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NO. 54325-7-11

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; and
Defendants.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
THE HONORABLE SHELLY SPEIR

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. RESTATEMENT OF THE CASE..... 1

 A. The City placed an “atypical” crosswalk, leading into a popular park, north of an un signaled intersection on a busy arterial. The crosswalk did not meet driver expectations and was unreasonably dangerous..... 2

 1. The injury crosswalk was not at the intersection and did not have advance pedestrian warning signs..... 2

 2. The City placed a “distracting” speed radar sign, intended to address a known “speeding problem,” in an unsafe location just north of the injury crosswalk..... 5

 3. Because of the geometry of the intersection and injury crosswalk, which had no “refuge area,” turning vehicles could obscure the view of both drivers and pedestrians..... 6

 B. There was no competent evidence that marijuana use by plaintiff Austin Fite, age 18, contributed to him being run down in the City’s unsafe crosswalk. 8

 C. The driver did not see Austin in the unsafe crosswalk before hitting him, and admitted liability. The City does not dispute Austin’s grievous injuries and damages on appeal. 13

D.	The trial court dismissed the City’s “intoxication defense” but allowed the jury to decide plaintiff’s comparative fault. After an 18-day trial, the jury found the City 67% liable and the driver 33% liable for Austin’s damages.	16
III.	ARGUMENT	20
A.	The trial court did not abuse its discretion in correctly instructing the jury that the City’s roadway duty of care depended on the totality of the circumstances.	20
B.	The trial court did not abuse its discretion in denying reconsideration of its dismissal of the City’s intoxication defense, while leaving plaintiff’s comparative fault to the jury.	26
1.	The City submitted no evidence Austin was impaired by his use of marijuana.	27
2.	The City submitted no evidence Austin’s marijuana use proximately caused his injuries.	33
3.	As the City was allowed to argue comparative fault to the jury, the City was not prejudiced by dismissal of the intoxication defense.	35
C.	The trial court did not abuse its discretion in any of its other evidentiary rulings.	39
1.	The trial court did not abuse its discretion in excluding the belated conjecture of the City’s expert toxicologist.	39
2.	While allowing its expert to testify, the trial court did not abuse its discretion in excluding unhelpful conjecture of the City’s accident reconstructionist.	44

3.	The trial court did not abuse its discretion in admitting two police reports of other accidents in the area of the injury crosswalk after the City “opened the door.”.....	49
4.	The trial court did not abuse its discretion in refusing to admit a pretrial declaration of a witness who testified and was subject to cross-examination at trial.....	50
IV.	CONCLUSION	54

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>United States v. Hale</i> , 422 U.S. 171, 95 S. Ct. 2133, 45 L.Ed.2d 99 (1975)	50
STATE CASES	
<i>Bowers v. Marzano</i> , 170 Wn. App. 498, 290 P.3d 134 (2012)	48
<i>C.L. v. D.S.H.S.</i> , 200 Wn. App. 189, 402 P.3d 346 (2017), <i>rev. denied</i> , 192 Wn.2d 1023 (2019)	26
<i>City of Seattle v. Pearson</i> , 192 Wn. App. 802, 369 P.3d 194 (2016)	28-29, 32
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 346 P.3d 708 (2015).....	21
<i>Gerlach v. Cove Apartments, LLC</i> , No. 97325-3, 2020 WL 5048574 (August 27, 2020).....	<i>passim</i>
<i>Gilmore v. Jefferson County Pub. Transp. Benefit Area</i> , 190 Wn.2d 483, 415 P.3d 212 (2018)	39-40, 42
<i>Hamilton v. Dep't of Labor & Indus. of State of WA</i> , 111 Wn.2d 569, 761 P.2d 618 (1988)	24
<i>Hickly v. Bare</i> , 135 Wn. App. 676, 145 P.3d 433 (2006), <i>rev. denied</i> , 161 Wn.2d 1011 (2007)	29, 37
<i>Howell v. Spokane & Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	38
<i>Jenkins v. Snohomish Cty. Pub. Util. Dist. No. 1</i> , 105 Wn.2d 99, 713 P.2d 79 (1986)	49
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014).....	40

<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	21, 24
<i>Kimball v. Otis Elevator Co.</i> , 89 Wn. App. 169, 947 P.2d 1275 (1997)	51
<i>Mark v. Seattle Times</i> , 96 Wn.2d 473, 635 P.2d 1081 (1981), <i>cert. denied</i> , 457 U.S. 1124 (1982).....	33
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001)	40-41
<i>Needham v. Dreyer</i> , 11 Wn. App.2d 479, 454 P.3d 136 (2019), <i>rev. denied</i> , 195 Wn.2d 1017 (2020)	41, 44
<i>Owen v. Burlington N. & Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	24
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017)	28-29, 31-32
<i>Porter v. Kirkendoll</i> , 194 Wn.2d 194, 449 P.3d 627 (2019)	38
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991), <i>rev. denied</i> , 118 Wn.2d 1010 (1992).....	40, 42, 44, 47
<i>Sewell v. MacRae</i> , 52 Wn.2d 103, 323 P.2d 236 (1958).....	47
<i>Sligar v. Odell</i> , 156 Wn. App. 720, 233 P.3d 914 (2010), <i>rev. denied</i> , 170 Wn.2d 1019 (2011)	26, 35
<i>State v. Arndt</i> , 194 Wn.2d 784, 453 P.3d 696 (2019).....	47
<i>State v. Hultenschmidt</i> , 125 Wn. App. 259, 102 P.3d 192 (2004)	47, 49

<i>State v. Komoto</i> , 40 Wn. App. 200, 697 P.2d 1025, <i>cert. denied</i> , 474 U.S. 1021 (1985).....	32
<i>State v. Wilhelm</i> , 78 Wn. App. 188, 896 P.2d 105 (1995)	32
<i>Tanguma v. Yakima Cty.</i> , 18 Wn. App. 555, 569 P.2d 1225 (1977), <i>rev. denied</i> , 90 Wn.2d 1001 (1978)	22
<i>White v. Kent Med. Ctr., Inc., P.S.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	34
<i>Wuthrich v. King Cty.</i> , 185 Wn.2d 19, 366 P.3d 926 (2016)	24-25
<i>Xiao Ping Chen v. City of Seattle</i> , 153 Wn. App. 890, 223 P.3d 1230 (2009), <i>rev. denied</i> , 169 Wn.2d 1003 (2010).....	21-25

STATUTES

RCW 5.40.060.....	<i>passim</i>
RCW 46.61.502	27-28
RCW 46.61.605	27

RULES AND REGULATIONS

CR 30	10, 30
CR 36	31
CR 59	34
ER 613	50
ER 702	40-41
ER 703	40-41

OTHER AUTHORITIES

6 Wash. Prac., Pattern Jury Instr. Civ.
WPI 70.03 (7th ed.)15

Andrea Roth, *The Uneasy Case for Marijuana as
Chemical Impairment Under a Science-Based
Jurisprudence of Dangerousness*,
103 Calif. L. Rev. 841, 886 (2015) 29

I. INTRODUCTION

Respondent Austin Fite suffered life-altering, permanent injuries because of the City of Puyallup's negligent roadway design when he was struck by a truck driven by defendant Lee Mudd while legally crossing a busy Puyallup arterial in a marked crosswalk. The jury apportioned 33% of the fault for the accident to Mr. Mudd, 67% to the City, and none to Austin in awarding him \$6.5 million in damages. (CP 3265-66) Mr. Mudd has not appealed the judgment entered on the jury's verdict, and the City does not challenge the amount of damages awarded by the jury and concedes that the trial court's instructions correctly recited its duty of care in designing and maintaining its roads. The City's challenges to the trial court's discretionary evidentiary rulings provide no basis for reversing the jury's verdict after this 18-day trial.

II. RESTATEMENT OF THE CASE

The City's opening brief is an extraordinarily biased hodgepodge of often irrelevant "facts," nominally supported by disputed evidence that the jury clearly discounted in returning its verdict, or by indiscriminate citation to allegations in pretrial pleadings. This Restatement of the Case gives the jury's verdict and

the trial court's discretionary decisions, based on the facts actually elicited below, the deference to which they are both entitled.

A. The City placed an “atypical” crosswalk, leading into a popular park, north of an unsignaled intersection on a busy arterial. The crosswalk did not meet driver expectations and was unreasonably dangerous.

The City of Puyallup extended 5th Street SE to connect with 7th Street SE in the early 2000s, in a project called the “7th Street Extension.” Prior to the extension, 5th Street terminated at 31st Avenue SE. A car driving north on 5th Street SE would have to turn left onto 31st Avenue NE; a car driving east on 31st Avenue NE would have to turn right onto 5th Street SE. (Ex. 519) The City built the 3-lane 7th Street Extension to alleviate congestion and provide an alternative north-south route to its main north-south arterial, Meridian Street. (RP 2188-89, 2308-10)

1. The injury crosswalk was not at the intersection and did not have advance pedestrian warning signs.

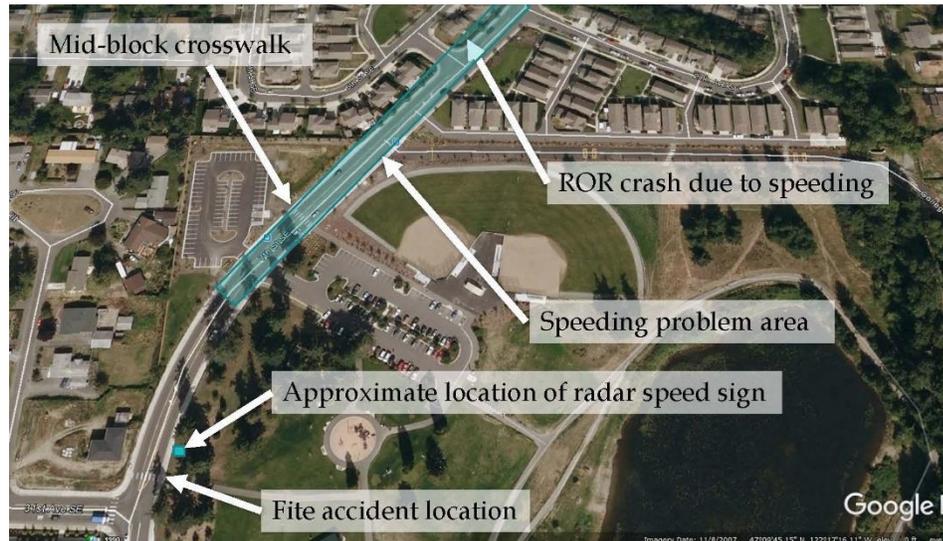
At about the same time it built the 7th Street Extension, east of the intersection of 5th/7th Street SE and 31st Avenue SE the City developed Bradley Lake Park, which hosts many events and attracts many pedestrians. (RP, 2351, 2657, 2711) The City built two crosswalks into Bradley Lake Park north of 31st Avenue SE as part of the 7th Street Extension. The first crosswalk, mid-block north of 31st

Avenue SE, connects a parking lot for Bradley Park to the main park entrance. This parking lot crosswalk had advance pedestrian warning signs in both directions. (RP 2276-77, 2280-81; Exs. 57, 675) An advance pedestrian warning sign alerts drivers they are approaching a crosswalk. (RP 766)

The City placed the second crosswalk, where Austin Fite was grievously injured (the “injury crosswalk”), south of the mid-block park entrance parking lot crosswalk. This crosswalk was not in a standard location, but in “no mans land” (RP 1100); the City had placed it not at the new T-intersection with 31st Avenue SE but 26 feet north of the intersection. (RP 1093) Rather than being at the intersection, or mid-block, this crosswalk fed directly into a path that leads into the park where an unpaved private road had been before the City developed Bradley Lake Park. (RP 1109, 1203, 2392, 3017, 3027; Ex. 512) Because it was not at the intersection with 31st Avenue SE, it was “not typical” (RP 1101) and did not match drivers’ expectations where a crosswalk should be. (RP 765, 1093-95, 1124)

Exhibit 675 contains an aerial view showing the locations of the mid-block crosswalk, the injury crosswalk, and a speed radar

sign, discussed *infra* at § II.A.2, that the City added after the 7th Street Extension was built:¹



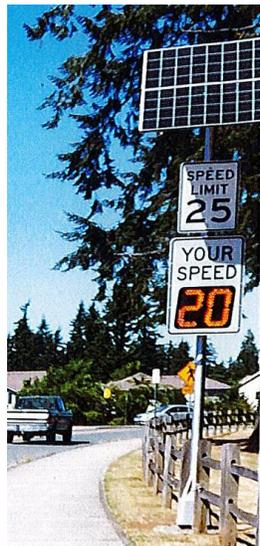
The City did nothing to alert northbound drivers that they were approaching the injury crosswalk after they cleared the intersection. (RP 761) There were no traffic signals at the intersection of 31st Avenue SE and 5th/7th Street SE. (RP 753, Exs. 20, 25, 39) There were no advance pedestrian warning signs alerting northbound drivers they were approaching the injury crosswalk. (RP 765-77) Marlene Ford, the City’s former traffic engineer responsible for the placement and signage for the mid-block parking lot

¹ The font of the legends on Exhibit 675 has been enhanced to improve legibility. The “ROR crash due to speeding” legend refers to a single-vehicle “run-off-the-road” accident that had prompted citizen complaints. (RP 2347-48)

crosswalk that had advance warning signs, testified as a paid expert for the City. (RP 2528) She admitted that a marked crosswalk that was not at an intersection requires an advance pedestrian warning sign. (RP 2380-81) An advance pedestrian warning sign would have cost \$100-\$150, plus labor, for a total of \$400. (RP 2904-05)

2. The City placed a “distracting” speed radar sign, intended to address a known “speeding problem,” in an unsafe location just north of the injury crosswalk.

South of the injury crosswalk, the speed limit on 5th/7th Street SE was 30 miles per hour; the speed limit drops to 25 miles per hour



at the intersection with 31st Avenue SE. (RP 2283) In addition to having no advance pedestrian warning signs alerting northbound drivers they were approaching a crosswalk that was not at the intersection, the City just north of the injury crosswalk had placed a “speed radar sign” with a flashing display of an approaching northbound vehicle’s speed. (RP 770-71, 849)

The City’s former traffic engineer testified that the City placed the speed radar sign at that location because of speeding complaints from residents of the neighborhoods north of Bradley Lake Park. (RP 2282-83, 2512-13) The speed radar sign, reproduced above, is in Exhibit 25.

Police Sergeant David Obermiller, the City's "specialist" in traffic-related enforcement (RP 2613-16), testified that the City "monitored" the intersection because there is a "speeding problem" south of 31st Avenue SE; vehicles accelerate in the long straight-away approaching 31st and the "soft curve" of the 7th Street Extension, vehicles turning left onto 31st have a turn lane, and there are no right turns into the park off 5th/7th Street SE to slow northbound traffic. (RP 2658-59; *see also* RP 2347) Sergeant Obermiller himself had monitored the area, from the path into the park connecting to the injury crosswalk, because of "citizen concerns" and complaints. (RP 2712-14)

The jury heard evidence that the City placed its speed radar sign, which is designed "to be looked at" (RP 850), in an unsafe location. It had the effect of distracting drivers, who would notice the sign and check their speed, looking at either the sign or their speedometers when they should be looking for pedestrians in the injury crosswalk. (RP 771; *see also* RP 1240, 1877, 1891, 3033)

3. Because of the geometry of the intersection and injury crosswalk, which had no "refuge area," turning vehicles could obscure the view of both drivers and pedestrians.

The City's atypical placement of the injury crosswalk could prevent northbound drivers from seeing pedestrians in the

crosswalk, and pedestrians in the crosswalk from seeing northbound vehicles, if there were vehicles waiting in the middle lane to turn left onto 31st Avenue SE. (RP 761, 768-70, 787-88, 804, 1886; Ex. 91) Because of the geometry of the intersection and because the injury crosswalk was neither an intersection crosswalk nor a mid-block crosswalk, its “awkward” location also meant that vehicles turning left from 31st Avenue SE to travel north on 5th/7th Street SE could cut into the middle lane. (RP 1181, 1186, 1239; Exs. 121, 507) The City had painted a “bullnose” south of the injury crosswalk in the middle lane; on appeal it characterizes the paint marks as a pedestrian “refuge area.” (App. Br. 8) Plaintiff’s traffic design and human factors experts testified that the paint marks were not, in fact, a pedestrian “refuge area.” (RP 762, 764, 1117-19)

Exhibit 42 is an aerial view of the intersection and the injury crosswalk leading to the pedestrian path in Bradley Lake Park:



Just as the City had intended, the 7th Street Extension became a heavily-traveled arterial route; one of the busiest in the area. (RP 1881-82) As it did below, the City on appeal makes much of the fact that there was no evidence that any other *pedestrian* had been injured in the injury crosswalk before July 2014. (App. Br. 1, 7, 27, 34) But after its police traffic “specialist” Sgt. Obermiller made that assertion (RP 2631), the trial court exercised its discretion to allow the jury to hear evidence that there had been other accidents there:

For instance, a lead vehicle belatedly saw – and stopped for – a pedestrian in the injury crosswalk, resulting in a rear-end collision. (RP 2639; Ex. 48A) A vehicle also hit a bicyclist in the injury crosswalk before Austin was injured. (RP 2643; Ex. 48B) And the day after Austin was injured, the City received a report of a collision at the intersection. (RP 2644) Lay witnesses, who had seen Austin run down in the injury crosswalk and were familiar with this “very, very congested” area, also testified they were aware of other accidents and “near misses” there. (RP 1703, 1808-10)

B. There was no competent evidence that marijuana use by plaintiff Austin Fite, age 18, contributed to him being run down in the City’s unsafe crosswalk.

Austin Fite was 18 years old in July 2014. His mother and stepfather lived about 400 yards away from the injury crosswalk, and

Austin had lived in the neighborhood for two years. (RP 1587, 2096; CP 896-97) Although he later completed his GED, and at the time of trial was employed as a Costco gas station attendant (RP 1776-77, 1936, 1975), Austin had struggled in school, and had dropped out during his senior year a few months earlier. (RP 1988, 2105)

Austin was a skateboarder. He had gone on his skateboard from Bradley Lake Park to buy a cheeseburger at the McDonald's in the Walmart (visible in the upper left corner of Ex. 42, *supra*, p.7). Austin had no alternative to using the injury crosswalk to reach Bradley Lake Park except jaywalking or traveling a long distance to the mid-block crosswalk. (RP 797) There was no marked crosswalk at the southern corner of the intersection of 31st Avenue SE and 5th/7th Street SE, and plaintiff's human factors expert told the jury that painting a crosswalk channels pedestrians to the place the municipality believes is the safest place to cross. (RP 797)

Returning to Bradley Lake Park, Austin crossed 31st Avenue SE heading north in the marked crosswalk at the T-intersection. He slowed down to turn the corner, headed east into the injury crosswalk, and was almost across 5th/7th Street SE, within a few feet of the curb and the path into the park, when he was struck by a pickup

truck driven northbound by defendant Lee Mudd, at approximately 5 p.m. on Wednesday, July 9, 2014. (RP 1888, 1897-98, 1900)

The City emphasizes on appeal that Austin had been smoking marijuana on a daily basis, including on the day when he was run down in the injury crosswalk. The City cites as its sole support for Austin's claimed "admission" the deposition testimony of the CR 30(b)(6) witness for the hospital where Austin was treated in the Emergency Department and ICU to the results of a urine sample taken during his treatment (CP 1847-48), and the hearsay statements of a physician at a family medicine practice Austin visited with his mother, seeking treatment for depression and anxiety 11 weeks after he was injured. (CP 2121-24) (App. Br. 5)

Totally missing from the record, however, is any connection of Austin's marijuana use to the tragic accident in which he was injured. The City also ignores that it failed to present the "expert evidence" of intoxication it now makes the cornerstone of its appeal until *after* the trial court granted partial summary judgment dismissing its intoxication defense. The City first submitted *on reconsideration* a 2-page declaration of Kenton Wong, a Hayward, California "senior forensic scientist" who admitted that Austin's urine sample, which screened positive for THC of "*at least* 50 ng/ml"

(emphasis in original) “cannot be correlated to one’s impairment.” (CP 1952) Mr. Wong nevertheless speculated that THC’s “presence detected in Mr. Fite’s system may have been at least a contributory factor in the precipitation [sic] of the accident which resulted in his subsequent injuries.” (CP 1953)

After plaintiff pointed out that this belated “expert” opinion was rank speculation (CP 2064), Mr. Wong tried again, in a second 2-page declaration first submitted with the City’s *reply* on reconsideration. Claiming that defense counsel had only pointed out to him that Austin had “reported” he was “high” (a reference to the family medicine records addressed above) after he filed his *first* declaration on reconsideration, Mr. Wong in his “do-over” declaration claimed that he could now rely on this “significant” “fact” to opine that the “presence [of THC] detected in Mr. Fite’s system was, on a more probable than not basis, at least a contributory factor in the precipitation [sic] of the accident which resulted in his subsequent injuries. Given the positive drug screen and Mr. Fite’s admission that he was ‘high’ while riding his skateboard, Mr. Fite was impaired at the time of accident on a more probable than not basis.” (CP 2114)

This 30(b)(6) deposition testimony, medical record, and Mr. Wong's declarations on reconsideration are the sum total of the "intoxication evidence" relied upon by the City as the basis for its primary argument for overturning the jury's verdict and ordering a new trial. The City further ignores that its own investigating Officer Jeff Bennett, who responded to the accident, "didn't identify any actions on behalf of the pedestrian [Austin] as causing or contributing to the accident." (RP 2820) The City's co-defendant Mr. Mudd joined in plaintiff's (unsuccessful) motion to dismiss the comparative fault defense at the conclusion of trial, arguing to the trial court that "there's no comparative fault on Mr. Fite." (RP 3161)

Finally, the City elevates the exclusion of evidence of Austin's marijuana use to its centerpiece on appeal without mentioning that the trial court, on the same day it dismissed the City's "intoxication defense," granted a protective order prohibiting any evidence or mention of Mr. Mudd's opioid addiction or methadone use on the day of the accident, on the analytically similar grounds that there was no evidence Mr. Mudd was impaired or that his drug use affected his conduct at the time of the accident. (CP 1297-98)

C. The driver did not see Austin in the unsafe crosswalk before hitting him, and admitted liability. The City does not dispute Austin’s grievous injuries and damages on appeal.

The front of Mr. Mudd’s pickup truck hit Austin when he was almost across 5th/7th Street SE, so close that after the impact Austin’s head landed on the curb. (RP 2827, 2832) The responding officer testified to his report that “Fite was lying in the traveled portion of the road with his head resting on the curb. Fite had blood all over his head area. He had a visible knot on his left forehead and there was blood coming from the back of his head. . . . Blood was also coming from his mouth. Fite’s left leg was twisted in a manner which led me to believe it was broken.” (RP 2832)

Mr. Mudd testified that he did not see Austin at all before hitting him. (RP 1709, 1713-18, 1727; *see also* RP 1237) All the witnesses to the accident who gave statements to the City at the time (all of whom testified consistently on summary judgment, and at trial) confirmed that Mr. Mudd’s vehicle did not brake or slow at all before hitting Austin, who was almost at the curb, lawfully riding his skateboard at a “jogging” pace in the crosswalk. (CP 948, 956-57, 1089-94; RP 1237, 1860, 1869, 1874, 1890, 1895) Austin has no

memory of the accident except for the moment of impact. (CP 893-94; RP 1977)

Mr. Mudd conceded he was negligent during the summary judgment proceedings. (CP 929-30) The jury was instructed that Mr. Mudd had admitted liability and that they must answer “yes” to the questions on the special verdict form whether his negligence was the proximate cause of plaintiff’s damages. (CP 3173, 3264)

The City completely ignores the substantial evidence supporting the jury’s verdict that the City was negligent: That because of the City’s atypical placement of the injury crosswalk, Mr. Mudd may not have been able to see Austin, and Austin may not have been able to see Mr. Mudd’s truck, due to vehicles in the middle lane waiting to turn left onto 31st Avenue SE. (RP 761, 768-70, 788, 804, 1709-10; Ex. 91); that the T-intersection between 31st Avenue SE and 5th/7th Street SE was extremely busy and the middle lane often congested with vehicles turning to enter the Walmart (RP 1227, 1808-09, 1816, 2824); and that the City’s signage not only failed to alert drivers they were approaching the injury crosswalk, which the City had placed in an atypical, unexpected location, but distracted drivers from looking for pedestrians. (RP 765-66, 771, 850, 1093-95, 1124, 1240, 1877, 1891, 3033)

It cannot be disputed that Austin had the right-of-way, was legally in a marked crosswalk, was entitled to rely upon drivers yielding to him, and had no duties of observation once he had entered the crosswalk. (See unchallenged Instr. 25, CP 3187 (WPI 70.03)) Although the jury rejected the City's claim of comparative fault, the City nevertheless criticizes Austin for failing to take three "safety measures" (App. Br. 8), including seeing Mr. Mudd's truck (from almost a quarter mile away) and not crossing until it had stopped for him (if the middle lane was clear), or stopping in the middle of the roadway or speeding up on his skateboard to finish crossing the street (if the middle lane was occupied).

The sole "evidentiary" support cited for the City's criticism of Austin for being run down in its marked crosswalk (App. Br. 7-8) comes from a 4-page declaration of Gerald Bretting, an El Segundo, California engineer, accident reconstructionist, and "experienced skateboarder" submitted on summary judgment. (CP 923) The City ignores that the trial court *denied* summary judgment on Austin's comparative fault (CP 1303), and Mr. Bretting then testified at trial. (RP 2559) The jury thus heard and weighed his testimony as elicited by the City concerning the ability of Mr. Mudd and Austin to avoid the accident. (RP 2585-96, 2600-01)

In addition to a severe head injury, Austin suffered an acute displaced comminuted fracture of his left femur, broken nasal and eye bones, detached retinas in both eyes, and concussion. (RP 3126, 3139-40) After being hospitalized, at first in the ICU, for almost a week, and after surgery to insert a femoral nail to repair his leg fracture, Austin was discharged to his parents' care. (RP 1294, 1303-05) In October 2014, Austin underwent surgery to repair the detached retina in his right eye; surgery for the similarly detached retina in his left eye was in December 2014, with follow-up surgeries on both eyes in February and March 2015. (RP 1522; Ex. 72)

Austin suffers from ongoing cognitive issues and PTSD as a result of his injuries. He has macular degeneration, is now legally blind in one eye, and will never be able to obtain a driver's license. (RP 1395, 1614-15, 1971, 2050) On appeal, the City does not challenge Austin's injuries as a result of the collision or the jury's \$6.5 million damage award.

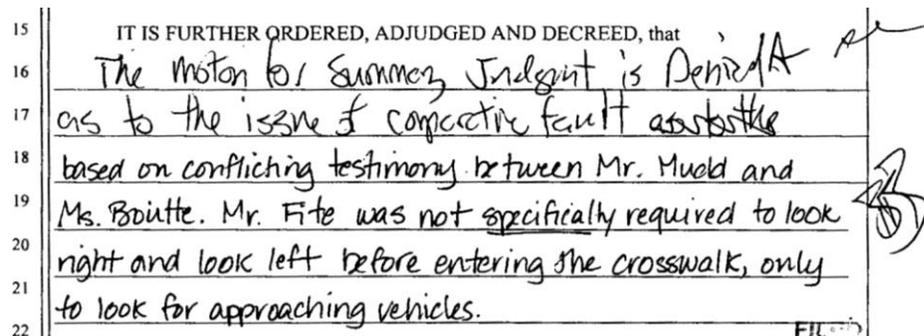
D. The trial court dismissed the City's "intoxication defense" but allowed the jury to decide plaintiff's comparative fault. After an 18-day trial, the jury found the City 67% liable and the driver 33% liable for Austin's damages.

Austin's claims against Mr. Mudd and the City were consolidated before Pierce County Superior Court Judge Shelly Speir

(“the trial court”). (CP 9-11) On cross-motions, the trial court granted plaintiff’s motion for partial summary judgment establishing Mr. Mudd’s negligence and dismissing the City’s RCW 5.40.060 “intoxication defense” but denied summary judgment on the issue of Austin’s comparative fault. (CP 1302-03) Although the trial court (over plaintiff’s objection) did not strike Mr. Wong’s belated “expert” declarations submitted on reconsideration, the trial court exercised its discretion and denied the parties’ motions for reconsideration of its summary judgment rulings. (CP 2185-92, 2190-92)

The trial court denied plaintiff summary judgment on comparative fault:

15 IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that
16 The motion for Summary Judgment is Denied
17 as to the issue of comparative fault assistance
18 based on conflicting testimony between Mr. Mudd and
19 Ms. Boutte. Mr. Fite was not specifically required to look
20 right and look left before entering the crosswalk, only
21 to look for approaching vehicles.
22

A handwritten court ruling on a lined document. The text is written in black ink. At the end of the ruling, there is a signature that appears to be 'A' and some initials 'B' in a circle. The word 'FILED' is printed at the bottom right of the ruling.

(CP 1303) The “conflicting testimony” was whether there were vehicles in the middle lane that would have obstructed Mr. Mudd’s – or Austin’s – view. Mr. Mudd had testified he did not see Austin because of vehicles waiting in the middle lane to turn left. (CP 842) Kelly Boutte, who had been driving the vehicle behind Mr. Mudd’s

truck, stated in a July 22, 2019 declaration that she did “not recall any cars in the left turn lane blocking my view.” (CP 1153)

The idiosyncratic “look right and look left” language of the order denying summary judgment, which the City now seizes on in arguing (contrary to the order itself) that the trial court “effectively granted summary judgment” on Austin’s comparative fault (App. Br. 4), arose not from disputed facts, but because of the City’s untoward reliance on the July 22 declaration it had extracted from Ms. Boutte – a declaration she corrected three days later:

In the July 22 declaration obtained and submitted by the City on summary judgment, Ms. Boutte stated that she saw Austin enter the crosswalk, and that “[a]t 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) In her deposition, taken after summary judgment was denied, and in an offer of proof at trial, Ms. Boutte testified that she had felt “intimidated,” “threatened,” and “harassed” by the three City representatives (including defense counsel) who had visited her at her home and prepared the July 22 declaration for her signature. (CP 2098; *see* RP 1831, 1854) Three days later, on July 25, Ms. Boutte corrected her declaration to make clear that she did “not recall if he looked r[igh]t or left one way or another.” (CP 1294; *see* CP 2093)

The case went to trial before a 12-person jury on October 28, 2019. All the witnesses to the accident testified at trial, including Ms. Boutte and her daughter Audrey, who had been with her mother in the vehicle behind Mr. Mudd's truck. Although the trial court exercised its discretion not to allow "impeachment" of Ms. Boutte with her uncorrected July 22 declaration (RP 1853-54), she was otherwise subject to full cross-examination on what she did, and did not, see Austin do, or not do, before he entered the crosswalk. (RP 1862, 1878-84, 1889-93) The City admits that the trial court's instructions "properly stated the law" on plaintiff's "observational duties" before and after entering the crosswalk. (App. Br. 37)

The City's argument that it was not negligent was based primarily on extensive testimony of its employees and expert witnesses that the injury crosswalk complied with MUCTD guidelines. (*See, e.g.*, 2199-2214, 2257-2305, 2955-68) Of the 34 instructions to the jury, the City assigns error to only Instruction 28, which told the jury, correctly, that "[w]hether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the 'totality of the circumstances.' A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes,

regulations or guidelines concerning roadways and crosswalks.”
(Instr. 28, CP 3190)

The jury returned a \$6.5 million verdict attributing 67% of the fault to the City and 33% to Mr. Mudd on November 27, 2019. (CP 3264-65) The City alone appeals from the joint and several judgment entered on the jury’s verdict December 13, 2019. (CP 3470)

III. ARGUMENT

A. The trial court did not abuse its discretion in correctly instructing the jury that the City’s roadway duty of care depended on the totality of the circumstances. (App. Br. 21-31)

The City challenges a single jury instruction, arguing not that it was an incorrect statement of the law but that it should not have been given under the “different circumstances” of this particular case. (App. Br. 2) “Whether to give a certain jury instruction is within a trial court’s discretion and so is reviewed for abuse of discretion . . . The propriety of a jury instruction is governed by the facts of the particular case. . . . Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law. . . . The party challenging an instruction bears the burden of establishing

prejudice.” *Fergen v. Sestero*, 182 Wn.2d 794, 802-03, ¶¶ 14-15, 346 P.3d 708 (2015) (cited cases omitted).

Here, the City complains of Instruction 28, which told the jury that “[w]hether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the ‘totality of the circumstances.’ A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of states, regulations or guidelines concerning roadways and crosswalks.” (Instr. 28, CP 3190) As the City concedes (App. Br. 23), this correct statement of the law is taken from the decision in *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *rev. denied*, 169 Wn.2d 1003 (2010). As the City also concedes (App. Br. 23), the instruction immediately preceding Instruction 28, correctly told the jury the City’s duty was limited to exercising “ordinary care in the design, construction, maintenance, and repair of its public roads and crosswalks to keep them in a reasonably safe condition for ordinary travel.” (Instruction 27, CP 3189)

Instruction 27, which set out the City’s roadway duty of care, was “hand-crafted” (App. Br. 29) in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). That is, Instruction 27 was taken from the language of an appellate opinion, just as Instruction 28 was

taken from the holding of *Chen*. The jury was further instructed, as the City proposed (CP 2792), that it had “no duty to conform its roads to present-day standards,” and that the jury could “not consider standards promulgated after the development of the premises at issue when evaluating negligence” (Instr. 29; CP 3191), based on the holding of *Tanguma v. Yakima Cty.*, 18 Wn. App. 555, 560, 569 P.2d 1225 (1977), *rev. denied*, 90 Wn.2d 1001 (1978).

The Court of Appeals reversed a defense summary judgment and remanded for trial in *Chen* because “[w]hether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. . . . [E]vidence that a municipality was in violation of a law concerning roadway safety measures [is] not essential to a claim a municipality breached the duty of care . . .” 153 Wn. App. at 894, ¶ 1. The supposedly “unique” (App. Br. 24) “circumstances” in *Chen* are in reality quite similar to those of this case.

In *Chen*, a pedestrian was struck and killed when he had almost made it across South Jackson Street, a 5-lane arterial in Seattle, in a marked crosswalk at 10th Avenue South. “[T]here were no stoplights, stop signs, or pedestrian signals at the intersection . . . [, which] contained only pole-mounted signs at the curbs warning

that there was a crosswalk and an overhead ‘Crosswalk’ sign with a flashing light suspended above the street.” *Chen*, 153 Wn. App. at 895, ¶ 2. Just as the City here had installed its distracting “speed radar sign” just north of the injury crosswalk because of citizen complaints, the City of Seattle in *Chen* had removed a “pedestrian refuge” from the crosswalk where the pedestrian was killed because of citizen complaints that it prevented left turns into businesses on Jackson. 153 Wn. App. at 895, ¶ 3 The trial court in *Chen* erred in granting summary judgment to the City of Seattle, which – like the City here – argued it could not be liable because the crosswalk “did not contain any physical defect rendering [it] inherently dangerous or misleading,” and the City “was not in violation of any law requiring safety measures different from those installed at the crosswalk.” 153 Wn. App. at 898, ¶ 8.

The City does not, and cannot, claim that Instruction 28 is a misstatement of the law. Far from being “isolated” language in an atypical case (App. Br. 11, 23), *Chen*’s recital of a municipality’s duty to maintain reasonably safe roadways and crosswalks “reflects binding precedent in this state and correctly states the law. Since this is a rule of law, it [was] appropriate that the jury be informed of

this by the instructions of the court.” *Hamilton v. Dep’t of Labor & Indus. of State of WA*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988).

Instead, the City’s argument that Instruction 28 was “inappropriate” because it “ultimately undermines the duty established by our Supreme Court in *Keller*” (App. Br. 26) is, “ultimately,” an argument that *Chen* was wrongly decided.² But the Supreme Court cited with approval *Chen*’s recognition that “[w]hether the roadway was 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” in *Wuthrich v. King Cty.*, 185 Wn.2d 19, 27, ¶ 11, 366 P.3d 926 (2016).

Further, *Chen*’s recognition that a municipality’s claimed compliance with statutes, regulations or guidelines does not preclude liability was based on well-established law that “[n]egligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care.” *Owen v. Burlington N. & Santa Fe R.R. Co.*,

² Although the City’s appellate counsel represented the plaintiff in *Chen*, respondent declines to gratuitously suggest there “is more than a little irony” (App. Br. 16, n.4) in his assault in this case on *Chen*’s holding.

153 Wn.2d 780, 787, ¶ 11, 108 P.3d 1220 (2005), quoted at *Chen*, 153 Wn. App. at 908, ¶ 27. And in holding that the duty of care extends to hazardous conditions not inherent in the “roadway itself,” the Supreme Court in *Wuthrich* expressly “reject[ed] the notion that continuing to recognize this duty will make municipalities strictly liable for all traffic accidents because, as we have previously emphasized, ‘only *reasonable* care is owed.’” 185 Wn.2d at 26-27, ¶¶ 10-12 (emphasis in original) (quoted and cited cases omitted).

Instructing the jury that the City’s duty of care depends upon the totality of the circumstances, and that a roadway can be unreasonably dangerous even if it complies with regulations or guidelines, was a correct statement of the law, and did not in any way prejudice the City. To the contrary, the City’s counsel relied on Instruction 28 to emphasize in closing that the City’s duties were cabined by the crosswalk’s location and accident history (RP 3281, 3291-92), and did not require the City to make its roads safe for “extraordinary travel.” (RP 3282) The trial court did not abuse its discretion in giving Instruction 28, which was a correct statement of the law and allowed each party to fairly argue their case to the jury.

B. The trial court did not abuse its discretion in denying reconsideration of its dismissal of the City's intoxication defense, while leaving plaintiff's comparative fault to the jury. (App. Br. 12-18)

RCW 5.40.060(1) prohibits recovery in a personal injury action if the trier of fact finds that an intoxicated plaintiff's condition was a proximate cause of the injury and the plaintiff was more than fifty percent at fault. The City had the burden of producing substantial evidence supporting this affirmative defense on summary judgment. *C.L. v. D.S.H.S.*, 200 Wn. App. 189, 203-04, ¶ 40, 402 P.3d 346 (2017), *rev. denied*, 192 Wn.2d 1023 (2019).

Although this Court reviews the grant of summary judgment de novo, the trial court's denial of reconsideration is reviewed for manifest abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, ¶ 40, 233 P.3d 914 (2010), *rev. denied*, 170 Wn.2d 1019 (2011). The City does not distinguish between evidence it submitted on summary judgment, which raised no issue concerning Austin's intoxication, nor that his marijuana use had any effect on his conduct or contributed to the accident, and evidence submitted on reconsideration (or in its reply in support of reconsideration), which as the trial court in any event recognized added nothing to the undisputed facts. This response makes that distinction:

1. The City submitted no evidence Austin was impaired by his use of marijuana.

The intoxication defense requires a defendant to show that the plaintiff was intoxicated using the “the same standard established for criminal convictions,” which provides two ways to demonstrate that a person was “under the influence” of marijuana. RCW 5.40.060(1); RCW 46.61.502(1)(b), (1)(c). Under the “per se” method, a person is considered under the influence of marijuana if “within two hours after driving, a THC concentration of 5.00 [nanograms] or higher as shown by analysis of the person’s *blood*.” RCW 46.61.502(1)(b) (emphasis added). The City concedes that it could not establish intoxication “per se” (App. Br. 16) because no blood test exists, let alone one that satisfies the rigorous procedures of RCW 46.61.605.

Accordingly, the City was required to produce evidence that Austin was “under the influence of or affected by intoxicating liquor, marijuana, or any drug.” RCW 46.61.502(1)(c). It was not enough to establish that Austin had marijuana in his system – the City was required to produce evidence that, at the time of the accident, marijuana had “so far affected his nervous system, brain, or muscles, so as to impair, to an appreciable degree, his ability to [act] in the manner [of] an ordinary prudent and cautious man, in the full

possession of his faculties, using reasonable care . . . under like circumstances.” *Peralta v. State*, 187 Wn.2d 888, 898, ¶ 18, 389 P.3d 596 (2017) (quoted cases omitted). Here, the City failed to present any evidence on summary judgment that Austin was affected by his marijuana use at all.

Characterizing Austin as “a regular marijuana user” (CP 881), the City on summary judgment relied on two pieces of evidence it claimed established that he was intoxicated when he was run down in the injury crosswalk:

First, a urine screen at the hospital where Austin was initially treated for his grave injuries indicated a THC concentration of at least 50 nanograms per milliliter (ng/ml).³ (CP 915-16, 1879-80) But the mere presence of THC in urine, without more, does not shed any light on whether it impaired Austin’s ability to act as a reasonably

³ The City continues to claim, with no evidence whatsoever, that Austin had “ten times the ‘per se’ legal limit of THC in his system.” (App. Br. 16; CP 2110) This false statement deceptively mischaracterizes the law. While there is a “per se” limit for THC concentration in *blood*, there is no legal limit for THC concentration in *urine*, RCW 46.61.502(1)(b), and the “per se” method *requires* compliance with state toxicology standards. *Gerlach v. Cove Apartments, LLC*, No. 97325-3, 2020 WL 5048574, ¶ 17, n. 5 (August 27, 2020). If this defense had proceeded to trial, any reference to the statutory legal limit of THC concentration in *blood* would have been completely irrelevant and prejudicial. *See, e.g., City of Seattle v. Pearson*, 192 Wn. App. 802, 818, ¶ 26, 369 P.3d 194 (2016) (reference to legal limit of THC was irrelevant and “highly prejudicial” when crime occurred before legal limit was enacted).

careful person in any appreciable degree. *Peralta*, 187 Wn.2d at 898, ¶ 18; see also *Hickly v. Bare*, 135 Wn. App. 676, 688, ¶ 39, 145 P.3d 433 (2006) (despite “evidence that [plaintiff] had been drinking alcohol earlier in the evening . . . there was no evidence that [plaintiff] was also intoxicated” under RCW 5.40.060), *rev. denied*, 161 Wn.2d 1011 (2007). Unlike alcohol, which dissolves into blood and is metabolized at a predictable and consistent rate, THC absorbs into fat cells and can cause positive THC results even a month after use, particularly in chronic marijuana users. Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment Under a Science-Based Jurisprudence of Dangerousness*, 103 Calif. L. Rev. 841, 886 (2015); see also *Pearson*, 192 Wn. App. at 815, ¶ 21 (noting “studies showing a test could detect THC in the blood of a chronic cannabis user even several days after that person smoked marijuana.”).

The additional evidence the City submitted on reconsideration in fact confirmed that the urine screen could not establish actual impairment. Kenton Wong, the toxicologist whose speculative opinion the City first proffered on reconsideration, admitted that “urine results alone cannot be correlated to one’s impairment (that sort of interpretation can only be accomplished using a blood sample).” (CP 1952, 2113-14) The hospital’s

CR 30(b)(6) witness, whose deposition testimony the City also submitted on reconsideration, could not testify whether the presence of THC had any effect on Austin because “there’s so many variables;” THC “can sit in the body for a while in . . . fatty tissue” for “up to 30 days,” and the presence of THC “depends on the individual.” (CP 1866-67) This was consistent with the hospital’s official policy manual, also submitted on reconsideration. (CP 1888: “In chronic users, THC may accumulate in fatty tissue faster than it can be excreted, leading to longer detection times in urine for chronic users than for occasional users.”) Such speculation concerning “the general effects of intoxication, not the effect it actually had on [plaintiff]” is “only minimally probative of causation and fault.” *Gerlach*, 2020 WL 5048574, at *4, ¶ 21.

Second, the City relied on the hearsay record of a family physician with whom Austin consulted for depression and anxiety, 11 weeks after the accident, which recites he was “high on Cannabis while riding his skateboard” when he was hit in the crosswalk. (CP 908) Austin’s supposed “admission” was purely speculative hearsay. Permitting the jury to consider the intoxication defense based on this “evidence” to find that Austin’s alleged intoxicated was a proximate

cause of the collision as required by RCW 5.40.060 would have invited the jury to reach a conclusion based solely on conjecture.

The City claims that the hearsay statement Austin was “high” is no different than the plaintiff’s admission in *Peralta*. (App. Br. 17) The City’s attempted analogy ignores that the plaintiff in *Peralta* admitted her intoxication in an unqualified response to a CR 36 request for admission during discovery “clearly related to [the intoxication] defense,” and that “the purpose of [defendant’s] request for admission was” to establish the affirmative defense, “not to establish another concept that had no legal significance.” 187 Wn.2d at 899-900, ¶¶ 21-22. The Supreme Court affirmed the trial court’s ruling that this CR 36 admission conclusively established the plaintiff was intoxicated for purposes of RCW 5.40.060.

As did the defendant in *Gerlach*, 2020 WL 5048574, at *5, ¶ 24, the City misreads *Peralta*. Unlike this case, the courts in *Peralta* did not need to determine whether the plaintiff’s admission gave rise to a sufficient genuine issue of material fact to survive summary judgment. Indeed, the Supreme Court specifically emphasized that “[t]he purpose of CR 36 is to eliminate from controversy factual matters that will not be disputed at trial.” *Peralta*, 187 Wn.2d at 895, ¶ 13 (quoted source omitted). The

admission in *Peralta* established the first element under RCW 5.40.060 only because it was a legal concession that the defendant need not present facts to prove the first element of the statutory intoxication defense.

Peralta provides no insight into the factual question whether Austin's alleged statement to the family physician that he was "high" shows that he was "under the influence" of marijuana. As the trial court correctly noted during the summary judgment hearing, the City failed to present "any sort of corroborating evidence" that Austin was impaired, such as testimony that "he was skateboarding erratically or behaving strangely, wandering across the street or anything like that." (7/29/19 RP 64) The trial court did not abuse its discretion in requiring some such evidence from the City in order to argue that Austin was "under the influence" under the non-per se method to support its "intoxication defense." *See State v. Wilhelm*, 78 Wn. App. 188, 192-93, 896 P.2d 105 (1995); *State v. Komoto*, 40 Wn. App. 200, 205, 697 P.2d 1025, *cert. denied*, 474 U.S. 1021 (1985); *Pearson*, 192 Wn. App. at 818, ¶ 26.

2. The City submitted no evidence Austin’s marijuana use proximately caused his injuries.

The City had the burden of establishing the relevance of Austin’s alleged intoxication as to each element of its intoxication defense under RCW 5.40.060. *Gerlach*, 2020 WL 5048574, at *3, ¶ 18. Even assuming a reasonable jury could infer from the City’s scant evidence that Austin was under the influence of marijuana, summary judgment was proper because the City submitted no evidence that Austin’s intoxication proximately caused his injuries.

“While being intoxicated can certainly influence a person’s behavior, the fact of intoxication does not prove a person was acting in any particular way.” *Gerlach*, 2020 WL 5048574, at 5* ¶ 25. To avoid summary judgment, the nonmoving party must raise a genuine issue of material fact as to each element of the cause of action or affirmative defense on which the nonmoving party has the burden of proof. *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). Just as it did below (CP 881), the City makes no attempt on appeal to show how Austin’s marijuana use proximately caused his injuries.

The record on summary judgment unambiguously established that Austin was simply skateboarding through the crosswalk when

Mr. Mudd failed to slow down and struck him as he neared the curb.⁴ The trial court did not abuse its discretion in recognizing that the City's belated (second) declaration from toxicologist Wong, submitted only with its reply on reconsideration, claiming that Austin's "admission" he was "high" was a "significant fact" allowing him to speculate to causation, did not manufacture a disputed issue of fact. The trial court did not abuse its discretion in finding "the important parts didn't change" (8/23/19 RP 24), leaving aside there was no reason the City could not have submitted Mr. Wong's speculation earlier for purposes of CR 59. *White v. Kent Med. Ctr.*,

⁴ Although the trial court allowed the issue of Austin's comparative fault to go to the jury, every single witness to the accident said he was blameless, and not a single witness suggested that Austin was in any way appeared impaired, or was behaving in a manner consistent with impairment. (CP 1091: "Young man on skateboard going across crosswalk, man in truck did not slowdown or brake."; CP 1093: "The teenager in the crosswalk had almost made it entirely across the street . . . when he was struck by the truck."; CP 1094: "My mom and I watched a teenager [cross] the street and a man didn't slow down for him to cross and the man hit the teenager."; CP 956: "I looked into my rearview mirror and saw a kid on a skateboard hit by a truck (in the crosswalk)."; CP 957: "I saw a young man on a skateboard crossing the street . . . A driver in a blue Nissan pickup . . . hit the man on the skateboard in the crosswalk. The man in the Nissan pickup did not appear to slow down or see the pedestrian."; CP 948: "All four witnesses had the same version of events . . . All four agreed that Fite was in the intersection, riding his skateboard. All four agreed that Mudd . . . collided with Fite . . . I issued Mudd [a citation] for Failure to Yield to Pedestrian in Crosswalk."; CP 1994: "I did not observe the pedestrian/skateboarder engage in any activities that caused or contributed to the collision occurring.") Mr. Mudd admitted that he didn't see Austin in the crosswalk until after he "heard something hit [his] car" and got out of his truck and saw Austin on the side of the road. (CP 842, 844, 847)

Inc., P.S., 61 Wn. App. 163, 169, 810 P.2d 4 (1991) (error for trial court to consider proximate cause issue first raised in reply on summary judgment); *Sligar*, 156 Wn. App. at 734, ¶ 41 (evidence must not have been previously available to warrant reconsideration of summary judgment).

The trial court's decision also was wholly consistent with the trial court's ruling, the same day, that Mr. Mudd's opiate addiction and methadone use on the day of the accident was inadmissible. (CP 1297-98) The City completely ignores this ruling in the City's challenge to the trial court's consistent partial summary judgment in favor of Austin. The trial court correctly dismissed the "intoxication defense" in the absence of any evidence Austin was impaired in any way by his marijuana use.

3. As the City was allowed to argue comparative fault to the jury, the City was not prejudiced by dismissal of the intoxication defense. (App. Br. 35-44)

The City's argument that the trial court's ruling on its intoxication defense "failed to properly address . . . Fite's comparative fault" ignores the summary judgment ruling, and the proceedings at trial. (App. Br. 11-12, 53) Conceding that the jury was properly instructed that "[a] pedestrian within a crosswalk has the

right to assume that all drivers of approaching vehicles will yield the right of way” (unchallenged Instr. 25, CP 3187), the City is hard pressed to argue that the trial court erred in allowing the jury to decide whether Austin exercised reasonable care in entering and proceeding through the City’s marked crosswalk.

Mr. Mudd testified that he did not see Austin because vehicles in the middle lane waiting to turn left had obscured his view. (CP 841-42) According to Ms. Boutte, the driver of the car behind Mr. Mudd’s, there were no cars in the left turn lane. (CP 1294) The trial court allowed comparative fault to go to the jury based on the declaration of Gerald Bretting, the City’s accident reconstructionist, who concluded based on the geometry of the intersection and injury crosswalk that “Fite had sufficient time and ample sight distance to detect the Mudd vehicle and utilize reasonable strategies to avoid this accident.” (CP 923) The trial court reasoned that if the jury believed Mr. Mudd that there were cars in the turn lane, “there’s no way [Fite] could have made any sort of evaluation of whether or not Mr. Mudd was slowing or was going to yield the right-of-way,” and because of Ms. Boutte’s contrary testimony, “that’s an issue of fact that the jury will have to determine.” (7/26/19 RP 65)

The trial court’s decision was consistent with *Hickly*, where the court held that a comparative fault claim can go forward even if an affirmative intoxication defense is properly dismissed. 135 Wn. App. at 689, ¶ 41. The *Hickly* court noted that “there was evidence that [the plaintiff] had been drinking alcohol earlier in the evening,” but nevertheless concluded the evidence was insufficient to conclude that the plaintiff “was also intoxicated” under RCW 5.40.060, “or that her actions contributed to causing the accident.” 135 Wn. App. at 689, ¶ 39. The court emphasized, however, that “[t]his holding does not mean . . . that a plaintiff’s condition or actions cannot give rise to a defense independent of RCW 5.40.060,” including a traditional comparative fault claim. *Hickly*, 135 Wn. App. at 689, ¶ 41.

The City’s argument, to the contrary, would allow an intoxication defense against *any* injury plaintiff who happened to have THC⁵ in their system to go to the jury. The City’s proposed leap to a complete defense to liability based on the “moral hazard” of a plaintiff’s use of marijuana contradicts the plain language of the intoxication defense statute. It is not enough to show that “the

⁵ Or alcohol, for that matter, even where it is “only minimally probative of causation and fault.” *Gerlach*, 2020 WL 5048574, at *4, ¶ 21.

person injured . . . was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury,” – the defendant must also show “that such condition was a proximate cause of the injury.” RCW 5.40.060. Permitting an affirmative intoxication defense at trial without *some* evidence establishing a causal connection between the plaintiff’s alleged intoxication and the injury would render the statute meaningless. *See Porter v. Kirkendoll*, 194 Wn.2d 194, 211, ¶ 37, 449 P.3d 627 (2019) (courts must apply statutes such that no phrase is rendered meaningless).

The City could not possibly have been prejudiced by the trial court’s partial summary judgment in light of the jury’s verdict rejecting the City’s claim of comparative negligence. *See Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627-28, 818 P.2d 1056 (1991) (summary judgment order that limited appellant from conducting discovery not reversible because it did not cause prejudice). The trial court left the issue of Austin’s comparative fault to the jury, giving the City the opportunity to argue he should have seen and avoided being run down by Mr. Mudd in the injury crosswalk. As the jury fairly decided the parties’ respective fault based on proper instructions, this Court should affirm.

C. The trial court did not abuse its discretion in any of its other evidentiary rulings.

As the City concedes (App. Br. 18 & n.5), this Court “review[s] a trial court’s evidentiary rulings for abuse of discretion,” deferring to the trial court’s judgment unless it is “convinced that ‘no reasonable person would take the view adopted by the trial court.’” *Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, ¶ 17, 415 P.3d 212 (2018) (emphasis in original; parenthetical and quoted case omitted); *Gerlach*, 2020 WL 5048574, at *2, ¶ 13. The City also correctly concedes the jury was properly instructed on Austin’s “duties of self-protection” on the City’s comparative fault defense (App. Br. 37), substantially undermining its attempt to characterize the trial court’s evidentiary rulings as taking any issue from the jury. (App. Br. 39-40) These additional evidentiary issues are addressed in turn here:

1. The trial court did not abuse its discretion in excluding the belated conjecture of the City’s expert toxicologist. (App. Br. 18-21)

Having not abused its discretion in declining to reconsider its summary judgment ruling dismissing the intoxication defense, the trial court did not abuse its discretion in excluding from the jury’s consideration at trial the belated conjecture of the City’s toxicologist

that Austin’s urine screen raised the possibility that his conduct had contributed to the accident. Leaving aside the dubious provenance of Mr. Wong’s opinions – reached, as set out in the Restatement of the Case, only in his second declaration submitted on reply in support of reconsideration – the trial court did not manifestly abuse its discretion in deciding his general observations on the consequences of marijuana use would not have been helpful to the jury. Contrary to the City’s argument (App. Br. 18), that Mr. Wong purported to be (or was qualified as) an “expert” toxicologist, eminent or otherwise, does not change the standard of review, or the deference given the trial court’s decision, and to the contrary heightens the potential prejudice of admitting his conjecture. *Gerlach*, 2020 WL 5048574, at *4-5, ¶¶ 21-22; *Gilmore*, 190 Wn.2d at 494, ¶ 18; *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, ¶ 10, 333 P.3d 388 (2014).

Expert testimony is admissible when a qualified expert relying on generally accepted scientific theories can provide specialized knowledge that will help the trier of fact determine a factual issue. *Miller v. Likins*, 109 Wn. App. 140, 147-48, 34 P.3d 835 (2001); ER 702, 703. But trial courts cannot admit “conclusory or speculative expert opinions lacking an adequate foundation.” *Safeco Ins. Co. v.*

McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *rev. denied*, 118 Wn.2d 1010 (1992). “[W]hen ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Miller*, 109 Wn. App. at 148 (quoted case omitted). The trial court has broad discretion to determine whether expert testimony that is potentially admissible under ER 702 and 703 should nevertheless be excluded because its prejudicial effect substantially outweighs its probative value. *Needham v. Dreyer*, 11 Wn. App.2d 479, 493, ¶ 34, 454 P.3d 136 (2019), *rev. denied*, 195 Wn.2d 1017 (2020).

In *Gerlach*, the Supreme Court reversed the Court of Appeals’ grant of a new trial and reinstated a jury verdict reached after the trial court exercised its broad discretion to exclude an expert’s speculative opinion that the plaintiff’s impairment affected her behavior. The Court noted that the risk of unfair prejudice “is exacerbated where a medical doctor speculates about the impact such [testimony] may have had on [plaintiff] without any regard to her actual behavior. Excluding such speculative, minimally probative evidence and testimony as too unfairly prejudicial to

Gerlach was well within the trial court's discretion.” *Gerlach*, 2020 WL 5048574, at *5, ¶ 22.

Here, the trial court’s reasons for excluding Mr. Wong’s opinion are not even “fairly debatable.” *Gilmore*, 190 Wn.2d at 494, ¶ 17. Rather than present any additional evidence that Austin was impaired, Mr. Wong’s declaration relies entirely on his claimed statement that he was “high” to summarily conclude that Austin must have been impaired at the time of an accident he could not remember. (CP 1952-53, 2113-14) The declaration epitomizes the conclusory, speculative expert opinions that trial courts cannot admit. *Safeco*, 63 Wn. App. at 177, n.18 (“expert opinion based on speculation and conjecture may not go to the jury”). Because evidence of drug use is “highly controversial” and thus creates a significant “potential for prejudice” (8/23/19 RP 24), the trial court was not even close to abusing its discretion when it excluded Mr. Wong’s testimony at trial.

At the outset, Mr. Wong’s initial declaration admits that the urine screen is completely irrelevant: “urine results alone *cannot be correlated to one’s impairment* (that sort of interpretation can *only* be accomplished using a blood sample).” (CP 1952) (emphasis added) Mr. Wong based his conclusion in his reply declaration entirely on Austin’s supposed “admission,” listing a number of

symptoms that “may” result from marijuana use, and that “may” last up to 24 hours, but then summarily concludes that, because Austin said he was “high,” he “inten[ded] . . . to become intoxicated,” and therefore “was impaired at the time of the accident.” (CP 2114)

Paradoxically, Mr. Wong suggests this is true “[g]iven the positive drug screen” – the same urine screen that, on the previous page, he admits cannot demonstrate impairment. (CP 2114) The declaration does not identify any behavior noted by any witness to the accident that suggests Austin suffered from any specific symptom of impairment identified by Mr. Wong, such as “decreased motor coordination,” “disorientation,” “altered time/space perception,” or “lack of concentration.” (CP 2114) Essentially, Mr. Wong’s second declaration boils down to: Austin said he was high, so he must have caused Mr. Mudd to run him down in the City’s crosswalk.

The trial court has ample discretion to exclude speculative expert opinion on intoxication because it lacked a sufficient foundation in the record, even when there is some evidence a party consumed intoxicating substances. *See, e.g., Gerlach*, 2020 WL 5048574, at *5, ¶ 22 (reinstating jury verdict after noting risk of prejudicing the jury with speculative “expert” opinion plaintiff “*must have been impaired* and making risky decisions”) (emphasis in

original); *Needham*, 11 Wn. App.2d at 495-96, ¶¶ 38-39 (reversing summary judgment based on “expert” opinion that alcohol consumption caused plaintiff’s collapse, even though plaintiff “admitted to his treating physician that he had been drinking prior to collapsing,” because expert “speculat[ed] as to the potential effect of alcohol on [his] collapse”); *see also Safeco*, 63 Wn. App. at 175-79 (reversing summary judgment based on “expert” opinion that defendant suffered from an “impaired mental capacity” due to alcohol consumption even though defendant admitted to having “11-13 drinks over the course of 9 ½ hours on the evening in question”). Similarly, here, the trial court did not abuse its discretion in refusing to admit the City’s speculative “expert” evidence of intoxication.

2. While allowing its expert to testify, the trial court did not abuse its discretion in excluding unhelpful conjecture of the City’s accident reconstructionist.
(App. Br. 49-53)

The City’s contention that the trial court abused its discretion when it limited Gerald Bretting’s testimony regarding Austin’s speed and excluded computer-generated illustrations re-creating the accident fails for similar reasons. Mr. Bretting’s “expert” credentials did not give him any more license to engage in rank speculation than Mr. Wong.

The trial court *denied* plaintiff's motion in limine to exclude Mr. Bretting's opinion altogether as too speculative and lacking sufficient foundation. (CP 2846; 2298-99) Contrary to the City's argument, the trial court did not prevent Mr. Bretting from testifying as to Austin's speed entirely, and simply required that Mr. Bretting clarify when he calculated speed based on an assumption:

I am going to prohibit any expert from saying 'this is the speed.' I'm going to let the jury decide what the speed was. However, if the expert wants to say, I assume speed and here's what I calculate it based on that assumption, then they can give their calculations. And then the jury is left to decide what calculations they think are correct.

(RP 142)

It is unclear what, exactly, the City thinks is unfair here. The City laments that "had the court allowed it, Bretting's speed testimony would have been based on eyewitness testimony" (App. Br. 50) and that "[i]t would only have been fair" to permit Bretting to testify as to Fite's speed (App. Br. 52), but the trial court *allowed* Mr. Bretting to calculate Austin's speed based on the testimony of Andrea and Kelly Boutte, the only witnesses who testified to how fast Austin

was riding his skateboard. When asked what his calculation was, Mr. Bretting said six miles per hour.⁶ (RP 2583-84)

In his declaration, Mr. Bretting noted that Austin testified that he accelerates from zero to six miles per hour when skateboarding across a crosswalk. (CP 920) In opposition to plaintiff's motions in limine, the City noted that "the average skateboard speed" is 8.3 mph and that Austin's estimated speed was "less than the average speed." (CP 2434) Once Mr. Bretting provided sufficient foundation by explaining the witness testimony he relied on for his assumptions and calculations, the trial court allowed him to give his opinion on Austin's speed. (RP 2584)

If there were some other "upper limit" speed the City hoped Mr. Bretting would testify to, such as 8.3 mph (App. Br. 51), it was not based on testimony of any witness to the accident. Andrea Boutte testified that Austin was traveling twice as fast as walking speed, but "not dramatically fast." (RP 1898) Kelly Boutte testified that Austin was moving at "a jogging pace." (RP 1890) No other witness testified to his speed, and Mr. Bretting relied on this testimony to

⁶ Plaintiff's human factors expert also testified, based on Austin's deposition, that he travels up to 6 mph (RP 876-77), consistent with Mr. Bretting's testimony.

conclude Austin was traveling at 6 mph. A different “upper limit” would therefore be speculation, and it was within the trial court’s discretion to exclude it. *Safeco*, 63 Wn. App. at 177 (trial courts have broad discretion to exclude “conclusory or speculative expert opinions lacking an adequate foundation.”).

The City also contends the trial court abused its discretion when it prevented Mr. Bretting from using a misleading computer-generated animation to demonstrate his accident reconstruction. A trial court may admit demonstrative evidence, like computer-generated animations, only when “the experimental conditions are substantially similar to the facts of the case” and its probative value outweighs its prejudicial effect. *State v. Hultenschmidt*, 125 Wn. App. 259, 268, ¶ 26, 102 P.3d 192 (2004). Despite the ubiquity of demonstrative evidence, trial courts retain wide discretion in determining whether to admit it. *State v. Arndt*, 194 Wn.2d 784, 809, ¶ 39, 453 P.3d 696 (2019). “The ultimate test for the admissibility of an experiment [or demonstration] as evidence is whether it tends to enlighten the jury and to enable them more intelligently to consider the issues presented.” *Sewell v. MacRae*, 52 Wn.2d 103, 107, 323 P.2d 236 (1958).

The trial court here did not abuse its discretion in deciding that Mr. Bretting's animations were not substantially similar and that they might distract or mislead the jury. The trial court was primarily concerned that Mr. Bretting's assumptions about location and speed would overcome any differences in witness testimony and prevent the jury from determining credibility. (RP 2555) For instance, the trial court noted that no one knew the precise starting locations for Austin or Mr. Mudd, nor did anyone know their precise speed. (RP 2548) *See Bowers v. Marzano*, 170 Wn. App. 498, 506, ¶ 21, 290 P.3d 134 (2012) (to show proximate cause, the party asserting contributory negligence must "produce evidence from which the trier of fact can infer the favored driver's approximate point of notice."). There was also a crucial factual dispute whether there were vehicles in the middle lane, and Mr. Bretting's animations did not account for this difference. (RP 2554) For those reasons, the trial court allowed Mr. Bretting to explain his assumptions and calculations; the concern was "that seeing it on a big screen . . . will cause the jury to discount oral testimony that we've had from various witnesses which is conflict, and it may interfere with their ability to weigh the evidence and decide who's credible." (RP 2557)

Given the differences between the animation and the evidence,⁷ the trial court had discretion to decide that the potential to mislead the jurors outweighed the animation's probative value. *Hultenschmidt*, 125 Wn. App. at 268, ¶ 26; *Jenkins v. Snohomish Cty. Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 107, 713 P.2d 79 (1986) (“When demonstrative evidence is likely to confuse the jury, raises collateral issues or is more prejudicial than probative, courts should refuse its admission. Courts may consider . . . whether the evidence is merely cumulative and illustrative of issues already introduced.”).

3. The trial court did not abuse its discretion in admitting two police reports of other accidents in the area of the injury crosswalk after the City “opened the door.” (App. Br. 32-34)

The trial court did not abuse its discretion in admitting Exs. 48A and 48B, City police reports of two accidents in the crosswalk, especially once the City opened the door by eliciting testimony that the crosswalk must be safe because no pedestrian accidents had been reported there. (RP 2631) The claimed distinctions making these accidents arguably irrelevant to the case here (discussed

⁷ Among other deficiencies, the animated “reconstruction” had the point of impact in the middle lane of 5th/7th Street SE. The evidence was undisputed that Austin was almost across the roadway before he was run down in the crosswalk. (RP 1888, 1898, 1900)

at App. Br. 31-34) were exhaustively addressed by the City before the jury in examination of the City's witnesses. (e.g., RP 2692-2703; see RP 2636-37)

4. **The trial court did not abuse its discretion in refusing to admit a pretrial declaration of a witness who testified and was subject to cross-examination at trial.** (App. Br. 44-49)

The circumstances surrounding the execution (and correction of) Ms. Boutte's declaration that the City now contends was improperly excluded at trial are set out in the Restatement of the Case at § II.D, *supra*. The City contends that the trial court abused its discretion in excluding the declaration it first extracted from Ms. Boutte as impeachment evidence to demonstrate her prior inconsistent statement. (CP 1153, 1294) Under ER 613, "prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent." *United States v. Hale*, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L.Ed.2d 99 (1975)). Here, Ms. Boutte was prepared to testify that the two statements were not inconsistent; she had intended to say that she did not see whether Austin looked left or right, not that she actually

saw him fail to look left or right, as she explained in her corrected declaration. (7/26/19 RP 15-16; CP 1294)

Ms. Boutte testified at trial that she did not see Austin stop before crossing the crosswalk (RP 1874), that she did not recall observing Austin looking at oncoming traffic or at his surroundings while crossing the crosswalk (RP 1891), and that there were no cars in the turn lane blocking his view and that if he had looked, Austin would have seen Mr. Mudd's truck. (RP 1882) Her pretrial declaration was not inconsistent with her trial testimony, and its admission would have been cumulative. "The exclusion of evidence which is cumulative or has speculative probative value is not reversible error." *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 173, 947 P.2d 1275 (1997) (quoted source omitted).

Excluding Ms. Boutte's declaration did not affect the outcome of the case because other evidence supported the City's comparative fault theory, the declaration had minimally persuasive value, and other evidence substantially outweighed the City's theory – leaving aside that any error in excluding the declaration was not only harmless, but invited by the City's insistence on the "left and right" construction it had placed on the first declaration – an

“observational duty” found nowhere in the law governing pedestrians.

The City argued that Austin was negligent because he failed to look for oncoming traffic and, had he done so, he would have been able to avoid Mr. Mudd’s truck. Many witnesses testified that pedestrians should look for traffic before entering a crosswalk. Marlene Ford, who assisted in designing the crosswalk, explained that it was intended to facilitate a “two-stage” crossing, where the pedestrian “first just looks in one direction,” then crosses the lane to the “bullnose” in the middle, then looks the other direction before completely crossing. (RP 2243) Mr. Mudd testified that he looks both ways before crossing a crosswalk. (RP 1759-60) Plaintiff’s human factors expert testified that it would be “prudent” for a pedestrian to look both ways before crossing the street. (RP 823-24)

When plaintiff moved for a directed verdict on the comparative fault issue, the trial court denied the motion, concluding that all of this evidence could easily support “an inference that he didn’t look out for approaching traffic.” (RP 3162) In fact, before trial, *the City* argued that there was sufficient evidence for comparative fault without Boutte’s declaration:

In the absence of the Boutte declarations, there is ample evidence of Fite's comparative fault. This includes ample circumstantial evidence that Fite did not look. If Fite had looked, it would have been reasonable for him to stop, rather than enter when it is undisputed that the Mudd vehicle was within striking distance. If Fite had looked, then the witnesses would have reported some evasive maneuver like slowing or trying to stop to avoid the imminent threat. But there was no such action, which is strong circumstantial evidence that Fite did not look.

(CP 1287-88) The City cannot take the opposite position now simply because the jury decided in Austin's favor.

Finally, besides having minimally probative value, the excluded declaration characterized Ms. Boutte's testimony in a manner that she explicitly recanted. Had the City introduced the declaration as impeachment evidence, Ms. Boutte would have been able to explain that the City's representatives (including the City's defense counsel) intimidated her into signing it, that she didn't have a chance to correct it, and that the declaration did not clearly reflect her intent, thus requiring the corrected declaration. (CP 1294; RP 1854) The City is asking this Court to believe that the outcome would have been different if the jury had only gotten a chance to see a prior declaration that the witness had recanted and corrected, and which the witness would have testified was the product of the City's duress. Whatever value the prior declaration might have had, it

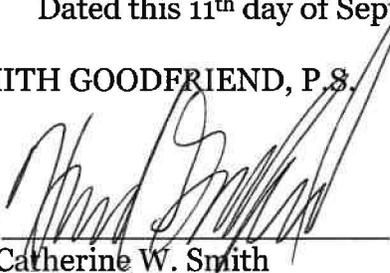
certainly did not add much to the evidence of comparative fault that the jury already heard, and the trial court did not abuse its discretion in excluding it.

IV. CONCLUSION

The jury fairly determined that the City's negligent placement of a crosswalk caused Austin's life-changing injuries under correct instructions, after considering substantial evidence of the parties' relative fault. The trial court's discretionary rulings present no basis to reverse the jury's verdict.

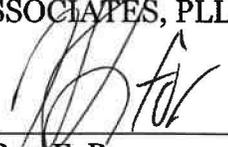
Dated this 11th day of September, 2020.

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DECLARATION OF SERVICE

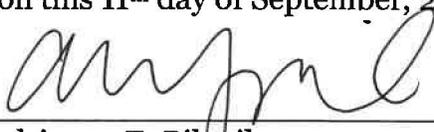
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That September 11, 2020, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of September, 2020.



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