonwealth Ct. 1978):

> "The reasons alleged by the Commonwealth for its failure to timely respond, while regrettable, are not compelling. Indeed, were we to find them compelling, we can conceive of few sets of circumstances which could ever be deemed noncompelling. Weight of case load is not a compelling reason; nor is the dearth of counsel competent to handle matters involving the complexities of a rule providing that unless a response is filed within ten days, the matter of which an admission is requested is deemed admitted. Transfer of a file from one attorney to another is not a compelling reason. And assuming a 'clerical error' resulted in the document initially being placed unnoticed into the file, the fact that it remained unnoticed for nearly five months renders this a noncompelling reason as well."

In this litigation, the attorneys for Defendant-City did not seek leave of court to file answers *nunc pro tunc*, and admitted in their Post-Trial Memorandum that they also forgot that Plaintiffs had served written Requests for Admissions until after reading Plaintiffs'

Response to the City's Motion for Summary Judgment in March, 2017. Within a week, on April 5, 2017, the City *sua sponte* served late answers and objections to the Requests for Admission. "The request for admission, the answers did not go out. It fell through the cracks." N.T. 4, 19, May 15, 2017. The answers should have been served thirty days after September 7, 2016, however, the City of Philadelphia acknowledged it served the objections and answers **more than six months late**. N.T. 24, May 15, 2017.

Well settled rules and precedent in Pennsylvania hold that the averments contained in Requests for Admission are deemed admitted when a party fails to file a timely answer. See, Rule 4014(b); 9A Goodrich-Amram 2d §4014(b): 2 (failure to file a timely response entitles party requesting the admission to summary judgment); 6 Standard Pennsylvania Practice 2d §34:128 (where a party files an answer late, the answer can be stricken if the party did not first obtain court permission); §34:132 (Failure to file a timely response renders the matter "conclusively established"); §34:134 (the party who has obtained the admission is spared the burden of producing or being ready with proof of the matter at trial); §34:136 (when the reasons for the failure to respond are weight of caseload, shortage of personnel, or clerical error, those reasons are not compelling reasons for a court to grant leave to amend or file a late response).

In Discover Bank v. Repine, 157 A.3d 978 (Pa. Superior Ct. 2017), the Superior Court recently held that where the Defendant never sought permission to amend or withdraw responses, challenges to the Requests for Admissions are waived; Penn

Township v. Aetna Casualty & Surety Co., 719 A.2d 749 (Pa. Superior Ct. 1998) where evidence was admitted "for want of a reply" to Request for Admission, trial court's award of partial summary judgment was affirmed; Borough of Mifflinburg v. Heim, 705 A.2d 456 (Pa. Superior Ct. 1997) when Requests for Admissions were not answered, the facts contained therein "were conclusively established" and summary judgment was proper; Richard T. Byrnes Co., Inc. v. Buss Automaton, Inc., 609 A.2d 1360 (Pa. Superior Ct. 1992) affirming summary judgment when party failed to respond per Rule 4014; Innovate, Inc. v. United Parcel Service, Inc., 418 A.2d 720 (Pa. Superior Ct. 1980), a party that fails to respond to Requests for Admissions runs the risks that the admissions will be "conclusively binding"; Poli v. South v. Union Township Sewage Authority, 424 A.2d 568 (Pa. Commonwealth Ct. 1981), failure to respond or to file motion for the court permission deems Requests as admitted; Commonwealth v. Diamond Shamrock Chemical Co., 391 A.2d 1333 (Pa. Commonwealth Ct. 1978) there must be a "compelling reason" to permit *nunc pro tunc* application to file untimely response. See also, Thumberg v. Strause, 682 A.2d 295, 300 n.5 (Pa. 1996).

In September, 2016, Plaintiffs-Joers and D'Abruzzo served 53 Requests for Admissions on the Defendant-City. When the City failed to respond the Plaintiffs were entitled to rely on these as "deemed admitted" for purposes of trial preparation. The discovery period ended in January, 2017 and the case was scheduled for trial in May, 2017. The trial preparation included evidence that Officer Leduc was acting in furtherance of the

City's interests by traveling to testify on behalf of the City in the criminal court matter, and, that the Officer and the City admitted that Officer Leduc was acting within the course and scope of her employment.

After the jury was sworn in, after trial commenced and Plaintiffs' witnesses were ready and seated in the courtroom, the City advised the Court **for the first time** that it objected to 9 of the 53 Requests. N.T. 3-32, May 15, 2017. The Court ruled that as per Rule 4014(d) all 53 admissions were "conclusively established."

C. The City of Philadelphia's Ennui Does Not End.

Pennsylvania Appellate case law is also clear that in order to preserve a right to request a Motion for Judgment Notwithstanding the Verdict, a litigant must first either move for a nonsuit or move for a directed verdict. It is undisputed on this record that Defendant-City never made a motion for compulsory nonsuit, N.T 58-59, May 16, 2017, and, never made a motion for a directed verdict, N.T. 73-75, May 16, 2017. See generally, Drake Manufacturing Co., Inc. v. Polyflow, Inc., supra, 109 A.3d at 258 citing Youst v. Keck's Food Service, 94 A.3d 1057, 1071 (Pa. Superior Ct. 2014); Phillips v. Lock, 86 A.3d 906, 918 (Pa. Superior Ct. 2014); Commonwealth v. TAP Pharmaceutical Products, 36 A.3d 1197, 1278 (Pa. Commonwealth Ct. 2011); Commonwealth v. U.S. Mineral Products Co., 927 A.2d 717, 724-725 (Pa. Commonwealth Ct. 2007).

Earlier cases which suggest that a request for a binding instruction preserves JNOV, have been supplanted by Rule 226 of the Pennsylvania Rules of Civil Procedure. Compare, Thomas Jefferson University v. Wapner, 903 A.2d 565, 570 (Pa. Superior Ct. 2006); Hayes v. Donohue Designer Kitchen, 818 A.2d 1287, 1291 n.4 (Pa. Superior Ct. 2003) with Rule 226 requiring that a jury instruction be read into the record or filed with the prothonotary prior to post-trial motions. Neither action was taken by the City of Philadelphia.

The basis for the Defendant-City's JNOV motion is that its failure to respond to the Requests for Admission within 30 days should not deem those Requests as admitted. The City is challenging the sufficiency of the evidence as well as legal and evidentiary rulings of the Trial Court. **In other words, the City of Philadelphia waived its objections to certain Requests for Admission by failing to timely respond to them, and also has waived its right to challenge the waivers or to challenge the deemed admissions by Motion for Post-Trial Relief.** See also, N.T. 29-30, May 15, 2017.

The words of Supreme Court Justice Roberts ring just as true today as when written in Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974). It is clear at this Post-Trial juncture that the Plaintiffs-Joers and D'Abruzzo would be prejudiced if the multiple levels of waiver and disregard for the rules of trial were circumvented by the actions and inactions of the City of Philadelphia. Diligent and prepared lawyers and clients are penalized by the failures of opposing parties to engage in "alert professional representation." 322 A.2d at 116.

III. CONCLUSION

For all of the reasons set forth above, the City of Philadelphia's Motion for Post-Trial Relief is **DENIED**. The record supports the jury award of **$256,237.70**. The Plaintiffs' Motion for Delay Damages in the amount of **$2,600.99** is **GRANTED.**

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.
October 5, 2017

Control No. 17053337
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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Deborah Joers and Ralph D'Abruzzo **Plaintiffs**	:	February Term, 2016
vs.	:	No. 4233
City of Philadelphia and Yvette Leduc **Defendants**	:	

ORDER

And Now, this 5th day of October, 2017, after considering the Motion for Judgment Notwithstanding the Verdict filed by the City of Philadelphia, All Responses in Opposition, after oral argument held September 19, 2017, and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Motion for Post-Trial Relief is **DENIED**. Plaintiffs' Motion to Add Delay Damages is **GRANTED**.

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Deborah Joers and Ralph D'Abruzzo **Plaintiffs**	:	February Term, 2016
vs.	:	No. 4233
City of Philadelphia and Yvette Leduc **Defendants**	:	

JUDGMENT ORDER

And Now, this 5th day of October, 2017, after considering the Plaintiffs' Motion for Delay Damages pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure, Defendants' Responses thereto, and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that Delay Damages in the amount of **Two Thousand Six Hundred Dollars and Ninety Nine Cents ($2,600.99)** shall be added to the jury verdict award of **Two Hundred Fifty Six Thousand Two Hundred Thirty Seven Dollars and Seventy Cents ($256,237.70)** and,

JUDGMENT is entered in favor of Deborah Joers and Ralph D'Abruzzo, II in the amount of **Two Hundred Fifty Eight Thousand Eight Hundred Thirty Eight Dollars and Sixty Nine Cents ($258,838.69)** and against the City of Philadelphia only, and,

Post-Judgment interest shall accrue on the total award from May 17, 2017 at the rate of six percent (6%) per annum.

BY THE COURT:

Massiah-Jackson

FREDERICA A. MASSIAH-JACKSON, J.