NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017CA0285

DALE CORDELL

VERSUS

TANAKA, LLC, LORNA MADISON A/K/A LORNA HUMPHREY, ABC INSURANCE COMPANY, XYZ INSURANCE COMPANY, MARTIN AND MALKEMUS COMPANY, AND PLAZA ARCHITECTURE PLANNING

Judgment Rendered: JAN 0 4 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2014-15131

The Honorable August J. Hand, Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McClendon, J. concurs for reasons assigned.
Welch J. dissents with reasons assigned

THERIOT, J.

Ms. Dale Cordell ("Appellant") appeals the judgment of the Twenty-Second Judicial District Court granting Tanaka, LLC's and Lorna Madison's motion for summary judgment and dismissing her claims against Tanaka, LLC and Ms. Madison. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On November 18, 2013, around 2:30 p.m., Appellant fell outside of a building located at 126 Terra Bella Boulevard in Covington, Louisiana ("the Tanaka building"). The Tanaka building is owned by Lorna Madison,[1] who also owns Tanaka, LLC. Further, the Tanaka building and the brick area in front of it were constructed in 2012 by Martin & Malkemus, LLC. According to Ms. Madison, the brick area was constructed to permit the use of tables and chairs in front of the building.

When Appellant's fall occurred, Appellant was a sales representative for ADT Security Services. On the afternoon of the incident, Appellant had an appointment with a business near the Tanaka building. Following that appointment, Appellant attempted to cold call businesses in the neighborhood.

While in the area, Appellant originally passed the Tanaka building and visited a business on its left. Appellant subsequently walked from that business to the Tanaka building. Specifically, Appellant stated that she walked near the front of both buildings, but did not use the sidewalk to reach the Tanaka building. Appellant alleged that she never went to the entrance or exit of the Tanaka building, but instead walked through the grass to look through one of the Tanaka building's windows. According to Appellant,

[1] Lorna Madison is also known as Lorna Humphrey. For the sake of consistency, she will be referred to as "Ms. Madison" for the remainder of this opinion.

there was grass, but no walkway between the building on the left and the Tanaka building.

After looking through the window, Appellant walked towards the street. At this point, before she could reach the street, Appellant tripped and fell on a short drop-off ledge. Appellant stated that she fell to her knees, then onto her hands, and then hit her head on the cobblestone in front of the Tanaka building. Appellant alleged that she did not see the ledge that caused her to fall, and further alleged that the ground on which she was walking was dry and that she was wearing flat, slip-on shoes when the fall occurred. A photograph of the ledge itself indicates that there are darker bricks above the ledge and lighter bricks below the ledge. As a result of this fall, Appellant alleged that she suffered severe injuries to her face, shoulder, arm, tibia, and spine.

On November 17, 2014, Appellant filed suit against Tanaka, LLC, Ms. Madison, ABC Insurance Company, XYZ Insurance Company,[2] Martin & Malkemus, LLC and Piazza Architecture Planning, A Professional Architectural Association.[3] Appellant claimed that the ledge on which she had fallen was unreasonable, unforeseen, exceedingly dangerous, and posed a great risk of harm. Appellant further alleged that the named defendants had actual or constructive knowledge of the dangerous condition caused by the ledge, that defendants had a duty to warn or take precautionary measures in regard to the drop-off, and that defendants had failed to do so. Appellant subsequently dismissed her claims against Martin & Malkemus, LLC and Piazza Architecture Planning, A Professional Architectural Association.

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[2] ABC Insurance Company and XYZ Insurance Company are the liability insurers of Tanaka, LLC and Ms. Madison.

[3] Both Martin & Malkemus, LLC and Piazza Architecture Planning, A Professional Architectural Association were named incorrectly in the original petition. The names in this report reflect the correct names of these parties.

In response to Appellant's Petition, Tanaka, LLC and Ms. Madison ("Appellees") filed an answer, maintaining that Appellant was at fault for her own injuries. On April 18, 2016, Appellees filed a motion for summary judgment on the grounds that there were no genuine issues of material fact. In their memorandum in support of this motion, Appellees argued that Appellant could not prove the essential elements of her claim under Louisiana Civil Code Articles 2317 and 2322. Specifically, Appellees argued that Appellant could not carry her burden of proving (1) that a defect which created an unreasonable risk of harm existed and (2) that the owner knew or, in the exercise of reasonable care, should have known of any ruin or defect, should it be determined that one did exist. Appellees further alleged that at the time of Appellant's fall, Appellees had no knowledge of any deficiencies, code violations, or defects in the Tanaka building or the brick area in front of the building.

On September 2, 2016, the trial court granted the motion for summary judgment filed by Tanaka, LLC and Ms. Madison. In its written reasons for judgment, the trial court found that there was a change of color between the brick terrace, which was red, and the lower elevation, which was yellow. Accordingly, a change of color existed which should have called a walker's attention to the difference in elevation. Further, the trial court noted that the area in which the plaintiff fell was not the ingress (entrance) or egress (exit) of the building, and that the actual ingress and egress used both the change in brick color and a change in elevation to remove the one-step ledge. The trial court also reasoned that the walkway at issue did not present a hazard or an unreasonable risk of harm, because it showed an open and obvious condition sufficient to alert a walker that there was a one-step change in elevation on the brick terrace in front of the building. The trial court

concluded that Appellant would not be able to carry her burden of proving that there was a defect in the walkway that created an unreasonable risk of harm, nor would Appellant be able to prove that the business owner knew or should have known of a condition of ruin or defect in the walkway. Accordingly, the trial court dismissed Appellant's claims with prejudice and granted Appellees' motion for summary judgment. This appeal followed.

ASSIGNMENTS OF ERROR

Appellant assigns the following as error:

(1) The trial court erred when it disregarded the evidence presented by both Plaintiff's architect and Defendants' architect that there was a deviation in the Code approved plans. As this is a jury trial, there is more than sufficient evidence to allow a reasonable juror to conclude that the expert's opinion on a material fact is more likely than not true and the Court should deny the motion and let the issue be decided by a jury at trial.

(2) The trial court failed to conduct a proper *Daubert* analysis before summarily rejecting both architects' opinions that the "as built" structure was not Code compliant.

(3) The trial court's findings were "clearly wrong" in its understandings of the operative facts of the case as to the movement of Mrs. Cordell. This is especially true where the operative facts are not in dispute. Thus, the trial court reached a factual conclusion and a legal conclusion that was unsupported by any facts.

STANDARD OF REVIEW

A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; *i.e.*, whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Schultz v. Guoth*, 2010-0343 (La. 1/19/11); 57 So.3d 1002, 1005-06.

DISCUSSION

Assignment of Error #1 and #2

In two related assignments of error, Appellant argues that the trial court improperly disregarded evidence presented by both parties' architects that established that there was a deviation between the Code approved plans for the Tanaka building and the building itself. According to Appellant, the trial court should have conducted a *Daubert-Foret* analysis before deciding to exclude the experts' evidence. Appellant further claims that her expert witness, Ladd P. Ehlinger ("Mr. Ehlinger"), found numerous Code violations for the brick area in front of the building and found that the one-step ledge was a material deviation from the approved plans.

At the summary judgment stage, the trial court should consider the *Daubert-Foret* standards in deciding whether to admit expert opinion evidence. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 1999-2181 (La. 2/29/00); 755 So.2d 226, 235-36. The *Daubert-Foret* guidelines require that expert opinions be grounded in approved methods and procedures of science, rather than subjective belief or unsupported speculation. *Franklin v. Franklin*, 2005-1814 (La. App. 1 Cir. 12/22/05); 928 So.2d 90, 92, *writ denied*, 2006-0206 (La. 2/17/06); 924 So.2d 1021. The trial court must also ensure that the scientific evidence admitted is not only relevant, but reliable. *Id.* If a party submits expert opinion evidence in opposition to a motion for summary judgment that would be admissible under *Daubert-Foret* and the other applicable evidentiary rules, and is sufficient to allow a reasonable juror to conclude that the expert's opinion on a material fact more likely than not is true, the trial judge should deny the motion and let the issue be decided at trial. *Independent Fire Ins. Co.*, 755 So.2d at 236.

Appellant first alleges that both Mr. Ehlinger and former defendant Michael A. Piazza ("Mr. Piazza") found there to be a deviation between the original plans for the Tanaka building and the construction that was executed. Mr. Piazza is the architect that created the original designs for the Tanaka building. Mr. Piazza attested that the brick ledge was not included in his design for the building and that he did not learn of the modification until after the incident at issue occurred. Although there may have been a difference between Mr. Piazza's designs for the Tanaka building and the eventual building itself, there is nothing in the record to suggest that the deviation constitutes a code violation.

Additionally, although Appellant argues that the trial court did not consider their expert's opinion, this is incorrect. On the contrary, the trial court found an important discrepancy between Mr. Ehlinger's expert report and the actual condition of the property in question.

In his expert report, Mr. Ehlinger states the following:

> Warning signs, a change of texture and **a change of color are some of the visual devices that are used to call attention to a walker of a stumbling or tripping hazard.** Handrails also announce a one to three step stair condition. These devices either interrupt the cone of vision or provide sufficient visual attraction to attract the walker's visual attention. **None of these visual devices were present at the brick sidewalk running parallel to the street.** More likely than not, Mrs. Dale didn't see the one step condition presented on the sidewalk.

(Emphasis added).

Mr. Ehlinger's claim that there is no change of color to demonstrate the change in elevation is incorrect. The top of the ledge is made up of red bricks. The bottom of the ledge is made up of yellow bricks. Accordingly, there is clearly a change of color which demonstrates the change in elevation. The trial court specifically addressed Mr. Ehlinger's error in its

written reasons. Accordingly, the trial court did not disregard Mr. Ehlinger's opinion; it simply found his opinion to be factually incorrect.

Mr. Ehlinger also states in his expert report his estimation that the building was built in 2012 or 2013. He then listed applicable codes that were in effect during that time period. However, Mr. Ehlinger did not state which codes were violated, nor did he ever use the phrase "code violation." Further, the majority of codes referenced by Mr. Ehlinger are not contained within the record. The only code in the record is ASTM (American Society for Testing and Materials) F 1637 - 10 "Standard Practice for Safe Walking Surfaces."[4]

In regard to ASTM F 1637 - 10 "Standards for Walking Surfaces," Mr. Ehlinger states that this code has limitations on changes in level of the walking surface that apply to the ledge at issue. The articles within this particular code apply to walkways. The ledge in this case was not part of a walkway. The actual walkway leading up to the door did have a ramp to make up for the change in elevation. Accordingly, this code article does not apply to the ledge at issue.

The expert report in this case is similar to the expert report in *Williams v. Liberty Mutual Fire Ins. Co.*, 2016-0996 (La. App. 1 Cir. 3/13/17); 217 So.3d 421, *writ denied*, 2017-0624 (La. 6/5/17), 219 So.3d 338. In the expert report in *Williams*, the expert referred to many different safety codes, but never stated how the condition at issue in that case (a curb) violated any of the codes. *Id.* at 426. Further, the expert report in *Williams*

[4] Aside from ASTM F 1637 - 10, Mr. Ehlinger's report also references the following: (1) the NFPA 101 Life Safety Code (LSC), 2009 and 2012 Editions, (2) the ANSI A117.1 Handicapped Code 1984 Edition, (3) the IBC 2009 or 2012 Edition, and (4) the 1991 ADAAG. None of these codes are in the record. We note that two of the codes elaborated upon by Mr. Ehlinger in his expert report are inapplicable. Specifically, Mr. Ehlinger states that the NFPA 101 Life Safety Code requires that there be handrails and visual markings/contrasting color that acknowledge a change in level in the required means of egress. Mr. Ehlinger also refers to the International Building Code (IBC) which requires handrails for a one step condition in the required means of egress. The change in level in this case is not a part of the required means of egress.

provided building codes for stairs, handrails, and pooling of water, but provided no information pertaining to curbs. *Id.* In *Williams*, this court found the expert report to be conclusory and stated that "[a]n expert's opinion that is conclusory, largely irrelevant to the alleged defect he has been asked to consider, and which is based on little or no factual support does not create a genuine issue of material fact." *Id.* This finding applies here as well. Mr. Ehlinger's findings are conclusory and do not create a genuine issue of material fact.

Accordingly, these assignments of error are without merit.

Assignment of Error #3

In her third assignment of error, Appellant argues that the trial court misunderstood the facts of the case as to Appellant's movement. Specifically, Appellant argues that she approached the Tanaka building from the side of the building, not from the street or the sidewalk. According to Appellant, the ledge in question was only visible from the street or sidewalk, and not visible from the side. Appellant argues that, in regard to the angle from which she approached, there was no open and obvious condition sufficient to alert Appellant of the change in elevation.

Louisiana Civil Code article 2322 requires a plaintiff to prove the following elements to hold the owner of a building liable for damages caused by the building's ruin or a defective component:

> (1) ownership of the building;
> (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect;
> (3) the damage could have been prevented by the exercise of reasonable care;
> (4) the defendant failed to exercise such reasonable care; and
> (5) causation.

Broussard v. State ex. rel. Office of State Bldgs., 2012-1238 (La. 4/5/13); 113 So.3d 175, 182-83. The question of whether a defect presents an

unreasonable risk of harm is a disputed issue of mixed fact and law or policy that is a question for the jury or trier of the facts. *Id.* at 183. To aid the trier-of-fact in making this unscientific, factual determination, Louisiana courts have adopted a risk-utility balancing test, wherein the factfinder must balance the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair. *Id.* at 184. Louisiana jurisprudence has synthesized this risk-utility balancing test to a consideration of four pertinent factors: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. *Id.*

The second prong of this risk-utility inquiry focuses on whether the dangerous or defective condition is obvious and apparent. Under Louisiana law, a defendant generally does not have a duty to protect against an open and obvious hazard. *Id.* In order for a hazard to be considered open and obvious, the Supreme Court of Louisiana has consistently stated the hazard should be one that is open and obvious to all, *i.e.*, everyone who may potentially encounter it. *Id.* In the absence of any material issues of fact, a court may determine by summary judgment that a defect is open and obvious and, therefore, does not present an unreasonable risk of harm. *Temple v. Morgan*, 2015-1159 (La. App. 1 Cir. 6/13/16); 196 So.3d 71, 78, *writ denied*, 2016-1255 (La. 10/28/16); 208 So.3d 889.

According to Louisiana jurisprudence, alleged defects found to be open and obvious include a curb in a restaurant's parking lot, a shopping cart that a patron tripped over, an unpaved grassy parking area where a car accident occurred, and a concrete barrier on a vehicle ramp. *Williams*, 217

So.3d at 425. See also *Rodriguez v. Dolgencorp, LLC,* 2014-1725 (La. 11/14/14), 152 So.3d 871, 872 (*per curiam*); *Allen v. Lockwood,* 2014-1724 (La. 2/13/15), 156 So.3d 650, 653 (*per curiam*); *Ludlow v. Crescent City Connection Marine Division,* 2015-1808 (La. 11/16/15), 184 So.3d 21.

In the aforementioned case *Williams v. Liberty Mutual Fire Ins. Co.*, a restaurant patron was exiting a restaurant when she fell from the curb to the parking lot below. *Williams*, 217 So.3d at 423. The patron sustained several injuries in the fall and sued the restaurant and its liability insurance carrier for damages. *Id.* The defendants in that case filed a motion for summary judgment, claiming that the curb, sidewalk, and parking lot did not pose an unreasonably dangerous condition and that any condition of the area was open and obvious. *Id.* The trial court granted their motion for summary judgment, finding that the curb was "just a basic curb." *Id.* at 423, 426. This court affirmed, finding that the plaintiffs in that case had not produced factual support sufficient to establish that they would be able to satisfy their evidentiary burden at trial. *Id.* at 427. This court specifically stated that "[a]n accident, alone, does not support the imposition of liability, particularly considering the normal hazards pedestrians face while traversing sidewalks and parking lots in this state." *Id.*

This court's reasoning in *Williams* applies here as well. The ledge in the present case is similar to the curb in *Williams* and was a normal hazard. The ledge at issue was made more noticeable by the color deviation between the upper-part of the ledge and the lower-part of the ledge. Additionally, Appellant did not use the sidewalk or the walkway to approach the front door of the Tanaka building. If Appellant had come from the front of the building or used the sidewalk to approach, she would have seen the ledge. Further, Appellant had previously passed by the Tanaka building while

walking on the sidewalk. Considering these facts, the change in elevation at issue in this case constitutes an open and obvious condition. As such, Appellees had no duty to protect against this condition.

This assignment of error is without merit.

DECREE

The judgment of the Twenty-Second Judicial Court granting the motion for summary judgment filed by Tanaka, LLC and Lorna Madison is affirmed. All costs of this appeal are assessed to Appellant, Dale Cordell.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0285

DALE CORDELL

VERSUS

TANAKA, LLC, LORNA MADISON A/K/A LORNA HUMPHREY, ABC INSURANCE COMPANY, XYZ INSURANCE COMPANY, MARTIN AND MALKEMUS COMPANY, AND PLAZA ARCHITECTURE PLANNING

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McCLENDON, J., concurring.

Finding the alleged defect is open and obvious, I concur with the result reached.

DALE CORDELL

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NO. 2017 CA 0285

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WELCH, J., dissents.

FW

I respectfully disagree with the majority opinion in this matter. The trial court (in rendering summary judgment) and the majority (in affirming that summary judgment) have weighed evidence and made credibility determinations, which is inappropriate on summary judgment. Specifically, the majority notes that "the trial court found an important discrepancy between Mr. Ehlinger's expert report and the actual condition of the property in question," that "Mr. Ehlinger's claim that there [was] no change in color to demonstrate the change in elevation [was] incorrect," and that "the trial court did not disregard Mr. Ehlinger's opinion[,] it simply found his opinion to be factually incorrect." It is well-settled that on summary judgment, in determining whether there is a genuine issue of material fact, courts cannot make credibility determinations, evaluate testimony, or weigh evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So2d 730, 751. Since the credibility of a witness is a question of fact and a trial court may not make credibility determinations on a motion for summary judgment, in determining a motion for summary judgment, a trial court must assume that *all affiants are credible.* **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533 (La.2/20/04), 866 So.2d 228, 234.

When Mr. Ehlinger's expert report is considered *in its entirety*, Ms. Cordell met her burden of establishing a genuine issue of material fact as to whether the one step condition in the brick sidewalk presented a hazard and an unreasonable

risk of harm and thus, whether it was the cause of Ms. Cordell's fall and injury. Notably, Mr. Ehlinger's affidavit (to which his expert report was attached) satisfies the requirements of La.C.C.P. art. 967 and that affidavit was not challenged under the provisions of La.C.C.P. art. 1425; therefore, the trial court erred in not considering Mr. Ehlinger's affidavit. See **Adolph v. Lighthouse Property Insurance Corporation**, 2016-1275 (La. App. 1st Cir. 9/8/17), 227 So.2d 316.

In Mr. Ehlinger's expert report, he observed that "[a]t the time of this accident, there were no warning signs, no contrasting paint color on the nosing or anywhere, no cones, no caution tape, etc., warning pedestrians of the one step condition interrupting the walking surface of the sidewalk" and that "[t]here were no handrails on either side of this step condition." Based on this observation, Mr. Ehlinger opined that "[t]he one step condition in the brick sidewalk without handrails, and the lack of nosing contrasting color, and or a nosing contrasting texture announcing the one step condition of the walkway in the required means of egress, presented a hazard and an unreasonable risk of harm."

In disregarding the expert opinion of Mr. Ehlinger, the trial court and the majority rely on another observation set forth by Mr. Ehlinger, which states "[w]arning signs, a change of texture and a change of texture are some of the visual devices that are used to call attention to a walker of a stumbling or tripping hazard" and that none of those visual devices were present at the brick sidewalk running parallel to the street." The trial court and the majority then determined that Mr. Ehlinger's opinion was "factually incorrect" because there was a change in color, *i.e.*, the top of the ledge was made of red bricks and the bottom of the ledge was made up of yellow bricks. However, when Mr. Ehlinger's report is viewed in its entirety, it is clear that his observations and opinion focused on the lack of handrails and the lack of ***nosing*** of a contrasting color or texture; it was not based on the lack of contrasting color between the bottom and the top of the ledge.

Thus, regardless of the change in color of the bricks from the top of the ledge to the bottom of the ledge, the ledge lacked nosing of a contrasting color or texture. Indeed, based on my review of the photographs that were part of the summary judgment evidence, the ledge at issue does not have any nosing. Therefore, I think the trial court and the majority have inappropriately found Mr. Ehlinger's opinion to be factually incorrect.

Furthermore, even if Mr. Ehlinger based his opinion that the one step condition presented a hazard and an unreasonable risk of harm on his observation that there was no change in color to demonstrate the change in elevation when there may have been a change in color of the bricks, this factor only affects the weight to be afforded his conclusion and may serve as a basis for attack by the defendants on cross examination at trial, but it does not entitle the trial court or this court to disregard his affidavit on summary judgment. As such, I would reverse the judgment of the trial court.

Thus, I respectfully dissent.