No. 100925-9

SUPREME COURT
OF THE STATE OF WASHINGTON

AUSTIN K. FITE, individually,

Petitioner,

v.

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

Respondent,

and

LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof,

Defendants.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

This case is about the City of Puyallup ("City")'s alleged liability for a collision between an intoxicated skateboarder, Austin Fite, and Lee Mudd's pickup truck in a marked City crosswalk. There had never been an injury to another pedestrian in that crosswalk, and the City's crosswalk complied with all applicable road design standards.

Division II's well-reasoned opinion concluded that the trial court committed a series of errors that deprived the City of a fair opportunity to present its defenses at trial when it awarded the City a new trial confined to liability only. There are jury questions whether the City should be held liable and whether Fite was at least partially at fault for his injuries.[1] Review is not merited under RAP 13.4(b).

B. STATEMENT OF THE CASE

The Court of Appeals opinion discusses the facts here,

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[1] Fite will be compensated by Mudd, who did not appeal from the judgment on the jury's $6.5 million verdict.

op. at 4-8, but several factual points bear emphasis, particularly in light of Fite's repeated distortion of the facts.

Fite had a "cannabis dependence,"[2] according to his medical records, CP 906, with his cannabis use dating back to his time in middle school. CP 2121-22. When Fite was in 12th grade, as his addiction worsened, Fite dropped out of high school. CP 2123. Fite used cannabis "frequently during the day and into the evening on a daily basis." CP 2122. Fite's family expressed concern about Fite's mental state, but Fite rejected their worries, insisting to his doctor that he was merely under "heavy intoxication w/ THC." CP 2123.

On the day of his accident, Fite was "high" on cannabis, as he later *admitted* to his doctor (and this was confirmed by urinalysis). CP 1847-48, 2123, 2125.

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[2] The THC in cannabis is "a potent and unique psychoactive drug." CP 1952, 2114. THC causes "fatigue, paranoia, possible psychosis, memory deficits, altered mood, decreased motor coordination, lethargy, disorientation, relaxation, altered time/space perception, lack of concentration," and other effects. CP 1953.

Fite rode across 31st Avenue Southeast and headed towards the marked crosswalk across 5th/7th Street towards the park. CP 896-97. He was familiar with the marked crosswalk there. CP 898; RP 2097.[3] He had used the crosswalk numerous times while riding his skateboard. CP 897-98; RP 2096-97. Traffic was heavy, as motorists used 5th/7th Street to turn onto 31st Avenue Southeast for access to Walmart. CP 655, 898.

Before he would enter that crosswalk, Fite's general practice was to first stop entirely. RP 2097. He thought that drivers in that area were inattentive. CP 901. He also believed that cars would speed, and that this speeding increased the danger to him when using the crosswalk. CP 901. His mother had even warned him to be careful when crossing the street there. CP 903. Fite understood that if an oncoming vehicle presents a danger, he should not enter the street or should get out of the way. CP 899-900.

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[3] Fite's mother's house was about 400 yards away, and he had lived in that neighborhood for 2.5 years. CP 896-97; RP 2096.

Fite was wearing sunglasses and holding a McDonald's cup as he skateboarded. RP 1875, 1899-1900. Fite did not stop in the middle of the intersection, CP 2096, where a pedestrian refuge was located, RP 2387, 2242. Instead, he proceeded into the crosswalk without looking, according to eyewitness Kelly Boutte.[4] At the last moment, Fite noticed Mudd's pickup truck. CP 894. Mudd's truck hit him. CP 672.

The City-operated roadway and crosswalk at issue complied with national, state, and city road-design standards. RP 2177-78, 2199-2215, 2257, 2952-54, 2962-68. After the City installed the crosswalk, no pedestrian had ever been hit by a vehicle until Fite's accident; the City's public works

[4] Boutte changed her story from her initial declaration in which she testified that Fite failed to look both ways to saying that she did *not* see whether Fite looked both ways before entering the crosswalk. CP 1294; RP 1845. But the trial court prohibited the City from presenting her first declaration to the jury, reasoning, "To suggest that there's this more particular looking right and looking left, I think would … undercut the summary judgement order because there is no duty to look right or look left, and I don't want the jury to think that there is." RP 1847. Division II concluded this was error. Op. at 20-22. Fite did not seek review of that ruling by this Court.

department had not received any complaints about pedestrian safety at the crosswalk. RP 2304-05, 3080.

On summary judgment, the trial court ruled that Mudd was negligent as a matter of law, dismissed the City's RCW 5.40.060 intoxication defense, and allowed the City's comparative fault defense to go to trial. CP 1303. Although the court denied Fite's motion to dismiss the City's comparative fault, it hamstrung that defense by ruling that Fite "was not *specifically* required to look right and left before entering the crosswalk, only to look for approaching vehicles." CP 1303. The court denied reconsideration. CP 1789-1802, 2107-12, 2187-92.

The trial court also granted Fite's motions *in limine* further restricting the City's comparative fault defense by, among other things, excluding any evidence of Fite's intoxication, his rate of speed upon entering the crosswalk, or any safety precaution he should have taken to look both ways. CP 2842, 2846. The trial court also excluded evidence that

Fite's mother had warned him about the danger there and urged him to be careful. CP 2846. During the City's cross examination of Fite, the trial court sustained Fite's objection to the City's questioning about his prior habit of stopping before entering that crosswalk. RP 2097.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

Division II's thorough opinion, and developments in the law since its filing, document how the City was deprived of a fair trial on liability by a series of trial court rulings on dispositive motions, evidentiary issues, and jury instructions.

It is important, however, to pinpoint the precise issues that Fite raises in his petition. Although *required* by RAP 13.4(c)(5) and this Court's decision in *Clam Shacks of America, Inc. v. Skagit County*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) ("RAP 13.4(c)(5) requires a concise statement of the issues presented for review"), Fite deliberately chose to defy the rule by not identifying his issues for this Court. Thus, under RAP 13.7(b), Fite, in effect, *concedes* Division II's ruling that certain

trial court decisions were in error by failing to address them. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 401, 314 P.3d 1093 (2013) (failure to raise issue in petition for review forecloses review of it). Among the conceded errors were Division II's ruling that the trial court erred in admitting police reports as business records (op. at 5-7, 16-18), and that it erred in failing to allow Boutte's full testimony to be heard by the jury (op. at 7, 20-22).[5]

On the issues Fite does raise, review is not merited. RAP 13.4(b).

(1) Division II Was Correct that the Trial Court Erred in Depriving the City of RCW 5.40.060's Intoxication Defense

Desperately hoping to secure review here, Fite claims that this Division II's opinion conflicts with this Court's decision in *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111,

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[5] Fite hopes to justify filing a future reply by offering a "place saver" footnote, pet. at 12 n.3, that glides over these evidentiary rulings. Fite did not preserve any error for review or a RAP 13.4(d) reply.

471 P.3d 181 (2020), a case where the intoxication defense *went to the jury* after the plaintiff *admitted* her intoxication. Pet. at 1-2, 12-20. In so doing, Fite attempts to raise erroneous contentions about proof of THC intoxication belied by case law and this Court's recent decision in *State v. Fraser*, __ Wn.2d __, 509 P.3d 282 (2022).

In 1986, the Legislature established what amounts to a contributory fault standard for intoxication by alcohol or drugs. *See* Appendix. RCW 5.40.060 is a *complete defense* to liability. *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619 (1999); *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993); *Peralta v. State*, 187 Wn.2d 888, 892, 896, 389 P.3d 596 (2017).

In this case, *ample* evidence supported the submission of this statutory defense to the jury. By its terms, RCW 5.40.060 incorporates "the standard established by RCW 46.61.502" (the criminal statute for driving under the influence), for "determining whether a person was under the influence of

intoxicating liquor or drugs."

This Court's decision in *Fraser* looms large in this case. This Court's observation there about impaired driving by cannabis use is apt. 509 P.3d at 290. ("There is no dispute in this case that cannabis can impair one's driving."). It is no less true for skateboarding through a crosswalk. Although Fite tries to downplay the significance of that decision by relegating it to a footnote in which he misrepresents this Court's actual holding, pet. at 16 n.4, this Court has resolved the question of the applicable THC standard under RCW 5.40.060; it unanimously held in *Fraser* that the 5 ng/ml THC standard[6] for

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[6] RCW 46.61.502(1)(b) establishes a THC concentration of 5 ng/ml in the blood or higher for intoxication. This standard readily equates to 5 ng/ml in urine. *City of Kent v. Cobb*, 196 Wn. App. 1043, 2016 WL 6534892 at *1 (2016), *review denied*, 188 Wn.2d 1005 (2017).

This Court has historically addressed equivalence standards in the DUI context. For example, this Court has concluded that the Legislature may constitutionally establish a *per se* standard for alcohol intoxication by reference to alcohol in the breath rather than in the blood. *State v. Brayman*, 110 Wn.2d 183, 751 P.2d 294 (1988). The 1986 Legislature

a *per se* violation of the DUI statute is rationally related to the legislative purpose of deterring impaired driving and promoting highway safety, so that it does not to exceed the Legislature's constitutional police power authority, is not unconstitutionally vague, and is not facially unconstitutional. In arriving at that conclusion, the Court stated that the Legislature's choice of the 5 ng/ml standard was supported in scientific studies:

> While there may not be a universal THC blood level that is akin to the 0.08 BAC for alcohol impairment, the studies do show that THC levels above 5.00 ng/mL are indicative of recent consumption in most users, recent consumption generally leads to impairment as THC levels lower, and for chronic users there can be chronic impairment that lasts for weeks. Fraser's own expert testified that some people *are* impaired at the 5.00 ng/mL THC level. 1 CP at 181. Although this limit may not be perfect in terms of identifying degree of impairment for all individuals, it is

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adopted a breath-based *per se* standard to avoid questions arising out of the translation of breathalyzer results into the former blood-alcohol standard. *Id*. at 186. Although RCW 46.61.502(1)(b) speaks to THC in the blood, nothing foreclosed proof of that standard derived from urinalysis results by appropriate expert testimony, as was true under the pre-1986 version of the DUI law for the translation of breathalyzer results to the statutory blood alcohol equivalent measure.

> reasonably and substantially related to recent consumption, which is related to impairment.

509 P.3d at 291. The 5 ng/ml standard is sustainable as well in the civil setting where it is incorporated by reference in RCW 5.40.060.

Whether a person was "under the influence" under RCW 46.61.502 may be proven two ways, a point that Fite again relegates to an incomplete footnote. Pet. at 16 n.4. The first way is a "*per se*" method where the individual has "a THC concentration of 5.00 or higher as shown by analysis of the person's blood," with a state toxicologist-approved test. RCW 46.61.502(1)(b).

The second way is by other evidence showing the person "is under the influence of or affected by … [cannabis]." RCW 46.61.502(1)(c). This latter standard means that "'the person's ability to act as a reasonably careful person under the same or similar circumstances is lessened in any appreciable degree.'" *Peralta*, 187 Wn.2d at 899 (quoting and approving jury

instruction on the intoxication standard under RCW 46.61.502(1)(c)).

Either of these two methods suffices to show that a person is intoxicated by cannabis. *E.g.*, *Peralta,* 187 Wn.2d at 892, 897; *State v. Charley*, 136 Wn. App. 58, 64, 147 P.3d 634 (2006), *review denied,* 161 Wn.2d 1019 (2007) (blood sample taken by hospital for medical purposes was admissible to prove second method for a DUI conviction). The second method of RCW 46.61.502 is at issue here.

The City adduced ample evidence to support submitting the intoxication defense to the jury. According to Fite's doctor, Fite had a "cannabis dependence," CP 906, and was, at the moment of the accident, "intoxicated on [a] skateboard and hit by a truck." CP 2121. Fite *admitted* to his doctor that he was "high" at the time of accident and was on his way to buy a cheeseburger. CP 2123. He also told the providers at the hospital after the accident that he had used cannabis that day.

CP 2125.[7] This admission, like that of the plaintiffs in *Peralta* and *Garlach* constituted sufficient evidence to require a jury to decide the RCW 5.40.060 defense, particularly given Fite's incentive to be truthful with his medical providers. *Peralta*, 187 Wn.2d at 893, 902-05 (quoting plaintiff's admission); *Gerlach*, 196 Wn.2d at 118.

Fite's statements to his medical providers were not "hearsay," as he briefly asserts. Pet. at 15.[8] An admission of a party opponent is not hearsay. ER 801(d)(2); *Saldivar v. Momah*, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009). In *Hor v. City of Seattle*, 18 Wn. App. 2d 900, 493 P.3d 151 (2021), *review denied*, 198

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[7] Fite was an experienced cannabis user. CP 2121. His statement that he was "high" was his own that his mental faculties were affected to an appreciable degree. *Peralta*, 187 Wn.2d at 899. In fact, evidencing his knowledge of THC dependence, Fite insisted to his physician that his mental state was caused by "heavy intoxication with THC." CP 908.

[8] Fite neglects to provide any authority supporting this contention.

Wn.2d 1038 (2022), Division I broadly applied the rule to allow even the statements of a party-opponent who died to be admitted. *Id*. at 911. Additionally, Fite's statements to his doctor are not hearsay under ER 803(a)(4) in any event. *State v. Doerflinger*, 170 Wn.2d 650, 664, 285 P.3d 217 (2012).

Other evidence supported the City's entitlement to present its statutory defense to the jury.[9] When Fite claims in passing that the Franciscan hospital urinalysis results were "non-conforming," pet. at 15, that is belied by the record and common sense. Medical tests conducted at a hospital are

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[9] Urinalysis results have long been *routinely* utilized as reliable to establish improper drug use in employment or in post-conviction supervision of criminal offenders. *See, e.g., Alvarado v. State, Dep't of Licensing*, 193 Wn. App. 171, 371 P.3d 549 (2016) (commercial driver license revocation under RCW 46.25.125 and 49 C.F.R. § 40); *Rushing v. State*, 382 N.W.2d 141 (Iowa 1986) (UA results as to cannabis in prison discipline proceeding); *State v. Snider*, 835 P.2d 495 (Az. App. 1992) (UA results in probation revocation); *State v. Farmer*, 964 P.2d 670 (Ida. App. 1998) (UA results credible and reliable in probation revocation proceeding). Of course, had the intoxication defense been presented to the jury, Fite would have been free to argue the reliability of the urinalysis results, if he had any legitimate basis to do so.

necessarily reliable. A hospital wants its treatment of a patient to be based on the most reliable information possible if nothing else than to avoid the risk of liability for corporate negligence. *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984).

Fite's hospital urinalysis test documented that his THC levels were *ten times* the statutory limit. Those results were reliable, as Sally Kramer, CHI Franciscan's CR 30(b)(6) witness, testified. Kramer testified in detail on the process used to analyze the THC levels in Fite's urine sample. CP 1828-30, 1839. She affirmed the precision and accuracy of Fite's test results. CP 1848, 1857-58, 1880. Franciscan even undertook quality control in Fite's case, documenting his results, and ensuring that the results were properly charted. CP 1849-51.[10] Fite did not show that there were any complications or mistakes in processing his screening test. CP 2058-66.

[10] Another CHI Franciscan CR 30(b)(6) representative, Haley Wahl, further testified that the hospital's method of obtaining a urine sample from Fite did not affect the accuracy of his test. CP 1901-10.

Notwithstanding Fite's contrary contention, pet. at 16 n.4, a blood draw was not required to establish that Fite was under the influence of cannabis based on the standards of RCW 46.61.502.[11] In her twenty plus years of experience, Kramer testified that it would be rare to do a blood draw to test for THC levels, as such tests are almost always done by a urine sample. CP 1835-37. While a urinalysis might not satisfy the "*per se*" intoxication prong of RCW 46.61.502(1)(b), the City was entitled to go to the jury on whether Fite was "under the influence of or affected by … [cannabis]," because urinalysis results can be indicative of intoxication, RCW 46.61.502(1)(c), particularly after *Fraser*.

Moreover, contrary to Fite's argument, pet. at 16-21, the City provided sufficient evidence on causation on summary judgment. The issue is whether a plaintiff is "under the

[11] It is ironic that Fite's counsel argued to this Court in *Gerlach* that the BAC results derived from hospital blood draws were "unreliable" for purposes of RCW 5.40.060. Plainly, no test results are ever satisfactory to Fite's counsel to document intoxication.

influence of intoxicating liquor or drugs." Contrary to Fite's position, in *Peralta* and *Gerlach*, the plaintiff's admission of intoxication was sufficient to submit the RCW 5.40.060 defense to the jury. In *Peralta*, a State Patrol vehicle struck the plaintiff when she stepped into the street. There was no evidence that alcohol consumption had anything to do with that decision, and such evidence was unnecessary for the statutory defense once the plaintiff admitted she was intoxicated. 187 Wn.2d at 900-01.

In *Gerlach*, the plaintiff stipulated to the fact that she was intoxicated, and this Court seemingly concluded that such an admission coupled with evidence on the plaintiff's behavior in connection with her fall from an apartment balcony was sufficient to allow the defense to be submitted to the jury. The *Gerlach* majority did not hold that the trial court erred in submitting the defense to the jury, even though it indicated in passing that evidence of the plaintiff's behavior was necessary

to prove the causation element. *Id*. at 121.[12] Rather, the majority stated only that evidence of high BAC levels "alone" do not establish plaintiff's fault or causation. *Id.* at 124-26. *Gerlach* did not foreclose a jury considering drug test results in tandem with other evidence of a plaintiff's intoxication. *See id.*

Division II's opinion addressed causation appropriately, in any event, noting that Fite's failure to stop before entering the crosswalk and his failure to make any move to avoid the Mudd vehicle could have been the basis for a reasonable jury to conclude that Fite's behavior resulted from his cannabis intoxication. Op. at 9. That is especially true because Fite acted outside of his own habits, forgoing his usual safety precautions that he believed necessary at that intersection. RP 2097; CP

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[12] The majority upheld the trial court's exclusion of the plaintiff's BAC results where a "stipulation" as to her intoxication had been submitted to the jury, and also excluded essentially all of the defense expert testimony on the *effect* of the plaintiff's egregious intoxication on her judgment and behavior in attempting to climb over a balcony rail. *Id*. at 121-27.

901-03. Fite told his doctor that he "was high on Cannabis while riding his skateboard to Wallmart (*sic*) to buy a cheeseburger." CP 2123. An experienced drug user's self-assessment of how his drug intake affected his behavior may properly be considered by a jury.

A jury brings its "opinions, insights, common sense, and everyday life experience" to bear in rendering a verdict based on its common wisdom. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 493, 302 P.3d 500, *review denied*, 178 Wn.2d 1014 (2013). A reasonable jury could readily conclude from its common experience that a person admittedly high on THC with THC levels in his system *10 times* the legal limit manifested impaired judgment and seriously diminished motor skills. *See Fraser*, 509 P.3d at 290 ("[R]ecent consumption is linked to impairment."). That was enough to establish a *prima facie* basis for the City to present its RCW 5.60.040 defense to the jury.

Whether the evidence here was enough to support

causation is a fact-specific question unique to this case's particular circumstances, not a broad legal question for this Court's determination. As this Court has repeatedly noted, "[c]ause in fact is generally left for the jury, and it determines what actually occurred." *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021). Fite's causation argument belongs in front of a jury, not in this state's highest court.

Finally, Fite's contention that the City was not prejudiced by the trial court's failure to submit its intoxication defense to the jury because it found him not to be at fault, pet. at 20-21, is wrong. Of course, the jury heard *no evidence* on Fite's extreme THC intoxication. Nor did the jury hear any evidence on Fite's failure to look.

The RCW 5.60.040 defense and comparative fault are *distinct* defenses, as the Legislature fully understood in enacting RCW 5.60.040 in 1986, long after it enacted comparative

negligence in 1973.[13] The City was entitled to present its RCW 5.60.040 defense to a jury under long-standing decisions of this Court. A comparative fault-related defense is a *jury question*. *See, e.g.*, *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 834 (1983) (Contributory fault is ordinarily a jury question and should be resolved as a matter of law "only in the clearest of cases and when reasonable minds could not have differed in their interpretation of a factual pattern."). A party is entitled to present an affirmative defense to the jury if there is substantial evidence to sustain it. *See, e.g.*, *Fergen v. Sestero,* 182 Wn.2d 794, 346 P.3d 708 (2015). When a court deprives a party of a theory or defense for which there is evidence in the record, that is *reversible error* because a party, like the City here, is hamstrung by such a decision. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (defendant is entitled to jury

[13] Fite obviously ignores the trial court's persistent pattern of depriving the City of evidence to establish Fite's fault. Reply br. at 22-27. The trial court's actions in connection with the City's comparative fault defense are not before this Court, however.

instruction on his/her theory of the case where there is evidence to support it; failure to instruct is reversible error).

In sum, Division II was correct that the trial court erred in failing to allow a jury to assess Fite's intoxication and the defense afforded the City in RCW 5.40.060. Review is not merited. RAP 13.4(b).

(2) Division II Was Correct that The Trial Court Erred in Instructing the Jury on the City's Alleged Liability for Fite's Injuries

Although the trial court properly gave Instruction 27 to the jury that is WPI 140.01, CP 3189, the general instruction for a municipality's road design liability after this Court's decision in *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002) and its progeny, it then put its thumb on the scale in the case by giving the jury Instruction 28. *See* Appendix. Division II correctly determined that the City was deprived of a fair trial when the trial court did so. Op. at 14-16.

This Court has clearly articulated the rule of municipal road design liability that balances making the government an

insurer of all car accidents against providing appropriate redress for people injured by inherently dangerous roads in cases like *Keller*; *Owen v. Burlington No. & Santa Fe R.R. Co.,* 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); and *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016). A municipality is not an insurer against roadway risks or a guarantor of travelers' safety. *Berglund v. Spokane Cnty*., 4 Wn.2d 309, 313, 103 P.2d 355 (1940); *Keller*, 146 Wn.2d at 252.

Nevertheless, the trial court told the jury in Instruction 28 that it could find the road dangerous "even when there is no violation of statutes, regulations and guidelines concerning crosswalks and roadways." CP 3190. The trial court allowed the jury to hear only *half* the story to which they were entitled under RCW 5.40.050 and pertinent roadway design authorities, depriving the City of a fair trial, as Division II properly concluded.

The City was required to exercise "ordinary care," CP 3178, 3189, and evidence of what ordinary care requires may be

shown by referencing national standards, statutes, or administrative regulations. *Nordstrom v. White Metal Rolling & Stamping Corp*., 75 Wn.2d 629, 640, 453 P.2d 619 (1969). *See generally, Restatement (Second) of Torts* § 286 (discussing cases). Industry standards also may establish the standard of conduct. *Restatement (Second) of Torts* § 295A. It is no different in the context of roadway design. *Owens*, 153 Wn.2d at 787; *Ruff v. Cnty. of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995).

The Washington State Department of Transportation ("WSDOT") must implement the Federal Highway Administration's Manual on Uniform Traffic Control Devices ("MUTCD"). RCW 47.36.030(1); WAC 468-95-010, *et seq*. In turn, municipalities must utilize those state-imposed standards. RCW 36.86.080; RCW 47.36.030(2). Also, a road design industry organization, the American Association of State Highway and Transportation Officials ("AASHTO"), promulgates standards that may be used to evaluate a roadway

design if the municipality has adopted them. as suggested in *Ruff*, 125 Wn.2d at 705.

Consistent with these principles, the City called in-house and forensic experts who testified that the roadway and crosswalk complied not only with the MUTCD and AASHTO policy prescriptions, but also with WSDOT design guidelines and with City standards. RP 2177-78, 2199-2215, 2257, 2952-54, 2962-68. This testimony should have permitted the City to argue that that the City had used ordinary care to make the road reasonably safe. Instruction 28 prevented that.

Fite's claim that the instructions allowed the City to argue its theory of the case, pet. at 27-29, is belied by the fact that Instruction 28 rendered any of the evidence noted above *meaningless* to the jury. An instruction that tells the jury it should ignore such evidence is erroneous, as Division II properly concluded.

Fite quibbles about whether this aspect of Instruction 28 actually overemphasizes the issue. Pet. at 28. But whether the

statement misstates the law, *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 280-81, 428 P.3d 1197 (2018), or, as Division II charitably put it, overemphasizes Fite's theory of the case, *Cornejo v. State*, 57 Wn. App. 314, 321, 788 P.2d 554 (1990) (error to give instruction that unfairly emphasized one side's case); *Terrell v. Hamilton*, 190 Wn. App. 489, 506, 358 P.3d 453 (2015) (Court should not give instructions that impart a "improper argumentative slant."), the instruction was error.

Fite seems to contend that overemphasis requires multiple instructions emphasizing a point. Pet. at 28. *Cornejo* makes clear that argument is baseless. There, a single instruction constituted "overemphasis." 57 Wn. App. at 320-21. Instruction 28 deprived the City of a fair shake on liability and should not have been given to the jury.

Fite also contends that the City did not preserve this error for review. Pet. at 26-27. Fite's procedural argument fails. First, he did not preserve it. He never raised it in his brief, saving it for his motion for reconsideration. Division II

properly disregarded an argument not raised until that late date in the case. *1515-1519 Lakeview Blvd. Condo. Ass'n v. Apt. Sales Corp.*, 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2022) (refusing to consider issue raised for first time on reconsideration in the Court of Appeals).

The City offered jury instructions on the relevance of MUTCD standards, CP 2797-98, but withdrew them after the trial court's position made clear that it would be fruitless to argue about them. RP 3225-26. But more importantly, the City *objected* to Instruction 28 because of its treatment of its compliance with signage standards. RP 3318-19. The City had no obligation to propose specific language amending Instruction 28 to address the City's compliance with statutes and regulations on signage. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 748, 310 P.3d 1275 (2013) (objecting party has no affirmative obligation to offer alternative language or an alternative instruction).

Instruction 28's prejudice to the City was clear. Fite's

counsel zeroed in on the issue during closing argument. Thanks to that instruction, Fite's trial counsel was able to argue that the crosswalk's compliance with road-design standards was not enough as a matter of law, arguing; "Just because you might comply with a law or directive, *you have to do more*." CP 3252 (emphasis added). That is emphatically not the law; a municipality's compliance with road design standards *may* be enough. *Owen,* 153 Wn.2d at 787. Division II did not err in requiring a new trial. Review is not merited. RAP 13.4(b).

D. CONCLUSION

Fite has failed to establish why Division II's opinion that the City was deprived of a fair trial on liability merits this Court's attention under RAP 13.4(b). For the reasons articulated herein, this Court should deny review.

This document contains 4950 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 27th day of June, 2022.

Respectfully submitted,

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APPENDIX

RCW 5.40.060:

[I]t is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor *or any drug* at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at fault. The standard for determining whether a person was under the influence of intoxicating liquor *or drugs* shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor *or drugs* under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor *or drugs*.

Instruction 28:

Whether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the "totality of the circumstances." A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks. CP 2778.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court of the State of Washington, Cause No. 100925-9 to the following parties:

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Original E-filed via appellate portal:
Supreme Court of Washington
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 27, 2022 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

June 27, 2022 - 1:34 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,925-9
Appellate Court Case Title:	Austin K. Fite v. City of Puyallup, et al.
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Comments:

Answer to Petition for Review

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