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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANGELINA KOLOMIETS,

Plaintiff,

v.

CITY OF SEATTLE; KING COUNTY; and
DYLAN WALKER,

Defendants.

No. 22-2-01694-9 SEA

DEFENDANT CITY’S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

The truism that a picture is worth more than a thousand words sometimes proves its worth. On July 30, 2019, Plaintiff Angelina Kolomiets failed to yield the right of way and suddenly



1 jaywalked into a protected bike lane without looking for approaching cyclists. Not only did Ms.
2 Kolomiets fail to yield to oncoming traffic, she compounded her negligence by entering an arterial
3 roadway, with a bright green PBL, facing away from the direction of travel on the PBL and looking
4 down at an object in her hand. Ferguson Decl. on SJ, Ex. A.¹ On July 30, 2019, Ms. Kolomiets
5 admitted that she stepped directly into the path of Defendant Dylan Walker, causing the collision.

6 **HISTORY OF PRESENT ILLNESS:**

7 Angelina Kolomiets is an otherwise healthy 25-year-old female brought in by AMR who presents after a
8 pedestrian versus bicycle collision this morning. The patient was the pedestrian, she states she stepped off
9 the bus, tried to avoid another passenger, accidentally entered the bike lane, and was struck. She states that
10 she fell and landed on her left side. She struck the left left side of her head, but denies loss of consciousness.
11 She also landed on her left shoulder and arm. She states that she has left-sided jaw pain, headache, left
12 shoulder, left hand, and left lower leg pain. Additionally, she does note some numbness over the left cheek.
13 She also complains of pain in the middle of her back. She denies any trauma to her dentition. She denies
14 chest or abdominal pain. She denies any changes in her vision, double vision, or eye pain.

15 Ex. B (emphasis added).

16 As a jaywalker, Ms. Kolomiets breached her legal duty to yield to traffic on the roadway under
17 RCW 46.61.235 and Seattle Municipal Code (SMC) 11.40.060. She also violated her duty to use a
18 crosswalk when entering an arterial roadway. SMC 11.40.140. The City owed Ms. Kolomiets no duty
19 to maintain the entire course of an arterial road in a condition safe for pedestrian travel. Ms. Kolomiets
20 is the sole proximate cause of her alleged injuries and Defendant City of Seattle is entitled to summary
21 judgment of dismissal.

22 **II. FACTS SUPPORTING SUMMARY JUDGMENT**

23 **A. The Location Where the Traffic Incident Occurred**

Roosevelt Way NE is an arterial road connecting north Seattle to the University District and
serving thousands of motorists, bus commuters, pedestrians, and bicyclists. Decl. Venu Nemani, ¶ 8;
Ferguson Decl., Ex. C; *see also* Ex. D., Ordinance No. 118401 (identifying arterials). In late 2014,
The Seattle Department of Transportation (SDOT) began a repaving project that modified Roosevelt

¹ All exhibits are attached to the Declaration of A. Janay Ferguson, unless otherwise indicated.

1 Way NE from NE 65th down to the University Bridge, the Roosevelt Way NE Arterial Asphalt and
2 Concrete (AAC) Project. Nemani Decl., ¶ 5. Two features of the Project are at issue in this litigation.

3 First, the Project developed bus islands (also referred to as transit islands) along Roosevelt
4 Way NE. Bus islands permit buses to pick-up and discharge passengers without having to pull over
5 to the side of the road at stops and then wait for a break in traffic to get back into the travel lane. *See*
6 Ex. E, Venu Nemani Dep. 3/23/23, 35:4-8; *see also* Ex. C, p. 2. Bus islands increase bus speed and
7 reliability, promoting the use of public transit. Ex. F, City CR 30(b)(6) Dep. 3/23/23, 13:5-9; *see also*
8 Ex. C. The bus islands in the Project were designed and constructed with input from King County
9 Metro and included Bus Island No. 6 (the Project designation), or Transit Stop No. 9610 (King County
10 Metro’s stop designation), the bus island located on southbound Roosevelt Way NE near 42nd Street
11 where Ms. Kolomiets alighted on July 30, 2019. *See* Ex. G, Dep. Daniel Wells, 11/17/22, 24:2-12.

12 Second, the Project included installation of a protected bike lane (PBL) on the west side of
13 Roosevelt from NE 65th to the University Bridge. Ex C. PBLs are a means of improving cycling
14 access and safety for cyclists of various skill levels because they separate cyclists from motorized
15 traffic. Ex. E, Nemani Dep, 12:9—13:4; *see also* Nemani Decl., ¶¶ 9-10.

16 At the conclusion of the Project, along the stretch of Roosevelt Way NE between NE 43rd
17 Street and NE 42nd Street, Roosevelt Way NE consisted of two vehicular lanes traveling in one
18 direction to the south and a protected bicycle lane (PBL) traveling in one direction to the south.
19 Nemani Decl., ¶ 8. There was a transit island between the two general purpose lanes and the PBL on
20 this block. *Id.* The PBL is a portion of the principal arterial street designed for preferential or exclusive
21 use of bicycles. *Id.* ¶ 9.

22 Crosswalks were designated to identify the locations for pedestrians to cross the PBL.
23 Crosswalk markings provide “guidance for pedestrians who are crossing roadways by defining and

1 delineating paths on approaches to and within signalized intersections” and at “non-intersection
2 locations, crosswalk markings legally establish the crosswalk.” *Id.* ¶¶11-12.

3 **B. The Traffic Incident Underlying Plaintiff’s Lawsuit**

4 On July 30, 2019, at about 8:44 a.m., Angelina Kolomiets exited a University of Washington
5 shuttle on her way to work. Ferguson Decl. on SJ, Ex. A. She was familiar with this location and had
6 used the shuttle regularly when traveling to work. Ex. H, Dep. Kolomiets 9/16/22, Vol. I, 33:3-25.
7 She knew that there was a bike lane adjacent to the bus island and that cyclists traveled down that
8 path. *Id.*, 421-25. She knew there was a cross walk. Ex. L, Kolomiets Dep. Vol. II, p.52:1-4. She had
9 experienced both cyclists stopping and not stopping at that location on earlier trips. *Id.*

10 Ms. Kolomiets exited the shuttle at Bus Island No. 6. *See* Ex. H, Dep. Kolomiets 9/16/22, Vol.
11 I, 33:3-25. As Ms. Kolomiets exited the shuttle, Defendant Dylan Walker was cycling south on
12 Roosevelt Way NE in the PBL. Ex. I, Dylan Walker Dep., 10/7/22, 67:20-68:10. Dr. Walker was
13 “covering his brakes,” but not actively braking as he neared the bus island. *Id.*, 65:7-16. Dr. Walker’s
14 accident reconstructionist, Nathan Rose, calculated Dr. Walker’s speed as approximately 20 m.p.h.
15 Ex. J, Nathan Rose Dep., 3/30/23, 22:11-14.

16 Ms. Kolomiets may have been rushing to attend a meeting scheduled for 9:00 a.m. Ex. H,
17 Kolomiets Dep. Vol. I, p. 34:9-15. In her Complaint, answers to written discovery, and deposition,
18 Ms. Kolomiets repeatedly described her route of travel across the PBL as originating from and then
19 continuing through the marked crosswalk:

20 I was in the marked pedestrian crosswalk over the bike lane. More specifically, I was
21 in the process of crossing the crosswalk and approaching the sidewalk. A bicyclist ran
22 into me, while I walked amidst others, some were in front of me and others walked
23 behind me. We were also crossing the same crosswalk in a lawful manner.

Ex. K, Pl. Ans. King County, Interrog. No. 17 (emphasis added); *see also* Compl. ¶ 4.12 (Dkt. No.

1). Ms. Kolomiets similarly asserted on multiple occasions that she had looked for oncoming bicycle

1 traffic from the edge of the curb in front of the marked crosswalk in the yellow detectable warning
2 surface:

3 Yeah. I had a 9 a.m. meeting, so I, you know, got ready for the day, caught the
4 shuttle, was taking it there, and then it stopped and let me off, and I got off of it like
5 I would normally do, and walked up to the little crosswalk area and looked both
ways, and didn't see anybody, so I started walking along with whoever else was
crossing the sidewalk with me, the crosswalk with me.

6 Ex. H, Kolomiets Dep., Vol. I, p. 34:9-15 (emphasis added).

7 Q: [Y]ou were at the edge of the curb here when you looked to the right. Is that
correct?

8 A: Yes.

9 Ex. L, Kolomiets Dep. Vol. II, p.75:1-4 (emphasis added).

10 Q: [W]hen you looked right and left, where were you standing?

11 A: On the yellow. Yellow square.

12 *Id.*, p.76:3-12 (emphasis added).

13 In contrast, Dr. Walker testified that Ms. Kolomiets suddenly stepped in front of him into the
14 PBL. Ex. I, Walker Dep. 67:20-68:10. Dr. Walker was forced to “immediately hit both brakes [on his
bicycle] as hard as [he] could” in an unsuccessful effort to avoid a collision with Ms. Kolomiets.

15 Finally, contemporaneous camera footage of the incident produced in response to subpoena by
16 a non-party significantly differs from Ms. Kolomiets’ inaccurate testimony in two important respects.
17 First, contrary to her sworn deposition testimony, Ms. Kolomiets did not cross the bike lane in the marked
18 cross walk. Ex. A. Second, Ms. Kolomiets did not step to the curb of the transit island and look to the
19 north from the yellow detectable warning surface. *See* Ex. A; *contra* Exs. G & K. Had Ms. Kolomiets
20 looked in the direction of travel from the location where she testified she checked for oncoming traffic,
21 she would have seen Defendant Walker, who was clearly visible. Ex. A. But rather than checking for
22 oncoming traffic – as Ms. Kolomiets’ voluntarily admitted she failed to do on the day of the Incident –
23 Ms. Kolomiets stepped into the bike lane without warning and without looking for oncoming cyclists.

1 Ex. B. So, Ms. Kolomiets caused the collision with Dr. Walker and all claims against the City of Seattle
2 should be dismissed with prejudice.

3 III. ISSUES PRESENTED

4 1. Whether the City is entitled to dismissal of Plaintiff Angelina Kolomiets' claims in their
5 entirety with prejudice when the City owed her no duty to maintain the arterial roadway in a condition
6 safe for pedestrian travel; she violated SMC 11.40.140 by attempting to cross an arterial road outside a
7 marked crosswalk; and she violated RCW 46.61.240 and SMC 11.40.090 by failing to yield to Defendant
8 Dylan Walker; actions that are the sole proximate cause of the collision and her alleged damages.

9 2. In the alternative, in the unlikely event that Plaintiff Angelina Kolomiets produces
10 sufficient evidence to avoid summary judgment of dismissal, whether the City's liability is several
11 only as a matter of law because Ms. Kolomiets cannot be a fault-free plaintiff under RCW
12 4.22.070(1)(b).

13 IV. EVIDENCE RELIED ON

14 Declaration of A. Janay Ferguson with all attachments thereto, A through L; Declaration of Venu
15 Nemani with all attachments thereto, A through C; and the records and pleadings herein.

16 V. ARGUMENT AND AUTHORITY

17 A. Summary Judgment Standard

18 Summary judgment proceedings exist so parties can avoid useless trials. *Davis v. West One*
19 *Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007) (citations omitted). When there is no
20 genuine issue of any material fact and the moving party is entitled to judgment as a matter of law,
21 summary judgment is proper. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011) (citations
22 omitted); *see also* CR 56(c). A defending party may support its motion for summary judgment by
23 "merely challenging the sufficiency of the plaintiff's evidence as to any material issue." *Las v. Yellow*

1 *Front Stores*, 66 Wn. App. 196, 198, 839 P.2d 744 (1992). In response, the plaintiff must present
2 evidence to establish the genuine issue of material fact and cannot rely on “mere allegations or denials
3 of a pleading,” but instead, must set forth specific facts that would be admissible evidence to show
4 there is a genuine issue for trial. *Cano-Garcia v. King County*, 168 Wn. App. 223, 249, 277 P.3d34
5 (2012) (holding inadmissible evidence cannot be considered on summary judgment); CR 56(e). “If
6 plaintiff ‘fails to make a showing sufficient to establish the existence of an essential element of that
7 party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should
8 grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)²
9 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

10 The existence and the scope of the City’s duty hinges on Ms. Kolomiets’ failure to use a
11 plainly marked crosswalk and observe her duty to yield to oncoming traffic. Ms. Kolomiets cannot
12 reasonably dispute objective, photographic evidence, that she failed to cross an arterial road in the
13 marked crosswalk, that she crossed the arterial diagonally looking away from the direction of
14 oncoming traffic, and that she failed to yield to oncoming traffic as she was required to do. Because
15 Ms. Kolomiets recklessly caused this collision, her claims against the City of Seattle should be
16 dismissed on summary judgment.

17 **B. Ms. Kolomiets Violated the Rules of the Road**

18 Washington’s statutory scheme regulating its roadways is intended to be applicable and
19 uniform throughout the state and in all incorporated cities and towns and all political subdivisions.
20 See RCW 46.08.020. “Local authorities may, however, adopt additional vehicle and traffic
21 regulations” that do not conflict with the State’s provisions. *Id.* The driver of any vehicle, a person
22 operating a bicycle, and every pedestrian shall . . . obey any official traffic control device applicable

23 _____
² *Overruled in part on other grounds*, 130 Wn.2d 160, 922 P.2d 59 (1996).

1 thereto . . .” RCW 46.61.050. Traffic control devices include “signs, signals, markings, curb
2 markings, cross-hatchings, buttons and other devices officially placed or erected for the purpose of
3 regulating, warning or guiding traffic.” SMC 11.14.650. “Crosswalk” means the portion of the
4 roadway between the intersection area and a prolongation or connection of the farthest sidewalk line
5 or in the event there are no sidewalks then between the intersection area and a line ten feet therefrom,
6 except as modified by a marked crosswalk. RCW 46.04.160. A “[m]arked crosswalk” means any
7 portion of a roadway “distinctly indicated for pedestrian crossing by lines or other markings on the
8 surface thereof.” RCW 46.04.290.

9 The highway is “the entire width between the boundary lines of every way publicly
10 maintained when any part thereof is open to the use of the public for purposes of vehicular travel.”
11 SMC 11.14.245. The roadway is the “portion of a highway improved, designed, or ordinarily used
12 for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is
13 used by persons riding bicycles.” SMC 11.14.530. An “[a]rterial street” means every street, or portion
14 thereof, designated as such in Chapter 11.18. SMC 11.14.035. Arterial streets are the streets
15 designated by Ordinance No. 118401. SMC 11.18.010; Ex. D. Roosevelt Way NE is a designated
16 arterial street. *Id.*; *see also* Compl. ¶ 4.3 (“The location at issue in this claim is a limited section of
17 Roosevelt Way NE, a two-lane, one-way arterial street with a protected bike lane on one side of the
18 street”).

19 Except for purposes of licensing under Chapter 11.22, a bicycle can be a vehicle under the
20 SMC. *See* SMC 11.14.710 (defining a vehicle as a “device capable of being moved upon a street . .
21 .”). A “[b]icycle lane” is the “portion of the roadway which has been designated by traffic control
22 devices for preferential or exclusive use by bicycles.” SMC 11.14.060. Cyclists have all of the rights
23 and shall be subject to all of the duties applicable to the driver of a vehicle. RCW 46.61.755(1).

1 A “[p]edestrian” is any person who is afoot or who is using a wheelchair, a power wheelchair,
2 or a means of conveyance propelled by human power other than a bicycle. RCW 46.04.400; SMC
3 11.14.445. With exceptions that do not apply here, “[n]o pedestrian shall cross an arterial street other
4 than in a crosswalk.” SMC 11.40.140. (emphasis added). Finally, pedestrians shall not “cross a
5 roadway intersection diagonally unless authorized by official traffic-control devices. . .” RCW
6 46.61.240(5).

7 “[E]very pedestrian crossing a roadway at a point other than at designated crosswalks or other
8 than within an unmarked crosswalk at an intersection shall yield right-of-way to all vehicles upon the
9 roadway.” RCW 46.61.240; SMC 11.40.090 (emphasis added). When walking or otherwise moving
10 along and upon an adjacent roadway, a pedestrian shall exercise due care to avoid colliding with any
11 vehicle upon the roadway. RCW 46.61.250. Finally, both RCW 46.61.235 and SMC 11.40.060 prohibit
12 pedestrians from “suddenly leav[ing] a curb or other place of safety and mov[ing] into the path of a
13 vehicle which is so close that it is impossible for the driver to stop.”

14 Here, Ms. Kolomiets violated the rules of the road in four, significant ways. First, she violated
15 SMC 11.40.140 by crossing a vividly marked PBL in an arterial roadway outside the clearly marked
16 crosswalk, which was further delineated by a yellow detectable strip and curb ramp. Ex. A. Second,
17 Ms. Kolomiets violated RCW 46.61.240(5) by attempting to cross the arterial diagonally. *Id.* Third,
18 she violated RCW 46.61.240 and SMC 11.40.090 by failing to yield the right-of-way to oncoming
19 traffic. *Id.* Finally, Ms. Kolomiets violated RCW 46.61.235 and SMC 11.40.060 by suddenly leaving
20 the curb outside the crosswalk and suddenly moving into Dr. Walker’s path, facing away from him,
21 causing the collision. Exs. A & B.

1 **C. Plaintiff Angelina Kolomiets’ Claims Fail As a Matter of Law Because She Is the Sole**
2 **Legal Cause of Her Alleged Injuries—Not the City of Seattle**

3 “[M]unicipalities are generally held to the same negligence standards as private parties.” *Keller*
4 *v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002). Thus, Ms. Kolomiets’ negligence claim
5 should be dismissed if she cannot prove “duty, breach, causation, and injury.” *Cho v. City of Seattle*, 185
6 Wn. App. 10, 16, 341 P.3d 309 (2014). To survive summary judgment on proximate cause, a plaintiff
7 must establish more than that a defendant’s breach of duty *might* have caused an injury. *Miller v. Litkins*,
8 109 Wn. App. 140, 145 (2001). Courts decline to find negligence based on mere speculation or
9 conjecture. *Kristjanson v. City of Seattle*, 25 Wn. App. 324, 326 (1980). A plaintiff must rely on more
10 than conclusory allegations, speculative statements, or argumentative assertions to prevent summary
11 judgment on proximate causation. *Boguch v. Landover Corp*, 153 Wn. App. 595, 610, 224 P.3d 795
12 (2009). Washington “recognizes two elements to proximate cause: [c]ause in fact and legal
13 causation.” *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

14 Though generally a jury question, cause in fact becomes a question of law for the court if the
15 facts, and inferences from them, are plain and not subject to reasonable doubt or a difference of opinion.
16 *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 194, 252 P.3d 914 (2011) (internal
17 quotation marks omitted) (quoting *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005)). The “legal
18 causation” prong involves policy considerations as to how far the consequences of a defendant’s action
19 should extend; the court must determine that the cause in fact should be deemed the legal cause of harm.
20 *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). Here, neither cause in
21 fact nor legal causation exist.

22 **1. Ms. Kolomiets is the sole cause in fact of her alleged damages.**

23 Washington’s Supreme Court has long affirmed summary judgment of dismissal when a
defendant’s actions are not the cause in fact of the alleged injury. Cause in fact concerns “the ‘but

1 for' consequences of an act, or the physical connection between an act and the resulting injury.”
2 *Hartley*, 103 Wn.2d at 778. “Cause in fact” requires a determination of some “physical connection
3 between an act and an injury.” *Moore v. Hagge*, 158 Wn. App. 137, 148, 241 P.3d 787 (2010)
4 (citation omitted); *see also Schooley v. Pinch’s Deli Market Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749
5 (1998) (“[c]ause in fact refers to the actual, ‘but for,’ cause of the injury, *i.e.*, ‘but for’ the defendant’s
6 actions the plaintiff would not be injured”) (citation omitted). “If an event would have happened
7 *regardless of the defendant’s negligence*, that negligence is not a proximate cause of the event.”
8 *Stoneman v. Wick Const. Co.*, 55 Wn.2d 639, 643, 349 P.2d 215 (1960) (emphasis added) (citations
9 omitted).

10 *Hansen v. Wash. Nat. Gas Co.* illustrates when a plaintiff’s own actions are the cause in fact
11 of her injuries. 95 Wn.2d 773, 779-80, 632 P.2d 504, 506-07 (1981). In *Hansen*, the plaintiff
12 jaywalked across a street, passed several erected barricades, and stepped on a wet plank covering an
13 excavation. She slipped and fell. *Id.* at 775. Plaintiff claimed that the defendant was the proximate
14 cause of her injury because it had not erected additional barricades and had violated municipal
15 regulations. *Id.* at 776. The *Hansen* Court disagreed:

16 [I]t is apparent [Plaintiff] was fully aware of the situation in the street. She saw it and
17 understood it. She chose to ignore the sidewalk, to jaywalk into a clearly visible
18 construction site, and to step on the wet plank.

18 *Id.* at 780. The Court held the defendant was not the proximate cause of the accident and reinstated
19 the trial court’s judgment notwithstanding the trial verdict finding liability because additional
20 barricades would not have “prevented this accident from happening.” *Id.* at 779-80.

21 Just as in *Hansen*, Ms. Kolomiets was able to observe and use the crosswalk over the bike
22 lane. Just as in *Hansen*, she could see the vivid, green, bike lane and knew that cyclists traveled it.
23 Instead of observing ordinary care, Ms. Kolomiets decided not to use the clearly visible crosswalk

1 through the PBL and instead suddenly entered the bike lane from the curb in front of Dr. Walker –
2 facing away from oncoming cyclists and looking at her hand. As she admitted on July 30, 2019, the
3 day of the collision, Ms. Kolomiets is the sole cause in fact of this collision. Ex. A. & B.

4 **2. Because the City did not owe her a duty, Ms. Kolomiets is the only legal cause of**
5 **her alleged damages.**

6 Legal causation “is grounded in policy determinations as to how far the consequences of a
7 defendant's acts should extend.” *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013)
8 (citation omitted) (internal quotation omitted). In deciding whether a defendant's breach of duty is
9 too remote or insubstantial to trigger liability as a matter of legal cause, Washington courts evaluate
10 “mixed considerations of logic, common sense, justice, policy, and precedent.” *Hartley*, 103 Wn.2d
11 at 779 (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)).

12 “The threshold determination of whether the defendant owes a duty to the plaintiff is a
13 question of law.” *Tincani v. Inland Empire Zoological Soc’y*, 124 Wn.2d 121, 128, 875 P.2d 621
14 (1994). A duty may be predicated on violation of either a statute or common law principles of
15 negligence. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). “The standard must be one
16 of conduct, rather than of consequences.” *Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980)
17 (quoting W. Prosser, *Law of Torts* s 31 at 146 (4th ed. 1971)).

18 Ms. Kolomiets’ negligence claim fails on this element, as well. In *Nelson v. City of Tacoma*, the
19 Court of Appeals affirmed that the City of Tacoma did not owe a duty to a plaintiff pedestrian who
20 fell while crossing the street outside of the crosswalk. 19 Wn. App. 807, 577 P.2d 986 (1978).

21 The Court of Appeals explained:

22 Plaintiff was jaywalking. In effect he selected and created his own crosswalk mid-
23 block, and insists the city should have made it safe for him. To permit him to recover
on the basis that the city was negligent would require us to hold that the city must
maintain the full block of a street safe for pedestrian cross travel when the sidewalk,
or even a portion thereof, is blocked. This we will not do.

1 *Nelson* at 811. Stated differently, a municipality owes pedestrians a duty to maintain crosswalks in a
2 condition that is reasonably safe for ordinary travel. Ordinary travel for a crosswalk is pedestrian foot
3 traffic, but ordinary travel for a roadway is vehicle traffic. Therefore, the scope of the City’s duty
4 within the marked crosswalk differs from its duty to maintain the roadway outside of a marked
5 crosswalk.

6 Numerous other cases similarly support dismissal because the City owes no duty to jaywalkers
7 who voluntarily fail to use marked crosswalks. In *McKee v. City of Edmonds*, although the crosswalks
8 at either end of the block were unobstructed, the plaintiff crossed the street in the middle of the block.
9 *McKee v. City of Edmonds*, 54 Wn. App. 265, 266, 773 P.2d 434 (1989). The plaintiff tripped on a
10 pothole as she was jaywalking, fell, fractured her leg, and sued the City of Edmonds. *Id.* The Court
11 of Appeals rejected her claim that the City owed her a duty to make the entire street safe for pedestrian
12 travel outside crosswalks, because jaywalking was foreseeable. *Id.* at 266-269. Instead, the Court of
13 Appeals found Edmonds owed no such duty to the plaintiff and affirmed the summary judgment
14 dismissing her claims. *Id.*

15 Similarly, in *Woolcott v. City of Seattle*, the plaintiff tripped while walking to the Seattle
16 Mariners’ home opening game. 194 Wn. App. 1009, 2016 WL 2967731, *1 (2016) (unpublished).³
17 As the plaintiff neared the stadium on the sidewalk, a police officer waved him through the
18 intersection. *Id.* The plaintiff stepped off the curb into a pothole, which he conceded was outside the
19 marked crosswalk, and broke his foot. *Id.* The Court of Appeals affirmed summary judgment of
20 dismissal because the plaintiff failed to establish the City owed him any duty to keep the street outside
21 the marked crosswalk reasonably safe for pedestrian travel. *Id.*

22 _____
23 ³ GR 14.1 allows that unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authority, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

1 The Court of Appeals reiterated the importance of distinguishing between streets and
2 crosswalks. *Id.* at *1.

3 Courts must consider the intended use of a street. “[T]he law directs pedestrians to use
4 marked crosswalks.” Thus, cities must ensure that crosswalks are safe for
5 pedestrians. In contrast, cities have no duty to ensure that pedestrians can safely cross
6 the street where there is no crosswalk.

7 *Id.* (citations omitted) (emphasis added). The scope of the City’s duty was “defined by the availability
8 of unobstructed, marked crosswalks.” *Id.* at * 2 (citing *Hansen*, 95 Wn.2d 773, *McKee*, 54 Wn. App.
9 265). Plaintiff’s claims failed, because:

10 there is no evidence that the marked crosswalk was blocked, full, or otherwise
11 unusable. Nevertheless, Woolcott chose to step into the street outside the marked
12 crosswalk. There simply is no duty the City owed him to make this area safe for his
13 travel.

14 *Id.* at * 2.

15 Significantly, the plaintiff argued that his failure to cross in the marked crosswalk was only a
16 factor in assessing his contributory negligence, not determinative of the City’s duty. *Id.* at *3. The
17 Court of Appeals disagreed. It held that “the City’s duty turns on whether it invited [the plaintiff] to
18 cross where he did.” *Id.* The Court concluded that whether the absence of duty might also support
19 “[the plaintiff’s] contributory negligence is irrelevant.” *Id.*

20 Just as in *Hansen*, *Nelson*, *McKee*, and *Woolcott*, the City did not owe Ms. Kolomiets any
21 duty to ensure that the entire length of the bike lane near the bus island was a reasonably safe location
22 for her to cross the PBL. The City’s duty was to provide a crosswalk safe for ordinary travel. Ms.
23 Kolomiets elected not to use the crosswalk and cannot complain that alleged defects in the location
of a crosswalk she did not use are the legal cause of her injuries. The City had no duty to make other
areas outside the crosswalk safe for pedestrian travel. Accordingly, Ms. Kolomiets’ claims against
the City should be dismissed with prejudice as a matter of law.

1 **D. In the Alternative, the City is Entitled to a Jury Instruction Reducing Any Damages**
2 **Ms. Kolomiets Proves by the Amount of Her Contributory Fault**

3 RCW 4.22.070 provides for several liability in all actions involving the fault of more than one
4 entity except when the plaintiff is fault-free. RCW 4.22.070(1). When the plaintiff is at fault, as Ms.
5 Kolomiets is here, the rule of several liability applies and her contributory fault “diminishes
6 proportionately the amount awarded as compensatory damages.” RCW 4.22.005. “Fault” includes
7 the acts or omissions that are “in any measure negligent or reckless toward the person or property of
8 the actor or others.” RCW 4.22.015.

9 As discussed above at length, Ms. Kolomiets cannot be considered a fault-free plaintiff. She
10 clearly violated the mandate that “every pedestrian crossing a roadway at a point other than at
11 designated crosswalks ... shall yield the right-of-way to all vehicles upon the roadway.” SMC
12 11.40.090; RCW 46.61.240(1). Violation of that mandate is “a traffic infraction.” SMC 11.31.010;
13 RCW 46.63.020. Further, as discussed in *Woolcott*, Ms. Kolomiet’s choice to jaywalk and attempt to
14 cross the PBL outside the marked crosswalk goes to the existence of the City’s duty – not to the
15 measure of her contributory fault. But, in the unlikely event that Ms. Kolomiets avoids summary
16 judgment of dismissal, the City should be subject to several liability only and any damages reduced
17 by the proportional amount caused by Ms. Kolomiets’ reckless actions.

18 **VI. CONCLUSION**

19 Defendant City of Seattle should not be forced to continue defending against Ms. Kolomiets’
20 claims when an objective image she subpoenaed shows she failed to use ordinary care and the City
21 owed her no duty. Ms. Kolomiets’ claims against the City should be dismissed in their entirety with
22 prejudice. A proposed order is attached.

1 In compliance with KCLR 56, I certify that this motion does not exceed 8,400 words.

2 DATED this 5th day of May 2023.

3 ANN DAVISON
4 Seattle City Attorney

5 By: /s/A. Janay Ferguson
6 A. Janay Ferguson, WSBA# 31246
7 Assistant City Attorney

8 *Attorney for Defendant City of Seattle*

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CERTIFICATE OF SERVICE

I certify that on the 5th day of May 2023, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

| | |
|--|---|
| Catherine Fleming Fleming Law, PLLC 936 N. 34th Street, Suite 300 Seattle, WA 98103 | Via Email cf@cflaw.com paralegal@cflaw.com |
| Ronald J. Park Friedman Rubin PLLP 1109 1st Avenue, Suite 501 Seattle, WA 98101 | Via Email rpark@friedmanrubin.com AGust@friedmanrubin.com ; |
| <i>Attorneys for Plaintiff</i> Carla B. Carlstrom Amy E. Montgomery Senior Deputy Prosecuting Attorney 516 3 rd Avenue, #W554 Seattle, WA 98104 <i>Attorney for Defendant King County</i> | Via Email carla.carlstrom@kingcounty.gov amy.montgomery@kingcounty.gov ; |
| Mark A. Thompson, WSBA #29730 Mix Sanders Thompson PLLC 420 5th Ave Ste 2200 Seattle, WA 98101-1346 <i>Attorney for Defendant Dylan Walker</i> | Via Email mark@mixsanders.com |

s/Gretta Dattan
Gretta Dattan, Legal Assistant