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No. 673432

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Justin Leonard,

Appellant,

v.

Grubb & Ellis Equity Advisors, Property Management, Inc.,

Respondent.

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred in entering its August 12, 2011 order granting Respondent's motion for summary judgment and dismissing Mr. Leonard's claims against Respondent.

B. Issue Pertaining to Assignment of Error

Whether the trial court erred in dismissing Mr. Leonard's claims against Respondent when Mr. Leonard raised genuine issues of material fact and presented sufficient evidence to sustain a negligence claim against Respondent; when it was foreseeable that Mr. Leonard, an employee for Microsoft on the Microsoft Campus in Redmond, Washington on July 25, 2007, would be caused harm and injury should Respondent fail to adequately operate, maintain, and manage electrical equipment in their control on the Microsoft Campus in Redmond, Washington; when a declaration from a registered professional electrical engineer, unrefuted by Respondent, states that Respondent failed to adequately operate, maintain, and manage electrical equipment in their control on the Microsoft Campus in Redmond, Washington and failed to adhere to industry standards and customs and due diligence and therefore proximately caused the harm and injury suffered by Mr. Leonard on July 25, 2007; and when it is

undisputed that Mr. Leonard did, in fact, suffer harm and injury of an extensive nature requiring a surgical procedure.

II. STATEMENT OF THE CASE

A. Factual Background

Mr. Leonard takes issue with Respondent's account of the Factual Background and therefore re asserts his facts from his opening brief in toto. *See* Brief of Appellant at 2-4. Respondent's editorialized facts are ripe with information that is irrelevant and inconsequential to the issues between Mr. Leonard and Respondent. Except for two paragraphs, Respondent's Factual Background is void of any mention of their actions or involvement. *See* Brief of Respondent at 4, 6. Further, Respondent's Factual Background leaves out important and relevant information and facts regarding Respondent's actions, or more accurately, inactions.

B. Procedural Background

As with the Factual Background, Mr. Leonard takes issue with Respondent's version of the Procedural Background of this matter, and would steer the Court to his rendition as set forth in the original Brief of Appellant which accurately portrays the procedural happenings between Mr. Leonard and Respondent. Respondent, again, attempts to editorialize regarding reasons for certain defendants' departures from this matter.

Specifically, Respondent states that Defendant Kone was dismissed due to Mr. Leonard's failure to oppose Kone's motion. *See id.* at 2. If Respondent had been privy to conversations that occurred between Mr. Leonard and Kone, as well as other defendants, Respondent could have provided the Court with accurate information. Respondent wasn't aware of the context of the conversations between Mr. Leonard and Kone and their assumption regarding how Kone left this matter is inaccurate.

III. SUMMARY OF ARGUMENT

Respondent fails to address the claims brought against them by Mr. Leonard. Instead of rebutting the allegations against them, Respondent focuses on everything but and points to the actions or inactions of others. Respondent raises various legal theories, but doesn't address the common law negligence claim leveled against them. Respondent incessantly points to the elevator on which Mr. Leonard was a passenger, but doesn't address Mr. Leonard's assertions, confirmed by unrebutted expert testimony, that it was their actions, or inactions, which caused this particular elevator to lose power and cause his injuries in the first place.

Respondent created a risk that was reasonably perceivable and foreseeable in their failure to adequately operate, maintain, and manage electrical equipment in their control and in their failure to adhere to

industry standards and customs of a property manager responsible for electrical and related services. Respondent knew of and had experience with the types of power anomalies that occurred on the Microsoft Campus on July 25, 2007, and also had the responsibility of troubleshooting these power anomalies. The failures of Respondent coupled with their prior knowledge, experience, and responsibilities created a perceivable and foreseeable risk of harm and injury to those on the Microsoft Campus, to include Mr. Leonard. Therefore, Respondent owed Mr. Leonard the duty to exercise care as would a reasonably prudent property manager responsible for electrical and related services. In their failures, Respondent breached their duty owed to Mr. Leonard on July 25, 2007, which proximately caused him injury and harm of an extensive nature.

Mr. Leonard has presented sufficient evidence, to include uncontested expert testimony, to sustain a negligence claim against Respondent, and has shown that genuine issues of material facts do exist that should be presented in front of a jury at trial.

IV. ARGUMENT

A. By Failing to Abide by Industry Standards and Customs and Failing to Adequately Operate, Maintain, and Manage Electrical Equipment in Their Control, Respondent Created a Risk in Which It Was Foreseeable That Mr. Leonard Would be Injured and Therefore a Duty Existed for Respondent to Exercise Care as Would a Reasonably Prudent Property Manager Responsible for Electrical and Related Services.

As stated in Mr. Leonard's original brief, and reiterated here, Respondent failed to adhere to industry standards and customs and failed to adequately operate, maintain, and manage electrical equipment in their control. CP 63-67, 143-51. This, when combined with the fact that Respondent had prior knowledge of the power anomalies affecting the Microsoft Campus and the responsibility to troubleshoot these power anomalies, created a risk of injury and harm to Mr. Leonard, an employee of Microsoft on the Microsoft Campus in Redmond, Washington, that was reasonably perceivable and foreseeable on the part of Respondent. CP 63-67, 143-51. Therefore, Respondent owed Mr. Leonard a duty to use the same amount of care as a reasonably prudent property manager responsible for electrical and related services would. This duty was subsequently breached which caused Mr. Leonard to suffer injury and harm.

Further, it should be pointed out that the actual mechanism of injury is inconsequential if the risk was foreseeable. "Liability extends to

foreseeable results from unforeseeable causes.” King v. City of Seattle, 84 Wash.2d 239, 248, 525 P.2d 228 (1974) (en banc). “Liability is not predicated upon the ability to foresee the exact manner in which the injury may be sustained.” Id. (citing Berglund v. Spokane County, 4 Wash.2d 309, 103 P.2d 355 (1940)). Thus, although Respondent spends some time addressing the specific elevator in their brief, it is inconsequential that Mr. Leonard was even in an elevator when his injuries occurred due to the power outage or whether the elevator acted appropriately or not.

1. The facts and law of Palsgraf support Mr. Leonard’s position.

Contrary to Respondent’s opinion, Mr. Leonard more than appreciates the lesson taught by the Palsgraf court. See Brief of Respondent at 11; see Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (1928). As mentioned by Respondent, the State of Washington has adopted the reasoning of the majority in Palsgraf, which was authored by Justice Cardozo. Id. Respondent quoted Justice Cardozo in Palsgraf, stating “[t]he risk reasonably to be perceived defines the duty to be obeyed....” See Brief of Respondent at 11; see Palsgraf, 248 N.Y. at 344. In following Palsgraf, the Washington Courts have determined that “foreseeability of the risk of harm to the plaintiff is an element of the duty question[, and i]f the risk of harm which befell the plaintiff as a result of

the defendant's act was not reasonably foreseeable ... then ... no duty respecting that act was owed." King, 84 Wash.2d at 248 (*citing* Rikstad v. Holmberg, 76 Wash.2d 265, 456 P.2d 355 (1969); *citing* Wells v. Vancouver, 77 Wash.2d 800, 467 P.2d 292 (1970)).

The facts of the matter at hand are nothing like the facts of Palsgraf. As block quoted and cited to in Mr. Leonard's opening brief, the facts of Palsgraf illustrate how far removed the plaintiff in that matter was from the negligent action and how it was unforeseeable that the plaintiff would suffer injury from the defendant's negligent act¹. *See* Brief of Appellant at 13; *see generally* Palsgraf, 248 N.Y. at 339. In Palsgraf, how was the defendant supposed to reasonably perceive and foresee that this particular individual carrying the fireworks would be late for his train? What if he was the first man running to the train and not the second? What if the guard on the train hadn't held the door and attempted to help him? What if the guard on the platform wasn't there to help him or pushed him in a different manner that wouldn't have dislodged the

¹ The facts of the Palsgraf matter: "A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injury...." Palsgraf, 248 N.Y. at 340-41.

fireworks? What if the fireworks weren't concealed in a newspaper, would the man have been allowed access to the train station or the train itself²? What if the fireworks were slightly smaller in size and the explosion didn't cause any scales to fall on the platform? In other words, the actions and conduct of everyone involved in Palsgraf had to align perfectly for this unfortunate accident to occur.

Not so in Mr. Leonard's case. The extensive "connect the dots" exercise in Palsgraf is not present in Mr. Leonard's situation. As explained and emphasized in more detail in Mr. Leonard's opening brief, it was foreseeable that Mr. Leonard would suffer harm and injury should Respondent fail to adequately operate, maintain, and manage the electrical equipment in their control and this risk was reasonably perceivable, and therefore a duty was owed, given the fact that Respondent failed to adhere to industry standards and customs. *See generally* Brief of Appellant; CP 143-51. In a sworn declaration provided by Respondent, Jon Parkin, holding the title of Senior Director of Facilities, stated that on the date of the accident, Respondent was the property manager on the Microsoft Campus and was "responsible for delivery of integrated facility management services..." to include delivery of "electrical ... and related services." CP 64. Mr. Parkin further stated by way of sworn declaration

² It is recognized that security standards were different, and likely more relaxed, in the 1920's as compared to today's security standards and requirements.

that Respondent had prior experience and knowledge of power anomalies similar to the one on July 25, 2007. CP 64. On the date of the accident, Mr. Leonard was an employee of Microsoft, was expected to be on the same campus for which Respondent held the electrical responsibilities, and was using an elevator on said campus. CP 155, 160. On the date of the accident, Respondent failed to adequately operate, maintain, and manage the electrical equipment in their control on the said campus and failed to adhere to the industry standards and customs. CP 143-51. Respondent's failures subsequently led to the injuries and harm suffered by Mr. Leonard. CP 155. This chain of events is night and day when compared to that of Palsgraf.

Respondent argues that this case is similar to Palsgraf in that "a party claims injury from an event that the defendant could not reasonably perceive would result in harm (i.e., stoppage of an elevator in a routine power outage)." *See* Brief of Respondent at 12. This is categorically not true. Respondent persistently falls back to mentioning the elevator on which Mr. Leonard was a passenger when the power outage occurs and continually fails to address Mr. Leonard's claim against Respondent. Mr. Leonard's claim against Respondent has nothing to do with the actual elevator Mr. Leonard was a passenger on. As previously stated in this brief, "the ability to foresee the exact manner in which the injury may be

sustained” is not determinative of whether liability attaches. King, 84 Wash.2d at 248 (*citing* Berglund, 4 Wash.2d at 309). Mr. Leonard’s claims against Respondent revolves around Respondent’s failure to adhere to industry standards and customs and failure to adequately operate, maintain, and manage electrical equipment in their control on the Microsoft Campus in Redmond, Washington. But for Respondent’s aforementioned failures, the elevator never would have lost power and Mr. Leonard never would have suffered injury and harm.

More so, in this matter the risk was reasonably perceived by Respondent and therefore a duty was owed. CP 143-51. The type of industry Respondent does business in is ripe with standards and customs that guide those in positions identical to Respondent. Respondent has been in the property management business for some time³. With the longevity that Respondent has been in the industry it cannot be argued that they were unaware or had no knowledge of the well established standards and customs in their respective industry. The fact that Respondent failed to abide by industry standards and customs considering the length of time they have been doing business is evidence⁴ that the risk was clearly

³ According to Respondent’s website, they have been in business since 1958. *See* <http://www.grubb-ellis.com/Company/BusinessHistory.aspx>.

⁴ Mr. Leonard’s opening brief contains more in depth discussion regarding industry standards and customs. *See* Brief of Appellant at 10, 11, 16-20; CP 143-51.

perceived and therefore a duty was owed to Mr. Leonard⁵. But for Respondent's failure to adhere to industry standards and customs the elevator never would have lost power and Mr. Leonard never would have suffered injury and harm.

2. The facts and law of Higgins support Mr. Leonard's position.

In their brief, Respondent states that Mr. Leonard relies on Higgins v. Intex Recreation Corp., a products liability case from Division Three, as supporting his claim. *See* Brief of Respondent at 9; *see Higgins v. Intex Recreation Corp.*, 123 Wash. App. 821, 99 P.3d 421 (Div. III 2004). Mr. Leonard cited to Higgins for the supporting case law it contained, not for the purpose of case comparison. With that being said, in looking at Higgins further, not only does the case law support Mr. Leonard's position, but the facts are distinctly distinguishable and therefore supportive of Mr. Leonard's position as well. As stated in Mr. Leonard's opening brief, in deciding whether a duty was owed, foreseeability of the risk created by the defendant is determined. *See* Brief of Appellant at 10; Higgins, 123 Wash. App. at 837. In Higgins, and as stated by Respondent, the appellate court affirmed a trial court verdict that an individual on an inflatable snow tube was not negligent because, as he went down the hill,

⁵ Although mentioned before, it should be again mentioned at this juncture that Mr. Parkin stated in his sworn declaration that Respondent had prior knowledge and experience with power anomalies similar to the one on July 25, 2007. CP 64.

he was rotating backward and could not “reasonably foresee the hazard” and he could not see obstacles and/or persons in his path⁶. *See* Brief of Respondent at 9-10; Higgins, 123 Wash. App. at 837-38.

Respondent’s opinion that Higgins supports their position and the decision of the trial court to grant summary judgment is misplaced. Again, Respondent focuses on the elevator in which Mr. Leonard was a passenger at the time of the power outage. Respondent is confusing the issue. Mr. Leonard doesn’t take issue with Respondent as they relate to the elevator. Mr. Leonard does take issue with Respondent’s actions, better described as inactions, in their failure to adequately operate, maintain, and manage electrical equipment in their control on the Microsoft Campus in Redmond, Washington, and failure to adhere to industry standards and customs.

The facts of Higgins are clearly distinguishable from the facts of the matter at hand. As stated above, the rider of the snow tube wasn’t held liable because the hazards weren’t foreseeable. *See generally Higgins*, 123 Wash. App. at 821. The same can’t be said for Respondent in the current situation. Respondent failed to adequately operate, maintain, and manage electrical equipment in their control and failed to adhere to

⁶ The appellate court affirmed the trial court verdict that the manufacturer of the snow tube was liable, but not the actual rider of the snow tube. *See generally Higgins*, 123 Wash. App. at 821.

industry standards and customs. CP 143-51. As stated in the prior section, it is clear that Respondent's prolonged existence in the industry make them acutely aware of the standards and customs in said industry, as well as the fact that Respondent had prior knowledge and experience with these types of power anomalies. CP 64. There is no excuse for Respondent not to be all knowing regarding the industry standards and customs. For Respondent to continually point to the elevator only serves to confuse. Knowing the applicable standards and customs, Respondent undoubtedly had knowledge and foresight that failure to adhere to these said standards and customs of the industry could, and would, lead to failure of the electrical systems in their control and therefore subsequent injury and harm to an employee on the Microsoft campus, based on Respondent's actions or inactions, was foreseeable⁷.

B. Respondent Analyzes Negligence Theories That Were Intentionally Never Asserted by Mr. Leonard.

Respondent raises negligence theories that are not applicable to the situation at hand and were never raised by Mr. Leonard. *See* Brief of Respondent at 12-21. Respondent admits in their brief that a premises liability theory of negligence does not apply to this case yet still spends time on this particular theory. *See id.* at 13. Addressing these theories

⁷ Mechanism of injury is inconsequential if the risk was foreseeable. *See King*, 84 Wash.2d at 248.

when they were never claimed by Mr. Leonard only lends themselves to confuse the actual issue and they cannot be considered instructive or applicable. Mr. Leonard asserted a common law negligence claim against Respondent, not a premises liability theory of negligence⁸⁹, a special relationship theory¹⁰, or an idea of third party beneficiary¹¹.

C. Respondent Failed to Refute Expert Testimony Provided by an Expert Witness on Behalf of Mr. Leonard.

The expert testimony presented on behalf of Mr. Leonard by John R. Beebe, a registered professional electrical engineer, went uncontested by Respondent as they provided no evidence or testimony to the contrary

⁸ Respondent cites to Bates, a Division Two premises liability/snow removal case, for the proposition that Mr. Leonard has not presented sufficient evidence to support a claim of negligence based on a premises liability theory. *See* Brief of Respondent at 14-15; *see Bates v. Grace United Methodist Church*, 12 Wash. App. 111, 529 P.2d 466 (Div. II 1974). This is not disputed as Mr. Leonard had no intention of raising the theory of premises liability. This being said, Mr. Leonard has presented sufficient evidence for the claim he has actually asserted.

⁹ Respondent cites to Ford, a premises liability/snow removal case, for the proposition that Mr. Leonard has not presented evidence to support a premises liability negligence claim. *See* Brief of Respondent at 14-15; *see Ford v. Red Lion Inns*, 67 Wash. App. 766, 840 P.2d 198 (Div. I 1992). Again, this is not disputed as Mr. Leonard has not raised a negligence claim based on premises liability. As stated above, Mr. Leonard has presented sufficient evidence for the claim he has actually asserted.

¹⁰ The cases cited by Respondent regarding a special relationship theory are not applicable and all deal with lawsuits involving security service companies and/or pedestrians passing by property. *See Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998) (security company was no longer under contract with Burger King when the harm occurred); *see Hutchins v. 1001 Fourth Ave. Associates*, 116 Wash.2d 217, 802 P.2d 1360 (1991) (en banc) (passerby was assaulted and robbed on Defendant's property); *see McKown v. Simon Prop. Group, Inc.*, 2010 WL 5463104 (W.D. Wash. 2010) (claim against security company involving criminal activity and a mall occupant).

¹¹ Respondent cites to Burke & Thomas, Inc. v. Int'l Org. of Masters, 92 Wash.2d 762, 600 P.2d 1282 (1979) regarding the idea of a third party beneficiary. Third party beneficiaries come into play when contract law is involved, not tort law, and therefore is not applicable in Mr. Leonard's situation.

and did not present an expert witness to rebut Mr. Beebe, P.E. CP 1-9, 143-51, 159-64. As previously mentioned, the only declaration presented by Respondent is that of Jon Parkin, an employee of Respondent who holds the title of Senior Director of Facilities and has worked on the Microsoft account since 2002. CP 63-67. In fact, Mr. Beebe, P.E. used Mr. Parkin's declaration, along with other documents and briefs presented in this matter, to render his expert opinion¹². CP 143-51. The Washington State Supreme Court, in Grundy v. Thurston County, dealt with a matter in which a plaintiff presented un rebutted expert testimony. *See Grundy v. Thurston County*, 155 Wash.2d 1, 117 P.3d 1089 (2005) (en banc). In Grundy, the Supreme Court determined that the un rebutted expert testimony created a genuine issue of material fact for purposes of summary judgment and reversed and remanded the matter for trial¹³. Grundy, 155 Wash.2d at 10, n. 8; *see also Coggle v. Snow*, 56 Wash. App. 499, 510-12, 784 P.2d 554 (Div. I 1990). Respondent failed to provide any evidence or testimony from any source that is contrary to the expert testimony of Mr. Beebe, P.E., which supports Mr. Leonard's claim.

¹² It should be noted that the expert opinion contained in the declaration of Mr. Beebe, P.E. satisfies the requirement that expert testimony by way of declaration in a summary judgment must contain the facts and information relied upon. *See* ER 705; *see also Hash by Hash v. Children's Orthopedic Hosp.*, 49 Wash. App. 130, 741 P.2d 584 (Div. I 1987).

¹³ Although Grundy dealt with a nuisance action and Coggle dealt with a medical malpractice claim, both cases are instructive regarding summary judgments and un rebutted expert testimony. *See Grundy*, 155 Wash.2d at 1; *see Coggle*, 56 Wash. App. at 499.

Understandably, Respondent tries to place the focus on anything but their actions, or inactions, that led to the power outage and Mr. Leonard's injuries. *See generally* Brief of Respondent. Respondent mentions the idea of uninterrupted electrical power, troubleshooting efforts, and citing to the Microsoft Service Plan. *Id.* at 18-20. Respondent's ideas miss the point. The point, which is clearly laid out in the declaration of Mr. Beebe, P.E., is that Respondent had prior knowledge and experience with power anomalies, to include power anomalies of the type that occurred on the day Mr. Leonard was injured, and had the responsibility of troubleshooting them. CP 63-67, 143-51. This information coupled with the fact that Respondent failed to adhere to industry standards and customs and failed to adequately operate, maintain, and manage electrical equipment in their control validates Mr. Leonard's claim against Respondent. CP 143-51. Respondent knew that they were failing to abide by industry standards and customs. Respondent knew that they were failing to operate, maintain, and manage electrical equipment in their control in an adequate manner. Respondent knew of the propensity of the Microsoft campus to lose power. Respondent knew that they weren't doing enough and weren't doing what was required of them and knew that these failures and inactions put those on the Microsoft Campus, to include employees such as Mr. Leonard, in danger of being injured and

harm. Respondent knew that had they followed industry standards and customs for a property manager responsible for electrical and related services then the power outage that occurred on July 25, 2007 could have, and would have, been avoided. The risk was reasonably perceivable that, based on Respondent's prior knowledge and experience and their subsequent failures and inactions, an employee of Microsoft, such as Mr. Leonard, could, and would, be injured and harmed due to the Microsoft campus losing power.

Again, these claims are all supported by the expert testimony provided by Mr. Beebe, P.E., which have not and cannot be refuted or contested by Respondent.

V. CONCLUSION

After carefully considering Mr. Leonard's Brief, the Brief of Respondent, as well as Mr. Leonard's Reply Brief, Mr. Leonard respectfully requests that this Court reverse and remand this matter to the trial court as Mr. Leonard has presented sufficient evidence to sustain a negligence claim against Respondent and has shown that genuine issues of material fact do exist.

RESPECTFULLY SUBMITTED this 13th day of February, 2012.

A handwritten signature in black ink, appearing to read "J. Walsh", written over a horizontal line.

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