No. 98351-8

SUPREME COURT OF THE STATE OF WASHINGTON

No. 79132-0-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHANNON R. OGIER,

Respondent

v.

CITY OF BELLEUVE, a municipal corporation,

Petitioner

CITY OF BELLEVUE'S PETITION FOR REVIEW

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Appendix A: Court of Appeals opinion issued on March 2, 2020

I. INTRODUCTION AND IDENTITY OF PETITIONER

In its opinion in this case ("Opinion"), the Court of Appeals reversed the trial court and expanded the duty of the City of Bellevue ("City") to include anticipating missing manhole covers in its roadway. Although it is undisputed that the City had no prior notice of the missing manhole cover, the Opinion expands the City's duty to protect persons who utilize its roadways from harm caused by conditions that arise outside the natural and ordinary use of the roadway by vehicular traffic. The Court of Appeals' formulation of the City's duty to persons utilizing its roadways significantly expands tort liability for defects in the roadway regardless of whether the City knew or should have known of the alleged defect and regardless of whether the City created the alleged defect.

This Court should grant review of the Opinion on two alternative grounds. First, the Opinion conflicts with this Court's precedent and other precedent of the Court of Appeals. RAP 13.4(b)(1)(2). The Opinion creates a new duty for municipalities to continually inspect their roadways, even in the absence of actual or constructive knowledge of a particular defect at a location. This makes a municipality the insurer of all who travel on its roadways regardless of the nature of the defect or type of incident, something this Court and the Courts of Appeal have continually rejected. Second, the Opinion exposes public entities to substantial damages claims

for events occurring totally outside their control, an issue of substantial public importance. RAP 13.4(b)(4). For these reasons, the City respectfully requests that the Court accept review in this matter, reverse the Court of Appeal's Opinion, and reinstate the decision of the trial court.

II. COURT OF APPEALS DECISION

The Court of Appeals' Opinion reverses the trial court's grant of summary judgment to the City. The Court of Appeals found that there was a dispute of material fact as to whether the City should have reasonably anticipated the hazard of an uncovered manhole would develop in its roadway. The Court of Appeals issued its Opinion on March 2, 2020, __ Wn. App., ____ (2020 WL 995136); Appendix A.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred by determining that the City owed a duty to Shannon Ogier ("Ogier") where the City had no prior notice of a defect in the roadway and did not create the defect.

B. Whether the Court of Appeals erred by determining that the City should have reasonably anticipated that an unknown third party would remove a large and heavy manhole cover from the middle of a roadway and fail to replace it.

IV. STATEMENT OF THE CASE

A. Incident of October 14, 2014.

On October 14, 2014, Ogier was driving her 2012 Hyundai Tucson west on NE 24th Street in Bellevue, Washington when she drove over an uncovered storm manhole. CP 1-2. Ogier did not recall precisely where this storm manhole was located but believes it was somewhere close to the cross street of 140th Avenue. CP 38. In driving along this same section of NE 24th Street a few days prior to the incident, Ogier had not noticed any uncovered storm manholes. CP 37.

The first time the City became aware that a storm manhole cover was missing along NE 24th Street was on October 14, 2014 when Ogier's incident was reported to the City through its 24-hour emergency response telephone number. CP 57. It was a 911 operator who placed the call to the City's 24-hour emergency response number to report the missing manhole cover on October 14, 2014. CP 57; CP 60-64. The missing storm manhole cover was found by the responding police officer on the roadway curb on the right side of the westward lane of NE 24th Street, approximately 15 feet away from the manhole itself. CP 39; CP 114. The responding police officer replaced the missing cover. CP 57.

B. No History of Prior Complaints Along NE 24th Street.

NE 24th Street is a well-traveled street. CP 57. If there had been prior problems with any of the storm manholes in this roadway section, City staff would have expected the problems to have been reported. CP 57. The City has a robust 24-hour emergency response telephone number which logs the complaints it receives about any of its resources. CP 56. If someone wanted to report a missing manhole to the City, it could be done through this 24-hour telephone response number. CP 56. If someone calls 911 to report problems, the 911 dispatchers know to report those problems to the City through this 24-hour emergency response number. CP 62.

The City's search of its records following the October 14, 2014 incident uncovered no records of any complaints about a missing manhole cover along NE 24th Street in the year that preceded this incident. CP 57. Furthermore, inspection of the fourteen (14) storm manholes located between 130th Avenue and 140th Avenue following the incident found all the manhole frames and covers structurally sound and present. CP 96. None of the manhole covers, including the one at issue, were in need of replacement. CP 57.

C. Inspection and Maintenance of Storm Manholes Covers.

There are over 22,000 storm drains with covers within Bellevue City limits and approximately 5000-6000 are storm manholes. CP 55. In

addition to these storm manholes, there are over 13,000 sewer manholes (with covers) throughout the City. CP 21.

During the time at issue, the City's storm drain systems, including manholes, were inspected approximately once every five years as part of the City's ongoing maintenance program. CP 55. If a storm manhole cover was found to be worn down or loose during the inspection process, it would be secured or replaced. CP 55. The storm manholes along NE 24th Street in the area of the incident were inspected in 2012 and 2013 as part of the City's regular maintenance program. CP 55. All the manhole covers were present, and no problems were detected at the time of inspection. CP 55.

Outside of those regular inspections, the City performs maintenance on its storm manholes upon receipt of a specific complaint. CP 56. Again, the City's search of its records indicated no reports of any defective or loose storm manhole covers along NE 24th Street in the year that preceded this incident. CP 57.

D. Removal of Storm Manhole Covers by Others.

Storm manhole covers are large and cumbersome. CP 116. Each storm manhole cover weighs between 75-100 pounds. CP 55. Storm manhole covers fit snuggly in place within the actual manhole and do not move around. CP 55. Storm manhole covers may or may not have bolts for attachment to the actual manhole, depending on the type and age of the

manhole/cover. CP 55. The primary purpose of bolting manhole covers in place is to keep them from rattling around as they become worn. CP 55. Even when bolted in place, the bolts can be removed by a common Allen wrench. CP 55.

The City requires third parties to obtain a permit to perform work within the City's right-of-way, including work that requires the removal of any storm manhole covers. CP 56. However, it is physically possible to access a manhole in the City's right-of-way without first obtaining a permit. CP 56. On rare occasion, manhole covers have been vandalized and stolen. CP 109.

The City moved for summary judgment on the grounds that Ogier had failed to establish that the City owed a duty to her because the City had neither actual nor constructive notice of the missing manhole cover. CP 19-32. The trial court granted the City's motion on October 15, 2018. CP 164-166.

V. ARGUMENT

A. The Opinion Conflicts with Precedent.

1. The Opinion Expands the City's Duty.

The Opinion incorrectly holds that the City owed Ogier a duty of care to anticipate, discover, and protect her against a missing manhole cover in a roadway. It has been well established that the City's duty is to maintain

its roads so that they are reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). That duty is conditional, however, for it arises only when the City has notice of, and time to correct, the hazard in question. *Laguna v. Wash. State Dep't of Transp.,* 146 Wn.App. 260, 263, 192 P.3d 374 (2008). Notice may be actual or constructive. *Iwai v. State*, 129 Wn.2d 84, 96, 915 P.2d 1089 (1996). Constructive notice may be inferred from the elapse of time a dangerous condition is permitted to continue. *Ingersoll v. DeBartolo, Inc*., 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

Actual or constructive notice of a dangerous condition is an essential element of the duty of reasonable care. *Lewis v. Krussel*, 101 Wn.App. 178, 186, 2 P.3d 486 (2000). But the notice requirement does not apply to dangerous conditions created by the governmental entity or its employees or to conditions that result from their conduct. *Batten v. S. Seattle Water Co.*, 65 Wash.2d 547, 550–51, 398 P.2d 719 (1965).

This Court has also recognized that in limited circumstances, notice of a defective road condition is not required where the entity charged with maintenance of the roadway should have reasonably anticipated a condition that is the natural and ordinary result of use by vehicular traffic. *Argus v. Peter Kiewit Sons' Co*., 49 Wn.2d 853, 856, 860–61, 307 P.2d 261 (1957).

In *Argus,* a highway contractor for the state constructed a gravel-surfaced detour adjacent to the highway near Snoqualmie Pass. To maintain the detour, the contractor periodically wetted the temporary graveled detour and kept it graded throughout the day.

However, on the evening of the accident George Argus used the detour route while on his motorcycle and struck a three to four-inch depression where the graveled detour was transitioning back to the paved highway. The impact threw Argus over the handlebars of his motorcycle resulting in personal injuries and property damage. Argus brought suit alleging the contractor was negligent in maintaining the detour route.

The contractor argued, in part, that it did not have actual or constructive notice of the defect giving rise to the accident and therefore was not liable. Defining the contractor's duty, this Court held "ordinary care in keeping the detour in a safe condition for proper travel involved the anticipation of defects that *were the natural and ordinary result of use by vehicular traffic*." *Id*. at 856. Justice Finley, concurring in the result, echoed this rational stating the contractor's duty "involved the anticipation of defects w*hich would result from the natural and ordinary use of the detour by vehicular traffic*….If the detour had been left in a reasonably safe condition, considering anticipated traffic, and thereafter a dangerous defect or condition had resulted from some cause *not reasonably related to the*

unfinished condition of the roadway, under our decisions the contractor would have been entitled to notice of the defect or dangerous condition as a prerequisite to liability based upon negligence." *Id*. at 860-861.

In this matter, the Opinion conflicts with the precedent established by this Court in *Argus*. The Opinion does not limit the City's duty to anticipating defects that were the natural and ordinary result of use by vehicular traffic. Instead, the Opinion greatly relaxes the standard of care holding that "Although there is no evidence that the City had actual notice of the missing manhole cover, a jury could find that the City should have reasonably anticipated this hazard." Opinion at 5. In the next sentence the Court of Appeals explains: "The evidence offered by Ogier demonstrates that the City did not regularly check and monitor the manholes, despite being aware that third parties or vandals could remove the covers at any time."[1] *Id*.

Taken together, these statements in the Opinion illustrate the conflict with the holding in *Argus*. The Opinion expands the City's duty to now not only anticipate roadway defects that are the "natural and ordinary result of use by roadway traffic" but also the negligent actions of "third parties or vandals" who "could remove the cover at any time." The Opinion

[1] The Opinion repeatedly mixes its analysis of the legal duty imposed upon the City with its analysis of whether there was evidence of a breach of the duty.

articulates a new and radically enhanced duty to "regularly check and monitor" roadways to protect against the negligent acts of "third parties or vandals." To comply with the standard put forth by the Opinion, the City would have to put in place some mechanism to watch its 6000 storm manhole covers 24 hours a day to insure no one removed a cover.

The Opinion moves one step closer to making the City an insurer of roadway safety; something this Court has previously recognized as unwise and impractical. *See Albin v. Nation Bank of Commerce of Seattle*, 60 Wn.2d 745, 375 P.2d 487 (1962) (No evidence that county had notice of tree falling across roadway was hazardous; although foreseeable trees will fall across tree-line roads, public policy precludes imposing liability due to practicality and costs).

2. The Opinion Expands What the City Should Anticipate.

The Opinion's holding and supporting rationale conflict with prior Court of Appeals opinions which refused to extend the duty to all imaginable roadway conditions.

The Opinion holds that "the City should have reasonably anticipated the hazard of an uncovered manhole would develop." Opinion at 6. The Opinion relies on the fact that the City did not "regularly check and monitor manholes, despite being aware that third parties or vandals could remove the cover at any time." Opinion at 5. However, the Opinion completely

ignores the fact that the City had a regular inspection process for storm manholes as part of its ongoing maintenance program and had a robust process in place for responding to complaints or problems that came to its attention. CP 55-56.

In *Ruff v. King County*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995), the Court of Appeals recognized that in order for roads to be reasonably safe for ordinary travel, a municipality does not have to update every road and roadway structure to present-day standards. Nor does the duty require a county to "anticipate and protect against all imaginable acts of negligent drivers" for to do so would make a county an insurer against all such acts. *Id*. *citing Stewart v. State,* 92 Wn.2d 285, 299 597 P.2d 101 (1979). The logic in *Ruff* is contrary to the Opinion in *Ogier*. Just as municipalities are not in the position to anticipate or protect against all the imaginable acts of negligent drivers, they are not in the position to anticipate and protect against all the imaginable acts of third parties who may remove a manhole and fail to replace it. By doing so, however, the Opinion makes the City an insurer against all such acts regardless of whether the City had notice or the opportunity to correct the defect.

The Opinion also conflicts with *Laguna v. Washington State Dept. of Transp*., 146 Wn.App. 260, 192 P.3d 374 (2008) in which the Court of Appeals rejected the concept that simply being aware that an event could

occur would serve as the basis to create a duty. *Laguna* involved an accident on eastbound Interstate 90 near Rye Grass Summit, between Ellensburg and Vantage. Isidro Laguna, a passenger in one of the vehicles, sustained serious injuries. Black ice covered both eastbound lanes of the freeway at the time of the accident. Although neither Washington State Department of Transportation (WSDOT) personnel nor a Washington State Patrol trooper patrolling the area had observed ice before the accident, road and weather conditions had been favorable to ice formation for some time. However, no action was taken by the State. *Id*. at 261.

In reviewing whether the State was entitled to summary judgment, Laguna argued that the State had a duty to act because the State knew that the formation of ice was foreseeable. The Court of Appeals, however, held the foreseeability of harm does not create the duty to prevent it. *Id*. at 265. The court acknowledged there is a difference between liability based on knowledge that a dangerous condition actually exists and knowledge that a dangerous condition might, or even probably will, develop. *Id*. The Court of Appeals found that no Washington case has held that the State has a duty to act when to prevent harm just because weather conditions exist that are likely, or even certain, to produce icy roads. The Court of Appeals rested its holding on a policy argument that if the fact that ice is predictable at some (uncertain) point were enough to create a duty to prevent it, the State

would be required to apply anti-icing chemicals to hundreds of miles of roadway whenever moisture and freezing temperatures exist. *Id*.

The same logic applies to this matter. The Opinion in *Ogier* found that there was a disputed issue of material fact as to whether the City should have reasonably anticipated the hazard that an uncovered manhole would develop. However, this is not liability based on knowledge that a dangerous condition actually exists, but instead based on the idea that a dangerous condition might develop. Just as in *Laguna*, to create a duty here under such circumstances would require a municipality to continually inspect hundreds of miles of roadways and thousands of manholes to ensure that third parties which have facilities within a city of right-of-way (e.g. Puget Sound Energy, Comcast, etc.) that are accessed through a manhole diligently replace and secure each manhole cover that is removed for their own business purposes. The City should not be an insurer against such third party actions.

The Opinion is also in conflict with one of the cases it repeatedly cites, *Nguyen v. City of Seattle*, 179 Wn.App. 155, 317 P.3d 518 (2014). *Nguyen* recognizes that a broad duty to inspect roadways to ensure against all types of incidents that may arise does not exist. *Nguyen* involved a traffic accident where a rented U-Haul truck struck a large tree branch overhanging the street. Nguyen argued that the City of Seattle had a duty to inspect trees along the roadway. However, as the court in *Nguyen* noted, Nguyen did not

cite any "common law, statutory, or regulatory authority requiring a municipality to inspect its street infrastructure as a component of its duty to provide streets that are reasonably safe for ordinary travel." *Id*. at 171. Nor did the court find or impose such a duty. Here, the Opinion in *Ogier* implicitly recognizes such a duty by overturning the summary judgment in the City's favor. Expressed differently, in the absence of a recognized duty to inspect streets and infrastructure as a component of the duty to provide streets that are reasonably safe for ordinary travel, the relevant inquiry remains whether the municipality had actual or constructive knowledge of the defect. That duty should not be replaced with one which requires the City to anticipate all types of events that may or possibly could arise.

B. The Opinion Involves an Issue of Substantial Public Interest that Should Be Determined by this Court.

The Opinion raises an issue of substantial public interest necessitating review by this Court because it creates new liability for municipalities and thus exposes public entities to substantial additional legal obligations and damage claims. The Opinion makes a municipality the insurer of all who travel on its roadways regardless of the nature of the defect. Municipalities will now be liable for conditions that they did not create, had no knowledge of, and that did not arise out of the natural and ordinary use of the roadway

by vehicular traffic. The Opinion exposes public entities to liability for claims for events occurring totally outside their control.

VI. CONCLUSION

The City's duty to Ogier was conditional on having either actual or constructive notice of the missing manhole cover. The Court of Appeals improperly expanded the City's duty to encompass inspecting for and anticipating the potentially negligent acts of third parties or even vandals, thus requiring the City to guard against conditions that arise well outside the natural and ordinary use of the roadway by vehicular traffic. The Court should accept review and restore the proper duty placed upon municipalities.

DATED this 1st day of April, 2020, at Bellevue, WA.

Respectfully submitted,

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Appendix A

FILED
3/2/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHANNON OGIER, Appellant, v. THE CITY OF BELLEVUE, a municipal corporation, Respondent.	No. 79132-0-I DIVISION ONE PUBLISHED OPINION FILED: March 2, 2020

MANN, A.C.J. — Shannon Ogier appeals the trial court's order on summary judgment dismissing her personal injury case against the City of Bellevue (City) arising from injuries suffered after Ogier ran over an uncovered manhole while driving in Bellevue. The City alleged that because it had no notice of the defect, it did not owe a duty to Ogier. The trial court agreed. We reverse.

I.

Ogier was driving west on NE 24th Street in Bellevue on a dark evening in October 2014, when she drove over an uncovered manhole in the middle of the traffic lanes. Ogier called 911 to report a "dangerous" situation. The street was partially lit and the storm drain was not visible without direct light from the responding police

officer's headlight. The manhole cover was off to the right side of the lane on the sidewalk.

Ogier's car bumper was knocked off. Ogier submitted a claim for property damages for the reimbursement of her deductible and to her insurer, State Farm. The City approved the claim and paid the property damage to State Farm and Ogier.

Ogier developed a sharp pain in her shoulder two days after the accident, and sought physical therapy for the treatment. Ogier submitted a follow-up claim to the City. The underlying lawsuit ensued.

The City moved for summary judgment dismissal of Ogier's action. Ogier responded to the City's motion and relied on deposition testimony from the following City employees.

Bellevue Utilities Operations Manager Don McQuilliams was the superintendent of the storm and surface water department at the time of the incident. He said that the City has approximately 5,000 to 6,000 covered storm manholes and each cover weighs approximately 75 to 100 pounds. A common Allen wrench can be used to remove the bolts that hold the covers down.

During the time of the accident, it was the City's practice to inspect the storm drain systems, including the storm manholes once every five years. When the City inspected the storm drain manholes most recently prior to the accident, no problems were detected. Outside of the inspections, the City repairs manholes upon receipt of a specific complaint. Missing manhole covers are reported to the City through a 24-hour emergency maintenance response number, and a response crew is dispatched immediately. McQuilliams recalled that the City was notified about the missing cover

when Ogier reported the incident. He found no other reports of missing or loose covers in the area.

McQuilliams explained that although persons or entities performing work on the manholes should obtain a permit ahead of time, "nothing actually prevents someone from simply opening up a storm manhole to look inside." Private contractors, private consultants, private locate services, and other utilities such as Puget Sound Energy, may access the manholes to inspect storm drain pipes. He explained further that "nobody asks for permission" to remove the covers. McQuilliams said that the City does not have a system to determine who had accessed the manhole recently, and that consultants often will not obtain permits. No right of way permits had been issued to work on the manholes near the accident. McQuilliams did not find any work orders to indicate that the City had worked on the manholes on NE 24th Street. McQuilliams stated that he responds to dislodged manhole covers a few times a year. Occasionally manhole covers will vanish, which McQuilliams attributes to vandalism.

Anthony Badia is a construction lead for the City, working in the storm and surface water department. He inspected the manhole covers along NE 24th street after the incident, noticing that they were not bolted down. He said if the manholes are within the travel lane, like the one Ogier ran over, they should be bolted down. Badia explained that the purpose of the bolts is to keep the manhole covers "locked down and prevent them from coming up if a vehicle drives over them, to prevent damage to personal property or city property, and to prevent any incidents with any pedestrians on a sidewalk nearby if one does come off." Badia dispatched a crew to lock down all of

the covers with bolts on NE 24th street. He said it is not uncommon for the manhole covers to become loose or go missing.

Jerry Campbell, who works for the storm department, physically inspected the manholes after the incident. Campbell recalled two instances of manhole covers popping up. He said that it was unlikely that a vehicle could have knocked the cover off, and that the cover was likely removed by someone.

The City's motion for summary judgment contended that because the City had no notice of the defect, the City did not owe a duty to Ogier. The trial court granted summary judgment and dismissed Ogier's action. Ogier appeals.

II.

Ogier argues that the court erred in concluding that the City had no duty to ensure that city streets and storm drains were safe for the public. We agree.

We review summary judgment decisions de novo. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). "Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Int'l Marine Underwriters, 179 Wn.2d at 281. The moving party has the initial burden of proving the absence of an issue of material fact. Young v. Key Pharm. Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). When the moving party is a defendant who meets this initial showing, then the inquiry shifts to the plaintiff to make "a showing sufficient to establish the existence of an element essential to that party's case." Young, 112 Wn.2d at 225.

To recover on a claim of negligence, the plaintiff must show: (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach

as the proximate cause of the injury. Wuthrich v. King County, 185 Wn.2d 19, 25, 366 P.3d 926 (2016). The question before us is whether the City had a duty.

A municipality has the duty "to maintain its roadways in a condition safe for ordinary travel." Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005). Actual or constructive notice is necessary to prove breach of the duty of care. Nguyen v. City of Seattle, 179 Wn. App. 155, 165, 317 P.3d 518, 523-24 (2014). "But the notice requirement does not apply to dangerous conditions created by the governmental entity or its employees or to conditions that result from their conduct." Nguyen, 179 Wn. App. at 165. The plaintiff is excused from proving notice when the City should have reasonably anticipated that the condition would develop. Nguyen, 179 Wn. App. at 165. Constructive notice arises if the condition existed for a period of time so that the municipality should have discovered its existence through the exercise of reasonable care. Niebarger v. City of Seattle, 53 Wn.2d 228, 230, 332 P.2d 463 (1958). "Whether one charged with negligence has exercised reasonable care is ordinarily a question of fact for the trier of fact." Bodin v. City of Stanwood, 130 Wn.2d 726, 735, 927 P.2d 240 (1996).

Although there is no evidence that the City had actual notice of the missing manhole cover, a jury could find that the City should have reasonably anticipated this hazard. The evidence offered by Ogier demonstrates that the City did not regularly check and monitor the manholes, despite being aware that third parties or vandals could remove the cover at any time. Further, evidence suggests that the manhole covers on NE 24th street were not bolted down at the time of the accident, even though it was the City's practice to bolt down the covers in the roadway. The evidence also demonstrates

that while the City has a permit process, the City knows that no one actually applies for permits before working on the manholes. The City further admits that it has no control to require third parties to use this process. Finally, the City employees knew of past instances of missing manhole covers. McQuilliams testified that he knew that manhole covers sometimes went missing as a result of vandalism. Badia testified that manhole covers in the road should be bolted down, but it was not uncommon for the manhole covers to become loose or go missing. And Campbell testified that he knew of instances of manhole covers popping up or going missing.

The evidence supports that even if the City did not have actual notice, there is a dispute of material fact whether the City should have reasonably anticipated the hazard of an uncovered manhole would develop. Nguyen, 179 Wn. App. at 165. Because there are disputed issues of material fact whether the City breached its duty of care to Ogier, summary judgment was not appropriate.[1]

Reversed.

Mann, ACJ

WE CONCUR:

Chun, J.

Dwyer, J.

[1] Ogier also argues that the City is equitably estopped from arguing that it is not liable because the City accepted Ogier's property damage claim. The City argues that this issue is not properly before this court. Because we find that the court erred in granting summary judgment, we will not address this argument. Additionally, the City correctly states that the language and intent of ER 408 is clear. Therefore, this argument is without merit.

DECLARATION OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington that he/she caused to be served in the manner indicated below a true correct copy of the CITY OF BELLEVUE'S PETITION FOR REVIEW on the party or parties below stated:

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DATED this 1st day of April, 2020, at Bellevue, WA.

/s/Jason W. Banks
Jason W. Banks, Legal Assistant

BELLEVUE CITY ATTORNEY'S OFFICE

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