STATE OF MICHIGAN

COURT OF APPEALS

BENJAMIN TAPPEN,

Plaintiff-Appellee,

v

CARLTON 54TH L.L.C., d/b/a HAMPTON INN,

Defendant-Appellant.

UNPUBLISHED
July 22, 2010

No. 290919
Kent Circuit Court
LC No. 08-002168-NO

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals as on leave granted[1] the circuit court's denial of its motion for summary disposition with respect to plaintiff's claim of negligent building design. We reverse and remand for entry of judgment in favor of defendant.

On May 13, 2006, plaintiff began a stay at defendant's Hampton Inn in Wyoming, Michigan, while in town for a family wedding. On May 14, 2006, plaintiff was walking with two other family members toward the hotel's first floor elevators. The flooring in the area immediately in front of the elevator was constructed of tile, and the elevators were located adjacent to the swimming pool. When plaintiff approached the elevators, he stepped onto wet tile, which caused him to slip and fall. He sustained back and wrist injuries.

On April 28, 2008, plaintiff filed suit against defendant seeking damages for the injuries he had sustained. Plaintiff alleged three counts: (1) premises liability (Count I), (2) negligent building design (Count II), and (3) nuisance (Count III). Defendant moved for summary disposition of the premises liability claim on the basis of the open and obvious danger doctrine. Defendant also moved for summary disposition of the negligent building design claim, arguing that expert testimony was required for such a claim but that plaintiff had provided none. Defendant also sought summary disposition of the nuisance claim.

[1] In lieu of granting leave to appeal, our Supreme Court has remanded this case to this Court for consideration as on leave granted. *Tappen v Carlton 54th, LLC*, 485 Mich 994 (2009).

The circuit court heard oral argument on December 5, 2008, and afterward granted summary disposition in favor of defendant on the nuisance claim. The court denied summary disposition with respect to the premises liability claim, ruling that although the condition was open and obvious, the circumstances presented "a uniquely high likelihood of harm." The court also denied summary disposition of the negligent building design claim "because of the proximity of the pool to the elevator and the consistency of the floor."

Defendant sought leave to appeal the circuit court's order. In its application for leave, defendant argued that the circuit court had erred by denying summary disposition of the premises liability claim because there had been no special aspects making the condition unreasonably dangerous. Defendant also argued that the court should have granted summary disposition of the negligent building design claim on the basis of plaintiff's lack of expert testimony.[2]

Meanwhile, defendant filed a second motion for summary disposition concerning the premises liability and negligent building design claims. In its second motion, defendant argued that the premises liability claim should be dismissed because there was no evidence that its employees had created the unsafe condition or that it had actual or constructive notice of the wet floor prior to plaintiff's fall. Defendant also argued that the negligent building design claim should be dismissed because it did not design or construct the building, nor did it act as general contractor for the building's construction. Defendant presented an affidavit from Karl Carlton, its managing member, to support these contentions.

On February 24, 2009, the circuit court entered an order partially granting and partially denying defendant's second motion for summary disposition. With respect to the negligence claim, the circuit court agreed with defendant's new arguments and granted summary disposition in defendant's favor. However, the court denied summary disposition of the negligent building design claim, simply stating that "[t]his was a slip and fall on wet tile. Part of the allegation here . . . is lack of floor mats or anything to absorb the moisture in that area outside the elevator." Defendant's counsel noted that a photograph showed a floor mat, but the court said, "Well, I'm not basing my decision on whether or not that photograph shows a mat."

Defendant filed a second application for leave to appeal, challenging the denial of summary disposition with respect to plaintiff's negligent building design claim. Defendant again argued that plaintiff had provided no expert testimony to support the claim and asserted that it lacked any involvement in the design or construction of the hotel.

This Court initially denied defendant's second application for leave to appeal. *Tappen v Carlton 54th, LLC*, unpublished order of the Court of Appeals, issued May 18, 2009 (Docket No. 290919). However, in lieu of granting leave to appeal, our Supreme Court remanded the matter

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[2] This Court denied defendant's first application for leave to appeal. *Tappen v Carlton 54th, LLC*, unpublished order of the Court of Appeals, issued May 18, 2009 (Docket No. 290050). Defendant did not appeal this Court's ruling in Docket No. 290050 to the Michigan Supreme Court.

to this Court for consideration as on leave granted. *Tappen v Carlton 54th, LLC*, 485 Mich 994 (2009).

We review de novo the circuit court's grant or denial of a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Whether a claim must be supported by expert testimony is a question of law. We review de novo all questions of law. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

Defendant argues that because plaintiff presented no expert testimony to support his negligent building design claim in this case, the circuit court erred by declining to dismiss the claim. We agree.

Plaintiff alleged that he sustained his injuries as the result of a negligent building design. Whether a building was negligently designed is generally beyond the knowledge and understanding of lay jurors. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 436; 542 NW2d 612 (1995). "In the absence of expert testimony providing standards for evaluating the relevant risks and advantages of [a particular] design, a jury would be denied an objective framework by which to evaluate [the] plaintiff's claim, thus precluding any genuine determination whether the design was unreasonable." *Id*. at 434. Therefore, a plaintiff's negligent building design claim must be dismissed if not supported by expert testimony. *Id*. at 436.

In the present case, plaintiff alleged that the hotel was negligently designed and that the resulting design defects caused his injuries. He contended that the pool was negligently positioned near a tile floor that was likely to become slippery from accumulated water, and that the pool was negligently positioned too close to the elevator area, an area that people were likely to traverse on their way to and from the elevators. Other than this, plaintiff presented no expert testimony to support his claim of negligent building design. It is well settled that a jury must not be permitted to speculate or guess whether a defendant has been negligent; nor may a jury be permitted to speculate concerning the causation of a plaintiff's injuries. See, e.g., *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994); *Taylor v Kent Radiology*, 286 Mich App 490, 517-518; 780 NW2d 900 (2009); *Fessenden v Roadway Express*, 46 Mich App 276, 281; 208 NW2d 78 (1973). Because plaintiff failed to present expert testimony to support his claim that defendant's hotel was negligently designed, the circuit court erred by declining to grant summary disposition in favor of defendant with respect to this claim. *Lawrenchuk*, 214 Mich App at 436.

In light of our conclusion that plaintiff was required to offer expert testimony in support of his negligent building design claim, we need not address the remaining arguments raised by defendant on appeal.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering