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NO. 640241-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GERALD R. TARUTIS, as Guardian ad Litem for
Nicholas K. Messenger,

Appellant,

v.

THE CITY OF SEATTLE,

Appellee.

Appeal from Superior Court of King County
Honorable James Rogers
NO. 07-2-33883-7 SEA

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Washington courts have emphasized that a municipality owes a duty to *all travelers* to maintain its roadways in a condition that is reasonably safe for ordinary travel. See *Chen v. City of Seattle*, 2009 WL 5067512, Slip Opinion at 9 (2009) and the cases cited therein. Our Supreme Court has explained that a municipality's duty to maintain its roadways in a reasonably safe condition includes the "duty to eliminate an inherently dangerous or misleading condition." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

Despite the fact that it owes this duty to *all* travelers, Defendant City claims that it owed no duty to a 12-year-old boy as he attempted to cross 15th Avenue NW in an unmarked city crosswalk. Defendant City claims that, although there were virtually no traffic gaps at the time Nick Messenger tried to cross 15th, "the Rules of the Road create opportunities for pedestrians to cross by requiring motorists to stop for pedestrians in crosswalks." *City's Response Brief* at 1. But the City's claim flies in the face of its own employee's admission that drivers do not stop for pedestrians on busy roadways without direction "from some form of traffic control device – usually a traffic signal." CP 689-690.

Defendant City also claims that it did not breach its duty to Nick Messenger because pedestrian volumes at 15th and 87th, or 15th and Holman Road, did not meet warrant requirements for a signal, and no

industry standard required it to install a traffic signal at either 15th and 87th, or 15th and Holman. *City's Response Brief* at 1-2. But as this Court made clear in *Chen*, the fact that the Manual on Uniform Traffic Control Devices (MUTCD) may not require a particular corrective action at a given location does not mean that the City has satisfied its duty to provide a reasonably safe street. *Chen*, Slip Op. at 19-20. Instead, “a trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence.” *Chen*, Slip Op. at 1-2.

Based on the totality of the circumstances in this case, as explained below, Transportation Engineer Edward Stevens concluded “that pedestrians crossing 15th Avenue NW at its intersection with 87th St. NW are presented with an unreasonable risk of harm and the crossing is inherently dangerous.” CP 473. Because there are questions of fact as to whether Defendant City breached its duty to provide a reasonably safe roadway, the trial court erred in granting Defendant City of Seattle’s motion for summary judgment.

II. REPLY TO DEFENDANT CITY’S REPRESENTATIONS OF FACT

A. Nick and Charlie would have had to go far out of their way to use the signalized crossings to the south and north of 87th.

Defendant City claims that Nick and Charlie should have used signalized crossings to the south at 85th Street or to the north at Mary

Avenue and Holman Road. *City's Response Brief* at p.4. The boys were headed north, not south. CP 525, CP 826-828 (diagrams showing boys' intended route). They would have had to travel several hundred feet well out of their way to use the crossing at 85th Street. CP 449; CP 641 (the signalized crossing at 85th was approximately 700 feet to the south of 87th). The crossing to the north at Mary Avenue and Holman Road was 1,000 feet away from 87th (CP 449) and also would have required that they go out of their way – further north than they needed to go. CP 643. In fact, one of the reasons that Transportation Engineer Edward Stevens recommended installing a signalized crossing at Holman Road was to balance the spacing for pedestrian crossings over the 1,700 feet between the signals at 85th and Mary Avenue. CP 451.

B. A signalized intersection creates gaps in traffic for pedestrians to cross safely.

Defendant City claims that there is no evidence that a signalized crossing is safer than a nonsignalized crossing.¹ Transportation Engineer Edward Stevens testified that a traffic signal creates gaps in traffic, which

¹ The fact that more pedestrians may be injured at signalized crossings than nonsignalized crossings simply reflects the fact that greater numbers of pedestrians cross at signalized crossings. By definition, signalized crossings have higher volumes of vehicles and/or pedestrians than nonsignalized crossings – otherwise, the signalized crossings would not have met warrants for installation of a traffic signal.

allows for “protected pedestrian crossing.”² CP 450, 835. Further, by claiming that its installation of a signal at 15th and Holman Road should be excluded under ER 407, the City implicitly concedes that a signal at Holman Road would have made this accident less likely to occur, because by definition a measure taken after an accident must be something that would have made the event less likely to occur in order to come within the terms of ER 407. *City’s Response Brief* at p.32.

III. ARGUMENT

A. Heavy traffic volumes made the unmarked crosswalk at 15th and 87th inherently dangerous for pedestrians trying to cross 15th.

In February of 2005, Transportation Engineer Edward Stevens conducted an engineering study and survey of the vicinity of 15th and 87th. CP 472. As part of his study, Mr. Stevens reviewed a number of Seattle Department of Transportation documents relating to this location, including vehicular volume studies, pedestrian volume studies, vehicular speed studies, signing records, traffic signal warrant studies, and accident histories. CP 473. According to Mr. Stevens:

- Pedestrians crossing 15th at 87th must cross without the aid or protection of a traffic signal that would otherwise stop vehicles with a red light. CP 473.

² A signal at Holman Road could also be coordinated with the signals at 85th and Mary Avenue, which would provide gaps for pedestrians at intermediate intersections such as 87th, where previously there were not sufficient gaps due to traffic volumes. CP 452.

- The only traffic signals for pedestrians to safely cross 15th Avenue NW in this vicinity at the time of the subject incident were at 85th to the south and Mary Avenue NW to the north. The distance between these traffic signals was 1,700 feet, with no traffic signals in between. CP 449.
- At 87th, the signal to the south (85th) is approximately 700 feet away (and in the wrong direction for pedestrians walking northbound, as Nick Messenger was). The signal to the north (Mary Avenue NW) was 1,000 feet away. CP 449.
- The width of 15th Avenue NW in this section of the corridor is 62.7 feet, consisting of four through lanes and one left-turn lane. CP 449. Transportation industry standards set pedestrian crossing speed for purposes of gap studies at 3.5 feet per second. It therefore would take a pedestrian 18 seconds to cross all five lanes at that intersection, according to industry standards. CP 473.

Industry standards direct traffic engineers to use the peak traffic hour when conducting gap studies. CP 473. Based on traffic volumes, the peak hour at the intersection of 15th and 87th was from 5:00 p.m. to 6:00 p.m. CP 473. Mr. Stevens found that during that period, there were absolutely no gaps in traffic that would allow pedestrians to safely cross 15th in this 1,700-foot section of this busy arterial without pedestrians having to challenge vehicles to stop for them as they attempted to cross. CP 449, 473. In fact, Mr. Stevens' engineering study found 2,541 vehicles traveling through the intersection of 15th and 87th during the peak hour, 5:00 p.m. through 6:00 p.m., and 2,416 vehicles between 4:00 p.m. and 5:00 p.m. CP 449-450. And at the time of Mr. Stevens' study, there was

such a high volume of traffic that northbound cars waiting to turn left further north at Holman Road backed up all the way down and through 87th. CP 449. As a result, pedestrians crossing 15th at 87th had to rely on drivers seeing them and yielding, or they would be subject to being hit by approaching cars. CP 473.

One of the factors considered under the MUTCD for determining whether a traffic signal is warranted at an intersection is traffic volumes. CP 451. This is because high traffic volumes can create dangerous conditions for people traveling on a roadway, depending on roadway characteristics and the traffic controls in place. CP 451.

Consistent with Mr. Stevens' findings in 2005, traffic signal studies conducted by the Seattle Department of Transportation in 1992 and 1993 showed that traffic signal warrants set forth in the MUTCD were met in both 1992 and 1993 at 15th and Holman Road based on traffic volumes. CP 451. SDOT's traffic signal study conducted in 2005 showed that the same traffic signal warrants that had been met in 1992 and 1993 were still met, and that the installation of a traffic signal at Holman Road was still warranted. CP 451.³ Yet, no signal was installed, and pedestrians trying to cross 15th in this location continued to be at risk of being hit by a car.

³ Defendant City states that Mr. Stevens testified that warrants were not met for a signal at 15th and Holman prior to the accident, citing CP 835, 840. *City's Response Brief* at p.9. What Mr. Stevens actually said is that *pedestrian* warrants for installation of a traffic signal at 15th and Holman were not met (CP 840), but *vehicular* volume warrants

The fact that pedestrian volumes at 15th and 87th did not meet warrants for installing a traffic signal and that no engineering standard required that a signal be installed at 15th and 87th, or 15th and Holman Road, does not mean that this stretch of 15th Avenue NW was reasonably safe for the pedestrians who did cross at unmarked crosswalks in this area, as verified by the numerous citizen complaints. CP 450; CP 548-558; CP 811-818; CP 907. Whether 25 people per day or 2,500 people per day crossed there, it was not reasonably safe for pedestrians to cross because there were insufficient gaps in traffic. The fact that the MUTCD may not require a particular corrective action at a given location does not mean that the City has satisfied its duty to provide a reasonably safe street. *See Chen*, Slip Op. at 19-20. The City's Pedestrian Safety Engineer herself admits that "[t]he truth remains . . . that this location is not an ideal pedestrian crossing." CP 910. And the City's Director of Traffic Management admitted that it would not be appropriate to paint a crosswalk and designate the crossing as a "preferred crossing for pedestrians" "[d]ue to the number of lanes on 15th Avenue NW and the high north-south traffic volumes this roadway carries." CP 920. So pedestrians continued to be subjected to the hazard of being hit by a car while trying to cross in this lawful unmarked crosswalk

for a signal *were* met at 15th and Holman, and in fact had been met for over 10 years before the subject incident. CP 837; CP 451, CP 453.

Based on the circumstances present at the intersection as identified in his engineering study, Mr. Stevens opined that “as of February 17, 2005, 15th Avenue NW from 87th through Holman Road was inherently dangerous and, as operated, presented a risk of serious injury for pedestrians trying to cross 15th at 87th or Holman”,⁴ and “that pedestrians crossing 15th Avenue NW at its intersection with 87th St. NW are presented with an unreasonable risk of harm and the crossing is inherently dangerous.” CP 473.

B. A traffic signal at 15th and Holman Road would have corrected the inherently dangerous circumstances confronting pedestrians trying to cross 15th Avenue NW in this vicinity.

After determining that the unmarked crosswalks at 15th and 87th and 15th and Holman were inherently dangerous for pedestrians trying to use them, Mr. Stevens then analyzed various options available to Defendant City to correct this hazardous condition. CP 450. These options included:

- A raised median (pedestrian refuge island) between the northbound and southbound lanes to enable pedestrians to cross only two lanes at a time, and then wait for a gap in the next two lanes of traffic;
- A traffic signal to allow for protected pedestrian crossing, with a red light for the vehicles on 15th;
- Curb bulb outs or extensions to shorten the crossing distance; and

⁴ CP 450.

- Signs and/or markings to warn drivers of the crosswalk and the likely presence of pedestrians.

CP 450.

After considering these options, Mr. Stevens recommended installing a traffic signal at 15th and Holman Road:

Based upon my engineering study of 15th Avenue NW at this location, it was clear to me that the proper solution was the installation of a traffic signal within this corridor at Holman Road, the next intersection north of 87th. The solution could be easily and inexpensively implemented by converting an existing fire signal to a standard traffic signal that could be actuated by pedestrians wishing to cross. Further, the Holman Road intersection was only 300 feet north of 87th and closer to schools in the area. By contrast, signals at 85th (700 feet south) and at Mary Avenue (1,000 feet north) were substantially further away and did not offer a realistic option for pedestrians headed north intending to cross 15th near 87th.

CP 450-451.

Mr. Stevens further concluded that converting the existing fire signal at 15th and Holman Road to a full traffic signal would provide a safe crossing across 15th for pedestrians:

I further determined, based on my engineering study, that the conversion of the fire signal to a standard traffic signal at Holman Road would provide a safe, signalized pedestrian crossing, with a red light for traffic on the 15th Avenue NW arterial.

Important to my analysis is the fact that a signal at the intersection of Holman Road and 15th balances the spacing for pedestrians crossing 15th over the 1,700 feet between the signals at 85th and Mary Avenue NW. Placing a signal at Holman Road would also allow the City to coordinate the signals at 85th and Mary Avenue to provide

gaps for pedestrians to cross at intermediate intersections such as 87th, where previously there were not sufficient gaps due to traffic volumes.

CP 451-452.

In reaching his conclusion that the fire signal at Holman Road should be converted to a full signal to address the dangers that crossing 15th in this vicinity created for pedestrians, Mr. Stevens took into account Seattle Department of Transportation Director's Rule 2004-01. CP 452.

Director's Rule 2004-01 provides in pertinent part:

This Director's Rule is established solely to provide guidelines to work toward the City's goal of installing pedestrian safety improvements when funds are available. The intent is to provide for and promote the health, safety and welfare of the general public.

...

It is important to remember that providing marked (painted) crosswalks is only one of many possible engineering measures. Thus, when considering how to provide safer crossings for pedestrians, the question should NOT simply be: 'Should I provide a marked crosswalk or not?' Instead, the question should be: 'What are the most effective measures that can be used to help pedestrians to safely cross the street?' Deciding where to mark or not mark crosswalks is only one consideration in meeting the objective to create safe pedestrian crossings.

CP 452.

Mr. Stevens also took into account a report by the Federal Highway Administration, entitled "Safety Effects of Marked vs. Unmarked Crosswalks at Uncontrolled Locations" (February 2002). CP

452. This report emphasizes that engineers should focus on finding the best tools and methods for getting pedestrians across the road safely:

Marked crosswalks are one tool to get pedestrians safely across the street. When considering marked crosswalks at uncontrolled locations, the question should not simply be: “Should I provide a marked crosswalk or not?” The question should be: “Is this an appropriate tool for getting pedestrians across the street?” Regardless of whether marked crosswalks are used, it remains the fundamental obligation to get pedestrians safely across the street.

In most cases, marked crosswalks are best used in combination with other treatments (e.g., curb extension, raised crossing islands, traffic islands, roadway narrowing, enhanced overhead lighting, traffic calming measures, etc.). Think of marked crosswalks as one option in a progression of design treatments. If one treatment does not adequately accomplish the task, then move on to the next one. ***Failure of one particular treatment is not a license to give up and do nothing.*** In all cases, the final design must accomplish the goal of getting pedestrians across the road safely.

CP 452-453 (emphasis added).

Mr. Stevens concurs completely with both Director’s Rule 2004-01 and the Federal Highway Administration report, which direct transportation engineers to find solutions that enable pedestrians to safely cross busy arterials, including examining surrounding crossing areas for the installation of a traffic signal and marked crosswalk. CP 453. Based on the fact that the circumstances at 15th and 87th created an inherently dangerous situation for pedestrians trying to cross 15th, as well as the fact that Holman Road met traffic volume warrant requirements for a traffic

signal in 1992, 1993 and 2005, Mr. Stevens concluded that the City should not have “given up and done nothing”, thereby leaving the roadway in a dangerous condition for pedestrians:

My determination, as a result of my engineering study, that the conversion of the fire signal at Holman Road to a full traffic signal was the proper solution for addressing the hazardous condition for pedestrians at this section of 15th Avenue NW has been borne out by the City’s decision to do exactly what I have recommended. Given the fact the intersection of 87th and 15th was inherently dangerous for pedestrians attempting to cross it, in 1992 and 1993, and given that Holman Road met warrants for the installation of a traffic signal in 1992 and 1993, there was no justification for the City of Seattle to have, paraphrasing the FHWA report, “given up and done nothing”, leaving the roadway in a dangerous condition for pedestrians.

CP 453.

C. The City knew that the statute requiring drivers to yield for pedestrians would not create adequate gaps for pedestrians to safely cross a busy arterial like 15th Avenue NW.

Throughout its brief, Defendant City alleges that its duty must be analyzed in the context of “the statutory framework that regulates traffic operations at unsignalized intersections.” *See, e.g., City’s Response Brief* at 19. Specifically, the City claims that its duty is limited by RCW 46.61.235(2), which requires motorists to stop for pedestrians in all crosswalks, marked or unmarked. *City’s Response Brief* at 22. The City further claims that “[r]oad authorities ... have the right to assume that road users will obey the law and will proceed without negligence and with due

regard to the rights of the users of the street.” *City’s Response Brief* at 23.

But the City’s own employees know the truth and belie its claims.

Megan Hoyt is a Pedestrian Safety Specialist for the City. CP 690.

In a 2002 letter to Marianne Scholl of the Whittier Heights Community Council’s 15th Avenue Improvement Committee, Ms. Hoyt acknowledged that drivers do not always stop for pedestrians on multi-lane arterials such as 15th: “[A] significant concern on multi-lane roadways is the potential for one driver to stop for a pedestrian, but the driver in the next lane to continue.” CP 689. This is exactly what occurred in this case. Ms. Mulholland, who occupied the southbound curb lane, stopped for Nick and Charlie so they could cross the street. CP 1020-1021. Unfortunately, Mr. Hansen, who occupied the inside southbound lane, failed to stop for the boys in the crosswalk. This type of collision is a recognized hazard at uncontrolled pedestrian crossings like the one in this case:

Adequate gaps may be relatively infrequent on wide streets where vehicle volumes and speeds are high. In addition, ***the driver may not physically see the pedestrian because the pedestrian is obscured . . . by a vehicle in another lane that has stopped to allow the pedestrian to cross***

CP 697 (2000 Federal Highway Administration report on pedestrian safety issues at unsignalized locations) (emphasis added); CP 481.

Ms. Hoyt further acknowledged that “[d]rivers are also less accustomed to stopping for pedestrians on large roadways without appropriate indication from some form of traffic control device -- usually

a traffic signal.” CP 689. As our Supreme Court made clear in *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), municipalities have a duty to anticipate foreseeable actions of drivers:

[T]he authority charged with the maintenance and repair of a bridge must use ordinary care to provide against such dangers to the traveling public as may reasonably be anticipated, having due regard to the character of travel, the incidental purposes for which the highway may be lawfully used, and the nature of possible danger at the point in question.

Berglund, 4 Wn.2d at 314 (quoting 8 Am.Jur. 936, § 38).

Here, the City knew, as acknowledged by Ms. Hoyt and established by the numerous citizen complaints⁵ received by the City, that drivers often do not stop for pedestrians on a busy arterial like 15th. *See also* CP 697 (2000 FHA study) (“[M]any drivers do not stop or slow down for pedestrians in crosswalks, even when they are legally required to do so.”); CP 710 (FHA study at a crossing in Seattle finding that less than 50% of motorists yielded for pedestrians without additional

⁵ Defendant City claims that the citizen complaints cannot create a question of fact that the condition of the roadway was dangerous. *City’s Response Brief* at 27. First, the citizen complaints are clearly admissible on the issue of notice/foreseeability. *See, e.g., Nelson v. Bjelland*, 1 Wn.2d 268, 271-272, 95 P.2d 784 (1939) (statements made by third parties are admissible to prove knowledge); *Moen v. Chestnut*, 9 Wn.2d 93, 108, 113 P.2d 1030 (1941) (party’s testimony that a passenger in her car told her that an intersection was dangerous was admissible to establish the fact that the party had been **warned that the intersection was dangerous**, but not for the purpose of proving that the intersection was dangerous); *Spokane County v. Bates*, 96 Wn. App. 893, 900, 982 P.2d 642 (1999). Further, courts have allowed lay witness testimony regarding dangerous conditions of a roadway when based on personal knowledge of the roadway. *See, e.g., Unger v. Cauchon*, 118 Wn. App. 165, 176-177, 73 P.3d 1005 (2003). The citizen complaints in this case were from people with personal experience with this dangerous pedestrian crossing. CP 550, 552, 554, 811-813.

warnings/traffic control). This knowledge is significant, because it demonstrates the foreseeability of the collision that occurred in this case.

The trial court granted the City's summary judgment motion on the basis that the Plaintiff failed to show facts sufficient to raise an issue of fact as to foreseeability. CP 971. As emphasized by *Berglund*, the duty of a municipality such as the City of Seattle is to "use ordinary care to provide against such dangers to the traveling public as may reasonably be anticipated." *Berglund*, 4 Wn.2d at 314. It was clearly foreseeable to Defendant City that many drivers would not yield to pedestrians on a busy five-lane arterial like 15th Avenue and that exactly the type of collision that occurred in this case would happen without adequate traffic controls or warnings, as acknowledged by the City's own documents and employees. Whether Nick's injury was foreseeable, thus creating a duty of care on the part of the City, is a question of fact for a jury to resolve and therefore should not have been decided by the Court on summary judgment. *Niece v. Elmview Group Home*, 79 Wn. App. 660, 668, 904 P.2d 784 (1995).

D. Defendant City removed the overhead crosswalk warning sign because it wanted to discourage pedestrians from crossing at this dangerous intersection but then did nothing to warn pedestrians not to cross there.

Defendant City claims that it removed the overhead crosswalk warning sign based on (1) low pedestrian demand at the intersection; (2)

the City's decision not to mark a crosswalk; and (3) citizen correspondence complaining that drivers ignored the sign. *City's Response Brief* at p.6, citing CP 861. The document cited by the City, however, states that the City removed the overhead crosswalk warning sign "so as to avoid any pedestrians mistakenly relying on these signs as an indication that SDOT had designated this intersection to be a preferred crossing location." CP 861.

But the City did not post any signs warning pedestrians not to cross at 87th or advising them to use the signalized crossings at 85th or Mary Avenue. Without a warning directed at *pedestrians* not to cross at 87th, the City's removal of the overhead crosswalk warning signs did nothing to discourage pedestrians from crossing at 87th.⁶ Instead, it *increased the danger to pedestrians* by eliminating the only warning to drivers to watch for pedestrians at the intersection, despite the City's acknowledgement that drivers often do not stop for pedestrians on large, heavily traveled roadways "without appropriate indication from some form of traffic control device." CP 689-690; *see also* CP 908 ("we . . . do not recommend removing signs, as there is no reason to lessen driver awareness of this intersection"). If the City wanted to discourage

⁶ RCW 46.61.240(6) prohibits pedestrians from crossing at an unmarked crosswalk where an official sign prohibits crossing. Defendant City could have posted a sign prohibiting crossing at this dangerous unmarked crosswalk but did not do so.

pedestrians from crossing at 87th, it should have posted signs warning against crossing at 87th and advising the use of the signalized crossings at 85th (to the south) or Mary Avenue (to the north). Instead, the City made an inherently dangerous crossing even more dangerous.

E. Defendant City's duty is independent of any fault on the part of Steven Hansen or Nick Messenger.

Any alleged fault on the part of Steven Hansen or Nick Messenger does not bar Nick from recovering for Defendant City's share of fault. It only diminishes proportionally the amount of damages awarded against the City. *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 546-547, 682 P.2d 942 (1984).

Any fault on the part of Nick or Steven Hansen goes to the issue of apportionment of fault. It does not relate to the issue of duty and does not negate or excuse Defendant City's negligence:

There is likewise no merit to the city's argument that its duty to safely maintain roadways is tempered by motorists' duties to also exercise reasonable care. . . . The negligence of a third party does not absolve the city of its duty to maintain its roadways, including crosswalks, in a reasonably safe manner.

Chen, Slip Op. at p. 17-18.⁷

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⁷ See also *Tanguma v. Yakima County*, 18 Wn. App. 555, 561-562, 569 P.2d 1225 (1977) (alleged negligent conduct of oncoming pickup truck driver in using more than his share of bridge, forcing auto driver into canal, did not excuse county's negligence in failing to warn about bridge's narrowness).

F. Defendant City's attempt to distinguish *Chen* fails.

Defendant City argues that *Chen* is not controlling here because *Chen* “hinges” on the fact that it involved a marked crosswalk, which was a direction to pedestrians to cross there, and this case involves an unmarked crosswalk. This Court’s decision in *Chen* was not as narrow as Defendant City claims.

In *Chen*, this Court noted that it is not merely painted crosswalk markings that direct pedestrians to cross at crosswalks, but also the statutory rules of the road, which require motor vehicles to yield to pedestrians in marked *or unmarked* crosswalks (RCW 46.61.235(1)), but not at other locations (RCW 46.61.240). *Chen*, Slip Op. at 14-16. In *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940), our Supreme Court stated that it is a governmental entity’s “invitation, expressly or impliedly extended to the public, that imposes the obligation [to exercise reasonable care] and the duty extends to so much of a [roadway] . . . as the public is invited to use.” *Berglund*, 4 Wn.2d at 317. Here, not only was Nick Messenger crossing at an unmarked crosswalk, which is designated by statute as a preferred location for pedestrians to cross streets, but for many years there had been an overhead CROSSWALK warning sign at this crossing. CP 729; CP 735-736. The presence of the crosswalk warning sign clearly created an invitation to pedestrians to cross there. Although the City removed the overhead

crosswalk warning sign two months before the collision at issue in this case, the City did nothing to negate its longstanding invitation for pedestrians to use this crossing. Not only was this crossing designated as a preferred location for pedestrians to cross the street by statute,⁸ but it had long been designated by the City, through its overhead crosswalk sign, as an appropriate pedestrian crossing, and the City did nothing to tell pedestrians that, after years of encouraging them to cross there, it no longer wanted them to do so.

G. The fact that Defendant City installed a signal at Holman Road is admissible to impeach its claim that signalized intersections are not safer than unsignalized intersections.

ER 407 specifically states that it “does not require the exclusion of evidence of subsequent⁹ remedial measures *when offered for another purpose, such as . . . impeachment.*” A number of cases have held that evidence of subsequent remedial measures is admissible when used for impeachment purposes. In *Jones v. Robert E. Bayley Const. Co.*, 36 Wn. App. 357, 361, 674 P.2d 679 (1984), *overruled on other grounds in Brown v. Prime Const. Co.*, 102 Wn.2d 235, 240, 684 P.2d 73 (1984), for example, the court held that evidence of a subsequent change was admissible to impeach a witness’ testimony. Similarly, in *Pitasi v.*

⁸ Defendant City claims that *Krogh v. Pemble*, 50 Wn.2d 250, 254, 310 P.2d 1069 (1957), “rejected the argument that the statutes ‘direct’ pedestrians to marked crosswalks specifically.” *City’s Response Brief* at p.31. *Krogh* does not support the City’s claim.

⁹ The conversion of the fire signal at 15th and Holman to a full traffic signal had already been planned *before* the collision at issue in this case. CP 861.

Stratton Corp., 968 F.2d 1558 (2d Cir. 1992), a personal injury action against a ski resort, the court held that the plaintiff should have been allowed to introduce evidence that, shortly after the accident, the resort placed warning signs and ropes across the side entrances to the trail where the accident occurred. The court emphasized that, although this evidence was inadmissible to prove the resort's negligence, it was admissible for the purpose of impeaching the resort's witnesses and to rebut its defense that the plaintiff was contributorily negligent. Likewise, in *Cech v. State*, 183 Mont. 75, 598 P.2d 584 (1979), the trial court properly allowed the plaintiff to impeach defense testimony that "recovery areas" were superior to guardrails by evidence that the state had in fact installed a guardrail at the location in question after the collision.¹⁰

Defendant City claims repeatedly that signalized intersections are not safer than unsignalized intersections (*City's Response Brief* at pp. 12, 23, 40), and that Nick and Charlie would not have crossed at Holman Road even if there had been a signal there. *City's Response Brief* at pp.

¹⁰ See also *Patrick v. South Central Bell, et al.*, 641 F.2d 1192 (6th Cir. 1980) (in a suit arising out of an electrocution, defense testimony was given to the effect that the defendant had always maintained the power line at the statutorily required height of 18 feet; plaintiff was then permitted to impeach the testimony by evidence that the defendant first restored the power line to its pre-accident height of 13 feet and later raised it another 10 feet); *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976), *cert. denied*, 426 U.S. 907, 96 S. Ct. 2229, 48 L. Ed.2d 832 (1976) (the fact that Ford subsequently ceased using flange-mounted fuel tanks in favor of an earlier design was a proper subject on cross-examination of Ford's witnesses); *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 286 N.W.2d 257 (1979) (in suit alleging that defendant's cattle had strayed onto plaintiff's property, defense testimony that fences would have been ineffective entitled plaintiff to introduce evidence that defendant had in fact erected fences after the incident).

38-39. By claiming that its installation of a signalized crossing at Holman Road should be excluded under ER 407, the City essentially admits that a signalized crossing at Holman Road would have made the accident less likely to occur, because by definition, a measure taken after an accident must be something that would have made the event less likely to occur in order to come within the terms of ER 407. The City's installation of a signal at Holman Road is admissible to impeach its claims that signalized crossings are no safer than unsignalized crossings and that a signalized crossing at Holman Road would not have prevented the accident.

H. Defendant City has failed to present any evidence that Nick Messenger saw the Hansen van before impact and had a reasonable reaction time.

It is well-established in automobile collision cases that a plaintiff cannot be charged with comparative fault unless there is evidence that the plaintiff had an opportunity to observe that the disfavored driver was not going to yield the right of way and that the plaintiff was afforded a reasonable reaction time to avoid the collision. Defendant City has completely failed to respond to Plaintiff's legal citations or factual arguments on this point. Defendant City has failed to show that Nick Messenger could have seen the Hansen van and recognized that it was not going to yield the right of way in time to avoid the collision.¹¹

¹¹ While Defendant City notes that, in *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 682 P.2d 942 (1984), the appellate court ruled that there was

The evidence is that Nick was not afforded a reasonable reaction time to avoid the collision. CP 405 (“just as Nicholas stepped over the white lane divider, the van simultaneously appeared”). Defendant City has failed to present any evidence that Nick was afforded a reasonable reaction time. Without such evidence, Nick cannot be at fault as a matter of law, and the trial court therefore erred in denying Plaintiff’s motion to strike the affirmative defense of comparative fault on the part of Nick.

I. Defendant City did not argue proximate cause in the trial court.

For the first time in its response brief, Defendant City raises the issue of proximate cause. *City’s Response Brief* at p.34. Here, as in *Chen* (Slip Op. at p. 8, fn.2), Defendant City limited its motion for summary judgment to the issues of duty and breach.¹² CP 338. The issue in this appeal is whether Defendant City had a duty to maintain 15th Avenue NW in a reasonably safe condition for pedestrian travel, and whether there is sufficient evidence to create issues of fact as to whether Defendant City

sufficient evidence to take the issue of contributory fault on the part of a pedestrian to a jury, that was because there was evidence that the pedestrian should have been alerted to the fact that an approaching vehicle was not going to yield. There was evidence that the driver of the stopped vehicle sounded his horn three separate times to alert the pedestrian to the oncoming vehicle and even yelled to attract the pedestrian’s attention to the approaching vehicles. *Clements*, 37 Wn. App. at 551. In this case, there is no evidence of anything that put Nick Messenger on notice that the Hansen van was approaching and was not going to yield as required by law. In the absence of such evidence, the trial court erred in denying Plaintiff’s motion for summary judgment to strike the affirmative defense of comparative fault.

¹² The City provides no Clerk’s Papers cite for its claim that it raised the issue of proximate cause in its summary judgment motion. *City’s Response Brief* at p.2.

breached that duty. The Court should reject Defendant City's attempt to raise the issue of proximate cause for the first time on appeal. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414-415, 553 P.2d 107 (1976); *White v. Kent Medical Center*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991).

J. Defendant City essentially concedes that the trial court erred in considering evidence of Plaintiff's settlement with Steven Hansen.

Defendant City fails to cite to any testimony by Steven Hansen that it claims Plaintiff's settlement with Hansen is relevant to impeach. Defendant City also fails to address the factors set forth in the case law (*Grigsby, Northington*) governing when evidence of a prior settlement is admissible to impeach a *plaintiff's* prior testimony. Defendant City fails to cite a single case supporting the admission of a settlement agreement for the purpose of impeaching testimony of the *released party* (Hansen).

By completely failing to address the case law and failing to cite any specific testimony by Hansen that the City claims the settlement is relevant to impeach, Defendant City essentially concedes that evidence of Plaintiff's settlement with Hansen should have been excluded entirely.

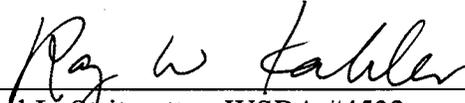
IV. CONCLUSION

Plaintiff Messenger presented ample evidence that Defendant City was well aware of the dangerous conditions at this intersection based on numerous citizen complaints over the years and the City's investigation of

those complaints; that the City recognized that this was not a location where pedestrians could safely cross 15th Avenue NW and therefore desired to discourage them from crossing at this location; and that the collision that occurred in this case was foreseeable based on the numerous citizen complaints and the City's knowledge that drivers often do not yield to pedestrians on multi-lane, high-volume roadways like 15th Avenue NW without traffic control devices. But rather than take measures to eliminate the dangers at this crossing, Defendant City removed the only sign warning drivers of the presence of pedestrians, thereby increasing the danger that motorists would fail to yield to pedestrians. Weeks later, Nick Messenger suffered permanently disabling injuries trying to cross 15th Avenue NW at that location. Plaintiff Messenger presented ample evidence that Defendant City breached its duty to maintain pedestrian crossings in this area of 15th Avenue NW in a reasonably safe condition.

Under the circumstances presented in this case, and the case law, including this Court's recent decision in *Chen v. City of Seattle*, the question of whether the City breached its duty to exercise ordinary care – i.e., whether the intersection at issue was reasonably safe or inherently dangerous, and whether the City took appropriate corrective action – should have been decided by a jury. This Court should reverse the trial court's summary judgment in favor of Defendant City, as well as its other rulings set forth in Plaintiff's Opening Brief, and remand this case for trial.

DATED this 10th day of March, 2010.



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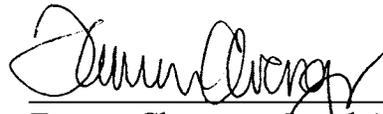
CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document as follows:

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DATED: March 10, 2010



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