

FILED

OCT 18 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290158 Consolidated with No. 290492

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

William D. Blaine, et ux

v.

Jayne R. Crow, et vir

Appellants

Benton County

Respondent

Appeal from Benton County Superior Court
Honorable Craig J. Matheson
NO. 08-2-00666-0

OPENING BRIEF BY APPELLANTS CROW

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I. INTRODUCTION

Plaintiff Jayme Crow was seriously injured in a collision that occurred on the morning of Christmas Eve of 2006 as she was returning from a church service. As Jayme drove home that morning, she was unaware that the Clodfelter Bridge had been the site of a rollover collision the night before. Although Benton County initially tried to deny any knowledge of ice on the Clodfelter Bridge, the truth is that Erwin Laureano and his wife encountered ice on this very bridge at 7:57 p.m. on December 23rd, slid out, rolled over and smashed into a guardrail. Deputy Lane Blanchard of the Benton County Sheriff's Office responded to the collision and filled out a report describing the roadway as "icy" at the bridge:

E Laureano's vehicle started to slide sideways due to the *icy* road....

Clerk's Papers (CP) at 764 (emphasis added).

In his sworn declaration, Mr. Laureano confirms that he suddenly encountered ice on the bridge:

I had no difficulty driving on Clodfelter Road until I reached the Clodfelter Bridge that passes over Interstate [82].

At the point my Land Rover made contact with the Clodfelter Bridge, I lost control on the ice and fish tailed, sliding the length of the bridge. My Land Rover continued out of control until I broke through the guardrail on the

canal overpass approximately 60 yards from the edge of the Clodfelter Bridge and finally came to rest on the canal bank.

After I was off the roadway and waiting for a tow truck, I noticed that the Clodfelter Bridge was a sheet of ice. I called 911 and Deputy Lane Blanchard of the Benton County Sheriff's Office responded. It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail.

CP 759.

According to both Mr. Laureano and the drivers who drove on Clodfelter Road the next day, the surface of Clodfelter Road was not slick or icy up to the point of the Clodfelter Bridge, which was extremely icy and slippery. The reason – Clodfelter *Road* had been sanded earlier in the day on the 23rd, but the Benton County sand truck driver purposefully did not sand the Clodfelter *Bridge* portion of the road because he had been told not to apply a salt-sand mixture on any bridges, given that the salt corrodes the metal structure of the bridge. So while Clodfelter Road was sanded on December 23rd to address the frozen road surface, the County simply ignored the Clodfelter Bridge deck, and left it untreated and icy.

Benton County Road Department employees all knew that bridges ice up first because of the cold ambient air surrounding them, above and below. The Road Department employees also knew that the County's bridges are the most dangerous for drivers when temperatures drop below

freezing and that, because of this, the safety of the traveling public using bridges in snowy and icy conditions are to be the Road Department's primary concern.

Under these facts, the negligence of Benton County was palpable, and should have been appreciated by the trial court. Recognizing the hazard of icy roads, Benton County sanded its roads on December 23rd, but knowing that the Clodfelter Bridge was also icy, it nevertheless failed to sand or otherwise treat the most dangerous location – the bridge. In the face of this clear evidence of the negligence of the entity charged with properly maintaining road surfaces, the trial court granted the County's motion for summary judgment, and dismissed Plaintiff Jayme Crow's claim against it.

Ms. Crow now appeals the trial court's decision.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting Third-Party Defendant Benton County's Motion for Summary Judgment (October 23, 2009); and
2. Order Granting Third-Party Defendant Benton County's Motion to Strike Third-Party Plaintiff Jayme Crow's Motion for Reconsideration, as well as Joinders Thereto (January 21, 2010).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE ONE: Did the trial court err in granting Defendant Benton County's motion for summary judgment when the evidence clearly established that the County breached its duty to the traveling public to maintain the Clodfelter Bridge in a reasonably safe condition for ordinary travel?

ANSWER: Yes. This is a simple negligence case that involves the issue of whether or not Defendant County breached its duty of ordinary care to the traveling public to safely maintain its roads and bridges in a reasonably safe condition. The uncontroverted evidence in this case is that Defendant County breached its duty on both December 23 and 24, 2006. Although it responded to the snow and ice that it *knew* had formed on its roadways on these dates by deploying sanding crews, Defendant County has been *forced to admit* that it failed to treat its bridge decks, including the Clodfelter Bridge, for snow and ice. This uncontroverted evidence clearly should have precluded summary judgment in favor of Defendant County.

ISSUE TWO: Did the trial court err in denying Plaintiff Crow's motion for reconsideration when the evidence establishes that Defendant County had *actual notice* of the dangerous, icy condition of the Clodfelter Bridge?

ANSWER: Yes. The uncontroverted evidence establishes that Defendant Benton County had actual notice of the icy, hazardous condition of the Clodfelter Bridge deck. First, on December 23, 2006, Benton County dispatched sheriff personnel to a single car spin-out collision on ice at the Clodfelter Bridge at approximately 7:57 p.m. The Benton County Sheriff's Deputy who responded to the collision called the County Road Department that night to notify them of the icy accident. This was approximately *15 hours* before the collision that severely injured Plaintiff Jayme Crow.

Second, as discussed in more detail below, eyewitness Geri Bauer called 911 and reported that the Clodfelter Bridge needed sanding. The 911 operator passed on the warning to the County. Later, Ms. Crow who had been traveling on Clodfelter Road with its apparently adequate friction surface, entered onto the bridge and encountered the same hazardously slippery condition, resulting in the loss of tire traction, followed by the crash that severely disabled her.

This evidence clearly created genuine issues of material fact that should have precluded summary judgment as a matter of law.

ISSUE THREE: Did the trial court err in denying Plaintiff Crow's motion for reconsideration when a genuine issue of material fact exists as to whether or not Defendant Benton County had a reasonable opportunity

to correct the dangerous condition that existed on the Clodfelter Bridge prior to the Blaine-Crow collision?

ANSWER: Yes. As set forth above, Defendant Benton County had *actual* notice of the dangerous and unsafe icy conditions on the roadway surface of the Clodfelter Bridge 15 hours prior to Ms. Crow's encounter with the untreated ice. Obviously, Benton County had well beyond a reasonable opportunity to respond to this dangerous condition. Defendant County disagreed. A factual issue existed. The trial court erred in denying Plaintiff Crow's motion for reconsideration.

IV. STATEMENT OF THE CASE

A. Multiple vehicles, including the vehicle driven by Jayme Crow, slid off the Clodfelter Bridge due to the icy conditions on this overpass on the morning of Sunday, December 24, 2006.

Plaintiff Jayme Crow was seriously injured in a collision that occurred on Christmas Eve morning, 2006, as she was returning from a church service. CP 426; 954. Her route had taken her toward and then across Benton County's Clodfelter Bridge above Interstate 82. CP 767-768.

Earlier that morning, Michael Bauer, who had experienced no problems driving along the sanded Clodfelter Road, suddenly encountered the invisible hazard of ice as he began crossing the Clodfelter Bridge. CP

766. His vehicle, which was equipped with snow tires, spun out and crashed onto the shoulder. CP 766.

Following Mr. Bauer's slide-out on the icy bridge, Michelle Blaine later slid off the bridge in the same general location. CP 766-767. According to Mr. Bauer's mother, Geri, Ms. Blaine's vehicle started fishtailing on the Clodfelter Bridge, and then spun out of control:

On the morning of December 24, 2006, I called my son Michael on his cell phone to find out information regarding our morning plans. I understood from our call that he had just been involved in an accident on Clodfelter Road in his All-Wheel-Drive Subaru with snow tires.

I immediately drove to the accident site to help him ... When I arrived at the scene, I saw that Michael's Subaru was well off the road at the north end of the Clodfelter Bridge. I parked my car in a turnoff area on the side of the road. I then got out of my car and walked across the road over to the Subaru...

....

After I got to Michael, I called 911 and told the person on the line that *they needed to get a sand truck out on the Clodfelter Road Bridge*. Within five to ten minutes I saw a red minivan traveling north on Clodfelter headed towards the bridge. The van was traveling at a reasonable rate of speed until it reached the bridge. When it got to the bridge, I watched as it violently fishtailed forward and seemed to be moving uncontrollably. As the minivan came to the north end of the bridge it careened off to the side of the road and into a ditch.

I spoke to the lady in the minivan. I remember telling her that I would tell her insurance company that she was not speeding. Ten minutes later, a truck came crawling

down Clodfelter towards the bridge. It moved very slowly as it went across the bridge. It was my understanding that it was the husband of the woman driving the minivan. She had called him to come help her. After crossing the bridge, he drove across the road and parked.

CP 766-767.

Ms. Blaine's husband cautiously approached the Clodfelter Road overpass in his pickup truck and parked on the roadway in the southbound lane to see if he could pull his wife's Windstar van out of the ditch. CP 510- 511; 767. Unfortunately, he left his Ford F-150 pickup stopped on the road. CP 510-511; 767; 810.

As she returned from church, Jayme Crow experienced nothing unusual on Clodfelter Road – until she too encountered the latent, icy hazard on the bridge. CP 767. As with the others before her, Jayme's tires lost traction on the ice, and her car also spun out. CP 767; 807. According to eyewitness Geri Bauer, the Crow vehicle, like the vehicle driven by Michelle Blaine, slid out of control once it encountered the icy conditions on the Clodfelter Bridge:

Within a short time, I saw a Lexus approaching the bridge driving northbound. I was sitting in my car on the phone with my insurance company, when I saw the Lexus reach the bridge and, like the minivan before it, the Lexus moved at a normal rate of speed and then suddenly lurched forward at a higher rate of speed, fishtailing violently, and spinning out of control on the ice. I watched as the Lexus careened uncontrollably towards the group of vehicles that were now on the north end of the bridge. I was sitting in

my car looking directly towards the Lexus as it came towards the parked truck. I saw the driver's side of the Lexus slam into the backend of the truck at the north end of the bridge.

CP 767.

The driver's side door of Jayme's Lexus impacted the left rear bumper of the Blaine pickup. CP 805. The pickup's two-ton steel hulk crashed into her seating area, knocking Jayme unconscious and so badly injuring her that she appeared to be near death to witnesses and rescuers on the scene. CP 426-427; 805; 816.

Jayme was then transported by ambulance to Kennewick General Hospital where her treating doctor reported to the Sheriff's Office that she was in critical condition, but had a chance of survival. CP 427. She was then airlifted via Medstar to the Harborview Regional Trauma Center in Seattle.

B. Benton County personnel acknowledge that the bridge deck was in fact quite icy on the morning of December 24th.

Benton County Sheriffs Deputies Thompson and Runge arrived at the accident scene at approximately 11:30 a.m. The officers immediately experienced the icy conditions on the Clodfelter Bridge.¹ CP 426. Deputy

¹ Deputy Thompson and Deputy Runge both testified that the bridge deck was icy and extremely slippery. Deputy Thompson testified that "the bridge was ... exceptionally icy." CP 514. Similarly, Deputy Runge testified

Thompson called the County Road Department for a truck to sand the bridge deck, and he then placed flares across the bridge. CP 804.

In response to Deputy Thompson's request for a sand truck, County Road employee Jack Pickard was deployed to sand the Clodfelter Bridge. CP 484. Upon arriving at the bridge, Mr. Pickard observed that the bridge deck was icy, and that there was no evidence of any sand on it:

Q. Okay. And when you arrived on the scene, do you recall what the overpass – in terms of the road conditions – looked like?

A. It was icy.

....

Q. ...On the 24th when you went out to the accident site on the bridge, you didn't see any sand on that bridge, did you?

A. I wasn't really looking for anything. If there was some, I didn't see it.

That overpass was pretty -- from what I recall, was pretty good and slick.

CP 518-519.

The testimony of the two deputies is supported by eyewitness Geri Bauer:

I never walked onto the Clodfelter Bridge, but it was obviously icy. I did not drive on the road to the south of the bridge, but from my vantage point, the minivan, truck, and Lexus did not have any problem on Clodfelter until they reached the bridge. I do not remember any cars, other than the Lexus, minivan and truck, driving over the bridge while I was at the scene.

CP 530.

CP 480; 487.

Once Mr. Pickard then sanded the Clodfelter Bridge deck *after* the collisions, Deputy Thompson reported the bridge was no longer slippery:

Q. Did you go out and walk the bridge after the sand trucks left, to check and see if it felt better as far as traction?

A. We walked it, taking the photographs, yes, and, yeah, it was different, as far as –

Q. Did it make a difference with the sand, salt down there?

A. Oh, yeah.

Q. When you say "oh, yeah," do you mean we could now walk on it without worry?

A. Yeah. From the first time I walked on it and then after the sand trucks had been through, there was a noticeable difference. It was, you know, easier to walk.

CP 514-515.

At approximately 1:00 p.m., following the application of salt and sand to the Clodfelter Bridge, Benton County Engineer Ross Dunfee arrived at the scene to document the conditions. He noted that the bridge was then no longer icy:

Q. Did you walk out onto the bridge? Did you remember to test out how slippery it was out there?

A. Yes.

Q. Did you find it to be slippery?

A. No.

Q. Is that -- You walked on it after the sand-and-salt truck had gone by?

A. Correct.

....

Q. ... Was it icy on the bridge when you walked across it?

A. No.

CP 523.

C. In terms of clear, advance notice of the icy condition of the unsanded bridge roadway surface, Benton County knew that a vehicle driven by Erwin Laureano had slid off the Clodfelter Bridge some 15 hours before the Crow collision.

The December 24th collisions on the Clodfelter Bridge were not the only such collisions to occur within this 24-hour period on this icy bridge deck. On December 23, 2006, there was a single car spin-out collision at the Clodfelter Bridge at approximately 7:57 p.m. CP 759. The driver of the vehicle involved, Erwin Laureano, testified that he had no trouble driving on Clodfelter Road until he reached the Clodfelter Bridge:

I had no difficulty driving on Clodfelter Road until I reached the Clodfelter Bridge that passes over Interstate [82].

At the point my Land Rover made contact with the Clodfelter Bridge, I lost control on the ice and fish tailed, sliding the length of the bridge. My Land Rover continued out of control until I broke through the guardrail on the canal overpass approximately 60 yards from the edge of the Clodfelter Bridge and finally came to rest on the canal bank.

After I was off the roadway and waiting for a tow truck, I noticed that the Clodfelter Bridge was a sheet of ice. I called 911 and Deputy Lane Blanchard of the Benton County Sheriff's Office responded. It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail.

CP 759.

Like Mr. Laureano, Deputy Blanchard attributed this collision to "the icy road." CP 764. Deputy Blanchard then reported the ice-caused incident to the Benton County Road Department through dispatch. CP 764; CP 759 (*Laureano Declaration*: "It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger.")). This was approximately 15 hours before the collision that injured Plaintiff Jayme Crow.

According to Mr. Laureano, as well as the other drivers who drove on Clodfelter Road the next day, the roadway surface leading up to the bridge was fine, but the bridge deck itself turned out to be dangerously

slippery.² CP 759. The reason why the Clodfelter Bridge was dangerous on December 24, 2006 is simple – Benton County road crews sanded the roads, including Clodfelter Road, but left the Clodfelter Bridge (and other bridge decks) untreated, thereby leaving drivers unaware of the hazard completely unprotected. CP 480; 487. As indicated above, Benton County employee Jack Pickard, operating a sanding truck on the 23rd, had been told earlier that truck drivers were not to apply a salt-sand mixture on any bridges because the salt corrodes the metal structure of the bridge. CP 485; 489-490. So, although he sanded Clodfelter Road on December 23rd to address the frozen *road* surface, he bypassed the Clodfelter Bridge roadway surface, leaving it untreated and dangerously icy. CP 485.

² Both Deputy Thompson and Deputy Runge – the Benton County Sheriff Deputies who responded to Jayme Crow’s crash -- testified that the bridge deck of the Clodfelter Road overpass was “icier” than Clodfelter Road:

A. I guess what you're asking me: Is the bridge icier than the roadway?

Q. Yeah.

A. Yeah.

CP 513 (*Thompson Deposition*).

“[F]rom the best of my memory, yeah, it was just the bridge that was icy.”

CP 517 (*Runge Deposition*). See also CP 528 (*Bauer Declaration*).

D. Defendant Benton County failed to sand or take any other corrective measure to address the icy roadway surface condition that existed on the Clodfelter Bridge on the morning of December 24th, notwithstanding its notice of the existence of the ice hazard there.

The obvious answer to the snow and freezing conditions on December 23, 2006 was to sand the roads and apply sand or de-icer to the bridge decks. That is exactly what the Benton County's current Road Superintendent, Donald Rawlings, says should have been done under the conditions that existed at the time. CP 235. But this did not happen. Instead, Benton County deployed sanding trucks, but unbelievably ignored the bridge decks, including the Clodfelter Bridge. CP 485; 489-490. The consequence was a dangerous road and a breach of a municipality's explicit duty to provide a reasonably safe road.³ This duty obviously becomes even more acute during winter conditions.

Earlier, on December 21, 2006, Benton County Road Department Supervisor Patrick McGuire deployed the County's two 200-gallon anti-icer trucks to spray County roads to protect against ice formation.⁴ CP 473-474. One of the drivers of these trucks was Jack Pickard. CP 474-

³ See WPI 140.01; *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005).

⁴ Liquid magnesium chloride, the anti-icer used by the County, works to prevent moisture from bonding with roadway surfaces during freezing conditions. CP 453; 457-458; 460-461; 463; 465; 471. If there is no additional snow or rain, it can remain effective in preventing the formation of ice for up to 7 days. CP 470.

476. Mr. Pickard testified that he applied anti-icer to Clodfelter Road, including the Clodfelter Bridge, on December 21, 2006. CP 473-474; 476.

Two days later, on Saturday, December 23, 2006, from 4:00 a.m. to 7:00 a.m., 1 to 1½ inches of snow fell in the Kennewick area. CP 492-493. Road Department Supervisor McGuire directed Mr. Pickard and three other employees to plow and sand the County roads. CP 454; 455. Mr. Pickard plowed snow and sanded the County roads in Zone 7, which includes Clodfelter Road. CP 481-484. But Mr. Pickard did not sand the Clodfelter Bridge because his truck carried a salt-sand mixture, and he had been instructed that the salt-sand mixture was never to be applied to bridges:

Q. All right. Do you have any recollection as to whether or not the sand that you were putting down had calcium chloride or magnesium chloride mixed in it or salt of some kind mixed with it?

A. Salt, yes.

Q. But you are not supposed to be putting salt on a bridge, are you?

A. No.

Q. Okay. So if you were following strict rules, you would not have applied this sand mixture to the Clodfelter bridge; correct?

A. Correct.

....

Q. Okay. And I understand that mixture had some salt in it as well?

A. Correct.

....

Q. If you did have a mixture in it, it shouldn't be used on the bridge?

A. According to the guidelines, yes.

....

Q. What is the purpose for no salt on bridge decks?

A. The corrosion in the deck units...

....

Q. Okay. If you had observed ice on a bridge top, would you still apply a salt sand if you had it?

A. No.

CP 485; 486; 488; 489-490.

In fact, Benton County's written policy prohibits the use of the salt-sand mixture on its bridges, including the Clodfelter Bridge:

BRIDGES
Liquid Anti De-Icer

Primary Concrete Structures on Arterial Roads,
which require a non-corrosive Anti De-Icer, rather than
using salted sanding material.

Twin Bridges—On Twin Bridges Road, West
Richland

Bermuda Road Overpass—@ I-82, south of Reata

Clodfelter Road Overpass—@ I-82, and K.I.D.
Canal

Christensen Overpass—@ I-82, West of Union
Loop Road. (If needed: Low Traffic Area.)

Beck Road Overpass—@ I-82, West of Bofer
Canyon Road. (If Needed: Low Traffic Area.)

Tripple Vista Road.

Clodfelter Road—@ Miller Hill.

Clodfelter Road—Between Richmond Road and H.
Smith Road.

Oak Street—Between Bowles Road and 47th
Avenue

Nine Canyon Road—From Lower Blair Road,
South.

CP 199 (emphasis added).

According to accident reconstructionist Timothy Leggett, the snow that accumulated on the Clodfelter Bridge on December 23, 2006, melted upon contact with the anti-icer that was applied on December 21st, diluting the anti-icer and rendering it ineffective in preventing ice from forming:

Q. ...if the anti-icer was applied on the 21st, and then under your scenario there's an inch to inch and a half of snow that fell on the 23rd, how much snow would be needed to dilute the anti-icer to a point of it's no longer effective?

A. ...less than half an inch of snow. So for sure if there's an inch or inch and a half, there's no more chemical left at that point....

....

....it's at least double, if not probably four times, maybe even five or six times the amount needed to dilute the chemical to render it ineffective.

CP 465-466.

As discussed in more detail in Section V.B, below, everyone in the Benton County Road Department, from top to bottom, has testified that they know that bridges ice up first because of the cold ambient air surrounding them, above and below. *See, e.g.* CP 453 (McGuire Dep. – “bridges tend to ice over earlier than road surfaces do”). Everyone in the Road Department knows that the bridges are the most dangerous for drivers when temperatures drop below freezing. *See* CP 457. Everyone knows that the bridges then must become the primary concern for the safety of the public. *See, e.g.,* CP 467-468.

Here, Defendant Benton County recognized the hazard of the icy roadway, and addressed the hazard with sand. But through apparent bureaucratic oversight, confusion and miscommunication, its employees applied the necessary sand everywhere except the most dangerous locations – the bridges.

Benton County road maintenance crews plowed and sanded area roadways on December 23 due to snowfall of about 1-1/2 inches, but they failed to apply any sand or anti-icing chemicals to the Clodfelter Bridge. CP 485; 489-490. When temperatures dropped, as had been forecast, on the morning of December 24, the Clodfelter Bridge was dangerously icy, causing vehicle tires to lose traction, including those of Ms. Crow’s car.

The fact that Defendant County applied sand to the road surfaces on *both sides of the roadway leading up to the Clodfelter Bridge* is a clear admission that a dangerous condition existed on the roads and bridges, and that the roads and bridges needed to be treated to maintain them in a reasonably safe condition for the traveling public:

Benton County Road Department Superintendent McGuire made a fundamental error in deploying only sanding trucks, leaving the bridge decks unprotected from ice formation – an obviously foreseeable condition. This fell well below the standard of care in winter roadway maintenance, and clearly was the cause of the multiple collisions that occurred on the Clodfelter Overpass on the morning of December 24, 2006.

CP 321 (Declaration of Dale Keep).⁵

E. Proceedings in the trial court.

Plaintiff Jayme Crow filed this personal injury action against Defendant Benton County to recover for the injuries she sustained as a result of losing tire traction on the Clodfelter Bridge and sliding into Mr. Blaine's stopped pickup truck. CP 19-25. The County subsequently moved for summary judgment. CP 355-386. On October 23, 2009, the trial court entered an order granting the County's motion. CP 745-748.

⁵ Mr. Keep worked for the Washington State Department of Transportation for 26 years where he oversaw the winter maintenance procedures for the effective control of snow and ice on our state highways. CP 319. Mr. Keep is now a winter roadway maintenance consultant with a specialty in the deployment of sand trucks and snow plows, as well as anti-icing/de-icing trucks. CP 318.

During the hearing on Defendant County's motion for summary judgment, counsel for the County represented several times to the trial court that there was no evidence of ice on the Clodfelter Bridge on December 23rd and that the County did not have notice of ice on the Clodfelter Bridge prior to the morning of December 24th:

Where is the notice of ice? ...

...

[t]his is all on the 24th, not the 23rd ... the only time that anybody talks about a call going into the county is after the Bower [sic] accident ...

Report of Proceedings (RP), October 23, 2009 at 13.

[I]t says Benton County breached its duty by sanding roads on the 23rd for snow and ice. There is no ice. Nobody has alleged ice. Nobody has said that there was any ice that formed on the 23rd. But what they wanted us to do was treat for icy conditions.

RP 10/23/2009 at 14.

Of course there was ice that the car slid out on, and equally clear is the fact that Defendant County had been put on direct notice of it, yet failed to respond. Nevertheless, the trial court's decision to grant Defendant County's motion for summary judgment was based on the County's misrepresentations that it did not have notice of the icy conditions on Clodfelter Bridge:

I agree with the county's interpretation of law in this case. I think actual notice is required of this condition. And those are not the facts in this case, and I think that's controlling.

And I don't really think I need to say much more than that. Frankly I think the county in order to be at the table has to have notice of the hazardous condition and an opportunity to fix it. That's the law.

RP 10/23/2009 at 37. Unfortunately, that was a jury question, not one for the Court.

As indicated above, after the summary judgment hearing, Plaintiffs' counsel learned that approximately 15 hours before the subject collision in this case, Erwin Laureano was involved in a single car spin-out collision at the Clodfelter Bridge at 7:57 p.m. on December 23rd. Counsel also learned that Deputy Lane Blanchard, the deputy sheriff who responded to the Laureano collision, called the Benton County Road Department that evening to notify them of the danger.

Based on this newly discovered evidence, Plaintiff Crow filed a motion for reconsideration of the trial court's October 29, 2009 Order granting Benton County's motion for summary judgment. CP 749-757. After a hearing on Plaintiff's motion, the trial court entered an Order on

January 21, 2010 striking Plaintiff's motion for reconsideration. CP 1148-1150.⁶

Plaintiff Crow then filed a timely Notice of Appeal as to the Order entered on October 29th, as well as the Order entered on January 21st. CP 1166-1183.

V. ARGUMENT

A. Standard of review on appeal.

Article 1, § 21 of our State Constitution mandates that “[t]he right of trial by jury shall remain inviolate.” Under Article 1, § 21, “[i]t is the function of the jury – not the court – to settle disputed issues of fact.” *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Likewise, RCW 4.44.090 provides that “[a]ll questions of fact ... **shall** be decided by a jury, and all evidence thereon addressed to them” (emphasis added).

A party's **right** to submit issues of fact to a jury is the “essence” of the right to a jury trial:

Subsequent cases [to *Mullen, supra*] underscore the jury's fact finding province as the *essence* of the right's scope. *See, e.g., State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *In re Ellern*, [23 Wn.2d 219, 160 P.2d 639 (1945).

⁶ Although he signed the County's Proposed Order Granting Defendant Benton County's Motion to Strike Plaintiff's Motion for Reconsideration, Judge Matheson made it clear at the December 18, 2009 hearing on the Plaintiff's Motion that he was reconsidering his October 23, 2009 Order Granting Third-Party Benton County's Motion for Summary Judgment. RP 12/8/2009 at 18.

Sofie v. Fibreboard, 112 Wn.2d 636, 645, 771 P.2d 711 (1989) (emphasis added).

On a motion for summary judgment, a court does not try issues of fact; it only determines whether or not factual issues are present. See *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-303, 616 P.2d 1223 (1980). Summary judgment is not to be used as a substitute for a trial or to try an issue of fact. *City of Seattle v. Dept. of Labor and Industries*, 136 Wn.2d 693, 696-697, 965 P.2d 619 (1998); *Thomas v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence, considering the facts in the light most favorable to the nonmoving party. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992).

Washington appellate courts review *de novo* a superior court's summary judgment dismissal of a plaintiff's negligence claim, considering the facts and any reasonable inferences drawn from them in the light most favorable to the plaintiff, as the non-moving party. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 345, 3 P.3d 211 (2000). In reviewing a grant of summary judgment, appellate courts engage in the same inquiry as the trial court. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when

the trial court finds that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott Galvanizing*, 120 Wn.2d at 580.

In this case, genuine issues of material fact clearly exist as to whether or not Defendant Benton County breached its duty to keep its roads and bridges reasonably safe for ordinary travel, as well as its notice of the icy bridge and its opportunity to sand the bridge deck. The existence of these factual issues should have precluded summary judgment for Defendant County as a matter of law under CR 56(c).

B. Benton County has a duty to keep its roads and bridges reasonably safe for ordinary travel.

Defendant County's duty in this case arises under well-established Washington law. The Supreme Court has repeatedly emphasized in recent years that governmental entities owe a duty to the traveling public to provide reasonably safe roadways. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). A hazardously icy bridge is not reasonably safe.⁷

⁷ In its motion for summary judgment, Defendant County claimed that Third-Party Plaintiff Jayme Crow was "alleging that the County failed to properly anticipate the formation of ice on the roadway." CP 356. But nowhere did Plaintiff Crow allege that the County "failed to properly anticipate the formation of ice on the roadway". Defendant County's motive for making up this claim is to try to turn this into a case in which the County claims that it was taken by surprise with sudden snow and ice, hoping

In *Keller, supra*, the Supreme Court set forth the general duty owed by governmental entities to all persons on public roadways as follows:

We ... hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and ***maintain*** its roadways in a condition that is reasonably safe for ordinary travel.

Keller, 146 Wn.2d at 249. (emphasis added).

More recently, the Supreme Court has set forth this requirement in terms of an overarching duty to ***provide*** reasonably safe roadways:

Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *See Keller*, 146 Wn.2d at 249. The inherently dangerous formulation recognizes that "[a]s the danger becomes greater, the actor is required to exercise caution commensurate with it." *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957). Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings. *Id.* at 246, 251-52. *See also Bartlett v. N. Pac. Ry. Co.*, 74 Wn.2d 881, 882-83, 447 P.2d 735 (1968).

to invoke the shield of two anti-icing cases, *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (2008) and *LeRoy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004), that stand for the proposition that a governmental entity need not anticipate snow and ice. Here, there was nothing to anticipate. It was snowing on December 23, 2006. Benton County road personnel were out plowing and sanding the roads. But they sanded only the roads, not the bridge decks, and left the bridges hazardously slippery.

Owen, 153 Wn.2d at 787-788.

As held by the Supreme Court in *Owen*, a governmental entity's duty to provide reasonably safe roadways is an "overarching" duty that encompasses other duties. These other duties include maintaining roadway surfaces in a proper condition so that they are reasonably safe for ordinary travel. This overarching duty also includes a duty to eliminate hazards such as snow and ice on public roadways and bridges. See *Wright v. Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993).

Here, Plaintiff Jayme Crow established a *prima facie* case of Defendant County's negligence. The uncontradicted evidence in this case establishes that bridge decks ice up first:

Q. Would you help at all with setting any policy or standard in your position for when and where they would use either liquid or salt or sand?

A. Yeah. Principally it was salt and sand, although on the bridges or the spots that would have a tendency to ice up, we would try to get the anti-icer down.

Q. That's the liquid agent, the anti-icer, right?

A. That's correct. It's also called deicer.

Q. Why the difference on bridges?

A. There's a tendency for freezing sooner than in the roadways.

CP 522 (Deposition of former Benton County Public Works Director and County Engineer, Russ Dunfee).

Q. Mr. Pickard, has it been your experience, given your familiarity with the road department and winter maintenance for 33 years here, that the bridges tend to ice up before other areas of the road?

A. Yes.

Q. Is it because of the ambient air underneath and above the bridge?

A. Yes.

CP 477-478 (Deposition of Jack Pickard, Benton County Road Department sand truck driver).

The uncontradicted evidence also establishes that the Clodfelter Bridge has had a history of complaints of being icy, as confirmed by Road Department employee Jack Pickard:

Q Okay. And what complaints have you received or heard about regarding the Clodfelter overpass?

A. It being slick in the area.

CP 479. Benton County Deputy Sheriff Runge underscores the dangerous condition of this bridge in the winter:

Q. In your experience as a deputy, this particular overpass on Clodfelter, is there a good history of accidents on this overpass in the wintertime?

A. My personal experience, and I can honestly say since, you know, I've been a deputy for three years

this April, I've only been -- I've only taken one accident report on that overpass. As far as what the collective is, I couldn't give you that number. But it's always warned -- it's preached: Hey, be careful going over that overpass in the winter. Everybody you talk to: Be careful of that overpass. I don't know, I'm not sure if you tell that people that sort of stuff without having some sort of history with it.

CP 520.

The uncontradicted evidence further establishes that, while the road crew sanded Clodfelter Road on December 23, 2006, this crew neither sanded nor applied magnesium chloride -- or sand -- to the Clodfelter Bridge. It is also uncontradicted that, due to the road crew's failure to sand or apply magnesium chloride to the Clodfelter Bridge, the bridge deck was icy and extremely slippery on December 24, 2006:

“That overpass was pretty -- from what I recall, was pretty good and slick.”

CP 518-519 (Runge Deposition).

- Q. Were the icy road conditions that you were talking about specifically related to the bridge itself?
- A. The entire roadway was icy, but the bridge was, you know, exceptionally icy.

CP 512 (Thompson Deposition).

Likewise, it is uncontradicted that the icy condition of the bridge deck on December 24th was due to the failure of the Benton County Road Department to address snow and ice on the bridge on December 23rd. In

fact, the County's own records show that it earlier dispatched crews to sand its roads, including Clodfelter Road. This same evidence has also clearly established that Defendant County had the opportunity to correct the dangerous condition, again because its crews were in fact out sanding Clodfelter Road itself.

There is no question that Defendant County owed a legal duty to keep its highways, including the Clodfelter Bridge, in a reasonably safe condition for ordinary travel. *See, e.g., Owen v. Burlington Northern & Santa Fe Railroad Co., supra; Keller v. City of Spokane*, 146 Wn.2d 237; WPI 140.01. There is also no question that the County breached its duty to provide reasonably safe roads and bridges for the traveling public when it sanded Clodfelter Road, but failed to take any action on its bridges, including the Clodfelter Bridge. Because the evidence clearly shows that Defendant County breached its duty to keep the Clodfelter Bridge safe for ordinary travel, the trial court erred in granting Defendant County's motion for summary judgment, and it must be reversed. The issue of whether the roadway surface of the bridge was reasonably safe is a factual issue for the jury, not the judge.

C. Defendant County had actual notice of the dangerously icy condition of the Clodfelter Bridge well in advance of the Blaine/Crow collision.

WPI 140.02 sets forth the law regarding the county's liability for unsafe conditions that it did not create:

In order to find a county liable for an unsafe condition of a road that was not created by its employees, and that was not a condition which its employees or agents should have reasonably anticipated would develop, you must find that the county had notice of the condition and that it had a reasonable opportunity to correct the condition.

A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents, or the condition existed for a sufficient length of time and under such circumstances that its employees or agents should have discovered the condition in the exercise of ordinary care.

WPI 140.02; *see also Nibarger v. Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463 (1958); *Wright v. Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993).

Under this standard, in order to maintain an action for the failure to remove ice and snow, a person injured due to an icy roadway condition must show that the governmental entity had notice of the dangerous condition and that it had a reasonable opportunity to correct it before the incident occurred. See *Wright v. Kennewick, supra*; *Bird v. Walton, supra*.

The evidence in this case clearly shows that Defendant County had actual notice of the dangerous conditions existing on its roads and bridges prior to the subject collisions on December 24, 2006.⁸ In fact, the evidence shows that the icy condition of the Clodfelter Bridge came to the *actual* attention of the County and its employees *long before* the occurrence of the crash that injured Jayme Crow. It was defense counsel's position during oral argument that, had someone encountered the slippery condition and called the County, that would indeed be actual notice to the County. In fact, that is *exactly* what happened twice prior to Ms. Crow's nearly fatal encounter with the bridge surface.

As alluded to above, Erwin Laureano was involved in a single vehicle spin-out collision on the Clodfelter Bridge on the evening of December 23, 2006. Laureano Declaration (CP 759). According to Mr.

⁸ In its summary judgment motion, Defendant County argued that conditions changed on the Clodfelter Bridge between 10 a.m. and 11 a.m. on the morning of December 24th. In particular, the County claimed that it did not have notice of the specific condition of melting ice on top of ice because motorists had driven across the Clodfelter Bridge prior to 11 a.m. without any reported problems or incidents. CP 360-363. The County's claim misses the mark. The hazardous condition on the Clodfelter Bridge was ice. The evidence shows that this condition existed for a 15-hour period leading up to the Crow collision. See CP 764. This was nothing more than an icy condition becoming even icier. The ice existed here from the 23rd through Ms. Crow's encounter with the ice on the 24th because the County failed to address the icy bridge after having been directly told that the bridge was icy. Degrees of iciness do not change the fact that this is an icy condition that only gets worse if the County fails to deal with it. Under these circumstances, the question of whether there was adequate notice to the County and an opportunity for it to respond remains a jury question, and is not for the judge to decide.

Laureano, ice on the Clodfelter Bridge caused his Land Rover to lose traction and spin out:

3. On December 23, 2006, at approximately 8:00 p.m., I was driving my Land Rover eastbound on Clodfelter Road (though the roadway is actually headed north at that point) from my home in the Tripple Vista area to Red Robin restaurant for dinner.

4. I had no difficulty driving on Clodfelter Road until I reached the Clodfelter Bridge that passes over Interstate 182.

5. At the point my Land Rover made contact with the Clodfelter Bridge, I lost control on the ice and fish tailed, sliding the length of the bridge. My Land Rover, continued out of control until I broke through the guardrail on the canal overpass approximately 60 yards from the edge of the Clodfelter Bridge and finally came to a rest on the canal bank.

CP 759.

Realizing that the deck of the Clodfelter Bridge was covered with ice, Mr. Laureano then called 911 and Deputy Sheriff Blanchard responded. CP 759. After arriving at the scene of the crash, Deputy Blanchard notified Benton County Road Department of the danger on the Clodfelter Bridge:

6. After I was off the roadway and waiting for a tow truck, I noticed that the Clodfelter Bridge was a sheet of ice. I called 911 and Deputy Lane Blanchard of the Benton County Sheriff's Office responded. It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail.

CP 759.

Deputy Blanchard responded to the Laureano spin-out collision at the Clodfelter Bridge at approximately 7:57 p.m. on December 23, 2006. In his narrative report, Deputy Blanchard in fact attributed this collision to ice, and reported the incident to the Benton County Road Department through dispatch:

On 12-23-09 at 1957hrs, I was dispatched to a one-car accident non-blocking on Clodfelter Rd/Leslie Rd area in Benton County, State of Washington. Contacted the driver/owner, of U-1 Erwin J Laureano [redacted]. Christina M. Laureano [redacted] was in the front passenger seat when the accident happened. The two individuals are husband and wife. Both parties said they weren't injured, just shaken up.

E. Laureano was heading eastbound on Clodfelter, about .5 miles from the Leslie rd. intersection. ***E. Laureano's vehicle started to slide sideways due to the icy road in the area***, slid off the roadway hitting a guardrail, with the passenger side of the vehicle. The vehicle then rolled and landed upright, against the ditch bank, with the front of the vehicle facing west, about 15 feet off the roadway. E. Laureano thought the vehicle only rolled once. Due to the location of the vehicle where it was sitting, I would have to agree it only rolled once. The guardrail that was hit is above an irrigation canal that is empty. Both parties were wearing seatbelts. No indication of alcohol or drugs.

E. Laureano thought he was going between 40-45 mph.

.....

Via dispatch, *I left a message with the County Road Department*, they would need to come out and fix the guardrail.

CP 764 (emphasis added).

The next morning, Geri Bauer witnessed the ice on the Clodfelter Bridge and called 911, actually telling the County via 911 dispatch that the Clodfelter Bridge needed sanding:

After I got to Michael, *I called 911 and told the person on the line that they needed to get a sand truck out on the Clodfelter Road Bridge*. Within five to ten minutes I saw a red minivan traveling north on Clodfelter headed towards the bridge. The van was traveling at a reasonable rate of speed until it reached the bridge. When it got to the bridge, I watched as it violently fishtailed forward and seemed to be moving uncontrollably. As the minivan came to the north end of the bridge it careened off to the side of the road and into a ditch.

CP 766-767 (emphasis added).

This evidence is to be viewed in a light most favorable to Plaintiff Crow as the nonmoving party in a summary judgment proceeding. Deputy Blanchard was a Benton County employee charged with policing the County's roads, and was an agent of Benton County. As set forth in his narrative report on the December 23rd crash, Deputy Blanchard knew that the roadway surface at the Clodfelter Bridge was icy and dangerous. "A county is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents." WPI 140.02.

Additionally, he reported this ice-caused incident to the Benton County Road Department via dispatch, providing even further notice. Deputy Blanchard's actual knowledge of the dangerous condition of the Clodfelter Bridge, along with Ms. Bauer's call to 911 requesting sand for the icy bridge the next morning, precludes summary judgment as a matter of law because it satisfies the notice requirement set forth in WPI 140.02 and presents evidence of opportunities to respond.

D. The issue of whether or not Defendant County had a reasonable opportunity to correct the condition is one of fact for the jury.

Because Plaintiff Crow has established that Benton County had actual notice of the icy condition on the Clodfelter Bridge roadway surface, the sole remaining issue is whether or not the County had a reasonable opportunity to correct this dangerous condition. Issues of reasonableness are questions of fact for the jury. *See Bodin v. City of Stanwood*, 130 Wn.2d 726, 733, 927 P.2d 240 (1996) (whether one charged with negligence has exercised reasonable care is a question of fact); *Lano v. Osberg Constr. Co.*, 67 Wash.2d 659, 663, 409 P.2d 466 (1965) (holding in a contract termination case that whether a party had reasonable notice depends on the circumstances of each case and was a question of fact for the jury); *Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.*, 149 Wn. App. 429, 434, 203 P.3d 1077 (2009);

Blomster v. Nordstrom, Inc., 103 Wn. App. 252, 259, 11 P.3d 883 (2000) (holding in a constructive termination case that a question of material fact as to whether the situation into which plaintiff was placed would compel a reasonable person to resign defeated summary judgment); *Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001) (question of whether a reasonable person would resign from her job due to sexual harassment was one of fact for the jury); *O'Donnell v. Zupan, Enters., Inc.*, 107 Wn. App. 854, 28 P.3d 799 (2001) (in slip and fall cases involving self-service market, the reasonableness of a proprietor's methods of protection is a question of fact).

In this case, Deputy Blanchard, as the County's agent in reporting unsafe road conditions, knew of the icy and dangerous condition of the Clodfelter Bridge some *15 hours prior to the Blaine-Crow collision*. As a result, the County had both actual notice of this icy, dangerous condition, and ample time to address the hazard on this small section of Clodfelter Road with sand, salt, a salt-sand mix or de-icer.

Thereafter, according to the Police Traffic Collision Report prepared by Deputy Sheriffs Runge and Thompson, Michael Bauer slid on the ice and lost control of his vehicle on the bridge the next morning. As set forth above, Geri Bauer went to the scene, and called 911. Ms. Bauer

told the person on the line at 911 that the Clodfelter Bridge was icy, and that a sand truck was needed there to address the ice.

Despite having actual knowledge of the dangerous condition on the Clodfelter Bridge over a 15-hour period before Ms. Crow's encounter with the hazardously icy condition, Defendant County failed to take any action until after the subject collision when a truck was finally called out to sand the bridge deck. Based on these facts, the issue of whether or not the County had a reasonable opportunity to correct the dangerously icy condition on its bridge after having notice of this condition is clearly a question for the jury that precludes summary judgment, as a matter of law.

VI. CONCLUSION

On summary judgment, Defendant Benton County had the burden of showing that no genuine issues of material fact existed as to its negligence. CR 56(c). All factual claims were to be viewed in a light most favorable to Ms. Crow, as the non-moving party.

The County failed to meet its burden. The evidence shows that Benton County sanded its roadways on December 23rd, but failed to sand or de-ice the most dangerous location – the bridge. The evidence also establishes that Benton County had actual notice of the hazardous icy roadway condition on the Clodfelter Bridge some 15 hours prior to the

Crow collision. The ice was never treated. It never got better -- it got progressively worse.

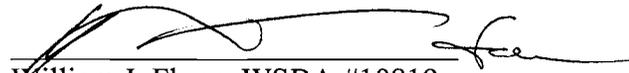
In the face of this clear evidence pointing to Defendant County's negligence, the trial court erroneously granted the County's motion for summary judgment. It improperly and prejudicially dismissed this important action brought to hold Defendant Benton County accountable for the injuries that it caused the public -- and in particular Jayme Crow -- by its obvious negligence in recognizing the need to sand the roads, yet completely ignoring the known icy condition of the Clodfelter Bridge.

The lower court usurped the fact-finding role of the jury in this case. The Order Granting Defendant County's Motion for Summary Judgment, and the Order Striking Plaintiff's Motion for Reconsideration, must be reversed and the case remanded for trial.

DATED: October 15, 2010.

Respectfully submitted,


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FILED

OCT 18 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2010, I served the following documents:

1. **Appellants Opening Brief; and**
2. **Certificate of Service.**

on counsel below by the method(s) indicated and addressed as follows:

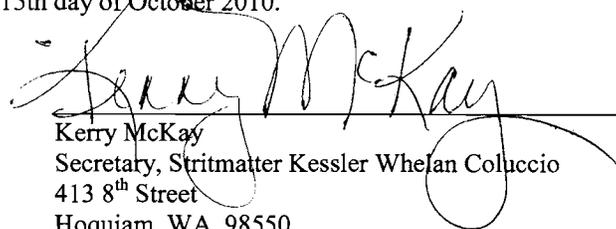
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