IN THE SUPREME COURT OF THE STATE OF OREGON

LINDA TWO TWO an Individual; and PATRICIA FODGE, an individual,
Plaintiffs-Appellants,
Petitioners on Review,
v.
FUJITEC AMERICA, INC., a Delaware Corporation,
Defendant-Respondent,
Respondent on Review,
and
CENTRIC ELEVATORS CORPORATION OF OREGON, INC.,an Oregon corporation,
Defendant.
Multnomah County Circuit Court
090100985
Court of Appeals
A145591
S061536

BRIEF ON THE MERITS OF PLAINTIFFS'- APPELLANTS, PETITIONERS ON REVIEW, LINDA TWO TWO AND PATRICIA FODGE

Review of the decision of the Court of Appeals dated May 30, 2013, Opinion by Darleen Ortega, Presiding Judge; Other panel members Sercombe, Judge, and Hadlock, Judge. Appeal from the Judgment of Dismissal of Circuit Court of Multnomah County; Honorable Nena Cook, Judge Pro Tem

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

1. Should ORCP 47 E be interpreted so narrowly that an attorney's Affidavit of expert stating "Plaintiffs' expert has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment" is insufficient to overcome a motion for summary judgment if it also states that the elevator expert has been retained to support Plaintiffs' claims that Defendant Fujitec was negligent in their service and maintenance of the elevators, and Fujitec's modernization of those elevators was defective and dangerous, thereby, in effect, penalizing Plaintiffs for clarifying that the expert was to address both the negligence and product liability claims?

2. Is evidence in an elevator fall and injury case that there had been similar malfunctions of the equipment on previous occasions; that defendant's mechanics had undertaken to repair the equipment so that this would not happen again; that they had failed to make proper repairs; and an affidavit of expert that defendant was negligent in their service and maintenance of those elevators, sufficient to overcome a motion for summary judgment by elevator repair defendant?

A. If not, is such ruling in direct contradiction to this court's ruling in the *Rice V. Hyster* elevator fall and injury case?

B. Is such evidence in the summary judgment record sufficient for a jury to conclude that the type of injury that occurred in this case is of a kind that ordinarily does not occur in the absence of negligence?

3. Is evidence that Defendant, pursuant to a contract for an elevator modernization, sold, installed, inspected, and tested, component parts in an elevator system that failed and caused injury to Plaintiffs, sufficient to subject Defendant to ORS 30.920 strict product liability.

A. Is it necessary that the component parts be manufactured by Defendant in order for strict liability to attach or can liability still attach if the component parts were manufactured by others and sold and installed and tested by Defendant?

B. Is it necessary for Plaintiffs to prove exactly what manufacturing flaw existed, or exactly how the design was deficient when Plaintiffs alleged and provided an affidavit of expert that Defendant's modernization was dangerously defective under the consumer expectation test?

PROPOSED RULES OF LAW

1. An attorney's Affidavit of expert that states " Plaintiffs' expert has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary

judgment" should be deemed sufficient to meet the requirements of ORCP 47 E and overcome a motion for summary judgment whether on a claim for negligence or a claim for products liability and should not be ignored or excluded because Plaintiffs also add that the expert was hired to address both its negligence claims and products liability claims.

2. Evidence in an elevator fall and injury case that there had been similar malfunctions of the equipment on previous occasions; that defendant's mechanics had undertaken to repair the equipment so that this would not happen again; that they had failed to make proper repairs; and an affidavit of expert that defendant was negligent in their service and maintenance of those elevators,

A. Is sufficient to overcome a motion for summary judgment by elevator repair defendant and is consistent with this court's *Rice V. Hyster* elevator fall and injury case.

B. Is precisely the kind of facts, instrumentality of injury, and evidence to support a res ipsa theory of liability and is sufficient for a jury to conclude that the type of injury that occurred in this case is of a kind that ordinarily does not occur in the absence of negligence.

3. Evidence that Defendant, pursuant to a contract for an elevator modernization, sold, installed, and tested, component parts in an elevator system, that is deemed

by Plaintiffs' expert as dangerously defective, and that failed and caused injury to Plaintiffs is sufficient to subject Defendant to ORS 30.900 and ORS 30.920 strict product liability and overcome a motion for summary judgment.

A. It is not necessary that the component parts installed and tested by Defendant also be manufactured by Defendant in order for strict liability to attach.

B. It is not necessary for Plaintiffs to prove exactly what manufacturing flaw existed, or exactly how the design was deficient when Plaintiffs alleged and provided an Affidavit of expert that Defendant's modernization was dangerously defective under the consumer expectation test, and the evidence submitted could reasonably be construed to show that Defendant's modernization and inspection of the elevator system was more likely than not the cause of Plaintiff's injuries sustained in the falling elevator.

NATURE OF THE ACTION, RELIEF SOUGHT, AND NATURE OF THE JUDGMENT

This is a negligence and products liability lawsuit brought by Petitioners on Review, Plaintiffs Linda Two Two and Patricia Fodge. Plaintiffs allege that they were injured due to the negligent maintenance and repair of, and the sell, refurbishing, distribution, testing, and manufacture of, a defectively dangerous

product (an elevator and its transport systems) by Respondent on Review, Defendant, Fujitec America Inc., (Fujitec) an elevator maintenance, repair, modernization, and manufacturing company. The trial court granted Fujitec's Motion for Summary Judgment, and the court of appeals upheld the trial court's ruling in *Two Two v. Fujitec America Inc., 256 Or App 784 (2013)*. Plaintiffs seeks a reversal of the court of appeals holding, and remand to the trial court for trial.

HISTORICAL AND PROCEDURAL FACTS

Plaintiffs Linda Two Two and Patricia Fodge were employees working at the United States Department of Interior, Bureau of Indian Affairs, and the United States Department of Fish and Wildlife at the “911 Building” located at 911 N.E. Eleventh Avenue, Portland, Oregon. TCF, par. 1 of Complaint.

Defendant Fujitec America Inc. (hereafter Fujitec) modernized equipment in the elevators in the 911 building. TCF, par. 3, Fujitec’s Answer. Fujitec entered into a modernization and maintenance contract with the U.S. administered by General Services Administration (GSA) dated September 27, 2001. The contract was extensive amounting to over a million dollars including replacing old relay logic elevator controls with new solid state microprocessor controls responsible for moving the cars from floor to floor for a smoother more reliable ride. TCF, Ex:

2, p. 3, Response to Motions for Summary Judgment (MSJ).

As well as extensive upgrades the original contract included long term maintenance which was extended several times through September 30, 2008.The addendum to the modernization contract provides that maintenance personnel are to conduct periodic testing and inspection of all elevators in the 911 building. TCF, Ex: 2, p. 3, and 8-11, Response to MSJ. Fujitec represents that their elevators produce the industries, smoothest ride quality, dependability, and safety. TCF, website advertising, Ex. 14, Response to MSJ.

Fujitec subcontracted the maintenance of the elevators to Centric whereby Fujitec agreed to provide technical support pertaining to problems arising from Fujtec's design and or manufacturing errors. The assignment was to be effective January 1, 2008 (subject to customer approval). TCF Ex: 5 p. 17, Fujitec's MSJ. Thus at all times material, including on February 11, 2008, and July 16, 2008 Defendants, Fujtec, the manufacturer, and its parts distributor, Centric, were responsible for maintaining the elevators. TCF par. 3 and 4 of Complaint.

On February 11, 2008, Plaintiff Linda Two Two, was a passenger in Elevator No. 2. On the way to the first floor the elevator plummeted and crashed abruptly with a loud bang, then dropped suddenly again for an indeterminate distance where it came to a complete stop. After pressing the elevator buttons and

a short delay the elevator opened on the first floor. Ms. Two Two suffered severe physical pain and trauma and was treated for extensive injuries. TCF, par. 5-7 of Complaint, Ex: 3, Response (Medical Records).

On July 16, 2008, Plaintiff Patricia Fodge was a passenger in Elevator No. 2 acting within the scope of her employment. While on her way to the first floor the elevator stopped abruptly and the speaker indicated the emergency break had been activated, then the elevator dropped again where it came to a complete stop. After pressing the elevator buttons and a short delay the elevator shuddered and tried to level and dock on the first floor and a waiting passenger on the other side helped her open the door and pull her out of the elevator. As a result Ms. Fodge suffered severe physical injury and trauma for which she was treated and continues to be treated. TCF, par. 8-10 of Complaint, Ex: 4, Response(Medical Records).

Elevator No.2 has had a rash of continual problems since the modernization by Fujitec in 2001, including numerous reported drops resulting in physical injuries (TCF, Ex: 9, Response), an OHSA safety hazard notice for an elevator malfunction of Elevator No. 2 resulting in injuries to several employees in March of 2003 (TCF Ex:11, p. 1-2, Response), and a civil complaint filed May of 2005 for negligence (including res ipsa) and product liability from Marcella a federal employee injured in Elevator No. 2. TCF Ex: 8, Response.

In the case Fujitec moved for summary judgment and upon submission of briefs and a hearing their motion was denied as to the negligence, res ipsa, and products liability claims. See ER p. 1-5, and 26-34.

Plaintiffs, Linda Two Two and Patricia Fodge filed the present Complaint alleging negligence and res ipsa and strict product liability. Fujitec filed a Motion for Summary Judgment on February 17, 2010 on the claims of negligence, res ipsa, products liability, and warranty, and Defendant Centric filed a Motion to Join. Plaintiffs filed a Response with affidavits (including an attorney Affidavit of expert) and exhibits rebutting the issues raised in Defendants' Motions.

Plaintiffs submitted admissible evidence that Fujitec contracted for the modernization and maintenance of the elevators that caused injury and remained in possession of the elevators through August of 2008, medical documentation of elevator injuries from falls in Elevator No. 2, OSHA safety notices to Fujitec of physical injury to employees as a result of malfunctions to Elevator No. 2, as well as over 60 pages of exhibits including previous physical complaints, repeated reports of dropping, falling, scraping, injuries from elevator maintenance logs and GSA journals and affidavits from GSA employees responsible for reporting elevator problems in the building. See Exhibits generally of Response to MSJ.

Plaintiffs' attorney submitted an ORCP 47 E Affidavit which should have

been deemed sufficient to controvert the allegations raised in Fujitec's Motion. The Affidavit of expert states that "Plaintiff's expert has actually rendered an opinion or provided facts which, if revealed by affidavit or declaration, would be a sufficient basis for denying the motion for summary judgment." It specifically states that the elevator expert has been retained to support Plaintiffs' claims that Defendant Fujitec was negligent in their service and maintenance of the elevators in the 911 building. It also specifically states that Plaintiffs have retained an elevator expert to support their claims that Defendant Fujitec's modernization of the elevators in the 911 building was defective and dangerous to an extent beyond that which an ordinary consumer would have expected. TCF, Ex: 16, Par. 5, Affidavit of expert, Response.

After opportunity for oral argument the trial court ruled in favor of Fujitec regarding Plaintiffs' claims of negligence (including res ipsa) on the grounds that there was no admissible evidence of causation and Fujitec is not vicariously liable for Centric's alleged negligence, and in favor of Fujitec regarding Plaintiffs' strict liability claim on the grounds that as a matter of law Fujitec did not manufacture or sell or distribute or lease Elevator No. 2 or any of its parts. TCF, Tr. p. 28.

The court of appeals after oral argument and review of the briefs affirmed the opinion of the court below even though Plaintiffs provided ample evidence

from which a jury could find that there had been similar malfunctions of the equipment on previous occasions; that Fujitec's mechanics had undertaken to repair the equipment so that this would not happen again; that they had failed to make proper repairs. The court of appeals in upholding the decision of the trial court below held: 1) Plaintiffs' ORCP 47 E Affidavit was insufficient to create a jury issue as to causation; and 2) Plaintiffs failed to offer any evidence on causation in response to Fujitec's motion for summary judgment; and 3) the product liability statute does not apply to Fujitec; and 4) the summary judgment record lacks a legally sufficient basis for a jury to conclude that the type of injury that occurred in this case is of a kind that ordinarily does not occur in the absence of negligence. Plaintiffs seeks review and reversal of those holdings and remand to the trial court for trial.

ARGUMENT

OVERVIEW AND SUMMARY

Plaintiffs filed a complaint against Defendants alleging they negligently designed, installed and maintained the Elevator No. 2 and such negligence was the direct and proximate cause of Plaintiffs' injuries. TCF, par. 13 of Complaint. Plaintiffs further allege that Elevator No. 2 was and still may be defective as it failed to perform in the manner reasonably to be expected in light of its nature and

intended function. This was not the first time counsel for Plaintiffs had filed a complaint against Fujitec Elevator Company for an injured passenger in Elevator No. 2. Counsel had filed a former nearly identical complaint for an employee in the 911 building who alleged a similar fall and injuries. In that complaint Fujitec had moved for summary judgment on Plaintiff's negligence and products liability claims. In response an ORCP 47 E affidavit nearly identical to the one filed in the present claim was submitted and the Motion for Summary Judgment was denied. That claim against Fujitec for negligent maintenance and products liability was settled between the parties. Fujitec was clearly aware of the falls and injuries in the elevator they admit they maintained and modernized.

In the current claim Fujitec admitted that it modernized certain equipment in the existing elevators in the subject building but filed a Motion for Summary Judgment. Fujitec argued it did not design, manufacture distribute, sell, lease, install or construct the elevator at issue; it properly inspected and maintained the elevator at issue up until December 31, 2007; and Plaintiff's incident could have occurred through no fault of Fujitec's. TCF, MSJ, p. 2. In support of the Motion they attached a single affidavit of a service manager Bob Ferari who admitted that Fujitec's modernization consisted of modernization of the elevators with prefabricated components pursuant to customer (GSA's) specification. He stated

he had not seen any documents indicating that Elevator No. 2 was defective or dangerous but admitted Fujitec was aware of such notices, complaints, and documents since Dec.16, 2002. TCF, MSJ, Affidavit, p. 2, line 5 and last sentence.

This sworn statement was contradicted by Mr. Ferari's earlier representations to the property manager for the Bureau of Indian Affairs in the 911 building in which he acknowledges the March 21, 2003 accident involving injured employees, and the complaint to OSHA (TCF, Response, Ex: 11). Mr. Ferari's letter dated April 3, 2003 to Mr. Murphy admits the number two elevator may have gone into an emergency terminal slowdown and the slowdown pattern was set a little behind normal to get a faster slowdown. TCF, Response, Ex: 12 p. 1 (If you find that a witness has intentionally given false testimony in part you may disregard the rest, UCJI 10.04). Equally important is Mr. Ferari's assurance to Mr. Murphy and the other BIA employees that his mechanics had thoroughly checked the elevator and the system seemed to be operating as designed and he had no further faults recorded in the fault log but he would try and get a printer to permanently record any future events that might occur.

Mr. Ferari went on to state in his Affidavit he believed the elevator could have failed in the way described by no fault of Fujitec or simply because it was 30 years old and if there was any defect they could not have discovered it through

inspection because Fujitec had exercised all reasonable care. See Affidavit throughout particularly beginning Par. 5. However, because the elevator was over 30 years old, this is precisely why it had to be modernized and routinely inspected and maintained. And the fact remains that Fujitec, through its own admission, modernized an old elevator (the one that failed), with component parts, and routinely inspected and maintained that elevator up until January 2008, just 45 days before Plaintiff Linda Two Two fell in Elevator No. 2, was aware of the dangerous and defective nature of the elevator since at least December 16, 2002, and failed to identify and correct the problem, shut down the elevator, or properly apprise the new elevator maintenance company the extent of the severity and danger of the problem before subcontracting the maintenance of the elevators to Centric in 2008.

Fujitec appears to be arguing that an old elevator is an unavoidably unsafe product. However this does not square with the modern understanding and safety expectations of elevator systems and their components. As comment K of restatement second of torts, section402A states " There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." But today's elevator systems are not one of them. Particularly when you the elevator company have endeavored and

contracted to make the elevator system safe in your extensive modernization, upgrades, and exclusive maintenance of said old elevator.

Fujtec does not deny that it sold and installed component parts to a customer (US govt/GSA) for the modernization, only that the customer helped specify the parts used. In fact the total for parts and labor as detailed in the modernization contract was over $800,000.00 alone. Fujitec's bill to GSA under the contract included the drives from MCE, and the safeties to stop the elevators, and roller guides (to keep the moving elevator in line), governors (to keep the elevator from moving to fast) from other manufacturers including Whitney Hollister. Trial Tr. last paragraph page 13. Fujitec does not deny that they sold these parts to GSA pursuant to the Modernization contract, only that they were supplied by vendors specified by GSA. GSA specified the vendors they approved, such as MCE and Whitney Hollister, Fujitec ordered and purchased the parts, then sold them to GSA and installed them as agreed. If there was any doubt that Fujitec was the seller or distributor of parts used in the modernization, Ex: 3 of Fujitec's MSJ makes it clear. Ex: 3 is the letter of appreciation for the 911 elevator upgrade from GSA to Fujitec dated December 16, 2002 which states "You provided optimum solutions, not just the easy or most obvious answer, but the best possible products at the best possible cost effective prices." Fujitec clearly sold the products used in its

modernization to GSA. As such Fujitec was a seller or distributor of a product. One can infer from the total cost that the modernization, and the parts and labor, was quite extensive.

Further the Distribution agreement, effective January 2008, submitted in Support of Fujitec's Motion shows that parts under the maintenance contract for the 911 building (in place since the September 2001 modernization and maintenance contract) are to be provided by Fujitec alone. Centric may not use any competitive products and must use Fujitec products which include Fujitec's complete market line in North America. Fujitec is also to provide technical support upon request. The distribution agreement states that delays or non functioning of the units (elevators) will remain the responsibility of Fujitec if it is caused by the actions or failure to act of Fujitec. The agreement also provides for technical training of Centric's employees by Fujitec when available and as scheduled. TCF Ex: 5, p. 6, par. 6; p.12; p.18, par. D; and p.17, par. A, C (1) and (4) of MSJ. The first paragraph of the agreement states that Fujitec is engaged in the design and manufacture of elevators, escalators and other vertical transportation products, and Centric desires to actively promote the sale of Fujitec products.

Collectively, Fujitec's own admissions and exhibits, without more, establish that the parts used in the modernization, and all subsequent maintenance

and repairs, including those by Centric after January 1, 2008 were, installed, sold, inspected , supplied, or distributed by Fujitec alone and that Fujitec was in the business of manufacturing, modernizing, designing, selling and installing, elevators and vertical transportation products and their components, and did install, inspect, and distribute such products and remained the sole supplier and technical advisor for such products at all relevant times for the elevator at issue in the present case.

In response to Fujitec's Motion, Plaintiffs supplied over 64 pages of exhibits including 14 pages of detailed maintenance records showing repeated and numerous problems with elevator no. 2 including dropping, scraping, rattling, shaking, falling and injuries since the modernization and up to the subcontract to Centric, an Affidavit of a GSA employee and her handwritten journal of the numerous problems and injuries associated with the elevator since its modernization by Fujitec and its failure to address or correct the problem (Ex: 7), letters to OSHA and GSA by residents of the building about the safety hazard associated with Elevator No. 2 and the specific injury of several employees on March 21, 2003 (Ex: 11 and 12).

Also included was a series of e-mails showing that a non OEM (original equipment manufacturer) contactor was replaced by mechanic Bobby

Dukes on Elevator No. 2's main drive (who worked for both Fujitec and Centric as is evident by the entries in the repair logs, Ex: 9) before the injuries. After Ms. Fodge's injuries the elevator was shut down and the drive was sent for inspection (there appears to be no dispute that the drive is a new solid state drive installed by Fujitec during the modernization). See Ex: 13 throughout. It is not clear when Mr. Dukes replaced the contactor on the drive but it was either when Fujitec was maintaining it or shortly after the maintenance was subcontracted to Centric. In any event it is clear under the distribution agreement that since it was a non manufacturer part and Fujitec was the sole supplier of parts to Centric the contactor had to be a Fujitec supplied part.

Plaintiffs have not plead or alleged that the contactor or other components of the drive were the specific parts that failed. Plaintiffs have plead and alleged that Fujitec negligently modernized and maintained Elevator No. 2 and such negligence was the direct and proximate cause of Plaintiffs' injuries and that as a result of the modernization and maintenance by Fujitec (and maintenance by Centric) that Elevator no. 2 was and still may be defective as it failed to perform in the manner reasonably to be expected in light of its nature and intended function. Plaintiffs plead that under the circumstances (the modernization by Fujitec and exclusive control and responsibility for maintenance and inspection thereafter and

repeated reports of drops or injuries while in Fujitec's control) that Plaintiff's injuries are of the type that would have not occurred absent someone's negligence and the negligence that caused Plaintiffs injuries were more probably than not attributable to Fujitec (and to a lesser extent possibly Centric, considering Fujitec modernized the elevator, maintained for over 7 years, was aware of a longstanding history of complaints of dropping and injuries, and remained the sole supplier of parts for the elevator after the modernization). TCF, Complaint, par. 11,12,19.

Plaintiffs apprised the trial court below in its pleadings, and at the hearing that Fujitec did not have to manufacture parts itself to be considered a manufacturer but in assembling another manufacturer's products, you are providing a product. Plaintiffs informed the court that Fujitec was not a manufacture under ors 30.900 and 30.920 just for installation and sell of the various parts (which Plaintiffs identified as, microchips, controllers, roller guides, safeties, motor brushes, governors, etc) but was also responsible under the statute for inspection and testing as well. TCF, Tr. p. 12-13 and 16 beginning line 22. Plaintiffs pointed out the short and long term maintenance contracts provided for the periodic testing of the installed components and elevators and that Fujitec maintained that responsibility throughout all times relevant and subcontracted the responsibility to Centric in 2008.

The trial judge below ruled without explanation that as to Plaintiffs' negligence claim that as a matter of law there was no was no admissible evidence of causation and with respect to the strict liability claim that Fujitec did not manufacture, or sell or distribute or lease the elevator number two or any of its parts. No where, and at no time, did Fujitec argue or assert that it did not sell or distribute parts used in the modernization of Elevator No. 2. Counsel for Fujitec at the hearing for summary judgment asserted that Fujitec was not the seller, or distributor of "any of the components that have anything to do with the fall" This was a general statement not supported by the evidence. For example Fujitec went on to argue that the claim should have been brought against MCE who actually did manufacture the component parts that Fujitec installed and likened their role to the role of a mechanic who is asked to install a new engine in a new car or a mechanic asked to install spark plugs in the motor. TCF, Tr. p. 6 beginning line 14.

In such a case however the mechanic or auto shop who sales and installs the new engine and new spark plug (even if manufactured by another) is still a seller or distributor of a product subject to product liability if the product or installation of that product is defective and dangerous, and strictly liable if the auto shop is in the business of selling or installing such products and the product reaches the consumer without substantial change in the condition it was when sold. In the

present case, like the auto shop example provided by Fujitec, Fujitec sold and installed countless component parts, including the MCE drives (the same ones Fujtec says we should be suing MCE for), one or a number of them that failed, and inspected and maintained all of those parts and the entire elevator system.

Fujitec admits that their modernization included installation of new microprocessor controls "...distributed, sold and shipped directly to the 911 building by MCE" TCF, p. 5, line13, Reply to MSJ. This implies that the controllers were sold by MCE to Fujitec who then turned around and sold them to GSA for a mark up either as a distributor for MCE or original seller (Just as Centric was the Distributor and Fujitec the seller under the distribution agreement supplied by Fujitec in support of their Motion). There is no other way to construe the word "distributed" if MCE sold the controllers directly to GSA. As stated above no where does Fujitec deny the controllers (or other key system part) were sold by Fujitec to GSA and Ex: 3 of Fujitec's Motion shows the parts were sold by Fujitec to GSA.

Plaintiffs in response cited and included the "contract for the modernization of the elevators and their control systems in the 911 building....which included the new control systems, other seismic upgrades and hoistway improvements to include new roller guides and other various equipment totaling over $800,000

dollars." Plaintiffs stated that "Fujitec and Centric are manufactures, distributors, or sellers, of a product that caused personal injury to plaintiffs...Fujtec and Centric are engaged in the business of selling, installing, distributing, inspecting, and servicing elevator products like those sold to the federal government." TCF, Response to MSJ p. 3.

The trial court and court of appeals did not make all inferences in a light most favorable to Plaintiffs. See ORCP 47. A motion for summary judgment should be denied only if there are no disputed issues of material fact. The court of appeals should have reviewed the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the non moving party. See p. 12 of Plaintiffs' Opening brief below. The judgment should be reversed unless this court can say that "no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment." ORCP 47C; *Robinson* v. *Lamb's Wilsonville Thriftway,* 332 Or 453, 455,(2001). It should be obvious from the record and undisputed that the nearly million dollar contract included the sale of the above referenced components, that Fujtec admits it installed, and does not deny that it sold to GSA pursuant to the contract.
If there is any dispute about this fact or any other material fact then the motion for summary judgment should be denied. Both the trial court below and the court of

appeals made errors in their findings and conclusions of law substantially affecting the right of Plaintiffs.

FIRST QUESTION ON REVIEW REGARDING SUFFICIENCY OF ORCP 47 E REQUIREMENT

The Affidavit of expert enumerated both the negligence claims and strict liability claims, solely for the purpose of informing Defendants and the court that Plaintiffs' expert would be addressing both these claims, not one or the other, and not the breach of warranty claim. It was not for the purpose of identifying that Plaintiffs' expert would be testifying to some and not all of the elements of negligence as Fujitec contends. Rather Plaintiffs' intended purpose was to identify that Fujitec's modernization (and by implication subsequent testing, inspection, and failure to warn after learning of injury while still in exclusive control) and Centric's inspection and repair after they were subcontracted the maintenance, were defective and dangerous to an extent beyond that which an ordinary consumer would have expected (and thus subject to strict product liability under Oregon's statutory and legal rules for product liability). The intent was to inform the court that the inspections and repair of the elevator and its components would subject Defendants (including Centric) to products liability, as well as Fujitec's modernization of the elevator. Plaintiffs alleged that Fujitec negligently designed

and installed (modernized) and maintained Elevator No. 2 and such negligence was the proximate cause of the injuries sustained by Plaintiffs (they were hospitalized following the fall of Elevator No. 2 in which they were passengers). TCF, Complaint, par. 13 and 14. Plaintiffs simply reiterated their expert would not only speak to the products liability of both Defendants but to the negligence of Fujitec in it long term maintenance and service of the elevator.

The expert was not prepared to provide expert testimony at that time regarding the negligent maintenance of Elevator No. 2 by Centric because at the time of the first injury in early February Centric had responsibility for maintenance of the elevator for little over 30 days and no reported falls or injuries. On the other hand Fujtec had performed a major modernization in 2001 with nearly a million dollars in labor and equipment and continued to, service, inspect, and maintain Elevator No. 2 until subcontracting to Centric with over 60 reports of dropping, shaking, rattling, falling, injuries, etc. since at least 2002.

As such the Affidavit was designed, either artfully, or in-artfully, to identify that the Expert was prepared to testify that Fujitec and Centric were on the hook for product liability for testing, inspection and repair and replacement of parts in Elevator No. 2, and Fujtec for its modernization and installation of the extensive parts making up the transport system of the elevator, and Fujtec was negligent in

its maintenance of the elevator and failure to correct or warn of the problem before subcontracting to Centric.

Both the trial court below and the appellate court overlook the fact that even if you set aside whether the expert is offering an opinion on just duty, or duty and cause (as Plaintiff's clearly intended) regarding negligence, there is no mention of the testing and inspection, and repair of the elevator by either Fujitec or Centric which allowed a defective or dangerous elevator system and its components to cause injury to Plaintiffs.

Fujtec openly admits that the Affidavit is sufficient to create genuine issues of material fact that Fujitec's modernization of the elevator was dangerous and defective and that Fujitec negligently serviced and maintained the elevator. See the court of appeals opinion below, *256 Or App at 790*, last paragraph. That alone coupled with the extensive evidence of injuries, and problems with Elevator No. 2 that remained unresolved creates a clear inference of causation sufficient to overcome a motion for summary judgment on both the products liability claim and the negligence claim.

In the recent court of appeals *Whalen* case an affidavit was submitted stating an expert would provide an opinion which would be a sufficient basis to overcome summary judgment and stated additionally the expert would be prepared to testify

to the reasonable probability that plaintiff was subjected to a traumatic event that involved sexual touching by defendant during an ambulance ride and the subsequent amnesia was a result of that event. Defendant argued that the expert could not speak to causation as it was something a lay witness must establish.

The court in *Whalen*(with the same panel as the present case) found that an affidavit of an expert coupled with other evidence of causation, sufficient to defeat the motion for summary judgment. The court explained that:

> we are not persuaded by defendants' arguments that plaintiff's ORCP 47 E affidavit is inadmissible or, if admissible, insufficient to create a genuine issue of material fact. Particularly in combination with evidence about Haszard's sexually offensive behavior following the ambulance ride, and evidence that plaintiff does not recall the transport but subsequently has experienced nightmares about Haszard and obsessive feelings of uncleanliness, the affidavit creates a genuine dispute of fact regarding whether Haszard battered plaintiff in the ambulance. In the end, defendants express frustration at their inability "to discover or learn any facts relating to how Plaintiff was allegedly touched by Mr. Haszard until Plaintiff's expert takes the stand in trial." That frustration may be understandable, but it is the result of ORCP 47 E's clear mandate that parties litigating summary judgment motions need provide only very limited information about the expert opinions on which they intend to rely at trial. See *Whalen v. Am. Med. Response Northwest, Inc*., 256 Ore. App. 278, at 293, (2013).

The court in the present case should have likewise looked at the other evidence offered coupled with Plaintiffs' Affidavit of expert to find genuine issues of material fact on all elements of plaintiffs negligence and products liability claims including causation.

The court of appeals in its analysis of the Affidavit of expert addressed only the negligence claim but ignored Plaintiffs' products liability claim. One might surmise that it did so (incorrectly as pointed out above) because it did not find that Fujitec sold or leased a product in a defective condition unreasonably dangerous to the user under ORS 30.920 (Ex: 3 of the MSJ shows Fujitec did sell parts for the elevator upgrade to GSA, See also last par. p. 12 of Appellants Reply brief). However that would not obviate the fact that Fujitec would nonetheless still be liable under 30.900 for the inspection, testing, manufacturing or other defect in a product or any failure to warn or properly instruct in the use of a product. ORS 30.920 was adopted 2 years after ORS 30.900. It does not limit the causes of action already available to injured parties but rather expands them and makes clear that no fault liability for defectively dangerous products is available to claimants. The court of appeals in *Mason* has stated that the two sections must be interpreted in light of each other or *in pari materia*.

> We interpret, then, the terms "manufacturer, distributor, seller, or lessor" in the ORS 30.900 definition of a "product liability civil action" to have the same meaning as those terms in ORS 30.920, a statute that defines a particular "product liability civil action," that is, one imposing liability without fault. Both statutes define the nature of a product liability claim and operate *in pari materia.* Thus, a "seller" of a defective product for purposes of ORS 30.920 is the same type of person or entity as a "seller" of a defective product that is referenced in ORS 30.900. Similarly, a "manufacturer" or "distributor" of a defective product under ORS 30.900 is

> the same type of person or entity that is culpable under ORS 30.920 and its incorporated provisions of the *Restatement (Second) of Torts* § 402A comments a to m(1965). *Mason v. Mt. St. Joseph, Inc.*, 226 Or. App. 394, at 399 (2009).

The court in *Mason* found the claims against Manufacturer GE could not be sustained because even though GE was a manufacturer, it did not manufacture the injuring product (containing asbestos) even though it manufactured other similar products. In *Mason* plaintiff asserted that GE was a distributor under the statutes because they directed that recycled products be reused. The court stated:

> A "product liability civil action" under ORS 30.900 against "a manufacturer"does not include *any* manufacturer of the type of product at issue; it means a manufacturer of the product who is otherwise liable for its condition. Plaintiff advances no other common-law or other statutory policy that imposes liability for a defective product on a disassociated manufacturer. *Id* at 402

The plaintiff in *Mason* did not advance other common law or statutory policy that imposes liability but Plaintiffs in the present case do. Plaintiffs argue that Fujitec is not only liable as a manufacture or seller or distributor of the elevator system and its installed components but also for its inspection of the elevator system (the same ones that injured Plaintiffs) and the installed components under its modernization contract. Plaintiffs support their claim with evidence of representations by Fujitec regarding their elevators. Plaintiffs provided advertisements from 2005 of Fujitec's representations regarding the safety,

smoothness, dependability of elevator systems it modernizes, installs, maintains and inspect, and that it is a technological leader in the design inspection and maintenance of elevator systems around the world (even so bold as to guarantee that a nickel can be placed on edge on the floor of any elevator installed, maintained, or modernized by Fujitec). TCF, Mayfield Affdiavit, par. 15, Ex: 14, Response (Fujitec advertisements and representations).

Plaintiffs cited *McCathern v. Toyota* which held that " A plaintiff's proof under the representational theory is legally sufficient if a reasonable juror could find that there is such a relationship between the manufacturer's representations and the circumstances of the product's nonperformance such that a reasonable consumer would have believed that the product could perform safely under those circumstances." TCF, Response to MSJ, p. 5(The court of appeals in the *McCathern* opinion allowed recovery under either the consumer expectation approach or the representational theory).

This court clarified that the representational approach was not a separate theory of liability but an important aspect of the consumer expectation approach and in some instances such representations may constitute sufficient evidence to demonstrate what an ordinary consumer may expect from a particular product.

This court in *McCathern* emphasized that:

> When a plaintiff alleges that a product is "in a defective condition unreasonably dangerous to the user or consumer," ORS 30.920(1), the plaintiff must prove that, when the product left the defendant's hands, the product was defective and dangerous to an extent beyond that which the ordinary consumer would have expected. ... This court may set aside plaintiff's verdict only if the court affirmatively can say that there was no evidence from which the jury could have found the facts necessary to establish an element of plaintiff's claim. See *McCathern v. Toyota Motor Corp.,* 332 Or 59, at 79 (Or., 2001).

This court stated that “in some cases, consumer expectations about how a product should perform under specific conditions will be within the realm of jurors ‘common experience’ Only in those instances where design defect cases involve products or circumstances that are not that common that the average person would know from common experience what to expect would this court require more.” See *Id.* at 78.

As argued from the outset, Plaintiffs assert and allege that this is a case where the consumers expectation of how a product (an elevator system) should perform under normal conditions (without falling) is one within the realm of common jurors experience. An average person or prospective juror knows from common experience that elevators and their control mechanisms are expected to operate safely and smoothly transporting them from floor to floor without mishap, falling, or injury. Plaintiff’s should be able to proceed without more. However Plaintiffs have gone further and provided evidence that the elevator was

modernized in 2001 and maintained exclusively by Fujitec for over 7 years, said maintenance was subcontracted to Centric a month and half before Plaintiff Two Two's injuries, Fujitec remained the sole supplier of parts under the distribution agreement, Fujitec retained on call technical advise and training regarding said maintenance, non manufacturer parts were replaced by Fujitec or Centric prior to Plaintiff Fodge's injuries, that representations were made by Fujitec regarding the safety and reliability of the elevators they modernized, maintained and inspected, the elevator system was in a defective and dangerous condition while still in Fujitec's hands or when it left Fujitec's hands, and Fujitec did not warn Centric of the known danger and defect of the elevator when subcontracting the maintenance to them. TCF, Ex: 1-16 , Response to MSJ.

In sum, even if one accepts that the Affidavit of the expert was not specific enough to overcome the Motion for Summary Judgment on the negligence claim (which Plaintiffs do not concede), it is sufficient to overcome the Motion on the products liability claim alone. Under Oregon law causation may be inferred where there is no evidence available to prove exactly what sort of manufacturing flaw existed if plaintiff can show that the product did not perform in keeping with the reasonable expectations of the user (as Plaintiffs argue more fully below). Plaintiffs' negligence claims against Fujtec should also not have been

dismissed. Either the evidence provided in response to the Motion, or the Affidavit of expert, on the issue of negligent service and maintenance of the elevators is alone sufficient, where here, as in other similarly situated Oregon cases, the inferences of causation may be reasonably made. Determinations of reasonable expectations are proper for a jury to decide as are the weighing of the facts and evidence. Put in another way, the trial court's decision below would have been proper only if no reasonable person could have found that the elevator systems and components, sold or distributed, installed, maintained and inspected by Fujitec, which caused repeated injuries due to their falling and dropping, performed in keeping with the reasonable expectations of the user.

SECOND QUESTION ON REVIEW- SUFFICIENCY OF EVIDENCE IN SUMMARY JUDGMENT RECORD -USE OF RES IPSA FOR ELEVATOR FALL CASES.

With the proliferation of urban development the number of elevator injury cases has increased significantly in Oregon. New York (with well developed case law regarding elevator injuries) typically finds if an elevator company serviced an elevator regularly and had notice of the defect which caused the accident or could have reasonably detected the defect during maintenance and inspection, then liability exists. Plaintiffs in New York elevator cases often utilize the doctrine of *res ipsa loquitur* to prove liability, especially in misleveling and

fall cases. Plaintiffs are required to show (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be within the exclusive control of the defendant and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *See Weeden v. Armor*, 468 N.Y.S.2d 898, 902 (2nd Dept. 1983); *Dickman v. Stewart Tenants Corp.,* 633 N.Y.S.2d 35 (1st Dept. 1995). For misleveling the first condition is often shown by expert testimony. See *Burgess v. Otis Elevator Company,* 495 N.Y.S.2d 376 (1st Dept. 1985).

For fall cases all that is needed is allegations by plaintiffs to the nature of the fall in order to invoke res ipsa implied causation. For example, the NY Appellate Division opinion *Stewart v World El. Co, Inc* 2011 NY Slip Op 03895, involved a case where Plaintiff testified that the elevator dropped suddenly, causing him to fall. He notified the building superintendent and was lowered to the lobby level where several persons had to pry the door open. Regarding the application of res ipsa the court held "Certainly, this is the type of event that does not ordinarily happen in the absence of negligence, and plaintiffs are entitled to invoke the doctrine as against defendants based on plaintiff's testimony concerning the elevator malfunction." Also see e.g. *Kleinberg v. City of New York*, 61 AD3d 436, 438 (2009) (free-falling elevator is not an event that ordinarily happens in the

absence of negligence); *Miller v. Schindler Elev. Corp*., 308 A.D.2d 312 (2003) (applying doctrine where plaintiff testified that elevator dropped suddenly, causing her to fall, notwithstanding defendant's evidence that the elevator was functioning immediately after the incident). Oregon case law already similarly allows use of res ipsa in elevator fall and misleveling cases but Plaintiffs propose clear adoption of the same rule in Oregon. For example, in the specially concurring opinion in this court's *Haughtoun Elevator* opinion, Chief Justice O'Connel stated:

> I believe this is a proper case to apply the doctrine of res ipsa loquitur. Elevator doors do not normally close with the force reported by plaintiff. In a self-service elevator, such force could result only from a mechanical malfunction. The defendant had the exclusive responsibility for inspecting and repairing the mechanical parts of this elevator. Under this set of facts, I believe it is permissible for the jury to infer that the accident was the result of negligence and that the negligence more probably than not was that of the defendant. Close scrutiny of the majority opinion will reveal, I believe, that in fact my brethren also rely on a res ipsa loquitur analysis... *Hickman v. Haughtoun Elevator Company* 268 Or. 192 at 203(1974).

Because Oregon, unlike New York, does not allow discovery of the identity of expert witnesses, an affidavit of expert who testifies elevator maintenance is negligent and any modernization is dangerously defective should be sufficient to invoke the use of res ipsa so long as it can be shown that the elevator is in the exclusive control of defendants and there's no contributory negligence. Only in an

elevator misleveling, or door injury case should evidence regarding the extent, if any, of contributory negligence be required, but not in elevator fall case as it's assumed passengers injured in falling elevators are not at fault.

This case presents issues of causation in negligence claims where the exact defect of the instrumentality causing the injury is unknown. The trial court and court of appeals have erroneously concluded that this is not the type of case that allows a res ipsa theory of liability and causation. The court of appeals specifically cited a single court of appeals opinion, *Bingenheimer*, in support of their conclusion. Plaintiffs discussed *Bingenheimer* at length in its opening brief specifically distinguishing it from the present case. Opening Brief, p. 36. The trial court and, the court of appeals erroneously relied on *Bingenhiemer v. State Farm Mutual Ins. Co.*, 196 Or. App. 316 (Or. App., 2004)in precluding causation for res ipsa appropriate claims and did not follow this court's holdings in *Vanek, Heaton, Haughton Elevator, and Rice v. Hyster*.

In *Bingeheimer,* a driver under an auto insurance policy lost control of her car. Evidence showed that the road she was on was slick and wet from rain. She provided some evidence that the road may have also been slick from an oily

substance left by a phantom vehicle. The court found that plaintiff had not presented enough evidence that the alleged phantom vehicle dumped the oil by negligence since it could have occurred due to an unknown defect. The court cited *American Village V. Stringfield Lbr*., 269 Or 41,44 (1974) for the proposition that If the probability of a non-negligent cause is as great or greater than the probability of a negligent cause, the case should be withdrawn from the jury.

The *Bingenheimer* case is inapposite to the present case. This is not a vague allegation of a phantom vehicle that may or may not have spilled or leaked oil on a roadway surface. There are allegations and evidence showing that Fujitec was directly responsible for manufacturing and maintaining (by an exclusive maintenance and inspection contract) the elevator system which caused injury to Plaintiffs. A reasonable inference can be made that when a nearly million dollar upgrade to an elevator system is made by a manufacturer, or elevator maintenance company, like Fujitec, who retains exclusive control, along with its subcontractor thereafter, and subsequent injuries occur as a result of the malfunction of those elevators, that its more likely than not due to the negligence of the defendant (either in the original upgrade or the subsequent maintenance and inspection and

failure to warn its subcontractor) and not some other non negligent cause. It can reasonably be inferred that elevator manufacturers and maintenance companies are responsible for identifying and correcting all reasonable possible causes of malfunction and safety hazards.

The law assumes that all persons have obeyed the law and have been free from negligence. However, you may find that the defendant was negligent if you find that the incident that caused damage to the plaintiff is one that, in the normal course of events, would not have occurred unless the defendant was negligent. See UCJI no. 24.01. Res ipsa loquitur is a rule of circumstantial evidence. *Watzig v. Tobin* 292 Or. 645, 648–650, (1982) “exclusive control” is no longer required as long as there is evidence connecting the incident to the defendant’s conduct as opposed to actions of third parties. *Pattle v. Wildish Construction Co., 270 Or 792*, 797–798, (1974). Plaintiff’s comparative fault does not preclude application of the doctrine. *Cramer v. Mengerhausen, 275 Or 223,* 229,(1976).

Causation is defined as an act or omission that is a substantial factor in producing or bringing about the injury or damage. See UCJI no. 23.01. The term ‘substantial factor’ expresses a concept of relativity which is difficult to reduce to

further definiteness. Little, if anything, can be done with words to help the jury decide how much causal relationship must exist between conduct and damage before it constitutes a basis for recovery. *Furrer v. Talent Irrigation District, 258 Or 494, 511*(1971). But the question still remains a jury determination.

Plaintiffs cited extensively this court's *Rice v. Hyster* opinion but both the trial court and court of appeals(as well as Defendant/Respondent) either overlooked it or chose not to address it. TCF, Response to MSJ, p. 6, Opening Brief, p. 35-36, and Reply Brief p. 6-7. *Hyster* involved similar facts to Plaintiffs' present case. The forklift truck was a mobile service elevator maintained and serviced by defendant used at construction sites to lift construction workers to and from the construction site. It was comprised of a hydraulic elevator. The plaintiff, a worker at the site, was lowered from a height of about 20 feet which dropped abruptly for 3 to 4 feet beginning at about the 15 foot level causing injury to plaintiff. *Hyster* established the appropriate legal standard and conclusion with like facts, circumstances, and legal questions as those in the present case that could have been resolved simply by following its holding. Why both court's overlooked it is not clear.

Respondent without responding to the authority in *Hyster* cited, *American*

Village v. Stringfield Lbr., 269 Or 41, (1974). In *American Village* plaintiff alleged defendant did not know how to use its forklift and popped the clutch causing damage. The court felt it could have just as easily broke due to wear and tear. The difference between the present case and *Hyster*, and *American Village*, is the breakdown of a clutch on a forklift does not require the same scrutiny as the breakdown of critical elevator systems. The duty of care of an elevator manufacturer and repair company is greater than that of a manufacturer of a non critical forklift component. The distinction is whether the lift will be used for hauling equipment or personnel as deduced in *Hyster*:

> It follows from the evidence received without objection that Hyster knew or should have known that this forklift truck might well be used to 'hoist' people when pallets, platforms, seats or other 'safe riding facilities' were provided, and that this was one of the 'uses' or 'risks' for which the equipment should be safely designed, including the design of such 'fail-safe features' as would prevent either the forklift carriage or 'uprights' from 'falling,' as in this case, for the reason that in such an event people riding on the fork carriage might well be injured even if standing on a pallet or platform or seated in a seat. (See *Rice v. Hyster* 273 Or. 191, at 203(1975).

The court in *Hyster* allowed plaintiff to proceed on both a negligence and products liability claim, and denied defendant’s motion for directed verdict:

> after examining the record, we hold that wholly aside from any theory of res ipsa loquitur there was substantial evidence to support a finding by the jury that defendants were negligent in the maintenance of the equipment, if not in its original design and manufacture. This consisted of evidence from which the jury could properly find that there had been similar malfunctions of the equipment on previous occasions; that defendants' mechanics had undertaken to repair the equipment so that this would not happen again; that they had failed to make proper repairs, but had nevertheless assured the lessee that the equipment had been restored to good operating condition. See *Hyster* at 198.

Hyster has been followed and cited subsequent to the adoption of ORS 30.900 and 30.920 by numerous Oregon courts (e.g. *AFT Oregon v. Or. Taxpayers United Pac*,345 Ore. 1, 2008, *Lowrimore v. Dimmitt* 310 Ore. 291, 1990).

The standard for responding to a motion for summary judgment under ORCP 47C has been construed the same as required for surviving a motion for a directed verdict. Because Plaintiffs here have provided as much evidence and more than provided in *Hyster*, the motion for summary judgment should not have been granted. *Hyster*, not *American Village or Bingenheimr* is controlling. Fujitec provided discovery and Plaintiffs offered evidence which shows that Fujitec was aware of a longstanding history of problems with elevator no. 2 well before Plaintiffs' injuries in 2008. (TCF, Ex. 9 Response to MSJ, call back log with, over

60 incidents for Elevator No. 2), That Fujitec's mechanics had undertaken to repair the equipment so that it would not happen again but failed to make the proper repairs but nonetheless assured property managers and employees of the 911 building that it was restored to good operating condition. (TCF, Ex 12, Response to MSJ, letter from Mr. Ferari). Fujitec had an independent duty to inform any assignee of the extensive problems and injuries with Elevator No. 2 before turning it over to a new service company and had a duty to correct the problem before doing so (TCF, Response to MSJ, p.10, line 1-3).

It is incorrect to say that Plaintiffs provided no admissible evidence to controvert Fujitec's Motion for Summary Judgment. Exhibit 9 of Plaintiffs Response is directly relevant to the specific malfunctions (such as dirty selector tapes and contacts on terminal motion controls, incorrect clearances on pickup rollers, faulty plug on drive unit, incorrectly adjusted dust cover, repair of astrigal at basement level, DC Relay replacement, sticking pickup rollers, replace of brake relay failure, replace fuses) all of which are components installed by Fujitec during its modernization of the elevator systems in the 911 building (TCF, Ex: 2, modernization, including roller assemblies as well as conversion from old relay to solid state microprocessors and new drive units and motion control units).

Every recorded or reported stop, drop, jerk, scrape, rip, fall, or injury was accompanied by a repair of a faulty component, or incorrectly installed or adjusted unit, which said component or unit was installed by Fujitec only. Evidence shows the faulty contactor was installed by either Fujitec or Centric and the distribution agreement shows that Fujitec was the sole parts supplier when it was installed. The record of any one of these faulty repairs alone should be sufficient to controvert Fujitec's Motion for Summary Judgment and raise genuine issues of material fact pertaining to duty, breach, causation, products liability, etc. It is hard to imagine how Plaintiffs could have done more short of presenting its entire case in chief, every proffered exhibit, and the full scope and detail of its experts testimony and opinion. Certainly this is not what ORCP 47C requires nor is it what the legislators had in mind when adopting it (which many believe merely codified pre-existing case law that only required a scintilla, or any evidence, in response).

Fujitec moved to strike Plaintiffs'Ex: 3-11 and 13 but the trial court did not grant Fujitec's motion nor did it exclude evidence during the summary judgment proceeding. There was no motion to strike 2,12,14,15 and 16. Most of the records were maintenance records provided by Fujitec through discovery, or medical records (along with business correspondences or sworn affidavits), and thus

regularly kept business records or statements made for medical purposes. See Trial Tr. p.24-25, and Reply Brief, p.1, summary of evidence on motions.

The appellate court's decision will limit the use and scope of res ipsa for negligence claims, indeterminate defects, and inferences of causation in products liability cases and will cause more plaintiffs to appeal unfavorable motions for summary judgment that typically involve issues of material fact for a jury to decide or issues that an expert opinion should resolve. This court considers the ability to spread risk, expectation of the user, and the impetus to make or sell better products as justification for strict liability. See *Tillman v. Vance Equipment Co.,* 286 Or 747, 754 (1979). The court of appeals decision undermines these factors and ignores reasonable expectations of safety by consumers, will lessen the impetus to make and sell safer products, and leaves those injured by dangerous products without full compensation.

This court has ruled on similar issues relating to products liability and res ipsa, such as in *Markle v. Mulholland's Inc*., Or. 259 (Or., 1973); *Hickman v. Haughtoun Elevator Company* 519 P.2d 369 (1974) *McKee Electric Co. v. Carson Oil Co.,* 301 Or 339(1986) and *Rice v. Hyster Company* 273 Or 191 (1975), but the application of these prior rulings needs stricter adherence.

THIRD QUESTION ON REVIEW-SUFFICIENCY OF EVIDENCE FOR APPLICATION OF ORS 30.920-WHETHER COMPONENT PARTS INSTALLED AND SOLD BY DEFENDANT MUST ALSO BE MANUFACTURED BY DEFENDANT- WHETHER INFERENCE OF CAUSATION IN PRODUCTS DEFECT CASE MAY BE MADE

As stated earlier, Fujitec's own exhibit 3 in support of its Motion shows that Fujitec sold the parts for the elevator upgrade to GSA. Fujitec admits that the modernization included installation of new microprocessor controls "...distributed, sold and shipped directly to the 911 building by MCE" TCF, p. 5, line 13, Reply of MSJ. Fujitec admits it substantially modernized the elevator in which Plaintiffs were injured. Respondent's Brief, p.1. Ex: 2 of Plaintiffs' Response to the Motion shows that the parts and labor for the modernization were nearly a million dollars and the short and long term maintenance included maintenance, testing, and inspection of the elevator systems and the installed parts. Ex 2. Page 9, item 14, of Plaintiffs' Response shows that Fujitec retained the exclusive maintenance contract with GSA through September 30, 2008(Plaintiffs were injured in the elevators in February and July of 2008). Ex 9 of Plaintiffs' Response showed repeated malfunctions and repairs of Elevator No. 2 by Fujitec that did not correctly identify or fix the problem of falling and injuries. Ex 5 of Fujitec's

Motion, the distribution agreement, shows Fujitec remained the sole supplier of products, and technical advisor under the maintenance contract. Plaintiffs submitted evidence that they, as well as others, were injured in Elevator No. 2 since the modernization and while Fujitec still retained the contract for exclusive maintenance of the elevator. See Ex: 3-8, 10, 11,and 12.

"When a plaintiff alleges that a product is "in a defective condition unreasonably dangerous to the user or consumer," ORS 30.920(1), the plaintiff must prove that, when the product left the defendant's hands, the product was defective and dangerous to an extent beyond that which the ordinary consumer would have expected.. ..This court may set aside plaintiff's verdict only if the court affirmatively can say that there was no evidence from which the jury could have found the facts necessary to establish an element of plaintiff's claim." See *McCathern* 332 Or 59, at 79 (Or., 2001). The court cannot say there was no evidence from which a jury could have found the facts necessary to establish Plaintiffs' claim (that the elevator system and its parts, modernized, installed, and sold by Fujitec, which Fujitec retained exclusive responsibility for maintenance, was dangerous and defective beyond that which the ordinary consumer would have expected).

The ORCP 47E affidavit stated that an expert had been retained that Plaintiffs intended to rely upon at trial to support their claim the modernization was defective and dangerous to an extent beyond which an ordinary consumer would have expected. The evidence provided supports all elements of Plaintiffs claim. The evidence established that Fujitec sold the parts to GSA used in the elevator upgrade, and any parts replaced subsequently were to be Fujitec parts, and the entire elevator systems was inspected and maintained by Fujitec, and when the elevator (comprised of the elevator system and its component parts) failed the elevator system was defective or dangerous while still in (or when it left) Fujitec's hands.

It is clear under Oregon case law and statute that sellers and lessors of products in the distribution chain can be subject to strict products liability if in the business of selling or leasing such product. See ORS 30.920(1). *See Cornelius v. Bay Motors Inc.,* 258 Or 564, 576,(1971) (brakes sold in used car may be subject to liability). The decision below is wrong regarding liability for the sale of component parts. This court's rulings, both pre- and post-codification, hold that strict liability can extend to component-part manufacturers and distributors for the sale of defective components. *See State, ex rel. Hydraulic Servocontrols Corp. v.*

Dale, 294 Or 381 (1982) and *Smith v. J.C. Penney Co., Inc 269 Or 643 (1974).*

The court of appeals disagreed that *Jamison* and *Brokenshire* applied because there was no evidence that Fujitec sold and installed parts, only that it installed parts and thus was a service provider, akin to the *Watts v. Rubber Tree, Inc.*118 Or App 557 (1993) case where a tire recapper affixed a new tread to a defective tire casing.

In *Watt*s a passenger was injured as a result of a blown tire which had previously been taken to a recapper. The court ruled for defendant recapper because evidence showed that the cause of blown tire was a defect in the manufacture of the casing, not the application of the tread by the recapper. In the present case there is no evidence that any defect was caused by anyone other than Fujitec who was responsible for the modernization of the elevator systems and their maintenance. In another related tire retread case, *Markle v. Mulholland's Inc*.,265 Or. 259 (1973) This court found strict liability against defendant recapper, and concluded that there was sufficient evidence to permit a jury to infer that the recapped tire was unreasonably dangerous. Here were the specific defect is not pleaded there is sufficient evidence to infer that the modernized elevator,

maintained by Fujitec, was unreasonably dangerous.

The *Jamison* and *Brokenshire* cases are more instructive on the present issue as to who can be considered a manufacturer under Oregon products liability statutes. In *Jamison v. Spencer R.V. Center, Inc*., 98 Or.App. 529 (1989), the plaintiff purchased from the defendant a travel trailer and a trailer hitch to tow it. The defendant installed the hitch. That process included assembling the component parts, including welding the parts together and to the plaintiff's truck. One of the welds apparently failed, and the plaintiff was injured in an accident. The defendant moved for summary judgment on the ground that the plaintiff had asserted a strict liability claim well after the eight-year statute of ultimate repose for product liability claims had run. After noting that the product liability statute embraced product claims premised both in negligence and in strict liability, the court concluded that plaintiff's claim was indeed one for a defective product, a trailer hitch that had been negligently assembled. *Id*. at 531-33.

In the present case it does not matter that Fujitec has assembled parts from various manufacturers as long as it was assembled for a purchaser. Here, like in *Jamison,* Fujitec assembled the parts pursuant to a nearly million dollar sales contract with the U.S. govt. and Plaintiffs have alleged the product that was

assembled, the elevator system and its various components, was defective.

Equally helpful is the court of appeals holding in *Brokenshire v. Rivas and Rivas, Ltd.*, 922 P.2d 696, 142 Or.App. 555 (1996) In *Brokenshire* a strict product liability case, a jury awarded plaintiff, a baker and cake decorator, compensatory damages for the serious back injuries she sustained when she slipped and fell on a floor that was sold and installed by defendant at the bakery where plaintiff worked. Fujitec attempted to downplay *Brokenshire* by arguing in that case a product was sold *and* installed on plaintiff's premises and in the present case there was no evidence Fujitec supplied any of the component parts used to refurbish the elevator (and even if it did no evidence a specific component supplied by Fujitec cuased the injury). See Respondent's Brief page 29. In *Brokenshire* the defendant sold the plaintiff an acrylic floor product and installed the product on plaintiff's premises.

The court in *Brokenshire* carefully explained that product liability is found even in installation of another's product, and that it does not have to involve assembly or manufacture off site:

> defendant was required to customize each Silical acrylic floor that it sold by applying the proper mix of acrylic flakes to the wet resin along with a finish

> coat of sealer to provide the desired combination of color, texture and surface. The process of making the acrylic floor need not be distinguished from its installation, because defendant's role was to manufacture on site the floor that it sold to Birnbach.....The nature of the product that plaintiff purchased was that it had to be manufactured on site and applied over a concrete substrate that had been blasted to remove the old concrete surface. The new Silical acrylic floor was finished with two coats of sealer. The dissent would be more persuasive if all defendant had done was to apply sealer to the old concrete surface. The dissent seems to suggest that an action in strict product liability can lie only if a product is manufactured elsewhere and brought to the site where it is installed. Had defendant manufactured the Silical floor at defendant's warehouse, for example, and installed it at the bakery as precut squares, strict product liability would be obvious. Furthermore, the dissent simply assumes that the floor that defendant manufactured and installed was not defective. It then poses a variety of hypothetical examples, 142 Or. App. at 568, 922 P. 2d at 702-03, all of which presuppose negligent selection and application of a product that otherwise performs as manufactured. Those examples miss the point: In this case, plaintiff's allegation was that the new Silical acrylic floor was dangerously defective in that it was dangerous for its intended purpose. *Id* at 700.

Under Oregon's Product liability statute, one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer even if one is installing a product or assembling preexisting product. The key determination is whether it was a custom install and whether Plaintiffs have alleged that the instrumentality causing the injury (an

elevator system here, a trailer hitch in *Jamison*, and an acrylic floor in *Brokenshire*) was defectively dangerous. It does not matter that Fujitec did not manufacture the original elevator anymore than it mattered that defendant did not manufacture the original floor in *Brokenshire*. Here as in *Brokenshire* and *Jamison* it is clear that Fujitec's modernization was pursuant to GSA's specifications and Plaintiffs have alleged that the modernization was defective and dangerous for its intended purpose(beyond what a reasonable consumer would expect). Furthermore as evidence shows, contrary to the court of appeals findings, Fujitec did sell the products to GSA used in the elevator upgrade. See Ex: 3 of Fujitec's Motion for Summary Judgment. Also unlike *Brokenshire* and *Jamison*, or the tire retredder cases, Fujitec was, apart from the modernization, additionally tasked with inspecting and maintaining the elevator systems and failed to identify and correct the problems (falling and dropping) that caused the injuries.

The court of appeals decision below is internally confusing and inconsistent, and inconsistent with the court of appeals, this court, and the federal district court's opinions. For example, Plaintiffs in support of their Response to the Motion submitted the contract between Fujitec and the United States dated September 2001 for the modernization of the elevators and their

controls systems in the 911 building which showed that Fujttec was responsible for the manufacture, installation, and design of the new control systems and other seismic upgrades and hoist way improvements to include the sale of new roller guides and other various equipment totaling over $800,000.00 dollars in parts, equipment, and labor (See TCF, Ex. 2 p. 1-4, Response to MSJ).

The court of appeals in its decision, confirming the sale and installation of component parts states “The only evidence in the record is that Fujitec installed component parts provided by others. As such, that evidence only supports the allegation that Fujitec provided a service by installing, per GSA's conditions and specifications, component parts manufactured and supplied by other parties.” See Opinion, p. 14 beg. line 13. The court acknowledges that Fujitec installed component parts per the customers specifications (a custom install as in *Brokenshire*), yet inexplicably does not accept that Fujitec is a manufacturer, distributor, or seller of a product because the component parts were not originally manufactured by Fujitec. This holding is wrong and contrary to this court’s holdings and the federal district court’s holding to the contrary.

As stated above this court has held that sellers of defective components, even those manufactured by others (such as in the *Smith v. J.C. Penny* case) are subject to strict product liability. Additionally, the federal district court has similarly ruled that selling and installing new component parts even in used equipment incurs liability under Oregon's strict products liability laws. See *Allstate Indemnity Co. v. GO Appliances,* in the US District Court for the District of Oregon, July 19, 2006 (Defendant reconditioned a used refrigerator with several new parts including a new compressor that later failed).

Fujitec and the court below incorrectly believe that if you don't specify the component that fails in a strict products liability or negligent maintenance case that plaintiff cannot prevail on a motion for summary judgment by defendant for failure to prove causation. It is not necessary for Plaintiffs to prove exactly what manufacturing flaw existed, or exactly how the design was deficient. The evidence submitted, and the Affidavit of expert show that Fujitec's modernization and inspection of Elevator No. 2 was dangerously defective under the consumer expectation test.

As stated above, the court of appeals in arriving at its conclusion that Plaintiffs could not rely on res ipsa cited the court of appeals *Bingenheimer* case.

See *Two Two*, last paragraph, at 793. As previously stated this court's *Hyster* and *Haughton Elevator* case are controlling and more instructive. Additionally, this court has consistently held that inability to pinpoint a defect is not fatal to the plaintiff's products liability case. *See, e.g., Wulff v. Sprouse Reitz Co., 262 Or 293(1972*) (electric blanket on bed started house fire); *Brownell v. White Motor Corp., 260 Or 251*(1971)(on a three-week-old truck with 8,200 miles, left axle suddenly dropped and jerked truck into wall); *Vanek v. Kirby,253 Or 494*(1969) (new vehicle became uncontrollable on first day of use and caused collision with pole). *Heaton v. Ford Motor Co., 248 Or 467*(1967), (Plaintiff may recover without evidence of exact manufacturing flaw or how design deficient if can prove product did not perform in keeping with reasonable expectations of user). In *Heaton* this court stated:

> In the type of case in which there is no evidence, direct or circumstantial, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectations of the user. When it is shown that a product failed to meet the reasonable expectations of the user the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the

> existence of a defect. *Heaton v. Ford Motor Company*, 85 Or. 823, at 826 (1967).

This court in *Vanek* made a more careful analysis of the specificity with which a plaintiff must plead and prove that his injury was caused by a defendant's product rather than by some other cause. There is seldom direct evidence of defect in a products liability case. Circumstantial evidence generally must be used. Recognizing this, the *Vanek* court drew an analogy between proof of unreasonable conduct under the doctrine of *res ipsa* in a standard negligence case and proof of defect in a strict products liability case (For discussion of *Vanek* and its impact see "Proof of Defect in a Strict Liability Case" Mainelaw.Maine.edu/acadmics/maine-law.../vol 22-me-1-rev-189.pdf) . *Vanek* involved the loan by a dealership of a newer automobile to plaintiff which careened off the road while plaintiff was driving it hitting a light pole and causing injuries. The plaintiff in *Vanek* initially tried to identify the various specific causes of the malfunction but then amended his complaint to plead more generally. This court explained:

> Apparently plaintiff discovered that he could not obtain evidence identifying the defect which caused the car to leave the highway and so he resorted to the general allegations of cause contained in his third amended complaint. The complaint makes it reasonably clear that the cause which plaintiff relies upon is a defect of some kind in the mechanism of the vehicle rather than some other cause. The complaint states, in effect, that the vehicle

> was not fit for its general purpose as warranted (i.e., it was defective) in that it 'could not be kept on said highway during its normal use as a vehicle for transportation' because it was 'uncontrollable in normal operation.' This would adequately inform defendant that plaintiff was not relying upon any cause other than the defective mechanism of the vehicle. The question is whether the failure to identify the defect more specifically renders the complaint fatally defective. ...The problem is essentially no different from that encountered in other cases where the proof of the tort rests upon circumstantial evidence. Recovery is allowed where a plaintiff's injury may be traceable to some conduct of the defendant although the Specific act which caused the injury cannot be identified. An analysis of the problem of proof in negligence cases is found in 2 Harper & James, The Law of Torts, §§ 19.4 [253 Or. 501] and 20.2 (1956). There we are told that '(c)ircumstantial proof may be sufficient to meet the burden of proof on an issue like negligence even though the inference is equivocal as to just what the party's specific acts or omissions were.' And, although '(i)t may well be Impossible to say that any One explanation is more probable than not--that is, that its probability exceeds the sum of the probabilities of All the alternative explanations,' yet if 'most of the explanations (and the weight of probability) include some conduct which a jury could call negligence,' the jury will be allowed to draw an inference of negligence. *Vanek v. Kirby*, 253 Or. 494, at 499-501 (Or., 1969).

Here , like in *Vanek*, Plaintiffs have plead that Fujitec designed installed and constructed the elevators in the 911 building, and Elevator No. 2. was defective and dangerous because it failed to perform in the manner reasonably to be expected in light of its nature and intended function, and requested a

determination that defendants' negligence was the proximate cause of Plaintiffs injuries. See Complaint, par. 3, 19 and first request for relief. This court in *Vanek* went on to explain that the inference of negligence in res ipsa cases may also be made to prove causation in product defect cases.

> The same kind of reasoning will sustain plaintiff's cause of action in the present case. For the purpose of testing the sufficiency of the complaint, we may assume that plaintiff would be able to produce evidence from which the jury could infer that as the vehicle was driven down the highway the driver found it impossible to control it because of some defect in its mechanism. At this point, if the jury accepts plaintiff's version of what happened, plaintiff has carried the proof far enough to permit the jury to infer that the vehicle was uncontrollable because of Some unidentified defect in the mechanism of the vehicle. If plaintiff carries his burden of proving that the defect was attributable to defendant's conduct rather than to some other cause, he need not identify the specific defect which caused the vehicle to become uncontrollable. There is no greater reason for imposing upon plaintiff the necessity of proving a specific defect in the present case than there is for imposing upon a plaintiff in a res ipsa case the necessity of proving a specific act of negligence on the part of the driver. And since plaintiff may make out his case on such general proof, he may fashion his pleadings with general allegations sufficient to meet the necessary proof. It is true that when the allegations of the complaint take this general form the defendant may find it burdensome to prepare his defense. But he has available to him discovery procedures with which he may determine whether the cause alleged can be more specifically identified. If discovery is not productive, defendant must through other means try to convince the court and the jury that the probabilities pointing to [253 Or. 503] causes other than the defect in the mechanism preponderate. This is a familiar task to those who defend in the res ipsa loquitur cases. *Id* at 502 to 503.

The court of appeals reliance on *Bingenheimer* is misplaced or contravenes

this courts holding in *Vanek, Heaton, Haughton Elevator*, and *Rice v Hyster* which allow inference of causation in products liability cases where the exact defect of mechanism causing the injury is not known, plead, or provided. This court in *Vanek* allowed such inference even when the plaintiff himself may have been contributorily negligent (since he was driving the car which hit the pole). Here, Plaintiffs' proof is stronger as there should be no issue of contributory negligence in falling elevator cases (passengers cannot cause elevators to fall at backbreaking speeds simply by pushing the control buttons).

CONCLUSION

Here, like in *Hyster*, Plaintiffs provided evidence in this elevator fall and injury case that there had been similar malfunctions of the equipment on previous occasions; that Fujitec's' mechanics had undertaken to repair the equipment so that this would not happen again; and that they had failed to make proper repairs. Here Plaintiffs do more than in *Hyster* by submitting an Affidavit of expert that Fujitec's modernization of the elevators was defective and dangerous to an extent beyond that which an ordinary consumer would have expected and that they were negligent in their maintenance and inspection of those elevators.

To allow the appellate court's decision to stand will run contrary to this Court's *Hyster* opinion and will only serve to confuse personal injury and products liability petitioners and practitioners. It will also result in a serious chilling effect in disallowing factual determinations, inferences, and determinations of reasonable care and consumer expectations to proceed to jury determination. It is contrary to this court's prior decisions and fails to give effect to the public policy purpose of ORCP 47 C and E and clearly stated requirements of ORS 30.900 and 30.920.

The court of appeals ignores extensive opinions disfavoring summary judgment determinations on negligence and products liability claims. *McPherson v. State*, 2010 Or App 602, 613(2007). The error if left to stand will serve a serious injustice on the present Plaintiffs who will not be able to recover the full measure of their damages and injuries. It wall also serve a public injustice in allowing sellers, distributors, or manufacturers and elevator maintenance companies to install and maintain products that are dangerous to all who have and will continue to frequent them instead of correcting them so that repeated injuries, like those sustained by countless passengers in the 911 building, do not continue to occur.

The trial court below and the court of appeals strain at the gnat of causation having swallowed the camel of negligence. This court should reverse the decision of the trial court and the court of appeals and remand for further proceedings.

RESPECTFULLY submitted this 13th day of December 2013.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this Brief on the Merits complies with the word-count limitation in ORAP 5.05(2)(b) and that the word-count is less than 14,000 words (14 pt type for the text) excluding the table of contents, table of citations, cover page and any certificates of counsel.

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PROOF OF SERVICE

I certify that I directed the Plaintiffs Appellants' Brief on the Merits to be filed with the Supreme Court of Oregon by means of Electronic filing, provided by the Oregon Judicial Department for the electronic filing on December 13, 2013.

I further certify that I directed the Plaintiffs Appellants' Brief on the Merits to be served on the attorneys for Defendants, and Defendant Respondent on December 13, 2013 by mailing two copies, with postage prepaid, in an envelope addressed to:

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