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No: 69839-7

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN -3 PM 2:29

JEANNE PASCAL and DALLAS SWANK, husband and wife,

Plaintiff/Appellant

vs.

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

Defendants/Respondents

BRIEF OF APPELLANTS

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

ORIGINAL

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I. INTRODUCTION.

Appellant Jeanne Pascal was severely injured by a misleveled elevator in the Park Place Building. Respondents WH Park Place Mezz, LLC and WH Park Place LLC, building owners, (hereinafter referred to collectively as Park Place) are common carriers with respect to the offending elevator.

A common carrier owes the highest duty of care to its passenger short of being an insurer. Jeanne Pascal presented evidence establishing that standard was not met. Summary judgment should not have been granted.

II. ASSIGNMENTS OF ERROR

A. The trial court erred by entering summary judgment against Plaintiff/Appellants Jeanne Pascal and Dallas Swank December 7, 2012.

B. The trial court erred by denying Plaintiff/Appellants Jeanne Pascal and Dallas Swank's motion for reconsideration entered January 7, 2013.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. RCW 5.40.050 provides breach of a duty imposed by a statute may be considered by the trier of fact as evidence of negligence. An elevator safety statute provides elevators must level within ½ inch accuracy. There was evidence supporting the contention the elevator which injured Jeanne Pascal had misleveled by more than ½ inch. Was it error

for the trial court to find Park Place was not negligent as a matter of law? (IIA, IIB)

B. Park Place is a common carrier with respect to the elevators in the Park Place Building. Park Place hired Fujitec to perform its elevator maintenance. Can Park Place avoid common carrier liability by hiring a third party to perform duties owed by Park Place to elevator passengers? (IIA, IIB)

C. Uncontradicted evidence established random mislevelings of the Park Place garage elevator of ½ to ¾ of an inch around the time of Jeanne Pascal's accident. The trial court disregarded the testimony of mislevelings of ½ inch or more and assumed mislevelings of ½ inch or less. Was it error for the trial court to assume misleveling of the garage elevator at the time of Jeanne Pascal's accident did not exceed ½ inch? (IIA, IIB)

D. The trial court assumed Park Place garage elevator misleveling did not exceed ½ inch despite contrary evidence from a fact witness and an expert witness. After disregarding estimates of misleveling beyond ½ inch, the trial court stated that, because the elevator safety statute only mandates leveling accuracy to be within ½ inch, any misleveling of ½ inch or less was specifically allowable and as a matter of law the higher degree of care placed on a common carrier was met. Was it error for the trial court to find the common carrier burden of care was met as a matter of law by meeting the safety code where Washington case law has specifically held compliance with safety regulations does not necessarily satisfy the higher degree of care placed on a common carrier? (IIA, IIB)

E. Complaints about elevators were entered by Park Place building guards in a logbook maintained by the guards and kept at the guard desk. Park Place reported in response to discovery that it had been unable to find the guard log book. Was it error for the trial court to assume there had

been no complaints of misleveling where Park Place was unable to produce the guard log book that would have contained those complaints? (IIB)

IV. STATEMENT OF CASE

January 21, 2010 Jeanne Pascal's foot was stopped by the misleveled floor of the garage passenger elevator in the Park Place Building, and she pitched forward into the elevator. She suffered severe injury, requiring surgery on both shoulders and years of rehabilitation. CP 255-6.

Thirteen days after Jeanne Pascal's accident, Barbara Lither went to the offending elevator and took pictures. She reported random mislevelings of ½ inch to ¾ of an inch by her estimation. CP 257-65.

Park Place owns the Park Place Building. Park Place contracted with Fujitec to maintain elevators in the Park Place Building. The Fujitec maintenance agreement required elevator leveling accuracy to be within ¼ inch. CP 226-7. The agreement called for Fujitec to perform maintenance on the elevators once a month. The agreement also provided for service calls when problems showed up between monthly maintenance visits. CP 179-80.

There were many reports of garage elevator mislevelings by tenants. CP 266-8, 317-8. Bogdan Wojnicz in particular was a Special Agent with EPA's Criminal Investigation Division. He stated the garage elevator was a constant problem. He states he complained many times to the Park Place representatives about the garage elevator misleveling. He states there were

definitely times where the garage elevator misleveled by more than ½ inch. He states this was a particular problem for him because he was frequently maneuvering equipment and/or file boxes. Mr. Wojnicz states his complaints brought no obvious improvement in the misleveling problem. CP 269-72.

When problems with the elevators were reported to building guards, an entry was made in a separate logbook maintained by the guards and kept at the guard desk. CP 266-8, 317-8. As of the date of the summary judgment hearing, Park Place had not located the guard log book. CP 315.

Building guard Michael Graeber testified there was a decline in elevator maintenance once Fujitec took over. He further states building tenants had so many complaints about elevators after Fujitec took over that he requested and obtained a change to a weekend shift so he would not have to deal with all of the complaints from building tenants about the elevators. CP 266-8, 317-8.

The Fujitec employee who maintained the Park Place elevators was Chris Love. Love testified at deposition that he was aware of no mislevelings of the garage passenger elevator from September 2009 through January 2010. CP 213-5. In direct contrast to this the October 15, 2009 TR Work Order list to Fujitec states: "day porter reports garage elevator not leveling on 1st floor." CP 224. The work order indicates it was assigned to

Fujitec and dispatched. The work order does not state "work started" or "work completed" as it states for a February 23, 2010 (different) work order to Fujitec that appears on the same page. CP 224.

The Fujitec ticket summary indicates that January 2010 tasks related to the Park Place elevators were incomplete. The Fujitec PM ticket for December 2009 through February 2010 for the garage passenger elevator indicates the monthly inspection for January 14, 2010 (7 days before Jenne Pascal's accident) was not performed. CP 239.

Love, the Fujitec technician, states he was not informed of Jeanne Pascal's January 21, 2010 accident until two weeks before his deposition on October 3, 2012. Love never discovered the random misleveling problems which Barbara Lither found within 13 days of Jeanne Pascal's accident. CP 213-5, 257-65.

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

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

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

Mr. Buckman states misleveling is the most common cause of elevator passenger injury. He states trip hazards must be anticipated and that it is not sufficient to simply wait for reports of accidents. Mr.

Buckman states there is a need to aggressively check for the source of misleveling problems and that all reports of misleveling must be taken seriously and followed up on. Mr. Buckman states this was not done and that failure to do so was negligent. CP 240-4.

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

Limited discovery took place. By agreement the parties suspended discovery pending mediation. CP 315-7.

Mediation was unsuccessful and discovery began again. Defendants then moved for summary judgment. At the time there were outstanding discovery requests, including request for production of the guard log book containing elevator complaints. Also pending was the deposition of Fujitec personnel familiar with the software running the garage elevator. Id.

Summary judgment was granted by the trial court CP 296-300. Among other reasons given by the court for its ruling was the following: "...apparently the RCW allows misleveling of up to a half an inch. That's allowable." RP 29.

Jeanne Pascal and Dallas Swank timely moved for reconsideration with respect to Park Place pointing out the outstanding discovery among the other issues. CP 301-12. Reconsideration was denied. CP 319-21.

This appeal followed. CP 322-31. The dismissal of Fujitec was not appealed.

V. ARGUMENT

A. Standard of Review.

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

For purposes of summary judgment all evidence and all inferences that can be drawn from the evidence must be construed in favor of Jeanne Pascal and Dallas Swank. Where there is any conflict in the evidence, the conflict must be resolved in favor of Jeanne Pascal and Dallas Swank for purposes of summary judgment. The trial court cannot weigh evidence.

B. Evidence of misleveling greater than ½ inch was evidence of negligence which should have prevented summary judgment.

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

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

Barbara Lither testified she personally observed the Park Place elevator by more than ½ inch within 13 days of Jeanne Pascal's fall. She took pictures of the misleveling. Those pictures are part of the record. CP 257-265.

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

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

In Brown v. Cresent Stores, Inc., 54 Wn.App. 861, 776 P.2d 705 (Div. 3, 1989) Crescent attempted to obtain summary judgment by arguing that because it had met the statutory elevator safety standards, as a matter of law it was entitled to judgment. The Brown court stated: "Compliance with safety regulations, however, does not necessarily satisfy the higher degree of care placed on a common carrier." Id. at 868. The Brown court cited Dennis v. Maher, 197 Wash. 286, 84 P.2d 1029 (1938) as support for this proposition. Dennis stated:

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

Id. at 291.

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

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

Park Place is a common carrier with respect to passengers in its elevators. Dabroe v. Rhodes Co., 64 Wn.2d 431, 433, 392 P.2d 317 (1964). This is a nondelegable duty. Niece v. Elmview Group Home, 131 Wn.2d 39, 54, 929 P.2d 420 (1997).

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

In the case at bar the court was persuaded no issue of material fact exists and that Park Place met this exceptional standard as a matter of law. Jeanne Pascal and Dallas Swank respectfully suggest review of the facts

reveal this is not so and that inferences from the evidence were improperly applied by the trial court against the nonmoving parties.

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

The evidence was that Chris Love, the Fujitec employee who serviced Park Place elevators, stated there were no reported mislevelings of the Park Place garage elevator from September 2009 through January 2010. Yet on October 15, 2009 the "day porter reports garage car not leveling on 1st floor." This directly contradicts the testimony of Chris Love. Further, although the same page indicates work was assigned and someone was dispatched, the status is described as "open" and there is no indication the work was completed, as is stated on the February 23, 2010 (different) item listed on the same page. From this it cannot be inferred that the garage passenger elevator misleveling problem observed October 15, 2009 was addressed and resolved. In fact the inference taken in favor of the nonmoving party is that this misleveling problem was not addressed, resolved or followed up on. Certainly, it cannot be assumed the misleveling

problems were addressed without improperly taking inferences in favor of Park Place.

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

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

By ruling as it has, the trial court in effect found that, as a matter of law, the highest degree of care compatible with the practical operation of its elevators was for Park Place to hire Fujitec to maintain its elevators once a month and to respond to service calls when received. On its face this cannot represent the highest degree of care, especially since Park Place Building guard Graeber reports a decline in elevator maintenance once Fujitec took over elevator maintenance. Obviously, Park Place could have contracted to have Fujitec inspect more than once a month. In Murphy v. Montgomery

Elevator Company, 65 Wn.App. 112, 828 P.2d 584 (Div. 2, 1992) elevators were to be serviced two times a month under the agreement in place there.

It cannot be said that Park Place, by signing a contract providing for only monthly maintenance and inspection, met the highest degree of care compatible with the practical operation of its elevators since others, in fact, do so more often. Further, more frequent inspections and maintenance undoubtedly would increase the chance of actually discovering random mislevelings, which seemed to be the problem here.

Obviously, the decision to have Fujitec conduct only monthly inspections was an economic choice. It was undoubtedly cheaper to have Fujitec inspect and maintain less frequently. However, it was not safer.

Even if the decision to have only monthly maintenance and inspections was the highest degree of care possible, there is no reason Park Place could not have had its own workers, such as janitors, keep an eye out for elevator mislevelings and report them. This would have increased Park Place elevator safety at no additional cost to Park Place. Further, it would have, in effect, provided inspection of all elevators on all floors on a daily basis. There is no evidence Park Place did this. Hiring Fujitec to conduct monthly maintenance and inspections and respond to service calls is not proof as a matter of law that Park Place met its common carrier burden.

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

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

D. Summary judgment based on assumptions by the trial court related to relevant documents which had not been located by Park Place was improper.

The order granting summary judgment should be vacated to permit the completion of discovery related to assumptions made by the trial court. The court assumed, for purposes of summary judgment, Park Place had no notice of the misleveling problem.

As was previously pointed out, the guard logbook in which complaints about misleveling would have been written was not produced by Park Place; further, the deposition of Fujitec software personnel had not taken place. The logbook had been requested and the software person's deposition had been requested prior to the time of the summary judgment hearing.

By mutual agreement the parties had agreed to delay certain discovery until after mediation. Mediation took place November 19, 2012. When settlement did not occur, both sides geared discovery back up. The

discovery necessary to refute certain concerns raised by the court, however, had not yet taken place. CP 315-6.

The court on summary judgment assumed no complaints of misleveling and therefore assumed there was no notice between the last Fujitec inspection and Jeanne Pascal's fall. However, Park Place has yet to provide the guard logbooks which would have contained such complaints. The court should not assume absence of misleveling complaints where Park Place has been unable to locate documents where such notice would have been reported.

Further, deposition of Fujitec software personnel could have revealed mechanisms of misleveling related to the software. Inquiry was also going to be made regarding the possibility of interrogating the software to discover mislevelings, etc., among other things.

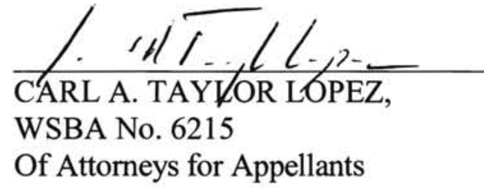
Summary judgment at best should have been delayed, if not denied, to permit relevant discovery to be completed.

VI. CONCLUSION

The orders granting summary judgment in favor of Defendants WH Park Place Mezz, LLC and WH Park Place, LLC and denying reconsideration should be reversed. This cause should be remanded to the Superior Court for trial on the merits.

Dated this 2 day of June, 2013.

LOPEZ & FANTEL, INC., P.S.



CARL A. TAYLOR LOPEZ,
WSBA No. 6215
Of Attorneys for Appellants

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Defendants/Respondents

CERTIFICATE OF SERVICE

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

ORIGINAL

1 I, Cynthia Ringo Palmer, declare and state as follows:

2 1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County,

3 Washington, and am over the age of 18 years.

4 2. On the 2 3rd day of June, 2013, I caused to be served the following document on counsel as follows:

5
- Appellant's Brief; and
- Certificate of Service

6

7 Suzanne Pierce
Davis Rothwell Earle & Xochihua
8 5500 Columbia Center
701 Fifth Avenue
9 Seattle, WA 98104

10 [X] via email spierce@davisrothwell.com
[ ] via Fax: 206-340-0724
11 [X] via ABC legal messenger, regular run , 6/3/13
[ ] via U.S. regular mail

12

13 I declare under penalty of perjury under the laws of the State of Washington that the above is true and

correct.

14

15 Dated at Seattle, Washington, this 2 3rd day of June, 2013.

16

17 Cynthia Ringo Palmer

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LOPEZ & FANTEL
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
206.322.5200