

TABLE OF CONTENTS

Page

I. ISSUES PRESENTED	1
1. Whether the trial court properly granted Defendant King County's motion for summary judgment when King County did not breach its duty of ordinary care to Plaintiff Terrance Brewster or proximately cause his injuries?.....	1
2. Whether the trial court abused its discretion in denying Plaintiff's motion for reconsideration when the evidence submitted did not create a genuine issue of material fact regarding breach or proximate cause?.....	1
II. STATEMENT OF THE CASE.....	1
A. THE ACCIDENT.....	1
B. BECK'S INTOXICATION AND THE TRIANGLE LOUNGE.....	3
C. PLAINTIFF'S CLAIMS.....	4
D. THE BUS SHELTER.....	5
1. Shelters Generally and Accident Shelter Location.....	5
2. Shelter Structure.....	8
E. PROCEDURAL BACKGROUND.....	11
III. ARGUMENT.....	11

A. THE TRIAL COURT PROPERLY GRANTED DEFENDANT KING COUNTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXIST NO GENUINE ISSUES OF MATERIAL FACT AND KING COUNTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.....	12
1. King County did not breach any duty of care owed to Plaintiff.....	13
a. Plaintiff was not a bus passenger at the time of the accident.....	13
b. King County exercised ordinary care.....	15
2. King County did not proximately cause Plaintiff's injuries, and the declarations of Plaintiff's experts and witness Hogan do not create a genuine issue of material fact which would prevent summary judgment.....	17
3. King County has no duty to protect against unforeseeable accidents or criminal acts.....	23
B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION.....	24
IV. CONCLUSION.....	25
CERTIFICATE OF SERVICE.....	27

TABLE OF AUTHORITIES

Table of Cases Page

Washington Cases

<i>Anderson v. Dreis & Krump. Mfg.</i> , 48 Wn.App. 432, 739 P.2d 1177 (1987).....	18, 20
<i>Anderson v. Weslo, Inc.</i> , 79 Wn.App. 829, 906 P.2d 336 (1995).....	18
<i>Bordon v. State Dept. of Corrections</i> , 122 Wn.App. 227, 95 P.3d 764 (2004).....	18
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993).....	12
<i>Evans v. Yakima Valley Transportation Co.</i> , 39 Wn.2d 841, 239 P.2d 336 (1952).....	18
<i>Houck v. University of Washington</i> , 60 Wn.App. 189, 803 P.2d 47, rev. den., 116 Wn.2d 1028 (1991).....	14
<i>Lilly v. Lynch</i> , 88 Wn.App. 306, 945 P.2d 727 (1997).....	24
<i>Miller v. Likins</i> , 109 Wn.App. 140, 34 P.3d 835 (2001).....	20, 21
<i>Parilla v. King County</i> , 138 Wn.App. 427, 157 P.3d 879 (2007).....	23
<i>Pedroza v. Bryant</i> , 101 Wn.2d 226, 677 P.2d 166 (1984).....	13
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	18

<i>Scott v. Blanchet High School</i> , 50 Wn.App. 37, 747 P.2d 1124 (1987).....	12
<i>Scruggs v. Jefferson County</i> , 18 Wn.App. 240, 567 P.2d 257 (1977).....	20
<i>Sweek v. Municipality of Metropolitan Seattle</i> , 45 Wn.App. 479, 726 P.2d 37 (1986).....	13
<i>Tortes v. King County</i> , 119 Wn.App. 1, 84 P.3d 252 (2003).....	23, 24
<i>Walker v. King County Metro</i> , 126 Wn.App. 904, 109 P.3d 836 (2005).....	12, 13, 17
<i>Zorotich v. Toll Bridge Auth.</i> , 80 Wn.2d 106, 491 P.2d 1295 (1971).....	14

STATUTES, RULES AND REGULATIONS

Washington State Statutes

RCW 46.61.183.....	22
RCW 46.61.502.....	22
RCW 66.44.200.....	23

Rules

CR 56.....	12
CR 56(c).....	12
CR 56(e).....	12

Other Authorities

WPI 15.01.....	18
WPI 100.09.....	14
WPI 370.01.....	23
W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 41 AT 269 (5 TH ED. 1984)...	21

I. ISSUES PRESENTED

1. Whether the trial court properly granted Defendant King County's motion for summary judgment when King County did not breach its duty of ordinary care to Plaintiff Terrance Brewster or proximately cause his injuries?

2. Whether the trial court abused its discretion in denying Plaintiff's motion for reconsideration when the evidence submitted did not create a genuine issue of material fact regarding breach or proximate cause?

II. STATEMENT OF THE CASE

A. THE ACCIDENT

At approximately 1:30 a.m. on December 16, 2006, Plaintiff-Appellant Terrance Brewster was sitting inside a Metro bus shelter near the intersection of 8th Avenue NW and NW Market Street in Seattle waiting for a bus. CP 2. This intersection is a four-way intersection with a dedicated turn lane for all directions. CP 39. Northwest Market Street has two lanes in each direction and 8th Avenue NW has a single traffic lane and a bike lane for southbound travel and two vehicle lanes for northbound travel. *Id.* As Plaintiff was sitting in the bus shelter, two vehicles collided at the intersection of 8th Avenue NW and NW Market Street. CP 2. One of the vehicles in the collision was driven by defendant Bethel Beck III, and the

other was driven by defendant Cong Nguyen. *Id.* At the time the collision occurred, the traffic signal at the intersection was inoperable, thus requiring the intersection to be treated as a four-way stop. *Id.* *See also* CP 40. The collision caused Mr. Beck's vehicle to spin 180 degrees and run into the bus shelter and Plaintiff. CP 39. *See also* CP 113.

Prior to the collision with Mr. Nguyen's vehicle, Mr. Beck, who was driving a 1993 Nissan Quest van, was traveling north on 8th Avenue NW approaching the intersection with NW Market Street in the inside lane. CP 39. Mr. Beck and Mr. Nguyen have each admitted that they failed to stop at the intersection prior to the collision between their vehicles. CP 2. At some point as he started through the intersection, Mr. Beck saw Mr. Nguyen's vehicle and he accelerated to attempt to avoid the collision. CP 53. Mr. Beck was unsuccessful, however, and the right front portion of Mr. Nguyen's vehicle hit the right rear corner of Mr. Beck's vehicle. CP 39. It is estimated that Mr. Beck's post-collision speed was approximately 33 mph. CP 113. The force of the collision caused Mr. Beck's vehicle to spin clockwise, jump the curb and run into the bus shelter where Plaintiff sat 70 feet away. CP 114.

Eric Hunter, an engineer specializing in accident reconstruction, reviewed the police reports, photos and other materials associated with this accident. He also used HVE simulation software to recreate the accident.

CP 112-16. Mr. Hunter found that the post-collision speed of 33 mph estimated by police for Beck's vehicle was consistent with the tire marks and other physical evidence at the scene. *Id.* Mr. Nguyen was estimated to have been traveling 17 mph at the time of the collision. CP 114. The vehicle speeds and location of the collision would have to be very specific to cause Beck's vehicle to continue on a trajectory that would cause it to strike the bus shelter. *Id.* Mr. Hunter's analysis is consistent with neither vehicle coming to a complete stop before entering the intersection. CP 115.

Following the collision, Beck's vehicle lost speed but it is estimated to have been traveling 17 mph at the time it hit the shelter. CP 115. Beck's vehicle jumped the curb and hit the bus shelter, Mr. Brewster and the bench on which he sat. *Id.* The shelter itself absorbed the majority of the impact, serving as a buffer between Beck's vehicle and Plaintiff. CP 115-16. Had the shelter not been there, Plaintiff likely would have faced the full impact of Beck's vehicle, or 42,000 ft-lb, causing him greater injury. CP 116.

B. BECK'S INTOXICATION AND THE TRIANGLE LOUNGE

Defendant Bethel Beck was legally intoxicated at the time of the accident. His blood alcohol content when it was tested following the accident was .09. CP 54. Prior to the collision, Beck and his passenger, Sam Saycocie, were drinking alcohol at the Triangle Lounge in Fremont. CP 47.

Mr. Beck was deposed during the first lawsuit Plaintiff filed arising out of this accident (a lawsuit in which King County was not a party), and he testified that he was served two double gin and tonics and four beers in 2 1/2 hours at the Triangle. CP 49, CP 50-1. He also testified that he was visibly intoxicated and that his behavior was likely observed by Triangle Lounge employees. CP 51.

Despite being intoxicated, Mr. Beck chose to get behind the wheel of his vehicle with passenger Saycocie. Moments later, driving north on 8th Avenue NW approaching the intersection with NW Market Street, he failed to stop and failed to yield the right of way to Mr. Nguyen who was on the right. CP 39-40. The two vehicles collided, and Beck's vehicle spun out of control, jumping the curb and hitting the bus shelter and Plaintiff. *Id.* Beck was visibly intoxicated at the scene and was processed for Driving Under the Influence. CP 40. He ultimately pled guilty to injury by vehicle. CP 46.

C. PLAINTIFF'S CLAIMS

Prior to filing a lawsuit against King County, Plaintiff filed a lawsuit against Bethel Beck, III, Bethel Beck, Jr., Cong Nguyen, and the Triangle Lounge, LLC in King County Superior Court. CP 58-61. King County was not a party to that lawsuit. Plaintiff alleged in his complaint that the Triangle Lounge, LLC, "negligently served and/or negligently over-served Bethel Beck, III, with alcohol after he was apparently intoxicated in violation of

Washington law." *Id.* Plaintiff reached a financial settlement with the Triangle Lounge and voluntarily dismissed Mr. Beck and Mr. Nguyen. CP 71. Plaintiff then sued King County as well as Mr. Beck and Mr. Nguyen, claiming each of the defendants was negligent.

Plaintiff's vague allegation of liability against Defendant King County is that the County "negligently designed, constructed, replaced and/or maintained the bus shelter where Terry Brewster sustained life threatening injuries." CP 2. King County propounded interrogatories on Plaintiff and asked him the following:

Describe with specificity and detail the factual basis of your allegations of liability on the part of King County, including any duty you claim was owed to you and was violated, and all facts known to you or your attorney in support of this allegation.

CP 72. Plaintiff's response directs King County to refer to his complaint and also states that "the King County bus shelter at issue in this lawsuit was unreasonably dangerous to the travelling public and did not meet King County's own safety guidelines or other applicable state and national safety standards." *Id.*

D. THE BUS SHELTER

1. Shelters Generally and Accident Shelter Location

King County Metro Transit has approximately 9,600 bus stops and nearly 1,600 sheltered bus stops located throughout King County. CP 81.

Most of those shelters, including the one at issue in this lawsuit, are placed in the right of way belonging to the local jurisdiction. *Id.* Bus shelters are covered waiting areas that provide protection from inclement weather. CP 82. These shelters may have other amenities such as benches, lighting, etc. however these amenities are not required. *Id.*

King County Metro Transit has design guidelines regarding the installation of bus shelters. *Id.* The decision to install a passenger shelter at a particular bus stop is based on factors including, but not limited to, passenger volume, frequency of service, transfer points, available space and property owner concurrence. *Id.* See also generally CP 85-95. In addition to its internal guidelines, Metro relies on the Transit Cooperative Research Program (TCRP), Report 19, Guidelines for the Location and Design of Bus Stops, in the planning of its bus stops and shelters. CP 82. See also generally CP 97-105.

Once a shelter is planned at a bus stop, Metro's Design and Construction Group takes over regarding actual placement of the shelter at a given location. Prior to placing a bus shelter in a given location, Metro Transit Design and Construction reviews the proposed site and considers a number of factors to determine appropriate placement of the shelter. CP 126. These factors include, but are not limited to, sight distance, accessibility, zone obstructions, adjacent properties, crosswalk proximity,

lighting, etc. *Id.* A designer or engineering technician will typically conduct a site survey as part of the planning and design process. *Id.* *See also* CP 129-135. In addition to the design and construction process, Metro Transit also goes through the permitting process for the local jurisdiction in which the shelter will be placed. CP 126. The length and breadth of this process varies by the jurisdiction, but it is mandatory in order to obtain the approval for shelter placement in the city's right of way. *Id.*

The bus shelter at issue here is located at a bus stop in the City of Seattle on the east side of 8th Avenue NW approximately 65 feet north of the crosswalk at (or 75 feet north of the intersection with) NW Market Street. CP 126. This is considered a far-side bus stop because it allows the bus to clear the intersection and crosswalk and for disembarking passengers to cross behind the bus instead of in front of it. CP 82.

This shelter location has been in use since approximately 1974. CP 126. The shelter structure is owned by King County but is on city right of way. *Id.* The shelter opening faces away from the roadway, and it was placed at its current location to avoid blocking doorways/windows of the adjacent business as well as the sidewalk. *Id.* *See also* CP 137, 139. Although the checklists referenced above were not in place in 1974, the bus stop and shelter meet these guidelines as discussed below. CP 127.

At the time this shelter location was approved by the City of Seattle, the city's clearance requirement, or the distance which a structure must be away from the face of a curb, was, at most, two feet. CP 127. There is two feet between the face of the curb and the shelter at issue here. *Id.* Clearance requirements are in place to address safety concerns for the traveling public, as well as environmental reasons and concern for property owners. *Id.* A site survey was recently conducted at this location, and the shelter location is in conformance with current Metro Transit safety and engineering standards, as well as the municipal requirements in effect at the time of permitting. *Id. See also* CP 83, 141. Metro Transit does refurbish its shelters, including the one at issue here, but that is simply a replacement of the shelter itself (which sits on a concrete landing pad) and requires no new construction or permitting. CP 216-17.

2. Shelter Structure

The bus shelter that was hit by Mr. Beck in the early hours of December 16, 2006, was one of King County's standard bus shelters. CP 117. This shelter, Metro's standard F-21 model, consists of a steel structural frame with architectural plywood inserts around the bottom and architectural window panels around the upper portion. CP 117-18. The shelter has a two-inch thick cellular fiberglass roof and is secured to a

concrete landing pad. CP 118. King County's bus shelters are designed in accordance with the following standards: a. International Building Code as amended by the City of Seattle, Chapter 16 (Structural Design), Chapter 17 (Structural Testing and Special Inspection), Chapter 18 (Soils and Foundations), Chapter 19 (Concrete), and Chapter 22 (Steel); b. American Society of Civil Engineers (ASCE) 7 "Minimum Design Loads for Buildings and Other Structures;" c. American Institute of Steel Construction (AISC) "Steel Construction Manual;" and d. American Concrete Institute (ACI) 318 "Building Code Requirements for Structural Concrete." *Id.* See also CP 121-124.

King County's shelter structure design is based not only on the required codes and standards, but also on ease of construction and modularity. CP 118. Due to the concerns about modularity and ease of construction, the shelters are capable of carrying loads far in excess of those required by code. *Id.* The F-21 shelter model has a structure capable of carrying more than 300% of all code-required loads. *Id.* King County's shelters are far more structurally robust than those used by other transit agencies in the region. *Id.*

King County purchases the materials for the shelters and constructs them in-house. CP 118. Bus shelters are designed to protect users from the elements such as wind and rain. Bus shelters are not, however,

designed to resist vehicle impact loads which are extremely high loads. *Id.* None of the standards set forth above require King County to install bus shelters that are capable of withstanding vehicle impact loads. *Id.* A shelter designed to resist vehicle loads would have two principal negative effects. CP 119. First, the massive rigid structure that would be required would imperil the occupants of any vehicle that struck the shelter. *Id.* Second, such a shelter would impair the capability of Metro crews to fabricate and install the shelters. *Id.*

King County Metro Transit structural engineer John Davis reviewed the F-21 model shelter for structural strength and code compliance in 2000 and again in 2005. CP 119. Each time he concluded that the F-21 shelter met all structural strength and code requirements. *Id.* Mr. Davis also reviewed photos of the shelter that were taken after the accident. It is clear from the photos that the shelter frame remained intact. *Id.* The plywood inserts that serve as wind-screens were damaged by the vehicle when it hit the shelter. *Id.* These panels, however, are architectural in nature and not part of the load-carrying structure of the shelter. *Id.* According to structural engineer Mr. Davis, the bus shelter involved in this accident was designed and constructed in accordance with all applicable safety and engineering standards. *Id.* In his opinion, this

shelter performed exactly as intended because it maintained its structural integrity despite being impacted by an out-of-control vehicle. *Id.*

E. PROCEDURAL BACKGROUND

Defendant King County agrees with the procedural background set forth in Appellant Brewster's brief.

III. ARGUMENT

The trial court correctly granted Defendant King County's motion for summary judgment in this case. First, King County owed Plaintiff, at most, a duty of ordinary care because he was not a bus passenger at the time this incident occurred. Second, King County did not breach its duty of care to Plaintiff in the design, construction and placement of the bus shelter. Third, Plaintiff's injuries were proximately caused by co-defendants Bethel Beck III and Cong Nguyen, as well as by the Triangle Lounge, and not by King County. Fourth, King County had no duty to protect Plaintiff against the unforeseeable criminal acts of defendant Beck. For all of these reasons, the trial court correctly granted Defendant King County's motion for summary judgment. Similarly, the trial court properly denied plaintiff's motion for reconsideration. Defendant King County respectfully requests that the judgment of the trial court be affirmed.

A. THE TRIAL COURT PROPERLY GRANTED DEFENDANT KING COUNTY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE EXIST NO GENUINE ISSUES OF MATERIAL FACT AND KING COUNTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

A trial court's grant of summary judgment is reviewed *de novo*, thus the Court will engage in the same inquiry as the trial court. *Walker v. King County Metro*, 126 Wn.App. 904, 907, 109 P.3d 836 (2005). Summary judgment is appropriate if the pleadings, admissions, answers to interrogatories and affidavits, if any, “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). *See Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). In response to a motion for summary judgment, the nonmoving party may not rely solely on his pleadings but must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). Additionally, the facts submitted and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249, 850 P.2d 1298. The motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. *Scott v. Blanchet High School*, 50 Wn. App. 37, 41, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1988). A summary judgment motion should not be denied on the basis of an unreasonable inference. *Scott*, 50 Wn. App. at 47, 747 P.2d 1124.

There are no genuine issues of material fact in the case at bar and, as discussed below, Defendant King County is entitled to judgment as a matter of law.

1. King County did not breach any duty of care owed to Plaintiff.

In order to succeed in a negligence action, 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.

Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The threshold determination in any negligence action—whether a duty is owed—is a question of law. *Id.* Plaintiff must produce evidence sufficient to show that the defendant breached the required standard of care. *Walker*, 126 Wn.App. at 908, 109 P.3d 836. If he fails to do so, summary judgment must be entered. *Id.*

a. Plaintiff was not a bus passenger at the time of the accident.

A common carrier owes a prospective passenger who has not attained passenger status the duty to exercise ordinary care. *Sweek v. Municipality of Metropolitan Seattle*, 45 Wn.App. 479, 482, 726 P.2d 37 (1986). The Court has set forth a five-part test for determining whether an individual has the status of a passenger on a common carrier:

The matters to be considered in determining the status as a passenger are: (1) place (a place under the control of the

carrier and provided for the use of persons who are about to enter carrier's conveyance); (2) time (a reasonable time before the time to enter the conveyance); (3) intention (a genuine intention to take passage upon carrier's conveyance); (4) control (a submission to the directions, express or implied, of the carrier); and (5) knowledge (a notice to carrier either that the person is actually prepared to take passage or that persons awaiting passage may reasonably be expected at the time and place).

Zorotich v. Toll Bridge Auth., 80 Wn.2d 106, 108-09, 491 P.2d 1295 (1971). WPI 100.09¹ sets forth a definition of a passenger based on a similar jury instruction discussed with approval in *Houck v. University of Washington*, 60 Wn.App. 189, 201, 803 P.2d 47, *rev. den.*, 116 Wn.2d 1028 (1991).

Here, it is clear that plaintiff was not a "passenger" at the time this incident occurred. He was not in the act of "boarding, entering, riding upon or alighting from" the bus. He was simply sitting in a bus shelter waiting for a bus. There is no indication that a bus was even nearby, let alone close enough to allow him to convey his intention to ride. Plaintiff also was not under the control of King County Metro in any way. Plaintiff neither meets the definition of a "passenger" nor satisfies the factors set

¹ WPI 100.09: A person is a passenger if he or she is in the act of boarding, entering, riding upon or alighting from the carrier's conveyance with the actual or implied consent of the carrier. [Also, one is a passenger while upon the carrier's premises for a reasonable time before the departure of the carrier's conveyance, or for a reasonable time before the departure of the carrier's conveyance upon which he or she intends to ride as a passenger.] WPI 100.09 (5th edition).

forth above. Thus, at most, Defendant King County owed Plaintiff a duty of ordinary care in this case.

b. King County exercised ordinary care.

There is simply no evidence that defendant King County breached its duty of ordinary care to Plaintiff in this case. As discussed in detail above, the bus shelter complies with all applicable standards both structurally and with respect to placement. Regarding the structure of the shelter, it is constructed to carry 300% of the loads that are required. The reality is that bus shelters are designed to protect users from the weather. They are not designed to be crash barriers for out-of-control vehicles driven by drunk drivers, nor should they be. As Mr. Davis indicated, a shelter designed to withstand the impact of a vehicle would endanger the safety of the vehicle occupants. CP 119. The bus shelter in this case performed exactly as intended, perhaps even better than intended, because it withstood the impact of Beck's out-of-control vehicle.

Regarding the shelter location which has been in place since 1974, Defendant King County does not own the roadway where this accident occurred, nor does it own the property on which the bus shelter is located. CP 126. King County's involvement with the accident location is limited to its ownership of a bus shelter and having a bus stop at this location. The bus stop and shelter location were approved by the City of Seattle at

the time of permitting. The location of the shelter met all code requirements in place at the time of permitting, including the clearance requirement between structures and curb faces. CP 127.

The only documentary evidence submitted by any of Plaintiff's experts came from Mr. Haro, and the evidence does not create a genuine issue of material fact regarding breach in this case. Mr. Haro submitted King County Metro's 1991 facility design guidelines as well as a single page from the 1991 Washington State Department of Transportation Design Manual. CP 183-86, 265-66. There is not a single statement in those guidelines which mandates any of the alternate shelter locations, let alone shelter removal, that plaintiff's experts claim was required by the "applicable standard of care." Additionally, the King County standards are 1991 standards (17 years after this shelter was installed) and the WSDOT standards apply to state roadways, thus it is questionable whether either even applies. It should be noted that Mr. Camardella and Mr. Haro also claim the bus shelter is less than two feet from the curb. However, neither Mr. Camardella nor Mr. Haro provides any evidence to support this contention or clarify to which part of the curb they are referring. In fact, neither even says he took a measurement. Plaintiff's experts are incorrect. King County submitted the original plans and a site survey of

the bus shelter, both of which show a clearance of at least 2 feet from the curbface to the shelter. CP 137, 141.

Plaintiff alleges that the shelter is unreasonably dangerous, but that claim is without merit and no evidence has been submitted in support of it. To the contrary, the bus shelter probably saved Plaintiff's life. At the time he hit the bus shelter after the collision with Mr. Nguyen's vehicle, Mr. Beck was driving approximately 17 mph. As Mr. Hunter noted in his report, the bus shelter absorbed the majority of the impact of Beck's vehicle, serving as a buffer between the vehicle and Plaintiff. CP 115-16. If the shelter had not been there, it is likely that Plaintiff would have faced the full impact of Beck's vehicle and suffered far greater injury than he did. CP 116. It is clear that Defendant King County exercised ordinary care and was not negligent in this case. Further, as discussed below, King County was not the proximate cause of Plaintiff's injuries.

2. King County did not proximately cause Plaintiff's injuries, and the declarations from Plaintiff's experts and witness Hogan do not create a genuine issue of material fact which would prevent summary judgment.

King County was not the proximate cause of Plaintiff's injuries, thus his claims against King County were properly dismissed. Negligence cannot be assumed merely because an accident took place. *Walker*, 126 Wn.App.2d at 908, 109 P.3d 836. In order to establish a cause of action,

plaintiff must prove that the actions of defendant constituted negligence toward plaintiff, and that defendant's negligent actions were the legal, or proximate, cause of the injury. *Evans v. Yakima Valley Transportation Co.*, 39 Wn.2d 841, 846, 239 P.2d 336 (1952). Proximate cause contains two prongs: (1) cause in fact (or "but for"); and (2) legal cause. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). The cause in fact element of proximate cause is met if a plaintiff's injury would not have occurred but for the defendant's negligence. *Bordon v. State Dept. of Corrections*, 122 Wn.App. 227, 240, 95 P.3d 764 (2004) (citation omitted). Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative. *Id.* As for "legal causation", its existence "is driven by policy considerations and common sense, which in turn stem from the particular facts of the case." *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 840, 906 P.2d 336 (1995). "Unlike factual causation, legal causation 'hinges on principles of responsibility, not physics', and the determination of legal causation rests on policy considerations as to how far the legal consequences of a defendant's acts should extend." *Anderson v. Dreis & Krump, Mfg.*, 48 Wn.App. 432, 442, 739 P.2d 1177 (1987). It is possible to have more than one proximate cause of an injury. WPI 15.01.

Plaintiff claims that the declarations submitted by his experts were sufficient to defeat King County's motion. He is incorrect. In response to King County's motion for summary judgment, Plaintiff submitted declarations from three retained expert witnesses who claim that King County violated the standard of care with respect to the placement of this bus shelter. Although these witnesses argue that King County was negligent by not having the shelter 12 inches further back on the sidewalk, none of them allege that doing so would have prevented this accident. William Haro argues that King County should have located the bus shelter approximately 20 feet to the north of its current location and that that would "provide greater safety for shelter users and would have prevented Mr. Brewster from being injured." CP 177-78. Lee Camardella argues that King County breached "the applicable standard of care" by not (1) placing the bus shelter against an adjacent building owned by a private party; (2) placing the shelter north of the current bus zone; (3) placing the seating in the bus shelter such that passengers' views face oncoming traffic; or (4) removing the shelter entirely. CP 172-73. However, he only alleges that this accident would have been prevented if the shelter would have been north of the current bus zone or against the adjacent building. CP 173. He clearly does not allege the accident would have been prevented if the shelter seating was oriented differently or if the shelter

had been completely removed. *Id.* Richard Gill appears to generally assert the same arguments as Mr. Camardella.

The claims by Plaintiff's experts that this accident would not have happened if King County had placed the shelter further north or against the adjacent building are pure speculation and do not create proximate cause. Even if, despite the absence of any evidence, the Court found King County had a legal duty to relocate the shelter, it is conjecture to say that this accident and Plaintiff's injuries would not have occurred but for King County's failure to do so. In order to defeat King County's motion on proximate cause, a plaintiff must establish more than that a defendant's breach of duty *might* have caused an injury. *Miller v. Likins*, 109 Wn.App. 140, 145, 34 P.3d 835 (2001). He has failed to do so here, in part because a speculative opinion does not become admissible to prove causation because it happens to come from an expert witness. *Miller*, 109 Wn.App. at 148 (citation omitted). Additionally, the legal causation requirement of proximate cause against King County is also lacking because public policy considerations weigh against finding any claimed County negligence as the legal cause of Plaintiff's injuries. *Anderson*, 48 Wn.App. at 442, 739 P.2d 1177. Finally, the bus shelter was simply a passive condition and not the cause of Plaintiff's injuries. *See e.g. Scruggs v. Jefferson County*, 18 Wn.App. 240, 244, 567 P.2d 257 (1977) (holding

that utility pole placed on the road right-of-way and struck by a vehicle occupied by plaintiff was at most, "merely a passive, nonculpable cause-in-fact of the injuries. It was a condition and not a cause of the accident.").

The declaration of Christopher Hogan is similarly speculative and did not create a genuine issue of material fact regarding proximate cause. Plaintiff argues that he has proven causation by the fact that Mr. Hogan was standing outside the bus shelter and was not injured. That argument is without merit. It is complete speculation to say that Plaintiff would not have been injured if the shelter had been facing the street (setting aside the fact that the County had no duty to place it that way), and speculation cannot be the basis for proximate cause. *Miller*, 109 Wn.App. at 145 ("[T]o survive summary judgment, the plaintiff's showing of proximate cause must be based on more than mere conjecture or speculation."). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 269 (5th ed. 1984) ("The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict

for the defendant."). Plaintiff's own deposition testimony is he was "lost in a book." CP 259. No one knows what would have happened if the shelter had been facing the street. Plaintiff may have been able to avoid injury, or he may have been hurt worse because the van would have hit him before it hit the shelter. Plaintiff cannot prove that King County proximately caused his injuries, thus his claims against King County were properly dismissed.

Plaintiff's injuries were, however, proximately caused by the negligence of defendants Beck and Nguyen, as well as the Triangle Lounge. Defendant Beck was negligent when he drove while intoxicated above the state's legal limit of .08 blood alcohol content. RCW 46.61.502. Mr. Beck admitted that his blood alcohol content was measured at .09. CP 54. Mr. Beck and Mr. Nguyen were also each negligent when they failed to treat the accident intersection as a four-way stop. *See* RCW 46.61.183 (" ... the driver of a vehicle approaching an intersection controlled by a traffic control signal that is temporarily without power ... shall consider the intersection to be an all-way stop. After stopping, the driver shall yield the right-of-way in accordance with RCW 46.61.180(1) and 46.61.185.") Finally, the Triangle Lounge, who is not a party in this case, was also negligent and proximately caused Plaintiff's injuries. The Triangle owed a duty to plaintiff, which it breached, not to serve alcohol

to a person who is obviously intoxicated. WPI 370.01. *See also* RCW 66.44.200. The negligence of each of these individuals/entities proximately caused Plaintiff's injuries. Plaintiff's injuries were not proximately caused by King County, therefore the trial court correctly granted summary judgment.

3. King County has no duty to protect against unforeseeable accidents or criminal acts.

Regardless of the standard of care applied in this case, this accident was unforeseeable as a matter of law and King County cannot be required to have prevented it.² *See generally Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (2003); *Parrilla v. King County*, 138 Wn.App. 427, 436, 157 P.3d 879 (2007) ("If a risk [of harm] is not foreseeable, an actor generally has no duty to prevent it.") (citations omitted). The bus shelter in this case is away from the intersection location where defendants Beck and Nguyen's vehicles collided after each admittedly failed to stop as required. It simply was not foreseeable that one of these two vehicles driven by a drunk driver would spin out of control, jump the curb and hit the shelter where Plaintiff sat. Further, the general rule is that people cannot be held liable for the criminal acts of others because criminal

² Even if the Court finds the common carrier standard applies, the duty or standard of care owed by a common carrier is not strict liability. *Tortes v. King County*, 119 Wn.App. 1, 7, 84 P.3d 252 (2003). "A common carrier is not the insurer of its passengers' safety, and negligence should not be presumed or inferred from the mere happening of an accident." *Id.* at 7-8.

conduct is usually not reasonably foreseeable. *See e.g. Tortes, supra.* Defendant Beck broke the law when he drove while intoxicated. King County had no duty to protect against this unforeseeable accident, thus Plaintiff's claims against the County were properly dismissed. The judgment of the trial court must be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION.

Plaintiff's motion for reconsideration was properly denied by the trial court. The denial of a motion for reconsideration is reviewed for abuse of discretion by the trial court. *Lilly v. Lynch*, 88 Wn.App. 306, 321, 945 P.2d 727 (1997). As discussed in detail above, the declarations from Plaintiff's experts do not create a genuine issue of material fact regarding breach or proximate cause. Additionally, the declaration of Christopher Hogan fails to create a genuine issue of material fact regarding proximate cause. Finally, the evidence submitted by King County in support of its motion for summary judgment proved it was entitled to judgment as a matter of law. The trial court did not abuse its discretion when it denied Plaintiff's motion for reconsideration. Thus, the judgment of the trial court should be affirmed.

//

//

IV. CONCLUSION

Based on the foregoing, defendant King County respectfully requests that the trial court's grant of summary judgment to King County and denial of Plaintiff's motion for reconsideration be affirmed.

DATED this 24th day of September, 2010.

Respectfully submitted,

DANIEL SATTERBERG
King County Prosecuting Attorney

By: Jessica L. Hardung
JESSICA L. HARDUNG, WSBA #30416
Senior Deputy Prosecuting Attorney
Attorney for Respondent King County

FILED
COURT OF APPEALS
CIVIL DIVISION

10 SEP 24 PM 2:09

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I, LISA BOGGESS, declare under penalty of perjury, under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

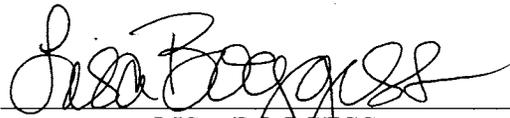
1. I am over 18 years old and competent to testify to the matters set forth herein. I make this declaration based upon my own personal knowledge.
2. I caused to be served **BRIEF OF RESPONDENT** upon the following via ABC Messenger Service, to be served by September 24, 2010:

Raymond J. Dearie, Jr.
DEARIE LAW GROUP
2125 Fifth Avenue
Seattle, WA. 98121

David J. Wieck
WIECK SCHWANZ
400 112th Avenue N.E., Suite 340
Bellevue, WA. 98004

Robert Swerk
KEOLKER & SWERK
300 Admiral Way, Suite 201
Edmonds, WA. 98020

DATED this 24th day of September, 2010 at Seattle,
Washington.


LISA BOGGESS