IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH KNAPPETT and JUDY KNAPPETT, husband and wife,	)	DIVISION ONE
Respondents,	)	No. 65801-8-I
v.	)	UNPUBLISHED OPINION
KING COUNTY METRO TRANSIT,	)	
Appellant.	)	FILED: February 21, 2012

Dwyer, C.J. — Keith Knappett sued King County (Metro) to recover damages for injuries that he sustained after slipping while exiting a county-operated bus on a rainy day.[1] At trial, Knappett introduced evidence that yellow nosing strips, located at the edges of the stairs of Metro buses, become dangerously slippery when wet. At the conclusion of Knappett's case in chief, Metro moved for judgment as a matter of law based upon the lack of direct evidence that Knappett had stepped on a yellow nosing strip or that the strip was wet at the time of the incident. The trial court denied the motion, and the jury found that Metro's negligence was the sole cause of Knappett's injuries.

[1] Prior to 1994, the bus system was operated by the Municipality of Metropolitan Seattle, colloquially known as Metro. In 1996, following the merger of Metro and King County, Metro's Transit Department became part of the county's new Department of Transportation. Thus, King County was the operator of the bus that Knappett was riding on the day that he sustained his injuries. Although Metro no longer exists as an independent entity, for readability, we refer to King County as Metro throughout this opinion.

Following the verdict, a juror testified by declaration that he had tested the slipperiness of a yellow nosing strip while exiting a Metro bus on the last day of trial. Although Metro knew that the court had provided bus passes to jurors for use during jury service, Metro moved for a new trial based on juror misconduct. The trial court denied the motion.

Metro appeals from both rulings. Finding no error, we affirm.

I

On the morning of October 24, 2006, Keith Knappett was commuting from Bothell on a bus operated by Metro. It was raining heavily that day and the floor of the bus was covered with small puddles. Knappett was the last passenger to exit the bus at his stop in downtown Seattle. Knappett began to descend the stairs of the bus's rear exit, holding onto the hand rail as he did so. As he moved his right foot to the second step, Knappett slipped and fell. The fall carried him out of the bus and onto the pavement below. The bus pulled away, and Knappett called 911. Medical personnel arrived at the scene shortly thereafter. Knappett sustained a severe ankle injury as a result of the fall.

Knappett later commenced an action for personal injury damages against Metro. At the jury trial that followed, Knappett testified regarding his recollections of the incident. He introduced expert testimony indicating that the material covering the nosing of the stairs on Metro buses becomes dangerously slippery when wet. The expert explained that the term "nosing" refers to the first

two to three inches from the edge of each step. The expert further testified regarding the dynamics of descending stairs and the importance of a slip-resistant surface on the nosing of the stairs. Following the conclusion of Knappett's case in chief, Metro moved for judgment as a matter of law pursuant to Civil Rule 50. Metro's motion was based upon the absence of evidence demonstrating a violation of a transit industry standard of care and the absence of any testimony indicating that the rear steps were wet or that Knappett actually contacted a yellow nosing strip while exiting the bus. The trial court denied Metro's motion.

Metro called three witnesses. Sergey Buryy, the driver who was operating the bus that Knappett was riding on the day of the incident, testified that he did not observe Knappett fall. Michael Tanberg, the ambulance attendant who initially treated Knappett, testified that Knappett had reported tripping but not hitting the ground. Anthony Miceli, one of the firefighters who responded to Knappett's 911 call, testified that Knappett had told him "that he slipped on the wet sidewalk and twisted his left ankle." Report of Proceedings (RP) (May 20, 2010) at 28. In closing argument to the jury, Metro argued that the testimony of these witnesses indicated that Knappett had not sustained his injuries while exiting the bus.

The jury found that Metro's negligence was the sole cause of Knappett's injuries and awarded substantial money damages. After the verdict was read,

the jurors met with counsel for both parties outside the courtroom. One juror stated that, when exiting a Metro bus on the last day of trial, he noticed that the yellow nosing on the bus stair was wet and slick. Thereafter, the juror testified by declaration that he had "scuffed" his shoe across the yellow strip, and that a second juror had described engaging in similar conduct. However, there was no evidence that either juror's observations were discussed during deliberations. Metro brought a motion for new trial pursuant to Civil Rule 59 based on juror misconduct. The trial court denied this motion.

II

Metro first contends that the trial court erred by denying its motion for judgment as a matter of law because there was no direct evidence that Knappett stepped onto the yellow nosing strip or that the strip was actually wet at the time of Knappett's fall.[2] Because there was ample evidence adduced at trial to submit these questions to the jury, we disagree.

We review a motion for judgment as a matter of law de novo, applying the same legal standard as the trial court. Hill v. BCTI Income Fund–I, 144 Wn.2d 172, 187, 23 P.3d 440 (2001); Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 765 n.11, 162 P.3d 1153 (2007). Such a motion admits the truth of the opponent's evidence and all inferences that can be reasonably

[2] It was established at trial that only the yellow nosing strips presented an unreasonable danger to passengers and that these strips were only dangerously slippery when wet. The majority of the bus's flooring was slip-resistant even when wet. Thus, Knappett was required to prove both that he contacted a yellow nosing strip and that the strip was wet in order to demonstrate that Metro's negligent conduct was the proximate cause of his injuries.

drawn therefrom and requires the evidence to be interpreted most strongly against the moving party and in the light most favorable to the opponent. Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55, 386 P.2d 958 (1963). 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.'" Schwab v. Dep't of Labor & Indus., 69 Wn.2d 111, 116, 417 P.2d 613 (1966) (quoting Mutti v. Boeing Aircraft Co., 25 Wn.2d 871, 877, 172 P.2d 249 (1946)). Indeed, a motion for judgment as a matter of law "'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.'" Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting State v. Hall, 74 Wn.2d 726, 727, 446 P.2d 323 (1968)).

Circumstantial evidence, of course, may be used to support a verdict. Arnold v. Sanstol, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). Circumstantial evidence is sufficient if the evidence "'affords room for [persons] of reasonable minds to conclude that there is a greater probability that the thing in question . . . happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would not be liable.'" Callahan v. Keystone Fireworks Mfg. Co., 72 Wn.2d 823, 829, 435 P.2d 626 (1967) (quoting Gardner v. Seymour, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)). "[A] verdict does not rest on speculation or conjecture when founded

upon reasonable inferences drawn from circumstantial facts." Douglas v. Freeman, 117 Wn.2d 242, 254-55, 814 P.2d 1160 (1991). Accordingly, in this case, we must determine whether there was sufficient evidence—either direct or circumstantial—from which a reasonable jury could determine that the yellow nosing strip was wet and that Knappett actually stepped upon it prior to his fall. We have no difficulty concluding, as the trial court did, that the evidence was sufficient to submit these questions to the jury.

At trial, Knappett testified that he had just begun to descend the stairs of the bus's rear exit when he fell. Knappett told the jury that he recalled lifting his right foot prior to "flying through the air" and landing on the pavement. RP (May 24, 2010) at 117. It was uncontested that a two-inch yellow strip of material—known as "Nora" flooring—extended along the edge of each step in the rear stairwell of the bus that Knappett was riding. Accordingly, there was direct evidence that Knappett was in the area of the yellow nosing strip just prior to his fall.

As Metro correctly points out, Knappett did not testify regarding the specific area of the step that his foot touched prior to slipping. However, Dr. Gary Sloan, an expert in ergonomics and industrial engineering, explained the dynamics of descending stairs to the jury. Dr. Sloan testified that "[w]hen we descend a flight of stairs, what we do is basically take our lead foot [and] move it over the nosing of the step below." RP (May 20, 2010) at 103. Dr. Sloan told

the jury that it is "typically the case" that the ball of the foot "comes down on the edge of the step." RP (May 20, 2010) at 106. Dr. Sloan explained that where the surface of a step's nosing lacks adequate resistance to prevent movement of the ball of the foot, a person may "slip, oftentimes fall backwards, and be injured on the steps." RP (May 20, 2010) at 106. Given this testimony, a reasonable jury—knowing that Knappett was descending the rear stairs of the bus and that a person typically contacts the edge of the steps while doing so—could reasonably infer that Knappett had contacted the yellow nosing strip while exiting the bus.

Moreover, the nature of Knappett's injuries was inconsistent with Metro's own theory of the case at trial. Metro argued to the jury that the testimony of the medical personnel, as well as Knappett's own varying accounts of the incident, indicated that Knappett had slipped on the sidewalk and not while descending the stairs of the bus. However, the orthopedic surgeon who treated Knappett, Dr. Alexis Falicov, testified that Knappett's injury was of a type "typically not encountered with normal walking-type injuries." Clerk's Papers (CP) at 249. He identified the injury as a "pilon fracture," an injury that occurs when the talus bone of the ankle is driven upwards into the tibial plafond, shattering the weight-bearing portion of the ankle joint. CP at 249. Dr. Falicov told the jury that, because a pilon fracture "requires a relatively high amount of force to shatter that bone," CP at 249, such an injury is generally inconsistent with "slipping on wet pavement." CP at 251. Instead, Knappett's injury was better explained by a

fall from a height in which Knappett "landed, did a direct axial load onto his tibia, and essentially just exploded his weight-bearing surface of his tibia." CP at 270-71. Given this testimony, it is clear that a reasonable jury could have determined that Knappett slipped while descending the stairs of the bus and not on the sidewalk.

Similarly, there was abundant circumstantial evidence that the yellow nosing strip was wet at the time of Knappett's fall. Knappett testified that it was "pouring rain" at the time that he boarded the bus. RP (May 24, 2010) at 11. He described the floor of the bus as "wet" with "small puddles all over it." RP (May 24, 2010) at 12. Knappett told the jury that he could not avoid the puddles as he moved down the aisle. This water had been deposited by wet passengers "getting on and off [the bus]." RP (May 24, 2010) at 12. Metro asserts that, because no passengers were permitted to enter the bus via the rear door until one block before Knappett exited, there was no opportunity for water to have been tracked from the street to the rear steps. However, this argument ignores the possibility that passengers may have tracked water from the floor of the bus to the rear steps as they *exited* the bus. Although Knappett did not testify that he observed water on the stairs, given the prevailing conditions on the bus, a reasonable jury could have determined that it was more probable than not that the yellow nosing strips on the rear steps of the bus were wet when Knappett fell. The trial court did not err by denying Metro's motion for judgment as a

matter of law on the bases discussed.

III

Metro next contends that the trial court erred by denying its motion for judgment as a matter of law because Knappett failed to present sufficient evidence to demonstrate a breach of the applicable standard of care. We disagree.

Negligence, of course, requires the breach of a duty owed to the plaintiff. Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). Metro's duty of care to Knappett is well-established—"[a]s a common carrier of passengers, a bus system owes the highest degree of care toward its passengers commensurate with the practical operation of its services at the time and place in question."[3] Price v. Kitsap Transit, 125 Wn.2d 456, 465, 886 P.2d 556 (1994); Benjamin v. City of Seattle, 74 Wn.2d 832, 833, 447 P.2d 172 (1968). Here, the trial court properly instructed the jury that "[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." CP at 124 (Jury Instruction 9). Metro does not contend, nor could it, that the trial court erred by instructing the jury as to this unremarkable standard.

Nevertheless, Metro asserts that because its duty of care does not include a duty to "keep the floors of its buses dry on a wet and rainy day,"

[3] Metro concedes, as it must, that it is a common carrier and that, because Knappett was a passenger, Metro owed Knappett this high duty of care.

Knappett failed to introduce evidence demonstrating the breach of an applicable duty. Br. of Appellant at 11. In so asserting, Metro misapprehends both the scope of its duty as a common carrier and the evidence that may be used to demonstrate a breach of that duty. Of course, not every injury to a passenger constitutes a breach of duty by the carrier. Metro is correct that a common carrier is not liable for injuries that are attributable to ordinary jolts and jerks that are necessarily incident to the carrier's mode of transportation. Walker v. King County Metro, 126 Wn. App. 904, 908, 109 P.3d 836 (2005). However, unlike ordinary jolts and jerks, dangerously slippery floors are not "necessarily incident" to the practical operation of Metro's services. Walker, 126 Wn. App. at 908. Indeed, the evidence at trial established that the flooring of other areas of Metro's buses remained slip-resistant even when wet, demonstrating that such material was readily available at the time of Knappett's fall. We have long held that a common carrier's duty to exercise the highest degree of care extends to ' "the selection, maintenance, inspection and use of its cars and their appliances."' Leach v. Sch. Dist. No. 322 of Thurston County, 197 Wash. 384, 387, 85 P.2d 666 (1938) (quoting Adduci v. Boston Elevated Ry. Co., 215 Mass. 336, 337, 102 N.E. 315 (1913)). A common carrier '"is bound to adopt approved appliances that are in general use and necessary for the safety of passengers.'" Leach, 197 Wash. at 388 (quoting Adduci, 215 Mass. at 337). Accordingly, if there was any evidence that Metro failed to exercise the highest degree of care

in selecting, maintaining, or inspecting the material of its bus's flooring, the trial court was required to submit the question of negligence to the jury. See Peterson v. City of Seattle, 51 Wn.2d 187, 192, 316 P.2d 904 (1957).

Here, the evidence presented at trial was sufficient to send the case to the jury. Knappett's liability expert, Dr. Sloan, described to the jury several experiments that he conducted to test the coefficient of friction of both the yellow nosing strips and the other areas of the bus's flooring. Dr. Sloan's experiments revealed that, although the yellow Nora material was slip-resistant when dry, when wet, this material became as slippery as "compact snow." RP (May 20, 2010) at 156. Dr. Sloan explained that, within the discipline of industrial design, this material would be considered "dangerously slippery."[4] RP (May 20, 2010) at 156. This was in contrast to the majority of the bus's floor, which was composed of a different material than the nosing of the steps and remained slip-resistant even when wet. Moreover, there was evidence that Metro had notice of the danger that the yellow Nora material posed to its passengers. Among the 45 incident reports filed in the three years before Knappett's fall, Dr. Sloan identified nine falls where the passenger reported being injured while slipping on the rear stairs of a Metro bus.[5] These falls all occurred when the stairs were wet with rainwater. In each case, the same yellow Nora material had been utilized to

[4] There was evidence that Metro's own specifications stipulated that all floor coverings on Metro buses be "non-skid" or slip-resistant. Sloan testified that, to meet these specifications, the floor material must register a coefficient of friction of at least 0.5. The yellow Nora material registered a coefficient of friction of less than 0.3 when wet.

[5] This evidence was admitted for the purpose of demonstrating that Metro had notice of a dangerous condition on the stairs of the bus.

cover the nosing of the rear stairs. Nevertheless, Metro never tested the slip-resistance of the yellow Nora material. Given this testimony, a reasonable jury could conclude that Metro breached its duty as a common carrier in selecting, maintaining, and inspecting the material of its bus's flooring.

Not to be deterred, Metro asserts that, because Dr. Sloan is not an expert in the transit industry, he was not qualified to testify regarding Metro's breach of duty. Metro appears to imply that a party must introduce expert testimony in order to demonstrate a breach of the common carrier standard of care. Such testimony is, of course, not required. The complaint in this case does not allege a statutory cause of action, such as one alleging medical malpractice, wherein a plaintiff must produce evidence of duty and breach through the testimony of an expert medical witness. See, e.g., RCW 7.70.040; Coggle v. Snow, 56 Wn. App. 499, 510, 784 P.2d 554 (1990). Similarly unavailing is Metro's contention that Knappett was required to demonstrate a violation of an industry standard in order to prove that Metro breached its duty of care. Any industry standard not encompassed within the common carrier standard of care can only augment Metro's duties to its passengers. The existence of any such transit industry standard could not reduce the degree of care owned by Metro to its passengers. Accordingly, Metro cannot escape liability on either of these bases.

The evidence adduced at trial was sufficient to submit the issue of Metro's breach of duty to the jury. Viewing the evidence in the light most favorable to

Knappett, a reasonable jury could have concluded that Metro had failed to exercise the highest degree of care in the selection, maintenance, and inspection of the yellow Nora material on the stairs of its buses. The trial court properly denied Metro's motion for judgment as a matter of law.

IV

Metro next contends that the trial court erred by determining that, because Metro knew that jurors would encounter the yellow nosing strips during trial and had not contested that the strips were dangerously slippery when wet, the jurors' conduct in independently testing the slipperiness of the strips did not constitute misconduct and did not objectively affect the jury's verdict. Accordingly, Metro asserts that the trial court abused its discretion by denying Metro's motion for a new trial. We disagree.

The grant or denial of a new trial is a matter within the trial court's discretion. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). A court abuses its discretion only when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203-04, 75 P.3d 944 (2003) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "We review a trial court's decision to deny a new trial for an abuse of discretion based on 'the oft repeated observation that the trial judge,' having 'seen and heard' the proceedings, 'is in a better position to evaluate and adjudge than can we from a

cold, printed record.'" State v. Perez-Valdez, 172 Wn.2d 808, 819, 265 P.3d 853 (2011) (internal quotation marks omitted) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

The test to determine whether a new trial is warranted due to juror misconduct is "first whether the alleged information actually constituted misconduct and, second, if misconduct did occur whether it affected the verdict." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Because the "'the free, frank and secret deliberation'" of the jury must generally be held sacrosanct, a strong, affirmative showing of juror misconduct is required in order to impeach a verdict. Richards, 59 Wn. App. at 271 (quoting Ryan v. Westgard, 12 Wn. App. 500, 503, 530 P.2d 687 (1975)). The abuse of discretion standard applies to both the trial court's determination of whether juror misconduct occurred and whether any such misconduct affected the verdict. Breckenridge, 150 Wn.2d at 203.

"[T]he consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial." State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Evidence is "novel or extrinsic" if it is wholly outside the evidence received at trial, and thus not subject to objection, cross-examination, explanation, or rebuttal by either party. Balisok, 123 Wn.2d at 118; Richards, 59 Wn. App. at 270-71. "Jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations."

Breckenridge, 150 Wn.2d at 199 n.3; see also State v. Tandecki, 120 Wn. App. 303, 311, 84 P.3d 1262 (2004), aff'd, 153 Wn.2d 842, 109 P.3d 398 (2005). "In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial." Breckenridge, 150 Wn.2d at 199 n.3. Moreover, even where such specialized knowledge is introduced, the evidence is not extrinsic if the juror's knowledge was fully disclosed during voir dire. Richards, 59 Wn. App. at 274 (no novel evidence introduced where nurse's background was disclosed on voir dire and her medical knowledge was naturally brought into the deliberations).

Where extrinsic evidence has been introduced during deliberations, the trial court must make "an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence on the jury."[6] Kuhn v. Schnall, 155 Wn. App. 560, 575, 228 P.3d 828, review denied, 169 Wn.2d 1024 (2010). A new trial must be granted if there is any reasonable doubt regarding the effect of extrinsic evidence on the jury. Kuhn, 155 Wn. App. at 574. However, the prejudicial effect of extrinsic evidence is a question properly determined in the sound discretion of the trial court. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128,

[6] An objective inquiry is required because the actual, subjective effect of the extrinsic evidence inheres in the verdict. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). The individual or collective thought processes leading to a verdict cannot be used to impeach a jury verdict. State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). Accordingly, affidavits of jurors may be considered only to the extent that they do not attest to matters inhering in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

137, 750 P.2d 1257, 756 P.2d 142 (1988).

Metro asserts that two jurors committed misconduct by testing the slipperiness of the yellow Nora material on Metro bus stairs during their commutes to the courtroom. Juror Brawley testified by declaration that, on a rainy day, he "had stopped at the top of the rear stairs prior to exiting the bus" and had "test[ed] the slipperiness of the yellow nose strip by scuffing my shoe over the top of this yellow nose strip." CP at 154. He testified that he would have "likely fallen if I wasn't extra careful when getting off the bus that morning." CP at 154. However, Juror Brawley testified that he did not share this experience until after the verdict had been delivered.[7] Furthermore, he explained that he had only tested the yellow strip "to ensure that [he] didn't fall and end up like Mr. Knappett." CP at 198.

The trial court determined, first, that there was no juror misconduct and, second, that even if misconduct did occur, it had no effect on the verdict.

Neither determination by the trial court was remotely unreasonable. The court ruled that Juror Brawley's actions were not misconduct because Metro was well aware that jurors would come into contact with yellow nosing strips as part of their everyday experiences during the trial. As the court explained, jurors were provided with Metro bus passes and encouraged to ride the buses to and from the courthouse. The court noted that there was "no request by Metro that

[7] When he described this experience to other jurors following the trial, a second juror described a similar experience.

we take away their bus passes and give them parking instead." RP (July 2, 2010) at 12. Instead, as the trial court correctly observed, Metro was fully aware that jurors would come into contact with the yellow nosing strips:

> 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 (July 2, 2010) at 13. Moreover, given the extensive testimony regarding the slipperiness of the steps on Metro buses, it is unsurprising that two jurors sought to exercise caution when approaching the steps. Indeed, Juror Brawley explained that he "was being exceptionally careful because it was raining and we had been told that part of the stair is slippery when it's wet." CP at 198. As the trial court recognized, such actions do not constitute the deliberate collection of external evidence:

> It's not the same as . . . 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 the trial. . . . Metro could have . . . suggested an alternative [but] didn't.

RP (July 2, 2010) at 16.

As the trial court pointed out, Metro possessed all the information necessary to conclude that jurors might encounter the yellow nosing strips as part of their everyday experience during the trial. As in Richards, the jurors

would naturally bring this knowledge with them into deliberations. 59 Wn. App. at 274. No juror caused these experiences to be a subject of discussion during deliberations. Because these common experiences cannot be deemed to be extrinsic evidence, the trial court did not abuse its discretion by determining that no misconduct had occurred.

Similarly, the trial court did not abuse its discretion by determining that the jurors' conduct did not objectively affect the verdict. The court found that, because Juror Brawley's observations were consistent with the uncontroverted evidence adduced at trial, his conduct could not have prejudiced Metro's case. The trial judge explained that Metro's defense was not based upon proving that the yellow strip was not dangerously slippery when wet:

> My judgment, however, is the case was not defended on the basis of 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 had 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 (July 2, 2010) at 14. In fact, Metro introduced no evidence to contradict Dr. Sloan's determination that the yellow strip became dangerously slippery when wet. Metro called no witnesses to refute Dr. Sloan's testing methods or to question his conclusions. Nor did Metro seek to undermine Dr. Sloan's findings during its cursory cross-examination of the doctor. Indeed, at no point during the

trial did Metro argue to the jury that the yellow nosing strip was not slippery when wet.

Nevertheless, Metro contends that the slipperiness of the yellow nosing strip was a central part of the defense's case because Metro had always contested "whether that yellow strip was wet enough to be . . . slippery." Br. of Appellant at 7. However, Juror Brawley's observations were irrelevant to this issue. At the time he scuffed his shoe across the yellow nosing strip, the strip was already wet, and his "test" was limited to confirming that the yellow strip was, in fact, slippery under these conditions. This conclusion, of course, would have no bearing on whether the strip was wet at the time of Knappett's fall. Instead, Juror Brawley's observations were merely consistent with the uncontroverted evidence adduced at trial. There is no juror misconduct, warranting a new trial, where "the results of [a jury] test conformed to the uncontroverted testimony introduced at trial." Tarabochia v. Johnson Line, Inc., 73 Wn.2d 751, 754, 440 P.2d 187 (1968). The trial court's determination that the jurors' conduct had no effect on the verdict was not based on untenable grounds. The court did not abuse its discretion by denying Metro's motion for new trial.

Affirmed.

Dwyer, C.J.

We concur:

Leach, A.C.J.

Andrus, J.