

No. 41433-3-II

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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EAMONN NOONAN, an individual,

Appellant,

v.

THURSTON COUNTY, WASHINGTON, a municipal corporation,

Respondent

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**REPLY OF APPELLANT NOONAN**

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## I. INTRODUCTION

The County's response on appeal is simply a reiteration of its motion for summary judgment. The County persistently points to irrelevant paths that detract from the material issues in this case, perhaps because the County has no real defense against the actual claims at hand. Repeating something over and over does not make it so.

This is not a case about liability for original construction of French Loop Road ("Road"). This is a case about liability for the County's maintenance of, or failure to maintain, the Road's water drainage systems.

This is not a case about the County taking occasional care of a road it never adopted. This is a case about the County's statutory and legal duty to responsibly maintain a road it adopted, both implicitly and explicitly, into its roadway system, and maintained (however poorly) for over three decades.

In short, the County introduces no sound legal or factual bases for upholding the trial court's ruling that granted the County's summary judgment motion. The statutes and case law hold the opposite of what the County argues. If anything, the County's response underlines the multiple issues of material fact in this case, issues that preclude summary judgment.

## II. NOONAN'S REBUTTAL

### A. **Relevance of Original Design and Construction.**

The County repeatedly states that it is not responsible for flaws in the original design and construction of the road. The County mentions “original design and construction” as the primary issue at least twenty-six times in its response brief. This was the County’s tune at summary judgment – but they have the wrong song. Noonan emphasized the distinction between this issue and the real problem at hand in its opening brief. Yet the County continues to focus on legal and factual issues that are not on point in this case.

#### **1. Noonan allegations focus on maintenance – not original construction.**

In its opening brief, Noonan does not assert any error on the part of the trial court regarding findings relating to original design and construction. Noonan’s assignments of error relate only to application of the statutes and to liability arising out of maintenance of the Road.

With respect to common law on this issue, the County focuses once again on cases regarding *original* construction and design. But the issue in this case is not whether or not the County originally designed or built the road. The issues at hand when applying Washington law to this particular case are:

- (a) whether the County maintained the Road;
- (b) whether the County made changes to the Road;

(c) whether the County's subsequent maintenance, changes and actions with respect 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. None of these factors relate to original design and construction of the Road.

The County cites not a single case that suggests a municipality is free from liability for its own acts, or for failure to act, once it assumes a duty of *maintenance*. This failure to cite to case law supporting the County's position is probably because no such support exists. In fact, as discussed in Noonan's opening brief, the courts have consistently upheld a county's liability for a county's own actions or breach of a duty.

No one disputes that the County maintained the road for over three decades. The County attempts to downplay its role by admitting only to "minimal" maintenance. But Washington law says nothing about a county doing "so much" maintenance before liability kicks in.

The County furthermore admits to extensive work on the Noonan property while under ownership of Noonan's predecessor. The County attempts to dismiss this as irrelevant because the work happened on private property. But, notably, the County neither refutes nor provides any

contrary evidence that the County's work was anything except managing the drainage off of the Road. Thus, the Court or factfinder can reasonably construe this work as work on the Road's drainage system.

At a minimum, the extent of the County's maintenance is a question of fact precluding determination of these issues on summary judgment.

Ironically, the fact that the County provided less than the maintenance it should have is precisely the problem. By doing "some" maintenance, the County undertook the duty to maintain the road responsibly. By admitting to "some" maintenance but denying more extensive work, the County essentially admits its own wrong.

**2. Noonan's initial allegations included claims regarding maintenance.**

The County attempts to argue that Noonan never raised the issue of maintenance in its complaint, and thus cannot sustain claims based on the issue of maintenance. This is simply not true.

Noonan's complaint includes allegations regarding the County's maintenance of the Road's water drainage systems; diversion of stormwaters onto Noonan's property; and failure to adequately maintain the Road's drainage system. CP 4-5. These allegations go to the County's actual work on the Road – not original design and construction

On summary judgment, the County failed to meet its initial burden of proving a lack of any genuine issue of material fact regarding the extent

of the County's maintenance. The County's own materials contradict the extent of the County's work; and the County admits to extensive work on the Noonan property as part of handling the drainage problem off of the Road. Whether or not the extent of this maintenance gave rise to a duty is a question of fact, not law.

The County accordingly failed to meet its burden in establishing a complete absence of any question of fact on the issue of maintenance, particularly when the facts on the record are construed in the light most favorable to Noonan.

Even if the County had met its burden, Noonan then met his respective burden in demonstrating issues of material fact and therefore defeating summary judgment. Noonan submitted evidence in the record (*see., e.g.,* Palazzi Report), identifying aspects of the County's work on the Road, and tying that work to Noonan's damages. Noonan raises a genuine issue of material fact as to whether the County performed sufficient work on the Road to trigger a duty to do such work responsibly.

**B. County's Adoption of the Road – RCW 36.75.080.**

The County's accounting of the chronology is generally accurate, with a few notable exceptions. The County's entire house of cards rests upon a critical incorrect factual allegation.

In applying RCW 36.75.080, the County insists that it never adopted the Road into its roadway system. Noonan respectfully disagrees,

and provides evidence in the record to the contrary. Nothing in the record or law supports the County's assertion.

As a matter of law, the record supports a finding that the County did, in fact, adopt the Road into its roadway system by operation of the previous motions and resolutions of the Board of County Commissioners ("Board"). At a minimum, whether or not the County did or did not adopt the Road into its roadway system is a question of fact, which precludes granting the County's motion for summary judgment.

Noonan submitted a Board Agenda and Resolution affirming that the County acknowledged and accepted the Road as part of its road system. In the Agenda, the Board references the Road as a "County roadway." CP 75. In Resolution No. 10834, the Board again references the Road as a "County roadway," and the Road's drainage system as a "County storm drainage system." CP 77-78. On their face, the Agenda and Resolution reflect a formal acknowledgment and acceptance of the Road as part of the County road system.

Noonan respectfully submits that these documents constitute, as a matter of law, an adoption of the Road into the County's roadway system.

Also notable is the fact that the County submitted not a single declaration from a Board member, or any other officer of the County, attesting to the premise that the Board resolution was not intended, and did not operate, to adopt the Road into its general Roadway system. The

County dances around this issue by claiming a lack of any *other* documentation; but the County provides no authority that the Agenda and Resolution itself did not constitute an adoption. The only reasonable inference is that no such authority exists.

At a minimum, this case involves genuine questions of fact material to the issue of whether or not the County “adopted” the Road, as that term is used in the statute. Such issue of fact precludes a ruling on summary judgment.

**1. Application of RCW 36.75.080.**

Consideration of the overall statutory framework is a touchstone for interpretation of a particular statute. The only reasonable application of RCW 36.75.080 and its companion statutes is to protect a county from liability *only* where the county was not aware of, or had not yet undertaken any care of, a particular road. In other words, the County is protected from liability only until the point that the Road became part of the County system by prescription through an affirmative act by the County. This is a logical and reasonable reading of the statute.

Here, the County Board passed a resolution acknowledging and accepting French Loop Road as part of its county system. CP 77-78. This action precludes the limited scope of liability protection afforded by RCW 36.75.080. The County also maintained the road for decades. One way or

the other, the County knew of its responsibility for this road and accordingly had a duty to exercise that responsibility.

**C. Issue of maintenance: RCW 36.75.070.**

The County then tackles the application of RCW 36.75.070 to this case. The County attempts, initially, to assert that raising RCW 36.75.070 was untimely because Noonan first discussed this statute in his supplemental memorandum. However, the County ignores the fact that the *County* bore the burden to introduce and discuss all applicable law governing its motion. The County failed to do so, and therefore failed to establish, as a matter of law, that the statutory framework as a whole protected the County from liability for its own acts.

The County also attempts a creative, but incorrect, application of RCW 36.75.070. This statute provides:

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).

The County claims that Noonan overreaches by reading into the statute more than what is written – yet the County turns around and does just that.

The plain language of RCW 36.75.070 does not say the scope of the statute is limited to shortening the prescriptive time frame for adoption of a road. The County’s reasoning is the one that is strained, reading a limitation into the statute that is not there.

Noonan submits a reading of the statutes that, when read together, make a cohesive whole. As discussed in Noonan's brief, the courts interpret statutes within the overall statutory scheme. The courts do not read one provision in isolation. *Prince v. Savage*, 29 Wn. App. 201, 204, 627 P.2d 995, *rev. den'd* (1981); *see also ITT Rayonier, Inc. v. Dalman*, Wn.2d 801, 807, 863 P.2d 64 (1993).

In the statutory scheme at issue, the complete picture demonstrates a logical means by which a county assumes liability for a road only once it has actual knowledge of its responsibility for that road, whether through adoption (RCW 36.75.080) or active maintenance (RCW 36.75.070). This reading is not "strained" – it is the only reading that makes sense.

In contrast, nothing in the law – or common sense – supports the County's argument that a municipality can forever escape liability for its actions, even when it actively maintains a road and does so negligently, simply by never "formally" adopting that road. This would be an irrational and inequitable result, with no reasonable argument that the Legislature intended to create this significant loophole.

Both statutes provide for the absorption of publicly used roadways into the County's road system, but the County opted to address only one of these statutes in its original motion. The County never disputed 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 County continues to argue incorrectly and unreasonably that RCW 36.75.070 simply provides an alternate means by which a road becomes a county road, with a shorter time period. But as discussed in Noonan's opening brief, such a reading negates the legislative choice to provide a limited waiver of liability only where a roadway is acquired by prescription but not yet recognized by the County. The Legislature does not provide protection from liability where a roadway is maintained by the County and affirmatively recognized as part of the County's roadway system through action. The County's reading also eviscerates the general legislative premise that a municipality is liable for its own negligent acts. RCW 4.96.010.

Importantly, as addressed above and in Noonan's opening brief, the County offers no dispute that it performed maintenance on the Road. The County simply tries to downplay the significance of this admitted fact by asserting that it only provided "a little" maintenance.

But the statute does not distinguish between "a little" and "a lot" – the statute simply requires active maintenance. The record includes ample evidence that the County actively maintained the Road, even if (for argument's sake) only "a little."

At a minimum a genuine issue of fact exists as to the extent of the County's maintenance. And where a fact dispute exists, the County as moving party is not entitled to deference. When the facts in the record are

read in the light most favorable to Noonan, the non-moving party, the County regularly performed maintenance on the Road, therefore bringing this case squarely under RCW 36.75.070.

The County then attempts to argue that since it *failed* to do the work it was supposed to do, that this demonstrates it did not “maintain” the road. This circular argument leads to an illogical result. 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 a municipality assumes a duty to maintain a road, RCW 36.75.070 provides no immunity from liability for a breach of that duty. Once the County assumed a duty to maintain the Road, failure to maintain the Road gives rise to a claim for negligent maintenance.

**D. Unresolved Issues of Causation.**

The County repeatedly asserts that Noonan provided no evidence sufficient to establish that the County’s work on the Road caused damage to Noonan’s property. This line of argument fails due to two fundamental flaws: the County failed to place the issue of causation before the trial court in its motion for summary judgment; and even if it had, Noonan submitted sufficient evidence to raise a genuine issue of material fact.

**1. Count’s Argument Untimely**

First, the County never properly placed this issue before the trial court. Noonan objected to the County’s arguments regarding causation, as

the County failed to raise the issue of causation in its motion for summary judgment. This issue was never properly before the trial court.

CR 56 sets forth a strict mandate that the moving party must introduce *all* supporting evidence and affidavits in the party's moving papers. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168-9 (1991).

The County based its motion for summary judgment on the following arguments:

- 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 two year 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.

The County offered no argument that the water resulting from the County's maintenance work did not cause harm to Noonan's property.

The County's motion was focused entirely on the initial threshold question - the question of whether a duty exists. Noonan did not seek

summary judgment on or otherwise put proximate cause into issue, and simple references to causation issues do not raise the issue in the context of a summary judgment motion. *White*, 61 Wn. App. at 169.

**2. Genuine Issues of Material Fact Regarding Causation.**

Even if the County had properly raised the issue of causation, Noonan submitted substantial evidence in the record directly tying the County's work on the Road to damage to the Noonan property. The County's assertion that Noonan failed to submit such evidence is simply wrong. *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); CP 109 and 111 (county engineered berm either not done or done poorly, resulting in water flow onto Noonan property and damage as a result); CP 112 (failure to properly maintain culverts and collector boxes resulted in water overflow that damaged the Noonan property).

The County provided no argument or evidence undermining the Palazzi Report, or its credibility or admissibility. Accordingly, even if this issue were properly before the trial court, (1) the County failed to meet its initial burden in demonstrating an absence of factual dispute as to causation, and (2) Noonan submitted sufficient evidence to raise genuine

disputes as to material fact. These factual disputes preclude summary judgment.

**E. Remaining claims.**

The County continues to make broad allegations regarding Noonan's alleged concession as to tort claims and the property waste statute. These allegations are incorrect, and the records provide no evidence to support them. The County offers no substantive counter to Noonan's argument; the County simply makes broadly stated but ultimately unsupported allegations.

Furthermore, the County failed to meet its initial burden on any of these claims. The County therefore cannot claim a right to determination of a matter of law. The trial court glossed over these issues, and made no clear rulings that can be upheld in the County's favor. Even had the trial court made such rulings, multiple factual issues remain regarding intent, causation and the extent of the County's work on the Road's drainage system.

For example, with respect to the two-year statute of limitations, Noonan has not conceded that the statute of limitations bars his claims. Noonan filed his lawsuit within two years of damage. While perhaps some past events are precluded by statutory limitations, as discussed in Noonan's opening brief Noonan's property experienced multiple flooding events with multiple occasions causing damage. Noonan submitted

evidence in the record (the Palazzi report) regarding damages flowing from the more recent events, thus precluding a determination of any limitations issues on summary judgment.

As another example, the County argues that because it never stepped foot on Noonan's property, it cannot be liable for trespass. Nothing in Washington law supports such an assertion.

First, the County *did* step on the Noonan property when it made repairs to that property in managing the Road's drainage problems.

Second, "trespass" includes trespass by water. *Phillips v. King County*, 136 Wn.2d 946, 957 n. 4 (1998).

These are just a few examples of the many unresolved issues regarding Noonan's claims, which preclude a ruling on summary judgment. Noonan addresses these issues in his opening brief.

### **III. CONCLUSION**

The County fails to refute the numerous factual and legal issues Noonan raised in his opening brief. The County makes several allegations, but all are either (1) a question of disputed material fact; (2) incorrect application of statutory law; or (3) application of irrelevant case law.

As a matter of law, the County's adoption of the Road negates the limited liability protection under RCW 36.75.080; and the County's maintenance of the Road precludes protection under RCW 36.75.070.

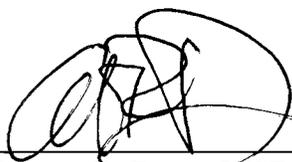
At a minimum, several material issues of fact preclude summary judgment, particularly when the Court construes the facts in the record in the light most favorable to Noonan.

Noonan respectfully requests the Court to find as follows:

(1) That as a matter of law neither RCW 36.75.070 nor -.080 protect the County from liability for its own acts or breach of duty in maintaining the Road and its supporting drainage system; and

(2) That because of genuine disputes of material facts, the summary judgment in the County's favor was in error, and remand for further hearings.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 2011.

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**Certificate of Service**

I certify that on the 5<sup>th</sup> day of August, 2011, I served the party listed below with a true and correct copy of the foregoing Appellant Noonan's Reply Memorandum in the above-entitled matter by ABC Legal Messenger:

Mark R. Johnsen  
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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 5<sup>th</sup> day of August, 2011.



DONNA WAITE  
Paralegal for attorneys  
Goldstein and Rowe

11 AUG 11 11:00 AM  
COURT OF APPEALS  
CLERK OF COURT  
JENNIFER P. BROWN