

65801-8

65801-8

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 RESPONDENT

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I. INTRODUCTION

Keith and Judy Knappett filed a negligence action against King County Metro. (Herein "Metro"). The action was tried to a jury verdict. The Knappetts proved (1) that a dangerous condition exists on Metro buses, and (2) that Keith Knappett (Herein "Mr. Knappett") was injured due to the condition of the Metro bus.

Mr. Knappett presented evidence from Metro's records, expert testimony, medical testimony and lay factual testimony of what happened. In summary the evidence was that stairs on the bus had a yellow strip that wraps around the nosing of each stair. When that yellow strip is wet it becomes as slick as compact snow. Metro had prior notice of the danger. On October 24 2006, it was raining. When exiting the Metro bus, Mr. Knappett slipped on the top step. The force of the fall jammed his left ankle bone up into his left tibia, shattering it. He is in constant pain, walks with a limp, is limited in his activities of daily living and lives every day with the fear of amputation. At the close of Mr. Knappett's case, Metro made a CR 50(a) motion. It was denied.

Metro put on its case. At trial, Metro submitted no evidence rebutting the hazard of the yellow stripping. Metro presented no evidence challenging Mr. Knappett's expert witness or the hazardous condition of

the yellow nosing strip when wet. Metro's defense was to contest Mr. Knappett's factual claim that he fell while exiting the bus

Post trial Metro made a CR 59(a) motion for a new trial. Metro submitted declarations of a juror's observations that the yellow strip was slick.

The Trial Court noted that Metro's trial strategy was not to defend on the issue of whether the yellow stair nosing was hazardously slick when wet. The Trial Court confirmed that Metro's defense focused upon contesting Knappett's factual claim that he fell while exiting the bus. The Trial Court found that Metro failed to contest the issue of whether the yellow stair nosing was hazardously slick when wet. The Trial court ruled that the juror's observations regarding the slickness of the yellow stair nosing while wet did not affect the outcome of the case. Metro then filed an appeal.

II. RESPONSE TO: STATEMENT OF THE CASE

A. Overview of Bus Use, Weather and Fall

Mr. Knappett typically commuted by Metro transit. October 24, 2006, he caught the bus near his home in Bothell. RP (5/19/10) p.130 The weather that day "was pouring rain." RP (5/24/10) 11; RP 5/24/10) p.111. The bus had made at least three stops in downtown Seattle prior to Mr. Knappett's stop at 5th Avenue and Pike St. RP (5/24/10) pp. 11-12.

Knappett testified, “People had been getting on and off it; they were wet; the bus floor was wet—basically small puddles all over it.” RP (5/24/10) p.12. There were so many puddles on the bus floor that even picking his way carefully down the aisle, Mr. Knappett could not avoid stepping in the puddles. RP (5/24/10) pp.12-13. He was the last passenger to disembark the bus. RP (5/24/10) p. 116. In order to descend the stairs Mr. Knappett had a hold on the hand rail. RP (5/24/10) pp. 13-14. He began to move his right foot to the second step, slipped and fell. RP (5/24/10) p. 117. The next thing Mr. Knappett knew he was leaning against the bus with his lower left leg was swaying back and forth RP (5/24/10) p.16. The bus then pulled away, and he fell to the ground. RP (5/24/10) p.17.

B. Hazardous Condition of Metro Bus

Mr. Knappett presented evidence from Metro’s own records and expert testimony from Gary Sloan, Ph.D. ¹

Metro buses have a material called “Nora” flooring on each bus. There are two types of “Nora” flooring used. One is blue and the other is yellow. The blue Nora covers the floor of the bus.² A yellow strip of Nora flooring wraps around the nosing of each stair. This yellow Nora

¹ RP (5/20/10) pp. 91-92; pp. 95-100; pp. 102-107; pp. 116-121; pp. 167-169. Exs. 38A; 43, 44, 45, and 54.

² RP (5/20/10) p.148; Exs. 41(a); 41(b); (41(c)).

flooring is made of a different material from what is on the floor of the bus or the stair treads. This yellow Nora strip extends two inches onto the top of each step. The yellow Nora strip is also on the landing, which is the top step of the stairs³.

Bus passengers come in contact with the yellow Nora nosing strip because of its placement and the fact that it extends two inches onto the top of each step. It is natural for a passenger to come into contact with the yellow Nora strip when entering or exiting a Metro bus. RP (5/20/10) p. 107. Understandably passengers will be entering and exiting the Metro bus in the rain. The known dynamics of using the steps is that passengers place the ball of their foot on the yellow nosing. The human movements—forces and momentum—of going down stairs is described as a “controlled fall” as a person shifts their weight and begins to descend. RP (5/20/10) p.103; p. 131, Ex 54.

One of the basic considerations of people moving on surfaces is known as “co-efficiency of friction”. Basically, this term refers to how slick a material is. RP (5/20/10) pp. 104-105.

Metro did study the co-efficient of friction of the blue Nora flooring. RP (5/20/10) p. 112. It was uncontroverted that Metro had never performed any testing on the yellow Nora nosing material. RP (5/20/10)

³ RP (5/20/10) p 128-129; Exs. 41(a); 41(b); 41(c).

p.112. It was uncontroverted that Metro did not know the co-efficient of friction of the yellow Nora strips on the nosing of its bus stairs. It was uncontroverted that, when wet, the yellow nosing material has the same co-efficient of friction as compact snow. RP (5/20/10) p. 156. Metro did not call an in-house or trial expert witness to rebut Dr. Sloan's testimony. In fact, Metro failed to produce any evidence regarding the yellow nosing material in question.

C. Factual Basis of Expert Witness Opinion

At the time of this incident, Mr. Knappett was 55 years old and employed as a communications specialist at WAMU. At trial detailed evidence of Mr. Knappett's conduct and observations on October 26, 2006, was presented. Ex. 52.

Mr. Knappett described the amount of rain and the condition inside the bus *vis-à-vis* the floor and puddles of water from all the wet commuters. RP (5/24/10) p. 12. He described how careful he was the day of this incident in preparing to exit. He gave a detailed description of how cautious he was, holding onto the handles on the back of the bus seats as he made his way down the aisle to the door located in the middle of the bus. RP (5/24/10) p. 13. While the passengers in front of him left the bus, Mr. Knappett positioned himself on the top stair. He carefully held on to the handrail and oriented himself before preparing to step down. RP

(5/24/10) 13-16. Mr. Knappett just began to lift his right foot to step down to the next stair when the fall occurred. RP (5/24/10) p. 117. He testified that:

My next recollection is standing, and I believe I was leaning against the bus, and I was looking down at my left foot, which I was – I had lifted, and it was swaying at the end of my leg – like it was just held on by my skin, which it essentially was.... RP (5/24/11) p. 16.

Mr. Knappett fell with such force that his hand was ripped from the handrail. RP 5/24/10) p. 130. Mr. Knappett was leaning against the bus when it drove off and he fell to the sidewalk. RP (5/24/10) p. 17.

Eventually a passerby helped Knappett to an upright position and propped him against the wall of a nearby building. RP (5/24/10) p.18. His memory of the events of the day from that moment forward are scattered visual flashes. “That was one of the odd –kind of the odd things – I mean I remember bits and pieces of things throughout that day....” RP (5/24/10) p. 18. Mr. Knappett’s first call was to his office. “I told them I was going to be late.” RP (5/24/11) p. 19. He then called his wife and asked her to pick him up. *Id.* Then he suggested a taxi. “I didn’t want to make a big deal out of this.” RP (5/24/10) p.20. Judy Knappett called her husband back and told him to call an ambulance. RP (5/19/10)p.132. He complied and called 9-1-1 but had to ask some people nearby where he was. RP (5/24/10) p. 20. “I didn’t – I was not really connected to things –

it was like it wasn't real." RP (5/24/10) p. 21. Knappett gave the 9-1-1 dispatcher the wrong intersection. He ended up calling a second time "...and told them I really didn't know where I was." RP (5/24/10) *Id.*

Gary Sloan, Ph.D., a human factor's engineer considered circumstances of October 26, 2006, and how Mr. Knappett fell. He examined the surfaces of the bus, steps and conditions of the day⁴.

D. Expert Testimony on Liability of Metro

Gary Sloan, Ph.D. is a human factors expert. He has a doctorate in experimental psychology and industrial engineering. RP (5/20/10) pp. 95-96. He specializes in ergonomics as well as industrial engineering and design. *Id.* He taught at Cornell University. RP (5/20/10) p. 96. He has been working in this field for more than 30 years. *Id.* Dr. Sloan is a member of multiple relevant professional associations and has published academic articles on fall accidents. RP (5/20/10) pp. 97-98. Dr. Sloan developed a 3-D computer model used to replicate falls. He presented a paper on that subject to the Human Factors and Ergonomics Society. RP (5/20/10) p. 99. He has studied the dynamics of a person descending stairs. RP (5/20/10) p. 100.

Dr. Sloan was provided and considered the circumstances of Mr. Knappett's fall as outlined above. He did testing on the actual steps of the

⁴ RP (5/20/10) pp. 149-151; RP (5/20/10) p. 153; RP (5/20/10) p. 155-156.

Metro Bus involved in Mr. Knappett's fall. He considered the data that Metro produced on other falls. He then applied the science to situation⁵.

First, using the photographs of a figure descending stairs, Dr. Sloan explained,

When we descend a flight of stairs, what we do is basically take our lead foot, move it over the nosing of the step below, and we start lowering our foot at the same time we're raising up the heel of our rear leg.

[W]hen we get to a point where we basically have to shift our weight from our rear leg, which is bearing our weight, we're going to have to do a controlled fall forward onto the ball of our lead foot...

That's actually the most dangerous—one of the most dangerous times descending a flight of stairs.

RP (5/20/10) p. 103.

Dr. Sloan explained the scientific principles co-efficient of friction to the jury. RP (5/20/10) pp. 104-105. He identified that the term "nosing" of a stair includes the first two to three inches from the edge of each step. RP (5/20/10) p. 106. He explained how in the normal movements of going down stairs that:

So if you have – if you – if your ball of your foot comes down on the edge of the step, which is typically the case, then if there's inadequate resistance, again, for movement of your foot, then you can slip, oftentimes fall backwards, and be injured on the steps.

⁵ RP (5/20/10) p. 147-151; p. 155-156; p. 158-160; Exs. 44, 45.

RP (5/20/10) p.106; Exs. 45, 54.

Dr. Sloan identified that, "...the nosing is the most important with regard to preventing a slip that would result in, in effect, having this controlled fall forward become an uncontrolled fall forward." RP (5/20/10) p. 107.

Dr. Sloan examined and considered 45 incident reports covering three years beginning in November 2003 through October 2006. This was relevant to the time Knappett sustained this devastating injury. RP (5/20/10) p. 109. From those 45 incident reports Dr. Sloan identified 9 falls where the passenger reported being injured while slipping on the back stairs of a Metro bus. The 9 falls occurred when the stairs were wet with rainwater and the Metro buses had the identical flooring and the identical configuration of the bus on which Knappett sustained his fall. RP (5/20/10) pp. 168-169. In all of the 9 falls the same yellow material wrapped around the nosing of each stair. RP (5/20/10) p. 169.

In detail Dr. Sloan explained his testing method and how he prepared and tested the blue flooring of the bus and the yellow nosing strip both wet and dry. RP (5/20/10) pp. 148-151; Exhibit 42. A videotape was shown of Dr. Sloan performing his testing on the yellow nosing strip to demonstrate how he took his measurements. RP (5/20/10) pp. 152-153; Ex. 43.

Dr. Sloan testified that for a material to be slip resistant it needs to register at least a point 5 (0.5) on the slip meter. RP (5/20/10) p. 155. This meant the floor as well as the tread on the stairs must have a coefficient of friction of at least point 5. *Id.* Dr. Sloan reviewed Metro's own specifications which direct that all flooring be "slip resistant". RP (5/20/10) p. 162; Ex. 38A. By objective testing, Dr. Sloan showed that the blue flooring of the bus tested above slip resistance both wet and dry. He also showed when "dry" the yellow nosing tested as slip resistant. RP (5/20/10) p. 156, Ex. 44.

Then Dr. Sloan addressed the yellow nosing's co-efficient of friction when wet. Dr. Sloan identified with objective testing how that co-efficient of friction plummeted well below the level of slip resistance when the yellow nosing became wet. He performed his tests at least 6 times and the best coefficient of friction reached by the stair nosing when wet was point 3. (0.3). RP (5/20/10) p. 156, Ex 44. Dr. Sloan testified:

Answer by Dr. Sloan: And from my discipline, that would be considered dangerously slippery.

Question by Ms. Haskell: And would you compare it with any substance we run into in our everyday life?

A. I've taken readings of ice, compact snow. This is equivalent to compact snow.

RP (5/20/10) p. 156.

Dr. Sloan identified the angle of a person's foot descending a stair. He showed diagrams of the angle of a foot with descending levels of coefficient of friction, explaining that is the "level of friction". RP (5/20/10) pp.157-158, Ex 45. "The nosing just takes a little bit of an angle before you're going to slide." RP (5/20/10) p. 160, Ex. 45. He identified, that angle is half of the angle of friction meaning, "This is a dangerous slippery surface when wet." RP (5/20/10) p. 160.

Dr. Sloan also testified regarding Metro's own specifications that all floor coverings on Metro buses be "non-skid" or slip resistant. This means they are to have a co-efficient of friction of at least 'point 5'. RP (5/20/10) p. 162; Exhibit 38A.

In cross-examination, Dr. Sloan was asked generally about his testing methods. RP (5/20/10) p.172. Metro's Counsel also inquired if the reports of the emergency medical technician and the firefighter differed from the description that Mr. Knappett had given him. RP (5/20/10) pp. 178-180. In cross examination, Counsel questioned whether Mr. Knappett had ever stated that he looked down and saw his foot was on the yellow nosing prior to beginning his descent of the bus stairs. RP (5/20/10) p. 181. In answering, Dr. Sloan again explained that when descending stairs the ball of the foot is on the nosing. RP (5/20/10) p.182, Ex. 54. He also explained that concrete sidewalks typically have a very high coefficient of

friction. RP (5/20/10) p. 183. Dr. Sloan testified that slipping on stair nosing with the coefficient of friction between point two and point three would cause an individual to slip down the stair with enough force to rip their hand from a handrail. RP (5/20/10) p. 184. Again Dr. Sloan confirmed that the wet bus stair nosing was “incredibly slippery”. RP (5/20/10) p. 186.

Prior to the trial, Metro took Dr. Sloan’s deposition and had the opportunity to explore all of his opinions. At trial, Metro presented no expert witness testimony either from their in-house experts or from a forensic expert witness. Metro presented no testimony on the condition of the stairs, the surfaces, co-efficient of friction or how people go down stairs.

E. Initial State After Injury

When emergency personnel approached Mr. Knappett, “I actually thought they were the ambulance, but apparently – recently I found out they were firemen.” RP (5/24/10) p. 21. He has no memory of talking to any emergency aid workers at the scene of the accident. RP (5/24/10) p. 122. Knappett does not recall being transported to the hospital. RP (5/24/10) p. 23. He has no recollection of talking to anyone who attended to him at the scene how the accident happened. RP (5/24/10) p. 24. He

has no memory of the doctor who tended to him in the emergency room or describing how his injury occurred. RP (5/24/10) p. 24.

At the hospital, Alexis Falicov, M.D. was on duty and ended up operating on Mr. Knappett and became his treating physician. Mr. Knappett does not recall giving Dr. Falicov a description of how this injury occurred. RP (5/24/10) p. 25. Mr. Knappett does not recall seeing his wife in the emergency room or being admitted to the hospital. RP (5/24/10) p. 25. Mr. Knappett has no recollection of being asked to describe any details whatsoever of how this accident occurred at any time on the day of the incident. RP (5/24/10) pp. 26-27.

Mr. Knappett does recall meeting with Dr. Falicov after admission. He remembers Dr. Falicov telling him he could save the foot and ankle but that he would eventually face an amputation. RP (5/24/10) p. 28. Metro's Counsel took liberal use of Mr. Knappett's lack of memory as to all the circumstances of the fall and the initial health care to build its defense.⁶

F. Medical Expert Testimony on Dynamics of Injury

Alexis Falicov, M.D. is an orthopaedic surgeon. He earned his medical degree from Harvard, did his residency at the University of Washington and is board certified in orthopaedic surgery. CP 236-237.

⁶ CP 258, 261.

He has treated multiple patients with the type of fracture Mr. Knappett sustained. CP 237.

Dr. Falicov identified Mr. Knappett's injury as a pilon fracture where the ankle bone is shoved up into the tibia, shattering the bone. CP 237. "It requires a high amount of force to shatter that bone." *Id.* Surgery is not a cure. "A successful result is considered one in which you can walk comfortably. Anything beyond that is considered better than average." CP 245. This type of injury is not "encountered with normal walking-type injuries." *Id.* A pilon fracture is not an injury one would expect from tripping on wet pavement. CP 239. Dr. Falicov testified that Mr. Knappett, "landed, did a direct axial load onto his tibia and essentially just exploded his weight-bearing surface of his tibia." CP 258-259. Dr. Falicov testified, "my understanding was that he was getting off the bus and he axially loaded his ankle, based on the injury and based on the history..." CP 258. He did not find the descriptions in Mr. Knappett's medical records to be "inconsistent". *Id.*

Dr. Falicov operated on Mr. Knappett twice for these injuries. The first surgery was to place an external fixator in the lower leg. CP 239. The second surgery was for internal fixation. CP 242. Mr. Knappett has sixteen pins and two metal plates in his lower left leg. *Id.*; Ex. 46(a), 46

(b). Mr. Knappett underwent a third surgery for lower leg tendon release after extensive discussion of amputation. RP (5/24/10) p. 70.

The damage to the left lower leg is such that Mr. Knappett has substantial ongoing and limiting pain. RP (5/24/10) pp.77, 84, 92, Metro focused on an exam Dr. Falicov performed that did not cause Mr. Knappett pain, but the doctor specifically stated, "I was not indicating at all that he was pain-free." CP 259. Mr. Knappett testified that he must eventually decide when his pain level has become so intolerable that he will have his left foot and ankle removed (amputated). RP (5/24/10) p. 99.

G. Metro's Case-in-Chief

Metro only called three witnesses. The witnesses were the bus driver (Sergey Buryy), the Fire Department Medic who arrived on the scene (Anthony Miceli) and the ambulance attendant (Michael Tanberg). None of these witnesses has any firsthand knowledge of Mr. Knappett's conduct immediately before or at the time of the fall or an independent recollection of this event.⁷ The thrust of the testimony elicited from these three witnesses was an attempt to suggest that Knappett's injury was not the result of falling down the stairs of the Metro bus.⁸

⁷ RP (5/20/10) p. 24; RP (5/24/10) p 105; RP (5/25/10) p. 20.

⁸ RP (5/20/10) p. 40; RP (5/24/10) p. 105; p. 109; RP (5/25/10) p.16.

Mr. Buryy, the bus driver, testified that he did not observe Knappett fall. RP (5/25/10) p. 16. He had no independent recollection of the day Mr. Knappett sustained his injuries. RP (5/25/10) p. 20. Mr. Tanberg, the ambulance attendant, testified that he had no “reliable” memory of the day of this incident. RP (5/24/10) p. 105. He also testified that, according to his report, Knappett “tripped” but “did not hit the ground.” RP (5/24/10) p. 107. Metro’s counsel elicited testimony from Mr. Tanberg that there was no reference in his report to a bus. RP (5/24/10) p. 109. Mr. Miceli, the medic, testified that Knappett “...told me that he slipped on the wet sidewalk and twisted his ankle.” RP (5/20/2010) p. 28. On cross-examination, Mr. Miceli admitted that Mr. Knappett had no abrasions on his palms, elbows or knees. RP (5/20/10) p. 33. Mr. Miceli also stated that he “most definitely” would have written it down if Knappett had “said anything about a bus being involved.” RP (5/20/10) p. 40. On cross exam, he admitted that there was no indication of how Mr. Knappett’s foot came in contact with the sidewalk. RP (5/20/10) p. 36.

H. Metro’s Theory in Arguing to the Jury

Consistent with Metro’s position in presenting its case-in-chief, Metro submitted Mr. Knappett had not fallen while exiting the bus. In closing, Metro emphasized that emergency personnel did not report that

Mr. Knappett sustained his injuries in a fall. In addition Metro's Counsel focused on "different versions" of how the accident occurred contained in the initial medical records.

What our position – what our position is, they are very different descriptions over time, and the most –

We are not saying that he made it up, but we are saying that it matters, the different versions that he gave - - the different descriptions of his fall. It matters a lot. They cannot all be accurate.

We think the ones that are most accurate are the first things he said. "No bus at all, stepping off the bus" - - "stepping off the bus, stepping off the bus." Nothing about slipping or missing a step.

Missing a step is later in the day; slipping is several months later.

RP (5/25/10) p. 70.

In asserting this argument Metro ignored how profound the fracture was as well as Mr. Knappett's understandably disjointed mental state immediately after the fall and at the hospital prior to surgery. The thrust of the defense was that Mr. Knappett did not sustain his injuries slipping on the stairs of a Metro bus while disembarking. Metro skated over the fact that it did not call a single witness to testify regarding (a) the co-efficient of friction of the yellow strip on the bus stairs; (b) the necessity of slip resistant flooring and stairs, and (c) co-efficient of

friction testing. Likewise, Metro did not challenge Dr. Sloan's coefficient of friction findings regarding the stair nosing.

I. Circumstances Surrounding Juror's Declarations

Metro provides bus passes to the King County Court, which are distributed to all jurors and citizens on jury duty are encouraged to ride the bus. RP (7/2/10) p. 12. At trial, Metro did not request any specific instructions to the jury or request that these jurors not have access to its buses during the trial.

After the verdict was read on May 26, 2010, the jurors met with Counsel for both parties in the hallway outside the courtroom. It had rained that morning and one juror, Kimber Brawley, stated that when exiting the bus that he noticed that the yellow nosing on the bus stair was slick. Declaration of Kimber Brawley, CP 188-199. Brawley stated that he "scuffed" his shoe across the yellow strip and did so in an abundance of caution to safely exit the bus.

The record is devoid of any statement being made in the jury room regarding a juror's personal experience riding the bus. The Declarations provided by Metro all reference the fact that Juror Brawley's statement was made in the hallway after the reading of the verdict. CP 142-160. In argument, Metro asserted that a second juror made a similar statement but has no direct evidence of such a statement. There is no evidence that any

discussions about experiences riding the bus were part of jury deliberations. There is no evidence in the record that any juror's personal experience on a Metro bus entered into the jury deliberations in this matter at any time.

III. ARGUMENT

A. The Testimony of Mr. Knappett and The Expert Witnesses Provided Sufficient Substantial Evidence to Support the Jury's Verdict. The Denial of the CR 50(a) Motion Should Be Affirmed.

1. Standard of Review for CR 50(a) Motion

At the close of Plaintiffs' case, Metro made a Civil Rule 50(a) Motion for a Judgment as a Matter of Law. In presenting its view of the Standard of Review, Metro omits a logical application of all aspects of the standard.

First, beginning with the rule, CR 50(a) states:

(1) *Nature and Effect of Motion.* 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 a 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....A motion for judgment as a matter of law shall state the specific ground therefore.

The decision to grant or deny a CR 50(a) Motion is a decision within the sound discretion of the trial judge after hearing all of the

evidence produced by the nonmoving party. A challenge regarding the denial of a CR 50(a) motion requires the same analysis. “When reviewing decisions granting or denying a judgment as a matter of law, we apply the same standard as the trial court.” *Hizey v. Carpenter*, 119 Wn.2d 251, 271, 830 P.2d 646 (1992). A CR 50(a) Motion is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party. *Hizey*, at 271-72; and also *Schmidt v. Coogan* 162 Wn.2d 488, 173 P.3d 273 (2007). The trial court’s decision will not be overturned on appellate review unless it can be determined that the decision was unreasonable. “We will reverse a trial court's discretionary decision only if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *See State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. Based Upon the Evidence Presented the Trial Court’s Decision to Deny Metro’s CR 50(a) Motion Was Reasonable.

Metro’s CR 50(a) Motion was a request for the trial court to either weigh or ignore the evidence presented in Plaintiffs’ case. Just as at trial, on appeal Metro ignores that Mr. Knappett testified as to his recollection of what happened. Additionally, his physician testified that a pilon

fracture would occur from a fall from the bus and not a walking fall on the concrete.

Likewise, Metro completely discounts the expert testimony of Dr. Sloan. The trial court had before it evidence where Dr. Sloan established that the nosing on the bus stairs, when wet, fell well below the co-efficient of friction required to make the nosing slip resistant. Dr. Sloan established that co-efficient of friction of the nosing, actually fell so low that the stair nosing was hazardous. Dr. Sloan established that a person descending stairs typically places the ball of their foot on the edge of the stair. The fact that the hazardous bus nosing extends two inches onto the flooring of the bus on the edge of each step had been established. Mr. Knappett testified that he was standing at the edge of the step when he suddenly fell, when he began to step down. It is uncontroverted that it was raining heavily the day that Knappett sustained this brutal fall.

Just as in any case, direct and circumstantial evidence will be considered by the court in a CR 50(a) Ruling. A motion for judgment as a matter of law may be overcome by direct or circumstantial evidence. The court cannot grant a Rule 50 Motion directed against the plaintiff's case, when the sole basis for that motion is that the plaintiff has presented not direct evidence of the facts sought to be established, but merely circumstantial evidence. *Faust v. Albertson*, 167 WN.2d 531, 222 P.3d

1208 (2009); Teglund and Ende, *Washington Handbook on Civil Procedure*, Vol 15A Sec. 58.9 *Quoting McCormick on Evidence* Sec 338 (4th Ed.).

The standard for a CR 50 Motion is similar to a CR 56 Motion for Summary Judgment. All of the evidence presented will be construed in favor of the nonmoving party in this case Mr. Knappett.

In considering that evidence pursuant to CR 50(a) "...the nonmoving party's evidence and all reasonable inferences therefrom will be accepted as true. *Davis v. Early Construction Co.*, 63 Wn.2d 252, 386 P.2d 958 (1963). In fact, the nonmoving party "is entitled to have his case submitted to the jury on the basis of the evidence which is most favorable to his contention." *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 640 P.2d 1 (1982). 4 A judgment as a matter of law is only appropriate when no substantial evidence or reasonable inference would sustain a verdict for the nonmoving party. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wash.2d 907, 915, 32 P.3d 250 (2001). " 'Such a motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.' " *Id.* (quoting *State v. Hall*, 74 Wash.2d 726, 727, 446 P.2d 323 (1968)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.* The evidence must be viewed favorable to the non-moving party. *Id.* In reviewing a decision on a motion for a judgment as a matter of law, an appellate court applies the same standard as the trial court.

Corey v. Pierce County 154 Wn.App. 752, 225 P.3d 367 (2010).

The trial court ruled that there were no grounds to grant Judgment as a Matter of Law. Mr. Knappett exceeded the parameters CR 50

establishes for defeating the assertion that there was insufficient evidence. He had ample, and substantial evidence for the jury to make a determination whether or not Mr. Knappett sustained his injuries due to the unsafe condition of the nosing that was slick from rainwater. It rains in Seattle. The public will be riding the bus on rainy days. Passengers must go up and down stairs that are wet from rain. Metro's records over the preceding three years, documented nine other similar falls. Here the jury had substantial evidence that Metro had notice of the slick bus nosing. Metro's own incident reports describing similar falls under similar conditions was substantial evidence.

Metro asserts that it does not have a duty to keep its bus floors dry. It also acknowledges that Mr. Knappett never claimed that Metro had such a duty⁹. Metro knew there was a problem with its stairs. Unquestionably, as a common carrier, Metro has a duty to keep its bus floors and steps from being unreasonably slippery. Metro argues that Mr. Knappett must demonstrate that a particular industry standard was violated. This argument fails on its face. Metro is responsible for negligent conditions on its buses just as any other business has a duty to provide safe premises.

⁹ Metro made a pro forma CR 50(a) Motion. Now, on appeal Metro randomly throws out positions and arguments that Mr. Knappett never made in an attempt to distract this Court.

Under the law, as a Common Carrier, Metro has a higher standard regarding the safety of its passengers.

A common carrier has a duty to its passengers to use the highest degree of care consistent with the practical operation of its type of transportation and its business as a common carrier. Any failure of a common carrier to use such care is negligence.

WPI 4th 100.01

Common sense and Dr. Sloan established that the nosing on the edge of the stair is the most dangerous part of the stair when a person is descending. Here the material on the nosing of each stair objectively fell well below the standard of slip resistance. In supporting his opinion, Dr. Sloan referenced Metro's own specifications stating *that all floor covering on buses shall be non skid*; 'Non-skid' means "slip resistant". RP (5/20/10) p.162; Ex. 38A. Dr. Sloan's evidence on the slickness of the nosing on the bus stairs proved that Metro violated its own standards. On this record it is uncontroverted that, when wet, the nosing on the stairs of the Metro bus was as slick as compact snow. Metro failed to perform any testing on the material wrapped around the nosing on its bus stairs.

Metro cannot hide behind the fact that it never took any steps to assure that steps, including the nosing, were skid resistant, by now arguing that Dr. Sloan's testing and testimony were not substantial evidence. Metro offers no explanation as to why it failed to present evidence that the

nosing was skid resistant. If Metro had ever tested the nosing then it should have presented that proof. Dr. Sloan's testimony was not a surprise. Metro presented no rebutting evidence, because there is none.

Metro cannot claim there is no breach of standard of care while at the same time it fails to meet its own standards specifying slip resistant floor covering. Ignoring its own standards Metro applied nosing to its bus stairs that was neither tested nor slip resistant when wet. Metro created an extremely hazardous condition on its own buses. The well-settled law directs common carriers to exercise "a duty to its passengers to use the highest degree of care...". A bus carrier in rainy Seattle fails to exercise the highest degree of care, when it does nothing to assure that the surfaces of the bus meet non-skid specifications.

Metro is asking this Court to ignore or discount, the testimony of Mr. Knappett, who described the weather, the amount of rainwater that had been tracked into the bus, how carefully he approached the stairway, the fact that he was wearing shoes with thick rubber soles and that he fell so violently that his hand was ripped from the handrail he was holding. Metro offered no contradictory testimony. Metro attempted to divert the jury, and now this Court, by suggesting that this injury was not sustained on the bus, but simply walking down the street on a rainy sidewalk. After hearing Metro's CR 50(a) Motion, the trial court ruled:

Metro has standards....the standards are that you have nonskid surfaces. The question is what is nonskid?

From the testimony I heard at trial, “nonskid” means above .5....the .5 as the standard for nonskid is the only testimony I have—is since it is well below that when it is covered with a [UNINTELLIGIBLE] full of water, so it is not the same as those cases that simply say there was water on the floor. So there is enough to go to the jury. The motion is denied.

RP (5/25/10) 4-5.

Based on the substantial evidence, the trial court’s reasoning was tenable. Metro’s argument that the denial of the CR 50(a) Motion was on untenable grounds or for untenable reasons is unsupported. The trial court’s ruling should be affirmed as to CR 50(a) standards.

B. Based on Metro’s Trial Strategy to Not Contest the Slickness of the Wet Yellow Nosing Strip the Juror’s Observation Had No Affect on the Outcome of the Case. The Denial of Metro’s CR 59(a) Motion for a New Trial Was Reasonable

1. Standard of Review for CR 59 Motion for New Trial

A CR 59 Motion for a new trial requires a very high hurdle for the moving party. “A trial court’s ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion.” *State v. Crowell*, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). The law accords much deference to the trial judge’s decision because the judge sat through the trial, observed the witnesses, heard all of the testimony and reviewed all of the evidence.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.) See also, *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). Stated differently, a trial court's discretionary decision will be affirmed unless no reasonable judge would have reached the same conclusion. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985).

Byerly v. Madsen, 41 Wn. App. 495, 499, 704 P.2d 1236 (1985).

Here, the trial court found no prejudice to Metro. A trial court's ruling on a motion for a new trial will not be reversed on appeal unless there is a showing of abuse of discretion. *State v. Crowell*, 92 Wn.2d 143, 145, 594 P.2d 905 (1979). In its opening brief, Metro was unable to demonstrate that the judicial discretion exercised by the trial court was unreasonable or an abuse of discretion.

2. Based Upon What the Trial Court Observed During Trial, the Denial of Metro's CR 59 Motion Was Reasonable.

Metro submitted Juror Declarations on a trial topic that was uncontested. Further, the Juror Declarations concerned comments made after the deliberations, on an uncontested matter. During the hearing on the CR 59 Motion, the trial court observed:

THE COURT: Because I'm the trial judge and I have to exercise discretion, and I'm saying for the record that my perception of the defense of this case throughout was that it was being defended on causation. There was very little evidence presented, very little defense presented that the strip was in fact not slippery, either through the presentation of evidence, during argument, and I during the course of trial with both counsel at various times, not in the presence of the jury, commented on the fact that I was surprised by the way the case was being defended.

RP (7/2/10) p. 9.

The trial court specifically observed that Metro did not attempt to defend the case on the question of whether the yellow stair nosing was hazardously slick, when wet. RP (7/2/10) p. 7. In fact the trial court noted that Metro failed to produce any evidence to counter Mr. Knappett's argument that the yellow nosing was hazardously slick when wet.

THE COURT: What evidence was presented by the defense that in fact the yellow strip was not slippery?

COUNSEL FOR METRO: That's a very good question. And the--

THE COURT: My recollection is nothing.

RP (7/2/10) p. 5.

Now on appeal, Metro argues that the back stairs of the bus could not have been wet because the back doors had not been opened enough the morning of this accident. Metro has no evidence one way or another to support this argument. Further, Metro's appellate argument ignores the fact that Knappett fell from the main floor of the bus, so how much the

door was open is irrelevant. Likewise Metro ignores the incontrovertible fact that the yellow nosing extended at least two inches from the top step onto the main floor. Finally, Metro dismisses that Mr. Knappett's detailed description of the bus floor established that considerable rainwater had collected from the dripping passengers. Metro did not refute Mr. Knappett's description. Metro's position succumbs to the same errant reasoning as its post trial motion; it makes arguments with absolutely no record to support those arguments.

Constitutionally, an appellate court is prohibited from substituting its judgment for that of the trial court. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn. 2d 570, 343 P.2d 183 (1959). As the trial court pointed out, Metro cannot ignore evidence that the bus nosing was slick during the trial and then state that it is prejudiced because a juror found that the bus nosing was slippery.

But to come in after the fact and say, we now were prejudiced because the jury found an issue perhaps on their own that Metro really never contested, hotly contested, I mean you can say, well, we relied on their evidence, but I was surprised by the way it was defended, and I mentioned that during the course of the trial.

Having defended it that way, it's hard to suggest because the jury in fact found it was slippery comes as a great surprise to the State—to the defendant, who never argued seriously that it wasn't is my perception.....but I have to say on the record, for the appellate court, I was surprised the way it was tried. And based on the way it was

tried, it's my view that the misconduct, if any, my view, did not affect the outcome, given the way it was tried.

RP (7/2/10) pp. 10-11. From the perspective of the trial court the slipperiness of the stair nosing was not an issue for Metro—until a verdict was returned in favor of Mr. Knappett.

My judgment, however, is the case was not defended on the basis of the slipperiness of the step. It was defended on the basis that when Mr. Knappett was approached by the first aid units, he didn't mention the bus either time. That was the heart of the defense case. He never said he slipped on the bus. So the case was defended on the fact that either Mr. Knappett was misrepresenting or misperceiving what happened. That was the heart of the defense. It had nothing to do with whether the step was slippery or not. I know it was in there. My judgment, having tried the whole case, is it was not a major part of the defense.

RP (7/2/10) p.14.

When analyzing whether prejudice occurred, the inquiry is objective rather than subjective. *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). The slickness of the yellow nosing was an uncontroverted fact when the matter was submitted to the jury. When a juror makes an observation that is consistent with an uncontroverted fact, a juror does not bring new evidence into the deliberations. Objectively, no outside evidence was introduced into deliberations. Exercising its discretion, the trial court properly denied the CR 59 (a) Motion.

3. The Fact that the Yellow Nosing on the Stair Was Slick Is Not Extrinsic Evidence. If Evidence Is Uncontroverted It Cannot Be Extrinsic Evidence When There is an Outside

Acknowledgement of The Same. Thus the Trial Court Ruled Properly Denying the CR 59 Motion for New Trial.

The first line of inquiry regarding an assertion of juror misconduct of the nature which Metro contends, is whether the evidence allegedly introduced by the juror is “extrinsic evidence.” Here, the question is whether the fact that Juror Brawley stepped on the yellow stair nosing material and found it slick is extrinsic evidence. The analysis begins with Juror Brawley’s observation which was consistent with an uncontroverted fact. Extrinsic evidence is defined as evidence that was not introduced at trial. The basis of the rule is that all evidence considered by the jury must be subject to objection, cross examination, explanation or rebuttal. *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973).

Mr. Knappett introduced exhaustive evidence that the material on the bus nosing was extremely slick when wet. Dr. Sloan testified for an entire afternoon about the co-efficient of friction of the bus nosing material and how instantly hazardous it became when it was wet. He demonstrated his co-efficient of friction measuring device and how he conducted his testing on the exact same bus that Mr. Knappett was riding the day of his fall. The jurors viewed a videotape of the testing, an explanation of the testing and results of tests on the bus flooring when both dry and wet as well as the nosing when it was dry and wet. The jury

was given thorough details on the meaning of slip resistance and the coefficient of friction necessary for material to be slip resistant.

On the other hand, Metro did not introduce a scintilla of evidence to contradict the fact that the yellow stair nosing becomes as slick as compact snow when wet. Nor did Metro argue to the jury that the nosing was not slick. Metro said nothing about the slick yellow nosing.

Metro had ample opportunity to present evidence on the nosing but produced none. Metro did not call a single witness to contradict Dr. Sloan's findings or to question his testing methods.¹⁰ Metro had ample opportunity to prepare for and cross examine Dr. Sloan to refute his findings and challenge his testing methods. The cross examination of Dr. Sloan was cursory, basically because the defense conceded that the stair nosing was extremely slick. By deliberations, there was no factual question for the jury to decide as far as the slickness of the yellow nosing since Metro did not contest that evidence.

Conceding the issue of how slick the material on the stair nosing is when wet means that any evidence regarding the slickness of the stair nosing is not 'extrinsic evidence'. The slick nosing was not a disputed matter and thus not a jury question. "Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial,

¹⁰ Metro named Joe Steward "vehicle inspector" as a rebuttal witness in the Joint Statement of Evidence but never called him to testify. CP 223-232.

either orally or by document.” (Italics ours.) *Richards v. Overlake Hosp. Med. Center*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990); *see also Halverson v. Anderson*, 82 Wash.2d 746, 513 P.2d 827 (1973). Such evidence is improper because it is not subject to a thorough vetting.

Where the court has found misconduct, it is when a juror brings evidence into the jury room that was never introduced during the trial. In *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wn. App. 665, 82 P. 3d 1199 (2004) a juror opined about the plaintiff’s loss of earning potential and the jurors tallied up such a loss even though no evidence had been given regarding the subject and loss of earning capacity was not in the damages instruction. The court found that such actions amounted to misconduct based upon extrinsic evidence. Contrarily, here no juror brought anything extrinsic to the deliberations.

Juries are not allowed to consider extrinsic evidence in any form. “Extrinsic evidence is information that is outside all evidence admitted at trial, either orally or by document.” *Kuhn v. Schall*, 155 Wn. App. 560, 228 P.3d 828 (2010). In *Kuhn* the court concluded that the jury was influenced by media coverage since newspapers articles covering the case were brought into the jury room and some were read aloud.

By contrast, the denial of a new trial was upheld in *Johnson v. Carbon*, 63 Wn. App. 294, 818 P.2d 603 (1991). There the alleged juror

misconduct included jurors commenting on their personal experiences with herniated disks. The trial court ruled that such comments were not prejudicial but “within the realm of life experiences a juror is expected to bring to deliberations.” *Id.* at 301. This ruling was upheld on appeal.

The measuring stick used by courts regarding these matters is whether or not information provided by a juror is novel or amounts to “specialized knowledge.” If the information simply constitutes general life experiences that a typical juror would encounter it is not extrinsic evidence. *State v. Tandecki*, 120 Wn. App. 303, 311, 84 P.3d 1262 (2004); *aff'd*, 153 Wn.2d 842, 109 P.3d 398 (2005) is an example of evidence that was considered general life experience. In that case a criminal defendant sought a new trial based upon juror misconduct. As part of his defense to eluding police the alleged driver introduced medical records showing he had no injuries consistent with the car crash that concluded a high speed chase with authorities. During deliberations, jurors discussed various experiences with car accidents. On review, the trial court’s denial of a new trial was upheld because such incidents are part of the range of life experiences. The opinion concludes, “the jury apparently discussed the range of possible injuries resulting from car accidents and properly deliberated over the credibility and weight to be given to the defense expert’s opinion evidence, as instructed.” *Id.* at 311.

Conversely, juror misconduct overturned the verdict in *State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989). During deliberations, a juror presented his personal experience with stuttering, despite his failure to disclose during voir dire that he had any such experience. On appeal a new trial was ordered. “This is evidence outside the realm of a typical juror’s general life experience and therefore should not have been introduced into the jury’s deliberations.” *Briggs* at 59.

Juror Brawley’s experience was supported by unrefuted trial testimony about how slick the nosing was when wet. The jurors were given the results of tests demonstrating that the stair nosing was dangerously slick when wet. The jurors watched a video of the testing. No contrary testimony or evidence was ever presented by Metro. “There is nothing to indicate that the jurors obtained new evidence which was not introduced at the trial.” *Tarabochia v. Johnson Line, Inc.*, 73 Wn.2d 751, 440 P.2d 187 (1968) *citing State v. Burke*, 124 Wash. 632, 637, 215 P. 31 (1923). *Tarabochia* is on point with this case. In that case, the plaintiff, a longshoreman, alleged he had been injured because he slipped on a substance that was slippery when wet. The jurors mixed the substance in question with water in the jury room and a new trial was sought on the basis that this was juror misconduct. However, our supreme court ruled that such an experiment was not misconduct because, “All of the

testimony on the question at the trial was that a mixture of water and urea on a plastic bag would be slippery.” *Id.* at 753. Comparing that case to taking jurors to the scene of an accident, which had changed, the *Tarabochia* court ruled the jury’s experiment was not misconduct because:

There is no such certainty in regard to the outcome of the test performed by the jury in this case, unless that certainty is that the results of the test *conformed to the uncontradicted testimony introduced at trial.*

Id. at 754. (Emphasis added)

Furthermore, jurors are expected to bring their own experiences and reasoning into the courtroom and apply that reasoning in their analysis of the evidence. For instance in *State v. Balisok*, 123 Wn.2d 114,119, 866 P.2d 631 (1994) the jurors heard testimony regarding a struggle that had taken place involving the defendant in a criminal trial. During their deliberations, the jurors reenacted the struggle concluding that it could not have occurred in the manner that the defendant described. The defendant claimed that such a reenactment was juror misconduct. In disagreeing, the court stated, “Jurors are expected to utilize their common sense and the normal avenues of deductive reasoning to determine the truth of the facts presented. Although the actual fact of a struggle was in dispute, the description of the struggle was not.” *Balisok* at 119.

In analyzing Metro's claim of juror misconduct, this court should consider that Metro did not call an expert witness or any witness regarding how slick the stair nosing material became when wet. Metro called no witness and offered no testimony regarding co-efficient of friction. Metro called no witness and offered no evidence regarding slip resistant surfaces. As has been established, evidence is only extrinsic when not subject to cross examination and Metro had ample opportunity to cross examine Dr. Sloan, the expert who testified on behalf of the respondents. However, the following is the **complete** cross examination conducted by counsel for Metro on the subject of how slick the stair nosing became when wet:

Q. ...the scope of your work was to evaluate the coefiction (sic) of the floor treatment, including the edge that you call the nosing on this particular bus.

A. That's correct.

Q. Thank you. And when you did that, in order to make your meter work right, you make—I think you called it—can't remember the word you used, but are you making a complete puddle of water there?

A. That's correct.

Q. It's not just a little bit of water it needs to have a puddle that's continuous to have the hydroplaning effect?

A. That's correct.

Q. Okay. You did that both on the blue part of the floor at the main floor, and also on the yellow nosing or the yellow part of the floor.

A. Correct.

Q. Okay. And when you did that, the blue flooring as much as you sprayed or poured water on it and made these

puddles, tested slip resistant with all of the measurements you made.

A. Correct.

Q. Both wet and dry.

A. Correct.

Q. Okay. And the yellow nosing, the strip at the edge of the step, tested fine when it was dry.

A. Correct.

Q. But it did test slippery when you put puddles on that edge and used your meter on it.

A. Yes.

Q. Okay, and that's what you showed us in the video.

A. I did.

RP (5/20/10) pp. 171-172

Metro never offered any evidence contradicting that, when wet, the yellow stair nosing strip was as slick. Since the coefficient of friction of the yellow stair nosing was uncontroverted at trial, any juror's experience that the yellow stair nosing was slick when wet was not extrinsic evidence and the trial court properly denied the Motion for a New Trial.

4. Metro Requested No Limiting Instruction When Jurors Were Provided Metro Transit Passes and Encouraged to Commute to the Trial on Metro's Buses. Metro Requested No Limiting Instruction on Stepping on the Yellow Line While Exiting the Bus, Which Was a Foreseeable Life Experience for A Juror.

Rain in Seattle is common. It is a common life experience for jurors to commute in the rain. Metro provided passes to the King County Court so that jurors were encouraged to commute to the courthouse on its

buses. Therefore, it clearly falls within general life experience that a juror's foot would come into contact with the yellow material on each stair. The trial court relied on the common sense inherent in this situation when it denied the request for a new trial.

Everybody knew they were going to be on those buses. No one suggested, and certainly I wouldn't have told them, you know what, when you get on those buses, jump across the steps, don't step on them, jump from the curb to the top landing so that you never touch the yellow strips or close your eyes when you get on those buses. Nobody suggested that. It would have been absurd. Everybody knew they were going to have to step on those strips getting on and off the buses.

RP (7/2/10) p. 13.

For this case, Metro never requested that jurors not be given bus passes or that they should not be allowed to ride the bus. This is analogous to *State v. Gobin*, 73 Wash.2d 206, 437 P.2d 389 (1968), an eminent domain case where the parties agreed that two cases would be consolidated. One party then claimed juror misconduct because the jury made assumptions in the second trial based on evidence gleaned in the first proceeding. The court ruled that when the parties agree to a procedural issue, neither can cry foul if displeased with the outcome. "There has been no suggestion that it was improper to try the two cases to the same jury. Both parties consented, thus both were apparently willing to

undertake the risk that evidence heard by the jurors in the first trial might affect their deliberations in the second.” *Gobin*, 212.

Juror Brawley, said he “scuffed [his] shoe over the top of this yellow nose strip” while exiting the bus the morning the verdict was read. Metro attempts to characterize this occurrence as a test. However, “scuffing” a shoe over the yellow nosing strip on a bus stair while legitimately exiting a bus does not rise to the level of “testing”.

Here, jurors were encouraged to ride Metro buses and had to step on the yellow nosing strip to get on and off the bus. In denying the CR 59 Motion the trial court, specifically cited the fact that jurors were encouraged to ride the bus with Metro bus passes. The court distinguished the everyday act of getting on and off a bus as opposed to conducting an experiment or visiting an accident scene.

THE COURT: At what point does stepping on the step become a test verse [sic] if you rub your foot on it, versus walking on the bus? At what point does getting off the bus when it's wet and you got to walk across the step become improper when you slide your foot across the step that you're walking on and form an impression? It's not the same as going- - taking the time to go to the scene of an accident, investigate the scene of an accident. They were on the bus. We knew they were on the buses. We in fact gave them permission and tickets to get on the buses going into trial.

RP (7/2/10) p. 16.

By providing bus passes to the court and failing to request any limiting instruction about utilizing Metro buses for transportation to and from the courthouse, Metro conceded that the jurors would come in contact with the yellow nosing in question as part of their everyday experience during the trial.

[T]he rule ... is to the effect that, if the experiment, or what the jury has done, has the effect of putting them in possession of material facts which should have been supported by evidence upon the trial, but which was not offered, this generally constitutes such misconduct as will vitiate the verdict. But if the experiment involves merely a more critical examination of an exhibit than had been made of it in the court, there is no ground of objection.

State v. Everson, 166 Wash. 534, 7 P.2d 603, 80 A.L.R. 106 (1932).

Juror Brawley used caution getting off of a bus. That is not tantamount to an experiment or gathering information outside what was presented in court. In order to establish misconduct to overturn a verdict Metro would have to present evidence that the jurors went out of their way to uncover issues with regard to the flooring. Examples consistent with 'testing' that rise to the level of misconduct would be if a juror attempted to perform their own coefficient of friction testing on a piece of Nora flooring. Impermissible conduct would include a juror researching lawsuits involving the same flooring or using the Internet to find facts about Nora Flooring or gathering information on types of flooring used by

other transit operations. Even if this court finds on review that Juror Brawley conducted a “test” he did nothing to bring extrinsic evidence into the jury room. The standard in our courts is that, “ ‘[a litigant] is entitled to a fair trial but not a perfect one,’ for there are no perfect trials.” (Citations omitted.) *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208 (1973).

It was a non issue whether or not the co-efficient of friction on the bus nosing was sufficiently low to cause Knappett to fall from the top stair all the way to the pavement. Metro denied the fall occurred from the top stair, but that denial was not based on the co-efficient of friction. Metro denied the fall had occurred on the bus at all. There is no evidence whatsoever that Juror Brawley touching the ball of his shoe to the yellow strip in order to disembark safely provided an answer to that question outside of what was introduced in Court. Juror Brawley made an everyday observation within the common experience of jurors. Furthermore, that observation was made after juror deliberations had concluded so it cannot have had any influence on the verdict.

5. When a Juror’s Experience Is Not Even Discussed in the Jury Room, It is Not Juror Misconduct.

Metro claims that Juror Brawley’s act of touching his shoe to the yellow strip of stair nosing in the act of exiting from the bus constitutes

‘misconduct’. Whether or not the actions of a juror constitute misconduct is a question of fact for the Appellate Court to evaluate from the record. It can only do so by detailing what a juror did and comparing it to case law where juror misconduct has been found.

The threshold question regarding misconduct is whether or not it occurred or was discussed in the jury room. This court must carefully review the declarations from the jurors. *Not a single juror states that Juror Brawley’s comments regarding the slickness of the yellow strip were made in the jury room or discussed in the jury room.* Juror Brawley never states in either declaration that he discussed disembarking from the bus in the jury room or mentioned it to jurors until the trial had concluded and the jurors were milling around in the hallway outside the courtroom.

While Metro claims the action of safely exiting a bus is a “test” case law holds that testing regarding evidence sufficient to overturn a trial must be much more deliberate and *it must be introduced in the jury room.* There is no evidence before this court that at any time Juror Brawley discussed ‘scuffing’ his shoe over the yellow strip of stair nosing in the jury room or during juror deliberations. In *Steadman v. Shackelton*, 52 Wn. 2d 22, 322 P.2d 833 (1958) the jurors were taken to the scene of an auto accident and then vehicles were placed in the position they “might” have been in at the time of the collision. The supreme court ruled such an

experiment was “prejudicial”. In *Gardner v. Malone*, 60 Wn. 2d 836, 844, 376 P.2d 651 (1962) jurors made an unauthorized visit to an accident scene, one that had substantially changed since the time of the accident and this was ruled prejudicial. The opinion points out that by going out of their way to view the accident scene certain jurors gleaned knowledge that “was neither casual nor accidental.” *See also, Halverson, 752, supra.*

In cases where the courts have found juror misconduct there has been unassailable and emphatic documentation that the matter was discussed in the jury room and was a part of juror deliberations. There is no such evidence before this court. There is no misconduct when a jurors actions are foreseeable, a typical life experience and were not even brought up in the jury room.

Where juror misconduct has been found, the extrinsic evidence was discussed in the jury room or the jurors deliberately engaged in testing that was far beyond the scope of the evidence presented. Deliberate volitional acts by the jury foreman to gather information not presented in court constituted misconduct in the case of *Arthur v. Iron Works*, 22 Wn. App. 61, 587 P.2d 626 (1978). After hearing testimony of competing experts, the jury foreman looked up one expert in the yellow pages and reported back to jury that other experts were not listed in the telephone book. He then went to the library and researched books on stevedore

rigging, a seminal question in the case. The opinion references the trial court's description of this activity as a "brazen violation of the Court's admonition". *Id* at 64. The foreman freely discussed his findings in the jury room. The Court concluded that the jury foreman "placed before his fellow jurors evidence which [was] not subject to objection, cross-examination, explanation or rebuttal." *Id.* at 66 quoting *Ryan v. Westgard*, 12 Wn. App. 500, 503, 530 P.2d 687 (1975); *Gates v. Jensen*, 20 Wn. App. 81, 579 P.2d 374 (1978).

Another case where juror actions were held to be misconduct was when jury members asked for a Legal Dictionary and looked up terms such as "proximate cause" and "negligence" as part of their jury room discussions. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 750 P.2d 1257 (1988). There can be no prejudice if the matter was never part of juror deliberations. Prejudice cannot be found when the record is completely void of any statements that Juror Brawley discussed an everyday experience disembarking from a bus with other jurors until *after* the verdict had been read aloud in court.

6. Juror Brawley's Act of Scuffing the Toe of His Boot Across the Yellow Stair Nosing on the Metro Bus Was Not Prejudicial.

Whether the actions of a juror are misconduct is largely the purview of the trial judge. Here, the court, spoke emphatically regarding

whether Juror Brawley's statements to other jurors after departing the jury room influenced the outcome of this case.

My judgment, however, is the case was not defended on the basis of the slipperiness of the step. It was defended on the basis that when Mr. Knappett was approached by the first aid units, he didn't mention the bus either time. That was the heart of the defense case. He never said he slipped on the bus. So the case was defended on the fact that either Mr. Knappett was misrepresenting or misperceiving what happened. That was the heart of the defense. It had nothing to do with whether the step was slippery or not. I know it was in there. My judgment, having tried the whole case, is it was not a major part of the defense.

RP (7/2/10) p. 14.

Thus this court can find juror misconduct without finding that such misconduct constituted prejudicial error. "The effect which this evidence may have had upon the jury was a question which was properly determined in the sound discretion of the trial court which had observed all the witnesses and the trial proceeding and had in mind the evidence which had been presented." *Halverson v. Anderson*, 82 Wn. 2d 746, 752, 513 P.2d 827 (1973).

When the court finds misconduct it must go further and also find prejudice in order to grant a new trial. *State v. Tigano*, 63 Wn. App. 336, 818 P.2d 1369 (1991) involved a murder trial where an accomplice had previously been tried and found guilty. During voir dire, jurors were questioned regarding whether or not they were familiar with the case. At

least one juror was not forthcoming. The fact that the accomplice had been found guilty came up in juror deliberations, a fact made known to the prosecutor after the jury found Tigano guilty. The appellate court found that “either two or three jurors engaged in misconduct.” *Id.* at 342. However, since both sides were going to argue that the accomplice participated in the murder, the appellate court agreed with the trial judge that the misconduct was not cause for a new trial. “Under these circumstances, the trial court did not abuse its discretion when it ruled that the acts of misconduct were not prejudicial.” *Id.* at 343.

To assess whether prejudice has occurred, it is necessary to compare the particular misconduct with all of the facts and circumstances of the trial. As a neutral, trained person observing both the verbal and nonverbal features of the trial, the trial judge is in the best position to make this comparison. *See State v. Harvey*, 34 Wn. App. 737, 744, 664 P.2d 1281, *review denied*, 100 Wn.2d 1008 (1983). Not surprisingly, then, whether to grant a motion for mistrial is a matter addressed to the sound discretion of the trial court, and that court's decision will be overturned on appeal only for an abuse of discretion. *McDonough Power Equipment v. Greenwood*, 464 U.S. at 556, 104 S. Ct. at 850; *Richards v. Overlake Hosp. Med. Center*, 59 Wn. App. at 271, 796 P.2d 737; *State v. Briggs*, 55 Wash.App. at 60, 776 P.2d 1347; *State v. Rempel*, 53 Wash.App. at 801, 770 P.2d 1058; *State v. Hicks*, 41 Wn. App. 303, 314, 704 P.2d 1206 (1985).

Tigano at 341-342.

Richards v. Overlake Hosp. Med. Center, *supra.*, a medical malpractice claim, demonstrates an analysis of claimed juror misconduct.

In *Richards*, the plaintiff asserted that a juror who was a nurse committed misconduct by telling other jurors that, in her experience, having the flu during pregnancy could have caused the plaintiff's baby to be born with birth defects. This court found no misconduct. "Given the standard of review, after reviewing the record it cannot be said that the decision of the trial court was an abuse of discretion. In fact we agree with the conclusion that misconduct has not been established." *Id.* at 275. The court concluded that the juror's opinion was part of her everyday experience as a nurse.

In *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997) the court found juror misconduct was found and ordered a new trial. In *Allyn*, a juror failed to be forthcoming about her personal knowledge of a witness and then attacked his credibility during juror deliberations.

"[U]ltimately the determination of whether juror misconduct in interjecting evidence outside of the record affected the verdict is within the discretion of the trial court." *Richards*, 59 Wn. App. at 272, 796 P.2d 737. Here, the trial court found misconduct that affected the verdict-a decision within its sound discretion. We cannot say its decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Richards*, 59 Wn. App. at 271, 796 P.2d 737 (citing *State ex. rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971)).

Allyn at 722.

In *State v. Robinson* 146 Wn. App. 471, 191 P.3d 906 Wn. App. (2008) a situation similar to the present situation occurred. In that case the defendants were accused of stealing valuable wooden planks. The owner testified that he had put up flyers in an effort to recover the stolen goods. A juror told fellow jurors that he had, indeed, seen one of the flyers although it was not admitted into evidence. Upon review, no misconduct was found because there was no proof that the incident tainted the jurors in any way.

Here the question is how could Juror Brawley's actions be prejudicial when the only information entered into evidence regarding the yellow stair nosing was that it was as slick when it is wet? How can his experience be prejudicial when it was never discussed in the jury room? The trial court, which presided throughout the entire trial, reviewed all the evidence and observed all of the witnesses emphatically found that the juror-bus passenger's experience did not prejudice this jury.

The U.S. Supreme Court has examined the issue of juror misconduct in the light of judicial economy and "the important investment of both private and social resources" in the finality of an outcome relied upon by all parties, emphasizing that a juror's actions must be shown to "affect the fairness of a trial."

To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give.

McDonough Power Equipment v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 854, 850 (1984).

There is no such certainty in regard to the outcome of the test performed by the jury in this case, unless that certainty is that the results of the test conformed to the uncontradicted testimony introduced at the trial.

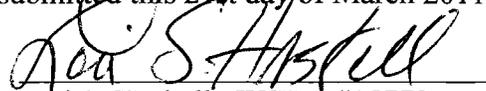
There is nothing to indicate that the jurors obtained new evidence which was not introduced at the trial.

Tarabochia v. Johnson Line, Incorporated, 73 Wn.2d 751, 754, 440 P.2d 187 (1968).

V. CONCLUSION

Here the trial court carefully considered the legal parameters, the evidence presented, the fact that Metro never contested the slickness of the yellow nosing, the uncontroverted evidence from Mr. Knappett regarding the condition of the bus floor, and the fact that Juror Brawley never brought up the matter in deliberations. Metro asked for no limiting instructions while providing bus passes and encouraging jurors to commute by bus during trial. What happened was not prejudicial. Based upon the law and this record, the trial court's decision should be affirmed.

Respectfully submitted this 21st day of March 2011.


Lori S. Haskell WSBA #15779
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 2/5th day of March, 2011, I caused a true and correct copy of the Brief of Respondent to be served as indicated below.

Linda M. Gallagher [] U.S. Mail
Senior Deputy Prosecuting Attorney [] Overnight Mail
900 King Cty Administration Bldg [x] Hand Delivery
500 Fourth Avenue [] And Supplemental Fax
Seattle, WA 98104

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 2/5th day of March, 2011, at Seattle, Washington.



Lori S. Haskell

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