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No. 73514-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOSHUA J. WOOLCOTT,
Appellant/Plaintiff,

v.

CITY OF SEATTLE,
Respondent/Defendant.

REPLY BRIEF OF APPELLANT

Anthony C. Johnson, WSBA# 18073
Attorney for Joshua J. Woolcott, Appellant

LAW OFFICES OF ANTHONY C. JOHNSON
1700 7th Avenue, Suite 2200
Seattle, WA 98101
206-582-3500

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ARGUMENT

In determining whether the city owed a duty to Mr. Woolcott for his fall in the intersection and crosswalk area, the court must examine whether his use of the public right of way amounted to "ordinary travel."

Mr. Woolcott's argument is that "ordinary travel" is determined based upon consideration of the totality of circumstances of how the intersection is used by pedestrians and whether such use was reasonably foreseeable by the city where city (police) took direct and active total control of the entire public right of way/intersection, directing and allowing Mr. Woolcott to walk over area where he fell on the pothole, breaking his foot. Indeed, it is undisputed by city's own admission that the city allowed pedestrians during special events to walk in the area where Mr. Woolcott fell. In sum, foreseeability is the determinative issue and, as a matter of law, should be left to the trier of fact.

The city's argument distilled is that "ordinary travel" equals "intended use" as merely defined by the city's unilateral design and striping of crosswalks at intersections. Inside its painted lines, the city owes a duty to a pedestrian. Outside its painted lines, the city only owes a duty to vehicle drivers. The city argues that no duty exists (and, therefore, no duty can be breached) and is owed to a pedestrian who is one step outside the crosswalk striping painted by the city, even if that spot is well

within the curbline extensions of the two corners of the crosswalk at the signal-controlled and police-controlled intersection or public right of way.

Initially, it appears that the city seeks to expand issues on appeal beyond the only issue it initially raised on summary judgment. If now allowed, given the factual record developed by Mr. Woolcott in opposition to summary judgment (i.e., excerpting only testimony relevant to the existence of duty issue from the two police officers as well as the four CR 30(b)(6) deponents proffered by the city), an expansion of issues without a record of all evidence developed and to be developed in discovery would be fundamentally unfair to plaintiff.

> Pursuant to CR 56, the City seeks summary judgment of dismissal as the City does not have a duty to maintain the street area – outside the marked crosswalk – in reasonably safe condition for pedestrians.
> [CP 8 (City of Seattle's Motion for Summary Judgment, p. 1)]
>
> **III. ISSUE PRESENTED**
> Whether the scope of the City's duty to maintain roads in reasonably safe condition for ordinary travel extends to a pedestrian who chooses to travel outside the marked crosswalk that has been expressly designated for his travel.
> [CP 12 (City MSJ, p. 5)]
>
> The City's duty of care to Mr. Woolcott did not extend to places where pedestrians are not expected to walk.
> [CP 16 (City MSJ, p. 9)(City Appellate Response Brief, p. 13)]

Indeed, the only original argument on summary judgment regarding breach was simply that the city could not breach a duty that did not exist in the first place. As with the foreseeability/existence of duty issue, determinations of breach and notice are typically issues for the trier of fact, unless reasonable minds could not differ. In determining whether the city breached its duty (assuming there exists a duty owed to Mr. Woolcott who stepped on a pothole one step outside of crosswalk striped by city) to maintain the public right of way safe for ordinary travel, the test is whether a reasonably cautious person charged with that duty would or would not consider a particular defect (here, the pothole) as one where the public might be injured. *Millson v. City of Lynden et al*, 174 Wn.App. 303, 310, 298 P.3d 141, 144-145 (2013), *citing Johnson v. City of Ilwaco*, 38 Wn.2d 408, 414, 229 P.2d 878 (1951) (quoting *Fritsche v. City of Seattle*, 10 Wn.2d 357, 360, 116 P.2d 562 (1941)). As it happens, some of this testimony excerpted from deposed city witnesses for the summary judgment record indicates that this type of pothole would have been (and this one actually was) reported for repair so as to ensure the public's safety traveling over the right of way. See, e.g., CP 160; 187; 203-204; **243**; 267, 275; 256, 353. Reasonable minds could differ on whether the city breached its duty by failing to maintain the public right of way.

As far as the belatedly raised notice issue, there also happens to be sufficiently excerpted in the summary judgment record evidence that the city's police officers inspected the scene before Mr. Woolcott's fall and failed to notice what the city describes as an open and obvious pothole hazard. See CP 187, where Officer Yasutake admits he did not note or report an open and obvious tripping hazard. Indeed, one of the city's CR 30(b)(6) deponents testified that he had no idea if the city, as a matter of course, inspects designated intersections around the stadium prior to the first special use of the season. CP 211. The city acknowledged that the hazardous pothole resulting from spalling had been there at least 30 days prior to Woolcott's fall (see CP 356, included in record by city on its SJ Reply) and possibly as long as since 1994 when the utility strip was restored or repaired (see CP 111 [¶6] & 269). Indeed, no new spalling has occurred in the area in the four years since Woolcott's fall. See CP 245; 288-289. Of course, there can be no dispute that the city was on notice of the intended heavy pedestrian use of this specially designated public right of way/intersection where it was subject to a written pedestrian traffic control plan and actually controlled by city police for that reason. In sum, reasonable minds could differ on whether the city was, or reasonably should have been, on notice of the subject defect in the public right of way.

Returning to the foreseeability/existence of duty issue, the city argues that Woolcott's choice to ignore the law and walk one step outside of the crosswalk striping designed and painted by the city but well within the curbline extensions cannot result in a unilateral expansion of the city's duty only to pedestrians walking within the painted crosswalk. Although the issue of whether or not Woolcott's use was unlawful only goes to contributory negligence, it seems a leap to conclude that his use was illegal when city police took direct and active control over the entire right of way/intersection and directed and allowed pedestrians to walk outside the crosswalk striping but well within the intersection. The city police officers are not merely incidental and ornamental observers of the entire right of way/intersection; the police actually become the traffic (pedestrian and vehicular) control plan as they took active and direct control of the entire intersection and all those traveling over it. The city police are charged with inspecting the area and directing and controlling pedestrian traffic in order to ensure pedestrian safety. Moreover, there is no law that requires a pedestrian to walk only on crosswalk striping designed and painted by the municipality that serves merely as a **guide** to center and direct pedestrian traffic.

Again, Woolcott contends that he was not a scofflaw jaywalker, but a reasonably anticipated – if not an expressly or impliedly invited –

user of the right of way by the city. The police directed and waived him across the intersection in the reasonably anticipated path he took. See CP 122-124 [¶¶ 2,3,5 & 9].[1] Again, *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940) controls. Where, as here, the city extended an invitation to Mariners fans to walk on its improved right of ways including the entire intersection controlled by city police, the city "must exercise reasonable care to keep them in a reasonably safe condition for travel" as "[i]t is the invitation, expressly or impliedly extended to the public, that imposes the obligation." *Berglund* at p. 317 (citations omitted).

Ultimately, questions of fact surrounding the duty of care element preclude summary judgment. *Iwai v. State*, 129 Wn.2d 84, 101-03, 915 P.2d 1089 (1996).

The city also now seems to take the position that the city somehow owes no duty to Woolcott as he failed to see what was there to be seen.

[1] The city moves to exclude pictures taken by Mr. Woolcott on Opening Day 2015, which Woolcott contends are relevant and probative. Woolcott in his declaration establishes the pictures depict the same scene/right of way where he fell. CP 123-124. Similarly, the city also acknowledges that these pictures depict the same scene where he fell. CP 281-288. Woolcott declares that the pictures depict police taking active and direct control of the entire intersection/public right of way. CP 123-124. Woolcott declares that the pictures depict police directing and allowing fans to cross as shown and that the police did not direct or warn fans to walk only on painted crosswalk markings. *Id.* Woolcott contends that these photographs are relevant and probative on the duty issue presented on summary judgment; i.e., the determination of pedestrians' reasonably foreseeable use of or "ordinary travel" on the public right of way intersection during special events such as Mariners Opening Day, based upon the totality of circumstances. As such, the pictures should be considered.

(See Response Brief, pp. 6-7) Whether a dangerous condition in a pedestrian's path is "open and obvious" is a jury question and does not operate as a bar to negligence. *Millson*, 174 Wn.App. 303, 310-311, *citing Blasick v. City of Yakima*, 45 Wn.2d 309, 313, 274 P.2d 122 (1954) (other citations omitted). A pedestrian is not required to keep his eyes on the right of way immediately in front of him at all times. *Millson*, at 144. Nor does it constitute negligence on the part of the pedestrian as a matter of law if there is something in the pedestrian's path which he could see if he looked but does not see because he did not look. *Id.* Additionally, a "[m]omentary diversion of the attention of the pedestrian does not as a matter of law constitute contributory negligence." *James v. Burchett*, 15 Wn.2d 119, 128, 129 P.2d 790 (1942), *citing Mischke v. Seattle*, 26 Wash. 616, 67 P. 357 (1901). Finally, a pedestrian's knowledge of a dangerous condition in the right of way is analyzed as a jury question of the pedestrian's comparative negligence and not a bar to the pedestrian's negligence claim. *Millson*, at p. 145 (citations omitted).

CONCLUSION

The trial court order granting the city's motion for summary judgment should be reversed and this case remanded to the trial court for further proceedings, including any properly presented arguments by the

city that Mr. Woolcott's claims fail, as a matter of law, on any issue other than whether a duty is ever owed to a pedestrian who walks one step outside crosswalk stripes painted wherever and for whatever reason the city chose to paint them. The trier of fact should assess the credibility of the parties and witnesses and make the appropriate determination of the material facts and duties of the parties flowing therefrom.

Dated this 12th day of November, 2015.

Respectfully submitted,

ANTHONY C JOHNSON

Anthony C. Johnson, WSBA #18073
Attorneys for Plaintiff/Appellant Joshua J. Woolcott

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

JOSHUA J. WOOLCOTT, Plaintiff/Appellant, vs. CITY OF SEATTLE, Defendant/Respondent.	CERTIFICATE/PROOF OF SERVICE RE: REPLY BRIEF

I, Anthony C. Johnson, attorney for Appellant Joshua J. Woolcott, certify that on the 12th day of November, 2015, I caused a true and correct copy of

(1) REPLY BRIEF

to be served on the Respondent's attorney at the address and in the following manner indicated below:

Counsel for Respondents/Defendants City of Seattle: (X) Hand Deliver
ROBERT TAD SEDER, WSBA#14521 (X) Email
Assistant City Attorney
PETER S. HOLMES
Seattle City Attorney
Civil Division
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
TEL: 206-727-8498
FAX: 206-684-8284
E-Mail: Tad.sedert@seattle.gov

DATED this 12th day of November, 2015.

ANTHONY C JOHNSON

Anthony C. Johnson, WSBA #18073
Attorneys for Plaintiff/Appellant Joshua J. Woolcott
Law Offices of Anthony C. Johnson
1700 7th Ave., Ste. 2200
Seattle WA 98101
Tel: (206) 582-3500
Fax: (206) 447-1422
E-mail: tony@anthonycjohnsonlaw.com