No. 100925-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 54325-7-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

AUSTIN K. FITE, individually,

Petitioner,

v.

CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington,

Respondent,

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

A. Introduction.

The petitioner, Austin Fite, plaintiff in the trial court and respondent in the Court of Appeals, asks this Court to reverse the Court of Appeals' published decision and reinstate the jury's verdict, after an 18-day trial, awarding Austin damages (uncontested on appeal) for the serious injuries he suffered when struck by a driver who did not see him in an unreasonably dangerous crosswalk negligently designed by the City of Puyallup.

The Court of Appeals' decision reversing the jury's verdict conflicts with this Court's decision in *Gerlach v. Cove Apartments,* 196 Wn.2d 111, 471 P.3d 181 (2020), which reversed the Court of Appeals and reinstated a verdict for plaintiff because the trial court did not abuse its discretion in declining to admit evidence of the plaintiff's intoxication. Contrary to *Gerlach,* the Court of Appeals held here that because Austin admitted he consumed cannabis, it was reversible error to dismiss on summary

judgment the City's intoxication defense, which would have foreclosed recovery were Austin more than 50% at fault. The Court of Appeals ignored both that the City submitted no competent evidence that Austin's alleged intoxication was a proximate cause of his injury and that the jury had rejected the City's comparative fault defense, which the City fully presented at trial, assigning no comparative fault to Austin whatsoever.

The Court of Appeals also erred by failing to hold the City to its burden of proving prejudice from the trial court's failure to include a single sentence—a sentence *that the City did not even ask for*—in an instruction that correctly stated the City's duty to construct a safe crosswalk. The Court of Appeals' reversal on the grounds the instruction as given "improperly emphasized Fite's theory" conflicts with established precedent because the City was fully able to argue its theory that its crosswalk met all safety standards and was not unreasonably dangerous. *See, e.g.*,

Hendrickson v. Moses Lake Sch. Dist., 192 Wn.2d 269, 281, ¶¶34-35, 428 P.3d 1197 (2018) (reversing Court of Appeals and reinstating jury's verdict because instructions correctly stated the law).

This Court should grant review pursuant to RAP 13.4(b)(1), reverse the Court of Appeals, and reinstate the judgment on the jury's verdict.

B. Court of Appeals Decision.

The Court of Appeals issued its original published decision November 9, 2021 (App. A), reported at 19 Wn. App.2d 917, 498 P.3d 538 (2021), and an April 12, 2022 order amending opinion on petitioner's timely motion for reconsideration. (App. B)[1]

[1] Citations (Op. ¶_) are to the paragraphs of the published decision.

C. Statement of the Case.

1. Because the City's crosswalk design and placement breached its duty of reasonable care, Austin Fite suffered catastrophic injuries when he was hit by a driver who did not see him in the crosswalk.

The Court of Appeals' decision fails to recite the facts that were the basis of the jury's verdict that the motorist was 33% and the City was 67% at fault for Austin's injuries, suffered when Austin was hit when he had almost crossed the street in the City's negligently-designed crosswalk. These facts are briefly summarized here:

The jury heard substantial evidence that the City breached its duty of reasonable care by placing a marked crosswalk not at an intersection or mid-block, but where motorists would not expect a crosswalk. (RP 761-71, 1093-1101, 1113-14, 1124, 1215) The City failed to alert drivers to the location of this "atypical" crosswalk, the City's signage distracted drivers from looking for pedestrians in the crosswalk (RP 765-71, 787, 850, 1124, 1239-40, 1876-77, 1891, 2380-81, 3032-33; Ex. 675), and turning vehicles

blocked the view of both motorists and pedestrians in the crosswalk. (RP 761, 768-70, 787-88, 804, 1886, 2463; Ex. 91)

Austin Fite, age 18, was in the crosswalk and within a few feet of the opposite curb when he was struck by a pickup truck driven northbound by defendant Lee Mudd. (RP 1888-89, 1897, 1900) Mudd's vehicle did not brake or slow at all before hitting Austin, who was lawfully riding his skateboard at a "jogging" pace in the crosswalk. (RP 1237, 1860, 1869, 1874, 1890, 1895; CP 948, 956-57, 1089-94) Mudd did not see Austin, who had made it almost all the way across the street when he was hit. (RP 1709-10, 1713-18, 1727, 2827, 2832; *see also* RP 1237) According to the City's accident reconstructionist, Mudd's vehicle was 150 feet away when Austin stepped into the crosswalk (RP 2584), but Mudd may not have been able to see Austin, and Austin may not have been able to see Mudd's truck, because of vehicles in the middle lane waiting to turn left. (RP 761, 768-70, 787-88, 804, 1709-10; Ex. 91)

Austin had the right-of-way, was legally in the marked crosswalk, was entitled to rely upon drivers yielding to him, and had no duties of observation once he entered the crosswalk. (*See* unchallenged Instruction 25, CP 3187, WPI 70.03) Every single witness to the accident said Austin was blameless; not a single witness suggested that Austin darted into the roadway, appeared impaired, or was behaving in any manner consistent with impairment. (RP 1237, 1860-63, 1869, 1874, 1888-90, 1895)[2]

[2] The City's police officer who responded to the accident and interviewed witnesses "didn't identify any actions on behalf of the pedestrian [Austin] as causing or contributing to the accident." (RP 2820: "All four witnesses had the same version of events . . . All four agreed that Fite was in the intersection, riding his skateboard. All four agreed that Mudd . . . collided with Fite . . . I issued Mudd [a citation] for Failure to Yield to Pedestrian in Crosswalk."; CP 1994: "I did not observe the pedestrian/skateboarder engage in any activities that caused or contributed to the collision occurring.") Mr. Mudd admitted that he didn't see Austin in the crosswalk until after he "heard a thud," got out of his truck and saw Austin on the side of the road. (RP 1713-19; *see* CP 842, 844, 847)

The trial court nevertheless submitted the issue of Austin's comparative fault to the jury on the City's theory that he failed to see Mudd's truck (from at least 150 feet away), failed to wait to cross until it had stopped for him (if the middle turn lane was clear), or failed to stop in the middle of the roadway, or to speed up to finish crossing the street (if the middle lane was occupied). (RP 2585-96, 2600-01) The jury rejected the City's comparative fault defense as a matter of fact after 18 days of trial. (CP 3265)

In addition to a severe head injury, Austin suffered an acute displaced comminuted fracture of his left femur, broken nasal and eye bones, detached retinas in both eyes, and concussion. (RP 3126, 3139-40) Austin suffers from ongoing cognitive issues and PTSD. (RP 951-52, 2061) He has macular degeneration, is now legally blind in one eye, and will never be able to obtain a driver's license. (RP 1395, 1614-15, 1971, 2050) On appeal, the City did not challenge Austin's injuries or the jury's $6.5 million damage award.

2. The trial court dismissed the City's intoxication defense on summary judgment because the City submitted no evidence Austin's cannabis use proximately caused his injuries.

The Court of Appeals also elides why the trial court dismissed the City's intoxication defense on summary judgment. The City alleged that Austin was "a regular marijuana user" (CP 881), that a family physician who saw Austin 11 weeks after his injury recorded in his notes that Austin was "high on Cannabis while riding his skateboard" (CP 908), and that a urine sample taken for treatment purposes at the hospital showed a THC concentration of at least 50 nanograms per milliliter (ng/ml). (CP 915-16, 1879-80)

The summary judgment record, however, unambiguously established that Austin was slowly skateboarding through the crosswalk when Mudd failed to slow down and struck him as he neared the curb. (CP 715, 954-57) The trial court dismissed the intoxication defense

(CP 1302-04) because the City offered no evidence supporting any correlation between the concentration of THC in Austin's urine sample and his actions:

> We don't have any sort of corroborating evidence like he was skateboarding erratically or behaving strangely, wandering across the street or anything like that. He actually made it most of the way across.

(7/26/19 RP 64)

The City moved for reconsideration, submitting a toxicologist's declaration that conceded a urine sample "cannot be correlated to one's impairment." (CP 1952) But then, in its reply on reconsideration, the City's toxicologist claimed Austin's "admission" he was "high" was a "significant" fact in support of the intoxication defense. (CP 2114) The trial court held that such speculation on the issue of causation did not manufacture a disputed issue of fact and denied reconsideration reasoning that the expert "does not say that Mr. Fite was in fact experiencing any of these symptoms of THC on a more probable than not basis, and

just saying that he may have been does not rise to the proper level of proof." (8/23/19 RP 25)

3. The Court of Appeals reversed the verdict of the properly instructed jury.

The trial court gave the jury several unchallenged instructions on the parties' respective duties of care. The jury was instructed that "The City has a duty to exercise ordinary care in the design, construction, maintenance, and repair of its public roads and crosswalks to keep them in a reasonably safe condition for ordinary travel" (Instruction 27, CP 3189) and that the City "has no duty to conform its roads to present-day standards." (Instruction 29, CP 3191) The trial court instructed the jury that "[w]hether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the 'totality of the circumstances.' A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks." (Instruction 28, CP 3190)

The City only excepted to this last instruction, arguing Instruction 28 was unnecessary because pattern instruction WPI 140.01 "gets the job done" and allowed the plaintiff "to make its arguments." (RP 3187) In a supplemental brief, the City further asserted that any deviation from the pattern instruction was a prohibited "judicial comment[ ] on the evidence." (CP 2936-38)

The City did not challenge any of the court's instructions as to its comparative fault defense: that Austin had the right of way (Instruction 25, CP 3187), and the "right to assume that others will exercise ordinary care and comply with the law" (Instruction 21, CP 3183); that "[e]very person has a duty to see what would be seen by a person exercising ordinary care" (Instruction 22, CP 3184) and that "[b]efore entering a crosswalk, a pedestrian has a duty to look for approaching vehicles" and to not "walk, run, or otherwise move into the path of a vehicle that is so

close that it is impossible for the driver to stop." (Instruction 24, CP 3186)

The jury found the City 67% and Mudd 33% responsible for Austin's injuries, rejecting any comparative fault on the part of Austin. (CP 3482-85) The Court of Appeals reversed on the grounds that the City was entitled to present its intoxication defense to the jury, and that Instruction 28 "improperly emphasized Fite's theory." (Op. ¶4)[3]

D. Why This Court Should Grant Review.

1. The Court of Appeals' reinstatement of the intoxication defense conflicts with *Gerlach*.

The Court of Appeals' decision that "the trial court erred by . . . prohibiting Puyallup from presenting evidence

[3] The Court of Appeals rejected the City's arguments that any of the trial court's discretionary evidentiary decisions at trial justified reversal. (Op. ¶43) To the extent the City argues that the Court of Appeals erred in not finding reversible evidentiary error, petitioner reserves the right to address those arguments in a reply to the City's answer, pursuant to RAP 13.4(d).

under RCW 5.40.060 because evidence of Fite's intoxication created material issues of fact preventing summary judgment" (Op. ¶64) conflicts with *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 121, ¶17, 471 P.3d 181 (2020). This Court in *Gerlach* reversed a Court of Appeals decision, 8 Wn. App.2d 813, 446 P.3d 624 (2019), that focused solely on the fact of intoxication to the exclusion of the remaining elements of the defense established by RCW 5.40.060(1). Division Two made the same error here.

Evidence of intoxication is only the first element of the defense provided by RCW 5.40.060. The City also had the burden of establishing that Austin's intoxication (2) was a proximate cause of his injury, and (3) that he was more than fifty percent at fault. *Gerlach* 196 Wn.2d at 121, ¶17; *see* 6 *Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI* 16.03 (7th ed.) (reciting elements of defense). The trial

court correctly dismissed the defense because the City could not establish each element under RCW 5.40.060.

a. The City could not show that Austin's alleged cannabis consumption caused his injuries.

In *Gerlach,* this Court reinstated a jury verdict for plaintiff, holding that the trial court properly exercised its discretion to exclude an expert's speculative opinion that the plaintiff's consumption of alcohol affected her behavior, based on a hospital toxicology report that did not comply with state toxicology standards.

The plaintiff in *Gerlach* had stipulated to the fact of intoxication; the hospital blood draw, which purported to show a blood alcohol of three times the legal limit, was only "minimally probative" of the disputed elements of causation and degree of fault and the defense expert's testimony "was merely speculative as to [how consumption of alcohol] affected Gerlach's behavior" at the time of her injury. 196 Wn.2d at 120-23, ¶¶16, 21. This Court held that

"[w]hile being intoxicated can certainly influence a person's behavior, the fact of intoxication does not prove a person was acting in any particular way." *Gerlach,* 196 Wn.2d at 125-26, ¶25.

Here, the City's evidence on summary judgment—a non-conforming urine draw and a physician's hearsay statement that Austin was "high"—did not establish his legal intoxication under RCW 5.40.060. As in *Gerlach,* the trial court did not abuse its discretion in excluding such "minimally probative" evidence of intoxication, particularly given the City's expert's concession that "urine results alone cannot be correlated to one's impairment

(that sort of interpretation can only be accomplished using a blood sample)." (CP 1952, 2113-14)[4]

In any event, establishing the mere fact of intoxication is not enough under RCW 5.40.060(1). As in *Gerlach*, the Court of Appeals in this case did not identify any admissible evidence that Fite's intoxication "could have contributed to the accident." (Op. ¶26) The Court

[4] While there is a "per se" limit for THC in *blood*, there is no legal limit for THC concentration in *urine*. RCW 46.61.502(1)(b). Where, as here, "a plaintiff does not admit to being intoxicated, RCW 5.40.060(1) uses the same standard required for criminal convictions under RCW 46.61.502." *Gerlach,* 196 Wn.2d at 121, ¶17, n.5. As the City's expert conceded (CP 1952), the mere presence of THC in urine in a test that does not comply with state standards, without more, is not probative of whether THC impaired Austin's ability to act as a reasonably careful person. Unlike alcohol, which dissolves into blood and is metabolized at a predictable and consistent rate, THC can cause positive urine test results long after cannabis use. *See, e.g., City of Seattle v. Pearson,* 192 Wn. App. 802, 815, ¶21, 396 P.3d 194 (2016). *See also State v. Fraser,* __ Wn.2d __, 2022 WL 1493987 (May 12, 2022) (recognizing expert testimony that "the level of THC in one's blood may be an indicator of how recently one used cannabis, but it is not correlated to cognitive impairment and motor performance.").

relied exclusively on a declaration, first submitted by the City on reply in support of its motion for reconsideration of the trial court's summary judgment dismissing the intoxication defense, that was pure speculation. (CP 2113-14)

Even if the Court of Appeals could overlook the trial court's discretion not to change its decision based on "evidence" submitted only on reconsideration, *Shanghai Comm'l Bank Ltd v. Kung Da Chang,* 189 Wn.2d 474, 479, ¶7, 404 P.3d 62 (2017), the appellate court's reliance on this declaration fails on a threshold level because, as in *Gerlach,* the expert could only speculate that Fite's alleged consumption of cannabis necessarily contributed to his injury. (CP 1952-53, 2113-14). Speculation concerning "the general effects of intoxication, not the effect it actually had on [the plaintiff]," is "only minimally probative of causation and fault because" it cannot "link [the plaintiff's] intoxication to any actual behavior leading to" the accident.

Gerlach, 196 Wn.2d at 124, ¶21; *see Safeco Ins. Co. v. McGrath,* 63 Wn. App. 170, 177, n.18, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010 (1992) ("expert opinion based on speculation and conjecture may not go to the jury").

The admissible and undisputed evidence on summary judgment established that Austin's consumption of cannabis had no role in his injury. Austin "almost made it entirely across the street" before being struck by Mudd's right front fender; Mudd "did not slow down or brake" or "see the pedestrian" in the City's crosswalk. Not a single witness suggested that Austin, traveling at "jogging speed" on a skateboard, darted into the crosswalk, or was behaving in a manner consistent with impairment. (CP 846-957, 1091-94) The Court of Appeals erred in relying on pure speculation to hold that a jury could find that Austin's alleged intoxication caused his injury.

The intoxication defense is a powerful one, prohibiting any recovery at all if a plaintiff is more than

50% responsible for his injuries. As such, the statute itself requires evidence of both the fact of intoxication and its contribution to the claimed injuries. *Gerlach*, 196 Wn.2d at 126, ¶25 ("the fact of intoxication does not prove a person was acting in any particular way.").

The Court of Appeals' published decision would render these limitations in RCW 5.40.060 as a defense to liability meaningless, authorizing an affirmative intoxication defense at trial without *any* evidence establishing a causal connection between the plaintiff's alleged intoxication and the injury. *See Porter v. Kirkendoll*, 194 Wn.2d 194, 211, ¶37, 449 P.3d 627 (2019) (courts must apply statutes such that no phrase is rendered meaningless).

Division Two's published decision would manufacture a complete defense to liability based on the perceived moral hazard of a plaintiff's use of cannabis, in conflict with *Gerlach* and the plain language of the statute

requiring the defendant to show "that such condition was a proximate cause of the injury." RCW 5.40.060.

b. The City was not prejudiced by the inability to present an intoxication defense when the jury found Austin was not negligent.

The Court of Appeals further erred in ignoring that for the defendant to establish an intoxication defense, RCW 5.40.060(1) requires "the trier of fact finds [plaintiff] to have been more than fifty percent at fault." The trial court here submitted Austin's contributory negligence to the jury, which did not allocate *any* comparative fault to Austin at trial, finding that Austin was fault-free in relying on the safety of the crosswalk to get to the opposite curb and avoid harm.

The City therefore could not possibly have been prejudiced by the trial court's dismissal of its intoxication defense given the jury's verdict rejecting the City's claim of comparative negligence. "[E]rror without prejudice is not grounds for reversal." *Barriga Figueroa v. Prieto*

Mariscal, 193 Wn.2d 404, 415, ¶18, 441 P.3d 818 (2019); *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983); *see Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627-28, 818 P.2d 1056 (1991) (affirming summary judgment order that limited appellant from conducting discovery because it did not cause prejudice).

The Court of Appeals' reversal cannot stand in light of the jury's findings that Austin was fault-free.

c. The Court of Appeals imposes obligations on pedestrians that are unsupported by Washington law.

In addition to equating intoxication with fault, the Court of Appeals misstated the legal standards governing a pedestrian's responsibilities in a marked crosswalk. The Court of Appeals concluded that "evidence of intoxication" created an issue of fact because "testimony suggested that [Austin] failed to stop before entering the crosswalk, and he also failed to make any move to avoid Mudd's vehicle"

(Op. ¶26) The appellate court's published opinion misstates a pedestrian's duties in a crosswalk, in conflict with established law.

In instructions that the City did not challenge on appeal, the trial court properly instructed the jury on a pedestrian's duty of care in a crosswalk. Once Austin was in the crosswalk, he had no duty to "avoid" Mudd's truck; "[a] pedestrian within a crosswalk has the right to assume that all drivers of approaching vehicles will yield the right of way." (unchallenged Instruction 25, CP 3187, WPI 70.03) *See Jung v. York*, 75 Wn.2d 195, 198, 449 P.2d 409 (1969); *Jerdal v. Sinclair*, 54 Wn.2d 565, 567, 342 P.2d 585 (1959). Whether Austin looked, or stopped, before entering the crosswalk is irrelevant under the standard in WPI 70.03, because the only "approaching vehicle" was a slow-moving pick-up truck at least 150 feet away and possibly obscured by other cars in the center turn lane. (RP 2582-96) The Court of Appeals' published opinion improperly

holds pedestrians to legal duties that they do not have. RAP 13.4(b)(1).

2. The Court of Appeals' decision conflicts with *Hendrickson* and settled case law protecting the verdict of a properly instructed jury.

This Court has consistently held that an appellant can establish reversible instructional error only if the trial court's instruction both "erroneously states the law and prejudices a party." *Hendrickson v. Moses Lake Sch. Dis*t., 192 Wn.2d 269, 281, ¶31, 428 P.3d 1197 (2018). Prejudice is presumed only if "the instruction contains a clear misstatement of the law; prejudice must be demonstrated if the instruction is misleading." *Hendrickson*, 192 Wn.2d at 281, ¶31, quoting *Anfinson v. FedEx Ground Package Sys., Inc.* 174 Wn.2d 851, 860, ¶10, 281 P.3d 289 (2012); *Lake Hills Invests., LLC v. Rushforth Constr. Co., Inc.,* 198 Wn.2d 209, 216, ¶10, 494 P.3d 410 (2021).

Instruction 28 told the jury:

> Whether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the "totality of the circumstances." A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks.

(CP 3190) As the Court of Appeals held, both portions of Instruction 28 correctly stated the law. (Op. ¶39) *See Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 908, ¶27, 223 P.3d 1230 (2009), *rev. denied*, 169 Wn.2d 1003 (2010); *Wuthrich v. King Cnty.*, 185 Wn.2d 19, 26-27 ¶¶9-11, 366 P.3d 926 (2016).

The Court of Appeals then erred in concluding that "[t]he trial court improperly emphasized Fite's theory by including the second sentence in instruction 28 without also including language stating that compliance with statues, regulations or guidelines can be evidence the crosswalk was safe." (Op. ¶38) The Court summarily concluded that this correct instruction "denied Puyallup a fair trial" (Op. ¶40) having *never* analyzed the City's

burden to prove prejudice. Not only did the Court of Appeals reverse based on the failure to give an instruction the City did not ask for, there was no prejudice to the City here.

a. Instruction 28, which correctly stated the law, was not a comment on the evidence.

To reverse on the ground that a correct instruction "improperly emphasized" the respondent's theory of the case, as the Court of Appeals did here, "the instructions on a particular point must be so repetitious as to generate an 'extreme emphasis' that 'grossly' favors one party over the other." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.,* 123 Wn. 2d 15, 38, 864 P.2d 921 (1993) (affirming jury verdict because instructional errors were harmless; quoted source omitted). The standard is akin to that prohibiting a judicial comment on the evidence under Wash. Const. Art. 4, § 16, the basis for the City's supplemental exception to Instruction 28 below. (CP 2938) *See State v. Studd*, 137

Wn.2d 533, 550, 973 P.2d 1049 (1999). But Instruction 28 accurately stated the law; its language was taken directly from the opinion in *Chen*. An instruction that accurately states the law is not, by definition, an impermissible comment on the evidence. *Christensen v. Munsen,* 123 Wn.2d 234, 249, 867 P.2d 626 (1994).

b. The City never requested the instruction the Court of Appeals held the trial court should have given.

The Court of Appeals nevertheless criticized Instruction 28 because the instruction failed to "also includ[e] language stating that compliance with statutes, regulations or guidelines can be evidence the crosswalk was safe." (Op. ¶38) But the City never proposed an instruction containing this language, or argued to the trial court that "additional language" was necessary. (CP 2936-38; RP 3187, 3318-19) The Court of Appeals thus reversed a jury verdict for plaintiff, reached after an 18-day trial,

based on the trial court's failure to give an instruction that the defendant never requested.

"When an instruction to be given by the trial court is a correct statement of the law but is objected to as too broad or as insufficiently specific under the evidence, the objecting party must propose a proper instruction on the subject. Reversible error is not present unless the preferable instruction has been submitted and has been refused." *Harris v. Burnett,* 12 Wn. App. 833, 843, 532 P.2d 1165 (1975); *Goodman v. Boeing Co.*, 75 Wn. App. 60, 75, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). The Court of Appeals ignored this fundamental requirement.

c. The instructions as a whole allowed the City to argue its theory of the case.

Preservation aside, the Court of Appeals erred in viewing this one portion of a single instruction in isolation, because the instructions "when read *as a whole* properly

inform the trier of fact of the applicable law," and allowed the City to argue its theory of the case. *Hendrickson,* 192 Wn.2d at 280, ¶31 (emphasis added); *Bodin v. City of Stanwood,* 130 Wn.2d 726, 732, 927 P.2d 240 (1996). This is not a case where multiple instructions combined to overemphasize one party's case to the prejudice of the other.[5] The Court of Appeals failed to identify how a single instruction "prevented Puyallup from arguing that it met its duty of care because it complied with applicable statutes and regulations." (Op. ¶40)

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[5] *Cf, Brown v. Dahl,* 41 Wn. App. 565, 579, 705 P.2d 781 (1985) ("instructions 5, 11, 13, 15 and 16[], taken as a whole, overemphasized defendants' case to the point of prejudicing plaintiffs.") (Op. ¶32); *Cornejo v. State,* 57 Wn. App. 314, 321, 788 P.2d 554 (1990) ("duty to see" instruction was not a "harmless redundancy" but was prejudicial "in light of the weakness of evidence" that the plaintiff was guilty of contributory negligence.) (Op. ¶¶31, 40). Here, by contrast, the single sentence in Instruction 28 created no "redundancy," and the jury was not given instructions "so repetitious and overlapping as to make them emphatically favorable to one party." *Cornejo,* 57 Wn. App. at 320 (quoted source omitted).

To the contrary, the instructions as a whole allowed the City to argue that it complied with its duty of reasonable care. In addition to Instruction 28, the jury was specifically instructed, as the City proposed (CP 2792), that the City had "no duty to conform its roads to present-day standards." (Instruction 29; CP 3191) In closing, the City cited the testimony of its design expert to argue that the crosswalk met Department of Transportation standards, and relied on the extensive evidence it presented over 18 days of trial in which its design expert, engineers, and others involved in the design and placement of its crosswalk testified that it was reasonably safe. (RP 3284-86)

The Court of Appeals erred in reversing because it failed to hold the City to its burden of proving prejudice from the failure to include a single sentence *it did not even ask for* in an instruction that accurately stated the law. RAP 13.4(b)(1).

E. Conclusion.

The Court of Appeals' decision conflicts with *Gerlach's* requirement that a defendant present proof of all three elements of the intoxication defense under RCW 5.40.060, and with established law that an instruction that correctly states the law is not grounds for reversal unless an appellant proves it was unable to argue its theory of the case. This Court should grant review and reinstate the trial court's judgment on the jury's verdict.

I certify that this petition is in 14-point Georgia font and contains 4,773 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 12th day of May, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That May 12, 2022 I arranged for service of the foregoing Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 12th day of May, 2022.

*/s/ Andrienne E. Pilapil*_____
Andrienne E. Pilapil

19 Wash.App.2d 917
Court of Appeals of Washington, Division 2.

Austin K. FITE, individually, Respondent,

v.

Lee R. MUDD and "Jane Doe" Mudd, individually and husband and wife, and the marital community comprised thereof; and City of Puyallup, a Municipal Corporation under the laws of the State of Washington, Appellant.

No. 54325-7-II

Filed November 9, 2021

Synopsis

Background: Pedestrian brought action against motorist and municipality, alleging negligence after he was struck by vehicle while in crosswalk. The Superior Court, Pierce County, Shelly K. Speir, J., granting summary judgment regarding pedestrian's duty of care and intoxication affirmative defense, and granted judgment for pedestrian after jury verdict in his favor. Motorist appealed.

Holdings: The Court of Appeals, Bernard F. Veljacic, J., held that:

[1] even without urinalysis, pedestrian's admission that he was "high," i.e., under influence of drug, during accident potentially satisfied complete defense from liability for injury;

[2] factual issue existed as to whether pedestrian was under influence of drug, and therefore whether motorist was entitled to affirmative defense to liability for injury;

[3] trial court abused its discretion by submitting instruction to jury that improperly emphasized pedestrian's theory of case;

[4] police officer's denial of knowledge of police reports of prior accidents at intersection at issue, on cross-examination by pedestrian's attorney, did not open the door so they could be admitted; and

[5] although pedestrian was required to look before entering crosswalk, he was not required to specifically look to left and right before entering crosswalk; and

[6] witness who testified at trial that she did not remember if pedestrian had looked before entering crosswalk could be impeached with her prior inconsistent statement that pedestrian did not look before entering crosswalk.

Reversed and remanded.

Procedural Posture(s): On Appeal; Judgment; Motion for Summary Judgment.

West Headnotes (55)

[1] **Amicus Curiae** Powers, functions, and proceedings

An appellate court does not consider issues raised first and only by amici.

[2] **Automobiles** Contributory and comparative negligence; apportionment of fault

Motorist could present evidence of pedestrian's intoxication as affirmative defense to liability in pedestrian's action against motorist alleging negligence after he was struck by vehicle while in crosswalk. Wash. Rev. Code Ann. § 5.40.060.

[3] **Appeal and Error** De novo review

Appeal and Error Review using standard applied below

Court of Appeals reviews a superior court's order granting summary judgment de novo, and performs the same inquiry as the superior court. Wash. Super. Ct. Civ. R. 56(c).

[4] **Judgment** Presumptions and burden of proof

On a motion for summary judgment, a court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. Wash. Super. Ct. Civ. R. 56(c).

[5] **Judgment** Existence or non-existence of fact issue

A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Wash. Super. Ct. Civ. R. 56(c).

[6] **Negligence** Necessity of causal connection

Negligence Intoxication

Negligence Effect of determination on recovery; methods of apportionment

If the plaintiff's intoxication was the proximate cause of the injury and the plaintiff was more than 50 percent at fault a defendant is entitled to a complete defense from liability. Wash. Rev. Code Ann. § 5.40.060.

1 Cases that cite this headnote

[7] **Automobiles** Driving while intoxicated

To satisfy the driving while under the influence (DUI) statute, a party must prove beyond a reasonable doubt that at the time of the accident, the person was under the influence of a drug so as to impair his ability to operate to an appreciable degree. Wash. Rev. Code Ann. § 46.61.502(c).

[8] **Automobiles** Driving while intoxicated

Party's admission of intoxication may satisfy driving while under the influence (DUI) statute. Wash. Rev. Code Ann. § 46.61.502(c).

[9] **Automobiles** Persons under disability in general

A urinalysis or toxicology report alone is insufficient to prove someone was impaired by a drug as a complete defense from liability to injury; proving intoxication's impact on behavior is necessary. Wash. Rev. Code Ann. §§ 5.40.060, 46.61.502.

[10] **Automobiles** Persons under disability in general

Even without urinalysis, pedestrian's admission that he was "high," i.e., under influence of drug, during accident potentially satisfied complete defense from liability for injury in pedestrian's action against motorist alleging negligence after he was struck by vehicle while in crosswalk. Wash. Rev. Code Ann. §§ 5.40.060, 46.61.502(c).

[11] **Judgment** Torts

Whether pedestrian's admission to his doctor that he was "high," i.e., under influence of drug, during accident could be prejudicial could not be considered on summary judgment in pedestrian's action against motorist alleging negligence after he was struck by vehicle while in crosswalk; question was whether, in light most favorable to motorist, there was some evidence to create issue of fact for jury relating to affirmative defense from liability for injury. Wash. Rev. Code Ann. §§ 5.40.060, 46.61.502(c); Wash. Super. Ct. Civ. R. 56(c).

[12] **Judgment** Tort cases in general

Genuine issue of material fact existed as to whether pedestrian was under influence of drug, and therefore whether motorist was entitled to affirmative defense to liability for injury, precluding summary judgment in pedestrian's action against motorist alleging negligence after he was struck by vehicle while in crosswalk. Wash. Rev. Code Ann. §§ 5.40.060, 46.61.502(c); Wash. Super. Ct. Civ. R. 56(c).

[13] **Trial** Negligence and personal injuries

Trial court abused its discretion by submitting instruction to jury that improperly emphasized pedestrian's theory of case against motorist alleging negligence after he was struck by

vehicle while in crosswalk; although instruction could state that municipality could violate its duty of care even when it complied with statutes, regulations, and guidelines, it did not also state that compliance with statutes, regulations, and guidelines could be evidence that crosswalk was safe. Wash. Rev. Code Ann. §§ 5.40.050, 36.86.080, 47.36.030(1); Wash. Admin. Code 136-11-040, 468-95-010 et seq.

[14] **Trial** Authority to instruct jury in general

Whether to give a specific jury instruction is within the discretion of the trial court.

[15] **Appeal and Error** Instructions

A trial court's decision to give a particular jury instruction is reviewed for an abuse of discretion.

[16] **Appeal and Error** Abuse of discretion

A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds.

[17] **Appeal and Error** Instructions

Court of Appeals reviews de novo whether a jury instruction correctly states the law.

[18] **Trial** Construction and Effect of Charge as a Whole

Jury instructions must allow counsel to argue their theory of case, may not be misleading, and must properly inform trier of fact of applicable law.

[19] **Appeal and Error** Relation Between Error and Final Outcome or Result

Misleading jury instruction does not require reversal unless appealing party can prove instruction was prejudicial.

[20] **Trial** Sufficiency of evidence to warrant instruction

Where substantial evidence supports a party's theory of the case, trial courts are required to instruct the jury on the theory.

[21] **Trial** Facts and Evidence

To determine whether to give an instruction, the trial judge must merely decide whether the record contains the kind of facts to which the doctrine applies.

[22] **Trial** Undue Prominence of Particular Matters

Where instruction focuses jury's inquiry on one theory of case over another, trial court abuses its discretion.

[23] **Trial** Undue Prominence of Particular Matters

Trial court deprives party of fair trial when it issues jury instruction that emphasizes one party to explicit detriment of other party.

[24] **Municipal Corporations** Nature and grounds of liability

Under common law, municipalities are held to the general duty of care of a reasonable person under the circumstances.

[25] **Automobiles** Care required as to condition of way in general

Municipalities are required to maintain roadways that are reasonably safe for travel.

[26] **Automobiles** Care required as to condition of way in general

A municipality's duty to maintain roadways that are reasonably safe for travel extends beyond

merely complying with applicable laws and regulations.

[27] **Automobiles** Condition of way and nature of defects or obstructions

Whether a roadway was reasonably safe and whether it was reasonable for a municipality to take, or not take, any corrective actions are questions of fact that must be answered in light of the totality of the circumstances.

[28] **Municipal Corporations** Nature and grounds of liability

Statutes and regulations can help define a municipality's duty of care.

1 Cases that cite this headnote

[29] **Automobiles** Care required as to condition of way in general

The Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD) provides at least some evidence of the appropriate duty to maintain roadways that are reasonably safe for travel.

[30] **Municipal Corporations** Nature and grounds of liability

Compliance with applicable statutes and regulations may be used to show a municipality met its duty of care.

1 Cases that cite this headnote

[31] **Automobiles** Care required as to condition of way in general

The Washington State Department of Transportation (WSDOT) must implement the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD). Wash. Rev. Code Ann. § 47.36.030(1); Wash. Admin. Code 468-95-010 et seq.

[32] **Automobiles** Requirements of statutes and ordinances

Automobiles Care required as to condition of way in general

Municipalities must maintain roadways and comply with roadway design statutes. Wash. Rev. Code Ann. § 36.86.080; Wash. Admin. Code 136-11-040.

[33] **Municipal Corporations** Ordinances, resolutions, or other action by municipality

A municipality's failure to comply with a duty imposed by statute, ordinance, or administrative rule may be considered by the trier of fact as evidence of negligence. Wash. Rev. Code Ann. § 5.40.050.

[34] **Municipal Corporations** Nature and grounds of liability

Municipality can violate its duty of care even when it complies with statutes and regulations.

1 Cases that cite this headnote

[35] **Automobiles** Care required as to condition of way in general

Automobiles Defective plan of construction

When a municipality's road maintenance and design is at issue in a case, a finder-of-fact should evaluate whether it satisfied its legal duty under the totality of the circumstances.

[36] **Automobiles** Care required as to condition of way in general

The term "totality of the circumstances" is properly a part of the standard by which a municipality's duty to maintain roadways that are reasonably safe for travel is measured, but it is not the whole of the standard.

[37] **Appeal and Error** Evidence and Witnesses in General

Court of Appeals reviews evidentiary rulings for abuse of discretion.

[38] **Evidence** Hearsay issues in general

The business records exception to the hearsay rule generally applies to objective records of regularly recorded activities. Wash. Rev. Code Ann. § 5.45.020.

[39] **Evidence** Hearsay issues in general

The business records exception to the hearsay rule does not apply to those records created through skill, judgment, or discretion. Wash. Rev. Code Ann. § 5.45.020.

[40] **Evidence** Police Reports

Police reports do not satisfy the business records exception to the hearsay rule because they require the officer creating the report to produce a subjective summary of the officer's investigation. Wash. Rev. Code Ann. § 5.45.020.

[41] **Evidence** Effect of Admissibility of Similar Adverse Evidence; "Opening the Door"

When party opens door to subject, opposing party may request admittance of previously excluded evidence on that subject during cross or redirect examination.

[42] **Evidence** Effect of Admissibility of Similar Adverse Evidence; "Opening the Door"

The open door doctrine applies to evidence excluded due to policy or prejudice not hearsay.

[43] **Evidence** Effect of Admissibility of Similar Adverse Evidence; "Opening the Door"

The open door doctrine permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion; therefore, a party may not open the door through strategic questioning of a witness and then seek to admit excluded evidence based on its own questioning.

[44] **Evidence** Police Reports

Police reports that include eyewitness testimony and the conclusions of officers are not objective records, and therefore they are not admissible under the business records exception. Wash. Rev. Code Ann. § 5.45.020.

[45] **Evidence** Police Reports

Police officer's denial of knowledge of police reports of prior accidents at intersection at issue, on cross-examination by pedestrian's attorney, did not open the door so they could be admitted in pedestrian's action against motorist and municipality alleging negligence after he was struck by vehicle while in crosswalk.

[46] **Evidence** Hearsay in General

Party seeking to admit hearsay evidence may not do so by laying trap and forcing witness to spring it.

[47] **Appeal and Error** Form and requisites in general

Court of Appeals would not examine issue on appeal of whether jury should have been able to evaluate whether pedestrian was negligent when he failed to avoid motorist's truck after entering crosswalk, since motorist did not identify ruling of trial court that denied it opportunity to argue that theory. Wash. R. App. P. 10.3(6).

[48] **Automobiles** Crossing street or way

Automobiles Persons Crossing Highway

Pedestrians generally may assume that drivers will recognize their right of way when

entering crosswalk; however, pedestrian may not suddenly enter crosswalk without providing approaching vehicles time to stop.

[49] **Automobiles** Duty to stop, look, and listen

Although pedestrian was required to look before entering crosswalk, he was not required to specifically look to left and right before entering crosswalk.

[50] **Automobiles** Duty to stop, look, and listen

Pedestrians must look before entering a crosswalk.

[51] **Witnesses** Inconsistency of Statements as Ground of Impeachment in General

A party may impeach a witness using a prior inconsistent statement. Wash. R. Evid. 613(b).

[52] **Witnesses** Grounds of credibility in general

Witnesses Inconsistency of Statements as Ground of Impeachment in General

"Impeachment" is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful; such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true. Wash. R. Evid. 613(b).

[53] **Witnesses** Necessity of Laying Foundation

A party seeking to impeach a witness must directly confront the witness with their prior statement and provide them an opportunity to respond. Wash. R. Evid. 613(b).

[54] **Witnesses** Nature and extent of inconsistency

A court examines the whole impression of a statement to determine if two statements are inconsistent by considering whether the two expressions appear to have been produced by inconsistent beliefs. Wash. R. Evid. 613(b).

[55] **Witnesses** Nature and extent of inconsistency

Witness who testified at trial that she did not remember if pedestrian had looked before entering crosswalk could be impeached with her prior inconsistent statement that pedestrian did not look before entering crosswalk, in pedestrian's action against motorist and municipality alleging negligence after he was struck by vehicle while in crosswalk. Wash. R. Evid. 613(b).

****542** Appeal from Pierce County Superior Court, Docket No: 17-2-07876-5, Honorable Shelly Speir, Judge

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PUBLISHED OPINION

Veljacic, J.

***921** ¶ 1 Lee Mudd struck Austin Fite with his truck while Fite was riding his skateboard through a crosswalk. A jury awarded Fite $6.5 million in damages and found Mudd 33 percent at fault and the City of Puyallup (Puyallup) 67 percent at fault. The jury assigned no liability to Fite. Puyallup argues on appeal that the trial court erred in striking its intoxication affirmative defense on summary ****543** judgment, and in separately excluding evidence of intoxication.

¶ 2 Puyallup also argues that the court erred by submitting an instruction to the jury that favored Fite's theory of the case by instructing the jury, with instruction 28, to consider the "totality of the circumstances" in determining whether the crosswalk was safe, and by stating that a ***922** crosswalk may be unsafe even when there is no violation of statutes, regulations, or guidelines.

¶ 3 Puyallup further argues that the trial court erred in granting summary judgment regarding Fite's duty of care, erred in admitting two police reports, erred in denying Puyallup the opportunity to impeach a witness, and erred in excluding evidence of Fite's speed and events of the accident.

¶ 4 The trial court erred by granting Fite's motion for summary judgment prohibiting Puyallup from presenting the intoxication affirmative defense under RCW 5.40.060 because the evidence considered by the court at summary judgment created genuine issues of material fact preventing summary judgment. It also erred by submitting jury instruction 28 because the instruction included "totality of the circumstances" language but failed to explain what circumstances the jury should consider except for a sentence that improperly emphasized Fite's theory of the case. Lastly, the trial court erred in admitting hearsay police reports under the business records exception and by denying Puyallup the opportunity to impeach the only eyewitness to Fite's behavior immediately preceding the accident. Accordingly, we reverse and remand for a new trial.

FACTS

¶ 5 Mudd struck Fite while Fite traveled on a skateboard through a crosswalk. Fite was taken to the hospital and treated for his injuries. The hospital performed a screening urinalysis on Fite. Such test was not conducted to determine Fite's intoxication at the time of the accident but rather to assist in his medical treatment. The screening revealed Fite's urine contained tetrahydrocannabinol (THC). The screening used was not for the purpose of determining blood-THC concentration, and therefore lacked that information. Fite sued Mudd and Puyallup.

¶ 6 An eyewitness, Kelly Boutte, provided an initial sworn statement, stating that "[a]t no time did I see [Fite] ***923** stop. At no time did I see him look left. At no time did I see him look right." Clerk's Papers (CP) at 1153. She later amended her statement to read, "I do not recall if he looked r[igh]t or left one way or another." CP at 1294.

¶ 7 Fite moved for partial summary judgment. In Puyallup's response to Fite's motion for summary judgment, it argued Fite's intoxication was evidence of his comparative fault. Puyallup relied on the urine drug screening and a later statement Fite made to his doctor that he was "high on [c]annabis while riding his skateboard" on the day of the accident. CP at 908. Fite replied that Puyallup's intoxication defense was factually unsupported and that Fite was fault free. The court granted Fite's motion for summary judgment dismissing the intoxication affirmative defense.

¶ 8 While Fite's comment to his doctor was part of the evidence provided by Puyallup in its response to Fite's motion, the court did not address the comment. In its summary judgment order, the court ruled that Puyallup was barred from presenting an intoxication defense under RCW 5.40.060. However, the court denied Fite's motion to establish that he had no comparative fault, and clarified Fite's legal duty, ruling "Fite was not *specifically* required to look right and look left before entering the crosswalk, only to look for approaching vehicles." CP at 1303.

¶ 9 Puyallup moved for reconsideration on its intoxication defense based in part on new expert witness testimony, which it submitted for the first time on reconsideration. The court again concluded that Puyallup had not provided evidence establishing when Fite had ingested marijuana or that Fite was experiencing any symptoms of THC intoxication at the time of the accident as required by RCW 5.40.060.

¶ 10 Fite later requested, and the court granted, a motion in limine to exclude all evidence of Fite's drug and alcohol use (that apparently included his statement to his doctor). ****544** Puyallup also filed a motion in limine seeking to exclude ***924** two police reports—exhibits 48A and 48B—detailing two other accidents that had occurred in the crosswalk at issue. The court granted Puyallup's motion.

¶ 11 However, during Fite's cross-examination of a traffic detective with experience investigating pedestrian accidents, he asked whether the detective had studied the excluded police reports, asking "Have you ever had occasion to study all of the accident reports in the intersection of 5th and 31st that we've got here?" 14 Report of Proceedings (RP) (Nov. 20, 2019) at 2630. Fite questioned the detective further, asking:

> Q. You don't know whether or not there'd been pedestrian accidents and how many there have been?
>
> A. I can say that there have not been many and the reason I can say that is because I'm consulted very often on any kind of pedestrian accident because of my expertise.
>
> Q. The true answer is, you don't know; is that right?
>
> A. I cannot give you a number, absolutely.
>
> Q. But you know there have been some?
>
> A. I know there's been one. I don't know of the other ones.
>
> Q. And you know that there have been some pedestrian accidents in that particular crosswalk, don't you?
>
> A. I know of this one, sir.
>
> Q. This one in this case?
>
> A. This case.
>
> Q. You don't know about any others?
>
> A. None that come to mind, no.

RP (Nov. 20, 2019) at 2630-31. To counter this testimony, Fite offered exhibits 48A and 48B as business records. The court admitted the exhibits as business records over Puyallup's hearsay objection.

¶ 12 Exhibit 48A contained an investigation into a collision between two cars while stopped at a crosswalk. The report includes a determination of fault based on the officer's interviews with the drivers involved in the accident ***925** and a witness. No pedestrians were injured in the accident. Exhibit 48B described witness testimony that a bicyclist entered a roadway without looking, swerved in front of a car, and was hit. Fite relied on the incongruities between the traffic officer's testimony and the police reports in his closing arguments. He claimed that Puyallup attempted to hide the other accidents and that the traffic officer had tried to mislead the jury.

¶ 13 At trial, Puyallup requested the opportunity to impeach the eyewitness, Boutte, with her prior statement. The trial court prohibited Puyallup from impeaching Boutte, ruling that Boutte's prior statement conflicted with its summary judgment order that Fite did not have a duty to look left or right. Boutte testified at trial, stating "I did not see [Fite] stop before crossing the road." 11 RP at 1874.

¶ 14 During conferencing on the jury instructions, Fite requested an instruction that included that the jury should consider the "totality of the circumstances" when determining whether the crosswalk was safe. 17 RP at 3185. That language came from *Xiao Ping Chen v. City of Seattle*, 153 Wash. App. 890, 899-900, 223 P.3d 1230 (2009). Puyallup objected to that language and asserted that WPI 140.01 [1] alone was the correct jury instruction. Instead, the court crafted instruction 28, which read:

> Whether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the "totality of the circumstances." A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks.

CP at 3190.

[1] ¶ 15 The jury awarded Fite approximately $6.5 million in damages and found Mudd was 33 percent at fault and Puyallup was 67 percent at fault for the accident. ***926** Puyallup appeals the liability verdict but not the damage award. [2]

****545** ANALYSIS

I. INTOXICATION DEFENSE UNDER RCW 5.40.060

[2] ¶ 16 Puyallup argues that the trial court erred when it prohibited Puyallup from presenting a defense under RCW 5.40.060 by excluding evidence of Fite's intoxication. Fite argues that Puyallup failed to produce evidence that would satisfy RCW 5.40.060. We conclude that the trial court erred in ruling as a matter of law that Puyallup could not present the affirmative defense of evidence of Fite's intoxication.

A. Standard of Review

[3] **[4]** **[5]** ¶ 17 We review a superior court's order granting summary judgment de novo, and perform the same inquiry as the superior court. *RockRock Grp., LLC v. Value Logic, LLC*, 194 Wash. App. 904, 913, 380 P.3d 545 (2016). We consider the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wash. App. 226, 230, 15 P.3d 688 (2001). The court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *RockRock Grp.*, 194 Wash. App. at 913, 380 P.3d 545; CR 56(c).

B. Legal Principles

[6] ¶ 18 RCW 5.40.060 provides a complete defense for liability if a defendant can show the plaintiff's intoxication ***927** was the proximate cause of the injury and the plaintiff was more than 50 percent at fault. *Peralta v. State*, 187 Wsah.2d 888, 893-94, 389 P.3d 596 (2017). RCW 5.40.060(1) states in relevant part:

> [I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault.

¶ 19 "To determine if an individual was 'under the influence of intoxicating liquor,' the intoxication defense statute incorporates by reference the definition of 'under the influence of intoxicating liquor or drugs' in RCW 46.61.502, the [driving while under the influence] DUI statute." *Peralta*, 187 Wsah.2d at 897, 389 P.3d 596; RCW 5.40.060(1). RCW 46.61.502 states in relevant part:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
>
> ....
>
> (c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug.

[7] **[8]** ¶ 20 To satisfy RCW 46.61.502(c), a party must prove beyond a reasonable doubt that at the time of the accident, the person was under the influence of marijuana so as to impair his ability to operate to an appreciable degree. *Peralta*, 187 Wash.2d at 898, 389 P.3d 596. A party's admission of intoxication may satisfy RCW 46.61.502(c). *Id.* at 903, 389 P.3d 596.

¶ 21 In *Peralta*, a driver admitted to being "under the influence of intoxicating liquors," and the trial court determined this established intoxication under RCW 46.61.502. *Id.* at 893, 389 P.3d 596. On appeal, the court held that the trial court was reasonable in concluding such admission was conclusive evidence of intoxication under RCW 46.61.502(c) and that the driver was bound by such admission. *Id.* at 903-04, 389 P.3d 596.

***928** ¶ 22 In a recent case, the Washington Supreme Court ruled that a toxicology report alone is insufficient to prove someone was impaired by intoxicating liquors, because the causation component of the statute examines a person's behavior not simply whether they were intoxicated. *Gerlach v. Cove Apt., LLC*, 196 Wash.2d 111, 125-26, 471 P.3d 181 (2020). ****546** The court held that "without other evidence or testimony that could connect Gerlach's [blood alcohol concentration (BAC)] results to behavior that caused her [injury], the BAC results were not relevant to whether her

intoxication was a proximate cause of her injuries or to her degree of fault." *Id.* at 126, 471 P.3d 181.

C. Analysis

¶ 23 Puyallup argues that Fite's admission to his doctor that he was "high on [c]annabis" during the accident and his urinalysis result that was positive for THC are sufficient evidence to show he was intoxicated under RCW 46.61.502. CP at 908.

[9] ¶ 24 Fite argues that *Gerlach* supports the trial court's prohibition of the affirmative defense. However, *Gerlach*'s holding is narrower than a blanket exclusion of all urinalyses or toxicology reports showing the presence of intoxicants, so its holding is not dispositive of the summary judgment issue for the parties here. Instead, *Gerlach* only prohibits Puyallup from relying solely on such a report to support the affirmative defense under RCW 5.40.060 because a toxicology report cannot prove a person behaved in an impaired fashion, i.e. that they were affected to an appreciable degree, as required under RCW 46.61.502. *See* *Gerlach*, 196 Wash.2d at 126, 471 P.3d 181. Under the defense, proving intoxication's impact on behavior is necessary. So, the urine screening here is still available for our de novo consideration of whether there was an issue of fact as to Fite's intoxication. The screening was available to the trial court for the same reason.

[10] **[11]** ¶ 25 However, even without the urinalysis, Fite's admission that he was high during the accident does potentially ***929** satisfy RCW 46.61.502(c) per *Peralta*. *See* 187 Wash.2d at 903-04, 389 P.3d 596. The trial court did not address why Fite's admission to his doctor could not satisfy RCW 46.61.502(c), only suggesting that the comment could be prejudicial. But prejudice is not the question on summary judgment. Instead, the question was whether, in the light most favorable to Puyallup, there was some evidence to create an issue of fact for the jury relating to the affirmative defense. And here there was.

[12] ¶ 26 A party's admission of intoxication may satisfy RCW 46.61.502(c). *Peralta*, 187 Wash.2d at 903-04, 389 P.3d 596. While the trial court stated that there was no other evidence of Fite's intoxication, witness testimony suggested that he failed to stop before entering the crosswalk, and he also failed to make any move to avoid Mudd's vehicle. When coupled with the positive urine screening and his admission, and when viewed in the light most favorable to Puyallup, Fite's behavior could have contributed to the accident; the behavior could have resulted from impairment due to being appreciably affected by marijuana; and a reasonable jury could have concluded accordingly. The evidence creates a genuine issue of material fact that Puyallup should have had the opportunity to present to the jury. The trial court erred by granting Fite's motion for partial summary judgment excluding the affirmative defense.

II. JURY INSTRUCTION 28

[13] ¶ 27 Puyallup argues that the first sentence of jury instruction 28 misstates the law of municipal fault and that the second sentence improperly emphasized Fite's theory of the case. We agree that the trial court abused its discretion by submitting instruction 28 to the jury because the instruction improperly emphasized Fite's theory of the case by failing to include a sentence in the instruction stating that compliance with statutes, regulations, and guidelines may be evidence that the crosswalk was safe.

***930** A. Standard of Review

[14] **[15]** **[16]** **[17]** ¶ 28 Whether to give a specific instruction is within the discretion of the trial court, and we review such decision for an abuse of discretion. *Taylor v. Intuitive Surgical, Inc.*, 187 Wash.2d 743, 767, 389 P.3d 517 (2017). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Bengtsson v. Sunnyworld Int'l, Inc.*, 14 Wash. App. 2d 91, 99, 469 P.3d 339 (2020). We review de novo whether a jury instruction correctly states ****547** the law. *Intuitive Surgical, Inc.*, 187 Wash.2d at 767, 389 P.3d 517.

B. The trial court did not err by crafting a jury instruction instead of using the pattern instruction

[18] **[19]** ¶ 29 Jury instructions must allow counsel to argue their theory of the case, may not be misleading, and must properly inform the trier of fact of the applicable law. *Keller v. City of Spokane*, 146 Wash.2d 237, 249, 44 P.3d 845 (2002). A misleading instruction does not require reversal unless the appealing party can prove the instruction was prejudicial. *Id.*

[20] **[21]** ¶ 30 Where substantial evidence supports a party's theory of the case, trial courts are required to instruct the jury on the theory. *Intuitive Surgical, Inc.*, 187 Wash.2d at 767, 389 P.3d 517. "To determine whether to give an instruction, the trial judge 'must merely decide whether the record contains the kind of facts to which the doctrine applies.' " *Id.* at 767, 389 P.3d 517 (quoting *Kappelman v. Lutz*, 167 Wash.2d 1, 6, 217 P.3d 286 (2009)).

[22] ¶ 31 Where an instruction focuses the jury's inquiry on one theory of the case over another, the trial court abuses its discretion. *Cornejo v. State*, 57 Wash. App. 314, 320-21, 788 P.2d 554 (1990). In *Cornejo*, the repetition of one party's theory of the case in jury instructions emphasized that theory over that of the opposing party. *Id.* On appeal, the court determined this emphasis led to the trial court ***931** favoring one theory over another, which was an abuse of discretion. *Id.*

[23] ¶ 32 A trial court deprives a party of a fair trial when it issues a jury instruction that emphasizes one party "to the explicit detriment of the other party." *Brown v. Dahl*, 41 Wash. App. 565, 579, 705 P.2d 781 (1985).

¶ 33 Puyallup first argues that jury instruction 28 was improper because it was crafted from case law and WPI 140.01 correctly states the law of municipal fault. It cites to *Swope v. Sundgren*, 73 Wash.2d 747, 750, 440 P.2d 494 (1968), and *Turner v. City of Tacoma*, 72 Wash.2d 1029, 1034, 435 P.2d 927 (1967), for the proposition that trial courts should not craft jury instructions from case law. However, neither case holds a trial court is prohibited from doing so, but merely that opinions are not written with the intent that they will serve as the basis for jury instructions. *See Sundgren*, 73 Wash.2d at 750, 440 P.2d 494; *Turner*, 72 Wash.2d at 1034, 435 P.2d 927. Accordingly, Puyallup's argument fails.

C. Municipal Fault, Generally

[24] **[25]** **[26]** **[27]** ¶ 34 Under common law, municipalities are held to the general duty of care of a reasonable person under the circumstances. *Chen*, 153 Wash. App. at 899-900, 223 P.3d 1230. This duty requires municipalities to maintain roadways that are reasonably safe for travel. *Id.* at 900, 223 P.3d 1230. A municipality's duty extends beyond merely complying with applicable laws and regulations. *Wuthrich v. King County*, 185 Wash.2d 19, 26, 366 P.3d 926 (2016). "Whether the roadway was reasonably safe and whether it was reasonable for [a municipality] to take (or not take) any corrective actions are questions of fact that must be answered in light of the totality of the circumstances." *Id.* at 27, 366 P.3d 926; *see also Chen*, 153 Wash. App. at 894, 223 P.3d 1230 ("A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence.").

[28] **[29]** **[30]** **[31]** **[32]** ¶ 35 Statutes and regulations can help define a municipality's duty of care. ***932** *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wash.2d 780, 787, 108 P.3d 1220 (2005). Specifically, the Federal Highway Administration's Manual on Uniform Traffic Control Devices (MUTCD) "provides at least some evidence of the appropriate duty." *Id.* Therefore, compliance with applicable statutes and regulations may be used to show a municipality met its duty of care. The Washington State Department of Transportation (WSDOT) must implement the Federal Highway Administration's MUTCD. RCW 47.36.030(1); WAC 468-95-010, et seq. Municipalities must maintain roadways and comply with roadway design statutes. WAC 136-11-040; RCW 36.86.080.

****548** **[33]** ¶ 36 Similarly, under RCW 5.40.050, a municipality's failure to comply with a duty imposed by statute, ordinance, or administrative rule may be considered by the trier of fact as evidence of negligence. *See* RCW 5.40.050. RCW 5.40.050 states in relevant part: "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence."

¶ 37 In *Keller*, 146 Wash.2d at 252-54, 44 P.3d 845, the Washington Supreme Court crafted a jury instruction on a municipality's duty for road design and maintenance. Such instruction became WPI 140.01, and states:

> The [county] [city] [town] [state] has a duty to exercise ordinary care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] [bridges] to keep them in a

> reasonably safe condition for ordinary travel.

D. Analysis: Instruction 28 Improperly Emphasized Fite's Theory

Jury instruction 28 provided:

> Whether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the "totality of the circumstances." A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks.

CP at 3190.

***933** ¶ 38 The trial court improperly emphasized Fite's theory by including the second sentence in instruction 28 without also including language stating that compliance with statutes, regulations, or guidelines can be evidence the crosswalk was safe.

[34] ¶ 39 The common law of municipal fault states that a municipality can violate its duty of care even when it complies with statutes and regulations. *Wuthrich*, 185 Wash.2d at 26, 366 P.3d 926. However, the second sentence of instruction 28, while a correct statement of the law, improperly focuses the jury on Fite's theory when evaluating Puyallup's fault. This theory—that a crosswalk may be unsafe even if it complies with statutes and regulations—exclusively supports Fite's theory of the case. The instruction fails to include additional language on evidence the jury may consider that supports Puyallup's theory of the case—namely that compliance with statutes and regulations is evidence it met its duty of care.

¶ 40 *Cornejo* is instructive here. In *Cornejo*, the trial court abused its discretion when it submitted instructions to the jury that overemphasized one party's theory. 57 Wash. App. at 320-21, 788 P.2d 554. Here, the emphasis favored Fite and prevented Puyallup from arguing that it met its duty of care because it complied with applicable statutes and regulations. Because the second sentence of jury instruction 28 emphasized Fite's theory of the case and improperly limited Puyallup's, the trial court abused its discretion and denied Puyallup a fair trial.

[35] ¶ 41 Puyallup next argues that the "totality of the circumstances" language in instruction 28 is improper because the circumstances in *Chen* are absent here. According to Puyallup, that court relied on evidence of accidents, deaths, complaints, the existence of a safety refuge island, the fact that there were traffic signals at other similar intersections, and the City's admission that similar crosswalks were dangerous. However, "totality of the circumstances" is ***934** not limited to those circumstances present in *Chen*. The case law clearly holds, without limitation, that finders of fact should evaluate whether a municipality's road maintenance and design satisfied its legal duty under "totality of the circumstances." *See* *Wuthrich*, 185 Wash.2d at 27, 366 P.3d 926; *Chen*, 153 Wash. App. at 894, 223 P.3d 1230.

[36] ¶ 42 Such holdings imply that the finder of fact should examine those circumstances relevant to the case at bar to determine whether a municipality has satisfied its duty of care. So, the term "totality of the circumstances" is properly a part of the standard by which a municipality's duty is measured, but it is not the whole of the standard.

¶ 43 We address the remaining issues in this case because they are likely to be repeated at trial, however, they do not serve as independent bases for reversal.

****549** III. ADMITTED POLICE REPORTS

¶ 44 Puyallup argues that the trial court abused its discretion when it admitted police reports under the business records exception to the hearsay prohibition. We agree with Puyallup.

¶ 45 While Puyallup secured exclusion of the reports via the court's order after motions in limine, Fite argues that Puyallup's witness opened the door to the admittance of the police reports when he testified that he did not know of any other accidents in the crosswalk where Fite was injured.

A. Standard of Review

[37] ¶ 46 We review evidentiary rulings for an abuse of discretion. *Peralta*, 187 Wash.2d at 894, 389 P.3d 596. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Bengtsson*, 14 Wash. App. 2d at 99, 469 P.3d 339.

B. Legal principles

¶ 47 The business records exception to the hearsay prohibition states,

> ***935** A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

[38] **[39]** **[40]** ¶ 48 The business records exception generally applies to objective records of regularly recorded activities. *In re Detention of Coe*, 175 Wash.2d 482, 505, 286 P.3d 29 (2012). The exception does not apply to those records created through skill, judgment, or discretion. *Id*. Police reports do not satisfy the exception because they require the officer creating the report to produce a subjective summary of the officer's investigation. *Id*.

[41] **[42]** **[43]** ¶ 49 When a party opens the door to a subject, the opposing party may request admittance of previously excluded evidence on that subject during cross or redirect examination. *State v. Gefeller*, 76 Wash.2d 449, 455, 458 P.2d 17 (1969). A recent case from Division Three explains that the open door doctrine applies to evidence excluded due to policy or prejudice not hearsay. *State v. Rushworth*, 12 Wash. App. 2d 466, 473, 458 P.3d 1192 (2020). The doctrine "permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion." *Id*. Therefore, a party may not open the door through strategic questioning of a witness and then seek to admit excluded evidence based on its own questioning.

C. Analysis

¶ 50 We conclude that the trial court abused its discretion by admitting the police reports under the business records exception to hearsay. Exhibits 48A and 48B are two police reports detailing accidents that occurred at the same intersection ***936** where Fite was injured. Notably, neither accident involved a pedestrian—exhibit 48A describes a car that was rear ended while stopped at a crosswalk, and exhibit 48B describes a collision between a car and bicycle that occurred when the bicyclist entered the street without looking and swerved in front of a car.

[44] ¶ 51 Both reports detail eyewitness testimony and the conclusions of the responding officer. Because police reports that include eyewitness testimony and the conclusions of officers are not objective records, they are not admissible under the business records exception. *See Coe*, 175 Wash.2d at 505, 286 P.3d 29.

[45] **[46]** ¶ 52 Further, Puyallup did not open the door to the admittance of the police reports because it was Fite that elicited the statements about the prior accident reports. A party seeking to admit hearsay evidence may not do so by laying a trap and forcing a witness to spring it. *See Rushworth*, 12 Wash. App. 2d at 473, 458 P.3d 1192. While Fite argues Puyallup opened the door to admittance of the police reports, Fite only ****550** cites to its own cross-examination of the detective. During Fite's cross-examination, he asked the detective about the police reports that had been previously excluded, and when the witness denied knowledge of them, Fite sought to admit them. Such questioning does not constitute opening the door. The trial court abused its discretion by admitting the reports under the business records hearsay exception and the open door doctrine.

IV. FITE'S COMPARATIVE FAULT

[47] ¶ 53 Puyallup argues that when the court denied Fite's motion for summary judgment as to his lack of comparative fault, the court erred by adding "Fite was not *specifically* required to look right and look left before entering the crosswalk, only to look for approaching vehicles." CP at 1303. Such order prohibited Puyallup from arguing Fite

was required to look left or right, but did not prevent Puyallup from arguing Fite failed to look, generally. Puyallup argues that by eliminating its opportunity to ask witnesses whether ***937** Fite looked left and right before entering the crosswalk, it was denied an opportunity to establish Fite's comparative fault. [3] We disagree with Puyallup.

A. Legal Principles

[48] ¶ 54 Pedestrians may generally assume that drivers will recognize their right of way when entering a crosswalk. *Chen*, 153 Wash. App. at 906, 223 P.3d 1230. However, a pedestrian may not suddenly enter a crosswalk without providing approaching vehicles time to stop. *Id*. None of the case law identifies the particular actions pedestrians must take to satisfy this duty in any greater detail than the above.

C. Analysis

[49] ¶ 55 We conclude that the trial court's statement on Fite's duty was an accurate statement of the law and did not deprive Puyallup the opportunity to argue he failed to look before entering the crosswalk. The trial court ordered that Puyallup was prohibited from arguing Fite had a duty *to look left and right* prior to entering the crosswalk. However, the trial court allowed Puyallup to argue that Fite did not look prior to crossing.

[50] ¶ 56 Puyallup fails to cite relevant authority that establishes a pedestrian must look left and right before entering a crosswalk. Case law shows pedestrians must look before entering a crosswalk. *See* *Chen*, 153 Wash. App. at 906, 223 P.3d 1230. More importantly, contrary to Puyallup's assertion, it was not denied an opportunity to question witnesses about whether they saw Fite look before entering the crosswalk. Indeed, one witness clearly stated that "I did not see [Fite] stop before crossing the road." 11 RP at 1874.

***938** ¶ 57 The court prohibited Puyallup from arguing that Fite was at fault by specifically not looking left and right before entering the crosswalk; the court did not err in doing so.

V. PRIOR INCONSISTENT STATEMENT

¶ 58 Puyallup argues that the trial court abused its discretion by excluding Boutte's prior statement, because it was admissible to impeach as a prior inconsistent statement. Fite argues that Boutte's prior statement was not inconsistent and that if excluding the statement was an error, Puyallup was not prejudiced by the decision. We agree that the trial court abused its discretion by denying Puyallup the opportunity to impeach Boutte because her prior statement was inconsistent.

A. Standard of Review

¶ 59 Again, we review evidentiary rulings for an abuse of discretion. *Peralta*, 187 Wash.2d at 894, 389 P.3d 596. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Bengtsson*, 14 Wash. App. 2d at 99, 469 P.3d 339.

****551** B. Legal Principles

[51] **[52]** **[53]** **[54]** ¶ 60 A party may impeach a witness using a prior inconsistent statement. *State v. Garland*, 169 Wash. App. 869, 885, 282 P.3d 1137 (2012). " 'Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true.' " *Id*. (quoting *State v. Burke*, 163 Wash.2d 204, 219, 181 P.3d 1 (2008) (citation omitted)). ER 613(b) empowers a party to impeach a witness using a prior inconsistent statement, but "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and ***939** the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Therefore, a party seeking to impeach a witness must directly confront the witness with their prior statement and provide them an opportunity to respond. *Id*. Courts examine the whole impression of a statement to determine if two statements are inconsistent, asking " 'Do the two expressions appear to have been produced by inconsistent beliefs?' " *State v. Newbern*, 95 Wash. App. 277, 294, 975 P.2d 1041 (1999) (quoting *Sterling v. Radford*, 126 Wash. 372, 375, 218 P. 205 (1923)).

C. Analysis

[55] ¶ 61 We conclude that the trial court abused its discretion by denying Puyallup the opportunity to impeach Boutte. The trial court prohibited Puyallup from attempting to impeach Boutte using her prior inconsistent statement because Boutte's prior statement conflicted with its summary

judgment order that Fite did not have a duty to look left or right. [4] At trial, Boutte testified that she did not remember if Fite had looked before entering the crosswalk.

¶ 62 The court did not articulate an evidentiary basis for excluding Boutte's prior inconsistent statement, and instead relied entirely on its summary judgment order that clarified Fite's duty of care. The trial court seemed to suggest that because Fite had no specific duty to look left and right, any testimony that he failed to look left or right was inadmissible. However, legal duty aside, Boutte should have been permitted to testify about her prior statement and respond to questions regarding her credibility.

¶ 63 The prior inconsistent statement was admissible and the trial court erred by excluding it. Indeed, Boutte's two statements are inconsistent. Her initial statement, "At no time did I see him stop. At no time did I see him look left. ***940** At no time did I see him look right," CP at 1153, affirmatively states she did not see Fite stop, or look, while her amended statement, "I do not *recall* if he looked r[igh]t or left one way or another," CP at 1294 (emphasis added), states she does not *remember* whether he looked, and is silent on whether he stopped. The prior statement was inconsistent with her trial testimony. Therefore, the statement was admissible for impeachment purposes. *See Newbern*, 95 Wash. App. at 293-95, 975 P.2d 1041. The court should have allowed the jury a full opportunity to assess Boutte's credibility by hearing the prior statement that was inconsistent with her trial testimony. Denying Puyallup the opportunity to question Boutte's credibility was unreasonable and based on untenable grounds.

CONCLUSION

¶ 64 The trial court erred by granting Fite's motion for summary judgment prohibiting Puyallup from presenting evidence under RCW 5.40.060 because evidence of Fite's intoxication created material issues of fact preventing summary judgment. It also erred by submitting jury instruction 28 to the jury because it improperly emphasized Fite's theory of the case, and prohibited Puyallup from presenting its defense. Lastly, the trial court erred in admitting hearsay police reports under the business records exception and by denying Puyallup the opportunity to impeach the only eyewitness to Fite's behavior immediately ****552** preceding the accident. Accordingly, we reverse and remand for a new trial.

We concur:

Sutton, J.P.T.

Glasgow, A.C.J.

All Citations

19 Wash.App.2d 917, 498 P.3d 538

Footnotes

1 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 140.01, at 829 (2019) (WPI).

2 Two amici briefs and one response were also submitted. Both amici put forward arguments substantially similar to Puyallup's. The original arguments the amici raise were not addressed at trial, and we do not consider issues raised first and only by amici. *See* *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash.2d 622, 631, 71 P.3d 644 (2003).

3 Puyallup also argues that the jury should have been able to evaluate whether Fite was negligent when he failed to avoid Mudd's truck after entering the crosswalk. However, Puyallup fails to identify a ruling of the trial court that denied it the opportunity to argue this theory. We refuse to examine the issue. *See* RAP 10.3(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

4 We address the arguments as presented by the parties. We do not address the propriety of a court making an evidentiary ruling at the time of ruling in a summary judgment order, as the court did here.

Filed
Washington State
Court of Appeals
Division Two

April 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

AUSTIN K. FITE, individually, Respondent, v. LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof; and CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington, Appellant.	No. 54325-7-II ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND AMENDING OPINION

The published opinion in this matter was filed on November 9, 2021. After consideration, we grant Respondent's motion for reconsideration in part, and amend the opinion as follows:

On page 2, the last sentence of paragraph two stating:

Accordingly, we reverse and remand for a new trial.

is edited to state:

Accordingly, we reverse and remand for a new trial on liability and allocation of fault only.

One page 21, the last sentence of the opinion stating:

Accordingly, we reverse and remand for a new trial.

is edited to state:

Accordingly, we reverse and remand for a new trial on liability and allocation of fault only.

We further add the following footnote to the published opinion:

*footnote: Judge Sutton concurred as a panel judge to this case. Judge Sutton has since retired and the Chief Judge appointed a new panel on reconsideration.

IT IS SO ORDERED.

Veljacic, J.

We concur:

Glasgow, C.J.

Price, J.

SMITH GOODFRIEND, PS

May 12, 2022 - 2:36 PM

Transmittal Information

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