

1  EXPEDITE

2  Hearing is set:

3 Date: September 29, 2017

4 Time: 9:00 am

5 Judge/Calendar: -

6  
7 **IN THE SUPERIOR COURT**  
8 **IN AND FOR**

9 CHRISTIAN DOSCHER, an individual

10 Plaintiff,

11 vs.

12 TRANSIT, a political  
13 subdivision of the State of

14 Defendant.

**No. 16-2-01487-34**

**DEFENDANT  
TRANSIT'S REPLY MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

15 **I. INTRODUCTION**

16 Transit hereby submits its' reply in support of its' summary judgment  
17 motion. Quite simply, plaintiff fails to carry his burden of proof in responding to the  
18 motion. Plaintiff fails to demonstrate that Transit breached any duty of care  
19 pertaining to the incident at issue. The undisputed evidence establishes the bus was  
20 operating under the speed limit as it approached the intersection when the traffic signal  
21 changed from green to amber. The driver determined she had to brake to a stop  
22 because she would not clear the intersection before the signal turned red.  
23 46.61.055 (2)(a). Finally, the undisputed evidence establishes plaintiff voluntarily  
24 moved out of his seat rather than being dislodged due to braking. Plaintiff's claims  
25 about a medical condition being responsible for him leaving his seat during the braking  
26 is unsupported by medical or expert evidence. For the afore noted reasons as well as  
the others set forth in this reply defendant respectfully requests its' motion for summary  
judgment should be granted.



1 P.2d 475 (1999). The threshold determination of whether the defendant owes a duty  
2 to the plaintiff is a question of law. (1984), *Coleman*

3 v. (2003). The plaintiff must establish an issue of material  
4 fact as to each element of negligence to defeat summary judgment.

5 ). The plaintiffs' cause of action fails if no duty is  
6 established. In this case, plaintiff has

7 failed to establish a duty and breach of said duty. Without proof of these essential  
8 elements of negligence, his case is subject to dismissal upon summary judgment.

9 In response to defendant's motion for summary judgment plaintiff has failed to  
10 set forth any factual or legal authority establishing that transit breached a duty  
11 of care. A common carrier owes a duty to its passengers to exercise the highest  
12 degree of care consistent with the **practical operation** of the type of transportation and  
13 business to protect them from harm.

14 (1 8 V  
15 126 Wn. App. 904 (2005). Furthermore, a common carrier is not liable for injuries  
16 received from ordinary jolts and jerks necessarily incident to the mode of  
17 transportation, unless there is evidence of physical facts from which operator  
18 negligence might reasonably be inferred.

19  
20 In his opposition memorandum plaintiff assert defendant is liable based on his  
21 belief the bus was speeding, came to a stop past the stop line and entered the  
22 crosswalk. Plaintiff claims defendant's bus driver violated 6.61.055(3)(a).  
23 Doscher Opposition pg. 14. This statute provides in pertinent part:

24 (3) Steady red indication

25 (a) Vehicle operators facing a steady circular red signal alone shall stop at a  
26 clearly marked stop line, but if none, before entering the crosswalk on the  
near side of the intersection or...

Plaintiff fails to offer any facts supporting this supposition either through personal  
knowledge or expert reconstruction. Furthermore it is evident from the bus video

1 (Doscher Decl. Ex. 1) that as the bus approached it was not facing a "steady  
2 circular red signal alone" as contemplated by this section of the statute and therefore it  
3 does not apply. Rather as the bus approached the intersection the signal turned from  
4 green to amber. As disclosed in the video of the incident the signal did not turn red until  
5 after the operator began braking in response to the signal changing from green to  
6 amber. As a result the section of the statute which applies is .61.055 (2)(a)  
7 which provides as follows:

8 (2) Steady yellow indication

9 (a) Vehicle operators facing a steady circular yellow or yellow arrow signal are  
10 thereby **warned that the related green movement is being terminated or that**  
11 **a red indication will be exhibited immediately thereafter when vehicular**  
12 **traffic shall not enter the intersection.** Vehicle operators shall stop for  
13 pedestrians who are lawfully within the intersection control area as required by  
14 46.61.235(1). (emphasis added).

15 The undisputed evidence establishes the bus came to a stop in order to avoid violating  
16 and in compliance with the afore noted law.

17 A yellow light is not an invitation to try to beat a red light.

18 A driver approaching a yellow light may proceed through  
19 intersection when he can do so before the light turns red, but he nevertheless has an  
20 absolute right to stop and need never gamble on his ability to clear the intersection in  
21 time. When a traffic signal light will  
22 change from green to amber or from amber to red is not within the control of any motor  
23 vehicle operator including a bus driver. A bus driver like any other driver must react and  
24 make decisions regarding how to respond to a signal change with regard to the current  
25 circumstances of the bus location in relation to the intersection. Certainly determining if  
26 a vehicle can safely clear an intersection before a traffic signal changes from amber to  
red requires quick decision making and action on the part of the driver. Here it was  
clear to Ms. Gossett that she would not be able to clear the intersection before the  
signal turned red. So she did the responsible and safe thing, she brought the bus to a  
stop before entering the intersection. Nonetheless, plaintiff claims without factual  
support or authority that the bus stopped in the intersection and therefore defendant is  
liable. This is incorrect and unsupported by the law as is demonstrated below.

1 Contrary to plaintiff's contention at page 22 of his opposition the term  
2 "intersection" is defined in the following two statutes. Pursuant to 20 an  
3 intersection is defined as follows:

4 (1) "Intersection area" means the area embraced within the prolongation or  
5 connection of the lateral curb lines, or, if none then the lateral boundary lines of  
6 the roadways of two or more highways which join one another at, or  
approximately at, right angles, or the area within which vehicles traveling upon  
different highways joining at any other angle may come in conflict.

7 The same definition of intersection is reiterated at 61.010 (12). Therein it  
states:

8 Intersection area." (a) The area embraced within the prolongation or connection  
9 of the lateral curb lines, or, if none, then the lateral boundary lines of the  
roadways of two or more highways which join one another at, or approximately  
at, right angles, or the area within which vehicles traveling upon different  
highways joining at any other angle may come in conflict;

10 Per these definitions it is clear the area constituting an intersection is that area formed  
11 by the lateral curb lines at an intersection between two streets or the area in which  
12 vehicles traveling upon different roads may come into conflict. The evidence submitted  
13 by plaintiff in opposition to this motion for summary judgment demonstrates the bus did  
14 not enter the intersection and therefore complied with 61.055 (2)(a). Exhibit 1  
15 to plaintiff's declaration (the bus video of the incident) at time stamp 11:39:05.26 shows  
16 the bus stopped before the lateral line formed by the curbs of the intersection and  
17 outside of the vehicle conflict area between for 61.055 (2)(a) Way. Furthermore,  
18 Exhibit 4 and 5 to plaintiff's declaration establish the bus did not encroach beyond the  
19 lateral line formed by the curbs of the intersection and is outside of the conflict area.  
20 Therefore as a matter of law and undisputed fact the bus did not enter the intersection  
21 in compliance with 61.055 (2)(a). Furthermore, there is no conflict between  
22 61.055 (3)(a) since they apply to different traffic  
23 scenarios. 61.055 (3)(a) applies when a red signal is already present as a  
24 vehicle approaches an intersection and 61.055 (2)(a) applies when a signal  
turns from green to amber as a vehicle approaches an intersection.

25 Plaintiff's claim the bus driver violated 61.055(3)(a) because the bus  
26 stopped beyond the stop line and partially in the crosswalk does not establish  
negligence and is misplaced under the undisputed facts of this incident. Plaintiff has

1 not cited any authority suggesting otherwise. In fact under the undisputed  
2 circumstances of this incident it is established that the bus driver met her statutory duty  
3 pursuant to 5(2)(a). The actions of the bus driver were consistent with  
4 the **practical operation** of the bus in light of the conditions present at the time of the  
5 incident and in compliance with the duty of care pursuant to 25

6  
7 2005). Therefore the evidence establishes  
8 defendant did not breach any duty owed to plaintiff.

9 **C. PLAINTIFF FAILS TO PROVIDE ANY COMPETENT EVIDENCE SUPPORTING  
10 HIS CLAIM THE BUS WAS SPEEDING.**

11 Plaintiff asserts in his opposition that because the bus did not stop behind the  
12 stop bar or the crosswalk in response to the amber traffic signal the bus must have  
13 been speeding. Doscher Opposition, pg. 15. No material facts or accident  
14 reconstruction is offered in support of this conclusory assertion. On the other hand  
15 defendant's accident reconstructionist, Eric Hunter, performed a detailed and fact  
16 specific analysis as described in his declaration and report in reaching his opinions  
17 pertaining to the speed of the bus at the time of the incident. He concluded that at the  
18 time of the incident the bus was traveling at a speed of 32 to 33 mph which is under the  
19 35 mph speed limit. This fact is undisputed. Plaintiff has failed to provide any  
20 substantive evidence to the court establishing the bus was traveling above the speed  
21 limit other than conjecture and speculation. It is further undisputed that the bus was  
22 140 feet from it's final stop position when the traffic signal turned amber, that it could  
23 not clear the intersection before the signal turned red as required by 46.61.055  
24 (2)(a) and that it did not enter or stop in the intersection. Quite simply, plaintiff has  
25 failed to offer any credible evidence or argument to support his claim that the bus was  
26 speeding at the time the driver applied the brakes in response to the traffic signal  
turning amber from green.

Like the bus driver in o, Ms. Gossett was confronted with  
a situation wherein she would be unable to clear the intersection before the traffic signal

1 turned red in violation of 46.61.055 (2). As a result she brought the bus to a stop  
2 before encroaching into the intersection. This action on her part was legal, appropriate  
3 and conducive to the safe, practical operation of the bus at the time of the incident. The  
4 undisputed evidence establishes Ms. Gossett did not violate any duty owed, but rather  
5 complied with her legal duty.

6 **D. CONTRARY TO PLAINTIFF'S ASSERTIONS PREVENTABILITY IS NOT THE**  
7 **APPLICABLE STANDARD FOR DETERMINING FAULT.**

8 Contrary to plaintiff's assertion on page 25 of his opposition, The National Safety  
9 Council's definition of preventability and application by an employer is not admissible to  
10 establish negligence.

11 1154073, \*6 (N.D.Ill. Aug. 14, 2000) (plaintiff could not offer evidence that an  
12 employer deemed a collision a "preventable accident" where the defendant "utilize[d]  
13 the National Safety Council Rules to determine accident preventability").

14 In fact plaintiff has failed to provide this court with any authority establishing  
15 preventability is a recognized negligence standard of care for bus drivers and therefore  
16 it should not be considered by the Court.

17 ) State Commercial Driver Guide and the Model Commercial  
18 Driver License Manual does not establish a recognized standard of care for city bus  
19 drivers forming the basis for legal action). Plaintiff's reliance on Mr. Dudek's preliminary  
20 determination at the scene of the incident does not establish negligence and plaintiff  
21 fails to establish otherwise.

22 **E. PLAINTIFF HAS FAILED TO SUBMIT COMPETENT MEDICAL EVIDENCE**  
23 **ESTABLISHING HE SUFFERS FROM SCIATICA AND THAT IT PREVENTED**  
24 **HIM FROM REMAINING IN HIS SEAT DURING THIS INCIDENT.**

25 Plaintiff claims he suffers from sciatica which prevented him from remaining in  
26 his seat during this incident. Plaintiff relies on medical records attached as Exhibit 9 to  
his declaration to support this claim. This assertion is not established by competent  
evidence and therefore should be disregarded. None of the medical records attached  
to plaintiff's declaration set forth a diagnosis or medical opinion establishing he suffers

1 from sciatica. Rather the records only note plaintiff claims he has sciatica. Nor do the  
2 records contain any medical opinions stating sciatica causes pain and loss of lower  
3 back and leg strength. Nor do the records contain any medical opinions addressing the  
4 factual circumstances of this incident or offer an opinion that such a condition would  
5 result in plaintiff being dislodged from his seat. Furthermore this issue is not even  
6 pertinent if the court concludes defendant did not breach any duty to plaintiff.

7 Plaintiff is not a biomechanical or medical professional and therefore is not  
8 qualified to offer opinions regarding the impact, if any, sciatica would have on dislodging  
9 him from his seat or that people with sciatica would react differently under the  
10 circumstances. In fact, plaintiff admits there were insufficient forces generated during  
11 the incident to dislodge passengers from their seats. Doscher Declaration, pg.4: 18-21.  
12 He also acknowledges that he did have the capacity to brace his body. On page 7 line  
13 5 of his declaration he states he was able to use his left leg to brace. On page 8 line  
14 22-23 he states he voluntarily chose to "loosen my grip on the chair arm" in order to fall.  
15 In fact the photo on page 8 of Doscher's declaration clearly demonstrates he is  
16 engaged in making voluntary, controlled physical movements as well as capable of  
17 bracing. If the braking was responsible for dislodging plaintiff from his seat he would  
18 not have been able to control his movements. Probst Declaration, pg 2:12-14.  
19 Therefore there is no material dispute of fact regarding the voluntary nature of plaintiff's  
20 movements nor are his opinions admissible given their speculative and conjectural  
21 nature.

22 Contrary to plaintiff assertions on pg 6-7 of his brief, Mr. Probst is not expressing  
23 opinions regarding whether plaintiff was or was not injured during this incident.  
24 Therefore the out of state cases cited by him for this proposition are inapplicable.  
25 Rather Mr. Probst expresses opinions about whether the incident would have caused  
26 plaintiff to be dislodged from his seat. Per Mr. Probst's expertise, analysis of the video  
and field testing all of plaintiff's movements were voluntary and the reason why he left  
his seat rather than the bus braking. Probst Declaration, pg. 2:12-14; Probst decl.  
Exhibit 2, pg.15, conclusion No. 3. The forces generated during this incident were



1 insufficient to dislodge plaintiff from his seat. Probst Declaration, pg. 2:16-17. This is  
2 undisputed and plaintiff fails to address this with expert testimony. Furthermore,  
3 plaintiff's movements were inconsistent with the forces that were generated. Probst  
4 Declaration, pg.2: ¶ 6 -7. If the braking generated sufficient forces to dislodge plaintiff  
5 from his seat then he would not have been able to control in what direction the forces  
6 would move him. Probst Declaration pg. 2: ¶ 6 -7. The force generated during braking  
7 would produce forward motion in a straight line. Probst Declaration, Exhibit 2, pg. 12-  
8 13. However, Mr. Doscher moves backward, laterally, rotationally, rolls and  
9 somersaults. All of which were not forces generated by the incident but by voluntary  
10 movement. Probst Declaration, Exhibit 2, pg. 12-13.

11 Mr. Probst is clearly qualified and has the established expertise to conduct his  
12 analysis and to express opinions. Furthermore in ¶ 10 of his declaration Mr. Hunter  
13 states that his analysis and opinions are in accord with "accepted scientific standards,  
14 method, principles and practices in the field of physics and accident reconstruction."  
15 Mr. Probst in his declaration at ¶ 9 also states his opinions are in accord with "accepted  
16 scientific standards, method, principles and practices in the field of biomechanical  
17 engineering." Plaintiff fails to establish any substantive grounds establishing  
18 defendant's experts lack the qualifications and expertise to express opinions pertaining  
19 to this matter.

20 **F. PLAINTIFF'S SECRET RECORDINGS OF CONVERSATIONS WITH TWO**  
21 **TUMWATER POLICE OFFICERS ARE INADMISSIBLE.**

22 Plaintiff seeks to introduce two alleged recordings of \_\_\_\_\_ police officers in  
23 opposition to this motion. There are many problems with plaintiff's efforts to introduce  
24 his surreptitious recordings. Plaintiff claims he recorded these officers in the presence  
25 of third parties. First, the recordings themselves do not provide any verification that the  
26 people being recorded are in fact \_\_\_\_\_ police officers or the identity of the alleged  
third parties who were in attendance. Second, plaintiff did not advise the persons he  
was recording that they were being recorded which is a violation of \_\_\_\_\_ 3.030  
(1)(b). Nor did plaintiff advise each that he intended to submit their statements as  
testimony in court on a matter unrelated to the scenarios he presented to each. Third,

1 these recordings are not relevant to the matter before the court since plaintiff did not  
2 even present the actual circumstances of the case at bar to each of the persons  
3 recorded in soliciting their opinions. Rather he misrepresented the nature of the  
4 scenarios and now seeks to apply those responses to a completely different set of  
5 facts. In fact the person identified as "Liska" states there could be "extenuating  
6 circumstances" with respect to the circumstances presented. Fourth, these statements  
7 constitute conclusions of law which a lay witness is not permitted to testify regarding.

8 These statements are inadmissible pursuant  
9 to ER 402.

10 Fifth, contrary to CR 56 (e) these statements were not submitted under oath by  
11 affidavit or declaration. ER 603 requires that witnesses can only testify under oath.  
12 Finally the statements in the recordings constitute hearsay and are inadmissible  
13 pursuant to ER 802 since they are out of court statements, which are not made under  
14 oath, offered to prove the truth of the matter asserted. Therefore, these recordings lack  
15 any guarantee of trustworthiness, relevancy and admissibility thus mandating the  
16 recordings should not be considered for purposes of this motion.

### 17 **III. CONCLUSION**

18 For the reasons cited herein Transit respectfully requests that  
19 defendant's summary judgment motion should be granted.

20 Dated this 22<sup>nd</sup> day of September, 2017.  
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