

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0603

COASTAL DRILLING COMPANY, L.L.C., CERTAIN UNDERWRITERS  
AT LLOYD'S OF LONDON AND LONDON INSTITUTE COMPANIES  
ALL SUBSCRIBING TO INSURANCE POLICY NO. 14720.025

VERSUS

LEMOINE MARINE REFRIGERATION, INC. AND  
FIRST OPERATIONS, LP

Judgment rendered

JUN 27 2013

\*\*\*\*\*

Appealed from the  
16<sup>th</sup> Judicial District Court  
in and for the Parish of St. Mary, Louisiana  
Trial Court No. 115627  
Honorable Charles L. Porter, Judge

\*\*\*\*\*

ALEXANDER L. BURNS  
FREDERICK T. HAAS, III  
NEW ORLEANS, LA

ATTORNEYS FOR  
PLAINTIFFS-APPELLANTS  
COASTAL DRILLING COMPANY,  
L.L.C., CERTAIN  
UNDERWRITERS AT LLOYD'S  
OF LONDON AND LONDON  
INSTITUTE COMPANIES

DANIEL R. ATKINSON, JR.  
BATON ROUGE, LA  
AND  
LOUIS C. LACOUR, JR.  
NEW ORLEANS, LA

ATTORNEYS FOR  
DEFENDANT-APPELLEE  
FIRST OPERATIONS LP

\*\*\*\*\*

**BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.**

**PETTIGREW, J.**

This is a products liability case in which the plaintiffs, Coastal Drilling Company, LLC (Coastal Drilling) and its insurers, seek damages for losses caused by a fire that destroyed a drilling barge owned and insured by plaintiffs. The plaintiffs appeal two judgments. First, they appeal a summary judgment granted in favor of defendant, First Operations, LP, alleged to be liable in products liability as the manufacturer of a "fan coil air handling unit" – a component part of the air conditioning system, which allegedly failed and caused the fire. The judgment dismissed all of plaintiffs' claims against First Operations based on the trial court's finding that no genuine issues of material fact remain and that First Operations is exonerated from any liability. The court's judgment was based on evidence establishing that modifications, which disabled certain safety components to the unit manufactured by First Operations, were made after its delivery to the barge, such that plaintiffs failed to prove an essential element of its products liability claim; *i.e.*, that a defect attributable to First Operations existed prior to subsequent modifications to the unit. (In particular, the trial court found plaintiffs' evidence failed to create a genuine issue as to causation; *i.e.*, whether the fan coil *could have reached* the temperatures necessary to ignite the fire.)

Plaintiffs also appeal a second judgment, contending the trial court erred in striking the testimony of experts they intended to submit in opposition to the summary judgment, and in granting summary judgment in favor of First Operations, LP, an error they contend was compounded by the ruling disallowing their experts' testimony. After reviewing the record, including the excluded testimonies, the trial court's reasons for judgments, and considering the plaintiffs' arguments on appeal, we find no error below and affirm.

**FACTS AND PROCEDURAL HISTORY**

On June 11, 2005, at approximately 3:00 A.M., a fire erupted in the living quarters of Coastal Drilling's inland barge #21, operating at that time in the waters of St. Mary Parish, Louisiana, resulting in significant property loss (total loss of the drilling rig). Based on an alleged theory that the cause and origin of the fire was the heating-ventilating and air-conditioning (HVAC) system, specifically the alleged malfunction of the "ductless fan

coil unit" manufactured by First Operations, Coastal Drilling and its insurers (sometimes referred to collectively as plaintiffs) filed suit on June 9, 2006, seeking damages from First Operations and Lemoine Refrigeration, the HVAC contractor for the construction of the barge. (Lemoine acquired the unit from a distributor, incorporated it into the HVAC design, and installed it on the barge. The record indicates that Lemoine removed a strap-on thermal sensor on the refrigerant line in the unit, for the unit to operate as a "slave" unit. This action was alleged to have voided the UL certificate on the stand-alone unit. However, the record also reveals that the claims of plaintiffs against Lemoine have been resolved and the only remaining defendant is First Operations.) The allegations against First Operations were defective design, manufacture, and failure to adequately warn.

All evidence presented established that there was no contractual relationship between First Operations and Lemoine, nor were there any communications between First Operation and the distributor *or* Lemoine Refrigeration concerning the use of the unit on the barge. Nonetheless, under Louisiana Products Liability Act, La. R.S. 9:2800.51 *et seq.*, First Operations, as manufacturer, *may* be liable if the plaintiffs can prove that the fire was caused solely by a defect that existed in the ductless fan coil unit at the time it left the control of First Operations. Plaintiffs' petition contains such allegations.

On November 15, 2010, First Operations filed a Motion to Strike/Exclude Certain Witnesses in anticipation that Coastal Drilling would submit the testimony of such witnesses to oppose a summary judgment the defendant intended to file. First Operations' objections to these witnesses are grounded in La. Code. Evid. Art. 702 and **Daubert v. Merrill Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and its contention that the opinions of plaintiffs' anticipated experts, James L. Mazerat, K. Derek Longeway, Jeffrey W. Kuen, and Roger B. Tate, fail to meet the requirements and standards set forth by law.

The following day, on November 16, 2010, First Operations filed the motion for summary judgment essentially asserting that at least two major modifications were made by Lemoine to the unit after it was acquired from First Operations, without any communication between those two regarding the alternative modified use of the unit.

First Operations also contends that the unit was utilized in ways not contemplated by the manufacturer such that the warranty was invalidated. It contends, therefore, as a matter of law, it cannot be held liable in the absence of proof that the unit contained a defect at the time of delivery to Coastal Drilling and that such defect was the sole cause of the fire and resultant property loss.

On January 6, 2011, the motion to strike the testimony of plaintiffs' experts came up for hearing before the trial court, following which the trial court denied the motion and rendered oral reasons. On that same date, the trial court heard the motion for summary judgment and took that matter under advisement. On February 25, 2011, after reconsideration of all of the evidence and argument of counsel, the trial court reversed its earlier ruling, and granted First Operations' Motion to Strike/Exclude expert opinion testimony by plaintiffs' experts: James L. Mazerat, Fire Investigator; Roger B. Tate, Mechanical Engineer; K. Derek Longeway, Mechanical Engineer; and Jeffrey W. Kuen, setting forth written reasons for that judgment on February 25, 2011, and signing the judgment on March 18, 2011.

Also on February 25, 2011, the trial court rendered written reasons for granting summary judgment in favor of First Operations, which judgment was signed on March 15, 2011, dismissing plaintiffs' claims against First Operation with prejudice.

On March 24, 2011, plaintiffs filed a motion for new trial, which the trial court denied on March 25, 2011. On April 13, 2011, plaintiffs filed a motion for devolutive appeal, which motion was granted on April 14, 2011.

#### **PLAINTIFFS/APPELLANTS' ASSIGNMENTS OF ERROR**

The plaintiffs assert five assignments of error, and contend these assignments raise twelve separate issues. The assignments of error, together with the issues the plaintiffs assert are as follows:

- 1) The District Court erred when it excluded a known scientific phenomenon – the pyrolysis/the long term low temperature ignition of wood – as "unreliable theory" when neither party raised, briefed, or argued the issue at the time the motion was originally heard and decided; and

2) .... when First Operations' original motion did not bring **Daubert** into play.

a. First Operations did not articulate an objection to pyrolysis as "junk science" with particularity;

b. The District Court may not decide summary judgment on issues that were not raised or briefed by the parties;

c. First Operations' motion challenged the applicability of scientific principles to the instant facts to determine causation, which is not grounds for a **Daubert** challenge.

d. The debate over "pyrolysis" and the long term low temperature ignition of wood is not about the science; rather the debate concerns the nexus of time and temperature needed for ignition to occur. This is a genuine issue of material fact.

3) The District Court erred in granting summary judgment because plaintiffs' evidence, including plaintiffs' expert testimony, properly considered, creates genuine issues of material fact and the district court was persuaded by and applied the wrong law.

a. The District Court may not grant summary judgment where the facts and expert testimony create genuine issues of material fact.

i. Summary judgment in fire specific products liability cases; circumstantial evidence is permitted to defeat summary judgment.

ii. Coastal Drilling is entitled to ***res ipsa loquitor*** because no plausible alternative explanation for the fire exists.

iii. Coastal Drilling presented evidence in its opposition to First Operations' motion for summary judgment which established genuine issue of material fact which precluded summary judgment.

b. The legal standard relied upon by the district court to grant summary judgment is contrary to Louisiana law. (The District Court relied on Colorado law in granting both the motion to strike and the summary judgment.)

4) The District Court incorrectly held that modifications made by Lemoine Marine entitled First Operations to an "absolute defense."

a. An "absolute defense" to a products liability case does not exist under the "comparative fault" doctrine.

b. Facts argued created a genuine issue of material fact regarding whether or not the modification to the unit was a causative factor or, if it was, whether or not the modification was reasonably anticipated by First Operations.

5) The District Court erred by denying the motion for new trial without allowing Coastal Drilling to be heard on the serious and improperly raised pyrolysis unreliable science issue.

a. Due Process was violated because appellant was not given notice or fair opportunity to be heard on the new pyrolysis issue.

b. Persuasive authorities recognize that wood can and will ignite at temperatures less than 400° Fahrenheit.

### **DISCUSSION AND ANALYSIS**

At the outset, we note that the trial court gave very thorough reasons for both of the judgments complained of on appeal; there are nine pages of written reasons for granting the summary judgment, and sixteen pages of the court's reasons for reconsideration of and granting the motion to strike the testimony of plaintiffs' experts. Our careful review of those reasons reveals that the trial court carefully set forth the correct burden of proof, as well as the applicable law, and then did a clear and thorough application of that law to the facts of this case. We find the record wholly supports the reasons and analysis employed by the trial court; and, in affirming those judgments, we hereby adopt the trial court's reasons by reference. We also find that those reasons dispose of most of the issues raised by the plaintiffs' assignments of error on appeal, and we will not re-hash the applicable law or analysis herein. We will address the remaining portions of plaintiffs' arguments that were not before the trial court and/or were not directly addressed in its reasons for judgments.

#### **Assignments of Error One and Two: Motion to Strike**

These two assignments challenge the trial court's grant of the motion to strike the plaintiffs' experts. According to the plaintiffs' assertions, no one raised the issue of the unreliability of the "pyrolysis/long term low temperature ignition of wood," and First Operations' motion did not bring **Daubert** into play, such that the trial court erred in even considering the issue. There is absolutely no support for this assertion. First Operations' pleading entitled "Motion to Strike and/or Daubert Motion and Request for Hearing" explicitly alleged that the plaintiffs' experts fail to meet the requirements and standards set forth in **Daubert**. Moreover, the trial court expressly noted that his decision to reconsider and grant the motion was based primarily on his consideration of the factors in La. C.C.P. art. 1425, which provides guidelines and a procedure for determining the admissibility of expert opinion testimony. The court also expressly noted, among many other observations supported by the record, that the theory posited by proposed expert,

Mazerat, was not based on sufficiently reliable scientific theory. This significant finding is supported by the opinion testimony of First Operations' expert, Babrauskas, (upon whose publications Mazerat admittedly relied), that the pyrolysis experimentation that the plaintiffs' experts posited concerned a topic that "is not one that thus far has been amenable to having theories constructed." Babrauskas expressed serious doubt as to the plaintiffs' experts' methods of collecting data, their hypothesis, lack of data and statements, and other evidence they used to support ruling out other potential causes of the fire. For these, and all the other reasons given by the trial court, we find the motion to strike was properly granted.

To the extent that the plaintiffs assert that the trial court was without authority to reconsider its prior ruling, the law is well established that a trial court has the authority to review and reconsider an interlocutory ruling at any time prior to final judgment if the new ruling would do substantial justice. See Ryan v. State Farm Mutual Auto. Ins. Co., 2010-0961, p. 4 (La. App. 1 Cir. 12/22/10), 68 So.3d 563, 566, writ denied, 2011-0172 (La. 4/1/11), 60 So.3d 1250.

However, most significantly, we note that in granting the motion for summary judgment, the trial court stated, that *even considering the testimony of the proposed experts*, its legal conclusions would not be affected. Our de novo review leads us to the same conclusions as the trial court; even considering the excluded evidence, our legal conclusions would be the same.

#### **Assignments of Error Three and Four: Summary Judgment**

Again, the trial court gave excellent and thorough reasons for granting summary judgment. The applicable law on summary judgment, as well as the burden of proof and the elements of a cause of action under Louisiana's Products Liability Law, La. R.S. 9:2800.51 et seq., are well stated and carefully, in detail, properly applied to the facts of this case in those written reasons. The reasons adequately espouse the same findings reached after our de novo review, and we see no need to recreate that analysis herein.

We simply and briefly address plaintiffs' sole assertion that is not covered in the trial court's reasons; namely, that the trial court relied on the wrong legal standard (i.e.,

"Colorado law") in granting the judgment. This assertion is meritless. Although the trial court very clearly cited and was guided by cases from other circuits, this was very clearly limited in scope to those courts' treatment of the reliability of the "pyrolysis" theory advanced by the plaintiffs' experts' opinions in this case. However, both before and after citing those cases and relying on (even repeating, as plaintiffs point out) language in those cases for that limited purpose, the trial court in this matter specifically delineated applicable Louisiana law and applied that law, and that law only, to the facts of this case.

And while we agree with the plaintiffs' contention that the mere finding of a modification, alone, is ordinarily not an absolute defense to the appellants' claims, implicit in the trial court's reasons is the finding, also reached on our de novo review, that such modification was not and should have not been reasonable anticipated by First Operations.

#### **Assignment of Error Number Five: Denial of Due Process?**

The plaintiffs argue they were denied due process by the trial court's failing to give notice and a fair opportunity to be heard and denying their motion for new trial without granting a contradictory hearing thereon. However, our review of the record reveals that the plaintiffs' motion for new trial was not based on any *new* evidence that had not been previously introduced that may affect the court's ruling. Indeed, plaintiffs' basis for a new trial is a re-hashing of all the same arguments they advance for the trial court's allegedly improper consideration of issues in granting the motion to strike. As articulated earlier herein, the trial court did not err; there were no procedural irregularities in the trial court's holding a **Daubert** hearing, and those same allegations, without more, did not warrant the plaintiffs being granted a contradictory hearing prior to the trial court's denial of a motion for new trial.

#### **CONCLUSION**

For all the foregoing reasons, as well as the reasons given by the trial court for both judgments at issue, finding no error, we affirm the judgments of the trial court, granting First Operations' Motion to Strike as well as granting First Operations' Motion for



Summary Judgment and dismissing the claims of the plaintiffs against it. All costs of this appeal are assessed to the plaintiffs/appellants.

**AFFIRMED.**