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 ELEVATOR CORPORATION OF OREGON, INC., an Oregon corporation,

Defendant.

Supreme Court No. S061536
Court of Appeals No. A145591
Trial Court No. 0901-00985

Review of a Decision of the Court of Appeal,
on Appeal from the Judgment of the Multnomah County Circuit Court,
by the Honorable Nena Cook, Judge Pro Tempore

Date of Decision:	May 30, 2013
Author:	Ortega, P.J.
Concurring:	Sercombe and Hadlock, JJ.

Respondent's Brief on the Merits

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I. INTRODUCTION

Plaintiffs were injured in 2008 when an elevator in the building where they worked "dropped" suddenly from one floor to another, or so they say, for reasons no one has explained. The elevator was built decades ago and "modernized" by defendant Fujitec America, Inc. (Fujitec) in 2001. Fujitec maintained the elevator until 2007 and defendant Centric Elevator Corporation (Centric) thereafter. In their complaint, plaintiffs allege that Fujitec and Centric are liable for their injuries under negligence, product liability, and warranty theories. The trial court granted summary judgment to Fujitec on each of those claims, concluding, among other things, that plaintiffs had failed to produce evidence of "causation," meaning evidence that Fujitec's alleged negligence caused it to drop. The court also concluded that Fujitec was not liable on the product claim because, again, there was no proof of causation, and because Fujitec did not sell, or lease the elevator, but merely installed some components designed, built, and sold by others. Plaintiffs appealed, seeking reversal on the negligence and product claims only. The Court of Appeals affirmed, agreeing that plaintiffs had failed to produce evidence of causation and that the product liability law, ORS 30.920, doesn't apply. *Two Two v. Fujitec America, Inc.*, 256 Or App 784, 305 P3d 132 (2013). For reasons that follow, this court should affirm too.

II. FACTS

Plaintiffs are federal employees who work in a government-owned building in Portland. On February 11, 2008, plaintiff Two Two was riding in an elevator in the building, known as Elevator No. 2, when it dropped suddenly and stopped abruptly, she claims. SER 2. If that actually happened, no one knows why it did, only that it shouldn't have. Plaintiff Fodge claims that the same thing happened to her while riding in the same elevator on July 16, 2008. SER 3. Again, if that happened, no one knows exactly why. *See* Pltf Merits Br 34 (conceding that point).

Elevator No. 2 was built by Westinghouse in the 1960s or 70s. SER 15, 17; Brandon Mayfield Aff. (OJIN 79), Ex 2. In 2001, the General Services Administration (the GSA) undertook to "modernize" it and other elevators in the building and bring them up to code, which were not simple tasks. SER 16; Decl of Pamela J. Paluga (OJIN 83), Ex 2, p 1, and Ex 3, p 1. The GSA hired architects and engineers for the project, retained a project manager to oversee the work, and purchased new parts from various suppliers. SER 16.

Fujitec was the contractor on the job. *Id.* In that capacity, its role was limited to installing the parts "manufactured and supplied by vendors and suppliers specified by [the] GSA or its consultants." *Id.*; *see also* SER 18 (¶ 6). Fujitec did not design, build, or sell the parts, or specify their inclusion.

After the job was complete, the GSA contracted with Fujitec to perform periodic maintenance and inspection on the elevators. SER 17. Fujitec performed those services through the end of 2007, when, by contract, those tasks were assigned to Centric. SER 19-24. Plaintiffs were injured in February 2008 and July 2008, two months and six months, respectively, after Centric replaced Fujitec in maintaining and inspecting the elevators. SER 2-3.

III. PROCEEDINGS

In their complaint, plaintiffs alleged that both Fujitec and Centric negligently "designed, installed, and maintained" the elevator, and that the negligence of both of them in those respects caused their injuries. SER 3-4. They further alleged that both Fujitec and Centric are strictly liable for their injuries under ORS 30.920, because the elevator was, in plaintiffs' view, "defective and dangerous." SER 6 (¶ 19).

Fujitec moved for summary judgment, arguing, among other things, that it was not liable on the product claim because it did not sell or lease the original elevator or the parts installed during the 2001 refurbishing. *See* Fujitec's Motion (OJIN 42) at 6-9. It also argued that it was not liable on the negligence claim, because plaintiffs could not explain why the elevator dropped and, therefore, could not prove that Fujitec's alleged negligence "caused" their

injuries. *Id.* at 10-11. In support of these arguments, Fujitec offered the affidavit of one of its managers, Ferari, who testified that Fujitec did not design or manufacture the elevator or any of its parts, but simply "modernized" it by installing components "manufactured and supplied by vendors and suppliers specified by [the] GSA or its consultants." SER 16; *see also* SER 18 (¶ 6) (identifying manufacturer of various components). Ferari also testified that, based on his review of the pertinent records, Fujitec's maintenance and inspection of the elevator through the end of 2007, when Centric took over, "conformed to industry standards and contract requirements." SER 17. Finally, Ferari testified that elevators can drop from one floor to another "through no fault or negligence of anyone, including, simply because of the age of the elevators," *id.*, and that, in his opinion, the work performed by Fujitec on Elevator 2 "did not cause or contribute to" plaintiffs' injuries. SER 18.

In response to the motion, plaintiffs offered a variety of documents, attached as exhibits to the affidavit of their attorney. *See* Aff in Support of Pltfs' Response to Mot for Summ J etc. (OJIN 79). These included:

- Fujitec's contracts with the GSA and Centric (Ex 2);
- some of plaintiffs' medical records (Exs 3-4);
- several documents reflecting various problems with the elevators in the building in 2002 and 2003 (Ex 7);

• a log of Fujitec's service calls from 2002 to 2007 (Ex 9);

• a complaint filed against Fujitec in 2005, alleging a similar accident to the ones involving plaintiffs (Ex 8);

• a letter from the federal Occupational Safety and Health Administration to the GSA about an alleged "malfunction" in the elevator in March 21, 2003 (Ex 11);

• a letter from Ferari to the GSA, explaining that he found no evidence of a malfunction on March 21, 2003, and that an "independent elevator inspector" hired by GSA had recently inspected the elevators in the building and found "that they are all in good and safe condition and in compliance with all governing codes" (Ex 12); and

• screenshots of some of Fujitec's and Centric's web pages (Exs 14-15).

The final exhibit to the affidavit, number 16, was another affidavit, also by plaintiffs' attorney, which referred to ORCP 47 E and announced that plaintiffs had retained a qualified expert to testify that Fujitec's "modernization" of the elevator was "dangerous and defective," as alleged in the product liability claim, and that Fujitec was "negligent" in maintaining the elevator, as alleged in the negligence claim:

> "4. Since the time of the filing of Plaintiffs' Complaint Plaintiffs' [*sic*] have retained a qualified elevator expert whom they intend to rely on at trial to support their claims that *Defendant Fujitec's modernization of the elevators* in the 911 building, and

> Centric's inspection and repair of those elevators[,] was *defective and dangerous* to an extent beyond that which an ordinary consumer would have expected. 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.
>
> "5. Since the time of the filing of Plaintiffs' Complaint Plaintiffs' [*sic*] have retained a qualified elevator expert whom they intend to rely on at trial to support their claims that Defendant Fujitec was *negligent in their [sic] service and maintenance* of the elevators in the 911 building. 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."

Plaintiffs argued that Fujitec created a "product" when it refurbished the elevator, making it strictly liable under ORS 30.920 for injuries caused by any defect in the elevator; that summary judgment was precluded by their attorney's ORCP 47 E affidavit, even without proof of what caused the elevator to drop; and that, in any event, causation could be established under the doctrine of *res ipsa loquitur*. Pltfs' Response (OJIN 78) at 2-3, 6-7, 10. As a final, fallback argument, plaintiffs asserted that Fujitec is vicariously liable for Centric's alleged negligence. *Id.* at 9-10.

In their reply, Fujitec objected to and moved to strike Exhibits 3-11 and 13 under ORCP 47 D, which provides that affidavits in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein."

Fujitec's Reply (OJIN 85) at 11-13. Among other things, Fujitec asserted that these exhibits were inadmissible because they lacked a proper foundation, were irrelevant, and were hearsay containing hearsay. Thus, Fujitec argued, plaintiffs had failed to present *any* admissible evidence in response to the motion for summary judgment. Admissibility concerns aside, Fujitec argued that none of plaintiffs' exhibits explained the cause of their accidents and, furthermore, that the 47 E affidavit did not create a question of fact on that issue. *Id.* at 1-4, 8-10; Tr 5 (arguing that plaintiffs had burden to prove "what actually failed" and "haven't specified at all what caused that elevator to fail").

The trial court granted Fujitec's motion, saying:

> "As to the negligence claim * * *. As a matter of law, I find that there's no admissible evidence of causation. And Fujitec is not vicariously liable for any of Centric's alleged negligence.
>
> "As to the strict liability claim, * * * [w]ith respect to Fujitec, I'm going to grant that motion. I find as a matter of law that Fujitec did not manufacture or sell or distribute or lease elevator number two or any of its parts."

Tr 28.[1]

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[1] Plaintiffs also alleged that Fujitec was liable for breach of a warranty it had given to the federal government. SER 6. The trial court granted summary judgment to Fujitec on that claim too, SER 26, but plaintiffs did not challenge that ruling on appeal. Meanwhile, Centric moved for summary judgment on the negligence claim against it, but the trial court denied its motion, SER 26, and then stayed the proceedings against Centric. OJIN 105. So, the warranty claim against Fujitec is not an issue on appeal. Neither are the claims against Centric.

The trial court then entered a limited judgment in favor of Fujitec. Plaintiffs appealed that ruling and, as noted, the Court of Appeals affirmed, agreeing with the trial court that "plaintiffs failed to offer any evidence on causation in response to Fujitec's motion for summary judgment and [that] the product liability statute does not apply to Fujitec." *Two Two*, 256 Or App at 786.[2] In the meantime, the trial court has stayed the proceedings against Centric until this appeal concludes. (OJIN 105).

IV. QUESTIONS PRESENTED

1. Was expert evidence required to prove causation – that is, to prove that Fujitec's alleged negligence in maintaining the elevator through 2007, or some defect from the 2001 "modernization," caused it to drop in 2008 while plaintiffs were on board?

2. If expert evidence was required, did plaintiffs' ORCP 47 E affidavit suffice?

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[2] The court rejected without discussion plaintiffs' contention that Fujitec is vicariously liable for Centric's negligence. 256 Or App at 789 n 3. It also rejected without discussion plaintiffs' argument, raised in the summary judgment hearing, Tr 26, that the trial judge had no choice but to deny Fujitec's motion for summary judgment because a different judge had denied a similar motion in a separate case involving a separate plaintiff who allegedly sustained injuries in the same elevator. *Id.* Plaintiffs do not pursue those issues in this court.

3. Does the product liability law, ORS 30.920, apply to plaintiffs' claim against Fujitec for the alleged "defects" in the elevator when plaintiffs were injured?

V. SUMMARY OF ARGUMENT

1. Expert evidence was required to prove causation – that is, to prove that Fujitec's alleged negligence in maintaining the elevator through 2007, or some defect in the elevator created by the 2001 "modernization," caused it to drop in 2008 while plaintiffs were on board. How elevators work and, more importantly, what causes them to malfunction are not matters of common knowledge. Without the aid of experts, reasonable jurors could not find, except through guesswork and speculation, that Fujitec's alleged negligence caused their injuries. Invoking *res ipsa loquitor* does not circumvent the need for expert opinion. That doctrine permits the jury to infer that a defendant was negligent in causing an accident, if the accident was unlikely to have occurred without negligence by that defendant. In this case, however, it's not a matter of common knowledge that elevators don't drop, in the manner alleged here, without some negligence in the maintenance of the elevator two to six months earlier or some defect created in the installation of new components six years earlier.

2. Plaintiffs' 47 E affidavit did not satisfy their need for expert evidence on the causation issue, because the affidavit said that plaintiffs had retained an expert who held an opinion on two different issues, namely, whether Fujitec was negligent and whether the elevator, post-modernization, was defective. Because the affidavit specified the issues on which the expert had opined, the trial court could not presume that the expert would opine on other issues, including causation.

3. The product liability law, ORS 30.920, does not apply to plaintiffs' claim against Fujitec for the alleged defects in the elevator when plaintiffs were injured. A refurbished elevator, affixed to a building, is not a "product" within the meaning of that statute. And, in any event, Fujitec did not "sell" or "lease" the elevator or any of its parts. It merely installed some new parts, which the GSA purchased from someone else, into the original elevator, likewise purchased from someone else.

VI. ARGUMENT

The trial court did not err in granting summary judgment to Fujitec on the negligence claim, because there is no evidence to support a finding that Fujitec's negligence caused the elevator to drop. And it did not err in granting summary judgment to Fujitec on the product claim, because, again, there is no

evidence of causation, and because Fujitec did not sell or lease the elevator or any of its parts. These arguments are addressed in turn below.

A. No Evidence of Causation

On review, plaintiffs reprise their arguments in the courts below. Specifically, they argue that their attorney's affidavit, announcing that plaintiffs had retained an expert to testify on particular issues, precluded summary judgment based on the lack of evidence that Fujitec's negligence or a defect in the elevator post-modernization caused the elevator to drop. In the alternative, they argue that the trial court should have inferred a causal connection between the alleged negligence and plaintiffs' injuries based on *res ipsa loquitor* or the exhibits they offered in their response to Fujitec's motion. Neither argument is well-taken. As explained below, expert testimony was required here, even under a *res ipsa* theory, and the attorney's affidavit did not supply it. Neither did the exhibits.

1. Expert evidence was required

It's well-settled that expert testimony is required when the issues are technical and beyond the knowledge and experience of the ordinary juror, *see, e.g.*, *Vandermay v. Clayton*, 328 Or 646, 655, 984 P2d 272 (1999); *Hall v. State*, 290 Or 19, 27, 619 P2d 256 (1980); *Lynd v. Rockwell Mfg. Co.*, 276 Or

341, 349, 554 P2d 1000 (1976), which describes the situation here. An elevator is a complicated piece of machinery.[3] The average person doesn't know how one works and, more importantly, what could cause one to malfunction the way that this one allegedly did when plaintiffs were injured. Even now, at this late stage of the proceedings, plaintiffs concede that this is a case in which "the exact defect of the instrumentality causing the injury is unknown." Pltfs' Merits Br 34. Without the benefit of expert testimony, reasonable jurors would be no better off than plaintiffs themselves; they could not find, based on common knowledge alone, that Fujitec's alleged negligence caused Elevator No. 2 to drop when it allegedly did. They would have had to resort to speculation, which isn't allowed. *See Lemons et al v. Holland et al*, 205 Or 163, 192, 284 P2d 1041 (1955) ("Verdicts of a jury must be based upon substantial evidence, not upon speculation."). Thus, plaintiffs needed expert evidence to proceed with their claims

Res ipsa loquitur – Latin for "the thing speaks for itself" – was not a way around that problem. That doctrine holds only that jurors may infer that a defendant was negligent in the manner alleged when an accident occurs that, more probably than not, would not have occurred but for that negligence.

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[3] Just modernizing the GSA's elevators cost over $1 million, not including the architectural and engineering fees. *See* Aff in Support of Pltfs' Response to Mot for Summ J etc. (OJIN 79), Ex 2, p 3.

McKee Electric Co. v. Carson Oil Co., 301 Or 339, 353, 723 P2d 288 (1986); *Watzig v. Tobin*, 292 Or 645, 649, 642 P2d 651 (1982). It's not enough, however, to show that the accident would not have occurred but for the negligence of *someone*, not necessarily, or even probably, that defendant. Indeed, in its traditional formulation, *res ipsa loquitor* did not apply unless the accident was of a kind that ordinarily does not occur in the absence of someone's negligence *and* was "caused by an agency or instrumentality within the exclusive control of the defendant." *Mayor v. Dowsett*, 240 Or 196, 214, 400 P2d 234 (1965) (quoting W. Prosser, *Handbook of the Law of Torts* 201-02 (2d ed 1955)); *see also Brannon v. Wood*, 251 Or 349, 355, 444 P2d 558 (1968). Later cases make clear, however, "that the requirement of control by the defendant does not mean that defendant's control must have been exclusive in terms of physical possession." *Pattle v. Wildish Construction Co.*, 270 Or 792, 797, 529 P2d 924 (1974). Even so, "[t]he evidence must be such as to provide a rational basis upon which the trier of the fact can find that the negligence which caused the injury was *probably* that of defendant rather than that of someone else." *Id.* at 798 (emphasis in original).

Whether the evidence is sufficient for that purpose is a question of law for the court. *Pattle*, 270 Or at 798. And, in deciding that question, the usual rules of proof apply, including the rule that expert testimony is required for

matters beyond the ken of lay jurors. The decision "cannot be based on speculation and conjecture and cannot be drawn from probabilities that are evenly balanced." *Hagler v. Coastal Farm Holdings, Inc.*, 354 Or 132, 146, 309 P3d 1073 (2013).

Brannon, a malpractice action, illustrates this point. The plaintiff in that case became paralyzed after an operation in which the surgeon packed cellulose against his spinal cord in an attempt to stop him from hemorrhaging. This court held that the trial judge did not err in rejecting a *res ipsa loquitor* instruction, because, the court said, it's not common knowledge that paralysis does not usually result from that procedure without negligence by the surgeon, and because the plaintiff did not offer expert evidence on that point. 251 Or at 563-64; *compare Mayor*, 240 Or at 214-17 (allowing the plaintiff to rely on *res ipsa loquitur* based on expert testimony that the injury was of a kind which ordinarily would not have occurred in the absence of the defendant's negligence).

Brannon applies here. It's not a matter of common knowledge that elevators don't drop suddenly but for someone's negligence. As this court recognized in *American Village v. Stringfield Lbr.*, 269 Or 41, 44, 522 P2d 891 (1974), "mechanical objects suffer breakdowns every day without someone being negligent." That's certainly true of the mechanical object at issue in this

case. Fujitec's expert opined, without contradiction by plaintiffs, that "the type of elevator failure pleaded by Plaintiffs in their complaint could have occurred through no fault or negligence of anyone, including[] simply because of the age of the elevators." SER 17.

More to the point, it's not a matter of common knowledge that elevators don't drop suddenly without negligence by someone, in particularly someone involved in the elevator's maintenance the way that Fujitec was involved here – two to six months beforehand. Thus, the fact that the elevator malfunctioned when plaintiffs were riding in it does not support a finding that, more probably than not, *someone* was negligent in causing their injuries, let alone a finding that, more probably than not, Fujitec was that someone. *See American Village*, 269 Or at 43-44 (*res ipsa loquitor* did not apply to malfunction of forklift, because malfunction alone did not establish negligence).

To be sure, Fujitec's negligence is one *possible* cause of the elevator's malfunction on the days when plaintiffs were injured. But it's not the only one. The malfunction could have been caused by an engineering or design flaw in the elevator as a whole or some particular part of it. Or it could have been the result of a defect in an original part, one that Fujitec did not install during the refurbishing. Or a defect in a part that Fujitec installed – correctly – but didn't build. Or a part that was unsuited to that machine but the GSA and its

consultants specified it anyway. Maybe the cause was undetectable wear and tear. Or maybe misuse. Yet another possibility is a disruption in the power supply. And no one has ruled out "operator" error. On this record, there really is no telling what happened on the days in question and, therefore, no basis for a jury to find, unaided by an expert, that the Fujitec's participation in the modernization of the elevator or its maintenance of the elevator for a time was, more probably than not, the cause of plaintiffs' later injuries.[4]

Relying on-out-of-state cases, mostly from New York, plaintiffs argue that reasonable jurors could find, without the help of an expert, that elevators do

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[4] Plaintiffs rely on *Rice v. Hyster Co.*, 273 Or 191, 540 P2d 989 (1975), to support their *res ipsa loquitor* theory. Pltfs' Merits Br 37-39. But *Rice* was not a *res ipsa* case. In *Rice*, this court held that the manufacturer and supplier of a forklift could be held liable to a workman who was riding on the forks when they suddenly dropped four feet, commencing at the 15-foot level. 273 Or at 195-96. Although the plaintiff had raised a *res ipsa* theory, the trial withdrew it from consideration by the jury. *Id.* at 198. This court held "that *wholly aside from any theory of res ipsa loquitor* there was substantial evidence to support a finding that defendants were negligent in the maintenance of the equipment, if not its original design and manufacture." *Id.* (emphasis added).

Plaintiffs also rely on *Hickman v. Haughton Elev. Co.*, 268 Or 192, 519 P2d 369 (1974), which involved an elevator door that closed on the plaintiff's arm. The court affirmed a judgment on a verdict against the company that built, sold, installed, and serviced the elevator, finding evidence that it "was negligent in the performance of its duty of inspection, repair and maintenance." *Hickman*, 268 Or at 199. In light of that ruling, it was "unnecessary to decide whether, under the facts of this case, it was proper for the trial court to submit to the jury * * * the theory of res ipsa loquitor, as also alleged in plaintiff's complaint." *Id.* at 201.

not drop like this one allegedly did without *someone* being negligent *somehow* – whether in designing or building the elevator or some of its parts, in installing additional parts, or in inspecting or maintaining the elevator afterwards. *See* Pltfs' Merits Br 31-33. The problem with that argument, of course, is that, when it comes to Elevator No. 2, Fujitec was not responsible for all of those things – only some of them, and only for a time. Fujitec did not design or build the elevator or any of its parts, but only installed some parts that were designed, built, and specified by others. And while it undertook to maintain the elevator post-installation, it did so only for a while; that undertaking ended before the malfunctions that resulted in plaintiffs' injuries. Thus, even if the malfunction proved that someone was negligent at some point in the long sequence of events leading up to plaintiffs' accidents, it doesn't prove that that someone was probably Fujitec.

In sum, plaintiffs could not proceed on their claims against Fujitec without expert evidence. They needed an expert to opine that Fujitec's conduct, either in modernizing the elevator or maintaining it for a while, caused the elevator to drop on them. Even under a *res ipsa loquitor* theory, they needed an expert to opine that elevators ordinarily do not drop absent the negligence attributed to Fujitec.

2. The 47 E affidavit did not suffice to prove causation

ORCP 47 E declares that motions for summary judgment "are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions." Accordingly, the rule provides that when a party opposing a motion for summary judgment "is required to provide the opinion of an expert to establish a genuine issue of material fact," that party can avoid summary judgment by offering an affidavit from its attorney "stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact."[5] The rule thus enables the party to rely on the expert's

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[5] ORCP 47 E reads in full:

> "Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit or declaration shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who 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."

opinion to establish a material issue of fact – and thereby avoid summary judgment – without having to disclose the expert's identity or opinion.

As explained above, plaintiffs were required to provide the opinion of an expert on the "causation" element of their negligence claim. They could have met that burden through an affidavit from their attorney under ORCP 47 E, attesting that plaintiffs had retained a qualified expert who was "available and willing to testify to admissible facts or opinions creating a question of fact." And, in fact, their attorney filed an affidavit that referred to "ORCP 47" and tracked the language of subsection E – sort of. The affidavit said that plaintiffs had "retained a qualified expert whom they intended to rely on at trial." But it didn't say that the expert was in fact "available and willing to testify." It also said that the expert had "rendered an opinion or provided facts"[6] that would, if revealed, be a sufficient basis for denying Fujitec's motion. But the affidavit did not stop there. It went on to describe the issues upon which the expert had formed an opinion – namely, that Fujitec's "modernization" of the elevators and Centric's inspection and repair of them rendered them "defective and dangerous to an extent beyond which an ordinary consumer would have expected," and, in addition, that Fujitec "was negligent in [its] service and maintenance of the

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[6] It's not clear how an expert can "provide facts." Usually, the facts are provided *to* the expert, who then formulates an opinion about them.

elevators in the 911 building." It was reasonable, then, for the trial court to conclude that plaintiffs' unidentified expert had *not* rendered an opinion on other issues, including causation, let alone that he was "available and willing" to testify about them at trial.

That follows from the text of the rule, specifically, the last sentence. That sentence limits the circumstances in which a party can avoid summary judgment by filing an affidavit which states, in the language of the second sentence, that "an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact." Under the third sentence, a party can file a second-sentence affidavit only if the party has an expert who has "actually" rendered an opinion "*which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment*." (Emphasis added.) If the expert has not actually rendered an opinion on *all* issues for which expert testimony is required, then the opinion, if revealed by affidavit, would *not* be a sufficient basis for denying the motion. Thus, where, as here, a party's 47 E affidavit does not track the language of the second sentence, but instead identifies the issues on which the expert has opined, it's logical to conclude that the expert has not actually opined on other, unidentified issues. To put it the other way around, when a party's expert is not able to testify on one or more issues, the party cannot file an affidavit under the

rule *except* by specifying the issues on which the expert will testify. And so, when a party files an issue-specific affidavit, the trial court should conclude that the party does not have an expert for *un*specified issues.

That's been the practice in Oregon for a quarter-century, ever since *Moore v. Kaiser Permanente*, 91 Or App 262, 754 P2d 615, *rev den*, 306 Or 661 (1988), a malpractice case decided not long after ORCP 47 E took effect.[7] The defendants in *Moore* moved for summary judgment on the ground that "they were not negligent in their diagnosis and advice and that [the] plaintiff's return to work did not cause his condition to worsen," *Moore*, 91 Or App at 264, issues on which expert evidence is usually required. In response, the plaintiff submitted his own affidavit, offering his non-expert opinion that his return to work had "aggravated" his medical condition. *Id.* He also submitted an affidavit from his attorney, which said that he "had retained an expert who 'is available and willing to testify to the diagnoses, standard of care and duty of the defendants herein,'" but did not mention two other elements of the claim: causation and damages. *Id.* The Court of Appeals explained that, if the attorney had not identified the issues on which the expert would testify, the

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[7] ORCP 47 E was drafted by the Council on Court Procedures in 1982, *see Due-Donohoe v. Beal*, 191 Or App 98, 102, 80 P3d 529 (2003), but did not take effect until January 1, 1984, pursuant to Oregon Laws 1983, chapter 751, section 1. *See May v. Josephine Memorial Hospital*, 297 Or 525, 527, n 1, 686 P2d 1015 (1984).

affidavit would have sufficed to defeat the motion, but, having identified those issues, the plaintiff could not rely on the affidavit to create a question of fact on causation and damages and thus avoid summary judgment. The court said:

> "The rules purpose, essentially, is to permit a declaration by affidavit that evidence will be provided at trial to create an issue of fact. It does not require that the actual evidence be furnished to contravene what the moving party has shown. * * * The affidavit does not have to recite on what issues the expert will testify. It need state only that an expert has been retained and is available and willing to testify to admissible facts or opinions that would create a question of fact.
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> "However, when, as here, the party enumerates those elements on which the unnamed expert will testify, that enumeration would reasonably lead the defendants and the trial court to believe that plaintiff will not be offering expert testimony on the unenumerated elements. We hold that, when a party chooses to enumerate the elements on which an expert will testify, even though a general assertion would otherwise satisfy the rule, the enumeration must give notice of all elements on which the expert may testify. Therefore, in this case, plaintiff's attorney's affidavit, alone, is only sufficient to demonstrate that there are genuine issues of material fact on the issues of diagnosis, standard of care and duty or foreseeability."

91 Or App at 265.[8]

For 26 years, up to and beyond this case, the Court of Appeals has adhered to *Moore*'s holding that a "47 E" affidavit says that an available-and-willing expert will testify on certain issues, the trial court may assume that the

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[8] *Moore*'s holding is not just logical, it's also practical and efficient. *See Stotler v. MTD Products, Inc.*, 149 Or App 405, 410-13, 43 P2d 220 (1997) (Warren, J, concurring).

expert will testify only on those issues and not others. *See, e.g., Lavoie v. Power Auto, Inc.*, 259 Or App 90, 312 P3d 601 (2013) (affidavit which averred that "Plaintiff has retained unnamed qualified experts who are available and willing to testify to admissible facts or opinions creating questions of fact as to each of the allegations of duty, breach, causation, and damages * * * in plaintiff's proposed First Amended Complaint" did not create a question of fact regarding defendant's affirmative defense); *Two Two*, 256 Or App at 789 ("If the affidavit specifies the issues on which the expert will testify, however, the trial court will presume that those are the only issues on which the expert's testimony will create genuine issues of material fact."); *Piskorski v. Ron Tonkin Toyota, Inc.*, 179 Or App 713, 718, 41 P3d 1088 (2002) ("when * * * an affidavit specifies the issues on which an expert will testify, the court will presume that those are the only issues on which the expert's testimony will create genuine issues of material fact."); *Stotler v. MTD Products, Inc.*, 149 Or App 405, 409 n 3, 43 P2d 220 (1997) ("When * * * an affidavit specifies the issues on which an expert will testify, the court will presume that those are the only issues on which the expert's testimony will create genuine issues of material fact.").

This court should endorse the Court of Appeals's approach to 47 E affidavits, and not just because of its longevity. There are other, good reasons

for it. To start with, *Moore* and progeny are consistent with the language of ORCP 47 E. That subsection says what the affidavit should say to "be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion": it should say that "an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact." If the affidavit says something else – that, for instance, the expert is available to testify on certain issues – it should *not* be deemed sufficient, pursuant to the rule, to controvert the submissions of the moving party. It might still be sufficient for that purpose, depending on what it says and the other issues and evidence. But it's not sufficient simply by virtue of Rule 47 E. To get the benefit of the rule, a party needs to follow the language of it, the same as any other rule or statute. The Court of Appeals holdings are consistent with that principle.

At the same time, the holdings are not *in*consistent with purpose of ORCP 47 E, which, as noted above, and as stated in the rule itself, is to prevent summary judgment motions from being "used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions." *See also* Minutes, Council on Court Procedures, Nov. 14, 1981, 2 (discussing "what is viewed as an abuse of the summary judgment process under ORCP 47": "use of a motion for summary judgment as a discovery device, primarily the

discovery of experts"). *Moore* and the other cases don't defeat that purpose; they don't compel discovery of the nonmovant's experts or their opinions.

Meanwhile, those cases serve the broader purpose of summary judgment proceedings, which is to save the time and expense of a trial in cases where the nonmoving party doesn't have the evidence it needs, expert or otherwise, to obtain a favorable verdict. As this court explained in *Tiedemann v. Radiation Therapy Consultants, P.C.*, 299 Or 238, 245, 701 P2d 440 (1985), "[t]he whole scheme of summary judgment is designed to cut off litigation at an early stage, without subjecting the parties to months or years of extensive and expensive litigation, where it appears that one of the parties has no case or defense." Consistent with that scheme, when a party responds to a motion for summary judgment with an affidavit which says, in all candor, that the party has an expert to testify on enumerated issues, not including an issue for which the party will need an expert at trial, the trial court should be entitled to grant the motion and forgo the unnecessary trial. In those circumstances, the court and moving party should not be forced to endure the time and expense of preparing for and trying the case only to find in the end that, indeed, the nonmovant *doesn't* have a necessary expert on an un-enumerated issue. Relief then is too late in coming. A directed verdict at trial is no substitute for a summary judgment pre-trial, because of the time and expense in between.

The Court of Appeals decisions make good sense, then, in light of the purposes of ORCP 47 in general and ORCP 47 E in particular. At the same time, those decisions don't impose a burden on litigants. If a party has retained an expert to testify on all issues for which an expert is required, it's easy enough to say so. In fact, it's easier than doing what plaintiffs did here: specify the issues on which the expert has opined. All the party has to do is parrot the language of the rule – state that it has retained an expert "who is available and willing to testify to admissible facts or opinions creating a question of fact." Litigants have been doing exactly that ever since *Moore*. *See*, *e.g.*, *Deberry v. Summers*, 255 Or App 152, 156, 296 P3d 610 (2013); *Mittleman Properties v. Bank of California, Nat. Ass'n*, 131 Or App 666, 671, 886 P2d 1061(1994). And without much problem, it would appear. So far as Fujitec can tell, in the past 26 years, no one has run off to the legislature or Council on Court Procedures to clamor for a change in the law to overturn *Moore*.

In sum, this court should conclude that the Court of Appeals correctly interpreted ORCP 47 E in *Moore* and later cases. Accordingly, it should conclude that plaintiffs' 47 E affidavit was not sufficient to avoid summary judgment on the negligence claim, because it stated only that plaintiffs had retained an expert who believes that Fujitec was negligent in maintaining the elevator and not also that its negligence was the cause of plaintiffs' injuries, an

issue for which expert evidence is required, as explained above. Likewise, the court should conclude that the affidavit was not sufficient to avoid summary judgment on the product claim, because it stated only that plaintiffs had retained an expert who believes that Fujitec's "modernizing" of the elevator rendered it "defective and dangerous" and not also that the defect was the cause of plaintiffs' injuries, again an issue for which expert evidence is required.[9]

The result would be the same even if this court were to decline to follow the *Moore* line of cases on the effect of 47 E affidavits that specify the issues on which experts have been retained. Even in that event, plaintiffs' affidavit would still be insufficient to avoid summary judgment, because, as noted, it doesn't comply with one important requirement of the rule: It doesn't say that the expert plaintiffs refer to is "available and willing" to testify. The available-and-willing requirement is an important facet of the rule, because not all experts

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[9] It's possible, of course, for a party to be negligent without causing injury. Injuries occur as often with due care as without. *See Waterway Terminals v. P.S. Lord Mech. Contractors*, 242 Or 1, 54, 406 P2d 556 (1965) ("[t]he cause of a fire is generally unknown, fires commonly occur where due care has been exercised as well as where due care was wanting") (citation and internal quotation marks omitted). That's why negligence and causation are usually separate questions on verdict forms. It's possible, then, for plaintiffs' expert to have concluded that Fujitec was careless in maintaining the elevator through 2007 without also concluding that its carelessness caused the accidents in 2008 in which plaintiffs were injured. Likewise, it's possible for a product to be defective without the defect being the cause of a later accident involving the product. So, again, it's possible for plaintiff's expert to have concluded that the post-refurbishing elevator was defective without also concluding that the defect had anything to do with plaintiff's injuries.

are available and willing. Experts are consulted all the time, and they often give opinions, but not always on the record, sometimes only as background. Indeed, in professional negligence cases, the experts – other members of the same profession – are notoriously reluctant to testify in court against a colleague.

The available-and-willing requirement is not superfluous to the rule. In fact, it appears there twice. The rule requires, first, that the affidavit swear that an expert has been retained "who is available and willing to testify," and, second, that the affidavit be based on the opinion of an expert who has "actually been retained" and is "available and willing to testify."[10]

47 E affidavits are show-stoppers. They terminate summary judgment proceedings without consideration of the evidence, and force the case on to trial, which, as noted, is a time-consuming and expensive proposition. In return for that extraordinary relief, it's not too much to require that parties strictly

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[10] According to the "legislative history" to Rule 47 E, which derives from the proceedings of the Council on Court Procedures, *see Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382 n 2, 8 P3d 200 (2000), *adhered to on recons*, 331 Or 595, 18 P3d 1096 (2001), the original rule did not include the available-and-willing requirement. It required, instead, that the affidavit state that "an expert had been employed by the adverse party or his attorney to testify in the pending action." Minutes, Council on Court Procedures, Jan. 23, 1983, App "A." The "Summary Judgment Subcommittee" drafted the "available and willing" provision, *see* Minutes, Council on Court Procedures, Summ J Subcom, May 8, 1982, Ex A, which the full Council eventually adopted. Minutes, Council on Court Procedures, June 19, 1982, p 1, and Dec. 12, 1982, p 2.

comply with the rule, including the requirement of averring that the unnamed expert is available and willing to testify.

3. The other evidence did not suffice to prove causation

In addition to the 47 E affidavit, plaintiffs' opposition to Fujitec's motion for summary judgment included a variety of documents that were attached as exhibits to another affidavit by their attorney. These documents purport to be plaintiffs' medical records; a journal of elevator incidents kept by a the GSA employee in 2002 and 2003, years before the incidents at issue here; a complaint filed against Fujitec for another alleged elevator accident, this one in 2003; a record of Fujitec's service calls for the elevators in the GSA building; and some correspondence, both email and regular mail, between the GSA, OSHA, and Centric. *See* Aff in Support of Pltfs' Response to Mot for Summ J etc. (OJIN 79), Exs 3-11 and 13. These documents only "purport" to be those things, because they are not properly authenticated. ORCP 47 C provides that affidavits opposing a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant or declarant is competent to testify to the matters stated therein." This affidavit does not demonstrate that the affiant – plaintiff's attorney – has personal knowledge of the exhibits (excepting the

complaint) or is otherwise competent to testify that they are what he says they are. That problem aside, the documents are replete with hearsay and hearsay upon hearsay. For that reason, Fujitec moved the trial court to strike most of the documents, *see* Fujitec's Reply (OJIN 85) at 11-13, and the motion should have been granted.

Even if the documents are admissible, they are not on point. Nothing in them proves that Fujitec's refurbishing or maintenance of the elevator through 2007 caused it to drop on plaintiffs in 2008. As the Court of Appeals remarked after its review of the documents, "[w]ithout recounting that evidence in detail, suffice it to say that [it] did not create a genuine issue of material fact as to whether Fujitec's alleged negligent conduct caused the harm that befell plaintiffs." 256 Or App at 784. At most, the documents prove that there were problems with the elevator -- or at least alleged problems (see Ex 8) – long before the problems plaintiffs experienced. They don't prove that Fujitec was somehow the cause of those problems or the later ones.

B. Fujitec Did Not Sell or Lease the Elevator

Plaintiffs alleged that Fujitec was strictly liable for their injuries under ORS 30.920, which provides, in relevant part:

> "(1) One who *sells* or *leases* any product in a defective condition unreasonably dangerous to the user or consumer or to the

> property of the user or consumer is subject to liability for physical harm or damage to property caused by that condition, if:
>
> "(a) The *seller* or *lessor* is engaged in the business of selling or leasing such a product; and
>
> "(b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold or leased.
>
> "(2) The rule stated in subsection (1) of this section shall apply, even though:
>
> "(a) The *seller* or *lessor* has exercised all possible care in the preparation and sale or lease of the product; and
>
> "(b) The user, consumer or injured party has not purchased or leased the product from or entered into any contractual relations with the *seller* or *lessor*."

(Emphasis added).

Under this statute, liability extends only to one who "sells" or "leases" a "product" with a "defective condition" that causes the harm or damage to someone.

Fujitec did not sell or lease Elevator No. 2 or any of its components. As explained earlier, Westinghouse sold and installed the elevator in the 1960s or 1970s. In 2001, Fujitec "modernized" the elevator, SER 16, a term which presupposes an earlier product, by installing various components, including new solid-state microprocessor controls and a seismic-protection system. But "[a]ll components of the modernization were manufactured and supplied by vendors

and suppliers specified by [the] GSA or its consultants," which included an architect, an engineering design firm, a project manager, and a building manager. SER 16. There is no evidence to the contrary – no evidence that Fujitec sold any of the new components.[11]

As noted, plaintiffs contend, based on the opinion of their unidentified expert, that the elevator, after modernizing, was "defective and dangerous." But they don't explain exactly which part was defective. If it was an original part, one not replaced in the modernizing, it was not a part that Fujitec sold and ORS 30.920 does not apply. If it was in a new part, installed in the modernizing, then, again, it was not a part that Fujitec sold and, again, ORS 30.920 does not apply. If no part was defective, but the installation was improper, creating the hazard, then, once more, ORS 30.920 does not apply,

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[11] In support of their contrary assertion, plaintiffs rely on Exhibit 3 to Fujitec's motion. *See* Pltfs' Merits Br 43. That exhibit is a letter from the GSA to Fujitec's project manager, "commending you and your construction team for exemplary performance on this potentially difficult project." It does not say that Fujitec built or sold the parts it installed during the project.

Plaintiffs also rely on Exhibit 2 to their response to the motion, a copy of Fujitec's contract with the GSA. According to plaintiffs, that document shows that Fujitec 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 in parts, equipment, and labor." *See* Pltfs' Merits Br 51. Actually, the document doesn't say that Fujitec will manufacture or design anything. Nor does it say that the $800,000-plus charge includes "parts." Ex 2 at 3. It says that new controls and a seismic system will be installed, *id.* at 4, but not that Fujitec will build or sell them.

based on this court's decision in *Hoover v. Montgomery Ward*, 270 Or 498, 528 P2d 76 (1974).

The plaintiff in *Hoover* was injured in a one-car accident that was caused, she said, by the carelessness of the defendant, which had recently sold and installed tires on the vehicle. She claimed, in particular, that the defendant had failed to tighten the lug nuts on one of the wheels, resulting in the crash. 270 Or at 499. Her complaint included a claim for products liability under section 402A of the Restatement (Second) of Torts, which this court had recently adopted, *see Heaton v. Ford Motor Co.*, 248 Or 467, 470, 435 P2d 806 (1967), and which the legislature later codified as ORS 30.920. But the trial court declined to submit that claim to the jury. This court affirmed that ruling, concluding that strict liability under section 402A should not be expanded to include negligent installation of a nondefective product. *Hoover*, 270 Or at 501. The court said:

> "In the instant case it is obvious that the product sold to plaintiff was not dangerously defective. Even if we accepted plaintiff's version of the cause of the accident, it was not a dangerously defective tire which caused plaintiff's injuries, but rather the installation of the wheel on the hub and axle of the auto. In such case it might be said that plaintiff's auto became dangerously defective, but certainly not the tire. * * *"

Id. at 502-03.

So, too, here. The elevator might have become dangerously defective after Fujitec installed the new parts. But if the parts were not themselves defective, and if Fujitec didn't sell them, strict liability doesn't apply. *Compare Markle v. Mulholland's, Inc.*, 265 Or 259, 509 P2d 529 (1973) (strict liability theory should have gone to jury in case where defendant sold and installed tire that was itself defective).

In sum, Fujitec did not "sell" the elevator, within the meaning of ORS 30.920, merely by modernizing it and installing parts supplied by others. But, even if it did, Fujitec would not be strictly liable under ORS 30.920, because the modernized elevator is not a "product." ORS 30.920 does not define that term, which, "[i]n its ordinary usage, * * * is capable of broad meaning." *Association of Unit Owners v. Dunning*, 187 Or App 595, 615, 69 P3d 788 (2003). But ORS 30.920(3) provides that ORS 30.920(1) and (2) "shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments *a* to *m* (1965)," and those comments indicate that "product" refers to personal and moveable "chattels" and "goods," terms which do not include structures, such as condominiums. *Dunning*, 187 Or App at 617. Therefore, ORS 30.920 does not apply to a claim for injury or damage caused by defective construction of a building. *Id.* Likewise, it should not apply to injury or

damage caused by the defective construction of a *part* of a building, including an elevator.

In sum, the refurbished elevator was not a "product" under ORS 30.920, and even if it was, Fujitec did not "sell" it. Therefore, Fujitec cannot be held liable under that statute.[12]

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[12] In its *amicus* brief, the Oregon Trial Lawyers Association raises a number of arguments that are not pertinent to the facts of this case. First, OTLA argues that Fujitec could be found liable under ORS 30.920 if its "modernization business necessarily involved the supply of components parts that were defective and caused injury to plaintiffs." OTLA Br 16. Leaving aside the absence of evidence that any part installed by Fujitec was defective or the cause of plaintiffs' injuries, there is no evidence that Fujitec supplied any parts. The evidence shows, instead, that the components Fujitec installed were "manufactured and supplied" by others. SER 16.

Next, OTLA argues that Fujitec could be held liable under ORS 30.920 for the sale of a defective product even if the product was "specifically requested by the purchaser." OTLA Br 17. But, again, there is no evidence that Fujitec sold a product, defective or not.

OTLA goes on to argue that "[o]ne whose business includes selling products 'manufactured and supplied by other parties' is still subject to strict liability for [the] dangerously defective conditions of those products." OTLA Br 18. Once more, there is no evidence that Fujitec sold, or is in the business of selling, the components it installed here, let alone that any of those components was defective.

Finally, OTLA argues: "[A]ssuming Fujitec could be considered the 'seller' of the modernized elevator, the fact [that] it refurbished an old elevator to create the modernized elevator would pose no obstacle to strict liability." OTLA Br 19. It should be clear by now that that assumption is untenable.

VII. CONCLUSION

The Court of Appeals and trial court should be affirmed.

Respectfully submitted,

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Certificate of Compliance with ORAP 5.02(2)(d)

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I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Thomas M. Christ

Certificate of Filing and Service

I certify that I filed the attached Brief by Electronic filing on January 24, 2014. I further certify that on the same date, I served a copy of this Brief on the following lawyers by using the electronic service function of the eFiling system (for registered eFilers) or by first-class mail (for those who are not registered eFilers):

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