

LUCINDA M. OLESH and LAWRENCE J. OLESH

vs.

**JAY A. BENFIELD, PEGGY J. BENFIELD, and CITIZENS UTILITIES WATER COMPANY
OF PENNSYLVANIA**

Motion in Limine

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA.,
CIVIL ACTION - LAW., NO. C0048CV2001-006826

Order of Court entered granting leave of Plaintiff's expert's to file a report that includes the facts, information or data relied upon by the expert in forming his opinion.

Harold J.J. DeWalt, Jr., Esq. -for Plaintiff

Joanne Kelhert, Esq. -for Defendant Benfield

Christopher Underhill, Esq. -for Defendant Citizens Utilities

Order of Court entered October 14, 2003 by Stephen G. Baratta, Judge.

DESCRIPTION OF DECISION

The Court granted the Defendants' Motion in Limine seeking to preclude the use of Plaintiff's expert report because the report was not sufficiently detailed, in that it failed to set forth the facts, information or data relied upon by the expert in forming his opinion. Plaintiffs were granted leave to file a suitable expert report.

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW**

LUCINDA M. OLESH and LAWRENCE J. OLESH,) NO. C0048CV2001-006826
)
Plaintiffs,)
)
vs.)
)
JAY A. BENFIELD, PEGGY J. BENFIELD, and CITIZENS UTILITIES WATER COMPANY OF PENNSYLVANIA,)
)
Defendants.)

ORDER OF COURT

AND NOW, this day of October, 2003, the Motion in Limine to Exclude Testimony of Plaintiff's Expert on Liability filed on behalf of the Defendants, Jay Benfield and Peggy Benfield, is hereby **GRANTED IN PART** and **DENIED IN PART**. The Defendants' Motion in Limine seeking to preclude the use of Defendants' expert report dated March 21, 2003, is granted because the expert report fails to set forth the facts, information or data relied upon by the expert in forming his opinion. However, we grant Plaintiffs leave to file a suitable expert report within fifteen (15) days from the date of this Order.

STATEMENT OF REASONS

Presently before the Court is the Motion in Limine filed on behalf of the Defendants, Jay Benfield and Peggy Benfield.

The factual predicate of this matter flows from a trip and fall accident. On September 10, 1999, Plaintiff, Lucinda Olesh, was walking on the sidewalk adjacent to 126 South Spruce Street

in Nazareth, Pennsylvania. (Complaint, ¶ 11). This property was owned by the Defendants, Jay and Peggy Benfield (“Defendants”). As she was walking, Ms. Olesh tripped and fell by a curb box that was concealed by weeds, and owned by Defendant, Citizens Utilities Water Company of Pennsylvania. (Complaint, ¶ 11).

Plaintiff filed her Complaint on August 29, 2001, seeking economic damages.

Defendants filed the present Motion in Limine on August 5, 2003, seeking to exclude testimony of Plaintiff’s expert on liability. Defendants assert that, under Pennsylvania’s Rules of Evidence, an expert is only permitted to testify when his or her “scientific, technical or other specialized knowledge [is] beyond that possessed by a layperson.” Pa. Rules of Evidence § 702.

Defendants argue that there is nothing in the expert report submitted by the Plaintiff’s expert in liability that provided information beyond the ken of the average layperson. This Order addresses Defendants’ Motion in Limine only.

I. Legal Standard

A Motion in Limine is a procedure for obtaining a ruling on the admissibility of evidence before the evidence has been offered. It may be heard before or during the trial. Delpopolo v. Nemetz, 710 A.2d 92 (Pa. Super. 1998). In civil cases, appellate relief for an evidentiary error made by the trial court will not be granted unless the error affects a “substantial” right of a party. See Pa.R.Civ.P. Rule 126. The admissibility of evidence is within the sound discretion of the trial court and should not be overturned absent an abuse of discretion. Delpopolo v. Nemetz, 710 A.2d 92 (Pa. Super. 1998).

II. Discussion

This case is a claim of negligence regarding the installation and maintenance of a curb box installed by the utility company on the Defendants’ property. Plaintiffs obtained a two-page

report from Alan R. Lewis, P.E., the President of Eastern Engineering Associates, Inc. We reviewed Mr. Lewis' written report dated March 21, 2003. The body of the report contains a description of the injury (trip and fall), a description of the box and the immediate area surrounding the box made from a personal inspection in March 2003 and a review of photographs taken shortly after the fall. The report also includes detailed measurements regarding the curb box. Finally, the report contains Mr. Lewis' opinion that the installation and maintenance of the curb box was "an obvious hazard that directly caused Mrs. Olesh's fall and result in injuries."

During oral argument on the Defendants' Motion in Limine, counsel discussed the relevant zoning ordinances and BOCA codes that may govern the maintenance of such a curb box. Plaintiffs' counsel specifically noted that Mr. Lewis relied on those codes and ordinances in forming his opinion. However, we note that Mr. Lewis' report makes no mention of statutory or code violations with respect to his conclusion regarding the existence of a hazard.

The Defendants argue that Plaintiffs' expert in liability is irrelevant to this case, and therefore should be excluded. The Defendants claim that because there is nothing in the Plaintiffs' expert's report that discloses a need for scientific, technical or specialized knowledge, that the expert should not be permitted to testify.

We disagree. Pennsylvania Rules of Evidence Rule 702 states, in its entirety, "**If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.**"

Generally, expert testimony is not required when matters under consideration are so simple and the lack of ordinary care is so obvious that the assertion of negligence is within the range of comprehension of the average juror. See Montgomery v. Bazaz-Sehgal, 742 A.2d 1125 (Pa. Super. 1999), appeal granted, 760 A.2d 855, aff'd 798 A.2d 742.

The mere happening of an accident is not evidence of negligence. A plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent and that defendant's negligence was the proximate cause of the accident. Gift v. Palmer, 141 A.2d 408 (Pa. 1958). In this case, we find that a professional engineer's testimony regarding the failure to comply with appropriate zoning ordinances and/or BOCA codes regarding the installation and maintenance of a utility curb box is the type of expert testimony contemplated under Rule 702 in that such testimony is outside the ken of the typical juror and that such information would assist the trier of fact in understanding the ultimate issue.

However, we find that Plaintiffs' expert report is deficient in that it does not provide, with any specificity, the support necessary to reach a conclusion that the curb box was an obvious hazard. Specifically, there are no references to BOCA code, zoning ordinances or construction practices that would support his conclusion. Thus, the report fails to provide Defendants with specific notice regarding Plaintiffs' theory of negligence and fails to provide Defendants with sufficient notice to properly prepare for trial and/or obtain a competing expert report.

Therefore, we grant Defendants' Motion in Limine. However, we also grant Plaintiffs fifteen (15) days from the date of this Order to file an amended expert report, setting sufficient detail to support the expert's conclusion regarding the existence of negligence and providing

Defendants with appropriate notice so that they may obtain a competing expert report, if they so choose.

BY THE COURT:

STEPHEN G. BARATTA, J.