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DIVISION II

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No. 41433-3-II

STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

EAMONN NOONAN, an individual,

Appellant,

v.

THURSTON COUNTY, WASHINGTON, a municipal corporation,

Respondent

BRIEF OF APPELLANT NOONAN

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I. INTRODUCTION

This case concerns water damage to private property. Appellant, Eamonn Noonan (“Noonan”), purchased a home on French Loop Road (“Road”) in Olympia, Thurston County, Washington in 2005. CP 34. Stormwater drainage from the Road and its ditches and stormwater system overflowed onto the Noonan property, causing substantial damage.

Thurston County (“County”) maintained the Road and the adjoining drainage system for well over 30 years. Failures in the drainage system, resulting from negligent maintenance and/or work by the County, caused water flooding and resulting damage on the Noonan property.

The County argues that RCW 36.75.080 protects the County from liability for damages resulting from water run-off from the Road. However, RCW 36.75.080 only relieves the County of liability for publicly used roads that have become part of the County’s roadways through prescription and where the County has not yet made any affirmative indications that it acknowledges or even knew about the road as part of its road system. That is not the case here.

The applicable statute is RCW 36.75.070, which applies as the County was active in maintaining a road within its system. Washington law provides no liability exclusion under RCW 36.75.070. In other words, under statutory law and RCW 4.96.010, as well as supporting common law, the County is liable for torts arising out of its own negligent acts.

The County also incorrectly argues that several of Noonan's tort and statutory claims are precluded on various grounds. The County failed, however, to meet its burden as the moving party to establish an absence of any genuine question of material fact regarding Noonan's claims. Despite errors in applicable law and Noonan's submission of admissible evidence raising genuine issues of fact, the trial court dismissed all remaining claims. Noonan respectfully appeals the trial court's rulings.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it found that there were no genuine issues of material fact, that Thurston County was entitled to summary judgment as a matter of law, and dismissing all of Noonan's claims with prejudice. (Trial Court Order CP 203-204; RP 26).

Assignment of Error No. 2: The trial court erred when it held that RCW 36.75.080 applies, instead of RCW 36.75.070. (RP 24-25).

Assignment of Error No. 3: Alternatively, the trial court erred in applying RCW 36.75.080 and holding that RCW 36.75.080 absolved the County of liability. (RP 25).

Assignment of Error No. 4: The trial court erred when it granted the County summary judgment on various statutory and tort claims, when the County failed to meet its initial burden. In the alternative, the trial court erred in finding there was no evidence that the County maintenance

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of the road or ditches caused the problems at issue (RP 25); and that the only water at issue was water already on Noonan's property (RP 26).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **(Assignment of Error No. 1)** The trial court erred when it found that Thurston County was entitled to summary judgment as a matter of law dismissing all of Noonan's claims with prejudice, given the multiple genuine issues of material fact.

2. **(Assignment of Error No. 2)** The trial court erred when it held that RCW 36.75.080 applied where, given the County's longtime maintenance of French Loop Road, RCW 36.75.070 applied.

3. **(Assignment of Error No. 3)** If RCW 36.75.080 applies, whether the trial court erred in applying -.080 when it found that the County had not adopted French Loop Road into the county system by Resolution, notwithstanding Noonan's submission of a County Board Agenda and concurrent Resolution specifically referencing the Road.

A prior County resolution suffices, as a matter of law, to preclude the Road from the limited liability afforded under RCW 36.75.080.

In the alternative, Noonan submits there are genuine questions of material fact, and the County failed to meet its initial burden on summary judgment regarding adoption of the Road into the county system.

4. **(Assignment of Error No. 4)** Whether the trial court erred in deciding causation when the County did not present evidence on that

issue in its moving papers. Alternatively, the trial court erred in finding no evidence that County maintenance of the road or ditches caused the problems at issue, when Noonan submitted evidence presenting a genuine question of material fact to the contrary, particularly when that evidence is viewed in the light most favorable to Noonan as the non-moving party.

IV. STATEMENT OF THE CASE

A. Substantive Factual History.

1. *French Loop Road: Original construction*

The Road was built several decades ago. For purposes of the summary judgment motion, Noonan acknowledges the lack of evidence that the County originally designed or constructed the Road. Dale Rancour, County Engineer, testified that he believed the Road was built over 50 years ago by private parties. CR 45-46. The parties do not dispute that the Road has been a publicly used thoroughfare for decades.

2. *French Loop Road: County undertakes maintenance.*

The County performed ongoing maintenance on the Road for well over thirty years. CP 80 (deposition of Mr. Rancour, "Rancour Dep.").

The County's maintenance of the Road included routine repairs and upkeep as well as repairs to address more substantial damage. CP 81 1. 10-17; CP 83 11. 17-20; CP 84 1. 22 – 99 1. 2. (Rancour Dep.).

Mr. Rancour confirmed that in several instances, the County's general maintenance included specific maintenance, repair and other work

on the stormwater and drainage system of the Road. *See, e.g.*, CP 85 1. 20 – 86 1. 7 (stormdrain maintenance/repair); CP 86 1. 20 – 87 1. 18 (maintain stormwater drainage); CP 88 1. 15 – 89 1. 2 (repair of sinkhole resulting from wash-out of soils); CP 89 ll. 3-16 (repair of storm-related problems after January 2006 slide); CP 89 ll. 16-22, CP 91 1. 9 – 92 1. 20 (maintain and repair culvert); CP 92 1. 21 – 93 1. 4 (sinkhole repair); CP 93 ll. 14-15 (culvert maintenance); CP 93 1. 20 – 94 1. 7 ([possible stormwater related crack); CP 94 1. 17 – 95 1. 21 (ditch maintenance); CP 95 1. 23 – 96 1. 2 (general work in 1997-98: maintain culvert; inspect and maintain stormdrain, etc.); CP 97 ll. 1-5 (maintain and inspect culvert, drain repair and replacement, inspect and maintain drain, etc. during 1995-97).

3. **French Loop Road: 1994 flooding and County repairs.**

Major flooding in November and December of 1994 caused extensive damage to what is now the Noonan property, previously owned by Don Miles. The County did emergency action to repair the Road and adjoining properties. *See, e.g.*, CP 71-72; CP 75-78; CP 102-103; CP 117-136; CP 137-181. This work included replacing drainage pipes, installing a concrete berm, and substantial work to the hillside on the Miles/Noonan property, including a retaining wall and additional drainage systems. *Id.*

4. **French Loop Road: Flooding during Noonan's ownership.**

Flooding of the Road and overflow from its drainage system continued to damage the Noonan property after Noonan purchased the

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property, even during periods of normal rainfall. *See, e.g.*, CP 102 (major slope failure due to flooding in November and December 1994); CP 102-4 (damage resulting from similar flood event in January 2006); CP 104-6 (damage resulting from December 2007 and January 2009 flood events).

B. Procedural History.

1. Initial Pleadings.

Noonan filed his complaint on March 20, 2009, alleging claims for negligence, and inverse condemnation. CP 3-10. Noonan alleged that drainage pipes constructed by Thurston County diverted water and otherwise failed, harming the Noonan property in the 2009 flooding. CP 4. Noonan also alleged that the County had a duty to design, construct and maintain the ditches and drains along the Road, that the County breached that duty, and as a result damaging Noonan's property. CP 5. This damage arose from water diverted by the Road and/or its drainage system onto the Noonan property. CP 4-5.

Noonan alleged that the County's diversion of stormwater from its natural flows that damaged his property was done for the purpose of creating a public benefit, and that the County had neither paid just compensation for such impact on Noonan's private property nor initiated formal proceedings to compensate Noonan. CP 5.

The County filed its answer and affirmative defenses on May 21, 2009, CP 11-15. Noonan answered. CP 16-17.

Noonan filed an Amended Complaint on January 20, 2010, adding claims for injury to land under RCW 4.24.630; common law trespass; and nuisance. CP 18-26. Noonan also additionally alleged that the County acted intentionally, for purposes of RCW 4.24.630 and trespass; the diversion of stormwater was either intentional or through failure to maintain drainage systems; and such action caused damage. *Id.*

The County filed its Answer and Affirmative Defenses to the Amended Complaint on May 1, 2010. CP 27-32.

2. County's Summary Judgment Motion.

The County brought its motion for summary judgment on June 3, 2010. CP 33-42. The primary bases for the County's motion are:

- RCW 36.75.080 applied to bar liability. The County claims the liability protection under RCW 36.75.080 applies as the County never passed a resolution adopting the Road into its roadway.
- Negligence and nuisance claims barred by statute of limitations.
- There is no valid claim under RCW 4.24.630 (waste statute), as County did not enter Noonan's property and did not engage in intentional misconduct.
- There is no valid claim for intentional trespass as there is no evidence of a deliberate wrongdoing by the County.
- Inverse condemnation claim barred because the Road was privately designed and constructed, and therefore the "public project" element of an inverse condemnation claim not present.

LaBonita Bowmar, a Clerk of the Board of County Commissioners for Thurston County ("Board"), submitted the County's first two-page
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declaration. CP 43-44. Ms. Bowmar states that she searched the County's document management system looking for the term "French Loop" in Board minutes from 1917 to the present, and in resolutions and ordinances from 1920 to the present. CP 43. Ms. Bowmar declared that "[m]y search resulted in finding no resolution by the Board of County Commissioners adopting French Loop Road into the Thurston County road system."

Dale Rancour, County Engineer for Thurston County, submitted the County's second two-page declaration. CP 45-46. Mr. Rancour stated that he searched the records maintained by Thurston County Public Works for documents regarding the acquisition, design or construction of French Loop Road, and that no documents were found. As a result of this search, Mr. Rancour concluded that the Road was designed and constructed by private parties, not Thurston County. *Id.* Mr. Rancour offered no opinion as to the County's ongoing maintenance or work on the Road. *Id.*

3. Noonan's Opposition.

After the County filed its motion Noonan requested additional time for discovery. The County re-noted the motion for September 10, 2010. Noonan deposed Mr. Rancour on July 29, 2010. CP 79-100 (excerpts).

Noonan opposed the County's motion in his response filed August 30, 2010. CP 47-66. In support of it opposition, Noonan addressed the misapplication of law and filed two declarations and several documents demonstrating genuine issues of material facts. CP 67-181; CP 73-181.

Noonan submitted a declaration by Henry Borden, PE PLS, formerly of the consulting engineering firm Skillings-Connolly, Inc. CP 67-70. Mr. Borden worked on the 1995 County project relating to failure and damage on the Road, its drainage systems, and adjoining property owned at that time by Don Miles (Noonan's predecessor).

Mr. Borden attached as an exhibit his letter of October 6, 1995, signed as Project Manager for the project. CP 71-72. Mr. Borden's letter related to ongoing County work on the Road and Noonan property, and included follow up questions and recommendations for further work necessary to avoid ongoing or future damages. The letter referenced a County plan to relieve stormwater flow over the Noonan property. *Id.*

Mr. Borden confirmed in his declaration various aspects of the County's involvement in the repairs and maintenance of the Road and stormwater affecting adjoining properties, including Noonan's, and the County's knowledge regarding the need for specific work and maintenance to avoid future problems. CP 67-70.

Noonan also submitted the following documents relating to ongoing County work, repair and maintenance of the Road, its drainage and stormwater system, and the adjoining Miles/Noonan property:

- Board Agenda submitted January 24, 1995 for a meeting January 30, 1995 ("Agenda"). CP 75-76. The Agenda was approved January 30, 1995, and cleared by the prosecuting attorney. CP 75.
- Board Resolution passed on January 30, 1995, referencing French Loop Road as part of the County roadway, and authorizing

expenditure of public funds to repair stormwater damage to the drain system and Noonan property (“Resolution”). CP 77-78.

- Excerpts from deposition of Dale Rancour. CP 79-100.
- Soils and hydrology assessment from Lisa Palazzi of Pacific Rim Soil & Water, Inc., dated September 8, 2009 (“Palazzi Report”). CP 101-116.
- Letter from County to C.W. Dice of Skillings-Connolly, Inc., dated February 22, 1995, regarding contract and scope of work for County work done on the Road and the Miles/Noonan property to address drainage system problems and damage. CP 117-136.
- Cost accountings for decades of County work on the Road and Miles/Noonan property, relating to the stormwater drainage problems and damage. CP 137-181.

A few of these documents are particularly important to note with respect to the legal issues in this case, and are discussed in more detail below.

a. Board Agenda and Resolution.

The Board Agenda and Resolution go to the heart of whether the County acknowledged and accepted the Road as part of its road system, directly impacting the appropriate application of RCW 36.75.070 or -.080. Both the Agenda and the Resolution specifically address County work on the Road. The Agenda included a “summary statement” providing in part:

The winter storm of December 15, 1994 damaged the property of Don Miles [Noonan predecessor] ... and the storm drainage system for the County roadway. When the storm drainage system was damaged by the winter storm, it caused a landslide on Mr. Miles’ property. The situation constitutes an emergency condition ... and the potential for further damage must be minimized. County Road Maintenance staff immediately made temporary repairs to the drainage system and property. However, in order to do the

necessary permanent repairs the County needs to have a site evaluation and recommendations prepared by a professional engineer knowledgeable in soils stabilization.

Staff recommends that a professional firm be retained to provide the necessary services of evaluation, recommend a course of corrective action, and supervise repairs made by a contractor.

CP 75. Emphasis is added to demonstrate the repeated references to the Road by the staff as part of the County roadway.

The Agenda also included the following recommendations: (1) that the Board find an emergency exists; (2) move to authorize Director of Roads and Transportation Services to contract for site evaluation, emergency repair recommendations, and supervision of contractor; and (3) move to authorize the Director to expend funds for such repairs. CP 76.

The Board passed Resolution No. 10834 at its meeting on January 30, 1995. CP 77-78. This resolution stated, in summary, as follows:

A RESOLUTION declaring an emergency ... and authorizing the selection of a contractor for the repair of damages to the storm drainage system for a **County roadway and adjacent property.**"

WHEREAS, the winter storm of December 15, 1994 damaged the property of Don Miles ... and the storm drainage system for the **County roadway;** and

* * *

WHEREAS, immediate action needs to be taken to stabilize the area where the landslide occurred, and to make the necessary repairs to **the County's storm drainage system** in order to minimize material damage to both public and private property; and

* * *

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF THURSTON COUNTY that an emergency situation exists at the [Miles/Noonan property] and to **the County storm drainage system** which requires immediate action ...

BE IT FURTHER RESOLVED that the requirements of Chapter 36.32 RCW are hereby waived for the repairs to 3230 French Loop Road N.W. and **to the County storm drainage system.**

BE IT FURTHER RESOLVED that the Director of Roads and Transportation Services is authorized to select a contractor **and to enter a contract for the repairs** to 3230 French Loop Road N.W. and **to the County storm drainage system.**

CP 77-78. Emphasis is added to demonstrate the repeated references by the Board to the Road as part of the County roadway; as well as to point out the authorization to expend public funds for the project.

b. Rancour Deposition.

Noonan deposed County Engineer Dale Rancour July 29, 2010.

CP 79-100. Mr. Rancour affirmed the County had regularly maintained the Road for well over 30 years, including routine repairs, upkeep, and repairs for more substantial problems such as major flooding events. CP 81 l. 10-17; CP 83 ll. 17-20; CP 84 l. 22 – 99 l. 2.

Mr. Rancour confirmed several instances where the County's work addressed the Road's stormwater and drainage system. *See, e.g.*, CP 85 l. 20 – 86 l. 7 (storm drain maintenance and repair); CP 86 l. 20 – 87 l. 18 (maintenance of stormwater drainage); CP 88 l. 15 – 89 l. 2 (repair of sinkhole resulting from wash-out of soils under road); CP 89 ll. 3-16 (repair of storm-related problems after slide in January 2006); CP 89 ll.

16-22, CP 91 l. 9 – 92 l. 20 (culvert maintenance and repair); CP 92 l. 21 – 93 l. 4 (possible sinkhole repair); CP 93 ll. 14-15 (culvert maintenance); CP 93 l. 20 – 94 l. 7 (possible stormwater related crack); CP 94 l. 17 – 95 l. 21 (ditch maintenance); CP 95 l. 23 – 96 l. 2 (general activities on culvert maintenance, stormdrain inspection and maintenance, etc. during 1997-98); CP 97 ll. 1-5 (culvert inspection and maintenance, drain repair and replacement, drain inspection and maintenance, etc. during 1995-97).

c. Palazzi Report.

Also of particular note are numerous instances where the Palazzi Report identifies work done, or done poorly, by the County as causing water problems resulting in damage to the Noonan property. Several other contributors to Noonan's damage are identified that may also stem from County-related work over the last thirty years. Examples include:

- CP 103, CP 109, CP 111: County engineered drawings indicating instructions to install a berm to protect against run-off onto the Miles/Noonan property, which work (referenced later in report) was not done or done poorly, resulting in water flow onto Noonan property and resulting damage;
- CP 110: referencing recent roadside ditch work by County revealing a pipe that abruptly ends and channels water to run along the road surface towards the Noonan site, but no County action taken to address broken/incorrectly installed pipe;
- CP 111: failures related to PVC pipe installed by County to replace original pipe system;
- CP 112: failure to properly maintain collector box/inflow culverts, resulting in water overflow and damage to Noonan property;

- CP 113: flaws with previous repairs made by County;
- CP 114, 115: clogged culverts, indicating County's failure to properly maintain culverts during upkeep of Road's drainage system; also, advised to install berms previously recommended by the County's engineer as necessary to prevent further damage;
- CP 101-116 generally (numerous failures of pipes and drainage system, some of which may have been installed, altered or maintained by County since original construction and design).

The Palazzi Report notes several storm events that resulted in damage on the Noonan property. CP 102 (major slope failure due to flooding in November and December 1994); CP 102-4 (damage resulting from similar flood event in January 2006); CP 104-6 (damage resulting from December 2007 and January 2009 flood events). The January 2009 event was similar to the 1994 flooding. CP 106.

The Palazzi Report identifies documented and probable events resulting in severe damage to the Noonan property. *See, e.g.*, CP 107. Several of these events "are only slightly above average rainfall events, and have occurred with such regularity (annually) that this cannot be considered an aberration or accident of nature." CP 107. The Palazzi Report documents cumulative damage to the Noonan property from the various flooding and rainfall events. *See, e.g.*, CP 106 (pictures).

Most importantly, the Palazzi Report identifies the Road and its drainage system as the primary source of water damaging the Noonan property. *See, e.g.*, CP 102, 107-113 (detailed identification of runoff sources, all relating to the Road).

These materials raise several issues of material fact and application of law rebutting the County's position. Questions remain regarding the County's work, the County's acknowledgment and acceptance of the Road as part of its road system, and the nature and source of Noonan's damages.

4. County Reply.

The County filed a reply on September 7, 2010. CP 182-92. The County listed several issues that it alleged – inaccurately – Noonan “did not dispute.” CP 182-3. However, Noonan had provided both argument and documentation disputing most of the items listed by the County.

The only two statements Noonan agrees with are (1) Thurston County did not provide the original design or construction of the Road or its drainage ditches; and (2) Thurston County did not enter into any contract with Noonan or his predecessor.

However, these are irrelevant – and thus immaterial – facts. Noonan did not acquiesce to the other claims, and submitted evidence and argument demonstrating genuine areas of dispute as to both facts and law.

a. Noonan never agreed that the County or Board has never adopted the Road as part of the County road system.

Noonan submitted a Board Agenda and Resolution specifically showing the County acknowledged the Road as part of the County road system. CP 75-78. On their face, these documents serve as formal acknowledgment and acceptance of the Road.

The Agenda and Resolution also undermine the credibility of the Bowmar declaration, in which Ms. Bowmar says she found no Board documents relating to the Road. This discrepancy precludes the declaration from supporting the County's burden on summary judgment.

b. Amended Complaint allegations regarding cause of damage substantially broader than County states.

County asserts that Noonan identified the drainage ditches on the Road as the cause of damages, implying (as later argued) that all damage resulted from defects in the original design or construction. This mischaracterizes the Complaint/Amended Complaint.

The facts asserted in the Amended Complaint are not restricted to damage resulting from original construction or design; and specifically include maintenance as a cause of damage. CP 20-21.

The County never raised the issue of causation in its moving papers outside a bare, unsupported assertion that the claims related only to original design and construction problems. The County focused exclusively on liability for failures or defects in the original construction or design of the road. The County neglected, however, to offer any proof or other argument to establish an absence of material fact regarding damage resulting from the County's own work.

c. Noonan's lawsuit filed timely.

Noonan does not dispute that claims were brought more than two years after a major flooding event. But this does not negate Noonan's

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claims, as more than one flooding event is at issue. Noonan submitted evidence (the Palazzi Report) demonstrating an ongoing occurrence of flooding and storm water problems, including events occurring within the two years preceding the filing of this Lawsuit.

d. Noonan never conceded that Noonan's claims for negligence, nuisance, intentional trespass, waste and inverse condemnation were barred.

Noonan provided evidence relating to several elements of these claims. The trial court misapplied the law to these claims, and neglected to make rulings on some altogether. As the County has not met its initial burden to demonstrate a complete issue of fact, the County is not entitled to summary judgment, regardless of whether Noonan provided rebutting evidence. The County failed to meet its burden on several key elements.

5. County Reply: Untimely Supplemental Declaration.

With its reply, the County supplied a supplemental declaration of Mr. Rancour.¹ This declaration was untimely, however. The County bore the burden of providing all relevant documentation and supporting affidavits in its moving papers. CR 56(c).

Regardless, Mr. Rancour's declaration fails to put to rest any question of material fact, and differs substantially from his earlier

¹ Through an inadvertent oversight, the supplementary Declaration of Dale Rancour was not designated in the Clerk's Papers. Noonan has submitted a request to supplement to Clerk's Papers to remedy this error. *See* County's Reply Brief, CP 182-193, and reference therein at CP 187 ll. 6-7.

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testimony. Mr. Rancour testifies in his declaration that the County performed no work on the Road other than repairs following the 1994 flood. However, Mr. Rancour's deposition testimony, submitted with Noonan's response, directly contradicts this statement. In Mr. Rancour's deposition, he acknowledges ongoing County work and maintenance on the Road, including specifically work on the drainage system. CP 79-100; *see also* detailed list *supra* (Section IV(B)(3)(b)).

Mr. Rancour also asserts in his supplemental declaration that the County made no changes to the Road or to the ditches along the Road. Mr. Rancour's deposition testimony contradicts these assertions.

Furthermore, Noonan submitted the Palazzi Report, which identifies and discusses several areas where the County did, in fact, make changes to the Road and adjoining ditches and drainage system, and attributes some of those changes, or insufficient work thereof, as contributing to Noonan's damages. CP 101-116; *see also* detailed breakdown *supra* (Section IV(B)(3)(c)). The County's own records regarding the work done in 1995 reflect substantial work done both on the Road and the adjoining private property, and thus work on the overall Road drainage system. CP 71-72; CP 75-78; CP 117-136; CP 137-181.

6. Noonan Supplemental Memorandum.

The summary judgment hearing was continued briefly. Noonan filed a supplemental memorandum on September 14, 2010, addressing the

new issue argued by the County for the first time in its reply. CP 196-200. Noonan's supplemental memorandum primarily addressed the issues of negligent trespass and negligence, as well as additional authority regarding the County's liability for voluntarily assumed maintenance. *Id.*

7. Trial Court Decision.

The court entered summary judgment in favor of the County on September 20, 2010. CP 202-04. The order included no specific findings of fact or conclusions of law, but the trial court voiced several findings of fact and conclusions of law in its oral ruling.

The trial court's rulings include the following relevant items:

- There were no genuine issues of material fact that precluded granting the County's motion for summary judgment as a matter of law. RP 26.
- That despite the fact that the County maintained French Loop Road for over 30 years, RCW 36.75.080 (regarding liability for roads that became county roads through prescription, but were not yet formally adopted or actively maintained by the County) applied to this action, rather than 36.75.070 (regarding roads that the County actively maintained for at least 7 years). (RP 24-25).
- That French Loop Road had not been adopted as part of the County's road system by resolution, despite such a County resolution on record referencing French Loop Road. (RP 24-25).
- That RCW 36.75.080 absolved the County of liability, despite the fact that the limited liability protection applied only to actual "failure" to maintain, but did not apply to protect against the County's negligence once the County chose to undertake maintenance of a publicly used roadway. (RP 25).

- That RCW 36.75.080 absolved the County of liability, despite the fact that established Washington case law does not absolve a County from its own negligent acts in maintaining a road or drainage system. (RP 25).
- That there was no evidence that County maintenance of the Road or ditches caused the problems at issue (RP 25); and that the only water at issue was already on Noonan's property (RP 26), despite (1) Noonan's expert testimony to the contrary; and (2) the County did not address causation in its original motion, rendering this inappropriate for determination on summary judgment.

Noonan filed for reconsideration. CP 205-07 (Motion); 208-228 (Memorandum). The County filed a brief in response, reiterating its prior arguments under the statute and case law. CP 229-240. The trial court denied the motion for reconsideration on October 19, 2010. CP 241.

Noonan timely filed this appeal. CP 244-50.

V. ARGUMENT

A. Summary of Argument

The County performed work and repairs on the Road and its drainage system. The County was negligent in performing this work, and in failing to complete additional work recommended by its engineers. This negligence led to damage on Noonan's property. Both statutory and common law hold the County liable for its own actions. The one limited statutory liability exception does not apply here.

The trial court erred in dismissing Noonan's other claims, as the County failed to establish a lack of any genuine issues of material fact.

B. Standard of Review

Genuine issues of material fact exist, and the trial court incorrectly applied the applicable statutory and common law.

1. Questions of Fact

Several material questions of fact go to the claims at issue in this case. Accordingly, one issue before this Court is whether any genuine issues of material fact preclude the County's motion. *Jacobsen v. State*, 89 Wn.2d 104, 107-08, 569 P.2d 1152 (1977).

A material fact is one upon which the outcome of litigation relies. *Jacobsen*, 89 Wn.2d at 108. Factual issues are those focused on the "who-what-when-where-and-how" questions, a determination of damage awards, and issues such as reasonableness of an action. *See, e.g.*, Teglund, 14A Wash. Prac., Civil Procedure § 33.18.

The purpose of summary judgment is to avoid a useless trial. However, trial is not useless, but absolutely necessary, where there is genuine issue as to any material fact. *Jacobsen*, 89 Wn.2d at 108. In determining whether a genuine issue of material fact exists, the Court will construe all facts in favor of Noonan as the nonmoving party. *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 872-3, 969 P.2d 10 (1998).

The County, as moving party, bears the initial burden to show an absence of any genuine issue of material fact. *Young v. Key Pharms, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden shifts to Noonan only once the moving defendant meets its initial burden. *Id.* at 234-5.

The mere fact that a defendant moving for summary judgment alleges some relevant facts is insufficient to meet its initial burden. The defendant's task in demonstrating there are absolutely no questions of fact means that all facts asserted in the defendant's affidavits, together with plaintiff's allegations taken as true, with the facts construed in the light most favorable to plaintiff as the nonmoving party, must support only inferences in the defendant's favor. *Young*, 112 Wn.2d at 235.

If the moving party fails to sustain that burden summary judgment should not be entered, even if the nonmoving party submits no affidavits or other supporting materials. *Young*, 112 Wn.2d at 235.

Even where the moving party met its initial burden, where the nonmoving party submits admissible evidence raising a genuine question of material fact, summary judgment cannot be granted. A plaintiff who is the nonmoving party must create an issue of fact in order to defeat summary judgment. In meeting this burden, "an affidavit asserting *any* supportable, relevant fact inconsistent with the defendant's position will be sufficient to do so." *Young*, 112 Wn.2d at 192.

2. Questions of Law

Noonan also assigns several errors to the trial court's application of statutory and common law to the facts in this case. These questions of law are reviewed de novo. *DiBlasi*, 136 Wn.2d at 872-3; *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

Interpretation and application of statutory language is likewise a question of law reviewed de novo. *Bostain v. Food Exp. Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

C. Summary Judgment Issues

Not surprisingly, the County's motion for summary judgment took on a life of its own. Ultimately several of the legal and factual issues became confused and even dropped. This confusion may have been the basis for some of the trial court's errors in findings of fact and conclusions of law. Because of the complexity and multiple theories of law at issue, below is a summary of the factual and legal issues on summary judgment.

- RCW 36.57.070 applies, not RCW 36.57.080, as the plain language and intent of the statute applies to every public roadway the County was active in maintaining for at least seven years.
- Even if RCW 36.57.080 applies, the County's work does not fall under the limited liability exception under this statute. The County passed a resolution recognizing and accepting the Road as part of its public roadways. The County also performed work on the Road for over 30 years, thus not meeting the "failure to maintain" language of the statute.
- Statutory construction leads to only one reasonable result as a matter of law. RCW 36.57.080 is an abrogation of common law, and thus is construed narrowly. At a minimum, Noonan raised several genuine issues of material facts addressing application of these statutes.
- The trial court mistakenly dismissed Noonan's other claims, based on either misunderstanding of the law or of the facts. The County failed in meeting its initial burden to prove a lack of any issue of

material fact. In addition, Noonan presented substantial evidence alerting the court of genuine questions of material facts.

D. RCW 36.75.070 Applies, not RCW 36.75.080, Where County Maintained Road for 30 years.

The trial court erred in concluding that RCW 36.75.080 applies to this case as a matter of law, rather than RCW 36.75.070. At a minimum, genuine issues of fact relate to the application of these statutes to this case.

1. The Two Statutes at Issue.

RCW 36.75.080 applies where a roadway has become part of the governmental road system via prescriptive use, a passive action as opposed to some affirmative action by the government. Given this statute allows a road to become part of a municipality's road system without any knowledge on the part of the municipality, the statute also establishes a limited liability protection until the municipality indicates through some affirmative action that it recognizes responsibility for the roadway:

All public highways in this state, outside incorporated cities and towns and not designated as state highways which have been used a public highways for a period of not less than ten years are county roads; PROVIDED, that no duty to maintain such public highway nor any liability for any injury or damage for failure to maintain such public highway or any road signs thereon shall attach to the county until the same has been adopted as part of the county road system by resolution of the county commissioners.

(Emphasis added).

However, RCW 36.75.080 is not the only potentially applicable statute. The more apt statute in this case is RCW 36.75.070:

All public highways in this state, outside incorporated cities and towns and not designated as state highways, which have been used as public highways for a period of not less than seven years, where they have been worked and kept up at the expense of the public, are county roads.

(Emphasis added). By its plain language, RCW 36.75.070 applies given the County's undisputed active maintenance of the Road for well over three decades. CP 80 ll. 1-12; *see also* Section IV(B)(3)(b) *supra*.

Both statutes provide for the absorption of publicly used roadways into the County's road system. The County does not dispute that the Road has been used as a public roadway for a substantial length of time, well beyond the time frames at issue in these two statutes. The question is not whether one of these statutes apply, but rather which one.

A primary difference between the two statutes is whether the County acquired a road through passive, prescriptive use (RCW 36.75.080), or, as is the case here, the County recognized and accepted a road as part of its system by working on and keeping up such road at public expense (RCW 36.75.070).

Another key distinction between the two statutes is that RCW 36.75.070 provides no protection against liability where a county has actively worked on and maintained a road.

A municipality is generally liable for its own negligence and other torts. RCW 4.96.010. RCW 36.75.080's limited liability protection applies only where a county "silently" acquires a road through use, but has not yet publicly acknowledged responsibility for the road.

The trial court erred in allowing the County to take advantage of the liability provision under RCW 36.75.080. As a matter of law the trial court should have applied RCW 36.75.070; or, if RCW 36.75.080 applies, recognized that the County's acknowledgement and acceptance of the road, through both active maintenance and recorded resolution, negated the limited scope of liability protection afforded under -.080.

2. Washington Law Regarding Statutory Interpretation.

Statutory interpretation is a matter of law reviewed de novo. *DiBlasi*, 136 Wn.2d at 872-3. A court's fundamental duty when interpreting a statute is to give effect to the legislature's intent. *McLand Co., Inc. v. Wash. State Dept. of Revenue*, 105 Wn.2d 409, 413, 19 P.3d 1119 (2001); *see also Bostain*, 159 Wn.2d at 708. The court derives intent primarily from the statutory language. *McLand*, 105 Wn.2d at 413.

If the statute's meaning is plain, the court will give effect to that meaning as expressive of legislative intent. *Bostain*, 159 Wn.2d at 708.

In interpreting a statute, the court cannot consider a single sentence of the statute in isolation; it is the duty of the court to consider all provisions of a statute in relation to one another, and harmonize various provisions in order to insure proper construction of each in light of the statute's intent. *Prince v. Savage*, 29 Wn. App. 201, 204, 627 P.2d 995, *rev. den'd* (1981); *see also ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993).

Accordingly, the court determines plain meaning from the ordinary meaning of the language as used in context. *Bostain*, 159 Wn.2d at 708. The court will also consider such meaning within the context of related statutory provisions, and the statutory scheme as a whole. *Id.*

If statutory language is susceptible to more than one reasonable interpretation, the court will resolve such ambiguity by looking to other indicia of legislative intent, including reference to principles of statutory construction to resolve the ambiguity. *Bostain*, 159 Wn.2d at 708-9.

Where a statute's meaning is ambiguous, the court's duty is to adopt a construction that is reasonably liberal in furthering the legislative intent. *State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957).

This directive to implement legislative intent applies even when the general objective or intent is inconsistent with literal reading of the statute as it could be applied to particular facts. *Murphy v. Campbell inv. Co.*, 79 Wn.2d 417, 420-21, 486 P.2d 1080 (1971). Washington courts have long held that when something is within the letter of the law, but not within its spirit, a literal reading of the statute may be held inoperative where it would otherwise lead to an absurd conclusion. *Id.* At 421.

3. Plain Language: RCW 36.75.070 Applies Where County Maintained Road at Public Expense.

The Legislature's use of particular language in one instance and different language in another infers a difference in legislative intent. *State v. Keller*, 143 Wn.2d 267, 278, 19 P.3d 1030 (2001). The court looks at

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the entire statute to interpret the provision so as to give meaning to all elements of the statute. *Id.* at 278-9.

The County claimed that it did not do regular maintenance on the Road. However, aside from the fact that the second Rancour declaration was untimely and thus not properly considered, Mr. Rancour himself admits to a long-standing history of maintenance by the County in his deposition. CP 79-100; *see also supra* (Section IV(B)(3)(b)). At a minimum there may be a genuine question of fact as to the County's scope of maintenance of the Road. However, given Mr. Rancour's admission of the County's decades of maintenance, this fact is in actuality undisputed.

Given the undisputed facts regarding the County's longstanding maintenance of the Road, coupled with the prior actions and Resolution by the County Board acknowledging the Road as part of the County's roadways, section .080 simply does not apply.

The County provides no credible proof that the Road is anything but a public roadway kept up at County expense for well over the statutory seven years. *See also* CP 75-78 (Agenda and Resolution authorizing payment for work on the Road).

RCW 36.76.070, by its plain language, applies to situations such as this one where the roads have been "worked and kept up at the expense of the public;" thus indicating that the municipality has, through its actions, accepted the road as part of its system.

The Legislature limited liability only where a county may have acquired a roadway through prescriptive use by the public -- e.g., without actual knowledge on the part of the county. RCW 36.75.080. RCW 36.75.070 on the other hand provides no limitation on liability for the County in this case, given the County's active maintenance of the Road.

Without implementing this critical distinction in determining which statutory provision applies, it serves no purpose to have two separate statutory provisions. The County's reasoning, and that adopted by the trial court, is not a reasonable application of the statutes.

To apply RCW 36.75.080 to this case is to ignore the existence of .070, and the clear distinction between the two sections within the statutory scheme. One or the other must apply; it cannot be both. To argue otherwise is to ignore the distinctions between the two statutory sections and render these distinctions meaningless. This is not the law.

As the Legislature included a limited liability protection under RCW 35.76.080, the absence of such a clause in RCW 36.76.070 was intentional. *State v. Keller*, 143 Wn.2d at 278-9.

Thus, where RCW 36.75.070 applies, RCW 36.75.080 cannot; the County cannot pick and chose under which statute it falls.

The County argued that RCW 36.75.070 simply provides an alternate means by which a road becomes a county road, with a shorter time period, and does not take 36.75.080 off the table. CP 230 ll. 12-14.

But such a reading undermines the legislative choice to grant a limited liability waiver in one circumstance (roadway acquired by prescription but not yet recognized by the County) but not the other (roadway maintained by the County, and thus recognized as part of its roadway). Both the County and the trial court erred in choosing a reading and application of the statutes that rendered the statutory distinctions between RCW 36.75.070 and -.080 superfluous.

4. Determining Legislative Intent: RCW 36.75.070 is the Logical Statute to Apply.

To give full effect to the statutes regarding county roads, the Court must first determine which statute applies in a manner that is consistent with and furthers the intent of this particular legislation. The Court looks to the statutory structure as a whole. *ITT Rayonier*, Wn.2d at 807; *Prince*, 29 Wn. App. at 204. The County's interpretation - and that adopted by the trial court - violates this standard rule of statutory interpretation.

The law in Washington since 1967 is that a municipality is liable for its own negligent acts. RCW 4.96.010. Through this statute, the Legislature evidenced a clear intent to generally hold municipalities accountable for their own acts absent some legislative exception.

RCW 4.96.010, coupled with the contrasting language of the two statutes at issue, RCW 36.75.070 and -.080, indicates an intent to protect a municipality for liability on its roadway work (or lack thereof) *only* where a municipality may acquire a roadway it doesn't even know about.

The plain language of RCW 36.75.080, particularly when read in conjunction with -.070, indicates an intent to limit liability only where a county may have acquired a road through public use over time; but has not yet undertaken maintenance of that road and may not even be aware of the fact that this road has now come under the county's umbrella.

If a municipality has demonstrated such knowledge through active maintenance, then that road falls under RCW 36.75.070. Active road maintenance would also take that road out of the limited liability protection under RCW 36.75.080, which applies only to relieve the County of liability for complete "failure" to maintain the road.

The municipality may also exhibit knowledge of the road through a resolution, thus terminating any protection under RCW 36.75.080.

The statutes must be read liberally in order to give effect to the legislative intent, as interpreted within the context of the statutory structure as a whole. *McLand Co*, 105 Wn.2d at 413; *ITT Rayonier* at 807.

The Legislature has made the law clear. Municipalities, such as the County, are responsible for their own acts under RCW 4.96.010. The Legislature carved out a very limited exception where the County may not know it acquired a public roadway through prescription.

However, because of the County's active maintenance of the Road, the liability protection under RCW 36.75.080 either (1) never applied, because RCW 36.75.070 is the applicable statute; or (2) terminated when

the County began active maintenance of the road (thus no absolute “failure” to maintain). Furthermore, once the County passed a resolution addressing repairs on, and specifically acknowledging, the Road as part of its road system, the liability protection under RCW 36.75.080 terminated.

The County’s and trial court’s interpretation fails to give effect to legislative intent to provide protection from liability *only* where a county has no active role in, or perhaps even knowledge of, a particular road.

E. Trial Court Misapplied RCW 36.75.080 to Facts of This Case.

If RCW 36.75.080 does apply, the trial court erred in applying that statute to this case. RCW 36.75.080 provides a limited liability exemption only for (1) failure to maintain a public highway that has become a public road through use; where (2) such road has not been adopted as part of the county road system by resolution of the county commissioners.

The trial court erred in finding that the county road had not been adopted as part of the county road system by resolution within the meaning of the statute.

1. Adoption of French Loop Road into the County System.

The trial court found that “the county road has not been adopted as part of the county road system by resolution.” RP 24 l. 24 - 25 l. 1. The trial court further found that “[t]he fact that it is referred to - French Loop

Road is referred to in one of the preliminary statements or the whereas statements in one of the resolutions does not satisfy this statute.”

The trial court made an error in law.

The Legislature intended to protect a county only where the county was not aware of, or had not yet undertaken any care of, a particular road that became part of the county system through prescription, without some affirmative act by the County. The Legislature specifically limited the liability protection under RCW 36.75.080 to apply only until such time that the municipality recognized the road as part of its road system.

The County in this case passed a resolution acknowledging and accepting French Loop Road as part of its county system. CP 77-78. This County action brings this Road, and this case, out of the limited scope of liability protection afforded by RCW 36.75.080.

Another question of fact (if not determined as a matter of law) is whether the County met its burden in showing an absence of any question of fact regarding the Road’s acceptance into the County’s road system.

The County, as moving party, bore the burden on summary judgment to establish all material facts through admissible evidence. *Young*, 112 Wn.2d at 225. These questions of fact preclude summary judgment dismissing Noonan’s claims.

Noonan presents a legitimate challenge to the credibility of the County’s evidence purported to establish an absence of any resolution

regarding the Road. The only evidence submitted by the County to support its contention that French Loop Road was never adopted was the declaration from the County clerk, LaBonita Bowmar. CP 43-44.

Ms. Bowmar's declaration states that she searched the County's document management system, looking for the term "French Loop" in Board minutes from 1917 to the present, and in resolutions and ordinances from 1920 to the present. CP 43. Ms. Bowmar declares that "[m]y search resulted in finding no resolution by the Board of County Commissioners adopting French Loop Road into the Thurston County road system."

In rebuttal, Noonan submitted the Board Agenda and Resolution specifically discussing the Road, obtained through public records request. CP 75-6 (Agenda for Board meeting); CP 77-8 (concurrent Resolution).

Therefore, Noonan raised a genuine question of fact regarding whether the County Board approved a "resolution" wherein the County accepted the Road as part of its road system.

The fact that Noonan found documents through a public records request that Ms. Bowmar could not locate, also brings into question the credibility of whatever search Ms. Bowmar conducted. Ms. Bowmar's declaration does not suffice to meet the County's burden on summary judgment in establishing a complete absence of material fact with respect to the Road's adoption by the County.

The County provided only one other piece of evidence in support of its motion, the brief testimony of Dale Rancour, County Engineer. In his initial declaration, Mr. Rancour asserted that he found no documents “regarding the acquisition, design or construction” of French Loop Road.” CP 45. Absent from Mr. Rancour’s declaration, however, is any declaration or opinion as to whether or not French Loop Road had ever been adopted into the county’s road system. Mr. Rancour testifies only as to the original design and construction. CP 45-46.

The County later submitted a supplementary declaration from Mr. Rancour in support of its Reply Brief, but again this declaration makes no statement as to the adoption, or lack thereof, of French Loop Road by the County into its road system.

The only reasonable way to apply RCW 36.75.080 to the facts here is to consider the County’s earlier discussion of French Loop Road in its January 30, 1995 Agenda and the concurrent County Resolution 10834 as a “resolution” within the meaning of this particular statutory provision. The County formally acknowledged French Loop Road as part of its road system. This reading is the only one that gives effect to the statute in its entirety, and effects clear and unambiguous legislative intent to hold the County liable for its own acts, excepting only the limited circumstance where the County may not even know it owned the road and has taken no affirmative action indicating its knowledge or acceptance of the Road.

The County argued that the legislature clearly meant for liability to apply only once the County adopts a formal resolution adopting the road into its system. But such a reading would lead to absurd results and ignores the plain language of RCW 36.75.070. If a county could forever escape liability this way, no municipality would ever pass a formal resolution adopting a road. This is not the law.

Noonan respectfully requests that the Court find, as a matter of law, that the Resolution was sufficient to satisfy RCW 36.75.080 with respect to adoption of the road into the county system.

In the alternative, Noonan submits that a material issue of fact exists as to whether a resolution exists that satisfies RCW 36.75.080, precluding summary judgment in the County's favor.

2. County did not "fail" to maintain French Loop Road: County maintained the Road for decades, and therefore undertook a duty to do so responsibly.

Additionally, Noonan asserts a second reason that the limited liability provision under RCW 36.75.080 does not apply. Once the County undertook maintenance of the Road, it assumed a duty to do so without negligence. *Sigurdson v. City of Seattle*, 48 Wn.2d 155, 161-2, 292 P.2d 214 (1956). Once that duty is assumed, RCW 36.75.080 provides no immunity from liability for a breach of this duty.

RCW 36.75.080 protects against liability only for "failure" to maintain a road, again indicating legislative intent that this protection, an

abrogation of common law, applies only where the County has not yet demonstrated through affirmative action, whether by adoption through resolution (RCW 36.75.080), or active maintenance (RCW 36.75.070).

F. County Liability for Its Own Acts Consistent with Washington Common Law

The County argues RCW 36.75.080 “is simply an extension of Washington common law which provides that a local government is not responsible for the design and construction or improvement of roads or drains simply because it undertook maintenance of the road after it was constructed.” CP 36. But this is not true; the statute is an abrogation.

1. Common Law: County Liable for its Own Acts

In support of its assertion that RCW 36.75.080 is an extension of common law, the County cites *Phillips v. King County*, 136 Wn.2d 936, 968 P.2d 871 (1998) and *Pepper*, 73 Wn. App. 523, 871 P.2d 601 (1994). But the law addressed in *Phillips* and *Pepper* is inapplicable here.

The *Pepper* court dealt with the public duty doctrine protecting a county from liability based on its exercise of regulatory authority to issue and regulate permits; and on liability flowing from original design and construction done by private parties. Neither is the issue in this case.

The *Phillips* court also dealt with liability for original design and construction performed by another. The *Phillips* court recognized, however, a distinction in a case such as this one, where the municipality

actively participated in subsequent maintenance and work where that maintenance is the cause of damages. 136 Wn.2d at 966.

Phillips points to *Sigurdson*, 48 Wn.2d as the appropriate case to apply in a case such as this one. Where negligent maintenance caused the damage, the county is liable for failure to maintain a public drainage system. *Id.*, citing *Sigurdson* at 162.

Sigurdson emphasizes that a municipality's acceptance of a system through control and management of the same is sufficient to trigger liability for negligence having to do with that work and maintenance:

‘Municipal liability is restricted to the public sewers which the corporation controls; it does not extend to private sewers and drains *which it did not construct, nor accept.* * * * But if sewers, drains or culverts constructed by third persons are, in some legal manner, adopted by the municipality as a part of its sewerage or drainage system, *or the municipality assumes control and management thereof, the municipality becomes liable for injuries resulting therefrom, since in such cases it is immaterial by whom the sewer, drain or culvert was constructed.*’ (Italics ours.) 18 McQuillin, Municipal Corporations (3d ed.), 467, § 53.118.

48 Wn.2d at 161 (emphasis retained).

The *Sigurdson* holding supports Noonan's reading of RCW 36.75.080's "acceptance into the system" element. Once a municipality accepts a road into its system through actively maintaining that road, any protection from liability under RCW 36.75.080 terminates. This application of the statute is the only one consistent with legislative intent to protect against liability only where the municipality may not even know

it has acquired responsibility for a particular road. The common sense interpretation of this intent is reflected in the *Sigurdson* distinction of road systems “which [the County] did not construct, nor accept” and those where the County “assumes control and management” of that road.

2. RCW 36.75.080 an Abrogation of Common Law

As Washington law generally holds a county liable for its own actions, RCW 36.75.080 is an abrogation. RCW 36.75.080 carves out a narrow exception to this common law rule, and as an abrogation this liability exception in RCW.76.080 must be strictly construed.

While the Legislature may supersede, abrogate or modify common law, courts will not recognize an abrogation or derogation of common law absent clear legislative intent to deviate from such law. *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008). Therefore, the courts will strictly construe a statute in derogation of the common law, and the court will not find an intent to change the law unless such legislative intent is clear. *Id.* at 77.

RCW 36.35.080 does not express any clear intent to abrogate existing law. Coupled with RCW 36.35.070 and RCW 4.96.010, and the language in RCW 36.35.080 itself terminating liability protection once a municipality recognizes a publicly used road as part of its roadways, the Legislature clearly intended statutory and common law liability to apply

for all roadways of which the County is aware, particularly once the County already voluntarily undertook maintenance of this Road.

3. Washington Common Law as Applied to This Case

The question at hand is whether Washington law holds a county liable for its own negligence. As discussed above, it does. The County attempts to deflect this reality and detract from the real issues at hand.

The County repeatedly states that the County cannot be responsible for defects in original design and construction. This is correct.

However, the issue is not whether or not the County did original design and construction work on French Loop Road. No one contests that the road was built half a century ago by unknown persons or entities.

But this is not the issue here. The relevant issues in applying Washington's common law are as follows: (a) whether the County maintained the Road; (b) whether the County made changes to the Road; (c) whether the County's subsequent maintenance of and changes to Road created a duty to conduct such activity in a responsible manner; (d) whether the county was negligent in its performance of such work; and (e) whether such negligence caused damage to Noonan's property.

a. County maintained the Road.

It is undisputed that the County maintained the Road for well over 30 years; and that the County undertook extensive work on the Noonan

property repairing drainage issues and resulting damage from the Road's water run-off. CP 80 ll. 1-12; *see also* Section IV(B)(3)(b) *supra*.

Accordingly, the County's longstanding and active maintenance of the Road meets the first requirement of finding a duty.

b. County made changes to the Road.

Likewise, the County's own witness, Mr. Rancour, admitted in several instances that the County made actual changes to the Road. CP 79-100; *see also* detailed list *supra* (Section IV(B)(3)(b)). The County's records reflect substantial work on the Road and its drainage system in response to earlier flooding. CP 71-72; CP 75-78; CP 117-136; CP 137-181. Noonan submitted the Palazzi report, which also identified work done by the County on the Road and its drainage system. CP 101-116; *see also* detailed break-down *supra* (Section IV(B)(3)(c)).

Therefore, as to the second element, there is at a minimum a genuine issue of material fact as to whether the County performed work on the Road sufficient to trigger a duty to do such work responsibly. The County failed to meet its initial burden by failing to establish a complete lack of genuine issue of fact on this issue.

c. County's actions give rise to a duty to perform such work without negligence.

The County repeatedly argued that "a local government is not responsible for the design and construction or improvement of roads or

drains simply because it undertook maintenance of the road after it was constructed.” *See, e.g.*, CP 36 ll. 21-24;

This is a creative, but incorrect, expansion of the law. Nothing in the law the County cites or discusses suggests that the County is not responsible for its own work in improving or maintaining the road. Indeed, this argument is directly contrary to established Washington law set forth in *Sigurdson* and cited favorably by *Phillips*.

Noonan does not argue that the County is liable for work someone else performed. This case is about responsibility for damages flowing from the County’s own negligent acts in with respect to the road and drainage system. Washington law holds the County liable for such acts.

d. County negligent in performing maintenance and repairs.

The County concluded its argument with this summary statement:

The facts of this case are even stronger than those in *Pepper* and *Phillips*, because Thurston County did not even adopt French Loop Road as part of its road system by County resolution.

The County bore the burden to prove its case as a matter of law, and a complete absence of any genuine dispute as to material fact, in its initial moving papers. The County failed to do so.

The facts in this case are completely different than those in either *Phillips* or *Pepper*, by way of an important distinction the County glosses over and the trial court neglected to address. Here, the liability alleged is not for original construction or design, but for the County’s own actions

(or inactions) in maintaining the road and drainage system, and following up on repairs and work it had already begun.

The County spends much time arguing that either it did not do work on the Road (a bare statement contradicted by the County's own witness), or if it did, that it is not liable. The County completely neglected, however, to make any offering of proof that it was not negligence in performance of its various work and repairs.

In contrast, Noonan submitted the Palazzi report documenting negligence or inadequacy in work done by the County on the Road and its drainage systems. CP 101-116. Noonan submitted a letter from a representative of the engineering firm the County hired, warning of the problems that would arise from problems in the County's work and/or recommended actions the County failed to perform. CP 67-72.

The County failed to establish an lack of any genuine factual issue.

e. County's negligence caused Noonan's damages.

Likewise, the County failed to present any evidence establishing that negligence on the part of the County did not cause Noonan's damage.

In contrast, Noonan submitted the Palazzi report showing how the damage to Noonan's property resulted from prior negligent or inadequate work by the County on the Road and its drainage systems. CP 101-116.

Therefore, once again, the County failed to establish an absence of genuine issue with respect to this material fact.

G. There are Genuine Issue of Material Fact Regarding Causation.

The trial court erred when it held that there was no evidence that the County maintenance of the road or ditches caused the problems at issue (RP 25); and that the only water at issue was water already on Noonan's property (RP 26). The trial court then rejected Noonan's trespass claim as a matter of law, finding that Noonan provided no proof of damage resulting from County maintenance, or insufficient maintenance. This is putting the cart before the horse.

It was the County's burden, as the moving party, to present evidence establishing a lack of any genuine issue as to all material facts. *Young v. Key Pharms, Inc.*, 112 Wn.2d. Proximate causation is typically a question of fact. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 227, 135 P.3d 499 (2006, Div. 1).

The County did not meaningfully address the issue of causation until its response to the motion for reconsideration. In its moving papers, while the County claims that nothing the County did caused Noonan's damages, there is no submission of evidence or testimony supporting this bare assertion. Even if the issue were properly before the court, the County thus ultimately failed to meet its initial burden in showing the absence of any material fact as to the causation of Noonan's damage.

Even if the County had presented such evidence, there are disputed facts that preclude summary judgment. As discussed at length above,

Noonan submitted substantial evidence regarding the County's work on the Road, and the impact of that work on his Property.

H. Trial Court Erred in Dismissing other Statutory and Common Law Claims.

The trial court summarily dismissed Noonan's claims for negligence, trespass, property waste and inverse condemnation in error.

The County asserted that Noonan had acquiesced to dismissal of these claims. However, such acquiescence is nowhere in the record. The trial court dismissed these claims, without ever making a finding that the County had actually met its burden.

The trial court based its holding on the erroneous finding that there was no evidence of the County's maintenance, or damage from water other than what was already on the Noonan Property (RP 25-26).

But the burden never shifted to Noonan to prove these issues. The County never presented any evidence raising the issue of causation, much less enough to establish the lack of any genuine issue. Accordingly, the entire question of causation was improperly considered in this motion.

Even if causation was properly before the trial court, until the County meets its burden, the burden did not shift to Noonan to present evidence raising an issue of fact. The trial court should not have entered summary judgment where the County failed to sustain its burden, even if Noonan as the nonmoving party submits no affidavits or other supporting materials. *Young*, 112 Wn.2d at 235, quoting *Jacobson*, 89 Wn.2d at 108.

Finally, many of the claims made by the County revolve around classic questions of fact. Under RCW 4.44.090 and -.080, all questions other than admissibility of testimony and construction of legal writings are questions of fact. Only where the County has established a complete lack of genuine questions as to a factual issue, with the facts construed in the light most favorable to Noonan as the nonmoving party, is the County entitled to summary judgment. *Id.*

The County fails to establish any element of these claims as a matter of law, and dismissal was in error.

1. Negligence.

Negligence requires (1) a duty, (2) a breach of that duty, (3) resulting injury, and (4) proximate causation between the breach and injury. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474, 951 P.2d 749 (1998). As discussed above, Noonan submitted facts supporting a duty, breach, damage, and causation.

But, once again, the County had failed to meet its own burden, and thus the burden never shifted to Noonan. The County's only argument against Noonan's negligence theory is based on statute of limitations. The County argued that because flood damage occurred in 2006, any subsequent claim for flooding damage is barred after two years.

The first problem is that the County once again misstates the case, claiming that Noonan blames the original construction. CP 38.

As set forth above, however, Noonan's claims are not about original construction and design, but rather the result of the County's ongoing maintenance, or lack thereof, and injury flowing from failed prior repairs the County performed on the Road and its drainage systems. These are separate and distinct acts.

The second problem is the County failed to meet its initial burden on summary judgment. The County presented no evidence that all of Noonan's damage resulted from activities that occurred in 2006 or earlier. The County presented no evidence that later flooding events did not cause Noonan's damages. The County presented no evidence that its actions causing the damage at issue all occurred prior to March 20, 2007, two years before Noonan filed his initial complaint.

In short, the County presented no evidence at all on causation, and failed to meet its initial burden. Even if Noonan had not submitted the Palazzi Report, discussing damage flowing from the County's work and ongoing failure to maintain, the burden never shifted to Noonan as the nonmoving party. Summary judgment was inappropriate where the County failed to meet its burden. *Young*, 112 Wn.2d at 235

2. Trespass.

The County's argument against trespass rests upon misstatements of the law and claims at issue. The County claims that it never set foot on Noonan's land, but submits no evidence establishing this "fact". The

County once again fails to meet its initial burden, thus never shifting the burden to Noonan.

The County also claims that the results of actions on the adjoining Road are not trespass. However, the County's work did cause water to intrude upon Noonan's property, thus "entering" the land.

Furthermore, the County did step foot on Noonan's property, through the undisputed work the County performed on the property while under ownership of Don Miles. The Palazzi report identifies this work as contributing to the damage on Noonan's property. CP 101-116. There is at a minimum a genuine question of material fact.

Finally, the County says that there was no "intentional" act. The County need not have intended to cause harm, only know that the consequences were "substantially certain" to occur. CP 40. The Palazzi Report (CP 101-116), the initial recommendations for work after earlier flooding, and warnings of consequences if such work not done (CP 75-76), and the later letter from the County's engineer (CP 117-136) all raise genuine questions of material fact as to whether the County could be substantially certain that the predicted failures did indeed occur.

3. Liability for waste to property under RCW 4.24.630.

Similarly, for all the reasons stated above, dismissal on the property waste statute claims was inappropriate.

The County's failed once again to meet its initial burden, as it presented none of the evidence necessary to establish the facts supporting the County's argument. Even if the County had provided such proof, the fact the County could be reasonably sure that its work, or failure to complete its work, could cause damage may be determined "intentional" under Washington law. There are genuine issues of fact on these issues.

4. Inverse condemnation.

The County likewise failed to meet its burden with respect to the inverse condemnation claims. The County argued that the damage to Noonan's property was "unplanned." CP 41-42. The County also rests once again on the fact that it did not do the original design or construction. CP 42. However, as discussed above, this is not what the case is about.

This case is about damage flowing from the County's work on the Road and drainage systems. The County is liable for such damage. *See, e.g., Pruitt v. Douglas County*, 226 Wn. App. 547, 66 P.3d 1111 (2003). The County knew that its work on the Road and its supporting drainage system would result in further damage to Noonan's property. The County presents no facts to the contrary. Summary judgment was inappropriate.

I. Attorneys Fees.

Noonan may be entitled to his attorneys fees if awarded compensation under his inverse condemnation claim. RCW 8.25.075.

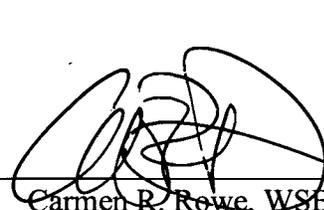
Such award has not yet been made, but Noonan would be awarded all fees and costs for appeal as well as trial court if so. RAP 18.1.

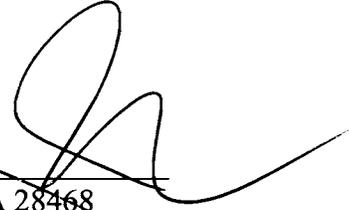
VI. CONCLUSION

In conclusion, the trial court erred in finding that RCW 36.75.080 applied; or, if RCW 36.75.070 did apply, the trial court erred in finding that the limited scope of liability under that statute applied.

The trial court further erred when it granted the County summary judgment on issues for which it had not met its initial burden; or where Noonan submitted evidence raising a genuine issue of material fact.

RESPECTFULLY SUBMITTED this 16th day of June, 2011.

By: 


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Certificate of Service

I certify that on the 6th day of June, 2011, I served the party listed below with a true and correct copy of the foregoing Brief of Appellants in the above-entitled matter by ABC Legal Messenger:

Mark R. Johnsen
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Seattle, WA 98101

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Olympia, Washington, this 6th day of June, 2011.


KAREN L. DIETRICH
Paralegal for attorneys
Goldstein and Rowe