No. 90363-8
SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
No. 69839-7

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JEANNE PASCAL and DALLAS SWANK, husband and wife,

Plaintiffs/Appellants

vs.

WH PARK PLACE MEZZ, LLC; WH PARK PLACE, LLC

Defendants/Respondents

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# RESPONDENTS' ANSWER TO APPELLANTS' PETITION FOR REVIEW

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## I. INTRODUCTION

This is an unpublished slip-and-fall case, not a matter meriting Supreme Court review. Appellants fail to show any considerations for acceptance of review under RAP 13.4(b). They petition this Court to review, again, whether they presented the trial court with any evidence against Respondent Park Place. At a summary judgment hearing the trial court dismissed their claims (and denied reconsideration) and the Court of Appeals affirmed (and denied reconsideration). This Court should similarly deny Appellants' petition for review.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Appellants proffered no evidence of elevator misleveling at the time of the accident.

2. Alleged evidence of elevator misleveling thirteen days after the accident was irrelevant to whether elevator misleveled at the time of the accident.

3. The Court of Appeals properly cited another case (as authority for dismissal of this case because of lack of evidence of negligence).

4. There was no evidence that Park Place breached its common carrier duty; Park Place met its duty by contracting with others.

5. Lack of evidence of negligence is not construed against Park Place.

## III. STATEMENT OF THE CASE

Appellant Jeanne Pascal had worked in a Seattle office building for 26 years without incident. But shortly before she retired, right after Respondent Park Place purchased the building, she claims she fell in a parking garage elevator and that the elevator's floor was slightly "misleveled" (not the same level as) the building floor.

Park Place, like its predecessor building owner, contracted with elevator maintenance company Fujitec to perform monthly preventative maintenance as well as service callbacks for the elevators. Fujitec performed all of its monthly maintenance work on the parking garage elevator, including on January 13, 2010. Pascal fell in the parking garage elevator only eight days later. There were no service calls or complaints of elevator misleveling between January 13, 2010 and Pascal's fall.

Pascal and her husband Dallas Swank sued Park Place, alleging that the elevator must have misleveled and caused Pascal to fall. The trial court granted Park Place's motion for summary judgment, holding that there was **no evidence** of elevator defect and that Park Place had met its common carrier duty. The trial court denied reconsideration.

Pascal and Swank appealed to Division One, which affirmed in an unpublished decision, holding that:

> [T]here is **no evidence** that Park Place breached the duty of care or that it knew or should have known of a dangerous condition on January 21, 2010.

Memorandum Opinion dated 3/10/14, Appendix A to Petition for Review, at pages 1-2 (emphasis added). Division One denied reconsideration.

Pascal and Swank now seek discretionary review from this Court.

## IV. ARGUMENT

A. Appellants fail to show any considerations for acceptance of review under RAP 13.4(b).

Rule 13.4(b) requires a petitioner to meet one of four considerations for review to be accepted. Appellants fail to even argue, let alone demonstrate, any of these considerations.

1. There is no conflict between the Court of Appeals decision and a prior decision of the Supreme Court.

Appellants argue that requiring them to proffer evidence of negligence (in order to survive summary judgment) "conflicts" with the common carrier duty of care, Petition for Review at 17. But Appellants fail to cite any specific Supreme Court decision to demonstrate this supposed conflict.

2. There is no conflict between the Court of Appeals decision and another decision of the Court of Appeals.

Similarly, Appellants fail to cite any specific Court of Appeals decision to support their claim of "conflict."

3. There is no significant question of law under the Constitution of the State or United States.

Appellants state that the decision here "presents a significant question of law," Petition for Review at 17. But Appellants fail to cite any Constitutional provision. Their petition does not even include the word "Constitution."

4. There is no issue of substantial public interest.

Appellants' petition does not even include the words "public interest." The Court of Appeals declined to publish its opinion, implying that it saw no public interest in its ruling.

B. Appellants' Assignments of Error concern the (absence) of material fact disputes, rather than a consideration meriting Supreme Court review.

Should this Court accept review, the parties will brief their substantive arguments in detail. But in summary:

1. ***Appellants proffered no evidence of elevator misleveling at the time of the accident.*** There was zero evidence that the elevator in which

Pascal fell misleveled, to any degree, on January 21, 2010 (the day of her fall). Pascal herself testified that she did not observe any misleveling. Moreover, Appellants' expert never examined the elevator and did *not* opine that there was any defect in the elevator at the time of Pascal's fall. Appellants' new argument that Pascal's trip-and-fall constitutes "sense of touch observation of misleveling" was not argued below, and essentially argues *res ipsa loquitor*.

2. ***Alleged evidence of elevator misleveling thirteen days <u>after</u> the accident was irrelevant to whether elevator misleveled at the time of the accident.*** Pascal's witness Lither alleged a misleveling of 'about ½" to ¾"'thirteen days *after* Pascal's fall, which of course could not have proximately caused Pascal's fall.

3. ***The Court of Appeals properly cited another case (as authority for dismissal of this case because of lack of evidence of negligence).*** The Court of Appeals here noted that elevator misleveling may occur even in the absence of negligence, citing *Adams v. Western Host, Inc.*, 55 Wn.App. 601, 779 P.2d 281 (1989) ("[e]levators are mechanical devices of some complexity. Materials can wear out or break without negligence being involved"). Thus, "[h]ere, as in *Adams*, Pascal's expert did not state an opinion as to why the elevator may have misleveled or how it is

attributable to any negligence by Park Place." (Court of Appeals Memorandum Decision, at page 12.) This ordinary citation to a precedent case (granting summary judgment because of lack of evidence of negligence of elevator owner) hardly constitutes adoption of the other case's facts. It merely is authority for the unexciting proposition that lack of evidence merits summary judgment dismissal.

4. ***There was no evidence that Park Place breached its common carrier duty; Park Place met its duty by contracting with others.*** Appellants complain that Park Place contracted with Wright Runstad and Fujitec to assist in the fulfillment of its common carrier responsibilities. But the Court of Appeals explicitly found that by so contracting, "Park Place met its duty to take reasonably foreseeable precautions on behalf of its passengers." (Court of Appeals Memorandum Decision, at page 10.) Contracting isn't delegation of duty; it's fulfillment.

5. ***Lack of evidence of negligence is not construed against Park Place.*** Appellants argue that even though their own expert investigation did not reveal any proof of negligence, that Park Place had a duty to "more aggressively" investigate Pascal's accident to discover such evidence. Appellants would incorrectly invert the summary judgment standard of *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989)

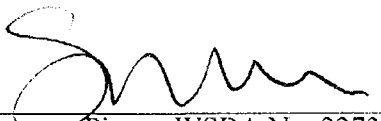
(describing burden of *plaintiff* to rebut defendant's contention of lack of evidence).

## V. CONCLUSION

Appellants fail to demonstrate how the Court of Appeals' summary judgment dismissal, based on an absence of evidence, is a renegade legal decision (in opposition to other decisions), or involves Constitutional or public interest issues. The decision here was an ordinary one and limited to its facts. There is no reason for another review.

RESPECTFULLY SUBMITTED this 20th day of June, 2014.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC



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THE SUPEME COURT OF THE STATE OF WASHINGTON
OF THE STATE OF WASHIMGTON
COURT OF APPEALS, DIVISION 1

JEANNE PASCAL, and DALLAS SWANK, husband and wife,

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WA PARK PLACE MEZZ, LLC;WH PARK PLACE,LLC

DECLARATION OF
EMAILED DOCUMENT
(DCLR)

Defendant/Respondent

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I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 12 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: June 20, 2014 at Tumwater, Washington.

Signature: _____

Print Name: Carrie Lewis