IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

WAYNE L. HALL, in his personal capacity and as Administrator of the ESTATE OF PRISCILLA E. HALL, Plaintiff	:	CIVIL ACTION -- LAW
vs.	:	NO. 07-01,088
HOLLICK'S COAL YARD AND HEATING SERVICE, INC., a Pennsylvania Corporation, Defendant	:	

OPINION AND ORDER

This matter comes before the court on four motions filed by plaintiff. The case arose out of the death of Priscilla Hall, who was walking her dog when a strong wind blew the roof off a building owned by the defendant. The roof landed on Ms. Hall.

Regarding plaintiff's Motion for Summary Judgment, the motion is denied. The plaintiff argues that both experts agree the roof was the same weight as the wind load, and there is no evidence the roof was being held down by anything. Defendant's expert report, however, specifically states it is unlikely the roof framing was not attached to the support frames in some fashion. Moreover, in a supplemental statement submitted after defendant's expert received color photos, the expert states, "Three of the photographs clearly show spikes/nails were used to attach the log rafters to the support frame beams below." As to the deposition of Jon Hollick, Mr. Hollick did not testify there were no nails holding the roof on—he merely stated he never saw any such nails. His testimony also revealed that he did not inspect the roof very carefully. N.T. p. 41.

There are further issues of fact. Assuming the roof was in a state of disrepair, it is for the jury to determine if the exercise of reasonable care by the defendant would

have disclosed the disrepair and the unreasonable risk. It is also for the jury to decide whether the exercise of reasonable care by the defendant would have made the building reasonably safe by repair or otherwise. *See* Ford v. Jeffries, 379 A.2d 111 (Pa. 1977); McCarthy v. Ference, 58 A.2d 49 (Pa. 1948), *citing* Section 365 of the Restatement of Torts, Second.

The next motion is a motion in limine, in which the plaintiff appears to be asking the court to make a ruling that the doctrine of *res ipsa loquitur* is applicable to this case, and that the court will so charge the jury. The court will deny this motion without prejudice as being premature, although it may be determined to be an appropriate jury instruction at a later date.

The next motion is a motion to preclude defendant's expert from testifying, for a variety of reasons. The court does not find any merit to the plaintiff's arguments on this motion. As to the defendant's supplemental report, in the form of a letter dated January 28, 2008, the court will order that Mr. Aufiero's testimony regarding identifying nails in the photos must be offered as a lay witness, and not as an expert witness.

The final motion is a motion for sanctions, which arises from the defendant's removal of the roof. Immediately after the incident, which occurred on December 1, 2006, the police cordoned off the area where the roof was located by use of yellow tape, in order to preserve the scene and the evidence during their investigation. The police advised Mr. Hollick to refrain from removing the debris until after their investigation was completed, and Mr. Hollick complied. The boyfriend of plaintiff's daughter took photos of the roof during this time, and the defendant took a videotape. Several days after the incident, the police advised Mr. Hollick that the investigation was concluded,

and that he could clean up the area. He was also advised that he would need a permit to do so, and Mr. Hollick obtained a permit on December 8, 2008. On December 12, 2008, at the request of Mr. Hollick, Steinbacher Enterprises removed the remnants of the coal bin and roof. On December 13, 2008, counsel for plaintiff sent a letter to Mr. Hollick advising him of the impending lawsuit, and stating he should not dispose of any of the remnants of the building or roof. Mr. Hollick forwarded the letter to his insurance company, which wrote to plaintiff's counsel on December 19, 2008, notifying him that the roofing material had been removed, and promising, "We will attempt to locate where the material was taken and will advise you of the location." Neither the insurance company nor Mr. Hollick ever told plaintiff's counsel the debris was removed by Steinbacher Enterprises, or attempted to find out where the debris was taken.

In determining a spoliation of evidence issue, the court must consider (1) the degree of fault of the party who altered or destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. Schroeder v. Department of Transportation, 710 A.2d 23 (1998). In reviewing these factors, we find that Mr. Hollick was at fault. Initially, we cannot fault him for removing the debris, because the roof was on the property of the Borough of Jersey Shore, and because he was unaware of the existence of the lawsuit. However, once he was alerted to the lawsuit by plaintiff's counsel, he should have attempted to find out where the debris had been taken. It would have been an easy matter for him to have called Steinbacher Enterprises to learn this information, or at the very least to have notified plaintiff's counsel that the debris was removed by Steinbacher Enterprises, so that

plaintiff's counsel could have contacted Steinbacher's himself. In addition, his insurance company promised to attempt to locate the debris and get back to plaintiff's counsel, which it never did. The prejudice suffered to plaintiff is not grave, as there are photos as well as a videotape of the roof after the incident. Furthermore, it is highly speculative whether the evidence could have been located at the landfill once it had been taken there. Regarding the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct, the court finds it appropriate to instruct the jury that an adverse inference may be drawn from the defendant's failure to notify plaintiff's counsel regarding who removed the debris, as well as the defendant's failure to make any attempt to find out where the debris had been taken.

O R D E R

AND NOW, this _____ day of March, 2008, for the reasons stated in the foregoing opinion, the motion for summary judgment is denied and the motion in limine is denied. The motion to preclude testimony is denied; however, any testimony David Aufiero offers regarding identification of spikes/nails shall be offered as lay testimony rather than expert testimony. The motion for sanctions is granted, and the court will instruct the jury that it may draw an adverse inference from the defendant's actions in regard to its failure to notify defense counsel who removed the debris, and to determine where the debris was taken.

BY THE COURT,

_____
Richard A. Gray, J.

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