

STATE OF MICHIGAN
COURT OF APPEALS

CONNIE L. CHRISTIAN,

Plaintiff-Appellant,

v

BRE/SOUTHFIELD, L.L.C. and
THYSSENKRUPP ELEVATOR
CORPORATION,

Defendants-Appellees.

UNPUBLISHED

October 26, 2006

No. 260361

Oakland Circuit Court

LC No. 2002-043482-NO

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action entered after a jury determined that neither defendant was negligent. We affirm.

Plaintiff alleged that she was injured when an elevator at the Southfield Town Center malfunctioned. She brought a premises liability claim against defendant BRE/Southfield, L.L.C., and a claim for ordinary negligence against defendant ThyssenKrupp Elevator Corporation.

On appeal, plaintiff argues that the trial court erred by refusing to give her proposed jury instruction, which was modeled after SJI2d 6.01. We disagree. Claims of instructional error are reviewed de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence. *Id.* at 83-84.

Plaintiff's proposed instruction provided:

The Defendants in this case have not offered certain documents, namely a record of the work performed by Mr. Straka in response to complaints registered regarding elevator no. 8 on the morning of April 9, 2002. If you believe that such documents were created and are under the control of Defendants and that no reasonable excuse has been furnished for their non-production, then you may infer that the information contained in the documents would be adverse to the Defendants.

SJI2d 6.01 (failure to produce evidence or a witness) is appropriate when evidence under the control of a party could have been produced, but was not, and no reasonable excuse for not producing the evidence was shown. In this case, however, there was no evidence that the records in question actually existed. The elevator mechanic testified that he did not prepare a work ticket for his earlier inspection of the elevator. Moreover, the elevator log, which was not generated or maintained by defendants, contained many other time period gaps in addition to the period in question here. Although plaintiff's expert testified that better records should have been maintained, there was no evidence that any missing records actually were generated or were in defendants' control. Under the circumstances, the trial court did not err in declining to give the proposed jury instruction.

Plaintiff also argues that the trial court discredited her case by instructing the jury that the remarks of counsel were not evidence. Plaintiff offers no authority for the suggestion that the trial court erred in giving this standard instruction. It is well settled that the statements of attorneys are not evidence. *Dalm v Bryant Paper Co*, 157 Mich 550, 556; 122 NW 257 (1909); *Tobin v Providence Hospital*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Thus, there is no merit to this claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot