NOT DESIGNATED FOR PUBLICATION

GLORIA LOTTS	*	**NO. 2002-CA-2421**
VERSUS	*	**COURT OF APPEAL**
EQUITABLE LIFE ASSURANCE SOCIETY, THE TRAVELERS'S INSURANCE COMPANY, ENTERGY CORPORATION , NEW ORLEANS PUBLIC SERVICE INC., AND SCHINDLER ELEVATOR COMPANY, INC.	* * * * * * * *	**FOURTH CIRCUIT** **STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-20335, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

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REVERSED

Plaintiff/appellant, Gloria Lotts (Lotts), sued defendant/appellee, Schindler Elevator Corporation (Schindler), and others, alleging that she was injured in an elevator accident. Summary judgment was granted in favor of Schindler, dismissing Lotts' claim against Schindler. Lotts argues in this appeal that material questions of fact exist, and that the evidence does not support summary judgment in favor of Schindler on the issue of liability. For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY:

This case arises out of an incident that occurred on November 26, 1996. Lotts worked as an office assistant in the office building located at 1555 Poydras Street in New Orleans. Upon leaving work, she entered elevator number five on the fourth floor. Lotts claims that the doors closed, and as the elevator began to descend, the lights went out, and the elevator fell from the fourth floor to within a few feet of the first floor. When the elevator came to a stop, the doors remained closed for approximately 15 to 20 minutes. Lotts contends that she was injured in the fall.

A service mechanic for Schindler, Danny Roy (Roy), responded to the

call, and found Lotts still inside of the elevator with the elevator stopped four feet above the first floor. As stated in his affidavit, Roy determined that the stoppage occurred as a result of the building temporarily losing power. Roy was able to restart the elevator, bring it to the first floor level, and release Lotts.

On November 18, 1997, Lotts filed suit against Equitable Life Assurance Society (the owner of the office building), its' insurer, The Travelers Insurance Company, Entergy Corporation, and Schindler (the manufacturer and maintenance company of the elevator in question). Lotts settled with Equitable Life Assurance Society, and has an action still pending against Entergy.

Schindler's first motion for summary judgment was denied on February 23, 2001. After re-urging the motion, summary judgment was granted on April 24, 2002, dismissing Lotts' claim against Schindler. On motion of Schindler, the trial court, by order dated June 10, 2002, certified the granting of the summary judgment as a final and appealable judgment. Appeal was timely filed on July 11, 2002.

ARGUMENT:

As her first assignment of error, Lotts argues that Schindler was not entitled to summary judgment as a matter of law because genuine issues of material fact still exist. Lotts asserts the following disputed issues of material fact:

1. Whether the elevator's fail-safe mechanism malfunctioned allowing the elevator to free-fall three stories;
2. Whether Schindler had care, custody, control or garde of the elevator;
3. Whether Schindler knew or should have known of the defect of the fail-safe mechanism; and,
4. Whether the facts justify application of *res ipsa loquitur*.

Lotts acknowledges that the power outage in the building initiated the stoppage of the elevator, but argues that the actual cause of her injuries was the failure of the fail-safe mechanism to properly deploy. Lotts submits that Schindler assumed full responsibility to assure that the elevators operated properly by virtue of the fact that Schindler manufactured and installed the elevators, and maintained the elevators pursuant to a maintenance contract with the owner of the building.

To establish the question of material fact as to whether a defect existed, Lotts relies on the affidavit of expert, Kevin Dykes (Dykes), offered in opposition to the summary judgment. Lotts contends that Dykes, an experienced elevator mechanic, stated in his affidavit, "either the fail-safe brake mechanism was improperly programmed or the fail-safe mechanism

malfunctioned and failed to properly deploy." Dykes opined that if an elevator is functioning properly before a power outage, it should restart, return to the terminal floor, and resume normal operation once the power is restored.

The second genuine issue of material fact argued by Lotts is whether Schindler assumed responsibility for the care, custody, control and garde of the elevator pursuant to La. Civ. Code arts. 2317 and 2317.1. Lotts submits that Schindler's maintenance contract, which required a Schindler employee to spend twenty hours per week in upkeep of the elevators at 1555 Poydras Street, was sufficient to give Schindler "custody" or "garde." In support of this position, Lotts cites *Coleman v. Otis Elevator Co.*, 582 So.2d 341 (La.App. 4 Cir. 1991), wherein this Court recognized that the duty imposed by La. Civ. Code art. 2317 may rest with the party with garde even if that party is not the owner of the object. Lotts asserts that, just as in *Coleman*, Schindler was the manufacturer, installer and custodian of the elevator and should therefore have custodial liability under La. Civ. Code arts. 2317 and 2317.1, which provide as follows:

> **Art. 2317. Acts of others and of things in custody**
>
> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

Art. 2317.1. Damage caused by ruin, vice, or defect in things

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.
> (Added by Acts 1996, 1st Ex. Sess., No. 1 §1, eff. April 16, 1996.)

The third issue of material fact argued by Lotts is whether Schindler knew or should have known of the defect in the fail-safe mechanism. Lotts points to service repair logs to show malfunctions of these elevators, both prior to and after the accident. Specifically, Lotts submits that the repair logs show that on March 14, 1994 and on September 19, 1994, elevator No. 5 would not stop on the third floor, and that the "selector" in elevator No. 5 was reset in July 1996 and again in August 1996. In light of the malfunctions contained in Schindler's repair logs, Lotts contends that a genuine issue of fact exists as to whether Schindler knew or should have known of the potential defect.

Finally, Lotts argues that there is an existing issue as to whether the facts presented justify application of the doctrine of *res ipsa loquitur*. Lotts cites *Cangelosi v. Our Lady of the Lake Regional Medical Center*, 564 So.2d

654, 665 (La. 1989) for the position that *res ipsa loquitur* is a rule of circumstantial evidence which allows the court to infer negligence on the part of the defendant if the facts indicate the defendant's negligence, more probably than not, caused the injury. Specifically, Lotts contends that *res ipsa loquitur* applies when three requirements are met:

> 1. 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 has the exclusive control over the thing that caused the injury;
> 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.

Citing Williamson v. St. Francis Cabrini Hosp. of Alexandria, 99-1741, p 6 (La.App. 3 Cir. 5/10/00), 763 So.2d 50, 54.

Lotts argues that the criteria for the application of *res ipsa loquitur* have been met in this case. First, the circumstances surrounding this accident are so unusual that in the absence of other pertinent evidence, there is an inference of negligence on the part of Schindler. Lotts points to the affidavit of Dykes in support of her position that if the elevator had been in proper working order at the time of the power outage it would not have fallen three floors. Second, Lotts asserts that Schindler had exclusive control over the elevators due to the fact that Schindler manufactured and installed the elevators and was obligated by contract to provide maintenance

for approximately twenty hours per week. Finally, Lotts argues that Schindler had a duty to maintain the elevators in proper working order, and that Schindler breached that duty.

In her second assignment of error, Lotts argues that the trial court erred in finding that she failed to produce evidence to establish negligence on the part of Schindler. Lotts submits that the affidavit of Dykes and the repair logs were sufficient to establish negligence on the part of Schindler to defeat the summary judgment.

Lotts' third assignment of error, that the trial court applied the wrong standard of proof as to Schindler's duties, and fourth assignment of error, that the trial court erred in finding that Lotts failed to show a breach of duty, are combined for purposes of this opinion. Specifically, Lotts asserts that Schindler's duty should not have been based solely on negligent maintenance, as the trial court determined, but that Schindler was also responsible as a custodian under La. Civ. Code arts. 2317 and 2317.1. Lotts relies on *Rabito v. Otis Elevator Co.*, 93-1001, 93-1002, p. 15 (La.App. 4 Cir. 12/15/94), 633 So.2d 368, 376, for the position that Schindler can be held liable under the theory of custodial liability with a showing that Schindler had care, custody, or garde of the elevator. Lotts further contends that La. Civ Code art. 2317.1, in effect at the time of this accident, imposes a

standard of liability based on the custodian's knowledge or constructive knowledge of the defect. Lotts argues that the trial court failed to recognize Schindler's duty, pursuant to article 2317.1, to discover apparent defects in things under its garde. In either case, Lotts submits that sufficient evidence was presented to the court to establish a duty on the part of Schindler, whether Schindler's duty is based on negligent maintenance or on custodial liability.

As her fifth assignment of error, Lotts submits that the trial court incorrectly held that she failed to show that Schindler's conduct was the cause-in-fact of the resulting harm. Lotts asserts that the expert witness testimony, that she is prepared to introduce at trial, would show that a defect and/or malfunction of the fail-safe mechanism was the actual cause of the accident.

The last assignment of error suggests that the trial court erred in finding that Lotts failed to produce a qualified expert. Lotts presented the affidavit of Kevin Dykes who opined that had Schindler properly maintained the elevator it would not have fallen three floors when the power outage occurred. Lotts asserts that Dykes' qualifications, as an experienced and certified elevator mechanic, are the same as that of Schindler's expert. Lotts further argues that if there is to be a challenge to the expertise of Dykes, then

a *Daubert* hearing and inquiry should be made at the trial court level.

In opposition to this appeal, Schindler argues that the trial court was correct in finding that Lotts failed to put forth positive evidence, beyond the mere allegations in her petition, to support her negligence claims. Schindler submits that the trial court correctly held that to prove negligent maintenance Lotts must show, 1) the conduct in question was the cause-in-fact of the resulting harm, 2) the defendant owed a duty of care to plaintiff, 3) the requisite duty was breached by defendant, and 4) the risk of harm was within the scope of protection afforded by the duty breached. *Syrie v. Schilhab*, 96-1027 (La. 5/20/97), 693 So.2d 1173. Schindler argues that Article 4(A) of the Preventative Maintenance Agreement, entered into with the building owners, relieves Schindler from liability for circumstances beyond its control. Article 4(A) provides:

> Under no circumstances shall Schindler be liable for loss, delay or damage due to any cause beyond Schindler's reasonable control, including but not limited to acts of government, strikes, lockouts, labor disputes, fire, explosion, theft, weather, flood, earthquake, riot, civil commotion, vandalism, abuse, misuse, malicious mischief, or act of God.

Schindler submits that the loss of electrical power to the building was such a circumstance beyond its reasonable control.

Schindler further argues that there was no evidence produced to show that Schindler failed to properly maintain the elevators, that a malfunction in

the elevator occurred, or that Schindler had any knowledge or constructive knowledge of a defect. Schindler contends that neither the affidavit of Dykes nor the repair logs relied on by Lotts can show that there was ever a malfunction or defect in this elevator, much less that Schindler was responsible for any such malfunction.

DISCUSSION:

Appellate review of the granting of a motion for summary judgment is *de novo. Miller v. Martin*, 2002-0670, p. 5 (La. 1/28/03), 838 So.2d 761, 764. The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of actions. *Two Feathers Enterprises, Inc. v. First National Bank of Commerce*, 98-0465, p. 3 (La.App. 4 Cir. 10/14/98), 720 So.2d 398, 400. This procedure is now favored and shall be construed to accomplish these ends. La. Code Civ. Proc. 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 a material fact, and the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966 B. When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations or denials of his pleadings, 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. Proc. art. 967. 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, no genuine issue of fact exists. La. Code Civ. Proc. art. 966 C (2); *Fleming v. Hilton Hotels Corp.*, 99-1996, p. 3 (La.App. 4 Cir. 7/12/00), 774 So.2d 174, 177.

Thus, to defeat Schindler's motion for summary judgment, Lotts must produce sufficient evidence to show that she can meet her burden of proof at trial. Expert opinion testimony in the form of an affidavit or deposition may be considered in support of or in opposition to a motion for summary judgment. *See Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 15 (La. 2/29/00), 755 So.2d 226, 235. Lotts presented to the court the affidavit of Dykes who clearly stated, "either the fail-safe brake mechanism was improperly programmed or the fail-safe mechanism failed to properly deploy." We find that the affidavit of Dykes is sufficient to establish a genuine issue of fact as to Schindler's negligence. Moreover, if Dykes' testimony at trial is sufficient to convince the fact finder of Schindler's negligence, then Lotts may meet her evidentiary burden.

In the recent case of *George v. Dover Elevator Co.*, 02-0821 (La.App. 4 Cir. 9/25/02), 828 So.2d 1194, *writ denied* 2002-2641 (La. 12/13/02), 831

So.2d 992, this Court determined, under similar facts, that the affidavit of plaintiff/appellant's expert witness was sufficient to establish a question of fact and to reverse the granting of summary judgment. We further agree with Lotts that any challenge to the qualifications, expertise or theories of Dykes should be resolved in a hearing before the trial court, and should not be addressed on this appeal.

Accordingly, for the foregoing reasons, the summary judgment granted in favor of Schindler is reversed.

REVERSED