69839-7

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NO. 69839-7

DIVISION I, COURT OF APPEALS

OF THE STATE OF WASHINGTON

JEANNE PASCAL AND DALLAS SWANK,
Appellants,

v.

WH PARK PLACE, LLC AND WH PARK PLACE MEZZ, LLC

Respondents.

BRIEF OF RESPONDENTS WH PARK PLACE, LLC AND WH PARK PLACE MEZZ, LLC ("PARK PLACE")

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TABLE OF CONTENTS

Pg.

TABLE OF AUTHORITIES

Pg.

CASES

COURT RULES

OTHER AUTHORITIES

A. SUMMARY AND IDENTITY OF PARTIES

Appellant Jeanne Pascal had worked in Respondent Park Place's office building for 26 years without incident. But shortly before she retired, right after Park Place purchased the building, she claims she fell in that elevator and was injured.

Park Place, like its predecessor building owner, contracted with elevator maintenance company Fujitec to perform monthly preventative maintenance as well as service callbacks for the elevators. Fujitec performed all of its monthly maintenance work on the parking garage elevator, including on January 13, 2010. Pascal fell in the parking garage elevator only eight days later. There were no service calls or complaints of elevator misleveling between January 13, 2010 and Pascal's fall.

Pascal and her husband Dallas Swank sued Park Place and Fujitec, alleging that the elevator must have misleveled and caused Pascal to fall. The trial court granted Park Place and Fujitec's separate motions for summary judgment, holding that there was no evidence of elevator defect and that Park Place had met its common carrier duty. The trial court denied reconsideration. This appeal, against Park Place only, followed.

B. DECISIONS BELOW

1. The trial court entered summary judgment against Plaintiffs/Appellants Pascal and Swank, in favor of Park Place, on December 7, 2012. Clerk's Papers ("CP") 296-300.

2. The trial court denied Plaintiffs/Appellants Pascal and Swank's motion for reconsideration (of the court's grant of summary judgment in favor of Park Place) on January 7, 2013. CP 319-321.

C. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly entered summary judgment against Plaintiffs/Appellants Pascal and Swank on December 7, 2012.

2. The trial court correctly denied Plaintiffs/Appellants Pascal and Swank's motion for reconsideration on January 7, 2013.

D. RESPONSE TO ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. ***No breach of statute***. There was zero evidence that the elevator in which Pascal fell misleveled, to any degree, on January 21, 2010 (the day of her fall). Pascal herself did not observe any misleveling. Park Place's contractor Fujitec performed its monthly maintenance work on the parking garage elevator on January 13, 2010 without finding any problems, and there were no service calls or complaints of elevator misleveling between January 13, 2010 and January 21, 2010. Moreover, Pascal's expert never examined the elevator, did *not* opine that there was any defect in the elevator at the time of Pascal's fall, did not explain the causes of misleveling, and did not tie together isolated incidents of mislevelings. At most, Pascal's witness Lither alleged a misleveling of 'about ½" to ¾"'thirteen days *after* Pascal's fall, which of course could not have proximately caused Pascal's fall; and witness Wojnicz alleged instances of garage elevator misleveling (of over ½") at least two-and-a-

half years prior to Pascal's fall, prior to Park Place's ownership. Therefore Park Place did not violate a WAC standard (that allows elevator misleveling of ½" but no more), and the trial court properly found that there was no evidence of Park Place's negligence, thereby meriting summary judgment in favor of Park Place. (Appellants' Assignments of Error IIIA, IIIB)

2. ***No delegation of duty***. Park Place as a common carrier met its duty to take reasonably foreseeable precautions on behalf of its elevator passengers by contracting with property manager Wright Runstad to receive tenant complaints and with Fujitec for monthly elevator maintenance and service callbacks. The trial court properly found that such contracting constituted fulfillment of Park Place's duty, rather than delegation of duty. (Appellants' Assignments of Error IIIA, IIIB)

3. ***No evidence of misleveling***. There was zero evidence that the elevator in which Pascal fell misleveled, to any degree, on January 21, 2010 (the day of her fall). Therefore the trial court properly found that there was no evidence of Park Place's negligence, meriting summary judgment in favor of Park Place. (Appellants' Assignments of Error IIIA, IIIB)

4. ***No breach of common carrier duty***. There was no evidence of elevator defect. Furthermore, Park Place contracted with Wright Runstad and Fujitec to assist in the fulfillment of its common carrier responsibilities. The trial court properly found that there was no evidence

of any misleveling (let alone one measuring more than ½") at the time of Pascal's fall, no violation of the WAC standard (that allows elevator misleveling of ½" but no more), and no evidence that Park Place violated its common carrier duty, meriting summary judgment in favor of Park Place. (Appellants' Assignments of Error IIIA, IIIB)

5. ***No justification for adverse inference (issue not raised in trial court)***. Pascal and Swank noted in their summary judgment response that they wanted further discovery, specifically a third-party security guard logbook and additional Fujitec depositions. But they did not request a CR 59(f) continuance, and specifically admitted that the motion could be decided without this discovery. Now on appeal, for the first time, Pascal and Swank argue that because the production and deposition had not yet occurred that the trial court erred by not making an inference adverse to Park Place regarding what was contained in the logbook. The trial court never heard (or decided) this argument on summary judgment. Therefore, this issue is unripe for appellate consideration. Should this Court consider this issue, then the trial court properly did not grant a summary judgment continuance because Pascal and Swank failed to meet the CR 59(f) standard for continuance, *e.g.*, explaining how the additional evidence would create material fact disputes. The trial court also properly denied reconsideration because Pascal and Swank failed to meet the CR 59(a) standard for reconsideration, *e.g.*, their alleged need for discovery did not

constitute the "newly discovered evidence..." required for reconsideration. (Appellants' Assignments of Error IIIA, IIIB).

C. COUNTERSTATEMENT OF THE CASE

1. Identity of Persons and Entities Involved.

Park Place. Beginning in January 2010 (just prior to Pascal's fall), Respondent WH Park Place Mezz, LLC owned a commercial building at 1200 Sixth Avenue, Seattle. CP 62:25-26. The building had eight elevators, only one of which, the "garage elevator," was a passenger elevator that descended to the parking garage. CP 153:22-154:5.

WH Park Place Mezz, LLC was the sole member of Respondent WH Park Place, LLC. The two respondents are collectively labeled "Park Place."

Park Place's relationship with non-party Wright Runstad. Between January 1, 2010 through at least January 25, 2010, Wright Runstad was the property manager for 1200 Sixth Avenue. CP 121:22-24, 122:4-9, 131:18-132:5. Wright Runstad reported to the building ownership (Park Place). CP 122:10-13.[1] As property manager, Wright Runstad managed Park Place's elevator contract with Fujitec (a defendant below) and was solely responsible for scheduling routine maintenance, keeping track of all trouble calls and sending them in to Fujitec. CP 122:19-123:5, 123:18-21, 124:24-125:2. Wright Runstad was responsible

[1] Note that the "WH" in respondents' names stands for "Washington Holdings."

for taking any tenant complaints for the elevators. CP 123:12-14. Wright Runstad and Fujitec, alone, were responsible for taking an elevator out of service if it was malfunctioning in any way. CP 123:22-124:2, 125:8-13. Wright Runstad was *solely* responsible for ensuring that the building's elevators were safe for tenants to enter. CP 124:15-23, 125:4-7.

Wright Runstad knew of no problems with the parking garage elevator in the year before Pascal's accident there. CP 126:2-7, 126:20-127:4, 127:21-128:1, 133:7-10. Fujitec did not inform Wright Runstad of any malfunctions, and building tenants had no complaints regarding that elevator in the four months before Pascal's accident. CP 128:9-11, 128:22-129:1. In those four months, Fujitec did not do any service on the garage elevator except for routine maintenance (including a Talon belt change). CP 126:20-128:1, 129:22-130:2. Wright Runstad stated that there wasn't any problem with the garage elevator. CP 127:24-128:1.

Park Place's relationship with Fujitec. By January 2010, Fujitec had been the contracted elevator maintenance and servicing company for 1200 Sixth Avenue for several years. CP 136:18-23, 137:18-20. Fujitec performed monthly preventative maintenance as well as service callbacks. CP 138:20-139:10. From September 2009 until Wright Runstad left as property manager, the Fujitec elevator technician communicated only with the Wright Runstad chief engineer and with security guards (to check into the building), never the building owners. CP 138:2-10, 140:15-21.

Fujitec performed and documented its monthly maintenance checks on the parking garage elevator between September 2009 and January 2010. CP 141:16-17, 142:4-7, 142:19-145:8. There was nothing the Fujitec technician was supposed to check, that he did not check. *Id.* The last monthly maintenance check prior to Pascal's accident was just eight days before, on January 13, 2010. CP 145:11-15.

A callback is where the building (Wright Runstad or a security guard) or the Fujitec technician finds an issue with an elevator and reports it to Fujitec. CP 145:20-146:13. Up through Wright Runstad's leaving as property manager, none of the building owners or their employees ever made a callback to Fujitec. CP 146:14-20. There were only two callbacks for the parking elevator between September 2009 and January 2010. CP 147:18-151:11, 156:20-157:1. One was called in (and performed) on October 20, 2009, and the other called in (and performed) on October 27, 2009, both to repair the talon belt on the car. CP 149:25-150:17, 152:3-19. Neither had anything to do with misleveling of the elevator. CP 151:25-152:2, 152:21-23.

The Fujitec technician did not observe any misleveling problems in the garage elevator in the four months prior to Ms. Pascal's accident. CP 153:14-17, 155:14-18. In that same time period, he also did not receive any complaints of misleveling. CP 153:18-21. Fujitec was responsible for insuring that no mislevelings occurred. CP 154:22-25.

Jeanne Pascal's elevator fall. Appellant Pascal alleges that on January 21, 2010, she was injured as a result of a fall while attempting to enter the garage elevator in 1200 Sixth Avenue. CP 60:24-25. Specifically, she testified:

> A I -- I entered the elevator, I felt my foot clip -- my left flip clip what I assumed 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.

CP 164:6-22. Pascal admits that the elevator doors were completely open, and the cab floor had stopped moving, before she walked in. CP 162:17-23.

Pascal testified that she did not observe any misleveling in the elevator floor on the day of her accident. CP 163:24-164:1, 165:4-13. In fact, she didn't remember *ever* seeing the garage elevator mislevel in the

26 years she worked in the building, including for the five or six years prior to her accident when she was parking in the building garage every day. CP 160:10-21, 161:15-18, 166:17-167:17. She further admitted that she never reported the garage elevator as misleveling. CP 166:18-20.

Pascal and Swank's lawsuit. Pascal sued Park Place and others for negligence, with her husband Swank asserting loss of consortium. CP 28. Pascal and Swank later amended their complaint to add claims against Fujitec. CP 59.

2. Decisions Below

In the trial court, Park Place and Fujitec moved for summary judgment. As more fully described under "Argument" below, Park Place's motion explained that there was no evidence of any elevator defect that could have caused Pascal's fall, because its contractor Fujitec performed its monthly maintenance work on the parking garage elevator on January 13, 2010, and there were no service calls or complaints of elevator misleveling between January 13, 2010 and Pascal's fall on January 21, 2010. (Pascal herself admitted she did not observe any misleveling – ever.)

Park Place further argued that, assuming it was subject to the common carrier standard,[2] it had met its duty "to take reasonably foreseeable precautions on behalf of its passengers" "compatible with the practical operation of its business" by contracting with two companies to

[2] Application of the common carrier standard is not raised on appeal.

assist in the fulfillment of its responsibilities. Property manager Wright Runstad scheduled routine elevator maintenance, kept track of all trouble calls, sent the calls in to Fujitec, took tenant complaints for the elevators, and was authorized to take an elevator out of service if it was malfunctioning in any way. Fujitec performed monthly preventative maintenance as well as service callbacks.

In response to Park Place's motion, Pascal and Swank proffered witness declarations alleging elevator mislevelings somewhere in the multi-elevator building, over a long time period (mostly preceding Park Place's ownership of the building), all but two failing to specify the degree of misleveling (as misleveling up to ½" is permissible under WAC elevator standards). None of the witness declarations alleged garage elevator defects in the relevant time period (between Fujitec's 1/13/2010 monthly inspection and Pascal's fall eight days later). At most, Pascal's witness Lither alleged a misleveling of 'about ½" to ¾"' thirteen days *after* Pascal's fall, which of course could not have proximately caused Pascal's fall; and witness Wojnicz alleged instances of garage elevator misleveling (of at least ½") at least two-and-a-half years prior to Pascal's fall, which Pascal admitted did not continue into her use of the elevator. Notably, Pascal and Swank did not allege any unfinished discovery necessary for them to rebut summary judgment (*i.e.*, under CR 59(f)).

Pascal and Swank also offered an expert declaration, but their expert never examined the elevator, did *not* opine that there was any defect in the elevator at the time of Pascal's fall, did not explain the causes

of misleveling, and did not tie together isolated incidents of mislevelings. Rather, their expert Buckman opined under *res ipsa loquitor* that there was a defect because there was an injury: the elevator "probably" misleveled, and more that ½", because "a lower misleveling would likely not have tripped Jeanne Pascal."

After oral argument, the trial court granted summary judgment to Park Place. CP 296-297; RP 28:16-17. It found Pascal and Swank failed to raise a genuine issue of material fact and that Park Place met its burden as a common carrier by having service contracts with Wright Runstad and Fujitec. RP 30:1-2, 30:23-31:3.

Pascal and Swank moved for reconsideration, arguing in part that they had recently sought more discovery (a security guard logbook and Fujitec depositions). It did not argue for adverse inferences by the absence of this information. The trial court did not invite responsive briefing and thus, following local rule,[3] Park Place did not provide any. There was no oral argument. The trial court denied reconsideration by short written order without findings or conclusions. CP 319-321.

D. ARGUMENT

1. Elevators can malfunction without owner negligence.

Washington courts have repeatedly recognized that conveyance devices such as elevators can malfunction in the absence of negligence. In

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[3] "No response to a motion for reconsideration shall be filed unless requested by the court." King County LCR 59(b).

Adams v. Western Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989), the plaintiff was injured when an elevator in the University Tower misleveled one to two feet above the ground floor. (In contrast to that documented, same-day, large mislevel, Pascal alleges misleveling of just ¾", occurring eight days *after* Pascal's fall, and also occurring over two years *before* Pascal's fall.) The *Adams* building owner, like Park Place, employed an elevator maintenance company for regular maintenance checks and service callbacks. The *Adams* court found no liability:

> This is not a case where the malfunction is so unusual that we can say it does not occur in the absence of negligence. Elevators are mechanical devices of some complexity. Materials can wear out or break without negligence being involved.

55 Wn. App. at 66. The Washington legislature recognizes such ordinary malfunctions by allowing elevator mislevelings up to ½".[4] Here, as the trial court noted (RP 29:5-13), Pascal and Swank's expert entirely failed to explain the causes of elevator misleveling, and did not tie together isolated past incidents of mislevelings (*i.e.*, those observed by witness Wojnicz) to Pascal's fall over two-and-a-half years later. There was no evidence that these past incidents, under different building ownership, and followed by thousands of uneventful elevator trips for years, had anything to do with Pascal's fall.

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[4] WAC 296-96-0650 states that Washington's Department of Labor and Industries has adopted ASME A17.1-2004, Rule 2.26.11(a). Pascal's expert Buckman explained that this rule allows floor leveling accuracy of +/- ½ inch. CP 242:20-23.

2. Park Place's duty as a common carrier.

Assuming that Park Place is a common carrier rather than "mere" property owner, its standard of care still contemplates reasonable care, not strict liability. An elevator operator is a common carrier and owes "a duty of the highest care for its passengers' safety *compatible with the practical operation of its business.*" *Brown v. Crescent Stores, Inc.*, 54 Wn. App. 861, 863-64, 776 P.2d 705 (1989); *see* WPI 100.01. This duty requires a common carrier to take *reasonably foreseeable* precautions on behalf of its passengers. *Brown*, 54 Wn. App. 861 (emphasis added). Breach of this duty is established by evidence that a common carrier's negligence played "any part, even the slightest" in the plaintiff's injury. *Seeberger v. Burlington N. R.R. Co.*, 91 Wn. App. 865, 867, 960 P.2d 461 (1998) (citing *Moore v. Union Pac. R.R.*, 83 Wn. App. 112, 115, 920 P.2d 616 (1996)). A common carrier, however, is not an insurer and is not liable "for injuries received from ordinary jolts and jerks, necessarily incident to the mode of transportation, which are not the result of negligence." *Brown,* 54 Wn. App. at 864 (citing *Gentry v. Greyhound Corp.*, 46 Wn. 2d 631, 633, 283 P.2d 979 (1955)).

3. There was no evidence of elevator defect in the relevant time period.

Fujitec performed all of its monthly maintenance work on the parking garage elevator, including on January 13, 2010. CP 141:16-17,

142:4-7, 142:19-145:8, 145:11-15. There was nothing Fujitec was supposed to check, that it did not check. *Id.* (Pascal and Swank do not provide any evidence questioning the adequacy of Fujitec's inspection.[5]) Pascal fell in the parking garage elevator only eight days later. CP 60:24-25.

Thus, the relevant time period in which to analyze Park Place's duty is only the eight days between the inspection on January 13, 2010 and Pascal's fall on January 20, 2012. Otherwise, Park Place's duty becomes hyper-strict liability: if there was even one elevator mislevel at any time in the building's history, then despite subsequent, and successful, Fujitec and City Elevator Inspector inspections, Park Place would be liable for all future elevator falls regardless of causation. (As *Adams* noted, mislevelings are ordinary and not necessarily representative of a defect. Misleveling occurrences are not necessarily related.) And Park Place could be liable regardless of whether it owned the building at the time of the long-ago defect! (Park Place owned the building only beginning January 2010 – the very month of Pascal's fall - onwards. CP 62:25-26.)

None of Pascal and Swank's fact witness declarations alleged garage elevator defects in the relevant time period:

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[5] Pascal and Swank pointed to declaration excerpts that don't provide any such evidence. CP 189:17-20.

- Pascal herself admitted she did not *ever* see any misleveling or trip hazard before her fall. CP 255:25. *See also* CP 160:10-21, 161:15-18, 163:24-164:1, 165:4-13, 166:17-167:17.

- Bogdan Wojnicz observed garage elevator misleveling, but he retired from the building in June 2008, two-and-a-half years prior to Pascal's fall. CP 269:23-26.

- Kevin McDermott observed misleveling, as well as fast elevator travel. But McDermott retired from the building in July 2009, a year-and-a-half prior to Pascal's fall. CP 274:1-2. He did not specify which of the eight elevators had the problems. And the elevator travel speed issue was irrelevant to Pascal's alleged defect of misleveling.

- Michael Graeber stated that the "levelers" in the elevators sometimes "drift[ed] out of adjustment." But he left the building in April 2007, almost three years before Pascal's fall. He did not specify which elevators "drifted," or whether "drifting" was the same thing as misleveling. He alleged that the garage elevator "quit running" sometime during a prior building owner's ownership of the building, which was a different kind of defect than Pascal alleged, and which preceded Park Place's ownership. He also alleges hearsay regarding tenant statements.

- Jennifer Eason twice observed misleveling, as well as fast closure of elevator doors. But Eason provided no time period for the mislevelings, other than during her work tenure (January 2007 to present). She did not specify which of the eight elevators had the problems. And

the elevator door issue was irrelevant to Pascal's alleged defect of misleveling.

- Eileen Livingstone observed misleveling three times. But she provided no time period, other than sometime during her work tenure (December 1982 to December 2010). She did not specify which of the eight elevators had the problems.

- Barbara Lither observed a misleveling almost two weeks *after* Pascal's fall, which obviously could not have caused Pascal's fall.

Pascal and Swank's elevator expert Buckman opined regarding the elevator. But he reviewed only written materials, and did not inspect the elevator itself at any time. CP 241:8-16. He did not delineate between alleged elevator defects prior to, vs. during, Park Place's ownership. He considered "elevators" generally, not just the specific elevator at issue. And, most significantly, he did *not* conclude that there was any defect in the elevator at the time of Pascal's fall![6] Buckman improperly drew an inference from a lack of evidence ("[t]here is no record that misleveling was adequately investigated [by Fujitec] and there was no record that Park Place adequately followed up with Fujitec") and from this false premise he creates a legal standard-of-care that does not match case law:

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[6] Buckman stated that from his review of written materials he "culled" the fact that "Jeanne Pascal tripped on the *apparently* misleveled" elevator. CP 241:17, 242:11-12 (emphasis added). *See also,* CP 242:25-26 ("a lower [than ¾ inch] misleveling would *likely* not have tripped Jeanne Pascal")(emphasis added). He stated that Lither's photos show the elevator was misleveled ¾ inch thirteen days *after* Pascal's fall. CP 242:15-17.

> There is a need to aggressively check for the source of misleveling problems and all reports of misleveling must be taken seriously and followed up on. This was not done and failure to do so was negligent by both Fujitec and Park Place.

But to prove negligence Pascal and Swank must present some affirmative evidence of an elevator defect subsequent to Fujitec's 1/13/10 inspection, and prior to Pascal's 1/21/10 fall. Pascal and Swank failed to do so. (Furthermore, again, Park Place did not even own the building during the long-ago occurrences of elevators misleveling "somewhere" in this multi-elevator building.)

Note the red herring (masquerading as a disputed fact) of an October 15, 2009 work order to Fujitec (*prior* to Park Place's ownership). Pascal and Swank suggest, without any evidence or even expert opinion, that perhaps Fujitec didn't actually service that elevator. Their attorney admits that the work order exists and that Fujitec was dispatched, but he argues that the work order doesn't log the times of "work started" and "work completed" as a different work order (entered by a different technician) did four months later. Appellants' Brief at 4-5, 12. But Fujitec's technician explained in undisputed testimony that Fujitec received only two parking elevator service calls between September 2009 and January 2010, both in October 2009; and that Fujitec addressed both with same-day service callbacks. CP 147:12-148:10, 149:14-152:20. Neither call found any leveling problem; Fujitec replaced Talon belt. CP 151:22-152:2, 152:18-23.

Similarly, Pascal's counsel argues without evidence that perhaps Fujitec's monthly checks did not perform all possible tasks. Appellants' Brief at, at 5. But Fujitec's technician testified that he performed all monthly maintenance tasks including checking for leveling (in September 2009, October 2009, November 2009, December 2009 and January 2010). CP 142:22-145:10. Any blank boxes on his maintenance record represented (quarterly) tasks that were not required that particular month. CP 145:2-8.

4. There was no evidence of notice to Park Place of any elevator defect in the relevant time period.

The scope of any duty is bounded by the foreseeable range of danger.[7] In the absence of notice of a malfunction, the danger is not foreseeable. As there was no notice to Park Place that the garage elevator was misleveling between Fujitec's 1/13/10 inspection and Pascal's 1/21/10 accident, the injury was not foreseeable and cannot be attributed to any negligence by Park Place.

5. Park Place met its common-carrier duty by taking reasonable precautions.

Buckman's "culled fact" was "there is no record that Park Place adequately followed up with Fujitec." This assumed failure, he said, was the reason that Park Place was negligent. The inverse of Buckman's

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[7] *See, e.g., Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483, (1992) ("the concept of foreseeability determines the scope of the duty owed")(citing other authority). To establish foreseeability, "'the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.'" *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

statement is that *if* Park Place took misleveling reports seriously and followed up on them, *then* Park Place was not negligent. As previously explained, Park Place contracted with two companies to assist in the fulfillment of its responsibilities, as follows:

a. Property manager Wright Runstad scheduled routine elevator maintenance, kept track of all trouble calls, sent the calls in to Fujitec, took tenant complaints for the elevators, and was authorized to take an elevator out of service if it was malfunctioning in any way. CP 12:19-123:5, 123:12-14, 123:18-124:2, 124:24-125:2, 125:8-13. Park Place "took reports of misleveling seriously" by hiring Wright Runstad to take such reports and immediately act on them, as well as to take the elevator out of service to prevent tenant harm (once a defect was known) until it was repaired.

b. Fujitec performed monthly preventative maintenance as well as service callbacks, CP 138:20-139:10, including two callbacks for the parking elevator in October 2009 to repair the talon belt on the car. CP 149:25-150:17, 152:3-19. Park Place "followed up on reports of misleveling" by having professional service of the elevator upon report of any hazard, and monthly preventative maintenance.

For Park Place to hire such professional assistance was not delegation of its legal duty, as Pascal and Swank allege. Instead, it was the *fulfillment* of Park Place's legal duty (to take reasonably foreseeable precautions). Expert Buckman didn't opine how else, other than by hiring

these professionals, Park Place could fulfill its duty (short of strict liability). Could Park Place have had Fujitec inspect semimonthly? Or weekly? Or daily? Or could it have posted a Fujitec technician at the door to each elevator on every floor, 24/7, to inspect before each elevator journey that the car floor was level? In theory, yes, but the law requires only such precautions "compatible with the practical operation of its business." Park Place's service contract with Fujitec, combined with an absence of evidence of defects between the date of the last elevator inspection and Pascal's fall in the elevator, met the common carrier standard.

6. There was no evidence of misleveling (Pascal and Swank's Issue III.C).

There was zero evidence that the elevator in which Pascal fell misleveled, to any degree, on January 21, 2010 (the day of her fall). Pascal herself did not observe any misleveling. Park Place's contractor Fujitec performed its monthly maintenance work on the parking garage elevator on January 13, 2010 without finding any problems, and there were no service calls or complaints of elevator misleveling between January 13, 2010 and January 21, 2010. Moreover, Pascal's expert never examined the elevator, did *not* opine that there was any defect in the elevator at the time of Pascal's fall, did not explain the causes of misleveling, and did not tie together isolated incidents of mislevelings. At most, Pascal's witness Lither alleged a misleveling of 'about ½" to ¾"'thirteen days *after* Pascal's fall, which of course could not have

proximately caused Pascal's fall; and witness Wojnicz alleged instances of garage elevator misleveling (of at least ½") at least two-and-a-half years prior to Pascal's fall, which was long before Park Place's ownership of the building. Therefore the trial court properly found that there was no evidence of Park Place's negligence, meriting summary judgment in favor of Park Place.

7. Park Place did not breach the statute (Pascal and Swank's Issue III.A).

It is true that under RCW 5.40.050, the trier of fact *may* consider a breach of statutory duty as evidence of negligence. But here there was no such breach for the trial court to consider.

The WAC standard allows elevator misleveling of up to ½". There was zero evidence that the elevator in which Pascal fell misleveled, to *any* degree, on January 21, 2010 (the day of her fall). At most, Pascal's witness Lither alleged a misleveling of 'about ½" to ¾"'thirteen days *after* Pascal's fall, which of course could not have proximately caused Pascal's fall. Therefore Park Place did not violate the WAC standard, and the trial court properly found that there was no evidence of Park Place's negligence, thereby meriting summary judgment in favor of Park Place.

8. Park Place did not breach the common carrier duty (Pascal and Swank's Issue III.D).

There was no evidence of elevator defect. Furthermore, Park Place contracted with two companies to assist in the fulfillment of its common carrier responsibilities. The trial court properly found that there was no evidence of any misleveling (let alone one measuring more than ½") at the

time of Pascal's fall, no violation of the WAC standard (that allows elevator misleveling of ½" but no more), and no evidence of that Park Place violated its common carrier duty, meriting summary judgment in favor of Park Place.

9. Park Place did not delegate its duty (Pascal and Swank's Issue III.B).

Park Place as a common carrier met its duty to take reasonably foreseeable precautions on behalf of its elevator passengers, by contracting with Fujitec for monthly elevator maintenance and service callbacks. The trial court properly found that such contracting constituted *fulfillment* of Park Place's duty, rather than delegation of duty. Building owner Park Place unsurprisingly did not have the expertise to inspect elevators itself.

10. There is no justification for an adverse inference (Pascal and Swank's Issue III.E).

Pascal and Swank noted in their summary judgment response that they wanted further discovery, specifically a third-party security guard logbook (kept under prior building ownership) and additional Fujitec depositions. CP 188:2-8 (motion argument only with no supporting evidence). But they did not request a CR59(f) continuance, and specifically admitted that the motion could be decided without this discovery. Id.

Then on reconsideration, with no opportunity provided for Park Place to rebut, Pascal and Swank relabeled their desired discovery, alleging that "[f]or some time Plaintiffs have sought production *from Park Place* of the relevant log books maintained *by Park Place security*

guards." CP 315:24-26 (emphasis added). But Pascal and Swank did not proffer any evidence of such discovery requests to Park Place, let alone any evidence of dilatory tactics by Park Place. (And, again, note that Park Place did not own the building until just before Pascal's fall.)

Now on appeal, Pascal and Swank rephrase this allegation yet again, claiming baldly that Park Place building guards entered elevator complaints in a logbook, that Park Place was asked for this book and had not found or produced it. Appellants' Brief at ii, 2-3, 7, 15, 16. And for the first time, Pascal and Swank argue that because the production and deposition had not yet occurred at the time of the summary judgment hearing, that the trial court erred by not making an inference adverse to Park Place regarding what was contained in the logbook. The trial court never heard (or decided) this argument on summary judgment. Therefore, this issue is unripe for appellate consideration.

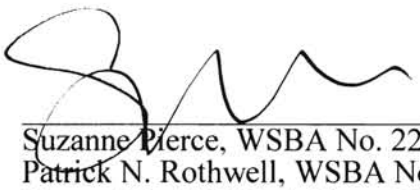
Should this Court consider this issue, then the trial court properly did not grant a summary judgment continuance because Pascal and Swank failed to meet the CR 59(f) standard for continuance, *e.g.*, asking for one and explaining how the additional evidence would create material fact disputes. The trial court also properly denied reconsideration because Pascal and Swank failed to meet the CR 59(a) standard for reconsideration, *e.g.*, their alleged need for future discovery did not constitute the "newly discovered evidence…" required for reconsideration.

E. CONCLUSION

Elevators contain complex mechanics that can fail without negligence being involved. Individuals also may fall without any premises defect, hence the term "accident" and the concept of contributory negligence. Here, there is no evidence of defect and no breach of duty. Park Place took "reasonably foreseeable precautions" "compatible with the practical operation of its business." Park Place fulfilled its duty, and the trial court correctly awarded summary judgment.

RESPECTFULLY SUBMITTED this 28th day of June, 2013.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, PC



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DECLARATION OF SERVICE

I, Laura Bilderback, hereby declare under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of PARK PLACE RESPONDENT'S RESPONSE TO PETITIONER'S OPENING BRIEF addressed as follows:

Via ABC Legal Messenger

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DATED at Seattle, Washington, on this 28th day of June, 2013.

Laura Bilderback

Laura Bilderback

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