NO. 97165-0

SUPREME COURT
OF THE STATE OF WASHINGTON

NO: 77177-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STANLEY SALTZBERG AND DONNA SALTZBERG,

Petitioners,

vs.

CHUCKANUT CAPITAL, LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. Identity of the Respondent

The Respondent is Chuckanut Capital, LLC ("Chuckanut"). Chuckanut was the Defendant at trial, and the Respondent at the Court of Appeals.

II. Summary of Why the Petition Should Be Denied.

From a rhetorical perspective, it is easy to understand why the Saltzbergs' Petition for Review casts the Court of Appeals' Opinion as an assault on the ancient legal tradition that "ignorance of the law is no excuse." The Saltzbergs misapply this maxim, which is not germane to this case, as will be explained below. But of equal importance, the *actual* holdings of the Court of Appeals are: 1) That denying the Saltzbergs' motion *in limine* was within the trial court's discretion based on quotidian concepts of evidentiary fairness; the Saltzbergs had made what Chuckanut "should have known" about the Seattle Municipal Code an issue in the case, and basic fairness permitted testimony to the contrary. And 2) that the Saltzbergs failed to preserve any objection related to the jury instruction at issue. Those two holdings were the decision fulcrums of this case, but the Saltzbergs wish them away by ignoring them in their Petition. The Court of Appeals was correct on these issues, which do not, in any event, invoke grounds for Review under RAP 13.4(b). This Court should deny the Petition to Review the unpublished Opinion.

III. Restatement of the Case

1. Factual history.

Chuckanut Capital, LLC is a real estate investment company owned by Lee Johnson. RP 74. This lawsuit relates to a trip and fall injury on the sidewalk in front of a duplex rental building Chuckanut owns in Madison Park.

Chuckanut purchased this duplex in 2009. RP 74. It bought the property at a distress sale, and closed on it without inspection due to the nature of the sale. RP 74, 70. One feature of the property was a "fixed raised curbing" or kind of brick perimeter running parallel and adjacent to the sidewalk. RP 75. No one knows how long it had been there, but there was evidence that it had already been installed when a prior owner purchased the property in 1991. RP 521. Mr. Johnson was aware of similar conditions on other properties up and down the street: "It's a constant in the neighborhood." RP 79. Chuckanut made no changes to this pre-existing brick perimeter until the plaintiff in this case, Mr. Saltzberg, tripped on it. RP 76-77.

As it turns out, unbeknownst to Chuckanut, that brick perimeter was located within the City of Seattle's unmarked right-of-way. RP 77-83. And because the bricks were in the right-of-way, the Seattle Municipal Code requires that they be permitted. If Chuckanut had applied for a

permit, it would likely have been denied because the bricks were not a foot away from the sidewalk, per the standards contained in the Seattle Right-of-Way Improvement Manual. RP 121-123, 137.

Mr. Saltzberg had worked in the neighborhood for 16 years, and had walked in front of the duplex on a regular basis over those years. RP 451. One night, he tripped on the perimeter bricks in front of the house and fell. RP 472. It is undisputed that he suffered significant injury as a result.

At trial, Mr. Johnson testified that he was quite familiar with the corner, but the bricks had never appeared to him to be a hazardous condition. RP 79. He testified that he was not aware of anyone prior to Mr. Saltzberg having tripped on them. RP 77-79. Additionally, he explained that he had never received any notice from the City that the bricks implicated any code violations, and that he did not know that the City's right-of-way even encompassed the piece of land on which the bricks were laid. RP 77-82.

The first Chuckanut knew of a problem with the bricks was when it received a letter from Mr. Saltzberg's attorney in this case, demanding that they be removed. RP 84-85. As soon as Mr. Johnson saw this letter, he went over to the property with a wheelbarrow and removed the bricks. Id.

2. Litigation History

Mr. Saltzberg and his wife brought this lawsuit against Chuckanut in King County Superior Court; he for his injuries, and she for loss of consortium. CP 1-5. Prior to the trial, both parties filed motions *in limine*. CP 130, 26. One of those filed by the Saltzbergs requested that the trial court prohibit any testimony regarding the fact that Chuckanut was unaware that the bricks violated the Seattle Municipal Code. CP 130. The court denied that motion, with a notation that Chuckanut's knowledge was relevant to the negligence claim. CP 187 (MiL #22).

Both parties filed proposed jury instructions. One of those proposed by the Saltzbergs was related to the motion *in limine* regarding Chuckanut's knowledge. CP 279. It was an instruction from the Washington Pattern Jury Instructions (Criminal) stating, "A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful." *Id.* The trial court declined to give this instruction, and the Saltzbergs failed to take exception. Not only did they fail to except, their attorney also acknowledged that he did not like the "language" of his own proposed instruction and mused about the possibility of another variety of "ignorance is no excuse" style instruction.

RP 502-504. He did not, however, propose any such alternative instruction. *Id.*

The trial proceeded, and on the court's instructions, the jury returned a defense verdict. RP 598. The Saltzbergs filed a Motion for New Trial. The court denied that Motion. CP 336. The Saltzbergs timely appealed. CP 342. The Court of Appeals affirmed in an unpublished Opinion, and denied the Saltzbergs' Motion for Reconsideration. The Saltzbergs now Petition this Court for Review.

IV. Argument Why the Saltzbergs' Petition Should be Denied.

1. The Court of Appeals Opinion is based on evidentiary fairness and failure to preserve an objection regarding the instruction at issue.

The bases for the decision made by the Court of Appeals represent routine appellate deference to discretionary determinations of the trial court. On appeal, the Saltzbergs have exclusively focused on the trial court's denial of their Motion *in Limine* No. 22, and the trial court's failure to give an "ignorance of the law" instruction that *they acknowledged* was inappropriate to the facts, and withdrew. Both of these decisions are addressed below. Neither merits this Court's Review.

a. The trial court was well within its discretion to deny the motion in limine. The Court of Appeals correctly affirmed.

The Court of Appeals found that the trial court acted "unremarkably" and within its discretion when it allowed Chuckanut to present testimony about its knowledge of the code violation, because the Saltzbergs themselves had made that knowledge a centerpiece of their case in chief. Prior to trial, the Saltzbergs consistently intended, and informed the court that they intended, to present the evidence and testimony regarding what Chuckanut "should have known" about the status of the bricks. Trial began on June 26, 2017. RP 6. Three and a half months earlier, on March 7, 2017, the Saltzbergs had filed a Motion for Leave to Introduce Evidence. CP 33. In that Motion, they sought pre-approval for the admission of the following testimony from Mr. Taskey, a Risk Manager for the City of Seattle[1]:

> "Further, Plaintiffs wish to present the testimony of Mr. Taskey that the improvements made by the Defendant prior to November 2013 required a permit and compliance with the code; the permit itself ***informs the landowner*** that compliance with the code is required, and compliance with the code would have required removal of the offending bricks within the 12" right of way."
>
> CP 39-40 (emphasis added).

As part of this motion, the Saltzbergs argued they had the right to admit two Notices from the City informing Chuckanut that the bricks were in violation of the setback requirements. The trial court granted this

[1] Although not so denominated, this was an evidentiary motion *in limine*.

motion on April 7, 2017.[2] CP 112-113. The Court of Appeals correctly recognized the Saltzbergs' stated intention to make knowledge an issue in the lawsuit: knowledge of both the location of the right-of-way, and violation of the setback requirement. CP 61, 77, Opinion at fn. 3. All of this was months *prior* to the trial court's June 26 denial of the Saltzbergs' "no evidence of ignorance" motion *in limine* (MIL #22) on the first day of trial. CP 187. It was the Saltzbergs that made an issue of Chuckanut's knowledge, and it was they who put the Notices in their ER 904 disclosure and reiterated an intent to introduce that evidence on the first day of trial. RP 22. And really, the Saltzbergs had to. Absent a strict liability regime, a landowner's premises liability will always be tied to knowledge of a dangerous condition.[3]

Consequent to winning his March *in limine* motion, Mr. Saltzberg was permitted to present Mr. Taskey's testimony about permit violations and the Notices. That is precisely what he actually did, jumping directly to

[2] The Order resolved competing motions *in limine* on the admission of Mr. Taskey's testimony and the Notices. The Order is denominated an Order Denying Defendant's Motion In Limine to Strike Taskey Testimony, but it grants the relief sought in the Plaintiff's Motion: permitting that testimony.

[3] *See Smith v. Stockdale*, 166 Wn. App. 557, 569, 271 P.3d 917, 924 (2012) (discussing the issue of the landowner's knowledge of a dangerous condition as a well-understood element of premises liability claims). *See also: Bills v. Willow Run I Apartments*, 547 N.W.2d 693, 694 (Minn. 1996), *Lamm v. Bissette Realty, Inc*., 327 N.C. 412, 395 S.E.2d 112 (1990) and *Singleton v. Collins*, 40 Colo. App. 340, 574 P.2d 882 (1978) (holding that knowledge of code requirement prerequisite to premise liability.)

the issue of what Chuckanut knew about the code infraction in the first moments of his opening statement:

> Now, before bringing this case to trial we had to look into whether Chuckanut was actually liable to our client. And ***the first thing we looked at was whether Chuckanut was even aware of its obligation to remove these bricks under these safety rules***. In our investigation we learned that Chuckanut is a professional, for profit, property developer. We believe that Chuckanut should have known about its obligations under the law. . .
>
> We believe that if Chuckanut did not know of its obligations it chose not to know by ignoring its requirements to apply for city permits.
>
> RP 53-54 (emphasis added).

This history solidly supports the Court of Appeals' conclusion that Mr. Saltzberg "sought to admit evidence of the premises owner's knowledge…" and it is "[e]ntirely unremarkable that the trial court allowed Chuckanut to introduce evidence on the same topic that Saltzbergs proposed to admit evidence." Opinion at 5. The evidence was relevant – at a minimum – because the Saltzbergs made it so. The Court should deny Review of this "unremarkable" evidentiary ruling.

b. The Saltzbergs abandoned Proposed Instruction No. 34 and failed to preserve any claimed instructional error on appeal.

The Saltzbergs attempt frame the Court of Appeals affirmance of the trial court's refusal to give an "ignorance is no excuse" instruction as

an egregious assault on a sacred legal principle. The actual ruling of the Court of Appeals is that the Saltzbergs failed to present a choate, applicable instruction on that issue, and failed to preserve the issue for appeal. Secondarily, the Court of Appeals ruled that the "ignorance is no excuse" maxim is generally inapplicable to the code violation in this case. The Saltzbergs ignore both of these holdings in their Petition, but both entirely undermine grounds for review under RAP 13.4(b); there is no conflict of authority, and there is no issue of substantial public interest.

First, the Saltzbergs' Proposed Instruction No. 34 – a criminal pattern instruction – was abandoned by the Saltzbergs at the trial court, and their failure to take exception to its absence prevents them from pursuing error on appeal. In affirming the trial court, the Court of Appeals Opinion correctly recited the tortured history of Proposed Instruction No. 34. Opinion at 6-8. The criminal instruction does not fit in the context of a common law premises liability case.[4] *Id.* During colloquy regarding the instructions, the Saltzbergs' attorney acknowledged to the trial court that "we don't really like the language" of the criminal instruction. RP 503. He then orally attempted to persuade the trial court to give a different, but

[4] The Court of Appeals explained that Chuckanut's defense was more nuanced than "ignorance of the law." Opinion at 7, fn. 21. Knowledge of City's setback requirements is only relevant if one also has knowledge of the location of the City's invisible right-of-way in which those rules apply. Chuckanut presented evidence that it did not know the offending brick was within the right-of-way. RP 77-82. That, as the Court of Appeals noted, would be a question of fact in any event. Opinion at 8.

nebulous "ignorance of the law is no excuse" instruction.[5] *Id.* The Court refused, and then turned to taking formal exceptions. RP 504. The Saltzbergs excepted to the failure to give several of their proposed instructions, but *not* Proposed Instruction No. 34. RP 504-505. The Court of Appeals correctly held that the Saltzbergs' failed to preserve the issue for appeal. Opinion at 7. Failure to take exception is fatal to an appeal of the court's failure to give it, as noted in *Goehle v. Fred Hutchinson Ctr.*, 100 Wn. App. 609, 614-15, 1 P.3d 579, 582-83 (2000). In *Goehle*, the Court ruled that "If the court fails to give the proposed instruction, the party must take exception to that failure." *Id.* This failure to take exception (as required by CR 51(f)) bars a party from complaining on appeal about the instruction not given. *Id*. There is no RAP 13.4(b) conflict with precedent nor violation of public interest in requiring the Saltzbergs to comply with Court Rules and established case law regarding the preservation of alleged error in jury instructions.

2. The Saltzbergs are wrong about the core issue in their Petition. Regardless of whether ignorance of the law is an excuse, not all laws are the basis for civil liability. The code governing the illegal brick is not.

The keystone at the center of the Saltzbergs' legal argument is the proposition that the Seattle Municipal Code, violated by the offending

[5] Oral requests for instructions are insufficient. CR 51(c), (e); *Cowan v. Jensen*, 79 Wn.2d 844, 848, 490 P.2d 436 (1971) (error cannot be based on an oral motion to give instructions).

brick, set the standard of reasonable care for purposes of civil tort liability. It does not. And the fact that it does not is fatal to the Saltzbergs' position. It renders all of their appellate arguments moot, as it provides an alternative ground to affirm the judgment of the trial court.[6] And, importantly, the Saltzbergs did not challenge the appellate court's resolution of this issue against them in their Petition for Review.[7]

To determine whether a statute or municipal code sets the standard of reasonable care for tort liability, Washington has expressly adopted Restatement (Second) of Torts § 286:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

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[6] This issue was not presented at the trial court, but appellate courts should affirm on any meritorious theory. *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 206-07, 293 P.3d 413, 430 (2013). *State v. Carter*, 74 Wn. App. 320, 324 n.2, 875 P.2d 1, 3 (1994)..

[7] The Supreme Court generally does not consider issues that were not specifically identified in the Petition. *Clam Shacks of Am. v. Skagit Cty.,* 109 Wn.2d 91, 98, 743 P.2d 265, 269 (1987).

> *Melville v. State*, 115 Wn.2d 34, 37, 793 P.2d 952, 954 (1990).

The court in *Jackson v. City of Seattle*, 158 Wn. App. 647, 650, 244 P.3d 425, 427 (2010) applied §286 in a context very similar to the present one. There, a contractor was alleged to have negligently installed a water line in a hill that later caused a landslide, damaging plaintiff's home. The plaintiff claimed that a violation of the City of Seattle's stormwater code resulted in the damage, and argued that the code established a duty, under tort law, breached by the contractor. The court disagreed, first noting that the plaintiff in a negligence case has the burden of establishing the existence of a duty, and that the use of statutes or codes in negligence cases pertains to that element. *Id.* SMC 22.802.015 required the contractor to stabilize the soils according to rules promulgated by the Director. SMC 22.802.090 made it a civil violation to create a Dangerous Condition:

> Dangerous Condition. It is a violation of this subtitle to allow to exist, or cause or contribute to, a condition of a drainage control facility, or condition related to grading, stormwater, drainage or erosion *that is likely to endanger the public health, safety or welfare, the environment, or public or private property*.
>
> *Jackson v. City of Seattle*, 158 Wn. App. at 653 (emphasis added).

The court rejected this contention that this statement was enough to trigger §286, recognizing the "lack of language expressing a purpose to

protect a particular class of persons." Then the court stated the baseline rule in this State: "Building codes and other similar municipal codes do not typically serve as a basis for tort liability because they are enacted merely for purposes of public safety or for the general welfare." *Id*. at 654 (emphasis added). The Court looked for a declaration of the basis of the City's intent to deviate from this norm – to determine whether the code was meant to create a private cause of action for violations; the Court found the opposite:

> The code specifically states, "It is expressly the purpose of this subtitle to provide for and promote the health, safety and welfare of the general public. This subtitle is not intended to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefitted by its terms." Former SMC 22.800.020(B).
>
> *Id.* at 654-55.

Courts, as *Jackson* demonstrates, *do not adopt* every statute or code as the standard of conduct for reasonable people in negligence actions. *Id*. Rather, as a matter of "judicial self-restraint, rooted in part in the theory of separation of powers," they look to the purpose of the code as expressed by its authors. *Id*. Because the authors of the municipal stormwater code expressly *disavowed* an intention to create a "class or group of persons who will or should be especially protected or

benefitted[8]," the Court concluded that the code did not *as a matter of law*, establish the standard of care in the negligence action. *Id.* The plaintiff could prove its case only by reference to the usual "reasonable person" standard. *Id.*

The code at issue here does not define the tort liability standard of care. It is Seattle Municipal Code Title 15, the "City's Right of Way Ordinance." CP 130-132. This is the code that the Saltzbergs insist should be the standard of care in this negligence case. The ordinance explicitly states its intent with regard to the use and purpose of Title 15:

> It is expressly the purpose of this Street Use Ordinance to provide for and promote the health, safety, and welfare of the general public; and ***not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited*** by the terms of this Street Use Ordinance.
>
> SMC 15.02.025(C) (emphasis added)

That is to say, the code relevant in the case at bar recites the identical purpose, to the comma, as did the code sections relied upon by the plaintiff in *Jackson*. Correctly relying on that language (which even adopts the phraseology of the Restatement to avoid any chance of confusion), the Court of Appeals in the case at bar ruled that SMC 15 could *not* be used to set the standard of care for tort liability. Opinion at 8, fn. 22. This holding removed the keystone from the Saltzbergs' "ignorance

[8] Per Restatement (Second) of Torts §286.

of the law is no excuse" argument and causes its collapse; the law about which Chuckanut was ignorant was legally irrelevant to Chuckanut's liability *ab initio*.

This critical (and correct) holding of the Court of Appeals remains unchallenged; the Saltzbergs have not sought review of it, and do not even mention it. Because *all* of the issues on which the Saltzbergs *do* petition are predicated on using SMC 15 as the only basis for civil liability, nothing of substance remains. The Court should deny the Petition.

3. Washington is not a negligence per se State. In Washington it is the jury, not the court, that determines whether a statutory violation is evidence of negligence.

The Saltzbergs contend that the Court of Appeals Opinion conflicts with the "better reasoned" Idaho case of *Nettleton v. Thompson,* 117 Idaho 308, 787 P.2d 294 (Ct. App. 1990). But it is not the *reasoning* of *Nettleton* that conflicts with the Court of Appeals' Opinion, it is the law of Idaho that conflicts with the law of Washington. As noted in *Nettleton* itself, Idaho fully subscribes to the doctrine of Negligence Per Se.[9] *Id.* In Washington, negligence per se has been legislatively abolished. RCW 5.40.050: "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence. . ." Even

[9] "In Idaho, violation of a city ordinance may constitute negligence per se." *Nettleton at* 310.

presuming that SMC 15 creates a "duty imposed by ordinance" (although it does not), a violation of that code "shall not be considered negligence per se" under RCW 5.40.050. Instead, the jury "may" (but is not required to) consider it as evidence of negligence. *Id*.

Despite the fact that negligence per se has been statutorily abolished in Washington, the Saltzbergs, undeterred, argue that this Court must accept review to judicially impose a full-throated version of the very doctrine explicitly rejected by our legislature. The Saltzbergs do not even cite RCW 5.40.050 in their Petition, much less make any attempt to distinguish it. As the Court of Appeals correctly held, "The basic premise of Saltzberg's argument that ignorance of the law is an invalid excuse for violation of this ordinance fails." Opinion at 8, fn. 22.

In negligence per se jurisdictions, such as Idaho, negligence is legally presumed as a consequence of a statutory or code violation. Restatement (Second) of Torts §286, Restatement (Third) of Torts §14. Once established, that presumption can be "excused" under certain circumstances, described in the Restatement (Second) of Torts §288A and Restatement (Third) of Torts § 15.[10] As noted in *Nettleton*, the burden is on the defendant to prove the excuse. Under RCW 5.40.050, Washington's law works in almost exactly the opposite direction. While

[10] Washington has never adopted Restatement (Second) of Torts §288A, nor Restatement (Third) of Torts § 14, or 15.

violation of *appropriate* statutes "may" be considered by the jury as evidence of negligence, no presumption of negligence is created, and no burden falls to the defendant to prove any excuse. In this State, the relationship between a statutory violation and the duty of reasonable care is unambiguously committed to our juries, not controlled by legal presumptions.

The effect of RCW 5.40.050 was described in *Mathis v. Ammons*, 84 Wn. App. 411, 418-19, 928 P.2d 431, 435-36 (1996):

> Because of RCW 5.40.050, a trial judge can no longer find negligence as a matter of law merely because a statutory duty was violated without excuse or justification; rather, he or she must determine whether, ***in light of all the facts and circumstances of the case***, reasonable minds could differ on whether the defendant used ordinary care. If all reasonable minds would conclude that the defendant failed to exercise ordinary care, the judge can find negligence as a matter of law. If no reasonable mind could find that the defendant failed to exercise ordinary care, the judge can find the absence of negligence as a matter of law. In any other case, negligence is an issue for the trier of fact, even when the defendant breached a duty imposed by statute.
>
> *Id.* (emphasis added)

Thus did RCW 5.40.050 eliminate the need to pigeon-hole defenses to "negligence established by statutory duty" into the narrow "excuse" categories of Restatement (Second) of Torts §288A (Restatement (Third) of Torts §15). Instead, the statute turns the question over to the jury to weigh along with all the other evidence. It is hornbook law that

"[w]eighing the evidence lies exclusively within the province of the jury." *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 148, 381 P.2d 605, 612 (1963). In short, in Washington, the jury writes its own list of permissible factors to weigh against the evidence of negligence supplied by a statutory or code violation. *Nettleton* is in direct conflict with Washington law on these points.

Mr. Saltzberg also *continues* to attempt to power through the adoption of RCW 5.40.050 by relying on, and misinterpreting, *Mathis v. Ammons*, 84 Wn. App. 411. Without explanation, the Saltzbergs argue to this Court that *Mathis* supports the proposition that a defendant is negligent per se if a statutory duty was violated without excuse or justification. Respectfully, it remains impossible to more grossly mischaracterize *Mathis*. The explicit holding of that case is that the statutory elimination of negligence per se removes "excuse or justification" from the legal analysis entirely and replaces it with presenting the "statutory standard" to the jury as evidence of negligence to be weighed along with all other attendant circumstances in determining whether the defendant used ordinary care.

And while a Washington jury is performing this weighing, there is absolutely no prohibition on its consideration of whether the defendant was aware that a brick on its property was located within the City's right-

of-way or not. As the conscience of the community, one should expect the jury to judge more harshly a defendant that knew of an ordinance and chose to violate it than a defendant who was understandably unaware of its application. There is nothing wrong with this. Tort law consciously and frequently makes distinctions based on whether conduct was intentional or negligent, with more severe consequences corresponding to the former than the latter. For example, RCW 4.22.070 allows a negligent tortfeasor to apportion liability to a comparatively negligent plaintiff, but prohibits an intentional tortfeasor from doing so. Indeed, the degree of intentionality versus inadvertence has everything to do with what a reasonable person expects to follow from his or her conduct:

> Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another.
>
> *Adkisson v. Seattle*, 42 Wn.2d 676, 687, 258 P.2d 461, 467 (1953)

As described above, the code violation in this case should not even be considered negligence. But even if it were, the violation was submitted to the jury with an instruction that it may be evidence of Chuckanut's negligence, in accordance with RCW 5.40.050. CP 208. The jury was

entitled to give different weight to that evidence as between a defendant that was actively, maliciously cementing bricks in the middle of the sidewalk, in knowing violation of code, and this defendant, which purchased a building not knowing that a few bricks that had been there for 30 years were closer to an invisible right-of-way than it realized. Because the jury was entitled to differential weighing of the evidence based on the defendant's intention, testimony regarding whether Chuckanut knew that its bricks were in the City's right-of-way or otherwise violated code was entirely appropriate, properly allowed by the trial court, and correctly affirmed by the Court of Appeals.

V. Conclusion

For the foregoing reasons, Respondent Chuckanut Capital, LLC respectfully requests that the Court deny the Petition for Review.

Respectfully submitted this 31st day of May 2019.

HACKETT, BEECHER & HART

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CERTIFICATE OF SERVICE

I, Brent W. Beecher, certify under penalty of perjury under the laws of the State of Washington that on this day I sent the foregoing brief via electronic service through the Clerk of the Court (JIS) and caused to be delivered to the following parties:

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