NOT DESIGNATED FOR PUBLICATION

KENNETH A. AGNEW, SR.	*	**NO. 2001-CA-0038**
VERSUS	*	**COURT OF APPEAL**
ZML-LAKEWAY II LIMITED PARTNERSHIP, EQUITY	*	**FOURTH CIRCUIT**
OFFICE PROPERTIES, L.L.C., AND SCHINDLER ELEVATOR	*	**STATE OF LOUISIANA**
CORPORATION	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-16640, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge

* * * * * *

Judge Patricia Rivet Murray

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Terri F. Love)

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(SCHINDLER ELEVATOR CORPORATION)

AFFIRMED

Plaintiff, Kenneth A. Agnew, Sr., appeals the trial court's granting of summary judgment in favor of Schindler Elevator Corporation, dismissing, with prejudice, his claims against it.

This lawsuit arises out of an incident that occurred on October 25, 1995 as Mr. Agnew was entering an elevator located in an office building at Two Lakeway Center. Mr. Agnew states in his petition that he was entering the elevator "when unexpectedly and without warning, the doors of the elevator closed upon him, crushing his body such as to cause him bodily injury." The elevator in question was manufactured and installed by Schindler Elevator Corporation. Schindler also maintained the elevator pursuant to a maintenance contract between it and Equity Office Properties, Inc., the agent for the owner of the building.

On October 8, 1996, Mr. Agnew filed this suit against Schindler as well as ZML-Lakeway II Limited Partnership, the owner of the building, and Equity Office Properties, L.L.C., the building manager. The defendants removed the suit to federal court, but it was remanded in January 1997 based upon the plaintiff's stipulation that his damages would not exceed the

amount necessary for diversity jurisdiction. Shortly thereafter, ZML and Equity Properties filed a cross-claim for indemnity and/or contribution against Schindler. In May 1998, plaintiff settled his claims against ZML and Equity Properties.

On May 15, 2000, Schindler filed a motion for summary judgment alleging that despite the passage of four years since the alleged incident, the plaintiff had failed to adduce any objective evidence to support his allegations that his damages were caused by any negligent act or omission by Schindler, or that Schindler was strictly liable for his damages. Mr. Agnew filed an opposition to said motion. Schindler's motion was heard and granted on June 16, 2000, and a judgment dismissing Mr. Agnew's claims was signed on June 27, 2000.

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257, p.7 (La. 2/29/00), 755 So. 2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. Code Civ. Pro. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. Pro. art. 966 B.

The jurisprudential presumption against the granting of summary judgment was legislatively overruled by La. Code Civ. Pro. art. 966 as amended. Further, the amendments level the playing field, with the supporting documentation submitted by the parties to be scrutinized equally. Under the amended statute, the initial burden of proof remains with the movant to show that no genuine issue of material fact exists. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all the essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more of the elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. Code Civ. Pro. art. 966 C(2); Coates v. Anco Insulations, Inc., 2000-1331, p.5-6 (La. App. 4 Cir. 3/21/01), 786

So.2d 749, 753.

An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. Code Civ. Pro. art. 967; Townley v. City of Iowa, 97-493, p.5 (La. App. 3 Cir. 10/29/97), 702 So. 2d 323, 326. Therefore, once the mover has properly supported the motion for summary judgment, the failure of the non-moving to produce evidence of a material factual dispute mandates the granting of the motion. Coates, supra, p. 6, 786 So.2d at 753.

Mr. Agnew claims that Schindler is liable for his injury as a result of Schindler's failure to maintain the elevator in a reasonably safe manner and condition, and its failure to inspect and repair the elevator on a regular basis. Alternatively, he alleges that Schindler is strictly liable to him under former Civil Code art. 2317 as the custodian of a defective thing. The trial court granted Schindler's motion for summary judgment based upon the plaintiff's failure to produce any objective evidence to support these allegations, i.e., to prove that his injury was caused by any negligent act or omission by Schindler, or that Schindler was strictly liable for his injury.

In this appeal, Mr. Agnew asserts two assignments of error. First, he

contends that the trial court erred in finding that there was insufficient evidence to demonstrate the existence of a material issue of fact with regard to his negligence claim, including specifically the evidentiary issue of *res ipsa loquitur*. Secondly,

Mr. Agnew contends that the trial court erred in finding that the evidence was insufficient to show the existence of a material issue of fact with regard to his strict liability claim.

Negligence Claim

To prove negligence, the plaintiff has the burden of showing that Schindler breached its duty to exercise reasonable care in the performance of its maintenance contract, and that Schindler's breach caused his resulting injury. Rabito v. Otis Elevator Co., 93-1001, 93-1002, p.1 (La. App. 4 Cir. 12/15/94), 648 So. 2d 18, 19.

In support of its motion for summary judgment, Schindler offered portions of the deposition testimony of Arthur Snyder, the Schindler technician responsible for the maintenance of the elevator in question, elevator No. 5. He stated that he had no knowledge of any prior occurrence of a person getting caught in the door of elevator No. 5 or any similar elevator. In addition, he testified that he did not know what would cause an elevator to close on something and not immediately retract. He also stated

that he checked the operation of the elevator doors on a daily basis when he was in Lakeway Two making his rounds.

Schindler also offered portions of the deposition of Michael Washburn, the director of security for Lakeway Two. He stated that immediately following the incident, he performed an investigation/ inspection of the elevator in question and, in his opinion, the elevator was operating properly. He further stated that he knew of no other instances in which anyone had gotten caught in the elevator doors in the building.

Schindler also relied on the deposition testimony of Mr. Agnew himself in supporting its motion for summary judgment. According to Mr. Agnew, the elevator doors closed upon him with what he considered to be unusual force and speed, and did not immediately open after hitting him, but did reopen within a matter of seconds. In Mr. Agnew's affidavit, he stated that he had to "physically push" the doors open; his deposition testimony, however, does not reflect that he had to exert any force.

Based on this evidence, Schindler argues that summary judgment was warranted because the plaintiff offered no evidence, in the form of expert testimony or otherwise, beyond his own subjective perceptions, to explain what would cause the elevator doors to close with unusual force and speed; to corroborate that the doors did, in fact, close with unusual force and speed;

or to connect this alleged occurrence with Schindler's maintenance of the elevator.

In opposition to Schindler's motion, Mr. Agnew alleged that he was a contemplated third party beneficiary of Schindler's maintenance contract with the owner of Lakeway Two. As such, he argued that Schindler owed a duty toward passengers such as himself to maintain and service the elevator so as to allow safe ingress and egress and transportation thereon. Plaintiff alleged that Schindler breached that duty by failing to regularly test the regulators that controlled the force with which the doors closed.

Plaintiff attached to his opposition a copy of the elevator maintenance contract. According to that contract, Schindler was to perform weekly inspections in which the operation of each car and its hatch doors was checked. Plaintiff alleged that the deposition testimony of the service technician, Mr. Snyder, proves, or at least raises a question of material fact, as to whether Schindler was negligent in its maintenance of the elevator and whether it breached the duty owed to plaintiff. Mr. Snyder testified that the specifications for the elevator in question require that the doors not close with over thirty pounds of pressure. He stated that when the elevator was initially installed, he followed the procedures specified in the manual to set the correct speeds at certain current limits. He referred to the mechanism

that regulates the operation of the doors as a potentiometer. Mr. Snyder testified that he mechanically adjusted the potentiometer only when he installed an elevator or when he received a trouble call that an elevator had stopped or that its doors would not open or close; there was no procedure to check the mechanism on a regular basis. He noted, however, that he visually inspected all of the elevators on a daily basis when he was in the building.

Plaintiff contends that Schindler's inspection procedures are utterly inadequate to measure the force of the elevator doors and their recoil time. Accordingly, plaintiff suggests that a genuine issue of material fact exists and that the factfinder should have the opportunity to decide whether Schindler was negligent in the performance of its maintenance contract.

We disagree. Plaintiff's mere allegations in his petition that Schindler was negligent in its performance of the maintenance contract are not enough to defeat summary judgment. Schindler's technician, Mr. Snyder, testified that he checked the operation of the elevator doors, including the speed at which they closed, on a daily basis. The maintenance contract relied upon by plaintiff requires only that the operation of the doors be checked weekly. Moreover, both Mr. Snyder and Mr. Washburn testified that there were no similar problems with the elevator in question either before or after the incident involving Mr. Agnew.

Confronted with this evidence, it was incumbent upon plaintiff to produce something, in the form of expert testimony or otherwise, either to refute the testimony of Schindler's witnesses or to show that Schindler's failure to have in place a procedure to regularly check the potentiometers constituted a breach of duty. Plaintiff failed to do so.

Plaintiff suggests in his reply brief to this court that "[a] full trial, complete with safety experts (and taking into consideration the maintenance contract), is a much more suitable means of determining whether regularly testing and regulating the force and recoil time of the elevator doors was within Schindler's scope of duty and, if so, whether they were in conformance with that duty rather than summarily deciding such issues on summary judgment." However, under the standards of La. Code Civ. Pro. art. 966, if the plaintiff had any such expert testimony or safety manuals indicating that Schindler's inspection and maintenance procedure were inadequate, he was required to present that evidence to defeat the motion for summary judgment.

Mr. Agnew also argues that the doctrine of *res ipsa loquitur* should apply, and that if it were so applied, he would have met his burden of proof to defeat the summary judgment. The Louisiana Supreme Court has summarized *res ipsa loquitur* as a rule of circumstantial evidence which

allows a court to infer negligence on the part of the defendant if the facts indicate the defendant's negligence, more probably than not, caused the plaintiff's injuries. Spott v. Otis Elevator Co., 601 So. 2d 1355, 1362 (La. 1992). The Court noted that the doctrine must be sparingly applied, and can be successfully invoked by the plaintiff only when three requirements are met: 1) the circumstances surrounding the accident are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence on the part of the defendant; 2) the defendant had exclusive control over the thing which caused the plaintiff's injury; and 3) the circumstances are such that the only reasonable and fair conclusion is that the accident was due to a breach of duty on the defendant's part. Id; Ledet v. Montgomery Elevator Co., 94-0411, p.6 (La. App. 4 Cir. 10/13/94), 644 So.2d 1075, 1079 (citations omitted). In Spott, the court noted that Louisiana courts have not strictly applied the requirement that the defendant have exclusive control over the thing. 601 So. 2d at 1362. Nevertheless, in order for the doctrine to apply, the plaintiff bears the initial burden of proving that the facts warrant the inference that his injury would not have occurred absent the defendant's negligence. Ledet, supra, at 1079. The Spott court held that the plaintiff failed to meet this burden in a case where an elevator had dropped several feet before stopping; the Ledet court held the same in a case where the

plaintiff had been trapped in an elevator that had stopped between floors.

Similarly, in the instant case, Schindler argues that the plaintiff has failed to present proof of any unusual circumstances surrounding the accident which would make *res ipsa* applicable. We agree. The mere fact that the plaintiff was injured in an elevator serviced by Schindler does not, *ipso facto*, establish causation. See Ledet, supra, p. 5, 644 So. 2d at 1078. Assuming plaintiff's version of the accident is true, we still cannot say that the circumstances were so unusual as to infer that Schindler was negligent. Mr. Agnew simply stated that the elevators closed on him as he entered the elevator, and that they remained closed for a matter of seconds before retracting. Therefore, although the elevator apparently briefly malfunctioned, the doors worked as intended when they retracted several seconds after hitting Mr. Agnew. Under these circumstances, we cannot say that the only reasonable and fair conclusion is that Schindler breached its duty of performing its maintenance contract with reasonable care. Therefore, having failed to prove any of the requirements for the application of *res ipsa loquitur*, plaintiff is not entitled to rely on any inference of negligence on the part of Schindler.

Accordingly, because Mr. Agnew failed to submit any factual support sufficient to establish that he will be able to satisfy his evidentiary

burden of proof at trial regarding his claim of Schindler's negligence, we find that Schindler successfully proved its entitlement to summary judgment as to plaintiff's claim of negligence.

Strict liability claim

To recover under La. Civ. Code art. 2317 (pre-1996), Mr. Agnew must prove that he was injured by the elevator, that the elevator was in Schindler's custody, that there was a vice or defect causing an unreasonable risk of harm in the elevator, and that his damages arose from such a defect. Spott, supra, 601 So. 2d at 1363.

We will assume, without deciding, for purposes of our discussion of strict liability, that plaintiff was injured by the elevator. Hence, we must next determine whether Schindler had custody or "garde" of the elevator.

Plaintiff argues that Schindler had garde of the elevator because the maintenance contract allocated the responsibility of maintenance and repair to Schindler. In support of this argument, he relies on Coleman v. Otis Elevator Co., 582 So. 2d 341 (La. App. 4th Cir. 1991).

Schindler counters that the jurisprudence in this area has clearly established that "the mere existence of a service contract does not create garde on the part of an elevator maintenance contractor, even if such contract gives the contractor the exclusive right to service the elevator."

Ledet, supra, p. 5-6, 644 So. 2d at 1078 (citations omitted). Schindler points out that Coleman is the only reported Louisiana case in which an elevator maintenance company was found to have custody of an elevator. Further, Schindler argues that Coleman was decided on a very peculiar set of facts. In Coleman, Otis had an employee who was assigned to work at Charity Hospital forty hours a week to upgrade and maintain the hospital's forty-eight elevators. As such, Otis was found to have custody or garde of the elevators because of its employee being physically on the premises on a full-time basis. Schindler argues that this case is more analogous to the situation present in Spott, supra, 601 So. 2d at 1363, wherein the Louisiana Supreme Court found that an elevator maintenance company whose service contract required weekly maintenance inspections and repairs did not have garde over the elevator.

The maintenance contract here, like the one in Spott, required weekly inspections. Although Mr. Snyder, the Schindler technician, indicated that he was present in Lakeway Two on a daily basis, there was no evidence offered that he worked there full time, or anywhere near the forty hours per week that the technician did in Coleman. Plaintiff suggests in his reply brief that Schindler has the burden of proving who had garde over the elevator and that it did not share concurrent garde with that entity. This assertion is

directly contrary to the law, which requires that the plaintiff prove that Schindler had garde of the elevator before it can be found strictly liable for causing his injuries. *See* Spott, 601 So. 2d at 1363.

We find that Schindler successfully pointed out the absence of factual support for the plaintiff's assertion that Schindler had garde over the elevator. Accordingly, there is no material issue of fact as to strict liability on the part of Schindler, and the trial court did not err in granting Schindler's motion for summary judgment.

Conclusion

For the reasons stated herein, we affirm the judgment of the trial court granting summary judgment in favor of Schindler Elevator Corporation and dismissing with prejudice the plaintiff's suit.

AFFIRMED