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No. 673432

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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JUSTIN LEONARD,

*Appellant,*

v.

GRUBB & ELLIS EQUITY ADVISORS, PROPERTY  
MANAGEMENT, INC.,

*Respondent,*

KONE, INC., OTIS ELEVATOR CO., MICROSOFT CORP., PUGET  
SOUND ENERGY, INC.,

*Defendants*

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**BRIEF OF RESPONDENT**

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## **I. ISSUE PRESENTED FOR REVIEW**

Can a plaintiff, who claims he was injured in an elevator when it properly stopped during a power outage, avoid summary judgment when he has offered no competent proof of duty or negligence by the defendant property management firm?

## **II. RESTATEMENT OF THE CASE**

### **A. INTRODUCTION**

This is an appeal involving summary judgment dismissal of negligence claims brought by Plaintiff-Appellant Justin Leonard, an employee of Microsoft Corporation ("Microsoft"), who was a passenger in an elevator on July 25, 2007, at the Microsoft Redmond Campus during an electrical power failure. Mr. Leonard allegedly suffered personal injuries when the elevator properly came to an emergency stop during the power failure.

Although Mr. Leonard sued an array of entities in conjunction with this event, none of them had any responsibility for causing the plaintiff's alleged injuries. In particular, he failed to produce any factual or legal basis for the creation of a duty of care on the part of Defendant-Respondent Grubb & Ellis Equity Advisors, Property Management, Inc. ("Grubb & Ellis"), the property management firm hired by Microsoft to operate facilities at its Redmond campus. Because no duty existed, all other facts are immaterial and the trial court properly dismissed Plaintiff's claims against Grubb & Ellis.

## B. PROCEDURAL HISTORY

Following the power failure, the Plaintiff sued several defendants (*CP 13–17*), but all were subsequently dismissed. The Plaintiff voluntarily dismissed Microsoft, because it was his employer at the time of the power outage, and thus not subject to negligence claims under the Workers Compensation Act, title 51 RCW.<sup>1</sup> The Plaintiff voluntarily dismissed Defendant Otis Elevator Co. (“Otis”), because it was not the manufacturer of the subject elevator. (*CP 22*)

The Plaintiff sued Defendant Kone, Inc. (“Kone”) as the elevator manufacturer and/or maintenance company. (*CP 14, 22*) The trial court dismissed Kone on its motion for summary judgment, following the Plaintiff’s failure to oppose the motion. (*CP 47–49*)

Defendant Puget Sound Energy (“PSE”) was sued based on its role as the supplier of electricity to the Microsoft campus (*CP 14, 59*). The trial court dismissed PSE on summary judgment, because it is immune from consequential damages arising from a power failure. (*CP 74*) (“Schedule 80 also limits PSE’s liabilities and obligations relating to such events.”)

Defendant Grubb & Ellis was sued as the company responsible for distributing electrical power to the campus and providing elevator services (*CP 14, 64, 134*). The trial court

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<sup>1</sup> See RCW 51.04.010 (barring an employee’s civil actions against his employer for work-related personal injuries, except as otherwise provided in the statute).

dismissed Grubb & Ellis on summary judgment, because the Plaintiff failed to set forth genuine issues of material fact regarding a duty owed by Grubb & Ellis, or that it had breached such a duty. (*CP 1–9, 167–69*)

The Plaintiff timely appeals only the trial court’s dismissal of Grubb & Ellis from this lawsuit. (*CP 165–66*)

### **C. FACTUAL BACKGROUND**

#### **1. Electrical and Elevator Service at the Microsoft Campus**

The Microsoft campus in Redmond, Washington, is served by an electrical system “owned and maintained by PSE,” which system includes “PSE transmission lines and distribution circuits that serve each facility.” (*CP 74*) PSE, governed by the rates and tariffs filed with the Washington Utilities and Transportation Commission (“WUTC”), provides electrical service to Microsoft under Rate Schedule 80, which specifically notes “. . . electric service is inherently subject to interruption, suspension, curtailment and fluctuation.” (*Id.*)

PSE provides electrical power to the campus under the terms of the Microsoft Service Plan, issued June 2007, which states there are no restrictions or limits on the power PSE provides to Microsoft. (*CP 64*) Notably, one of Microsoft’s goals outlined in the Service Plan was to “Improve reliability and quality of energy services.” (*CP 73*) This goal was developed because “[w]ith any

electric utility system, **unplanned disruptions are inevitable . . . .**” (CP 75) (emphasis added) PSE performed infrared testing on both PSE- and Microsoft-owned equipment every five years to determine if there were any electrical issues. (CP 54, 59)

Microsoft contracted with Grubb & Ellis to manage the facilities on the Microsoft campus. (CP 64) Grubb & Ellis, under the direction of its Senior Director of Facilities, was responsible for “delivery of integrated facility management services for Microsoft’s 14 million square foot portfolio in Puget Sound,” which included delivery of electrical power and elevator services. (*Id.*) Grubb & Ellis would also routinely troubleshoot “power anomalies,” ranging from very short “power bumps” to complete power outages lasting for minutes to days. (*Id.*)

Elevator 2 at Microsoft Building 26 was designed and built so that when electrical power to the elevator drive mechanism is cut off, the elevator brake will set immediately “to prevent it from running free without electrical control.” (CP 43) The subject elevator in question was built in compliance with the American National Standards Safety Code for Elevators and Escalators, ASME A17.1, 2.27.8.1 and 8.3, which requires that “[t]he brake shall apply automatically when . . . there is a loss of power to the driving machine brake.” (CP 43–44)

Prior to the events leading to Mr. Leonard’s claimed injury, on August 2, 2006, Otis performed the Elevator Five Year Safety

Test on Elevator 2, as required by the Washington Department of Labor and Industries, which confirmed the elevator was in good working order and performed satisfactorily. (CP 66, 124–25) Kone, which had a service contract with Microsoft to maintain the campus elevators, inspected Elevator 2 a few weeks before the alleged incident, and found no problems with its operation. (CP 43, 66)

## **2. The Subject Power Outage and Elevator Incident**

Mr. Leonard alleges he was injured on July 25, 2007, while a passenger inside Elevator 2 of Building 26 at the Microsoft Redmond campus. (CP 14, 155) Mr. Leonard claims he entered the elevator intending to ride it down to the garage. (CP 155) While it was in motion, a power outage occurred causing the elevator to reportedly stop “abruptly.” (*Id.*)

After receiving a call that a person was trapped in Elevator 2, Kone dispatched a service mechanic to the scene. (CP 23) The Kone mechanic determined the elevator was in the leveling zone within a foot or so of the landing at level P-1, with the hoistway and elevator car doors fully closed. (CP 44) The mechanic opened the elevator doors and freed Mr. Leonard, who reported he felt hurt. (*Id.*) The mechanic determined the electrical power to Building 26 and the elevator had been shut off due to an electrical transformer failure outside the building. (CP 43) The mechanic further determined that the loss of power to the elevator’s driving machine

brake caused the brake to automatically be applied, as required by law and in compliance with its design function. (CP 42–43)

Grubb & Ellis investigated the cause of the power outage. Its building automation control team was initially notified that there was a power fluctuation originating from PSE's transmission equipment. (CP 65) This power fluctuation fed into PSE switch cabinets, which transferred energy into Microsoft-owned equipment. (Id.) The PSE-caused power fluctuation resulted in the brief shutdown of three Microsoft chiller plants on the campus. (Id.) All three chiller plants then automatically re-started at the same time, a common occurrence on the campus. (Id.) The concurrent startups caused a fuse to blow out at location SW CAB U2332. (Id.) That fuse blow out in turn caused one phase of the three-phase campus electrical system to blow out, resulting in total power loss to Buildings 26, 27 and 28. (Id.) PSE also identified a blown 400-amp fuse in a PSE Switch Cabinet at POS #4 in SW CAB U2332 – Cable 38483. (CP 65–66) After replacing the blown fuses, power was restored to the three buildings. (CP 66)

After elevator power was restored, the Washington State Elevator Inspector determined there was “no electrical or mechanical malfunction or deficiency of the elevator that caused it to stop.” (CP 44) The state inspector further determined the “elevator appeared to be in good working order and that the **loss of electrical power had caused the brakes to set as designed.**”

(*Id.*) (emphasis added) Elevator 2 was returned to full service without any repairs being made. (*Id.*)

### **III. SUMMARY OF ARGUMENT**

At summary judgment, it was incumbent upon Mr. Leonard to produce a genuine issue of material fact of a duty owed by Grubb & Ellis, and breach of that duty. He did not do so, and the trial court properly ordered dismissal of all claims against Grubb & Ellis as a matter of law. There is no basis for a duty or liability under any theory or fact as to Grubb & Ellis.

### **IV. LAW AND ARGUMENT**

#### **A. MR. LEONARD FAILED TO ESTABLISH GRUBB & ELLIS OWED A DUTY OF CARE AND SUMMARY JUDGMENT WAS PROPERLY ENTERED BY THE TRIAL COURT**

##### **1. There Is No Basis for Finding Grubb & Ellis Owed a Duty of Care**

When the defendant in a negligence action moves for summary judgment challenging the sufficiency of the evidence of an essential element of the plaintiff's claim, to prevail the plaintiff must present sufficient evidence to establish the essential elements of its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Hitter v. Bellevue School Dist.* 405, 66 Wn. App. 391, 399, 832 P.2d 130, *rev. den'd*, 120 Wn.2d 1013 (1992).

A cause of action for negligence requires the plaintiff to establish the following essential elements: “(1) the existence of a duty owed, (2) breach of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the injury.” *Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d 121, 127–28, 875 P.2d 621 (1994). The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law. *Id.* at 128 (citing *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991)). The facts, and all reasonable inferences therefrom, are viewed in the light most favorable to the non-moving party, but when reasonable minds can reach only one conclusion from the evidence presented, a question of fact may be determined as a matter of law. *Central Washington Bank v. Mendleson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

Here, the Plaintiff not failed to raise a genuine issue of material fact regarding a duty owed by Grubb & Ellis, he also failed to cite a single viable case where a duty has been imposed under circumstances like those in this case. As all other facts are immaterial if there is no duty owed, the trial court correctly dismissed Mr. Leonard’s claims as a matter of law.

Mr. Leonard and his electrical expert provide only a conclusory opinion of the existence of such a duty and its breach: “In the matter at hand, Grubb & Ellis clearly owed a duty to Mr. Leonard which they subsequently breached.” (*CP 138, 143-47*);

see *Gunnar v. Brice*, 17 Wn. App. 819, 823, 565 P.2d 1212 (1977) (conclusory statements, lacking foundation, cannot be considered on summary judgment). Plaintiff's argument that Grubb & Ellis owes a duty appears to be entirely based on a misunderstanding of the doctrine of foreseeability of harm. (CP 136)

The court in *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002), clearly explained how a court determines the duty of care:

In a negligence action, in determining whether a duty is owed to the plaintiff, a court must not only decide who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed. *Wick v. Clark County*, 86 Wn. App. 376, 385, 936 P.2d 1201 (1997) (Morgan, J., concurring). **The answer to the second question defines the class protected by the duty** and the answer to the third question defines the standard of care. *Id.* at 386, 936 P.2d 1201. The class protected generally includes anyone foreseeably harmed by the defendant's conduct regardless of that person's own fault. [*Hansen v. Friend*, 118 Wn.2d 476, 484, 824 P.2d 483 (1992)]

*Keller*, 146 Wn.2d at 243, 44 P.3d 845 (emphasis added). In other words, foreseeability of harm does not establish which party owes a duty of care, but rather only limits to whom an existing duty is owed.

Mr. Leonard's reliance on *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 99 P.3d 421 (2004), as somehow supporting his case is without merit. In *Higgins*, the court affirmed the jury's verdict that the snow tube rider was not negligent as it sped down the hill, because the snow tube's rotation backward "prevented him

from seeing what was in his path and foreclosed any opportunity for evasive action,” meaning he could not be negligent because he was unable to “reasonably foresee the hazard.” *Id.* at 837–38. Thus, *Higgins* appears to stand for the proposition that a defendant, unable to see where he is going through no fault of his own, cannot owe a duty of care to others when he cannot reasonably be expected to foresee he would hit someone, despite the fact that he had taken off down a crowded sledding hill.

*Higgins* actually supports the trial court’s summary judgment decision here, because similar to the non-negligent snow tube rider who could not foresee the danger in where he was going, Grubb & Ellis could not reasonably be expected to foresee that an elevator passenger would be harmed if the electrical power went out, given Grubb & Ellis’ knowledge and understanding that the elevators would come to a complete stop during any power outage. The trial court correctly understood Grubb & Ellis did not have a duty to prevent all electrical power fluctuations and outages on the Microsoft campus, simply because of its past experience with such fluctuations. Because there is no material factual dispute that Elevator 2 was designed to stop properly, and did so, during the subject power outage, Grubb & Ellis did not owe a duty to a passenger in the elevator. The defendant did not and could not reasonably foresee any harm to a passenger during a power outage.

Mr. Leonard does not appreciate the lesson taught by the *Palsgraf* court, which reversed the trial court's finding of liability by eloquently describing how a defendant's duty of care is determined by "reasonable apprehension" of the existence of a risk of harm to the plaintiff. *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 101 (1928). Following an explosion arising from a parcel inadvertently dropped on the train tracks, which explosion toppled a scale that injured a distant bystander, the court found the defendant railroad company did not owe a duty of care to the injured bystander:

[W]rong is defined in terms of the natural or probable, at least when unintentional. The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, **there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station.** If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

*Palsgraf*, 248 N.Y. at 345, 162 N.E. at 101 (internal citation omitted) (emphasis added). The Washington Supreme Court has adopted the *Palsgraf* definition of when a duty of care exists:

As Chief Judge Cardozo phrased it in *Palsgraf v. Long Island R. Co.*: "The risk reasonably to be perceived defines the duty to be obeyed" . . . .

*Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 260, 407 P.2d 440 (1965) (quoting *Palsgraf*, 248 N.Y. at 344, 162 N.E. at 100).

Here, similar to *Palsgraf*, a party claims injury from an event that the defendant could not reasonably perceive would result in harm (*i.e.*, stoppage of an elevator in a routine power outage). The trial court correctly found the defendant facility manager did not owe a duty to the elevator passenger, because “there was nothing in the situation to suggest to the most cautious mind” that the power outage would cause harm to a passenger in a properly braking elevator. Mr. Leonard presents no issue of material fact that an elevator stoppage during a power outage presents an unreasonable risk of harm that should have or could have been foreseeable by Grubb & Ellis.

Grubb & Ellis did not owe a duty of care to protect elevator passengers from unforeseeable risks of harm when the electrical power went out. The Court should affirm the trial court’s dismissal of all claims and conclude there is insufficient evidence of a duty to allow this case to go to a jury.

## **2. Grubb & Ellis Owes No Duty Based on Premises Liability Theories**

Mr. Leonard is unable to establish a duty based on a theory of premises liability. In such actions, a person's status, based on the common law classifications of invitee, licensee or trespasser,

determines the scope of the duty owed by the owner or occupier of that property. *Tincani*, 124 Wn.2d at 127–28, 875 P.2d 621. The Washington Supreme Court has summarized the rule of premises liability for business owners as follows:

Washington courts have attempted to address the duty owed by business owners to their invitees to protect them from harm on the business premises. In the case of physical danger on the business premises, Washington courts have held a business owner owes a duty to invitees to protect them from dangerous conditions on the premises.

*Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 198, 943 P.2d 286 (1997). “Reasonable care requires the landowner to inspect for dangerous conditions, ‘followed by such repair, safeguards, or warning as may be reasonably necessary for [a tenant’s] protection under the circumstances.’” *Tincani*, 124 Wn.2d at 139, 875 P.2d 621.

Here, there is no evidence Grubb & Ellis was an owner, operator or possessor of the Microsoft campus at or before the time of the power outage, nor is there any evidence Microsoft delegated to Grubb & Ellis any of the duties a landowner legally owes to its business invitees. Consequently, theories of premises liability do not apply in this case to Grubb & Ellis. Nevertheless, analysis of such theories is instructive to demonstrate how Grubb & Ellis cannot owe a duty based on its role as the facility manager of Microsoft’s premises.

In a case where the plaintiff's claims were dismissed on summary judgment after he slipped and fell on the sidewalk outside his church, *Bates v. Grace United Methodist Church*, 12 Wn. App. 111, 114, 529 P.2d 466 (1974), the plaintiff claimed the church misapplied snow removal chemicals and/or failed to remove the snow entirely. The court determined that there was no proof of negligence and affirmed the summary judgment dismissal of plaintiff's claims:

The whole purpose of the summary judgment procedure would be defeated if the case could be forced to trial by a mere assertion that an issue exists without any showing of evidence ... Each party must furnish the factual evidence upon which he relies.

*Bates*, 112 Wn.2d at 114.

In *Ford v. Red Lion Inns*, 67 Wn. App. 766, 773, 840 P.2d 198 (1992), the court affirmed summary judgment dismissal because the plaintiff invitee failed to establish that the defendant owner breached a duty of reasonable care in an alleged slip and fall in the Bellevue Red Lion parking lot. The court noted the general rule that the possessor of land owes a duty of reasonable care to invitees with respect to dangerous conditions on the land. *Id.* at 770, 840 P.2d 198. In dismissing the plaintiff's claims, the Court reasoned Ford had the obligation in responding to the defendant's motion for summary judgment to present evidence to support his claim, but failed to do so, relying only on the fact of accumulated ice

and snow, rather than presenting evidence that Red Lion's lack of action with regard to the parking lot posed an unreasonable risk of harm to Ford. *Id.* at 773, 840 P.2d 198.

In applying the rules of *Bates* and *Ford* to the facts here, Mr. Leonard has failed to present evidence to support his claims under a premises liability theory, and thus cannot demonstrate Grubb & Ellis had owed a duty to Mr. Leonard. Rather than addressing the duty question or whether the power failure in general or the elevator itself posed an unreasonable risk of harm, the Plaintiff spends most of his brief focusing on technical methods for preventing a power failure, without once presenting any evidence that the method reasonably selected for protection of a passenger in the event of a power outage was in any way inadequate or defective.

### **3. Grubb & Ellis Owes No Duty Based on a Special Relationship**

Grubb & Ellis did not have a special relationship creating a duty to Mr. Leonard. *See Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998) (citing W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984)) (“Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists.”). The duty to protect another from harm may arise if a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct. *Hutchins*, 116

Wn.2d at 227, 802 P.2d 1360. “These special relationships typically arise when one party is entrusted with the well-being of the other party.” *Folsom*, 135 Wn.2d at 675, 958 P.2d 301 (identifying special relationships giving rise to an affirmative duty to act: (1) common carrier to passengers; (2) innkeeper to guests; (3) possessor of land open to public visitors; (4) individuals voluntarily controlling another such that opportunities for protection are removed; and (5) employers to employees acting within the scope of employment); see also *Hutchins*, 116 Wn.2d at 228–29, 802 P.2d 1360 (hospital, physician or psychiatrist to patient; business establishment to customer; and parents to children).

Here, the trial court’s dismissal of Grubb & Ellis was appropriate given the absence of any evidence it had a special relationship under any of the categories listed in *Folsom, supra*, or *Hutchins, supra*.

In *Folsom*, two Burger King employees were killed in a robbery during which one of the employees activated an alarm system operated by Spokane Security, a security-monitoring firm. 135 Wn.2d at 661, 673–74, 958 P.2d 301. Although Spokane Security received the alarm, it did not contact the police because Burger King had previously terminated its contract for security monitoring. *Id.* The court granted summary judgment in favor of Spokane Security, because the contract for monitoring services had expired and plaintiffs provided no evidence that Spokane Security

had a “legally recognized or established special relationship with the employees.” *Id.* at 675, 958 P.2d 301.

In a similar case involving allegations of a tort duty of care arising from a special relationship, the U.S. District Court, Western District of Washington, closely examined the holding in *Folsom* and concluded:

The [*Folsom*] court did not reach any conclusion as to what duty the security company may have owed the employees if the contract had been valid. Accordingly, under current Washington law, **no special relationship has been established between a business owner's invitees and a company hired to provide security services on the premises.**

*McKown v. Simon Prop. Group, Inc.*, C08-5754BHS, 2010 WL 5463104 (W.D. Wash., Dec. 29, 2010) (emphasis added). The *McKown* court went on to find that the existence of a contract between a business owner and a security services firm “does not automatically create a special relationship” between the security firm and the owner’s invitees and employees. *Id.* Similarly, it is not possible here to conclude that the mere existence of the Microsoft-Grubb & Ellis facility management contract automatically made Grubb & Ellis responsible for protecting Mr. Leonard from any harm arising from a power outage.

Moreover, there is no evidence that Grubb & Ellis or Microsoft ever intended Mr. Leonard to be a third party beneficiary

of the facility management contract. See *Burke & Thomas, Inc. v. Int'l Org. of Masters*, 92 Wn.2d 762, 767, 600 P.2d 1282 (1979) (“The creation of a third party beneficiary contract requires that the parties intend that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract.”). Importantly, Mr. Leonard provides no evidence or legal authority supporting an argument that Grubb & Ellis assumed or was delegated Microsoft's affirmative duty to provide a safe and secure environment for its employees and business invitees.

Importantly, there is also no evidence or authority leading to the inference that Grubb & Ellis had a legal obligation to provide uninterrupted electrical power to the Microsoft campus. Mr. Leonard appears to argue that Grubb & Ellis’ “knowledge of power anomalies suffered by Microsoft in the past” somehow operated to create a duty to prevent future outages. *Brief of Appellant*, at 19. However, even where a property management company had prior knowledge of problems with operation of a garage door in a property it managed, the court held the company did not have a duty to follow through with reasonable care to fix the problematic door. *Pruitt v. Savage*, 128 Wn. App. 327, 333, 115 P.3d 1000 (2005).

Here, similar to the property manager in *Pruitt*, Grubb & Ellis did not assume a duty to repair or improve the Microsoft electrical distribution system, even if it were found to be true that the fuses between PSE’s power delivery system and Microsoft’s distribution

system were not coordinated. (*Appellant's Brief, at 19*) Plaintiff's expert, John Beebe, apparently confuses the technological capability to prevent power fluctuations with the existence of a duty to do so. (*Appellant's Brief, at 18–20*) Contrary to Mr. Beebe's unsupported opinions, responsibility to manage Microsoft's electrical power distribution system is not synonymous with a duty to upgrade and improve the same system. (*Appellant's Brief, at 18–19*)

The record is devoid of any indication that Grubb & Ellis' efforts at "troubleshooting" power outages gave it the unilateral right to modify the Microsoft electrical distribution system to prevent future outages, or obligated it to seek permission or authority to do so. Indeed, Grubb & Ellis' Senior Director of Facilities merely stated he and his team would "troubleshoot" and "address" power anomalies at Microsoft's facilities. (*CP 64*) There is no evidence whatsoever that Microsoft ever told Grubb & Ellis to take steps to prevent power outages, or to upgrade the power distribution system by coordinating fuses and preventing simultaneous chiller plant startups.

Rather, the actual evidence before the trial court on this issue was that PSE believed automation of the power distribution system and speeding restoration of service "**will generally require a capital expenditure by Microsoft** for their implementation as they go beyond PSE's core services as defined with the WUTC."

(CP 73) Further, in June 2007, just prior to the July 2007 power outage at issue, even PSE expected such outages to continue at the Microsoft campus:

PSE will continue to investigate and report to Microsoft **on outage and power quality events** that affect the operation of their facilities. PSE will take action, **when economically justified**, to correct system weaknesses identified during investigations of outage and power quality events.

(*Id.*) (emphasis added) This means that if Microsoft, as the facility owner, and PSE, as the campus electrical power provider, desired uninterrupted electrical power on the Redmond campus, both of those entities needed to make economically justified capital improvements to achieve that goal. Notably absent from mention in the Microsoft Service Plan is any discussion of Grubb & Ellis having any responsibility for recommending or undertaking electrical system improvements. (*See, generally, CP 73–87*)

Mr. Leonard provides no genuine factual issue that Microsoft or PSE ever approved or undertook such capital improvements before July 25, 2007, or more importantly, that Microsoft ever delegated responsibility for procuring or installing such improvements to Grubb & Ellis. Consequently, the Court should affirm the trial court and conclude that Grubb & Ellis did not owe a duty to Mr. Leonard. Because all other elements of a negligence cause of action derive from the existence of a duty, all facts

supporting breach, causation and harm are immaterial and properly disregarded in reaching this conclusion.

**B. THERE IS NO EVIDENCE GRUBB & ELLIS BREACHED A DUTY OF CARE**

If the Court finds Grubb & Ellis had a duty to protect Mr. Leonard from harm, summary judgment dismissal is still indicated, because the record is devoid of any genuine factual issue regarding a breach of such duty. A defendant is not negligent simply because an accident occurred. *Gordon v. Deer Park School Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967) (citing *Havdon v. Bay City Fuel Co.*, 167 Wash. 212, 9 P.2d 98 (1932)).

The design and operation of the elevator was a reasonable and proper method for Grubb & Ellis to meet any duty of care it might owe to the passengers, because the elevators came to a complete stop on a power failure, thereby ensuring no one inside an elevator would be harmed during a power outage. There is no evidence Grubb & Ellis failed to ensure proper maintenance of the elevator in question, or that its braking system did not operate exactly as designed when the power outage occurred. Plaintiff presents no evidence whatsoever that the forces acting upon the elevator when it stopped must have been more likely than not sufficient to cause Mr. Leonard's alleged injuries, as required by *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985) (breach of duty must be shown to be the proximate cause of the injury).

Moreover, Mr. Leonard cannot demonstrate that the purported lack of coordination between the fuses and the simultaneous startup of the chiller plants posed an unreasonable risk of harm, as required to be shown in *Ford, supra*.

Like the plaintiff in *Ford*, Mr. Leonard presented no competent evidence that the elevator stopping in or itself posed a known unreasonable risk of harm, or that Grubb & Ellis' actions at most did more than cause the elevator to come to a complete stop, as per its design. The Court should not find, in the absence of proof of negligence, any liability based on these bare facts.

#### **V. CONCLUSION**

As the plaintiff, Mr. Leonard has failed to meet his burden to prove Grubb & Ellis owed a duty of care, or that it breached such a duty. There is no evidence or authority creating a duty on the part of Grubb & Ellis to protect invitees on the owner's land from sudden elevator stops during a power outage originating off the campus. Summary judgment was properly entered for Grubb & Ellis, and the trial court's order should be affirmed.

DATED this 13th day of January, 2012,

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