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Court of Appeals  
Division I  
State of Washington

74655-3

No. 74655-3

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ANNETTE ANDERSON,

Appellant,

vs.

THYSSENKRUPP ELEVATOR CORPORATION,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE VERONICA GALVAN

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. REPLY ARGUMENT .....1

    A. A jury could find that TKE negligently failed to prevent the CPT board’s failure, which was foreseeable and avoidable through the exercise of reasonable care. ....1

        1. The repeated problems with Elevator #2 in the months before Ms. Anderson’s accident should have alerted TKE of a potential defect in its CPT board..... 3

        2. The similar problems with adjacent elevators – equipped with identical CPT boards installed at the same time – gave TKE constructive notice of a problem with Elevator #2’s CPT board. ....7

        3. The State’s inspection of Elevator #2 does not immunize TKE from liability as a matter law. .... 9

III. CONCLUSION. .... 11

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Harrison v. Otis Elevator Co.</i> , 935 F.2d 714 (5th Cir. 1991) .....	5
<b>State Cases</b>	
<i>Adams v. Western Host, Inc.</i> , 55 Wn. App. 601, 779 P.2d 281 (1989).....	6
<i>Ayers v. Johnson &amp; Johnson Baby Prods. Co.</i> , 117 Wn.2d 747, 818 P.2d 1337 (1991).....	11
<i>Burr v. Clark</i> , 30 Wn.2d 149, 190 P.2d 769 (1948).....	6
<i>Gleeson-Casey v. Otis Elevator Co.</i> , 268 A.D.2d 406, 702 N.Y.S.2d 321 (2000).....	6
<i>J.N. v. Bellingham Sch. Dist. No. 501</i> , 74 Wn. App. 49, 871 P.2d 1106 (1994) .....	5
<i>Keck v. Collins</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015) .....	5
<i>M.H. v. Corp. of Catholic Archbishop of Seattle</i> , 162 Wn. App. 183, 252 P.3d 914, <i>rev. denied</i> , 173 Wn.2d 1006 (2011).....	2
<i>O'Neill v. City of Port Orchard</i> , 194 Wn. App. 759, 375 P.3d 709 (2016) .....	1
<i>Seeberger v. Burlington Northern R.R. Co.</i> , 138 Wn.2d 815, 982 P.2d 1149 (1999) .....	11
<i>Two Two v. Fujitec America, Inc.</i> , 355 Or. 319, 325 P.3d 707 (2014).....	9

*W.G. Clark Const. Co. v. Pac. Northwest Regional  
Council of Carpenters,*  
180 Wn.2d 54, 322 P.3d 1207 (2014)..... 5

**Statutes**

RCW 70.87.020 .....10

RCW 70.87.120 ..... 9

**Rules and Regulations**

WAC ch. 296-96.....10

## I. INTRODUCTION

Respondent ThyssenKrupp Elevator Corporation (TKE) repeats on appeal its mistaken mantra that because elevators *can* malfunction without negligence, the elevator in this case – one that caused appellant Annette Anderson severe spinal injuries – *must* have failed without negligence. Here, however, a jury could find there was negligence because TKE ignored repeated warning signs of a problem with the elevator’s CPT board, including prior instances of the elevator trapping passengers and similar problems with adjacent elevators. This Court should reverse the trial court’s grant of summary judgment and remand for a trial of Ms. Anderson’s claim of negligence.

## II. REPLY ARGUMENT

**A. A jury could find that TKE negligently failed to prevent the CPT board’s failure, which was foreseeable and avoidable through the exercise of reasonable care.**

TKE flips established law on its head by portraying the facts and inferences in the light most favorable to itself. On summary judgment a court must “constru[e] all facts and reasonable inferences in the light most favorable to the nonmoving party.” *O’Neill v. City of Port Orchard*, 194 Wn. App. 759, 771, ¶ 26, 375 P.3d 709 (2016). Here, a jury could reasonably find that the

repeated failures of Elevator #2 and the other elevators in the same bank should have – as Ms. Anderson’s expert testified – prompted TKE to undertake more diligent inspections and that had it done so it would have discovered the need to replace the CPT board on Elevator #2 before Ms. Anderson’s accident.<sup>1</sup>

TKE also distorts the law concerning foreseeability. The law does not require Ms. Anderson to show TKE had prior notice of the precise defect, in the precise part, in the precise elevator that caused her accident. The law requires only that she show the cause of her accident could “be reasonably perceived as within the general field of danger that should have been anticipated.” *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, ¶ 22, 252 P.3d 914, *rev. denied*, 173 Wn.2d 1006 (2011). If the law embraced TKE’s myopic conception of foreseeability, all risks would be unforeseeable until they caused harm and defendants would never be found negligent. The trial court mistakenly accepted TKE’s misstatement of the facts and law in granting summary judgment.

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<sup>1</sup> Ms. Anderson has never argued a *res ipsa loquitur* theory of liability, but has consistently asserted that TKE was negligent in failing to identify the problem with the CPT board based on the pre-accident problems with Elevator #2 and other elevators. (*See Resp. Br. 6*)

- 1. The repeated problems with Elevator #2 in the months before Ms. Anderson's accident should have alerted TKE of a potential defect in its CPT board.**

TKE does not dispute that it had a duty to maintain the elevator that injured Ms. Anderson, or that the elevator stopped suddenly without warning, causing Ms. Anderson's severe injuries. Instead, its sole defense is that it could not have "predicted" the accident, because there is allegedly no evidence that it could have discovered the defect in the CPT board before the accident. To the contrary, Ms. Anderson presented maintenance records and expert testimony confirming that had TKE exercised reasonable care, it would have discovered the need to replace the CPT board that caused Ms. Anderson's injuries. This evidence was more than enough to take the case to a jury.

TKE's maintenance records establish that between February and June 2011, Elevator #2 had five callback incidents, including four in which it trapped passengers. (CP 207-11, 213, 236, 253-54) TKE twists the testimony of Ms. Anderson's expert, Dr. Stephen Carr, to allege he admitted "not one of these five earlier incidents

related to a CPT.” (Resp. Br. 11)<sup>2</sup> But Dr. Carr did not say TKE had no way of knowing there was an issue with the CPT board – quite the opposite. TKE “misses the forest for the trees” by focusing on Dr. Carr’s discussion of each individual callback while ignoring his broader opinion that, taken together, the “significant number of problems on this elevator” evidenced an “intermittent failure” of the CPT board, *i.e.*, the elevator’s “brain.” (CP 213, 235) Indeed, TKE does not dispute the elevator experienced intermittent failure. (Resp. Br. 4)

TKE’s negligence was in failing to notice the “intermittent” malfunction. As Dr. Carr succinctly put it, during an intermittent failure “they’re down some, up some. That of course is a clue to go look at why,” and that TKE’s negligence was in never investigating that “clue.” (CP 84) Dr. Carr ultimately concluded “the CPT board failure in this case was not a ‘spontaneous event’ with no prior warning to [TKE],” but one it failed to “observe . . . beforehand

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<sup>2</sup> TKE takes issue with Dr. Carr’s calculation of callbacks in 2010 (Resp. Br. 22-23), but it does not (and cannot) dispute the five callbacks between February and June 2011 – the callbacks actually relied on by Dr. Carr in concluding TKE was negligent in not replacing the CPT board before Ms. Anderson’s accident.

because they did not look for it.” (CP 235-36)<sup>3</sup> Whether Dr. Carr was right was a question for a jury. *See Keck v. Collins*, 184 Wn.2d 358, 372, ¶ 35, 357 P.3d 1080 (2015); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 61, 871 P.2d 1106 (1994) (“[A]dmissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment.”); *Harrison v. Otis Elevator Co.*, 935 F.2d 714, 717 (5th Cir. 1991) (“Whether Otis’s inability to adequately correct the elevator’s malfunction amounted to negligence was a question for the trier of fact.”).<sup>4</sup>

The issue in this case is not, as TKE insists, whether the CPT board was still within its warranty. (Resp. Br. 29, 36) Parts can and do fail while still within their warranty; indeed, this is the very

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<sup>3</sup> Dr. Carr was consistent on this point in his deposition and declaration, contrary to TKE’s allegation. (Resp. Br. 33-34; *compare* CP 84, *with* CP 235-37)

<sup>4</sup> There is nothing unusual or improper about Ms. Anderson’s reliance on out-of-state authority in her opening brief. (Resp. Br. 6-7) *See, e.g., W.G. Clark Const. Co. v. Pac. Northwest Regional Council of Carpenters*, 180 Wn.2d 54, 58, ¶ 2, 322 P.3d 1207 (2014) (“join[ing] courts across the country” to hold ERISA did not preempt claims under public project statutes). Ms. Anderson discussed the one Washington case addressing the issue of notice to an elevator company, and which was the linchpin of TKE’s summary judgment motion below. (*See* App. Br. 10-11, 16) The other Washington cases cited by TKE do not address the facts that would put a reasonable defendant on notice of a problem with an elevator, but address the distinct issues of how to apply *res ipsa loquitur* or the enhanced standard of care for common carriers. (*See* Resp. Br. 42 n.114)

reason warranties exist. Thus, while it may be true that “[m]aterials can wear out or break without negligence being involved” (Resp. Br. 36, quoting *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 606, 779 P.2d 281 (1989)), it is equally true that a maintenance contractor can be negligent in failing to notice and replace a failed component, even one it has reason to “assum[e] . . . was in proper working order.” *Burr v. Clark*, 30 Wn.2d 149, 155, 190 P.2d 769 (1948) (repair contractor negligent in failing to notice that pressure relief valve had stopped working); see also *Gleeson-Casey v. Otis Elevator Co.*, 268 A.D.2d 406, 407, 702 N.Y.S.2d 321 (2000) (jury question whether leveling brush broke “spontaneously” as defendant asserted or whether “proper maintenance and inspection would have revealed excessive wear” as plaintiff’s expert averred).

Likewise irrelevant is whether a part is “field-serviceable,” *i.e.*, whether it can be repaired or must be replaced. (Resp. Br. 27, 29) A defendant has a duty to prevent reasonably foreseeable accidents, both through repair and replacement of defective parts. Indeed, TKE’s expert conceded that TKE could have inspected and replaced the board, as it actually did after Ms. Anderson suffered her injuries. (*Compare* CP 61-62, *with* CP 218 (TKE’s expert conceding TKE mechanic could “check the board with a meter”),

and CP 283 (TKE conceding “replacement ... could have prevented this incident”); *see also* Resp. Br. 19 (acknowledging the “solution” was “to replace the defective [CPT board]”))

TKE cannot escape liability by relying on the elevator’s performance *after* Ms. Anderson’s accident and *after* it replaced the CPT board. (Resp. Br. 5) That Elevator #2 ran without problems with a new CPT board is only evidence that TKE *eventually* satisfied its duty to exercise reasonable care in maintaining the elevator. It does not absolve TKE of its negligence in failing to replace the CPT board before Ms. Anderson’s accident.

**2. The similar problems with adjacent elevators – equipped with identical CPT boards installed at the same time – gave TKE constructive notice of a problem with Elevator #2’s CPT board.**

It was not only the repeated problems with Elevator #2 that provided TKE notice of a problem with its CPT board, but also that TKE had already taken precautions with the identical CPT boards on the two elevators immediately adjacent to Elevator #2. A jury could, as Dr. Carr did, conclude that this was additional evidence that should have put TKE on notice of an issue with the CPT board on Elevator #2.

TKE concedes that the CPT boards on Elevators #1-3 were identical and all installed at the same time. (Resp. Br. 8) And it is undisputed that TKE replaced the relay to the CPT board on Elevator #1 when it had issues trapping passengers, and that it contacted the CPT board's manufacturer, MCE, when Elevator #3 was "jerking." (CP 205, 207-08, 243-44) Yet when Elevator #2 behaved in the same way – stopping and trapping passengers – TKE never thought to look at its CPT board. TKE now asserts that Elevator #1's relay was merely "attached to" the CPT board (Resp. Br. 14-15), but that does nothing to change the fact that when Elevator #1 was behaving just as Elevator #2 did in the months before Ms. Anderson's accident, TKE took the precaution of inspecting its CPT board and related components. In short, TKE's own actions with respect to the elevators immediately adjacent to Elevator #2 belie its assertion that the elevator's failure was "entirely idiopathic" and "there is nothing TKE . . . failed to do" that could have prevented the accident. (Resp. Br. 38)

As Dr. Carr explained, "the excessive number of problems with all the elevators in the bank" should have prompted TKE to perform "[m]ore and better testing," and its failure to do this testing was further evidence of its negligent maintenance. (CP 237)

Indeed, TKE nowhere refutes that Dr. Carr's assertion of negligent maintenance, combined with Elevator #2's undisputed malfunction, was sufficient to take the case to the jury. (See App. Br. 15, citing *Two Two v. Fujitec America, Inc.*, 355 Or. 319, 325 P.3d 707 (2014)) A reasonable jury could find that TKE's own course of maintenance and inspection of these elevators establishes that it should have known there was a problem with the CPT board on Elevator #2.

**3. The State's inspection of Elevator #2 does not immunize TKE from liability as a matter law.**

TKE mistakenly treats a State inspection of Elevator #2 as irrefutable proof that it did not negligently maintain the elevator. (See Resp. Br. 38-41) That inspection took place on July 21, 2011, three months before Ms. Anderson's accident; the entirety of its findings are that "[t]his conveyance has been inspected and no apparent deficiencies were noted." (CP 72)

RCW 70.87.120 does not, as TKE argues, provide that such a cursory finding of no "apparent" defects is in fact a finding that the elevator complies with all regulatory requirements. Rather that statute simply states that "[i]nspections and tests shall conform with the rules adopted by the department." RCW 70.87.120 (emphasis added). The statute governs the conduct of *inspections*;

it does not state that passing an inspection is tantamount to a certification that an elevator satisfies the myriad requirements set forth in WAC ch. 296-96 and the voluminous engineering codes that chapter incorporates. (*See* Resp. Br. 41)

Even if the inspection could be construed as a finding that the elevator complied with every regulatory requirement, a jury could still find the elevator was unsafe because conformity with regulations is only “*prima facie* evidence that the conveyance work, operation, and inspection is reasonably safe.” RCW 70.87.020(3) (emphasis added); *see also* CP 238 (Dr. Carr: “[P]assing the inspection is the minimum that is expected. Passing one does not insure that the equipment is safe for public use.”)) “Prima facie” evidence is – by definition – rebuttable, and here the evidence of repeated failures and problems with adjacent elevators (Arg. §§ A.1-A.2, *supra*) is more than enough to rebut any “prima facie” value of the State’s one-sentence inspection report.

The cursory nature of the State’s inspection underscores the importance of TKE’s duty to exercise reasonable care to prevent foreseeable accidents. The test of foreseeability is not the myopic one set forth by TKE, but “an objective test” that asks “what the actor knew or *should have known* under the circumstances.”

*Seeberger v. Burlington Northern R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (emphasis added) (quoting *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 764, 818 P.2d 1337 (1991)). That TKE in fact did not predict the failure of this precise CPT board in this precise elevator does not absolve it of its negligence. A jury could find that TKE was on notice, or in the exercise of reasonable care *should* have been on notice, that the CPT board would fail and injure innocent passengers, as it failed and injured Ms. Anderson.

### III. CONCLUSION.

This Court should reverse and remand for trial of Ms. Anderson's claim.

Dated this 11<sup>th</sup> day of October, 2016.

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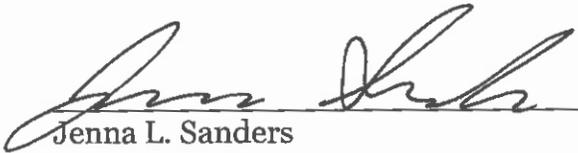
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 11, 2016, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 11<sup>th</sup> day of October,  
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Jenna L. Sanders