IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

ALICE R. MARSHALL, Administratrix of the Estate of James Steven Marshall, Deceased, and ALICE R. MARSHALL and RONALD MARSHALL, in their own right	:	
	:	APRIL TERM, 1998
v.	:	
	:	NO. 1082
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY and FRANK HARPER	:	

Myrna Field, J. January 12, 2001

OPINION OF THE COURT

Defendants, Southeastern Pennsylvania Transportation Authority ("SEPTA") and Frank Harper, appeal from this court's order dated October 2, 2000, denying their petition for leave to appeal *nunc pro tunc*. For the reasons which follow, the petition was properly denied, and judgment entered in favor of the plaintiffs in the amount of $948,759.50 should be affirmed.

This case arises from an accident which occurred on January 31, 1997, wherein plaintiffs' decedent James Steven Marshall, was struck and killed by a trolley owned and operated by SEPTA. A jury trial commenced on November 29, 1999. After five days of trial, the jury returned a verdict finding defendants 75% negligent and the decedent 25% negligent. Damages were assessed in a total amount of $1.7 million: $1.2 million on the wrongful death claim and $500,000.00 on the survival claim.

Defendants timely filed their post-trial motion pursuant to Pa.R.C.P. 227.1 seeking a new trial or, in the alternative, the molding of the verdict. Plaintiffs timely filed a motion for delay

damages pursuant to Pa.R.C.P. 238. On July 20, 2000, this court issued orders disposing of both motions. In response to defendants' motion, the court ordered that the verdict be molded to reflect the decedent's comparative negligence. Plaintiffs' motion for delay damages was granted, but the calculation was based on the molded verdict, rather than the original jury award. Both orders were issued on July 20, 2000, and docketed on July 21, 2000. Defendants concede that, pursuant to Pa. R.A.P. 903(a), any notice of appeal was required to be filed by August 20, 2000. None was so filed.

Subsequently, defendants filed a petition for leave to file an appeal *nunc pro tunc*. To explain their failure to file a notice of appeal within the prescribed time, defendants assert that they did not know that the orders of July 20th were "final" because the order disposing of defendants' motion said that their motion had been "granted in part." The explanation offered for not seeking clarification was "inadvertence of counsel."

Negligence of counsel is not a sufficient excuse for the failure to timely file an appeal. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979). Generally, appeal *nunc pro tunc* is only permissible in civil cases where there was fraud or a breakdown in the court's operations. Freeman v. Bonner, 761 A. 2d 1193 (Pa. Super., 2000). Additionally, counsel's argument that the order was unclear is unpersuasive. Since defendants' motion sought a new trial *or in the alternative* a molded verdict, and they were granted the molded verdict, and in light of the fact that plaintiff's motion for delay damages was granted, logic dictates that the portion of the motion seeking a new trial was implicitly denied.

Defendants' having failed to establish sufficient grounds upon which the statutory appeal period could be extended, the petition to file an appeal *nunc pro tunc* was properly denied. Judgment in favor of the plaintiffs in the amount of $948,759.50 should be affirmed.

By the Court:

_____

Myrna Field, J.