NO. 18-1220

In the Supreme Court of the United States

CLEVELAND FRANKLIN,

Petitioner,

v.

AMERICAN ELEVATOR INSPECTIONS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

BRIEF IN OPPOSITION

MARY L. GRAHAM
COUNSEL OF RECORD
HEARD & MEDACK, P.C.
(OF COUNSEL)
9494 SOUTHWEST FREEWAY
SUITE 700
HOUSTON, TX 77074
(713) 772-6400
MARY.GRAHAMATTY@AOL.COM

NATHAN M. RYMER
RYMER, ECHOLS, SLAY
& NELSON-ARCHER, P.C.
2801 POST OAK BLVD.
SUITE 250
HOUSTON, TX 77056
(713) 626-1550
NRYMER@RESNLAW.COM

MAY 20, 2019 *COUNSEL FOR RESPONDENT*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether this Court should grant the petition to review a straightforward application of long-established summary judgment standards.

RULE 29.6 DISCLOSURE STATEMENT

American Elevator Inspections, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

"Traditional" motions for summary judgment in Texas, as with motions for summary judgment under the Federal Rules of Civil Procedure, require the movant to show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Cf.* FED. R. CIV. P. 56(a) *with* TEX. R. CIV. P. 166a(c). A defendant is entitled to summary judgment if it conclusively negates at least one element of the plaintiff's claim. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130 (Tex. 2018), *reh'g denied* (Dec. 14, 2018). In reviewing a traditional summary-judgment motion, Texas appellate courts view the evidence "'in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not.'" *Id.* (quoting *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013)). Likewise, a federal reviewing court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*)).

Petitioner Cleveland Franklin asks this Court to resolve a nonexistent problem in which he perceives that Texas state courts incorrectly decide, and review decisions on, motions for summary judgment by misapplying properly stated summary judgment law in favor of corporations and "powerful interests." Pet.19. The substance of Franklin's complaint to this Court

is that the Court of Appeals of Texas misapplied the correctly stated requirement that courts view summary judgment evidence in the light most favorable to the nonmovant. From there, Franklin ineffectually contrives his question presented: "[W]hether to survive a motion for summary judgment, a plaintiff must anticipate and preemptively rebut every possible interference [sic] favoring the defendant, no matter how implausible." *See* Pet.i. American Elevator freely concedes this is not required under Texas summary judgment law, nor is it what occurred in this case. Moreover, this question answers itself because an obviously incorrect statement of law *is not* the law. Consequently, it is unlikely this issue will recur frequently, and addressing it in this forum would not have any significant impact on the determination of any summary judgment motion in any jurisdiction.

The question presented and subsidiary issues Franklin raises are not of the character this Court typically considers because they involve alleged "misapplication of a properly stated rule of law," for which this Court rarely grants review. *See* Sup. Ct. R. 10. Neither do they present any compelling reasons that merit review. *See id.*

Franklin does not even assert that the decision below conflicts with any decisions of (1) this Court or any other federal court; (2) any other state supreme court; or (3) any other Texas state court. This is instead a fact-bound case in which the court of appeals correctly applied established summary judgment law to the particular, unique facts of this case, which would have limited precedential value. And there is no reason for this Court to devote its limited resources

to review a state appellate court's application of settled Texas summary judgment law to a unique set of facts.

Finally, there are independent grounds, which the court of appeals did not reach, that support summary judgment on the causation element of Franklin's negligence claim under both the traditional and no-evidence summary judgment standards. American Elevator established that its alleged misstatement, that Franklin's residential elevator had a telephone at the time it was inspected, did not proximately cause the injuries he sustained from breaking out of his stalled residential elevator where, by his own admission, *he knew the elevator did not have a telephone for nearly two years before the elevator malfunctioned*.

This Court's review is not warranted, and the petition should be denied.

STATEMENT OF THE CASE

1. American Elevator witnessed[1] the December 2010 inspection of Franklin's residential elevator, which certified that the elevator had a working telephone during the inspection and otherwise complied with Rule 5.3.1.19 of the ASME A17.1 (American Society of Mechanical Engineers Safety Code for Elevators and Escalators) Safety Code for Elevators

[1] Franklin and even the Texas court of appeals have mistakenly stated that the builder hired American Elevator to "inspect" the elevator. *See* Pet.3; Pet.App.2a.

and Escalators. Res.App.44a ¶ 6 (Osina Affidavit); Res.App.8a ¶ 8 (McPartland Affidavit); *see* TEX. HEALTH & SAFETY CODE ANN. § 754.011(1) ("'Acceptance inspection' means an inspection performed at the completion of the initial installation or alteration of equipment and in accordance with the applicable ASME Code A17.1"). According to the inspection report, the elevator complied with all applicable City of Houston codes and standards, which required installation of a telephone in the elevator. Pet.App.3a.

Franklin claims that he was injured in September 2012 after breaking out of his malfunctioned elevator because the elevator had no telephone—a fact of which he admitted he was aware since the inspection nearly two years earlier. Pet.App.3a (appellate opinion); 28a-30a ¶¶ 5-6, 11 (Franklin Affidavit).

2. Franklin sued American Elevator for negligence, among other claims, for allegedly incorrectly certifying that the elevator had a working telephone during the inspection. Pet.App.2a. The substance of Franklin's complaint was that American Elevator violated Rule 5.3.1.19 of ASME Code A17.1:

> Emergency Signaling Devices. A telephone connected to a central telephone exchange shall be installed in the car and an emergency signaling device operable from inside the car and audible outside the hoistway shall be provided.

See Pet.App.2a-4a.

American Elevator filed both traditional and no-evidence[2] motions for summary judgment. Pet.App.3a. In support of its traditional motion, American Elevator submitted an affidavit from its employee, Mitchell Osina, who witnessed the inspection. Pet.App.3a-4a. Osina testified that there was a standard, handheld, hard-wired telephone, which dialed properly, sitting on the floor of the elevator cab at the time of the inspection. Pet.App.4a. According to Osina, the telephone met the City of Houston requirements. Pet.App. 4a. American Elevator also submitted an expert affidavit and report from engineer Patrick McPartland, who examined the elevator and the control room after the incident and spoke with Osina. Pet.App.4a. McPartland explained in his affidavit and report that the elevator control room had several pairs of telephone wires, with one pair stripped as if it had been removed from terminals. Pet.App.4a. In his report, McPartland stated that wires from the elevator terminated inside the control room in two screw terminals with the unused wires long enough to reach these terminals. Pet.App.4a. Based upon these facts, McPartland concluded that the telephone on the floor of the elevator during the inspection had been removed after the inspection. Pet.App.4a.

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[2] Texas Rule of Civil Procedure 166a(i) allows "a party without presenting summary judgment evidence" to move for summary judgment "on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). "The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Id.*

In response to American Elevator's motion for summary judgment, Franklin submitted his deposition and affidavit testimony as well as a report from Beau Harmer, who installed a telephone in the elevator after the incident. Pet.App.4a. Franklin testified that, in visiting the house before and after the day of inspection, he did not observe a telephone in the elevator. Pet.App.4a. Franklin did not attend the inspection. Pet.App.9a. Harmer testified as follows:

> I had to cut open the wall of the elevator to install the telephone and run the wires through the panels in the elevator. . . . There was no telephone installed in the elevator prior to me doing this new installation because the wall of the elevator did not have any cut-out space for a telephone install, and the telephone wires were not run all the way into the elevator for a telephone installation.

Pet.App.23a ¶¶ 3-4.

The trial court granted American Elevator's traditional and no-evidence motions for summary judgment without stating the grounds. Pet.App.18a-19a.

3. Franklin appealed the summary judgments to the Texas Court of Appeals. Pet.App.5a. In a majority opinion, the court affirmed the grant of the traditional motion for summary judgment on the grounds that (a) American Elevator's evidence conclusively established that it did not breach its duty in inspecting the elevator; and (b) Franklin failed to raise a genuine issue of material fact as to whether there was a standard, handheld telephone sitting on the floor of the elevator during the inspection. Pet.App.8a-9a. The dissenting

opinion asserted that Franklin raised a fact issue on whether the elevator lacked a telephone at the time of the inspection, reasoning that: (1) Franklin's testimony that he saw no telephone in the elevator before or after the day of the inspection was circumstantial evidence that there was no telephone in the elevator at the time of the inspection; and (2) Harmer testified that his telephone installation was a new installation and not a replacement, that he had to cut open the elevator wall to install the telephone, and that the telephone wires were not run all the way into the elevator for a telephone installation. Pet.App.12a.

The Texas Supreme Court denied Franklin's petition for review. Pet.App.1a.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT INVOLVE CONSIDERATIONS THAT NORMALLY PROMPT REVIEW ON CERTIORARI BUT RATHER INVOLVES THE APPLICATION OF CORRECTLY STATED STATE LAW, FOR WHICH THIS COURT RARELY GRANTS REVIEW.

"Justices have repeatedly claimed that the Court's role is not to remedy incorrect legal conclusions of the lower courts." Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 288 (2013). This Court should deny the petition because this case presents only the question whether the court of appeals properly applied correctly stated and established Texas summary judgment law. *See generally* Pet.12-19; Sup. Ct.

R. 10. And where the asserted error consists of "the misapplication of a properly stated rule of law," as here, petition is "rarely granted." *See* Sup. Ct. R. 10. And that is precisely the error Franklin asserts here—that the court of appeals ignored evidence that created a genuine issue of material fact, and failed to view the evidence in the light most favorable to him, in contravention of correctly stated and established summary judgment law. *See* Pet.12-19. Franklin specifically states in his petition that he will argue summary judgment was wrongfully granted if this Court grants his petition. Pet.12.

Moreover, Franklin has not presented a compelling reason to warrant review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). Supreme Court Rule 10 addresses considerations informing the Court's discretionary review on a writ of certiorari. *See id.* And although the rule's list of considerations is not exhaustive, this case does not satisfy any of them. *See id.*

Franklin asserts that this Court should grant his petition because Texas courts allegedly routinely misapply summary judgment law so as to favor corporations and "powerful interests." Pet.19. The courts allegedly do this by improperly viewing the evidence in the light most favorable to *the movant*. He does not cite any other case in which this type of error allegedly occurred. At any rate, he maintains that, as a result of this alleged departure "'from the accepted and usual course of judicial proceedings,'" Texas courts as a whole allegedly violate nonmovants' Seventh Amendment right to a jury trial. Pet.10 (quoting Sup. Ct. R. 10(a)). This is premised entirely

upon Franklin's unfounded belief that the court of appeals in this case erroneously concluded the elevator had a telephone during the inspection. However, as discussed more herein, American Elevator submitted testimony that there was a working telephone on the floor of the elevator during the inspection, and Franklin admits that none of his evidence conflicts with that of American Elevator.

This case does not involve the court of appeals deciding any federal question. *See* Sup. Ct. R. 10(b)-(c). In addition, Franklin does not present any split in authority. *See* Sup. Ct. R. 10(a).

Accordingly, this case does not warrant the Court's review.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED SUMMARY JUDGMENT BECAUSE FRANKLIN FAILED TO SUBMIT EVIDENCE THAT CREATED A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE ELEVATOR LACKED A TELEPHONE DURING INSPECTION.

Franklin broadly and vaguely claims that "Texas courts need to be corrected" because summary judgment against him was "absurd and abusive." Pet.12. He asserts that summary judgment for American Elevator was improperly granted, and then affirmed, when Texas state courts misapplied established summary judgment jurisprudence in Texas. *See* Pet.12-13. Specifically, Franklin contends that his direct and circumstantial summary judgment evidence established there was no telephone in the elevator during inspection and established that the lower courts improperly viewed the parties' evidence and its "conflicting inferences" in the

light most favorable to movant American Elevator. Pet.12-14.

Franklin acknowledges that the court of appeals' majority opinion recites the applicable summary judgment law. *See* Pet.13, 17-18. That opinion states: "We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not." Pet.App.6a. In conducting this review, however, courts "cannot disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018). In other words, "[i]n determining whether a material fact issue exists, [courts] must take as true all evidence favorable to the plaintiff, indulging every *reasonable* inference and resolving any doubts in the plaintiff's favor." *Id.* (emphasis added).

A. Franklin's Testimony Regarding the Absence of a Telephone in the Elevator Before and After the Day of the Inspection Neither Conflicts With Nor Negates American Elevator's Evidence That the Elevator Had a Telephone During Inspection.

ASME A17.1, Rule 5.3.1.19 requires that "[a] telephone connected to a central telephone exchange shall be installed in the car and an emergency signaling device operable from inside the car and audible outside the hoistway shall be provided." American Elevator employee Mitchell Osina testified that there was a standard, hard-wired, handheld telephone sitting on the floor of the elevator, which

dialed out, at the time of the inspection. Res.App.44a ¶ 6 (Osina Affidavit). Franklin misleadingly complains that Osina's testimony is not the same as stating that a telephone was installed in the car, tested, and was verified to work under the guidelines of Rule 5.3.1.19. *See* Pet.14. However, Franklin selected only a portion of Osina's testimony, ignoring the critical parts about the standard, hard-wired telephone in the elevator that dialed out, his witnessing the mechanic from Tejas Elevator Company "inspect and test [the] telephone," and Osina's testimony that the "telephone complied with the applicable ASME 17.1 standard," which would necessarily include any subordinate sections, such as Rule 5.3.1.19. *See* Res.App. 44a ¶¶ 5-6 (Osina Affidavit).

So the evidence does show that the telephone was tested and found to be in compliance with Rule 5.3.1.19. Moreover, given the ordinary definitions of "install," the evidence further shows that the telephone was "installed" in the elevator when it was placed on the floor and found to be working, indicating it was connected. "Installed" is defined as "placed." *See* https://www.definitions.net/definition/installed (last visited on May 8, 2019). "Install" also means "to place in position or connect for service or use." *See* https://www.dictionary.com/browse/install (last visited on May 9, 2019). At any rate, Franklin did not preserve any objection as to whether the telephone, because it was on the elevator floor, met the definition of "installed." *See generally* Res.App.14a-30a (Franklin's appellate brief).

Franklin also faults the court of appeals for supposing that a telephone on the elevator floor would satisfy an elevator safety inspection, stating

that Osina and McPartland did not testify that it was "an accepted safety procedure for an emergency telephone to be sitting unmounted on the floor of an elevator." Pet.12-13. However, Franklin failed to raise this issue below, so it is not preserved for this Court's review. *See generally* Res.App.14a-30a (Franklin's appellate brief).

Critically misstating the evidence, Franklin also asserts that he established there was no telephone in the elevator vis-à-vis his testimony that "there was no phone in the elevator *at any time*." Pet.14 (emphasis added). However, this was *not* Franklin's testimony. To the contrary, his affidavit provides that he visited the property "before and after" the day of the elevator inspection and "did not observe any telephone in the Elevator." Pet.App.28a ¶ 5 (Affidavit of Franklin). He has acknowledged he was not present at the inspection. Pet.App.9a.

Franklin admits that "[t]here has been no evidence produced by Respondents to dispute the testimony of the Petitioner." Pet.14. *That is entirely the point* and one that Franklin has refused to see. Accepting his testimony as true, it only speaks to what he saw at some point before and after the day of the inspection—not to the impermanent placement of the telephone on the floor of the elevator *during the inspection*. The problem is that Franklin wanted the court of appeals, and now wants this Court, to draw unreasonable inferences from his testimony—to conclude that the absence of an impermanent object (a handheld telephone) in the elevator at some time before and after the day of the inspection proves that the moveable telephone was not in the elevator during the inspection. His

testimony, even taken as true and viewed in the best light, simply cannot justify such a leap. And it is because the court of appeals very logically declined to make this leap that Franklin asserts the court improperly disregarded his testimony as not addressing "the exact moment of the inspection." Pet.12-13. But the conditions existing at the exact moment of the inspection *are* the issue here. Franklin muses that the court of appeals "alleg[ed] a wrinkle in time wherein the phone exists for a temporal moment during the inspection and then disappears immediately thereafter." Pet.13. Though not quite this fanciful, the evidence does show that the telephone on the floor during the inspection was later removed. Pet.App.9a.

The following hypothetical illustrates the flaw in Franklin's logic. If Franklin testified that he drove by a neighbor's house on a Monday and a Friday one week and did not see a bicycle in the yard, that testimony would have no bearing on whether the bicycle was in the yard on Wednesday of that week. It is no indicator either way. But Franklin would have it mean that the bicycle definitely was not in the yard on Wednesday of that same week, a day he did not drive by. The bicycle is impermanent, transitory, and easily moveable, like the handheld telephone in this case. Assuming further, what if another neighbor testified that she *saw* the bicycle in the yard sometime on Wednesday of the week at issue? Franklin's testimony that he did not see a bicycle in the yard on Monday or Friday does not contradict the neighbor's testimony. And his testimony would not justify leaping to the conclusion that there was no bicycle in the yard on that Wednesday.

Given that Franklin's testimony and any reasonable inferences did not conflict with American Elevator's evidence, the court of appeals was correct to credit to American Elevator the testimony that there was a working telephone in the elevator during the inspection.

Franklin states that the court of appeals also absurdly abused its discretion by "suppos[ing] a telephone on the floor would be enough to satisfy an elevator safety inspection," and he asks rhetorically whether there is "a person in the United States of America who would not be terrified to enter an elevator with a telephone sitting on the floor[.]" Pet. 13. But if the telephone works, as it did here, the issue would be a matter of aesthetics and not safety. That Franklin determinedly rode an elevator for nearly two years knowing it had no telephone is surely more terrifying than the placement of a working telephone on the floor of an elevator.

B. That Post-Incident Telephone Installer Harmer Made a First-Time Telephone Installation *in the Elevator's Wall* Does Not Conflict With Evidence the Elevator Had a Telephone on the Floor During the Inspection.

Franklin submitted Harmer's affidavit in response to American Elevator's motion for summary judgment. Franklin incorrectly states that Harmer is "the only neutral witness in the case, who was not a paid expert." Pet.14. First, American Elevator disagrees that, because an expert is paid for his time, he is somehow necessarily biased and presumed to lie. Second, and at any rate, American Elevators did not pay Osina for his participation in this case via his affidavit. Franklin also incorrectly asserts that Harmer "installed the first

and only *telephone system* in the elevator." Pet. 14 (emphasis added). "Telephone system" suggests something more involved than a mere "telephone," but there is no evidence indicating a broader telephone "system" was required in the elevator at the time of inspection. Harmer does not even reference "telephone system" in his affidavit, and the existence of such a telephone "system" was not at issue in the court of appeals.

At any rate, Harmer testified that he "installed a new telephone in the elevator" after the incident. *See* Pet.App.23a ¶ 2. He further testified that "[t]here was no telephone installed in the elevator prior to [his] doing this new installation *because the wall of the elevator* did not have any cut-out space for a telephone install, and the telephone wires were not run all the way into the elevator for a telephone installation." Pet.App.23a. ¶ 4. (emphasis added). In addition to Osina's and McPartland's testimony, American Elevator submitted McPartland's engineering report. It provides that McPartland, while inspecting the control room on the roof, "noticed several pairs of telephone wires with one pair of wires stripped as if they had been removed from terminals . . . . [and that] phone wires for the elevator terminate inside the controller in two s terminal . . . . [and that the] unused wires were long enough to reach these terminals." Res.App.3a.

Franklin concludes that the court of appeals chose among "competing inferences" and discredited Mr. Harmer's testimony by theorizing that a telephone need not be wired through a wall to work, that there need not be a cutout in which to house a telephone, and that an elevator with a telephone on the ground would pass inspection. Pet.12, 15. However, inferences

must be reasonable, and Harmer's affidavit does not support the inference Franklin believes the court of appeals should have drawn—that elevator telephone wires *must* come through an elevator's wall and that a telephone must be mounted to an elevator wall. *See* Pet.12. Moreover, Franklin did not submit any evidence suggesting an elevator telephone cannot be on the ground in order to pass inspection, and Franklin did not preserve this issue for review because he failed to raise it below.

In his petition, Franklin ponders whether the court of appeals, in concluding that the telephone wire need not come through the wall of the elevator, may have believed that an elevator telephone could be wireless, a notion that Franklin indicates is not plausible given his perception that mobile signals drop in elevators. A brief search of the Internet reveals that wireless (cellular) elevator phones do, in fact, exist. *See* https://www.rathmicrotech.com/wireless.html (last visited on May 13, 2019). Alternatively, Franklin sarcastically ponders whether the court of appeals may have believed in the seemingly fantastical notions that there could be "invisible [telephone] wires" or that there could be "some form of alternative energy that makes telecommunications feasible." Pet.13.

The court of appeals correctly found that Harmer's testimony that there were no wires running all the way into the elevator is consistent with McPartland's testimony that one pair of wires in the control room was stripped but not attached to the terminals. *See* Pet.App.9a-10a. Each expert's testimony is not mutually exclusive; both can exist and be true. So the court correctly concluded that Franklin's summary judgment

evidence, even viewed in the light most favorable to him, did not contradict American Elevator's evidence that there was a working telephone on the floor of the elevator during the inspection. The court, therefore, appropriately held that Franklin failed to raise a genuine issue of material fact that American Elevator breached its duty in inspecting the elevator. *See* Pet.App.9a.

C. The Court of Appeals Appropriately Declined to Draw Unreasonable Inferences in Franklin's Favor.

1. The Court of Appeals Did Not Misapply Summary Judgment Standards and Did Not Set a Dangerous Precedent for Courts Across Texas and the Rest of the Nation.

Franklin contends that this case involves "conflicting interpretations of the evidence" and "conflicting inferences" from the evidence such that a jury may have reasonably concluded that there was no telephone installed in the elevator during the inspection. *See* Pet.12, 14, 17. Franklin claims that the court of appeals, in "disregarding" his evidence and viewing the evidence in the light most favorable to American Elevator, created dangerous precedent that allows judges to determine factual issues. Pet.12, 17, 18. He urges this Court to correct Texas courts "before such egregious misapplication of the standard in favor of corporations and powerful interests spreads across the state of Texas and nationwide." Pet.19.

Franklin acknowledges that the court of appeals' majority opinion recites the applicable summary

judgment law. *See* Pet.13, 17-18. That opinion states: "We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not." Pet.App.6a. In conducting such review, however, courts "*cannot disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not*." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) (emphasis added)).

Franklin likens this case to *Tolan v. Cotton*, where this Court found that a lower court failed to view summary judgment evidence in the light most favorable to the nonmovant. Pet.19 (citing *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)). This Court further found that, "[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Tolan*, 572 U.S. at 657 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Here, by Franklin's own admission, the summary judgment evidence does not conflict, but rather he complains that it gives rise to conflicting interpretations and inferences. To avoid summary judgment, Franklin was required to produce "'sufficient evidence supporting the claimed factual dispute [to] be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Anderson*, 477 U.S. at 249 (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). If the nonmovant's evidence is merely colorable or is not significantly probative, summary judgment is appropriate. *Anderson*, 477

U.S. at 249-50. The court of appeals here did not fail to credit evidence that contradicted key facts. Osina's direct testimony there was a telephone was not contradicted, by Franklin's own admission, the evidence he submitted and it was not contradicted by some unreasonable inference any court would have to stretch to reasonably make work.

Inferences drawn from the evidence must be reasonable. But it is unreasonable to infer that the elevator could not have a telephone sitting on the floor during the inspection that was later removed, which would account for why Franklin saw no telephone in the days after the inspection. It is also unreasonable to infer that, because there was never a *wall installation* of an elevator telephone before the incident, there could not have been a working telephone *on the elevator floor* at the time of the inspection. Further, it is unreasonable to infer that, because telephone wires were not run through the elevator's wall panels at the time of the inspection, there could not be a working telephone connected to telephone wires in some manner other than through the elevator wall (1) where the control room had several pairs of telephone wires with one pair of wires stripped as if they had been removed from the terminals, and (2) where the unused wires were long enough to reach those terminals. *See* Res.App.3a (McPartland Report); Res. App.8a ¶ 8 (McPartland Affidavit).

While he contends that the court of appeals failed to view the evidence in the light most favorable to him, Franklin's real complaint is that the court failed to contort its interpretations of the evidence and failed to draw unreasonable inferences from the

evidence in a way that inappropriately favored him. Because the court of appeals appropriately declined to do these things, it correctly found the evidence did not create a genuine issue of material fact as to whether there was a telephone in the elevator during the inspection, of course even assuming Franklin's evidence was true.

2. The Court of Appeals Did Not Misapply Summary Judgment Standards and, Thus, Did Not Violate Franklin's Seventh Amendment Rights to Have a Jury Determine the Facts.

Franklin attempts to inflate this case's significance by asserting that his Seventh Amendment right to trial by jury was violated and is so fundamentally important that this Court should determine the propriety of summary judgment in this case. *See* Pet.11-12. However, Franklin acknowledges that the procedural device of summary judgment does not violate the Seventh Amendment when used properly. *See* Pet.17 (citing *Fidelity & Deposit C. of Maryland v. U.S.*, 187 U.S. 315, 320 (1902)). A proper grant of summary judgment does not violate the right to a jury trial because this right exists only with respect to disputed issues of fact. *Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003) (citing *Fidelity & Deposit Co.*, 187 U.S. at 319-20); *see In re Peterson*, 253 U.S. 300, 310 (1920) ("No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined."); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) (noting that procedural devices such as summary judgment and

directed verdict do not violate the federal constitution's right to jury trial in civil cases).

Franklin himself concedes that the facts in this case are undisputed, stating "it is only the absurdity of the inferences that are in conflict between the parties." Pet.12. Franklin does not specify what these conflicting inferences are. At any rate, courts may only "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (emphasis added) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). "While genuine disputes about material historical facts should be left for the state court, plainly unsupportable inferences from the undisputed facts . . . may be rejected." *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 746 n.11 (1983). Moreover, the nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

The inferences Franklin wishes the courts to make are unreasonable. And, as conceded by Franklin, testimony there was no elevator telephone before or after the day of the inspection does not conflict with testimony there was a working elevator telephone during the inspection. Moreover, Harmer's testimony that there were no wires running all the way into the elevator is consistent with McPartland's testimony that one pair of wires in the control room was stripped and not attached to, but able to reach, the terminals. *See* Pet.App.9a-10a. Accordingly, because the court of appeals appropriately affirmed the grant of a traditional

summary judgment in favor of American Elevator, it did not violate Franklin's Seventh Amendment right to a jury trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY L. GRAHAM
COUNSEL OF RECORD
HEARD & MEDACK, P.C.
(OF COUNSEL)
9494 SOUTHWEST FREEWAY
SUITE 700
HOUSTON, TX 77074
(713) 772-6400
MARY.GRAHAMATTY@AOL.COM

NATHAN M. RYMER
RYMER, ECHOLS, SLAY
& NELSON-ARCHER, P.C.
2801 POST OAK BLVD.
SUITE 250
HOUSTON, TX 77056
(713) 626-1550
NRYMER@RESNLAW.COM

COUNSEL FOR RESPONDENT

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