The plaintiff is granted leave to file an amended complaint within twenty (20) days of date hereof.

Exceptions are granted the plaintiff.

STONER, ET UX. VS. ARMSTRONG, ET AL., C.P. Franklin County Branch, No. A.D. 1989-71

Strict Liability - Improper Construction

1. A demurrer will not be granted unless there is a certainty that no recovery is possible.

2. Where a claim for defective construction of a chimney is based on strict liability, a demurrer will not be granted because the case law is not free from doubt.

Howard D. Kauffman, Esquire, Counsel for Plaintiffs
John N. Keller, Esquire, Counsel for Defendants

WALKER, J., October 13, 1989:

STATEMENT OF FACTS

The defendants built a house for the plaintiffs. On March 9, 1987, this house was completely destroyed by fire. Plaintiffs allege that the fire was caused by an improperly constructed chimney. Plaintiffs filed this suit against defendants on July 3, 1989, and filed an amended complaint on July 24, 1989. In their complaints the plaintiffs seek recovery from defendants on theories of negligence, breach of warranty, breach of contract, and strict liability. The defendant filed a demurrer to the strict liability cause of action. This issure was argued before the court on October 5, 1989, and is now ripe for determination.

DISCUSSION

When ruling on a demurrer, the determination to be made is whether, on the facts averred, the law says with certainty that no recovery is possible. *Mahoney v. Furches,* 503 Pa. 60, 468 A.2d 458

thirty (30) minutes West, seven hundred thirteen and eighty-eight hundredths (713.88) feet to a set iron pin in the center line of said Township Route 642; thence in the center line of said Township Route 642, North twenty-eight (28) degrees, fifty-four (54) minutes, thirty-three (33) seconds West, three hundred thirty-four and eight hundredths (334.08) feet to a set iron pin; thence in the center line of said road, North twenty-six (26) degrees, three (03) minutes, twenty-four (24) seconds West, one hundred forty-six and fourteen hundredths (146.14) feet to a set iron pin, the place of BEGINNING. CONTAINING 5.3227 acres according to survey and draft by William A. Brindle Associates, dated January 8, 1979.

IT BEING the same tract of land which Ronald G. Haarer and Renee M. Haarer, by their deed dated May 31, 1988, and recorded in the Office of the Recorder of Deeds of Franklin County, Pennsylvania, in Deed Book 1019, page 209, granted and conveyed unto Barry L. Suhrie and Sylvia J. Suhrie, husband and wife.

BEING sold as the property of Barry L. Suhrie and Sylvia J. Suhrie. Writ Number AD 1990-112.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, June 18, 1990 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on June 22, 1990 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA
5/18, 5/25, 6/1/90

(1983); *Gekas v. Shapp,* 469 Pa. 1, 364 A.2d 691 (1976). If doubt exists as to whether or not to grant the demurrer, the demurrer should be denied. *Mahoney, supra; Gekas, supra.* The present case is not free from such doubt.

In the case before us, plaintiffs seek to recover against defendants on a strict liability claim alleging that the defendants improperly constructed their chimney. Strict liability is provided for in Restatement of Torts 2d Section 402A which states that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for the physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) The seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) The user or consumer has not bought the product from or entered into any contractual relation with the seller.

Defendants' claim based on this definition is that a house is not a product for purposes of strict liability. Defendant refers us to *Cox v. Shaffer,* 223 Pa. Super. 429, 302 A.2d 456 (1973) as authority for this claim. While *Cox* stated that a silo was not a product for purposes of strict liability, the court finds that it is not clear whether or not a house is a product under section 402A.

As stated in *Bednarski v. Hideout Homes & Realty, Inc. et al.,* 711 F.Supp. 823, 825 (M.D. Pa 1989):

> The Supreme Court's only pronouncement on this subject is *Freezer Storage, Inc. v. Armstrong Cork Co.,* 476 Pa. 270, 382 A.2d 715 (1978).
>
> In the *Freezer Storage* case, the Supreme Court stated, in dicta, that:

a builder may be liable for construction defects under various legal theories - contract, warranty, negligence, *and perhaps strict liability in tort.*

Freezer Storage at 276 (emphasis added). Other courts have relied on this dicta as evidence of the Supreme Court's intention to at least entertain the possibility of applying Section 402A to builders. *See Schmidt v. James Lewis Corp.*, 33 Ches.Co.Rep. 409 (1985); and *Sports Management Group, Inc. v. Allensville Planing Mill, Inc.*, 16 Pa. D.&C. 3d 760 (C.P. of Mifflin Co., 1980). Both of these cases firmly held that a building was a product for purposes of Section 402A. As stated in *Sports Management* at 768:

at least some doubt is cast upon the viability of *Cox v. Shaffer* . . .

Based on this doubt and the analysis above, the court finds that the law does not state with certainty that no recovery is possible; therefore, the court denies the defendants' demurrer.

ORDER OF COURT

October 13, 1989, the court denies the defendant's demurrer.

STIVER, ETC., ET AL. VS. LEFEVERE, ET AL.,* C.P. Franklin County Branch, No. A.D. 1988-193

Jury View - Motion in Limine - Accident Reconstructionist

1. Where an accident scene has been altered to change the degree of visibility from the roadway, a jury view is inappropriate.

2. Where an accident scene is altered, a reconstructionist's testimony is limited to facts and conclusions drawn from the area of the scene which are not altered or photos taken immediately after the accident.

* Editor's Note: Another Opinion, at a later stage of proceedings in this consolidated matter is to be published, hereinafter, in this volume