

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

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WALKER, J., January 11, 1990:

STATEMENT OF FACTS

Plaintiffs filed this suit in 1988. The case involves an accident which occurred on June 16, 1986. On that date, Jeffrey E. LeFevre was driving an automobile owned by Lisa S. Mallery. As Mr. LeFevre rounded a curve on a country road, he struck the plaintiffs who were riding their bicycles in the middle of the road.

The plaintiffs filed a motion for a jury view of the section of Amberson Road where the accident occurred. The additional defendants, Robert Mears, Jr. and Linda Mears, filed a motion in limine requesting that the plaintiffs be prohibited from introducing an expert's report of the accident scene. The court will address both of these motions in this opinion.

DISCUSSION

I. Jury View

Pursuant to Pennsylvania Rule of Civil Procedure 219:

A party desiring to have the jury view any premises involved in the litigation, may make application therefor either prior to the call of the case for trial, or at the bar during the actual trial of the case. In all such cases, the allowance of the application shall be within the discretion of the court, which may impose upon the applicant such reasonable costs or expenses as may be involved in connection with such view, or may direct that any costs thereby incurred shall follow the judgment entered in such action as in other cases. Pa.R.C.P. 219.

After reviewing the facts in the case at bar, the court in its discretion determines that a jury view of the accident scene would be inappropriate.

The accident occurred in June of 1986. Pictures of the accident scene were taken shortly thereafter. Since the date of the accident, the Pennsylvania Department of Transportation has altered the scene. Specifically, they removed a portion of the embankment on the curve where the accident occurred. This alteration of the scene changes the degree of visibility of a driver rounding the curve.

Plaintiffs contend that:

[i]t is necessary for the jury to view the scene of the accident, in order that they may appreciate the facts that gave rise to the case. (plaintiffs' motion for jury to view accident scene, p. 2).

Based on the fact that the scene was materially altered since the accident, the court determines that a jury view is inappropriate. The court finds that a view of the altered scene and the testimony necessary to explain how the scene differs now from the way it appeared in June of 1986 would be confusing to the jurors. Testimony regarding the condition of the accident scene when the accident occurred and the possible admission of photographs taken shortly after the accident will be sufficient.

The Pennsylvania Supreme Court in *Garris v. McClain*, 399 Pa. 261, 160 A.2d 398 (1960) concluded that the trial judge had abused his discretion by ordering a jury view of a rural accident scene which had changed in the six and two thirds years between the accident and the trial. In *Garris*, as in the case at bar, the visibility was what had changed.

Based on the above, the court denies plaintiffs' motion for a jury view of the accident scene.

II. Accident Reconstructionist's Report

Additional defendants request an order to prohibit the plaintiffs from introducing a report describing the conditions of the accident scene. Additional defendants contend that the report of the plaintiffs' expert reconstructionist would be inaccurate as the accident scene was altered prior to his investigation.

As stated in *Whistler Sportswear, Inc. v. Rullo*, 289 Pa. Super. 230, 433 A.2d 40 (1981), "The lower court has a broad grant of discretion with regard to expert testimony. . ." *Id.* at 239. Given the

circumstances of the case at bar, the court agrees that the report prepared by plaintiffs' expert may be inaccurate.

Courts have held evidence to be inadmissible absent testimony that the condition of the evidence had not changed between the incident giving rise to the case and the subsequent investigation. *Ritson v. Don Allen Chevrolet, et al.*, 233 Pa. Super. 112, 336 A.2d 359 (1975). In *Semet v. Andorra Nurseries, Inc.*, 421 Pa. 484, 219 A.2d 357 (1966), the ladder from which plaintiff fell was examined fifty-two days after the fall. Photographs of the ladder were held inadmissible absent testimony that the condition of the ladder had not changed. In the case at bar, it is not disputed that the condition of the road *had* changed between the accident and the investigation of plaintiffs' expert.

The court determines that the expert report would be confusing regarding observations and opinions drawn from viewing the altered portions of the accident scene. Facts or conclusions drawn from the areas of the scene which were not altered or from properly authenticated photographs which were taken immediately after the accident may be admissible if the expert is properly qualified.

The court admonishes plaintiffs' counsel that any reference of the expert to the alterations may result in an instruction for the jury to disregard the entire expert opinion and report.

Based on the above, the court denies plaintiffs' motion for a jury view of the accident scene and partially grants additional defendant's motion in limine by prohibiting those sections of the accident reconstruction report that rely on the expert's observation of the altered portions of the accident scene.

ORDER OF COURT

January 11, 1990, the court hereby denies plaintiffs' motion for a jury view of the accident scene and partially grants additional defendants' motion in limine by prohibiting those sections of the accident reconstruction report which rely on the expert's observation of the altered portions of the accident scene.

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