

65801-8

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NO. 65801-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KEITH KNAPPETT and JUDY KNAPPETT,

Respondents

v.

KING COUNTY METRO TRANSIT,

Appellant.

FILED
COURT OF APPEALS
2011 APR 27 PM 3:15

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

REPLY BRIEF OF APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

LINDA M. GALLAGHER
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) 296-0430

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A. ISSUES PRESENTED FOR REPLY

1. Review is *De Novo* for King County's Civil Rule 50(a) Motion

Whether the trial court erred in denying Metro's Motion for Judgment as a Matter of Law when there was no evidence of *any* violation of a transit industry standard of care and no evidence, direct or circumstantial, that the yellow bus step edging was wet, was wet enough to be slippery or was actually stepped upon at all when Mr. Knappett got off the bus?

2. The Standard of Review for King County's Civil Rule 59 Motion for New Trial based on Juror Misconduct is Objective and All Doubts Must be Resolved in Favor of a New Trial

Whether the trial court erred in denying Metro's Civil Rule 59 Motion for New Trial based on jurors' misconduct in impermissibly stopping and testing materials on other bus stairs while traveling to trial during their jury deliberations in this case?

B. REPLY TO PLAINTIFFS' STATEMENT RE: EVIDENCE

1. Absence of Evidence Regarding How Plaintiff Fell.

Plaintiff Keith Knappett initially reported to the on scene fire fighter Mr. Miceli and on scene ambulance attendant Mr. Tanberg that he fell on the sidewalk or pavement. Their reports contain no mention at all of any involvement of a Metro bus. Ex. 47 & Ex. 48. If Mr. Knappett had told Mr. Miceli that a bus was involved he would have included that

information in his report. RP (5/20/10), 28-29. According to plaintiff's health care records, at the hospital on the day of his injury, Mr. Knappett first stated he "fell *after* stepping off a bus", Ex. 1. Later the same day he told the emergency room doctor that "he stepped off the bus and his ankle was pinned between the curb and the street." *Id.* The same day he told his surgeon Dr. Falicov "he missed the last step" getting off the bus. Ex. 2.

At trial, Mr. Knappett never testified that he stepped on the edge of the step or on the yellow strip at all along the bus step before he fell. In fact, at trial, he did not recall any specifics about how he fell. He only remembered *getting ready* to step down the stairs and starting to lift his right foot, then the next thing he recalled was already being on the street with an ankle injury:

Q. [by Ms. Haskell] Why don't you go ahead and explain to the jury what you recall.

A. Well, what I recall is that -- and it is going to get short from this point on -- I was holding onto this bar and the next thing I know I was on the street. I don't have a -- the sense of hitting anything. I just went right out to the street.

Q. From here, from the landing?

A. From the top -- yeah, the landing.

Q. And had you prepared yourself to step from here to here?

A. I believe I was in the process of doing that -- I was in the process of -- you know, during the deposition I was asked [UNINTELLIGIBLE].

Q. And you had oriented yourself on the landing --

A. Yes.

Q. -- in preparation to step down?

A. Yes.

Q. Why is that?

A. To orient myself?

Q. Yes?

A. So that I would be going basically straight down as opposed

Q. Okay. Go ahead and take your seat. What is your next recollection, Keith?

A. My next absolute recollection is standing, and I believe I was leaning against the bus, . .

RP (05/24/10) 15-16.

Mr. Knappett further testified on cross examination that he believed he was the last passenger to get off the bus and that when he fell he was still on the main floor of the bus and had just started to lift his right foot to step down the stairs:

Q.[by Ms. Gallagher] Okay. You believe that down at 5th and Pike you were the last passenger to get off the bus?

A. I was the last passenger to get off at that stop, and I think I was also the last passenger on the bus itself.

Q. When you got up and went to get off the bus, the bus was completely stopped?

A. Yes.

Q. The rear doors were open?

A. Yes.

Q. And did the bus remain completely stopped throughout the time that you got off the bus?

A. As far as I know, yes.

Q. Okay. Now is it your recollection that just before you fell, you were still on the top level on the main floor of the bus when you fell?

A. I want to make sure it is not a tricky question. That first -- yes, the landing, which would be the first step.

Q. And that is also even with the aisle way --

A. Yes.

Q. -- of the bus?

A. Yes.

Q. Okay. And that would be what you called in your deposition the top level of

A. Okay.

Q. Okay. And you also -- did you start to step off the top step and then basically you were flying through the air?

A. That is what I think, yes.

Q. And is that what you also --

A. I believe I was lifting my -- I think we talked about this at length; I think -- I believe I was starting to lift my right foot.

Q. Just starting to lift your right foot?

A. Yes.

Q. Okay. And that is what you told us in the deposition that you started to step off the top step and then basically you were flying through the air?

A. Yes.

RP (05/24/10), 116-117. No where in his testimony did Mr. Knappett ever say he was on the edge of the step or the yellow nosing strip. RP (05/24/10) 4- 138.

Respondents essentially concede there is no direct evidence of specifically where or how Mr. Knappett fell when they argue that circumstantial evidence somehow proved the liability issues in this case, Brief of Respondent (sic), p. 22-22, and that they relied upon "[C]ommon sense and Gary Sloan", Id., p. 24. These arguments fail. First, the trial court did not permit Dr. Sloan to opine about how Mr. Knappett's fall happened:

COURT: "How the accident happened, ultimately, is for the jury to decide" RP (05/20/10) 119

...

COURT: "-- in this courtroom you're not allowed to say to the jury, well, what I think happened is he slipped on the top step." RP (05/20/10) 120.

Moreover, Dr. Sloan is not an expert in the transit industry, conceded the flooring and the yellow strip were slip resistant when dry and could only get the yellow nosing strip to test slippery when he

completely submerged it in a continuous puddle of water. RP (5/20/10) 149-150; 155-156. 178. He also testified that the bus Mr. Knappett rode the day of his fall had "a good flooring" and "a good nosing" when its dry and that the blue flooring and yellow nosing materials were "Nora" and in accordance with the bus specifications, Ex. 38A. Id., 156, 176-178. Ex 38A describes both materials as "nonskid". Ex 38A.

Respondents also argue on appeal that evidence of nine other claims arising from falling incidents associated with rear bus doors and allegedly wet steps in a three year period, in a transit system with 1300 transit vehicles and over 100 million passenger boardings a year, should somehow be considered a form of circumstantial evidence of negligence. However, this argument must be disregarded because it directly violates the law of the case. This evidence was admitted only for the limited purpose of consideration of any issue of notice of a dangerous condition and not for any other purpose. See Court's Instruction No. 15 for which no exception was taken. In a negligence case, other accidents and injuries are inadmissible to show a general lack of care or negligence, but may be admissible on other, more limited issues if the conditions are sufficiently similar and the actions are sufficiently numerous. 5 *KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE* § 402.11 at 304 (2007). Evidence of prior accidents which occurred under substantially similar circumstances

is admissible for the purpose of demonstrating a dangerous condition or notice of a defect. See, e.g., Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Here there was simply no evidence by Mr. Knappett or Dr. Sloan of negligence or proximate cause.

Finally, plaintiffs have apparently conceded in their brief that King County Metro does not have a duty to keep bus floors dry on rainy days in Seattle. Brief of Respondent, p. 23: "Metro asserts that it does not have a duty to keep its bus floors dry. It [Metro] acknowledges that Mr. Knappett never claimed that Metro had such a duty." As set forth herein, respondents have failed to responded to or address the case law relied upon by King County in its CR 50(a) motion or the Brief of Appellant.

2. Jurors' Misconduct in Conducting Testing Outside the Courtroom.

The jurors were instructed during the trial not to go out and seek evidence on their own. RP 907/02/10) 14, In fact, Judge Hayden *specifically* instructed them that they could ride to downtown Seattle "***but please don't go and inspect the surfaces there, looking at sidewalks, or anything like that.***" RP (05/19/10), 23-24:

Anything that you decide the case on, must be based on the testimony you receive here in court and the exhibits that are presented to you. Were you to go out and seek information elsewhere, it would be unfair to the parties because they wouldn't know what information you were looking at. There would be no opportunity to question that information or cross-examine it or to scrutinize it in any way

and there will be plenty of that that happens during the trial. Please don't go and be wondering around the area where this occurred. I am not saying you can't ride to downtown Seattle, but please don't go and inspect the surfaces there, looking at sidewalks or anything like that.

In this trial where a central issue was the nature and involvement, if any, of the flooring surfaces of one particular Metro bus in a fleet of 1300, the court's instruction not to "inspect the surfaces" obviously included any bus steps. Unfortunately, two of the jurors, Juror 7 and Juror 8, completely disregarded the court's instructions when they each wore similar shoes, stopped at the top of the rear bus steps of different steps and tested the yellow edge of the step for themselves on their way to court. CP 142-160. One of the jurors committing this misconduct, Juror 8, candidly admitted under oath in a sworn declaration what he did, what he said and what the second juror admitted:

[O]n my commute on the articulated bus the morning of May 26th that I had stopped at the top of the rear stairs prior to exiting the bus. It was raining hard that morning. I used one of my shoes to test the slipperiness of the yellow nose strip by scuffing my shoe over the top of this yellow nose strip. Right after I made this comment about the testing of the yellow nose strip, juror [name omitted - Juror 7] stated, "Oh, I did that too". I told everyone that I had worn shoes that morning that I thought were similar to or had slightly more aggressive tread than Mr. Knappett's when Mr. Knappett's accident occurred and that the shoes I had on easily slipped. Juror [name omitted - Juror 7] agreed. Finally, I told everyone that I would have

more than likely fallen if I wasn't extra careful when getting off the bus that morning. CP 154.

Two other jurors, Juror 4 and Juror 10 also submitted sworn declarations establishing this misconduct. CP 142-160. Whether Mr. Knappett stepped on the yellow nosing strip at all and whether that yellow strip was wet enough to be as slippery as plaintiff's expert opined it to be were central issues disputed in this case. RP (5/25/10) 64-88. The jurors committed misconduct by obtaining evidence on these disputed issues on their individual bus rides to the courthouse, outside the presence of other jurors and while their deliberations were still under way.

After the verdict, both plaintiffs' counsel and the trial court failed to recognize the prejudicial nature of this misconduct in this case where King County did in fact dispute all aspects of liability in this case including how slippery the step edge may actually have been that day when no passengers entered or exited the bus rear doors so there was no opportunity to track any rainwater at all onto the rear steps until just before Mr. Knappett's stop, how much water the nonskid Nora material on the step required before Dr. Sloan opined it was "dangerously slippery" and the lack of evidence of whether or not Mr. Knappett ever stepped on the step at all. King County did in fact dispute the "slipperiness" issue, negligence and

proximate cause based on all of the evidence in the record including Ex. 38A, Ex 40 the Coach and Mat Inspection Report finding the stairs "o.k." in January 2007, almost three years before Dr. Sloan's own testing, and the evidence from Dr. Sloan about the skid resistance of the flooring including the yellow nosing until entire continuous puddles of water were placed on the edge.

3. King County Contested Liability Throughout the Trial

The trial court based the ruling denying the motion for new trial on the Court's erroneous impression that "the case was not defended on the basis of slipperiness of the step." RP (7/2/10), 14, lines 4-5. In the hearing on the motion Metro took exception to this characterization. RP (07/02/10) 5-7. The trial court also then acknowledged that the issue of whether the step was slippery *was* part of the case: "I know it was in there. My judgment, having tried the whole case, is it was not a major part of the defense." Id., lines 14-16. The record of the jury trial in this case indicates that negligence, causation and plaintiff's own alleged negligence were all disputed by Metro. Metro's affirmative defense of contributory negligence was submitted to the jury. CP 113-137. Both slipperiness of the yellow nosing/edge of the bus step and whether or not Mr. Knappett stepped on the nosing/edge were significant parts of the defense's case and definitely "in there". Whether or not the trial judge believed this was a

"major" part of Metro's case, the trial judge did not correctly apply the applicable law regarding juror misconduct.

After the verdict, plaintiffs' counsel argued and the court ruled that the misconduct did not make a difference, only by ignoring that King County did in fact dispute all aspects of liability in this case including how slippery the step edge may actually have been and whether or not Mr. Knappett ever stepped on the step.

In addition to the brief excerpt referenced by respondents, King County's closing argument included the following on the disputed liability issues in this case:

In his own words, in the statements he made closest in time to when this happened, and in statements he made recorded in his own health care records, he had already gotten off that bus.

. . . .
And Dr. Falikoff's testimony, and his later records, as well, explain that what Dr. Falikoff remembers the patient telling him is that he missed the last step. He understood that to be just the bottom step. He also told us, that is not the typical way a pilon fracture happens, stepping off a bus. We don't get -- see pilons stepping off the bus. So even stepping off the bus is not the typical way. RP (05/25/10) 64.

. . . .
The evidence in this case, and the lack of evidence in this case is that there is no liability for King County. There has been no proof and King County does not have any percent of responsibility for this injury. RP (05/25/10) 67.

August 13, 2009. At this time he says: "I was still standing on the main floor of the bus when I fell." And you will have that in Exhibit 52. And there he also says, "I may have started to lift my probably right foot," and if you are in the jury room and you are looking at Dr. Sloan's different pictures of how people walk -- but where he has the steps with the controlled fall one, "first starting to lift my right foot," the other foot is still almost completely down on the upper part. It is not even starting to go up -- if the other foot is not almost down on the next step. So you will have that, too. "I may have started to lift my probably right foot to start down to the first step." So down to the first step; he is calling the next one "down the first step"; not the landing at the top, but the first step. That is Exhibit 52. So these are all different descriptions of the fall. They are not the same story. We are not splitting hairs here. These are very different things: No bus at all versus fell out of a bus. Those are two very different things. Top step versus last or bottom step; two very different things. Still on the main floor or on the very edge -- the little yellow strip of the step? Two very different things.

Even Mr. Knappett himself yesterday in testimony did not say that he was at the very yellow edge, which we now know from their own expert is the only thing that their own expert could get any slippery reading on, and only when he made a full puddle of water that made a whole puddle there with his testing thing. And that was their expert, Dr. Sloan. material, and you have Exhibit 38A to show you what the specifications were for both the floor and the yellow strip, the Nora material. It is in Exhibit 38A if you need to look at it, and their own expert told us that is what it is, but their own expert said all of the blue flooring is not slippery, even when it was as wet as he could get it. He took the top off of his spray bottle while he was testing; he used the bottle to pour puddles to do that wet testing. But even Mr. Knappett himself did not say that his feet ever touched the yellow -- the little narrow yellow stripping. RP (05/25/10) 68-69.

...

About liability, they have just Mr. Knappett, and they have Gary Sloan, and that is all. You have in evidence, through their exhibits, that benefit us, as well, you have Exhibit 40, which is the coach mat and floors inspections that happened. It is the very beginning of January '07. You will see that in the jury room if you need to read it. Once Mr. Knappett did report his incident to Metro in December, then the bus was looked at -- the front doors, the back and the floors. It has got "OKs" on it. So you have that in evidence to look at. or even if he missed all of the steps and falls out of the bus, it is not enough to just prove that he fell out of the bus without having some connection to this little strip, and it is just not there. It is an absence of evidence. It is a failure of the burden of proof on the issue of negligence. It is a big -- it is a leap, a big leap to go to there. Common sense cannot substitute for evidence to get to that point. RP (05/25/10), 73-74.

Nobody, including Mr. Knappett, puts him on the very edge. Part of that, I think, is he didn't know until after his deposition that his own expert wasn't going to say that the floor was slippery when it's wet. RP (05/25/10), 81.

A crucial and material issue in this case was whether the yellow step edge at the rear doors was sufficiently under water with a continuous pool or puddle to become less slip resistant than it otherwise was as conceded by plaintiff's own expert, Gary Sloan. Moreover, the plaintiff had the burden of proof and the jury was not required to accept the opinion of plaintiffs' forensic expert including his opinion about "slipperiness". Court's Instruction No. 4. King County disputed "slipperiness" of the step, was entitled to argue and did, in fact, argue that plaintiffs failed to meet their burden of proof,

that Dr. Sloan's opinion should not be accepted and did not prove negligence in this case.

C. ARGUMENT IN REPLY

1. STANDARD OF REVIEW

a. Civil Rule 50 Motion for Judgment as a Matter of Law.

Contrary to respondents' argument that the trial court's ruling on the CR 50 motion need only be "tenable" or "reasonable", the standard of review is *de novo*. When reviewing a CR 50 motion for judgment as a matter of law, the Court of Appeals applies the same standard as the trial court. Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.2d 250 (2001), citing Goodman v. Goodman, 128 Wn. 2d 366, 371, 907 P.2d 290 (1995). See, also, Faust v. Albertson, 167 Wn. 2d 531, 537, 222 P.3d 1208 (2009) and Corey v. Pierce County, 154 Wn. App. 752, 761, 225 P. 3d 367 (2010) (cited by respondents).

b. Civil Rule 59 Motion for New Trial: Juror Misconduct.

Generally, an order denying a motion for a new trial is reviewed for abuse of discretion. Allyn v. Boe, 87 Wn. App. 722, 729, 943 P. 2d 364 (1997). When such an order, however, is predicated on rulings of law, no element of discretion is present. Id., citing Robinson v. Safeway Stores, Inc., 113 Wn. 2d 154, 158, 776 P.2d 676 (1989). See, also, Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 757, 440 P.2d 187

(1968): "The rule that this court will not reverse an order granting a new trial unless an abuse of discretion is shown does not apply in a case such as this, where the order is predicated on a question of law, since no element of discretion is involved." Id. (citation omitted).

Jurors' individual or collective mental processes in reaching a verdict may not be probed, as such information "inheres in the verdict." Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now, 119 Wn. App. 665, 681, 82 P.3d 1199 (2004). Where affidavits of jurors allege facts showing misconduct, where those facts support an objective determination by the court that the misconduct affected the verdict, and where the moving party has been prejudiced, a new trial *must* be granted. Halverson v. Anderson, 82 Wn.2d 746, 750, 513 P.2d 827 (1973). Any doubt regarding the effect of the misconduct on the verdict must be resolved in favor of granting a new trial. Id. Misconduct may be proved by jurors' affidavits which do not evidence their motives, intent, beliefs or mental processes, all of which have been held to "inhere in the verdict." Gates v. Jensen, 20 Wn. App. 81, 88, 579 P. 2d 374 (1978) *overruled on other grounds*, 92 Wn. 2d 246, 595 P. 2d 919 (1979), citing Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962). Appellant has proven misconduct in this case by declarations of four jurors. The trial court made an error of law by erroneously ruling that the misconduct was not

prejudicial because the nature of the yellow step surface on the bus in question was "in there" but enough of the "heart" of the defense's case. Under these circumstances, there is no doubt that King County's defense was prejudiced by the outside testing and extrinsic evidence and a new trial should, therefore be granted.

2. METRO'S MOTION FOR JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED AND THIS CASE REMANDED FOR ENTRY OF DISMISSAL.

Respondents have not addressed the legal authorities and argument set forth by King County Metro to establish that there is no duty to provide dry bus floors as part Metro Transit passenger service. King County Metro incorporates the arguments set forth in its opening brief. Negligence should not be presumed or inferred from the mere happening of an accident. Tortes v. King County, 119 Wn.App. 1, 8, 84 P.3d 252 (2003). Here the evidence was disputed regarding whether there was any rainwater on the steps at the rear doors of the bus when Mr. Knappett exited. Passengers boarded only at the front doors because of the fare policy so there was no opportunity to track any rainwater up the rear stairs. Moreover, Mr. Knappett testified he believed he was the last person off the bus at his stop in downtown Seattle. The evidence included Ex 38A, the specifications of the flooring and nosing as nonskid Nora material. Dr. Sloan did not testify regarding any failure by Metro to comply with an

industry standard of care with respect to the flooring. Rather, he opined only that more than three years later with his testing method he was able to get the yellow nosing material slippery by applying a full puddle of water. This evidence under the circumstances of this case is insufficient to submit the issue of negligence to the jury. Likewise, without evidence, direct or circumstantial, that Mr. Knappett actually stepped on the yellow nosing, King County was entitled to judgment as a matter of law on liability.

Respondents failed to address or even cite the Division One decision in Walker v. King County Metro, 126 Wash.App. 904, 109 P.3d 836 (2005). In Walker the court upheld summary judgment of dismissal where plaintiff presented no evidence that the common carrier failed to comply with any required standard of care. In Walker the plaintiff fell while walking down the aisle of a bus on her way to a seat. It was a rainy December day. Id. p. 906. The seats in the front of the bus that she preferred were occupied. Id. As she walked to the back of the bus, the bus driver pulled away from the curb and into traffic. Walker fell and was injured before reaching a seat when the bus stopped suddenly to avoid another vehicle. Id. p. 907. Even on a moving bus rather than a completely stopped bus as we have in the Knappett case, dismissal on summary judgment was upheld. Walker, p. 912:

Walker also argues that even if the driver did not have to wait until she was seated or braced, she presented other evidence sufficient to prove that the driver was negligently operating the bus immediately prior to the accident. She says the evidence would allow the jury to find that the driver failed to honk his horn or give a verbal warning to his passengers before the emergency stop; was not wearing his glasses (though he was not legally required to do so); did not continuously watch Le's car at the stop sign; and was driving at an unsafe speed. (the bus was going approximately 13 m.p.h.). Again, the cited evidence does not tend to show that any of these acts or omissions violated a standard of care.

Here, as a matter of law, there is no evidence of a breach of *any* standard of care in the transit industry applicable to King County Metro in relation to the Nora material used on both the bus floors and the narrow yellow step nosing/edge. Gary Sloan is not an expert in the transit industry and did not specify how he believed the "dangerously slippery when wet" yellow nosing strip at the step edge could have or should have been changed in 2006 or earlier. Any such suggestions would have been pure speculation. Even if the yellow nosing/edge was wet enough to be slippery, Metro has no legal duty to keep water off of its steps. Therefore, this case should have been dismissed at the close of plaintiffs' case in chief as a matter of law pursuant to Civil Rule 50.

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3. ALTERNATIVELY, METRO'S MOTION FOR NEW TRIAL BECAUSE OF JUROR MISCONDUCT SHOULD BE GRANTED AND THE CASE REMANDED FOR A NEW TRIAL.

When extrinsic evidence has been introduced, "[t]he court must make an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, and not a subjective inquiry into the actual effect of the evidence on the jury." Kuhn v. Schall, 155 Wn. App. 560, 575, 228 P.3d 828, rev. denied 169 Wn. 2d 1024 (2010), citing Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). A new trial must be granted if there is any reasonable doubt regarding the effect of extrinsic evidence on the jury. Kuhn supra, (court reversed a jury verdict on all issues in part as a result of juror misconduct when extrinsic evidence in the form of a newspaper article about the case was brought into jury room).

Independent research by jurors, including unauthorized scene visits, introduces extrinsic evidence and justifies a new trial. Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962) (new trial where three jurors made a "planned and intentional" visit to the scene of an automobile accident). The independent research done does not have to be shown to change the outcome of the case -- "the question is whether the extrinsic evidence *could have* affected the jury's determinations." State v. Boling, 131 Wash. App. 329, 331, 127 P.3d 740 (2006) (emphasis added) (juror's

internet research found to be juror misconduct even though it did not change his or any other jurors' vote in the case).

Juror 7 and Juror 8 intentionally and improperly stopped and tested the slipperiness of the stair nosing while commuting on the bus on their way to court for what turned out to be their final day of jury deliberations in this case. These tests introduced improper extrinsic evidence into the jury's deliberations. This extrinsic evidence could and would likely have affected the jury's decisions on liability and on Mr. Knappett's contributory negligence. As a result, Metro was prejudiced and is entitled to a new trial in this case.

Respondents' argument that the sworn declarations of juror 4 and 10 should not be considered because they are hearsay is countered by authority respondents themselves have cited: Gates v. Jensen, supra, at 88: "Misconduct may be proved by jurors' affidavits . . ." This authority is in addition to the numerous authorities on this point cited in King County's opening brief, p.17.

Although jurors may reenact testimony or closely examine items *admitted into evidence* while together in the jury room during deliberations and in conjunction with their own common sense, the actions of Juror 7 and Juror 8 went well beyond what is permissible and directly disregarded the court's instructions not to seek outside evidence.

Reenactments that do not accurately portray the accident -- even when a reenactment is authorized by the court -- justify a new trial. See, for example, Steadman v. Shackelton, 52 Wn.2d 22, 322 P.2d 833 (1958) (new trial where party was prejudiced by authorized site view and reconstruction of scene of automobile accident by jurors because facts at issue were assumed true). Similarly, the jurors' tests cannot by any reading of the court's instructions or the jurors' sworn declarations be held to be "entirely permissible simulations of the testimony at trial" as, for example, in State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994) (jacket and pistol evidence used in jury room). Plaintiffs' expert Gary Sloan testified only as to the alleged slipperiness of the stair nosing on the top landing at the rear doors of the specific bus Mr. Knappett rode on the day of his fall, not all Metro buses or all buses with Nora stair nosing.

Despite respondents' continued statements that it was conceded that the yellow step nosing was slippery this was *never* the case, as demonstrated by citations to the record, King County Metro's argument to the jury and at the hearing on the motion for new trial. The law does not require King County Metro to present its own expert or a separate witness. By whatever name it is called -- testing, reenactment, examination, or simulation -- the misconduct by Juror 7 and Juror 8 was objectively prejudicial to King County and therefore warrants a new trial.

No legal authority supports the Knappetts' argument that the extrinsic tests conducted by Juror 7 and Juror 8 were permissible because they were somehow similar to tests or experiments conducted in the jury room. For example, in Tarabochia v. Johnson Line, Inc., 73 Wn. 2d 751, 757, 440 P.2d 187 (1968), relied upon by the Knappetts, during deliberations the jurors used objects properly admitted into evidence to conduct a test of whether a chemical on a plastic bag would become slippery when wet. Id. at 752-753. The actual results of that experiment during deliberations in the jury room were not presented to the court. Id. A new trial was not appropriate in Tarabochia because "[t]here is nothing to indicate that the jurors obtained new evidence which was not introduced at trial." Id. at 754. The court acknowledged the rule that "it is not necessary to show that an experiment influenced the verdict, but only to show that it was likely to do so". Id. Here, the court was given the results the jurors found in their outside testing, that they found the yellow nosing slippery and believed they could easily have fallen on it. CP 144-160. The testing was clearly new evidence not introduced at trial. Under the case law summarized in 1968 in Tarabochia, a new trial is warranted.

Here, Juror 7 and Juror 8 gathered evidence by doing their own testing on presumably different buses while exiting near the King County Courthouse part of downtown Seattle. That testing was not done with

evidence admitted at trial, took place outside the jury room and other jurors' presence and directly contrary to the court's instruction not to "go and inspect the surfaces there". Although it was expected that many jurors would ride the bus to and from the courthouse during the trial, wearing similar shoes, stopping to conduct a test and intentionally "slipping" on yellow stair nosing on transit buses to test whether or not they are slippery is an impermissible test for the purpose of collecting extrinsic evidence, not a personal experience. King County Metro had no obligation to try to provide alternative transportation to jurors or order that they not ride buses to and from court. In any event, the trial judge made clear he would not have granted such a theoretical request had it been made. RP (07/02/10) 15.

Without citation to legal authority, Knappetts' counsel argues that additional evidence is required to show whether the jurors actually discussed their outside evidence in the jury room with other jurors. Brief of Respondent, pp. 43 - 45. This subjective standard is contrary to applicable law. Such statements about what may or may not have been said in the jury room would have inhered in the verdict. Gates v. Jensen, 20 Wn. App. at 88. "Where juror misconduct can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly

determined in the sound discretion of the trial court." Adkins v. Aluminum Co. of America , 110 Wn. 2d 128, 137, 750 P.2d 1257 (1988). "If the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial." Id. (additional citations omitted). See, also, Kuhn v. Schall, 155 Wn. App. at 575.

Respondents have essentially conceded that the actions of the jurors on what turned out to be the last day of deliberations constituted extrinsic evidence by arguing that the actions are not such evidence *only if* the slipperiness issue was not sufficiently contested. Both alleged slipperiness and whether plaintiff fell on the narrow yellow strip were disputed. Negligence, proximate cause and contributory negligence were all contested. The trial court's statements on the record at the time of the ruling denying Metro's motion indicate an erroneous legal conclusion that these issues needed to be a "major" dispute or the "heart" of Metro's case. Under the applicable cases, the jurors misconduct was prejudicial and any doubts that the verdict may have been influenced must be resolved in favor of a new trial.

It is prejudicial and likely affected the jury's determination in its 10-2 verdict when two jurors wearing shoes they thought were similar to those they were shown that Mr. Knappett wore when he fell, exited the rear doors of different buses on a rainy day during their deliberations, then

intentionally stopped and tested with their feet whether a different yellow nosing strip felt "slippery" or not to the them. Under the applicable objective standard, these jurors violated the court's instructions and went outside the evidence admitted in the courtroom, doing their own testing and investigation. As a result, a new trial should be granted.

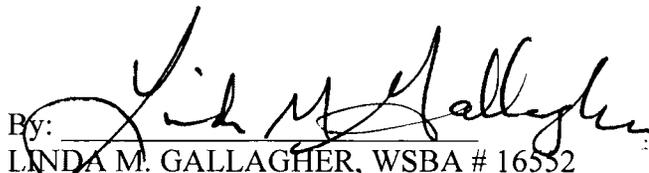
D. CONCLUSION

For the reasons herein and the reasons in Appellant's opening brief, King County Metro asks this Court to reverse the trial court and to dismiss plaintiffs' case as a matter of law, pursuant to Civil Rule 50. In the alternative, King County Metro asks this Court to reverse the trial court's ruling denying the Civil Rule 59 Motion for New Trial and remand this case for a new trial on all issues because of juror misconduct performing testing of wet bus steps outside the courtroom that was objectively prejudicial to the defense.

DATED this 27th day of April, 2011.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
LINDA M. GALLAGHER, WSBA # 16552
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

FILED
2011 APR 27 PM 3:15

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

KEITH KNAPPETT and JUDY)	
KNAPPETT,)	NO. 65801-8-I
)	
Respondents)	
)	DECLARATION OF SERVICE
vs.)	
)	
KING COUNTY METRO)	
TRANSIT,)	
)	
Appellant.)	
_____)	

I declare under penalty of perjury that the foregoing is true and correct:

That a copy of Reply Brief of Appellant, and this Declaration of Service was served on respondents' counsel of record Lori S. Haskell in the above-captioned case on April 27, 2011, by hand delivering a copy thereof to

ABC Messenger Service to be served on respondents' counsel:

Lori S. Haskell
Attorney at Law
Fishermen's Terminal
1900 W. Nickerson, Suite 209
Seattle, WA 98119

DATED this 27th day of April, 2011 at Seattle, Washington

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:



KARON R. THOMPSON

Legal Secretary to

LINDA M. GALLAGHER

Senior Deputy Prosecuting Attorney