69839-7

69839-7

No: 69839-7

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

JEANNE PASCAL and DALLAS SWANK, husband and wife,

Plaintiff/Appellant

vs.

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

Defendants/Respondents

REPLY 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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statute

1. It Is Reasonable To Infer Jeanne Pascal's Accident Was Caused By Misleveling Of The Park Place Elevator

Park Place states there is no evidence of elevator misleveling. This statement can only be made by inferring evidence against Jeanne Pascal, the non-moving party.

Jeanne Pascal described the facts of her fall at deposition. A misleveling elevator can be inferred from that description:

A. I just was – I just entered the elevator, my left shoe, foot, clipped the elevator floor and it pitched me forward and I fell.

Q. Do you know if your first foot – your first step was with your left foot or your right foot to get into the elevator?

A. That I don't know. I don't remember. I didn't – I wasn't thinking about my foot.

Q. I – I understand. When you say your left foot clipped the elevator what part of your foot clipped what part of the elevator?

A. Well, my shoe – I assumed it was my shoe that clipped the elevator – the elevator floor, because it was – I clipped – I tripped on something that was elevated. I mean the floor – I mean – I mean –

Q. Did you see at any point a difference in the elevation, either before or after this accident?

A. If I had I would have stepped over it.

Q. Okay. But after the accident, after you fell and before you moved the elevator up to the next floor, and I'll get to that in a minute. So you've – you've entered the elevator and fallen.

A. Yeah. I – I entered the elevator, I felt my foot clip – my left foot clip what I assume was the floor because there was nothing else to clip.

Q. Okay.

A. I mean the building – the garage floor is concrete and stationary. The only thing that can possibly elevate or not elevate is the elevator.

Q. I understand – I understand that.

A. So, I clipped that. I pitched forward and if this were – I'll use – I won't pick you out and use that – if this was the elevator – if this is the elevator entrance, what happened is I pitched forward, and I pitched into this corner (indicating). Okay?

Q. Uh-huh.

A. I pitched into this corner, went down, and I smacked my face along the railing, the steel railing around the elevator. Then I – I mean everything was a mess. And I tried to push myself off the floor. I crumpled on the floor on my right side. I knew something was wrong with my arm. And I kind of knelt and pivoted, got to the buttons, hit one and started yelling for the guard.

Q. Okay.

A. He came and helped me.

Q. And I understand – I understand that you may not have noticed the position of the floor of the elevator in regards to the – the entryway where you – the concrete floor of the garage. But I'm just asking if you will think back to when you pivoted around, and you hit the buttons, did you notice the – the level of the floor of the elevator as compared to the level of the garage floor outside the elevator?

A. No, I don't think so. I wasn't thinking about that.

Q. Understandable.

A. Yeah. I was – I was waiting for the door, watching for the door to open.

Q. When the left foot clipped a part of the elevator do you know if it was your toe, if it was your heel?

A. I assumed it was my toe.

CP 163:9-165-:19.

The testimony supports misleveling as the cause of the fall. The absence of proof of misleveling cannot be inferred from this. The testimony additionally reveals Park Place was immediately aware of the fall, since Jeanne Pascal had to summon Park Place security to remove her from the elevator.

Park Place suggests Jeanne Pascal had seen no misleveling of the garage elevator in 26 years. This is misleading. Jeanne Pascal actually stated she had rarely used the garage elevator during the first 21 years and simply did not recall if she had had any trouble with the garage elevator misleveling during those years. With respect to the next five years, Mrs. Pascal did not state she had never observed the garage elevator mislevel. What she actually said is the following:

Q. Did you notice that it [the garage elevator] didn't level?

A. I – that I don't remember. I – I know that I noticed – I noticed in the building the garage – some of the elevators did not level from time to time. If I saw it I walked over it.

CP 167:7-11. Jeanne Pascal then said that she did not think she had reported garage elevator misleveling. CP 167:18-20. Park Place asserts at page 9 of its brief: "Pascal herself admitted she did not observe any misleveling – ever." This is plainly not the case.

The record also contains the declaration of Jeanne Pascal which also states misleveling was the cause of her fall. The declaration states in part:

> I parked in the garage and approached the garage passenger elevator pulling a roller bag and carrying a purse. The elevators misleveled, creating a trip hazard, which I did not see. I tripped and fell into the elevator, striking my face, dislocating my shoulder and tearing rotator cuffs in both shoulders. I was transported by ambulance to the hospital.

CP 255-6.

Barbara Lither visited the involved elevator a few days after the accident and took pictures for a retirement roast being planned for Jeanne Pascal at work. Lither described misleveling of greater than one-half inch at that time and photographed it. The inference can reasonably made that the elevator had also misleveled a few days earlier, when Jeanne Pascal fell.

The record reasonably supports an inference that elevator misleveling caused Jeanne Pascal's fall.

2. It Is Reasonble To Infer From The Evidence That Park Place Elevator Inspection And Maintenance Was Not The Highest Degree Of Care Consistent With Practical Operation.

Park Place served the following interrogatory on Fujitec:

> INTERROGATORY NO. 8: In the month following the incident described in plaintiff's Complaint, how many times did you inspect, repair or otherwise observe the elevator in which plaintiff allegedly fell, as described in plaintiff's complaint?

CP 235. Fujitec answered as follows:

> The elevator was inspected on February 16, 2010; see Attachment No. 2, Work Ticket and Summary.

Id. Attachment No. 2 indicates Fujitec was dispatched February 16, 2010. The attachment indicates the task which was the subject of the dispatch was not completed. CP 238.

It can additionally be inferred from Attachment 2 that the inspection Park Place attributes to Fujitec in January of 2010 did not take place. The second page of Attachment 2 is the Fujitec inspection schedule. A key at the top of the schedule reveals the squares to the right of the particular task indicate whether the task was completed, not due that month, or incomplete. There is a single task listed for January. It relates to overhead machinery. The task is: "Inspect Belt & Machinery Space & Equipment – Monthly." CP 239. The square next to the task is unmarked, which, according to the key, means it was due, but incomplete. Id.

Additionally, on the same page, the tasks for February are listed. The same monthly task appears regarding monthly inspection of the belt, machinery space and equipment. However, there are other monthly tasks added for February which were not listed in January, the implication being those tasks were not assigned or performed in January. The monthly tasks listed as performed for February, but not January, are the following: car – inspect/test all fixtures, devices & ride operation; control room – check event codes and service trouble, inspect all c-room equipment and controls; Pit – inspect pit equipment. CP 239.

Two inferences can reasonably be drawn from this evidence. First, it can be inferred the January inspection did not take place. Second, it can be inferred the January inspection, even if it had been performed was much less thorough than the February inspection and did not include checking the elevator for ride operation.

Adding to this scenario are two telling facts. First, Chris Love, the Fujitec employee who serviced and inspected the Park Place elevator states he was never informed of Jeanne Pascal's accident until years later. Second, the Fujitec employee himself did not discover misleveling which Barbara Lither, a lay person, independently discovered with little effort.

At a minimum it seems Park Place should have immediately informed Fujitec of Jeanne Pascal's accident, so Fujitec could investigate

the cause. It can reasonably be inferred procedures surrounding elevator safety were inadequate and below the standard required of common carriers.

Further, Park Place as a matter of policy should not be rewarded for its lack of diligence in reporting Jeanne Pascal's accident to Fujitec. Failure to report the accident to Fujitec meant there was no investigation or discovery of the cause of the misleveling. Park Place had complete control over its own elevators; it should not be permitted to hide behind its own failure to investigate an instrumentality over which it had complete control. If common carriers could avoid liability that easily, there would be incentive for them to never investigate the causes of injuries to passengers. Certainly, Park Place should not be allowed to defeat Jeanne Pascal's claim by putting to her the burden of proving the precise cause of the misleveling which caused her fall when Park Place itself failed to follow up her accident with an investigation.

Elevator expert Charles A. Buckman is a principal in an elevator consulting firm. He is a certified specialist with the World Safety Organization. He was a Certified Elevator Safety Inspector from 1989-2008, certified by the National Association of Elevator Safety Inspectors by the authority of the American Society of Mechanical Engineers. He is a Qualified Elevator Safety Subcode Official. He was Certified Elevator

Inspection Agency Director for New York City. He testified he was familiar with the type of elevator involved in the case at bar. He stated he was familiar with the national and State of Washington standards and regulations applicable to said elevator. He testified he was familiar with the maintenance requirements of the subject elevator. CP 240-1.

Mr. Buckman testified that he had reviewed the depositions of Chris Love, Jeanne Pascal and Wright Runstad building engineer Travis Smith. He testified he had reviewed the vertical transportation agreement between Fujitec and Park Place. He stated he had reviewed various documents related to the elevators produced by the defendants and agents of defendants. He stated he had read interrogatory answers and declarations of Barbara Lither, Bogdan Wojnicz, Eileen Livingstone, Jennifer Eason, Keven McDermott, and Michael Graeber. CP 241.

Mr. Buckman stated that from this information he had culled certain facts relevant to his opinion. Those relevant facts are as follows:

1. Various building occupants reported elevator misleveling problems over a period of time before Jeanne Pascal's accident which were reported to Park Place;

2. On at least two occasions in 2009 there were reports of misleveling problems with the garage elevators;

3. In October 2009 the garage passenger elevator was reported to be misleveling (the documentation of this is found at CP 224);

4. The record provides no indication Fujitec responded to the misleveling reports or discovered the cause;

5. There is no indication Park Place followed up on reports of misleveling;

6. The Fujitec contract required elevator leveling accuracy to be within one quarter of an inch;

7. Elevator misleveling was the apparent cause of Jeanne Pascal's fall;

8. Jeanne Pascal's fall was apparently not reported to Fujitec;

9. Barbara Lither within 13 days of Jeanne Pascal's fall observed garage elevator misleveling of more than one half inch and took pictures of it.

CP 242.

Mr. Buckman testified state and national codes require elevator leveling accuracy to be within one half inch. He opined the involved elevator likely was misleveled beyond one half inch based on the Lither declaration and photographs and because an elevator misleveled less than one half inch was unlikely to have tripped Jeanne Pascal. CP 242-3.

Mr. Buckman testified Park Place's response to the reports of prior misleveling was inadequate. He testified there is no evidence the

misleveling was adequately investigated and no evidence Park Place adequately followed up on this. CP 243.

Mr. Buckman testified that with proper maintenance the elevator should not have been more than one quarter of an inch out of alignment with the floor. He stated the fact that the garage elevator was at times misleveled by as much as three quarters of an inch was evidence that maintenance of that elevator was inadequate. Mr. Buckman also cited the fact that Barbara Lither had discovered passenger elevator misleveling while Fujitec did not make that discovery as evidence the inspection process was inadequate. CP 243.

Mr. Buckman testified the most common cause of elevator passenger injury is misleveling. He stated it is not sufficient to simply wait for reports of accidents. All reports of misleveling must be aggressively investigated for cause. There is no evidence this was ever done by Park Place or Fujitec. CP 243.

The evidence in the record is sufficient to support the opinions drawn by Mr. Buckman. Park Place has presented no evidence of a non-negligent source of causation in this case and cannot do so because it did not conduct any investigation of causation following Jeanne Pascal's accident.

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

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

3. It Is Reasonable To Infer The Misleveling Which Caused Jeanne Pascal's Accident Was The Result Of Park Place's Violation Of Its Common Carrier Duty Where She Presented Expert Testimony To That Effect And Where Park Place Offered No Alternative Theory Of Causation And Chose Not To Investigate Causation Following Jeanne Pascal's Accident.

Pascal presented expert testimony establishing an elevator misleveling less than one half inch was unlikely to trip someone. CP 242. Pascal presented expert testimony establishing an elevator misleveling in excess of one quarter inch was unlikely with proper maintenance. CP 243. Park Place presented no evidence disputing either statement. Instead, Park Place cites Adams v. Western Host, Inc., 55 Wn.App. 601, 779 P.2d 281 (1989) to try to establish elevators can mislevel by more than one-half inch without negligence; however, that is a misinterpretation of Adams.

Adams does not stand for the proposition that elevators as a matter of law can mislevel by more than one-half inch in the absence of negligence. Adams is fact specific in a way that is completely distinguishable from the case at bar.

In the first place and most importantly Adams was a dismissal with respect to an elevator maintenance company, not a building owner. The distinction is important. An elevator maintenance company is held to a negligence standard. Pruneda v. Otis Elevator Company, 65 Wn.App. 481, 828 P.2d 642 (Div. 1, 1992). A building owner, however, is held to the much higher common carrier standard.

Additionally, Adams involved a specific, identified cause of malfunction which was proved to be not the result of negligence. The

plaintiff in Adams produced no evidence contrary to the specific cause established by the moving party's expert.

In contrast in the case at bar expert Mr. Buckman has criticized follow up of various reports of misleveling and has specifically noted with proper maintenance the elevator should not have been more than one quarter inch out of alignment with the floor. CP 243. Park Place has presented evidence of no alternative cause of misleveling in this case, and its contract with Fujitec in fact requires one quarter inch leveling accuracy, which provides further support for Mr. Buckman's statement. CP 227.

Park Place in its brief confuses the meaning of the one half inch leveling accuracy requirement. Park Place argues the standard means misleveling up to one half inch is permitted. This is backwards. The standard does not mean leveling inaccuracy up to one half inch is permitted; the requirement means leveling inaccuracy beyond one half inch is not permitted.

Park Place offers no explanation for how this accident occurred. Adams also stands for the proposition that, where there is an unexplained accident of a kind that ordinarily does not happen in the absence of negligence and where the instrumentality causing injury is within the sole control of defendant, defendant has the burden of coming forward with evidence to the contrary before summary judgment can apply.

This elevator was obviously within the sole control of Park Place. There is expert testimony establishing the event causing the accident (misleveling greater than one-half inch) does not ordinarily happen with proper maintenance. Park Place needed to establish evidence of non-negligent causation. There is no such evidence and Adams does not provide it.

4. The Issue Of The Outstanding Relevant Discovery Was Raised With The Trial Court.

Park Place argues the issue of outstanding discovery is raised for the first time on appeal. In fact the issue was directly called to the trial court's attention, and the trial court considered it.

The order denying reconsideration delineates the matters considered by the court. Plaintiffs' Motion for Reconsideration and the Supplemental Declaration of Carl A. Taylor Lopez were specifically considered by the court. CP 329.

The Supplemental Declaration of Carl A. Taylor Lopez stated that by agreement among the parties discovery was delayed until after mediation November 19, 2012. It states that, following unsuccessful mediation, the deposition of Fujitec's software engineer was requested. The declaration additionally stated production of the logbooks maintained by Park Place security guards had been requested and that those logbooks

reportedly contained elevator related complaints. The declaration stated that to date Park Place had been unable to produce those logbooks. CP 315.

The Motion for Reconsideration also pointed out that both the logbook and the deposition of the software person had been requested before the summary judgment. The motion pointed out that by agreement that discovery had not yet taken place. The motion noted that the court had assumed for purposes of summary judgment that Park Place had no notice of misleveling elevators and argued that since the logbook that would have contained those complaints had not been produced, the court should not have assumed there had been no complaints. The motion also pointed out the deposition of Fujitec software personnel may have revealed mechanisms of misleveling or methods of interrogating the software to discover incidents of misleveling. CP 309.

The relevant outstanding discovery was raised with the trial court. The trial court specifically considered it. CP 329.

Park Place argues Pascal seeks an inference be made against it based on failure to produce the security guard logbook. The reverse is true. Pascal seeks to avoid the assumption made by the trial court that there had been no reports of misleveling where Park Place had failed to produce the logbook that would have contained those complaints.

This is not a case of a lack of diligence in the discovery process. Park Place in its continuance motion described in detail the discovery process in this case. CP 82.

5. The Record Does Not Establish The Date Park Place Acquired Ownership; Further, Park Place Did Not Produce Evidence Establishing It Was Unaware Of Events Occurring At The Park Place Building Before It Acquired Ownership.

Respondents state Respondent WH Park Place Mezz, LLC owned the Park Place building beginning in January of 2010. The citation for this is CP 62:25-26. Respondents then state WH Park Place Mezz, LLC was the sole member of Respondent WH Park Place, LLC. There is no citation for this. Brief of Respondents at p.5. Respondents then try to divorce themselves from any events which happened before January 2010, among other things stating: "He [expert Buckman] did not delineate between alleged defects prior to, vs. during, Park Place's ownership." Brief of Respondents at p.16.

There is no evidence in this record establishing when Respondents acquired ownership of the Park Place building. The citation, CP 62:25-26, is to the Answer to the complaint. Lines 25-26 merely state "from January 2010 to present, Defendant Park Place Mezz, LLC owned the building at 1200 Sixth Avenue, Seattle." It says nothing about ownership before that

date. Even if it did, an unverified answer is not evidence, although it can be an admission.

The reality is that the ownership of the Park Place building at various times is difficult to parse and is not in the record. For instance, the Answer also states: "The members of WH Park Place Mezz, LLC are Defendants Transwestern Park Place Holdings, LLC, and Defendants WH Structure Finance, LLC. WH Structure Finance, LLC is a subsidiary of Defendant Washington Real Estate Holdings, LLC." CP 62-63.

There is no record of when or whether these other entities may have had ownership interest in the Park Place building. There is also no record as to whether any of the individuals who may have had ownership in any of these various LLC's may have had ownership interest in the Park Place building.

It cannot be inferred from the evidence that the Respondents had no Park Place building ownership prior to January 2010 without inferring against the non-moving parties. However, even if ownership timing could be established from the record, this would only be arguably relevant to the issue of notice. Absence of notice of prior misleveling cannot be inferred from the record where documentation, to which Respondents presumably had access, reveals unaddressed misleveling. CP 128:12-129:21; CP 224.

Park Place has presented no evidence suggesting it did not have complete access to all building records created prior to acquisition of ownership, including past reports of elevator problems. In fact it is inconceivable that Park Place would not have had complete access to such documents and that they would not have studied them prior to making what was presumably a substantial purchase by sophisticated investors. Wright Runstad said those documents were left to the premises of the Park Place building. CP 129:6-9.

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 5th day of August, 2013.

LOPEZ & FANTEL, INC., P.S.

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

No: 69839-7
COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

JEANNE PASCAL and DALLAS SWANK, husband and wife,

Plaintiff/Appellant

vs.

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

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

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

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 5th day of August, 2013, I caused to be served the following document on counsel as follows:

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

Original plus 1 copy to:

Court of Appeals, Division I
One Union Square
600 University St.
Seattle, WA 98101-4170

[ ] via email
[ ] via Fax:
[ ] via ABC legal messenger, regular run
[X] via U.S. regular mail

Copy to:

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

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

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

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

Dated at Seattle, Washington, this 5th day of August, 2013.

Cynthia Ringo Palmer

Cynthia Ringo Palmer

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