

FILED

DEC 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 29369-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HALEY E. WEEKES, a single person,

Appellant,

v.

KITTITAS COUNTY, a municipal corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE MICHAEL MCCARTHY

BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

ABEYTA NELSON P.C.

By: Terry P. Abeyta
WSBA No. 7165
Gregory S. Lighty
WSBA No. 21275

1102 W. Yakima Avenue
Yakima, WA 98902-3029
(509) 575-1588

Attorneys for Appellant

FILED

DEC 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29369-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HALEY E. WEEKES, a single person,

Appellant,

v.

KITTITAS COUNTY, a municipal corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY
THE HONORABLE MICHAEL MCCARTHY

BRIEF OF APPELLANT

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

ABEYTA NELSON P.C.

By: Terry P. Abeyta
WSBA No. 7165
Gregory S. Lighty
WSBA No. 21275

1102 W. Yakima Avenue
Yakima, WA 98902-3029
(509) 575-1588

Attorneys for Appellant

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
IV.	STATEMENT OF THE CASE	3
	A. Statement Of Facts.	3
	1. Kittitas County, Which Adopted A Resolution Requiring As A “First Priority” That Its Road Crews Clear Snow From Its Arterials, Left A One Inch Layer Of Ice On A Steep Section Of The Vantage Highway, Did Not Use Any Deicing Agent, And Had Not Applied Sand To The Icy Hill Since The Previous Day.	3
	2. Haley Weekes Lost Control Of Her Car On The Icy Slope Of The Vantage Highway’s Caribou Cut, Sustaining Permanent Life-Changing Injuries.	7
	B. Procedural History.	10
V.	ARGUMENT	11
	A. Standard of Review: This Court Reviews The Trial Court’s Grant of Summary Judgment De Novo.	11
	B. The County’s Refusal To Deploy Deicing Agents On This Treacherous Portions Of Its Highway Is An Operational Decision That Is Not Entitled To Immunity.....	13

C.	Whether The County Failed To Maintain Its Highway In A Reasonably Safe Condition For The Traveling Public Presents Disputed Issues Of Fact For The Jury.....	16
1.	The Trial Court Erred In Refusing To Hold The County To A Duty To Maintain Its Roads In A Condition Reasonably Safe For Travel.	16
2.	A Jury Could Find That The County's Failure To Sand The Caribou Cut In The Early Morning Hours On November 28 th Was A Breach of The Standard of Care.	18
3.	A Jury Could Find That The County's Failure To Apply Deicer To The Caribou Cut Was A Breach Of The Standard of Care.	23
4.	The County May Be Liable For Failure To Comply With Its Own Policies.	24
VI.	CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963).....	12
<i>Bender v. City of Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983)	16
<i>Bird v. Walton</i> , 69 Wn. App. 366, 848 P.2d 1298 (1993).....	21, 22
<i>Bishop v. Miche</i> , 137 Wn.2d 518, 973 P.2d 465 (1999).....	24
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1996)	15
<i>Duckworth v. City of Bonney Lake</i> , 91 Wn.2d 19, 586 P.2d 860 (1978)	12
<i>Fitzpatrick v. Okanogan County</i> , 169 Wn.2d 598, 238 P.3d 1129 (2010)	11, 12
<i>Haberman v. Washington Public Power Supply System</i> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987)	13
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	12
<i>Johnson v. Camp Automotive, Inc.</i> , 148 Wn. App. 181, 199 P.3d 491, <i>rev. denied</i> , 166 Wn.2d 1019 (2009)	3, 12
<i>Joyce v. Dept. of Corrections</i> , 155 Wn.2d 306, 119 P.3d 825 (2005)	24
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	16, 17, 21

Laguna v. Wash. State Dept. of Transp. , 146 Wn. App. 260, 192 P.3d 374 (2008).....	19
Leroy v. State , 124 Wn. App. 65, 98 P.3d 819 (2004).....	19
Mason v. Bitton , 85 Wn.2d 321, 534 P.2d 1360 (1975).....	13
Nibarger v. City of Seattle , 53 Wn.2d 228, 332 P.2d 463 (1958)	19
Owen v. Burlington Northern and Santa Fe R.R. Co. , 153 Wn.2d 780, 108 P.3d 1220 (2005)	17
Tyner v. State , 141 Wn.2d 68, 1 P.3d 1148 (2000).....	25
Xiao Ping Chen v. City of Seattle , 153 Wn. App. 890, 223 P.3d 1230 (2009), <i>rev. denied</i> , 169 Wn.2d 1003 (2010)	17

STATUTES

RCW 4.96.020	10
RCW 4.96.010.....	2, 13, 16

OTHER AUTHORITIES

Tardif & McKenna, <i>Washington State's 45-Year Experiment in Governmental Liability</i> , 29 Seattle U. L. Rev. 1 (2005).....	14
---	----

I. INTRODUCTION

A county owes all persons a duty to maintain its roadways in a condition that is reasonably safe for ordinary travel. Here, the plaintiff suffered severe life changing injuries after she lost control of her car on a steep and ice covered section of highway, known to be hazardous to County road crews, which had not been sanded since the previous day. The trial court granted summary judgment dismissing the plaintiff's lawsuit, holding that Kittitas County's failure to use salt or other deicing agents on this stretch of highway was entitled to immunity as a discretionary function despite the fact that the only policy formally adopted by the County Commissioners required that this highway be cleared of snow as a first priority.

The trial court also held that the County's decision to leave its highway covered in a one inch layer of ice and not apply sand during the early morning hours was reasonable as a matter of law because similar conditions existed elsewhere in the County, and because the County was unaware of a "special hazard" at the accident site. Because the trial court did not correctly hold the County to a duty of reasonable care, the plaintiff, Haley Weekes, appeals.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its Memorandum Decision and Order Granting Defendant Kittitas County's Motion for Summary Judgment. (CP 338-43) (Appendix A)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Is a county's maintenance department's decision limiting the deployment of deicing agent to particular county roads entitled to immunity from liability as a "discretionary function," notwithstanding the Legislature's broad waiver of sovereign immunity in RCW 4.96.010?

B. Is the breach of a county's duty to maintain its roads in a reasonably safe condition for travel a disputed issue of fact where the county's maintenance operators knew that the steep hill where plaintiff lost control of her car was covered in ice, but the county failed to use salt or other deicing agents after leaving a layer of compact snow and ice on the arterial highway and had not sanded the highway at all since the previous day?

IV. STATEMENT OF THE CASE

A. Statement Of Facts.

Haley Weekes suffered severe and permanent injuries, including a fractured skull and traumatic brain injury, when she lost control of her car on an icy downhill stretch of the Vantage Highway in Kittitas County on November 28, 2006. (CP 259) The trial court dismissed her action against Kittitas County on summary judgment. Accordingly, this court reviews the facts, and all reasonable inferences arising from those facts, in the light most favorable to Haley. *Johnson v. Camp Automotive, Inc.*, 148 Wn. App. 181, 184, ¶ 5, 199 P.3d 491, *rev. denied*, 166 Wn.2d 1019 (2009).

1. **Kittitas County, Which Adopted A Resolution Requiring As A “First Priority” That Its Road Crews Clear Snow From Its Arterials, Left A One Inch Layer Of Ice On A Steep Section Of The Vantage Highway, Did Not Use Any Deicing Agent, And Had Not Applied Sand To The Icy Hill Since The Previous Day.**

Haley, who was 20 years old at the time, lived with her mother in a home off the Vantage Highway. The Vantage Highway was the main east-west state highway from Ellensburg to the Columbia River prior to the construction of I-90, and is currently the main county arterial for east-west traffic between Ellensburg and Vantage. The Vantage Highway rises and falls through a series of

cuts made in the hills as it comes out of the Kittitas Valley east of Ellensburg. (CP 156) As it is a county highway, Kittitas County is responsible for snow removal and maintenance on the Vantage Highway. The Washington Department of Transportation is responsible for snow removal on Interstate 90 and all state highways in the County.

Approximately one quarter mile west of Caribou Road, the Vantage Highway crests a hill, through what is known as the Caribou Cut. As it continues downhill toward Ellensburg, the road reaches a slope of 5.6%. (CP 98, 156) Because the cut shaded the Highway from sun during winter months, County road crews knew that the Caribou Cut stretch of the Vantage Highway presented a hazard to the travelling public in icy road conditions. (CP 255 (“everybody knows on our crew that [if] you’re going through there, sand it.”))

The Kittitas County Commissioners had adopted Resolution 2001-155 in the year 2001 that designated “major arterials,” such as the Vantage Highway, as the “First Priority” for snow removal by County crews: “**First Priority** shall mean that these roads will be cleared of snow first.” (CP 286) (emphasis in original) The County

had not passed any resolutions regarding the use of deicers, such as salt or chemical deicers, which are the most effective means of breaking up ice on a roadway after plowing. (CP 104-05, 277) The County's road maintenance manager, in consultation with the commissioners, chose to use deicing agents only in the western part of the County, in the Hyak area east of Snoqualmie Pass. (CP 68-69, 103, 178-79)

It had snowed over the 2006 Thanksgiving weekend, beginning on early Sunday, November 26. (CP 273) Kittitas County snow removal crews were called out on Sunday, November 26, beginning at 6:00 a.m. (CP 153, 254) Kittitas County equipment operator Dan Higginbotham spent approximately three hours plowing and sanding arterials in the vicinity of the Caribou Cut on Sunday. (CP 190, 254) County records do not establish how many passes Mr. Higginbotham made, or the amount of sand used on the Vantage Highway. (CP 154)

It did not snow on Monday, November 27. Temperatures fell rapidly as clear, cold and dry weather settled into the area. While temperatures reached a high of 34 degrees on Sunday, on Monday

the high was 32 degrees and the low was nine degrees. (CP 131, 303)

As approximately six inches of snow had fallen on Sunday, (CP 273), the County's maintenance manager instructed some crews to begin work as early as 4:00 a.m. on Monday, November 27. (CP 153) Three different employees, who were responsible for plowing and/or sanding in the districts in which the Caribou Cut is located, may have performed maintenance operations on that section of the Vantage Highway on Monday, November 27. (CP 153) Donnie Kies plowed and sanded in that district for four hours, Bob Hagemier plowed and sanded in the district for three hours, and Boyd Redlin plowed (but did not sand) for four hours in the district encompassing the Caribou Cut. (CP 191-93) Because the County failed to keep complete records, it is impossible to determine when and how much sand had been applied to the Caribou Cut by the end of their shifts on Monday. (CP 154) Temperatures fell into the teens and single digits on Monday night. (CP 303)

The County did not call its crews out for road work in the pre-dawn hours of Tuesday, November 28th. (CP 153) By the morning

of November 28th, the Caribou Cut had not been “cleared of snow,” but was covered with ice. (CP 260 (“Both the east and westbound lanes of travel were covered with ice which had all lane lines covered at the time of the collision.”)) Because the plowing had not cleared the Vantage Highway of snow and ice, but had left approximately one inch of compact snow on the road surface, the Caribou Cut surface, in addition to ice, contained frozen ruts of a depth of up to one inch. (CP 279) Whatever sand had been applied by County road crews to the Highway was largely gone, swept away by a combination of the plowing that had occurred the previous day and the Highway’s traffic. (CP 259, 274) According to Haley’s expert, the sand that remained on the road was, “inconsequential . . . not enough to make any difference” in terms of aiding traction on the ice covered highway. (CP 279)

2. Haley Weekes Lost Control Of Her Car On The Icy Slope Of The Vantage Highway’s Caribou Cut, Sustaining Permanent Life-Changing Injuries.

Haley left for her job at a Safeway store in neighboring Ellensburg on Tuesday morning shortly before 7:00 a.m., heading west from her home on the Vantage Highway on the same stretch of road she had been driving for several years, since she was a

high school student. (CP 32, 259) She was driving the 2001 Camaro that she had purchased several months earlier. (CP 57-58, 259) It was 17 degrees, and the Vantage Highway was covered in a solid layer of compact snow and ice. (CP 259-61, 270)

Haley traveled approximately six miles from her house, passing the Caribou Road intersection and then went uphill into the Caribou Cut. (CP 37) Because of the snowy road conditions, she was traveling at approximately 30 to 35 miles per hour, well below the posted 50 mile per hour speed limit. (CP 37, 263) The downhill part of the Cut was shaded from the sun, making the roadway especially icy. (CP 39)

Haley crested the hill, noticed that it was "really icy," and tapped her brakes. (CP 37) Her car immediately went into a skid, sliding toward the steep embankment on the right side of the westbound lane. In attempting to correct and keep the car out of the ditch, Haley steered toward the left, but the vehicle skidded into the eastbound lane where it was broadsided on the passenger side by an oncoming Dodge pickup truck traveling at approximately 40 mile per hour. (CP 263) Haley's car came to rest in the ditch on

the south side of the Highway, adjacent to the eastbound lane. (CP 260-61, 270)

Although she was wearing her seat belt, the force of impact slammed Haley into the center console toward the passenger side of her car, causing severe internal injuries. The collision shoved the passenger side door completely into the middle of the car, where it collided with Haley's head, breaking her neck and fracturing her skull. (CP 262-63)

Because of the extent of her injuries, Haley was transferred by helicopter from Ellensburg's Kittitas County Community Hospital to Harborview Medical Center in Seattle. (CP 56) She suffered a fractured skull and traumatic brain injury that resulted in permanent cognitive damage, neck injuries, including fractured vertebrae and spinal cord compression, and internal injuries, including a collapsed lung and a lacerated liver. (CP 129) Haley remained at Harborview for three weeks, until December 18, 2006, and then transferred to Kittitas Valley Health & Rehabilitation Center where she remained for five months. (CP 130) After a year, she attempted to return to work, but struggled because of her cognitive deficits, and eventually lost her job. (CP 305-06)

B. Procedural History.

On March 13, 2009, Haley filed a tort claim with Kittitas County pursuant to RCW 4.96.020 alleging negligence. (CP 125) The County denied the claim on April 23, 2009. (CP 124) Haley timely commenced this action against the County on May 28, 2009 in Yakima County Superior Court. (CP 1-3)

After answering, (CP 4-6), the County sought summary judgment. (CP 8) Haley opposed summary judgment with expert testimony, including a study published by the County's expert, establishing that sand was ineffective to provide traction because it is quickly swept away on arterial roads by even light vehicular traffic, as well as by repeated plowing. (CP 277-78, 290) According to Haley's expert, "the appropriate solution would have been to use a decing chemical to burn off that residual of snow that always remains behind the snow plow." Citing studies that "show a salting program actually economically does make sense, Haley's expert asked, since the County had "chemical available for them to use, why aren't they using it?" (CP 277)

The Honorable Michael McCarthy ("the trial court") entered a memorandum decision and order granting the County's motion and

dismissing Haley's claim with prejudice on September 10, 2010. (CP 338-43) The trial court held that the County's decision to refrain from using deicer was entitled to immunity as a discretionary policy decision. (CP 342) Framing "the question posed [as] whether, despite the obvious road conditions, Kittitas County had a duty to eliminate any risk entirely and clear the road of any and all snow and ice," (CP 341), the trial court further held that the County could not be liable in the absence of knowledge that road conditions at the location of Haley's accident were "any more hazardous than those existing on other roadways in Kittitas County following the Thanksgiving weekend snow event." (CP 342) Finally, the trial court held that Kittitas County had not "voluntarily assumed a duty to keep the road snow and ice free." (CP 342)

Haley timely appealed. (CP 344)

V. ARGUMENT

A. **Standard of Review: This Court Reviews The Trial Court's Grant of Summary Judgment De Novo.**

This court reviews de novo the trial court's order granting Kittitas County's motion for summary judgment, and dismissing Haley's negligence claim as a matter of law. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, ¶19, 238 P.3d 1129

(2010). The trial court's findings are superfluous and its legal conclusions regarding the existence of a duty or the availability of immunity are freely reviewable by this court. See ***Duckworth v. City of Bonney Lake***, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

This court looks at the same record considered by the trial court, and determines whether the pleadings, declarations and documentary evidence when viewed in the light most favorable to Haley, the nonmoving party, raises a material issue of fact for trial. ***Johnson v. Camp Automotive, Inc.***, 148 Wn. App. 181, 184, 199 P.3d 491 (2007). The County, as the moving party, had "the burden of showing that there is no genuine issue as to any material fact." ***Fitzpatrick***, 169 Wn.2d at 605, quoting ***Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.***, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). Where a defendant's compliance with the duty of reasonable care presents an issue of fact, summary judgment may not be granted; in such a case a trial "is absolutely necessary" to resolve disputed issues of fact. ***Balise v. Underwood***, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

B. The County's Refusal To Deploy Deicing Agents On This Treacherous Portions Of Its Highway Is An Operational Decision That Is Not Entitled To Immunity.

The trial court erred in holding that the County's failure to use deicer on the Caribou Cut "was a policy choice of the County" that is entitled to immunity as a discretionary decision. (CP 342) Discretionary immunity is a narrow exception to the Legislature's sweeping abolition of sovereign immunity in RCW 4.96.010:

All political subdivisions . . . of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation.

RCW 4.96.010. See *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 157, 744 P.2d 1032, 750 P.2d 254 (1987) ("Discretionary immunity is a narrow court-created exception to the Legislature's abolition of sovereign immunity.")

In order to qualify for discretionary immunity, a challenged governmental decision must have been made at the "truly executive level," and not the "operational level." *Mason v. Bitton*, 85 Wn.2d 321, 328, 534 P.2d 1360 (1975). As the County's counsel has elsewhere noted, discretionary immunity applies "only to executive level policymaking decisions rather than 'field' decisions" and is limited "to adoption of laws, regulations, and policies by legislative

bodies.” Tardif & McKenna, *Washington State's 45-Year Experiment in Governmental Liability*, 29 Seattle U. L. Rev. 1, 15 (2005).

The County's decision to limit the use of deicer at the Caribou Cut was not made at the highest executive levels of County government. While the trial court found that “the Board of County Commissioners consciously chose to not implement a de-icing program after weighing the potential costs and benefits,” (CP 342), the actual resolution adopted by the County Commissioners did not address whether deicers were to be used on County roads at all, stating plainly that clearing arterials of snow was the department's “first priority.” (CP 286) To comply with that goal, the County's road crews used deicer in the snow-prone western part of Kittitas County in the Hyak region precisely because plowing alone would not clear those roads of hazardous accumulations of snow and ice (CP 149), and treated hazardous sections of other County roads with anti-icing liquids to keep snow from sticking to surfaces. (CP 150-51) Although the County presented testimony that the Commissioners “have discussed ... but have rejected” a “full road de-icing program,” (CP 118), the decision not to employ deicing in

other areas of the county was an operational decision made by the County's Roads Division chief. (CP 152)

The County contended that its Roads Division chief's decision to forego using deicing agents was based largely on cost concerns. (CP 151-52) However, the fact that a particular decision is based on fiscal considerations does not, standing alone, cloak that decision with discretionary immunity. Our Supreme Court has rejected a municipality's attempt to justify its negligence on the basis of its limited resources "because the duty of care owed to another does not change according to a party's financial situation." ***Bodin v. City of Stanwood***, 130 Wn.2d 726, 742-43, 927 P.2d 240 (1996) (opinion of Johnson, J., joined by Alexander, J.). Such a "poverty defense" is irrelevant to the County's standard of reasonable care.

Here, the trial court relied on the road division's decision concerning how to allocate its resources in holding that the decision not to apply salt or other deicing agents to an icy and hilly stretch of the Vantage Highway was entitled to immunity and negated the County's duty of reasonable care as a matter of law. (CP 341) This court should reverse and remand for trial because the

County's decisions regarding where and how to comply with its policy of clearing its main arterials of snow was not entitled to immunity as a discretionary decision under the narrow exception to RCW 4.96.010. See ***Bender v. City of Seattle***, 99 Wn.2d 582, 587, 664 P.2d 492 (1983) (discretionary governmental immunity is a "very narrow exception.")

C. Whether The County Failed To Maintain Its Highway In A Reasonably Safe Condition For The Traveling Public Presents Disputed Issues Of Fact For The Jury.

1. The Trial Court Erred In Refusing To Hold The County To A Duty To Maintain Its Roads In A Condition Reasonably Safe For Travel.

Kittitas County owes a duty to all persons to "maintain its roadways in a condition that is reasonably safe for ordinary travel." ***Keller v. City of Spokane***, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). The trial court, while acknowledging the County's duty of reasonable care, framed the issue differently: "The question posed is whether, despite the obvious road conditions, Kittitas County had a duty to eliminate any risk entirely and clear the road of any and all snow and ice." (CP 341) By framing the legal issue in terms of strict liability, rather than reasonable care, the trial court was able to dismiss Haley's action by reasoning that no such heightened duty to make its roadways entirely snow free existed, and failed to

properly analyze whether a reasonable juror could find that the County breached a duty to take reasonable steps to make the Caribou Cut “safe for ordinary travel.” *Keller*, 146 Wn.2d at 249.

Whether the County’s roadway was safe for ordinary travel is a question of fact. *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 909, 223 P.3d 1230 (2009), *rev. denied*, 169 Wn.2d 1003 (2010). “If reasonable minds can differ, the question of fact is one for the trier of fact and summary judgment is not appropriate.” *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

The trial court erred in resolving the factual issue of breach of duty as a matter of law. First, it was undisputed that when Haley lost control of her car, the Vantage Highway was covered with ice, and had not been sanded since the previous day, even though it was common knowledge that the Caribou Cut was a hazardous area and that sand would not provide traction for a significant length of time. Second, a reasonable juror could find that the County’s road manager’s decision to save money by refusing to deploy any deicing agent on one of the most hazardous portions of the County’s arterials was a breach of the standard of care. Finally,

whether the County complied with its own policy of clearing its arterials of snow and ice as a “first priority” presents a fact issue for the jury. For each of these reasons, or for any one of them, this court should reverse and remand for trial in which a jury determines whether the County’s breach of its duty of reasonable care caused Haley’s injuries.

2. A Jury Could Find That The County’s Failure To Sand The Caribou Cut In The Early Morning Hours On November 28th Was A Breach of The Standard of Care.

The trial court held that the County could not be liable for negligence in maintaining its highway absent notice that “the roadway condition at the Caribou Cut was any more hazardous than those existing on other roadways in Kittitas County following the Thanksgiving weekend snow event.” (CP 342) That similar conditions may have existed elsewhere in the County does not excuse the failure to exercise reasonable care to sand a steep and ice covered portion of the County’s major east-west road. The trial court erred in holding that the County’s duty of reasonable care arose only if it had notice that “the stretch of road posed a greater hazard than normal.” (CP 342)

The trial court relied on a pair of cases from Divisions One and Two holding that the State had no duty to predict and prevent ice forming on roadways. See **Laguna v. Wash. State Dept. of Transp.**, 146 Wn. App. 260, 192 P.3d 374 (2008); **Leroy v. State**, 124 Wn. App. 65, 98 P.3d 819 (2004). The appellate courts in both cases held that the State's duty to prevent the formation of ice on bridges and highways arose only if the State had "(a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises . . ." **Laguna**, 146 Wn. App. at 263; **Leroy**, 124 Wn. App. at 69, both quoting **Nibarger v. City of Seattle**, 53 Wn.2d 228, 229, 332 P.2d 463 (1958).

In both **Laguna** and **Leroy**, the courts rejected arguments that the State had a duty to prevent the formation of icy road conditions whenever such conditions were foreseeable. See **Laguna**, 146 Wn. App. at 265 (rejecting argument that "the State had a duty act because the facts known to it made the formation of ice foreseeable."); **Leroy**, 124 Wn. App. at 69-70 (characterizing plaintiff's argument that duty arose when ice became "predictable" as a "change [in] the law."). Those cases are inapposite because here, the icy conditions on the Caribou Cut were not just

foreseeable; they were actually known to the County and its road maintenance crews based on conditions that had existed since the previous day. Haley does not seek to impose a duty on the County to predict the formation of hazardous conditions, but to correct a hazardous condition on a well known dangerous stretch of its arterial highway that had existed since the previous day. The County had sufficient notice that the Caribou Cut presented hazards to ordinary travel to present an issue of fact regarding whether its maintenance of that roadway – particularly its decision not to sand in the early morning hours of November 28th – was reasonable under the circumstances

The County's maintenance personnel recognized that the Caribou Cut, with its 5.6% grade and shaded road surface, presented hazards to the traveling public following significant snowfall. (CP 255) The County necessarily knew that this portion of the Vantage Highway was icy on Tuesday morning because temperatures did not rise above freezing on Monday, no new snow had fallen since the snow on the Caribou Cut was plowed to a depth of approximately one inch the previous day, and each time the road was plowed whatever sand had been previously put down

by other workers got cleared off the road surface. (CP 131, 274, 303) As a result, the roadway was covered in ice and there was no appreciable amount of sand on the road surface by 7:00 a.m. on Tuesday, when Haley lost control of her car. (CP 259, 279)

The trial court also reasoned that the County could not be liable because “the accident occurred, on readily visible compact snow and ice, in spite of snow removal and sanding efforts of the County.” (CP 341, *citing Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993)) However, the fact that the conditions may have been “readily visible” is relevant only to the issue of Haley’s comparative fault, if any, and could not in any way limit the County’s duty to make the roadway safe for ordinary travel. See *Keller*, 146 Wn.2d at 250 n.13 (error “to limit the scope of a municipality’s duty to only fault-free plaintiffs”).

The trial court’s reliance on *Bird* was also error. In *Bird*, this court affirmed a summary judgment in favor of the State arising from a collision on Interstate 82 in icy conditions where it was undisputed that the State began sanding the roadway starting at 1:30 a.m. in the morning, and that “Department maintenance workers were thereafter engaged almost continuously in attempting

to sand the highway, up to the moment of the accident.” 69 Wn. App. at 368. Here, by contrast, the County had not applied any sand for at least 12 hours prior to Haley's collision, and the amount of sand that it had previously applied was unknown because the County failed to keep complete records.

County road maintenance worker Dan Higginbotham spent three hours plowing and sanding the arterials in Maintenance District I, which encompasses the Caribou Cut beginning at 6:00 a.m. on Sunday November 26. (CP 190, 254) County crews were called out at 4:00 a.m. on Monday morning because approximately six inches of snow had fallen the previous day. (CP 153) Three County workers plowed in that vicinity on Monday, November 27th, and two of them sanded. (CP 153, 191-93) However, no records show how many passes were made by each employee or the amount of sand placed at any location.

Haley presented photographic evidence, the observation of the investigating state trooper, as well as expert testimony, that the amount of sand on the highway was “inconsequential, which means there isn't enough there to make any difference.” (CP 259, 266, 279) Whether the County's failure to sand in the early morning

hours, “before people start to commute,” (CP 284), was a breach of the County’s duty to maintain its roadway safe for ordinary travel presents a disputed issue of fact. This court should reverse the trial court’s summary judgment.

3. A Jury Could Find That The County’s Failure To Apply Deicer To The Caribou Cut Was A Breach Of The Standard of Care.

The County’s failure to use any salt or other deicing agents on this hazardous stretch of roadway also raises a factual issue regarding its breach of its duty of reasonable care. Despite the fact that its plows routinely leave approximately an inch of snow on the road, the County limits the use of salt or other deicing agents only to County roads in the western part of the County.

Because sanding major arterials is ineffective, experts for both Haley and the County stated that it is appropriate to “use a deicing chemical to burn off that residual compact snow that always remains behind the snow plow.” (CP 277; see CP 293 (“abrasives do indeed have little value as friction enhancers”)) Kittitas County used a sand and salt mixture of ten parts sand to one part salt to break down the ice that was left after plowing the roads in snowiest part of the upper County. (CP 300-01)

The County's decision not to use deicer on any other portions of the County's highways is not entitled to discretionary immunity. (Arg. § B, *supra*) Whether it would have been reasonable to mix salt or other deicer with the sand in order to break up compact snow and ice on a steep portion of the County's well-traveled roadway is a question for the trier of fact.

4. The County May Be Liable For Failure To Comply With Its Own Policies.

The County's failure to comply with its stated policy of clearing snow and ice from major arterials as a "first priority" provides a further basis for liability. The trial court erred in rejecting Haley's theory that the County's violation of its own policies provided evidence of its breach of the standard of reasonable care.

"Internal directives, department policies, and the like may provide evidence of the standard of care, and therefore be evidence of negligence." *Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 324, ¶45, 119 P.3d 825 (2005). In *Joyce*, the Court held that a Dept. of Corrections' policy directive requiring community corrections officer to report violations of sentencing conditions provided evidence of the Department's breach of its duty of reasonable care. 155 Wn.2d at 323-24. See also *Bishop v.*

Miche, 137 Wn.2d 518, 531, 973 P.2d 465 (1999) (municipal probation department manual requiring probation officer to report violations); *Tyner v. State*, 141 Wn.2d 68, 87-88, 1 P.3d 1148 (2000) (CPS manual's requirement that caseworkers contact key collateral sources in investigating child abuse allegations).

Here, the only written policy adopted by Kittitas County designated the Vantage Highway a "First Priority" for snow removal. That policy defined "First Priority" as meaning "that these roads will be cleared of snow first." (CP 286) The County, by its own policies, thus provided substantial evidence of what was required to comport with the standard of reasonable care.¹ Whether the County's decision to leave one inch of compact snow that solidified to a layer of solid ice in the subfreezing temperatures overnight and into the early morning hours of November 28th conformed to its duty of reasonable care in light of the policy to "clear" the Vantage Highway of snow as a first priority was a question for the jury.

¹ The trial court misinterpreted Haley's argument, in opposition to summary judgment, that the County undertook, but negligently discharged a duty to make the road safe for travel. (CP 319) The trial court noted Haley's argument that "the County voluntarily assumed a duty to keep the road snow and ice free and negligently discharged this duty," but stated that the only cases offered to support this argument were based upon "the rescue doctrine." (CP 342) The trial court erred in rejecting Haley's theory on the ground that Haley could not establish that she "relied upon an assurance of assistance." (CP 342-43)

VI. CONCLUSION

The trial court erred in holding that the operational decision regarding where and whether to use deicer on a county highway is entitled to discretionary immunity. This court should reverse and remand for trial at which the jury determines whether the County's failure to deice or apply adequate sand to the Caribou Cut breached the County's duty to maintain its roadway in a reasonably safe condition for the travelling public.

Dated this 21st day of December, 2010.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 
Howard M. Goodfriend
WSBA No. 14355

ABEYTA NELSON P.C.

By: 
Terry P. Abeyta
WSBA No. 7165
Gregory S. Lighty
WSBA No. 21275

Attorneys for Appellant

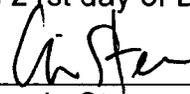
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 21, 2010, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division III 500 N. Cedar Street Spokane, WA 99201-2159	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Terry P. Abeyta Abeyta Nelson P.C. 1102 W Yakima Ave Yakima WA 98902-3029	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Michael E. Tardif Freimund Jackson Tardif & Benedict Garratt PLLC 711 Capitol Way S Ste 602 Olympia WA 98501-1236	<input type="checkbox"/> E-Mail <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 21st day of December, 2010.



Carrie Steen

FILED

2010 SEP 10 PM 4:05

REGISTRAR
EX OFFICIO CLERK
SUPERIOR COURT
YAKIMA WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

HALEY E. WEEKES, a single person,

NO. 09-2-01995-8

Plaintiff,

vs.

ORDER GRANTING DEFENDANT
KITTTITAS COUNTY'S MOTION FOR
SUMMARY JUDGMENT

KITTTITAS COUNTY, a municipal
corporation,

Defendant.

THIS MATTER having come on regularly for hearing on Defendant Kittitas County's motion for summary judgment, and the Court having reviewed the record herein, heard oral argument, and, to the extent deemed relevant and admissible, reviewed the material submitted by the parties concerning this motion, including:

1. Defendant Kittitas County's Motion and Memorandum for Summary Judgment;
2. Declarations of
 - A. James Van de Venter
 - B. Alan Crankovich
 - C. Darlene Mainwaring
 - D. Steve Reeves
 - E. Ron Damm
 - F. Neil Caulkins
 - G. Michael Tardif
3. Excerpts from depositions of:

ORDER GRANTING DEFENDANT KITTTITAS
COUNTY'S MOTION FOR SUMMARY JUDGMENT

FREIMUND JACKSON TARDIF & PATRICK GARDNER, PLLC
711 CAPITOL WAY S
OLYMPIA, WA 98501
(360) 534-9960
29369 6-000000338

- A. Haley Weekes
- B. Shirley Weekes
- C. James Van de Venter
- D. Donnie Kies
- E. Boyd Redlin
- F. Dale Keep
- G. Tim Leggett

4. Plaintiff's Response to Defendant's Motion for Summary Judgment

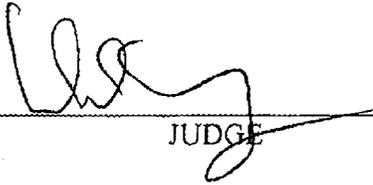
Including all attachments
How to

5. Defendant Kittitas County's Reply Memorandum in Support of Summary Judgment

And begin fully advised, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Kittitas County's motion for summary judgment is granted and this matter is dismissed with prejudice.

DONE IN OPEN COURT this ¹⁰ day of September, 2010.



JUDGE

Presented by:

FREIMUND JACKSON TARDIF
& BENEDICT GARRATT, PLLC

Michael E. Tardif, WSBA #5833
Attorney for Defendant Kittitas County



Superior Court of the State of Washington
for the County of Yakima

Judge Michael G. McCarthy

2010 SEP 10 PM 4:05

128 North 2nd Street
Yakima, Washington 98901
(509) 574-2710
Fax No. (509) 574-2701

KIM M. EATON
EX OFFICIO CLERK
SUPERIOR COURT
YAKIMA WASHINGTON

Michael E. Tardif
Freimund Jackson Tardif and Benedict Garratt
711 Capitol Way South, Suite 602
Olympia WA 98501

Terry Abeyta
Gregory Lighty
Abeyta Nelson
1102 West Yakima Avenue
Yakima WA 98902

September 10, 2010

Re: Weekes v. Kittitas County 09-2-01995-8

Dear Counsel:

Thank you for your briefing and arguments.

The undisputed facts of this case are as follows. A snowstorm struck Kittitas County on the weekend following Thanksgiving in 2006. Snow fell on Sunday the 26th of November and on the morning of Monday the 27th. Kittitas County Road Maintenance Manager James Van de Venter called out plowing crews on Sunday and one operator plowed and sanded in the general area of the accident scene for 6.5 hours. Crews were called out at 4 AM on Monday morning and 3 operators plowed or plowed and sanded for a total of 20 hours in the general area of the accident scene.

The accident scene is at the Caribou Cut on the Vantage Highway, east of the Town of Kittitas and west of Vantage. The Vantage Highway, formerly SR 10, is a major east/west county road which traverses Kittitas County and parallels Interstate 90. The road, at the Caribou Cut, slopes down from east to west as it passes through a cut in a ridge which runs north/south. At the bottom of the hill, the road continues to Kittitas and ultimately Ellensburg on generally flat terrain.

On Tuesday, November 28, the plaintiff was proceeding westbound on the Vantage Highway, going to her job at Safeway in Ellensburg from her home east of the accident scene. It was approximately 7 AM. She was driving a Chevrolet Camaro. She had driven this route on countless occasions and had driven it most recently the day before, after the snowstorm had ended. As she proceeded down the hill at the Caribou Cut, she lost control of her vehicle, and slid into the path of an eastbound pick-up. In the resulting collision, Ms. Weekes was severely harmed and suffered life-changing injuries.

No accidents had been reported at the location, prior to Ms. Weekes collision, nor had any complaints or other alerts been given to Kittitas County concerning the condition of the road. The condition of the road can accurately be characterized as compact snow and ice which had been sanded. Kittitas County does

29369 6-000000340

not use chemical de-icers, except they occasionally borrow some de-icing material from the Washington State Department of Transportation to assist in breaking up snow and ice accumulations at Hyak, adjacent to Snoqualmie Pass. The decision to not institute a de-icing program as part of winter road maintenance was made by the Board of Kittitas County Commissioners, which weighed the budgetary impact of such a program against the possible advantages.

Kittitas County owes a duty to all travelers, whether negligent or fault-free, to maintain its roadways in a condition that is reasonably safe for ordinary travel. Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 786, 108 P.3d 1220 (2005); Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). A municipality can be negligent if it fails to maintain warning signs if a condition on a highway is inherently dangerous or of such a character as to mislead a motorist. Bartlett v. Northern Pac. Ry. Co., 74 Wash.2d 881, 447 P.2d 735 (1968); Ruff v. County of King, 125 Wash.2d 697, 887 P.2d 886 (1995). However, a municipality has no duty to warn of known conditions. See Hansen v. Washington Natural Gas Co., 95 Wn.2d 773, 780, 632 P.2d 504 (1981).

The accumulation of snow and ice on the Vantage Highway on the morning of November 28, 2006, was the result of weather. Snow had fallen, temperatures had dropped and plowing and sanding had not removed all of the snow from the road. The fact the road had compact snow and ice on it was an obvious condition and not hidden, latent or a surprise to anyone. It is a fact of life that snowfalls and cold temperatures result in the creation of this type of driving condition from the Cascades to the Idaho border. Kittitas County had no duty to warn Ms. Weekes of the condition of the road. The question posed is whether, despite the obvious road condition, Kittitas County had a duty to eliminate any risk entirely and clear the road of any and all snow and ice.

Plaintiff urges several theories of liability; (1) that sanding and/or plowing was not done or not done properly; (2) that a de-icer should have been used to break up compact snow and ice on the roadway; and (3) that even if Kittitas County discharged its duty in regard to road maintenance, it had some further duty to maintain the roadway reasonably safe for ordinary travel.

In reference to the first assertion, the only competent evidence is that equipment and manpower were utilized by the County during and after the snow event. Although the County is unable to document exactly how many passes were made at Caribou Cut by plows and sanders during the 48 hours before the accident, it is clear from the documentary evidence significant snow removal and sanding efforts were made at that location. The plaintiff presents no evidence which would suggest otherwise. This situation is virtually indistinguishable from Bird v. Walton, 69 Wn App 366, 848 P.2d 1298 (1993). In Bird, the accident occurred, on black ice, despite the sanding efforts of the Department of Transportation. In the instant case, the accident occurred, on readily visible compact snow and ice, in spite of snow removal and sanding efforts of the County. In either case, no liability can attach to the governmental entity.

In response to Plaintiff's de-icer argument, the County cites Evangelical United Brethren Church of Adna v. State, 67 Wn 2d 246, 407 P.2d 440 (1965) for the proposition that, 'discretionary' governmental acts are immune from tort liability whereas 'ministerial' or 'operational' acts are not. Taggart v. State, 118 Wn.2d 195, 214-15, 822 P.2d 243 (1992) (citing Evangelical, 67 Wn.2d at 254- 55). See also Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983) (under the doctrine of discretionary immunity, governmental entities cannot be held liable for discretionary acts and decisions involving basic policy determinations). Under discretionary immunity, courts refuse to pass judgment on policy decisions of

other branches of government. Estate of Jones v. State, 107 Wn.App. 510, 523, 15 P.2d 180 (2000) (citing Taggart, 118 Wn.2d at 214- 15). Discretionary immunity is narrow and applies only to basic policy decisions made by a high level executive. Estate of Jones, 107 Wn.App. at 523. The Supreme Court has recognized that the discretionary immunity exception established by Evangelical has been narrowed substantially by later court opinions. Taggart, 118 Wn.2d at 214-15. Finally, a government entity is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages. Taggart, 118 Wn.2d at 215

Although the continued vitality of the Evangelical line of cases may be in question, the County's argument is well-taken. In this instance, the Board of County Commissioners consciously chose to not implement a de-icing program after weighing the potential costs and benefits. Plaintiff's argument centers on the lack of such a program as evidence of negligence. The assertion is not that de-icing was done poorly, but that it was not done at all because no de-icing program existed. However, the lack of such a program was a policy choice of the County. Plaintiff's argument flies in the face of discretionary immunity and fails as a result. The County's policy choice is immunized from liability.

Additionally, there is no evidence the County was aware of a special hazard present at the Caribou Cut. Although it is clear from the record that compact snow and ice were present on the Vantage Highway at the location of the accident, there is no evidence that this condition posed any greater threat to the safety of motorists than the same or similar conditions on other roads throughout Kittitas County. No accidents were reported at the location prior to the Weekes accident and no complaints were received by the County concerning the condition of the roadway. Although it is reasonable to assume there was generalized knowledge on the part of the County that compact snow and ice existed on the Vantage Highway [from the road maintenance crews observations and the existence of like conditions elsewhere in the County], there is no evidence of knowledge of a hazard specific to the location. Like Leroy v. State, 124 Wn App 65, 98 P.2d 819 (2004) and Laguna v. WSDOT, 146 Wn App 260, 192 P.3d 374 (2008), there must be notice before governmental liability attaches. There was no notice that the roadway condition at the Caribou Cut was any more hazardous than those existing on other roadways in Kittitas County following the Thanksgiving weekend snow event. It appears to the Court that some notice to the County that the stretch of road posed a greater hazard than normal was required before a duty to employ extraordinary snow or ice removal methods would be triggered. As noted in Lagunas, supra, a significant policy issue is implicated by adopting a governmental duty to keep roads snow and ice free in an environment where precipitation and freezing temperatures are the norm for five months of the year.

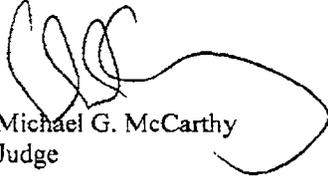
Finally, the Plaintiff's argue that liability exists because the County voluntarily assumed a duty to keep the road snow and ice free and negligently discharged this duty. For the reasons stated above in reference to the generalized obligation of government to maintain roads, this assertion is not well taken. The proffered evidence does not warrant any conclusion other than a concerted effort was made by the County to clear the snow and render the roadway as safe as it could be, given the weather conditions.

Additionally, the cases cited by Plaintiff for this proposition are based upon the "rescue doctrine" which posits governmental liability upon its assurance of assistance which induces reliance by a party, who is then injured when the governmental entity either defaults on the promise or performs negligently. Brown v. MacPherson's Inc., 86 Wn 2d 293, 545 P.2d 13 (1975); Osborn v. Mason County, 157 Wn 2d 18, 134 P.2d 197 (2006). However, there is no evidence that the County issued or communicated such an

assurance to Ms. Weekes, or that she relied upon such an assurance as she drove to work the morning of the accident. The condition of the Vantage Highway was obvious and there simply is no evidence the County represented it to be anything other than what it was.

Although the court recognizes the devastating injuries which have been suffered by the Plaintiff and sympathizes with her plight, the Court also believes the law, as it presently exists in this state, does not support a cause of action against Kittitas County. For this reason, the Court has signed the County's proposed order granting summary judgment. A copy of the order accompanies this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'M. McCarthy', with a large, sweeping flourish extending to the right.

Michael G. McCarthy
Judge