UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CLIFFORD HEARNE, an individual, Plaintiff, vs. HUB BELLEVUE PROPERTIES, LLC, a Delaware Limited Liability Company; CBRE, Inc., a Delaware Corporation; JOHN and JANE DOES 1 – 10, individually and the marital communities comprised thereof; DOE entities 1 – 10, limited liability entities, Defendants.	NO. 2:16-CV-01010-JCC PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT **NOTE ON MOTION CALENDAR:** **DECEMBER 27, 2019**

I. MOTION

COMES NOW plaintiff and moves this Court for an order of partial summary judgment determining (1) defendant Hub Bellevue Properties, LLC, is negligent under the common carrier doctrine and liable for all plaintiff's damages proximately caused thereby, [1] and (2) that plaintiff's medical treatment as identified more specifically below was reasonable and necessary for the injuries sustained in the event at issue in this case.

[1] Plaintiff submits it is important a jury has a context of what defendant's negligence was and how it caused plaintiff's injuries. That would likely not even require one hour.

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II. OVERVIEW

On March 1, 2016 plaintiff was riding an elevator down in the Expedia Building[2] when it came to an emergency stop due to a loss of power. Hub had years of notice of the problem relating to the entire building and all elevators, admits it was concerned about its effect on safety, but did nothing to address it.

The building's elevator maintenance company (Otis Elevators) repeatedly told the building, before Mr. Hearne's March 1, 2016 incident, there was a power problem inside the building causing its elevators to come to a stop. The building's maintenance superintendent admitted under oath he understood Otis was reporting a problem after power had "already gone through some aspects of the building."

Despite that, defendant's employees and agents took the litigation position it is not responsible for the elevator's stop on March 1, 2016, because it was supposedly externally by the power supplied by Puget Sound Energy. There is no evidence of that.

PSE has certified there was no external interruption of power on March 1, 2016. Further, on six other days the building had reported elevator stops because of a loss of power, PSE certified there was no interruption of power to the building on those days.

Otis, who maintains the elevators for Hub, admitted through a 30(b)(6) speaking agent that if PSE certifies there was no interruption of its supplied power, it agrees the cause of Mr. Hearne's March 1, 2016 event must be internal to the elevator system.[3]

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[2] Expedia is a tenant. The building is 333 – 108th Avenue Northeast, Bellevue. The building is branded the Expedia Building and for ease of reference that nomenclature may be used herein. HUB is the building owner.

[3] Otis designated as it speaking agent the actual mechanic who services the Expedia Building.

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Plaintiff's expert opines failing to take curative action in response to the power problem effecting all the elevators was a failure of care and the cause of plaintiff's March 1, 2016 event.

Defendant's elevator expert's deposition has been taken. It is no exaggeration to say he agreed with every single fact and what they mean as set forth by plaintiff's expert. Despite that, in his report and at deposition, engaged in a variety of broad conclusions asserting the defendant has no fault. However, upon questioning he admitted the facts were the opposite.

A few words about defendant's expert are required. After 2.5 years of litigation, for the first time in November 2019 defendant claimed through its expert – in contradiction of all its employees and agents – there was no power loss on March 1, 2016. Standing on the shoulders of ignoring the undisputed evidence, the expert asserts because there is no evidence of a power loss to the elevator on March 1, 2016 the cause must be the elevator itself *but he cannot say what the malfunction was because defendant destroyed – weeks after March 1, 2016 - the evidence* (fault codes) that would allow him to do so. That despite the fact defendant was given a litigation hold letter within days of the event and defendant's legal requirement under the WACs was to take the elevator out of service and preserve all evidence until it could be inspected by the State.

The evidence is so clear plaintiff need not rely on spoliation but defendant cannot profit from its destruction of evidence. Plaintiff is entitled to relief the least of which is a presumption the destroyed evidence was *adverse* to defendant.

III. FACTS

Defendant is the owner of what is commonly called the "Expedia Building" in Bellevue, Washington. Expedia is the prime tenant.

Defendant contracted with a variety of third parties for services: Otis Elevators for maintenance, ABM for security services, etc. Plaintiff sued defendant for the breach of its non-

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delegable duty as the land owner. Where relevant, plaintiff will identify third parties however all were agents of defendant; their failures and knowledge are the defendant's.

A. Facts Of March 1, 2016

While riding down an elevator at approximately 5:17 p.m. on March 1, 2016, Mr. Hearne experienced what he thought was the elevator dropping. The lights went out, the elevator shook and made loud scraping noises, he felt as though the elevator was dropping. Ex. #1, Dep. of Hearne, 16:18-26:15. Eventually all was quiet. It was dark. Id.

A mechanical voice came on saying security was alerted. A short time later, a human voice said they were responding. A short time after that, the lights came back on. Id. The elevator went up a floor. The doors opened and closed. The elevator went to the lobby. Id. Defendant's elevator expert agrees that is exactly what happens when an elevator "in flight" experiences a loss of power. Ex. #15, Stevens, 39:17-40:21; 61:15-62:10.

When the elevator returned to the lobby Mr. Hearne went to the security office and reported he was injured when the elevator stopped. Ex. #1, Dep. of Hearne, 16:18-26:15.

The property's security staff recorded in their log the event as caused by "a short power spike or brown out." Ex. #2.

Defendant's Chief Building Engineer, Craig Mikkila, *admits* the event happened and that it was caused by power going out for a short period of time, less than five seconds. Ex. #3, Mikkila, 13:21-14:3 and Ex #12.

Despite knowing immediately of the event and it caused injury, the building did not take the elevator out of service and advise the State so there could be an inspection and determination of cause, despite Washington law requiring it. Ex #3, Mikkila, 85:20-87:4. Defendant's elevator expert (Mike Stevens) agrees that violates elevator safety laws; he admitted as soon as defendant

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received Mr. Hearne's report the WAC on elevators required defendant to "lock (it) out," "notify" "the State L&I inspector," Ex. #15, Stevens, 59:17-25, who would have required any error codes to have been preserved. Id. At 60:11-19.

The defendant did not even inform Otis of the malfunction for weeks; the building's maintenance supervisor admits that is not acceptable. Mikkila, 92:21-93:6. ("Q: Do you think that's acceptable? A: No, it's not.")

B. Defendant Had Years Of Notice Of A Power Problem Stopping Elevators

Mikkila, the Chief Building Engineer, admits the building has had a power problem for years, causing an interruption up to ten times a year:

> Q: …[H]ow frequently do these power bumps happen at the Expedia Building?
>
> * * *
>
> A: More than once a year.
>
> Q: Okay.
>
> A: And then you're – and I just – I can't give you a true number 'cause it –
>
> Q: Could it be ten times a year?
>
> A: It could be. It could – I mean, it's just hard to say.

Ex. #12, Mikkila, p. 19-20. He calls any interruption of power a "bump." He alternately called it a "flicker," a "spike," or "an interruption of power." Id. at 18:6-8, 82:5-83:8.

The building's lead security employee, who has worked at the building since it was built, admitted the building has had that problem at least "a couple of times a year" since the building was built. Ex. #4, Dep. of Salinas, 31:15-32:7. The building was built in 2008. Ex. #5.

There is no dispute but that if there is an interruption of power, the elevators will come to an emergency stop. Ex. #6, Dep. of Otis 30(b)(6), 44:13-16. Ex. #15, Stevens,13:13-16.

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Indeed, there need not be a full power outage; if there is only a twenty-percent reduction in power, they will emergency shut down. Ex. #6, Otis, 52:23-54:12; 117:13-18; 137:9-138:2. ("…the elevator's going to shut down immediately."

Although defendant's expert speculated there was no power interruption March 1, 2016 in order to assert the elevator stopped due to some still unknown mechanical issue, *he admitted* he would rely on a report of a power outage from the building's staff:

> Q: How about an authorized and trusted agent of the owner of the building?... He said I was here, I filled out a report, we had a power outage. Would that be reasonable to rely on?
>
> A: Yeah.

Ex. #15. Stevens, 30:22-31:14. That is exactly what the owner's agents recorded in the log happened when Mr. Hearne's elevator stopped. Ex. #2, Log. Defendant's expert also admitted multiple elevators stopping could only be caused by a power interruption. Id. 88:8-13. That is also what defendant's employees/agents recorded happened when Mr. Hearne's event happened. Ex. #2. ("… several elevators came to an immediate stop/drop.")

In addition to Hub's admission of longstanding notice, Otis Elevators, the building's elevator maintenance contractor, reported to the building at least 5 times in the two years before Mr. Hearne's March 2016 incident the elevators were stopping *because of losing power* and specifically a loss of internal power – a problem inside the building.

On November 11, 2015 Otis responded to a stopped elevator and gave the building the following report; Ex. #7, Invoice:

> ELEVATOR 6 STUCK ON THE LOBBY LEVEL WITH DOORS CLOSED. NOT EQUIPMENT RELATED. FAULTS SHOW POWER SPIKE TO INCOMING 3 PHASE POWER. CHECKED OPERATION AND RETURNED TO SERVICE.
> 1.00 REG MECH HRS @ 225.10

The building's maintenance supervisor admitted he understood that to mean the power

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problem was *internal*. "Phase 3 power" is the power after it goes through the building's main bus from PSE, and is subsequently routed to the elevator:

> Q: But when he (referring to the OTIS mechanic who wrote the record) says incoming phase -- pardon me -- "incoming three phase power," do you know what he's talking about.
>
> A: Well, that -- to me, I would -- to me, in the way I read that, it's the power coming into the -- into the machine itself.
>
> Q: Okay. So that would have to already go through some aspects of the building before it gets there, right?
>
> A: Sure. Correct.

Ex. #3, Mikkila, p. 84:7-15.

There was another power issue on October 28, 2015 that caused an elevator to stop. And another outage on October 31, 2015. And another on November 2, 2015. Ex. #7, Invoices. And another on March 24, 2014 with a report of "Elevator 5 stuck on lobby, doors open… Not equipment related – power failure." Ex. #8, Report.

Those are only the *recorded* power losses. Mikkila admits *there are more* but defendant does not record outages stopping elevators unless there is a complaint. Ex. #3, Mikkila, 101.

Otis admitted at deposition that if PSE certifies the power losses are not on its end, the problem must and can only be inside the system itself:

> Q: If there is no power loss, if Puget Sound Energy has sworn under oath that it's researched all of its records, it's talked to all of its technicians, it's checked all of its boards; there was no power loss, no brownout, no nothing, in terms of its supplying of power, can you identify any cause for an elevator suddenly stopping, such as elevator 5 that Mr. Hearne was in, other than a cause within the elevator system?
> * * *
> A: No. No.

Ex. #6, Otis 30(b)(6), p. 125.

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That is precisely what PSE has sworn under oath; Ex. #9, Dec. of Rabon, para. 2. ("I could identify no power interruption in the PSE system related to the Expedia building on or around March 1, 2016.") PSE also certified as to the five elevator shut downs before Mr. Hearne's also caused by electrical interruptions, plus one that happened after, none of them were external to PSE. Ex. #10, Declaration (second) of Rabon, p. 5-6.

Defendant admits it knew the cause of its transitory loss of power "could be multiple things" inside the building. Ex. #3, Mikkila, p. 69.

The speaking agent for Otis, who defendant testified it relies on and defers to for a determination of cause, admitted a common cause of this type of building wide issue is too "large (of a) load on the building (electrical) bus… And that just comes to mind because I have absolutely seen that happen." Ex. #6, Otis 30(b)(6), 51-52, 104. That is exactly what PSE testified the problem is. Ex. #10, paras 19-20. After setting forth in detail the building's electrical history as admitted by defendant, Mr. Rabon (a PSE project engineer) testified:

> [I]t is more likely than not that the building is generally running at the upper capacity of its transformer(s), and for whatever reason on any given day, sometimes it is drawing too much power and power will flicker or even go out for a short period of time… [T]hat has nothing to do with PSE's supply of power. It is caused by how the building is managing its power usage.

Id. He indicated what defendant describes it experiences "is classically" an example of "the building drawing too great a load on its transformer or some other internal issue." Id.

Defendant's expert Stevens agrees too large a power draw will cause elevators to shut down; he testified to a specific example he investigated. Ex #15, Stevens, 65:3-11.

The building concedes these power problems and elevator stoppages have caused it to have a concern over elevator safety:

> Q: [Y]ou're having elevators suddenly stop and injury

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> accidents. So does that not make you wonder whether Otis is doing its job properly?
> * * *
> You're the building – chief building engineer. That raises no concern with you at all?
> * * *
>
> A: No, I have concern.

Ex. #3, Mikkila, 50:25-51:13.

But despite that concern, the building admits it has done nothing to address it:

> Q: Fair to say, as the chief building engineer, you've done nothing to determine whether there's some type of larger systemic problem at the Expedia Building causing the elevators to suddenly stop, have you?
>
> A: No.

Id. 46- 47 , 63-64.

C. There Is No Question Of Fact But That Defendant Breached Its Standard of Care

The building admits the condition causing Mr. Hearne's March 1, 2016 event was the same as all the preceding events. The "spike" Otis told the building in November 2015 was from the internal, "phase 3 power" after the building's main electrical bus, is how the building described the cause of Mr. Hearne's event; as a power "spike." From its internal log, Ex. #2:

Full Description of Occurrence:
AT APPROX. 3:20PM ON 3/1/16, THE BUILDING EXPERIENCED A SHORT POWER SPIKE OR BROWN OUT WHICH CAUSED SEVERAL ELEVATORS TO COME TO AN IMMEDIATE STOP/DROP. AN EXPEDIA EMPLOYEE REPORTED AN INJURY DURING THIS TIME PERIOD WHILE IN ELEVATOR TE-5T. HE REPORTED THAT HE MAY HAVE HYPER-EXTENDED HIS RIGHT KNEE WHEN THE ELEVATOR DROPPED AND COULD FEEL IT MESSED UP THE TENDONS IN HIS CALF. HE REFUSED TREATMENT WHEN OFFERED BY SECURITY.

The building did experience a power problem. However, there is not merely a lack of evidence it was external to the building, the only admissible evidence is it was internal to the building and the same type of electrical fault the building had been experience for years. Supra.

Otis admits these short power losses are the "worse thing for an elevator." Ex. #6, Otis 30(b)(6), 137-138.

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It is novel for defendant to protest it exercised care, ever. Even after Mr. Hearne's March 1, 2016 event, the building admits PSE told it directly the power problem that caused Mr. Hearne's sudden emergency stop was not external to PSE.

> Q: What did they (PSE) tell you?
>
> A: They didn't have any reports of an actual power outage.

Ex. #3, Mikkila, 17:13-16. Even with that knowledge, defendant admits it did nothing – not before Mr. Hearne's March 1, 2016 incident or after – to determine the cause:

> Q: Fair to say, as the chief building engineer, you've done nothing to determine whether there's some type of larger systemic problem at the Expedia Building causing the elevators to suddenly stop, have you?
>
> A: No.

Mikkila, p. 46- 47; 63-64.

Plaintiff's elevator expert's declaration is detailed and need not be set forth verbatim here. Ex. #11, Dec. of Johnson. With facts explaining why he reaches his conclusions, he explains:

1. The building failed its duty of care by not keeping records of elevator events caused by a power problem necessary to allow it to track and identify problems effecting the elevators. P. 7

2. The building failed its duty of care as an operator of elevators to preserve evidence of the cause of Mr. Hearne's event by never, not even to date, reporting the event to the State for a State inspection nor to Otis promptly.

3. Even without keeping sufficient records, the information the building had would put a reasonable operator of elevators on notice of a condition effecting the safe operation of its elevators that required correction. P. 8-9.

4. The building failed to ensure an appropriate and safe power supply to its elevators; that was a duty it undertook even in its contract with Otis. P. 8.

5. As the building's agent, Otis agreed to provide service sufficient to "maintain a comfortable elevator ride with smooth acceleration, retardation and a soft stop." A shrieking, emergency stop due to an ongoing power supply problem is not that. Id.

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6. The safe operation of the elevators cannot be separated from the infrastructure supporting them and it is unreasonable for the building and its contractor Otis to merely consider the elevators in isolation and conclude they were safe for use without considering the power supply to them.

7. The building, both directly and through its agent Otis, took no step to fix the interruptions of power, their duty of care required them to identify the cause, remedy it, and but for their failure to do so Mr. Hearne's event would not have happened. P. 11

Defendant's own expert Stevens agreed it is unreasonable for a building owner to diagnose the cause of elevators stopping due to an interruption of power:

> A: … they should look into it and investigate it, absolutely… I wouldn't ignore it. I would definitely investigate it, look into it, yeah.
>
> Q: Right. Because ignoring it would be unreasonable?
>
> A: I agree. I agree.

Ex. #15, Stevens, 73:15-74:12.

Otis agreed "protocol" required both it and defendant to determine the cause of defendant's elevators stopping:

> Q: [W]ouldn't it be protocol to figure out every time why an elevator suddenly stopped while it's in movement with passengers on it?
>
> A: To the best of your ability, yes.

Ex. #6, Hatch, 49:7-10.

D. <u>There Is No Question Of Fact But That Plaintiff's Treatment Was Reasonable And Necessary For The Injuries Caused By The Elevator Event At Issue</u>

Defendant has not disclosed opinions for any medical expert. Defendant sent a laundry list "disclosure" identifying a variety of experts' names and subject matter areas but: (1) disclosed no opinions in response to plaintiff's discovery requests, and (2) has provided no reports as required by the Rules. The only evidence is plaintiff's.

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Chrisophe Hofstetter, MD, at the University of Washington Medical Center Neurology department diagnosed Mr. Hearne with a multi-level cervical stenosis that was lit up by the elevator event:

> patient was in an elevated work on 1 March 2016. Apparently the elevator started falling and then came to his sudden stop. During the impact the patient had extreme flexion of his neck and deviation of his right lower extremity. Immediately after the impact the patient felt right lower extremity pain and weakness. He also developed rapidly neck pain and numbness and weakness in upper extremities. Patient at that point looked is worked up in

Ex. #16, Harborview, p. 1692

> **RADIOGRAPHIC EVALUATION**
> MRI of the cervical spine obtained on 3/31/2016 was reviewed. It depicts a congenitally narrow cervical spinal canal. With severe cervical spinal cord compression at 4/5 and 5/6. There is severe compression and deformity formation of the cervical cord and T2 hyperintensity.

Id, 1695, He was also diagnosed with a agrevataion of preexisting DJD of his right knee:

> (M17.31) Post-traumatic osteoarthritis of right knee
> Plan:
> 1. Suspect flare up of DJD related to injury in elevator shaft fall

Id. 2778.

He scheduled a C3-C7 laminoplasty. (Dec. of Wilkinson, p. 3-4). On July 18, 2016 Mr. Hearn underwent a partial C2, T2 laminectomy and a C3-C7 right open lower laminoplasty with a structural allograft. Again, his UW surgeon indicated this was necessitated by the injuries caused by the elevator accident. 284-286. See also, Ex #17, Dec. of Wilkison, p. 4.

Following the second surgery, Mr. Hearne was admitted for several weeks of in-patient care at Shoreline Health and Rehab Center. Id. at p. 4.

Mr. Hearne's pain and symptoms continued. Dr. Hoffstetter determined the elevator accident caused a cauda equina injury at L3-L4.

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Since the patient has recovered from his cervical myelopathy he is now noticing that his trauma has also aggravated his cauda equina compression. Most likely during the elevator fall the patient did not only pinch his spinal cord but also his cauda equina at L3/L4. The patient has severe central stenosis in this area. Given that his spinal cord function has recovered he is not able to perceive the symptoms that his central stenosis at L3/4 is giving him. The patient has clear cut neurogenic claudication. I would therefore recommend surgical decompression of L3/L4 area. This will certainly help the irritated nerve roots to recover. I explained to the

Ex. #16, Harborview, 1224. Additional PT was recommended but the pain continued.

Despite a variety of more conservative treatment, ultimately Dr. Hoffstetter recommended and conducted an additional laminectomy on October 30, 2017. He identified the same ongoing pain complex caused by the "severe stenosis at L3-L4" he previously diagnosed as having been lit up fom elevator event. Id. and 3262-3261. See also Ex. #17, Wilkinson, p. 5.

Mr. Hearne had a variety of other treatments including mental health counseling for panic attacks and anxiety from the elevator event and ultimate a pain complex caused by his complicated back injury. Id. at 5-6.

Karen Wilkinson, as an ARNP, is permitted to render medical opinions no differently than an MD. Although at trial plaintiff intends on offering the direct testimony of Dr. Hoffstetter, he also intends on offering Ms. Wilkinson for both medical testimony explaining the other interrelated therapies and to provide an opinion on the reasonableness and necessity of his treatment as required for the injuries from the elevator accident.

Her declaration explains Mr. Hearne's treatment reasonable and necessary to treat his injuries from the March 1, 2016 elevator event was $259,358.60. Wilkinson, Ex. #17. Plaintiff has future treatment expenses but those are reserved until trial.

IV. AUTHORITY

A. The Defendant Owed The Duty of a Common Carrier

Defendant owes the nearly strict liability duty of a common carrier.

> In this state, the operator of an elevator is a common carrier of passengers, and is held to the degree of care imposed upon carriers

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> generally. One who maintains or operates an elevator must exercise with reference thereto the highest degree of care compatible with their practical operation.

Pruneda v. Otis Elevator Co., 65 Wn. App. 481, 485 (1992). That is a non-delegable duty:

> Delegating maintenance to an independent contractor does not relieve owners and operators of escalators from the high degree of care they, as common carriers, owe to their passengers. Common carriers have historically been held vicariously liable for injuries to their passengers based upon a nondelegable duty of care.

Knutson v. Macy's W. Stores, Inc., 1 Wn.App.2d 543, 547 (2017); see also Pruneda, supra. At 488. ("The fact that the (owner) contracted with Otis to perform the actual maintenance and servicing of the elevators does not mean that Otis assumed (for the owner its) common carrier standard of care in its contract.")

The common carrier duty requires an elevator operator "to protect its passengers from the danger of injury from malfunctions or defects of which they [the defendants] knew or should have anticipated from facts and circumstances known to them." Houck v. Univ. of Washington, 60 Wn. App. 189, 196 (1991).

In anticipation of an argument by defendant it is not an insurer, that is agreed. A common carrier "is not liable for injuries received from ordinary jolts and jerks, necessarily incident to the mode of transportation, which are not the result of negligence." Gentry v. Greyhound Corp., 46 Wn.2d 631, 633 (1955) (underline added). However, when injury occurs because of "some conduct on the part" of the carrier, that causes an event "outside that of ordinary experience," the carrier is liable. Cf. id.

B. There Is No Question of Fact But That Defendant Breached Its Duty of Care

1. SUMMARY JUDGMENT PRINCIPLES

Normally basic principles would not be cited but the following bears noting. Mere

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contradiction or denial cannot create a question of fact:

> [T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2510 (1986).

> Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Ricci v. DeStefano, 557 U.S. 557, 586, 129 S. Ct. 2658, 2677, 174 L. Ed. 2d 490 (2009).

A weak or whiff of contradiction does not create a question of fact:

> [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative summary judgment may be granted.

Anderson, 477 U.S. as 249–50, 106 S. Ct. at 2511, 91 L. Ed. 2d 202 (internal citations omitted).

A non-moving party must present specific evidence to create a question of fact:

> [W]hen a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial.

Id. at 477 U.S. 242 at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d 202.

Facts must "be admissible in evidence" to be considered and based on "personal knowledge" or otherwise "competent" to be admitted as testimony. Rule 56(c)(4).

Given defendant's expert's broad conclusions contrary to admitted and objective facts, as well as his factual admissions at deposition contrary to his report, it bears noting an expert's base conclusions without sufficient support of fact do not create a question of fact:

> [I]n the context of a motion for summary judgment, an expert must back up his opinion with specific facts. The factual basis for the expert's opinion must be stated in the expert's affidavit and although the underlying factual details need not be disclosed in the affidavit,

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the underlying facts must exist.

Guidroz-Brault v. Missouri Pac. R. Co., 254 F.3d 825, 831–32 (9th Cir. 2001).

Guidroz affirmed the District Court's excluding on summary judgment a party's expert witness's opinions because, although his theory "was good as far as it went," "there was no factual basis for the assumption(s)" that were necessary and made by the expert to render his conclusions. Id. at 830.

Although addressing expert testimony under a more specific Daubert analysis, Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) explained an expert's opinion "connected to existing data only by the ipse dixit of the expert" is not admissible. Id. at 146. An expert's "self-serving assertion that his conclusions" are based on the evidence are insufficient when the evidence is to the contrary. Henricksen v. ConocoPhillips, 605 F.Supp.2d 1142, 1154 (ED Wash. 2009).

2. DEFENDANT SPOILIATED EVIDENCE

> A party's destruction of evidence qualifies as willful spoliation if the party has some notice that the documents were potentially relevant to the litigation before they were destroyed.

Leon v. IDX Sys. Corp., 464 F.3d 951, 959 (9th Cir. 2006).

Where prejudice exists from spoliation, the District Court must fashion a remedy. Prejudice lays where "the [spoiling party's] actions impaired [the non-spoiling party's] ability to go to trial or threatened to interfere with the rightful decision of the case." Id. In Leon, the 9th Circuit upheld the District Court's outright dismissal of the spoilating plaintiff's case, noting "less drastic sanctions are not useful" because a jury instruction creating a "presumption in favor" of the innocent party "would leave (them) equally helpless to rebut any material (the spoiliating party) might use to overcome the presumption." Id. at 960. Leon articulated five factors supporting the sanction of dismissal. Id. 960.

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There is no dispute defendant spoilated evidence its own expert agrees is material. Plaintiff's prior attorney sent a specific litigation hold letter identifying elevator logs; it was sent certified mail and signed received by defendant's property manager. Ex. #18, Dec of Johnson. That was notice enough. However, even without it, defendant's expert agreed once Mr. Hearne reported the event, defendant had a duty under the WACs to take the elevator out of service and notify L&I so it could inspect the elevator – and if that was done L&I would have ordered the logs preserved. Finally, defendant through its maintenance superindent admitted defendant had a duty to notify L&I and it was unacceptable it did not. Ex #3, Mikkila, 85:20-87:4.

Plaintiff need not even rely on spoliation given the undisputed evidence. However, spoliation matters for two reasons.

First, to the extent defendant wants to rely on opinions from its expert in response, he conceded he could *not* state on a "more-likely-than-not basis" any of the other causes he speculated *might* have been the cause of Mr. Hearne's event because of defendant's spoliation: "I have no way of knowing that without those detailed fault codes." Ex. #15, Stevens, 75:21-76:14; 57:2-22. It is undisputed Otis deleted all the codes weeks after the litigation hold letter was received. Ex. #6. Hatch, 147:19-148:19; Ex. #15, Stevens, 58:3-13 (Identifying them being erased when Otis later installed a TV screen on the elevator. That was weeks later. Dec. of defense counsel, Ex. #6).

Defendant cannot profit from its destroying evidence by offering its expert's speculation of possible alternate causes when it destroyed the very evidence that could disprove them.

Second, Otis agreed although a loss of power is not a fault per se, an elevator stopping because of a loss of power may create fault codes that could allow a technician to piece together the stop was due to a loss of power. 35:18-43:15. Otis said codes such as "phase imbalance,

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phase lost, low AC" may be recorded, Ex. #6, Hatch, 38:1-39:1, because when power is lost, the machine "will report what it saw last." Id. at 36:1-37:1. Other possibilities are "a safety switch" fault might be seen because as it looses power, the system will "say, oh, well, there's no power on that switch." Id. at 42:5-21. Or, it may show a "drive" malfunction. Id. Even defendant's expert agrees with that. Ex. #15, Stevens, 61:4-9:

> Q: If there was a power outage… that might have thrown off a code inside the REM that we could have seen after the fact; right?
>
> A: Yes.

Thus, as Otis admits the destroyed code evidence could prove an electrical interruption *consistent* with defendant's past experience and thus be undisputable evidence Mr. Hearne's event was caused by the same defect defendant long had notice of, it must be assumed that is what those codes would show if not destroyed by defendant.

Finally, it is critical to understand there are two types of reports in this case. The REM (remote elevator monitoring) system is Otis's detailed error log; it is detailed information kept on each elevator control chip (Ex. #6, Hatch, 45:15-19) a technician can download and view on a handheld device. Id. at 25:6-11; 26:1-10. What appears on the REM does *not* appear on an EMS report. Id. 53:8-16. The EMS (elevator monitoring system) is a more generic, report that only goes to the building to report on the general availability of a building's elevators. Id. at 49:1-14. Otis said, the EMS "is made for a building security guard to look at a computer." Id. at 148:2-7. The codes that were destroyed by defendant were REM codes. Id. at 148:4-21.

In terms of relief, plaintiff asks this Court to fashion a remedy that is appropriate. It would be appropriate under Leon to dismiss defendant's liability denial as it knowingly destroyed evidence that (1) would contradict its denial and (2) prove it was liable. All five factors in Leon

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are present. But if not that, the Court should assume the destroyed evidence was adverse to defendant and (1) preclude it from offering expert speculation sheltered from the actual error codes and (2) assume the fault codes would be consistent with plaintiff's expert's report.

Ultimately, plaintiff does not need spoliation – the evidence is that clear. However, defendant's deletion of the fault codes is such a bold act a remedy is requested.

2. THERE IS NO DISPUTE OF FACT BUT THAT THE MARCH 1, 2016 ELEVATOR EVENT WAS CAUSED BY A LOSS OF POWER INTERNAL TO THE BUILDING OR ELEVATOR SYSTEM

The building offered in discovery its Building Engineer's written statement he believes the historic loss of power is external. Ex. #12.[4] That creates no question of fact the problem was external but does concede years of notice of the problem. He has no experience, education, or knowledge to render an expert opinion on PSE's power supply. His CV indicates his training is in "refrigeration," "boiler" operation, and "welding." Id. When asked about his written statement, he admitted at deposition he has no expertise to render opinions. Ex. #3, Mikkila, 55:23-56:4. Unqualified assertion by defendant's employees is inadmissible. Rule 56(c)(4).

However, to take that a step further, Otis is/was defendant's agent for maintaining the elevators and defendant's Building Engineer agreed that if Otis says something is so, it must be so. Ex. #3, Mikkila, 31:14-24; 41:20-24. (Asking him the cause of the malfunction: "its not me to determine; it's (for) Otis to determine." 43:12-23, 45:17-46:5.

A 30(b)(6) speaking agent for Otis was deposed on a variety of topics including "any malfunction of Otis Elevators… on March 1, 2016… this includes but is not limited to an

[4] Plaintiff does not concede this statement, and more specifically its opinions, are admissible. It is not competent in terms of foundation nor is it under oath. However, it is the only 'evidence,' to use the term loosely, the defendant has offered these electrical problems are external to the building thus it is offered here in candor to the Court to identify the issues for this motion. Plaintiff offering it here is not offering it as admissible evidence; plaintiff is only attempting to be transparent and identify the issue.

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explanation and identification of how (Hearne's) elevator functioned in the afternoon of March 1, 2016. Ex #13, 30(b)(6) notice.

Within that scope, Otis agreed if PSE indicates there was no external problem with the power it supplied, the problem must and can only reside the elevator system itself – Otis could identify no other cause; Ex. #6, Otis 30(b)(6), p. 125:

> Q: …can you identify any cause for an elevator suddenly stopping, such as elevator 5 that Mr. Hearne was in, other than a cause within the elevator system?
>
> A: No. No.

Plaintiff need not even rely on his own expert.

4. THERE IS NO QUESTION OF FACT BUT THAT DEFENDANT HAD NOTICE

Defendant's admissions are above. Defendant's lead security officer admitted the building had known power interruptions at least "a couple of times a year" since the building was built. Ex. #4, Dep. of Salinas, 31:15-32:7. The Building Engineer admitted it happened so often he could not keep track, it could be upwards of 10 times a year. Ex. #3, Mikkila, p. 19-20.

Defendant also admits specific notice of interruptions *internal to the building* were causing the elevators to suddenly stop: (1) Mikkila admitted Otis reported in November 2014, 4 months before Mr. Hearne's event, an elevator stopped due to losing power after power entered the building, e.g., it was an internal issue, Ex #3, Mikkila, p. 84:7-15; (2) Otis told the property that directly in its report, Mr. Mikkila's admission notwithstanding, Ex. #7; (3) there were a variety of service calls and reports for elevators stopping due to losing power with no determination the loss was outside the building, Ex. #7 and 8.

Finally, although plaintiff is not duty bound to show defendant appreciated the problem and the danger posed (it is enough a reasonable common carrier would), the defendant's

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maintenance manager admits the elevator's electrical problems in fact caused a concern over safety and Otis's maintenance of the elevators. Ex. #3, Mikkila, 50:25-51:13 ("I have concern.").

5. THERE IS NO QUESTION OF FACT BUT THAT THE BUILDING BREACHED ITS STANDARD OF CARE

As a common carrier, defendant had a duty to exercise the "highest degree of care compatible with the (elevators') practical operation." Pruneda, 65 Wn. App. at 485. Yet, (1) with years of notice of a problem – both general and specific with specific notice as recent as four months before Mr. Hearne's event of an identical elevator stoppage, described the same (as a "spike")[5] due to an internal power issue, and (2) an actual in-fact concern over safety, defendant admits it did nothing to address it. Mikkila, p. 46- 47 , 63-64.

It is enough there is no dispute any reasonable elevator operator would have had notice. See Johnson Dec. However, defendant admits both Otis told it this was an internal problem before Mr. Hearne's situation (Ex. #3, Mikkila, 84:7-15) and it had an actual concern over safety. Id. at 50:25-51:3. It admits notice. And, it admits it did nothing. Id. at 46-47, 63-64.

What is more, defendant's own expert agreed at deposition a building owner, such as defendant, is "unreasonable" by ignoring and not attempting to resolve elevators stopping due to an electrical issue – even the suspicion of that. Ex. #15, Stevens, 73:15-74:12..

And, Otis admitted protocol required defendant and Otis to have determined the cause of these stopping elevators when it happened. Ex. #6, Otis, 49:7-10. It undisputed they never did;

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[5] As noted above, the defendant and its agents loosely interchange the terms spike, brown out, bump, flicker, to describe any interruption of power. Ex. #3, Mikkila, 18:6-8; 82:5-83:8. Regardless of the word used, the maintenance manager agreed what he is describing is an interruption of power. Id. Plaintiff observes this here, both to call out the fact that defendant at times uses different words does not mean it is describing different conditions and to underscore the fact defendant lacks any expertise to offer opinions as to what the cause of its power interruptions are – defendant uses any word that suits despite the fact that to those with actual expertise those words have different meanings.

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they never looked to determine on a systemic level what the problem was. Supra. The only thing done was to call Otis to determine if the elevators were working then – after the power came back on but no effort was made to determine what the originating problem was. Id.

On its face, defendant breached its standard of care as a common carrier.

While defendant is not liable for the "ordinary jolts and jerks, necessarily incident to the mode of transportation," it is liable for events "outside that of ordinary experience." Gentry, 46 Wn.2d at 633. Gentry held Greyhound, as a common carrier, was not liable for injuries caused inherent to operating a bus on a bumpy road but was liable for abnormal stops and jostling. Id.

A sudden loss of power, loud scrapping and shaking of the elevator cab, a sensation of dropping followed by a sudden emergency stop as Mr. Hearne experienced on March 1 is "outside that of ordinary experience." Gentry. Otis's speaking agent admitted what Mr. Hearne experienced was "not something that occurs frequently in (an) elevator behaving properly." Ex. #6, Hatch, 143:15-144:5.

Plaintiff need not even rely on his expert's opinions. However, his declaration is detailed: the building and Otis had notice of an ongoing condition effecting the safe operation of its elevators it had a duty to cure, it did not, and that was a breach of its standard of care. But for that breach, Mr. Hearne's March 1, 2016 injury would not have happened. Ex. #11.

B. There Is No Question Of Fact But That Plaintiff Incurred $259,358.60 In Medical Damages That Were Reasonable And Necessary To Treat His Injuries

Plaintiff's medical records are admissible business records. See ER 803(6). Further, they are properly considered under Rule 56. See Rule 56(c)(1)(A). Medical records for which there is no dispute as to their authenticity, are admissible on summary judgment. See Birdwell v.

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Gomez, 97 F.3d 1458 (9th Cir. 1996).[6]

ARNPs are permitted to make medical diagnoses. See Frausto v. Yakima HMA, LLC, 188 Wn.2d 227, 237 (2017) ("Washington's statutory scheme expressly permits ARNPs to independently diagnose conditions and prescribe medical, therapeutic, or corrective measures"). See also WAC 246-840-300. (An ARNP may "…establish diagnoses by patient history, physical examination, and other methods of assessment" and "manage health care by identifying, developing, implementing, and evaluating a plan of care and treatment for patients.").

Here, Wilkinson, ARNP, is within the scope of her practice to consider the medical evidence and records of others, and explain the course of Mr. Hearne's medical treatment. In addition to providing a narrative discussion, she has specific experience in researching and determining whether the amount of charges for a given service are reasonable within the area as is explained in her declaration.

The medical records and Wilkinson's declaration establish the treatment identified in Wilkinson's declaration, including the surgeries and other modalities, were medically necessary to treat the injuries Mr. Hearne sustained in the elevator event. Wilkinson's declaration continues by explaining the amount of the charges was reasonable. Those charges are $259,358.60. Ex. #17, Dec. of Wilkinson.

When "medical testimony is uncontroverted that… medical expenses were reasonable and necessary, resulting from the accident," they must be awarded. Hills v. King, 66 Wn.2d 738, 741 (1965).

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[6] A record's custodian declaration sworn under oath is included the exhibit of medical records.

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Liability aside, defendant has no evidence to rebut either Wilkinson's declaration or plaintiff's medical records and bills demonstrating plaintiff's injuries were caused by the elevator incident and his treatment was reasonable and necessary to treat those injuries. Defendant has disclosed no testimony or evidence on this. As such, plaintiff's evidence cannot be controverted. Plaintiff is entitled to partial summary judgment on his injuries as identified in Wilkinson's declaration and past medical special damages in the amount of $259,358.60.

V. CONCLUSION

Reasonable minds could not differ. There is no question of fact. Plaintiff is entitled to an order summarily determining defendant was negligent and liable for plaintiff's damages proximately caused thereby including but not limited to the damages and injuries identified in Wilkinson's declaration.

DATED this 5th day of December, 2019.

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