

65801-8

65801-8

A

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.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

---

**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

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PRESENTED.....	1
C. STATEMENT OF CASE.....	1
1. SUBSTANTIVE FACTS.....	1
2. PROCEDURAL FACTS.....	4
a. CIVIL RULE 50 MOTION.....	5
b. JURY VERDICT IN FAVOR OF PLAINTIFFS.....	5
c. JUROR MISCONDUCT IN TESTING OTHER BUS STEPS ON WAY TO COURT.....	5
D. ARGUMENT.....	9
1. STANDARD OF REVIEW .....	9
a. CIVIL RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW.....	9
b. CIVIL RULE 59 MOTION FOR NEW TRIAL: JUROR MISCONDUCT.....	9
2. METRO'S MOTION FOR JUDGMENT AS A MATTER OF LAW SHOULD BE GRANTED AND THIS CASE REMANDED FOR ENTRY OF DISMISSAL.....	11
3. ALTERNATIVELY, METRO'S MOTION FOR NEW TRIAL BECAUSE OF JUROR MISCONDUCT SHOULD BE GRANTED AND THE CASE REMANDED FOR A NEW TRIAL.....	15
E. CONCLUSION.....	24

TABLE OF AUTHORITIES

Table of Cases

**Washington:**

Aliverti v. City of Walla Walla, 162 Wash 487, 298 Pac. 698 (1931).....17

Arthur v. Washington Iron Works Division of Formac International, Inc.,  
22 Wn. App. 61, 587 P.2d 626 (1978).....16, 17

Breckenridge v. Valley General Hospital, 150 Wn.2d 197,  
75 P.3d 944 (2003).....17, 20

Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962).....15, 16, 17

Goodman v. Goodman, 128 Wn. 2d 366, 371, 907 P.2d 290 (1995).....10

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915,  
32 P.2d 250 (2001).....9, 10

Halverson v. Anderson, 82 Wn.2d 746, 750, 513 P.2d 827 (1973).....10, 17

Kaiser v. Suburban Transportation System, 65 Wn.2d 461, 468,  
398 P.2d 14 (1965).....11

Kuhn v. Schall, 155 Wn. App. 560, 228 P.3d 828, 836,  
rev. denied 169 Wn. 2d 1024 (2010).....15, 17, 20, 21

Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now,  
119 Wn. App. 665, 681, 82 P.3d 1199 (2004).....10, 15

Murphy v. Montgomery Elevator Company, 65 Wn.App. 112, 116,  
828 P.2d 584 (1992).....11, 13

Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266,  
796 P.2d 737 (1990).....15, 17, 20

Ryan v. Westgard, 12 Wn. App. 500, 503, 530 P.2d 687 (1975).....10

Steadman v. Shackelton, 52 Wn.2d 22, 322 P.2d 833 (1958).....19

<u>Sing v. John L. Scott, Inc.</u> , 134 Wn.2d 24, 29, 948 P.2d 816 (1997).....	9
<u>State v. Balisok</u> , 123 Wn.2d 114, 118, 866 P.2d 631 (1994).....	15, 18, 19
<u>State v. Boling</u> , 131 Wash. App. 329, 331, 127 P.3d 740 (2006).....	16
<u>State v. Everson</u> , 166 Wn. 534, 7 P.2d 603 (1932).....	18
<u>Tortes v. King County</u> , 119 Wn.App. 1, 8, 84 P.3d 252 (2003).....	11
<u>Walker v. King County Metro</u> , 126 Wash.App. 904, 109 P.3d 836 (2005).....	13, 14
<u>Woodruff v. Ewald</u> , 127 Wn. 61, 219 P. 851 (1923).....	16

**Other States:**

<u>Serritos v. Chicago Transit Authority</u> , 505 N.E.2d 1034, 1036 (Ill.App. 1 Dist. 1987).....	12, 13
<u>Shorts v. New Orleans Public Services, Inc.</u> , 522 So.2d 1265, 1267 (La.App. 4 Cir. 1988).....	11, 12, 13

**Court Rules**

Civil Rule 50.....	1, 9, 15, 24
Civil Rule 59.....	1, 10, 24

**A. ASSIGNMENTS OF ERROR**

1. King County Metro Transit (hereinafter "Metro"), Appellant, assigns error to the trial court's failure to grant Metro's Civil Rule 50 Motion for Judgment as a Matter of Law.

2. Metro assigns error to the trial court's failure to grant its Civil Rule 59 Motion for New Trial.

**B. ISSUES PRESENTED**

1. 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 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. 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?

**C. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS**

This personal injury case arose from a fall by plaintiff Keith Knappett on October 24, 2006 at Fifth Avenue & Pike Street in downtown

Seattle. CP 20. Both liability and the nature and extent of damages were disputed at trial. Id.

King County Metro Transit has a fleet of about thirteen hundred (1300) buses. RP (05/26/10) 14. In 2006 Metro had an annual ridership of approximately 103 million rider boardings. Id., at 15.

October 24, 2006 was a typical rainy Seattle day. RP (5/24/10) 112-113. On that morning, Metro's transit operator Sergey Buryy drove a Route 260 Metro Transit bus from the Finn Hill neighborhood bordering Bothell and Kenmore into downtown Seattle. Id. All of the passenger boardings on that route were through the front doors. Id. Because passengers in-bound toward downtown Seattle pay as they board the bus, no passengers would get on the bus through the rear doors until the "ride free" zone beginning for this particular route at the Fifth and Pine bus stop, only one block from the stop where Mr. Knappett got off the bus. Id., 16-17. Hence, there was no opportunity for passengers to track or bring rainwater over the rear steps of the bus that morning. In October 2006 Mr. Buryy did not ever see Mr. Knappett fall on his bus. Id., 16. After learning that Mr. Knappett reported a fall, Mr. Buryy looked for passengers with any information about such a fall but he did not find anyone. Id., 17.

Mr. Knappett sustained injuries to his lower leg when he fell on October 24, 2006. There are no known witnesses to his fall. RP (5/24/10) 119-121. Mr. Knappett gave several different versions of what happened. Initially, he did not mention a bus at all. RP (5/20/10), 28-29; Exhibit 47. He first reported to Seattle Fire Department Fire Fighter and Emergency Medical Technician (EMT) Anthony Miceli that he had slipped on the wet sidewalk and twisted his ankle. He made no mention at all of a bus. *Id.* At the scene he told the private ambulance EMT Michael Tanberg, that he had ankle pain as a result of a ground-level trip on wet pavement. RP (5/24/10), 105-106. As time passed, he reported that he had exited a bus and "missed the first step" and, much later in August 2009 he stated that he "was still on the main floor of the bus" when he fell. Exhibit 52. At trial, Mr. Knappett still did not testify that he stepped on the yellow nosing/edge of the steps instead of the main floor of the bus or missing a step. RP (5/24/10), 4-139. He testified 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. RP (5/24/10), 116-117.

Plaintiff's sole liability expert at trial was forensic human factors psychologist Gary Sloan who testified that the blue bus flooring and the yellow nosing/edge strip alerting passengers to the steps are both sufficiently slip resistant when dry. RP (5/20/10) 155-156. In his testing

Dr. Sloan found the yellow nosing/edge strip to be dangerously slippery but only when it was entirely covered in a puddle of water made when he opened a spray bottle and poured water onto the step edge. RP (5/20/10) 149-150; 155-156. Gary Sloan is not an expert in the standard of care in the transit industry. He testified that the specifications for the bus flooring and the bus nosing/edge both required Nora slip resistant material and that the Nora material was used for the flooring and the yellow nosing/contrast strip. RP (5/20/10) 148. He testified that there were hand railings available for passengers including Mr. Knappett using the steps at the rear doors of the bus. RP (5/20/10) 149. He did not testify to any specific change Metro was required by an applicable standard of care to make to the step edging nor was he qualified to do so. Sloan was also prohibited by the court from testifying regarding how the accident actually happened. RP (5/20/10) 139-141.

## **2. PROCEDURAL FACTS**

Mr. Knappett filed a claim for damages against King County. Exhibit 51. He and his wife later commenced this action for personal injury damages. CP 1-4.

On May 18, 2010 a jury trial began in King County Superior Court before the Honorable Michael C. Hayden. CP 70-86.

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

Based on the lack of evidence of any violation of a transit industry standard of care and the absence of *any* testimony that Mr. Knappett actually stepped on the yellow nosing/edge strip of the bus step, Metro filed a Civil Rule 50 Motion for Judgment as a Matter of Law. CP 95-112. On May 25, 2010 the Court denied this motion. RP (05/25/10) 5.

**b. Jury Verdict in Favor of Plaintiffs**

The jury trial concluded on May 26, 2010 with a verdict in favor of plaintiffs. CP 140-141. In answer to special verdict questions, the jury found Metro was negligent, said negligence was a proximate cause of injuries and awarded plaintiffs substantial money damages. *Id.* The jury also found Mr. Knappett was not contributorially negligent. *Id.*

**c. Juror Misconduct in Testing Other Bus Steps on the Way to Court.**

Immediately after the jury was dismissed, two jurors (Juror 7 and Juror 8) disclosed in a conversation with other jurors (including Juror 4 and Juror 10) and counsel in the hallway outside the courtroom that they had performed their own tests of wet yellow nosing strips on Metro bus steps on their way to court to continue their deliberations that morning. CP 142-160. Three jurors, Juror 4, Juror 8 (one of the two jurors admitting to performing the outside testing) and Juror 10, signed sworn declarations describing this misconduct and/or the participating jurors'

statements regarding the issue. Id. The jurors are referred herein by their number to protect their privacy interests but their sworn declarations contain their names. Juror 8 testified by declaration that:

[O]n my commute on the articulated bus the morning of May 26<sup>th</sup> 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 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.

The jurors had been instructed by the Court during the trial not to go out and seek out evidence on their own. RP (07/02/10) 14, lines 24-25. However, they did so anyway. As a result of the jurors' violation of this instruction from the court, Metro moved for a new trial based on juror misconduct. CP 142-160. On July 2, 2010 the trial court denied Metro's Motion for a new trial and entered judgment in favor of plaintiffs. RP (07/02/10) 12-16, CP 211-212.

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. 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.

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. Fortunately, Juror 4, Juror 8 and Juror 10 were candid enough to

disclosure this misconduct and confirm these facts in sworn statements.

Juror 8 also signed a second declaration on June 29, 2010 at the request of plaintiffs' counsel but did not recant his testimony given in his first declaration. CP 197-199. He stated that his carefully placing the ball of his foot on the yellow strip was incidental to disembarking from the bus and being cautious for his own safety. CP 199. However, he could just have easily avoided stepping on the narrow yellow nosing/edge strip at all if his own safety was really the sole reason for his conduct. In his second declaration he did not deny the initial statements he made that he *did* test the slipperiness of the step, as confirmed in his June 2, 2010 sworn declaration:

I 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. *June 2, 2010, Juror 8 Declaration, Para. 3, lines 5-8.*

Metro's defense in this case was prejudiced by this extrinsic evidence. As set forth herein, the trial court abused its discretion in denying a new trial in this case on the basis of juror misconduct.

Therefore, this timely appeal followed. CP 213-217.

//

//

//

## **D. ARGUMENT**

### **1. STANDARD OF REVIEW**

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

A motion for judgment as a matter of law is proper if, after viewing the evidence in the light most favorable to the nonmoving party, "there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.2d 250 (2001) (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). Substantial evidence is the amount sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Guijosa, 144 Wn.2d at 915, 32 P.3d 250. The Court should grant a motion for judgment as a matter of law if the evidence presented is insufficient to convince a reasonable jury of the issue. CR 50(a)(1) provides in pertinent part:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim ... that cannot under the controlling law be maintained without a favorable finding on that issue.

Review on appeal 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, 144 Wn.2d at 915, citing Goodman v. Goodman, 128 Wn. 2d 366, 371, 907 P.2d 290 (1995).

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

Generally, verdicts should be upheld and the jury deliberations upon which they are based should not be questioned. Ryan v. Westgard, 12 Wn. App. 500, 503, 530 P.2d 687 (1975). Jurors' individual or collective mental processes in reaching a verdict may not be probed, as such information "inheres in the verdict." Id., Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now, 119 Wn. App. 665, 681, 82 P.3d 1199 (2004). However, 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.

//

//

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

While a common carrier owes the highest degree of care for the safety of its passengers compatible with the practical operation of its business, that duty is also limited by the circumstances presented at the time and place of the alleged injury. Murphy v. Montgomery Elevator Company, 65 Wn.App. 112, 116, 828 P.2d 584 (1992). No common carrier is an insurer against any and all injuries that a passenger might sustain while being transported. Kaiser v. Suburban Transportation System, 65 Wn.2d 461, 468, 398 P.2d 14 (1965). 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).

In Washington there is no authority by case law, statute or otherwise supporting the notion that a municipal bus company has a duty to keep the floors of its buses dry on a wet and rainy day. Plaintiffs do not appear to be arguing that bus floors should be kept dry by common carriers. In fact, common sense as well as case law from other jurisdictions supports the conclusion that a bus company has no such duty.

In Shorts v. New Orleans Public Services, Inc., 522 So.2d 1265, 1267 (La.App. 4 Cir. 1988), the plaintiff boarded a bus in New Orleans on a "rainy morning." As she walked toward the exit, she slipped and fell.

She sued claiming that the floor of the bus was "just wet and muddy, slippery." The Court of Appeals dismissed her case, holding that:

The bus was a new one and there was no debris on the floor. There was no causal condition other than water from rain--a common situation in our subtropical climate. Thus, Ms. Shorts was not injured because of a breach of duty by defendant as a common carrier.

Shorts v. New Orleans Public Services, Inc., *supra* at 1267.

The practical effect of imposing liability on a transit provider in lawsuits complaining about wet floors was addressed in Serritos v. Chicago Transit Authority, 505 N.E.2d 1034, 1036 (Ill.App. 1 Dist. 1987). There, the court refused to hold the bus company liable for injuries caused by steps allegedly slippery because they were covered with ice and snow.

As the Serritos court said at p. 1039:

Requiring defendant's drivers to remedy a slushy condition on their steps which was brought about by snow being tracked into their vehicles by patrons would bring the transit system to a complete standstill. Therefore, we agree with the trial court that it is totally impracticable to impose such a duty upon defendant. Since there is no duty to remove slush and snow from the steps of its vehicles, defendant's drivers were under no duty to warn passengers of such conditions, especially since such conditions are readily apparent.

As demonstrated by Shorts and Serritos above, imposing a duty on a transit bus company to have dry floors on a wet and rainy day is clearly

not "reasonably compatible with the practical operation of its business."  
See Murphy v. Montgomery Elevator Co., 65 Wn.App. 112 (1992).

That being so, and it most certainly is the case in Seattle, Washington, the court should grant Metro judgment as a matter of law under the facts of this case and remand for entry of an order dismissing this lawsuit. Murphy v. Montgomery Elevator Co., *supra*; Short v. New Orleans Public Services, Inc., *supra*; and Serritos v. Chicago Transit Authority, *supra*. There was no duty to keep the bus floors or steps in a dry condition on a rainy morning.

The court in Division One in Walker v. King County Metro, 126 Wash.App. 904, 109 P.3d 836 (2005) upheld summary judgment of dismissal where plaintiff failed to present 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. Dismissal on summary judgment was upheld because the plaintiff failed to present evidence of a failure to comply with a required standard of care, 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 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. There is no evidence that the yellow nosing/edge was wet, wet enough to be slippery or actually stepped upon at all by Mr. Knappett when he got off the bus on the particular morning of his unfortunate injury. Even if the yellow nosing/edge was wet, 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.

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

"The consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial." State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994) (citations omitted). Extrinsic evidence is any information which provides the jury with a material fact that is not supported by evidence at trial, and thus is not subject to objection, cross-examination, explanation or rebuttal by either party. See, e.g., Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266, 796 P.2d 737 (1990); Loeffelholz, 119 Wn. App. at 681, citing Balisok, 123 Wn.2d at 119. 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, 228 P.3d 828, 836, rev. denied 169 Wn. 2d 1024 (2010), citing Richards, 59 Wn. App. at 270. A new trial must be granted if there is any reasonable doubt regarding the effect of extrinsic evidence on the jury. Id.

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); Woodruff v. Ewald, 127 Wn. 61, 219 P. 851 (1923) (new trial where entire jury viewed the scene of an accident); Arthur v. Washington Iron Works Division of Formac International, Inc., 22 Wn. App. 61, 587 P.2d 626 (1978) (new trial where juror looked for books related to the subject of the trial, where unavailability of books was an issue, and looked to see whether experts were listed as marine engineers in the Yellow Pages, to assist in determining which experts were credible). 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).

Defendant King County submitted three sworn declarations of jurors showing that Juror 7 and Juror 8 both conducted independent research and testing which constituted juror misconduct. This misconduct occurred on the morning of Wednesday, May 26, 2010. 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.

Plaintiffs argued to the trial court that the sworn declarations of jurors other than Juror 8 should not be considered because they are hearsay. Their argument relied on only one case which is readily distinguishable. In Aliverti v. City of Walla Walla, 162 Wash 487, 298 Pac. 698 (1931), the court held an affidavit by an attorney was hearsay. Sworn statements of jurors regarding statements of other jurors are properly and routinely considered by the courts in ruling on motions for new trial based on juror misconduct. See, e.g., Kuhn v. Schall, supra, Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 75 P.3d 944 (2003), Richards v. Overlake Hospital Medical Center, supra, Arthur v. Washington Iron Works, supra, Halverson v. Anderson, supra, Gardner v. Malone, supra. There is simply no support for plaintiffs' suggestion that only the jurors allegedly committing misconduct themselves may testify regarding their actions or statements. All the sworn declarations submitted should be considered.

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. In Balisok, supra, while in the jury room, the jury used a leather jacket and pistol, both of which had been entered into evidence, to reenact an alleged crime. This reenactment was not found to create extrinsic evidence because they were "entirely permissible simulations of the testimony at trial." 123 Wn.2d at 119. Likewise, in State v. Everson, 166 Wn. 534, 7 P.2d 603 (1932) the jury used a magnifying glass to examine a walking stick in evidence. Even though the magnifying glass was not admitted into evidence, just as jurors would have been able to use their reading glasses to examine admitted evidence in the jury room, "the jury merely more critically examined it by the aid of a magnifying glass". 166 Wn. at 537. Such "close examination of evidence" or simulations of trial testimony did not juror misconduct and did not require a new trial.

However, these cases are not dispositive in this instance. Unlike the walking stick in Everson or the gun and jacket in Balisok, neither the stairs on coach number 3298 - the bus ridden by Mr. Knappett on the date of his fall - nor the stairs "tested" by Juror 7 and Juror 8 before

deliberations were completed were admitted into evidence. Therefore, there is no guarantee that Juror 7's and Juror 8's reenactments were at all representative in any way of Mr. Knappett's fall. Metro buses have a number of different configurations and types of flooring material. Reenactments that do not accurately portray the accident -- even when a reenactment is authorized by the court -- justify a new trial. 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 in State v. Balisok. 123 Wn.2d at 119. Plaintiffs' expert testified only as to the alleged slipperiness when wet 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 even all buses with stair nosing made of Nora-brand material. 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.

Additionally, the improper tests by Juror 7 and Juror 8 were not merely personal experiences or knowledge, which jurors may share during

deliberations. See Richards, 59 Wn.App. at 274 (new trial was properly denied when a juror, a nurse, offered her opinion based on the medical records and her professional expertise; the juror's profession was fully disclosed without objection on voir dire); Breckenridge v. Valley General Hospital, supra, (juror's statements comparing his wife's symptoms and treatment with those of the plaintiff were not extrinsic evidence because they were based on personal life experience). 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.

Division One of the Court of Appeals in Kuhn v. Schall, supra, recently reversed a jury verdict on all issues in part as a result of juror misconduct when extrinsic evidence (a newspaper article about the case) was brought into deliberations:

It is misconduct for a juror to introduce extrinsic evidence into deliberations. Such misconduct will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced. The 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. Any doubt that the misconduct affected the verdict must be

resolved against the verdict. (Footnotes omitted). (155 Wn. App at 575, 228 P.3d at 836)

Plaintiffs erroneously claimed to the trial court that their evidence of negligence was undisputed at trial. This is plainly incorrect. Liability was contested throughout this case including through the cross examination of plaintiff's expert regarding the fact that all of the bus flooring (including the yellow nosing) passed the slip resistance test when dry, that the blue Nora flooring passed the test even when wet and that the yellow nosing strip tested slippery only when entire puddles were created on the edge of the step. Evidence was presented by the defense that the rear doors and stairs of the Route 260 bus were not used the morning of Mr. Knappett's injury until the ride-free zone began just one block north of his bus stop so water would not have been available to accumulate there that day anyway. RP (5/25/10) 15-16. The evidence also included Metro Vehicle Estimator Joe Stewart's January 3, 2007 Coach and Mats Inspection Report that both the front and rear stairs of the coach passed as "o.k.". Exhibit 50 (Supplemental Designation of Clerk's Papers). Significant disputed evidence was presented by the defense that plaintiff did not fall by stepping or otherwise touching his foot on the narrow yellow nosing strip of the stair. See, above, Statement of Case, p. 3. Moreover, plaintiffs essentially conceded that the actions of Juror 8

constitute extrinsic evidence by arguing that the actions are not such evidence *only if* the slipperiness issue was not contested. Both alleged slipperiness and whether plaintiff fell on the narrow yellow strip were disputed. The trial court's statements on the record at the time of the ruling denying Metro's motion indicate an erroneous belief that these issues needed to be a "major" dispute or the "heart" of Metro's case. The trial judge apparently disagreed with defense counsel's strategy in presenting the evidence and arguing this case as indicated by some of the remarks about the evidence. RP (5/24/10) 1-24. However, negligence, proximate cause and contributory negligence along with damages were always disputed in this case through the documentary evidence, the lay testimony and expert testimony via cross examination of plaintiff's expert. All of the liability issues involved whether the yellow nosing/edge on the particular bus in question was wet, was sufficiently slippery and/or was stepped upon at all by Mr. Knappett. The trial court appears to have found no misconduct in the jurors' conduct in performing outside testing or re-enacting whether a foot with a shoe similar to Mr. Knappett's would slip easily on wet bus step nosing. Such a finding in this case appeared based on an erroneous standard regarding how much or strongly Metro needed to argue its case. Under the applicable cases, the court's ruling denying a new trial constitutes an abuse of discretion.

The jurors who tested the slipperiness of the step did not "merely disembark the bus" but instead stopped at the top step and used their feet to test the narrow yellow strip on the edge of the rear stairs. They each determined that the step was slippery. This is exactly the type of conduct seeking out evidence on their own that the court instructed them not to engage in. Such outside evidence constitutes juror misconduct.

In the Knappett case, central issues in the case included whether (1) the narrow yellow nosing strip on the bus plaintiff rode was unduly slippery when wet, (2) whether the yellow strip was, in fact, wet on the day of plaintiff's fall, and (3) whether plaintiff in fact stepped on the yellow nosing strip at all. Plaintiffs' counsel argued that it was so dangerously slippery that it must have caused plaintiff to fall despite his lack of testimony that he actually stepped on the yellow nosing/edge of the step. 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 of the plaintiff exited the rear doors of different buses on a rainy day during their deliberations, then intentionally stopped and tested with their foot whether a different yellow nosing strip felt "slippery" to the them. 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, Metro is entitled to a new trial.

**E. CONCLUSION**

The trial court erred in failing to grant Metro's Motion for Judgment as a Matter of Law when there was no evidence of a violation of a transit industry standard of care and no evidence 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. The trial court further erred in failing to grant Metro's Motion for New Trial based on Juror Misconduct when jurors impermissibly stopped and tested materials on other bus stairs while traveling to trial during their jury deliberations in this case. If this case is not dismissed as a matter of law on the CR 50 Motion issue, then any doubt regarding the effect on the verdict of this clear juror misconduct must be resolved in favor of granting a new trial.

For these reasons, 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, 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

//

//

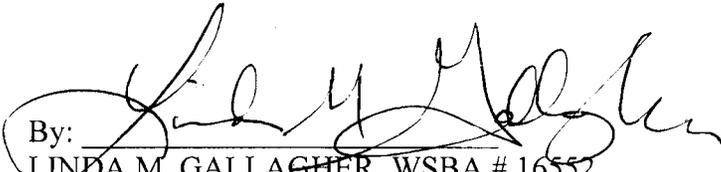
//

new trial on all issues because of juror misconduct performing testing of wet bus steps outside the courtroom that was objectively prejudicial to Metro's defense.

DATED this 10th day of January, 2011.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

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

2011 JUL 10 11 34 AM H

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.	)	
<hr/>		

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

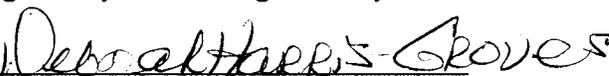
That a copy of Brief of Appellant, and this Declaration of Service was served on respondents' counsel of record Lori S. Haskell in the above-captioned case on January 10, 2011, by hand delivering a copy thereof to

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 10<sup>th</sup> day of January, 2011 at Seattle, Washington

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: 

DEBORAH HARRIS-GROVES

Legal Secretary to

LINDA M. GALLAGHER

Senior Deputy Prosecuting Attorney