73514-4

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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.

BRIEF OF APPELLANT

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INTRODUCTION

The issue on appeal in this case is whether the City of Seattle's duty or obligation to maintain the public right of way for ordinary travel extends to a pedestrian who broke his foot on a pothole one step off the curb and a couple of feet to the right of a painted crosswalk, but well to the left of the outside sidewalk curb lines extending through the intersection. In this case, the existence of the city's duty or obligation turns on whether such pedestrian's use was "ordinary travel" considering the totality of circumstances of how the intersection is used by pedestrians and whether such use was reasonably foreseeable by the city. The consideration of all these circumstances should be for the trier of fact to decide.

On April 8, 2011, Seattle Mariners Opening Day, Joshua J. Woolcott suffered a broken foot after he took one step off the curb to cross the street at the intersection of Royal Brougham Way and Fourth Avenue South, an intersection where heavy pedestrian and vehicle traffic that day were specially designated to be controlled and directed by the Seattle Police Department.

Woolcott presented evidence to the trial court that his use of the right of way was, at a minimum, reasonably foreseeable by the city and, therefore, an implied invitation based upon the totality of circumstances.

Indeed, Woolcott presented evidence that his use of the right of way was expressly directed and allowed by the city's police officers in control of the intersection pursuant to a written plan. The city presented evidence that the place where Mr. Woolcott stepped and broke his foot was not a walking area constituting a reasonably anticipated and intended use of the public right of way. Since both parties presented competent evidence on the foreseeable use of the intersection giving rise to the existence of the city's duty or obligation, the issue must be determined by the trier of fact.

ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred in granting the City of Seattle's summary judgment motion which dismissed Mr. Woolcott's claim against the city, by order entered on May 8, 2015.

Issue Pertaining to Assignment of Error

Woolcott has presented evidence that the city anticipated and even specifically planned for the intended use of this intersection that included heavy pedestrian traffic safely walking outside the painted crosswalk markings on numerous special event days throughout the year including Mariners Opening Day. The city presented evidence that the place where Woolcott walked was not a place where pedestrians were expected to

walk. Is this a material issue to be decided by the trier of fact? That is, is walking where Mr. Woolcott was injured a reasonably foreseeable and anticipated use constituting "ordinary travel" such that it imposes an obligation or duty on the city to design and maintain the right of way so that it is safe for pedestrians?

STATEMENT OF THE CASE

On Friday, April 8, 2011, Joshua Woolcott planned to attend the home opener for the Seattle Mariners' 2011 season. CP 121-122 [Declaration of Joshua J. Woolcott, ¶ 2]. At about a quarter to 7 p.m., he walked with friends and other fans southbound on the east sidewalk of the northeast corner of the intersection of Royal Brougham Way and Fourth Avenue South. *Id.* He was walking at a normal, steady pace in the middle of the sidewalk in a parallel path alongside the Pacific Office Automation building. *Id*, [¶¶ 2,3]. As Mr. Woolcott approached the crosswalk area at the intersection, he saw a police officer standing near the middle of Royal Brougham Way to his left or the east side of the east crosswalk leg of the intersection. CP 122 [¶ 2]. The officer was blocking westbound vehicle traffic while waving and directing Mr. Woolcott and other pedestrian traffic through the intersection. *Id.*

As he approached the curb leading across the intersection, Mr. Woolcott was looking forward at the crossing signal across the street and

at the traffic officer waving him through. *Id.* [¶ 3]. His intended path from the middle of the sidewalk, parallel to the side of the building and parallel with Fourth Avenue South, was a line straight across from the northeast curb corner to a point directly across at the same spot on the southeast curb corner. *Id.* He walked at a normal steady pace without slowing down or speeding up and, in one fluid motion, stepped off the curb with his right foot forward. *Id.* He had not noticed the pothole below the curb as he approached and his right foot caught the pothole on his first step off the curb. *Id.* [¶¶ 3,4].

The pothole Mr. Woolcott tripped on was not located on the painted crosswalk markings. CP 122 [¶ 5].

The pothole was located at the edge of a repaired utility strip running parallel to the west side of the painted crosswalk markings for the east leg of the intersection. CP 123 [¶¶ 6-9], CP 127 [¶ 8], CP 303-305, 311-312, 319-323; CP 126 [¶ 4], CP 193-196 (CR 30(b)(6) designee Dustin Weyer); CP 127 [¶ 7], CP 260-261 (CR 30(b)(6) designee Elizabeth Sheldon). Thus, as Mr. Woolcott was taking his first step off the curb, the pothole was located a couple of feet to the right of the painted crosswalk in the repaired utility strip, but well inside the edge of the outside sidewalk curb lines to the right (see CP 303, 305). The repaired utility strip was there since 1994 or 1995. CP 127 [¶ 7], CP 264, 269 (CR

30(b)(6) designee Joseph Taskey). Indeed, the city readily identified for repair the pothole where Mr. Woolcott fell. CP 193-194.

The city designed and painted the east crosswalk area with striping in 2005. CP 10, 22. The city has not produced an engineering study for the design and marking of the east crosswalk leg and cannot say what specific factors were actually considered in designing the striping plan used. CP 126 [¶ 5], CP 214, 217-224, 227-235, 239-242, 246-248 (CR 30(b)(6) designee Dongho Chang). In sum, specific factors to consider in exercising engineering judgment might include, for example, vehicle & pedestrian traffic counts, daily regular use of intersection by pedestrians, use of intersection on special event days (Mariners, Seahawks, Sounders, etc.), etc. In fact, in 2005 the city designed the 14-foot striping width for this east crossing leg of the intersection based only on the ordinary daily use of the intersection; the city did not consider special uses of the intersection by heavier pedestrian traffic such as that on Mariners Opening Day 2011. CP 126 [¶ 5], CP 233-234.

Although the city did not contemplate special uses of the intersection by heavy pedestrian traffic when it designed and marked the crosswalk, the city worked with the Mariners to develop a written special events traffic control plan for this intersection. CP 126-127 [¶¶ 5,8], CP 225-226, 230; CP 293-297. Despite the written traffic control plan, the

city allows the officers assigned to the intersection the discretion to alter the plan; directing and controlling pedestrian traffic as circumstances warrant to ensure their safety. CP 126 [¶ 2], CP 129, 135-136, 139, 143, 145, 154, 161-163; CP 126 [¶ 3], CP 165, 167-169, 171-172, 182-183.

Notably, at least after Mariners games, the city allows all-ways crossing at this intersection, through the middle of the entire intersection, **including the area where Mr. Woolcott fell**. CP 126 [¶ 3], CP 179-180, 182; CP 127 [¶ 6], CP 261-262.

ARGUMENT

1. The City of Seattle owes a duty to Mr. Woolcott for his reasonably anticipated use of the intersection, whether or not Mr. Woolcott is negligent or fault-free.

The pertinent pattern jury instruction, as applied to the totality of facts of the instant case, establishes that a duty exists and is owed by the City of Seattle to plaintiff Mr. Woolcott.

> **WPI 140.01 Sidewalks, Streets, and Roads – Duty of Governmental Entity**
>
> The [city] 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.

The comment to WPI 140.01 cites our Supreme Court's decision in *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), which provides a thorough survey of applicable law establishing the existence of

a municipality's duty and obligation to keep its public right of ways reasonably safe for reasonably anticipated use by the traveling public. Municipalities are held to the same negligent standards as a private person or corporation. *Keller*, 146 Wn.2d at 242-43, citing RCW 4.96.010(1). Thus, the city is held to the same general duty of care as that of a reasonable person under the circumstances. *Keller* at 243.

Whether a duty exists turns on the issue of foreseeability and generally includes a determination of whether the incident that occurred was foreseeable. *Id.* at pp. 243, 248, citing *Berglund v. Spokane County*, 4 Wn.2d 309, 313-15, 321, 103 P.2d 355 (1940).

The existence of the city's duty is established independent of the injured person's own negligence or fault, if any. *Keller* at pp. 243, 248-51, 254.

Of course, the city does not have a duty to anticipate all "imaginable" acts of negligent travelers; instead, the city "has a duty only to exercise ordinary care to build and maintain its roadways in a reasonably safe manner for the foreseeable acts of those using the roadways." *Keller* at p. 252, citing *Berglund* at 319-21.

The court in *Berglund* noted that if a municipality in any manner extends an invitation to the public to walk on its improved right of ways, 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).

At a minimum, on special event days such as Mariners games, the city impliedly – if not expressly – invited pedestrian traffic over the area where Mr. Woolcott fell. The city took direct and active control over the use of the intersection for all Mariners games. Notwithstanding the city's written plan to direct and control pedestrian traffic at this intersection for all Mariners games, the city's police officers were given authority and discretion as dictated under the circumstances to direct and control pedestrian traffic at this intersection to insure the safety of pedestrians. 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 Mariners Opening Day 2015. CP 123-124 [¶ 9]; CP 127 [¶ 8], CP 317-323.

Moreover, the city's admission that – at least after Mariners games – it directs and allows pedestrian traffic flow over this entire intersection, **including over the area where Mr. Woolcott fell**, is dispositive on the issue of whether the city owes a duty to Mr. Woolcott and others to keep the area safe for expected pedestrian travel. The use – walking over the area where Mr. Woolcott fell on Mariners game days – was not only

reasonably anticipated or expected, but it was expressly allowed at the city's invitation and direction. Thus, since the city directed and allowed pedestrian traffic over the area where Mr. Woolcott fell, it owed a duty to design and maintain and repair that area for the safe travel of pedestrians. Obviously, if the hole had been repaired for the benefit of only pedestrians walking after the games, any pedestrians anticipated to walk over it before games would not have tripped.

2. **The City's unilateral design and marking of the crosswalk that serves as a guide for pedestrian traffic is not determinative of whether or not any duty exists and is owed by the city.**

Painted crosswalk markings at signalized intersections provide "**guidance**" for pedestrians by delineating "approaches" to and within the intersection. CP 22 [¶ 3], CP 26 (§3B.17 of the Manual on Uniform Traffic Control Devices "MUTCD"); CP 228-229. Thus, the crosswalk markings designed and applied by the city at a signalized intersection serve as a **guide** for centering pedestrian traffic. By contrast, §3B.17 of MUTCD provides that "[a]t **nonintersection** locations, crosswalk markings **legally establish** the crosswalk." (emphasis supplied) CP 26. Thus, because vehicle traffic is not being stopped as it is in a signal-controlled intersection, painted crosswalks at a midblock location, for example, serve as more than a guide to pedestrians. In the instant case, the

crosswalk area is within the signal-controlled, police-controlled intersection.

Again, the issue of whether a duty is imposed upon the city turns on foreseeability and is established independent of Mr. Woolcott's own negligence or fault, if any. See *Keller* at pp. 243, 248-51, 254. Even if it were to be determined that Mr. Woolcott used the crosswalk area unlawfully, that does not mean the city owes no duty. See *Keller* at p. 248 citing *Berglund* at p. 320. Indeed, such determination as to the reasonableness of Mr. Woolcott's conduct goes to comparative fault and presents a question of fact as to whether he acted reasonably. See *Beireis v. Leslie*, 35 Wn.2d 554, 214 P.2d 194 (1950) where the court held in a pedestrian/motor vehicle collision case that it was a question of fact for the jury to determine whether or not a pedestrian, who went four or five feet beyond the **mid-block** marked crosswalk (not at a signal-controlled intersection crosswalk area), acted reasonably.

Although we do not reach the issue of breach of duty in response to the city's motion to dismiss based solely on lack of a duty owed, it is worthwhile to note that there are significant issues as to whether the city negligently designed the 14-foot wide striping for this crosswalk. The city cannot say what specific factors it actually considered in designing the marked crosswalk. CP 126 [¶ 5], CP 246-248. The city can only say it

designed the marked crosswalk based upon normal daily use and not special use events such as 81 annual Mariners games. CP 126 [¶ 5], CP 229-230, 233-234. The city cannot explain why it did not extend the striping to the curbline extensions as it does with other intersections. CP 126 [¶ 5], CP 240, 246-248. Although the totality of these circumstances are questions of fact for the jury to consider when determining whether there was a breach, they do highlight the issue of whether the city is entitled to dodge its obligation to all pedestrians in an intersection containing a painted crosswalk by designing a narrow path that it should know cannot accommodate reasonably anticipated heavy pedestrian traffic.

3. **Even if the law allowed for the determination of Mr. Woolcott's use to eliminate the city's duty, Mr. Woolcott's use was not unlawful. Issues relating to Mr. Woolcott's use, at most, go to the issue of contributory negligence to be determined by the trier of fact**.

Mr. Woolcott's position is that he did not jaywalk or unlawfully cross the intersection at a location where he was not directed to cross. The city principally relies on two cases that are distinguishable. Unlike in *Hansen v. Washington Natural Gas and the City of Seattle*, 95 Wn.2d 773, 632 P.2d 504 (1989) and *McKee v. City of Edmonds*, 54 Wn.App. 265, 773 P.2d 434 (1989), Mr. Woolcott did not abandon the sidewalk in the

middle of the block and cross the street. Here, Mr. Woolcott did not cross diagonally mid-block. He did not cross mid-block between two intersections with marked crosswalks. He did not trip on an unsafe area located in the middle of the street. Mr. Woolcott took one step off the curb,[1] in a direct line from the center of the sidewalk into the street, well within the curbline extension of the two opposing curb corners, on the inside of the crosswalk area abutting and parallel to the painted crosswalk marking. And, unlike in *Hansen* and *McKee*, police officers were present, directing and controlling pedestrian traffic, waving and allowing Mr. Woolcott to walk across in the path he took over the area where he fell.

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.

As a matter of law, a duty of ordinary care is imposed on the city to make its public right of way reasonably safe for travel where Mr. Woolcott and other Mariners fans were anticipated, allowed and directed to travel. Even if the trier of fact were to determine that somehow Mr. Woolcott's use was negligent or unlawful, that does not abolish the duty

[1] Mr. Woolcott stepped off of a curb section that was recently repaired because the city and Mariners determined it to be a high traffic pedestrian area. See CP 314; CP 309, 311; CP 206-210; CP 250, 257-262.

owed by the city, but merely goes to the issue of comparative fault. Consequently, the trial court order granting the city's motion for summary judgment dismissal brought on the basis that it owes no duty to Mr. Woolcott because he tripped on a hazard just outside a marked crosswalk designed by the city should be reversed, and this case should be submitted to arbitration/trier of fact for determination of responsibility and fair compensation for Mr. Woolcott's injury.

Dated this 10th day of September, 2015.

Respectfully submitted,

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73514-4-I

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: APPELLATE BRIEF

I, Anthony C. Johnson, attorney for Appellant Joshua J. Woolcott, certify that on the 10th day of September, 2015, I caused a true and correct copy of

(1) APPELLATE BRIEF

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

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