STATE OF MICHIGAN

COURT OF APPEALS

BARBARA EZELL and CALVIN MOORE,

Plaintiffs-Appellants,

v

LARDNER ELEVATOR COMPANY OF DETROIT, INC.,

Defendant-Appellee.

UNPUBLISHED
December 11, 2001

No. 222996
Wayne Circuit Court
LC No. 98-823494-NO

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant. We affirm.

This case involves an elevator accident that occurred on November 10, 1997, in a school operated by the Detroit Board of Education. The elevator has two stops, travels between the basement and ground floor, and falls within the category of freight elevator. The elevator is operated by a winding drum machine that has four cables, exposed gears, and a brake. The machinery is located in a room adjacent to the elevator, and the elevator can be operated either by the control buttons in the elevator or by the main control relays in the machine room.

When the elevator is operated by the control buttons, constant pressure must be applied to either the up or down button or the elevator will stop before it reaches the proper level. Even while the control button is pushed in, however, the elevator will stop at the appropriate place because of limit switches that cut power to the elevator when struck by a cam on the elevator as it reaches the appropriate level. When the elevator is run by the main control relays, however, the safety feature of the limit switches is bypassed, and the elevator can travel beyond the proper level.

Service records show that defendant serviced this elevator at least since 1991. Based on the service records, defendant repaired this elevator at least eleven times, seven of which were because the cables on the winding drum mechanism came off the drum or unspooled after the elevator had over traveled in the down direction. The last time defendant serviced this elevator was in April 1997, which involved the cable being off the drums. Defendant attributed this to the elevator being run by the main control relay that bypassed the safety-limit switch and thereby

allowed over traveling. In June 1997, the elevator was inspected and found to be in satisfactory condition according to a city of Detroit inspector.

On November 10, 1997, plaintiff Barbara Ezell,[1] an assistant custodian at the school, entered the elevator to ride it from the basement to the ground floor so that she could transport supplies back to the basement. Additionally, the husband and son of the school's chief engineer were getting ready to leave at that time, and they joined Ezell in the elevator. Evidence indicates that the elevator was run by the control buttons inside the elevator car. The up button was pushed at the basement level, but the car did not stop when it reached the ground floor. Instead, the elevator continued up a few feet, hit the top of the elevator shaft, and pressure continued to be applied by the motor until two bolts that held the motor to the floor broke, which caused the gears to disengage. The elevator then fell to the basement, approximately 17 ½ feet, causing injuries to all of its occupants. The bolts that broke were discovered to be 5/16-inch bolts, as opposed to the other hold-down bolts that were 5/8-inch bolts.

Plaintiffs filed suit claiming that defendant had a duty to maintain, inspect, and repair the elevator to insure that it operated in a safe condition. Defendant subsequently moved for summary disposition. At the conclusion of the proceedings on defendant's motion for summary disposition, the trial court determined that the condition of over traveling down in the past, that required defendant to service the elevator, had no connection to the cause of this accident, and defendant had no duty to inspect for a possible problem of over traveling the up-limit switch.

Plaintiffs first argue that the trial court erred in granting summary disposition because defendant was on notice that this elevator had of a pattern of unspooling problems because of the prior repairs made, and therefore, defendant should have investigated and tested the elevator to determine why the cables unspooled and then repair the problem.

The record indicates that there was no history of the elevator over traveling in the up direction, and the elevator passed an inspection by a city of Detroit inspector after defendant's last repair and before the accident occurred. The record also does not support a connection between the possible reasons for over traveling in the down direction which required defendant's service in the past, and plaintiffs' theories for over traveling in the up direction, which was the cause of the accident. This was all carefully noted by the trial judge, who indicated plaintiffs' expert's theory regarding why the elevator may have over run the top limit. Specifically, the trial court ruled in this regard that the record did not support any connection between the condition that caused the elevator to over run the down limit and any of the possible causes suggested by plaintiffs' expert regarding why the elevator over ran the upper limit. Thus, the trial court ruled that defendant did not have a duty to inspect for a possible problem of over traveling the upper limit when the elevator had no history of such a problem.

We agree with the trial court that defendant, who had a contract with the Detroit Board of Education to repair and maintain the elevator, did not owe a duty to plaintiffs because there was no foreseeability of harm or nature of any risk presented where the elevator had no history of

[1] Plaintiff Calvin Moore is Barbara Ezell's husband and his claims are purely derivative.

over traveling the upper limit. Moreover, as noted by the trial court, to impose a duty on defendant under this factual scenario would essentially impose strict liability on defendant. Consequently, the trial court did not err in finding that no duty existed in this case. See *Foster v Cone-Blanchard Machine Co,* 460 Mich 696, 707; 597 NW2d 506 (1999) (general discussion of duty).

Plaintiffs also argue that summary disposition was unwarranted because defendant either installed the hold-down bolts that broke and caused the elevator to fall, or defendant should have been on notice that the bolts were too small.

In this case, plaintiffs have failed to show that defendant should have known that the actual size of the bolt was smaller than the hole. Even though the size of the bolt head was different than the other bolts, plaintiffs' expert stated that unless the bolts had been loose in the past, defendant would not have seen that the bolt was smaller than the hole. Additionally, plaintiffs failed to present evidence that defendant actually installed the bolts. Even though plaintiffs point to an invoice where defendant purchased bolts, plaintiffs did not show by the service records or otherwise that those bolts purchased were the ones connected to holding down the motor. Absent additional evidence relating to plaintiffs' bolt theories, plaintiffs have failed to present more than a mere possibility that those theories could be supported at trial. *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999).

Plaintiffs' final argument is that summary disposition should not have been granted because, if the elevator was operated by the main relay controls, then defendant had a duty to warn the owner of the elevator about the dangers of running the elevator in that manner and to tell the owner of possible safety devices that could be installed.

This issue is not properly before us because it was not presented in the trial court. Plaintiffs' argument in the trial court was consistently based on the theory that the elevator was run by the control buttons in the elevator car. That theory was supported by all witnesses to the accident, including Ezell, testifying that the elevator was operated by the control buttons in the elevator car. Plaintiffs also suggested to the trial court that the only way to find for defendant would be based on a theory of operating the elevator by the main control relays. Accordingly, this theory raised on appeal was not presented to the trial court, is not based on the facts of this case, and will not be considered by this Court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen