

Affirmed and Majority and Dissenting Opinions filed December 21, 2017.



In The
Fourteenth Court of Appeals

NO. 14-16-00684-CV

CLEVELAND FRANKLIN, Appellant

V.

AMERICAN ELEVATORS INSPECTIONS, INC., Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2014-54920A**

DISSENTING OPINION

Franklin's summary-judgment response raised a fact issue as to whether the elevator lacked a phone at the time of the inspection. Because the majority erroneously concludes otherwise, I respectfully dissent.

The majority discounts Franklin's testimony because Franklin was not present at the time of the inspection. Franklin testified that he observed the elevator before and after the inspection and that it did not have a phone. This is circumstantial evidence that there was no phone in the elevator at the time of the inspection. *See*

City of Houston v. Leach, 819 S.W.2d 185, 190–91 (Tex. App.—Houston [14th Dist.] 1991, no writ) (“Evidence which tends to prove or disprove a fact that is of consequence to the case is relevant. Facts existing both before and after an event in controversy are relevant to establishing the cause of that event.”); *Kroger Co. v. Milanes*, 474 S.W.3d 321, 342 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

The majority also discounts the affidavit of Harmer, the technician who actually installed a phone in the elevator after the accident. Harmer testified that his phone installation was “a new installation and not a replacement”; that he had “to cut open the wall of the elevator to install the telephone and run the wires through the panels in the elevator”; and that a phone could not have been installed prior to his own installation “because the wall of the elevator did not have any cut-out space for a telephone install, and the telephone wires were not run all the way into the elevator for a telephone installation.”

The majority says Harmer’s testimony does not contradict the possibility of a working phone on the floor of the elevator. But how could a phone line come through the walls of the elevator without a cut out of some sort? Even if the phone was on the floor of the elevator, the telephone wires had to come through the wall.

The majority relies on the opinion of McPartland which in turn relies on the testimony of Osina. McPartland’s opinion that Osina properly witnessed the inspection is based on the contested fact as to whether or not a working phone was in the elevator. His inspection did not independently verify the presence of a working phone on the date of inspection. Nor does his opinion state that the wires that he saw in the control room for the elevator were capable of reaching the floor of the elevator. He states, “I noticed several pairs of telephone wires with one pair of wires stripped as if they had been removed from terminals.”

I would hold that Franklin raised a fact issue on whether the elevator lacked a phone at the time of the inspection and, therefore, I respectfully dissent.

/s/ Tracy Christopher
 Justice

Panel consists of Justices Christopher, Busby, and Jewell. (Busby, J., majority).