

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1164 & 2012 CW 0464

VICKY ELDER
VERSUS
HILTON HOTELS CORPORATION

Judgment Rendered: February 15, 2013

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 580,743

Honorable Todd Hernandez, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCleendon, J. Concurs and Assigns Reasons.

WHIPPLE, C.J.

This is an appeal from a summary judgment rendered in favor of Roy Hendrick, dismissing plaintiff's and third-party plaintiff's claims against Mr. Hendrick. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2008, at approximately 11:00 a.m., plaintiff Vicky Elder was leaving the Hampton Inn on Constitution Ave. in Baton Rouge after attending a seminar. While walking on the walkway outside the entrance of the Hampton Inn, she stepped on an uneven drop-off into the parking lot, causing her to fall.

On July 24, 2009, plaintiff filed a suit for damages for injuries sustained in the fall, alleging that the drop-off from the walkway into the parking lot was not detectible because the two levels were made of the same material and were the same color. Plaintiff subsequently filed six supplemental and amending petitions, each adding different defendants. Pertinent to this appeal, one of the named defendants was South Baton Rouge Hotel, LLC, d/b/a Hampton Inn and Suites (referred to hereinafter as "Hampton Inn").

On November 24, 2009, Hampton Inn filed a third-party demand against Roy Hendrick, Architect, and LA Pavers, LLC. The third-party demand alleged that Roy Hendrick was the architect for the construction of the Hampton Inn who designed the walkway where plaintiff fell, and LA Pavers, LLC laid the concrete/pavement/brick pavers where plaintiff fell. The third-party demand contended that the dangerous/hazardous condition was caused by the fault and negligence of Roy Hendrick and/or LA Pavers, LLC in improper design, improper laying of the walkway, or a combination of both.

On February 2, 2010, plaintiff filed a third supplemental and amending petition, naming Roy Hendrick and LA Pavers, LLC as additional defendants.

On May 13, 2011, defendant/third-party defendant Roy Hendrick filed a motion for summary judgment. Hendrick averred that the evidence shows: (1) Hendrick's plans were changed during the construction phase of the hotel, without his knowledge or approval, and plaintiff's fall and subsequent injuries were a direct result of that change; and (2) Hendrick did not have a duty, either in law or in contract, to conduct continuous inspections during the construction of the hotel.

Following a hearing, the trial court granted Hendrick's motion for summary judgment and dismissed all of plaintiff's and third-party plaintiff's claims against Hendrick.¹

Hampton Inn then filed the instant appeal, averring the summary judgment rendered in favor of Hendrick should be reversed.² On appeal, Hampton Inn contends: (1) the trial court erred in granting summary judgment where genuine issues of fact remain; (2) the trial court erred in granting summary judgment where Hendrick was not entitled to summary judgment as a matter of law; and (3) the trial court erred in failing to grant third-party plaintiff's motion to amend the pleadings to conform to the evidence.³

¹ LA Pavers, LLC was also dismissed on summary judgment, and the trial court issued a partial summary judgment as to Hampton Inn and HotelSouth Management's actual knowledge of the vice or defect. Those judgments are not the subject of the instant appeal.

² Plaintiff did not appeal the grant of the summary judgment and dismissal of her claims against Hendrick.

³ This appeal was also brought on behalf of HotelSouth Management, LLC. HotelSouth was named as an additional defendant in plaintiff's fourth and supplemental amended petition as the entity charged with the duties of general maintenance and oversight of the hotel premises. (R. 122-123) South Baton Rouge Hotel, d/b/a Hampton Inn, and HotelSouth Management are both owned and operated by Frank Benoit.

DISCUSSION

Application for Supervisory Writs

We first address the denial of the motion to amend the pleadings to conform to the evidence as our ruling, on the application for supervisory writs filed by Hampton Inn and referred to the appeal panel, could affect the scope of our review on appeal. Hampton Inn initially sought review of the trial court's denial of the motion to amend the pleadings by filing a writ application with this Court. On July 2, 2012, this Court issued an interim order referring the writ to the same panel assigned to the yet-to-be lodged appeal. Vicky Elder vs. South Baton Rouge Hotel, L.L.C. d/b/a Hampton Inn and Suites, 2012 CW 0464 (La. App. 1 Cir. 7/2/12).

Hampton Inn argues that the pleadings should be expanded to include the issue of whether or not Hendrick had a duty to inspect the premises (the hotel) for vices or defects and to report his findings to a representative of the owner. Hampton Inn concedes that the third-party demand against Hendrick alleges that Hendrick was liable because of "improper design or improper laying of the walkway." However, Hendrick's motion for summary judgment, filed in response to the third-party demand, raised the issue of whether he had a duty to inspect the premises. Furthermore, in opposition to the motion for summary judgment, Hampton Inn offered an affidavit from an architect expert which addresses Hendrick's duty to inspect. Accordingly, Hampton Inn argues, the pleadings should be expanded to include the issue of Hendrick's duty to inspect.

Louisiana Code of Civil Procedure article 1154, governing amendment of pleadings, provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading. Such amendment of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby, and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The standard of review for the denial of a motion to amend the pleadings is an abuse of discretion. Denton v. Vidrine, 06-0141, (La. App. 1st Cir. 12/28/06), 951 So. 2d 274, 285, writ denied, 07-0172 (La. 5/18/07), 957 So. 2d 152. On review, we find no abuse of discretion by the trial court in denying the formal motion to amend the pleadings, which, on the record before us, was unnecessary and superfluous.

As the record demonstrates, there was no objection to the evidence pertaining to Hendrick's duty to inspect. Rather, both parties submitted evidence as to this issue. Generally, under the provision of LSA-C.C.P. art. 1154, evidence not pertinent to any other issue raised in the pleadings that is admitted at trial without objection from the adverse party serves to enlarge the pleadings. Fitzgerald v. Tucker, 98-2313 (La. 6/29/99), 737 So. 2d 706, 715; Gulfstream Services, Inc. v. Hot Energy Services, Inc., 04-1223 (La. App. 1st Cir. 3/24/05), 907 So. 2d 96, 101, writ denied, 05-1064 (La. 2005), 904 So. 2d 706. Accordingly, a formal amendment of the pleadings was not necessary.

For the above reasons, we deny Hampton Inn's application for writs in 2012 CW 0464.

Appeal of Summary Judgment

We next address Hampton Inn's appeal of the granting of Hendrick's motion for summary judgment and the dismissal of Hampton Inn's third-party-plaintiff claims against Hendrick.

Hampton Inn first contends that summary judgment was inappropriate because issues of fact remain as to what Hendrick agreed to do by way of inspection, particularly inspection of the work by LA Pavers, LLC in installing pavers. We disagree.

Hendrick testified that he worked on projects for Mr. Benoit (the owner/builder of Hampton Inn) in the past and that he did not have a written contract regarding the building of this particular hotel. Hendrick stated that his involvement with the hotel was merely to produce a set of drawings to meet the requirements of the fire marshal, state, city, and franchisee. Hendrick specifically stated that his agreement did not include his being responsible for safety inspections and stated that he did not supervise the work of LA Pavers, LLC, further explaining that if inspections were required, he would have charged significantly more for his work on the project. The day before his deposition, Hendrick took pictures of the area where plaintiff fell. Hendrick stated this was his first inspection of the area since LA Pavers, LLC completed their work, and noted that there was an obvious tripping hazard in the area where plaintiff fell. Importantly, he noted that the pavers in this area extended past the point he had indicated in his drawings for the construction of the hotel.

Rod Trahan, the principal representative of LA Pavers, LLC, testified that after completing the job, he discussed the height differential with HotelSouth Management. In September of 2009, Trahan submitted a quote to fix the area and a contract was signed. However, he then received a call saying the owners did not want to spend the money at this time.

Similarly, Benoit (the owner of the Hampton Inn) acknowledged in his deposition that it was **his** decision, as owner, to continue the pavers beyond the point specified in Hendrick's drawings and that **he did not discuss this decision**

with Hendrick. Benoit stated that it was his understanding that Hendrick was to develop the plans for approval for the fire marshall, city/parish, and the franchisee. Additionally, while he acknowledged that Hendrick was to approve all of the AIA withdrawals needed for Benoit to receive draws from the bank, Benoit did not testify that Hendrick had or agreed to any duty to do a final inspection of the project.

In opposition to the motion for summary judgment, Hampton Inn submitted the affidavit of Neal Johnson, a forensic architect. In pertinent part, Johnson's affidavit states:

The Architect had a contractual and professional obligation to represent the owner in good faith, and to require his consultants to do so as well. In Roy Hendrick's own deposition, he stated that in the presence of the owner, he observed a potential tripping hazard involving the slope of the concrete. Other than a comment to Randy Lissard, Roy Hendrick did nothing. At a minimum, a letter to the owner should have been sent documenting this observation. This failed to meet the standard of care and degree of skill ordinarily exercised by architects currently practicing under similar circumstances.

On page 31, lines 5-21 of his deposition, Roy Hendrick referred to photographs of the area where Ms. Elder claims she fell as depicting a "tripping hazard...that should never have been built . . ." As architect for the project, Roy Hendrick should have noted any potential tripping hazard in his inspection of the premises and forcefully called that to the attention of the owner, preferably Frank Benoit, with whom he had an ongoing relationship and whom he knew to be the man in charge. A written notification to Mr. Benoit should have been made. This failed to meet the standard of care and degree of skill ordinarily exercised by architects currently practicing under similar circumstances.

Moreover, on *de novo* review, we are unable to find that any duty owed by Hendrick to perform a final safety inspection was shown to exist. Although Johnson's affidavit mentioned that Hendrick did not perform inspections, there is no factual support in the record demonstrating he ever agreed to do such, nor is there any showing that there was a duty to perform inspections for defects in the final construction. Specifically, no evidence was introduced to rebut Hendrick's

testimony that his oral agreement with the owner did not require safety or compliance inspections.

Expert opinion admitted on summary judgment is subject to the Daubert standards and as such, it must be both reliable and relevant. Independent Fire Ins. Co. v. Sunbeam, 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226. The factual basis for an expert's opinion determines the reliability of the testimony. Thus, an unsupported opinion can offer no assistance to the fact finder and should not be admitted as expert testimony. Roberston v. Doug Ashy Bldg. Materials, Inc. 2010-1552 (La. App. 1. Cir. 10/4/11) 77 So. 3d 339, 354, citing Miramon v. Bradley, 96-1872 (La. App. 1 Cir. 9/23/97), 701 So. 2d 475, 478.

Moreover, in reviewing Johnson's affidavit, we find that he either misinterpreted or misunderstood the context of Hendrick's statement in his deposition that he observed a "tripping hazard...that should never have been built." Hendrick made this statement in reference to what he observed at the hotel the day before his deposition. Accordingly, Hendrick made this observation after plaintiff's fall. No evidence was introduced to show that Hendrick was aware of this "tripping hazard" prior to plaintiff's fall and failed to notify Benoit. Furthermore, Johnson's affidavit does not state that Hendrick had a duty to do a final inspection after LA Pavers, LLC completed their work.

Thus, on the record before us, we find no support for Hampton Inn's argument that genuine issues of fact remain as to any alleged failure by Hendrick to adequately conduct or respond to inspections.

Furthermore, we find no support for Hampton Inn's assertion that Hendrick was not entitled to summary judgment as a matter of law based on an alleged breach of a duty owed herein. The architect's duty is not to provide perfect plans but to exercise the degree of professional care and skill customarily employed by

other architects in the same general area. M. J. Womack, Inc. v. House of Representatives of State, 509 So.2d 62, 64 (La. App. 1st Cir. 1987). Hampton Inn argues that Hendrick was not entitled to summary judgment as a matter of law because Johnson's affidavit establishes or creates issues of fact as to whether Hendrick exercised the degree of care and skill employed by other architects. On the record before us, we likewise find no merit to these arguments.

As stated above, Johnson's affidavit does state that Hendrick failed to meet the standard of care. However, in explaining why Hendrick failed to meet the standard of care, it appears that Johnson was confused or misinterpreted Hendrick's deposition testimony. Again, Johnson's affidavit criticized Hendrick for doing nothing when he observed a tripping hazard, but a full review of Hendrick's deposition shows that the tripping hazard was observed the day before the deposition, after plaintiff's fall. Accordingly, there is no factual support presented for Johnson's statement that Hendrick failed to meet the standard of care exercised by architects currently practicing under similar circumstances by not notifying the owner of this tripping hazard prior to plaintiff's fall.

Johnson's affidavit further states, "It *appears* that Roy Hendrick signed the Certificate of Completion (as required for occupancy by the State of Louisiana Fire Marshal and the City of Baton Rouge Permit office) before final inspections with the work incomplete. . . This action falls below the standard of care and degree of skill ordinarily exercised by architects currently practicing under similar circumstances." We also find an absence of factual support for this statement. The certificate of completion is not included in the record, and there is no testimony in the record that Hendrick signed the certificate of completion.

CONCLUSION

For the above reasons, Hampton Inn's application for supervisory writs of review in 2012 CW 0464 is hereby denied. Furthermore, the September 21, 2011 judgment of the trial court, granting Roy Hendrick's motion for summary judgment and dismissing third-party plaintiff's claims against Hendrick, is hereby affirmed. Costs of this appeal are assessed to South Baton Rouge Hotel, d/b/a Hampton Inn and Suites, and HotelSouth Management.

WRIT DENIED; AFFIRMED.

STATE OF LOUISIANA

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VERSUS

HILTON HOTELS CORPORATION

McCLENDON, J., concurs and assigns reasons.

I disagree with the majority's conclusion that Neal Johnson's affidavit failed to establish a duty on the part of Roy Hendrick to conduct inspections during the construction of the hotel. Nevertheless, I concur with the result reached by the majority.

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of Louisiana Civil Code article 2315. For liability to attach, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard of care; (2) the defendant failed to conform his conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages. **Bridgefield Cas. Ins. Co. v. J.E.S., Inc.**, 09-0725, 09-0726 (La.App. 1 Cir. 10/23/09), 29 So.3d 570, 573. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. **Bellanger v. Webre**, 10-0720 (La.App. 1 Cir. 5/6/11), 65 So. 3d 201, 207, writ denied, 11-1171 (La. 9/16/11), 69 So.3d 1149.

In this matter, even if Mr. Hendrick had inspected the property, his actions were not the cause-in-fact of Ms. Elder's injuries. Frank Benoit admitted in his deposition that it was his decision, as owner, to continue the paving



beyond the point depicted in the original design submitted by Mr. Hendrick and that he did not discuss his decision with Mr. Hendrick. Furthermore, Rod Trahan, the principal of LA Pavers, L.L.C., testified by deposition that in July of 2008, after the paving in question was completed and before Ms. Elder's fall, he met with Randy Lissard, the representative of the owner, to discuss the height differential and ways to fix the transition. Mr. Trahan testified that he gave Mr. Lissard his recommendations on how to remedy the problems at that time. In his affidavit, Mr. Trahan also stated that the owner was made aware of any concerns raised by the height differential long before Ms. Elder's fall. Mr. Trahan further attested:

11. He personally went to the Hampton Inn & Suites several months prior to the accident on October 28, 2008 to provide a proposal to tear out the pavers and address the height differential plaintiff alleges as a defect in this case;

12. He, on behalf of LA Pavers, proposed that LA Pavers be allowed to address this height differential during July of 2008;

13. This work proposal by LA Pavers during July of 2008 was rejected;

14. He was advised during July of 2008 by Randy Lissard that the owner did not authorize LA Pavers to do this work[.]

Clearly, the depositions and affidavits submitted show that the owner was aware of the problem prior to Ms. Elder's fall and chose not to correct it. Thus, the third-party plaintiffs, South Baton Rouge Hotel and Hotel South Management, failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial regarding the cause of Ms. Elder's injury. Therefore, I respectfully concur.