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No. 54325-7-II

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

AUSTIN K. FITE, individually,

Respondent,

v.

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

Appellant,

and

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

Defendants.

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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 and a private citizen's pickup truck in a marked crosswalk. At that site, there had never been an injury to another pedestrian in the crosswalk, and the City's crosswalk complied with all applicable road design standards. There is no question that the skateboarder suffered injuries and should be compensated by the pickup driver, who has not appealed from the judgment on the jury's $6.5 million verdict. But there are questions whether the City should also be held liable as though it is an insurer for its residents' roadway use, and whether plaintiff Austin Fite was at least partially at fault.

On these questions, the trial court committed a series of errors that deprived the City of a fair trial. Before trial even began, the court dismissed the City's statutory intoxication defense as a matter of law and excluded the ample evidence of Fite's intoxication, including his own admission that he was high on marijuana. Then, despite an eyewitness account of Fite riding his skateboard into the intersection without stopping or looking left or right for oncoming traffic, the trial court ruled as a matter of law that Fite did not need to look left or right. Based on this erroneous conception of Fite's own duty to protect himself, in trial the court repeatedly sustained objections to all the City's attempts to offer

evidence of Fite's speed, his failure to stop, and his failure to look. The court then hamstrung the City's closing argument, insisting that the City's counsel to delete illustrations that discussed a pedestrian's duty to look.

The court also slanted the jury instructions in Fite's favor. While municipalities undoubtedly have a duty of ordinary care for their roadways, jury instructions on that duty have been hotly contested. But in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), the Supreme Court promulgated the now-standard instruction that is found in a pattern instruction. Despite *Keller*, the court wrote its own instruction on the City's duty, using language that it cut and pasted from a Division I opinion that concerned very different circumstances. Then, when the City sought to balance that instruction with its own proposed instructions, the trial court refused to give them.

These rulings kept the truth from the jury and precluded the jury from fully hearing the City's liability defense. This Court must remedy these errors by awarding the City a new trial on liability.

B. ASSIGNMENTS OF ERROR

(1) <u>Assignments of Error</u>

1. The trial court erred in granting Fite's motion for partial summary judgment by its July 26, 2019 order.

2. The trial court erred in entering its August 23, 2019 order denying the City's motion for reconsideration on its intoxication defense.

3. The trial court erred in excluding the expert testimony of Kenton Wong.

4. The trial court erred in giving jury Instruction Number 28.

5. The trial court erred in admitting Exhibits 48A and 48B.

6. The trial court erred in excluding evidence of eyewitness Kelly Boutte's June 22, 2019 declaration.

7. The trial court erred in limiting the testimony of Gerald Bretting and excluding his illustrative exhibits.

8. The trial court erred in entering the judgment on the jury's verdict on December 13, 2019.

(2) Issues Pertaining to Assignments of Error

The City's appeal centers on liability, not damages.

1. The City's intoxication defense:

a. Where there is substantial evidence that Fite was high on marijuana when he rode a skateboard across a street and was struck by a vehicle, did the trial court err in summarily dismissing the City's intoxication defense under RCW 5.40.060? (Assignments of Error Numbers 1-3, 8)

b. Did the trial court abuse its discretion excluding testimony of an expert relevant to Fite's intoxication? (Assignments of Error Numbers 1-3, 8)

2. The City's alleged liability:

a. Did the trial court err in instructing the jury on a municipality's roadway safety duty when it crafted an instruction from language in a court decision that effectively made the municipality an insurer of the safety of anyone using that municipality's roads? (Assignments of Error Numbers 4, 8)

b. Did the trial court abuse its discretion by admitting hearsay police reports about other accidents when those

other accidents were not substantially similar to the accident in this case? (Assignments of Error Number 5, 8)

3. Fite's contributory negligence:

a. Did the trial court err in effectively granting summary judgment on the scope of Fite's observational duty at the intersection, absolving him of any obligation to look both ways before crossing a street on his skateboard? (Assignments of Error Numbers 1, 8)

b. Did the trial court err in preventing the City from introducing evidence during the testimony of eyewitness Kelly Boutte that she had testified in a declaration under penalty of perjury that Fite did not look to his right or his left for oncoming traffic? (Assignments of Error Numbers 1, 6, 8)

c. Did the trial court abuse its discretion excluding expert testimony and demonstrative evidence relevant to Fite's speed and the accident's events? (Assignments of Error Numbers 1, 6, 8)

C. STATEMENT OF THE CASE

(1) Factual History

Austin Fite had a "cannabis dependence," according to his medical records, with his marijuana use dating back to his time in middle school. CP 2121-22. The THC in marijuana is "a potent and unique psychoactive drug," according to a toxicologist. CP 1952. 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. When Fite was in 12th grade, as his addiction worsened, Fite dropped out of high

school. CP 2123. Fite used marijuana "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.

One afternoon, Fite was "high" on marijuana, as he later admitted to his doctor (and this was confirmed by a urinalysis). CP 1847-48, 2123, 2125. Fite felt hungry while he was high and went on his skateboard to buy a cheeseburger at McDonald's, which was inside the Walmart across from Bradley Lake Park in Puyallup. CP 781, 908, 2123; RP 3016. After getting his snack, Fite rode his skateboard back toward the park, where he had been living occasionally since leaving home. CP 896, 908, 2123; RP 1673-74.

As Fite made his way to the park, he rode across 31st Avenue Southeast and headed towards the marked crosswalk across 5th/7th Street towards the park. CP 896-97. Fite was familiar with this marked crosswalk. CP 898; RP 2097. 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. 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. In fact, he had seen near-miss accidents where pedestrians had to run or jump out of the way. CP 902-03. 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.

Fite was wearing sunglasses and holding a McDonald's cup as he skateboarded. RP 1875, 1899-1900. While he approached the crosswalk, vehicles were traveling on 5th/7th Street towards the crosswalk. One of the vehicles, a pickup truck driven by Lee Mudd was proceeding northbound on 5th. CP 667. Mudd was traveling 21-27 miles per hour, perhaps as fast as 30. CP 667; RP 1861, 2581-82. Mudd saw four or five vehicles in the left-hand turn lane as he headed to Walmart. CP 667-68. Mudd did not see Fite. CP 668, 670. When Fite entered the crosswalk, Mudd's pickup truck was only 200 feet away. CP 921.

Kelly Boutte was driving the vehicle directly behind Mudd at the same time. RP 1858-59. From her perch in her full-sized Yukon SUV, she had a "clear view" of the crosswalk, as she later recalled. RP 1858, 1883.

Boutte saw what happened: "I could see the Plaintiff on his skateboard approach the crosswalk from the sidewalk, and enter the crosswalk. At no time did I see him stop. At no time did I see him look left. At no time did I see him look right." CP 1153. Boutte also did not see Fite stop in the middle of the intersection, CP 2096, where a pedestrian refuge was located, RP 2387, 2242. And Boutte did not see Fite accelerate on his skateboard to get out of Mudd's way. CP 2096. At the last moment, Fite noticed Mudd's pickup truck. CP 894. Mudd's truck hit him. CP 672.

At the site, the City-operated roadway and crosswalk complied with national, state, and city road-design standards. RP 2177-78, 2199-2215, 2257, 2952-54, 2962-68. Since the City installed the crosswalk, no pedestrian had ever been hit by a vehicle before Fite's accident, and the City's public works department had not received any complaints about pedestrian safety at the crosswalk. RP 2304-05, 3080.

According to an accident reconstructionist, Gerald Bretting, upon Fite entering the crosswalk, Mudd's truck was an "imminent hazard" and "within striking distance." CP 921. Eyewitnesses disagreed about whether vehicles were in the left turn lane, potentially obstructing Fite's view of Mudd. Mudd said there were vehicles there; Boutte said there were not. CP 667-68; RP 1858. But if the turn lane was clear and Fite had looked right, he would have seen Mudd's truck and should have then recognized

the danger, according to Bretting. CP 921. And if the turn lane was occupied and Fite had stopped and looked right, he would have realized that his view of oncoming traffic in the far lane was obstructed, and he could then have waited to enter or paused in the refuge area. Fite could also have protected himself by accelerating his skateboard and finishing crossing the street, given how close he was to the other side after impact. CP 923. All three of these safety measures would have been reasonable and would have avoided the collision, according to Bretting. CP 922-23. There was no evidence that Fite took any of these precautions. CP 873-74.

(2) Procedural History

Fite filed an action in the Pierce County Superior Court against Mudd, CP 1-4, and a separate action against the City alleging negligent road design. CP 3794-97. The actions were consolidated. CP 9-11. Both Mudd and the City answered. CP 5-8, 3798-3801.

Fite moved for summary judgment. CP 606-47. The trial court, the Honorable Shelly K. Speir, granted Fite's motion in part. CP 1302-04. The 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 on comparative fault, the trial court limited the City's defense of contributory negligence, 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 case was tried to a jury over 18 trial days. CP 3229-62. Fite's attorney promised the jurors to be "brutally honest" with them. RP 295, 416, 3294. But Fite filed extensive motions *in limine* to keep evidence from the jury. CP 2259-2317, 2385-99, 2411-19. The trial court granted Fite's motions to, among other things, keep from the jury any evidence of his intoxication, his rate of speed upon entering the crosswalk, and 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.

After opening statements, the trial court barred the City from offering testimony about Fite's actions while crossing the street. Eyewitness Boutte changed her story from her initial written declaration, saying now that she did *not* see whether or not Fite looked both ways before entering the crosswalk. CP 1294; RP 1845. But the trial court prohibited the City from offering her first declaration, 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. Then, 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.

During the conference on jury instructions, Fite offered a customized jury instruction on the City's duty of care, which drew on *Xiao Ping Chen v. City of Seattle,* 153 Wn. App. 890, 223 P.3d 1230 (2009). CP 2690. The City objected. CP 2936-38; RP 3186-87. The court then wrote its own instruction, which became Instruction 28.[1]

Before closing arguments, the trial court directed the City's counsel to delete his PowerPoint slides about a pedestrian looking for oncoming traffic. CP 3373, 3449-50; RP 3235-36. With that ruling, and with the court's evidentiary rulings on whether Fite had stopped or had looked both ways for oncoming vehicles, the City's counsel did not even attempt to argue Fite's contributory negligent. RP 3273-93.

The jury found that Fite was not contributorily negligent and that both Mudd and the City were liable to Fite for damages of $6.5 million.

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[1] Instruction 28 provided, in full:

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

CP 3190.

CP 3264-65. The jury apportioned fault 33% to Mudd and 67% to the City. CP 3265-66. After the court entered judgment on the verdict, the City appealed. CP 3470-3514.

D. SUMMARY OF ARGUMENT

In depriving the City of RCW 5.40.060's intoxication defense, the trial court erred. The City adduced substantial evidence on Fite's intoxication at the time of the accident that should have been presented to the jury. Fite was a chronic marijuana user and a hospital urinalysis test documented that he was intoxicated at the time of the collision under RCW 46.61.502's standard, which is incorporated in RCW 5.40.050. The jury should have been allowed to hear expert testimony on his intoxication and to assess the truth of whether Fite's intoxication was to blame.

The trial court also failed to properly address the City's roadway design liability and Fite's comparative fault. The trial court's Instruction 28, developed by the trial court *sua sponte* from isolated language in a Division I opinion, incorrectly enhances the City's roadway design duty articulated in WPI 140.01, an instruction our Supreme Court developed. That prejudiced the City by effectively making it an insurer of roadway user's safety. Further, that instruction directed the jury to disregard evidence of City compliance with applicable road design statutes, rules, and standards, effectively depriving the City of its ability to argue its

theory of the case under Instruction 27, relating to its roadway design duty. These errors were exacerbated by the trial court's admission of a hearsay police report of a dissimilar accident to Fite's.

The trial court deprived the City of a fair opportunity to present its defense of Fite's comparative fault. Although Fite was high at the time of the collisionand failed to look both ways for traffic, the trial court precluded jury consideration of his cannabis use, or his speed, and absolved him as a matter of law of any obligation to look both ways to avoid the accident. The trial court abused its discretion in excluding evidence from Kelly Boutte that Fite failed to look both ways. This error was prejudicial to the City.

A new trial on liability is required.

E. ARGUMENT

(1) The Trial Court Erred in Excluding the City's Intoxication Defense Under RCW 5.40.060

The trial court excluded key evidence of Fite's cannabis intoxication at the time of the accident and then precluded the City from presenting an RCW 5.40.060 defense entirely by granting Fite's motion for summary judgment on that defense and denying reconsideration of that erroneous decision. CP 1303, 2190-92. This was error, particularly because RCW 5.40.060 provides a *complete* defense to liability.

(a) RCW 5.40.060 Provides a Complete Defense to a Plaintiff's Claim for Personal Injuries

In 1986, the Legislature established what amounts to a contributory fault standard for intoxication by alcohol or drugs:

> [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*.

RCW 5.40.060 (emphasis added).

This statute created a complete defense to liability. *Peralta v. State*, 187 Wn.2d 888, 892, 896, 389 P.3d 596 (2017). Our Supreme Court has confirmed that the statute's purpose is "to curtail the rights of certain intoxicated persons," *Morgan v. Johnson*, 137 Wn.2d 887, 896, 976 P.2d 619 (1999), by affording defendants a complete defense to civil liability "even when its results may seem unduly harsh," *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). For example, in *Geschwind*, the Court held the statute applies even to a car passenger. *Id.* Most

recently, in *Peralta*, the Court reaffirmed the state's broad sweep, applying it to an intoxicated pedestrian struck by a WSP vehicle while she was on the road. 187 Wn.2d 897. But the trial court deprived the City of an opportunity to present this complete defense to the jury.

(b) Proof of Fite's Intoxication

In this case, *ample* evidence supported the submission of this complete defense to the jury.[2] 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." Under RCW 46.61.502, whether a person was "under the influence" of marijuana may be proven two ways. 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 … marijuana." RCW 46.61.502(1)(c). This latter standard means that "'the person's ability to act as a reasonably

[2] A defense of comparative fault 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) ("If a party's theory of the case is supported by substantial evidence, he or she is entitled to have the court instruct the jury on it.").

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)). As with intoxication by alcohol, *either* of these two methods suffices to how that a person is under the influence of marijuana. *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).

Here, Fite's hospital urinalysis test results were sufficient for a jury to find he was under the influence of marijuana. Sally Kramer, CHI Franciscan's CR 30(b)(6) witness, testified that the hospital was "very confident" that Fite had at least 50 ng/ml in his body on the date of the test and could state so with 98% confidence, referring to the precision and accuracy measurements in Fite's test results. CP 1848, 1857-58, 1880. RCW 46.61.502(1)(b) establishes a THC concentration of 5.00 or higher for intoxication. This equates to 5 ng/ml. *City of Kent v. Cobb,* 196 Wn. App. 1043, 2016 WL 6534892 at *1 (2016), *review denied,* 188 Wn.2d 1005 (2017). Thus, Fite undeniably had THC in his system.

Fite's urinalysis results were reliable. Kramer testified in detail regarding the automated process used to analyze the THC levels in Fite's urine sample. CP 1828-30. Initial screening test results are confirmed to establish the exact amount of drugs in the system for medical treatment

purposes. CP 1839. The initial test is called a "screen" because it produced a qualitative result rather than a quantitative result. CP 1861. Kramer testified that to her knowledge, the fact that this initial test is called a "screening test" in no way impairs the accuracy of the result. CP 1877-78. In her twenty plus years of experience, 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. Franciscan undertook quality control in Fite's case, documenting his results, and ensuring that the results were properly charted. CP 1849-51.[3] Fite did not show that there were any complications or mistakes in processing his screening test. CP 2058-66.

Notwithstanding Fite's contrary contention, CP 2061-62, a blood draw was not required to establish that Fite was under the influence of marijuana based on the standards of RCW 46.61.502.[4] While a urinalysis might not satisfy the "*per se*" intoxication prong of RCW 46.61.502(1)(b), Fite having *ten times* the "per se" limit of THC in his system was powerful

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[3] Another CHI Franciscan CR 30(b)(6) representative, Haley Wahl, testified that the method of obtaining a urine sample did not affect the accuracy of the test. CP 1901-02. Once a sample is obtained, it is labeled with the patient's information and checked against their name tag and then verified with the patient. CP 1906-07. The samples are then placed in the pneumatic tubes where they are processed pursuant to the DXC process; misidentification issues are rare, involving less than one percent of the tests. CP 1906-10. According to Wahl, this same process was used in 2014 to process Fite's samples. CP 1934.

[4] There is more than a little irony in fact that Fite's counsel is arguing to our Supreme Court in *Gerlach v. Cove Apts.*, Supreme Court Cause No. 97325-3, that the BAC results of hospital blood draws in an RCW 5.40.060 are "unreliable."

evidence by which a jury easily and reasonably could infer, by a preponderance of the evidence, that Fite was "under the influence of or affected by … marijuana," RCW 46.61.502(1)(c).

Additional evidence strengthened—and independently supported—this reasonable inference. According to Fite's own doctor, Fite had a "cannabis dependence" 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 marijuana that day. CP 2125. These facts are like the plaintiff's admission in *Peralta* that she was "'under the influence of intoxicating liquors,'" which was sufficient evidence to prove the plaintiff's intoxication under RCW 5.40.060. *Peralta*, 187 Wn.2d at 893, 902-05 (quoting plaintiff's admission). While the admission in *Peralta* was a CR 36 admission, that distinction makes no difference. Fite was an experienced marijuana user. CP 2121. His statement that he was "high" was self-recognition that his mental faculties were affected to an appreciable degree. *Peralta*, 187 Wn.2d at 899. On top of all this evidence, forensic scientist Kenton Wong concluded on a more likely than not basis that Fite was impaired and his impairment contributed to the accident. CP 2114. Fite's intoxication would have led to altered time/space

perception and lack of concentration, CP 2114, both of which were factors in how the accident occurred, according to Gerald Bretting, the City accident reconstruction expert. CP 923 ("It is my expert opinion that Mr. Fite had sufficient time and ample sight distance to detect the Mudd vehicle and utilize reasonable strategies to avoid this accident.").

In sum, the trial court erred in failing to allow a jury to credit this evidence of Fite's overwhelming intoxication, and the jury should have been allowed to consider whether Fite's intoxication was a proximate cause of his injuries within the meaning of RCW 5.40.060.

(c) Toxicologist Kenton Wong's Testimony Should Not Have Been Excluded

The trial court also abused its discretion in excluding Kenton Wong's testimony.[5] At the hearing on the City's motion for reconsideration of the trial court's dismissal of its intoxication defense, the trial court determined that Wong's testimony about Fite's intoxication was "speculation" and did not identify the precise symptoms that Fite was experiencing at the time of the collision. RP (8/23/19) 23-26. Then,

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[5] Washington appellate courts generally review evidentiary decisions for an abuse of discretion, *Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011), but a court abuses its discretion if its ruling is manifestly unreasonable or is based on untenable grounds or reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). An incorrect application of the law, as here, necessarily constitutes an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

because the trial court excluded evidence of Fite's intoxication at trial, the City was precluded from presenting his testimony. The court erred.

Under ER 702-04, Washington employs a three-part test to determine if expert testimony is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Philippides v. Bernard,* 151 Wn.2d 376, 393, 88 P.3d 939 (2004). While trial courts have broad discretion when applying this test, *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), *cert. denied*, 568 U.S. 1090 (2013), Washington appellate courts have not hesitated to reverse exclusions of expert testimony. Indeed, a *long* line of cases shows that ER 702-04 express a liberal policy favoring the admissibility of expert testimony.[6]

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[6] *E.g. Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014) (expert testimony on biomechanical forces admissible); *L.M. by and through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019) (trial court properly admitted testimony of biomechanical engineer on the natural forces of labor in a malpractice claim against a midwife). *See also*, *Gonzalez-Mendoza v. Burdick*, 175 Wn. App. 1038, 2013 WL 3477281 (2013) (biomechanical forces expert testimony admissible); *Taylor v. Bell*, 185 Wn. App. 270, 286-87, 340 P.3d 951 (2014), *review denied*, 183 Wn.2d 1012 (2015) (trial court erred in excluding testimony of law professor who was not licensed in Washington although he had extensive experience on multi-jurisdictional corporate practice); *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 769, 375 P.3d 709 (2016), *review denied*, 187 Wn.2d 1003 (2017) (trial court erred in excluding testimony of bicycle expert on roadway); *Strout v. Wal-Mart Stores, Inc.*, 9 Wn. App. 2d 1073, 2019 WL 3413636 (2019) (trial court erred in excluding expert testimony of architect on window design defects); *Watness v. City of Seattle*, 11 Wn. App. 2d 722, 751-52, 457 P.3d 1177 (2019), *review denied*, __ P.3d __ (2020) (biomechanical engineer qualified to testify on synchronization of audio/video recordings).

Here, Wong was eminently qualified to render his opinion on Fite's impairment. CP 1956-61. His testimony would have been helpful to the jury. While many Washingtonians may have firsthand or secondhand knowledge about marijuana's effects, Wong's testimony would have helped all jurors understand the effects of THC. As he explained in his initial declaration, marijuana causes "decreased motor coordination, lethargy, disorientation, relaxation, altered time/space perception, lack of concentration, alterations in thought formation and expression, drowsiness, sedation," and other effects, "which may last up to 24 hours." CP 1953. Based on his review of the record, he concluded that the THC in Fite's body "may have been at least a contributory factor in the precipitation of the accident which resulted in his subsequent injuries." *Id*. Wong reinforced that opinion in his supplemental declaration, noting that "[i]n the absence of a medical reason for using marijuana, the intent of a marijuana user is to become intoxicated." CP 2114. He opined that "Mr. Fite was impaired at the time of accident on a more probable than not basis." *Id.* He further concluded that this impairment was, "on a more probable than not basis, at least a contributory factor in the precipitation of the accident which resulted in his subsequent injuries." *Id.*

The trial court was wrong to conclude that Fite's admission about being "high" could lead only to speculation and thus could not support

Wong's opinion. RP (8/23/19) 23-26. The trial court noted that a teenager might use the word "high" without implying intoxication, as in, "Are you high?" *Id.* at 23. But even if that were true (it is not true, because such a question from a teenager implies that the other person is acting so oddly that they must be on drugs), an alternative possible meaning of "high" would go only to the weight of Wong's testimony. In context, Fite's meaning was apparent—he was telling his medical doctor that he was affected to an appreciable degree by marijuana. CP 2121, 2123.

The prejudicial effect of Wong's exclusion is obvious. Even if the court had permitted the City's intoxication defense, the City was deprived of the ability to assist the jury in understanding the evidence.

(2) The Trial Court Erred in Handling Issues Pertaining to the City's Alleged Liability for Fite's Injuries

Although the trial court gave Instruction 27 to the jury that is WPI 140.01, CP 3189, the general instruction for a municipality's liability for an allegedly unsafe road design, it put its thumb on the scale in the case by giving the jury Instruction 28 and making erroneous evidentiary rulings that bore on liability, favoring Fite. The City was deprived of a fair trial.

(a) The Trial Court Erred in Giving Instruction 28, Based on Division I's *Chen* Case, to the Jury[7]

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[7] Jury instructions are reviewed *de novo* for errors of law. An instruction that contains an erroneous statement of the applicable law is reversible error if it prejudices a

For more than 100 years, our courts have developed a fair articulation of municipal liability for road design that balances making the government an insurer of all car accidents against providing appropriate redress for people injured by inherently dangerous roads. While a city has a duty to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, *Sutton v. City of Snohomish*, 11 Wash. 24, 28, 39 P. 273 (1895), a municipality does not have a duty to maintain its streets in "ideal traveling condition," *Owens v. City of Seattle*, 49 Wn.2d 187, 191, 299 P.2d 560 (1956), nor is it an insurer against roadway risks or a guarantor of travelers' safety. *Berglund v. Spokane Cty*., 4 Wn.2d 309, 313, 103 P.2d 355 (1940); *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002).

In *Keller*, our Supreme Court effectively crafted the requisite instruction on roadway design. The instruction at issue there stated:

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party. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). An error is prejudicial if it affects the outcome of the trial." *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). Instructions that misstate the law are presumed prejudicial "unless it can be shown that the error was harmless." *Fergen*, 182 Wn.2d at 803.

Trial courts have discretion in deciding whether to give a particular instruction, the number of instructions on a given theory, and word choice. *See, e.g.*, *Taylor*, 187 Wn.2d at 767 ("In general, whether to give a particular instruction is within the trial court's discretion." (citation omitted)); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994) ("The number and specific language of jury instructions is a matter within the trial court's discretion."). However, trial courts abuse this discretion when the instructions, read as a whole, mislead the jury, do not allow each party to argue their theory of the case, or do not inform the jury of the law to be applied. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991); *Seattle W. Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 9-10, 750 P.2d 245 (1988).

> A city has a duty to exercise ordinary care in the signing and maintaining of its public streets to keep them in a condition that is reasonably safe for ordinary travel *by persons using them in a proper manner and exercising ordinary care for their own safety.*

146 Wn.2d at 241 (emphasis added). But, focusing on the italicized clause, the Court redesigned the jury instruction for road design cases, stating:

> …we decline to remove the modifier "ordinary" from travel [as suggested by WSTLA], as that would seem to change the scope of the duty. Thus, we hold that when instructing a jury as to a municipality's duty, the correct instruction should read as follows:
>
> A {County} {City} {Town} {State} has a duty to exercise ordinary care in the {construction} {repair} {maintenance} of its public {roads} {streets} {highways} to keep them in a reasonably safe condition for ordinary travel.

Id. at 254. That instruction prevails today as WPI 140.01 and was given to the jury as Instruction 27. CP 3189.

(i) <u>Instruction 28's Emphasis on the "Totality of the Circumstances" Contradicted the Proper Standard for the City's Duty to the Traveling Public</u>

In addition to Instruction 27, the trial court gave Instruction 28, derived from isolated language in *Chen*, 153 Wn. App. 890. That was error because in doing so, the trial court improperly emphasized Fite's theory of the case, contrary to prevailing law on a municipality's duty to

provide safe roadways.

The facts in *Chen* were unique. There, decedent Liu was crossing a five-lane arterial when he was struck and killed. For the prior 15 years, residents of the neighborhood had complained and petitioned the City to install a stop light, like the adjacent intersections. Eight years before Liu's accident, the City installed a pedestrian refuge island that provided pedestrians a safe place to wait for a gap in traffic at the middle of the crossing. However, this safety refuge island prevented cars from making left turns into the commercial businesses adjacent to the intersection. Four years before Liu's accident, the City bowed to the commercial pressure and removed the refuge island. While the refuge island was in place, there had been no pedestrian accidents. After the City removed it, there were eight pedestrians hit in the intersection and one fatality. The City had adopted a Transportation "Director's Rule" that it should not install a marked crosswalk at this location, given the high speeds, high volumes, and five lanes of travel. 153 Wn. App. at 894–95.

Division I held there that "the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently

dangerous or inherently misleading." *Chen*, 153 Wn. App. at 909.[8]

The trial court erred in excerpting language from an opinion for its instruction on the law. That a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury instruction; in fact, the language in an appellate court opinion, even a Supreme Court opinion, "is not ordinarily designed or intended as a model for jury instructions." *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968).[9] In *Turner v. City of Tacoma*, 72 Wn.2d 1029, 1034, 435

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[8] *Chen* has been cited by appellate courts numerous times over the past 11 years. But not one of these cases involved the submission of a jury instruction based on *Chen*'s "totality of the circumstances" language (or anything else from *Chen*). *Hernandez v. Fedorchenko*, 156 Wn. App. 1053, 2010 WL 2807737 (2010) (affirming partial summary judgment); *Tarutis v. City of Seattle*, 158 Wn. App. 1030, 2010 WL 4402978 (2010), *review denied*, 171 Wn.2d 1020 (2011) (summary judgment reversal); *Gunther v. State*, 169 Wn. App. 1042, 2012 WL 3224327 (2012) (summary judgment reversal); *Kress v. State*, 170 Wn. App. 1032, 2012 WL 4055444 (2012), *review denied*, 176 Wn.2d 1028 (2013) (summary judgment reversal); *Plasse v. Dung Mao*, 171 Wn. App. 1008, 2012 WL 4857189 (2012), *review denied*, 177 Wn.2d 1013 (2013), *cert. denied*, 571 U.S. 1018 (2013) (affirming trial court's instruction, rejecting *Chen*-based argument that the instruction given should have been clarified); *Leonard v. Grubb & Ellis Equity Advisors*, 176 Wn. App. 1003, 2013 WL 4500336 (2013) (*Chen* cited for elements of negligence); *Alexander v. Sanford*, 181 Wn. App. 135, 170, 325 P.3d 341, *review denied*, 181 Wn.2d 1022 (2014) (*Chen* cited for elements of a tort action); *Torgerson v. City of Seattle*, 180 Wn. App. 1014, 2014 WL 1287128 (2014) (summary judgment reversal); *Rashoff v. State*, 190 Wn. App. 1037, 2015 WL 6440967 (2015), *review denied*, 190 Wn.2d 1037 (2016) (summary judgment reversal); *Wuthrich v. King Cty.*, 186 Wn. App. 1023 (2015), *rev'd*, 185 Wn.2d 19, 366 P.3d 926 (2016) (summary judgment affirmance); *Woolcott v. City of Seattle*, 194 Wn. App. 1009, 2016 WL 2967731, *review denied*, 186 Wn.2d 1020 (2016) (summary judgment affirmance); *Bruce v. Holland Residential, LLC*, 195 Wn. App. 1053, 2016 WL 4508247 (2016) (summary judgment reversal); *Wuthrich v. King Cty.*, 185 Wn.2d 19, 29, 366 P.3d 926 (2016) (summary judgment reversal); *White River Feed Co. v. Kruse Family, LP*, 3 Wn. App. 2d 1044, 2018 WL 2021881 at *5 (2018) (summary judgment affirmance).

[9] The City objected to the instruction on this basis. RP 3186-87. To balance against Instruction 28, the City proposed instructions that likewise used language from

P.2d 927 (1967), for example, the Court held both parties improperly submitted "slanted" instructions that supplemented the basic instructions on the relevant points of law. The Court explained that, though the Court "may have used certain language in an opinion," it "does not mean that it can be properly incorporated into a jury instruction. *Id.* The danger is that a "rhetorical sentence" from an opinion might be taken out of context, or it might overemphasize a party's theory of the case. *Id. Accord, Braxton v. Rotec Industries, Inc.,* 30 Wn. App. 221, 227, 633 P.2d 897, *review denied,* 96 Wn.2d 1023 (1981).

Chen did not supplant WPI 140.01's articulation of municipal liability in any event. An instruction based on the language in the *Chen* opinion is inappropriate here because it ultimately undermines the duty established by our Supreme Court in *Keller,* improperly favoring a plaintiff and allowing the jury to engage in speculative consideration of circumstances divorced from the particular roadway in question. That is particularly true where, as here, the instruction contained its "no violation of…regulations" language. Instruction 28. CP 3190. In short, in *Chen*, a plaintiff survived summary judgment in the absence of evidence of a

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published opinions to flesh out the limitations on a municipality's duty of care. RP 3186-87, 3224-26; CP 2749, 2793 (D43), 2794 (D44), 2799 (D49). But the trial court *refused* them, reasoning that "I do not want to overdo it," and "there's room to argue what you think you need to argue with the other instructions." RP 3224-26. This ruling only underscores the one-sided nature of Instruction 28.

violation of a recognized engineering standard (*e.g.,* the MUTCD). The decision did not—and was not intended to—revise the standards set forth in the WPI 140.01.

When the trial court told the jury in Instruction 28, an instruction the court crafted, that it *must* apply the "totality of the circumstances" test, and then failed to define the phrase, it committed prejudicial error. This reference to the totality of the circumstances afforded Fite the opportunity to offer evidence totally irrelevant to the particular collision site. For example, over the City's objection, Fite repeatedly showed the jury videos of chip sealing projects for the City roads that had no bearing on the accident here. RP 2314-23, 2327. It also allowed the trial court to improperly admit police reports on what were dissimilar accidents at the crosswalk, as will be noted *infra*.

The "circumstances" that the *Chen* court relied upon were the accidents, deaths, complaints, the before and after safety refuge island, the fact that there were full signals at the other 5-lane intersections and the City's admission in its "Director's Rule" that such crosswalks were dangerous. *Chen*, 153 Wn. App. at 894–95. However, *none* of those factors were identified in Instruction 28, such "circumstances" did not exist here. In the 10 years that the crosswalk existed prior to Fite's accident, there were *no pedestrian accidents*. RP 2304-05, 3080 In that

same period there were *no complaints* or neighborhood petitions. RP 2304, 2897-98, 3080. There were many City staff driving through the area inspecting it for problems and finding none. RP 2313, 2807, 2847, 2858-59, 2898-99, 3016, 3080, 3097-98, 3105. There were also staff personally using the marked crosswalk (sometimes with children in tow) and none saw any obvious or latent defects. RP 3016, 3070, 3080, 3098, 3105. The City here had no internal standard prohibiting crosswalks at this intersection. RP 2304-05, 2325, 2331. In short, there were no "circumstances" that would fit the *Chen* analysis.

Because the totality of the circumstances is not anchored to the particular roadway and the accident in any way,[10] the jurors could speculate on what that meant drawing on perceptions not connected to evidence presented in court. "Totality of circumstances" is not a legal standard, but was merely a phrase from Division I's *Chen* opinion that was the shorthand for the jury's factfinding, as our Supreme Court observed in *Wuthrich*, 185 Wn.2d at 27. ("Whether the roadway is reasonably safe and whether it was reasonable for the County to take (or not take) any corrective actions are questions of fact that must be answered in light of the totality of the circumstances," citing *Chen*). It was not designed to be

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[10] Fite's own instruction here, plaintiff's proposed 19, at least connected the "totality of the circumstances" to the "the roadway or crosswalk in question." CP 2690. The trial court's instruction failed to require such a necessary nexus.

a new jury instruction, especially in an area of the law where the key jury instruction was hand-crafted by our Supreme Court. The trial court erred in giving the instruction.

(ii) The Trial Court Erred in Its Treatment of Applicable Road/Crosswalk Design Standards in Instruction 28

Compounding its error, the trial court also 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 essentially relieved Fite of a key component of his burden to prove the roadway/crosswalk in question were unsafe for the traveling public and neutralized the City's uncontested evidence that the roadway/crosswalk met or exceeded recognized design standards. That deprived the City of a fair trial.

Here, the City was required to exercise "ordinary care," as Instructions 16 and 27 stated. CP 3178, 3189. Generally, 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. *Owen v. Burlington No. & Santa Fe R.R. Co.,* 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Ruff v. Cty. of King,* 125 Wn.2d 697, 705, 887 P.2d 886 (1995). For example, 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 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.

But Instruction 28 rendered that evidence *meaningless* to the jury. An instruction that tells the jury it should ignore such evidence, without

identifying what evidence it should consider, is contrary to WPI 140.01, contrary to the case law, and was highly prejudicial to the City. *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 28 became essentially a comment on the evidence that instructed the jury to ignore the City's proffered expert testimony on road design standards, and should not have been given to the jury.[11]

The prejudice is unmistakable. Fite's counsel zeroed in on the issue during closing argument. Thanks to Instruction 28, 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. RP 3252. He argued, "Just because you might comply with a law or directive, *you have to do more*." *Id.* (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. A new trial is merited.

(b) <u>The Trial Court Abused Its Discretion in Permitting the Introduction of a Hearsay Police Report</u>

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[11] The City offered jury instructions on the relevance of MUTCD standards. CP 2797-98. The City withdrew the instructions after the trial court's position on *Chen* made clear that it would be fruitless to argue about them. RP 3225-26.

The trial court compounded its instructional error on the City's roadway design duty by admitting into evidence police reports about allegedly similar accidents. Ex. 48A, 48B; RP 2637-38, 2642. The City moved *in limine* to exclude evidence of other accidents, and the trial court *granted* that motion. CP 2229-30, 2856. Nevertheless, the court changed course at trial, allowing Fite to present police reports of other accidents as "business records," over the City's hearsay objection. RP 2632-38, 2642. The City was prejudiced by the trial court's ruling.[12]

The business records exception to the hearsay rule, ER 803(b)(6) and RCW 5.45.020, is meant to allow only records that are 'the routine product of an efficient clerical system," such as the "cross-examination would add nothing to the reliability of clerical entries." *In re Welfare of J.M.*, 130 Wn. App. 912, 923–24, 125 P.3d 245 (2005). The exception does not apply to records that contain information evidencing "a high degree of skill of observation, analysis, and professional judgment." *Id.* at 924. Similarly, when a record reports a declarant's personal observations and witness interviews, the record does not meet the business-records exception because cross examination would be valuable for testing the accuracy of the declarant's observations and interview notes. *State v.*

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[12] The standard of review of evidentiary decisions is set forth in n.5, *supra*.

Hopkins, 134 Wn. App. 780, 790, 142 P.3d 1104, 1109 (2006), *review denied*, 160 Wn.2d 1020 (2007).

Consistent with these principles, Washington courts have generally declined to admit investigative reports in police reports as business records. *In re Det. of Coe*, 160 Wn. App. 809, 829, 250 P.3d 1056 (2011), *aff'd on other grounds*, 175 Wn.2d 482, 286 P.3d 29 (2012); *State v. Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9 (1997). Thus, the accident reports in Exhibits 48A and 48B were inadmissible hearsay. Both contained narrative from the investigating officer about an accident and the fault of the participants. Ex. 48A, 48B. Both contained reports of witness interviews. *Id.* Both required the investigating officer to use professional skill and judgment to evaluate the physical evidence and the credibility of the witnesses in order to recreate the incidents. *Id.* The reports were inadmissible hearsay, not clerical or routine records.

The reports were inadmissible also under other well-established evidentiary principles. Washington law bars the admissibility of evidence of other accidents to prove negligence in another setting. Evidence of other accidents is admissible *only* for limited purposes to establish a dangerous or defective condition or notice of a defect. *Porter v. Chicago, M., St. Paul & Pac. R.R. Co.*, 41 Wn.2d 836, 841-43, 252 P.3d 306 (1953); *Blood v. Allied Stores Corp.*, 62 Wn.2d 187, 189, 381 P.2d 742 (1963).

Critically, however, because the introduction of such evidence introduces *collateral matters* into the case, the other accidents must be *substantially similar* to the accident at issue in the case. *Id*. *See generally*, 5 Karl B. Tegland, *Wash. Prac., Evidence Law and Practice* (5th ed.) § 402.11. "If dangerousness is the issue," as it is here, "a high degree of similarity will be essential." 2-401 Weinstein and Berger, *Weinstein's Evidence* § 401.08.

The accidents discussed in Exhibits 48A/48B were not substantially similar to Fite's accident because neither accident implicated road/crosswalk design. The accident in Exhibit 48A involved a vehicle rear-ending another vehicle. The driver of the following vehicle admitted to not paying attention, thus causing the collision. In the second accident, Exhibit 48B, a bicyclist following a vehicle turning into an intersection did not check for traffic, accelerated diagonally across the intersection, and then cut abruptly to the curb site of the northbound lane of 5th St. SE. The following vehicle tried to stop, only to strike the bicyclist. The bicyclist's negligent actions, not roadway design, were relevant. In neither incident did a vehicle strike a pedestrian in the marked crosswalk, and in neither was the crosswalk's design in question.

Ultimately, exhibits 48A/48B were hearsay and they introduced a matter collateral to the case at hand for the jury. The trial court abused its discretion in admitting them into evidence.

(3) The Trial Court Improperly Addressed Fite's Comparative Fault

"A marked crosswalk is not a sanctuary." *Beireis v. Leslie*, 35 Wn.2d 554, 560, 214 P.2d 194 (1950) (citations omitted). Even though a marked crosswalk offers some protection for a pedestrian, a jury may find a pedestrian to have been at fault for a collision through their heedlessness. *Burnham v. Nehren*, 7 Wn. App. 860, 863-64, 503 P.2d 122 (1972). Despite a pedestrian's duty of self-protection, however, the trial court curbed the City's defense of contributory negligence. The court refused to allow any argument or evidence that Fite should have looked both ways. The trial court also limited expert testimony on Fite's speed and demonstrative evidence that showed the accident's dynamics. These rulings were prejudicial error, as will be discussed below.

(a) The Trial Court Failed to Properly Address Fite's Observational Duty

(i) Washington Law on a Pedestrian's Duty of Self-Protection

Washington law imposes duties on a pedestrian *before* and *after* entering a crosswalk. *Before* entering, the duty of a pedestrian is simple and easy to meet: to "look for approaching vehicles" and to not "suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield. *Burnham*, 7 Wn. App. at 863-64. The primary safety requirement—to

"use[] reasonable care in observing traffic conditions"—embodies the long-standing rule that a pedestrian should watch out for their own safety and not "heedlessly" enter a crosswalk. *Beireis*, 35 Wn.2d at 560. The latter component of a pedestrian's pre-entry duty—to not suddenly enter the crosswalk—has also long been recognized at law, *Iwata v. Champine*, 74 Wn.2d 844, 847, 447 P.2d 175 (1968), and has been approved by the Legislature, RCW 46.61.235(2). This pre-entry duty of self-protection is set out in a pattern jury instruction, WPI 70.03.03, which was given to the jury here as Instruction 24. CP 3186. *See* Appendix.

After entering a marked crosswalk, a pedestrian generally has the legal protection of the right-of-way. *Oberlander v. Cox*, 75 Wn.2d 189, 193-194, 449 P.2d 388 (1969). But this general principle is far from absolute, because this right-of-way is "relative," and "[a] pedestrian must use the right-of-way accorded him with due care for his own safety." *Burnham*, 7 Wn. App. at 864, 866. Thus, even if a pedestrian has used reasonable care to enter a crosswalk safely, the pedestrian still may have an observational duty of self-protection and may be at fault for contributory negligence. *Oberlander*, 75 Wn.2d at 193-94. When a pedestrian "knows or should know" that an oncoming motorist will not respect the right-of-way, this duty of self-protection, including the duty to watch out for oncoming vehicles, arises. *Jung v. York,* 75 Wn.2d 195, 449

P.2d 409 (1969); *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 550, 682 P.2d 942, *review denied*, 102 Wn.2d 1016 (1984). This post-entry duty of self-protection is set out in pattern jury instruction WPI 70.03, which was given to the jury here as Instruction 25. CP 3187. *See* Appendix.

Although Instructions 24 and 25 properly stated the law on Fite's pre-entry and post-entry duties of self-protection, the trial court truncated the City's defense of contributory negligence. On summary judgment,[13] the court ruled that "Fite was not specifically required to look right and look left before entering the crosswalk, only to look for approaching vehicles." CP 1303. Then, at trial, the court referred back to this ruling when prohibiting the City's evidence and argument that Fite should have, but failed, to look both ways before and after entering the crosswalk. RP 1847. The court gutted the City's presentation of its comparative fault defense.

The trial court's ruling made no sense. If a pedestrian must "use[]

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[13] This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c); *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018). In determining whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

reasonable care in observing traffic conditions" before entering a crosswalk, as our Supreme Court has held, *Beireis*, 35 Wn.2d at 560, then how precisely is a pedestrian to observe traffic if not by looking left or right? Does Washington law require a pedestrian to look up and down, but not side-to -side—the directions where vehicles are actually coming and going? That cannot be.

Besides common sense, a wide body of case law confirms that the trial court erred in defining Fite's duty. In *Farrow v. Ostrom*, 10 Wn.2d 666, 669, 117 P.2d 963 (1941), our Supreme Court went so far as to hold that "[w]here, as here, *no* attempt at observation is made and especially where one steps out from behind an obscuring object, the pedestrian is guilty of negligence *as a matter of law*." (Emphasis added). *Accord*, *Cakowski v. Oleson,* 1 Wn. App. 780, 782, 463 P.2d 673 (1970). This general principle were expanded upon in *Farrow*, which confirmed pedestrian's detailed observational duty of self-protection:

> We have time and again said that one must, before undertaking to cross a street, look for approaching vehicles, but whether after so doing, and while making the crossing, he must again look, or continue to look, depends on many *circumstances and conditions*; such as the *amount of traffic*; the *probability of there being approaching vehicles*; whether the statutes or ordinances give him the right of way; whether other objects or *things have attracted his attention*. Manifestly this is a question for the jury.

Farrow, 10 Wn.2d at 670 (emphasis added).[14] In *Farrow*, the plaintiff was crossing the street while a long funeral procession passed. She went between stopped cars north and south of the crosswalk, and entered the path of the defendant driver in the adjacent lane. The defendant appealed a verdict for the plaintiff, claiming the pedestrian was contributorily negligent as a matter of law, and the issue should not have been submitted to the jury. The Supreme Court rejected that claim, but said it was a question for the jury. The amount of traffic (a funeral procession) and the probability of approaching vehicles (cars trying to pass the slow moving procession) constituted special circumstances making contributory negligence a question for the jury.

(ii) It Was a Jury Question Whether Fite Was Contributorily Negligent Before Entering

While contributory negligence of the pedestrian is an affirmative defense, "the court is seldom justified in removing the issue from the jury." *Cakowski*, 1 Wn. App. at 781; *Farrow*, 10 Wn.2d at 667 (In only "rare instances is the court warranted in withdrawing the issue [of comparative fault] from the jury."). Here, however, the trial court

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[14] These three elements: amount of traffic, probability of approaching traffic, and whether things are "attracting the attention" of the pedestrian, come up repeatedly in the cases. The elements of bad weather and a pedestrian walking rapidly also frequently appear. *See Oberlander*, 75 Wn.2d at 193-94.

effectively took this issue from the jury by narrowing Fite's legal duty and then excluding evidence of his speed and his failure to look for oncoming traffic.

There should have been evidence submitted to the jury on Fite's breach of his pre-entry duty of self-protection. Eyewitness Boutte testified that Fite did not stop, did not look left, and did not look right. CP 1153. But again, the trial court excluded her declaration testimony and Fite's admission that he knew to stop before entering. RP 1847, 2097. Boutte's testimony was by itself sufficient to support a jury's finding that Fite failed to properly look out for oncoming traffic before entering the cross walk. This conclusion is confirmed by cases such as *Dabol v. United States*, 337 F.2d 163, 165 (9th Cir. 1964), a decision applying Washington law. In *Dabol*, the Ninth Circuit held "the finding that Mrs. Dabol passed the stopped vehicle and walked into the adjacent traffic lane *with no attempt to observe approaching traffic* probably required a holding that she was guilty of negligence as a matter of law." *Id.* (emphasis added).

Of course, there is a factual dispute over whether there were multiple cars in the left turn lane, CP 667-68; RP 1858, when the circumstantial evidence suggests there were not.[15] But even if there *were*

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[15] That circumstantial evidence includes that no other witness saw these cars, and there were no southbound motorists that would impose a duty on the left turning cars

multiple cars in the left turn lane, then it would block Fite's sight distance of the Mudd vehicle. CP 922-93. His decision to leave a place of safety (the sidewalk) and enter into the path of a vehicle hidden from him by other cars, is equivalent to the plaintiff in *Farrow* moving from between cars creating a similar sight distance obstruction. Similarly, the jury is entitled to consider that if there were multiple stopped cars, those both blocked Fite's view of dangerous vehicles, and should have attracted his attention.

(iii) It Was a Jury Question Whether Fite Was Contributorily Negligent After Entering

Besides finding that Fite was careless in entering the intersection, a jury also could have reasonably found that Fite was negligent after he was in the crosswalk. *See*, *e.g.*, *Clements*, 37 Wn. App. at 553 ("There was substantial evidence presented to support defendants' position that Clements should have known to look for oncoming traffic even though she was legally in the crosswalk. It was error to refuse to instruct the jury on contributory negligence and to direct a verdict on liability."); *Burnham*, 7 Wn. App. at 864-65 (emphasis added) ("There remains a possibility that a pedestrian, after having passed the center point of the intersection and being struck by a vehicle while in a marked crosswalk, may have been

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to remain stopped as Mudd claims.

contributorily negligent. If there is evidence to support the issue, *the court must submit the issue of contributory negligence to the jury.*" (Emphasis added)).

Fite's own perception of the intersection are important. He believed that this intersection was dangerous because he often saw cars speeding and drivers being inattentive. CP 901. He had witnessed near misses where pedestrians had to run or jump out of the way of cars. CP 902-03. Fite's knowledge about the traffic conditions should have allowed the jury to find Fite should have been *especially* vigilant in looking to his left and right for oncoming vehicles once he had ridden his skateboard into the crosswalk. As the Supreme Court teaches, when the circumstances in a crosswalk are more dangerous than usual, a pedestrian is not absolved from using care for his own safety. Rather, "the circumstances and conditions prevailing at the crosswalk," such as poor visibility, "may require *increased* vigilance upon the part of the pedestrian." *Oberlander*, 75 Wn.2d at 193 (emphasis added). Fite's subjective beliefs about the dangerous are "circumstances and conditions" no different than poor lighting or poor weather, that impose a duty of greater vigilance on the pedestrian.

Further, Mudd claimed that numerous cars were present in the left turn lane, blocking Fite's ability to see dangerous vehicles approaching the

crosswalk. CP 667-68. There would have been no way for Fite to see and evaluate whether Mudd had been discharging his duty to stop. The view-obstructing left-turning cars would have imposed an obligation on any pedestrian, and a greater obligation on Fite, given his belief of the dangerousness of the crosswalk. Again, special facts were present.

Fite failed to exercise that greater vigilance in connection with his observational duty. If he had, he would have seen the Mudd vehicle bearing down on him from as few as 200 feet away. CP 921. He would have known the Mudd's truck was an "imminent hazard" and "within striking distance." CP 921. In light of that threat, Fite should not have entered the crosswalk, or waited at the refuge island or accelerated to get out of the way of the Mudd vehicle, as Bretting was prepared to testify. CP 922-23.

Fite's conduct was markedly different than that of the bicyclist in *Pudmaroff v. Allen,* 138 Wn.2d 55, 977 P.2d 574 (1999). There, the bicyclist approached the intersection between a bike trail and a road, and dismounted from his bike. He observed a car slowing, and he entered the crosswalk accordingly. However, the driver was slowing for a nearby railroad crossing and did not see the bicyclist, striking him. Our Supreme Court held that the bicyclist was not at fault as a matter of law because there were no special circumstances, unlike here, that required the

bicyclist to take precautions to prevent his own injury. *Id.* at 69 ("[T]here is no indication Pudmaroff acted unreasonably in his use of the crosswalk."). Fite's conduct here in using the crosswalk was quite to the contrary, requiring him to be vigilant and properly meet his observational duty.

In sum, the trial court erred by improperly truncating the proof on Fite's observational duty in connection with the City's comparative fault defense. The trial court's error was prejudicial. A new trial is necessary.

(b) The Trial Court Abused Its Discretion in Excluding the Testimony of Kelly Boutte Regarding Fite's Failure to Observe

Boutte testified in her sworn declaration dated July 22, 2019 that, among other things, she saw that Fite failed to look both ways before he rode his skateboard into the crosswalk. CP 1153-54. But a few days after signing this declaration, she recanted this portion of her written testimony. CP 1294-95. At trial, rather than allowing the City to present Boutte's July 22, 2019 declaration for the jury to consider as evidence of whether Fite met his observational duty of care, the trial court excluded Boutte's written testimony and any other evidence about Fite's failure to look both ways. CP 2846; RP 1841-56.[16] The City argued that Boutte's "factual

[16] For the standard of review on evidentiary decisions, *see* n.5, *supra*.

observations are relevant to whether or not Mr. Fite fulfilled his duty to look for approaching vehicles," and noted that "[a]ny changes to her testimony would go to the credibility that she should be afforded by the jury or the weight that they give to her testimony." RP 1845. But the trial court kept her written testimony from the jury. RP 1847. This decision was error, further depriving the City of its opportunity to offer its theory of the case.

Relevant evidence is generally admissible. ER 402; *Bell v. State*, 147 Wn.2d 166, 181, 52 P.3d 503 (2002). Evidence is relevant if it has "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added). "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). For evidence to be relevant, it need not be conclusive on an ultimate issue or a party's theory of the case. The evidence need only be "a piece of the puzzle." *Bell*, 147 Wn.2d at 182.

Boutte's July 22, 2019 declaration was highly relevant, regardless of whether Fite was legally obligated to specifically look right or left or to instead generally keep a proper lookout. Even if Fite should have looked up or down instead of left or right, his failure to look left or right had at

least *some* tendency to make it more probable that he did not "look for approaching vehicles," despite his duty to do so "[b]efore entering the crosswalk." WPI 70.03.03. Whether Fite looked out for vehicles *at all* was a piece of this puzzle, and Boutte's written declaration testimony suggested very strongly that Fite did *nothing* to look out for cars before riding his skateboard from the sidewalk into the crosswalk. Indeed, as noted *supra*, Washington courts have recognized for decades that a pedestrian may be contributorily negligent "when, without looking, he steps from the curb into the path of an oncoming car either at an intersection in the middle of the block." *Farrow*, 10 Wn.2d at 669-70. And whether a pedestrian was thus contributorily negligent is a jury question, not a question of law for the court. *Id.* at 670; *Alston v. Blythe*, 88 Wn. App. 26, 35, 943 P.2d 692 (1997). Boutte's declaration far surpassed the low threshold for relevancy.

Even though Boutte later recanted that portion of her July 22, 2019, her prior written testimony was still admissible at trial as both substantive evidence and impeachment material. Under ER 801(d)(1)(i), it was not hearsay because it was a prior inconsistent statement of a witness given under penalty of perjury in a prior proceeding in the case. *See Faust v. Albertson*, 167 Wn.2d 531, 544, 222 P.3d 1208 (2009) (citing ER 801(d)(1)(i) and rejecting the argument that a declaration offered in

similar circumstances was inadmissible testimony). Boutte's prior declaration was also impeachment material because "[t]he credibility of a witness may be attacked by any party." ER 607; *see also*, ER 613 (prior statements of witnesses). Just as our Supreme Court has held that a prior declaration may be used to impeach the deposition testimony of one's own witness offered at trial, *Faust*, 167 Wn.2d at 544, surely the same must hold for the use of a prior declaration to impeach the trial testimony of an opposing party's witness.

Boutte's explanation for her recantation goes to the weight of the evidence, not its admissibility. To be sure, Fite told the trial court that Boutte would testify, if allowed, that she felt "intimidated, threatened, harassed" when City attorneys got her signature on the July 22, 2019 declaration. RP 1854. Be that as it may, however, Boutte's explanation for the change in her testimony was a credibility question for the jury, not a ground for exclusion. As our Supreme Court has noted, "[a] witness' credibility is always at issue." *State v. Froehlich*, 96 Wn.2d 301, 304, 306, 635 P.2d 127 (1981). Indeed, "the purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times," and thus the prior testimony allows the jury to "disbelieve the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 293, 975 P.2d 1041, *review denied*, 138

Wn.2d 1018 (1999). Boutte's explanation was simply a matter of whether the jury should believe her or not; it did not defeat the prior inconsistent statement's admissibility. In fact, this very scenario is addressed by the Rules of Evidence, which allow the parties to offer both a prior inconsistent statement *and* a prior statement that is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication." ER 801(d)(1)(i)-(ii). Thus, the solution was not exclusion, but to allow the jury to see both Boutte's July 22, 2019 declaration *and* her July 25, 2019 recantation and to hear her explanation. Regardless of Boutte's claims for why she changed her story, "the need for the jury to know that this witness may be unreliable remains compelling." *Newbern*, 95 Wn. App. at 293.

The trial court's evidentiary ruling was prejudicial because it deprived the City of the opportunity to offer its theory of the case under Instructions 24 and 25. Had the trial court permitted the City to question Boutte about these matters, she would have testified that she had a clear view of Fite, observed Fite riding his skateboard from the sidewalk into the crosswalk, and watched as Fite failed to stop or look right or left before entering the crosswalk. CP 3133. The probative value of this excluded testimony was recognized by Fite: during the conference about it outside the jury's presence, Fite's counsel *admitted* that Boutte's July 22,

2019 declaration "go[es] right to the heart of the issue about whether he had a duty to look both ways, which the Court has already explicitly ruled that he did not." RP 1842. But the trial court simply permitted Boutte to testify, without cross examination from the City, that she did not recall whether Fite looked for approaching vehicles. CP 3134. This one-sided presentation of the evidence was grossly unfair and prejudiced the City's defense.

(c) The Trial Court Abused Its Discretion in Excluding Evidence on Fite's Rate of Speed Entering the Crosswalk

The City offered the expert testimony of accident reconstructionist Gerry Bretting, which included opinion testimony on Fite's speed while riding his skateboard through the crosswalk. CP 919-28. But after hearing motions *in limine*, the trial court entered an order excluding the speed component of Bretting's testimony. CP 2298-99, 2434-35, 2635-36, 2846; RP 141-42. The trial court explained that "I'm going to let the jury decide what the speed was." RP 142. Instead of allowing substantive testimony about speed, the court allowed Bretting to give only foundational testimony about Fite's speed in the form of assumptions for his calculations about time and distances in the accident. CP 2846; RP 142, 2584-85. The court also barred Bretting's computer-generated illustrations of the accident using the PC Crash software program. Ex. 682; RP 2543-

57. By limiting Bretting's testimony, the court puts its thumb on the scale in favor of Fite's witnesses and theory of the case. The court erred.[17]

Bretting was well qualified to give his opinions. He is an experienced professional engineer and reconstructionist who has reconstructed nearly 500 accidents in his career and has testified in Washington superior courts. CP 919, 926-28; RP 2559-61, 2581-82. Bretting is also an experienced skateboarder himself. CP 923.

In addition to Bretting having ample experience and training, his opinions and illustrations were well founded on the facts. Bretting's excluded speed testimony is far afield from the inadmissible expert testimony in *Clements*, *supra*. In *Clements*, the expert's testimony about the pedestrian's speed was impermissibly based on "speculation and conjecture." 37 Wn. App. at 549. But in *Clements*, "[t]here was no evidence on the speed [the pedestrian] was walking," and the expert admitted that he "was without 'anything concrete to go on.'" *Id.* (quoting record).

Here, there *was* evidence about Fite's speed. As the City explained, had the court allowed it, Bretting's speed testimony would have been based on eyewitness testimony about Fite's speed, the average

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[17] The standard of review for the exclusion of an expert's testimony is set forth in n.5 and at 18, *supra*.

skateboarding speed documented in reliable literature (8.3 MPH), a meeting and site visit with one of the responding police officers, a high-definition 3D scan of the entire scene, photographs of markings made by police at the scene showing the Mudd vehicle's location and Fite's area of rest, and decades of experience in mechanical engineering. CP 920, 2434; RP 2562, 2572-73, 2579. Unlike in *Clements*, Bretting had many concrete facts for his opinions and illustrations.

Bretting relied also on the "Searle" method to calculate the speed of the Mudd vehicle as between 21 and 27 miles per hour, which was consistent with eyewitness testimony. RP 2581-82. The Searle method, which originated with a study, allows an accident reconstructionist to use a formula to calculate the speed of the striking vehicle based on the distance that a pedestrian has been projected by impact. RP 2575-78. The formula's variables, which were available to Bretting, include the measured distance that the pedestrian is thrown (25 feet, here), the co-efficient of friction as determined by studies, the type of vehicle, and where on the vehicle the pedestrian was struck, RP 2576-77. This Searle method is generally accepted in the accident reconstructionist field. RP 2579-80. Here, Bretting also could have used the "Searle" formula to calculate the upper limit of Fite's speed. RP 2583. But the trial court sustained an objection o such testimony. *Id.* Given the factual support for Bretting's analysis, any

weaknesses in that foundation for Bretting's speed testimony and PC-Crash-generated illustrations should have gone to weight, not admissibility. Fite's remedy should have been cross-examination of Bretting, not exclusion.

The trial court appeared to believe that Bretting's speed testimony and accident illustrations would not help the jury—an element of the analysis under ER 702. But courts must "construe helpfulness to the trier of fact *broadly*." *Philippides*, 151 Wn.2d at 393 (emphasis added). Here, it would have been helpful for the jury to know whether lay witnesses' lay opinion testimony about speed was consistent with an expert analysis of the physical evidence. Boutte testified that Fite rode his skateboard at "[a] jogging pace." RP 1890. And it would have only been fair, as Fite's expert Joellen Gill was permitted to testify about speed, telling the jury, "[I]f you consider, let's say Austin Fite, I believe he testified that he could get up to six miles an hour towards the end of that crossing; that's ten-minute miles if you're a jogger, it's not excessively fast." RP 875.

Moreover, the accident illustrations certainly would have been helpful. The trial court ruled that Bretting could testify orally about his opinions, but the court explained its "concern" that Bretting's illustrations "will cause the jury to discount the oral testimony that we've had from various witnesses which is in conflict, and it may interfere with their

ability to weigh the evidence and decide who's credible." RP 2557. The trial court also expressed concerns about "the old adage, garbage in, garbage out," explaining that "[i]f Mr. Bretting's input data is not accurate, then what we see on the screen is not going to be accurate." RP 2550. This rationale made no sense. The court gave no explanation for why Bretting could tell the jury his opinions about what happened in the accident but could not present illustrations of these same opinions. If his reconstruction opinions were helpful enough to be admissible, then his demonstrative exhibits were useful, too. Relevant illustrative evidence, like Bretting's illustrations, is entirely proper if it is "substantially like, and similar in function and operation to, the thing in issue." *State v. Mitchell*, 56 Wn. App. 610, 613, 784 P.2d 568 (1990). Neither the court nor Fite believed the illustrations were not substantially like Bretting's opinions.

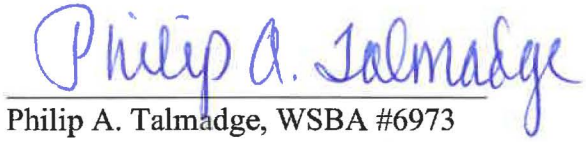
These erroneous evidentiary rulings further exemplify how the trial court deprived the jury of an accurate picture of Fite's unsafe conduct that bore upon his comparative fault. The trial court foreclosed evidence of Fite's cannabis intoxication, his failure to look before and after entering the crosswalk, and his rate of speed. In making a fault determination, the jury should have an accurate picture of Fite's conduct rather than the trial court's "sanitized" version. A new trial is required here.

F. CONCLUSION

By a series of rulings beginning with its decision on the City's RCW 5.40.060 defense, its evidentiary rulings, and its instructional errors, the trial court deprived the City of a fair trial on liability. This Court should reverse the judgment on the verdict and remand the case to the trial court for a new trial confined to liability. Costs on appeal should be awarded to the City.

DATED this 18th day of June, 2020.

Respectfully submitted,



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APPENDIX

17-2-07876-5 53631983 ORDYMT 07-30-19

7/31/2019 18:23 0020

THE HONORABLE SHELLY K. SPEIR
NOTED FOR HEARING:
FRIDAY, JULY 19, 2019 AT 9:00 A.M.

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

FILED
DEPT 5
IN OPEN COURT
JUL 26 2019
PIERCE COUNTY Clerk
By _____ DEPUTY

AUSTIN K. FITE, individually, Plaintiff, vs. LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof; and CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington, Defendants.	NO: 17-2-07876-5 **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING (1) DEFENDANT MUDD'S NEGLIGENCE; (2) LACK OF COMPARATIVE/CONTRIBUTORY FAULT ON THE PART OF PLAINTIFF; (3) "EMPTY CHAIR" DEFENSES; AND (4) INTOXICATION DEFENSE PURSUANT TO RCW 5.40.060**

THIS MATTER coming on before the above-referenced Court upon the Plaintiff's Motion for Partial Summary Judgment Regarding (1) Defendant Mudd's Negligence; (2) Lack of Comparative/Contributory Fault on the Part of Plaintiff; (3) "Empty Chair" Defenses; and (4) the intoxication defense pursuant to RCW 5.40.060; the Court having considered the following pleadings in support of and in opposition to this motion,

(1) Plaintiff's Motion for Partial Summary Judgment Regarding (1) Defendant Mudd's Negligence; (2) Lack of Comparative/Contributory Fault on the Part of Plaintiff; and (3) "Empty Chair" Defenses; \

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(2) Declaration of Paul A. Lindenmuth;

(3) Defendant Mudd's Response;

(4) Defendant City of Puyallup's Response;

(5) Declaration of Andrew Cooley;

(6) Declaration of Gerry Bretting;

(7) Plaintiff's Reply to Defendant City of Puyallup's Response;

(8) Declaration of Paul A. Lindenmuth; and

(9) Declaration of Paul A. Lindenmuth.

(10) Supplemental Declaration of Kelly Boutte dated 7/22/19

(11) Supplemental Declaration of Kelly Boutte dated 7/22/19 with handwritten changes dated 7/25/19

and the Court being otherwise fully advised in the premises; it is now, therefore,

ORDERED, ADJUDGED, AND DECREED, that Plaintiff's Motion for Summary Judgment on (1) Defendant Mudd's Negligence; (2) ~~Lack of Comparative/Contributary Fault of Plaintiff,~~ (3)"Empty Chair" defense; and (3) Intoxication defense pursuant to RCW 5.40.060 is hereby GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that

The motion for Summary Judgment is Denied as to the issue of comparative fault as to the based on conflicting testimony between Mr. Mudd and Ms. Boutte. Mr. Fite was not specifically required to look right and look left before entering the crosswalk, only to look for approaching vehicles.

DONE IN OPEN COURT this 26th day of July, 2019.

Shelly K. Speir

The Honorable Shelly K. Speir

FILED
DEPT
IN OPEN COURT
JUL 26 2019
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By
DEPUTY

PROPOSED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT- 2

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7/31/2019 1823 0021

PRESENTED BY:

Ben F. Barcus, WSBA # 15576
Paul A. Lindenmuth, WSBA # 15817
Of Attorneys for the Plaintiff Austin K. Fite

Approved as to Form and Content;
Notice of Presentation Waived:

Andrew G. Cooley, WSBA #15189
Brian Augenthaler, WSBA #44022
Derek C. Chen, WSBA #49723
Of Attorneys for Defendant City of Puyallup

Approved as to Form and Content;
Notice of Presentation Waived:

A. Grant Lingg, WSBA #24227
L. William Locke, WSBA #53240
Of Attorneys for Defendant Mudd

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7/31/2018 1:23 0022

17-2-07876-5 53781929 ORDYMT 08-28-19

The Honorable Shelly K. Speir
NOTED FOR HEARING: August 23, 2019

FILED
DEPT. 5
IN OPEN COURT
AUG 23 2019
PIERCE COUNTY Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

AUSTIN K. FITE, individually, Plaintiff, v. LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof; and CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington, Defendants.	No. 17-2-07876-5 ~~[PROPOSED]~~ ORDER ~~GRANTING~~ DEFENDANT'S MOTION FOR RECONSIDERATION

Denying

THIS MATTER having come on regularly before this Court on Defendant the City of Puyallup's Motion for Reconsideration of the Order on Plaintiff's Motion for Partial Summary Judgment Regarding the Intoxication Defense, the Court having considered the records and files herein, including:

1. Defendant the City of Puyallup's Motion for Reconsideration of the Order on Plaintiff's Motion for Partial Summary Judgment Regarding the Intoxication Defense;

2. Declaration of Derek Chen and exhibits thereto;

3. Declaration of Kenton Wong and exhibit thereto;

4. Plaintiff's Opposition to Defendant the City of Puyallup's Motion for Reconsideration of the Order on Plaintiff's Motion for Partial Summary Judgment Regarding the Intoxication Defense;

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
801 SECOND AVENUE, SUITE 1210
SEATTLE, WASHINGTON 98104
PHONE: (206) 623-8861
FAX: (206) 223-9423

8/28/2019 2255 0096

8/28/2019 2255 0097

5. Defendant's Reply to Plaintiff's Opposition to Defendant the City of Puyallup's Motion for Reconsideration of the Order on Plaintiff's Motion for Partial Summary Judgment Regarding the Intoxication Defense;

6. Supplemental Declaration of Kenton Wong;

7. Declaration of Brian C. Augenthaler and exhibits thereto;

8. Plaintiff's Supplemental Motion to Strike Supplemental Declaration of Kenton Wong;

9. Defendant's Opposition to Plaintiff's Supplemental Motion to Strike Defendant's Supplemental Declaration of Kenton Wong; and

10. Declaration of Brian Augenthaler and exhibit thereto.

IT IS HEREBY ORDERED that Defendant the City of Puyallup's Motion for Reconsideration of the Order on Plaintiff's Motion for Partial Summary Judgment Regarding the Intoxication Defense is ~~GRANTED.~~ Defendants may pursue an intoxication defense at trial.

Denied PL Mot PL B/A AC

DONE IN OPEN COURT this 23 day of August, 2019.

The Honorable Shelly K. Speir
Pierce County Superior Court Judge

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: */s/ Brian C. Augenthaler*
Brian C. Augenthaler, WSBA #44022
Attorneys for Defendants

FILED
DEPT 5
IN OPEN COURT
AUG 23 2019
PIERCE COUNTY, Clerk
By Deputy

Approved as to form; Notice of presentation waived:

LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, P.L.L.C.

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8/28/2019 2255 0098

Ben F. Barkus, WSBA #15576
Paul A. Lindenmuth, WSBA #15817
Attorneys for Plaintiff

A. Grant Lingg
For defendant Madell

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FILED
DEPT 5
IN OPEN COURT
DEC 13 2019
PIERCE COUNTY Clerk
By DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF PIERCE

AUSTIN K. FITE, individually, Plaintiff, vs. LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof; and CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington, Defendants.	NO: 17-2-07876-5 **JUDGMENT ON JURY VERDICT**

1. **Judgment Creditors:**	Austin K. Fite
2. **Judgment Creditors' Attorney:**	Ben F. Barcus and Paul A. Lindenmuth
3. **Judgment Debtors:**	City of Puyallup and Lee R. Mudd (jointly and severally)
4. **Judgment Debtors' Attorneys: (City of Puyallup)**	Andrew Cooley Brian Augenthaler Derek Chen

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Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

5. **Judgement Debtors' Attorneys:** A. Grant Lingg
(Lee R. Mudd) L. William Locke

6. **Principal Judgment Amount:** $6,500,000.00

7. **Costs Pursuant to RCW 4.84.010** $ ~~$4,434.76~~
(Including Statutory Attorney Fees) $3,634.54

~~8. **Pre-judgment Interest from verdict of November 27, 2019:** $ 49,945.12~~
~~**(11/27/19 – 12/13/19)**~~
~~**(16 days at $1,246.57 per day)**~~

9. **Post-judgment Interest Rate After Judgment:**
(See attached Exhibit No. 1) 7.0% – DEFENDANT MUDD – 33%
3.75% – DEFENDANT CITY OF PUYALLUP – 67%

10. **Total Judgment Amount:** $6,503,634.54

II. JUDGMENT OF THE COURT ON JURY VERDICT

THIS MATTER having come on before the undersigned Judge of the above-entitled action upon Plaintiff's Motion for Entry of Judgment on the Jury Verdict entered herein on November 27, 2019, and the jury having entered a verdict in favor of the Plaintiff Austin K. Fite, individually, for a total net verdict of $6,500,000.00 (including and totaling the amounts set forth within the Special Verdict Form of the jury herein (attached hereto as Exhibit No. 2); and against the Defendants, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Statutory Costs are awarded to Plaintiff in the amount of ~~$4,434.76~~ 3,634.54, (See Cost Bill, attached hereto as Exhibit No. 3); and it is further

ORDERED, ADJUDGED, AND DECREED that a total judgment shall be and is hereby entered in favor of the Plaintiff above-named in the amount of $6,503,634.54;

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& Associates, P.L.L.C.
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(including costs, the principal verdict amount, and post-verdict interest on the liquidated verdict of $6,500,000.00), and pursuant to RCW 4.22.070(1)(b), the full judgment amount is entered against defendants, The City of Puyallup and Lee R. Mudd, jointly and severally; and it is further

ORDERED, ADJUDGED AND DECREED that Judgment entered herein shall bear interest from today's date until said Judgment is satisfied in full at the statutory rate of interest of 7.0% per annum for Defendant Mudd, and 5.755% for Defendant City of Puyallup. Should an appeal be taken, pursuant to RCW 4.56.110(3)(b), interest shall accrue from the date of the verdict.

DONE IN OPEN COURT this 13th day of December, 2019.

The Honorable Shelly Speir

Ben F. Barcus, WSBA # 15576
Paul A. Lindenmuth, WSBA #15817
Of Attorneys for Plaintiff Austin K. Fite

FILED
DEPT 5
IN OPEN COURT

DEC 13 2019

PIERCE COUNTY Clerk
By ____ DEPUTY

Approved as to Form and Content:

Andrew G. Cooley, WSBA #15189
Brian C. Augenthaler, WSBA #44022
Derek C. Chen, WSBA #49723
Of Attorneys for Defendant City of Puyallup

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Approved as to Form and Content:

A.Grant Lingg, WSBA #24227
L.William Locke, WSBA #53240
Of Attorneys for Defendant

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Exhibit 1

STATE MAXIMUM INTEREST RATE

(Computed and filed by the State Treasurer under RCW 19.52.025)

The maximum allowable interest rate applicable for the month of December 2019 pursuant to RCW 19.52.020 is twelve point zero percent (12.00%) per annum. The auction yield of the November 4, 2019 auction of the six-month Treasury Bill was 1.573%

The interest rate required by RCW 4.56.110(3)(a) and 4.56.115 for the month of December 2019 is 3.573%.

The interest rate required by RCW 4.56.110(3)(b) and 4.56.111 for the month of December 2019 is 6.750%.

NOTICE: FEDERAL LAW PERMITS FEDERALLY INSURED FINANCIAL INSTITUTIONS IN THE STATE TO CHARGE THE HIGHEST RATE OF INTEREST THAT MAY BE CHARGED BY ANY FINANCIAL INSTITUTION IN THE STATE. THE MAXIMUM ALLOWABLE RATE OF INTEREST SET FORTH ABOVE MAY NOT APPLY TO A PARTICULAR TRANSACTION.

Click here to view Previous Monthly Interest Rates

PREVIOUS MONTHLY INTEREST RATES

Month and Year	Applicable Pursuant to RCW 19.52.020	6 Month Treasury Bill Auction Yield	Required by RCW 4.56.110(3)(a) and 4.56.115	Required by RCW 4.56.110(3)(b) and 4.56.111
December 2019	12.00% per annum	1.573	3.573%	6.750%
November 2019	12.00% per annum	1.733	3.733%	7.000%
October 2019	12.00% per annum	1.873	3.873%	7.250%
September 2019	12.00% per annum	2.002	4.002%	7.250%
August 2019	12.00% per annum	2.095	4.095%	7.500%
July 2019	12.00% per annum	2.319	4.319%	7.500%
June 2019	12.00% per annum	2.449	4.449%	7.500%
May 2019	12.00% per annum	2.449	4.449%	7.500%
April 2019	12.00% per annum	2.532	4.532%	7.500%
March 2019	12.00% per annum	2.505	4.505%	7.500%
February 2019	12.00% per annum	2.536	4.536%	7.500%
January 2019	12.00% per annum	2.562	4.562%	7.250%
December 2018	12.00% per annum	2.515	4.515%	7.250%
November 2018	12.00% per annum	2.396	4.396%	7.250%
October 2018	12.00% per annum	2.297	4.297%	7.000%

Ex. 1

August 2018	12.00% per annum	N/A	4.136%	7.000%
July 2018	12.00% per annum	N/A	4.121%	6.750%
June 2018	12.00% per annum	N/A	4.048%	6.750%
May 2018	12.00% per annum	N/A	3.950%	6.750%
April 2018	12.00% per annum	N/A	3.873%	6.500%
March 2018	12.00% per annum	N/A	3.687%	6.500%
February 2018	12.00% per annum	N/A	3.610%	6.500%
January 2018	12.00% per annum	N/A	3.450%	6.250%
December 2017	12.00% per annum	N/A	3.327%	6.250%
November 2017	12.00% per annum	N/A	3.214%	6.250%
October 2017	12.00% per annum	N/A	3.137%	6.250%
September 2017	12.00% per annum	N/A	3.163%	6.250%
August 2017	12.00% per annum	N/A	3.152%	6.250%
July 2017	12.00% per annum	N/A	3.091%	6.000%
June 2017	12.00% per annum	N/A	2.993%	6.000%
May 2017	12.00% per annum	N/A	2.927%	6.000%
April 2017	12.00% per annum	N/A	2.850%	5.750%
March 2017.	12.00% per annum	N/A	2.631%	*5.750%
February 2017	12.00% per annum	N/A	2.641%	*5.750%
January 2017	12.00% per annum	N/A	2.625%	*5.500%
December 2016	12.00% per annum	N/A	2.544%	*5.500%
November 2016	12.00% per annum	N/A	2.498%	*5.500%
October 2016	12.00% per annum	N/A	2.478%	*5.500%
September 2016	12.00% per annum	N/A	2.401%	*5.500%
August 2016	12.00% per annum	N/A	2.345%	*5.500%
July 2016	12.00% per annum	N/A	2.437%	*5.500%
June 2016	12.00% per annum	N/A	2.401%	*5.500%
May 2016	12.00% per annum	N/A	2.391%	*5.500%
April 2016	12.00% per annum	N/A	2.483%	*5.500%
March 2016	12.00% per annum	N/A	2.474%	*5.500%
February 2016	12.00% per annum	N/A	2.510%	*5.500%
January 2016	12.00% per annum	N/A	2.545%	5.250%
December 2015	12.00% per annum	N/A	2.285%	5.250%
November 2015	12.00% per annum	N/A	2.066%	5.250%
October 2015	12.00% per annum	N/A	2.280%	5.250%
September 2015	12.00% per annum	N/A	2.168%	5.250%
August 2015	12.00% per annum	N/A	2.086%	5.250%
July 2015	12.00% per annum	N/A	2.071%	5.250%

June 2015	12.00% per annum	N/A	2.071%	5.250%
May 2015	12.00% per annum	N/A	2.097%	5.250%
April 2015	12.00% per annum	N/A	2.076%	5.250%
March 2015	12.00% per annum	N/A	2.066%	5.250%
February 2015	12.00% per annum	N/A	2.112%	5.250%
January 2015	12.00% per annum	N/A	2.076%	5.250%
December 2014	12.00% per annum	N/A	2.061%	5.250%
November 2014	12.00% per annum	N/A	2.041%	5.250%
October 2014	12.00% per annum	N/A	2.051%	5.250%
September 2014	12.00% per annum	N/A	2.051%	5.250%
August 2014	12.00% per annum	N/A	2.061%	5.250%
July 2014	12.00% per annum	N/A	2.056%	5.250%
June 2014	12.00% per annum	N/A	2.046%	5.250%
May 2014	12.00% per annum	N/A	2.051%	5.250%
April 2014	12.00% per annum	N/A	2.081%	5.250%
March 2014	12.00% per annum	N/A	2.061%	5.250%
February 2014	12.00% per annum	N/A	2.081%	5.250%
January 2014	12.00% per annum	N/A	2.101%	5.250%
December 2013	12.00% per annum	N/A	2.086%	5.250%
November 2013	12.00% per annum	N/A	2.061%	5.250%
October 2013	12.00% per annum	N/A	2.056%	5.250%
September 2013	12.00% per annum	N/A	2.076%	5.250%
August 2013	12.00% per annum	N/A	2.086%	5.250%
July 2013	12.00% per annum	N/A	2.081%	5.250%
June 2013	12.00% per annum	N/A	2.076%	5.250%
May 2013	12.00% per annum	N/A	2.107%	5.250%
April 2013	12.00% per annum	N/A	2.122%	5.250%
March 2013	12.00% per annum	N/A	2.112%	5.250%
February 2013	12.00% per annum	N/A	2.122%	5.250%
January 2013	12.00% per annum	N/A	2.142%	5.250%
December 2012	12.00% per annum	N/A	2.152%	5.250%
November 2012	12.00% per annum	N/A	2.137%	5.250%
October 2012	12.00% per annum	N/A	2.137%	5.250%
September 2012	12.00% per annum	N/A	2.137%	5.250%
August 2012	12.00% per annum	N/A	2.152%	5.250%
July 2012	12.00% per annum	N/A	2.132%	5.250%
June 2012	12.00% per annum	N/A	2.145%	5.250%
May 2012	12.00% per annum	N/A	2.142%	5.250%

April 2012	12.00% per annum	N/A	2.132%	5.250%
March 2012	12.00% per annum	N/A	2.102%	5.250%
February 2012	12.00% per annum	N/A	2.051%	5.250%
January 2012	12.00% per annum	N/A	2.051%	5.250%
December 2011	12.00% per annum	N/A	2.036%	5.250%
November 2011	12.00% per annum	N/A	2.061%	5.250%
October 2011	12.00% per annum	N/A	2.071%	5.250%
September 2011	12.00% per annum	N/A	2.153%	5.250%
August 2011	12.00% per annum	N/A	2.081%	5.250%
July 2011	12.00% per annum	N/A	2.107%	5.250%
June 2011	12.00% per annum	N/A	2.102%	5.250%
May 2011	12.00% per annum	N/A	2.132%	5.250%
April 2011	12.00% per annum	N/A	2.158%	5.250%
March 2011	12.00% per annum	N/A	2.178%	5.250%
February 2011	12.00% per annum	N/A	2.193%	5.250%
January 2011	12.00% per annum	N/A	2.188%	5.250%
December 2010	12.00% per annum	N/A	2.157%	5.250%
November 2010	12.00% per annum	N/A	2.188%	5.250%
October 2010	12.00% per annum	N/A	2.183%	5.250%
September 2010	12.00% per annum	N/A	2.198%	5.250%
August 2010	12.00% per annum	N/A	2.208%	5.250%
July 2010	12.00% per annum	N/A	2.223%	5.250%
June 2010	12.00% per annum	N/A	2.249%	5.250%
May 2010	12.00% per annum	N/A	2.269%	N/A
April 2010	12.00% per annum	N/A	2.188%	N/A
March 2010	12.00% per annum	N/A	2.167%	N/A
February 2010	12.00% per annum	N/A	2.183%	N/A
January 2010	12.00% per annum	N/A	2.167%	N/A
December 2009	12.00% per annum	N/A	2.173%	N/A
November 2009	12.00% per annum	N/A	2.152%	N/A
October 2009	12.00% per annum	N/A	2.228%	N/A
September 2009	12.00% per annum	N/A	2.279%	N/A
August 2009	12.00% per annum	N/A	2.289%	N/A
July 2009	12.00% per annum	N/A	2.294%	N/A
June 2009	12.00% per annum	N/A	2.335%	N/A
May 2009	12.00% per annum	N/A	2.376%	N/A
April 2009	12.00% per annum	N/A	2.447%	N/A
March 2009	12.00% per annum	N/A	2.396%	N/A

February 2009	12.00% per annum	N/A	2.325%	N/A
January 2009	12.00% per annum	N/A	2.437%	N/A
December 2008	12.00% per annum	N/A	3.122%	N/A
November 2008	12.00% per annum	N/A	3.122%	N/A
October 2008	12.00% per annum	N/A	3.935%	N/A
September 2008	12.00% per annum	N/A	3.966%	N/A
August 2008	12.00% per annum	N/A	4.111%	N/A
July 2008	12.00% per annum	N/A	3.997%	N/A
June 2008	12.00% per annum	N/A	3.780%	N/A
May 2008	12.00% per annum	N/A	3.635%	N/A
April 2008	12.00% per annum	N/A	3.852%	N/A
March 2008	12.00% per annum	N/A	4.220%	N/A
February 2008	12.00% per annum	N/A	5.275%	N/A
January 2008	12.00% per annum	N/A	5.296%	N/A
December 2007	12.00% per annum	N/A	5.918%	N/A
November 2007	12.00% per annum	N/A	6.151%	N/A
October 2007	12.00% per annum	N/A	6.554%	N/A
September 2007	12.00% per annum	N/A	6.927%	N/A
August 2007	12.00% per annum	N/A	7.012%	N/A
July 2007	12.00% per annum	N/A	6.991%	N/A
June 2007	12.00% per annum	N/A	7.017%	N/A
May 2007	12.00% per annum	N/A	7.076%	N/A
April 2007	12.00% per annum	N/A	7.060%	N/A
March 2007	12.00% per annum	N/A	7.153%	N/A
February 2007	12.00% per annum	N/A	7.094%	N/A
January 2007	12.00% per annum	N/A	7.030%	N/A
December 2006	12.00% per annum	N/A	7.180%	N/A
November 2006	12.00% per annum	N/A	7.014%	N/A
October 2006	12.00% per annum	N/A	7.116%	N/A
September 2006	12.00% per annum	N/A	7.190%	N/A
August 2006	12.00% per annum	N/A	7.297%	N/A
July 2006	12.00% per annum	N/A	7.004%	N/A
June 2006	12.00% per annum	N/A	6.966%	N/A
May 2006	12.00% per annum	N/A	6.849%	N/A
April 2006	12.00% per annum	N/A	6.775%	N/A
March 2006	12.00% per annum	N/A	6.669%	N/A
February 2006	12.00% per annum	N/A	6.420%	N/A
January 2006	12.00% per annum	N/A	6.335%	N/A

December 2005	12.00% per annum	N/A	6.303%	N/A
November 2005	12.00% per annum	N/A	6.002%	N/A
October 2005	12.00% per annum	N/A	5.686%	N/A
September 2005	12.00% per annum	N/A	5.718%	N/A
August 2005	12.00% per annum	N/A	5.429%	N/A
July 2005	12.00% per annum	N/A	5.151%	N/A
June 2005	12.00% per annum	N/A	5.177%	N/A
May 2005	12.00% per annum	N/A	5.125%	N/A
April 2005	12.00% per annum	N/A	5.021%	N/A
March 2005	12.00% per annum	N/A	4.786%	N/A
February 2005	12.00% per annum	N/A	4.630%	N/A
January 2005	12.00% per annum	N/A	4.442%	N/A
December 2004	12.00% per annum	N/A	4.193%	N/A
November 2004	12.00% per annum	N/A	4.038%	N/A
October 2004	12.00% per annum	N/A	3.903%	N/A
September 2004	12.00% per annum	N/A	3.774%	N/A
August 2004	12.00% per annum	N/A	3.666%	N/A
July 2004	12.00% per annum	N/A	3.430%	N/A
Prior to July 2004	12.00% per annum	N/A	N/A	N/A

* An error was discovered in reporting the Historical Judgement Rates to the Office of the Code Reviser from February 2016 through March 2017. These rates have been corrected.

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12/19/2019 8:05 0050

Exhibit 2

FILED
DEPT 5
IN OPEN COURT
NOV 27 2019
PIERCE COUNTY, Clerk
By DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

AUSTIN K. FITE, Plaintiff, vs. LEE R. MUDD and JANE DOE MUDD, CITY OF PUYALLUP, Defendants.	Case No. 17-2-07876-5 SPECIAL VERDICT FORM

CN.2

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

QUESTION 1: Were any of the defendants negligent?

ANSWER: (Write "yes" or "no" after the name of each defendant)

Defendant City of Puyallup: Yes (YES) ____ (NO)

Defendant Lee R. Mudd: YES (YES) ____ (NO)

(DIRECTION: If you answered "no" to Question 1 as to each defendant, sign this verdict form. If you answered "yes" to Question 1 as to any defendant, answer Question 2.)

QUESTION 2: Was such negligence a proximate cause of damages to the Plaintiff?

ANSWER: (Write "yes" or "no")

Defendant City of Puyallup: Yes (YES) ____ (NO)

Defendant Lee R. Mudd: YES (YES) ____ (NO)

QUESTION 3: What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.

ANSWER: (Write the monetary amount in the space provided below)

1) Undisputed past medical expenses $353,048.73.
2) Past non-economic damages $ 300,000.
3) Other past economic damages $ 118,533.27
4) Future non-economic damages $ 4,000,000.
5) Future economic damages $ 1,728,418.

QUESTION 4: Was the plaintiff contributorily negligent?

ANSWER: (Write "yes" or "no")

~~YES~~ YES _____ NO ___NO___

(DIRECTION: If you answered "no" to Question 4, skip Question 5 and answer Question 6. If you answered "yes" to Question 4, answer Question 5.)

QUESTION 5: Was Austin Fite's contributory negligence a proximate cause of the damages to the plaintiff?

ANSWER: (Write "yes" or "no")

YES _____ NO ___NO___

(DIRECTION: If you answered "no" to Question 5, answer Question 6. If you answered "yes" to Question 5, skip Question 6 and answer Question 7.)

QUESTION 6: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's damages. What percent of this 100% is attributable to each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the damages to the plaintiff. Your total must equal 100%.

ANSWER: (Write these percentages in the space provided below)

To defendant City of Puyallup ___67___ %

To defendant Lee R. Mudd ___33___ %

TOTAL ___100%___

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused the plaintiff's damages. What percentage of this 100% is attributable negligence of each defendant whose negligence was found by you in Question 2 to have been a proximate cause of the damages to the plaintiff, and what percentage of this 100% is attributable to Austin Fite's negligence? Your total must equal 100%

ANSWER: (Write these percentages in the space provided below)

To defendant City of Puyallup	67 %
To defendant Lee R. Mudd	33 %
To plaintiff Austin Fite	0 %
TOTAL	100%

INSTRUCTION: Sign and return this verdict.

DATED: 11-27, 2019.

Danette Chilcutt
Presiding Juror

FILED
DEPT 5
IN OPEN COURT
NOV 27 2019
PIERCE COUNTY, Clerk
By _____ DEPUTY

Exhibit 3

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

AUSTIN K. FITE, individually, Plaintiff, vs. LEE R. MUDD and "JANE DOE" MUDD, individually and husband and wife, and the marital community comprised thereof; and CITY OF PUYALLUP, a Municipal Corporation under the laws of the State of Washington, Defendants.	NO: 17-2-07876-5 PLAINTIFF'S COST BILL

COMES NOW Plaintiff Austin K. Fite, by and through his attorney of record, Ben F. Barcus, of the Law Offices of Ben F. Barcus & Associates, PLLC, and presents the following Cost Bill, requesting taxation of the referenced costs against the Defendants herein.

Plaintiff's Cost Bill is submitted pursuant to RCW 4.84.et seq., the Affidavit of Counsel appended hereto, as well as the files and records herein.

1. **Filing Fee (4.84.010 (1):**
   Pierce County Superior Court
   Case filing fee 5/17/2017 re Defendant Mudd $ 241.50

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

Ex 3

Pierce County Superior Court
Case filing fee 7/17/2017 re Defendant
City of Puyallup $ 241.50

$ 483.00

2. **Service of Process Fees (4.84.010(2):**

AJ Investigations

- Service of Process on Defendant City of Puyallup (5/22/2017 - $84.62) (7/24/2017- $111.40) $ 196.02
- Service of Process on Defendant Mudd (6/2/2017) $ 115.15
- Service of Subpoenas on Witness Marvin Cox (2/3/2019) $112.50
- Service of Subpoena on Witness Marlene Ford (2/3/2019) $112.50
- Service of Trial Subpoena on Witness Audrey Boutte (10/27/2019) $ 90.00
- Service of Trial Subpoena on Witness Kelly Boutte (10/25/2019) $ 45.00
- Service of Trial Subpoena on Witness Doris Hockett (10/25/2019) $ 67.50
- Service of Trial Subpoena on Witness Andrew Larkin (10/26/2019) $ 90.00
- Service of Trial Subpoena on Witnesses Dr. Paul Inouye, MD and Dr. Evelyn Fu, MD (10/2/2019) $101.25
- Service of Subpoena on Records Custodian Tacoma General Hospital (9/30/2019) $ 67.50

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

- Service of Subpoena on Witness Steven Hamilton (11/19/2019 & 11/21/2019) $585.00

$1,582.42

3. Records Fees 4.84.010 (5):

City of Puyallup	$ 3.12
Olympic Sports & Spine	$ 34.00
Cascade Eye & Skin	$195.06
~~Sound Family Medicine~~	~~$155.32~~
IOD Medical Records	$ 28.47
St. Joseph Hospital Images	$ 27.25
Tacoma General Hospital	$ 6.50
CIOX Health	$ 6.50
Chartswap	$ 43.67

$ 499.89

4. Deposition Fees 4.84.010 (7):

Buell Realtime Reporting

Depositions/Transcript – Dr. Fu (Preservation Deposition – 10/14/2019) $1,024.55

Byers & Anderson

Transcript fee – Dep of Lee Mudd	$ 136.80
Transcript fee – Dep of Austin Fite	$ 508.10

$1,669.45

5. Statutory Attorney Fees (4.84.080): $ 200.00

$ 200.00

TOTAL COSTS: **$4,434.76**

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Law Offices Of Ben F. Barcus & Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

12/19/2019 8:05 0058

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Ben F. Barcus, being first duly sworn on oath, deposes and says:

That I am the attorney of record for the Plaintiff herein in the above-entitled cause, and the above and foregoing statement of costs and disbursements, exclusive of reasonable attorney's fees, is true and correct, and that said amounts have been or will be actually disbursed in this action. Your affiant submits that the referenced costs are reasonable and necessary expenses of Plaintiff in pursuing this cause of action.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Ben F. Barcus, WSBA# 15576

Subscribed and sworn to before me this 4 day of December, 2019.

M. Thea Wescott
NOTARY PUBLIC in and for the
State of Washington, residing at Gig Harbor, WA
My commission expires: 2-6-2023

MARY THEA WESCOTT
NOTARY PUBLIC #10485
STATE OF WASHINGTON
COMMISSION EXPIRES
FEBRUARY 6, 2023

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Appellant*** in Court of Appeals, Division II Cause No. 54325-7-II to the following parties:

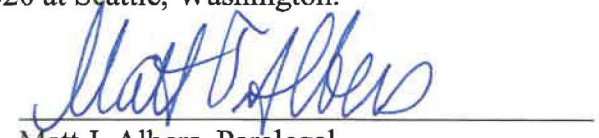
Benjamin Barcus, WSBA #15576
Paul Lindenmuth, WSBA #15817
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA 98402-5313

Andrew Cooley, WSBA #15189
Brian Augenthaler, WSBA #44022
Keating Bucklin & McCormack, Inc., P.S.
The Norton Building
801 Second Avenue, Suite 1210
Seattle, WA 98104

Original E-filed via appellate portal:
Court of Appeals, Division II
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 18, 2020 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

June 18, 2020 - 2:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	54325-7
Appellate Court Case Title:	Austin K. Fite, Respondent v. City of Puyallup, et al. Appellants
Superior Court Case Number:	17-2-07876-5

The following documents have been uploaded:

- 543257_Briefs_20200618144402D2557983_4678.pdf
  This File Contains:
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  The Original File Name was Brief of Appellant.pdf
- 543257_Motion_20200618144402D2557983_3294.pdf
  This File Contains:
  Motion 1 - Waive - Page Limitation
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- sarah@tal-fitzlaw.com
- tcaceres@kbmlawyers.com
- tiffany@benbarcus.com

Comments:

Motion for Leave to File Over-Length Brief of Appellant; Brief of Appellant

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