

FILED

NOV 05 2010

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,

Respondent

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

APPELLANTS BLAINE'S AMENDED OPENING BRIEF

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Attorney for Plaintiffs/Appellants Blaine

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I. INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff William Blaine (“Bill”) and Jaime Crow were both seriously injured in a collision that occurred at Clodfelter Bridge in Benton County on the morning of Christmas Eve of 2006. Bill was present on Clodfelter Bridge that morning to assist his wife, Michelle Blaine, who had slid on the ice that covered the Bridge and ended up off the side of roadway across the opposing lane of travel. Neither Bill or Michelle were aware that, at approximately 8pm on the evening of December 23, 2006, Mr. Edwin J. Laureano’s Landrover had slid on the same icy road, fishtailed while crossing the Clodfelter Bridge, slid the length of the bridge and broke through the guardrail on the canal overpass, coming to rest on the canal bank. Clerk’s Papers “(CP”) 759. The Blaines were unaware that this significant single car accident was investigated by Benton County Deputy Sheriff Lane Blanchard, who wrote a report stating that the Laureano “vehicle started to slide sideways due to the icy road” . CP 764 et seq. (*Police Traffic Collision Report* (emphasis added)). Deputy Blanchard then reported the ice-caused incident to the County Road Department through dispatch. CP 764 *Police Traffic Collision Report prepared by Deputy Blanchard*, attached as Exhibit 1 to the *Declaration of Jay Flynn*; and see *Laureano Declaration* (“It is my understanding Deputy Blanchard called the road department that evening to notify them of the

danger and of the broken guardrail.”). CP 759. This accident occurred approximately 15 hours before the collision that injured Plaintiffs Bill Blaine and Jaime Crow.

The Laureano accident and Blanchard’s report gave full notice to the County that a dangerous icy road condition existed on Clodfelter Bridge and provided them over 15 hours, an ample opportunity, to place de-icers on the bridge to protect other users of that roadway, including the Blaines and Jaime Crow. Despite this clear knowledge and notice Benton County initially tried to deny any knowledge of ice on the Clodfelter Bridge. Indeed, the attorney hired by Benton County to defend it in the Crow and Blaine lawsuits, Mr. Kenneth Miller, repeatedly represented to the Court below on summary judgment proceedings that the County had no knowledge of any icy condition on Clodfelter Bridge prior to the Crow/Blaine accident on the morning of December 24, 2006:

“When did the ice form? ... It wasn’t on the 23rd. It was sometime on the 24th. And in fact it didn’t become slick until sometime right around the accident.” See Report of Proceedings (“RP”), October 23, 2009 at page 12, lines 5-7.

“And again, where is the complaint? Where is the notice of ice? ... There’s no ice. Nobody has alleged ice. Nobody has said that there was any ice that formed on the 23rd.” Id. page 14, lines 19-21.

“They [the County] needed to have actual notice of one of their employees who might be on the roadway. They needed something to give them direct knowledge.” Id at p. 18, line 7 to 9.

“But we will tell you, and I think the facts clearly indicate that we don’t know until the late morning of 12-24 that there had been ice that had developed, and there is nothing that that been brought forward by the plaintiffs to indicate anything to the contrary. There’s no proof of that, and there definitely was not time to take any action when the first notice...occurred 10 to 20 minutes before the accident actually happens.” Id. at page 21 lines 2-10.

“So all they had to have is a call, just one phone call. Not an accident. Not anybody getting hurt, as he’s trying to outline to you. It just something. It’s just something...Now that would be negligence, because they dropped the ball, as he [Mr. Pickard] put it. But there is nothing.” Id. page 36, lines 11-12.

“They [Plaintiffs Crow and Blaine] had an obligation to show notice. It didn’t have to be an accident. It would have been enough if one of the parties that went up to the church that day on the 24th had called the county and said, “We’ve got ice on the bridge.” That would have been enough...They just needed to have notice and enough time to react to it.” Id. p. 35, lines 13 to 23.

“The county’s not obligated to have a crystal ball. It’s only obligated to react reasonably to known problems.” Id. at p. 21, lines 11-12.

Based in large part on these materials misrepresentations, the Court held: “I agree with the county's interpretation of 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.**” See RP October 23, 2009 at p. 37 lines 8 to 10.

The Court granted the County’s Motion for Summary Judgment and denied the Plaintiff Crow and Blaine’s Motion for Summary Judgment on October 23, 2009

Despite the fact that Detective Blanchard’s accident report was part of the County’s records, this report was never provided to the Blaines and was therefore completely unavailable to them to file and use in opposition to the County’s Motion for Summary Judgment and in support of their own motion. To the contrary, numerous County witnesses were deposed by Blaines’ counsel in this case and explicitly denied having any knowledge of any prior accidents on Clodfelter Bridge. These included Benton County Road Maintenance employee Jerry Dean Cunningham

11-13) CP 888; (Benton County Road Superintendent Patrick McGuire); CP 892; (Benton County Road Maintenance employee Jack Lee Pickard) CP 899; Benton County Public Works Director Ross Dunfee (Id. at Exh. 7, p. 41, lines 20-24).

Of course, it is conceded that everyone in the Benton County Road Department, top to bottom, testified that they know that bridges ice up first because of the cold ambient air surrounding them, above and below. See, e.g. CP 453 (McGuire Deposition “bridges tend to ice over earlier than road surfaces do”). Everyone in the Road Department knows that the bridges are the most dangerous for drivers when temperatures drop below freezing. See CP 457. Everyone knows that the bridges then become the primary concern for the safety of the public. See, e.g., CP 467-468.

Here, Benton County recognized the hazard of the icy roadway, and addressed the hazard with sand. But through bureaucratic oversight, confusion and miscommunication (to wit, through breaches of the standard of care to take steps to remediate known and existing icy conditions – not just trying to anticipate or predict unknown ones), its employees applied the necessary sand everywhere except the most dangerous locations – the bridges.

It is undisputed that Benton County’s standard procedure for winter roadway maintenance is to apply anti-icing chemicals to roadways

when icy conditions are foreseeable, and to apply de-icing chemicals and/or a sand/salt mixture to roadways after icy conditions exist. CP 235. However, they do not apply the salt/sand mixture to bridge/overpass surfaces due to concerns about the salt causing structural deterioration of the bridges/overpasses. CP199.

It is undisputed that Benton County road maintenance crews plowed and sanded area roadways on December 23 due to snowfall of about 1-1/2 inches, but they failed to apply any sand or anti-icing chemicals to the Clodfelter Road overpass. CP 473-474; 476; 485; 489-490.

It was not until after the Court had granted summary judgment for the County that the Blaines first became aware that in fact the County:

- (1) Knew about the Laureano accident,
- (2) Had actual notice of this accident and the icy conditions on the Clodfelter Bridge on the evening of December 23, 2006,
- (3) Knew that the Clodfelter Bridge was described as “icy” by Detective Blanchard in his accident report of Dec. 23, 2006,
- (4) Had ample opportunity to correct this dangerous condition by applying de-icing to the bridge roadway surface well prior to the Crow/Blaine accident; and

(5) Through its attorney, Mr. Miller, misrepresented to the Court, albeit unwittingly, the state of the County's actual knowledge of the icy conditions at Clodfelter Bridge that existed on the evening of December 23, 2006.

This newly discovered evidence and Mr. Miller's false statements were immediately brought to the attention of the Court through a motion for reconsideration, filed on November 2, 2009. CP 749-757. This Motion brought to the Court's attention the facts surrounding the Laureano's accident, Det. Blanchard's accident report, and Mr. Miller's misrepresentations to the Court. The record is clear: Every single piece of evidence that Mr. Miller represented to the Court at the hearing on summary judgment was **not** present in this case (i.e., that the County was on notice of icy conditions on December 23, 2006 with opportunity to correct this condition prior to 11:30am on December 24, 2006) is supplied by the Laureano and exhibits to the Peacock declarations. CP 759, 764. As the Report of Proceedings of October 23, 2009 (pages 12-39) cited about makes clear, every argument Mr. Miller made in opposition to summary judgment (that the Plaintiffs needed only to show a "single phone call, not an accident") and his rhetorical question: "[w]here's the ice. There is no ice on Dec. 23", etc) all proved to be completely inaccurate.

After a lengthy hearing with oral argument, the Court denied the Crow/Blaine motion for reconsideration. Plaintiffs Blaines filed a timely appeal from the Court's Orders granting Benton County summary judgment and denying the Crow/Blaines motion for reconsideration.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the following orders:

1. Order Granting Third-Party Defendant Benton County's Motion for Summary Judgment entered on October 23, 2009; and
2. Order Granting Third-Party Defendant Benton County's Motion to Strike Third-Party Plaintiff Jayme Crow's Motion for Reconsideration, as well as Joinders Thereto entered on January 21, 2010.
3. Order Denying Plaintiffs' Motion for Reconsideration by striking that Motion.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE ONE: Did the trial court err in granting Defendant Benton County's motion for summary judgment when the evidence clearly establishes that the County breached its duty to the traveling public to maintain the Clodfelter Bridge in a reasonably safe condition for ordinary travel?

ANSWER: Yes. This is a simple negligence case that involves the issue of whether or not Defendant County breached its duty of

ordinary care to the traveling public to safely maintain its roads and bridges. The uncontroverted evidence in this case is that Defendant County breached its duty on December 23 and 24, 2006. Although it responded to the snow and ice that had formed on its roadways on these dates by deploying sanding crews, Defendant County has been *forced to admit* that it failed to treat its bridge decks, such as the Clodfelter Bridge, for snow and ice. This uncontroverted evidence not only should have precluded summary judgment in favor of Defendant County.

ISSUE TWO: Did the trial court err in denying Plaintiff Blaine's motion for reconsideration when the evidence establishes that Defendant County had actual notice of the dangerous, icy condition of the Clodfelter Bridge and an opportunity to treat the Bridge with a de-icing agent?

ANSWER: Yes. The uncontroverted evidence establishes that Defendant Benton County had actual notice of the icy and hazardous condition of the bridge deck on the Clodfelter Road Overpass. First, on December 23, 2006 there was a single car spin-out collision at the Clodfelter Bridge at approximately 7:57 p.m. The Benton County sheriff's deputy Blanchard who responded to this collision called the road department that evening to notify them of the danger and of the broken guardrail. This was approximately 15 hours before the collision that severely injured Plaintiff Bill Blaine. Second, as explained in more detail

below, eyewitness Geri Bauer called 911 and told the 911 operator that the Clodfelter Road Overpass needed sanding. This was fifteen to twenty minutes before the Crow collision. This evidence created genuine issues of material fact that should have precluded summary judgment as a matter of law.

ISSUE THREE: Did the trial court err in denying Plaintiff Blaines's motion for reconsideration when a genuine issue of material fact exists as to whether or not Defendant Benton County had a reasonable opportunity to correct the dangerous condition that existed on the Clodfelter Bridge prior to the Blaine-Crow collision?

ANSWER: Yes. As set forth above, Defendant Benton County had actual notice of the dangerous and unsafe icy conditions on the bridge deck of the Clodfelter Road Overpass approximately fifteen hours prior to the Blaine/Crow collision. A genuine issue of material fact exists as to whether or not this actual notice of ice on the bridge gave Benton County a reasonable opportunity to respond to this dangerous condition. Based on the existence of this factual issue, the trial court erred in denying Plaintiff Crow's and the Blaines' motion for reconsideration.

IV. FACTUAL STATEMENT OF THE CASE

A. Multiple vehicles, including the vehicle driven by Jayme Crow and Michelle Blaine, slid off the Clodfelter Road overpass due to the icy conditions on the overpass on the morning of Sunday, December 24, 2006.

Plaintiff Bill Blaine was catastrophically injured in a collision that occurred on the morning of Christmas Eve of 2006. Plaintiff Crow was returning from a church service. Her route took her across the Clodfelter Road overpass above I-82 in Benton County. CP 767-768. The weather had been cold and icy, but the late morning sun had warmed the ice on the Clodfelter Road overpass somewhat.

At 11:03 a.m., Michael Bauer, who had experienced no problems driving along the sanded Clodfelter Road, suddenly encountered the invisible hazard of ice when he began crossing the Clodfelter Road overpass. CP 766. His vehicle, which was equipped with snow tires, spun out and crashed onto the shoulder. CP 766. See *Declaration of Geri Bauer*.

Michael Bauer was not the only motorist to slide off of the Clodfelter Road overpass that morning. Just ten minutes later, at 11:13 a.m., Michelle Blaine slid off the road in the same general location. CP 766-767. According to Michael Bauer's mother, Geri, Ms. Blaine's

vehicle started fishtailing when it reached the Clodfelter Road overpass and then spun out of control:

On the morning of December 24, 2006, I called my son Michael on his cell phone to find out information regarding our morning plans. I understood from our call that he had just been involved in an accident on Clodfelter Road in his All-Wheel-Drive Subaru with snow tires.

I immediately drove to the accident site to help him ... When I arrived at the scene, I saw that Michael's Subaru was well off the road at the north end of the Clodfelter Bridge. I parked my car in a turnoff area on the side of the road. I then got out of my car and walked across the road over to the Subaru...

....

After I got to Michael, I called 911 and told the person on the line that they needed to get a sand truck out on the Clodfelter Road Bridge. Within five to ten minutes I saw a red minivan traveling north on Clodfelter headed towards the bridge. The van was traveling at a reasonable rate of speed until it reached the bridge. When it got to the bridge, I watched as it violently fishtailed forward and seemed to be moving uncontrollably. As the minivan came to the north end of the bridge it careened off to the side of the road and into a ditch.

I spoke to the lady in the minivan. I remember telling her that I would tell her insurance company that she was not speeding. Ten minutes later, a truck came crawling down Clodfelter towards the bridge. It moved very slowly as it went across the bridge. It was my understanding that it was the husband of the woman driving the minivan. She had called him to come help her. After crossing the bridge, he drove across the road and parked.

CP 766-767 Declaration of Geri Bauer.

Ms. Blaine's husband, Plaintiff Bill Blaine, cautiously approached the Clodfleter Road overpass in his pickup truck and parked on the shoulder of the roadway next to the southbound lane to see if he could pull his wife's Windstar van out of the ditch. CP 510-511; 767

As she returned from church, Jayme Crow experienced nothing unusual on Clodfelter Road – until she too encountered the latent hazard on the bridge. CP 767 As with the others before her, Jayme's tires lost traction on the wet ice, and her car also spun out. CP 767; 807 According to eyewitness Geri Bauer, the Crow vehicle, like the vehicle driven by Michelle Blaine, spun out of control once it encountered the icy conditions on the Clodfelter Road Overpass:

Within a short time, I saw a Lexus approaching the bridge driving northbound. I was sitting in my car on the phone with my insurance company, when I saw the Lexus reach the bridge and, like the minivan before it, the Lexus moved at a normal rate of speed and then suddenly lurched forward at a higher rate of speed, fishtailing violently, and spinning out of control on the ice. I watched as the Lexus careened uncontrollably towards the group of vehicles that were now on the north end of the bridge. I was sitting in my car looking directly towards the Lexus as it came towards the parked truck. I saw the driver's side of the Lexus slam into the backend of the truck at the north end of the bridge.

CP 767 Declaration of Geri Bauer.

The crash with the Blaine pickup truck was violent. CP 426 The driver's side door of Jayme's Lexus contacted the left rear bumper of the

Blaine pickup. CP 805 The pickup's two-ton steel hulk crashed her seating area knocking Jayme unconscious and so badly injuring her that she appeared to be near death to witnesses and rescuers on the scene. CP 426-427; 805; 816 Plaintiff Bill Blaine suffered a severe rupture in his spinal column, severing the spinal cord and leaving him a paraplegic for many months. He was also medivaced to Harborview Medical Center where he underwent emergency surgery to save his life and repair his severed spinal column and other internal injuries. His surgery, medical and physical rehabilitation bills related to these injuries totaled over \$600,000.

B. Benton County officials acknowledge that the bridge deck was icy on the morning of December 24th.

Benton County Sheriffs Deputies Thompson and Runge arrived at the accident scene at approximately 11:30 a.m. The officers immediately noticed the icy conditions on the Clodfelter Bridge.¹ CP 426 Deputy

¹ Deputy Thompson and Deputy Runge both testified that the bridge deck was icy and extremely slippery:

"[T]he bridge was ... exceptionally icy."

CP 513. *Thompson Deposition.*

That overpass was pretty -- from what I recall, was pretty good and slick."

CP 517 *Runge Deposition.*

The testimony of the two deputies is supported by eyewitness Geri Bauer:

I never walked onto the Clodfelter Bridge, but it was obviously icy. I did not drive on the road to the south of the bridge, but from my

Thompson called the County Road Department for a truck to sand the bridge deck and then placed flares across the bridge. CP 804 *Deputy Sheriff Thompson report*.

In response to Deputy Thompson's request for a sand truck, Defendant County then deployed Jack Pickard to sand the Clodfelter Bridge. CP 784 Pickard Deposition. Upon arriving at the bridge, Mr. Pickard observed that the bridge's deck was icy, and that there was no evidence of any sand on it:

Q. Okay. And when you arrived on the scene, do you recall what the overpass – in terms of the road conditions – looked like?

A. It was icy.

....

Q. ...On the 24th when you went out to the accident site on the bridge, you didn't see any sand on that bridge, did you?

A. I wasn't really looking for anything. If there was some, I didn't see it.

CP 480; 487 *Pickard Deposition*.

vantage point, the minivan, truck, and Lexus did not have any problem on Clodfelter until they reached the bridge. I do not remember any cars, other than the Lexus, minivan and truck, driving over the bridge while I was at the scene.

CP 768. Declaration of Geri Bauer.

Once Mr. Pickard sanded the Clodfelter Bridge deck following the collisions, Deputy Thompson report the bridge was no longer slippery:

Q. Did you go out and walk the bridge after the sand trucks left, to check and see if it felt better as far as traction?

A. We walked it, taking the photographs, yes, and, yeah, it was different, as far as –

Q. Did it make a difference with the sand, salt down there?

A. Oh, yeah.

Q. When you say "oh, yeah," do you mean we could now walk on it without worry?

A. Yeah. From the first time I walked on it and then after the sand trucks had been through, there was a noticeable difference. It was, you know, easier to walk.

CP 514-515 *Thompson Deposition.*

At approximately 1:00 p.m., following the application of salt and sand to the Clodfelter Bridge, Benton County Engineer Ross Dunfee arrived at the scene to document the conditions. He noted that the bridge was not icy:

Q. Did you walk out onto the bridge? Did you remember to test out how slippery it was out there?

A. Yes.

Q. Did you find it to be slippery?

A. No.

Q. Is that -- You walked on it after the sand-and-salt truck had gone by?

A. Correct.

....

Q. ... Was it icy on the bridge when you walked across it?

A. No.

CP 523 Deposition of County Engineer Ross Dunfee.

C. A vehicle driven by Erwin Laureano slid off the Clodfelter Road Overpass the evening before the Crow/Blaine collision thus giving the County notice of a dangerous condition and an opportunity to correct it.

The December 24th collisions on the Clodfelter Road overpass were not the only such collisions to occur within this 24-hour period on this icy bridge deck. On December 23, 2006, there was a single car spin-out collision at the Clodfelter Bridge at approximately 7:57 p.m. CP 759 The driver of the vehicle involved, Erwin Laureano, states that he had no trouble driving on Clodfelter Road until he reached the Clodfelter Bridge:

I had no difficulty driving on Clodfelter Road until I reached the Clodfelter Bridge that passes over Interstate [82].

At the point my Landrover made contact with the Clodfelter Bridge, I lost control on the ice and fish tailed, sliding the length of the bridge. My Landrover continued

out of control until I broke through the guardrail on the canal overpass approximately 60 yards from the edge of the Clodfelter Bridge and finally can to rest on the canal bank.

After I was off the roadway and waiting for a tow truck, I noticed that the Clodfelter Bridge was a sheet of ice. I called 911 and Deputy Lane Blanchard of the Benton County Sheriff's Office responded. It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail.

CP 759 Declaration of Erwin Laureano

Like Mr. Laureano, Deputy Blanchard attributed this collision to "the icy road." CP 764 Deputy Blanchard then reported the ice-caused incident to the County Road Department through dispatch. CP 764; 759 *See Police Traffic Collision Report prepared by Deputy Blanchard, attached as Exhibit 1 to the Declaration of Jay Flynn; Laureano Declaration* ("It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail."). This was approximately 15 hours before the collision that injured Plaintiffs Jayme Crow and Bill Blaine.

According to Mr. Laureano, as well as the other drivers who drove on Clodfelter Road the next day, the roadway surface was fine, but the bridge deck turned out to be dangerously slippery.² CP 759 The reason

² Both Deputy Thompson and Deputy Runge -- the sheriff deputies who responded to the Crow/Blaine crash -- testified that the bridge deck of the Clodfelter Road overpass was "icier" than Clodfelter Road:

why the Clodfelter Overpass was dangerous on December 24, 2006 is simple – Benton County road crews sanded the roads, including Clodfelter Road, but left the bridge decks unprotected. CP 480; 487 Benton County employee Jack Pickard, operating a sanding truck on the 23rd had been told earlier that truck drivers were not to apply a salt-sand mixture on any bridges because the salt corrodes the metal structure of the bridge. CP 485; 489-490 So while he sanded Clodfelter Road, on December 23rd to address the frozen road surface, Mr. Pickard bypassed the Clodfelter Bridge deck, leaving it completely untreated and dangerously icy. CP 485

D. Defendant Benton County failed to sand or take any other corrective measures to address the icy conditions and hazards that existed on the Clodfelter Bridge on the evening of December 23th and the morning of December 24th.

The obvious answer to the snow and icy conditions on December 23, 2006 was to sand the roads and apply sand or de-icer to the bridge decks. That is exactly what the County's current road superintendent,

A. I guess what you're asking me: Is the bridge icier than the roadway?

Q. Yeah.

A. Yeah.

CP 513 *Deposition of Deputy Sheriff John Thompson.*

"[F]rom the best of my memory, yeah, it was just the bridge that was icy."

CP 517 *Deposition of Deputy Sheriff Scott Runge.*

See also CP 538, *Declaration of Geri Bauer.*

Donald Rawlings, says should have been done under the conditions that existed at the time. CP 235 Rawlings Deposition. But this did not happen. Instead, Benton County deployed sanding trucks, but completely ignored the bridge decks, including the Clodfelter Overpass. CP 485; 489-490 The result was a dangerous road and a breach of the County's explicit duty to provide a reasonably safe road, including during winter conditions.³

On Thursday, December 21, 2006, Benton County Road Department Supervisor Patrick McGuire deployed the County's two 200-gallon anti-icer trucks to spray County roads to protect against ice formation.⁴ CP 473-474 One of the drivers of these trucks was Jack Pickard. CP 474-476 Mr. Pickard testified that he applied anti-icer to Clodfelter Road, including the Clodfelter Overpass, on December 21, 2006. CP 473-474; 476 *Pickard Deposition*.

Two days later, on Saturday, December 23, 2006, from 4:00 a.m. to 7:00 a.m., 1 to 1½ inches of snow fell in the Kennewick area. CP 492-

³ See WPI 140.01; *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005).

⁴ Liquid magnesium chloride, the anti-icer used by the County, works to prevent moisture from bonding with roadway surfaces during freezing conditions. *McGuire Dep. at 13 (Exhibit A)*; *Cunningham Dep. at 6-7, 11 (Exhibit B)*; *Rawlings Dep. at 11-12 (Exhibit C)*; *Carriker Dep. at 13 (Exhibit D)*; *Leggett Dep. at 42 (Exhibit E)*; *Keep Dep. at 67 (Exhibit F)*. If there is no additional snow or rain, it can remain effective in preventing the formation of ice for up to 7 days. *Keep Deposition at 37 (Ex. F)*

493 *Deposition of Clifford S. Mass, Ph.D. See Section III, infra.* Road Department Supervisor McGuire once again directed Mr. Pickard and three other employees to plow and sand the County roads. CP 454; 455 *Deposition of Patrick McGuire.* Mr. Pickard plowed snow and sanded the County roads in Zone 7, which includes Clodfelter Road. CP 481-484 *Pickard Deposition.* But Mr. Pickard did not sand the Clodfelter Bridge because his truck carried a salt-sand mixture, and he had been instructed that the salt-sand mixture was never to be applied to bridges:

Q. All right. Do you have any recollection as to whether or not the sand that you were putting down had calcium chloride or magnesium chloride mixed in it or salt of some kind mixed with it?

A. Salt, yes.

Q. But you are not supposed to be putting salt on a bridge, are you?

A. No.

Q. Okay. So if you were following strict rules, you would not have applied this sand mixture to the Clodfelter bridge; correct?

A. Correct.

....

Q. Okay. And I understand that mixture had some salt in it as well?

A. Correct.

....

Q. If you did have a mixture in it, it shouldn't be used on the bridge?

A. According to the guidelines, yes.
....

Q. What is the purpose for no salt on bridge decks?

A. The corrosion in the deck units...
....

Q. Okay. If you have observed ice on a bridge top, would you still apply a salt sand if you had it?

A. No.

CP 485; 486; 488; 489-490 *Pickard Deposition.*

In fact, Benton County's written policy prohibits the use of the salt-sand mixture on its bridges, including the Clodfelter Bridge:

BRIDGES
Liquid Anti De-Icer

Primary Concrete Structures on Arterial Roads, which require a non-corrosive Anti De-Icer, rather than using, salted sanding material.

Twin Bridges—On Twin Bridges Road, West Richland

Bermuda Road Overpass—@ I-82, south of Reata

Clodfelter Road Overpass—@ I-82, and K.I.D. Canal

Christensen Overpass—@ I-82, West of Union Loop Road. (If needed: Low Traffic Area.)

Beck Road Overpass—@ I-82, West of Bofer Canyon Road. (If Needed: Low Traffic Area.)

Tripple Vista Road.

Clodfelter Road—@ Miller Hill.

Clodfelter Road—Between Richmond Road and H. Smith Road.

Oak Street—Between Bowles Road and 47th Avenue

Nine Canyon Road—From Lower Blair Road, South.

CP 199 *Benton County Policy Manual attached as Exhibit I to the Flynn Declaration* (emphasis added).

The snow that accumulated on the Clodfelter Bridge on December 23, 2006, melted upon contact with the anti-icer that was applied on December 21st, diluting the anti-icer and rendering it ineffective in preventing ice from forming:

Q. ...if the anti-icer was applied on the 21st, and then under your scenario there's an inch to inch and a half of snow that fell on the 23rd, how much snow would be needed to dilute the anti-icer to a point of it's no longer effective?

A. ...less than half an inch of snow. So for sure if there's an inch or inch and a half, there's no more chemical left at that point....

....

...it's at least double, if not probably four times, maybe even five or six times the amount needed to dilute the chemical to render it ineffective.

CP 465-466 *Leggett Deposition*.

Everyone in the Benton County Road Department, top to bottom, has testified that they know that bridges ice up first because of the cold ambient air surrounding them, above and below. *See, e.g.* CP 453

(McGuire Dep. – “bridges tend to ice over earlier than road surfaces do”). Everyone in the Road Department knows that the bridges are the most dangerous for drivers when temperatures drop below freezing. CP 457. Everyone knows that the bridges then become the primary concern for the safety of the public. *See, e.g.*, CP 467-468.

Here, Benton County recognized the hazard of the icy roadway, and addressed the hazard with sand. But through bureaucratic oversight, confusion and miscommunication, its employees applied the necessary sand everywhere except the most dangerous locations – the bridges.

Benton County’s standard procedure for winter roadway maintenance is to apply anti-icing chemicals to roadways when icy conditions are foreseeable, and to apply de-icing chemicals and/or a sand/salt mixture to roadways after icy conditions exist. However, they do not apply the salt/sand mixture to bridge/overpass surfaces due to concerns about the salt causing structural deterioration of the bridges/overpasses.

Benton County road maintenance crews plowed and sanded area roadways on December 23 due to snowfall of about 1-1/2 inches, but they failed to apply any sand or anti-icing chemicals to the Clodfelter Road overpass. CP 485; 489-490 When temperatures dropped, as forecast, on the morning of December 24, Clodfelter Road became dangerously icy,

causing vehicles to lose control on the overpass and resulting in the collision at issue in this case.

The fact that the County applied sand to the road surfaces on either side of the Clodfelter Overpass is an admission that a dangerous condition existed on the roads and bridges, and that the roads and bridges needed to be treated to maintain them in a reasonably safe condition for the traveling public:

Benton County Road Department Superintendent McGuire made a fundamental error in deploying only sanding trucks, leaving the bridge decks unprotected from ice formation – an obviously foreseeable condition. This fell well below the standard of care in winter roadway maintenance, and clearly was the cause of the multiple collisions that occurred on the Clodfelter Overpass on the morning of December 24, 2006.

CP 321 (Declaration of Dale Keep).⁵

E. Proceedings in the trial court.

Plaintiff Blaine filed his personal injury accident against Jaime Crow and Benton County. The County subsequently moved for summary judgment. On October 23, 2009, the trial court entered an order granting the County's motion.

⁵ Mr. Keep worked for the Washington State Department of Transportation for 26 years where he oversaw the winter maintenance procedures for the effective control of snow and ice on our state highways. CP 319. Mr. Keep is now a winter roadway maintenance consultant with a specialty in the deployment of sand trucks and snow plows, as well as anti-icing/de-icing trucks. CP 318.

During the hearing on Defendant County's motion for summary judgment, counsel for the County Mr. Ken Miller misrepresented several times to the trial court that there was no evidence of ice on the Clodfelter Bridge on December 23rd and that the County did not have notice of ice on the Clodfelter Bridge prior to the morning of December 24th:

Where is the notice of ice? ...

...

[t]his is all on the 24th, not the 23rd ... the only time that anybody talks about a call going into the county is after the Bower [sic] accident ...

RP October 23, 2009 *Hearing Transcript*.

[I]t says Benton County breached its duty by sanding roads on the 23rd for snow and ice. There is no ice. Nobody has alleged ice. Nobody has said that there was any ice that formed on the 23rd. But what they wanted us to do was treat for icy conditions.

Id. Hearing Transcript.

[W]e don't know until the late morning of 12-24 that there had been ice that had developed, and there is nothing that has been brought forward by the plaintiffs to indicate anything to the contrary.

Id. Hearing Transcript.

The trial court's decision to grant Defendant County's motion for summary judgment was based on the County's misrepresentations that it did not have notice of the icy conditions on Clodfelter Bridge or an opportunity to correct them:

I agree with the county's interpretation of 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.

And I don't really think I need to say much more than that. 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. That's the law.

Id. Hearing Transcript.

Subsequent to the summary judgment hearing, Plaintiffs' counsel learned that approximately 15 hours before the subject collision in this case, Erwin Laureano was involved in a single car spin-out collision at the Clodfelter Bridge at 7:57 p.m. on December 23rd. Counsel also learned that Deputy Lane Blanchard, the deputy sheriff who responded to the Laureano collision, called the County road department that evening to notify them of the danger and of the broken guardrail.

Based on this newly discovered evidence, Plaintiffs Crow and Blaine both filed a motion for reconsideration of the trial court's October 29, 2009 Order granting Benton County's motion for summary judgment. CP 749-757. After a hearing on Plaintiff's motion, the trial court entered an Order on January 21, 2010 denying Plaintiff's motion for reconsideration. CP 1148-1150

Plaintiff Crow then filed a timely Notice of Appeal to appeal the Order entered on October 29th as well as the Order entered on January 21st.
CP 1166-1183

IV. ARGUMENT

A. Standard of review on appeal.

Article 1, § 21 of our State Constitution mandates that “[t]he right of trial by jury shall remain inviolate.” Under Article 1, § 21, “[i]t is the function of the jury – not the court – to settle disputed issues of fact.” *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Likewise, RCW 4.44.090 provides that “[a]ll questions of fact ... *shall* be decided by a jury, and all evidence thereon addressed to them” (emphasis added).

A party’s right to submit issues of fact to a jury is the “essence” of the right to a jury trial:

Subsequent cases [to *Mullen, supra*] underscore the jury’s fact finding province as the *essence* of the right’s scope. *See, e.g., State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *In re Ellern*, [23 Wn.2d 219, 160 P.2d 639 (1945).

Sofie v. Fibreboard, 112 Wn.2d 636, 645, 771 P.2d 711 (1989) (emphasis added).

On a motion for summary judgment, a court does not try issues of fact; it only determines whether or not factual issues are present. *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-303, 616 P.2d 1223

(1980). Summary judgment is not to be used as a substitute for a trial or to try an issue of fact. *City of Seattle v. Dept. of Labor and Industries*, 136 Wn.2d 693, 696-697, 965 P.2d 619 (1998); *Thomas v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence, considering the facts in the light most favorable to the nonmoving party. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992).

Washington appellate courts review *de novo* a superior court's summary judgment dismissal of a plaintiff's negligence claim, considering the facts and any reasonable inferences drawn from them in the light most favorable to the plaintiff, as the non-moving party. *Shellenbarger v. Brigman*, 101 Wn. App. 339, 345, 3 P.3d 211 (2000). In reviewing a grant of summary judgment, appellate courts engage in the same inquiry as the trial court. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Summary judgment is proper only when the trial court finds that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott Galvanizing*, 120 Wn.2d at 580.

In this case, genuine issues of material fact exist as to whether or not Defendant Benton County breached its duty to keep its roads and

bridges reasonably safe for ordinary travel. The existence of these factual issues should have precluded summary judgment for the County as a matter of law under CR 56(c).

B. Benton County has a duty to keep its roads and bridges reasonably safe for ordinary travel.

Defendant County's duty in this case arises under well-established Washington law. The Supreme Court has repeatedly emphasized in recent years that governmental entities owe a duty to all travelers to provide reasonably safe roadways. *Owen v. Burlington Northern & Santa Fe Railroad Co.*, 153 Wn.2d 780, 786-787, 108 P.3d 1220 (2005); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

In *Keller, supra*, the Supreme Court set forth the general duty owed by governmental entities to all persons on public roadways as follows:

We ... hold that a municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.

Keller, 146 Wn.2d at 249.

More recently, the Supreme Court has set forth this requirement in terms of an overarching duty to ***provide*** reasonably safe roadways:

Tukwila acknowledges that it has a duty to provide reasonably safe roads and this duty includes the duty to

safeguard against an inherently dangerous or misleading condition. A city's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *See Keller*, 146 Wn.2d at 249. The inherently dangerous formulation recognizes that "[a]s the danger becomes greater, the actor is required to exercise caution commensurate with it." *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957). Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings. *Id.* at 246, 251-52. *See also Bartlett v. N. Pac. Ry. Co.*, 74 Wn.2d 881, 882-83, 447 P.2d 735 (1968).

Owen, 153 Wn.2d at 787-788.

As held by the Supreme Court in *Owen*, a governmental entity's duty to provide reasonably safe roadways is an "overarching" duty that encompasses other duties. These other duties include designing reasonably safe roads, properly constructing roadways so that they are reasonably safe, and maintaining roadway surfaces in a proper condition so that they are reasonably safe for ordinary travel. More importantly and germane to this case, this overarching duty also includes a duty to eliminate hazards such as snow and ice on public roadways and bridges. *See Wright v. Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993).

Here, Plaintiffs Bill and Michelle Blaine established a *prima facie* case of Defendant County's negligence. Among other thing, the

uncontradicted evidence in this case establishes that bridge decks ice up first:

Q. Would you help at all with setting any policy or standard in your position for when and where they would use either liquid or salt or sand?

A. Yeah. Principally it was salt and sand, although on the bridges or the spots that would have a tendency to ice up, we would try to get the anti-icer down.

Q. That's the liquid agent, the anti-icer, right?

A. That's correct. It's also called deicer.

Q. Why the difference on bridges?

A. There's a tendency for freezing sooner than in the roadways.

CP 522 Deposition of County Engineer Dunfee.

Q. Mr. Pickard, has it been your experience, given your familiarity with the road department and winter maintenance for 33 years here, that the bridges tend to ice up before other areas of the road?

A. Yes.

Q. Is it because of the ambient air underneath and above the bridge?

A. Yes.

CP 477-478 Pickard Deposition.

The uncontradicted evidence also establishes that the Clodfelter Bridge has had a history of being icy:

Q Okay. And what complaints have you received or heard about regarding the Clodfelter overpass?

A. It being slick in the area.

CP 479 Pickard Deposition.

Q. In your experience as a deputy, this particular overpass on Clodfelter, is there a good history of accidents on this overpass in the wintertime?

A. My personal experience, and I can honestly say since, you know, I've been a deputy for three years this April, I've only been -- I've only taken one accident report on that overpass. As far as what the collective is, I couldn't give you that number. But it's always warned -- it's preached: Hey, be careful going over that overpass in the winter. Everybody you talk to: Be careful of that overpass. I don't know, I'm not sure if you tell that people that sort of stuff without having some sort of history with it.

CP 520 Runge Deposition.

The uncontradicted evidence further establishes that, while the road crew sanded Clodfelter Road on December 23, 2006, this crew neither sanded nor applied magnesium chloride to the Clodfelter Bridge. *See pages 20-26, supra.* It is also uncontradicted that due to the road crew's failure to sand or apply magnesium chloride to the Clodfelter Road Overpass, the Clodfelter Bridge deck was icy and extremely slippery on December 24, 2006:

"That overpass was pretty -- from what I recall, was pretty good and slick."

CP 518-519 *Runge Deposition.*

- Q. Were the icy road conditions that you were talking about specifically related to the bridge itself?
- A. The entire roadway was icy, but the bridge was, you know, exceptionally icy.

CP 512 *Thompson Deposition.*

Likewise, it is uncontradicted 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. In fact, 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.

There is no question that Defendant County owed a legal duty to keep its highways, including the Clodfelter Bridge, in a reasonably safe condition for ordinary travel. *See, e.g., Owen v. Burlington Northern & Santa Fe Railroad Co., supra; Keller v. City of Spokane*, 146 Wn.2d 237; WPI 140.01. There is also no question that the 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 its bridges,

including the Clodfelter Bridge. Because the evidence clearly shows that the County breached its duty to keep the Clodfelter Road Overpass safe for ordinary travel, the trial court improperly granted the County's motion for summary judgment and it must be reversed.

C. The County had actual notice of the dangerously icy condition of the Clodfelter Bridge well in advance of the Blaine/Crow collision.

WPI 140.02 sets forth the law regarding the county's liability for unsafe conditions that it did not create:

In order to find a county liable for an unsafe condition of a road that was not created by its employees, and that was not a condition which its employees or agents should have reasonably anticipated would develop, 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; *see also Nibarger v. Seattle*, 53 Wn.2d 228, 229, 332 P.2d 463 (1958); *Wright v. Kennewick*, 62 Wn.2d 163, 167, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993).

Under this standard, in order to maintain an action for the failure to remove ice and snow, a person injured due to an icy roadway condition must show that the governmental entity had notice of the dangerous

condition and that it had a reasonable opportunity to correct it before the incident occurred. See *Wright v. Kennewick, supra*; *Bird v. Walton, supra*.

The evidence in this case 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. In fact, the evidence shows that the icy condition of the Clodfelter Bridge came to the *actual* attention of the County and its employees *long before* the occurrence of the crash that injured Jayme Crow and Bill Blaine. It was defense counsel's position during oral argument that, had someone encountered the slippery condition and called the County, that would indeed be actual notice to the County. In fact, that is exactly what happened twice prior to the Blaine-Crow collision.

As discussed above, Erwin Laureano was involved in a single vehicle spin-out collision on the Clodfelter Bridge on the evening of December 23, 2006. CP 759 Laureano Declaration. According to Mr. Laureano, ice on the Clodfelter Bridge caused his Land Rover to lose traction and spin out:

3. On December 23, 2006, at approximately 8:00 p.m., I was driving my Land Rover eastbound on Clodfelter Road (though the roadway is actually headed north at the point) from my home in the Tripple Vista area to Red Robin restaurant for dinner.

4. I had no difficulty driving on Clodfelter Road until I reached the Clodfelter Bridge that passes over Interstate 182.

5. At the point my Landrover made contact with the Clodfelter Bridge, I lost control on the ice and fish tailed, sliding the length of the bridge. My Landrover, continued out of control until I broke through the guardrail on the canal overpass approximately 60 yards from the edge of the Clodfelter Bridge and finally came to a rest on the canal bank.

CP 759 Laureano Declaration.

Observing that the deck of the Clodfelter Bridge was covered with ice, Mr. Laureano then called 911 and Deputy Sheriff Blanchard responded. *Laureano Declaration.* Also according to Mr. Laureano, Deputy Blanchard then notified Benton County Road Department of the danger on the Clodfelter Bridge:

6. After I was off the roadway and waiting for a tow truck, I noticed that the Clodfelter Bridge was a sheet of ice. I called 911 and Deputy Lane Blanchard of the Benton County Sheriff's Office responded. It is my understanding Deputy Blanchard called the road department that evening to notify them of the danger and of the broken guardrail.

Laureano Declaration.

Deputy Blanchard responded to the Laureano spin out collision at the Clodfelter Bridge at approximately 7:57 p.m. on December 23, 2006. In his narrative report, Deputy Blanchard in fact attributed this collision to

ice, and reported the incident to the Benton County Road Department through dispatch:

On 12-23-09 at 1957 hrs, I was dispatched to a one-car accident non-blocking on Clodfelter Rd/Leslie Rd area in Benton County, State of Washington. Contacted the driver/owner, of U-1 Erwin J Laureano [redacted]. Christina M. Laureano [redacted] was in the front passenger seat when the accident happened. The two individuals are husband and, wife. Both parties said, they weren't injured, just shaken up.

E. Laureano was heading eastbound on Clodfelter, about .5 miles from the Leslie rd. intersection. *E. Laureano's vehicle started to slide sideways due to the icy road in the area*, slid off the roadway hitting a guardrail, with the passenger side of the vehicle. The vehicle then rolled and landed upright, against the ditch bank, with the front of the vehicle facing west, about 15 feet off the roadway. E. Laureano thought the vehicle only rolled once. Due to the location of the vehicle where it was sitting, I would have to agree it only rolled once. The guardrail that was hit is above an irrigation canal that is empty. Both parties were wearing seatbelts. No indication of alcohol or drugs.

E. Laureano thought he was going between 40-45 mph.

Due to the vehicle's year and the amount of damage, I believe the vehicle will be totaled out. I suggested to the Laureano's they both go to the hospital to get checked out. They said, they might. At Laureano's request, I called a AAA tow to come get the vehicle. A&E towing came and picked up the vehicle. Laureano was still deciding where he wanted the vehicle towed when I left.

Via dispatch, *I left a message with the County Road Department*, they would need to come out and fix the guardrail.

CP 764 *Accident Narrative Prepared by Deputy L. Blanchard on December 23, 2006 Crash on Clodfelter Road* (emphasis added) (Exhibit 1 to *Declaration of William J. Flynn*).

The next morning, Geri Bauer witnessed the ice on the Clodfelter Bridge and called 911, actually telling the County via 911 dispatch that the Clodfelter Bridge needed sanding:

After I got to Michael, ***I called 911 and told the person on the line that they needed to get a sand truck out on the Clodfelter Road Bridge.*** Within five to ten minutes I saw a red minivan traveling north on Clodfelter headed towards the bridge. The van was traveling at a reasonable rate of speed until it reached the bridge. When it got to the bridge, I watched as it violently fishtailed forward and seemed to be moving uncontrollably. As the minivan came to the north end of the bridge it careened off to the side of the road and into a ditch.

CP 766-767 *Declaration of Geri Bauer* (emphasis added).

This evidence is to be viewed in a light most favorable to Plaintiff Crow as the nonmoving party in a summary judgment proceeding. Deputy Blanchard was an employee and agent of the County. As set forth in his narrative report on the December 23rd crash, Deputy Blanchard knew that the roadway surface at the Clodfelter Bridge was icy and dangerous. "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." WPI 140.02. Additionally, he reported this ice-caused incident to the Benton County

Road Department via dispatch, providing even further notice. Deputy Blanchard's actual knowledge of the dangerous condition of the Clodfelter Bridge, along with Ms. Bauer's call to 911 requesting sand for the icy bridge, precludes summary judgment as a matter of law because it satisfies the notice requirement set forth in WPI 140.02 and presents evidence of opportunities to respond.

In its summary judgment motion, Defendant County argued that conditions changed on the Clodfelter Bridge between 10 a.m. and 11 a.m. on the morning of December 24th. Specifically, the County claimed 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. CP 360-363. The County's claim 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. This was nothing more than an icy condition becoming even 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 being directly told that it was icy. At a minimum the Plaintiffs are entitled to the reasonable inference that the ice Mr. Laureano encountered and Deputy Blanchard documented at 8pm on December 23, 2006 on Clodfelter

Bridge was the very same ice that caused the Bauer's, Crows and Michelle Blaine to slip and slide on the bridge. Degrees of iciness do not change the fact that this is an icy condition that only gets worse if the County fails to deal with it. Under these circumstances, the question of whether there was adequate notice to the County and an opportunity for it to respond remains a jury question, and is not for the judge to decide.

D. The issue of whether or not the County had a reasonable opportunity to correct the condition is one of fact for the jury.

Because Plaintiff Blaine has established that the County had actual notice of the icy condition on the Clodfelter Bridge, the sole remaining issue is whether or not the County had a reasonable opportunity to correct this dangerous condition. Issues of reasonableness are questions of fact for the jury. *See Bodin v. City of Stanwood*, 130 Wn.2d 726, 733, 927 P.2d 240 (1996) (whether one charged with negligence has exercised reasonable care is a question of fact); *Lano v. Osberg Constr. Co.*, 67 Wash.2d 659, 663, 409 P.2d 466 (1965) (holding in a contract termination case that whether a party had reasonable notice depends on the circumstances of each case and was a question of fact for the jury); *Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.*, 149 Wn. App. 429, 434, 203 P.3d 1077 (2009); *Blomster v. Nordstrom, Inc.*, 103 Wn. App. 252, 259, 11 P.3d 883 (2000) (holding in a constructive

termination case that a question of material fact as to whether the situation into which plaintiff was placed would compel a reasonable person to resign defeated summary judgment); *Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001) (question of whether a reasonable person would resign from her job due to sexual harassment was one of fact for the jury); *O'Donnell v. Zupan, Enters., Inc.*, 107 Wn. App. 854, 28 P.3d 799 (2001) (in slip and fall cases involving self-service market, the reasonableness of a proprietor's methods of protection is a question of fact).

In this case, Deputy Blanchard, as the County's agent in reporting unsafe road conditions, knew of the icy and dangerous condition of the Clodfelter Bridge some *15 hours prior to the Blaine-Crow collision*. As result, the County had both actual notice of this icy, dangerous condition, and ample time to address the hazard on this small section of Clodfelter Road with sand, salt, a salt-sand mix or de-icer.

Thereafter, according to the Police Traffic Collision Report prepared by Deputy Sheriffs Runge and Thompson, Michael Bauer slid on the ice and lost of control of his vehicle on the bridge at 11:03 a.m. As set forth above, Geri Bauer went to the scene, and called 911. Ms. Bauer told the person on the line at 911 that the Clodfelter Bridge was icy, and that a sand truck was needed there to address the ice. Ms. Bauer stated that she

made the call within 5 to 10 minutes of the red minivan sliding off the road.

The Police Traffic Collision Report establishes that the Blaine Windstar slid off at 11:13. Therefore, Ms. Bauer called 911 between 11:03 and 11:08. The crash involving Mr. Blaine's pick-up and Ms. Crow occurred at 11:21. Based on these established times, the County had between 13 and 18 minutes to respond after being expressly notified of ice and the need for sand at the Clodfelter Bridge.

Despite having actual knowledge of the dangerous condition on the Clodfelter Bridge some 15 hours prior to the Blaine-Crow collision, Defendant County failed to take any action until after the subject collision when a truck was finally called out to sand the bridge deck. Based on these facts, the issue of whether or not the County had a reasonable opportunity to correct the dangerously icy condition on its bridge after having actual notice of this condition is a clearly a question for the jury that should have precluded summary judgment, as a matter of law.

E. The Trial Court Improperly Struck and Denied the Plaintiffs' Motion for Reconsideration.

When presented with the newly discovery evidence of the Laureano accident and Deputy Blanchard's description of that accident as having been caused by the "icy road" condition on the bridge, the trial court

should have granted the Plaintiffs motion for reconsideration and denied the County's Motion for Summary Judgment. By failing to do so, the trial court erred. As the Blaines established in its briefing below (See Plaintiffs Blaine's Joinder in Crow's Motion for Reconsideration and Plaintiffs Blaines' Reply to Benton County's Opposition to Plaintiffs' Motion for Reconsideration, substantial justice under CR 59(a)(9) requires a court to fulfill its "duty" and grant the motion for reconsideration (or new trial). See *Sullivan v. Watson*, 60 Wn.2d 759, 765 n. 2, 375 P.2d 501 (1962); *Olpinski 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).

The evidence proffered by the Blaines' in their motion for reconsideration meets the evidence standard of "newly discovered evidence" under the operative legal standards. See, eg. *Go2NET Inc. v. CI Host Inc.* 115 Wn. App. 73 (2003); *Holliday v. Merceri*, 49 Wn. App. 321, 329, 742 P.2d 127 (1987); *State v. Evans*, 45 Wn. App. 611, 613, 726 P.2d 1009 (1986) This evidence which was not available to the Blaine's prior to the court's rulings on summary judgment. The trial court thus erred in striking and denying the Plaintiffs' Motion for Reconsideration.

There are five criteria for what constitutes newly discovery evidence under CR 59(a)(4). First, the evidence that the Clodfelter Bridge was "icy" the night before the Blaine/Crow accident would probably change the

result of the motions because it satisfied important necessary conditions of the County's liability :

- (1) Ice formed or was present on the Clodfelter Bridge on the night of December 23, 2006.
- (2) The County was on notice of the icy overpass on December 23, 2006 because Deputy Blanchard observed it, described it in his report and attributed Mr. Laureano's slide and subsequent accident to the presence of that ice.
- (3) The County had an opportunity (15 hours) after the Laureano's accident to take corrective action to de-ice the bridge.

This element is further satisfied because County attorney Ken Miller argued repeatedly and effectively that the absence of that very evidence justified the court granting summary judgment. See RP October 23, 2006 pp. 12-39. The Court cited these factors in granting summary judgment to the County.

Second, the evidence was discovered after the hearing on summary judgment on October 23, 2009. The only entity which the County claimed had received the reports of the Laureano accident was Mutual of Enumclaw, who did not insure the Blaines and had no relationship with them.

Third, the Blaines exercised due diligence to obtain this information by taking the depositions of four County employee all of whom denied that there had been a prior accident on that roadway before the Blaine/Crow accident. These deponents included Benton County Road Maintenance employee Jerry Dean Cunningham (see Peacock Declaration at Exh. 4, p. 20, lines 11-13), Benton County Road Superintendent Patrick McGuire (Id. Exh. 5, page 30, lines 6 to 13); Benton County Road Maintenance employee Jack Lee Pickard (Id. at Exh. 6, p. 52, lines 9-14); Benton County Public Works Director Ross Dunfee (Id. at Exh. 7, p. 41, lines 20-24.)

Fourth, the evidence is clearly material to the issues involved in the summary judgment motions because it proves that the County had prior notice of an icy condition and an opportunity to remedy it. The materiality is further established because the County's counsel had argued that the absence of that very evidence justified the court granting summary judgment. Finally the proffered evidence is not merely cumulative or impeaching for the reasons stated above.

The trial court erred in not granting the Plaintiffs' motion for reconsideration based upon the newly discovered evidence and in denying the County's motion for summary judgment.

V. CONCLUSION

On summary judgment, Defendant Benton County had the burden of showing that no genuine issues of material fact existed as to its negligence. CR 56(c). All factual claims were to be viewed in a light most favorable to Ms. Crow, as the non-moving party.

The County failed to meet its burden. The evidence shows that Benton County sanded its roadways on December 23rd, but failed to sand or de-ice the most dangerous location – the bridge. The evidence also establishes that Benton County had actual notice of the hazardous icy roadway condition on the Clodfelter Bridge some 15 hours prior to the Crow collision. The ice was never treated. It never got better. It got progressively worse. In the face of this clear evidence pointing to Defendant County's negligence, the trial court erroneously granted the County's motion for summary judgment, and improperly and prejudicially dismissed Plaintiff Bill Blaine's claim against the County, that had been brought to hold it accountable for its obvious negligence in sanding the Clodfelter Road and foolishly ignoring the known icy condition of the Clodfelter Bridge.

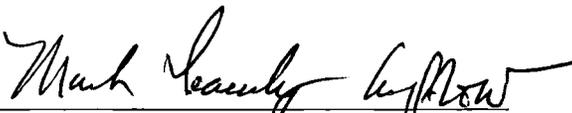
The lower court usurped the fact-finding role of the jury in this case. The Order Granting Defendant County's Motion for Summary

Judgment, and the Order Striking Plaintiff's Motion for Reconsideration,
must be reversed and the case remanded for trial.

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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

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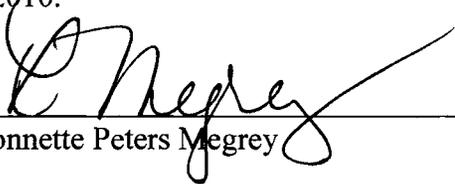
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