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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290158

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAYME R. CROW and WILLIAM D. BLAINE and MICHELLE A.
BLAINE,
individually and as husband and wife,

Appellants/Plaintiffs

v.

BENTON COUNTY,

Appellee/Defendant.

Appeal from Superior Court of Benton County
The Honorable Craig J. Matheson
Benton County Superior Court
Case No. 08-2-00666-0

APPELLANTS BLAINES' REPLY BRIEF

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I. INTRODUCTION

The Respondent Benton County's ("County") Brief rests almost entirely on the misrepresentation of its counsel to the trial court that the County did not have actual notice of icy conditions at the time of the Blaine/Crow accident and did not have reasonable time to remedy the icy condition that caused that accident. See Brief at pp. i, 27, 30. To prevail on this Appeal, the County bears the heavy burden of convincing this Court, on de novo review, that it should:

- (1) resolve these material and genuine factual issues against the non moving parties as a matter of law;
- (2) not consider in any way the facts of the Laureano accident of December 23 and whether this accident provided the County with actual notice and opportunity to remedy the icy conditions on Clodfelter Road; and,
- (3) find that the trial court did not err in not granting Blaine's motion for reconsideration because he lacked "due diligence" in not discovering the Laureano accident until after the trial court granted summary judgment.

The County's Brief essentially plays a game of "gotcha". The facts of the Laureano accident of December 23rd alone create genuine issues of material fact on the two critical questions of whether the County had actual notice of the ice on the bridge and adequate time to remedy that icy condition well prior to the Blaine/Crow accident. Because of this, the County has to make the Laureano accident go away by claiming that

William Blaine failed to exercise “due diligence” in discovering that accident.

But the inescapable facts are that four County witnesses who, as the Director of Public Works, and as the Superintendent of Roads of the County and other Road Maintenance employees, were clearly in a position to know about the Laureano accident, all denied under oath any knowledge of any prior accidents at that location. Furthermore, and most tellingly, Ken Miller, the County’s own attorney on this file, who presumably exercised “due diligence” in investigating the defense and facts of this case, also affirmatively represented to the Court that there was no such accidents and no notice of the ice on the bridge.

As a matter of substantial justice and fairness required in ruling on CR 59(a)(9) motions, see *Sullivan v. Watson*, 60 Wn.2d 759, 765 n. 2, 375 P.2d 501 (1962); *Oplinski v. Clement*, 73 Wn.2d 944, 951, 442 P.2d 260 (1968); *Clark v. Great Northern Ry. Co.*, 37 Wash. 537, 79 P. 1108 (1905), this Court should find that since four County Road Department employees and the County’s own attorney in this case did not know about the Laureano accident, there is no lack of “due diligence” by the Blaines to not know about it. The County claims that since the Blaines did not ask an Interrogatory question about any prior accidents, they failed to exercise due diligence. But there is no reason to believe that an Interrogatory

would have disclosed the Laureano accident when four County Road Department employees and the County's own attorney didn't know about it. "Substantial justice" requires that a party litigant not be denied their day in court when Plaintiffs were affirmatively misled by these witnesses and the County's own counsel in taking their word for it.

Nor is there any evidence that the Blaines were ever provided any "collision summary" or other documentation that the County claimed was sent to Mutual of Enumclaw. The evidence is unrebutted that this company insured the Crows, not the Blaines and that Bill Blaine had no actual knowledge of the accident on December 23, 2006.

The County makes its main argument for affirmance as though Mr. Blaine didn't introduced uncontroverted evidence showing that County employees had *actual* notice of the icy condition on the deck of the Clodfelter Bridge 15 hours before Ms. Crow's vehicle slid on the ice and collided with Mr. Blaine's parked pickup truck. Unable to rebut this evidence, the County disingenuously claims that the ice on the Clodfelter Bridge on the evening of December 23rd might not have been the same ice that caused multiple vehicles to spin out on that very same bridge deck on the morning of December 24th, ^{even} though it had not sanded the bridge in between the two events.

Finally, the County argues that this case is the same as *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (2008) and *LeRoy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004), and that under these cases it does not have a duty to predict or prevent the formation of ice on its roadways. This argument is a red herring that grossly misrepresents the Plaintiff's claim in this case. Plaintiff Blaine is not arguing such a duty, either to "anticipate ice formation" or even to "prevent" the formation of ice as was the case in *Laguna* and *LeRoy*. Plaintiff's claim has always been that the County had **actual** notice of the icy hazard on its bridge, but failed to remedy this **known** hazard in a reasonable time.

In fact, there was nothing for the County to predict or anticipate in this case. The Tri-Cities was hit by 1 to 1½ inches of snow and ice on December 23rd. In response to this snow fall, Benton County road crews were out sanding and plowing its roadways that day. The County simply dropped the ball as to the roadway surface of the Clodfelter Bridge – sanding the approach roads, but not the known iciest threat: the bridge deck. Since the County not only had notice of this condition, but actually undertook to remedy it, albeit negligently (by sanding the roadway but doing nothing to the much more dangerous bridge deck), it is folly for the County to argue that this case is actually about its failure to predict a hazardous condition.

Thus the County's reliance on the *Laguna* and *LeRoy* cases is completely misplaced. Neither *Laguna* nor *LeRoy* has anything to do with this case, either factually or legally. Lacking any application in this case, the County's argument concerning them is wholly without merit, and should simply be ignored by this Court.

In deciding a summary judgment motion, the trial court is required to view all evidence in a light most favorable to the nonmoving party. Based on the Plaintiff's evidence in this case, at a minimum genuine issues of fact exist as to whether or not the County had actual notice of the hazard on the deck of the Clodfelter Bridge, and as to whether or not the County had adequate time to respond to this known hazard. The existence of these factual issues clearly should have precluded the trial court from granting the County's summary judgment motion as a matter of law under CR 56(c) even without considering the Laureano accident. Because the trial court invaded the province of the jury in deciding these factual issues, and upon this basis erroneously and improperly granted Defendant County's motion, it committed reversible error, and this case should be remanded for the requisite jury trial.

II. LEGAL ARGUMENT

A. SUBSTANTIAL JUSTICE REQUIRES THAT A NEW TRIAL, BASED UPON THE TRUE FACTS, BE HELD.

As noted above, the standard in ruling on a CR 59(a)(9) motion for new trial/reconsideration is clear: the trial court has not only the power but the **duty** to grant a new trial to serve substantial justice. See *Sullivan v. Watson, supra*. Here substantial justice requires the judiciaries considered judgment be based upon the true facts and all of the evidence.

Our system of civil justice is founded on the fundamental principle that trials are a search for the truth and that courts, above all, must seek and find the truth in the process of adjudicating claims. The trial court heard the County's affirmative misrepresentation of at least three critical factual issues: (1) when did the ice form? The County stated it was on the late morning of the 24th when the trust was it formed on the evening of the 23rd; (2) was the County on notice of the ice? The County stated it had no notice of ice until the late morning of the 24th but it's officer investigated the Laureano accident and concluded it was caused by ice on the 23rd; and, (3) did the County have an opportunity to remedy the icy condition prior to the Blaine/Crow accident? The County stated it had not such opportunity when in fact it had more than 15 hours to remedy the icy condition.

It is absolutely clear that the trial court granted summary judgment based upon the County's skewed recitation of the facts. It stated: "I agree with the county's interpretation of the law in this case. I think actual notice is required of this condition. **And those are not the facts in this case, and I think that's controlling.** Frankly I think the county in order to be at the table has to have notice of the hazardous condition and an opportunity to fix it." CP 1066. (Emphasis added).

It is now established that the "facts" relied upon by the court are NOT the facts of this case. For substantial justice to be done, the actual facts, the truth must be controlling, not the County's misrepresentation of those facts.

1. The evidence is clear that the ice formed on December 23rd, not in the late morning of the 24th.

In his argument to the trial court, County attorney Ken Miller stated as follows: "When did the ice form?...**It wasn't on the 23rd.** It was sometime on the 24th." CP 1041. "**Nobody has said that there was any ice that formed on the 23rd.**" CP 1043. "[T]he facts clearly indicate that **we don't know until the late morning of 12-24** that there had been ice that had developed..." CP 1050.

Mr. Miller was wrong. Benton County Deputy Sheriff Lane Blanchard investigated an accident, described the conditions of Clodfelter Bridge on the evening of Dec. 23 and stated in a report what had happened to Edwin

J. Laureano's Landrover: "[the] vehicle started to slide sideways **due to the icy road**" CP 764.

Substantial justice cannot be accomplished when a party makes affirmative misrepresentations of facts and then claims the opposing party should have known it was wrong.

2. The evidence is clear that the County was on notice of the ice that formed on December 23rd.

Ken Miller also misrepresented to the Court that the County had no knowledge or notice of ice forming on the 23rd: "They [the County] needed to have actual notice of one of the employees who might be on the roadway. They needed something to give them direct knowledge." CP 1047... "So all they had to have is a call, just one phone call. Not an accident." CP 1065. But the truth is that the County did have that call and even an accident.

As noted above the County had actual notice of "one of [their] employees [Deputy Sheriff Lane Blanchard] who might be on the roadway." That observation of Blanchard gave the County the "direct knowledge" that Miller implied, falsely, it didn't have.

3. The evidence is clear that the County had ample opportunity, in fact 15 hours, to remedy the icy conditions on Clodfelter Bridge but failed to do so.

Ken Miller claimed the County had no opportunity to remedy the ice.. He stated: [T]here definitely was not time to take any action when the

first notice....occurred 10 to 20 minutes before the accident actually happens.” CP1050. Mr. Miller was off by about 14 and a one-half hours. No one has ever argued that the County could not have deployed de-icing procedures in the 15 hours that passed between when Sheriff Blanchard discovered the icy road at 8pm on Dec. 23rd and when the Blaines and Ms. Crow drove onto the bridge at 11:20 am the next morning. To do so would be folly.

Although the County attempts to argue that Appellants have mischaracterized what Mr. Miller represented to the trial court (Brief at p. 36), the clear gist, meaning and intent of Mr. Miller’s comments, relied upon by the trial court, are clear. For instance, the County cites the fact that Mr. Miller was merely quoting to the court what Plaintiffs’ expert Leggett had testified to: that the ice did not form on the 23rd. But those experts’ testimony was taken BEFORE the Laureano accident was known. The clear intent of Mr. Miller’s assertions was that the state of the record were as he represented it to be—that there was no ice on the 23rd. But clearly this wasn’t true. It was Ken Miller who asserted that “Nobody has said that there was any ice on the 23rd.” CP 1043. In trust, Mr. Laureano said there was and Deputy Blanchard said there was.

In short, the County’s misrepresentations to the trial judge did not concern one small detail about a collateral fact. They concerned the heart

of the facts in this case, that went to the key legal issues of notice and opportunity to remedy, facts which the Court described as “controlling.” By not rectifying the County’s misrepresentation of these material facts after the Laureano accident came to light, the Court erred. Substantial justice was not done. The County’s Brief gives short shrift to its own affirmative misrepresentation of the facts. Rather the Brief tries to shift the blame onto the Blaines for actually believing Mr. Miller’s statements and in not doubting the sworn testimony of four County Road Department employees some of whose testimony the County itself relied upon in supporting its Motion for Summary Judgment.

B. The Laureano Accident Constituted Newly Discovered Evidence Justifying Blaine’s Granting Appellants’ Motion for Reconsideration.

As was argued in the Appellants’ Opening Brief, (see pp.44-46) the five criteria for establishing that the Laureano accident was newly discovered evidence are met. The County’s Brief focuses principally on the alleged failure of the Blaines to exercise due diligence to obtain this information.

First, it claims that a scant record of an accident occurring on Dec. 23rd, 2006 was provided to Mutual of Enumclaw, the insurers of the Crows, not the Blaines, well prior to when litigation was initiated. Bill Blaine signed a sworn declaration that he had no knowledge of the

accident on December 23rd. So the County's claim of such imputed knowledge on Mr. Blaine's part is simply false.

More importantly, the Blaines and their counsel exercised due diligence in attempting to discover whether the responsible County Road Department Superintendents and Directors had any knowledge of prior accidents on that bridge. The depositions of four County employees included the Road Superintendent Patrick McGuire, Public Works Director Ross Dunfee, and two Road maintenance employees, Jerry Dean Cunningham and Jack Lee Pickard.

In its Brief the County makes the spurious argument that the "County has hundreds of employees..." Brief at p.43 and that the trial court's "reporters, clerk and bailiff" were County employees who also probably didn't know about the Clodfelter accident history. This argument ignores the fact that Appellants didn't depose the trial courts clerk to ask him or her about prior accidents. They took the depositions of the Superintendents, Directors and maintenance personnel who were in a position to know about such accident history. Furthermore, it seems incontestable that Ken Miller, another County employee who certainly should have exercised due diligence in his investigation of the facts of the case, also apparently did not know of the Laureano accident.

The County faults the Appellants for not submitting Interrogatories.

Brief at p.43. But there is no evidence whatsoever that an Interrogatory would have been answered by the County any differently than the testimony that the County Road employees gave or the knowledge that Ken Miller, who ostensibly would have played a role in answering the Interrogatories, had: i.e., no knowledge of prior accidents. The County also ignores the fact that the Blaines were entitled to rely upon the sworn testimony of key County employees, and indeed, Mr. Miller, in not pursuing additional discovery when it was clear they had reached a dead end. Due diligence is not clairvoyance. It does not presume that a party will believe an opposing party was lying under oath or in pleadings to the court. The diligence that is “due” is that which is dictated by all the facts and circumstances in a case, not by the exacting standard of 20/20 hindsight. Justice is not a game of gotcha. The truth must out. The trial court erred in not granting Appellants’ motion for reconsideration.

C. The County Cannot In Good Faith Claim that, as a Matter of Law, the Ice Present on the 23rd Evaporated by the Morning of the 24th Only to Reappear at 11am.

The County makes a half hearted attempt to claim that whatever ice was present on the 23rd must have been gone by the late morning of the 24th: “[W]hile the roadway may have been slippery (sic) sometime on the 23rd, it was not slippery during the morning of December 24 until minutes before the subject accident.” Brief at p.6. The County’s brief further

argues: “Those conditions formed minutes before the accident.” Brief at p. 38. But this argument resolves all inferences of fact (i.e. that the ice that caused Mr. Laureano to slide on Clodfelter Bridge the night of the 23rd wasn’t the same ice as caused the Crow and Blaine vehicles to slide on the 24th) against the non moving party and in favor of the County.

For this dubious proposition the County cites the fact that other drivers were able to navigate the Bridge prior to 11am on the 24th as if the absence of accidents is proof that the ice was not present. But the undisputed evidence is that Bill Blaine was able to navigate this bridge AFTER his wife’s vehicle hit the ice and slid off the side of the road and BEFORE the Crow vehicle did the same. By the County’s reasoning, the ice present when Mrs. Blaine was on the bridge must have dissipated when Bill Blaine drove on it, only to reappear when Jamie Crow came onto the bridge a minute later. This reasoning is nonsense. The County’s argument violates the fundamental principle of CR 56, that summary judgment is only appropriate of reasonable persons could reach but one conclusion from the evidence, considering the facts, and all reasonable inferences there from, in light most favorable to the nonmoving party. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-95, 823 P.2d 499 (1992). Under the authority cited in Appellant’s Opening Brief at p. 28 the inviolate right to a civil jury trial guaranteed by the Washington

State Constitution Article 1 Section 21 requires that the jury resolve this disputed factual issue, not a judge on summary adjudication.

D. Whether or not the Laureano collision put Defendant County on notice of the icy hazardous condition on the Clodfelter Bridge is an issue of fact for the jury that the trial judge erred in deciding.

Throughout its brief, Defendant County argues that it lacked notice of the icy hazard on the Clodfelter Bridge because conditions changed on the Clodfelter Bridge between 10 a.m. and 11 a.m. on the morning of December 24th. For example, the County states:

The ice present at the time of the Blaine/Crow accident was not the same condition that caused the Laureano accident. The ice present at the time of the Blaine/Crow accident didn't form until minutes before the accident itself.

Brief of Respondent at 3.

The County tries to bolster its argument by claiming that it did not have notice of the specific condition of melting ice on top of ice because motorists had driven across the Clodfelter Bridge prior to 11 a.m. without any reported problems or incidents. Brief of Respondent at 3.

The County's argument misses the mark. The hazardous condition on the Clodfelter Bridge was ice. The evidence shows that this condition existed for a 15-hour period leading up to the Crow collision. *See* CP 764. There had been no sanding during that 15-hour period; this was nothing

more than an icy condition becoming icier. The ice existed here from the 23rd through Ms. Crow's encounter with the ice on the 24th because the County failed to address the icy bridge after having been directly told that the bridge was icy. Degrees of iciness do not change the fact that this is an icy condition that can obviously get worse if the County fails to deal with it. Here, the uncontroverted evidence is that the icy condition of the bridge deck on December 24th was due to the failure of the Benton County Road Department to address snow and ice on the *bridge* on December 23rd, notwithstanding the County's *actual knowledge* of snow and freezing conditions on its *roads* and notwithstanding the County's actions in addressing such conditions on its roads leading up to the Clodfelter Bridge but not the bridge itself.

In order to maintain an action for the failure to remove ice and snow, the law requires a person injured due to an icy roadway condition to show that the governmental entity had notice of the dangerous condition, and had a reasonable opportunity to correct it before the incident occurred. *Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993); *Wright v. Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963). As set forth in the Washington Pattern Jury Instructions, a governmental entity is deemed to have notice of an unsafe condition if the condition has come to the actual attention of its employees or agents:

In order to find a county liable for an unsafe condition of a road that was not created by its employees, you must find that the county had notice of the condition and that it had a reasonable opportunity to correct the condition.

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

WPI 140.02.

In this case, Mr. Blaine established a *prima facie* case of Defendant County's negligence under the standards of *Bird* and *Wright*. The undisputed and uncontroverted evidence clearly shows that Defendant County had actual notice of the dangerous conditions existing on its roads and bridges prior to the subject collisions on December 24, 2006. The County's own records show that it earlier dispatched crews to sand its roads, including Clodfelter Road. This same evidence has also clearly established that Defendant County had the opportunity to correct the dangerous condition, again because its crews were in fact out sanding Clodfelter Road itself. In addition, as explained above, the uncontroverted evidence is that the Benton County Sheriff's Department *knew* about this condition on December 23rd, the County 911 Dispatcher *knew* about it on the 23rd, and the next morning Geri Bauer *again* notified the County that

the bridge was icy and told its agents that they needed to get a sanding truck out there immediately.

Interestingly, Defendant County did belatedly apply sand to the Clodfelter Bridge deck *after* Ms. Crow was seriously injured, making clear the fact that it could and should have been sanded earlier, when all of the other road surfaces were being sanded.

Contrary to the picture that Defendant County is trying to portray in its brief, the hazardous condition on the Clodfelter Bridge was the same on both the evening of December 23rd and the morning of December 24th – *ice*. Under the standard advocated by the County in its brief, a plaintiff would never be able to prove that a governmental entity had notice of snow and ice on its roadways and bridges. The governmental entity would always be able to claim, as the County does here, that the snowy or icy conditions at a given place and time are not the same as the snowy or icy conditions that it had actual notice of because of changes in temperature, the passage of time or the mere fact that some motorists were able to traverse snowy or icy conditions despite the hazard. All of these are jury questions.

Defendant County's negligence in this case does not lie in the failure to anticipate the formation of ice on the Clodfelter Bridge. Instead, its negligence rests in its failure to take any corrective action at all to

address the known ice on its bridges, including the Clodfelter Bridge, when it was out sanding its roads, including, in fact, Clodfelter Road.

Appellate courts review summary judgment dismissals *de novo*, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). In deciding a summary judgment motion, the court is required to view all evidence in a light most favorable to the nonmoving party -- in this case Plaintiff Jayme Crow. *See Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992). Viewing this evidence in a light most favorable to the Plaintiff as the court must, reasonable minds could obviously differ as to whether the icy conditions on the Clodfelter Bridge were the same during the evening of December 23rd as on the morning of December 24th when the Crow-Blaine collision occurred, particularly given the absence of any sanding or other corrective action. *See Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 790, 108 P.3d 1220 (2005) ((if reasonable minds may differ as to whether the roadway was reasonably safe for ordinary travel and whether appropriate corrective action has been taken, questions of material fact exist and summary judgment is inappropriate). Under these circumstances, the question of whether there was adequate notice to the County and an opportunity for it to correct the hazard is at best a jury question, and the trial judge clearly erred in

granting the County's motion for summary judgment.

E. This case is neither the *Laguna* case nor the *LeRoy* case.

Mr. Blaine contends that Defendant County breached its duty to provide reasonably safe roads and bridges for the traveling public when it sanded Clodfelter Road but failed to take any action on the Clodfelter Bridge. The County fails to address this issue either legally or factually. Instead, the County attempts to take this Court on a wild goose chase by falsely claiming that the Plaintiff's position in this case is that the County had a duty to predict the formation of ice.

Defendant County's motive for trying to reframe the Plaintiffs' issue in terms of predicting the formation of ice is transparent. The County wants to claim that it was taken by surprise with sudden snow and ice in the hope of invoking the shield of two anti-icing cases, *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (2008) and *LeRoy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004). But *Laguna* and *LeRoy* have nothing to do with this case and are factually and legally distinguishable.

In *Laguna*, a passenger in a vehicle was injured in a car accident that occurred in a dense fog on a road covered with ice. In order to recover for her injuries, the passenger sued the Washington state Department of Transportation (WSDOT), alleging that it was negligent because it failed to predict and prevent the formation of ice on the roadway through the use of

anti-icers. WSDOT moved for summary judgment, and the trial court denied the motion. It then appealed.

In reversing the trial court, the appellate court rejected the plaintiff's argument that the State had a duty to predict and prevent the formation of ice on the roadway.

Unlike *Laguna*, Plaintiff Crow is not alleging that the County should have predicted the formation of ice on the Clodfelter Bridge. Instead, Ms. Crow alleges that the County negligently failed to address the ice that had long before formed on the Clodfelter Bridge. The evidence is that ice began melting on top of its ice base. *Laguna* and the concept of anticipating fog are irrelevant.

Likewise, in *LeRoy*, the court rejected the plaintiff's argument that the State in that case had actual notice of the icy condition on the subject bridge due to weather forecasts and the WSDOT's knowledge that bridges are "among the first areas to develop ice." The court also rejected the plaintiff's claim that even if the State had lacked actual notice, it had a duty to "exercise ordinary care in the maintenance of its public roads to see to it that they are reasonably safe for ordinary travel," and that it had negligently failed to anticipate the formation of ice at the time and place of the accident. *LeRoy*, 124 Wn. App. at 67.

And unlike *LeRoy*, the evidence in this case shows that the County

did have actual notice of ice on the Clodfelter Bridge prior to the Crow-Blaine collision. Based on this evidence, a genuine issue of material fact exists for the jury as whether or not the County breached its duty to provide a reasonably safe bridge for the motoring public. *See Owen v. Burlington Northern and Santa Fe R.R. Co., supra*. This evidence should have precluded the entry of summary judgment as a matter of law under CR 56(c).

F. The “Dismissal” order was simply the mechanism for effectuating the Judge’s dismissal order.

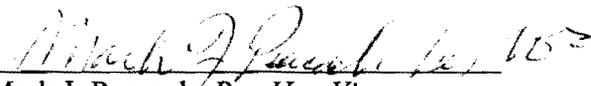
The County tacks on an argument that an agreed order of dismissal was entered and that this order was not designated as error on appeal. Brief at p.35. This argument is a red herring. This order was prepared by the County and was entered after the Court had ruled on the County’s summary judgment motion and denied the motion for reconsideration. CP 1151. It was simply the technical mechanism or form by which the final dismissal of all parties and causes of action this case was effectuated. It simply marked the date when the right to appeal began to run, nothing more. At no time have the Blaines ever abandoned or waived any of their legal arguments that the trial court did not err in granting the County summary judgment or in not granting reconsideration. Such a waiver could only be effectuated by clear and convincing evidence of such a

waiver, not by a ministerial act undertaken to facilitate the record and insure a final appealable judgment under CR 54(b).

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COURT OF APPEALS, DIVISION III
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BENTON COUNTY,

Appellee/Defendant.

Appeal from Superior Court of Benton County
The Honorable Craig J. Matheson
Benton County Superior Court
Case No. 08-2-00666-0

CERTIFICATE OF SERVICE

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I certify that I served a copy of Appellants Blaines' Reply Brief as

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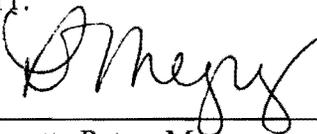
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