IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TERRENCE BREWSTER, Appellant, v. KING COUNTY, Respondent, BETHEL BECK III, and CONG NGUYEN, Defendants.	No. 40328-5-II UNPUBLISHED OPINION

Johanson, J. — Terrence Brewster appeals the trial court orders granting King County's motion for summary judgment and denying his subsequent motion for reconsideration in his negligence action against King County (the County). He argues that the expert witness declarations he supplied raise issues of material fact precluding summary judgment. We agree and reverse and remand for further proceedings.

FACTS

At approximately 1:30 am on December 16, 2006, two vehicles failed to stop at an inoperable traffic signal and collided at the intersection of NW Market Street and Eighth Avenue

NW in the Ballard neighborhood of Seattle. At the time of the collision, Brewster was sitting in a Metro bus shelter on Eighth Avenue NW, facing away from the street and "reading a book" as he waited for a bus. Clerks Papers (CP) at 168. The collision sent one of the vehicles, a minivan, spinning 70 feet into the bus shelter. The impact moved the bus shelter's frame and the bench Brewster was sitting on to the east, throwing Brewster backwards to the ground. Brewster did not see the vehicle approaching. He suffered several serious injuries. One of the drivers, Bethel Beck, III, had been drinking before the accident.

Brewster filed a complaint for damages against the drivers involved in the collision (Beck and Cong Nguyen) and against King County. As to the County, Brewster alleged that it had negligently designed, constructed, maintained, or replaced the bus shelter. The County moved for summary judgment, arguing that it had a duty of ordinary care, that it had not breached this duty, and that Brewster could not establish proximate cause. In response, Brewster argued that, at the very least, the County's action in placing the bus shelter at its location breached the duty of ordinary care. Brewster submitted several supporting declarations from experts in the transportation and human factors engineering fields.[1]

First, Brewster submitted a declaration from William E. Haro, P.E., former Senior Traffic/Transportation Engineer for the city of Bellevue, stating:

> 12. In my opinion, King County/Metro Transit breached applicable standards of care by failing to properly locate the bus shelter that caused Terrance Brewster's injuries. . . . [At the time of the accident,] the bus shelter was installed and placed less than two feet from the curb on 8th Avenue Northwest. This was a direct violation of King County's own engineering guidelines as well as those

[1] The trial court denied the County's motion to strike these declarations based on lack of foundation.

> presented in the Washington State Department of Transportation "Design Manual". Both of these documents provide design guidelines and standards to be followed by King County/Metro Transit.
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> 13. The King County/Metro Transportation Standard states in their March 1991 Metro Transportation Facility Design Guideline in Section IV, Internal Placement Guidelines: "The horizontal clearances include: 3 feet minimum from the curbface to face of shelter within the general Seattle/suburban area; and as much as 4 feet curbface clearance within Seattle's central business district." . . .
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> 14. The Washington State Department of Transportation "Design Manual", states, 'The buffering distance required from the roadway increases with traffic speed and traffic volume. Three to 5 feet is adequate where vehicle speeds are 30 miles per hour." It is my opinion that 8th Avenue NW is a relatively heavily traveled roadway and vehicle speeds can exceed 30 MPH.
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> 15. King County/Metro had at least two occasions when it should have recognized and fixed the hazard of the bus shelter coming too close to the roadway. The first occasion occurred in 1998 when the old shelter was removed and replaced with a different shelter that was substituted in its place. When the shelter was replaced in 1998, this provided King with the opportunity to locate the bus shelter in a place that was consistent with its own safety guidelines. It was my finding that where this bus shelter was located the sidewalk area was in excess of 14.5 feet wide and more than enough room existed to locate this shelter within the design guidelines. King County's failure to fix this safety problem resulted in King County breaching the applicable standard of care.
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> 16. . . . [N]ot only could this shelter have been located further from the face of curb [sic] on 8th Avenue NW as the standard calls for, it could also have been located further from the intersection of Market Street and closer to the point where the bus loading zone was signed and operated (approximately 20 feet to the north). This would provide greater safety for shelter users and would have prevented Mr. Brewster from being injured.
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> 17. When bus shelters are replaced, a transit agency has the legal obligation to bring the new bus shelter in compliance with the then existing safety guidelines. . . .
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> 18. King County had yet another opportunity to identify and fix these safety problems when it replaced this bus shelter on July 24, 2006.

CP at 176-78.

Second, Brewster submitted a declaration from human factors mechanical engineer Richard Gill, Ph.D., stating that "King County/Metro Transit knew or should have known of the

hazardous placement of the subject bus [shelter]." CP at 151. He opined that the placement of the bus shelter violated the minimum safety standards set forth by the Washington Department of Transportation's Design Manual. Dr. Gill stated that the hazardous condition was exacerbated by other factors, such as the shelter's proximity to an intersection, placement on a heavily traveled thoroughfare, and placement within the road's "buffer zone." CP at 152. Dr. Gill opined that the County either should have placed the shelter in a location that complied with its internal standards, designed and constructed a more structurally sound shelter within the dangerous location, or reconfigured the shelter to face the road so individuals using the shelter could take evasive action if necessary.

Third, Brewster submitted a declaration from former Chief of Transit Safety for King County Metro and Community Transit in Snohomish County Lee O. Camardella. Camardella opined that the County "breached the standard of care and committed negligence by installing the bus shelter" less than two feet from the curb, in violation of its own safety guidelines and regulations and by designing the shelter in a way that required waiting passengers to sit with their backs to traffic. CP at 171. Camardella noted that the County had the opportunity and obligation to recognize and fix the "obvious hazard" when it replaced the shelter in 1998 and in 2006, and that its failure to do so resulted in the breach. CP at 171. Camardella further opined that the County should have (1) placed the shelter "in a location abutting the business directly behind (east) [of] its current location," (2) relocated it to the north to a location where the shelter could be three feet from the curb and in compliance with the County's own safety guidelines, or (3) eliminated the shelter because it did not comply with safety regulations. CP at 172. Camardella

concluded that if the County had taken any of these steps or designed the seating to allow the waiting passengers to face traffic and have the "opportunity to see an approaching vehicle and escape oncoming danger," Brewster would not have been injured. CP at 173.

The County responded that (1) because the shelter's concrete foundation and the metal brackets that hold the shelter in place had not changed since the original installation and moving the shelter would require re-permitting, it was not required to reevaluate the shelter location to ensure that it complied with the new clearance requirements when it replaced the shelter; (2) its expert, Transit Engineer Paul Eng, was "not aware of any safety issues regarding this bus shelter that would require its modification;" and (3) none of Brewster's experts had alleged that moving the shelter back one foot would have prevented Brewster's injuries. CP at 202. The County also disputed the relevant standard of care, arguing that the duty of ordinary care applied and asserted that, regardless of the duty of care, this accident was "unforeseeable as a matter of law and King County cannot be required to have prevented it," given that the shelter was 60 feet away from the intersection where the vehicles had collided and because it could not be held liable for Beck's criminal act of driving while intoxicated. CP at 211. The trial court granted the County's motion for summary judgment and dismissed Brewster's claims against the County with prejudice.

Brewster moved for reconsideration and provided the court with supplemental declarations from Dr. Gill and Haro and a new declaration from a Christopher Hogan, a bystander who had avoided injury even though he had been near Brewster when the accident occurred.[2] In his declaration, Hogan asserted that he was standing next to the bus stop and facing the

[2] The trial court denied the County's motion to strike these declarations.

intersection when the accident occurred and that he was able to see the minivan coming towards him and jump out of the way to avoid injury. Hogan stated that Brewster could not see the minivan coming towards him because he had his back to the street and that he (Brewster) likely would have been able to escape injury if he had been standing or "at least facing the street while he was sitting within the bus shelter." CP at 249.

Haro's supplemental declaration took into account Hogan's statements and reaffirmed his (Haro's) opinion that the County's placement of the bus shelter violated the standard of care, that the County should have placed the bus shelter 20 feet north of its actual location, and that Brewster would have avoided injury if the shelter had been in the more northerly location. Haro also opined that if it was impractical for the County to relocate the shelter, it should have removed the shelter and that if Brewster had been standing at the time of the accident, he would have been able to see the approaching danger and move out of the way, as was the case with Hogan.

Similarly, Dr. Gill's supplemental declaration considered Hogan's statements. Dr. Gill stated that Hogan's ability to move out of the way "vividly illustrates" the fact that the shelter's seating, which forced the person sitting to face away from traffic, was a "safety defect." CP at 247. Dr. Gill agreed that if the County could not move the shelter to a safer location, it should have removed the shelter and that if the shelter had not been there, Brewster would not have been injured.

The trial court denied Brewster's motion for reconsideration. We granted Brewster's motion for discretionary review.

ANALYSIS

Brewster argues that the trial court erred when it granted the County's summary judgment motion and dismissed his claims against the County and when it denied his motion for reconsideration. We agree.

I. Standard of Review and Negligence Elements

We review a trial court's order of summary judgment de novo to determine whether, taking all the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) (citing *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992)). In a motion for summary judgment, the moving party bears the initial burden of showing the absence of a material fact. *Young v. Key Pharms*, *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005) (citing *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004)). The nonmoving party must then set forth specific facts showing that there is a genuine issue of material fact for trial. *Young*, 112 Wn.2d at 225-26.

To establish negligence, Brewster must establish four elements: "(1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause." *Degel v. Majestic Mobile Manor*, *Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

> The existence of a duty is a question of law, while breach and proximate cause are generally questions of fact for the jury. *Hertog*[,138 Wn.2d at 275]. Once [the court] determine[s] that a legal duty exists, it is generally the jury's function to decide the foreseeable range of danger, thus limiting the scope of that duty.

> *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982). In other words, given the existence of a duty, the scope of that duty under the particular circumstances of the case is for the jury. *Id*. However, breach and proximate cause may be determined as a matter of law where reasonable minds could not differ about them. *Hertog*, 138 Wn.2d at 275.

Briggs v. Pacificorp, 120 Wn. App. 319, 322-323, 85 P.3d 369 (2003), *review denied*, 152 Wn.2d 1018 (2004). The County does not assert that Brewster has failed to establish a question of fact as to the existence of any injury, and Brewster has either satisfied as a matter of law or presented a question of fact as to each remaining element.

II. Duty

As noted above, the existence of a duty is a threshold question that is a matter of law. *Hertog*, 138 Wn.2d at 275 (citing *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998)); *see also Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). "A bus system, as a common carrier of passengers, owes its passengers the highest degree of care commensurate with the practical operation of its business." *Sweek v. Municipality of Metro. Seattle*, 45 Wn. App. 479, 482, 726 P.2d 37 (1986) (citing *Roberts v. Johnson*, 91 Wn.2d 182, 184, 588 P.2d 201 (1978); *Benjamin v. City of Seattle*, 74 Wn.2d 832, 833, 447 P.2d 172 (1968)). But where a prospective passenger has not yet attained passenger status, the carrier owes that person the same duty that it owes to the general public—the duty to exercise ordinary care. *Sweek*, 45 Wn. App. at 482-83 (citing *Evans v. Yakima Valley Transp. Co.*, 39 Wn.2d 841, 846-47, 239 P.2d 336 (1952)). The duty of ordinary care does not require more care than a

reasonable person would exercise; the duty of ordinary care proscribes only the creation of foreseeable risk, and protects only those persons subjected to such risk. *Schooley v. Pinch's Deli Mkt., Inc.*, 80 Wn. App. 862, 868 n.16, 912 P.2d 1044 (1996) (citations omitted), *aff'd*, 134 Wn.2d 468, 951 P.2d 749 (1998). Here, Brewster did not have passenger status at the time of the collision; therefore, the County owed him a duty to exercise ordinary care. *Sweek*, 45 Wn. App. at 484 ("Absent any unusual inherent danger or defect in the place of disembarkment, the carrier-passenger relation ceases when a passenger departs from the bus and steps onto the sidewalk.").

Relying on *Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (2003), *review denied*, 151 Wn.2d 1010 (2004), the County argues that Beck's criminal act of driving drunk was an unforeseeable intervening cause and that it had no duty to protect Brewster from Beck's criminal act. *Tortes* is clearly distinguishable. In *Tortes*, the criminal act at issue was a murder/suicide on a moving city bus in which a passenger shot the bus driver in the head and then killed himself; other passengers were injured when the bus then drove off the Aurora Bridge. *Tortes*, 119 Wn. App. at 6. Division One of this court held that Metro had no duty to protect passengers against another passenger's criminal act in this case because such an act was not foreseeable. *Tortes*, 119 Wn. App. at 8 ("The proximate cause of the accident resulting in Tortes' injury was the act of violence by Cool, which Metro, in the exercise of the highest degree of care, could not have anticipated. . . . Metro cannot be held liable for a sudden assault that occurs with no warning and that is 'so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" (quoting *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 819, 975 P.2d 518 (1999))). *Tortes* does not hold that there is no duty to protect others against any criminal act that

may be a proximate cause of the plaintiff's injuries, it is merely an example of when there is no duty because of an *unforeseeable* criminal act. *See also Parrilla v. King County*, 138 Wn. App. 427, 437, 157 P.3d 879 (2007) ("[C]riminal conduct is not unforeseeable as a matter of law. Thus, in keeping with the general rule that an individual has a duty to avoid reasonably foreseeable risks, if a third party's criminal conduct is reasonably foreseeable, an actor may have a duty to avoid actions that expose another to that misconduct.") (citing *Bernethy*, 97 Wn.2d at 934). Here, that there could be an accident at the nearby intersection, involving a drunk driver or not, was unfortunately all too foreseeable an event. We hold that Brewster established a duty as a matter of law.

III. Breach

Brewster next argues that he presented a question of fact as to whether the County breached its duty of reasonable care by placing the bus shelter in a location and in such a manner that put him at risk of injury. We agree.

Taking the facts in the light most favorable to Brewster, his responding declarations contain evidence that the County breached the standard of ordinary care by failing to properly locate the bus shelter in accordance with its own internal safety standards in placing the shelter too close to traffic in a high traffic area, by not moving the shelter to a safer location that was further away from the street when the shelter was replaced after the safety guidelines and regulations changed, and by placing the seating in the shelter in a way that forced awaiting passengers to face away from traffic. That the County's expert may dispute some of Brewster's experts' declarations does not show the absence of a question of fact—it merely demonstrates

that there are disputed issues of fact for a jury to decide. Thus, an issue of material fact exists as to whether the County breached its duty of ordinary care to Brewster.

IV. Proximate Cause

Brewster next argues that his responding declarations also established a question of fact as to proximate cause because the declarants opined that had the shelter been placed in other locations or removed he would likely not have been injured.[3] Again, Brewster's responding declarations support this assertion.[4]

A proximate cause of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred. *Stoneman v. Wick Constr. Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960) (citing *Eckerson v. Ford's Prairie Sch. Dist. No. 11*, 3 Wn.2d 475, 101 P.2d 345 (1940)). Proximate cause comprises two elements: (1) cause in fact and (2) legal causation, both of which

[3] To the extent the County is arguing that because there were other concurrent proximate causes for the accident, for example, a tavern over-serving Beck and Beck and Nguyen failing to stop at the intersection, the County cannot be liable, that argument clearly fails because the same harm can have more than one concurrent proximate cause. *See State v. Meekins*, 125 Wn. App. 390, 398-99, 105 P.3d 420 (2005) (citing *State v. Leech*, 114 Wn.2d 700, 705, 790 P.2d 160 (1990); *Riojas v. Grant County Pub. Util. Dist.*, 117 Wn. App. 694, 699, 72 P.3d 1093 (2003), *review denied*, 151 Wn.2d 1006 (2004); *State v. Neher*, 52 Wn. App. 298, 301, 759 P.2d 475 (1988), *aff'd*, 112 Wn.2d 347, 771 P.2d 330 (1989); *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396, 558 P.2d 811 (1976)).

[4] The County argues that the responsive declarations are speculative opinions, inadmissible to prove proximate causation. But the declarations are not mere speculation, they are expert opinions based on knowledge of transit safety and the collision. *See* CR 56(e); *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (noting that affidavits submitted in opposition to summary judgment must set forth facts that would be admissible in evidence); *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) ("It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.") (citations omitted), *review denied*, 118 Wn.2d 1010 (1992).

must be established. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991) (citing *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986)). Cause in fact refers to the "but for" consequences of an act, or the physical connection between an act and the resulting injury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (citing *King v. City of Seattle*, 84 Wn.2d 239, 249, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997)). "Legal causation involves a determination of whether liability should attach given cause in fact and is a question of law for the court based on policy considerations as to how far the consequences of the defendant's act should go." *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008) (citing *Cunningham v. Lockard*, 48 Wn. App. 38, 44, 736 P.2d 305 (1987), *overruled in part on other grounds by Colbert*, 163 Wn.2d at 53).

Although proximate cause is ordinarily a question for the jury, "'when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.'" *Bordynoski v. Bergner*, 97 Wn.2d 335, 340, 644 P.2d 1173 (1982) (quoting *Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945)). Accordingly, the issue of proximate cause may be determined on summary judgment where the evidence is undisputed and only one reasonable conclusion is possible. *Hartley*, 103 Wn.2d at 778.

At the time of the accident, Brewster was sitting in a bus shelter constructed by the County on a bench that was facing away from traffic. At the very least, Brewster's responsive declarations create a question of fact as to "but for" causation because they suggest that had the

County not chosen to place this shelter where it was, not chosen to face the seating away from traffic, or corrected the shelter and seating locations when it became apparent that the shelter did not meet the current internal guidelines, Brewster would not have been sitting where he was with his back to the street when the accident happened or he could have noticed the minivan coming towards him in time to avoid serious injury. Thus, Brewster's evidence about the placement of the shelter and seating coupled with the evidence that this placement did not comply with the later internal guidelines and that the County had the opportunity to notice and discover these problems when it replaced the shelter in 1998 and in 2006, creates a question of fact as to whether the County's negligence in failing to move or remove the shelter was a "but for" cause of Brewster's injuries. Additionally, Brewster presented evidence that the County was negligent in failing to properly locate or relocate the shelter or seating and the relationship between locating a shelter that encouraged or required riders to sit or remain in areas that are too close to potentially dangerous traffic is immediately clear and not too attenuated to preclude legal causation.

The State asserts that it was not reasonably foreseeable that an accident would have endangered Brewster. We disagree. Taken in the light most favorable to Brewster, it is entirely forseeable that at some point two vehicles could collide at the nearby intersection and that they would do so in such a manner as to send one of the cars spinning towards the nearby bus shelter, injuring the people taking shelter in that location. Although the specific circumstances of this collision were not precisely foreseeable, any reasonable person would be aware that collisions

occur at intersections and that collisions occurring at 30 mph could send a car spinning out of control.

Citing *Scruggs v. Jefferson County*, 18 Wn. App. 240, 567 P.2d 257 (1977), the County also contends that the bus shelter "was simply a passive condition and not the cause of [Brewster's] injuries." Br. of Resp't at 20. *Scruggs* involved an accident in which the plaintiff struck a utility pole owned and maintained by Puget Power under a franchise agreement with Jefferson County. *Scruggs*, 18 Wn. App. at 241. In addressing the County's indemnity cross claim against Puget Power, the court held that the accident was not caused by "the mere presence of the pole in a place specified by the franchise agreement," and noted that, "At most, the pole was merely a passive, nonculpable cause-in-fact of the injuries." *Scruggs*, 18 Wn. App. at 244. It emphasized that the pole was "a condition and not a cause of the accident." *Scruggs*, 18 Wn. App. at 244. The County argues that the bus shelter here was similarly a condition and not a cause of the accident. But the County fails to recognize that unlike the utility pole, which was merely the object the injured person happened to run into, the presence and arrangement of the shelter is what caused Brewster to place himself within two feet of traffic on a well-traveled urban street with his back to traffic. Thus, the shelter was not merely a passive condition and its placement and the positioning of the seating arguably placed Brewster at risk. Accordingly, Brewster established a question of fact as to proximate causation.

Taken in the light most favorable to Brewster, the responding declarations established questions of fact sufficient to overcome the County's summary judgment motion and the trial

court erred when it granted the County's motion for summary judgment and denied Brewster's motion for reconsideration. Accordingly, we reverse and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Johanson, J.

We concur:

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Van Deren, J.

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Penoyar, C.J.