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I. INTRODUCTION

The trial court committed reversible error when it evaluated the Plaintiff's expert declarations as if it were the trier of fact. Each one of Plaintiff's three expert witnesses supplied the trial court with admissible evidence sufficient to raise a material question of fact. Although a simple inference is sufficient to create an issue of material fact, Plaintiff submitted direct, unequivocal expert testimony to establish that King County breached the standard of care and proximately caused Terrance Brewster's injuries. The trial court erred by granting summary judgment in favor of King County.

II. ARGUMENT

A. Plaintiff Submitted Admissible Evidence to Satisfy all the Prima Facie Elements of a Negligence Claim.

In its opposition brief, King County argues that summary judgment was appropriate because Plaintiff did not submit sufficient evidence to survive summary judgment. To support its argument, King County correctly states that "a plaintiff must establish (1) the existence of a duty owed; (2) breach of that duty; (3) a resulting injury; and (4) proximate cause between the breach and the injury." See King County's Brief at p. 13 (citing Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)).

King County's acknowledgment of the correct negligence standard provides an appropriate mechanism for illustrating why the trial court's order granting summary judgment should be overturned.

(1) Duty

Plaintiff agrees that he must first establish that King County owed him a duty. However, in King County's own brief it concedes that the County owed Plaintiff a duty of ordinary care in regards to the design, maintenance and placement of the King County Metro bus shelter where Terrance Brewster was injured. See King County's Brief at p. 15.

Contrary to King County's assertions, Plaintiff is not contending that King County owed a higher duty of care as a common carrier. See King County's Brief at pp. 13-15. While this issue was raised by King County at the trial court level, Plaintiff has not raised this issue on appeal.

(2) Breach

Plaintiff agrees that he must establish that King County breached its duty of care. Breach of a legal duty is generally a question of fact for the jury. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

In this case, Plaintiff alleged in his Complaint that King County failed to properly maintain its bus shelter, failed to properly design the bus

shelter, and/or negligently placed the bus shelter in an improper location.

See Plaintiff's Complaint at CP 1-4.

To satisfy his burden on summary judgment, Plaintiff submitted the declarations of three transportation experts. See CP 148-67 (Gill); CP 170-74 (Camardella); CP 175-86 (Haro); 246-47 (Supplemental Gill); and 262-66 (Supplemental Haro). It is important to note that: "[A]n expert opinion on an 'ultimate issue of *fact*' is sufficient to defeat a motion for summary judgment." Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 910, 223 P.3d 1230, 1240 (2009) (citing Eriks v. Denver, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (quoting Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)) (emphasis in original).

First, Plaintiff submitted the declaration of William Haro, P.E., who expressly opined that King County breached the standard of care by locating the bus shelter where Terrance Brewster was injured. CP 177-78. In his declaration, Mr. Haro states that King County violated its own engineering guidelines by placing the bus shelter too close to the roadway. Id. Mr. Haro also opined that King County breached the standard of care when it replaced the bus shelter in 1998 and 2006, but failed to relocate the bus shelter to a safer location. Id. Even if Mr. Haro's declaration was the only evidence submitted to rebut King County's motion for summary

judgment, it would be sufficient to establish a breach of King County's duty of care.

Second, Plaintiff also submitted the declaration of Lee Camardella, who is an undisputed transit safety expert. CP 170-74. Mr. Camardella similarly opined that King County breached its own engineering guidelines. CP 172. Additionally, Mr. Camardella opined that King County breached the standard of care by designing the bus shelter to require waiting passengers to be seated facing away from traffic, which prevents waiting passengers from seeing approaching danger. CP 173. Mr. Camardella's declaration is sufficient to create a material issue of fact to prohibit summary judgment.

Third, Plaintiff also submitted the expert opinions of Dr. Richard Gill, Ph.D., who opined that King County breached the standard of care for reasons not addressed by either Lee Camardella or William Haro. Dr. Gill specifically stated: "it is unequivocal that King County/Metro Transit's safety and risk management programs were defective and fell below a reasonable standard of care; they did so in all 5 of the basic components for a safety and risk management program." See CP 151 at ¶ 12. Dr. Gill then described, at length and in detail, the basis for his

opinions as to how King County breached the standard of care. See CP 151-54 at ¶¶ 13-19.

In his supplemental declaration, Dr. Gill also addresses King County's contention that it was impractical for it to relocate the bus shelter to a different location. CP 246-47. Besides the material question of fact created by Dr. Gill's testimony, Dr. Gill further opined that King County, at a minimum, was obligated to remove the bus shelter from its existing location rather than leave it an unreasonably dangerous location. Id. This is yet another example of King County's breach.

In its appellate brief, King County devotes considerable effort and emphasis regarding the structural integrity of its bus shelter. For example, King County proudly asserts that the King County Metro bus shelter is "constructed to carry 300% of the loads that are required" and are "not designed to be crash barriers for out-of-control vehicles." See King County's Brief at 15. In order to eliminate any confusion, Plaintiff has never contested that King County's bus shelter was structurally inadequate. Rather, Plaintiff has consistently maintained that King County breached the standard of care by negligently maintaining, designing, and placing the bus shelter in the location where Terrance Brewster was injured. Moreover, none of Plaintiff's transportation experts

takes issue with the structural integrity of King County's bus shelter. Thus, King County's assertion of the structural benefits of its bus shelter is irrelevant for the purposes of this appeal.

(3) Causation

Proximate cause consists of two elements: cause in fact and legal causation. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Accordingly, proximate cause is a mixed question of law and fact. Rasmussen v. Bendotti, 107 Wn. App. 947, 955, 29 P.3d 56 (2001). "The question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." Bordynoski v. Bergner, 97 Wn.2d 335, 340, 644 P.2d 1173, 1176 (1982).

In regards to causation, Plaintiff met his burden on summary judgment by relying again upon the declarations of William Haro, Lee Camardella, and Richard Gill. Even the submission of lay witness Christopher Hogan's declaration is sufficient to establish causation precluding summary judgment. CP 248-49.

As stated above, Mr. Haro states in his supplemental declaration: "In my opinion, if the bus shelter had been placed twenty feet to the north

of the location where the collision occurred, Terry Brewster would have avoided injury completely.” CP 263 at ¶ 6.

Dr. Gill also provides testimony sufficient to meet the element of causation. In his supplemental declaration, Dr. Gill opines as follows: “In my opinion, the King County bus shelter at issue was unreasonably dangerous and caused Mr. Brewster’s injuries. If the bus shelter had been designed to have persons facing the street inside the shelter, then Mr. Brewster probably would have avoided injury because he could have escaped the danger (the oncoming vehicle) just as Mr. Hogan did.” CP 247 at ¶ 6.

Christopher Hogan’s lay witness opinions also provide sufficient admissible evidence to establish causation. In his declaration, Mr. Hogan opines: “Based upon my observations of the crash, it is my opinion that Mr. Brewster probably would have been able to get out of the way of the oncoming mini-van if he was either standing like me, or if he was at least facing towards the street while he was sitting within the bus shelter. Because Mr. Brewster was facing away from the street, he was unable to react to the approaching danger like I did.” CP 249 at ¶ 9.

In short, Plaintiff submitted ample admissible evidence to preclude summary judgment from being entered under a cause in fact theory. These four declarations establish cause in fact as a matter of law.

King County also asserts that summary judgment was appropriate because legal cause was absent. The issue of legal causation is “intertwined” with duty. Schooley v. Pinch’s Deli Market, Inc., 134 Wn.2d 468, 477, 951 P.2d 749 (1998). “This so because some of the policy considerations analyzed in answering the question whether a duty is owed to the plaintiff are also analyzed when determining whether the breach of the duty was the legal cause of the injury in question. Id. Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. See Tyner v. State, 92 Wn. App. 504, 515, 963 P.2d 215 (1998).

In this case, King County has already conceded it owed a duty to Terrance Brewster. Moreover, King County offers no policy based rationale why it believes as a matter of public policy it should not be held to a negligence standard for an injury occurring in a public right of way. To the contrary, Washington law has long established that: “[M]unicipalities are generally held to the same negligence standards as private parties.” Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890,

900, 223 P.3d 1230, 1235 (2009) (citing Bodin v. City of Stanwood, 130 Wn.2d 726, 731, 927 P.2d 240 (1996)). In short, King County's assertion that Plaintiff cannot establish legal cause is without merit.

(i) Foreseeability

Closely related to legal causation, King County asserts that summary judgment was appropriate because Plaintiff's injuries were unforeseeable. "Foreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ." Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 477, 951 P.2d 749 (1998). Foreseeability "refers to the general type of harm sustained." Rikstad v. Holbert, 76 Wn.2d 265, 269, 456 P.2d 355 (1969).

As stated by the Washington Supreme Court:

The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls with the general danger area, there may be liability, provided other requisites of legal causation are present.

Id. (quoting Berglund v. Spokane County, 4 Wn.2d 309, 319-20, 103 P.2d 355 (1940) (quoting Harper on Torts, 14, § 7)).

King County apparently contends that a motor vehicle crashing into one of its bus shelters is unforeseeable. This argument lacks credibility. Moreover, as the case law above illustrates, the specific

manner of any given accident may be unusual or extraordinary, but this does not make it legally unforeseeable. Rather, the test is whether the general danger was foreseeable. Clearly, this type of crash was completely foreseeable. For example, King County's own engineering guidelines specifically reference the dangers of bus shelters being hit by objects from the roadway. CP 184-86. Moreover, common sense would suggest that a bus shelter is likely to be hit if constructed immediately next to a roadway.

King County also emphasizes that Defendant Bethel Beck, III, was intoxicated at the time, and therefore this was the proximate cause. However, as King County itself concedes, there can be more than one proximate cause. See King County's Brief at p. 18 (citing WPI 15.01). In addition, the negligence of a third party does not absolve the municipality of its duty to maintain its roadways, or in this case its bus shelter, in a reasonably safe manner. Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 908, 223 P.3d 1230, 1239 (2009); see also Tanguma v. Yakima County, 18 Wn. App. 555, 561-62, 569 P.2d 1225 (1977) (quoting Lucas v. Phillips, 34 Wn.2d 591, 597-98, 209 P.2d 279 (1949); RESTATEMENT (2ND) OF TORTS §§ 447, 449 (1965)).

King County also boldly asserts that Plaintiff's declarations are insufficient to establish proximate cause because they are based upon speculation. However, a close reading of these declarations shows that the opinions contained in each of these declarations are based upon admissible facts. See CP 148-67 (Gill); CP 170-74 (Camardella); CP 175-86 (Haro); 246-47 (Supplemental Gill); and 262-66 (Supplemental Haro). In his declaration, William Haro, P.E., opines that Plaintiff would not have been injured if the bus shelter was placed twenty feet to the north. CP 263. This is not speculation, but rather appropriate, fact based scientific theory. Similarly, Lee Camardella's and Dr. Rick Gill's opinions are based upon engineering facts. From these facts, Mr. Camardella and Dr. Gill conclude that Mr. Brewster would not have been injured if the bus shelter was moved away from its current location.

Christopher Hogan also opines in his declaration that Plaintiff would have avoided injury, just as Mr. Hogan himself did on the night of the crash, if he was similarly able to see the approaching danger. CP 248-49. Christopher Hogan's opinion is based upon his own observations and perceptions of the accident himself. This is standard opinion evidence, which is completely permissible under ER 701.

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(4) Injury

Although King County does not address this element in its brief, Plaintiff assumes that King County concedes this issue. Clearly, Plaintiff Terrance Brewster's life threatening injuries rise to the level of damages necessary to establish a cause of action for negligence.

III. CONCLUSION

The trial court erroneously granted King County's motion for summary judgment – despite Plaintiff's production of three expert declarations and one lay witness declaration establishing multiple questions of material fact. Juxtaposing Plaintiff's mountain of lay and expert opinion testimony against the standard set out in CR 56(c) illustrates that the trial court made an obvious mistake. Moreover, because the standard of review is de novo, any and all ambiguities, inferences, or reasonable hypothesis supporting Plaintiff's cause of action must result in reversal. The trial court's order granting summary judgment must simply be reversed, and this case remanded for trial on the merits.

DATED this 27th day of October 2010.

DEARIE LAW GROUP, P.S.

By: 
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I, Raymond J. Dearie, am employed by the Dearie Law Group,
P.S., 2125 5th Ave., Seattle, WA 98121, a citizen of the United States of
America and a resident of the State of Washington, over the age of twenty-
one years, and not a party to this action;

That on the 27th day of October 2010, I sent via legal messenger,
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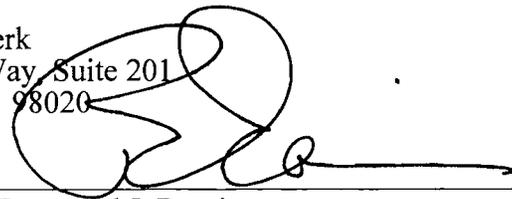
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