

No. 74655-3

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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ANNETTE ANDERSON,

Plaintiff/Appellant,

v.

THYSSENKRUPP ELEVATOR CORPORATION,

Defendant/Respondent

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**BRIEF OF RESPONDENT**  
**THYSSENKRUPP ELEVATOR CORPORATION**

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KING COUNTY SUPERIOR COURT  
NO. 14-2-27879-9 KNT  
HONORABLE VERONICA GALVAN

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**I. INTRODUCTION AND SUMMARY OF THYSSENKRUPP'S  
RESPONSE TO ANDERSON'S APPEAL**

*“The accident in the Anderson case was triggered by a manufactured electronic circuit board known as a CPT (manufactured by Motion Control Engineering). The failure of this board could not be predicted or repaired in the field.”<sup>1</sup>*

The above opinion, stated under oath by Annette Anderson’s own expert witness, Stephen Carr, was consistent with all of the other relevant and admissible factual evidence in the record on ThyssenKrupp Elevator Corporation’s (“TKE’s”) motion for summary judgment. All by itself, this straightforward statement spelled the end of Anderson’s negligence claim against TKE.<sup>2</sup>

But there was much more undisputed evidence to support TKE’s motion for summary judgment – and much of that evidence also came from Dr. Carr.

In October 2009 – a year before TKE began servicing the Boeing elevators in October 2010 -- a prior contractor (“VST”) had installed three factory-sealed microprocessor units from Motion Control Engineering (“MCE”) atop each of the four passenger elevators in Boeing Building 10-18. VST performed maintenance on the elevators through September 30, 2010. The twelve CPT units were expected to continue working properly for ten

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<sup>1</sup> CP 234-235. (Declaration of C. Stephen Carr, Ph.D. at ¶11).

<sup>2</sup> Carr’s conclusion is completely consistent with the conclusion drawn by TKE’s elevator expert, Chuck Bigler, who stated, at CP 139:

My opinion is the likely cause of elevator #2 stopping while Ms. Anderson rode the elevator was the failure of the CTP [sic] board. The CTP board is essentially a “black box” about the size of an iPad. The board is not serviceable by a mechanic in the field and failure of the board cannot be discerned until after the microprocessor sealed inside has already begun to fail.

years or more.<sup>3</sup> There is no evidence any one of the twelve MCE microprocessor units experienced any problems prior to October 1, 2010.

TKE's maintenance contract for the Boeing elevators began on October 1, 2010.<sup>4</sup> Between October 1, 2010 and December 31, 2010, there was not a single problem report or "callback" to TKE for Elevator #2.<sup>5</sup> Before TKE filed its motion for summary judgment, Carr gave testimony, under oath, about callbacks TKE received for problems with the *door mechanism* on Elevator #2 between February 4, 2011 and June 9, 2011. One by one, Carr admitted that *not one* of those callbacks was related in any way to the CPT on Elevator #2; and that not one put TKE on notice it should repair or replace any one of the three, nearly new, factory-tested and sealed MCE microprocessor units installed atop the elevator car.<sup>6</sup>

In addition, the evidence showed that on July 21, 2011, Elevator #2 was inspected by the State and certified as reasonably safe for public use.<sup>7</sup> From the date of inspection until Anderson's incident on October 21, 2011, the elevator was used for an estimated 50,000 trips over the course of three months.<sup>8</sup> There was not a single reported problem with the elevator, of any

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<sup>3</sup> CP 135, *see also*, CP 344 (Carr testimony that "age [of elevator components] is a major problem, *not in this case* but in general.")

<sup>4</sup> CP 17.

<sup>5</sup> CP 251-252, *compare* CP 367-369 (explaining how data on CP 251 was derived; at CP 368 ("So 2010 annualized I wrote 6. If we take that one away, I'd write zero").

<sup>6</sup> *See* pp. 11-12, *infra*.

<sup>7</sup> CP 72.

<sup>8</sup> CP 135; CP 140.

kind, at any time, during any of those 50,000 trouble-free trips, much less a reported problem that signaled there was an ongoing “intermittent failure” or a “potential defect” hidden inside one of the factory-tested and factory-sealed MCE microprocessor boxes on Elevator #2.<sup>9</sup> In fact, between the last door-related “callback” on June 9, 2011, and the October 21, 2011 Anderson incident nearly five months later, there were no reported problems with Elevator #2 of any kind. *Zero.*<sup>10</sup>

In sum, the undisputed evidence showed that for more than two full years, between October 1, 2009 and October 21, 2011, there was *nothing* in the operation and service history of Elevator #2 that showed a CPT board was “intermittently failing” or “potentially defective.”

Nevertheless, in the face of this undisputed evidence, Anderson continues to argue that “problems with Elevator #2 in the months before Ms. Anderson’s accident gave TKE notice of a potential defect in its CPT board.”<sup>11</sup> On this record, that is no more than a bare, conclusory allegation – not only unsupported by specific facts in evidence but directly *refuted* by the facts in the record on review – including the testimony of Anderson’s own expert witness. These bare allegations were not sufficient to rebut TKE’s

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<sup>9</sup> *Id.*

<sup>10</sup> Between June 9, 2011 and the October 21, 2011 CPT failure, there were *zero* reported problems or “callbacks” over the course of about *80,000* trips on the elevator. *Id.*; CP 254-255.

<sup>11</sup> Brief of Appellant (“App. Br.”) at 9. *See also*, App. Br. at 1 (asserting that Elevator #2 showed “telltale signs of a problem with its control panel”).

motion for summary judgment; and they do not justify reversal, on appeal, of Judge Galvan's order granting summary judgment.<sup>12</sup>

Furthermore, the undisputed record also shows that shortly after the Anderson incident on October 21, 2011, the failure of the Elevator #2 CPT was immediately apparent to TKE's mechanic during a routine maintenance visit – which he made *before* TKE had notice of the Anderson incident or any other reason to direct its attention to that elevator or its CPT. The mechanic described what he saw as an “intermittent failure,” because the elevator ran normally for a time and then “intermittently” would power down, come to a stop for a short time, and then power up and begin to run again – all during the course of his observation on a single day.<sup>13</sup>

*That* indeed was an “intermittent failure” of the factory-sealed CPT microprocessor circuitry – and it was unlike anything that had been seen before. It was not a failure caused by a loose or frayed wire connection, or the failure of a “dc relay connected to the CPT”<sup>14</sup> – but an outright failure of the nearly new, factory-tested and factory-sealed microprocessor inside of an MCE “black box” mounted atop Elevator #2. To quote Dr. Carr once again, “*the failure of this board could not be predicted or serviced in the field.*”

When MCE received notice of this problem, it promptly supplied a brand new, factory-tested and sealed CPT under warranty. Once the new CPT was

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<sup>12</sup> See argument and authorities at pp. 26-33, *infra*.

<sup>13</sup> CP 17-18. See also CP 219 (failure of a microprocessor results in many operational problems over a short period of time).

<sup>14</sup> App. Br. at 3-4.

installed, the elevator ran flawlessly once again.<sup>15</sup> The period between *October 1, 2010 and October 21, 2011* when, by Dr. Carr's own admission, *not a single incident indicative of CPT failure was ever observed*, surely was not "notice to TKE of a potential defect in the CPT board" or evidence of an "intermittent failure" of the CPT. It was evidence there was no prior failure at all; and the bare assertion that "more and better testing would have prevented this accident" is sheer speculation that assumes, contrary to all the evidence, that there was an ongoing problem with the CPT that "testing" would have revealed. It is a circular argument, not evidence, and not only does it run counter to all of the facts in evidence, it defies logic and common sense.

Nor was there any evidence of an "intermittent failure" or a "potential defect" of *another* CPT board, on any of the *other* three Boeing passenger elevators, in the course of scores of inspections, including inspections by the State; hundreds of thousands of trips; or in the operating and service history of any of the three *other* Boeing passenger elevators. Not one of those CPT boards malfunctioned or failed prior to October 21, 2011. Since the bad CPT on Elevator #2 was replaced on November 1, 2011, *not one of the twelve CPTs on the four Boeing elevators ever has failed, nearly five years later.*<sup>16</sup> In sum, with the exception of the one rogue, defective board that was replaced under warranty on Elevator #2, these twelve sealed MCE

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<sup>15</sup> CP 16-19; CP 82; CP 229; CP 255-256.

<sup>16</sup> CP 134-137.

microprocessor boards are now about seven years old; and every one of them is still working perfectly and as intended.<sup>17</sup>

There is only one reasonable inference from all of this evidence – one CPT on Elevator #2 failed prematurely, while still under warranty, and without any prior warning. One might speculate that it had a latent defect at the time of manufacture, or that it was compromised in some way when VTS installed it. The reason this one CPT prematurely failed may never be known, but one thing is certain – *it did not fail because of something TKE did or failed to do* during the course of performing maintenance of the Boeing elevators. And, under Washington law – not the law of Nevada, Utah, New York, Tennessee, or the other out-of-state authorities liberally cited in Anderson’s opening brief – Anderson could not fall back on the doctrine of *res ipsa loquitur* to establish a rebuttable presumption of negligence. Even if she could, the overwhelming, undisputed evidence here conclusively would have rebutted any such presumption in any event.

However, reading Anderson’s opening brief in this appeal, one would never know that any of this evidence is in the record. Anderson somehow neglects to mention it, much less attempt to explain it – no doubt because it cannot be explained away.

In this responding brief, TKE will address the undisputed evidence in the record in considerable detail, including the specific facts established by the

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<sup>17</sup> *Id.*; CP 242-279 (Carr review of service records showing no other CPT units replaced).

evidence that Anderson has chosen to ignore. When fairly and accurately presented, the record demonstrates, beyond any reasonable argument or inference to the contrary, that the sworn testimony of Dr. Carr quoted above is the only *reasonable* conclusion that a trier of fact could draw.

On this clear record, and under clear, controlling and published *Washington* law – not the out-of-state and unpublished decisions on which Anderson’s appeal so heavily relies -- Judge Galvan properly granted summary judgment in favor of TKE and properly denied Anderson’s motion for reconsideration.

TKE therefore asks the Court to affirm Judge Galvan’s order dismissing Anderson’s claims under CR 56.

## **II. TKE’S STATEMENT OF THE ISSUE**

Did the trial court properly grant summary judgment under CR 56, dismissing Anderson’s claims against TKE, when the undisputed evidence showed there was no reason for TKE to anticipate, prior to Anderson’s incident on October 21, 2011, that any one of the three nearly new, factory-tested and sealed, “no maintenance” CPT microprocessor units atop Elevator #2, or atop any of the other passenger elevators at Boeing Building 10-18, was failing or in imminent danger of failing, and should be replaced?

*TKE submits the answer to this question, on this record and under controlling Washington law, must be “yes.”*

### III. TKE'S STATEMENT OF FACTS

1. Each of the four elevators in Boeing Building 10-18 was fitted with three new, factory-sealed, non-serviceable microprocessor control boards in October, 2009 – and those boards were reasonably expected to provide reliable service for a decade.

Building 10-18 is part of the Boeing Park Plaza industrial complex. There are four passenger elevators and one freight elevator in Building 10-18. Montgomery Elevator originally installed the elevators in 1988. VTS extensively modernized the four passenger elevators in 2009. As part of that modernization, VTS installed a new electronic controller system designed, manufactured and sold by MCE.<sup>18</sup> This system consisted of *three* factory-sealed and tested MCE microprocessor control boxes for each elevator. Each box controlled different components and functions of the elevator.<sup>19</sup>

The MCE “black boxes,” commonly called “CPTs,” are sealed units, each about the size of a small laptop computer or tablet. Other than the wire connections on the exterior of the box, and separate relays and other devices which may be *connected* to and controlled by the CPT, this is a maintenance-free component of the elevator that an elevator mechanic cannot tamper with or repair. Because this is a maintenance-free, factory-tested and sealed unit, there is no way to predict that a CPT microprocessor will fail prematurely.<sup>20</sup>

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<sup>18</sup> CP 105-109.

<sup>19</sup> CP 134-135; CP 139-140. Stephen Carr erroneously believed each of the four elevators had *just one* microprocessor/controller unit mounted on the cartop. CP 339.

<sup>20</sup> CP 18.

VTS serviced the Boeing elevators for a year after the modernization work -- until October 2010. Boeing contracted with TKE to begin servicing the elevators from October 1, 2010 to the present.<sup>21</sup>

A CPT ordinarily can be expected to stay in service for ten years or more.<sup>22</sup> Anderson's elevator expert, Dr. Carr, did not disagree that just two years after VTS installed them, the CPTs on the Boeing passenger elevators were well within their reasonably expected, useful safe life.<sup>23</sup>

2. **From the time TKE began performing maintenance on Elevator #2 in October 2010 to the time of the CPT failure on October 21, 2011, the elevator had few "callbacks"; and not one of those pre-failure callbacks related to a problem with a CPT.**

TKE had only been servicing the Boeing elevators for a year when one of the black boxes atop Elevator #2 failed, sent the elevator into "safety mode," cut the power to the elevator and caused the unexpected stop that allegedly injured Annette Anderson on Friday, October 21, 2011.<sup>24</sup> The elevator powered back up a short time after and took Ms. Anderson to her destination on the ground floor. Anderson exited the elevator and rushed off to make her

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<sup>21</sup> CP 17.

<sup>22</sup> CP 135.

<sup>23</sup> CP 344 ("I run into far too many cases where parts are left in place twenty years when they should have been swapped out in ten. So age is a major problem, *not in this case, but in general*"); CP 325-326 at ¶3.

<sup>24</sup> CP 19; CP 82; CP 139; CP 229.

appointment with a chiropractor because she was “running late.”<sup>25</sup> This incident was not reported to TKE until the following Monday.<sup>26</sup>

There is no dispute the failure of a factory-sealed, zero-maintenance CPT microprocessor was the sole cause of the October 21, 2011 incident. TKE, the extensive State elevator inspection and investigation that followed the incident, and Anderson’s expert Dr. Carr all have agreed on that.<sup>27</sup>

During the first few months of 2011, Elevator #2 experienced issues related to operation of the doors. TKE’s witnesses explained precisely what caused those problems and how they were resolved;<sup>28</sup> and Dr. Carr gave sworn testimony in July 2015 in which he admitted, one by one, that none of the door-related “callbacks” for maintenance on Elevator #2 during the first half of 2011 were signals to the mechanic that one of the CPTs on the elevator would require repair or replacement. Instead, as he would later do in his declaration opposing summary judgment, Carr merely made the vague assertion “there’s a lot of problems” with the elevator.<sup>29</sup>

Prior to his deposition, Carr reviewed the service records for the five service calls or “callbacks” for Elevator #2 that occurred on February 8, March 14, April 4 and June 9, all in the first half of 2011. Although Carr has pointed to these callbacks as evidence of TKE’s allegedly “negligent”

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<sup>25</sup> CP 2-3; CP 228.

<sup>26</sup> CP 18-19.

<sup>27</sup> CP 19; CP 82; CP 139; CP 229.

<sup>28</sup> CP 139-140.

<sup>29</sup> CP 87. *Compare* Carr testimony quoted at pp. 11-12, *infra*.

maintenance of the Boeing elevators, he also admitted, under oath in July 2015, that not one of these five earlier incidents related to a CPT, or gave TKE a reason to suspect a CPT malfunction or to replace a CPT.

*With respect to the February 8, 2011 callback, Carr testified nothing should have indicated to TKE that there was a problem inside the CPT “black box” atop Elevator #2:*

*Q. All right. Well, tell me what in here tells you that this is notice of a CPT board needing to be changed out.*

*A. I'm not saying it is but there's a lot of problems.*

*Q. All right. So this isn't something that you can say is a reason to change out the CPT board, correct?*

*A. Correct.*<sup>30</sup>

*As to the March 14, 2011 callback, Carr also testified nothing gave TKE notice of a problem with the CPT:*

*Q. So where is there something that gives the mechanic notice that the CPT board is having a problem on March 14th, 2011?*

*A. I don't think there is on March 14th.*<sup>31</sup>

*Yet again, as to the April 4, 2011 callback, Carr testified that nothing gave TKE reason to suspect a problem with the CPT for Elevator #2:*

*Q. Okay. Again, nothing in here is telling you that the CPT board is a problem for the safety circuits opening, correct?*

*A. Correct.*<sup>32</sup>

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<sup>30</sup> CP 86-87 (emphasis added).

<sup>31</sup> CP 89 (emphasis added).

<sup>32</sup> CP 90-91 (emphasis added).

As to two service calls made to TKE on June 9, 2011, Carr once again agreed that nothing happened on that date to give TKE notice of an impending failure of the MCE CPT black box for Elevator #2:

Q. So this is a situation where we know the cause of the incident [the Anderson incident on October 21, 2011] is the CPT board failing and opening up the circuit?

A. Because of that one, yes.

Q. Right. *So we were looking at whether June 9<sup>th</sup> had anything about it that alerted ThyssenKrupp to go, 'You know what? We need to change out the CPT board.' Is there anything there?*

A. No.<sup>33</sup>

Carr's testimony was consistent with the testimony of Richard Preszler, the TKE mechanic who did most of the maintenance work on the elevators in Building 10-18 starting in October 2010. In all the time Preszler worked on Elevator #2 prior to the October 21, 2011 Anderson incident, he saw nothing that signaled a problem with a CPT.<sup>34</sup>

Carr's testimony also confirmed the opinions of TKE's own expert, Chuck Bigler, a former elevator mechanic and service manager. Like Carr, Bigler agreed that the elevator malfunctioned while Ms. Anderson was aboard on October 21, 2011 because the CPT microprocessor board failed. Just as Carr testified under oath, Bigler concluded the service history for

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<sup>33</sup> CP 92 (emphasis added).

<sup>34</sup> CP 16-19.

Elevator #2 did not give TKE any reason to believe the black box would fail, or any reason to replace the CPT microprocessor before October 21, 2011.<sup>35</sup>

Bigler went one step further to identify the actual cause of the prior callbacks for Elevator #2; and Anderson did not offer any factual evidence or opinion testimony to the contrary:

***Based on my evaluation of this case, none of the five callbacks for elevator #2 in the year before Ms. Anderson's incident involved the ICE-CTP [sic] car top board. These five incidents all related to problems with the elevator door hardware or software.*** This is consistent with my experience as an elevator mechanic. Elevator doors open and close each time an elevator is called. These doors also interact with the public and consequently get struck by people or their belongings, held open by people beyond normal closing time or obstructed from closing by debris or other impediments in the doorway. All of this combines to make doors the most common reason for elevator callbacks and needed maintenance.<sup>36</sup>

Despite all of this evidence, and directly contrary to his own prior testimony, Carr's later declaration stated the sweeping conclusion, without reference to any specific supporting facts, that failure of the CPT board "was not a spontaneous event with no prior warning to the Defendant."<sup>37</sup>

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<sup>35</sup> CP 139-140; *see* footnote 2, *supra*.

<sup>36</sup> CP 139-140 (emphasis added). In his sworn deposition testimony, Carr *agreed* with Bigler's assessment of the prior callbacks on Elevator #2. *See, e.g.*, CP 349-351 (February 8, 2011 door problems did not relate to CPT controlled "safety circuit"; door problems are often caused by passengers "rushing or bumping doors," in part because door pickup rollers and restrictors are "delicate"); CP 357 (April 4, 2011 callback and "entrapment" probably caused because elevator door "pickup rollers" required readjustment; "in fact, it's very common" for this to occur).

<sup>37</sup> CP 235.

That conclusory statement left an open question -- what *was* “the prior warning to the Defendant?” Carr’s declaration did not provide the answer.

Instead, Anderson’s opposition to TKE’s motion for summary judgment relied on her counsel’s *argument* – that the same service calls Carr already had testified were *not* related to a failing CPT, and that Bigler testified were all related to problems with door hardware and software and *not* the CPT, were “documented prior problems” that put TKE on notice that CPT failure was imminent and that the board should be repaired or replaced immediately.<sup>38</sup> Through argument of counsel, Anderson also relied on the speculative theory that other, wholly unrelated service calls on the other three Boeing passenger elevators warned of a possible failure of one of the three CPTs on Elevator #2.<sup>39</sup>

On appeal, Anderson again points to the replacement of a “*dc relay*” connected to one of the three CPT boards on *Elevator #1* as a warning to TKE that one of the three CPT boards on *Elevator #2* would fail nearly a year later. She argues that Elevator #1 “had experienced similar problems.”<sup>40</sup>

However, there is no evidence these “problems” were “similar”; and the record demonstrates they were *not* similar. Not one of the three CPT boards

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<sup>38</sup> Yet again on appeal, Anderson has told the Court the service history for Elevator #2 gave “*telltale signs of a problem with its control panel.*” App. Br. at 1. On this record, that statement is indefensible.

<sup>39</sup> CP 151.

<sup>40</sup> App. Br. at 3-4.

on Elevator #1 ever has failed, over the course of seven years of operation.<sup>41</sup> As Anderson herself states, the “dc relay” that failed and was replaced was *connected to* one of three CPT boards atop Elevator #1 – just as many different elevator components are connected to and controlled by the three CPT boards on each of the four Boeing elevators. Any one of those “connected” parts may wear out or malfunction and require repair or replacement on its own – as was the case with the dc relay on Elevator #1. Anderson has never offered evidence to show how the failure of a relay or any other part “connected to” the CPT on Elevator #1 put TKE “on notice of a potential defect or intermittent failure” of the CPT on Elevator #2 – other than the fact the CPT and the dc relay are “attached to” each other.

A relay, by definition, is an electromagnetic switching device – and as Anderson’s own description indicates, the “dc relay” was a separate, field-serviceable component *connected or attached to* the sealed CPT box. It can be and was repaired or replaced *without repair or replacement of the CPT* on Elevator #1.<sup>42</sup> The Elevator #1 CPT was not “potentially defective” and it was not “failing intermittently” – it was working normally then and is working normally today. The failure of a *relay* on Elevator #1 did not portend

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<sup>41</sup> CP 135; *see generally*, CP 242-279 (summarizing service records, showing no other CPT replacement since original installation).

<sup>42</sup> The Merriam-Webster dictionary defines a relay as “an electromagnetic device for remote or automatic control that is actuated by variation in conditions of an electric circuit and that operates in turn other devices (as switches) in the same or a different circuit.” [Http://www.merriam-webster.com/dictionary/relay](http://www.merriam-webster.com/dictionary/relay).

the failure of a *CPT board* on that elevator, much less the failure of a CPT board on any of the three other elevators at Boeing Building 10-18.

Similarly, testimony that TKE mechanics could have checked the wiring connections to the Boeing elevator CPT boards<sup>43</sup> was irrelevant to the question whether TKE should have known the factory-tested and sealed CPT microprocessor on Elevator #2 was “potentially defective” or “failing intermittently” prior to October 21, 2011. Elevator #2 did not come to a “safety stop” because of a bad wiring connection. The incident occurred because the microprocessor circuitry that was factory-sealed *inside* one of the CPT boxes failed, and for no other reason.

All of the evidence showed that there was no reason for TKE to pull and replace a CPT unit when it was only two years old;<sup>44</sup> there had been no prior incidents that were “telltale signs” of a malfunctioning CPT on Elevator #2 in the two years prior to October 21, 2011;<sup>45</sup> no other CPT unit on the other three Boeing elevators required replacement before or after the Anderson incident;<sup>46</sup> and, there had not been a single reported problem *of any kind* with Elevator #2 after the last callback for door-related problems on June 9, 2011 – nearly five months and over *80,000 elevator trips* prior to the Anderson

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<sup>43</sup> App. Br. at 12.

<sup>44</sup> CP 145; CP 344.

<sup>45</sup> See, Carr testimony quoted at pp. 11-12, *supra*.

<sup>46</sup> No such incidents are identified in any records or testimony. See, e.g., CP 242-279 (Carr service record summaries).

incident on October 21, 2011.<sup>47</sup> During that same five-month period, there had been *sixteen* TKE visits for routine maintenance and testing, and never did TKE observe anything related to an “intermittent failure” or “potential defect” in the CPT.<sup>48</sup>

3. **The State of Washington inspected Elevator #2 in July 2011 and found it to be in compliance with all applicable code requirements – and the elevator was used for about 50,000 trouble free trips between the time of the inspection and the Anderson incident.**

Furthermore, on July 21, 2011, the Washington State elevator inspector conducted a complete annual inspection of Elevator #2, to determine whether the elevator was operating in compliance with Washington regulations, including compliance with the national elevator code, American Society of Mechanical Engineers A.17.1, adopted in the Washington regulations. The inspector found “no apparent deficiencies” and signed off on the elevator as code compliant and safe for public use.<sup>49</sup>

Between the time the inspector provided his official sign-off on Elevator #2, on July 21, 2011, and the black box failure on October 21, 2011, Elevator #2 had been used for *more than 50,000 trips*. There is no evidence that anything occurred during those 50,000 trips to indicate that the black box should be replaced, or that gave anyone warning that it was about to fail prematurely – as it did on October 21, 2011. Instead, there were no reported

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<sup>47</sup> CP 135; CP 140 (4.5 months, at the rate of an estimated 18,000 trips per month).

<sup>48</sup> CP 254-255.

<sup>49</sup> CP 72.

malfunctions, of any kind, for any reason, during all of those 50,000 trips on Elevator #2.

4. **TKE immediately observed a problem with the operation of one of the three CPTs on Elevator #2 during routine inspection and maintenance, shortly after the Anderson incident.**

Boeing knew about Ms. Anderson's October 21, 2011 experience in Elevator #2, but did not notify TKE of the problem. Instead, two days after plaintiff's incident, on Sunday, October 23, 2011, TKE mechanic Richard Preszler first discovered there might be a problem with Elevator #2 when he reported to Building 10-18 to perform routine maintenance and testing.<sup>50</sup>

When he had completed his work that Sunday, Preszler noticed that Elevator #2 had stopped between floors. He locked off the elevator as a precaution until he could return to diagnose and resolve the problem.<sup>51</sup>

On Monday, October 24, 2011, Preszler found that Elevator #2 ran normally for a time, but would "intermittently" shut down completely, just as it had the day before. Preszler measured the outputs from the elevator car to the CPT black box, all of which were normal. As a result, he suspected the factory-sealed CPT itself could be the problem. Preszler contacted MCE and was told that an output circuit hidden inside the CPT black box was failing to activate, causing the CPT to cut the power to the elevator while it was

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<sup>50</sup> CP 17-18.

<sup>51</sup> *Id.*

traveling to a selected floor. There was only one solution: obtain a new factory-tested and sealed CPT unit from MCE to replace the defective one.<sup>52</sup>

On Wednesday, October 26, 2011, State elevator inspector Perry McKenzie examined the elevator and reviewed Preszler's troubleshooting work. MCE already had agreed to send a new CPT under warranty; and the elevator stayed shut down until that new unit arrived from the MCE factory.<sup>53</sup>

On Tuesday, November 1, 2011 Preszler replaced the CPT black box on Elevator #2. On November 2, 2011, McKenzie and Preszler tested the elevator with the new CPT on board. McKenzie concluded that with a new CPT installed, the elevator was again safe for use by the public and authorized Boeing to return the elevator to service.<sup>54</sup>

After Preszler replaced the black box on Elevator #2, it was no longer making unpredictable "safety stops" during travel, as it did for the first time on October 21, 2011 with Ms. Anderson on board, and as it did repeatedly during Preszler's inspection before a new CPT was installed.<sup>55</sup>

5. **Following replacement of the failed CPT on Elevator #2, all twelve of the CPTs on all four of the Boeing Building 10-18 passenger elevators continue to provide trouble-free service.**

The evidence reviewed above conclusively demonstrated that prior to October 21, 2011, none of the "callbacks" concerning Elevator #2 or any of

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<sup>52</sup> *Id.*; CP 111.

<sup>53</sup> CP 18-19.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

the other Boeing passenger elevators was related to a “potential defect” or an “intermittent failure” of a CPT.

Nor were there an unusual number of callbacks for the group of four Boeing passenger elevators that required TKE to “anticipate a problem with Elevator #2’s CPT board.”<sup>56</sup> The evidence submitted with Dr. Carr’s declaration demonstrated that – accounting for obvious errors and duplication; and ignoring undocumented and purely fictional callbacks Carr “assumed” had occurred before TKE began its contract with Boeing.<sup>57</sup>

The facts in evidence are not only consistent with Dr. Carr’s own opinion, stated under oath, that up to 5 callbacks per year is typical for well-maintained elevators of the type installed at Boeing<sup>58</sup> – it is somewhat remarkable. As Mr. Bigler testified, a certain number of service calls are required to repair damage caused by misuse of the elevators (*e.g.* passengers attempting to force doors to remain open or striking doors with equipment) or by accident (*e.g.*, debris dropped into door tracks) that an elevator maintenance contractor cannot prevent, no matter how thoroughly it tests and maintains the equipment.<sup>59</sup>

All of the specific facts in evidence point to only one logical conclusion: the failure of one of the three factory-sealed CPT’s on Elevator #2, just two years after its original installation, was an unexpected event that was not the

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<sup>56</sup> App. Br. at 10.

<sup>57</sup> See pp. 21-26, *infra*.

<sup>58</sup> CP 363.

<sup>59</sup> CP 139-140.

result of anything TKE did or failed to do in performing its elevator maintenance contract with Boeing. The undisputed facts in evidence show there was no “warning to TKE” that it would fail; and the assertion that “more and better testing” would have revealed “a potential defect” in the CPT is pure speculation, unsupported by any evidence.

Dr. Carr had it right: *“the failure of this board could not be predicted or repaired in the field.”*

6. ***The Boeing passenger elevators have had a reasonably trouble-free service record since TKE began its maintenance contract on October 1, 2010.***

Having failed to show that TKE had any reason to suspect a “potential defect” or “intermittent failure” of a CPT board on Elevator #2 prior to October 21, 2011, and no reason to replace a CPT board that was working perfectly prior to October 21, 2011, Anderson attempted to show that the four Boeing passenger elevators, as a group, experienced an unusual number of maintenance problems or “callbacks,” which somehow would create a question of fact whether TKE’s negligence proximately caused the premature failure of a nearly new CPT on Elevator #2.<sup>60</sup>

Instead, upon close inspection, the documentary evidence and sworn testimony provided by Anderson’s own expert Stephen Carr proves these elevators *did not* experience an unusual number of callbacks for service

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<sup>60</sup> App. Br. at pp. 2-4.

between regularly scheduled maintenance visits, from the inception of TKE's maintenance contract on October 1, 2010 through the present.

Carr gave sworn deposition testimony in July, 2015. During that deposition, he opined that 4 or 5 "callbacks" during a year are not unusual for a well-maintained passenger elevator of the type installed at Boeing. Carr also conceded the reasonably expected number of callbacks may be higher still if an elevator sees more than average usage.<sup>61</sup>

In response to TKE's motion for summary judgment, Carr submitted a sworn declaration that included what he described as a tabular summary of the number of callbacks for the Boeing elevators in 2010 and 2011. This summary, contained in paragraph 20 of the declaration, purported to document over 80 callbacks for the four Boeing elevators in 2010.<sup>62</sup> If this were true, that might be troubling – although it still would not show that the failure of the CPT was any less sudden, unexpected and beyond TKE's control.

However, the factual record before Judge Galvan demonstrated the information contained in paragraph 20 *was not true at all*.<sup>63</sup> This was not a question of "credibility" – it was clearly established by the facts in the record.

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<sup>61</sup> CP 363 ("I would go with the guidelines proposed by Filipone in his book, *which is four or five per year as a reasonable number*").

<sup>62</sup> CP 237.

<sup>63</sup> CP 327-329.

Carr's deposition testimony and the exhibits to his declaration showed that the overwhelming majority of the "callbacks" enumerated in paragraph 20 of his declaration never occurred – and *could not have occurred* while TKE was maintaining the Boeing elevators. Carr's assistant had merely "annualized" the TKE service records backwards, to the first nine months of 2010, *before TKE began servicing the elevators*; then *assumed* that scores of callbacks had occurred during the time VTS was handling the elevator maintenance; and then offered these "assumed" callbacks as evidence of TKE's alleged negligence. Carr did this without reference to any actual VTS maintenance records for the entire period from October 1, 2009 to September 30, 2010.<sup>64</sup>

In addition, through a clerical error, Carr had noted a callback for Elevator #2 during the period October 1, 2010 to December 31, 2010 – TKE's first three months of maintenance work on the Boeing elevators – when Carr already had admitted the error, under oath, and that there really were *no callbacks* for Elevator #2 during those three months. This meant what his declaration reported as *6 callbacks* for Elevator #2 during 2010 -- even using his method of "assuming" callbacks prior to October 1, 2010 without supporting documentation -- was really none, *zero*.<sup>65</sup>

When Carr's declaration is read to take these errors and unfounded assumptions into account – which easily can be accomplished by review of

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<sup>64</sup> *Id.*; CP 363-369.

<sup>65</sup> CP 367-368.

the summary judgment record -- the result is that *the Boeing elevators did not experience an unusual number of callback incidents*, using Carr's own yardstick of 4 or 5 callbacks per year.<sup>66</sup>

It appears Anderson now concedes this on appeal, although Anderson and Carr never acknowledged Carr's errors or submitted a subsequent correction, amendment, supplement or explanation to the trial court. In her opening brief, Anderson now states there were "21 callbacks" in calendar year 2011 for the four elevators – an average of about five per elevator per year – not an unusual record of service calls at all, by Carr's own standards.<sup>67</sup>

Furthermore, the record demonstrates that even "21 callbacks" for 2011 is incorrect – and significantly inflated. Carr counted Preszler's post-incident work to diagnose and replace the Elevator #2 CPT as *three callbacks* on that elevator; and as an additional callback on *each* of the other three elevators: *6 out of the 21 callbacks Anderson claims occurred in 2011 are all for her own single incident on a single elevator*. The actual number of callbacks in 2011 was no more than 16 – exactly 4 per elevator.<sup>68</sup> A number of those 16 also are

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<sup>66</sup> CP 363 ("I would go with four or five per year as a reasonable number").

<sup>67</sup> *Id.*

<sup>68</sup> Carr counted the Anderson incident, as *three callbacks* for #2. CP 255. Carr also counted TKE's visit to replace and test the CPT on #2 as a callback for Elevator #1, CP 246 (10/23/2011 entry); Elevator #3, CP 265 (10/23/2011 entry); and Elevator #4, CP 275 (10/23/2011 entry).

double-counted; others have nothing to do with elevator functionality or were required by an act of God.<sup>69</sup>

Thanks to Dr. Carr's deposition testimony, we also know that 5 of those 16 callbacks were for *unrelated problems with the doors* on Elevator #2; and thanks in part to the documents appended to his declaration, we know those door problems were resolved nearly 5 months before the Anderson incident.<sup>70</sup>

Furthermore, the documents appended to Carr's declaration established four key points. *First*, they showed that TKE promptly responded when it received notice there was a problem with one of the Boeing elevators and resolved it.<sup>71</sup> *Second*, from the time TKE began its maintenance work at Boeing to the present, the number of callbacks has been well within Carr's own yardstick of "reasonableness" and has been *decreasing* since TKE took over maintenance of these elevators – not a sign of poor maintenance at all.<sup>72</sup> *Third*, TKE made frequent visits to Boeing for routine inspection and maintenance of all of the elevators – with about 50 visits documented in his

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<sup>69</sup> CP 273 (3/14/2011 "callback" Carr erroneously attributed to Elevator #4, for door problems on *Elevator #2* on same date also recorded at CP 253, related testimony at CP 90-91); CP 263 (2/21/2011 callback for "elevator fan making noise, clean vent fan"); CP 246 (9/13/2011 callback request to "please check all fault logs for seismic events between 12 and 2 PM... and possible cracks in slab").

<sup>70</sup> See testimony quoted at pp. 11-12, *supra*; CP 253-256 (no door related problems documented on Elevator #2 from 6/9/2011 to 3/21/2013, when a broken "door restrictor" was discovered during routine maintenance and replaced).

<sup>71</sup> See CP 242; CP 251; CP 261; CP 271 – (showing no "unresolved" callbacks, 2010 to 2015 for any of the 4 Boeing passenger elevators).

<sup>72</sup> *Id.*

summaries during the year prior to the Anderson incident.<sup>73</sup> *Fourth* and finally, among the years of records of routine maintenance, testing and callback incidents summarized in the appendices to the Carr declaration, there is not one *other* instance of failure or replacement of *any* of the twelve CPTs – since their October 2009 installation to the time of TKE’s motion.<sup>74</sup>

#### **IV. ARGUMENT AND AUTHORITIES**

- 1. The trial court properly granted TKE’s motion for summary judgment because Anderson failed to meet her burden to produce evidence of specific facts showing that TKE was negligent and that any such negligence was the proximate cause of her injury.**

Summary judgment is properly granted when there are no genuine issues of material fact in dispute, such that the moving party is entitled to judgment as a matter of law.<sup>75</sup> An issue of material fact “is one upon which the outcome of the litigation depends.”<sup>76</sup> As the party moving for summary judgment, TKE had “the initial burden of showing the absence of an issue of material fact.”<sup>77</sup>

TKE had two ways to meet its initial burden. It could “attempt to establish through affidavits that no material factual issue exists or, alternatively, [it could] point out to the trial court that the [claimant] lacks

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<sup>73</sup> *Id.*

<sup>74</sup> CP 242 – CP 279 (summary of all records reviewed by Dr. Carr).

<sup>75</sup> CR 56(e).

<sup>76</sup> *Atherton Condo Ass’n v. Blume Dev.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

<sup>77</sup> *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

competent evidence to support an essential element of his or her case.”<sup>78</sup> If Anderson failed to produce evidence to establish an essential element of her case, Civil Rule 56 compelled Judge Galvan to enter judgment for TKE, as a matter of law.<sup>79</sup>

TKE unquestionably met its initial burden under Civil Rule 56. Carr’s own deposition testimony, declaration and appended documents, together with the testimony of Messrs., Bigler, Preszler and Moore, established, among other things, (1) there had been no prior incidents involving Elevator #2, or any of the other Boeing passenger elevators, that related to failure of a CPT; (2) there were no post-incident CPT failures during five more years of operation; (3) the CPT that failed was only two years old and expected to continue in service for ten years or more after installation; (4) the CPT was not field-serviceable; (5) the failure of the CPT “could not be predicted”; and (6) the CPT failure was the sole known cause of the “safety stop” that Anderson experienced on October 21, 2011.

The burden shifted to Anderson to come forward with competent evidence to show there are material questions of fact as to each and every element of her claims.<sup>80</sup> Anderson could not rest on allegations in her

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<sup>78</sup> *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988).

<sup>79</sup> *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

<sup>80</sup> *First Class Cartage, Ltd. v. Fife Service and Towing, Inc.*, 121 Wn. App. 257, 89 P.3d 226 (2004).

pleadings to meet her burden of production.<sup>81</sup> She could not rely on argument of counsel, conclusory opinions and speculation in lieu of admissible evidence of specific facts to show that TKE was negligent and that its negligence was the proximate cause of her injury.<sup>82</sup> Nor could Anderson rely on expert testimony based on speculation or lacking a factual foundation. “The opinion of an expert must be based on facts. An opinion of an expert which is simply a conclusion, or is based on an assumption, is not evidence which will take a case to the jury.”<sup>83</sup> And most certainly, Anderson could not rely on opinion testimony that assumed facts contrary to the facts in evidence.<sup>84</sup>

The record here demonstrates that Anderson flat out failed to meet her burden of production. There was no evidence that TKE negligently maintained the MCE factory-tested, factory-sealed CPT “black box” microprocessor controller unit on top of Elevator #2 – her own Dr. Carr

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<sup>81</sup> CR 56(e).

<sup>82</sup> *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007) (emphasis added).

<sup>83</sup> *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984); *see also, Seven Gables Corporation v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12-14, 721 P.2d 1 (1986) (plaintiff's unfair competition claims were properly dismissed on summary judgment; affidavits stated bare conclusions and speculation rather than specific facts and well-founded, admissible opinion testimony); *Rothweiler v. Clark County*, 108 Wn. App. 91, 29 P.3d 758 (2001) (in opposing a motion for summary judgment, an expert must support his opinions with specific facts or the opinions will be disregarded); *Price v. City of Seattle*, 106 Wn. App. 647, 656-567, 24 P.3d 1098 (2000). (summary judgment properly granted; plaintiffs in landslide case relied on speculative and conclusory opinions of an expert who did not quantify alleged changes in volume and direction of water that allegedly caused landslide).

<sup>84</sup> *Davidson v. Metro Seattle*, 43 Wn. App. 569, 719 P.2d 569, *rev. denied*, 106 Wn.2d 1009 (1986).

admitted the CPT could not be serviced in the field and its failure could not be predicted. The undisputed evidence showed that the black box spontaneously failed, without displaying any prior symptoms of failure, despite the fact it was only two years old and still under warranty. There was no dispute the failure of that black box directly caused the elevator incident that allegedly resulted in Anderson's injury – again, Dr. Carr admitted that.

The evidence showed that from October 2009 to October 21, 2011, none of the twelve CPTs on the four Boeing elevators failed. Anderson failed to identify a single instance, during the period October 1, 2010 to October 21, 2011, in which the operating and maintenance records for Elevator #2 evidenced that a CPT was “potentially defective” or “intermittently failing.”

Nor could Anderson reasonably argue that TKE just “missed it” during the course of its maintenance. The elevator was inspected by the State three months before the incident – it found nothing wrong with Elevator #2. TKE performed routine inspection and maintenance on Elevator #2 16 times after that – it found nothing wrong with the elevator. From the time of the State of Washington inspection and October 21, 2011, the elevator ran 50,000 trips – with not a single reported problem. But on Sunday October 23, 2011, just after Anderson's “safety stop” incident on Friday afternoon, October 21, 2011 – and with no notice from anyone that the CPT was “potentially defective” and was “intermittently failing” -- the TKE mechanic immediately

observed the problem during a routine inspection and performed the only possible fix: install a brand new, factory-tested and sealed CPT.

With the new CPT unit installed, Elevator #2 ran virtually flawlessly again for many months, as did all of the other Boeing elevators<sup>85</sup> – still more proof that there was nothing sloppy, careless or negligent about TKE’s maintenance of any of the Boeing elevators, much less that TKE’s alleged “negligence” was the proximate cause of Anderson’s particular incident and alleged injury.

How did Anderson attempt to rebut this mountain of undisputed evidence?

Anderson’s expert Carr said “there were a lot of problems,”<sup>86</sup> without further explanation -- at the same time the service records proved that was false; and after he already had admitted that every prior “callback” on Elevator #2 was wholly unrelated to the CPT and its premature failure.

Carr opined that elevator maintenance contractors in general are “blatantly negligent” because they wait for parts to age and fail rather than replace them at “prearranged intervals,” and stated his view that “the jury will

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<sup>85</sup> CP 242 (Elevator #1, 0 callbacks 2012 – 2015); CP 251 (Elevator #2, 7 callbacks 2012 – 2015, including “annualized”, *i.e.*, callbacks not documented but “assumed”); CP 261 (Elevator #3, 8 callbacks 2012-2015, including “annualized” callbacks); CP 271 (Elevator #4, 5 callbacks 2012 – 2015, including “annualized” callbacks). One may also review the supporting chronological summaries and find that most of the callbacks never actually occurred – they are “annualized.” (CP 242-279; *see also* CP 328-330 (referencing Carr testimony on callback data and adjustments to his tabular summaries, consistent with his testimony, to reflect actual, documented callback incidents).

<sup>86</sup> CP 353.

need to decide as to the appropriateness of the maintenance” that TKE performed.<sup>87</sup> But Carr already had conceded, under oath, that the age of the Elevator #2 CPT was never an issue in this case.<sup>88</sup>

Carr’s declaration told Judge Galvan there were over 80 “callbacks” on the four Boeing elevators in 2010, and offered this as proof TKE had allowed the elevators to run to wrack and ruin<sup>89</sup> – but the documents appended to his own declaration demonstrated beyond dispute that his numbers and his opinion were directly contrary to the undisputed evidence in the record.<sup>90</sup>

Carr said that “more and better testing would have prevented this accident,” with no further explanation and no evidence to show that there was anything wrong with the CPT that some “additional testing” would have revealed prior to October 21, 2011.

Anderson did not show that TKE had failed, in any way, to comply with all of the maintenance, testing and inspection standards under the national elevator code and Washington elevator regulations.<sup>91</sup> Nor did Carr explain his assertion that the CPT on Elevator #2 was “intermittently failing,” while it continued to run flawlessly for over 80,000 trips before the sudden “safety stop” on October 21, 2011 that allegedly injured Anderson, and when Carr could not point to a single incident involving a prior “intermittent” CPT

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<sup>87</sup> CP 234. That “view” was not an admissible expert opinion. ER 702/ER 703.

<sup>88</sup> CP 341.

<sup>89</sup> CP 237; *compare* pp. 21 – 26, *supra* (reviewing actual callback records and errors in paragraph 20 of Carr declaration and appended tables).

<sup>90</sup> CP 242-279; CP 282; CP 328-329; CP 366-370.

<sup>91</sup> CP 327; CP 361 (Elevator #2 test log showing all required testing performed).

failure in any of the four elevators in the two years after the twelve CPTs were installed in 2009.<sup>92</sup>

But Carr did tell Judge Galvan that one of the controlling Washington authorities, *Adams v. Western Host, Inc.*,<sup>93</sup> “makes absolutely no engineering sense,” and chastised TKE for “embracing” this Court’s decision.<sup>94</sup> Carr even told Judge Galvan that the legislators who enacted the elevator statute cited in TKE’s motion, RCW 70.87.020(3), were “pretentious”; and purported to advise the trial court how the statute should be construed and applied – as in not at all -- as a result of the Legislature’s pretension.<sup>95</sup>

None of this was relevant and admissible evidence or opinion testimony sufficient to create a question of material fact on any issue joined in TKE’s motion for summary judgment; and it failed to support two essential elements of Anderson’s negligence claim: breach of duty and proximate cause.<sup>96</sup>

Judge Galvan did not err. Under Civil Rule 56, Anderson completely failed to produce admissible evidence to support two essential prerequisites of her negligence claim. Judge Galvan properly granted summary judgment for TKE and dismissed Anderson’s claims, as a matter of law.

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<sup>92</sup> During his deposition, Carr stated “I’ll point them out to you if you care...” CP 213. However, Carr never did “point them out,” either during his deposition or in his later declaration in opposition to TKE’s motion for summary judgment.

<sup>93</sup> 55 Wn. App. 601, 779 P.2d 281 (1989).

<sup>94</sup> CP 234.

<sup>95</sup> CP 237-238. Carr testified “I don’t really care what they say” in RCW 70.87.020 because “the companies got to them... You can quote me. Go ahead.” CP 373-374.

<sup>96</sup> TKE preserved its objections and specifically identified the errors in Carr’s summaries in great detail. CP 324-385.

2. *Anderson and her expert could not ignore, disavow or contradict his prior sworn testimony in order to create a question of fact to avoid summary judgment.*

To rebut TKE's motion for summary judgment, Anderson was left with no choice: attempt to repudiate, or simply attempt to ignore, the prior sworn testimony of her own expert witness Carr. However, clear and controlling Washington law *prohibited* Anderson from contradicting or avoiding prior sworn testimony in order to rebut TKE's motion for summary judgment.

In his earlier deposition, Anderson's expert Stephen Carr admitted that the only documented callbacks for Elevator #2 between October 1, 2009 and October 21, 2011 were not related to the CPT; did not put TKE on notice of a problem with the CPT; and did not require TKE to replace the CPT. There was nothing ambiguous or equivocal about that testimony. It did not require explanation or "clarification," and Carr offered none in his later declaration.

Instead, in an attempt to oppose TKE's CR 56 motion, Carr and Anderson took a circuitous route around the prior testimony. Carr himself stated the bare conclusion that failure of the CPT "was not a spontaneous event with no prior warning to the Defendant."<sup>97</sup> Concurrently, Anderson's counsel attempted to provide the missing factual predicate for that conclusion – by pointing to the very same prior events that Carr already had admitted were unrelated to the CPT, as prior "warning" to TKE that a CPT on Elevator #2 would soon fail.<sup>98</sup>

Washington law is clear: Anderson could not abandon or modify the prior sworn testimony of her own expert in order to avoid summary judgment. The

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<sup>97</sup> CP 235.

<sup>98</sup> CP 151.

record of Carr’s clear prior sworn testimony controlled. Carr could not state opinions that relied on assumed facts that were directly contrary to his earlier sworn testimony and other undisputed evidence in the record. Nor could Anderson’s counsel backfill the glaring hole left in her proof by attempting to argue as though the contradictory sworn testimony never had occurred and the contradictory factual evidence did not exist.<sup>99</sup>

3. **Washington courts repeatedly have recognized that elevators and similar conveyances may malfunction because a part can fail without warning and in the absence of negligence.**

Washington long has held that as the owner/operator of the elevators in Building 10-18, *Boeing* acts as a common carrier, with the duty to exercise “the highest standard of care” for the protection of passengers who use its elevators.<sup>100</sup>

However, unlike *Boeing*, TKE is an outside contractor. It does not control building conditions. It is not in a position to observe the operation of the elevators on a day-to-day basis to determine whether they require immediate attention. Instead, TKE, like any outside maintenance contractor,

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<sup>99</sup> *Marshall v. AC&S, Inc.*, 56 Wn.App. 181, 782 P.2d 1107 (1989) (plaintiff’s affidavit disavowed prior knowledge of his claim, contrary to his prior sworn deposition testimony; the affidavit was properly disregarded and failed to rebut defendant’s motion for summary judgment based on statute of limitations); *see also*, *Klontz v. Puget Sound Power & Light*, 90 Wn.App. 186, 192, 951 P.2d 280 (1998); and *Ramos v. Arnold*, 141 Wn.App. 11, 19, 169 P.3d 482 (2007) (both following *Marshall*). *See* CP 324 – 331 (TKE’s objections to Carr declaration); CP 280-283 (reviewing record on reply); CP 304-311 (reviewing record in opposition to Anderson’s motion for reconsideration).

<sup>100</sup> *See, e.g., Pruneda v. Otis Elevator Co.*, 65 Wn. App. 481, 485-86, 828 P.2d 642 (1992), citing *Engstrand v. Harnett*, 106 Wash. 404, 180 P. 132 (1919).

makes periodic visits for scheduled maintenance and inspection to determine whether additional work is required; and primarily must rely on Boeing to provide notice that a problem has been observed that requires TKE's attention between regularly scheduled maintenance visits. Our courts consistently have recognized that an outside maintenance contractor like TKE plays a very different role from that of the owner/operator, and cannot be held to the owner/operator's heightened standard of care. Instead, TKE has only "a duty to act with reasonable care," and in this action, can only be held liable under an ordinary negligence standard.<sup>101</sup>

To establish that TKE was negligent, Anderson was required to prove: duty, breach of duty, and proximate cause between the breach and resulting injury.<sup>102</sup> The duty owed by an elevator maintenance contractor is one of ordinary, reasonable care in maintaining the equipment.<sup>103</sup> The mere occurrence of an elevator component failure, an accident and an injury does not support an inference that TKE breached its duty of ordinary care; and it does not establish proximate cause.<sup>104</sup>

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<sup>101</sup> *Pruneda* at 485-490 (Division One, rejecting plaintiff's invitation to apply the building owner's higher standard of care to outside elevator maintenance contractors); *see also* *Murphy v. Montgomery Elevator Co.*, 65 Wn. App. 112, 116-18, 828 P.2d 584 (1992) (Division Two, same holding); *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 176-77, 947 P.2d 1275 (1997) (Division Three, same holding, expressly adopting *Pruneda's* reasoning).

<sup>102</sup> *Christen v. Lee*, 113 Wn.2d 479, 488, 780 P.2d 1307 (1989).

<sup>103</sup> *Pruneda*, 65 Wn. App. at 483.

<sup>104</sup> *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

Washington courts repeatedly have recognized that an elevator or an escalator often can malfunction in the absence of negligence, because “elevators are mechanical devices of some complexity. *Materials can wear out or break without negligence being involved.*”<sup>105</sup>

In this case, there is no dispute that “materials broke” – a factory-tested and sealed MCE CPT microprocessor failed while still under warranty, with no prior reason to believe it needed to be repaired or replaced; and with no act or omission of TKE that contributed to its failure.

This Court’s decision in *Adams v. Western Host, Inc.*<sup>106</sup> also addressed the failure of an elevator component, and it is directly on point. Adams was injured when an elevator in the University Tower misleveled “between 1 foot and 2 ½ feet above the ground floor.” Adams stepped out of the elevator, fell forward and struck a nearby pillar, causing her serious injury. A mechanic with the maintenance contractor, U.S. Elevator, quickly determined that the misleveling was caused by a broken shunt on a relay. After the mechanic replaced the broken shunt, the elevator functioned properly once again. The mechanic testified there was no way to anticipate when metal fatigue will

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<sup>105</sup> *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 606, 779 P.2d 281 (1989) (emphasis added); *see also, Tinder v. Nordstrom*, 84 Wn. App. 787, 929 P.2d 1209 (1997) (mechanical devices, like elevators and escalators, can wear out or break without negligence); *Brown v. Crescent Stores, Inc.*, 54 Wn. App. 861, 776 P.2d 705 (1989) (*res ipsa loquitur* did not apply to claim that an elevator door “shot out” and injured plaintiff; plaintiff must produce “specific facts” evidencing her claim of negligent maintenance and proximate cause; summary judgment for maintenance contractor affirmed).

<sup>106</sup> 55 Wn. App. 601, 606, 779 P.2d 281 (1989)

cause a relay shunt to break<sup>107</sup> – just as in our own case, every witness agreed the failure of MCE’s factory-tested and sealed CPT on October 21, 2011, only two years after VTS installed it, “*could not be predicted or repaired in the field.*”

The *Adams* trial court granted U.S. Elevator’s motion for summary judgment.<sup>108</sup> This Court affirmed:

Here, U.S. Elevator provided substantial evidence of the cause of the misleveling and that it could occur without negligence on the part of U.S. Elevator. This is not a case where the malfunction is so unusual that we can say it does not ordinarily occur in the absence of negligence. Elevators are mechanical devices of some complexity. ***Materials can wear out or break without negligence being involved.***<sup>109</sup>

Plaintiff Annette Anderson’s claim is, in all respects but one, identical to the claim in *Adams*. Elevator #2 suddenly stopped and injured Anderson because MCE’s nearly new CPT unit failed, with no prior indication that it was going to do so, beyond the fact that all electrical or mechanical devices can fail. When TKE installed the new CPT that MCE provided under warranty, the elevator ran flawlessly again, as it had for tens of thousands of trips before the CPT failed. There is no question the failure of the CPT was the sole cause of the elevator malfunction on the date of Anderson’s injury.

But unlike the failed relay shunt in *Adams*, the CPT did not “wear out” or fail because of visible “metal fatigue.” It was not a simple electromagnetic

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 606-07.

<sup>109</sup> *Id.* at 606 [emphasis added].

device that could be readily observed or serviced in the field. This was a factory-tested, factory-sealed, “zero maintenance” component, a complex, sealed microprocessor that was only two years old and reasonably expected to keep working for a decade or more. Through two years of operation and scores of regularly scheduled visits for inspection and maintenance, the elevator never behaved in a way that indicated the CPT was failing or about to fail – Anderson’s own witness admitted that. The failed “dc relay” on Elevator #1 may have been akin to the failed relay shunt in *Adams* – it may have simply worn out. But the failure of the Elevator #2 CPT was entirely idiopathic – and there is nothing TKE did or failed to do that caused or contributed to its inexplicable failure.

Just as in *Adams* – and in fact, to a greater extent here -- there is no evidence of negligence or proximate cause – *as a matter of law*. Judge Galvan properly granted summary judgment in favor of TKE under *Adams* and the CR 56 standard.

4. ***Elevator #2 passed its annual State inspection three months before the Anderson incident; and under RCW 70.87.030, the inspection report is prima facie evidence that TKE maintained the elevator in reasonably safe condition.***

The installation, operation and maintenance of elevators in Washington are governed by ch. 70.87 RCW. RCW 70.87.020(1) states the legislative intent:

The purpose of this chapter is to provide for safety of life and limb, to promote safety awareness, and to ensure the safe design, mechanical and electrical operation, and inspection of

conveyances, and performance of conveyance work, and all such operation, inspection, and conveyance work subject to the provisions of this chapter shall be reasonably safe to persons and property and in conformity with the provisions of this chapter and the applicable statutes of the state of Washington, and all orders, and rules of the department. . . .

To effectuate the Legislature’s intent, under RCW 70.87.120(2)(a), the State elevator department inspects all elevators at least once each year. RCW 70.87.120(2)(a) specifically states:

Inspections and tests shall conform with the rules adopted by the department.

If any deficiencies are found during a State inspection, the inspector must issue a notice of a safety violation in her inspection report and order the owner to have the elevator repaired to render it safe. The inspector is authorized to order the elevator to remain shut down if a violation creates an unsafe condition, until the violation is repaired.<sup>110</sup>

Finally, the statute provides that if an elevator conforms with the rules of the department, and thus passes its State inspection, the inspection report serves as *prima facie* evidence that the elevator is “reasonably safe”:

In any suit for damages allegedly caused by a failure or malfunction of the conveyance, conformity with the rules of the department is *prima facie* evidence that the conveyance work, operation, and inspection is reasonably safe to persons and property.

RCW 70.87.020(3).

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<sup>110</sup> RCW 70.87.120(3).

Elevator #2 was inspected and certified as safe for public use on July 21, 2011. Under the plain wording of the statute, that served as *prima facie* evidence that the elevator was reasonably safe and compliant with the agency's regulations. Elevator #2 operated without a single glitch for three months and 50,000 trips after that inspection, until a latent defect in one of its three sealed CPT microprocessors caused it to go into "open safety mode" and momentarily stop the elevator car on October 21, 2011.

TKE produced overwhelming and uncontroverted evidence that it was not negligent and that the Anderson incident was the result of the unprecedented failure of a nearly new, factory-tested and sealed CPT. But, even if TKE had not put on such evidence, RCW 70.87.020(3) served, as a matter of law, to establish TKE's *prima facie* case that the elevator was reasonably safe when inspected; and that it remained reasonably safe prior to the CPT failure of October 21, 2011.

On summary judgment under CR 56, the evidence and the statute both shifted the burden to Anderson to show that Elevator #2 was in an unsafe condition prior to the October 21, 2011 incident; that TKE should have known of the unsafe condition and repaired it; and that TKE's failure to do so was the proximate cause of her accident and injury.

Anderson now argues that the State's sign-off on the elevator was a meaningless gesture and does not establish "conformity with the rules of the

department.”<sup>111</sup> But the statute itself states that inspections “*shall conform with the rules adopted by the department.*” Furthermore, the elevator regulations confirm that the Department has adopted the American Society of Mechanical Engineers (“ASME”) and American National Standards Institute (“ANSI”) national elevator codes as the standards for its inspection, testing and certification of all elevators; and that the goal of the Department’s work is to ensure compliance with the applicable ASME and ANSI standards.<sup>112</sup>

Contrary to Anderson’s suggestion, a signed inspection certificate is *not* a meaningless formality. The statute and regulations mean what they say: when an elevator has passed State inspection, that inspection is *prima facie* evidence the elevator was “reasonably safe to persons and property” in Anderson’s “suit for damages allegedly caused by a failure or malfunction of the conveyance.”<sup>113</sup>

Anderson failed to produce admissible evidence to establish any specific facts to rebut that *prima facie* evidence in response to TKE’s motion for summary judgment. With or without relying on the statute, Judge Galvan properly granted TKE’s summary judgment motion under Civil Rule 56.

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<sup>111</sup> App. Br. at 17.

<sup>112</sup> WAC 296-96-00500 – 206-96-00650. Dr. Carr himself referred to the State’s July 2011 inspection as “*the code compliance inspection.*” CP 372.

<sup>113</sup> RCW 70.87.020(3).

5. ***This case is controlled by clear and settled Washington law; and the out-of-state authorities on which Anderson relies are not controlling or persuasive.***

As discussed above, this Court's decision in *Adams v. Western Host* is on all fours with our own. Consistent with *Adams*, many Washington cases hold that to prove negligent elevator or escalator maintenance was the proximate cause of a malfunction and resulting injury, a plaintiff may not rely on a presumption of negligence under the *res ipsa loquitur* doctrine, or on speculative, factually unsupported opinions and argument; and must instead produce admissible evidence to establish "*specific facts*" to prove negligence and proximate cause.<sup>114</sup>

With no support in the Washington authorities, Anderson has cast a wide net and swept in a ragtag collection of out-of-state authorities, including unpublished decisions, not one of which is persuasive here -- and not one of which was presented to Judge Galvan for consideration.

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<sup>114</sup> *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 606, 779 P.2d 281 (1989) (*res ipsa loquitur* did not apply to elevator misleveling; the doctrine should not be applied where the actual cause of an accident can be readily determined); *see also*, *Kimball v. Otis Elevator Company*, 89 Wn. App. 169 (1997) (*res ipsa loquitur* instruction refused in elevator misleveling case); *Tinder v. Nordstrom*, 84 Wn. App. 787, 929 P.2d 1209 (1997) (elevators and escalators can malfunction without negligence, specific facts must be proven to establish negligent maintenance and proximate cause); *Murphy v. Montgomery Elevator Company*, 65 Wn. App. 112 (1992) (elevator's sudden descent did not support *res ipsa loquitur* instruction; defense verdict affirmed); *Brown v. Crescent Stores, Inc.*, 54 Wn. App. 861, 776 P.2d 705 (1989) (*res ipsa loquitur* did not apply to claim that an elevator door "shot out" and injured plaintiff; summary judgment affirmed); *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 392 P.2d 317 (1964) (*res ipsa loquitur* did not apply to the sudden stop of an escalator).

*Raulston v. Montgomery Elevator*,<sup>115</sup> an unpublished decision of the Tennessee Court of Appeals, is nothing at all like our case. In *Raulston*, a hospital complex contained 35 elevators. The plaintiff claimed that he and another hospital employee were in one of the elevators when it suddenly dropped nearly seven floors and came to an abrupt halt. The elevator maintenance contractor asserted there was nothing wrong with the elevator, and denied the incident occurred as the plaintiff claimed. However, these 35 elevators had been so riddled with problems that prior to the incident, the hospital had retained an outside consulting firm to audit their operation and service history. The consultant's pre-accident report showed there had been hundreds of documented safety issues; and over 125 of them had never been addressed or resolved. The *Raulston* court also noted that while "the typical number of trouble calls to be expected annually is *six calls per elevator*," the hospital elevators consistently averaged "*16 calls per unit, over 2.6 times the national average.*"<sup>116</sup>

In our case, there is no dispute the Anderson incident occurred. Its precise cause has been identified – premature failure of a nearly new, factory-sealed CPT. There was no independent audit of the Boeing elevators that found scores of safety problems that went ignored; nor is there a record of an excessive number of callbacks prior to the Anderson incident – once Carr's errors and false assumptions are accounted for. Every single pre-accident

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<sup>115</sup> 2002 Tenn. App. LEXIS 703; App. Br. at 14.

<sup>116</sup> *Raulston*, 2002 Tenn. App. LEXIS 703 at \*11.

callback on Elevator #2 is explained; and by Carr's own admission, not one related in any way to a failing CPT. And last, Carr himself admitted that a CPT failure "cannot be predicted" or "serviced in the field" – particularly when there has been no prior incident related to failure of a CPT, and the CPT in question is nearly new and still under warranty.

In short, this case is just like *Adams*, and wholly unlike *Raulston* – except that unlike *Adams*, Anderson's incident did not involve failure of a worn-out, field serviceable part like a relay, but a factory-tested and sealed microprocessor that was well within its expected service life, that began to malfunction on October 21, 2011 for reasons that may never be known.

In its two short paragraphs, the New York court's decision in *Fisher v. Crossroad Realty Co.*<sup>117</sup> offers no guidance here. In *Fisher*, the plaintiff claimed she was injured in a misleveling accident and sued the owner of the building, not the maintenance contractor. Without further explanation of the facts, the *Fisher* decision states only that on summary judgment, service records and expert testimony showed there was a prior history of similar misleveling incidents. The opinion does not disclose whether the owner ever took steps to resolve those problems. However, on summary judgment, the owner attempted to show, for the first time on reply, that the elevator did not actually mislevel and that instead, the plaintiff had been injured when she clumsily tried to avoid the closing elevator doors. The *Fisher* decision held

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<sup>117</sup> 63 A.D.3d 540; 880 N.Y.S.2d 479 (2009); App. Br. at 10.

this was procedurally improper; declined to consider the owner's evidence and argument on this alternative theory; and therefore denied summary judgment.

In short, *Fisher* is not like our case in any meaningful way.

In *Camaj v. East 52<sup>nd</sup> Partners*,<sup>118</sup> another New York case, the brief reported decision says the maintenance contractor was called in to repair an elevator because "it had ceased functioning," with no further description of the elevator's problem. The contractor purportedly repaired the elevator and put it back in service. However, "shortly thereafter, while in use by plaintiff, [the elevator] dropped suddenly, stopped and bounced several times, allegedly causing her injury."<sup>119</sup> The decision does not provide any further details, other than to state that the plaintiff offered expert testimony that "improper elevator maintenance over a period of time" contributed to the accident. And given the facts in *Camaj*, one could reasonably infer that the accident occurred because the maintenance contractor hastily put the elevator back in service, without resolving the problem it had been called in to fix "shortly before."

Once again, *Camaj* is nothing like our case. Elevator #2 had been working flawlessly for nearly five months and over 80,000 trips when this incident occurred; nothing in the prior service history related to a failing CPT; and when the CPT did fail, no one reported it to TKE. Nevertheless,

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<sup>118</sup> 215 A.D.2d 150, 626 N.Y.S.2d 110 (1995); App. Br. at 13.

<sup>119</sup> *Camaj*, 215 A.D.2d at 151.

TKE immediately identified the problem during routine service, took the elevator out of service to fix it, and did not return the elevator to service until the problem was resolved and the State had certified the elevator safe for public use following an extensive inspection. After that repair, Elevator #2 operated flawlessly, without a single callback for many months – just as it did before the Anderson incident.

*Kleinert v. Kimball Elevator Co.*,<sup>120</sup> a Utah case, was an action against the manufacturer and the building’s owner/operator of the elevator. The Utah Court of Appeals affirmed the dismissal of the plaintiff’s product liability claim against the manufacturer; but found there were triable questions of fact concerning the extent of the building owner’s prior knowledge of a dangerous condition on the premises, and whether the owner “had sufficient time to repair or replace the elevator” to eliminate that dangerous condition.

In that respect, *Kleinert* is akin to the Washington decision in *Brown v. Crescent Stores*.<sup>121</sup> In *Brown*, an elderly customer visited Crescent Stores and claimed she was injured when the automatic doors on one of the building elevators closed, struck her and knocked her down. She sued the building owner and the maintenance contractor. The trial court granted summary judgment for both defendants. On appeal, Division Three *affirmed* the grant of summary judgment for the *maintenance contractor* because the plaintiff

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<sup>120</sup> 905 P.2d 297 (Utah Ct. App.1995) *cert denied*, 913 P.2d 749 (1996); App. Br. at 10.

<sup>121</sup> 54 Wn. App. 861; 776 P.2d 705 (1989).

failed to produce specific facts to show the elevator was negligently maintained or to show proximate cause. But as in *Kleinert*, where the question was whether the owner might even have been required to *replace* the building elevators to make his building safer, Division Three considered a similar question as to the *building owner*: whether the owner knew the elevator posed a danger to some of its customers, whether it was working properly or not, and should have taken additional steps to eliminate the danger, such as having an elevator attendant on duty, or even making manual elevators available for older business invitees.

The *Kleinert* ruling does not help Anderson's cause at all. As the outside maintenance contractor for Boeing, TKE did not have the broader duties of the building owners in *Kleinert* or in *Brown*, who had enhanced duties and potential liability to their business invitees, even if the elevators in their buildings were not defective and were not negligently maintained.

Finally, in *Otis Elevator Co. v. Reid*,<sup>122</sup> a thirty-year old decision from Nevada, the plaintiff claimed he was injured when the "overspeed safety switch" in an elevator, maintained by Otis, tripped and caused an abrupt stop. Evidence at trial showed this very same "overspeed safety switch" had malfunctioned on at least four documented prior occasions; and that each time Otis had reset the switch and returned the elevator to service, only to have it malfunction again. Based on that evidence, the Nevada court held

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<sup>122</sup> 101 Nev. 515; 706 P.2d 1378 (1985); App. Br. at 11.

there was sufficient evidence to send the question of Otis's negligence to the jury.

Therein lies the critical difference between *Reid* and our case: *Anderson's own expert admitted that there never had been a prior incident in which the CPT on Elevator #2 had malfunctioned.* In fact, there was no evidence that *any* of the twelve CPTs on the four Boeing elevators ever had malfunctioned, before or after the Anderson incident. Further, the uncontroverted evidence showed that as soon as TKE discovered the Elevator #2 CPT had gone into "safety mode," TKE locked out the elevator and did not return it to service until a new CPT was installed and the State had inspected and certified the elevator for public use again.<sup>123</sup>

In sum, aside from the fact there is ample Washington law on point, and no good reason for this Court to look to the law of another jurisdiction for guidance, none of the out of state cases Anderson has cited support her argument that Judge Galvan erred by granting TKE's motion for summary judgment.

#### V. CONCLUSION

The record before Judge Galvan led to four inescapable conclusions. *First*, the Boeing passenger elevators were well maintained and experienced few unscheduled service calls or "callbacks," consistent with good

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<sup>123</sup> The Court also may note that in *Reid*, contrary to Washington law, the Nevada Supreme Court held the jury properly had been instructed under the *res ipsa loquitur* doctrine.

maintenance practice. *Second*, no prior elevator incidents indicated that any one of the twelve factory-tested, sealed and warranted CPT units on the four Boeing elevators was failing. *Third*, the failure of CPT units generally, and the failure of the CPT atop Elevator #2 in particular, “could not be predicted or repaired in the field” – other than to replace a failed unit with a new one from the manufacturer. *Fourth*, and finally, there is no evidence that TKE was negligent, or that such negligence was the proximate cause of the failure of the CPT on Elevator #2, which undeniably caused the elevator to stop before it reached her selected floor on October 21, 2011 and caused Anderson’s alleged injuries.

The record on review demonstrates that Judge Galvan properly granted TKE’s motion for summary judgment; and properly denied Anderson’s motion to reconsider – which offered no new evidence or law not already presented to the trial court in response to TKE’s original motion.

TKE therefore asks this Court to affirm.

DATED this 12<sup>th</sup> day of August, 2016.

By /s/David M. Jacobi & /s/Whitney L.C. Smith

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**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division I of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing BRIEF OF RESPONDENT upon the following:

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