No. 90363-8

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION I
No: 69839-7

JEANNE PASCAL and DALLAS SWANK, husband and wife,

Plaintiff/Appellant

vs.

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

Defendants/Respondents

APPELLANTS' PETITION FOR REVIEW

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1. IDENTITY OF PETITIONERS. Petitioners Jeanne Pascal and Dallas Swank are wife and husband. They were Plaintiffs in the superior court and Appellants in the Court of Appeals.

2. CITATION TO COURT OF APPEALS DECISION. The Court of Appeals opinion was filed March 10, 2014. A motion for reconsideration was timely filed by Appellants. The motion was denied April 22, 2014. The Court of Appeals opinion and order denying reconsideration are found in Appendices A and B, respectively. The opinion was not published.

3. ISSUES PRESENTED FOR REVIEW.

A. Jeanne Pascal stated she felt, but did not see, the misleveling of the garage elevator. The court of appeals held there was no evidence that the garage elevator had misleveled because Jeanne Pascal did not testify she had observed the misleveling. Is sight the only sense impression admissible as evidence? (5.B)

B. Barbara Lither stated she observed the garage elevator misleveling on multiple occasions only fourteen days after Jeanne Pascal's accident. The court of appeals held this evidence could not support an inference that the garage elevator had probably misleveled when Jeanne Pascal tripped and fell. Can misleveling discovered shortly after an accident support an inference that misleveling caused the accident? (5.B)

C. The court of appeals used fact evidence from another case involving different equipment and different parties to establish elevators can mislevel without negligence. There is no evidence in this case by any expert that the misleveling of this machine under these facts could have happened without negligence. Was it error for the court of appeals to take judicial notice of a fact finding in another case involving different parties and different equipment to hold negligence in this case under these facts could have happened without negligence? (5.E)

D. Park Place is a common carrier with respect to elevators in its building. Park Place contracted with Wright Runstand and Fujitec to maintain the building and its elevators. Can a common carrier avoid its own higher duty of care by contracting its duties to others who have a lower duty of care with respect to passengers? (5.C)

E. Park Place conducted no investigation of the accident which caused Jeanne Pascal's injury. The court of appeals held Plaintiffs' expert had not established the precise cause of elevator misleveling and that accordingly there was no proof of negligence. Can a common carrier avoid its duty to its passengers by simply not investigating the cause of an accident thereby depriving the plaintiff an opportunity to definitively prove causation? (5.D)

4. STATEMENT OF THE CASE.

January 20, 2010 Jeanne Pascal suffered severe injury as a result of a fall into a misleveled elevator. CP 255-6. The offending elevator was the garage elevator in the Park Place Building.[1]

The Park Place Building elevators had been the subject of misleveling complaints by tenants for years prior to Jeanne Pascal's fall. e.g., CP 223, 224, 267, 268, 269, 270, 274. This problem became particularly acute after 2006, when the Fujitec elevators were installed. CP 267; CP 317.

The garage elevator was considered a bit of a lemon. CP 267. It was not unusual for Park Place elevators, including the garage elevator, to drift out of alignment and not stop level with the floors. CP 267.

Bogdan Wojnicz was an investigator for EPA. He stated the garage elevator was a constant problem, frequently down for repairs. He stated he frequently had to lug his gear from the third floor underground to the lobby because the garage elevator had malfunctioned. CP 270. He stated he complained many times to Park Place building personnel about garage elevator misleveling. He reports there were definitely times the garage elevator had misleveled by more than one half inch, a fact he was aware of because he was frequently maneuvering equipment and/or file boxes into the

[1] The garage elevator is also referred to as the cab elevator, the shuttle elevator, elevator 8 and elevator H. CP 359, 366, 382. For convenience Defendants are referred to collectively herein as "Park Place."

elevator. Wojnicz stated his frequent complaints brought no improvement to the misleveling problem. CP 294.

Park Place building guard Michael Graeber stated, after upgrading to the Fujitec elevators, the elevators never got the same level of attention as before. CP 267. Graeber stated he received so many complaints about the elevators, including their misleveling, that he switched to a weekend shift so he did not have to deal with all the elevator complaints that happened after the change to Fujitec in 2006. CP 317.

Park Place contracted with Fujitec to maintain its elevators. CP 226-7. Among the requirements of the contract was a levelling accuracy of ¼ inch. CP 227. Complaints about elevator mislevelings were to be entered into the Park Place log book maintained by the building guards. CP 317 and 355. Security logs and Fujitec logs were the only place where elevator complaints would have been written. CP 355.

Maintenance of Park Place elevators was performed by Fujitec pursuant to its contract with Park Place. Chris Love was the Fujitec technician who actually performed all maintenance on the Park Place elevators. CP 365. At deposition Chris Love stated that to his knowledge there had been no mislevelings or complaints of misleveling between September 2009 and January 2010. CP 379 and 381.

A work order to Fujitec reveals that on October 15, 2009 there was in fact a record of garage elevator misleveling. The work order stated: "Details: day porter reports garage car not leveling on 1st floor." CP 224. There is no record that this problem was addressed or solved.

January 13, 2010 Chris Love went to the Park Place building. CP 371. At deposition he stated he did all of the tasks he was supposed to do that month. CP 370. However, he did not state what those tasks were. Further, the sheet indicates that he did not complete the January tasks. Additionally, there is no indication he inspected the garage elevator for leveling accuracy in January. CP 239.

Eight days later, January 21, 2010 Jeanne Pascal approached the garage car elevator pulling a roller bag and carrying her purse. She summoned the garage car. She did not see that the garage car had misleveled, but as she stepped in she felt her toe clip something that was elevated. She stated she inferred it was the elevator floor that was elevated since that was the only thing that could have been elevated. CP 389-90.

Jeanne Pascal pitched forward into the elevator, striking her face on the railing and tearing rotator cuffs in both shoulders. CP 255-6; CP 390. She managed to reach up and push the button for the first floor. Upon the elevator reaching the first floor, she shouted for the Park Place building guard, who came and helped her. She was taken by ambulance to the

hospital. CP 391. Park Place conducted no investigation of Jeanne Pascal's accident and did not report it to Fujitec. CP 381.

Fourteen days after Jeanne Pascal's accident, Barbara Lither, an EPA employee who worked in the Park Place building, observed repeated mislevelings of the garage car elevator ranging from ½ to ¾ inches. CP 257-8. She took pictures of some of the mislevelings, which reveal at least two separate mislevelings of the garage car elevator within the span of a minute. CP 259-65.

Chris Love of Fujitec next came to the Park Place building in February 2010 to conduct his monthly routine maintenance and inspection and found nothing out of the ordinary. CP 239. He was not told by Park Place of Jeanne Pascal's accident. At deposition Chris Love stated he found out about Jeanne Pascal's accident for the first time only two weeks before the deposition. CP 381. The deposition took place October 3, 2012. CP 361.

Depositions revealed that complaints about elevator problems were kept in the guard logbook. CP 317 and 354. Records and logs were paper based, not digital, and were left on the premises of the Park Place building. CP 355. Plaintiffs requested production of the logbooks; Park Place could not locate them. CP 315.

Plaintiffs presented the declaration of elevator expert, Charles Buckman. CP 240-1. Mr. Buckman established he was familiar with the type of elevator involved, as well as national and Washington standards and regulations applicable to the subject elevator. CP 241. He further stated he had reviewed the depositions, declarations, interrogatories and the contract between Park Place and Fujitec. CP 241.

Elevator expert Charles A. Buckman stated misleveling greater than ½ inch violates the Revised Code of Washington and national rules (ASME) adopted by Washington related to elevator safety. He stated it is probable the misleveling that tripped Jeanne Pascal exceeded the safety code maximum, given the Lither declaration and photographs as well as the fact that tripping would be improbable if misleveling were less than one half inch. CP 240-4.

Mr. Buckman stated Park Place failed to adequately respond to described elevator mislevelings reported before Jeanne Pascal's fall. He stated at a minimum the significant risk presented by misleveling should have been investigated aggressively to discover the source of the problem. Mr. Buckman stated there is no record that reported misleveling was adequately investigated, and there is no record that Park Place adequately followed up with Fujitec with respect to documented misleveling problems. Id.

Mr. Buckman stated the fact that the garage passenger elevator misleveled as much as ¾ of an inch at times was evidence that maintenance of that elevator was inadequate. Mr. Buckman stated that with proper maintenance the elevator should not have been more than ¼ inch out of alignment with the floor, which, incidentally, is consistent with the requirement of the Fujitec contract. Mr. Buckman noted that the fact that Barbara Lither, a lay person, discovered the garage passenger elevator misleveled while Fujitec and Park Place did not make the discovery is evidence the inspection process used by Fujitec and Park Place was inadequate. Id.; CP 226-7.

Mr. Buckman stated misleveling is the most common cause of elevator passenger injury. He stated trip hazards must be anticipated and that it is not sufficient to simply wait for reports of accidents. Mr. Buckman stated there is a need to aggressively check for the source of misleveling problems and that all reports of misleveling must be taken seriously and followed up on. Mr. Buckman stated this was not done and that failure to do so was negligent. CP 240-4.

Jeanne Pascal and Dallas Swank filed suit June 6, 2011. CP 1-2. Fujitect was brought into the case January 12, 2012. CP 55-61.

Fujitec and Park Place moved for summary judgment. Summary judgment was granted by the trial court. CP 296-300. Jeanne Pascal and

Dallas Swank timely moved for reconsideration with respect to Park Place. CP 301-12. Reconsideration was denied. CP 319-21. This appeal followed. CP 322-31. The dismissal of Fujitec was not appealed.

The court of appeals affirmed the summary judgment dismissal of Park Place. Appendix A. Reconsideration was denied. Appendix B.

5. ARGUMENT

A. Standard of Review.

Summary judgment is only appropriate if the pleadings, answers to interrogatories, depositions, declarations and admissions reveal there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). In determining whether a genuine issue of fact exists, all evidence and all inferences that can be drawn from the evidence must be drawn in favor of the nonmoving party. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

B. There is direct evidence that Jeanne Pascal was tripped by a misleveled elevator as well as evidence from which it can be inferred.

The court of appeals opinion in effect finds that an individual's sense of touch cannot be used as evidence. It additionally finds evidence after the event cannot be used to support an inference with respect to what had gone on shortly before. This violates longstanding Washington Supreme Court precedent with respect to sensory evidence as well as precedent regarding

inferences. See, e.g., Froemming v. Spokane City Lines, 71 Wn.2d 265, 427 P.2d 1003 (1997) [evidence based on sense of smell]; State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994) [evidence based on sense of touch]. It additionally presents significant questions of law with respect to sensory evidence and inferential evidence.

The inference that can be drawn from the evidence is that Jeanne Pascal was severely injured by an elevator that had misleveled more than a half an inch. Barbara Lither made estimates of misleveling beyond a half inch shortly after Jeanne Pascal's accident. CP 258. Jeanne Pascal stated she was tripped by the misleveled elevator, which caused her to fall. CP 255. Elevator expert Buckman reports misleveling was likely beyond a half inch because misleveling less than that was unlikely to trip. CP 242-3.

RCW 5.40.050 provides a breach of a duty imposed by a statute may be considered by the trier of fact as evidence of negligence. Chapter 70.87 RCW deals with elevators. RCW 70.87.030 provides the Department of Labor and Industries is to adopt safety rules and establish minimum elevator standards for existing installations and specifically adopts the American Society of Mechanical Engineers Safety Code for Elevators, Dumbwaiters, and Escalators (ASME). WAC 296-96-0650 references ASME A17.1, Rule 2.26.11 (a) and (b) which requires floor leveling accuracy of $\pm$ ½ inch because of the known trip hazard danger. CP 242-3. The implication is that

misleveling below ½ inch is unlikely to present a trip hazard. This is supported by expert testimony. CP 242.

Barbara Lither testified she personally observed the Park Place elevator mislevel by more than ½ inch within 14 days of Jeanne Pascal's fall. She took pictures of the misleveling. Those pictures are found at CP 257-265.

Barbara Lither's testimony is evidence. Taking her testimony and the expert testimony that a misleveling of less than ½ inch was unlikely to trip someone, it is reasonable to infer the Park Place garage elevator had misleveled by more than a half inch when Jeanne Pascal fell. Since this violates the safety statute, it is evidence of negligence which should have precluded summary judgment.

The court at the summary judgment hearing stated that because the statute required accuracy within ½ inch, any misleveling accuracy up to ½ inch was not negligent as a matter of law. RP 29. There are at least two flaws in this argument. First, it ignores the fact that the Lither declaration describes misleveling greater than one half inch. Second, this analysis has specifically been considered and rejected by the courts as it relates to common carriers.

In Brown v. Cresent Stores, Inc., 54 Wn.App. 861, 776 P.2d 705 (Div. 3, 1989) Crescent attempted to obtain summary judgment by arguing

that because it had met the statutory elevator safety standards, as a matter of law it was entitled to judgment. The Brown court stated: "Compliance with safety regulations, however, does not necessarily satisfy the higher degree of care placed on a common carrier." Id. at 868. The Brown court cited Dennis v. Maher, 197 Wash. 286, 84 P.2d 1029 (1938) as support for this proposition. Dennis stated:

> A common carrier such as a city in this instance was, is held to the highest degree of care compatible with the practical operation of its busses. That duty would not be met, as a matter of law, by mere observance of the laws of the road.

Id. at 291.

In contrast, the superior court assumed, for purposes of summary judgment, Park Place had no notice of the misleveling problem. This violates longstanding Washington Supreme Court precedent by inferring evidence against the non-moving party on summary judgment.

As was previously pointed out, the guard logbook in which complaints about misleveling would have been written was not produced by Park Place. CP 317. The court on summary judgment improperly assumed no complaints of misleveling and therefore made the inference Park Place had no notice of misleveling. The guard logbooks which would have contained such complaints had not been located. The court should not have

inferred absence of misleveling complaints where Park Place had been unable to locate documents where such notice would have been reported.

An issue of fact exists with respect to Park Place's common carrier negligence. Summary judgment in favor of Park Place should not have been granted.

C. As a common carrier Park Place could not avoid its burden by delegation to Fujitec.

Park Place is a common carrier with respect to passengers in its elevators. Dabroe v. Rhodes Co., 64 Wn.2d 431, 433, 392 P.2d 317 (1964). This is a nondelegable duty. Niece v. Elmview Group Home, 131 Wn.2d 39, 54, 929 P.2d 420 (1997). Whether or not common carrier liability can be avoided by delegation is a significant question of law.

As a common carrier the law holds Park Place to the highest standard of care compatible with the practical operation of its elevators. Murphy v. Montgomery Elevator Co., 65 Wn.App. 112, 116-7, 828 P.2d 584 (Div. 2, 1992). Whether or not that standard has been met is a question of fact for the jury. WPI 100.01.

In the case at bar the superior court was persuaded no issue of material fact exists and that Park Place met this exceptional standard as a matter of law. Jeanne Pascal and Dallas Swank respectfully suggest review of the facts reveal this is not so and that inferences from the evidence were

improperly applied by the superior court against the nonmoving parties.

The court in granting summary judgment inferred from the evidence that the misleveling of the garage passenger elevator reported October 15, 2009 was responded to by Fujitec and followed up on by Park Place. This conclusion could only be arrived at by inferring evidence in favor of the moving party, which is not permitted on summary judgment. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

The evidence was that Chris Love, the Fujitec employee who serviced Park Place elevators, stated there were no reported mislevelings of the Park Place garage elevator from September 2009 through January 2010. Yet on October 15, 2009 the "day porter reports garage car not leveling on 1st floor." This directly contradicts the testimony of Chris Love. Further, although the same page indicates work was assigned and someone was dispatched, the status is described as "open" and there is no indication the work was completed, as is stated on the February 23, 2010 (different) item listed on the same page. CP 224. From this it cannot be inferred that the garage passenger elevator misleveling problem observed October 15, 2009 was addressed and resolved. In fact the inference taken in favor of the nonmoving party is that this misleveling problem was not addressed, resolved or followed up on. Certainly, it cannot be assumed the misleveling problems were addressed without improperly taking inferences in favor of

Park Place.

Evidence was, also, presented which showed no monthly inspection by Fujitec the month of Jeanne Pascal's fall. CP 239. The inference is that there was no such elevator inspection despite the contract requirement, which is less than the highest degree of care possible by any measure.

Additionally, Fujitec employee Chris Love reports he was not even informed of the fact of Jeanne Pascal's accident until two weeks before his deposition. CP 155. This means Park Place apparently failed to inform of probably the most dramatic misleveling event in the history of the Park Place building. From this it can be inferred that Park Place is not as diligent as a common carrier should be with respect to reporting and responding to elevator misleveling.

By ruling as it has, the trial court in effect found that, as a matter of law, the highest degree of care compatible with the practical operation of its elevators was for Park Place to hire Fujitec to maintain its elevators once a month and to respond to service calls when received. On its face this cannot represent the highest degree of care, especially since Park Place Building guard Graeber reports a decline in elevator maintenance once Fujitec took over elevator maintenance. CP 267-8.

It cannot be said that Park Place, by signing a contract providing for only monthly maintenance and inspection, met the highest degree of care

compatible with the practical operation of its elevators since others. Hiring Fujitec to conduct monthly maintenance and inspections and respond to service calls does not rise to proof as a matter of law that Park Place met its common carrier burden.

Park Place seeks to distance itself by claiming it hired others who were responsible. In effect Park Place has argued it has delegated its common carrier duty to others; it cannot do so. The exceptional duty owed by common carriers to passengers is nondelegable and has been uniformly held to be nondelegable since at least 1912. Niece v. Elmview Group Home, 131 Wn.2d 39, 54, 929 P.2d 420 (1997). Park Place cannot avoid its common carrier duty by delegating it to others.

An additional reason why delegation does not satisfy the common carrier duty is because those hired to perform on behalf of the common carrier are held to a lower standard. In the case at bar Fujitec is held to a simple negligence standard, not a common carrier standard. Pruneda v. Otis Elevator Company, 65 Wn.App. 481, 828 P.2d 642 (Div. 1, 1992). Thus, permitting Park Place to avoid its independent common carrier duty by delegation to Fujitec and Wright Runstad would in effect eliminate the higher standard applied to common carriers and reduce the duty to simple ordinary care.

The law is clear that a common carrier cannot avoid its burden by

delegating duties it owes its passengers to third parties. Park Place cannot wash its hands of responsibility for Jeanne Pascal's safety by simply entering into a maintenance agreement with Fujitec. The highest possible duty with respect to its passengers still applies to Park Place regardless of the contract with Fujitec. Summary judgment in favor of Park Place should have been denied.

D. A common carrier should not be allowed to evade liability by failing to conduct an investigation of the cause of an accident that harmed one of its passengers.

The court of appeals, by finding Jeanne Pascal had to prove precise cause of misleveling in order to prevail on her negligence claim where Park Place had conducted no investigations of any mislevelings, including hers, creates an inappropriate and difficult burden on the passenger of a common carrier. It also creates a disincentive for a common carrier to investigate accidents and improve passenger safety. It presents a significant question of law. It, also, conflicts with the imposition of the high duty of care imposed on common carriers by the Washington State Supreme Court.

Pascal's expert testified the Fujitec response to misleveling issues was negligent. He testified cause of misleveling had to be aggressively investigated and solved, which was not done. CP 242-3.

Pascal's expert further stated the misleveling was the result of inadequate maintenance by Fujitec. He stated with proper maintenance the

garage elevator would not have been more than ¼ inch out of alignment. CP 242-3.

Pascal's expert further stated the Fujitec's inspection process was inadequate. As support he cited the evident misleveling and the fact that Barbara Lither was able to discover misleveling which Park Place apparently could not. CP 242-3.

Pascal's expert stated mislevelings the most common cause of elevator passenger injury. He stated misleveling problems must be aggressively pursued and solved. CP 242-3.

Evidence of negligence was provided by Pascal. Causation was attributed to inadequate maintenance and inspection. Pascal's expert could not report the precise mechanism of misleveling because Park Place did not investigate. It should not reap the benefit of this failure.

Summary judgment should have been reversed.

E. It was improper for the court of appeals to rely on a fact finding in another case, involving different parties, different facts and different equipment, to support its finding that misleveling could have occurred in this case without negligence.

The court of appeals has taken notice of facts in the record of another case involving different parties and different elevator equipment. This violates Washington State Supreme Court precedent which states a court cannot take judicial notice of records of other independent and separate

judicial proceedings even when they are between the same parties. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

In its opinion at p.12 the court of appeals cited the finding in Adams v. Western Host, Inc., 55 Wn.App. 601, 779 P.2d 281 (1989) that "[e]levators are mechanical devices of some complexity. Materials can wear out or break without negligence being involved." This statement is unsupported in the case at bar.

There is no evidence in this case by an expert that this misleveling could have happened without negligence. It was inappropriate for the court of appeals to cite a fact finding in another case involving different parties and equipment to support a finding that the elevator in this case could have misleveled without negligence.

Pascal's expert stated leveling greater than ¼ should not happen with proper maintenance. He further stated misleveling by ¾ of an inch was proof of inadequate maintenance. CP 243. This evidence was unrefuted and for purposes of summary judgment must be taken as true. Pascal's expert identified other areas of negligence, as well. CP 242-3.

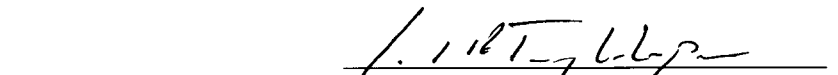
The court of appeals violated Washington Supreme Court precedent by in effect taking judicial notice of the finding in Adams that an elevator can break down without negligence being involved.

6. CONCLUSION.

The court of appeals decision should be reversed. This cause should be remanded for trial on the merits.

Dated this 22nd day of May, 2014.

LOPEZ & FANTEL, INC., P.S.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEANNE PASCAL and DALLAS SWANK, husband and wife, Appellants, v. WH PARK PLACE MEZZ, LLC; and WH PARK PLACE, LLC; Respondents, WASHINGTON REAL ESTATE HOLDINGS LLC; TRANSWESTERN PARK PLACE SEATTLE, LLC; TRANSWESTERN INVESTMENT COMPANY, LLC; TRANSWESTERN PARK PLACE SEATTLE HOLDINGS, LLC; WASHINGTON HOLDINGS STRUCTURED FINANCE, LLC; and FUJITEC AMERICA, INC., Defendants.	)	No. 69839-7-I DIVISION ONE UNPUBLISHED OPINION FILED: March 10, 2014

SCHINDLER, J. — On January 21, 2010, Jeanne Pascal fell while stepping into the garage passenger elevator in the Park Place Building. Pascal filed a personal injury lawsuit against the owner of the building WH Park Place Mezz LLC (Park Place) and the elevator maintenance company Fujitec America Inc. Pascal appeals summary judgment dismissal of her claims against Park Place. Because there 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, we affirm.

FACTS

In January 2010, WH Park Place Mezz LLC (Park Place) owned the Park Place Building at 1200 Sixth Avenue (the Building).[1] The Building has eight elevators including one garage passenger elevator.

Park Place contracted with Fujitec America Inc. (Fujitec) to service the elevators in the Building.[2] The contract required Fujitec to perform monthly preventative maintenance on the elevators and respond to all service calls. The contract also required Fujitec to maintain elevator leveling accuracy within one-quarter inch.

Park Place employed a property management company, Wright Runstad, to manage the Building, including the elevator contract with Fujitec. Wright Runstad was responsible for scheduling routine maintenance of the elevators, taking tenant complaints, writing up any incident or accident reports related to the elevators, and contacting Fujitec for emergency repairs.

On January 21, 2010 while stepping into the garage passenger elevator, Jeanne Pascal tripped and fell forward, dislocating her shoulder and tearing her rotator cuffs.

Pascal and her spouse Dallas Swank (collectively Pascal) filed a personal injury lawsuit against Park Place and Fujitec.[3] Pascal alleged her injuries were "directly and proximately caused by the negligence of Defendants and/or agents of Defendants."

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[1] The members of Park Place are Transwestern Park Place Seattle Holdings LLC and WH Structure Finance LLC. WH Structure Finance LLC is a subsidiary of Washington Real Estate Holdings LLC.

[2] Fujitec initially contracted with a different owner but was still servicing the Building in January 2010 when Park Place assumed ownership.

[3] In July 2012, Pascal dismissed the five other defendants she named in her initial complaint.

Park Place filed a motion for summary judgment dismissal. Park Place argued there was no evidence that Park Place knew or should have known of a dangerous condition. In support, Park Place presented the deposition testimony of Fujitec employee Chris Love and Wright Runstad employee Travis Smith. Park Place also presented Pascal's deposition testimony. Fujitec joined in the motion for summary judgment filed by Park Place.

Fujitec service mechanic Chris Love was responsible for inspecting and maintaining the elevators. Love performed the monthly maintenance inspection of the elevators on January 13, 2010. Love testified that he completed all required monthly maintenance tasks during each of his inspections. Love explained that any unchecked boxes in the Fujitec maintenance record for the January 13 inspection meant that those tasks were not necessary.

Love testified that he did not observe a misleveling problem in the garage passenger elevator during any of the monthly inspections he performed between September 2009 and January 13, 2010. Love described "misleveling" as "an elevator either being above or below floor level." Love said misleveling can occur "from clipping a door lock" or "from [a] safety circuit being broken, and that's pretty much it."

Love testified that Fujitec did not receive any complaints of misleveling problems with the garage passenger elevator. Love testified that between September 2009 and January 2010, there were only two service calls in October 2009 concerning the garage passenger elevator. Love testified the two calls in October concerned replacing the talon belt on the garage passenger elevator and Fujitec performed the necessary repairs.

Travis Smith worked for Wright Runstad as the chief engineer of the Building. Smith said that Wright Runstad had no notice of any misleveling problems with the garage passenger elevator before Pascal's fall on January 21. Smith testified that he could not "recall any complaints" about the garage passenger elevator between September 2009 and January 21, 2010 and Fujitec did not report any malfunction of the garage passenger elevator.

During her deposition, Pascal testified that as she entered the elevator, her foot "clipped the elevator floor and it pitched me forward and I fell." Pascal said that she "assumed" her foot clipped the elevator floor because "the garage floor is concrete and stationary. The only thing that can possibly elevate or not elevate is the elevator." Pascal testified that she did not observe the garage passenger elevator misleveling on the day of her accident. Pascal said she did not remember if she ever noticed the garage passenger elevator misleveling but did notice "some of the elevators did not level from time to time. If I saw it I walked over it."

In opposition to the motion for summary judgment, Pascal argued there were issues of material fact as to whether as a common carrier Park Place "exhibited the highest degree of care possible consistent with the practical operation of its elevators," and "whether Fujitec used the required degree of care in maintaining the Park Place elevators." Pascal also argued the summary judgment motion was "premature in light of remaining discovery. In particular handwritten logbooks maintained by building security guards" and outstanding depositions "of certain key Fujitec personnel familiar with software operating the elevator systems." Nonetheless, Pascal did not ask for a continuance. Instead, Pascal asserted there was "sufficient" information from the

"discovery already made" to defeat summary judgment.

In opposition, Pascal submitted a declaration and declarations from individuals who had previously or currently worked in the Building. Pascal also submitted the declaration of an elevator expert and documents produced during discovery.

Michael Graeber, Bogdan Wojnicz, Kevin McDermott, Eileen Livingstone, and Jennifer Eason each stated in their declarations that they observed misleveling of the elevators in the Building, but did not testify that they observed any misleveling in the garage passenger elevator between January 13 and January 21, 2010.

Graeber worked as a security guard at the Building between October 2001 and April 2008. Graber said that before leaving in April 2008, he was "personally aware, and was told by building tenants that the Park Place building elevators, including the garage elevator stopped above or below the level of the floors on occasion." Graeber does not identify when he observed misleveling or when tenants complained to him about misleveling before he left in April 2008.

Wojnicz worked in the Building until June 2008. Wojnicz recalled at least a dozen times when "the garage elevator stopped high or low of the floor." McDermott worked in the Building from 1990 to 2009 and Livingstone worked in the Building from December 1982 to December 2010. Both McDermott and Livingstone said they observed elevators in the Building misleveling but do not identify which elevator or when they observed misleveling. Eason has worked in the Building since January 2007. Eason states that she observed "the elevators" in the Building mislevel but does not identify when she made those observations or which elevators were misleveling.

Barbara Lither has worked in the Building since November 1978. Lither testified

that on February 4, 14 days after Pascal's accident, the garage passenger elevator was misleveling approximately one-half to three-quarters of an inch. Lither took photographs of the elevator misleveling. Lither also testified that she "watched the elevator doors open and close at least twice" and noticed that "the floor did not misalign every time." Pascal states in her declaration that on January 21, the garage passenger elevator "misleveled, creating a trip hazard, which I did not see."

Pascal also submitted an e-mail from Park Place Security, a 2009 work order to Fujitec, and the records from the maintenance inspection in January 2010. The May 12, 2009 e-mail asks Fujitec to "check on reports of intermittent leveling problems — no specifics as to floor or direction." The October 15, 2009 work order to Fujitec states that the "day porter reports garage car not leveling on 1st Floor."

In his declaration, elevator expert Charles Buckman relies on Lither's declaration and the fact that Pascal tripped to conclude that the garage passenger elevator "probably" misleveled by more than one-half inch because misleveling of less than one-half inch would be unlikely to trip someone. Based on the assumption that the elevator "was at times 3/4 inch misleveled," Buckman then concludes "maintenance of that elevator was inadequate. With proper maintenance the elevator should not have been more than the 1/4 inch out of alignment with the floor." Buckman also states misleveling is the most common cause of elevator passenger injury, and Park Place was negligent in failing to "aggressively check" for the source of the misleveling problems and following up on reports of misleveling.

In reply, Park Place reiterated there was no evidence of misleveling of the garage passenger elevator between the date Fujitec inspected and performed maintenance on

January 13 and the date Pascal fell on January 21. Park Place also asserted there was no evidence that Park Place had notice of misleveling from January 13 to January 21, and it took reasonably foreseeable steps by contracting with Wright Runstad and Fujitec "to assist in the fulfillment of its responsibilities" as a common carrier.

The court granted the motion for summary judgment and entered an order dismissing the claims against Park Place and Fujitec.[4] The court denied Pascal's motion for reconsideration.

ANALYSIS

Pascal argues the court erred in dismissing the claims against Park Place on summary judgment because there are genuine issues of material fact on breach of the duty of care.

We review summary judgment de novo. Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56(c).

A defendant can move for summary judgment by " 'showing . . . there is an absence of evidence to support the [plaintiff]'s case.' " Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

If the defendant shows an absence of evidence to establish the plaintiff's case, the burden then shifts to the plaintiff to set forth specific facts showing a genuine issue of material fact for trial. Young, 112 Wn.2d at 225. As the nonmoving party, the plaintiff may not rely on speculation or "mere allegations, denials, opinions, or

[4] Pascal does not appeal the summary judgment dismissal of her claims against Fujitec.

conclusory statements" to establish a genuine issue of material fact. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (citing Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988)).

While we construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff " 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' " summary judgment is proper. Young, 112 Wn.2d at 225 (quoting Celotex, 477 U.S. at 322). If the plaintiff fails to carry its burden, " 'there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.' " Young, 112 Wn.2d at 225 (quoting Celotex, 477 U.S. at 322-23).

As an elevator operator, Park Place is a common carrier and must take reasonably foreseeable precautions on behalf of its passengers. Brown v. Crescent Stores, Inc., 54 Wn. App. 861, 863-64, 776 P.2d 705 (1989). A common carrier owes "a duty of the highest care for its passengers' safety compatible with the practical operation of its business." Brown, 54 Wn. App. at 863. But the standard of care owed by a common carrier is not one of strict liability. Walker v. King County Metro, 126 Wn. App. 904, 908, 109 P.3d 836 (2005). A common carrier is not the insurer of its passengers' safety, and negligence should not be presumed or inferred from the mere happening of an accident. Tortes v. King County, 119 Wn. App. 1, 7-8, 84 P.3d 252 (2003).

An elevator operator also has specific statutory duties, including a duty to

maintain floor leveling accuracy within one-half inch. WAC 296-96-00650.[5] Breach of a duty imposed by statute or administrative rule may be considered as evidence of negligence. RCW 5.40.050.

Pascal relies on Brown to argue there are material issues of fact as to whether Park Place met the standard of care for a common carrier. In Brown, an elderly woman was injured when she was hit by an elevator door in a department store. Brown, 54 Wn. App. at 863.

The store moved for summary judgment dismissal of the suit, arguing the automatic elevators complied with safety standards and it had no duty to provide an alternative elevator for elderly passengers. Brown, 54 Wn. App. at 868. In opposition, the plaintiff presented evidence that the department store knew about the "age, size and physical condition" of its elevator passengers yet regularly invited elderly customers for luncheons. Brown, 54 Wn. App. at 868. The plaintiff also presented evidence that the store knew other elderly passengers had been injured by the automatic elevator doors and a safer manual elevator was available for use that day. Brown, 54 Wn. App. at 868-69. The trial court granted summary judgment dismissal of the lawsuit. Brown, 54 Wn. App. at 862-63. We reversed on the grounds that the facts "raise a question whether [the store] should have reasonably anticipated an accident might occur and was therefore obligated to take precautionary measures." Brown, 54 Wn. App. at 869.

[5] RCW 70.87.030 provides that the Washington State Department of Labor and Industries (Department) "shall adopt rules governing the mechanical and electrical operation, acceptance tests, conveyance work, operation, and inspection that are necessary and appropriate and shall also adopt minimum standards governing existing installations." The statute directs the Department to consider the American Society of Mechanical Engineers Safety Code for Elevators, Dumbwaiters, and Escalators (ASME). RCW 70.87.030. The Washington Administrative Code (WAC) states that the Department has adopted the ASME A17.1-2004, Rule 2.26.11(a) and (b). WAC 296-96-00650. ASME Rule 2.26.11 requires floor leveling accuracy within one-half inch.

Here, unlike in Brown, there is no evidence of breach of the duty of care or that Park Place had notice of any misleveling problems in the garage passenger elevator between the Fujitec inspection on January 13 and Pascal's fall on January 21. Park Place met its duty to take reasonably foreseeable precautions on behalf of its passengers by contracting with Wright Runstad and Fujitec to maintain the elevators. Fujitec service technician Love testified that he performed monthly maintenance on the garage passenger elevator from September 2009 to January 13, 2010. Love also testified that he did not observe any misleveling problems in the elevator nor did he receive any complaints of misleveling between September 2009 and January 13, 2010.

Pascal did not present any evidence showing misleveling of the garage passenger elevator when Fujitec performed the monthly maintenance inspection of the elevators on January 13. None of the declarations Pascal submitted report any misleveling in January 2010, and Pascal admitted in her deposition that she did not observe any misleveling the day she fell. Lither's testimony that she observed misleveling of the garage passenger elevator on February 4 does not support an inference that the elevator was misleveling when Pascal fell on January 21.

Pascal cites Murphy v. Montgomery Elevator Co., 65 Wn. App. 112, 828 P.2d 584 (1992), to argue that scheduling once monthly maintenance inspections does not meet the standard of care for a common carrier. But Murphy concerned the standard of care required by an elevator maintenance company and does not address the standard of care for a common carrier. Murphy, 65 Wn. App. at 116-18.

Pascal also argues the Fujitec inspection and maintenance records create a material issue of fact as to whether Love completed all required maintenance during the

inspection on January 13. Pascal points to a blank box on the "PM Ticket" to argue Love did not complete all of the required tasks during his January inspection. Pascal also points to the "Ticket Summary By Single Location" that notes, "PM System: January, TASKS: INCOMPLETE." But during his deposition, Love was asked only one question related to these two documents, "Was there anything that you should have done on that call that you did not do?" In response, Love answered that he performed all required tasks on January 13 and "any of the blank boxes are tasks that are not required for that month."

Pascal contends that an October 15, 2009 work order describing a leveling problem with the "garage car" creates a material issue of fact. Pascal asserts there is no evidence showing this report of misleveling was investigated or solved. But the unrebutted evidence establishes that Fujitec made only two service calls in October 2009 regarding the garage passenger elevator and neither service call involved misleveling.

Further, contrary to Pascal's assertion, Buckman's testimony does not create a material issue of fact. Buckman bases his conclusion that Park Place breached the duty of care on the premise that elevators do not mislevel without some negligence. But Buckman acknowledges the elevator safety codes recognize some degree of misleveling cannot be eliminated and require floor leveling accuracy only within one-half inch. In Adams v. Western Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989), the court addressed whether misleveling constitutes the kind of malfunction that may occur even in the absence of negligence. Adams, 55 Wn. App. at 606.

In Adams, a passenger was injured when a hotel elevator misleveled between one and two and one-half feet. Adams, 55 Wn. App. at 603. The elevator company presented evidence that it performed regular maintenance on the elevators twice each month and there were no complaints of elevator misleveling prior to the accident. Adams, 55 Wn. App. at 603. The elevator company also showed that the misleveling was caused by a broken shunt and "there is no way to anticipate when metal fatigue will cause a shunt to break." Adams, 55 Wn. App. at 603.

We recognized that "[e]levators are mechanical devices of some complexity. Materials can wear out or break without negligence being involved," and affirmed summary judgment dismissal because the plaintiff's expert "did not state an opinion as to the cause of the misleveling" and therefore failed to rebut the evidence showing that the misleveling was not caused by negligence. Adams, 55 Wn. App. at 606-07.

Here, 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. Pascal also did not rebut the evidence that Park Place took reasonably foreseeable precautions in maintaining its elevators. We conclude the court did not err in dismissing the claims against Park Place on summary judgment.

Denial of Motion for Reconsideration

Pascal claims the court erred in denying her motion for reconsideration because of the outstanding discovery requests. We review the trial court's order denying a motion for reconsideration for an abuse of discretion. Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A trial court abuses its discretion when its

decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Go2Net, 115 Wn. App at 88.

Pascal contends the court erred in denying her motion for reconsideration because there was an outstanding request for production of the Building security guard logbooks containing elevator complaints, and she did not have the opportunity to depose the Fujitec personnel familiar with the software running the garage elevator. But the record establishes Pascal knew about the security guard logbooks and the need to depose the Fujitec software personnel before the court ruled on summary judgment.

In opposition to summary judgment, Pascal stated that the motion was "premature in light of remaining discovery," in particular, the logbooks and the need to depose Fujitec software personnel, but Pascal did not ask the court for a continuance. Instead, Pascal asserted the summary judgment motion could be decided without considering additional evidence—"Nevertheless, discovery already made has revealed information sufficient to defeat summary judgment." The trial court did not abuse its discretion in denying Pascal's motion for reconsideration.

We affirm summary judgment dismissal of the claims against Park Place.

Schindler, J.

WE CONCUR:

Spearman, A.C.J.

Cox, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEANNE PASCAL and DALLAS SWANK, husband and wife, Appellants, v. WH PARK PLACE MEZZ, LLC; and WH PARK PLACE, LLC; Respondents, WASHINGTON REAL ESTATE HOLDINGS LLC; TRANSWESTERN PARK PLACE SEATTLE, LLC; TRANSWESTERN INVESTMENT COMPANY, LLC; TRANSWESTERN PARK PLACE SEATTLE HOLDINGS, LLC; WASHINGTON HOLDINGS STRUCTURED FINANCE, LLC; and FUJITEC AMERICA, INC., Defendants.	)	No. 69839-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellants Jeanne Pascal and Dallas Swank filed a motion for reconsideration. A majority of the panel determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 22nd day of April, 2014.

FOR THE COURT:

Judge