injuries are permanent within 5 days of the entry of this order.

ORDER OF COURT

August 11, 1987, it is hereby ordered that the plaintiffs' expert witness may testify concerning the cause and/or effect of the accident regarding plaintiff's carpal tunnel syndrome; and the plaintiffs shall amend the complaint within five days of the entry of this order to specify which of her injuries are permanent.

DEARDORFF, ET AL. V. SHEW, ET AL., C.P. Franklin County Branch, No. A.D. 1985-271

Local Rule 39-1801 - Lack of Prosecution - Extension of Time

1. Where an action has been dismissed for want of prosecution the burden to establish good cause for reinstatement is affirmatively on the petitioner.

2. The trial courts have an affirmative duty to apply all procedural rules with fairness.

3. Where the only prejudice to defendant in reinstating plaintiff's case is the need to defend against the action and plaintiff has given a reasonable explanation for his actions, the requirement of fairness in interpreting rules of court would be violated.

4. Where plaintiff sustains injuries in an accident that have not healed to the point where his damages are ascertainable and this is verified by medical evidence, an application for extension is appropriate.

Philip S. Cosentino, Esq., Counsel for Plaintiffs
Eileen F. Schoenhofen, Esq., Counsel for Defendants

OPINION AND ORDER

KELLER, P.J. August 26, 1987:

On April 16, 1985, plaintiffs were injured in a motor vehicle accident in Franklin County Pennsylvania.

On October 16, 1985, a writ of summons was issued against Michael Ray Shew, George Transfer and Rigging Company, Inc., and the Commonwealth of Pennsylvania, Department of Trans-

portation. Service of the writ of summons was made on Michael Ray Shew on November 6, 1985, and on the Commonwealth of Pennsylvania on November 13, 1985. The writ of summons was reissued and served on George Transfer and Rigging Company, Inc., on April 28, 1987. Kenneth Ray Lyons, Jr., was added as a defendant by writ of summons issued April 15, 1987, with service of the writ being made on May 5, 1987.

On November 19, 1986, we granted plaintiffs' application for extension, thereby extending the time for filing a certificate of readiness to April 1, 1987.

On April 2, 1987, we issued a rule upon plaintiffs to show cause why the action should not be dismissed for want of prosecution.

On May 6, 1987, we entered an order, pursuant to Local Rule 39-1801 *et seq.*, dismissing the action due to the fact that no answer to the rule issued April 2, 1987 had been filed by plaintiffs.

On May 13, 1987, plaintiffs presented a motion to vacate order of court dismissing action and for leave to file petition for extension of time nunc pro tunc within twenty (20) days from May 13, 1987. The same date we entered an order vacating the May 6, 1987 order of dismissal and granted plaintiffs' leave to file petition for extension of time nunc pro tunc within twenty (20) days from date.

On May 27, 1987, plaintiffs presented a second application for extension requesting an extension to October 1, 1987, for the filing of a certificate of readiness, and we entered an order granting plaintiffs' application for extension only as to the Commonwealth of Pennsylvania, Department of Transportation and Kenneth Ray Lyons, Jr., to October 1, 1987. With regard to defendants George Transfer and Rigging Company, Inc., and Michael Ray Shew, we ordered a special hearing on the application for June 18, 1987 at 1:30 p.m.

On May 27, 1987, Michael Ray Shew and George Transfer and Rigging Company, Inc., filed a motion to stay order of court dated May 13, 1987, and for a rule to show cause why order of May 6, 1987 should not be reinstated.

On June 18, 1987, the hearing was held and arguments of counsel were heard on plaintiffs' second application for extension, and on defendants' rule to show cause why order of May 6, 1987

should not be reinstated. Counsel for the parties have submitted memoranda of law and the matter is now ripe for disposition.

DISCUSSION

The first issue before us is whether the action was properly reinstated after it had previously been dismissed for want of prosecution.

The burden to establish good cause for reinstatement is affirmatively upon the petitioner. *White v. Cirelli*, 297 P.Super. 375, 378, 443 A.2d 1170, 1171 (1982).

Pennsylvania Rule of Civil Procedure 126 provides:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

In *Byard F. Brogan v. Holmes Elec. Prot. Co. of Phila.*, 501 Pa. 234, 240, 460 A.2d 1093, 1096 (1983), the Supreme Court of Pennsylvania explained the intent and application of Pa. R.C.P. 126 as follows:

> The trial of a lawsuit is not a sporting event where the substantive legal issues which precipitated the action are subordinate to the "rules of the game." A lawsuit is a judicial process calculated to resolve legal disputes in an orderly and fair fashion. It is imperative that the fairness of the method by which the resolution is reached not be open to question. A rule which arbitrarily and automatically requires the termination of an action in favor of one party and against the other based upon a non-prejudicial procedural mis-step, without regard to the substantive merits and without regard to the reason for the slip, is inconsistent with the requirement of fairness demanded by the Pennsylvania Rules of Civil Procedure. Rule 126 is not a judicial recommendation which a court may opt to recognize or ignore. Rather the rule is a statement of the requirement of fairness and establishes an affirmative duty courts are bound to follow in applying all procedural rules whether they be statewide or local in origin.

Defendants argue that the reinstatement of the action after it had been dismissed resulted in prejudice to the defendants. If we were to merely agree with defendants' position without concern for the reason for the procedural mis-step, we would violate the mandate of Pa. R.C.P. 126. We must weigh the potential prejudice to each party.

In an effort to show the substantive merits of their cause of action, plaintiffs have offered the basis of their cause of action in their amended answer to rule, filed on June 25, 1987. Although such a basis for a cause of action has only been relatively recently filed, it would cause extreme prejudice to the plaintiffs were we to ignore such information. The only possible prejudice to the defendants would be that they now must defend against the cause of action. Such an argument has little force and effect considering the fact that they would have had to defend against the cause of action but for a procedural mis-step on the part of counsel for the plaintiffs. Further, such an argument, if automatically given effect, would put an end to all actions for reinstatement of a case. If we were to agree with defendants' argument, we would, in our judgment, violate the fairness requirement of Pa. R.C.P. 126.

Regarding the reason for the procedural mis-step, counsel for the plaintiffs have offered the following explanation. On April 2, 1987, the rule was issued pursuant to Local Rule 39-1801 *et seq.*, upon plaintiffs to show cause why the action should not be dismissed for want of prosecution. Plaintiffs' counsel concedes the rule was received via U.S. Mail on April 3, 1987, at approximately 11:00 a.m. On that date he left his office in the early afternoon and traveled to New York where his father was hospitalized in the final stages of cancer. Plaintiffs' counsel inadvertantly placed the rule with other mail to be filed without docketing his file to take further action in the matter.

On April 13, 1987, plaintiffs' counsel, in response to his office tickler system alerting him to the two year statute of limitations, reviewed the status of the parties and service. As a result of that review, he filed a praecipe on April 15, 1987, directing the prothonotary to re-issue a writ of summons against George Transfer and Rigging Company, Inc., and issue a writ of summons against Kenneth Ray Lyons, Jr. Plaintiffs' counsel asserts that had he been aware of the outstanding rule, at that time he would have prepared an application for extension pursuant to the Local Rule or he could have discontinued and re-filed the action. The case was dismissed by order of court dated May 6, 1987.

We find that this is a sufficient and reasonable explanation of why no answer to the rule was filed, or in the alternative why no second application for extension was filed. A dismissal of this case would cause obvious and extreme prejudice to the plaintiffs. We are of the opinion that the plaintiffs should not bear the penalty

for their counsel's mistake, especially when counsel has reasonably explained his mistake.

Once again, the only prejudice to the defendants is that they now have to defend against this cause of action. We would only be redundant and no good purpose would be served if we were to discuss that argument again.

On balance, we find that the great weight of the prejudices would befall the plaintiffs if the previous dismissal were to be reinstated. We hold, that based upon the above discussion, plaintiffs have shown good cause why the action was properly reinstated after it had been previously dismissed for want of prosecution.

We now turn to the second issue of whether plaintiff has shown good cause to enable us to grant the second application for extension.

Plaintiffs allege as their reason for seeking a second extension of time for filing a certificate of readiness, that plaintiff, Leon Deardorff, Sr., sustained injuries in the accident which have not yet healed to the point where his damages are ascertainable. This is precisely the same reason offered in the first application for extension that was granted.

We are satisfied that plaintiffs have offered sufficient additional medical evidence in the interim verifying a continuation of the reason for the granting of the first unopposed application for extension. We, therefore, conclude that plaintiffs have shown good cause for this Court to grant the second application for extension and the second application is granted, extending the time for filing a certificate of readiness to October 1, 1987, as to all defendants.

In summary, we note that the main issue in this matter has been the proper interpretation and application of Local Rule 39-1801 *et seq.* These specific rules were promulgated primarily to serve as a prod to move along what has been termed "active cases". The primary intent was not to give the rules a static, rigid, inflexing meaning. As mentioned in *Byard F. Brogan v. Holmes Elec. Prot. Co. of Phila.*, 501 Pa. at 239, 460 A.2d at 1096, "almost four decades ago (the Supreme Court of Pennsylvania), speaking through Justice Horace Stern, said: 'procedural Rules are not ends in themselves but means whereby justice, as expressed in legal principles, is administered. They are not to be exalted to the status of substantive objectives . . .' *McKay v. Beatty,* 348 Pa. 286, 35 A.2d 264 (1944).

Parenthetically, we find it appropriate to note that the rationale presented for opening judgments of non pros and default judgments is equally applicable in the case at bar.

ORDER OF COURT

NOW, this 26th day of August, 1987:

The application of plaintiffs to extend the time for filing a certificate of readiness to October 1, 1987 as to defendants George Transfer and Rigging Company, Inc. and Michael Ray Shew to reinstate the order dismissing the above-captioned action is denied.

The motion of defendants George Transfer and Rigging Company, Inc. and Michael Ray Shew to reinstate the order dismissing the above-captioned action is denied.

Exceptions are granted the said defendants.

VALLEY QUARRIES, INC. V. BOARD OF SUPERVISORS OF GREENE TOWNSHIP, C.P. Franklin County Branch, Misc. Doc. Vol. Y, Page 569

Zoning Appeal - Conditional Use Permit - Vested Rights

1. The rules governing statutory construction are applicable to statutes and ordinances alike.

2. The obtaining of an option on real estate, expenditure of funds, acquisition of title and the knowledge of the Township of intended use prior to amendment of the zoning ordinance does not establish vested rights.

3. A mere "sketch plan" is insufficient to bar the effectiveness of a subsequent zoning amendment.

4. Subdivision approval and acknowledgement of intended use are analogous to a "sketch plan" and not a preliminary plan.

Philip S. Davis, Esq., Counsel for Appellant
Richard W. Davis, Esq., Counsel for Appellant
Robert E. Graham, Esq., Counsel for Appellant
Paul F. Mower, Esq., Counsel for Appellee
Welton J. Fischer, Esq., Counsel for Appellee
David C. Cleaver, Esq., Counsel for Intervenors