73514-4

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No. 73514-4

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

JOSHUA WOOLCOTT,

Plaintiff/Appellant,

vs.

CITY OF SEATTLE,

Defendant/Respondent,

BRIEF OF RESPONDENT CITY OF SEATTLE

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I. INTRODUCTION

Joshua Woolcott injured his ankle when he stepped off a curb and into a pothole located outside a marked crosswalk. After gathering with friends for a couple of hours for a barbeque in a nearby parking lot, Woolcott and his group walked south towards Safeco Field for a Mariners game. Instead of using the 14-foot wide marked crosswalk, Woolcott stepped onto the street 2.5 feet outside the marked crosswalk and into a visible pothole. He alleges the City breached its duty of care to him by failing to maintain the street in reasonably safe condition for ordinary travel. CP 1-2.

The City does not have a duty to maintain the street area – outside the marked crosswalk – in reasonably safe condition for pedestrians. That area is designed for vehicle travel and is maintained for that purpose. The intersection at 4th Avenue South and South Royal Brougham Way is heavily used by vehicles including buses and large trucks. Pedestrians are directed to walk within the marked crosswalk by engineering design and by applicable law.

The City did not breach a duty to Woolcott because case law in Washington holds there is no duty to protect pedestrians outside of a crosswalk. This Court should affirm Superior Court Judge Ronald

Kessler's order dismissing Woolcott's claim on summary judgment.

II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

The following are the City's statements of the issues raised by the Trial Court's Order Granting Motion for Summary Judgment:

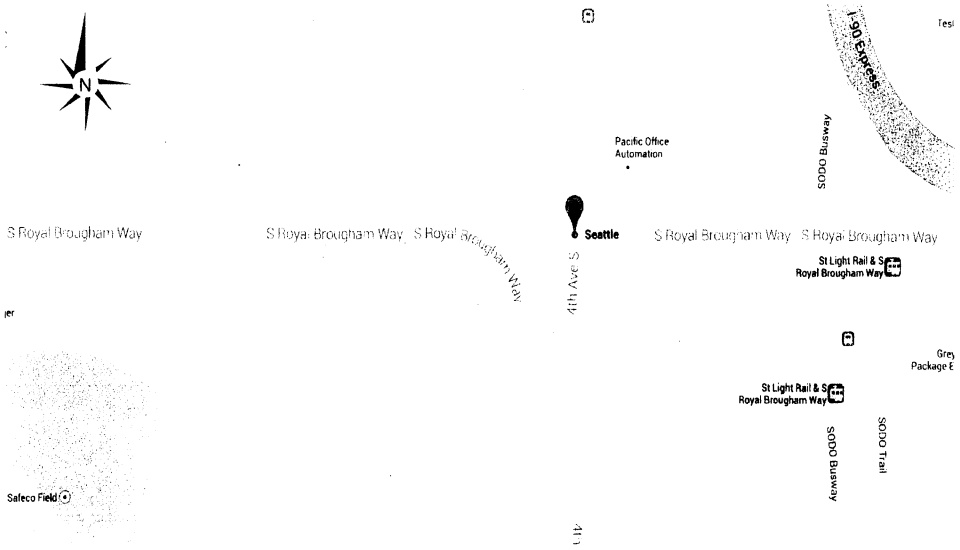
> 1. Whether the trial court properly granted the City's Motion for Summary Judgment because the duty owed to vehicles in streets is different than the duty owed to pedestrians inside a marked crosswalk;
>
> 2. Whether the trial court properly granted the City's Motion for Summary Judgment because Woolcott lacked sufficient evidence to establish a material issue of fact as to whether the City breached any duty owed; and
>
> 3. Whether the trial court properly granted the City's Motion for Summary Judgment because the City had no notice of prior falls at this location.

III. STATEMENT 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 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 heading to the games 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. WOOLCOTT'S ACCIDENT

The circumstances of the accident are not in dispute. On April 8, 2011, Woolcott met friends for a barbeque in the Pacific Automation Office Building parking lot just north of the intersection in question and close to near Safeco Field. CP 121-122. At around 7:00 P.M. 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 Wolcott 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 Woolcott says he was standing. For the purposes of the underlying motion alone, the City accepts Woolcott's version.) CP 11. 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, 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). 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. 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 AND AUTHORITY

A. STANDARD OF REVIEW

Since review in this case is de novo, the appellate court should conduct the same inquiry as the trial court and view all material facts and reasonable inferences from them most favorably to the appellants. *Renner v. City of Marysville*, 145 Wash. App. 443, 448-49, 187 P.3d 286 (2008). Summary judgment is appropriate if the pleadings, affidavits, and depositions establish both the absence of genuine issues of material fact and movant's entitlement to judgment as a matter of law. *Id.* Whether the City owed a duty, and the nature of that duty (the standard of care) are questions for the court to decide. *Tincani v. Inland Empire*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994); *Gall v. McDonald Indus.*, 84 Wash. App. 194, 202-03, 926 P.2d 934 (1996). Where a plaintiff does not produce evidence sufficient to show that the defendant breached "the *required* standard of

care," summary judgment must be entered. *Walker v. King Cy. Metro*, 126 Wash. App. 904, 908, 109 P.3d 836 (2005) [emphasis supplied]. A non-moving party may not rely on speculation or argumentative assertions to defeat summary judgment. *Craig v. Washington Trust Bank,* 94 Wash. App. 820, 824, 976 P.2d 126 (1999).

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, 44 P.3d 845 (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, 597 P.2d 101 (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, 223 P.3d 1230 (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:

- "No pedestrian shall cross an arterial street other than in a crosswalk. . . ." SMC 11.40.140 (Prohibited Crossing Upon Arterial Streets).

- Pedestrians, "facing a "WALK" word legend or walking person symbol may cross the roadway in the direction of the signal." SMC 11.50.270 ("Walk" Pedestrian-control Signal).

- Pedestrians "facing a steady or flashing "DON'T WALK" word legend or a hand symbol signal shall not enter the roadway. . . ."SMC 11.50.280 ("Don't walk" Pedestrian-control Signal).

- Pedestrians are prohibited from walking in the roadway if sidewalks are provided. RCW 46.61.250 (Pedestrians on Roadways).

- Pedestrians are prohibited from bolting into traffic when a vehicle is too close to stop. RCW 46.61.235 and SMC 11.40.060.

- Pedestrians must use a crosswalk to cross the street when they are between adjacent traffic-controlled intersections and "pedestrians crossing a roadway at any point other than within a marked crosswalk . . . shall yield the right-of-way to all vehicles upon the roadway." RCW 46.61.240 (Crossing at other than crosswalks).

- To further encourage the use of crosswalks, the law provides that vehicles must yield to pedestrians who are using crosswalks. RCW 46.61.235(1).

These statutes and ordinance make clear that crosswalks are the required crossing location and in exchange, pedestrians enjoy the right-of-way when using a crosswalk. As the Court in *Chen* articulated:

> By establishing certain presumptions in their favor, the law directs pedestrians to use marked crosswalks. Therefore, the city has a corresponding duty to maintain its crosswalks in a manner that is reasonably safe for ordinary travel in light of the circumstances at each particular crosswalk.

Chen, 153 Wash. App. at 906-07. In *Chen,* because the City had marked the crosswalk and directed pedestrians to cross there the Court wrote, "[T]he city had a duty to ensure that the sidewalk would be reasonably safe *for its intended use. . . .*" *Id.* at 907 (emphasis added).

In this case, 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, 773 P.2d 434 (1989); *Hansen v. Washington Natural Gas Company*, 95 Wn.2d 773, 632 P.2d 504 (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. 265. McKee tripped when crossing a street in downtown Edmonds. Crosswalks were located on either end of the block but plaintiff chose not to use the crosswalks and instead crossed mid-block. *Id.* at 266. McKee tripped in a 2-inch 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 in 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.

Hansen likewise controls that 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.

Woolcott dismisses *McKee* and *Hansen* as distinguishable because Woolcott fell within a few feet of the marked crosswalk instead of mid-block. 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; accordingly, the duty owed is 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. .

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. Woolcott is correct that foreseeability is an element of the duty analysis. *Keller,* 146 Wn.2d at 243 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.

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 Woolcott to walk where he chose to walk. Even though police officers, in their discretion, may 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 Woolcott would mean that the law requires the City to maintain the entire length of all streets in reasonably safe condition for pedestrians. 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).

D. THERE IS NO EVIDENCE THE CITY BREACHED ANY DUTY TO PEDESTRIANS WITHIN THE CROSSWALK OR TO VEHICLES OUTSIDE THE MARKED CROSSWALK.

While the City recognizes that breach is usually an issue for the trier of fact, it may be determined as a matter of law "where reasonable minds could not differ." *Estate of Jones v. State*, 107 Wash. App. 510, 518, 15 P.3d 180 (2000). Here, Woolcott has no evidence that the City breached any duty. He incorrectly argues the City's Motion is based entirely on the lack of duty. The City raised the issue of breach in its opening brief and the City's Motion is based on both elements of negligence. CP 15-17. As to the marked crosswalk, the only evidence before the court comes from the City of Seattle Traffic Engineer Dongho Chang who explained the engineering rules used for the type of marking at the location of 4th Avenue South and South Royal Brougham Way. CP 22,

23, 25-31. Woolcott has not cited any authority or provided a contrary traffic engineering opinion or criticism of the crosswalk design.

As to the street, the City's maintenance program was presented during the deposition of engineer Elizabeth Sheldon who is the Manager of the Pavement Engineering and Management Section of SDOT. She explained the City responds to pothole complaints and the City's goal is to make repairs within three business days. CP 345, 353-54. Although the subject pothole would not be considered a hazard, if the City had received a complaint, the City would have repaired it to prevent further pavement damage. Due to the variables with potholes, she could not estimate how long the particular pothole had been in place. CP 355-56. Ms. Sheldon provided information about the thousands of potholes repaired each year from 2011 to 2015. CP 359-60. She also provided budget information about the millions of dollars spent by the City each year on pothole repair. CP 361. Woolcott cites to no authority or expert opinion that this maintenance program is not consistent with the standard of care by a municipality in the asset management of its pavement.

E. THE CITY BREACHED NO DUTY HERE BECAUSE IT HAD NO NOTICE OF ANY PRIOR ACCIDENTS AT THIS LOCATION

There is no evidence in the record to indicate that the pothole in

question was ever reported to the City, and in fact the only evidence is that it was NOT reported. CP 111. Absent notice, there can be no liability for the City for an injury which occurred outside the crosswalk. *Rodriguez v. U.S. Postal Service*, 2009 WL 210707 *2 (W.D. Wa. 2009).

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

Woolcott cites *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (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. Here, walking in the street instead of the crosswalk was Woolcott's choice. The traffic control officers explained that despite their efforts to keep pedestrians within the marked crosswalks, pedestrians tend to cross where they want. CP 154-155, 54-56. Unlike the pedestrians in *Berglund,* Woolcott was not forced to walk where he chose to walk; nor was he directed to do so. Woolcott argues that the City directed him to cross outside the marked crosswalk but Woolcott never testified to this at his deposition and makes no such statement in his declaration. CP 117-118, 122.

To support his argument that he was directed to walk outside the crosswalk in April of 2011, Woolcott states: "The City directed and allowed Mr. Woolcott to cross the intersection where he did, just as the city continues to do so today as evidenced by the photos taken on opening day of 2015." Appellant's brief at 8. The City objected and moved to strike these photographs under KCLCR 56(e) as irrelevant and not probative under ER 401 to 403, and as lacking a proper foundation under ER 901. CP 326. The record does not show if Judge Kessler ruled on that motion, and it is renewed here. The main problem with the photographs from an evidentiary standpoint is that they do not address the point they are alleged to support, that Woolcott was "directed" to cross outside the intersection. They also are taken after the pothole in question was patched, so the accident scene has materially changed. In 2011, Mariner's Opening Day was a night game, and they were picked to finish in fourth place in their division, and in 2015, Opening Day was a day game, and they were picked by some to get to the World Series. http://www.seattletimes.com/sports/mariners/expert-predictions-for-the-2015-major-league-baseball-season-2/. The photos should be disregarded.

Because Woolcott's argument that he was "directed" to walk outside the crosswalk is not based on any admissible evidence, it is simply an unsupported assertion, which should be disregarded. *Craig v.*

Washington Trust Bank, 94 Wn. App. 820, 824, 976 P.2d 126 (1999) (nonmoving party may not rely on speculation or argumentative assertions).

The City had installed this marked crosswalk in compliance with national engineering standards and directed pedestrians to use the marked crosswalk consistent with applicable law. RCW 46.04.290, SMC 11.14.315 and 11.40.140. The City not only complied with applicable standards, it went above and beyond those requirements by installing a larger-than-required 14-foot wide crosswalk on the east leg and a 20-foot wide crosswalk on the south leg of the intersection to accommodate the heavy pedestrian traffic for special events and for the Sound Transit train traffic. CP 22, 23, 25-31.

Further, unlike *Berglund*, here there is no evidence of complaints regarding this crosswalk or notice to the City of problems for pedestrians with the markings or the crosswalk. In fact, Woolcott's accident is the only complaint or claim the City has ever received regarding that pothole. CP 111. Woolcott also argues that because the City will sometimes stop vehicle traffic and allow a large group of pedestrians to cross through the intersection **after** the game, this somehow creates a duty to pedestrians. While it is true that officers will allow pedestrians to use the intersection under special circumstances (*e.g.* when there is a close game and

thousands of fans leave Safeco at the same time), this was not the case for Woolcott as he was crossing **before** the game with average pedestrian traffic. The difference is significant. Fans tend to arrive in a steady stream starting several hours before a game, especially opening day which has more pre game activity ceremony than an average game. They then leave in a steady stream if the game is one-sided, and only a close game will result in a larger group leaving at one time.

Furthermore, there is a difference between permissive use and intended use. Unlike the pedestrians in *Berglund,* Mariner fans still have the ability to use crosswalks which are specifically designed for their use. The intersection at 4th and Royal Brougham is still designed and *intended* and maintained for use by vehicles the vast majority of the time.

V. CONCLUSION

Cities have a duty to maintain streets and sidewalks in reasonably safe condition for ordinary travel. WPI 140.01. Ordinary travel means the "intended use" of the area which in Woolcott's case is use by vehicles of the street. Although pedestrians may choose to venture outside of the marked crosswalks, the statutes do not afford them protection when they do so. Similarly, this claim for negligence should not stand as there is no evidence the City breached any duty owed to Mr. Woolcott. Judge Kessler's decision should be affirmed.

DATED this 12th day of October, 2015.

PETER S. HOLMES
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PROOF OF SERVICE

TAMARA STAFFORD 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 October 12th, 2015, I requested ABC Legal Messengers to serve, by 5:00 p.m. on October 12th, 2015, a copy of this document upon the following counsel:

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I further state that I requested ABC Messengers to deliver on October 12th, 2015 for filing, the original and one copy of this document to the Court of Appeals, Division I at the business address listed below:

Court of Appeals, Division I
Clerk's Office
600 University St
One Union Square
Seattle, WA 98101-1176

DATED this 12th day of October, 2015.

TAMARA STAFFORD