SUPREME COURT NO. 93332-4

Court of Appeals No. 73514-4-I

JOSHUA WOOLCOTT,

Plaintiff/Appellant,

v.

CITY OF SEATTLE,

Defendant/Respondent,

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING
CAUSE No.: 14-2-09938-0 SEA
HONORABLE RONALD KESSLER

CITY OF SEATTLE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This is a case about expanding the duty of governmental entities to pedestrians, when more and more pedestrians are plugged in, playing Pokemon Go, or staring at their cell phones while crossing streets. Joshua Woolcott asserts that the Court of Appeals for Division One erred in affirming King County Superior Court Judge Ronald Kessler's decision to grant summary judgment in this trip and fall case. But Rule of Appellate Procedure 13.4(b) applies an exacting standard for when this Court should grant review, which Mr. Woolcott's petition does not meet.

The Court of Appeals for Division One, in a unanimous unpublished opinion written by Judge Cox and joined by Judges Becker and Verellan, followed well-established rules of law established by several cases. The sole issue analyzed by the Court of Appeals was the duty the City owes to a pedestrian crossing a street outside of a marked crosswalk. The Court properly followed *McKee v. City of Edmonds*, 54 Wn. App. 265, 773 P.2d 434 (1989) and *Hansen v. Wash. Nat. Gas Co.* 95 Wn.2d 773, 778, 632 P.2d 504 (1981). The Court of Appeals stated:

> Here, there is no evidence that the unmarked crosswalk was blocked, full, or otherwise unusable. Nevertheless, Mr. Woolcott chose to step into the street outside the marked crosswalk. There simply was no duty the City owed him to make this area safe for ordinary travel.

Woolcott v. City of Seattle, 194 Wn. 1009 at *2 (2016).

The Court should deny the petition.

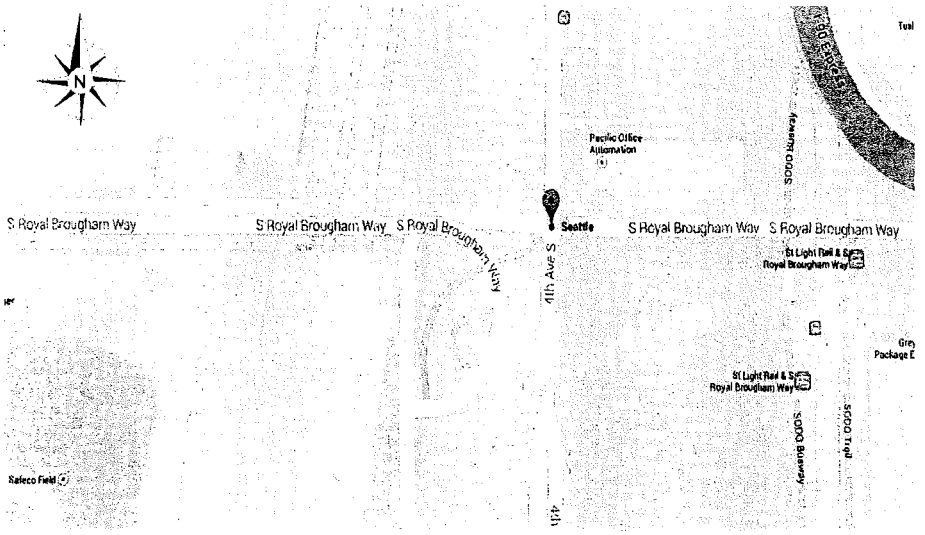
II. COUNTER STATEMENT OF ISSUE PRESENTED

Did the Court of Appeals follow well-established case law in concluding that the City did not owe Mr. Woolcott a duty to maintain the street outside of the sidewalk for pedestrian travel?

III. COUNTERSTATEMENT OF THE CASE

A. THE MARKED CROSSWALK

The intersection of 4th Avenue South and South Royal Brougham Way is an arterial intersection located in the SoDo neighborhood of Seattle. Sound Transit's Stadium station is to the east and Safeco Field is to the west. On the northeast corner is the Pacific Office Automation building where Mr. Woolcott and others had a barbeque, CP 121-122; and King County Metro's Ryerson Base is across the street on the southeast corner. The intersection is fully signalized and includes a pedestrian countdown signal. On Mariner game days, officers are assigned to the intersection both pre and postgame to facilitate the flow of pedestrian and vehicle travel. Officers direct pedestrians to stay in the marked crosswalks. Although they have the discretion to cite for jaywalking, their goal is not to write tickets but to keep traffic moving. CP 38-42, CP 54-58. A drawing of the intersection appears below. CP 9.



In Washington, a legal crosswalk exists by default at every point where two roadways intersect. *See* RCW 46.04.160 and SMC 11.14.135 ("Crosswalk" means the portion of the roadway between the intersection area and the prolongation or connection of the farthest sidewalk line...except as modified by a marked crosswalk). The crosswalk on the east side of 4th Avenue south crossing Royal Brougham is a marked crosswalk. *See* RCW 46.04.290 and SMC 11.14.315 ("Marked crosswalk" means any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface thereof). The Manual on Uniform Traffic Control Devices ("MUTCD") published by the Federal Highway Administration under 23 CFR Part 655, contains the standards for signs, signals, and pavement markings, such as crosswalk markings. CP 22. The 2003 MUTCD was adopted by the Washington Department of Transportation by WAC 468-95-010, pursuant to RCW 47.36.020 and was

adopted by reference in the Seattle Right-of-Way Improvements Manual, § 4.23. Under the provisions of the MUTCD, crosswalk markings are used at signalized intersections as "guidance for pedestrians who are crossing roadways by defining and delineating paths on approaches to and within signalized intersections." CP 22, 26-28. The crosswalk markings also alert motorists to the presence of pedestrians and direct pedestrians to that location. CP 22.

The east crosswalk has existed at that location for many years and in 2005 was re-marked in a ladder pattern made of 14-foot wide white thermoplastic lines. CP 22-23. This measurement exceeds the City's 10-foot minimum width and was designed to provide for the heavy Sound Transit traffic and special event traffic at the stadiums. CP 22-23 and 29-31. Despite the heavy pedestrian usage of that intersection, the City does not know exactly when this particular pothole developed as there are no prior complaints or reports of pedestrians falling at that location. CP 111. The City invites the public and City employees to report troublesome potholes by various means, including on-line, by e-mail, the "Find It, Fix It" cell phone "app" which allows the user to take a picture with a cell phones and forward it to the city, and by traditional telephone call reporting. CP 111.

B. MR. WOOLCOTT'S ACCIDENT

The circumstances of the accident are not in dispute. On April 8, 2011, Mr. Woolcott met friends for a barbeque in the Pacific Automation Office Building parking lot just north of the intersection in question and

close to Safeco Field. CP 121-122. At around 7:00 P.M. Mr. Woolcott and several friends started walking to the Mariner's game. The group walked southbound on the east side of 4th Avenue South intending to cross South Royal Brougham Way. CP 64. It was still daylight and Mr. Woolcott was walking with a group of six friends. CP 79. As he approached the northeast corner, he glanced up at the pedestrian signal which was counting down from 14 and flashing red. CP 80-81. He also noticed a police officer standing by the marked crosswalk who was waving pedestrians across the street. CP 84. (Parking Enforcement Officer Michael Yasutake was working at that crosswalk and disputes where Mr. Woolcott says he was standing. For the purposes of the underlying motion alone, the City accepts Mr. Woolcott's version.) CP 11. Mr. Woolcott says he stepped into the street as "a fluid motion" and there was no reason to stop at the corner. CP 81-21. He estimates there were six to ten additional people crossing the street along with his group. CP 88. As the game was about to start at 7:05 P.M., the pedestrian traffic was not particularly heavy, but comparable to a typical downtown Seattle day. CP 80.

At his deposition, Mr. Woolcott easily identified the pothole from pictures taken from the vantage point of the sidewalk. CP 77-79, 107-08. Despite its visibility, he stepped off the curb and directly into the 8" by 8" and 2" deep pothole which was located 2 ½ feet outside and to the west of the marked crosswalk. CP 110-111. When questioned about why he failed to notice the pothole he stated as follows:

Q: So as you step off the curb, and I understand that your first step was into the pothole, where were you looking as you stepped off the curb?

A: Just before I stepped off the curb, I saw the crosswalk sign at the time, the officer to the left of me, **and where I'm going**.

Q: Did you notice the pothole before you stepped in it?

A: No.

Q: Do you know why you didn't notice it?

A: Coming up to the pothole, the elevation of the sidewalk, the pothole being below it, I didn't see it as I walked up.

CP 87 (emphasis added). Mr. Woolcott admits he looked where he was going, but inexplicably failed to see what was there to be seen. Washington Pattern Instruction 12.06 (every person has a duty to see what would be seen by a person exercising ordinary care). He also admits the pothole was not within the marked crosswalk, and this is confirmed by the photographs. CP 68, 107-08. Moreover, he also acknowledges that the crosswalk's white stripes indicate the location of the crosswalk. CP 105. Mr. Woolcott did not ask the officers for help, did not tell them he was injured and went home that evening instead of seeking medical attention. CP 89.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. STANDARD FOR REVIEW IS STRINGENT.

The standard for review by this Court is stringent, for good reason. The Court has limited resources and cannot serve as a "do-over" for every dissatisfied litigant. A petition for review should be accepted under four

circumstances. CR 13.4 states:

> **(b) Consideration Governing Acceptance of Review.**
>
> A petition for review will be accepted by the Superior Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved, or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Mr. Woolcott has no basis to seek review under RAP 13.4(b)(1) or (2). Far from being in conflict with prior decisions of the Court of Appeals or this Court, the Court of Appeals opinion is entirely in accord with *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.2d 845 (2002), *McKee v. City of Edmonds*, 54 Wn. App. 265, 773 P.2d 434 (1989) and *Hansen v. Wash. Nat. Gas Co.* 95 Wn.2d 773, 778, 632 P.2d 504 (1981). Nor does Mr. Woolcott's matter involve a "significant issue of law under the constitution of the State of Washington" so RAP 13.4(b)(3) is not implicated either. Mr. Woolcott is thus left with the catchall, RAP 13.4(b)(4) which allows review only if a petition involves an issue of "substantial public interest." Mr. Woolcott's petition is conspicuously silent on this point, and he instead re-argues the failed response to the summary judgment motion, and the unsuccessful appeal. Rather than re-argue the City's position, we will only address one issue, the Duty owed,

and to whom that duty was owed.

B. THE DUTY OWED TO THE PUBLIC IN THE MAINTENANCE OF THE STREET FOR THE INTENDED ORDINARY VEHICLE TRAVEL WAS MET HERE.

Cities have a duty to "exercise ordinary care in the design, construction, maintenance and repair of public roads to keep them in a reasonably safe condition for ordinary travel." WPI 140.01. Ordinary travel for the street and areas outside the marked crosswalk means vehicle travel. *Keller* outlines a three-part test for determining whether a duty is owed to the plaintiff: the court must decide "who owes the duty, but also to whom the duty is owed and what is the nature of the duty owed." *Keller v. City of Spokane,* 146 Wn.2d 237, 243 (2002). "The answer to the second question defines the class protected by the duty and the answer to the third question defines the standard of care." *Id.* In this case, the City owes pedestrians a duty within the crosswalk as the City has marked and directed pedestrians to use the crosswalk. Outside the marked crosswalk the City owes motor vehicle drivers a duty to exercise ordinary care for the travel expected on those roads.

Municipalities are not insurers of the public safety and are not expected to "anticipate and protect against all imaginable acts...." *Keller v. City of Spokane,* 146 Wn.2d 237, 252 (2002) quoting *Stewart v. State*, 92 Wn.2d 285, 299 (1979). Rather, the duty owed by the City was defined in *Keller* and is contained in Washington Pattern Instruction 140.01:

The [county] [city] [town] [state] has a duty to exercise ordinary

> care in the [design] [construction] [maintenance] [repair] of its public [roads] [streets] [sidewalks] to keep them in a reasonably safe condition for *ordinary* travel.

Keller, 146 Wn.2d at 254 (emphasis contained in original citation). Whether a city can be said to have complied with that duty will depend on the circumstances present in a given location. *Xiao Ping Chen v. City of Seattle*, 153 Wash. App. 890, 907 (2009). It also depends on to whom the duty was owed, as "ordinary travel" in a crosswalk is for pedestrians and "ordinary travel" in a roadway is for vehicles. Although the facts of *Chen* are distinguishable in that it involved a pedestrian versus vehicle accident, that case involved a marked crosswalk and the Court discussed the City's duty with regard to crosswalks.

Washington law defines where and when pedestrians can cross the street. These statutes and ordinances make clear that crosswalks are the required crossing location and in exchange, pedestrians enjoy the right-of-way when using a crosswalk.

In this case, Mr. Woolcott does not take issue with the safety of the marked crosswalk as that is not where he fell. As a pedestrian, he sues the City for failing to maintain the street in a reasonably safe condition because he chose to disregard the 14-foot wide marked crosswalk made available for his use. The "intended use" for the street is vehicle traffic, not pedestrian traffic. The City has taken care to mark the area intended for pedestrians. The markings are compliant with the MUTCD and the City's Standard Plans and consistent with the statutory directives to pedestrians. As the Court stated in *Chen*, these presumptions result in a "corresponding duty"

on the city to maintain the **crosswalks** – not the streets – in reasonably safe condition for pedestrians. *Id.* at 906-07.

C. NO ACTIONABLE BREACH OF DUTY TO MAINTAIN CROSSWALKS CAN APPLY TO THE INSTANT CASE BECAUSE WOOLCOTT WAS NOT USING A CROSSWALK WHEN INJURED.

The cases of *McKee* and *Hansen* are directly on point. *McKee v. City of Edmonds,* 54 Wash. App. 265 (1989); *Hansen v. Washington Natural Gas Company*, 95 Wn.2d 773 (1981). In *McKee,* the City did not owe a jaywalking pedestrian who tripped in a pothole a duty to make the roadway safe for pedestrian travel. *McKee,* 54 Wash. App. at 265. McKee tripped when crossing a street in downtown Edmonds. Crosswalks were located on either end of the block but the plaintiff chose not to use the crosswalks and instead crossed mid-block. *Id.* at 266. McKee tripped in a 2" deep and 8" by 12" wide pothole in the street, very similar in size to the pothole here. The area where she crossed had been a marked crosswalk that the City removed less than 10 years earlier. In practice, the mid-block crossing was frequently used by pedestrians and jaywalking was openly tolerated by the Edmonds police. *Id.* In fact, twice a year during holidays, that section of the street was closed off to vehicles and made available for pedestrians to cross. *Id.*

McKee argued that since it was foreseeable that pedestrians were crossing outside of the crosswalks mid-block, the City's duty included making this street area safe for pedestrians. The Court, in rejecting this argument, explained:

> A sound policy judgment underlies our conclusion. Municipalities are responsible for maintaining thousands of miles of public highways and roads which have great social utility and are absolutely indispensable to the best interests of the public at large. It is impossible for these roads and highways to be maintained in perfect condition, and the fact that there are potholes and defects in roadways are matters widely known to the public.

McKee, 54 Wash. App. at 268 *quoting Hines v. Department of Transp. and Dev.*, 503 So.2d 724, 726 (La.App. 1987). The *Hines* case is also instructive. It involved a woman who parked her car mid-block and then attempted to cross the street carrying her dry cleaning in front of her. She was looking for traffic and did not see a protrusion in the street where the parking area had settled and tripped and fell. It was 18-24 inches long with an estimated height of 2-6 inches. *Hines* 503 So.2d at 725. She sued, but the Court dismissed the case explaining that the standard for roads was different than the standard for crosswalks, because the intended use was different.

> Defects or imperfections in highways such as those in the subject case are entirely passive and cannot cause harm to others by and of themselves. **Furthermore, in this case, the defect in the highway was such that it posed no danger or risk of harm to vehicular traffic, the purpose for which the roadway was designed.**

Id. at 726 (emphasis added). *McKee* citing *Hines* with approval demonstrates that, in Washington, the standard of care for the area outside the crosswalk is not maintenance for the safety of pedestrians but rather for vehicles.

The City's duty of care to Mr. Woolcott did not extend to places

where pedestrians are not expected to walk. *Hansen*, 95 Wn.2d 773. In *Hansen*, the plaintiff jaywalked diagonally across a Seattle street to catch a bus. She slipped on a plank that had been placed in the middle of the street to cover an excavation. The plaintiff alleged, among other things, that the defendants had a common law duty to protect her from the harm she suffered. *Id.* at 775-776. The Supreme Court, reversing the Court of Appeals, agreed with the trial court's observation that:

> [T]here is no duty on the part of defendants to make the middle of the street, mid-block, safe for pedestrians who might elect to leave the sidewalk in the middle of the block and angle illegally across the street through a construction area that is open and apparent and is safe for cars.

Id. at 778.

Mr. Woolcott dismisses *McKee* and *Hansen* as distinguishable because Mr. Woolcott fell within a few feet of the marked crosswalk instead of mid-block. *McKee v. City of Edmonds,* 54 Wash. App. 265 (1989); *Hansen v. Washington Natural Gas Company*, 95 Wn.2d 773 (1981). This distinction is insignificant as all three plaintiffs fell in an area intended for vehicle travel which so happened to be outside the boundaries of the marked crosswalk. While a particular pedestrian's negligent or fault-free behavior is not relevant for the duty analysis, the location and ordinary travel intended for that location is. *See Keller*, 146 Wn.2d 237, 249 (2002). The ordinary use of the street area outside the marked crosswalk is vehicle travel so any duty owed would be to people using that area with a vehicle. The nature of that duty determines the standard of care. *Keller,* 146 Wn.2d at

243. The ordinary travel and intended use for the crosswalk is pedestrian travel and a corresponding standard of care for maintenance of a marked crosswalk would apply. *Id.* Here, there is no evidence the City fell below the standard of care in either situation. Plaintiff is correct that foreseeability is an element of the duty analysis. *Keller,* 146 Wn.2d at 243.

Mr. Woolcott argues that since some baseball fans going to a Mariners game are known to walk outside the crosswalk, the City owes a duty to pedestrians to maintain those areas in a reasonably safe condition for pedestrians. That said, municipalities are not insurers of the safety of the public and cannot protect against all imaginable acts. *Id.* at 252. Just because some may ignore the law and walk wherever they wish, does not mean that such acts unilaterally expand the City's duty. Given the large task of maintaining thousands of miles of public highways The *McKee* court specifically rejected this argument stating:

> It is impossible for these roads and highways to be maintained in perfect condition, and the fact that there are potholes and defects in roadways are matters widely known to the public.

McKee, 54 Wash. App. at 268 *quoting Hines v. Department of Transp. and Dev.*, 503 So.2d 724, 726 (La.App. 1987).

Mr. Woolcott, like the plaintiffs in *McKee* and *Hansen*, chose to walk in the street instead of crossing at a marked crosswalk. As in *McKee* and *Hansen*, the City is entitled to expect pedestrians to use the marked crosswalk. Even though in the instant case a police officer was present by the marked crosswalk, no one directed Mr. Woolcott to walk where he chose

to walk. Even though police officers, in their discretion, decide not to cite pedestrians for walking outside the marked crosswalk, this does not somehow excuse their behavior or modify the City's duty with regard to maintenance of the street. Even though it is foreseeable that pedestrians *might* choose to cross outside the marked crosswalks or might choose to jaywalk, this again does not modify or broaden the City's duty.

Accepting this argument by Mr. Woolcott would mean that the law requires the City to maintain the entire length of all streets in reasonably safe condition for pedestrians. Carried to its logical extreme, the City would be required to make even more miles of roadway safe for pedestrians for events taking place once a year, like the St. Patrick's Day Parade. This argument is not consistent with common sense, or the well-established case law as cited above.

D. *BERGLUND V. SPOKANE COUNTY* IS FACTUALLY DISTINGUISHABLE AND DOES NOT ESTABLISH THE CITY'S DUTY TO WOOLCOTT HERE

Mr. Woolcott cites *Berglund v. Spokane County*, 4 Wn.2d 309 (1940), as authority to argue the City invited him to step outside the crosswalk and therefore the City had a duty to maintain the street for pedestrian travel. Appellant's Brief at pp. 7-9. His reliance on *Berglund* is misplaced. *Berglund* involved a pedestrian hit by a car on a heavily used bridge that was the only means of crossing a river and accessing schools, churches and other public buildings. *Id.* at 311. The bridge had no footpath or sidewalk for pedestrians so people were forced to walk where the cars

drove and the County was aware of this condition. *Id* .at 312. Pedestrians sometimes climbed the side railing of the bridge to avoid being hit and the County had received many reports of these problems. *Id.*

The issue there was "[W]hether, under the circumstances, [the County] exercised the required amount of care to maintain the bridge in a reasonably safe condition for pedestrians . . . who had been invited to use it." *Id.* at 318. Although limited to the allegations in the complaint on demurrer the *Berglund* Court wrote that "The financial burden, technical considerations and other factual circumstances are all factors to be considered in determining whether or not the county complied with its duty to use reasonable care." *Id.* at 319. The *Berglund* Court reversed the dismissal based on the bridge being the only means of crossing the river, its heavy use, the lack of a walkway or sidewalk for pedestrians and the fact that the County knew of the ongoing situation of pedestrians being forced to mingle with vehicle traffic. Since pedestrians had to use the bridge, the county understandably had a duty to exercise reasonable care to provide adequate protection for ordinary travel which there included pedestrians and vehicles. The bridge in *Berglund* bears no comparison to the crosswalk in this case.

V. CONCLUSION

Mr. Woolcott has based his petition for review on the "catch-all" provision of RAP 13.4(b)(4), but then failed to show an "issue of substantial public interest that should be determined by the Supreme Court." Their petition seems to suggest that Mr. Woolcott's interest in his own lawsuit is, in

and of itself, enough to show a substantial public interest. This Court should reject that view. This was a unanimous, unpublished decision regarding a simple legal issue. What duty does a municipality owe to people crossing streets outside of marked crosswalk? The Court of Appeals did not have to make new law, or break new ground. It merely turned to the existing precedent and followed those cases. The Court of Appeals was absolutely correct in its ruling, and this petition should be denied.

DATED this 22nd day of August 2016.

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PROOF OF SERVICE

AUTUMN DERROW certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On August 22, 2016, I hereby certify that I caused the foregoing document to be delivered by electronic mail and by U.S. mail to the following:

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Attached for filing is the City of Seattle's Answer to Petition for Review.

Thank you.

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