

FILED

FEB 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29369-6-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

HALEY E. WEEKES, a single person,

Plaintiff/Appellant,

v.

KITTITAS COUNTY, a municipal corporation,

Defendant/Respondent.

BRIEF OF RESPONDENT KITTITAS COUNTY

MICHAEL E. TARDIF, WSBA #5833
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960
Attorneys for Respondent Kittitas County

FILED

FEB 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29369-6-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

HALEY E. WEEKES, a single person,

Plaintiff/Appellant,

v.

KITTITAS COUNTY, a municipal corporation,

Defendant/Respondent.

BRIEF OF RESPONDENT KITTITAS COUNTY

MICHAEL E. TARDIF, WSBA #5833
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960
Attorneys for Respondent Kittitas County

TABLE OF CONTENTS

- I. STATEMENT OF THE CASE 1
 - A. Nature Of Action 1
 - B. Statement Of Facts 1
 - 1. Plaintiff’s Collision And Knowledge Of Road Conditions. 1
 - 2. County Winter Maintenance Policies. 2
 - 3. Winter Maintenance Activities On The Vantage Highway Prior To Plaintiff’s Collision. 4
 - 4. Some Facts Stated By Plaintiff Are Not Supported By The Record. 5
- II. ISSUES 6
- III. ARGUMENT IN SUPPORT OF JUDGMENT 7
 - A. The Issues Raised By The County Are Legal Issues That Are Reviewed De Novo By The Appellate Court. 7
 - B. Long-Standing Rules Govern Whether Counties Are Liable For Alleged Road Defects. 8
 - C. The County Did Not Have A Duty To Remedy Or Warn Of Open, Apparent, And Ordinary Compact Snow And Ice On The Vantage Highway. 11
 - D. The County Did Not Have Notice That The Snow And Ice On The Vantage Highway Was An Obstruction To The Road, Abnormally Slippery, Or Any Different In Character From

	Snow And Ice On The Other County Roads.	14
E.	Decisions By County Executives On Use Of Chemical De-Icers And Level Of Service For Plowing And Sanding Are Governmental Policy Decisions That Are Not Subject To Liability.	15
IV.	ARGUMENT IN RESPONSE TO APPELLANT	21
A.	Plaintiff Argues The Wrong Legal Standards For Determining Whether The County Had A Duty To Plaintiff Under The Circumstances Of This Case.	21
B.	Plaintiff Argues Notice Only Of The Generic Snow And Ice Condition On All Kittitas County Roads And Not Notice Of Any Hazard Peculiar To The Collision Site	27
C.	Plaintiff Has Provided No Evidence Contradicting The County’s Evidence That Its Decisions On Winter Maintenance Policies Were Made At The Executive Level Of County Government.	29
D.	The Role Of County Policies As Evidence Of The Standard Of Care Is Irrelevant To The Issues Of Duty And Policy Immunity In This Case.	32
V.	CONCLUSION	32

TABLE OF AUTHORIES

Cases Cited

<i>Barton v. King Cty.</i> , 18 Wn.2d 573, 139 P.2d 1019 (1943)	9
<i>Bergh v. State</i> , 21 Wn. App. 393, 585 P.2d 805 (1978)	18
<i>Berglund v. Spokane Cty</i> , 4 Wn.2d 309, 103 P.2d 355 (1940)	19, 24, 25, 26, 31
<i>Bird v. Walton</i> , 69 Wn. App. 366, 848 P.2d 1298 (1993)	28
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 927 P.2d 240 (1998)	30, 31
<i>Bradshaw v. City of Seattle</i> , 43 Wn.2d 766, 264 P.2d 265 (1953)	8
<i>Calder v. City of Walla Walla</i> , 6 Wash. 377, 33 P. 1054 (1893)	9, 10, 27, 30
<i>Crooks v. Stevens Cty</i> , 102 Wash. 231, 172 P. 1158 (1918)	23
<i>Evangelical v. State</i> , 67 Wn.2d 246, 253, 407 P.2d 440 (1965)	18, 19, 21
<i>Halleran v. Nu West</i> , 123 Wn. App. 701, 98 P. 3d 52 (2004), rev. denied, 154 Wn.2d 1005, 113 P.3d 481 (2005)	23
<i>J&B Development v. King Cty</i> , 100 Wn. 2d 299, 669 P.2d 468 (1983)	23
<i>Jenson v. Scribner</i> , 57 Wn. App. 478, 789 P.2d 306 (1990)	19

<i>Karr v. State,</i> 53 Wn. App. 1, 765 P.2d 316 (1988)	18
<i>Keller v. City of Spokane,</i> 146 Wn.2d 237, 44 P.3d 845 (2002)	21, 26
<i>Laguna v. State,</i> 146 Wn. App. 260, 192 P.3d 374 (2008)	10, 11, 14, 15
<i>Leber v. King Cty.,</i> 69 Wash. 134, 124 P. 397 (1912)	8
<i>Lee v. Sievers,</i> 44 Wn.2d 881, 271 P.2d 699 (1954)	9
<i>Leiva v. King Cty,</i> 38 Wn.2d 850, 855, 233 P.2d 532 (1951)	14
<i>Leroy v. State,</i> 124 Wn. App. 65, 98 P.3d 819 (2004)	10, 14
<i>Lucas v. Phillips,</i> 34 Wn.2d 591, 209 P.2d 279 (1949)	19, 25
<i>Mason v. Bitton,</i> 85 Wn.2d 321, 534 P.2d 1360 (1975)	18, 21
<i>McCluskey v. Handorff-Sherman,</i> 125 Wn.2d 1, 882 P.2d 157 (1994)	19
<i>Meabon v. State,</i> 1 Wn. App. 824, 463 P.2d 789 (1970)	26
<i>Mead v. Chelan Cty,</i> 112 Wash. 97, 191 P. 825 (1920)	10
<i>Nelson v. City of Seattle,</i> 16 Wn.2d 592, 134 P.2d 89 (1943)	10
<i>Nelson v. City of Tacoma,</i> 19 Wn. App. 807, 577 P.2d 986 (1978)	9, 27

<i>Nibarger v. City of Seattle</i> , 53 Wn.2d 228, 332 P.2d 463 (1958)	10, 11, 14
<i>Owen v. Burlington Northern R.R.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	24
<i>Owens v. City of Seattle</i> , 49 Wn.2d 187, 299 P.2d 560 (1956)	9, 11, 27
<i>Ruff v. Cty. of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	8, 26
<i>Tanguma v. Yakima Cty.</i> , 18 Wn. App. 555, 569 P.2d 1225 (1977)	26
<i>Taylor v. City of Spokane</i> , 91 Wash. 629, 158 P. 478 (1916)	8
<i>Tyler v. Pierce Cty.</i> , 188 Wash. 229, 62 P.2d 32 (1936)	9
<i>Wessels v. Stevens Cty.</i> , 110 Wash. 196, 188 P. 490 (1920)	8, 9, 11
<i>Wright v. City of Kennewick</i> , 62 Wn.2d 163, 381 P.2d 620 (1963)	9, 10, 14
<i>Xiao Ping Chen v. City of Seattle</i> , 153 Wn. App. 890, 223 P.3d 1230 (2009) rev. denied, 169 Wn.2d 1003 (2010)	24-26

Statutes Cited

<i>RCW 4.08.120</i>	8
<i>RCW 36.32.050</i>	31
<i>RCW 36.32.120(6)</i>	31

Other Authorities

Tardif & McKenna, <i>Washington State's 45-year Experiment in Governmental Liability</i> , 29 Seattle U. L. Rev. 1, 15 (2005)	31
--	----

I. STATEMENT OF THE CASE

A. Nature Of Action

This is a tort action against Kittitas County by a driver who was injured when she lost control of her automobile on the Vantage Highway and collided with a large pickup truck in the opposite lane.

B. Statement Of Facts

1. Plaintiff's Collision And Knowledge Of Road Conditions

On Sunday and Monday, November 26-27, 2006, Kittitas County received a major county-wide snowfall. CP 153. Sharply lower temperatures followed the storm, causing the snow to remain on the ground for several days. CP 153, 180-188.

On Tuesday, November 28, Plaintiff drove to work in Ellensburg at 7:00 a.m. on the Vantage Highway. CP 37-40. The highway had areas covered by snow and ice. CP 52. Plaintiff braked and lost control of her Camaro on snow and ice while descending a hill east of Ellensburg. CP 37-38. Plaintiff slid into the oncoming lane and collided with a pickup. CP 139-145. The vehicles following Plaintiff and following the pickup maintained control and drove around the collision. *Id.*

Plaintiff and her mother commuted (separately) on the Vantage Highway to their jobs. CP 39-40; 60. They worked on the day before the collision. CP 60, 62. Plaintiff's mother testified the hill at the accident

site commonly had snow and ice, but she never had problems driving on it. CP 51. She stated that driving conditions were “fine” on the day before the collision. CP 60.

Plaintiff drove through the collision site to high school in Kittitas for three winters. CP 32-36. She testified there was snow and ice on this hill in the winter. CP 35; 38-39; 41. She had a prior incident in which she lost control of her pickup and went into the ditch. CP 36. Other than Plaintiff’s two incidents, there is no evidence of vehicle accidents at the collision site.

2. County Winter Maintenance Policies

The County does not plow snow accumulations of three inches or less. CP 148. When snow depth reaches three inches, the County plows all roads, and sands curves, intersections, hills, and heavily shaded areas. CP. 148-49. The County does not sand straight and level roads. CP 148. The County plows arterials, such as the Vantage Highway, first. CP 149.

County crews plow roads until snow stops and all roads are plowed and sanded. CP 148-49. Thereafter, on weekdays, crews do non-emergency plowing and sanding only during regular working hours (7:00 a.m. to 3:30 p.m.), primarily sanding during morning commuting hours and afternoon plowing and sanding of softened snow and slush. *Id.* The County responds

to reports of specific winter road hazards made to KITTCOM (9-1-1) or public works at all times of every day. CP 10-12; 149.

County winter maintenance policies have been in place for at least thirty years. CP 116; 148. Policies are determined by the roads division manager in consultation with County Commissioners. CP 116-18; 147-48; 150. The policies are based on a balancing of the costs of maintenance with County officials' judgment of the level of service necessary for winter road drivability and the needs of County residents. *Id.*

In recent years, County officials made one change to winter maintenance policies. They adopted a chemical anti-icing¹ program for arterials, with the number of treated roads determined by the cost of chemicals and available funds. CP 150-51. Officials discussed chemical de-icing (bare road) and continuous sanding policies. CP 117-18; 151-52; 170-79. The former was not pursued for reasons including cost and potential liability (refreeze of bare, wet roads) and the latter was not pursued for reasons including cost and marginal benefit (compared to current sanding). *Id.*

¹ Anti-icing is the treatment of certain road areas, primarily curves, intersections, and bridge decks with liquid chemicals to retard the formation of black ice caused by frost and freezing fog. *See* CP 150.

3. Winter Maintenance Activities On The Vantage Highway Prior To Plaintiff's Collision

The County responded to the snowfall by following its snow and ice policies. CP 52-55. The roads division manager called out crews on Sunday, November 26. The County plowed and sanded in districts G and I, which include the Vantage Highway in the area of the accident, for 6.5 hours. *Id.* The highway is plowed and sanded as part of both H and I Districts because it is the border of the two districts. *Id.*

There was more snow overnight and crews were called out at 4:00 a.m. on Monday, November 27. CP 153. Crews plowed and sanded in Districts H and I until approximately noon when snowfall ended. *Id.* There was little or no new snow from Monday afternoon to Tuesday morning. CP 153-54. On Tuesday morning, the County dispatched crews at 7:00 a.m. for plowing and sanding in some districts, including District H. *Id.* The collision occurred shortly before the County would have re-sanded the Vantage Highway. *Id.*

The collision site is in a "cut" as the highway goes over a ridge. CP 156. The cut is similar to others on the highway as it runs over the ridges and foothills between Ellensburg and the Columbia River. *Id.* The hilly areas are typical of those on roads throughout the County. *Id.* These roads

remain shaded and cold after snowfalls, with compact snow driving surfaces. CP 71-73; 156. These areas are sanded after they are plowed. *Id.*

The highway at the collision site had a smooth plowed surface of compact snow with some areas worn down to the “chip seal” pavement. CP 156; 196-200. Collision scene photos show muddy appearing travel lanes with sand and gravel embedded in the compact snow on the highway surface.² *Id.* The County did not receive any reports of hazardous conditions on the Vantage Highway before the collision. CP 157.

4. Some Facts Stated By Plaintiff Are Not Supported By The Record

Plaintiff’s fact statement alludes to road conditions that do not precisely reflect testimony in the record.

Plaintiff states that road crews knew that the accident location “presented a hazard to the traveling public in icy road conditions.” App. Br. p. 4. The crew members did not testify the road was a special hazard, but only that they routinely sanded it because the road “cut” commonly had snow and ice, like others throughout the County. *See* CP 71-74. Plaintiff also states the accident site was “especially icy.” App. Br. p. 8. There was no testimony that the conditions were different from other roads. Plaintiff’s

² Collision scene photographs are in Appendix A for the Court’s reference.

expert agreed that the condition was “generic” snow and ice, which he called “good old compact snow and ice.” CP 97.

Plaintiff describes the accident site as having “frozen ruts” and sand “swept away.” App. Br. p. 7. The “swept away” is based on a plow driver’s testimony (CP 274) and the “frozen ruts” is based on testimony by Plaintiff’s expert. CP 279. The testimony by the plow driver was that he would not plow on a previously sanded road in order to avoid knocking the sand off. CP 274, pg. 48, ll. 1-4. Concerning the expert, there is no evidence that he was at the accident site on the day of the accident or has first-hand knowledge. The expert testified based only on photographs, which speak for themselves and do not seem to show what the expert describes. *See* Appendix A. Testimony based on first hand observation was by the road manager and a school bus driver. CP 119-20; 156-57. The former described the road condition as compact snow with embedded sand and the latter as “typical” at this location. *Id.*

II. ISSUES

1. Was the compact snow and ice on the Vantage Highway an inherently dangerous or misleading condition?
2. Was the compact snow and ice on the Vantage Highway an unusual or extraordinary condition?
3. Did the County have notice of an abnormally slippery condition?

4. Can the County be liable for the policy decisions of its elected and executive officials on the scope of County programs for chemical road de-icing and sanding?

III. ARGUMENT IN SUPPORT OF JUDGMENT

A. The Issues Raised By The Court Are Legal Issues That Are Reviewed De Novo By The Appellate Court

The County's summary judgment motion raised issues of duty and governmental policy immunity. These are legal issues. The County agrees that appellate courts review these issues de novo based on the record developed for the summary judgment motion. The facts stated about the collision, road conditions, Plaintiff's knowledge of road conditions, and the County winter maintenance activities performed, are undisputed. The first question in this appeal is whether the facts about the collision, road conditions, and Plaintiff's knowledge of road conditions meet the legal threshold necessary to create a duty to repair or warn of the conditions. The second question is whether County decisions on the scope of its winter maintenance program are low level operational decisions or governmental policy decisions.

The trial court issued an opinion explaining its decision on the summary judgment motion. CP 340-43. Although the opinion is not directly reviewed, the opinion is a correct statement of the law, and its

application of the law to the facts in this case can be considered by this Court.

B. Long-Standing Rules Govern Whether Counties Are Liable For Alleged Road Defects

Although the state waived sovereign immunity in 1961, counties have had tort liability by statute (now RCW 4.08.120) since territorial days. Cities also had tort liability for proprietary functions, including roads. See *Taylor v. City of Spokane*, 91 Wash. 629, 158 P. 478 (1916). Long-standing law governs claims for alleged road defects.

The overall duty of counties is to keep roads in a “reasonably safe condition for ordinary travel.” *Wessels v. Stevens Cty.*, 110 Wash. 196, 188 P. 490 (1920). This is the duty considered by the fact finder. See WPI 140.01. However, road maintenance cases must be dismissed if they do not meet legal criteria that define and limit the duty of road authorities. The Supreme Court applies several threshold tests to road claims. See *Wessels, supra*; *Ruff v. Cty. of King.*, 125 Wn.2d 697, 887 P.2d 886 (1995).

The basic rules used to determine whether a road claim is legally sufficient are as follows:

1. A road defect must be in the road itself, such as a pavement defect, or so close to the travelled way, such as a “declivity or excavation”, that it can be considered to be in the road. *Leber v. King Cty.*, 69 Wash. 134, 124 P. 397 (1912); *Bradshaw v. City of Seattle*, 43 Wn.2d 766, 264 P.2d 265 (1953); *Ruff v. King Cty.*, *supra*.

2. An alleged road defect must be an “unusual” or “extraordinary” hazard rather than a commonly encountered condition. *Wessels, supra; Tyler, supra*. Governments do not have a duty to provide road users “ideal travelling condition[s]” or to protect users from “normal hazards” (such as puddles of water on rainy streets). *Owens v. City of Seattle*, 49 Wn.2d 187, 299 P.2d 560 (1956).
3. If there is a road defect, government can either repair the defect or use the option of posting a warning. *Owens, supra*. However, warning signs are not required if the hazard would be apparent to and could be avoided by the user. *See Lee v. Sievers*, 44 Wn.2d 881, 271 P.2d 699 (1954). Warning signs or barricades (for drop-offs proximate to the road) are required only if prescribed by statute or “the situation along the highway is inherently dangerous or of such a character as to mislead a traveler exercising ordinary care.” *Barton v. King Cty.*, 18 Wn.2d 573, 139 P.2d 1019 (1943); *Tyler v. Pierce Cty.*, 188 Wash. 229, 62 P.2d 32 (1936).
4. Government must have notice of a particular road defect, and a reasonable opportunity to correct it, before it can be liable for the defect. *Wright v. City of Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963).

Governments are not liable for the normal slipperiness of snow or ice on roads and sidewalks. *Calder v. City of Walla Walla*, 6 Wash. 377, 33 P. 1054 (1893); *Nelson v. City of Tacoma*, 19 Wn. App. 807, 577 P.2d 986 (1978). Snow and ice is not a road defect unless, at the location of the accident, it is either unusually or extraordinarily slippery or so rutted, mounded, or uneven as to constitute an obstruction. *Id.* In *Calder*, the Supreme Court stated the basic rule followed in later cases:

It is questionable whether enough appears from the testimony to show that the ice had accumulated to such an

extent, or was in such condition, as to render it an obstruction to travel. The city is not liable for accidents occasioned by mere slipperiness caused by ice upon the walk. If the ice is not so rough and uneven, or so rounded up, or at such an incline as to make it an obstruction, and to cause it to be unsafe for travel with the exercise of due care, there is no liability.

Calder at 378. As with all road maintenance cases, governments do not have to repair or warn of slippery conditions unless they are inherently dangerous or misleading conditions that cannot be avoided by a motorist or pedestrian. See *Mead v. Chelan Cty*, 112 Wash. 97, 191 P. 825 (1920); *Nelson v. City of Seattle*, 16 Wn.2d 592, 134 P.2d 89 (1943).

The transitory and variable nature of obstructions or unusually slippery conditions caused by snow, and the wide area in which problems occur, makes notice a key element of winter maintenance liability. Governments are not liable for snow and ice unless they have notice of a specific hazard at the location of the accident and a reasonable opportunity to correct the hazard. *Nibarger v. City of Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958); *Wright, supra*. Notice of a general snowfall is not notice of a hazard triggering a duty to repair or warn. *Id.*

Governments do not have a duty to predict where weather might cause hazardous conditions. *Leroy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004); *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (2008). In *Laguna*, the plaintiff argued the state's knowledge of freezing weather and

moist conditions gave notice of hazardous icy conditions on the highway.

The court rejected that argument, stating:

There is a difference between liability based on knowledge that a dangerous condition actually exists and knowledge that a dangerous condition might, or even probably will, develop. No Washington case has held that the State has a duty to act when weather conditions exist that are likely, or even certain, to produce icy roads.

Consistent with *Nibarger, supra, Laguna* held that notice of an existing hazardous condition at a particular location, and a reasonable opportunity to correct it, are required before a duty arises. *Id.*

C. The County Did Not Have A Duty To Remedy Or Warn Of Open, Apparent, And Ordinary Compact Snow And Ice On The Vantage Highway

The foundation for a road maintenance claim is a road defect that is unusual or extraordinary. *Wessels, supra; Owens, supra.* Counties have no duty to warn of common road conditions that are evident to users and can be avoided. *Id.* In regard to slipperiness caused by snow, ice, or moisture, courts have long held that there is no duty to remedy the condition unless it is an obstruction or has an extreme level of slipperiness that would not be appreciated by the road user without warnings. *See III. B, supra.*

The snow and ice at the accident site was not limited to the site, but was a general condition on roads countywide due to a snowstorm. The County plowed and sanded all roads during and after the storm, including the

Vantage Highway, which was a priority arterial and a part of two districts. Photographs of the accident site show plowed and sanded compact snow with a muddy appearance and evidence of sand and gravel ground into the snow and ice surface. CP 196-200; Appendix A.

Plaintiff was aware of the snow on the road. CP 37. She was aware of the typical snow and ice conditions on the hill because she drove to high school for three years on this road and had commuted on the same road to Ellensburg since high school. CP 31-37. Plaintiff successfully commuted to work in snow the day before her collision. CP 62-63. Plaintiff lived with her mother, who also commuted to work in Ellensburg, including the day before Plaintiff's collision. CP 60. Her mother testified that she never had problems driving the Vantage Highway in snow and ice, and that conditions were "fine" before the collision.

Q. Have you ever had any problems driving on that hill in snow and ice?

A. No, I always just went really slow, took my time.

Q. Is that – During the winter months when there is snow, does the hill normally have snow and ice on it?

A. Yes.

Q. So that's a common condition?

A. Yes.

CP 51.

Q. South Dakota. So I guess you sort of grew up driving on snowy roads.

A. Yeah.

Q. There wasn't anything different about driving on the roads here in Kittitas County than you were used to in South Dakota?

A. No.

CP 59.

Q. So would you have driven in the Vantage Highway to get the work?

A. Yes.

Q. And then driven back out the Vantage Highway to get home?

A. Uh-huh, yes.

Q. So the Vantage Highway is the normal route into Ellensburg, I assume.

A. Yes.

Q. Do you remember what the road conditions were on the day before Haley's accident on the Vantage Highway?

A. They were fine.

Q. You didn't have any problem driving in and out of town on the Monday before the accident?

A. Huh-uh, no.

CP 60. The Kittitas school bus driver, who had driven the Vantage Highway for nine years, and drove through the accident scene the day before and immediately after the accident, provided the same testimony. He said that the compact snow was typical for this area of highway and other similar shaded areas. CP 119-20. Plaintiff's expert agreed that the snow and ice was generic and that there was no deceptive condition. CP 96-98; 99-100.

The County did not owe a duty to Plaintiff to remove or warn of the usual plowed and sanded snow and ice at the accident site. This was an open and apparent normal winter road condition in rural Kittitas County and not

an unusual or extra hazardous condition that presented a “trap” for a motorist.³

D. The County Did Not Have Notice That The Snow And Ice On The Vantage Highway Was An Obstruction To The Road, Abnormally Slippery, Or Any Different In Character From Snow And Ice On The Other County Roads

If the compact snow at the accident site was an extraordinary condition unique to the site, then the County must have notice and an opportunity to correct the particular hazard, before it has a duty to remedy or warn of the hazard. *Nibarger, supra; Wright, supra; Leroy, supra*. Plaintiff submitted no evidence that the County had notice of a unique hazardous condition.

Lack of notice is fatal to a claim that the County had a duty to use either de-icing chemicals or additional sand based on the possibility the accident site might develop some abnormal slipperiness following plowing and sanding. *Leroy, supra*. In *Laguna, supra*, the court held that notice of an existing hazard, rather than a predicted hazard, was required before a road department had a duty to take action. The Court of Appeals was sensitive to the problem created by requiring government to predict future weather related road hazards, stating:

The State offers a compelling argument against departing from precedent to establish liability for failure to

³ Defects in a road for which a county may be liable are traditionally called “traps.” See *Leiva v. King Cty.* 38 Wn.2d 850, 855, 233 P.2d 532 (1951).

prevent ice formation. Freezing weather exists throughout much of the State for a good portion of the year. These conditions do not necessarily lead to ice on the roadway. Here, for example, the same conditions that produced ice before the accident had prevailed for days beforehand, without ice formation. Unfortunately, weather forecasts cannot pinpoint when or where ice will form, and it can form within minutes. If the fact that ice is predictable at some (uncertain) point were enough to create a duty to prevent it, the State would be required to apply anti-icing chemicals to hundreds of miles of roadway whenever moisture and freezing temperatures exist.

Laguna, at 265. The County would have the same problem here as the State in *Laguna*. After the County plows and sands roads following a snowstorm, the County does not know which of thousands of hills, curves, intersections, and shaded areas on hundreds of miles of roads might develop some abnormal slippery condition. The County would have to sand all locations at all times to avoid claims for any abnormally “treacherous” condition that might develop at a particular location.

E. Decisions By County Executives On Use Of Chemical De-Icers And Level Of Service For Plowing And Sanding Are Governmental Policy Decisions That Are Not Subject To Liability

Plaintiff’s claims are challenges to County policies on chemical de-icer use and sanding rather than claims of errors unique to the accident site. These policies are stated in the Van de Venter and Crankovich declarations, and were provided to Plaintiff in response to her interrogatories asking for County policies on winter maintenance. CP 102-106; 115-18; 146-57.

Other than her interrogatories about policies, Plaintiff did no discovery on the existence or genesis of County policies on road chemical use and level of service for plowing and sanding.

Plaintiff's primary claim is that the County should de-ice County roads that have snow and ice remaining after plowing. Kittitas County has not adopted a road de-icing program for compact snow and ice on roads. CP 117-18; 151-52. The County Commissioners and roads division management considered a "bare road" policy. *Id.* They decided to continue plowing and sanding County roads due to cost, liability concerns, and other factors related to adoption of a bare roads standard for the relatively low speed, low use (compared to state highways) County road system. *Id.*

Plaintiff's alternative claim is that the County should sand roads more frequently. However, the County has not adopted a policy that requires roads to be re-plowed and re-sanded after they are fully plowed and sanded following a storm. CP 117-18; 151-52. County officials have considered continuous sanding of roads, but have not changed to that policy due to concerns about a large cost increase with marginal benefit over long-standing plow and sand policies. *Id.* County policy remains that additional post-

snowstorm plowing and sanding is done only in response to specific road hazard reports or during regular daytime working hours. *Id.*⁴

The determination of policies for the kind and frequency of winter road maintenance services is known as “level of service.” This concept is explained in a Federal Highway Administration manual used by Kittitas County and accepted as authority by Plaintiff’s expert, Dale Keep. CP 77-79; 88-89; 91-92. The manual was written to provide direction on anti-icing programs, but started with emphasizing the fundamental rule of first determining the jurisdiction’s level of service.

A winter maintenance program consists of several elements with varying degrees of importance depending on the size of the operational jurisdiction it covers and the complexity of its road network. One element, level of service (LOS), is important for all jurisdictions . . .

2.1 LEVEL OF SERVICE

The extent to which maintenance services will be provided to a road section is *determined by management by the assignment of a level of service*. In the case of winter maintenance, this will require *establishing a prescribed end-of-storm road condition*, what intermediate conditions will be acceptable while obtaining that condition, or the *frequency of snow and ice control maintenance operations*.

CP 79 (emphasis added). Plaintiff’s expert, Mr. Keep, had experience determining levels of service for state highways. CP 86-87. Mr. Keep

⁴ The research of the County expert, Dr. Nixon, (submitted by Plaintiff) shows that sanding is ineffective in the cold conditions typical at night and more effective in the softer snow conditions typical during the snowstorm or daytime driving hours. *See* CP 290-91.

testified the state has varying levels of service for winter maintenance, ranging from bare road for freeways, to plow and sand only for local state highways. CP 81-85.

Shortly after the State waived immunity in 1961, the Supreme Court considered whether the State could be liable for its policy decisions. The Court held that separation of powers prevented tort liability for government policy choices and stated “[i]t is not a tort for government to govern.” *Evangelical v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). Quoting Professor Peck (U. of W. Law), the Court stated:

Liability cannot be imposed when condemnation of the acts or omissions relied upon *necessarily* brings into question the propriety of governmental objectives or programs or the decision of one who, with the authority to do so, determined that the acts or omissions involved should occur or that the risk which eventuated should be encountered for the advancement of governmental objectives.

Id., p. 254. The Supreme Court held in later cases that policy immunity was a “narrow exception,” to the waiver of immunity, but only in the sense that it did not apply to “field” decisions by individual lower-level government employees. *See Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (decision by state trooper to chase a suspect at high speed). Immunity continued to apply to “acts involving basic policy discretion” at a “truly executive level.” *Id.* 327-328. *See Bergh v. State*, 21 Wn. App. 393, 585 P.2d 805 (1978) (decisions on commercial fishing seasons); *Karr v. State*, 53

Wn. App. 1, 765 P.2d 316 (1988) (decisions on danger zone around volcano); *Jenson v. Scribner*, 57 Wn. App. 478, 789 P.2d 306 (1990) (decisions on highway priorities and improvements).

At the time that *Evangelical* was decided, counties had never had immunity. However, 100 years of law, summarized in Section B above, did not create liability for road policies, but only for failure to repair or warn of specific defects that were inherently dangerous or misleading. The case that came closest to creating liability for policies was *Berglund v. Spokane Cty*, 4 Wn.2d 309, 103 P.2d 355 (1940), which seemed to allow liability (at the demurrer stage) for county decisions not to widen or replace a narrow bridge, a major capital project. A later decision, *Lucas v. Phillips*, 34 Wn.2d 591, 209 P.2d 279 (1949) returned to traditional analysis and held there was no duty to replace narrow bridges, but only to warn of them if they were misleading. Dicta in another case stated decisions involving highway funding and priorities are governmental and protected by immunity. *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994); see also *Jenson*, *supra*.

In this case, there is no evidence of operational errors by plow operators and Plaintiff does not claim such errors. See App. Br. pp. 1-2 (Introduction and Issues). The opinion of Plaintiff's expert, Mr. Leggett, was that Kittitas County officials chose an "unreasonable" level of service:

- Q. Well, doesn't level of service, though, assume that there may be other factors than effectiveness which bear on the decision as to what the level of service should be, again, such as cost or environmental, public opinion, whatever?
- A. I would agree with that.
- Q. And so now in this case you say that you're not really a level of service guy, but, in fact, you have an opinion that if the Kittitas County level of service was for use of traditional abrasive intermixed with sand [salt] along with plowing, that that was the wrong level of service for Kittitas County, at least for major arterials?.
- A. Well, we can call it level of service or we can call it reasonableness. In my view, that – if that is their policy, that's an unreasonable one because it provides the citizens with a substandard – well, I shouldn't say it does. It will provide the citizens with a substandard road on which to go about their business and expose them to undue and unnecessary risk.

CP 92.

Plaintiff's argument is that the County was negligent for not adding chemical de-icing and nighttime sanding to its winter maintenance program. App. Br. pp. 13-15; 18. The County's undisputed evidence shows these features of the County program were determined by conscious decisions of elected and executive government officials based on cost, nature of roads, driver need, potential liability (for refrozen wet roads), and other level of service considerations. CP 117-18; 150-52. Level of service is a policy decision that is part of the governing process. Separation of powers prevents

the use of tort lawsuits to challenge policy decisions of officials who have the authority to make those decisions. *Evangelical, supra; Mason, supra.*⁵

Liability for level of service decisions would present problems for government. For instance, Kittitas County does not sand straight and level roads and does not plow at all if snowfall is three inches or less. CP 148-49. Is the County potentially liable to motorists who lose control in snowfall of less than three inches or on un-sanded compact snow and ice on level roads?

IV. ARGUMENT IN RESPONSE TO APPELLANT

A. Plaintiff Argues The Wrong Legal Standards For Determining Whether The County Had A Duty To Plaintiff Under The Circumstances Of This Case

Plaintiff's primary duty argument is that the "reasonable safety of the road" is a disputed issue of fact. App. Br. 16. Plaintiff argues there are disputed questions of fact about whether the County acted reasonably in not using de-icing chemicals and not doing night sanding. App. Br. 23-4. Plaintiff's argument is based on the standard duty instruction provided to juries in road liability cases. *See* WPI 140.01; *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

⁵ The Supreme Court created a four question test for policy immunity, but that test has been honored by frequent disuse in later decisions. *See Bergh v. State, supra; Jenson, supra.* Decisions after *Evangelical* took a more global approach to analyzing the immunity, emphasizing simply whether the challenged government activity was the result of a field or operational decision or was the result of a conscious executive/administrative policy decision. *See Mason, supra.*

The County has used the broad approach from most post-*Evangelical* cases. Plaintiff did not seek to apply the *Evangelical* criteria in this appeal or in the trial court. The result would be the same.

A duty to act does not exist unless there is evidence of an unusual hazard that is inherently dangerous or misleading. *See pp. 8-9, supra.* Specific to snow and ice, there is no duty to remedy the normal slipperiness of snow; a duty arises only if the snow and ice is an obstruction (arguably an inherent danger) or abnormally slippery (arguably misleading). Plaintiff does not acknowledge this law or provide argument that the underlying facts about the road condition, and Plaintiff's knowledge of the condition, satisfy the legal criteria required to create a county duty to act.

The key undisputed facts related to the existence of duty in this case are: (1) the snow and ice was open and apparent; (2) Plaintiff was familiar with the collision site and knew that snow and ice was common there; (3) Plaintiff knew that there was snow and ice present on the day of her collision; and (4) the snow and ice was generic snow and ice that was not abnormally slippery or obstructing the road. If these facts are established by evidence in the record, there is no road condition creating a duty for the County to act on behalf of Plaintiff.

The duty issue in this case does not differ from the duty issue in other tort cases. For instance, police, regulatory, and social welfare agencies have a duty of ordinary care, but only if the court determines there is a duty after using the "focusing tool" of the public duty doctrine.

See J&B Development v. King Cty, 100 Wn. 2d 299, 669 P.2d 468 (1983).

Courts often determine that the underlying facts of such cases do not give rise to a duty. *See Halleran v. Nu West*, 123 Wn. App. 701, 98 P. 3d 52 (2004), *rev. denied*, 154 Wn.2d 1005, 113 P.3d 481 (2005).

In *Crooks v. Stevens Cty*, 102 Wash. 231, 172 P. 1158 (1918), the Supreme Court addressed the issue of whether counties have a duty to make a road “reasonably safe” when the allegedly hazardous condition is apparent. The plaintiff in *Crooks* lost his load and was thrown from his hay wagon after striking a large rock that impinged on a narrow road.

It is argued by the appellant that the road was not a reasonably safe road by reason of this rock and by reason of the fact that the road was on a grade and by reason of the fact that the road was narrow The appellant was familiar with the character of the road; he knew that it was narrow, he knew that it was rough at this particular place, and he knew that it was on a hill. Whatever dangers there were open and apparent to him, and it was his duty, under these circumstances, to follow the beaten track, and not to veer therefrom so as to run his wagon against the embankment or a rock which was located therein. It is common knowledge that in a mountainous county the roads are frequently graded out of hillsides through rocky cuts, and are narrow of necessity. Counties are not insurers of the safety of such roads for loads such as the appellant was carrying.

Crooks, at pp. 234-5. The court affirmed a judgment NOV on the ground that the County could have no liability for a road defect that was apparent and was not an unusual hazard on county roads at that time.

Plaintiff cites *Owen v. Burlington Northern R.R.*, 153 Wn.2d 780, 108 P.3d 1220 (2005), and *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), for the proposition that road safety is always an issue only for the trier of fact. Again, this ignores the threshold question of whether there is any evidence of an inherently dangerous or misleading condition that creates a county duty to act.

In *Owen*, a rail crossing case, the court cited the law requiring an inherently dangerous or misleading condition and emphasized the presence of a “crown” in the railroad tracks that hid a traffic signal. This arguably deceptive condition in the road caused train-vehicle collisions due to vehicle backups across the tracks, creating an issue of fact about the reasonable safety of the road. *Owen*, at 789. Thus, *Owen* does not change law requiring evidence of inherently dangerous or misleading conditions as a basis for a road liability claim.

Chen v. Seattle did state that an inherently dangerous or misleading condition is not a prerequisite to a claim that a road is unsafe. *Chen* is a Court of Appeals case that is inconsistent with law from the Supreme Court and cannot override it.

Chen relied almost entirely on *Berglund v. Spokane Cty*, *supra*, for its conclusion. *Berglund* was a narrow bridge case in which the claim was that the bridge was grossly unsafe for pedestrians due to heavy traffic and

the lack of any pedestrian facilities (a child was crushed by a car). *Chen* did not note that *Berglund* was a demurrer case, equivalent to a modern CR 12(b)(6) case. The *Berglund* court held that it had to take the allegations in the complaint at face value. The complaint alleged what was an inherently dangerous condition created by the lack of pedestrian facilities on the bridge and the inability of pedestrians to protect themselves from the danger. The complaint alleged:

(9) Defendant at all times was aware of the dangerous condition of said bridge for pedestrian travel and with the probability that pedestrians would be injured due to vehicular traffic and *of the fact that pedestrians had no way of protecting themselves from being injured by vehicles while they should be crossing said bridge*, and particularly that such dangers were present *where the bridge was being used by infants*.

Berglund, at 312 (emphasis added). *Berglund* did not reject the need for evidence of inherent danger or a misleading condition to create a duty but simply found that such a condition had been properly pled, allowing the case to proceed to the evidentiary stage under the rules then used by the courts.

In two later narrow bridge cases, both the Supreme Court and the Court of Appeals premised actual or potential liability on evidence that the approach to the narrow bridge was dangerous and misleading without a warning of the narrowness of the bridge. *See Lucas v. Phillips*, 34 Wn.2d

591, 209 P.2d 279 (1949); *Tanguma v. Yakima Cty*, 18 Wn. App. 555, 569 P.2d 1225 (1977). The most recent Supreme Court case to consider an appeal of summary judgment based on lack of a road maintenance duty is *Ruff v. King County, supra*. The Supreme Court affirmed summary judgment for the county based on lack of duty because there was no evidence of an inherently dangerous or misleading condition in the road. *See Ruff, supra*. Thus, *Chen's* reliance on *Berglund* to dispense with this requirement, and Plaintiff's reliance on *Chen*, is misplaced.

Plaintiff also cites *Keller* to support an argument there is a conflict between comparative negligence and the lack of duty to remedy or warn of open and apparent road conditions. App. Br. p. 21. *Keller* disapproved of an instruction that allowed a jury to find that a city had not breached a duty to sign a dangerous intersection if the plaintiff was not "using [the road] in a proper manner." *Keller*, 146 Wn.2d at 241, 249-254. *Keller* held that the plaintiff's conduct could be considered only in reference to his comparative negligence and not to absolve the city of a breach of its duty. *Id.*

In this case, a breach of duty issue never arises because open and apparent road conditions do not create a duty for the County to act to protect Plaintiff. Municipalities always have the option of posting a warning of an alleged road hazard rather than repairing it. *Meabon v.*

State, 1 Wn. App. 824, 463 P.2d 789 (1970); *Owens* (1956); *supra*. If a condition is undeniably open and apparent, as it is here, there is no condition requiring a warning and no duty to provide a warning. The duty issue depends only on whether the nature of the road condition is apparent. Any careless driving behavior related to comparative fault is immaterial to the court's legal decision on this duty issue.

B. Plaintiff Argues Notice Only Of The Generic Snow And Ice Condition On All Kittitas County Roads And Not Notice Of Any Hazard Peculiar To The Collision Site

Plaintiff acknowledged the cases holding that the County has no duty unless it has notice of a dangerous condition. *See* App. Br. 18-20. She also acknowledged cases applying the notice requirement to dangerous conditions caused by snow and ice. *Id.* Plaintiff argues that the County had notice of a dangerous condition because it had notice of snow and ice. App. Br. pp. 19-20.

There is no duty to remedy or warn of normal accumulations of snow and ice. *Calder, supra.*; *Nelson v. Tacoma, supra.* Therefore, notice of normal snow accumulations is not notice of a dangerous condition. Notice must be of a specific hazardous condition and location, rather than simply of a broad snow and ice condition. *Niberger, supra.*

Although Plaintiff's expert agreed the snow and ice at the collision site was generic, Plaintiff argues County employees recognized a "hazard"

at the site. There was no testimony by County employees that there was a special hazard at the site, but only testimony that it was a shaded area that was always sanded, as were other shaded areas. *See* section I.(B)(4).

In her section discussing notice, Plaintiff also criticizes the trial court's citation to *Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993). In *Bird*, this Court held the highway department had not breached its duty by failing to sand an icy highway when the evidence was that the state was sanding, but had not yet sanded the collision site. Plaintiff distinguishes *Bird* by arguing the state duty in *Bird* was satisfied because the state was sanding at the time of the collision. In this case the County had already plowed and sanded the road repeatedly (and was about to sand it again) before Plaintiff's collision. This is more than the state had accomplished before the *Bird* collision. The County did not rely on *Bird* in its briefing because Judge Munson did not articulate his duty analysis. However, the trial court is correct in highlighting the anomaly of imposing liability for a road already plowed and sanded by the County when the state had no liability for a road that it had not yet sanded.

C. Plaintiff Has Provided No Evidence Contradicting The County's Evidence That Its Decisions On Winter Maintenance Policies Were Made At The Executive Level Of County Government

Plaintiff agrees that policy decisions made at the executive level are not subject to liability. App. Br. 13. Plaintiff acknowledges the County presented evidence that the Commissioners had considered and rejected a road de-icing program. *Id.*

Plaintiff argues only that the decision not to use de-icer at the collision site was operational because: (1) a 2001 County Commission resolution on winter maintenance did not address use of de-icers, and (2) the County sometimes uses de-icer in the snow prone western part of the county. App. Br. 14.

The 2001 resolution created county winter maintenance districts and prioritized roads within those districts for work. *See* CP 107-108. The resolution does not contain winter maintenance policies other than road priorities and does not change the long term policies discussed in the County's testimony. *Id.* The evidence shows that, in 2001, county officials had only just begun discussing an experimental *anti-icing* program. *See* CP 150-51; 171-79. There is no evidence that county officials in 2001 had even begun discussing the larger topic of a *de-icing* program.

Concerning the use of de-icer in the Hyak area, Plaintiff misstates the evidence. There is no evidence concerning de-icer use other than the County's evidence, and Plaintiff cites only that evidence. *See* App. Br. pp. 14-15; CP 118; 149-52. The County does not use chemical de-icers at Hyak to de-ice roads but only to soften heavily rutted frozen accumulations to allow plowing. *Id.* The County never stated these roads are de-iced as Plaintiff argues. Ironically, if the County did not use de-icer to soften and plow heavy frozen snow at Hyak, the County would have potential liability for failing to ameliorate the frozen ruts and mounds that courts have traditionally considered dangerous road obstructions. *See Calder, supra.*

Plaintiff also argues that fiscal considerations "standing alone" do not justify immunity. App. Br. 15. No authority is cited. In any event, the evidence was the winter maintenance policies were based on several considerations, including fiscal, level of road use, need, potential liability, and citizen expectations. CP 117-18.

Plaintiff further argues that *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d 240 (1998), rejected the city's attempt to justify negligence based on limited resources. The lead opinion in *Bodin* states the opposite; the court said fiscal evidence can be considered in municipal liability cases in which fiscal evidence is relevant to the reasonableness of a

government decision. *See also Berghlund v. Spokane Cty., supra.* Moreover, the issue in *Bodin* is different from this case. *Bodin* discussed whether the fact finder could consider the resources of a municipality in deciding whether the city satisfied its duty of care. Here, the evidence of fiscal considerations is not offered to show lack of negligence (or poverty), but is offered to show the challenged county decisions involved policy and not operational matters.

Finally, Plaintiff quoted County counsel's law review article on sovereign immunity to the effect that discretionary immunity is limited "to adoption of laws, regulations and policies by legislative bodies." App. Br. 13-14; Tardif & McKenna, *Washington State's 45-year Experiment in Governmental Liability*, 29 Seattle U. L. Rev. 1, 15 (2005). Plaintiff's quote omitted the phrase "and elected or appointed officials" after "legislative bodies".⁶ The roads division manager is an appointed official and the county commissioners are elected officials with both legislative and administrative functions. *See* RCW 36.32.050; 36.32.120(6).

⁶ The full sentence in the law review article is "The effect of the new interpretation of discretionary immunity was to limit immunity to adoption of laws, regulations and policies by legislative bodies, and elected or appointed officials." Tardif and McKenna, 15-16 (emphasis added).

D. The Role Of County Policies As Evidence Of The Standard Of Care Is Irrelevant To The Issues Of Duty And Policy Immunity In This Case

Plaintiff argues the County's alleged failure to comply with policies is evidence of negligence. App. Br. 24. Negligence is relevant only if the County has a duty to Plaintiff and no policy immunity. Duty and immunity must be decided before negligence is considered.

In addition to the legal shortcoming of Plaintiff's argument, there are no facts supporting the argument that the County violated its winter maintenance policies. Plaintiff argues that the 2001 resolution, mentioned above at pages 28-29, is a policy setting standards for county maintenance operations. The resolution created winter maintenance districts and "a priority classification for a snow and ice control on the County maintained roads." See CP 107-108; 159-69. The resolution contains no operating procedures or policies beyond the prioritization of roads within districts. *Id.*

V. CONCLUSION

Kittitas County respectfully requests this Court of Appeals to affirm the trial court's order granting summary judgment to the County and dismissing Plaintiff's complaint.

RESPECTUFLY SUBMITTED this ^{JTA} ___ day of February, 2011.

FREIMUND JACKSON TARDIF
& BENEDICT GARRATT, PLLC

A handwritten signature in black ink, appearing to read "Michael E. Tardif", written over a horizontal line.

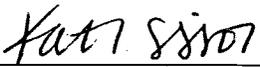
MICHAEL E. TARDIF, WSBA #5833
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960
Attorneys for Respondent

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:

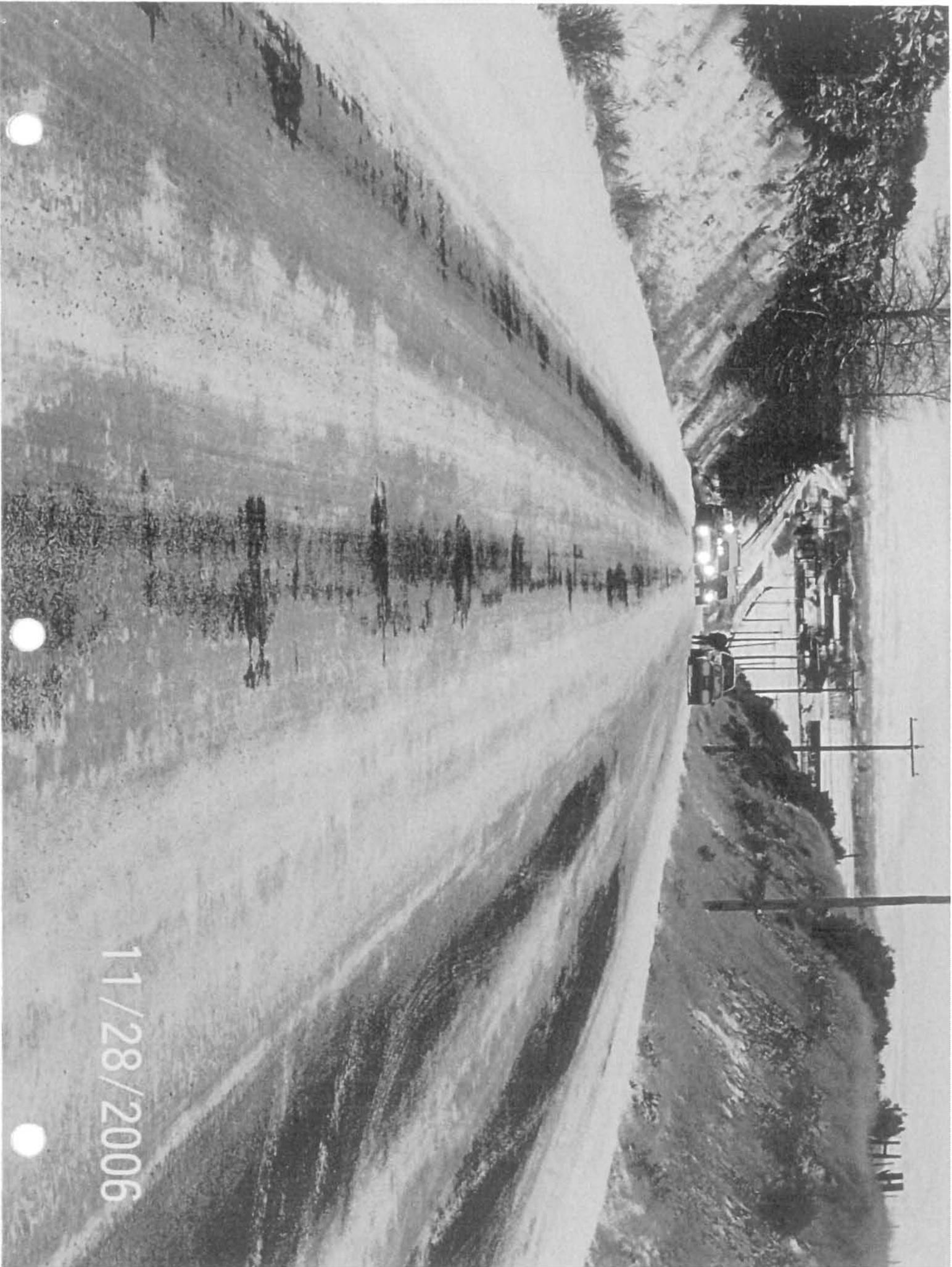
That on February 7th, 2011, I arranged for the service of the foregoing Answering Brief of Respondent Kittitas County, to the Court and to the parties to this action as follows:

Office of the Clerk Court of Appeals, Division III 500 North 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.S. 1102 West Yakima Avenue Yakima, WA 98902-3029	<input checked="" type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Howard M. Goodfriend Edwards, Sieh, Smith & Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101-2988	<input checked="" type="checkbox"/> Email <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

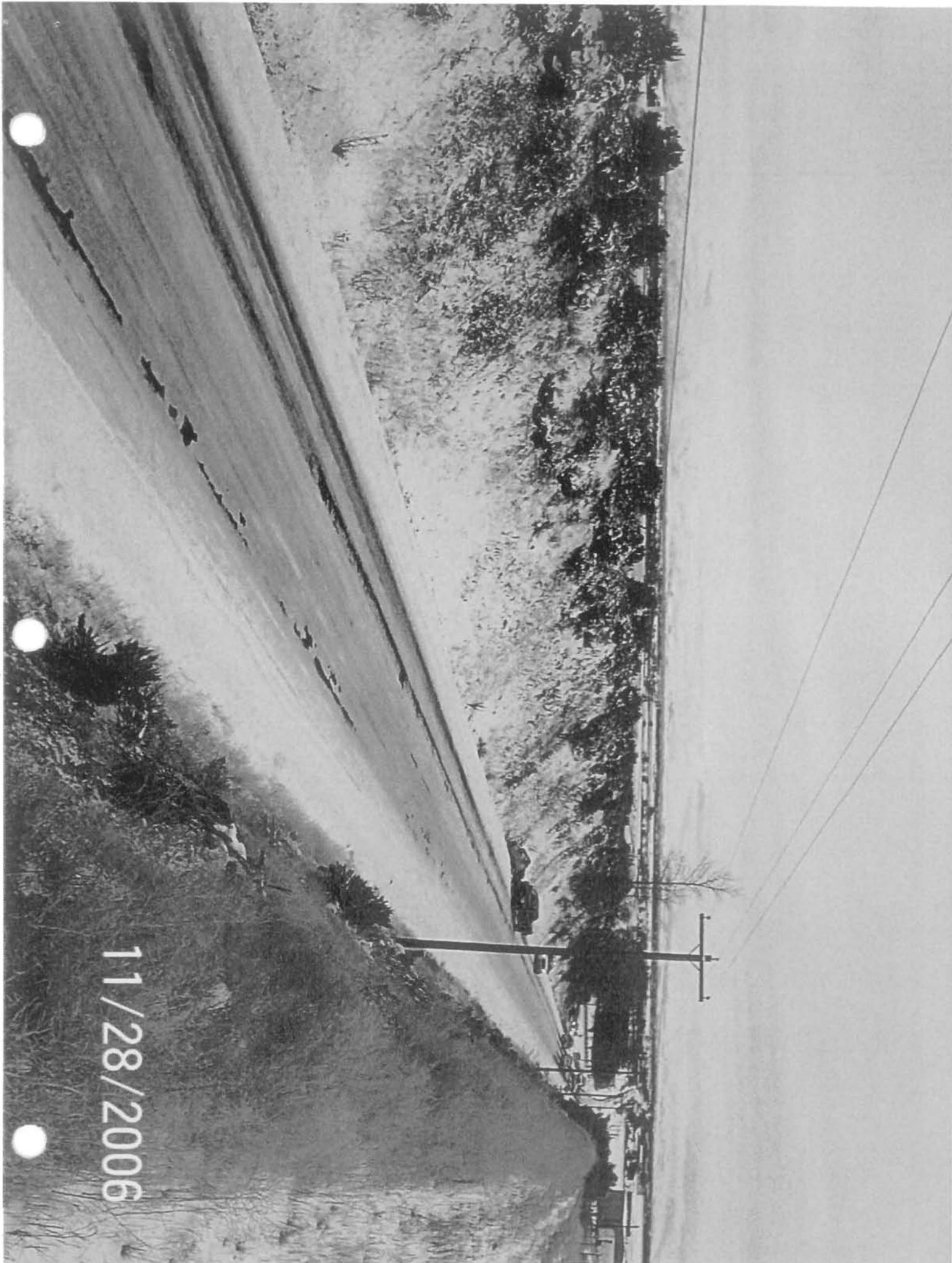


KATHRINE SISSON

APPENDIX A



11/28/2006



11/28/2006

An aerial photograph showing a winding road or path through a landscape. The terrain appears to be a mix of light-colored soil or sand and darker, vegetated areas. There are several distinct tracks or paths branching off the main road. The overall scene is captured from a high angle, providing a clear view of the road's curvature and the surrounding terrain. Three circular punch holes are visible along the left edge of the image.

11/28/2006

