

FILED  
NOV 17 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 290158

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JAYME R. CROW and WILLIAM D. BLAINE and MICHELLE A.  
BLAINE,

Appellants

v.

BENTON COUNTY,

Respondent,

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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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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Although Blaine and Crow filed separate appeals and submitted separate Briefs, their arguments and briefing are nearly identical, so the County has only filed one Brief of Respondent in response to Appellants' Briefs.

Plaintiffs filed suit against Benton County for personal injuries arising from a two car accident that occurred on the Clodfelter Road/I-82 Overpass ("The Overpass") in Kennewick, Washington on December 24, 2006.

On the morning of December 24, the Blaine family travelled from their home on Clodfelter Road, over the overpass to church services in Kennewick. After attending church, they made the return trip, again crossing the overpass, at approximately 10:30 a.m. There was no evidence of ice on the overpass when they went to church or when they returned.

During that same timeframe, the Crows drove southbound from Kennewick, across the overpass, to a church service at a home a short distance from the overpass. The Crow's had no problem with ice on the overpass. One of the Crow's fellow parishioners Scott Musser also drove over the bridge at about 10:15 a.m., without any problems. No one at the Crow's church complained of ice on the bridge or any traction problems anywhere on Clodfelter Road or the overpass.

The Blaine's crossed the overpass on their way home from church around 11:00 a.m. After dropping off her family at home, Mrs. Blaine decided to make a run to the grocery store and set out again. She again traveled northbound on Clodfelter Road. However, this time when she reached the overpass she lost control of her vehicle and slid off the roadway. She was not injured. A few minutes before Mrs. Blaine's accident, Michael Bauer also slid off the roadway. His accident occurred just minutes after the Blaine's crossed the overpass without problems on their return from church.

Mrs. Blaine called her husband on her cell phone and he came to the scene. The Blaine's live only a few minutes south of the overpass. Plaintiff William Blaine ("Mr. Blaine") stopped his vehicle in the southbound lane, facing northbound (wrong direction), near his wife's vehicle. At about the same time, plaintiff Jayme Crow and her husband James Crow, were also proceeding northbound on Clodfelter toward the overpass. As Mrs. Crow proceeded over the overpass she lost control and slammed into the rear of Mr. Blaine's truck. The impact occurred approximately 200 feet into the overpass.

Along with ice that formed on the road minutes before the accident, the accident was caused by Mr. Blaine parking his vehicle in the wrong lane of travel and Mrs. Crow travelling at a speed too fast for

conditions. Defendant Benton County filed a Motion for Summary Judgment because it did not have notice and sufficient time to respond to the icy conditions that formed just minutes earlier. The Plaintiffs also filed Motions for Summary Judgment. On October 23, 2009, the court granted the County's motion and denied Plaintiffs' Motions for Summary Judgment. Plaintiffs filed a Motion for Reconsideration, alleging substantial justice was not done and the discovery of new evidence. The court denied plaintiffs' Motion for Reconsideration. Plaintiffs' alleged "newly discovered" evidence was information related to a one-car accident that occurred in the early evening hours of December 23. This is known as the Laureano accident.

Plaintiffs' contention on appeal is that the "newly discovered" evidence of the Laureano accident gave the County notice of a hazardous condition and a reasonable time to respond. Although the Laureano accident occurred on December 23, the roadway was not icy on the morning of the 24<sup>th</sup>. 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. We know this because numerous vehicles passed over the roadway without problem during the morning of December 24. It wasn't until after 11:00 a.m. that vehicles started sliding

on the overpass. Then, every vehicle that crossed the overpass had traction trouble. So, within approximately 30 minutes (10:30-11:00 a.m.), the conditions went from all vehicles traveling the overpass without problem, to no vehicle being able to cross the overpass without being affected by the icy condition.

## **II. ASSIGNMENTS OF ERROR**

Plaintiff Crow identified two Assignments of Error:

1. Whether the trial court erred in granting Benton County's Motion for Summary Judgment; and
2. Whether the trial court erred in granting Benton County's Motion to Strike Plaintiff Jayme Crow's Motion for Reconsideration, as well as Joinders Thereto.

Plaintiff Blaine identifies the same two Assignments of Error and adds one additional Assignment of Error:

3. Whether the trial court erred in denying Plaintiffs' Motions for Reconsideration.

Interestingly, in Crow's Notice of Appeal she appealed an Agreed Order of Dismissal, dismissing all claims in the case. CP 1166-1176. However, Plaintiffs do not discuss that Dismissal Order in their Briefs. The entry of that order dismissed all claims in the case, with prejudice,

and therefore, Plaintiffs' appeals are moot. This issue is addressed more fully below.

### **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 Plaintiffs presented no evidence at summary judgment of the County having notice of the dangerous condition that led to the accidents and a reasonable opportunity remedy the hazard?

ANSWER: No. The County is not an insurer of perfect roadways and is not required to predict the weather or weathers' affect on road conditions. While the roadway may have been slippery sometime on December 23, the uncontroverted evidence is that multiple cars travelled over the overpass (including all of the plaintiffs) without problems less about 30 minutes before the accident.

ISSUE TWO: Did the trial court abuse its discretion in denying Plaintiffs' motions for reconsideration when Plaintiffs did not establish that Benton County had actual notice of the condition that caused the accident, or sufficient time to correct the condition.

ANSWER: No. Even with the knowledge of the December 23<sup>rd</sup> Laureano accident, the legal analysis and result are the same. The

evidence before the court is that while the roadway may have been slippery sometime on the 23<sup>rd</sup>, it was not slippery during the morning of December 24 until minutes before the subject accident. All of the plaintiffs drove the overpass without any problems shortly before the accident without incident. A sudden change in conditions caused the icy road that contributed to the accident. Because the County did not have sufficient notice of the specific dangerous condition that Plaintiffs allege was present at the time of the accident, or a reasonable time to correct the condition, it is not liable.

ISSUE THREE: Did the trial court abuse its discretion in denying Plaintiffs' motions for reconsideration when Plaintiffs failed to establish, explain or demonstrate that their "newly discovered" evidence was not available to them before the summary judgment hearing, or that they used due diligence in attempting to obtain the information.

ANSWER: No. Even though the Laureano accident doesn't change the outcome of the summary judgment hearing, the fact is the Plaintiffs simply dropped the ball in failing to offer the Laureano accident evidence at the summary judgment hearing. The information was provided to the Crow's insurance company before the lawsuits were filed. The Plaintiffs did not submit interrogatories or requests for documents to the County asking for accident history and they now want another "bite of

the apple” to remedy their shortcoming. Furthermore, the Laureano information was public record and by law does not qualify as “newly discovered” evidence.

ISSUE FOUR: Did the trial court err when it entered a Stipulated Order of Dismissal of all claims, with prejudice, when it was signed by counsel for both the Blaine’s and Crows?

ANSWER: No. On April 20, 2010, after the court denied Plaintiffs’ motions for reconsideration, the Blaine’s and Crow’s entered a signed Stipulation and Order of Dismissal With Prejudice and Without Costs. Plaintiff Crow appealed entry of the order in her Notice of Appeal, but does not mention it in her Brief of Appellant. The Order states “that the above-entitled action, including all cross-complaints and counterclaims, be and the same is hereby dismissed with prejudice and without costs to any of the parties.” The court properly accepted and entered the Order, which voluntarily dismissed all claims in the case and no party ever requested that the trial court modify or amend that Order.

#### **IV. COUNTER STATEMENT OF THE CASE**

##### **A. Procedural History**

Plaintiff Blaine filed suit against the Crows. CP 1. The Crows filed a counter-claim and third-party Complaint against Benton County. CP 28. Blaine then also filed suit against Benton County. CP 46.

After much discovery, and no less than twenty depositions, Plaintiffs and defendant Benton County filed competing summary judgment motions. CP 94, 322, 343, 355, 922. The court granted Benton County's motion for summary judgment and dismissed the case. CP 745-748. The court denied Plaintiffs' motions for summary judgment, and that denial was not appealed. CP 1154-55; 1166-67.

Shortly thereafter, Plaintiffs filed a Joint Motion for Reconsideration under the theories of "newly discovered" evidence and that substantial justice was not done. CR 59(a)(4) & (9). The "newly discovered" evidence was the Laureano accident. CP 1103. However, the information had actually been available to the Plaintiffs prior to the summary judgment hearing. The record discloses that the Plaintiffs did not ask the county for an accident history or similar information in interrogatories or requests for production, or even in depositions of the County's CR 30(b)(6) representative. CP 840-841. Prior to the lawsuits, the Laureano accident report was requested and provided to the Crows' insurance company, and presumably counsel appointed by their insurance company to represent the Crows, in response to a public records request.

CP 838-847. However, the information was never presented at summary judgment. *Id.*

After the Court granted the County's summary judgment motion, Plaintiffs realized their error and filed a Motion for Reconsideration, based on the Laureano accident, although they did not explain to the court at the hearing how the information qualified as "newly discovered" evidence. RP 12/18/09. Plaintiffs did not try to establish that the "newly discovered" evidence was information that the Plaintiffs could not with reasonable diligence have discovered and produced at the summary judgment hearing. RP 12/18/09 at 15. The court denied the motion for reconsideration. CP 1148-50.

After the court entered an order denying the motion for reconsideration, Blaine and Crow entered into a Stipulated Order of Dismissal With Prejudice and Without Costs. CP 1151-53. These appeals followed.

## **B. Counter Statement of Facts**

### **1. Weather & Road Conditions Before The Accident**

The accident in this case occurred on December 24, 2006, at approximately 11:20 a.m. CP 421. The accident occurred in or near the

southbound lane of Clodfelter Road immediately north of the Clodfelter Road/I-82 overpass, approximately one half of a mile from Clodfelter Road's intersection with Leslie Road in Kennewick. CP 421.

In the weeks prior to the accident the Benton County Road Department applied anti-icer to the Clodfelter Road/I-82 overpass on three occasions in accordance with its routine winter maintenance activities; the last application before the accident occurring on December 21, 2006. CP 392.

Assuming the facts in a light most favorable to the Plaintiffs, they allege that it snowed on December 23, but the snow melted as it accumulated on the Clodfelter Overpass because of the anti-icer, then froze the night of the 23<sup>rd</sup>, and then began thawing a few minutes before the Blaine/Crow accident. Opening Brief by Appellants Crow, p. 18. However, Plaintiffs' roadway expert, Dale Keep, testified in his deposition that he didn't know when the snow fell that may have diluted the anti-icer to a degree that it would affect its efficacy:

Q. Or when sufficient snow landed in order to somehow affect any de-icer on the roadway?

A. No the exact time, no.

...

Q. How long in advance of the accident was it that it [the de-icer] became ineffective?

A. Again, I was not asked to calculate that. I can't tell you.

CP 402-404.

On the morning of the accident, each of the parties passed over the Clodfelter Road/I-82 overpass without problem. CP 408-409; 415-416; 419-421.

The Blaine's drove across the overpass in the morning of the accident on their way to church in Kennewick. The roadway was without ice when they went to church or when they returned at approximately 10:30 a.m.:

Q. And do you recall whether the trip that you took earlier in the morning took you over the same route that you took subsequent - - later in the day just prior to the accident?

A. Yes.

Q. And did you go the same route?

A. Yes. Opposite direction, but yes.

...

Q. In fact, you'd made a round trip?

A. Yes.

...

Q. All right. Do you recall experiencing any difficulties either on the road or the bridge over the freeway with respect to ice or any other adverse road conditions on the morning trip?

...

A. No.

Q. What about your return?

A. No.

CP 408-409.

The Blaine's son, Bill, testified that he and his family had just returned from church when his mother decided to leave again to pick up something at the store. The overpass was clear on the way to church as well as on the way back home:

A. No sir. I believe we had just gotten home from church when my mom wanted to head out to get something, and my dad and I and my cousin just wanted to sit back and chill.

Q. So you had gone to church earlier that day?

A. Yes, sir.

Q. Where was the church located?

A. Lord of Life Lutheran . . . I think it's across the street from Red Robin and whatnot.

...

Q. To get there, did you just do down Clodfelter and over the overpass?

A. Yes, sir.

...

Q. And so you came back to the house, and is it at that point, as soon as you arrived back at the house, that your mom wanted to go out again?

A. Yes, sir.

Q. When you were coming back to the house from church, did you have any trouble getting over the overpass?

A. Not that I remember.

CP 362-363.

The evidence is uncontested that the overpass was not slippery the morning of the accident and even Ms. Crow's roadway maintenance expert, Dale Keep, testified that it is not possible to determine when the overpass became icy.

Q. Assuming that the Blaine's had been over the roadway and Crows had been over the roadway within a couple-hour period prior to the accident, would you think that this is still a trap?

A. What you're asking me to assume is there was no ice present at the time they went over, and I've known people to drive on icy roads going and then crashed on the same icy roads coming back. I don't know what speeds they were driving, I know nothing. I don't know that there was ice there earlier or not.

- Q. So you don't know whether or not the ice you're talking about was present when the Blaine's and the Crows went on the roadway prior to the accident when they traveled through without any problem, is that a fair statement?
- A. They could have been driving on ice or not, yes, that's a fair statement.

CP 719.

The Crows also attended church that morning. CP 419-421. The Crows traveled from their home in Kennewick to a private residence south of the Clodfelter overpass where they attended a non-denominational church meeting. *Id.* They crossed the overpass to reach their destination. Additionally, one of the fellow parishioners, Scott Musser, also drove over the overpass without problems. So, by approximately 10:30 a.m., the Blaine's had crossed the overpass twice and the Crows and Scott Musser once on the morning of the accident. There is no allegation that the overpass was icy during any of their crossings.

## **2. Road Conditions at the Time of The Accident**

At approximately 11:00 a.m. (about ½ hour after the Blaine's last drove across the overpass without problem) Michael Bauer was proceeding northbound on Clodfelter Road in his vehicle. CP 511. As he

proceeded over the Clodfelter Road/I-82 overpass, Mr. Bauer lost control of his vehicle, spun 180-degrees and struck the guardrail on the west side of the roadway. *Id.* Mr. Bauer, who was not injured, called his mother, Geraldine Bauer, and a tow truck, to come to the scene and assist him. *Id.*

After arriving home from church at approximately 10:30 a.m., Mrs. Blaine decided to take a trip to Albertson's to pick up last minute items for Christmas Eve dinner. CP 409. At approximately 11:10 a.m., Mrs. Blaine and her niece Tiana Stapleton proceeded northbound on Clodfelter Road toward the grocery store. CP 410; 611. As Mrs. Blaine proceeded over the Clodfelter Road/I-82 overpass, she began to lose control of her vehicle. *Id.* Mrs. Blaine attempted to control her vehicle but ended up crossing over the southbound lane and went off the road and into the embankment on the west side of the canal guardrail. *Id.* Neither Mrs. Blaine nor her passenger was injured as a result of the slide. Mrs. Blaine used her cell phone and called her husband. CP 611.

A few minutes later, Mr. Blaine arrived on the scene and stopped his vehicle in or near the southbound lane, facing the wrong direction. CP 611.

Within one minute, Mrs. Crow proceeded northbound over the overpass with husband when she lost control of her vehicle and slammed into the rear of Mr. Blaine's truck. CP 612.

**3. Laureano Accident on December 23**

A little before 8:00 p.m. on December 23, Edwin Laureano slid his car off the road as he crossed the overpass. CP 878. Benton County Deputy Lance Blanchard went to the scene and assisted Mr. Laureano. CP 849. Deputy Blanchard drove over the overpass and did not have any trouble with traction. CP 849. Deputy Blanchard determined that the contributing factor for the accident was Mr. Laureano exceeding a reasonably safe speed. CP 849. He called the County Road Department and left a message that they needed to fix the damaged guardrail. CP 849. He did not tell the Road Department that the overpass was icy, slippery or dangerous. CP 849.

**V. LEGAL ARGUMENT**

**A. Standard of Review**

**1. Summary Judgment**

When reviewing an order of summary judgment brought under CR 56, this court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). The reviewing court considers the facts in the light most favorable to the nonmoving party. Summary judgment is appropriate if the pleadings, affidavits,

depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

In this case, the Court of Appeals will consider the trial court's order granting the County's motion for summary judgment under the *de novo* standard.

## **2. Motion for Reconsideration**

The denial of a motion for reconsideration is reviewed for abuse of discretion. *Kohfeld v. United Pac. Ins. Co.*, 85 Wash.App. 34, 40, 931 P.2d 911 (1997). A trial court doesn't abuse its discretion unless it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

In this case, issues decided by the trial court during the Plaintiffs' Motions for Reconsideration should be analyzed by the Court of Appeals under the "abuse of discretion" standard. Those issues include the following:

- a. Whether the trial court abused its discretion in denying the motion for reconsideration;

b. Whether the trial court abused its discretion in determining that the Laureano accident did not create an issue of fact as to notice of the road conditions; and

c. Whether the trial court abused its discretion in ruling that the Bauer accident did not create an issue of fact as to notice of the road conditions.

**B. Benton County Kept its Roads and Bridges Reasonably Safe for Ordinary Travel.**

Although Plaintiffs would like the County to be an insurer of the safety of its roadways, a County is not required to predict and prevent the formation of ice through the use of chemical anit-icers or other means.

The courts addressed that issue in two recent cases: *Leroy v. State*, 124 Wn. App. 65, 98 P.3d 819 (Div. 2, 2004) and *Laguna v. State*, 146. Wn. App. 260, 192 P.3d 374 (Div. 1, 2008).

In affirming summary judgment in favor of the State, the court in *Leroy* held as a matter of law that the State's duty to exercise reasonable care did not extend to a duty to prevent the formation of ice on the roads. The court in *Laguna* held as a matter of law that the State did not have a duty to predict and prevent ice from forming on the roadways even when it has notice of weather conditions that make ice formation probable.

Just like the State in *LeRoy* and *Laguna*, Benton County's duty in maintaining its roads does not include a duty to keep the roads ice free. In fact, Benton County's duty in maintaining its roadways is not triggered by the existence of weather conditions that are likely or even certain to produce icy roads.

Benton County has a duty to maintain its roads in a condition that is reasonably safe for ordinary travel. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). This duty, in terms of public liability for natural accumulations of snow and ice, has been addressed on several occasions by Washington courts. *Wright v. City of Kennewick*, 62 Wn.2d 163, 381 P.2d 620 (1963); *Bird v. Walton*, 69 Wn. App. 366, 848 P.2d 1298 (1993). The Supreme Court established that before a government entity may be held liable for accidents attributable to the natural accumulation of snow or ice on public roads, the plaintiffs must prove:

(a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises for negligence from neglect of duty to keep the streets safe. *Niebarger v. Seattle*, 53 Wn.2d 228, 332 P.2d 463 (1958).

*Wright*, 62 Wn.2d at 167. In accord, *Bird v. Walton*, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993) (adopting *Wright* as the standard for county roadways).

For the County to be liable, it must have notice of the dangerous condition and a reasonable opportunity to correct the condition. *Id.* Notice in this context means actual notice that the “dangerous condition” exists on the roads. *Niebarger*, 53 Wn.2d at 229-230. Despite plaintiffs’ desire that the law be different, “notice” does not include forcing the County to predict the weather in order to prevent the formation of ice. *LeRoy*, 124 Wn. App. at 68-69. In fact, “[n]o Washington case has held that [a public entity] has a duty to act when weather conditions exist that are likely, or even certain, to produce icy roads.” *Laguna*, 146 Wn. App. at 265. Furthermore, this court must keep in mind that Plaintiffs do not allege that the condition of the road on December 23 was the cause of the accident on the 24<sup>th</sup>; rather, they allege that the ice on the 24<sup>th</sup> caused the crash. CP 321-22.

Here, plaintiffs present no evidence that Benton County had actual notice of ice on the Clodfelter Road/I-82 Overpass at the time of plaintiffs’ accident and a reasonable opportunity to respond to it. Plaintiffs’ own expert can’t state when ice formed on the overpass – he testified that it could have formed only one hour before the accident, although even this seems too lengthy because the Blaine’s crossed the overpass without incident on their way back to their house from church less than one hour before Mrs. Blaine slid off the road. CP 719.

However, the most telling fact in this case is that each of the plaintiffs traveled over the Clodfelter Road/I-82 Overpass earlier on the morning of the accident and did so without problem. CP 408-409; 415-416; 419-421. None of the plaintiffs encountered dangerous or icy conditions on the Clodfelter Road/I-82 Overpass and there were no reports to Benton County of dangerous conditions on the day of the accident until Geri Bauer called 911 to report her son's accident a few minutes before Mrs. Blaine lost control on the bridge. Because the evidence clearly supports a finding that the County had insufficient notice of the actual accident causing conditions, Plaintiffs push an alternative theory in which they claim the County should have known that snow on the 23<sup>rd</sup> would be diluted by anti-icers, freeze the night of the 23<sup>rd</sup>, remain frozen solid on the morning of the 24<sup>th</sup> to such a degree that the ice wouldn't even be slippery on the morning of the 24<sup>th</sup> and then start to melt at around 11:00 a.m. on the 24<sup>th</sup> and become dangerously slippery. That stretch of imagination is exactly why Washington Courts do not hold governmental agencies liable for winter road conditions unless the agency has notice of the actual conditions that caused the accident and a chance to address them. The two seminal cases are *Laguna* and *LeRoy*.

**Laguna and LeRoy are Controlling**

Plaintiffs' legal theory in this case is identical to the contentions rejected by the Court of Appeals in *Laguna v. State*, 146 Wn. App. 260, 192 P.3d 374 (Div. I, 2008) and *LeRoy v. State*, 124 Wn. App. 65, 98 P.3d 819 (Div. II, 2004).

The facts in *LeRoy* mimic the facts in the instant case. In fact, current counsel for Jayme Crow, Keith Kessler, was counsel of record for the plaintiff in *LeRoy*. *LeRoy*, 124 Wn.App. at 66. The arguments made by Crow at Crow's Summary Judgment Motion mirrored Mr. Kessler's contentions rejected by the *LeRoy* court six years ago.

In *LeRoy*, two cars collided on an icy bridge that spanned the Chehalis River. *LeRoy*, 124 Wn. App. at 66. The collision resulted in one fatality and injuries to the plaintiffs. *Id.* at 67. Plaintiff brought suit against the State, alleging that the State "negligently failed to anticipate the formation of ice at the time and place of the accident." *Id.* The State moved for summary judgment arguing that it did not have actual notice of ice at the time and place of the collision or an opportunity to correct the condition, and therefore, could not be held liable. *Id.* The *LeRoy* plaintiffs countered that the State knew or should have known of the roadway and icy conditions due to weather forecasts coupled with the State's knowledge that bridges are more susceptible to ice than other areas. *Id.* In addition, the *LeRoy* plaintiffs presented evidence that

weather forecasts predicted freezing temperatures for the time of the collision that it was a predictable icing situation, and the State had anti-icing chemicals available for use. *Id.* at 67, 70.

As in the case at bar, the *Leroy* plaintiffs argued that under a standard of reasonable care the State should be held liable for failing to predict and prevent the formation of ice at a given location. *Id.* at 68. In rejecting the plaintiffs' argument, the court held:

The main issue on appeal is whether the State owes a duty of reasonable care under all circumstances or whether its duty arises only when certain conditions are met. According to *LeRoy*, the State owes a duty of reasonable care under all circumstances. According to the State, it owes such a duty only when it has actual notice of, and time to correct, the hazard in question. Duty is a question of law that we review de novo.

Based on the case law we agree with the State. The State has a duty of ordinary care to make its roads reasonably safe for ordinary travel. That duty is conditional, however, for it arises only when the state has notice of, and time to correct, the hazard in question. In short, according to *Niebarger v. City of Seattle*, the State 'must have (a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises for negligence from neglect of duty to keep the streets safe.

*LeRoy*, 124 Wn. App. at 68-69 (footnotes omitted).

The plaintiffs in *LeRoy*, just as they have in the present case, argued that the statement of public duty announced by *Wright* and

*Niebarger* should be expanded to impose a duty on a governmental entity to predict the formation of ice and prevent the formation of ice by applying chemicals. *LeRoy*, 124 Wn. App. at 68-69. The court acknowledged that adopting the plaintiffs' argument would require changing the law and the court declined to do so. The Court's decision states the following:

"*LeRoy* invites us to change the law. He states:

Plaintiff acknowledges that the few Washington cases addressing ice or snow on roadways have used a more limited duty than the normal duty of reasonable care. However, the law should not be frozen in 1958 when *Niebarger* was decided. While . . . *Niebarger* may have made sense . . . when weather forecasts were not readily available and sand was the only tool available . . . to address icy roadways, circumstances have changed considerably since then in terms of the availability of reliable weather forecasts and anti-icing chemicals to prevent ice from ever forming on roadways . . . ."

*Id.* at 69.

In response to plaintiff's invitation, the court responded, "Believing that the law is settled, we decline his invitation." *Id.* at 70 (emphasis added). The court rejected plaintiff's argument and even with the advent of modern technologies, i.e., chemical anti-icers, the court declined to expand the State's duty to include an obligation to predict and prevent the formation of ice on the roadway. *LeRoy*, 124 Wn. App. at 69-70.

The *LeRoy* court summed up its decision as follows:

Viewed in the light most favorable to LeRoy, his evidence against the State shows that bridges generally are more susceptible to ice than other areas; that weather forecasts for the night [of the accident] predicted a low of 25-35 degrees; that “[t]his was a classic, predictable icing situation” in which “the threat of ic[e] on the bridge was quite real that morning”, and that the State had “anti-icing materials” available to it. His evidence fails to show, however, that the State had notice of ice at the time and place of the accident before the accident occurred. The trial court could not properly have submitted his evidence against the State to a jury, and the trial court did not err by granting summary judgment.

*Id.*

Just as the *LeRoy* court found that plaintiff lacked evidence of notice of the dangerous condition, this Court should do the same in this case and reject Plaintiffs’ appeals.

Two years ago, Division I of the Washington Court of Appeals decided the *Laguna* case on very similar facts as *LeRoy* (i.e., icy roadway, multiple vehicle accident, municipality maintained roadway). The *Laguna* case is important because it refutes plaintiffs’ contention in the current case that the County had notice of the dangerous conditions and acted negligently in maintaining the roads. As in the case at bar, the plaintiffs in *Laguna* argued that under a standard of reasonable care the State should be held liable for failing to address ice at a given location when it had notice of weather conditions that made ice formation probable. *Laguna*, 146

Wn.2d at 263. In *Laguna*, “road and weather conditions had been favorable to ice formation for some time. WSDOT employees noted ground temperatures below freezing and a dense fog in the area. The weather forecast for the area predicted a 60 percent probability of ice formation.” *Id.* at 262. “WSDOT ha[d] a policy of applying anti-icing chemicals when the conditions warrant[ed] it, even if ice [had] not yet formed.” *Id.* Despite the State’s apparent knowledge of the potential for ice formation, the *Laguna* court ruled that the State had no duty to the plaintiff without notice of the dangerous condition and entered Summary Judgment on its behalf. *Id.* at 267.

The court noted that in the *Laguna* case the State had “greater cause to anticipate the formation of ice.” *Id.* at 264. In fact, because of the weather conditions, State employees applied anti-icing chemicals to portions of the roadway just prior to the accident, but not to the roadway where the accident occurred. *Id.* Nevertheless, the court explained that “this evidence does not establish the State had notice of existing ice at the time and place of the accident before the accident occurred.” *Id.* at 264.

In rejecting the plaintiff’s argument, the *Laguna* court observed that freezing temperatures coupled with moisture in the air “do not make road travel treacherous.” *Id.* at 265. As stated in *Laguna*:

Moisture and freezing temperatures are only potentially dangerous. Essentially, Laguna argues that the State had a duty to act because the facts known to it made formation of ice foreseeable. But foreseeability of harm does not create the duty to prevent it.

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

*Id.* at 265 (emphasis added).

**C. County Did Not Have Actual Notice of Icy Road at Time of Blaine/Crow Accident**

Assuming the facts in a light most favorable to Plaintiffs, 1 – 1 ½” of snow fell in the area on December 23<sup>rd</sup>. CP 492-93. Plaintiffs’ meteorological expert, Clifford Mass, PhD, testified that it snowed between 4:00 a.m. and 7:00 a.m. on December 23. CP 492. Thereafter, Benton County employees plowed and sanded the Clodfelter Road area. CP 587-88. Mr. Laureano’s accident occurred in the evening of the 23<sup>rd</sup>, but the roadway was safely passable during the morning of the 24<sup>th</sup>. CP 408-409; 415-416; 419-421. This court can take judicial notice that weather and road conditions can fluctuate widely in the Tri-Cities and this is another example of that phenomenon.

The issue then, is when did the ice present at the time of the accident form, and was Benton County aware of it within sufficient time to do something about it. Plaintiffs try to make this a case into a claim that Benton County negligently plowed and sanded the roads on the 23<sup>rd</sup>. (Opening Brief of Appellants Crow, p. 19). However, there is no evidence that Benton County improperly treated the roadway conditions as they existed on the 23<sup>rd</sup>. Plaintiffs do not allege that the roadway conditions on the 23<sup>rd</sup> were the cause of the accident. *Id.* By arguing that Benton County improperly maintained the roads on December 23<sup>rd</sup>, Plaintiffs are essentially claiming that Benton County should have foreseen that the alleged improper maintenance on the 23<sup>rd</sup> would have been insufficient to address the icy conditions that Plaintiffs claim Benton County should have anticipated would accrue on the 24<sup>th</sup> at the time of the accident. This is a Herculean leap of foreseeability and certainly in conflict with Washington law.

All of the evidence is that the ice that caused the accident formed sometime shortly before 11:00 a.m. on the 24<sup>th</sup>. Even Plaintiffs admit that the road conditions changed just minutes before the accident. CP 719. The cause of the accident was the ice that formed sometime on the 24<sup>th</sup>. As mentioned above, Plaintiffs' roadway maintenance expert, Dale Keep, testified that he could not say when the ice that caused the accident

formed. CP 719. We know that many cars drove across the bridge numerous times in the hours before the accident without problems. CP 408-09; 415-16; 419-20. Furthermore, another of Plaintiffs' expert, Mechanical Engineer Tim Leggett, testified that it was a change in the road conditions late in the morning of the accident that caused the dangerous conditions. Mr. Leggett stated the following:

It is my understanding, based upon my review of the facts of this case, as I described in my deposition, that in the late morning hours of December 24, 2006, the surface of the ice on the deck of the Clodfelter Bridge had begun to melt, creating this dangerous, lubricated roadway surface.

CP 685.

Just as Mr. Leggett states, it was the change in the conditions late on the morning of the 24<sup>th</sup> that caused the dangerous road conditions, not the road conditions on the 23<sup>rd</sup>.

Ms. Crow drove across the bridge the morning of the 24<sup>th</sup> on her way to church. CP 419-421. One of Ms. Crow's fellow parishioners, Scott Musser, also drove over the bridge the morning of the accident, without any problems. CP 723-724. Mr. Musser provided a declaration in which he states he did not see any ice on the bridge as of approximately 10:15 a.m. and no one at the church service complained of icy bridge conditions. 723-724. All of the evidence presented in this case from those who drove over the bridge on the morning of the accident points to

the fact that the bridge was not icy. No one slipped, lost traction, saw ice, or had difficulty driving.

**D. The County Did Not Have Reasonable Time to Remedy the Icy Condition That Caused the Accident**

Plaintiffs ineffectively argue that the Laureano accident 15 hours before the Blaine/Crow accident and the Bauer accident a few minutes before, gave the County notice and a reasonable time to address the road condition. Plaintiffs raised the Laureano accident issue for the first time at the Motion for Reconsideration. At that hearing, Judge Matheson ruled that the road conditions at the time of the Laureano accident were a “different condition” than the condition that caused the Blaine/Crow collision:

Well, it was icy or at least snowy the night before. But what about it seems to me that the complaint here is that there was a marked difference between 10 in the morning and 11 in the morning on this road and that the condition complained of occurred there by your [Plaintiffs'] expert based upon change in temperature. That's something that just happened.

RP 12/1//09, p. 9, lines 10-16.

Similarly, as cited in the next colloquy, Judge Matheson ruled that the Bauer accident a few minutes before the Blaine/Crow accident was

insufficient time for the County to respond. Plaintiffs must establish that

Judge Matheson abused his discretion in making the following ruling:

And these cases to me seem to say that they have to have actual notice of the specific hazard, time and place. And my reaction, even today, is that they didn't here. Fifteen hours ahead was some different condition. And the 20 minutes before, well, the same condition wasn't sufficient. And I'm struggling on that one, because that seems to technically set up a summary, you know, a jury question. But I'm also concluding that that's not realistic that the county isn't going to be ever expected to respond and correct the condition so quickly on a fairly remote county road . . . I hate to send a case ahead that would be unnecessarily expensive to try and probably go nowhere, because I don't see where that's a fact that gives rise to duty on the county.

RP 12/18/09, p. 19-20, line 18-25, 1-8.

Because the Laureano accident was not before the court until the Motion for Reconsideration, Judge Matheson's decisions based on it are analyzed under the "abuse of discretion" standard, not a *de novo* review. This is only fair because it was through Plaintiffs' own fault that the information was not submitted at summary judgment. Judge Matheson conducted a detailed and thoughtful analysis of the evidence and ruled that the Laureano accident was caused by different road conditions and that the Bauer accident did not provide the County with sufficient notice to address the icy roadway. *Id.* Plaintiffs have not established that Judge

Matheson abused his discretion in making these findings or denying Plaintiffs' Motions for Reconsideration.

Plaintiffs also allege that the Sheriff's Deputy who responded to the Laureano accident on the 23rd notified the County of the road condition.<sup>1</sup> (Opening Brief by Appellant Crow, p. 33). However, that is not entirely accurate. Plaintiffs recite Mr. Laureano's declaration (CP 759) in support of their claim, in which Mr. Laureano states "it is my understanding Deputy Blanchard called the Road Department that evening to notify them of the danger and of the broken guardrail." As the Court will notice from even a cursory review of his declaration, Mr. Laureano does not state that he overheard Deputy Blanchard or that he knew that Deputy Blanchard contacted the Road Department regarding the road condition. He simply indicates that it was his "understanding." For all we know, this "understanding" could have come from Mr. Laureano's discussions with Plaintiffs' counsel.

For clarification purposes, Deputy Blanchard submitted a declaration dated November 12, 2009 that was filed with the County's Motion to Strike Plaintiffs' Motion for Reconsideration. CP 848-49. In his Declaration, Deputy Blanchard states that he did not ask the County

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<sup>1</sup> This is a red herring argument because Judge Matheson ruled that the Laureano accident was caused by different road conditions than those that caused the Blaine/Crow accident, therefore the "notice" issue is moot.

Road Department to sand or apply deicer to the roadway, nor did he “notify them of the danger” as suggested by Mr. Laureano. CP 849. Rather, he simply contacted dispatch asking dispatch to notify the Road Department that the guardrail needed repair. CP 849.

But, even considering the Laureano Declaration and Plaintiffs’ arguments related thereto, based upon Washington Law, the trial court properly denied Plaintiffs’ Motions for Reconsideration. Whatever the road conditions on December 23<sup>rd</sup> at the time of the Laureano accident were clearly not the same road conditions on the morning of December 24<sup>th</sup>. Although fearful of the proverbial “beating a dead horse”, it must be mentioned again that Mr. and Mrs. Crow, Mr. Musser, and the entire Blaine family crossed over the Clodfelter Road/I-82 overpass at least four times on the morning of December 24<sup>th</sup> without problem. CP 408-409; 415-416; 419-421.

What Plaintiffs are trying to do is to have the Court require the County to anticipate and predict that the road conditions on the 23<sup>rd</sup> would change and then anticipate the type of road work needed on December 24<sup>th</sup> to address those changed conditions. This is contrary to Washington law. The issue in this case is the road conditions as they existed on the 24<sup>th</sup> at the time of the accident. Those conditions were different than what they were on the 23<sup>rd</sup> at the time of the Laureano accident. Plaintiffs now argue that

because of snowfall on the 23<sup>rd</sup>, the County should have taken appropriate measures to treat the road. The fact that an accident occurred on December 23<sup>rd</sup>, does not change Plaintiffs' argument. They still argue that the County should have taken steps on the 23<sup>rd</sup> to treat the road conditions as they might have existed at that time of the Blaine/Crow accident the next day. However, the road conditions changed between December 23<sup>rd</sup> and 24<sup>th</sup>, and the County is not required to anticipate what those changes might be or try to guess what the road conditions would be like at 11:00 a.m. on December 24<sup>th</sup>.

By arguing that Benton County should have maintained the roads on the 23<sup>rd</sup>, Plaintiffs are essentially claiming that Benton County should have foreseen that the alleged improper maintenance on the 23<sup>rd</sup> would have been insufficient to address the icy conditions that Benton County should have anticipated would accrue on the 24<sup>th</sup> at the time of the accident. This leap of foreseeability is in conflict with Washington Law. As the *Leroy* court pointed out, the County's duty is contingent upon it having actual knowledge of the dangerous condition that was the cause of the accident and a reasonable amount of time to remedy the problem:

The State has a duty of ordinary care to make its roads reasonably safe for ordinary travel. That duty is conditional, however, for it arises only when the State has notice of, and time to correct, the hazard in question.

*Leroy*, 124 Wn.App. at 68-69 (footnotes omitted)(Emphasis added).

Again, the “hazard in question” was the newly formed black ice on the 24<sup>th</sup>. Plaintiffs’ expert, Tim Leggett, testified that “black ice” that formed on the 24<sup>th</sup> caused the accident. CP 721. While the County may have had notice of the Laureano accident on the 23<sup>rd</sup>, Judge Matheson did not abuse his discretion<sup>2</sup> by finding that the evidence showed that the conditions that caused that accident were different than those that caused the Blaine/Crow accident the next day.

**E. The Parties’ Stipulated Order of Dismissal Ended all Claims**

After the trial Court denied Plaintiffs’ Motions for Reconsideration, Blaine and Crow entered a Stipulated Order of Dismissal With Prejudice and Without Costs. CP 1151-53. The Order was signed by the court and entered on April 20, 2010

Pursuant to Civil Rule 2A, agreements or consents made on the record in and in open court are binding on the parties entering into the agreement. In this case, the Stipulation and Order was signed and entered with the court, effectively terminating the claims in this case. The Crows

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<sup>2</sup> As Judge Matheson explained, it would be unreasonable for someone [a juror] to conclude that the County had notice of the new icy condition on the 24<sup>th</sup> or a reasonable chance to address the situation. RP 12/18/09, pages 19-20. Therefore, the County prevails under both the *de novo* and “abuse of discretion” standards.

appealed entry of the Order, but did not discuss the matter in their briefing. CP 1166-67. The Blaines did not appeal entry of the Order and therefore they can not now raise it as an issue on appeal. CP 1154-55. This Court should give credence to the Stipulation and Order of Dismissal and dismiss all claims against Benton County.

**F. The County Did Not Misrepresent the Facts**

Plaintiffs Blaine asserts that the County made “material misrepresentations” to the trial court at summary judgment which lead to the court granting the County’s motion. Appellants Blaine’s Amended Opening Brief, p. 2-4. However, Blaine’s citation to excerpts of the Summary Judgment Report of Proceedings are incomplete, misleading and taken out of context. The Blaine’s argue that each of the excerpts contain assertions by the County’s attorney that “the County had no knowledge of any ice condition on Clodfelter Bridge prior to the Crow/Blaine accident on the morning of December 24, 2006.” Appellants Blaine’s Amended Opening Brief, p. 2. But, when the Report of Proceedings are read in full, it is clear that the County makes no such assertion. Again, this is another example of the Plaintiffs trying to divert attention away from the fact that they did not perform adequate discovery to learn of the Laureano accident before they filed their summary judgment motions. Nevertheless, the

following is a sequential response to the Blaine's assertions and the County invites this Court to read the Report of the Proceedings of the Summary Judgment Hearing, RP 10/23/09.

Blaine's Amended Opening Brief contains the following:

**Page 2: "When did the ice form? . . . It wasn't on the 23<sup>rd</sup>. It was sometime on the 24<sup>th</sup>. And in fact it didn't become slick until sometime right around the accident."**

Plaintiffs insinuate that the County argues that it did not have knowledge of the Laureano accident. However, in reading the transcript, the Court will note that County's counsel is not referring to notice to the County, but to testimony of Plaintiffs' experts. Plaintiffs' expert, Tim Leggett testified (as discussed above) that the snow on the 23<sup>rd</sup> melted, froze, and melted again by the time of the accidents on the 24<sup>th</sup>. Plaintiffs' expert Dale Keep testified (as discussed above) that he did not know when the accident causing ice formed. When read in full, the County's argument at summary judgment reads:

So the question's asked to all these experts that they've [Plaintiffs] hired that we've deposed, "When did the ice form?" And none of them can give us a definitive time. But they all agree on one thing. It wasn't on the 23<sup>rd</sup>. It was sometime on the 24<sup>th</sup>. And in fact it didn't become slick until sometime right around the accident. An in fact we know that to be the case, because we have multiple vehicles driving the roadway on the 24<sup>th</sup>, and nobody's complaining about the roadway.

RP 10/23/09, p12, lines 2-10.

**Page 2: “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 on the 23<sup>rd</sup>. *Id* at p. 14, lines 19-21.**

Preliminarily, at summary judgment Plaintiffs had the burden of proving the County had notice of ice. County’s counsel points out to the Court that Plaintiffs have failed to submit evidence of that notice.

If the court reads the transcript (which is mis-cited in Blaine’s Brief) starting at RP 10/23/09, p. 13, line 7, it will note that the County is referring to the lack of complaints by the Blaine’s, Crows or anyone who attended church with the Crows.

**Page 3, “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, lines 7-9.**

Again, if the court reads the transcript beginning at page 18, line 2, it will see that the County is actually explaining the evidence and holding in the *Laguna* case. In the Blaine’s Amended Opening Brief they insert “[the County]” in brackets, but that is another misrepresentation of the transcript.

**Page 3, “But we will tell you, and I think the facts clearly indicate that we don’t know until the late morning of 12-24 . . .” *Id.* at p. 21, lines 2-10.**

Again, the issue in this case is when did the County know of the actual conditions that caused the Blaine/Crow accident. Those conditions formed minutes before the accident. At summary judgment (RP 10/23/09,

p. 21, ll. 2-10) the County accurately argued that it was not aware of the accident causing conditions until shortly before the accident. The County further accurately stated that “there is nothing that has been brought forward by the plaintiffs to indicate anything to the contrary.”

**Page 3, “So all they had to have is a call, . . .” Page 3, “They [Plaintiffs Crow and Blaine] had . . .” *Id.* at p. 36, lines 11-12 & p. 35, lines 13-23.**

When a party moves for summary judgment challenging the non-moving party’s ability to prove a prima facie case, the non-moving party then has the burden of demonstrating that there are facts sufficient to establish a prima facie case of the elements of the claim. CR 56. In this case, Plaintiffs’ did not present sufficient evidence at summary judgment of anyone complaining to the County of dangerous road conditions on the 24<sup>th</sup> with adequate notice to allow the county to respond. The County’s argument points out this deficiency. RP 10/23/09, p. 35, lines 13-23; p. 36, lines 6-13.

**Page 4, “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.**

This is an accurate recitation of the law in *Laguna* and *LeRoy*. The County’s full argument is as follows:

The county’s not obligated to have a crystal ball. It’s only obligated to react reasonably to known problems. It isn’t supposed to look at if it removes snow one day that snow

may melt and form ice another day, which may become slick and may cause or be involved in an accident. The cases are clear. They have no obligation in that regard. That isn't their duty.

RP 10/23/09, p. 21, lines 11-17.

**G. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs' Motion for Reconsideration**

**1. Legal Standard**

Following entry of the Order granting the County's Motion for Summary Judgment, Plaintiffs' filed a Motion for Reconsideration based upon CR 59(a) (4) (newly discovered evidence) and (9) (substantial justice has not been done). In support of its Motion for Reconsideration, Plaintiffs argued that their post summary judgment discovery of the Laureano accident qualified as newly discovered evidence and therefore the summary judgment dismissal should have been overturned. However, this information does not qualify as "newly discovered" evidence for purposes of CR 59(a)(4).

**2. Newly Discovered Evidence**

This Court will grant Plaintiffs' appeal only if it finds that the trial court abused its discretion in denying the Motion for Reconsideration. A motion for reconsideration may be granted on the basis of newly

discovered evidence only if the evidence (1) will probably change the result, (2) was discovered since the trial or hearing, (3) could not have been discovered before trial or the hearing by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. Failing to satisfy any one of these five factors is a ground for denial of the motion for reconsideration. *Go 2 NET, Inc. v. C I Host, Inc.*, 115 Wn.App. 73, 88, 60 P.3d 1245 (2003) (Emphasis added).

The issue, then, is whether the Laureano accident information meets all five of the requirements. If any of the requirements are not satisfied, then the information is not “newly discovered” therefore should not have been considered at the Reconsideration hearing and should not be considered on appeal.

At the motion for reconsideration, it was Plaintiffs’ burden to show that the evidence could not, with reasonable diligence, have been discovered and produced at the Motion for Summary Judgment. *In re Jones*, 41 Wn.2d 764, 252 P.2d 284 (1953). In fact, the Washington State Supreme Court upholds trial courts’ rulings denying motions for reconsideration where there was no showing that the newly offered evidence qualifies as “newly discovered” or that it could not, with reasonable diligence, have been supplied at the summary judgment or trial. See *Fuller v. Ostruske*, 48 Wn.2d 802, 296 P.2d 996 (1956). However,

this analysis may be a moot point because the trial judge, out of an abundance of caution, allowed Plaintiffs to submit the Laureano accident evidence and it was considered on Reconsideration:

Well, let me address one thing first, and that's subsequent affidavits brought after the last hearing . . . It should have been done before the hearing . . . And so rather than leave this case with a technical glitch that maybe I made an incorrect call on that, I think it's better to err on the side of inclusion. RP 12/18/09, p. 18, lines 4-18.<sup>3</sup>

Plaintiffs claim that they were not aware of the Laureano accident until after the Motion for Summary Judgment. While that may be true, that is not the standard for “newly discovered” evidence and the Laureano accident should not be considered under this Court’s Summary Judgment *de novo* analysis. Plaintiffs must prove that they could not have acquired the evidence by using due diligence. *Id.* Interestingly, Plaintiff Crow does not make any argument in her appellate brief regarding whether or not the Laureano accident qualified as “newly discovered” evidence. That could be because that information was provided to Ms. Crow’s insurer and presumably her counsel, before the lawsuit was filed. CP 840-841, 846-847. Plaintiff Blaine discusses the issue in his appellate brief, but does not

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<sup>3</sup> A trial court’s decision can be affirmed on appeal if it is sustainable on any theory within the pleadings and proof. *Bock v. State*, 91 Wn.2d 94, 95, 586 P.2d 1173 (1978). So, even if this Court agrees with Plaintiffs that Laureano accident evidence is notice to the County, that evidence should have been excluded from the Motion for Reconsideration because it does not qualify as “newly discovered” evidence, and therefore Plaintiffs would be left with no evidence of notice, and therefore no proof.

adequately explain why he did not request accident information from the County through interrogatories or requests for production of documents.

Furthermore, Plaintiffs still do not say how they came to be aware of the Laureano accident. However, what is clear is that none of the Plaintiffs submitted interrogatories to the County asking whether there were accidents at the location prior to December 24, 2006, nor did any of the Plaintiffs submit requests for production of documents seeking such information. The only information before the Court on this issue is the Blaine's argument that he asked a few County employees during their depositions whether they were aware of any prior accidents at the scene of the collision. (Appellants Blaine's Amended Opening Brief, p. 46). What Plaintiffs fail to mention is that the County has hundreds of employees and just because a few employees were not aware of the Laureano accident, does not mean that by due diligence the information could not have been acquired. For example, the trial judge who heard the summary judgment and reconsideration motions are County employees, as were the court reporter, clerk and bailiff. However, it is highly unlikely that if queried by Plaintiffs' counsel any of them would have information regarding prior accidents. Just because someone is a County employee does not mean they would know the Clodfelter Road accident history. Plaintiffs' real deficiency in this matter is their failure to submit any type of discovery

requests for information related to accident history at the Clodfelter Road/I-82 overpass.

Obviously, the County was not attempting to hide this information inasmuch as it provided the accident history summary to Mrs. Crow's insurers well before this lawsuit was filed. CP 840-841; 846-847. Additionally, plaintiffs acquired the Laureano accident information, police report and declaration of Mr. Laureano within ten (10) days after the Summary Judgment hearing. (Appellant Blaine's Amended Opening Brief, p. 27). (that fact essentially establishes that the information was easily accessible by the exercise of due diligence.

Furthermore, the "new evidence" submitted by Plaintiffs included the Police Traffic Collision Report regarding Mr. Laureano's incident. Obviously, that document is a public document, available to requesting parties. RCW 42.56; CP 877. Washington Courts have long held that the post verdict discovery of a public record does not amount to newly discovered evidence warranting the granting of a motion for reconsideration:

It is generally held that the discovery of a public record material to the prosecution or defense of a cause is not within the rule of newly discovered evidence which warrants the granting of a new trial. Such matters are at all times within the reach of the complaining party, and it is because of a lack of diligence if he fails to discover them.

*In re Hammers Estate*, 145 Wn. 322, 326, 260 P. 532 (1927);  
*Starwich v. Ernst*, 100 Wn. 198, 170 P. 584.

The question then is whether the Plaintiffs exhibited due diligence in their failure to request the accident history of the Clodfelter Road/I-82 overpass prior to summary judgment. It is telling that the insurance company thought that information important enough that they made the inquiry before the lawsuit was actually filed. CP 844.

Where evidence was available for public records and would have been obtained by reasonable diligence, the information does not qualify as “newly discovered” and can not be considered a basis for reconsideration or an appeal in this case. *Lawrence v. Farmers Mutual Insurance Company*, 174 Wn. 588, 593, 25 P.2d 1029 (1939). The Washington State Supreme Court has long held that a party does not act diligently, for purposes of the “newly discovered evidence” element of the motion for reconsideration, when the party fails to submit interrogatories regarding a crucial aspect of the case. See *McCanna v. Silke*, 75 Wn. 383, 388, 134 P. 1063 (1913).

In the present case, the moving parties (Plaintiffs) failed to fulfill their burden of establishing all five elements of the “newly discovered evidence” basis for granting a motion for reconsideration. Plaintiffs offer no legitimate explanation why they did not acquire evidence regarding the

Laureano accident prior to the Summary Judgment Motion, and have failed to explain how they eventually did acquire that information.

Therefore, the Laureano accident information should not be considered by this court.

## **VI. CONCLUSION**

Benton County did not have actual notice and a reasonable opportunity to address the icy road conditions that caused the Blaine/Crow accident and therefore Summary Judgment was proper.

Additionally, Judge Matheson did not abuse his discretion when he denied Plaintiffs' Motions for Reconsideration because he properly analyzed the evidence before him and determined that the Laureano accident conditions were different than the Blaine/Crow conditions and that no reasonable juror could conclude that Benton County breached its duty. He also properly ruled that the County had insufficient notice of the Bauer accident.

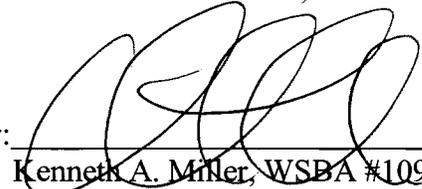
Furthermore, the Blaine's and Crows entered a Stipulated Order of Dismissal that dismissed all claims in the case.

Therefore, this Court should uphold the trial court's rulings and dismiss all claims against Benton County.

DATED: November 16, 2010

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FILED

NOV 17 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 290158

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JAYME R. CROW and WILLIAM D. BLAINE and MICHELLE A.  
BLAINE,

Appellants

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

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CERTIFICATE OF SERVICE

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I certify that I served a copy of Benton County's Brief of Respondent as follows:

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

DATED this 16<sup>th</sup> day of November, 2010, at Kennewick,  
Washington.

  
\_\_\_\_\_  
CHERYL J. STOCKDILL, Legal Assistant