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## **I. INTRODUCTION**

Appellant Terrance Brewster (Plaintiff) files this appeal to reverse the trial court's Order granting summary judgment in favor of Defendant King County. In response to Defendant King County's motion for summary judgment, Plaintiff provided the trial court with declarations from three transportation expert witnesses and one eye-witness. Each of these declarations, in and of themselves, was sufficient to create an issue of material fact that should have precluded the entry of summary judgment. Although a simple inference is sufficient to create a question of material fact, Plaintiff submitted direct, unequivocal expert testimony to establish that King County breached the standard of care and proximately caused Plaintiff's injuries. Therefore, Plaintiff asks this Court to reverse the trial court's summary judgment ruling and remand this case back for trial on the merits.

## **II. ASSIGNMENTS OF ERROR**

### *Assignments of Error No. 1*

- A. The trial court erred when it ruled that no issues of material fact existed and King County was entitled to summary judgment as a matter of law.

*Issue Pertaining to Assignment of Error No. 1*

- (a) Whether the trial court erred when it granted King County's motion for summary judgment even though Plaintiff submitted sworn declarations from three qualified transportation experts (and one lay witness) all of whom opined that King County breached the standard of care and proximately caused Plaintiff's injuries?

*Assignment of Error No. 2*

- B. The trial court erred when it denied Plaintiff's motion for reconsideration of its prior summary judgment order dismissing King County even though Plaintiff submitted additional evidence that created additional questions of material fact.

*Issue Pertaining to Assignment of Error No. 2*

- (b) Whether the trial court erred when it denied Plaintiff's motion for reconsideration even though Plaintiff submitted additional expert and lay testimony that created additional material issues of fact to preclude the entry of summary judgment?

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### **III. STATEMENT OF THE CASE**

#### **A. Underlying Facts**

Plaintiff Terrance Brewster was working as a cook at the Lockspot Café in Seattle on the night of December 15, 2006. CP 2-3. After concluding his work shift at approximately 1:15 A.M. on December 16<sup>th</sup>, Mr. Brewster took a King County Metro Bus from work to the intersection of 8th Avenue N.W. and Market Street in Seattle. CP 168-69. Mr. Brewster then crossed the street to transfer and wait for the next bus. Id.

At approximately 1:30 A.M., Mr. Brewster was reading a book in a King County Metro bus shelter when two vehicles driven by Defendant Beck and Defendant Nguyen failed to stop at the intersection and collided with each other. CP 168-69 and 248-49. Immediately thereafter, Defendant Bethel Beck's vehicle careened into the bus shelter where Mr. Brewster was reading his book. Id. As a result of the impact of the collision, the bus shelter partially collapsed on top of Mr. Brewster. Id.

Terrance Brewster was rushed to Harborview Medical Center where he almost died from his injuries, which included a pulmonary embolism, compartment syndrome, MRSA, and multiple compound fractures to both of Mr. Brewster's legs. CP 169. Mr. Brewster underwent several surgeries at Harborview, where he spent one month

confined to his hospital bed. Id. After being released from Harborview, Mr. Brewster's ordeal continued as he spent the next five months recovering at a nursing home. Id. Mr. Brewster now suffers from permanent disabilities.

Defendant Bethel Beck, III, was arrested for felony vehicular assault. Mr. Beck has since pled guilty to misdemeanor, negligent driving in the second degree.

B. King County Metro Bus Shelter in Question.

As stated above, Plaintiff Brewster was injured while he was reading a book inside a King County Metro bus shelter. CP 168. The King County Metro bus shelter in question was located near the northeast corner of the intersection of Market Street and Eighth Avenue, NW, in Seattle. According to King County, this bus shelter was originally installed in 1974. CP 81. According to testimony of King County employees, King County normally replaces its bus shelters approximately every eight years. See generally CP 142-47, 125-41, 81-105. Further testimony of King County employees establishes that this particular bus shelter was only known to have been replaced twice since it was originally installed. Id. The first known replacement occurred in 1988. The most

recent replacement of this bus shelter occurred less than six months before the crash involving this case. Id.

All of Plaintiff's experts have opined that King County Metro's negligent maintenance and design of the bus shelter proximately caused Mr. Brewster's injuries. See Declarations of Richard Gill, Ph.D (CP 148-67, 246-47), Lee O. Camardella (CP 170-74), and William Haro, P.E (CP 175-186, 262-66). An eyewitness to this collision, Christopher Hogan, also testified and opined that the placement and location of the bus shelter caused Mr. Brewster's injuries. CP 249.

C. Procedural Background.

On December 3, 2008, Plaintiff Terrance Brewster filed this lawsuit in Pierce County Superior Court against Defendants King County, Bethel Beck, III, and Cong Nguyen. CP 1. On November 20, 2009, the trial court granted King County's motion for summary judgment. CP 236-38. On December 18, 2009, the trial court denied Plaintiff's motion for reconsideration of its earlier summary judgment order. CP 307-09.

On January 13, 2010, Plaintiff filed a motion for direct review with the trial court under CR 54(b) or RAP 2.3(B)(4). CP 310-313. On January 22, 2010, the trial court held oral argument and granted Plaintiff's motion for direct review pursuant to CR 54(b). CP 337-39.

On March 26, 2010, King County filed a motion with this Court to dismiss this appeal by arguing that this Court should not exercise direct review under CR 54(b). On April 15, 2010, Commissioner Ernetta G. Skerlec granted King County's motion to dismiss this appeal, but ordered that Plaintiff's Notice of Appeal be converted to a notice for discretionary review.

On April 30, 2010, Plaintiff filed a motion for discretionary review with this Court. On June 9, 2010, this Court held oral argument on Plaintiff's motion for discretionary review. On June 22, 2010, Commissioner Eric B. Schmidt granted Plaintiff's motion for discretionary review in a ten page written decision.

#### **IV. ARGUMENT**

##### **A. The Trial Court Erred by Granting Summary Judgment Despite Numerous Disputes of Material Fact.**

In this case, the trial court erred by granting King County's motion for summary judgment even though Plaintiff submitted the declarations from three standard of care experts and one eye-witness establishing that Plaintiff's injuries were proximately caused by the negligent location, design and maintenance of King County's Metro bus shelter. See Declarations of Richard Gill, Ph.D (CP 148-67, 246-47), Lee O. Camardella (CP 170-74), William Haro, P.E (CP 175-186, 262-66) and

Christopher Hogan (CP 248-49). Plaintiff provided the trial court with overwhelming evidence sufficient to raise a material issue of fact as required under CR 56(c).

As this Court knows well, the quantum of evidence needed to defeat a motion for summary judgment is quite low. The trial court “must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party.” Sheriff’s Ass’n. v. Chelan County, 109 Wn.2d 282, 294-95, 745 P.2d 1 (1987); see also CR 56(c). Summary judgment “must be denied if a right of recovery is indicated under any provable set of facts.” Smith v. Acme Paving Co., 16 Wn. App. 389, 558 P.2d 811, 814 (1976). “A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact.” Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605, 607 (1960). “Summary judgment must be denied if the record shows even a reasonable hypothesis which may entitle the non-moving party to relief.” Adamski v. Tacoma Gen. Hosp., 20 Wn. App. 98, 579 P.2d 970 (1978); Mostrom v. Pettibon, 25 Wn. App. 158, 607 P.2d 864 (1980). Questions of negligence are also generally questions for the jury. See e.g., Schooley v. Pinch’s Deli Market, Inc., 80 Wn. App. 862, 874, 912 P.2d 1044 (1996), aff’d, 134 Wn.2d 468, 951 P.2d 749 (1998). With regard to the appropriate appellate

standard of review, this Court reviews determinations on summary judgment de novo. Enterprise Leasing, Inc. v. City of Tacoma, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

In this case, the declarations of Plaintiff's three expert witnesses clearly establish that King County failed to satisfy the standard of care. See Declarations of Richard Gill, Ph.D (CP 148-67, 246-47), Lee O. Camardella (CP 170-74), William Haro, P.E (CP 175-186, 262-66) and Christopher Hogan (CP 248-49).

In his declaration, William Haro, P.E., opines in part:

- In my opinion, King County/Metro Transit breached applicable standards of care by failing to properly locate the bus shelter that caused Terrance Brewster's injuries. Mr. Brewster was sitting within the bus shelter and reading his book on December 16, 2006. At this time, the bus shelter was installed and placed less than two feet from the curb on 8<sup>th</sup> Avenue Northwest. This was a direct violation of King County's own engineering guidelines as well as those presented in the Washington State Department of Transportation "Design Manual". Both of these documents provide design guidelines and standards to be followed by King County/Metro Transit.
- It was my finding that not only could this shelter have been located further from the face of curb of 8<sup>th</sup> Avenue NW as the standard calls for, it could also have been located further from the intersection of Market Street and closer to the point where the bus loading zone was signed and operated (approximately 20 feet to the north). This would provide greater safety for shelter users and would have prevented Mr. Brewster from being injured.

See Declaration of William Haro, P.E., at CP 176-78.

While not specifically excerpted above, Mr. Haro is a licensed professional engineer in the State of Washington. CP 175. Mr. Haro was previously employed with the City of Bellevue as a Senior Traffic/Transportation Engineer for more than twenty-five years. CP 176. As shown above, Mr. Haro's opinions, in and of themselves, were sufficient to defeat King County's motion for summary judgment.

Plaintiff's expert, Lee Camardella, also opines that King County breached the standard of care by placing the bus shelter at the location where Terry Brewster was seriously injured. CP 171-73. Mr. Camardella has over twenty-four years of experience in the field of mass transit. CP 170-71. Mr. Camardella has extensive experience and training in the placement of bus zones, bus stops, bus shelters, and mass transit safety. CP 171. In his declaration, Mr. Camardella opines, in part:

- In my opinion, King County breached the standard of care and committed negligence by installing the bus shelter that caused and/or contributed to Terrance Brewster's injuries. Mr. Brewster was sitting within the bus shelter and reading his book on December 16, 2006. At this time, the bus shelter was installed and placed less than two feet from the curb on 8<sup>th</sup> Avenue Northwest. Placing the bus shelter less than two feet from the edge of the curb was a direct violation of King County's own safety guidelines and regulations.
- King County had at least two occasions when it should have recognized and fixed the obvious hazard of the bus shelter coming too close to the roadway. The first occasion occurred in

1998 when the old shelter was removed and replaced with a different shelter that was substituted in its place. When bus shelters are re-installed, and new shelters are substituted, the transit agency has the opportunity and obligation to review all applicable safety guidelines, rules and regulations. In order to meet its safety obligations to passengers and the travelling public, the transit agency, at a minimum, should determine what changes to the bus zone or bus shelter are necessary to fix any safety problems. In this case, King County breached the standard of care by failing to even attempt or make any effort to recognize and fix the safety problems at the bus zone and bus shelter located near the northeast corner of Market Street and Eighth Avenue N.W. When the shelter was replaced in 1998, this provided the transit agency with the obvious opportunity (and obligation) to locate the bus shelter in a place that was consistent with its own safety guidelines. King County's failure to fix this safety problem resulted in King County breaching the applicable standard of care.

- In either 1998 or 2006, the bus shelter should not have been placed in the same location where Terry Brewster was injured. Rather, the bus shelter should have been placed in a location abutting the business directly behind (east) its current location. In this regard, King County should have requested that the private business owner consent to this location. In my experience, private businesses often consent to these requests. If King County had placed the bus shelter in this location, the bus shelter would have been approximately nine feet east and four feet south from its current location. If King County had previously placed the bus shelter in this location, then Mr. Brewster would not have been injured on December 16, 2006.

- Even if the bus shelter had not been relocated next to the abutting business, for whatever reason, King County should have relocated the bus shelter north of the current bus zone. If the bus shelter had been relocated to this area, King County Metro could have easily placed the bus shelter at least three feet away from the curb and thereby brought the bus shelter into compliance with its own safety guidelines. Moreover, if King County had previously placed the bus shelter in this location, then Mr. Brewster would not

have been injured on December 16, 2006.

See Declaration of Lee Camardella at CP 171-73.

The opinions of Lee Camardella alone are sufficient to defeat King County's motion for summary judgment. These opinions establish that King County breached the standard of care and caused Plaintiff's injuries.

Plaintiff's expert, Dr. Richard Gill, also opines that King County breached the standard of care. CP 148-67, 246-47. Dr. Gill is an engineering expert with a sub-speciality in human factors engineering. CP 148-50. Without excerpting his lengthy and specific opinions, Dr. Gill opines that King County failed to follow its own internal standards. CP 153. Dr. Gill also opines that King County failed to meet the guidelines established by the Washington State Department of Transportation. CP 151-52. And finally, Dr. Gill opines that King County failed to meet its most basic obligations of safety and safety practices by ignoring an obvious and preventable safety hazard. CP 152-54. Dr. Gill's opinions, in and of themselves, were sufficient to defeat King County's motion for summary judgment.

Overall, Plaintiff's obligation under CR 56(c) was to establish a single question of "material fact" in order to defeat King County's motion for summary judgment. In response to King County's motion, Plaintiff

submitted overwhelming evidence to establish multiple issues of material fact, which should have precluded the entry of summary judgment. The trial court simply erred by granting summary judgment and this case must be remanded for a trial on the merits.

B. The Trial Court also Erred by Refusing to Grant Plaintiff's Motion for Reconsideration.

A motion for reconsideration is reviewed by this court under the abuse of discretion standard. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175, 1180 (2002). However, where a trial court grants summary judgment and then denies a motion for reconsideration, evidence offered in support of the motion for reconsideration is properly part of an appellate court's de novo review. Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wash.2d 656, 675, n. 6, 911 P.2d 1301 (1996).

In his motion for reconsideration, Plaintiff asked the trial court to reconsider its summary judgment ruling based upon the previously submitted evidence in opposition to King County's motion and the additional evidence submitted through supplemental declarations of Richard Gill, Ph.D and William Haro, P.E. CP 246-47 and 262-66. These supplemental declarations were sufficient by themselves to defeat summary judgment.

On reconsideration, Plaintiff also submitted the Declaration of Christopher Hogan. CP 248-49. The trial court denied King County's motion to strike Mr. Hogan's declaration. CP 305-06. In his declaration, Mr. Hogan testifies that he was an eye-witness to the crash. CP 248. Mr. Hogan also testifies that he personally was able to avoid injury at the bus shelter by "jump[ing] out of the way." CP 249. Mr. Hogan avoided injury because he was facing towards the street at the time the crash occurred. Id. Conversely, Terry Brewster was seated in the King County bus shelter and was facing away from the street as the bus shelter was negligently designed to be used. CP 248-49. From Mr. Hogan's view of the crash, Terry Brewster could not react to Defendant Beck's oncoming mini-van because the shelter caused him to face away from the oncoming danger. CP 249. The Declaration of Christopher Hogan establishes causation in and of itself.

Overall, the trial court abused its discretion by failing to grant Plaintiff's motion for reconsideration in light of all the evidence proffered by Plaintiff in opposition to King County's motion for summary judgment. While Plaintiff's will concede that the abuse of discretion standard is difficult to overcome on appeal, the facts of this case meet this lofty standard. Given that the ultimate legal question on reconsideration

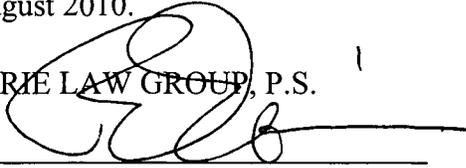
remains whether the Plaintiff has produced evidence sufficient to establish a material issue of fact, the overwhelming evidence submitted by Plaintiff in opposition to King County's motion for summary judgment required the trial court to grant Plaintiff's motion for reconsideration. When the trial court failed to grant Plaintiff's motion for reconsideration, it simply abused its discretion.

#### V. CONCLUSION

Terry Brewster was sitting down, reading a book inside a King County bus shelter when his life forever changed. Three qualified transportation experts have all opined and concluded that King County's failure to meet the standard of care caused Plaintiff's life altering injuries. Christopher Hogan, the one independent eye-witness to the crash, also opines that the bus shelter's location and placement caused Mr. Brewster's injuries. The trial court's decision to grant summary judgment violated black letter law, and rudimentary summary judgment principles. The trial court's order granting summary judgment must be reversed.

DATED this 26<sup>th</sup> day of August 2010.

DEARIE LAW GROUP, P.S.

By:   
Raymond J. Dearie, WSBA #28792  
Attorney for Petitioner Brewster

FILED  
COURT OF APPEALS

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STATE OF WASHINGTON

PIERCE COUNTY CAUSE NO. 08-2-15121-8  
DIVISION II CAUSE NO. 40328-57

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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TERRANCE BREWSTER,

Plaintiff/Appellant,

v.

KING COUNTY, BETHEL BECK, III, AND CONG NGUYEN,

Defendants/Respondents,

---

**DECLARATION OF SERVICE**

Terrance Brewster, Appellant

---

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ORIGINAL

I, Meredith M. Klein, 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 Appellants' Opening Brief to be served upon the following via U.S. Mail, postage prepaid:

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EXECUTED at Seattle, Washington, this 26th day  
of August, 2010.

DEARIE LAW GROUP, P.S.

A handwritten signature in black ink, appearing to read "Meredith M. Klein". The signature is written in a cursive style and is positioned above a horizontal line.

Meredith M. Klein, Legal Assistant