Supreme Court No. 97127-7

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76425-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife,

Plaintiffs-Respondents,

v.

STANDARD PARKING CORPORATION, a foreign corporation; TAYLOR WARN,

Defendants-Appellants.

APPELLANTS' PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Other State Cases

Federal Cases

Page(s)

Statutes and Court Rules

Other Authorities

I. IDENTITY OF PETITIONER

Defendants and Appellants Standard Parking Corporation and Taylor Warn (collectively, "Defendants") seek review of the decision designated in Section II of this Petition.

II. COURT OF APPEALS DECISION

Defendants seek review of the unpublished decision terminating review issued by Division One of the Court of Appeals on January 22, 2019. A copy of the decision ("Decision") is attached as Appendix A. A timely motion for reconsideration was denied by a summary order entered on March 29, 2019. A copy of that order is attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

This motor vehicle–bicycle accident case presents three issues warranting review by this Court:

1. The nature of the duties owed by disfavored and favored drivers, and their interplay with the concept of the "point of notice." The Court of Appeals modified two key concepts that govern motorists and determine liability for an accident: (1) the duties owed by so-called "disfavored" and "favored" drivers, and (2) the interplay between those duties and the case-law concept of the "point of notice."

First, the Court of Appeals affirmed the determination that a disfavored driver was negligent as a matter of law because he did not re-check to his right before completing his cross of a street, which he began only after checking and confirming the absence of oncoming "favored" traffic. This holding conflicts with this Court's decision in *Fetterman v.*

Levitch, 7 Wn.2d 431, 436-40, 109 P.2d 1064 (1941), and the well-established case-law rule that whether a disfavored driver crossing a street breaches their duty of care to oncoming favored traffic depends on the individual facts and circumstances. This matter warrants review under RAP 2.3(b)(1) and RAP 2.3(b)(4).

Second, in affirming the grant of a directed verdict in favor of the plaintiff bicyclist on the issue of his contributory fault, Division One relieved the so-called favored driver of complying with the basic duty of paying attention to what was transpiring up ahead, by applying the case-law rule of the "point of notice" in a fashion that frustrates the purpose of that rule. This matter warrants review under RAP 2.3(b)(4).

2. The obligation of a trial court to deal with misconduct of counsel based on a full and accurate apprehension of the events unfolding during trial. Counsel misconduct can deprive an opposing party of a fair trial. Of particular concern in a jury trial is systematic improper questioning of witnesses, which forces the opposing counsel to choose between letting the questions stand or alienating the jury by repeated, albeit proper objections. When, as here, the trial court, although warning the offending counsel to cease their misconduct, fails to track accurately the nature and scope of the problem unfolding before it, and later denies a new trial without offering any rationale for that denial, the court has abused its discretionary authority. The failure of the Court of Appeals to recognize that failure, and its decision instead to continue to defer to the trial court's

discretionary authority, is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

3. Fair notice that the Court of Appeals is considering resolving an appeal on a ground not raised in the briefing. In our adversarial system of justice, a court, including an appellate court, should resolve a case on a ground not raised by the parties only after giving them a fair opportunity to address that ground. RAP 12.1(b) provides that an appellate court may direct the parties to address an issue not raised in the briefs. Here, (1) Plaintiffs did not contend that Defendants had failed to preserve their principal legal basis for appellate relief from a directed verdict on both liability and contributory fault, (2) no member of the Panel on the Merits suggested at oral argument that the theory had not been preserved, and (3) the Court of Appeals did not request briefing on preservation of error. Yet in its decision terminating review, the court ruled that the issued was not preserved. In fact, the issue had been raised in both the trial brief and in opposition to the motion for directed verdict.

The decision by a Court of Appeals to reject considering a ground for appellate relief, based on a *sua sponte* rationale of failure to preserve, when in fact the ground was preserved, without first giving the parties an opportunity to address the issue by briefing it, conflicts with the basic tenets of our adversarial system of justice. This is a matter of substantial public interest warranting this Court's review under RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

A. The evidence pertaining to negligence and contributory fault.

A bicycle collided with a car on a clear October afternoon on Eighth Avenue near Pine Street in Downtown Seattle. CP 3; RP 217. Eighth Avenue is one way northbound with two lanes. RP 223, 1071. The right-hand lane was painted with shared-lane markings (or "sharrows"), indicating that it was for shared use by vehicles and bicycles. RP 1284; Ex. 208 at 9. Just before the block where the collision occurred, Eighth Avenue passes underneath the Washington State Convention Center and then intersects with Pine Street. RP 1141. *See* Illustrative Map (Appx. E).

The collision occurred while Taylor Warn, a valet driver employed by Standard Parking, was taking a Toyota sedan from the parking garage at the Olive 8 Hyatt to a waiting customer at the nearby Grand Hyatt. CP 3; RP 1140. Warn began his trip by driving the vehicle out of the parking garage and directly across Eighth Avenue from west to east, heading into a surface-parking lot across the street. RP 1140; Ex. 25. He regularly used this route because it allowed him to access an alleyway from which he could enter westbound traffic on Pine, reducing the time required to return a vehicle to a customer waiting at the hotel.

Warn testified that he stopped three times as he made his way across Eighth Avenue. He first stopped just inside the parking-garage, before exiting. RP 1141-42. After waiting for some pedestrians to pass on the sidewalk, he removed his foot from the brake pedal and, without depressing the accelerator pedal, allowed the momentum from the vehicle's

transmission to move the car forward across the sidewalk and up to the edge of the roadway. RP 1142. Warn stopped a second time before entering the roadway, to assess "the flow of traffic." RP 1142. Looking to his right—the direction of oncoming traffic approaching northbound from the Pine Street intersection—Warn saw two vehicles approaching and observed the pedestrian signal at the intersection counting down, meaning that the vehicle signal would soon turn red. RP 1142-43.

After waiting for the two vehicles to pass and observing no more traffic approaching on either of the street's two travel lanes, Warn again removed his foot from the brake pedal, allowing the vehicle to roll forward slowly into the roadway. RP 1141-44. Warn had driven partway across Eighth Avenue when he noticed a group of pedestrians on the opposite sidewalk, about to cross the driveway he intended to enter. RP 1144. Warn stopped the vehicle in the middle of the street for two to three seconds—his third stop—to allow the pedestrians to pass. RP 1144, 1146.

After the pedestrians had passed, and as Warn started to take his foot off the brake so he could then resume moving forward and complete his cross of Eighth Avenue, he heard something hit the car from the right:

> And then possibly two, maybe three seconds at most go by as I'm waiting there letting the pedestrians finish up their scurrying across, and at that moment is when I took my foot off the brake to allow my—the vehicle to continue moving towards my desired destination of that parking lot. And ***as I'm taking my foot off the brake*** is when I heard a loud bang sound. …

RP 1144-45 (emphasis added). Warn saw a "flash of a figure coming across the hood," quickly realized it was a bicyclist, and got out of the vehicle to

assess the situation. RP 1145-46. There was no evidence that Warn looked to the right a second time after entering the roadway; he told the investigating officer that, just before the collision, something had caught his attention and he was looking to the left. RP 221, 260-61.

The bicyclist was Plaintiff Thyce Colyn. As shown by the police-dashcam footage looking back toward the Pine Street intersection, a sedan stopped perpendicular across the roadway would have been visible to Colyn from as far back as the intersection. Ex. 208 at 9 (Appx. F). Yet he did not see the vehicle driven by Warn until the instant before the collision—too late to avoid it—apparently because something had caught his eye to the left.[1] RP 1298. Had Colyn seen the sedan from the intersection, he would have had ample time to stop. He agreed 20 miles per hour was a reasonable estimate of his speed, and the collision occurred about 155 feet past the intersection. *See* RP 1306, 1310, 1865.[2] Given a standard perception-reaction time of 2.5

[1] Colyn did not testify regarding liability issues; his deposition testimony was related by Hunter, without objection. *See* RP 1298. In the Court of Appeals, Plaintiffs interpreted Colyn's testimony (related by Hunter) as meaning that the vehicle driven by Warn was what caught his eye. But this interpretation of Colyn's testimony assumes he noticed the vehicle as he was passing in front of it, and that it moved towards him—an interpretation the jury was entitled to reject given the other evidence showing Colyn struck Warn's vehicle just before it could resume moving forward. Moreover, Plaintiffs' interpretation concedes that Colyn failed to see what was there to be seen.

[2] The Court of Appeals' notion that the 155-foot distance was posed by Plaintiffs' counsel as a hypothetical is both wrong and beside the point. *See* Decision at 19-20. Although that distance was used in a hypothetical, the distance itself was stated as fact, and more than once, by Plaintiffs' counsel. *See* RP 1310, 1865. Moreover, other sources can confirm the 155-foot distance, including the "Measure Distance" feature in Google Maps. *See* https://support.google.com/maps/answer/1628031 (last visited April 16, 2019). It can also be estimated from the police-dashcam screenshot or aerial photograph, which were in evidence. Ex. 25; Ex. 208 at 9 (Appx. F).

seconds, Colyn needed 92.33 feet to perceive and react to the Toyota and stop—well within 155 feet.[3] *See* RP 1296, 1306, 1308, 1310.

The physical evidence was consistent with the bicycle having hit the car, rather than the car hitting the bicycle: the bicycle's front wheel was deformed, and the sedan's front corner and hood were damaged on the passenger side. RP 1093, 1145, 1150, 1291-92; Ex. 208 at 1-3, 11. The accident reconstructionist, John Hunter, testified that the "leading edge" of the bike—the front wheel—hit the car's right front corner. RP 1291-92.

B. The record regarding the misconduct of Plaintiffs' counsel.

Plaintiffs' counsel engaged in misconduct throughout the trial. Lead counsel began by vouching for his clients' case in opening statement, stating that counsel had investigated and found it was a "righteous case" to move forward with. RP 164-65. Counsel then proceeded to ask hundreds of objectionable questions of all kinds during witness examination. *See Appellants' Opening Brief*, Appx. B. Defendants moved for a mistrial after Plaintiffs' counsel, while cross-examining Hunter, implied Warn was lying and accused Hunter of having been "barred for lying to a court" in another case, when in fact that court had merely found that his testimony lacked a credible foundation. RP 1312-13, 1334-36; CP 1578-80.

[3] Traveling at 20 miles per hour, the bicycle is moving at 29.33 feet per second (this is calculated by simple math: divide the speed in miles per hour by 60 minutes to obtain miles per minute; multiply this by the number of feet in one mile (5,280) to convert to feet per minute; divide the result by 60 for feet per second). A bicycle traveling at 20 miles per hour needs 19 feet to stop. RP 1296. With 2.5 seconds needed to perceive and react, Colyn needed a total of 92.33 feet. Even assuming Colyn was traveling as fast as a *car* driving at the speed limit (30 miles per hour), he needed 153 feet to perceive and react to the Toyota—still within the available 155 feet. RP 1309-10.

By the time of this motion, defense counsel had objected 186 times, and the court had sustained 130 of those objections (70%). *See Appellants' Opening Brief*, Appx. B. Yet in denying Defendants' motion, the court lamented that its hands were tied because the defense was supposedly not objecting and needed to "begin objecting":

> In general, Mr. Beninger, you have a number of times made comments about the credibility of witnesses and used the word "lies" in such a way that you are inappropriately commenting on the credibility of witnesses and vouching, and I want that to stop.
>
> There are so many times in this case where there have been inappropriate questions and characterizations and testimony from you, ***but I'm not getting objections from the defense. So my hands are tied.***
>
> I would encourage you, Ms. Hunter and Mr. Skinner, to ***begin objecting*** to those things because there have been so many objectionable questions in this case, and there has been so much testimony by Mr. Beninger. Feel free to object.

RP 1336 (emphasis added). Notwithstanding the court's rebuke, defense counsel were forced to continue objecting, and were sustained an additional 67 times. *See Appellant's Opening Brief*, Appx. B. The court would ultimately sustain 202 (nearly two thirds) of Defendants' 324 total objections. *See id.*

C. Summary of proceedings in the trial court and the Court of Appeals.

At the close of the evidence, the trial court granted judgment as a matter of law to Plaintiffs on negligence and contributory fault. RP 1905. The jury returned a total verdict of over $38 million. CP 1708-09. The trial court summarily denied Defendants' motion for a new trial or remittitur,

providing no rationale. CP 2377-78. The Court of Appeals affirmed and denied Defendants' motion for reconsideration.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Decision of the Court of Appeals affirming a directed verdict on the issue of breach of duty, against a "disfavored" driver defendant in a street-crossing collision case, conflicts with this Court's decision in *Fetterman v. Levitch*, 7 Wn.2d 431, 109 P.2d 1064 (1941), and the general rule that whether such a driver breaches the duty they owe when crossing a street depends on the individual facts and circumstances and thus is for the jury to determine.

The Court of Appeals upheld the directed verdict against the disfavored driver, Warn, on the ground that Warn breached a duty he had *as a matter of law* to re-check to the right before resuming his cross:

> [T]he uncontroverted evidence established Warn breached the duty to yield by not looking in the direction of the oncoming traffic when he removed his foot from the brake and the automatic transmission moved the car forward. The undisputed evidence established Warn was looking left at the time of the collision and did not yield the right-of-way to Thyce, the favored driver. The [trial] court did not err by concluding as a matter of law that Warn breached the duty to yield the right-of-way.

Decision at 14-15.

That holding conflicts with this Court's decision in *Fetterman v. Levitch*, 7 Wn.2d 431, 109 P.2d 1064 (1941). In an opinion authored by Justice Steinert, this Court upheld a jury verdict in favor of a plaintiff whose disfavored vehicle was in the same position as Warn's when it was struck broadside by an approaching (favored) vehicle. Like Warn, the disfavored driver in *Fetterman* had checked to the right before beginning his cross of an intersection but then had to stop while still in the street, to allow

pedestrians who appeared in front to get out of his way. This Court held that whether the driver had to re-check before resuming his cross was a question of fact for the jury to resolve:

> In the performance of the duty resting upon him, it is obviously essential that the disfavored driver look to his right from a point *at which he can see and reasonably decide* whether he can proceed across the intersection with a fair margin of safety. The maximum distance from the curb line at which the required observation may be made necessarily depends on the surrounding conditions and circumstances. …
>
> Whether or not the disfavored driver has performed the duty incumbent upon him is ordinarily a question for the jury, and cannot be decided by the court as a question of law, unless the circumstances are such that it can be said that reasonable minds could not arrive at different conclusions thereon. ….
>
> Whether or not respondent [plaintiff], in the case at bar, acted reasonably in relying upon an unobstructed observation made twenty-five or thirty feet from the intersection was, at least, under all the accompanying circumstances, a question upon which reasonable minds might differ. ….
>
> *That it was likewise for the jury to say whether or not respondent, after his initial look to the right, acted reasonably in failing to look in that direction again, or continuously, while crossing the intersection,* ***has been definitely settled in this jurisdiction***.

7 Wn.2d. at 436-440 (emphasis added in part) (citing, for the last point quoted, this Court's decisions in *Olsen v. Peerless Laundry*, 111 Wash. 660,

191 P. 756 (1920); *Huber v. Hemrich Brewing Co.*, 188 Wash. 235, 62 P.2d 451 (1936); and *Lindberg v. Steele*, 5 Wn.2d 54, 104 P.2d 940 (1940)).[4]

This Court's decision in *Fetterman* is still the controlling Washington law and applies when—as here—a disfavored driver is entering against the flow of favored traffic from an alley or driveway. Consistent with the rule applied in *Fetterman*, Washington Pattern Jury Instruction 70.02.04, entitled "Right of Way—Emerging from Alley, Driveway, or Building in Business or Residence District," states that the disfavored driver's duty in that situation *is not absolute*:

> A statute provides that a driver who is emerging from [an alley] [a driveway] [a building] shall stop the vehicle immediately before driving onto a sidewalk or onto the sidewalk area extending across the [alley] [driveway] [and shall yield the right of way to any pedestrian as may be necessary to avoid collision] [and upon entering the roadway shall yield the right of way to all vehicles approaching on the roadway].
>
> *This right of way, however, is not absolute but relative, and the duty to exercise ordinary care rests upon both parties. The primary duty, however, rests upon the driver of the emerging vehicle, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.*

WPI 70.02.04 (emphasis added).[5]

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[4] Defendants' appellate counsel located *Fetterman v. Levitch* during a supplemental case search done prior to argument, and submitted the decision, along with several others, in a Statement of Additional Authorities filed and served on June 27, 2019, two weeks prior to oral argument. Plaintiffs moved to strike, on the ground that cases available for submission during briefing may not be submitted in a statement of Additional Authorities. The Court of Appeals denied the motion to strike. Defendants' counsel discussed *Fetterman* extensively during oral argument.

[5] As discussed more fully in Section V.D, Defendants cited WPI 70.02.04 in their trial brief and during the argument opposing Plaintiffs' directed verdict motion, and they proposed that it be given to the jury.

So long as motor vehicles and bicycles remain the province of human beings to operate, the correct understanding and application by the trial and appellate courts of this state of the legal rules intended to assure safe conduct in the operation of such vehicles, and accountability for injury caused by breach of those rules, will be a matter of substantial public interest. Given the evidence, under the controlling Washington law the jury should have been allowed to decide whether Warn was negligent. The Court of Appeals' decision to affirm the trial court's directed verdict against Warn warrants review under RAP 2.3(b)(1) and 2.3(b)(4).[6]

B. The Decision of the Court of Appeals affirming a directed verdict in favor of a "favored" bicyclist plaintiff on the issue of contributory fault, when the bicyclist admitted he was not looking ahead just before the accident, based on a supposed failure by the defendant to prove the "point of notice," frustrates the purpose of the point-of-notice rule.

The Court of Appeals affirmed the trial court's directed verdict dismissing Defendants' affirmative defense of contributory fault on the ground that Mr. Hunter, Defendants' accident reconstructionist, did not expressly opine as to the location of the point when Colyn knew he could avoid the collision with Warn's car. Decision at 17-20. In doing so, the Court of Appeals turned the concept of the "point of notice" into a requirement that a defendant asserting contributory fault must prove that the plaintiff actually noticed the defendant's vehicle at a point when the plaintiff

[6] The Court of Appeals' attempt to sidestep the controlling law, based on a supposed failure to preserve that issue, will be addressed in Section V.D of this petition.

was still in a position to take action that would have avoided the accident; failing such proof, the defense fails as a matter of law.

The Court of Appeals is correct that Mr. Hunter did not presume to locate such a point. But affirming the dismissal of Defendants' contributory-fault defense on that basis betrays a fundamental misunderstanding of the concept of "point of notice." The "point of notice" is simply the point at which a plaintiff, exercising ordinary care, *should* have recognized the need to take action that, if taken by then, would have avoided the accident. *See, e.g.*, *Maxwell v. Piper*, 92 Wn. App. 471, 476-77, 963 P.2d 941 (1998). And as the facts of this case illustrate, the "point of notice" is more in the nature of a "point of no return"—a cut-off point beyond which the accident is no longer avoidable.

Here, the physical facts established by the police-dashcam recording show that a bicyclist in Colyn's position, proceeding north on Eighth Avenue, had a clear and unobstructed view from the intersection of Eighth and Pine all the way north to where Warn was crossing. *See* Ex. 208 at 9 (Appx. F). Colyn's counsel repeatedly admitted that the distance from Warn's car back to the middle of the intersection was 155 feet; given Colyn's claimed speed of 20 miles per hour, and applying the speed-and-distance formula testified to by Hunter, the jury could have found that Colyn could have avoided the accident had he begun to slow down as close as 92.33 feet from Warn's parked car. *See* RP 1296, 1306, 1308, 1310, 1865. The jury could also have found that Warn missed his chance to avoid the accident because he was not paying attention: for whatever reason, he was

looking to his left instead of straight ahead, and did not look back until it was too late to avoid the collision. RP 1298.

Why should it matter, then, that Mr. Hunter the accident reconstructionist did not connect up these dots for the jury? Hunter gave the jury the only tool it needed from him: the speed-and-distance formula. With that formula, the jury could derive the point of notice—more precisely, the point of no return. And with that in hand, the jury could conclude from the balance of the evidence—the clear view up Eighth, Colyn's admission that he was looking to the left and not straight ahead—that the accident happened *solely* because of Colyn's negligence.

The Court of Appeals has distorted the concept of the "point of notice," transforming it into a barrier to holding a plaintiff accountable for their responsibility for an accident that a jury could very well conclude would never have happened had the plaintiff been exercising due care. The Court of Appeals' decision to affirm the directed verdict dismissing Defendants' contributory-fault defense is a matter of substantial public interest warranting review under RAP 2.3(b)(4).

C. The Decision of the Court of Appeals to affirm a trial court's denial of a motion for new trial due to misconduct of counsel, when the record showed that the trial court did not recognize the extent of the misconduct unfolding during the course of the trial, and the trial court offered no rationale for its decision to deny a motion for new trial, frustrates the purpose of the case-law rule calling for deference to a trial court's new-trial determinations.

The Court of Appeals affirmed the trial court's denial of a new trial for counsel misconduct first by characterizing the issue as one where

counsel, having been called out for improper questioning, reframed the objected-to question so it was no longer objectionable, and then by deferring to the trial court's discretion to determine whether that situation deprived Defendants of a fair trial. Decision at 24-25.

The Court of Appeals' characterization of the issue is untenable and masks the deeper problem presented by the trial court's refusal to grant a new trial. This case is not at all comparable to the situations involved in the cases cited by the Court of Appeals. This case involved trial counsel systematically engaging in improper questioning, which forced defense counsel to object again and again in the jury's presence. By the end of an eight-day trial, the defense had objected 324 times and been sustained 202 of those times.[7] *See Appellants' Opening Brief*, Appx. B. This Court has repeatedly recognized the prejudice to a party put in the position Defendants were put into here, and has affirmed the grant of a new trial when counsel ignores a warning to cease and desist and instead forges ahead with improper questioning. *See, e.g., Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012).

Here, the trial court, on the sixth day of trial, warned Plaintiffs' counsel that he had to stop his improper questioning (vouching, testifying, and more). But the court then, astonishingly, turned to defense counsel and stated that its "hands [were] tied" and that defense counsel must "begin objecting." RP 1336. The court said this at the very moment when the

[7] Nor is this a case of *tu quoque*; review of the trial transcript will confirm that Defendants' questioning was objected to at only a fraction of the rate at which Defendants were compelled to object to questioning by Plaintiffs' counsel.

defense *had already objected 186 times and been sustained 130 of those times.* The record simply cannot be denied: the trial court indisputably had lost the thread of what was going on in the courtroom.

Then, after the jury rendered a $38 million verdict—in a case involving no death, no paraplegia, no loss of limb, an ability to continue working (albeit with diminished capacity), and even an ability to partially resume bicycling (the singular passion of Mr. Colyn and his wife)—Defendants moved for a new trial, specifically basing this request on counsel's misconduct. CP 1725-44. The trial court denied Defendants' motion summarily, giving no reason for that ruling. CP 2377-78. This is an astonishing omission for a Washington trial court; our courts routinely offer reasons for their rulings on new-trial motions so that the appellate court can understand why the trial court has chosen to exercise its discretionary authority one way or the other.

When a trial court exercises that authority based on a misapprehension of the material facts, the court by definition abuses that discretion. *See, e.g.*, *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 813, 425 P.3d 807 (2018); *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). Here, the trial court showed it had lost the critical thread, telling Defendants they needed to "begin objecting" to the improper questioning when they had already objected 186 times and had 130 of those objections sustained. The Court of Appeals' decision to affirm the trial court's subsequent summary denial of Defendants' new-trial motion, which was based expressly on the

prejudice from that improper questioning, is a matter of substantial public interest warranting review by this Court. RAP 2.3(b)(4).

D. The Decision of the Court of Appeals to resolve a central basis for appellate relief by *sua sponte* ruling that the basis had not been preserved, when the opposing party made no claim of failure to preserve in its brief, the Court of Appeals did not raise the issue until its decision terminating review, *an*d post-decision review of the record establishes that the basis for relief had been preserved, conflicts with the basic requirements of our adversarial system of justice.

The Court of Appeals declined to address Defendants' primary basis for a remand for a full trial on the issue of Warn's liability, stating that the issue had not been preserved. *See* Decision at 15, n.3.[8] Plaintiffs did not assert in their brief or at oral argument that the issue had not been preserved. The Court of Appeals did not raise the issue at oral argument. The Court of Appeals did not request briefing on the issue. The first "notice" of the issue received by Defendants was the Court of Appeals' decision terminating review.

Defendants moved for reconsideration, and in that motion cited and quoted the record establishing that the issue had been preserved.

First, the issued was raised in Defendants' trial brief:

> Mr. Warn was cited after the accident for "failing to yield the right of way," but the ticket is a red herring. Drivers must yield for pedestrians, which is why Mr. Warn was in the roadway. WPI 70.03.02 (drivers shall stop and remain stopped to allow a pedestrian to cross the roadway). Bicyclists and drivers alike also have a duty

[8] The Court of Appeals did not reference *Fetterman* in its statement that the issue was not preserved. As previously explained (footnote 4, *supra*), *Fetterman* was located prior to oral argument during a supplemental case search and submitted in a statement of additional authorities that the Court of Appeals refused to strike.

> to avoid a collision, even if someone violates their right-of-way. WPI 70.01 (every person using a public street must exercise ordinary care to avoid placing himself or others in danger and avoid a collision); WPI 70.02[.]04 (right-of-way is not absolute but relative, and the duty to exercise ordinary care rests upon both parties). Stated differently, an alleged violation of someone's right-of-way does not give them license to hit you. Everyone on a roadway is required to adjust to changing conditions and observe what is there to be seen. WPI 12.06 (duty of seeing what would be seen by a person exercising ordinary care); 70.05 (bicyclist or car shall reduce speed when special harm exists with regard to street conditions).

CP 1182 (Defendants' Trial Brief at 8) (copy attached as Appx. C), cited and quoted in Motion for Reconsideration at 6.

Second, the issue was raised in Defendants' argument against the motion for directed verdict:

> We would direct the Court to look specifically at the instruction regarding WPI 70.01. It says everyone using a public roadway must exercise ordinary care to avoid placing himself or others in danger and avoid a collision.
>
> ****
>
> What we know from this record is that Mr. Warn came out of the garage. He did nothing illegal. He was there to be seen, which is one of the instructions that's been proposed by both parties. Both parties had a duty to exercise ordinary care, ***and as instruction 70.02.04 says***, the mere violation of a right-of-way is not determinative of anything, it's variable, and both parties still have an obligation to act and avoid a collision.

RP 1875, 1878 (emphasis added) (copy attached as Appx. D), cited and quoted in Motion for Reconsideration at 7-8.[9]

[9] Defendants also included WPI 70.02.04 in their proposed instructions. *See* CP 1212.

In both the trial brief and during the argument against the motion for directed verdict, defense counsel expressly referenced WPI 70.02.04. As discussed in Section V.A, that instruction states that whether a disfavored driver fulfills their duty of care is a fact issue that must be resolved in light of the specific facts and circumstances of the accident at hand.[10]

An appellate court should decide cases based on the issues framed by the parties and not go outside those issues without giving the parties a fair opportunity to address that proposed departure. This is a bedrock principle of our adversarial system of justice. The late Justice Utter wrote:

> [W]e will generally decide a case only on the basis of issues set forth by the parties in their briefs unless we give parties the opportunity to present written argument on the issue raised by the court, RAP 12.1, or believe it would serve the ends of justice to waive the opportunity to be heard, RAP 1.2(c). …. This…ensure[s] the opinion [of the Court] ha[s] the approval of at least one party, and that we [have] had the opportunity to consider all pertinent aspects of the issue. As another court has noted, it is a "premise of our adversarial system ... that ***appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them***." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

[10] The Court of Appeals ordered an answer to the motion. The answer argued that the motion should be denied but did not deny that the issue had been preserved by Defendants' trial brief and by Defendants' argument in opposition to the directed-verdict motion.

Barr v. Day, 124 Wn.2d 318, 333, 897 P.2d 912 (1994) (concurring, dissenting in part) (emphasis added).[11]

Here, the Court of Appeals acted as just such a self-directing board of legal inquiry and research when it determined that Defendants had failed to preserve their primary basis for relief from a directed verdict that deprived them of a jury trial on liability. Plaintiffs had not asserted failure to preserve, and Defendants were given no opportunity to address it. And when the Court of Appeals was shown that the issue had in fact been preserved, it summarily denied reconsideration. This departure from the bedrock principles of our adversarial system of appellate justice is a matter of substantial public interest warranting review by this Court. *See* RAP 13.4(b)(4).

VI. CONCLUSION

This Court should grant review, and order a full trial on the issues of liability and contributory fault, and a new trial on the issue of damages.

[11] That this is indeed a bedrock principle of the Anglo-American system of appellate justice is confirmed by the following, illustrative federal and state appellate decisions: (1) *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); (2) *Loher v. Thomas*, 825 F.3d 1103, 1119-1120 (9th Cir. 2016) (citing *Greenlaw* and numerous other authorities); (3) *Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn.*, 311 Conn. 123, 84 A.3d 840, 853-75 (2014) (also citing *Greenlaw* and numerous authorities). The Connecticut Supreme Court's decision in *Blumberg* is particularly instructive. There the court granted review specifically to decide when an intermediate appellate court could properly decide a case based on an issue not raised by the parties and, after a thorough review of the authorities, including a comprehensive survey of the court's own jurisprudence on the subject, concluded this may be done only when the intermediate appellate court has given notice and allowed the parties to submit supplemental briefing on the point. Defendants urge this Court to grant review and adopt Connecticut's approach.

Respectfully submitted this 24th day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED: April 29, 2019.

Patti Saiden, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife,	)	No. 76425-0-I
Respondents,	)	DIVISION ONE
v.	)	
STANDARD PARKING CORPORATION, a Foreign Corporation; TAYLOR WARN, individually; and UNKNOWN JOHN DOES,	)	UNPUBLISHED OPINION
Appellants.	)	FILED: January 22, 2019

SCHINDLER, J. — While driving across a one-way two-lane street, Standard Parking Corporation valet Taylor Warn collided with bicyclist Thyce Colyn. There is no dispute Warn had a duty to yield and Thyce Colyn had the right-of-way. Thyce and Amy Colyn filed a personal injury lawsuit against Standard Parking and Warn. At the conclusion of the evidence, the court granted the plaintiffs' motion for judgment as a matter of law on the negligence of Warn and the failure to prove contributory negligence. The court instructed the jury that the negligence of Warn was established as a matter of law and Standard Parking was liable for the negligence of Warn. The court instructed the jury that Thyce Colyn was not negligent. The jury awarded Thyce

Colyn $7,259,238 for past and future economic damages, $4 million for past noneconomic damages, and $16 million for future noneconomic damages. The jury awarded Amy Colyn $2 million for past loss of consortium and $9 million for future loss of consortium. Standard Parking and Warn appeal the judgment on the verdict and the order denying the motion for a new trial. We affirm.

FACTS

Standard Parking Corporation provides valet service for the Grand Hyatt Seattle hotel located at 721 Pine Street. Taylor Warn worked as a valet driver for Standard Parking.

In 2012, the valets parked the cars of Grand Hyatt Seattle hotel guests at the Olive 8 parking garage located at 1635 Eighth Avenue. Eighth Avenue is a one-way two-lane northbound street. A painted bicycle symbol marks the right northbound lane as a shared car and bicycle lane.

Instead of driving northbound on Eighth Avenue to return a car to the Grand Hyatt, the valets used a "shortcut route." The valets would exit the Olive 8 parking garage driveway on Eighth Avenue, drive eastbound across the two one-way northbound lanes of traffic to a parking lot located across the street, turn right into an alley, and turn right on Pine Street.

At approximately 4:00 p.m. on October 8, 2012, Warn retrieved the Toyota Avalon of a Grand Hyatt hotel guest from the Olive 8 garage. It was a dry, bright sunny day. Warn drove the Toyota across Eighth Avenue toward the parking lot. Forty-seven-year-old Thyce Colyn was riding his bicycle on his way home from work in the far

northbound lane on Eighth Avenue. The Toyota collided with the bicycle. Thyce[1] hit the hood of the car and landed on the ground. After the collision, Warn moved the car. There was "an indentation on the hood of the vehicle" and the right headlight was "completely shattered."

Seattle Police Officer Joseph Belfiore responded to the 911 call. Officer Belfiore was the investigating officer in charge of interviewing witnesses, collecting evidence, and preparing a "Traffic Collision Report." Officer Belfiore contacted medics and spoke to Warn. An in-car "dash cam" recorded the conversation with Warn. Warn told Officer Belfiore that before the collision, he was looking to the right toward oncoming traffic, but then something "caught his eye" and he was looking "left" when the collision occurred.

The force of the collision bent the front tire of the bicycle, cracked the bicycle frame near the left pedal, and cracked Thyce's bicycle helmet. The leather on the left bicycle handle was ripped and unraveled.

Thyce suffered "high energy" traumatic injuries from the force of the collision. His acetabular hip socket was broken, his pelvic bone was "shattered," the rotator cuff in his right shoulder was damaged, and he suffered traumatic brain injury. Thyce underwent a number of surgeries during a lengthy stay at Harborview Medical Center. In order to repair the pelvic bone, the lateral femoral cutaneous nerve had to be severed and permanent hardware installed. After his release from Harborview, Thyce spent approximately 55 days in an inpatient rehabilitation center.

At first, Thyce could not walk. Thyce uses a wheelchair. After four years of physical therapy, Thyce can walk with the assistance of forearm crutches or a walker. It takes "a lot of effort" for him to walk.

[1] We refer to Thyce Colyn by his first name for clarity.

Thyce is a "high risk patient" for hip replacement because of the surgeries to repair his pelvis. The "[b]est case scenario would be that he would be able to walk around half to . . . one full revolution . . . around the track. . . . [W]hich is about a quarter mile."

Thyce suffers from severe chronic headaches and is in constant pain from his hip, pelvis, and damaged nerve. Thyce has cognitive impairment, tinnitus, and sensitivity to light as a result of the traumatic brain injury. Thyce is no longer able to recreate complex visual images. Thyce was diagnosed with depression, anxiety, and post-traumatic stress disorder.

Before the collision, Thyce was an expert in complex traffic signal maintenance and computer systems. With accommodation for his disabilities, Thyce was able to return to work at the Seattle Department of Transportation for approximately four hours a day. Thyce could no longer perform complex tasks. When he returns home from work, Thyce is exhausted and depressed. If Thyce were "not able to continue to work at the City of Seattle[,] . . . he's probably unemployable."

Thyce and his spouse Amy Colyn traveled and frequently rode their tandem bicycle, "around 40,000" miles. After the collision, their relationship changed from "husband and wife" to patient and caregiver. Amy[2] works fulltime and is the primary caregiver.

On July 14, 2015, Thyce and Amy (collectively, Colyn) filed a personal injury complaint for damages against Standard Parking and Warn. The complaint alleged Thyce had the right-of-way, Warn "failed to yield the right of way to [Thyce] and struck him in Mr. Colyn's lane," and Warn was acting "within the course and scope of his

[2] We refer to Amy Colyn by her first name for clarity.

employment" with Standard Parking when he hit Thyce. The complaint alleged Warn admitted he was looking the other way and did not see Thyce before hitting him with the Toyota. "Warn told the investigating police officer that he did not see [Thyce] because he (Defendant Warn) was looking north, away from oncoming traffic, as he (Warn) was crossing 8th Avenue." The complaint alleged the police cited Warn for failing to yield the right-of-way to "bicyclists when emerging from an alley, driveway or building, as necessary to avoid a collision, in violation of Seattle Municipal Code 11.58.230 and RCW 46.61.365." The complaint attached a copy of the Seattle Municipal Court "Agreement to Defer Finding on Traffic Infraction." The agreement states Warn admits he committed the traffic violation. Colyn alleged Standard Parking did not properly train or supervise Warn and the "practice of short cutting across 8th Avenue to save time created an unnecessary and unreasonable risk of harm to cyclists, motorists and pedestrians travelling on 8th Avenue."

Warn and Standard Parking each filed an answer and asserted affirmative defenses. Warn admits he told the police he "did not see Mr. Colyn" but denies he "failed to yield the right of way" to Thyce or "struck him in Mr. Colyn's lane." Warn asserted as an affirmative defense that "damages may have resulted from plaintiffs' own failure to exercise ordinary care or by their own negligence and recklessness" and "[p]laintiffs may have failed to mitigate, minimize, or avoid the damages."

Standard Parking admitted Warn "was employed by Standard Parking and was operating a hotel patron's vehicle at the time of the collision." Standard Parking asserted as an affirmative defense that the "alleged damages may have resulted from plaintiffs' own failure to exercise ordinary care or by their own negligence and

recklessness" and that "[p]laintiffs may have failed to mitigate, minimize, or avoid the damages allegedly sustained and their recovery, if any, should be reduced appropriately."

The eight-day jury trial began on November 28, 2016. Colyn called more than 15 witnesses to testify, including Seattle Department of Transportation supervisors, Officer Belfiore, former Standard Parking manager Sean Curry, primary care physician Dr. Joan Olson, orthopedic surgeon Dr. Jonathan Clabeaux, physical medicine and rehabilitation specialists Dr. Andrew Friedman and Dr. Jared Olson, physical therapist Dr. Catherine Nutting, neurologist Dr. Braden Nago, clinical psychologist Dr. Jeffrey Sherman, vocational rehabilitation and case manager Anthony Choppa, and economist Dr. Christina Tapia.

Seattle Department of Transportation supervisors testified about the work Thyce performed before the collision and his struggle after the collision to perform tasks—"he's certainly . . . not the same man as he was before." Thyce was "a lot slower mentally" and could "only handle the simplest task."

With assistance, Thyce walked to the witness stand and testified about the life he and Amy had before the collision and how "now Amy's been thrust into the role of a caretaker" with no "time for visiting her friends or family." Amy testified about the logistics of caring for Thyce. Amy testified Thyce is "in constant pain" and "very, very sad."

At the close of the plaintiffs' case, Standard Parking and Warn (collectively, Standard Parking) filed a CR 50 motion for judgment as a matter of law. Standard Parking argued Colyn did not prove the elements of negligence or wage and economic

loss. The court denied the motion.

Standard Parking called more than 10 witnesses to testify, including Warn, accident reconstruction expert John Hunter, orthopedic surgeon Dr. Stanley Kopp, neuropsychologists Dr. Gina Formea and Dr. Alan Breen, psychologist Dr. Gerald Rosen, neurologist Dr. Roman Kutsy, psychiatrist Dr. Kevin Berry, and certified public accountant and forensic economist William Partin.

At the conclusion of the evidence, Colyn moved for judgment as a matter of law on the negligence of Warn, the liability of Standard Parking, and the affirmative defense of contributory negligence. Colyn argued there was no evidence to support finding Warn yielded the right-of-way to Thyce. Colyn argued Standard Parking did not present evidence that would support finding Thyce was contributorially negligent for the collision. Standard Parking argued the issues of fault and contributory negligence should be submitted to the jury.

The court asked the Standard Parking attorney to "point out to me what evidence there is of failure to use reasonable care on the part of Mr. Colyn specifically." The attorney argued, "It was a bright, sunny day; it's a street that is controlled by a traffic light; and the side profile of this vehicle was 16 1/2 feet." The attorney stated, "[T]he car is perpendicular, and we've admitted to the fact that it was perpendicular." The attorney argued, "[E]veryone using a public roadway must exercise ordinary care to avoid placing himself or others in danger and avoid a collision."

The court reiterated, "But, again, where's the evidence that he didn't" use reasonable care.

> [DEFENSE COUNSEL]: Well, first of all, how about the testimony from Mr. Warn? Mr. Warn's testimony is completely uncontradicted, and

> he says he was stopped for three seconds.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: Three seconds is long enough. That is the amount of time for a yellow stoplight. That is long enough for an approaching vehicle, be that a bicycle, or be that a car, to recognize something is there and stop. It's why yellow stoplights are three seconds. We know that drivers — and consistent with Mr. Hunter's testimony — can recognize something and stop in three seconds.
>
> Mr. Colyn presented no evidence to rebut Mr. Warn's testimony that he was stopped for three seconds.

The court states, "I didn't hear Mr. Hunter testify that there was a point in time when Mr. Colyn would have, could have, or should have seen the car and had enough time to stop." The Standard Parking attorney agreed "we don't know exactly where" Thyce was before or after the collision.

> I believe [Hunter] acknowledges that we don't know exactly where Mr. Colyn was. He could have been as far back as the intersection. He could have been across the intersection. We don't know because he refused to testify about the accident.

The court granted the motion for judgment as a matter of law. The court ruled Warn breached his duty of care by not yielding the right-of-way to Thyce as the favored driver. The court ruled Standard Parking did not meet the burden of proving Thyce was contributorially negligent.

The jury instructions state the negligence of Warn and Standard Parking as his employer has been established as a matter of law. Jury instruction 7 states:

> You do not need to decide whether defendant Taylor Warn was negligent or whether he was acting within the scope of his employment with defendant Standard Parking. Mr. Warn's negligence has been established as a matter of law. Standard Parking is in turn liable for the negligence of its employee Taylor Warn.
>
> You are to decide what injuries and damages to plaintiffs were proximately caused by the defendants' negligence and what amount plaintiffs should recover. The plaintiffs have the burden of proof on these issues.

The jury instructions state Thyce was not negligent as a matter of law. Jury instruction 8 states, "You do not need to decide whether plaintiff Thyce Colyn was negligent with regard to the collision. It has been established that he was not."

The jury found the "proximate cause of injury or damage to the plaintiffs" was the negligence of Warn and Standard Parking. The jury awarded Thyce $7,259,238 for past and future economic damages, $4 million for past noneconomic damages, and $16 million for future noneconomic damages. The jury awarded Amy $11 million for past and future loss of consortium.

Standard Parking filed a CR 50(b) motion for judgment as a matter of law and in the alternative, remittitur or a new trial. The court denied the motion. The court entered judgment on the jury verdict.

ANALYSIS

Judgment as a Matter of Law on Negligence and Contributory Negligence

Standard Parking contends the court erred in granting Colyn's motion for judgment as a matter of law, ruling Warn breached the standard of care and Standard Parking did not present evidence to show contributory negligence.

We review a decision on a motion for judgment as a matter of law de novo, applying the same standard as the trial court. Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001); Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Judgment as a matter of law is appropriate when "viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Sing, 134 Wn.2d at 29; see CR 50(a)(1). Substantial evidence is a

"sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise." Helman v. Sacred Heart Hosp., 62 Wn.2d 136, 147, 381 P.2d 605 (1963); Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

Negligence

There is no dispute Warn had a duty to "yield the right-of-way" to all approaching vehicles while driving from the Olive 8 garage to the parking lot across the two lanes of traffic on northbound Eighth Avenue. RCW 46.61.365. RCW 46.61.365 states:

> The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.

The driver with the right-of-way is considered the favored driver and the disfavored driver must yield the right-of-way to the favored driver. RCW 46.61.365; Bowers v. Marzano, 170 Wn. App. 498, 506, 290 P.3d 134 (2012). The disfavored driver has a "duty to stop, observe all traffic upon the arterial and yield the right of way to all traffic moving in either direction." Petersavage v. Bock, 72 Wn.2d 1, 4-5, 431 P.2d 603 (1967). The disfavored driver bears "the primary duty to avoid a collision." Sanchez v. Haddix, 95 Wn.2d 593, 597, 627 P.2d 1312 (1981). There is no dispute that as a matter of law, Warn was the disfavored driver and Thyce was the favored driver.

Standard Parking contends the jury could have found Warn was not negligent. Standard Parking asserts that viewing the evidence in the light most favorable to the nonmoving party, substantial evidence would support the jury finding Warn did not breach the duty to yield to the bicycle. We disagree.

Officer Belfiore testified that Warn admitted he was looking southbound to the left and not northbound toward oncoming vehicles when he collided with Thyce:

> [Warn] stated he was leaving the Olive 8 hotel parking lot. After a car passed along 8th Avenue, which is a one-way road, he started to proceed directly across the street to the parking lot that was on the opposite side of the road.
>
> Mr. Warn stated to me that he had looked left because there was something that had caught his eye. And then the next thing he knew, the collision happened with Mr. Thyce, the bicyclist.
>
> Q. Did Mr. Warn explain to you at the time as to whether he hit the bicyclist or the bicyclist hit him?
> A. He admitted — he stated to me that he had collided into the bicyclist.
> Q. Did he ever say to you during the time that you were there that he stopped and was yielding for pedestrians?
> A. No. The only mention of a vehicle coming south was when he waited for that one car that was traveling along 8th Avenue to pass.
> Q. Would that have been in the inside lane?
> A. Yes. That would be the lane closest to the Olive 8 hotel, so the west northbound lane.
> Q. Now, you've listened to the video, the dash cam video, the part about the admissions several times; is that right?
> A. Yes.
> Q. And is what you can decipher from that consistent with what your memory was of what you were told?
> A. Yes.

Officer Belfiore testified the damage to the Toyota is consistent with the car crossing Eighth Avenue and hitting the bicycle going northbound:

> Q. (By [Plaintiffs' counsel]) Tell the jury — go ahead — where did you find the damage to the vehicle?
> A. The damage to the vehicle was on the front — if — here's the front side of the vehicle. This would be on the driver's side. This would be on the passenger side. It was approximately right over here, consistent with the vehicle hitting into an object as the vehicle was crossing 8th Avenue and Mr. Colyn coming northbound on 8th Avenue, it would look approximately like that; my left hand being the vehicle, my right-hand being the bicycle.

Officer Belfiore prepared a Traffic Collision Report and drew a diagram "based upon [his] conversations with" Warn. At trial, Officer Belfiore testified that he mistakenly labeled the bicycle as colliding with the car instead of the car colliding with the bicycle.

The court admitted and Colyn's counsel played the police car dashboard camera video and audio recording of the conversation between Officer Belfiore and Warn. Warn did not dispute Officer Belfiore's account of what he told the police.

Nonetheless, Standard Parking claims that because Warn had the right-of-way when he began crossing the two lanes of traffic and had to stop for two to three seconds to let pedestrians walk across the sidewalk in front of the parking lot, a jury could have concluded Warn did not breach the duty to yield to the bicycle. Standard Parking also cites the testimony of accident reconstruction expert Hunter that the physical evidence was consistent with the bicycle hitting the car. Neither Warn's testimony that he stopped before the car moved forward nor Hunter's testimony contradicts the undisputed admission that Warn did not look in the direction of oncoming traffic and breached the duty to yield to the bicycle that had the right-of-way.

Warn testified that as he was leaving "the front drive" of Olive 8," he "stopped before that sidewalk to allow for pedestrians" to pass. "[O]nce the pedestrians had cleared the path, I was able to take my foot off the brake" and "let the transmission of the automatic car kind of slowly roll" forward onto the sidewalk. Before driving across the one-way two-lane street, Warn said he stopped "to assess" the "flow of traffic" on Eighth Avenue and saw "two vehicles traveling northbound." Warn testified that after the two vehicles drove past him, he "did not see any more vehicles or — or anything of the sort in the flow of traffic heading my direction."

Warn testified that he "beg[a]n to allow the vehicle to roll . . . into the street again just by taking my foot off the brake." Warn said the automatic transmission was "actively pulling the car forward." As the car moved across Eighth Avenue toward the parking lot, Warn noticed "a group of pedestrians on the other side of the street on the sidewalk heading southbound." Warn testified that he "put the brakes on" to "facilitate . . . their right-of-way" and "allow the vehicle to remain stopped while allowing the pedestrians to . . . make their way across the sidewalk." Warn testified that after two or three seconds, he took his foot off the break to continue to move forward to the parking lot, when he heard "a loud bang."

> And then possibly two, maybe three seconds at most go by as I'm waiting there letting the pedestrians finish up their scurrying across, and at that moment is when I took my foot off the brake to allow my — the vehicle to continue moving towards my desired destination of that parking lot. And as I'm taking my foot off the brake is when I heard a loud bang sound, if you will. Maybe "bang" is not the right word to describe what it was, but that's the best way I can articulate it at this point. And it came from the right-hand side of the vehicle and — or maybe I suggest that because I heard it most clearly from my right ear rather than my left.

Warn testified he saw "a flash" of a figure with a bicycle helmet going over the hood of the Toyota.

> I saw what — kind of just a flash of a figure coming across the hood of my vehicle, and it seemed as if it had bounced off the hood and — and slid on the ground probably another few feet before it came to a rest. And at that point I realized it was a human and it was a cyclist, as the gentleman was wearing a bicycle helmet, and at that point I became to — began to realize the — the severity of the situation and began to fill with emotions.

Warn testified he "immediately stopped" and got out of the car to assist the bicyclist but "realized that there was nothing that I could do." Warn returned to the car because "I'm also realizing that I kind of had a vehicle parked just in the middle of the road. So I returned to the car, got in, continued to move the car out of the road and into

the parking lot." Warn testified that when he first got out of the car and when he returned to the car, he saw the bicycle was south of the car and on the right side.

Warn admitted he told the police officers he did not see the man on the bicycle because he was looking to the left instead of the right. Warn testified looking "[l]eft would be away from where the cars were coming from." Warn conceded Thyce had the right-of-way and he had the duty to yield to a bicycle traveling northbound on Eighth Avenue.

Accident reconstruction expert John Hunter testified that in his opinion, "[t]he leading edge of the bike was hit." Hunter concluded the physical evidence was consistent with his opinion that the bicycle hit the Toyota.

> I think that the bicycle interacted with the right-front corner of the car. And it did it with its leading edge, which is the tire. And possibly right where the frame starts to get bent that — that corner of the bike is not completely in front of the car, but it's trying to get there. And it's more of a sideswiping-type impact. And you have a dent to the hood of the car that's consistent with the rider interacting with the hood. . . . Just because the damage patterns that we have are a sideswiping-type impact, and [Thyce] doesn't interact with that parked car. He gets blasted off to the right, and he ends up underneath the parked car.

But even if the testimony that the bicycle hit the car is accurate, the uncontroverted evidence established Warn breached the duty to yield by not looking in the direction of the oncoming traffic when he removed his foot from the brake and the automatic transmission moved the car forward. The undisputed evidence established Warn was looking left at the time of the collision and did not yield the right-of-way to Thyce, the favored driver. The court did not err by concluding as a matter of law that

Warn breached the duty to yield the right-of-way.[3]

Contributory Negligence

Standard Parking contends the court erred in ruling as a matter of law that Thyce was not negligent. Standard Parking contends the evidence supports a jury finding that Thyce was contributorially negligent.

Standard Parking asserted contributory negligence as an affirmative defense and had the burden of proving Thyce was negligent by a preponderance of the evidence. Cox v. Spangler, 141 Wn.2d 431, 447, 5 P.3d 1265 (2000); Hart v. Clapp, 185 Wash. 362, 363, 54 P.2d 1012 (1936).

While the disfavored driver bears the primary duty to avoid a collision, the "rule of the road right of way is relative rather than absolute" and "does not absolve" a favored driver "from the duty to exercise due care." Cox v. Kirch, 12 Wn.2d 678, 682, 123 P.2d 328 (1942); Sanchez, 95 Wn.2d at 597.

The driver with the right-of-way has the right "to assume that cars entering upon [the roadway] will yield the right of way, and he is not obliged to anticipate that vehicles standing or approaching to enter will fail to yield the right of way." Petersavage, 72 Wn.2d at 5. However, when it becomes apparent to the favored driver that the disfavored driver "will not yield," the favored driver must "react concerning this possible danger." Petersavage, 72 Wn.2d at 5-6.

> When, in the exercise of reasonable care, it becomes apparent to the favored driver that the disfavored driver will not yield the right of way,

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[3] Standard Parking cites Lanegan v. Crauford, 49 Wn.2d 562, 304 P.2d 953 (1956), to argue Warn was entitled to deference from other vehicles until he cleared the road. We do not consider a theory that was not presented to the trial court. RAP 2.5(a); Cole v. Harveyland, LLC, 163 Wn. App. 199, 204, 258 P.3d 70 (2011). We note that Standard Parking concedes it is not invoking the "sudden-emergency doctrine" under Lanegan.

> the favored driver is, nevertheless, still entitled to a reasonable reaction time before he can be charged with contributory negligence.

Petersavage, 72 Wn.2d at 6.

As the favored driver, Thyce was entitled to rely on the reasonable expectation that Warn would yield the right-of-way until he reached the "point of notice." Channel v. Mills, 77 Wn. App. 268, 278-79, 890 P.2d 535 (1995); Whitchurch v. McBride, 63 Wn. App. 272, 276, 818 P.2d 622 (1991).

> [T]he favored driver is entitled to rely on the disfavored driver's yielding the right of way until the favored driver reaches that point at which a reasonable person exercising reasonable care would realize that the disfavored driver is not going to yield. It is from and after that point that a reasonable person's hypothetical conduct is compared with the favored driver's actual conduct in order to determine whether there is evidence sufficient to support a verdict that the accident would not have happened but for the favored driver's negligence. If there is no evidence showing the approximate location of that point, the reasonable person's conduct cannot be compared with the favored driver's, and the plaintiff has not borne the burden of producing evidence sufficient to support a finding that the accident would not have happened but for the favored driver's negligence.

Whitchurch, 63 Wn. App. at 276-77.[4] The "point of notice" is "that point at which a reasonable person exercising reasonable care would realize that the disfavored driver is not going to yield." Whitchurch, 63 Wn. App. at 276.

To show proximate cause, the party asserting contributory negligence must "produce evidence from which the trier of fact can infer the favored driver's approximate point of notice." Bowers, 170 Wn. App. at 506 (citing Channel, 77 Wn. App. at 279). The favored driver is entitled to judgment as a matter of law if the disfavored driver cannot establish the approximate point of notice. Bowers, 170 Wn. App. at 507; Whitchurch, 63 Wn. App. at 276-77. Standard Parking had the burden to prove that

[4] Footnotes omitted; citations omitted.

"between the point of notice and the point of impact," Thyce "would have been able to brake, swerve or otherwise avoid the point of impact." Channel, 77 Wn. App. at 278-79. Standard Parking must produce "evidence showing the approximate location" of the point where Thyce "would have perceived danger." Whitchurch, 63 Wn. App. at 276-77; Channel, 77 Wn. App. at 278-79. Standard Parking must show Thyce could have "stopped or otherwise avoided the collision" after passing the point of notice. Channel, 77 Wn. App. at 274-75.

Before trial, Colyn filed a motion in limine to exclude Hunter from testifying that a higher standard of care requires bicyclists to yield the right-of-way and avoid a collision. Colyn argued a higher standard of care for bicyclists is contrary to Washington law.

In his deposition, Hunter testified Thyce was not speeding and had the right-of-way. Hunter admits he does not know the point of notice where it was clear Warn was not going to yield the right-of-way or the point of impact. But Hunter testified that because bicyclists are not "conspicuous" and "do not . . . present much of a frontal profile," bicyclists must assume other drivers "are going to violate your right-of-way when you are riding a bicycle."

The court granted the motion in limine on the standard of care. The court ruled, "Mr. Hunter may testify as to his mathematical calculations pertaining to, e.g., stopping distances. He may not testify as to fault, or standards of care at odds with Washington law."

At trial, Hunter testified that after reviewing the Traffic Collision Report, the police car dashboard video, the deposition of Warn, the deposition of Thyce, and photographs of the bicycle and the car, in his opinion, the bicycle hit the Toyota.

Consistent with his deposition testimony, Hunter testified he did not know the point of notice or the point of impact. Hunter testified Thyce was not speeding and he did not know "what [Thyce] was doing" before the collision.

> Q. So if [Thyce is] pacing traffic and traffic is going the speed limit, it could be as much as 30 miles an hour?
> A. Right, but his impact speed is not going to be any faster than that. It just can't be based on the limited — I looked at — tried figuring out speed, and I looked at the physical evidence that we have and there's no way he's going faster than 30 at the time of impact.
> Q. And why do you say that?
> A. Just because the damage patterns that we have are a sideswiping-type impact, and he doesn't interact with that parked car. He gets blasted off to the right, and he ends up underneath the parked car. And there's no evidence that he interacted with this parked car. So there's a limited distance he can travel postcollision — like in our HVE[5] model, postcollision, how far did he go. And because you're limiting that distance, therefore you're limiting the speed that he's going.
>
> And I just, for the life of me, can't suggest that he was exceeding the speed limit at any time at impact. Now, I can't tell you what he was doing before that. It just depends on whether he brakes efficiently or not, or whatever happens before that. Obviously, he could scrub off some speed. But at impact, there's no way he's going faster than [the posted speed limit of] 30 [miles an hour].

Hunter testified that in his deposition, Thyce testified that he did not "notice" the Toyota "until just before the collision." Hunter testified Thyce said he "caught something from his eye to his left, and then there was the collision, and he attempted to brake." But as Hunter stated, he calculated the distances to brake but did not calculate "times." Hunter testified Thyce "was pacing traffic" but did not know his speed. Hunter testified there was "no way" Thyce was "going faster than 30 at the time of impact." Hunter did not testify how many feet-per-second a 20-mile-per-hour bicycle would travel.

[5] Human, vehicle, and environment.

During cross-examination, Hunter testified there would not be sufficient "perception-reaction time" to brake. According to Hunter, perception-reaction time is the time it takes to "perceive, decide and react."

> Q. So if we were to use — let's use your 30 miles an hour — and at 2.5 seconds, how much distance would you travel at 30 miles an hour?
> A. Well, 30 miles an hour is 44.1, but let's just say 44 feet per second at 2.5 seconds?
> Q. Yes.
> A. You'd cover about 110 feet.
> Q. And then on top of that, if you were to brake, you'd have about another, what, 43 feet, then, to brake?
> A. Well, if you waited that long to brake, yes. You'd have to then decelerate at 30 miles an hour to get to a stop. At full brake force, it would take 43 feet.
> Q. It takes all 43 plus 110 is about 153 feet total to perceive —
> A. Right.
> Q. — decide, react. That would put you about — back at the intersection, right?
> A. I'm not sure what that distance is, but that's an awful late perception-reaction time.

Standard Parking argues Thyce had enough time to brake before colliding with the Toyota because Warn testified he stopped for 2 or 3 seconds to wait for pedestrians on the sidewalk. Hunter testified the perception-reaction time is between 2.5 and 12 seconds. Standard Parking relies on a calculation of placing Thyce 155 feet away from the Toyota to argue Thyce only "needed 92.33 feet to perceive Warn's vehicle, react, and stop." Standard Parking argues Colyn's attorney conceded Thyce was 155 feet away from the Toyota. The record does not support Standard Parking's argument.

Standard Parking's assertion that Colyn's attorney conceded Thyce was 155 feet from the Toyota is based on a hypothetical that Colyn's counsel posed during argument

on the motion for judgment as a matter of law on contributory negligence. Colyn's attorney argued, in pertinent part:

> They don't have a point of notice, they don't have a point of impact, and they don't even have a reasonable reaction time between those two spots that would say that had [Thyce] done something different or reacted within a reasonable period of time, which is anywhere from 2.5 to 4 seconds by case law. Mr. Hunter also admitted on the 2.5 seconds is the AASHTO [(American Association of State Highway and Transportation Officials)], the Federal AASHTO standards for reasonable reaction time. And had they even put those together, he would have been 155 feet back, which puts him in the intersection, so we think as a matter of law, [contributory negligence] is not available under the facts of this case.

Because substantial evidence does not support the jury finding the point of notice and the point of impact and that Thyce could have avoided the collision, the court did not err in ruling Thyce was not contributorially negligent as a matter of law.[6]

Evidentiary Rulings and Denial of Motion for a Mistrial

Standard Parking contends the court erred by overruling the objection to expert testimony that Warn had a duty to yield and denying the motion for a mistrial based on the impeachment of Hunter under ER 608(b). We review evidentiary rulings for abuse of discretion. Hollins v. Zbaraschuk, 200 Wn. App. 578, 582, 402 P.3d 907 (2017), review denied, 189 Wn.2d 1042, 409 P.3d 1061 (2018). We review a trial court's decision to deny a motion for mistrial for abuse of discretion. Adkins v. Alum. Co. of Am., 110 Wn.2d 128, 137, 750 P.2d 1257, 756 P.2d 142 (1988); Kimball v. Otis Elevator Co., 89 Wn. App. 169, 178, 947 P.2d 1275 (1997).

[6] Because we conclude the court did not err in ruling as a matter of law that Warn was negligent and Thyce was not negligent, we need not address whether the trial court should have dismissed the independent negligence claims against Standard Parking. Ashley v. Hall, 138 Wn.2d 151, 161, 978 P.2d 1055 (1999). There is no dispute Standard Parking is vicariously liable for Warn's failure to use reasonable care.

On cross-examination, Colyn's attorney asked Hunter about the duty to yield:

Q. Mr. Warn had the duty to yield the right of way to Mr. Colyn, correct?
A. Yes.
[DEFENSE COUNSEL]: Objection; calls for a legal conclusion.
THE COURT: Overruled.
A. Yes.
Q. Your evaluation is Mr. Warn did not yield the right of way to Mr. Colyn, correct?
A. That's correct.

The existence of a duty is a question of law. Martini v. State, 121 Wn. App. 150, 160, 89 P.3d 250 (2004) (citing Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996)). The erroneous admission of evidence merits reversal only if the error prejudiced the party opposing the admission of the evidence. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence constitutes harmless error if the evidence is cumulative. Brown, 100 Wn.2d at 196. Hunter's testimony was cumulative of Warn's testimony that he had a duty to "yield to bikes coming down the road," making any error harmless.[7]

Standard Parking contends the court erred by allowing Colyn's attorney to impeach Hunter with ER 608(b) evidence and denying its motion for a mistrial. A party may not use extrinsic evidence to prove specific instances of conduct relating to credibility. ER 608(b). However, in the discretion of the court, a party may inquire into specific instances of conduct "on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." ER 608(b)(1).

[7] Any error was also harmless because the court did not err in ruling Warn breached the duty to yield the right-of-way.

In a 2008 lawsuit, Gullette v. Cole, Kitsap County Superior Court No. 08-2-01132-3, the defendant retained Hunter to investigate a motor vehicle accident and testify at trial. Hunter submitted two declarations to the court under penalty of perjury stating that he "visited the accident scene" and that his opinions were "based upon my personal knowledge." After a discovery request for the case log and "Scene Inspection Record," Hunter filed a supplemental declaration stating he had not visited the accident scene. The court in Gullette granted plaintiff's motion to exclude Hunter from testifying because he was not credible:

> The Court holds that John Hunter's original and supplemental declarations, certified to be true under penalty of perjury, were not based upon his personal observations at the scene of the accident. Mr. Hunter's second supplemental declaration, which attempts to reaffirm the factual bases contained in his previous declarations, was submitted in violation of the case event schedule which set February 17, 2009 as the last day to complete discovery. In any event, an additional declaration from Mr. Hunter does nothing to rehabilitate the credibility of Mr. Hunter in the eyes of the Court. . . . Due to concerns of the Court regarding credibility, John Hunter will not be permitted to testify at trial.

On cross-examination, Colyn's attorney asked Hunter whether he had "been barred for lying to a court before." Standard Parking argued the ruling in Gullette "from a number of years ago" was not relevant and Colyn's attorney mischaracterized the ruling as "perjury." Standard Parking moved for a mistrial, arguing Hunter's "reputation cannot be cleared in front of this jury." In opposition, Colyn argued, "Credibility is always at issue when someone's asking the jury to believe their opinions" and the previous court ruling was relevant.

The court ruled Gullette was relevant. The court ruled that under ER 608(b), the "question about a specific instance of conduct" was probative of Hunter's truthfulness.

The court denied the motion for a mistrial. The court did not abuse its discretion in allowing impeachment under ER 608(b) and denying the motion for a mistrial.

Motion for New Trial

Standard Parking seeks reversal and remand for a new trial. Standard Parking claims the trial court abused its discretion in denying its motion for a new trial on the grounds of prejudicial attorney misconduct.

We review the court's decision on a motion for a new trial for abuse of discretion. Teter v. Deck, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than an order denying a new trial because denial of a new trial " 'concludes [the parties'] rights.' " Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997)[8] (quoting Baxter v. Greyhound Corp., 65 Wn.2d 421, 437, 397 P.2d 857 (1964)); Teter, 174 Wn.2d at 215. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Teter, 174 Wn.2d at 215. A trial court should grant a new trial if the impact of the misconduct on the jury was so prejudicial that it denied Standard Parking a fair trial. Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978).

A party seeking a new trial based on attorney misconduct must establish (1) the conduct constitutes misconduct as distinct from aggressive advocacy, (2) the misconduct is prejudicial in the context of the entire record, (3) the misconduct was objected to and curative instructions requested, and (4) prejudice was not cured by the instructions to the jury. Teter, 174 Wn.2d at 226; Alum. Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 539, 998 P.2d 856 (2000). In reviewing the trial court's decision,

[8] Alteration in original.

we consider whether " 'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.' " Alum. Co. of Am., 140 Wn.2d at 537[9] (quoting Moore, 89 Wn.2d at 942). The trial court is in the best position to most effectively determine prejudice and whether attorney misconduct prevented a fair trial. Miller v. Kenny, 180 Wn. App. 772, 815, 325 P.3d 278 (2014).

Standard Parking attaches an appendix to their brief that identifies more than 300 objections and the rulings on the objections during the eight-day trial. Standard Parking cites the court's admonishment on the sixth day of trial to argue the court did not understand the scope of the misconduct. The record does not support Standard Parking's argument.

After ruling Colyn's attorney could impeach Hunter under ER 608(b) and denying the motion for mistrial, the court admonished Colyn's counsel for "vouching" and commenting on the credibility of witnesses by using the word "lies." The court admonished defense counsel for not objecting. The court stated:

> In general, [plaintiffs' counsel], you have a number of times made comments about the credibility of witnesses and used the word "lies" in such a way that you are inappropriately commenting on the credibility of witnesses and vouching, and I want that to stop.
>
> There are so many times in this case where there have been inappropriate questions and characterizations and testimony from you, but I'm not getting objections from the defense. So my hands are tied.
>
> I would encourage you, [defense counsel], to begin objecting to those things because there have been so many objectionable questions in this case, and there has been so much testimony by [plaintiffs' counsel]. Feel free to object.

The record shows defense counsel previously made a number of objections on the grounds of lack of foundation or asking leading questions. But when the court sustained an objection to lack of foundation, Colyn's attorney rephrased the question

[9] Internal quotation marks omitted.

and without objection, the witness answered. Likewise, when the court sustained the objection to asking a leading question, the attorney rephrased the question. See Bristol v. Streibich, 24 Wn.2d 657, 658, 167 P.2d 125 (1946) (sustaining objections to leading questions is, as a general rule, not a ground for reversal). The record shows that after the court admonished the attorneys, the number of objections made by the Standard Parking attorney increased but the court did not sustain a number of the objections.

Further, the court specifically instructed the jury to disregard the objections and comments of counsel:

> One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.
>
> The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.
>
> As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.
>
> You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.
>
> As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or

> significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.
>
> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

We presume the jury follows the court's instructions. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 136, 875 P.2d 621 (1994).

Standard Parking contends the "most flagrant example of misconduct" was asking questions during the cross-examination of Hunter that implied Warn lied and introducing ER 608(b) evidence to impeach Hunter. The record shows Warn's testimony at trial differed significantly from what he told Officer Belfiore immediately following the collision. As previously addressed, the court did not abuse its discretion in allowing Colyn's attorney to impeach Hunter.

The case Standard Parking cites, Miller v. Staton, 64 Wn.2d 837, 394 P.2d 799 (1964), is not analogous. In Staton, the defendants' attorney told the jury the defendants did not have liability insurance. Staton, 64 Wn.2d at 840. The Washington Supreme Court held the intentional introduction of insurance coverage was irrelevant and so prejudicial, a new trial was required. Staton, 64 Wn.2d at 840-41.

We do not condone the improper questions or the conduct of Colyn's attorney but conclude the court was in the best position to decide whether the improper questions and conduct prejudiced the right to a fair trial, and the record as a whole does not support finding prejudicial misconduct.

Standard Parking also contends remarks in opening statement and during closing argument prejudiced its right to a fair trial. Standard Parking did not object during either opening statement or closing argument. The failure to object waives any error unless the remarks are so flagrant and ill-intentioned that a curative instruction could not obviate any prejudice. Wash. Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993).

The record shows the attorney did not commit misconduct by discussing the significance of the instructions that state Warn and Standard Parking were negligent as a matter of law and Thyce was not negligent. See Miller, 180 Wn. App. at 817. Standard Parking waived the argument that Colyn's attorney made improper comments in the opening statement. If Standard Parking had timely objected to the improper comments in opening statement, any prejudice could have been cured by an instruction to disregard the remarks.

Standard Parking also claims the award of damages is the result of the prejudicial attorney misconduct. We must view the evidence in the light most favorable to Colyn and affirm the jury verdict unless the verdict is " 'outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.' " Collins v. Clark County Fire Dist. No. 5, 155 Wn. App. 48, 82, 231 P.3d 1211 (2010)[10] (quoting Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005)).

We give deference and weight to "the trial court's discretion in denying a new trial on a claim of excessive damages." Physicians Ins. Exch., 122 Wn.2d at 330.

[10] Internal quotation marks omitted.

> The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim of excessive damages. The verdict is strengthened by denial of a new trial by the trial court. While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, "appellate review is most narrow and restrained" and the appellate court "rarely exercises this power."

Physicians Ins. Exch., 122 Wn.2d at 330[11] (quoting Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 269, 840 P.2d 860 (1992)).

Substantial evidence supports the award of damages. Thyce suffered life-altering and debilitating permanent injuries that have resulted in Amy assuming ongoing responsibility for Thyce as a caretaker. The trial court did not abuse its discretion in denying the motion for a new trial.

We affirm entry of the judgment on the verdict and denial of the motion for a new trial.[12]

Schindler, J.

WE CONCUR:

Andrus, J.

Appelwick, C.J.

[11] Footnotes omitted.

[12] Standard Parking contends the trial court erred in refusing to give its proposed special verdict form that allocated fault. Standard Parking asserts, "If this Court reverses and remands, the Court should direct" the trial court to give the special verdict form. Because we affirm, we need not address the argument. After oral argument, Standard Parking filed a statement of additional authorities. Colyn filed an answer and motion to strike. We deny the motion to strike the citation to additional case law but grant the motion to strike argument. RAP 10.8.

APPENDIX B

FILED
3/29/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife, Respondents, v. STANDARD PARKING CORPORATION, a Foreign Corporation; TAYLOR WARN, individually; and UNKNOWN JOHN DOES, Appellants.	No. 76425-0-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Standard Parking Corporation and Taylor Warn filed a motion for reconsideration of the opinion filed on January 22, 2019, and the respondents Thyce and Amy Colyn filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

For the Court:

Judge

APPENDIX C

THE HONORABLE MARY E. ROBERTS
Trial Date: November 28, 2016
Time: 9:00am

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife,

Plaintiffs,

v.

STANDARD PARKING CORPORATION, a foreign corporation; TAYLOR WARN, individually; and UNKNOWN JOHN DOES,

Defendants.

NO. 15-2-16945-9 SEA

DEFENDANTS' TRIAL BRIEF

I. INTRODUCTION

This civil action concerns a car-versus-bike accident that occurred in downtown Seattle at approximately 4:00 p.m. on the evening of October 8, 2012. Liability for the accident is disputed. Defendants contend that the accident was avoidable by Plaintiff Thyce Colyn, who struck Defendant Taylor Warn's vehicle with his bicycle. Mr. Colyn sustained serious orthopedic injuries in the collision, including a broken pelvis and injured shoulder after being thrown over the stopped vehicle and landing on a nearby curb. Since the accident, Mr. Colyn has remained dependent on a wheelchair, although there is no physical reason that he cannot walk. There are available medical

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accident. Realistically, Mr. Colyn will never bicycle again, which was a passion that he and his wife shared. His new orthopedist is optimistic that, with a hip replacement, Mr. Colyn might be able to walk one to two miles. He will never return to his pre-accident level of activity. However, there is no medical reason for Mr. Colyn to remain as low-functioning as he is today.

C. Legal Issues & Authority

1. Liability

Mr. Colyn hit the car being driven by Mr. Warn. Mr. Colyn was not "T-boned" by the car, which was either not moving or moving at less than 5 mph at the time of impact. He sustained serious injuries after impacting the passenger side of the vehicle and being propelled over the top of the vehicle and into a parking curb. He was not pushed forward by the vehicle, which was the direction in which it was headed.

Mr. Warn was cited after the accident for "failing to yield the right of way," but the ticket is a red herring. Drivers must yield for pedestrians, which is why Mr. Warn was in the roadway. WPI 70.03.02 (drivers shall stop and remain stopped to allow a pedestrian to cross the roadway). Bicyclists and drivers alike also have a duty to avoid a collision, even if someone violates their right-of-way. WPI 70.01 (every person using a public street must exercise ordinary care to avoid placing himself or others in danger and avoid a collision); WPI 70.0204 (right-of-way is not absolute but relative, and the duty to exercise ordinary care rests upon both parties). Stated differently, an alleged violation of someone's right-of-way does not give them license to hit you. Everyone on a roadway is required to adjust to changing conditions and observe what is there to be seen. WPI 12.06 (duty of seeing what would be seen by a person exercising ordinary care); 70.05 (bicyclist or car shall reduce speed when special harm exists with regard to street conditions).

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Here, the vehicle driven by Mr. Warn should have been seen and avoided by Mr. Colyn. Mr. Colyn missed what was there to be seen and negligently failed to adjust his speed and route on a busy street in downtown Seattle during rush hour. *Id.*; WPI 10.01 (negligence is the failure to exercise ordinary care and do what a reasonable careful person would do under the same circumstances).

2. Causation

Although the defendants deny any fault for this accident, it is acknowledged that Mr. Colyn sustained certain injuries as a result of the accident. These include a broken pelvis, internal bleeding, hematomas, a mild concussion, post-operative ileus, and right supraspinatus (shoulder) tendinopathy. However, plaintiffs allege that Mr. Colyn suffered additional injuries that are not borne out by the available evidence.

It is anticipated that plaintiffs will assert that Mr. Colyn has an ongoing brain injury that is limiting his recovery from the accident. However, the evidence will demonstrate that Mr. Colyn has not sustained a brain injury as a result of the October 2012 accident. Although Mr. Colyn was diagnosed with a mild concussion while at Harborview post-accident, he received no care for this condition. In fact, Mr. Colyn has not received any medical treatment for a brain injury since being discharged from Harborview in 2012. He was evaluated by a neuro-psychologist in 2013. After putting Mr. Colyn through a battery of tests, this neuro-psychologist concluded that he did not have any cognitive deficits, but might otherwise show signs of malingering. To no surprise, Mr. Colyn discontinued his treatment with this neuropsychologist. Since that time, Mr. Colyn has not sought a substantive diagnosis of or treatment for a brain injury. In the absence of credible medical evidence of this purported condition, the jury should not be permitted to consider this allegation

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APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

THYCE W. COLYN and AMY J. COLYN, individually and as husband and wife, Plaintiffs, v. STANDARD PARKING CORPORATION, a foreign corporation; TAYLOR WARN, individually; and UNKNOWN JOHN DOES, Defendants.	No. 15-2-16945-9 SEA

JURY TRIAL - VOLUME XVI

December 12, 2016

December 13, 2016

December 15, 2016

The Honorable Mary E. Roberts Presiding

Transcribed by: Reed Jackson Watkins, LLC

Court-Certified Transcription

206.624.3005

You know, the biggest problem with Mr. Beninger's route analysis and all of this is, you know, our car -- the car is perpendicular, and we've admitted to the fact that it was perpendicular. But if he had pulled out and done exactly what Mr. Beninger prescribes, Mr. Colyn, by all indications on this record, would have plowed into the back of his car and had a smaller visual profile to look at.

We would direct the Court to look specifically at the instruction regarding WPI 70.01. It says everyone using a public roadway must exercise ordinary care to avoid placing himself or others in danger and avoid a collision.

Mr. Colyn hasn't proven if he exercised reasonable care. He has a recollection of this accident, and he chose not to take the stand. He has a duty, and he hasn't actually testified that he complied with his duty, first. Second of all...

THE COURT: But, again, where's the evidence that he didn't?

MS. HUNTER: Well, first of all, how about the testimony from Mr. Warn? Mr. Warn's testimony is completely uncontradicted, and he says he was stopped for three seconds.

THE COURT: Right.

MS. HUNTER: Three seconds is long enough. That is the amount of time for a yellow stoplight. That is long enough

MS. HUNTER: Yes. And, in fact, the only thing that's in the record regarding the brakes, actual evidence of the brakes, was that it had a modified braking system, and at least one of the front brakes was not operational.

MR. SKINNER: The other one.

MS. HUNTER: And the other one was a squeeze brake that went to the back.

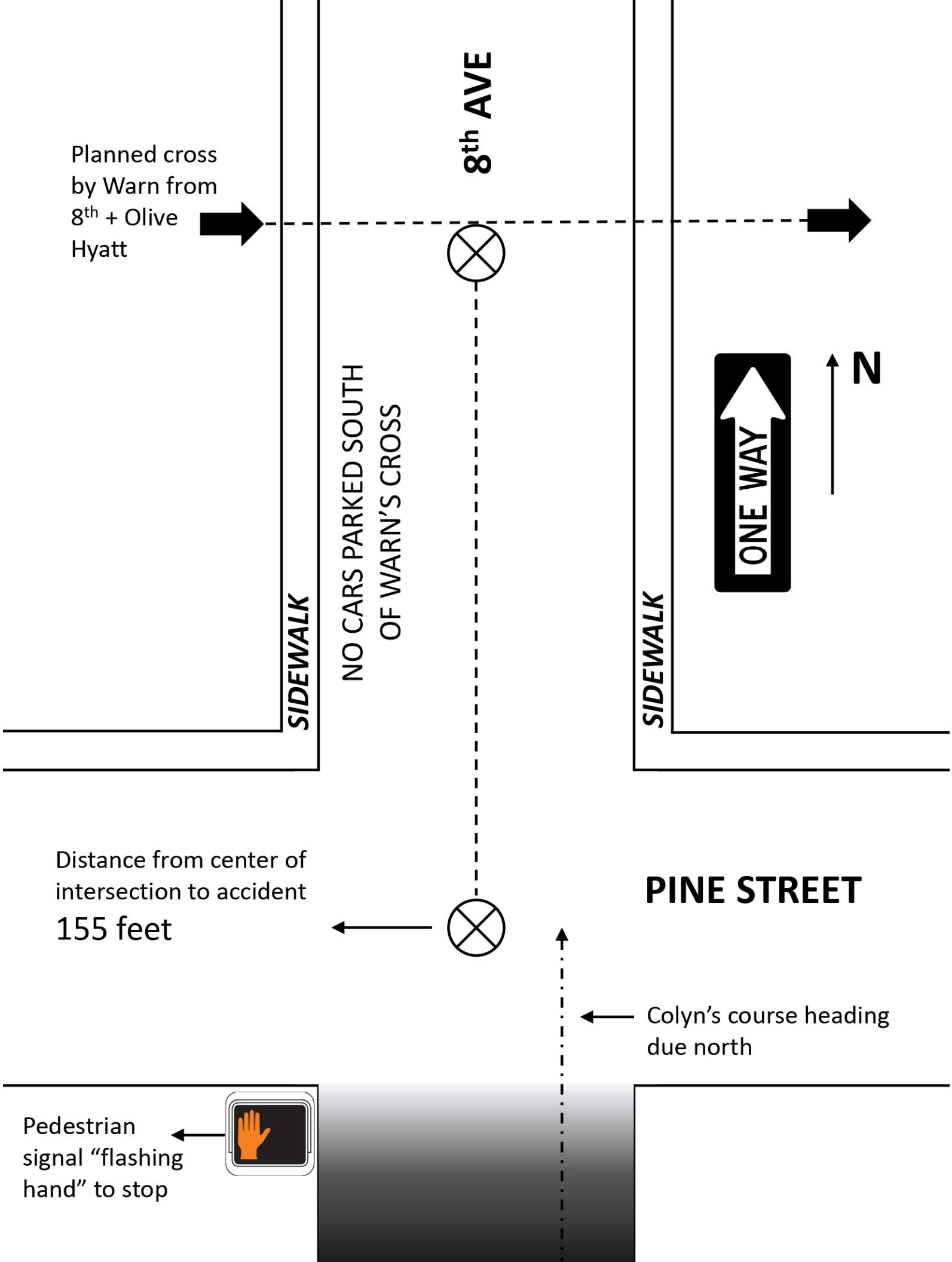
MR. SKINNER: The front.

MS. HUNTER: The front. That was the only evidence we had regarding the brakes. That rest of it was all argument from Mr. Beninger.

What we know from this record is that Mr. Warn came out of the garage. He did nothing illegal. He was there to be seen, which is one of the instructions that's been proposed by both parties. Both parties had a duty to exercise ordinary care, and as instruction 70.02.04 says, the mere violation of a right-of-way is not determinative of anything, it's variable, and both parties still have an obligation to act and avoid a collision.

Yet, you know, Mr. Beninger's arguing that his client was too close, but where's the evidence his client was too close to stop when he saw us? Where's the evidence from them that he didn't have time to stop? Where is there any refutation of the claim by Mr. Warn that he was stopped for at least three seconds? There's none.

APPENDIX E


8th AVE
Planned cross by Warn from 8th + Olive Hyatt
NO CARS PARKED SOUTH OF WARN'S CROSS
SIDEWALK
SIDEWALK
ONE WAY
N
Distance from center of intersection to accident
155 feet
PINE STREET
Colyn's course heading due north
Pedestrian signal "flashing hand" to stop

APPENDIX F

DEF ER 904 001160

CARNEY BADLEY SPELLMAN

April 29, 2019 - 12:21 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Thyce W. Colyn and Amy Colyn, Respondents v. Standard Parking, Appellants (764250)

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