

FILED

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

No. 29369-6-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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HALEY E. WEEKES, a single person,

Appellant,

v.

KITTITAS COUNTY, a municipal corporation,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR YAKIMA COUNTY  
THE HONORABLE MICHAEL MCCARTHY

---

REPLY BRIEF OF APPELLANT

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EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

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## I. INTRODUCTION

Kittitas County seeks to judicially reinstate the doctrine of sovereign immunity, both by characterizing its failure to employ deicing agents as a high-level policy decision, and by arguing that the County owes no legal duty at all to persons traveling on its ice-covered roadways unless the hazard they confront is an “extraordinary” one. The County’s first argument ignores the narrow scope of the discretionary function exception to the legislature’s broad waiver of sovereign immunity, while its second argument would immunize all but the most egregious of road defects, in contravention of established precedent.

The County mischaracterizes Haley Weekes’ argument as one that would make “road safety . . . always an issue only for the trier of fact.” (Resp. Br. at 24) The standards of liability in road maintenance cases are well established: The County owes those who use its highways a duty of reasonable care in the maintenance of its roads and summary judgment on the issue of breach of this duty is not appropriate when there are material issues of fact.

The Kittitas Board of County Commissioners adopted a policy that required its arterials be cleared of snow as a first priority, but the County’s Road Division, on an operational level, failed to

adhere to it. The County knew that the steep grade of the Caribou Cut, where Haley Weekes lost control of her car, could be especially hazardous, particularly because its County crews plowed the road the previous day leaving a one inch layer of snow that was compacted to solid ice. The County nonetheless failed to apply deicing agents, and failed to sand the road with sufficient frequency to make the roadway safe for ordinary travel. The County's knowledge of the hazard posed by the ice left of on this portion of Vantage Highway, and the adequacy of its response in light of the County Commissioners' policy to clear this arterial of snow, present issues for the trier of fact.

## II. REPLY IN SUPPORT OF STATEMENT OF THE CASE

The County's assertions that it is entitled to discretionary function immunity and that the court should narrow the scope of its duty to maintain its highways in a reasonably safe condition raise primarily legal arguments. However, the County's factual contentions ignore the governing standard of review. Because the trial court dismissed the case on summary judgment, this court views all facts in the light most favorable to appellant Haley Weekes, the non-moving party below. *Owen v. Burlington Northern and Santa Fe Railroad Co.*, 153 Wn.2d 780, 787, ¶ 10,

108 P.3d 1220 (2005); *Johnson v. Camp Automotive, Inc.*, 148 Wn. App. 181, 184, ¶ 5, 199 P.3d 491, *rev. denied*, 166 Wn.2d 1019 (2009).

The County improperly casts the evidence, including its snowplow operator's statement that the icy condition of the Caribou Cut was well known amongst County personnel, (CP 255), in the light most favorable to the County. Moreover, by characterizing the facts as undisputed, it ignores the evidence unfavorable to the County's position, including the investigative officer's observation that the road surface was "covered with ice with little sand on the roadway." (CP 139) Appellant addresses these and other material facts that would allow a jury to find the County liable for breach of its duty of reasonable care in Argument § III.B.2 and 3, below.

### III. REPLY ARGUMENT.

#### A. **The County Made A Policy Decision To Clear Its Arterial Highway Of Snow As A First Priority. Its Failure To Comply With That Policy On An Operational Level Is Not Entitled To Immunity.**

The County's decisions regarding when and where to sand or to use deicing agents are operational decisions that are not entitled to discretionary immunity. The County erroneously refers to these operational decisions as "policies," citing the declarations

of its manager and one of the County commissioners, who described how County officials had opted not to use deicing agents in all but the western part of Kittitas County. (Resp. Br. at 30; CP 118, 149)

These declarations confirm that there is only one County “policy” – the legislative Resolution 2001-155 adopted by which the County Commissioners required that well-traveled arterials such as the Caribou Cut be “cleared of snow” as a “first priority.” (CP 286) This resolution thus established as a matter of legislative policy what the County refers to as the “jurisdiction’s level of service” -- that the ice-covered highway where Haley Weekes lost control of her car be “cleared of snow.” (Resp. Br. at 17)<sup>1</sup>

As the County elsewhere acknowledges, the County Commissioners’ resolution contained no “operating procedures.” (Resp. Br. at 32) The County’s “operating procedures” – that is, how often its roads are plowed and sanded, and which roads are deiced – constitute the means by which the County implements its legislatively declared level of service policy. Such operational

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<sup>1</sup> As plaintiff’s expert noted in discussing the County’s refusal to use salt or deicing agents on the Caribou Cut, “we can call it level of service or we can call it reasonableness,” but the County’s refusal to treat its frozen arterial for ice removal exposes its citizens “to undue and unnecessary risk.” (CP 92, *quoted in* Resp. Br. at 20)

decisions are not entitled to discretionary immunity. See *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 158, 744 P.2d 1032, 750 P.2d 254 (1988).

The *Haberman* case illustrates the narrow scope of the discretionary exception to the Washington legislature's broad waiver of sovereign immunity. In rejecting the State's argument that its decision to sell bonds for the ill-fated WPPS nuclear power plants was entitled to discretionary immunity, the Supreme Court in *Haberman* distinguished between the decision to build the plants themselves, which was a basic governmental policy decision, and the means by which the plants were built and financed, which were operational decisions that could be reviewed under ordinary tort principles. 109 Wn.2d at 157.

As *Haberman* illustrates, a governmental decision need not be made "in the field" by the lowest level employees in order to be subject to ordinary tort principles of liability. See also, *Miotke v. City of Spokane*, 101 Wn.2d 307, 336-37, 678 P.2d 803 (1984) (rejecting discretionary immunity for city's decision to build sewer bypass). In *Miotke*, the Court held that a decision to discharge sewage was not entitled to immunity because though it was made in furtherance of a basic governmental objective – completion of a

sewage treatment facility – the decision was an “exercise of technical engineering and scientific judgment.” 101 Wn.2d at 337.

Similarly here, the means by which the County clears snow and ice from its arterials as a “first priority” may require technical expertise and judgment, but it is not the type of executive level governmental decision to which immunity attaches. Kittitas County Commissioners’ Resolution 2001-155 was “part of the governing process,” adopted by the County’s legislative body at the highest level. However, its road manager’s decisions about which roads to salt or how often they should be sanded do not involve “truly discretionary governmental acts on an executive level.” *Miotke*, 101 Wn.2d at 336-37.

Moreover, the fact that the County’s roads manager considered “costs, liability concerns and other factors” in deciding when and where to sand or apply deicer (Resp. Br. at 16), does not immunize its decisions regarding how to remove snow and ice from county roadways. Operational decisions are frequently based on economic criteria. At best, such considerations may be relevant to the trier of fact’s determination whether the County’s decisions

were reasonable, but such considerations do not cloak the decision with immunity.<sup>2</sup>

The County's argument cannot be squared with the Legislature's broad waiver of sovereign immunity. If every decision regarding the "level of service" to be provided by state and local government were subject to discretionary immunity, this narrow exception would swallow up the general rule that state and local government are held liable for their tortious conduct "to the same extent as if they were a private person or corporation." RCW 4.96.010. This court should reverse the trial court's dismissal of Haley Weekes' claim on the basis of discretionary immunity and remand for trial.

**B. Whether The County Failed To Maintain Its Highway In A Reasonably Safe Condition For The Traveling Public Presents Disputed Issues Of Fact For The Jury.**

The County owes all persons using its roads a duty to "maintain its roadways in a condition that is reasonably safe for ordinary travel." *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). The County concedes that this is the legal

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<sup>2</sup> The County acknowledges that only dicta supports its argument that all "decisions involving highway funding and priorities are . . . protected by immunity." (Resp. Br. at 19, *citing McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994))

standard to which it is held (Resp. Br. at 8), but then confuses the issue by arguing that it owed Haley Weekes no “duty to act” under these particular facts and in these particular circumstances.

The County is liable for injuries on its roads if it knew or reasonably should have known that a hazardous condition exists and fails to remedy it. Here, the trial court erred in resolving this factual dispute as a matter of law because a reasonable fact finder could find (1) that the County knew that this steep grade was icy as *its plow operators had compacted the snow to a level of one inch the previous day*, and (2) that it had ample time to remedy the icy condition through application of sand or deicer, but failed to do so.

**1. The County Owes Those Using its Highways A Duty of Reasonable Care, Including A Duty To Reduce Hazardous Conditions Such As Ice.**

The County’s various assertions that its duty of care must be determined through the lens of “the public duty doctrine,” (Resp. Br. at 22) or that it is liable only for “extraordinary,” (Resp. Br. at 11), “inherently dangerous or misleading conditions,” (Resp. Br. at 24-26), lack merit. While the County is correct that the issue of duty is a legal question that this court determines as a matter of public policy, this particular legal issue is well settled. The Supreme Court has repeatedly held that the State has a duty of care to make its

roads reasonably safe for ordinary travel. *Keller*, 146 Wn.2d at 249; *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (“county has a duty to maintain its roadways in a reasonably safe condition for ordinary travel by persons using them in a proper manner”); *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 6, 882 P.2d 157 (1994) (“duty to exercise ordinary care in the repair and maintenance of its public highways, keeping them in such a condition that they are reasonably safe for ordinary travel by persons using them in a proper manner.”); *Wilton v. City of Spokane*, 73 Wash. 619, 622, 132 P. 404 (1913) (“The city is liable only for those defects in its streets of which it has knowledge, or by the exercise of reasonable diligence could have obtained knowledge.”). See WPI 140.01 (defining county’s duty to maintain roads “to keep them in a reasonably safe condition.”)

The County’s duty of reasonable care includes the duty to reduce the dangers caused by icy road conditions that it knows or reasonably should know exist in hazardous locations. See *Leroy v. State*, 124 Wn. App. 65, 98 P.3d 819 (2004). The County also has a duty to avoid creating conditions on its roadways that renders them unsafe for ordinary travel. See *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 223 P.3d 1230 (2009), *rev. denied*, 169

Wn.2d 1003 (2010). As discussed below, §§ III B.2 and 3, leaving a one-inch layer of compact snow and ice on a steep arterial, and then failing to apply sufficient sand or deicer, is a breach of that standard of care.

The County's argument that its duty to maintain roads in a safe condition applies only to cases involving "inherent danger or misleading conditions," (Resp. Br. at 25), ignores the State's waiver of sovereign immunity and was rejected by the Supreme Court in *Keller*, and again in *Owen v. Burlington Northern*, 153 Wn.2d at 787, ¶ 11 ("Today, governmental entities are held to the same negligence standards as private individuals."); *Keller*, 146 Wn.2d at 242-43 ("[M]unicipalities are generally held to the same negligence standards as private parties."). Thus, the government's duty of reasonable care with respect to the design and maintenance of its roads is akin to the duty owed public invitees – to refrain from the creation of hazardous conditions, and to repair those of which it knows or reasonably should know, including ice and snow. See *Mucsi v. Graoch Associates, L.P.*, 144 Wn.2d 847, 856, 31 P.3d 684 (2001) ("accumulation of snow or ice is analyzed under the general rules of a landowner's duty to invitees"); *Radford v. City of Hoquiam*, 54 Wn. App. 351, 360, 773 P.2d 861 (1989) (city owes

public invitee duty to exercise ordinary care to maintain public facility in reasonably safe condition).

The County cites to cases absolving municipalities of liability after abutting property owners, who had primary responsibility for clearing snow or ice from sidewalks, failed to do so. (Resp Br. at 9-10, 18) See, e.g., ***Nibarger v. City of Seattle***, 53 Wn.2d 228, 332 P.2d 463 (1958). These cases are inapposite because a municipality is entitled to rely on a landowner to comply with a municipal ordinance to keep a sidewalk clear of snow and ice. Compare ***Niebarger***, 53 Wn.2d at 230 (“fifteen hours is insufficient to constitute constructive notice.”) with ***Hartley v. Tacoma School Dist. No. 10***, 56 Wn.2d 600, 602, 354 P.2d 897 (1960) (City’s constructive notice of school district’s failure to clear its sidewalk was factual issue where city crews “sanded and salted crosswalks and streets in the vicinity at least three times during preceding six-day period.”)

By contrast, because state and local government, and not adjoining landowners, have the primary duty to maintain roads, constructive notice of a dangerous road condition presents an issue of fact unless reasonable minds could not differ. See, e.g., ***Owens v. City of Seattle***, 49 Wn.2d 187, 191, 299 P.2d 560 (1956)

(whether City had constructive notice of presence of large pool of water on one of its streets was question for jury). Moreover, “as the danger at a particularly roadway becomes greater, the municipality is required to exercise caution commensurate with it.” *Xiao Peng Chen*, 153 Wn. App. at 907, ¶ 24, quoting *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940).<sup>3</sup> See *Owen*, 153 Wn.2d at 788, ¶ 12 (“Simply stated, the existence of an unusual hazard may require a city to exercise greater care than would be sufficient in other settings.”) The fact that state and local government owe a higher degree of care with respect to “extraordinary hazards,” does not absolve the County of its duty of reasonable and ordinary care with respect to the “ordinary” hazards that it knows, or reasonably should know, pose a danger to the travelling public. See WPI 140.01.

The cases cited by the County, affirming summary judgments in favor of the State for failing to foresee and prevent icy conditions, illustrate the limits of the duty of ordinary care but are

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<sup>3</sup> The County’s contention that Division One in *Chen* misstated the County’s duty of reasonable care is without merit. *Chen* relied on, and is consistent with the Supreme Court’s most recent pronouncements in *Keller* and in *Owen*. See DeWolf & Keller, 16A Wash. Practice § 29.30 (2010 Supp.); WPI 140.01, reprinted in Wash. Committee On Jury Instructions, 6A Wash. Practice 50 (5<sup>th</sup> Ed. 2005).

inapplicable here. Thus, in **Laguna v. Washington State Dept of Transp.**, 146 Wn. App. 260, 263, ¶ 9, 192 P.3d 374 (2008), Division One held that the DOT could not be liable for failing to prevent the formation of black ice on I-90 because “there is no evidence . . . that the State had notice that there was ice on the road where and when the accident occurred.” See also **Leroy v. State**, 124 Wn. App. 65, 70, ¶ 11, 98 P.3d 819 (2004) (“evidence fails to show . . . that the State had notice of ice at the time and place of the accident before the accident occurred.”); **Wright v. City of Kennewick**, 62 Wn.2d 163, 167, 381 P.2d 620 (1963) (“crust of ice had formed only a few hours earlier. It is plain that the city had not had reasonable opportunity to remove it.”) Similarly in **Bird v. Walton**, 69 Wn. App. 366, 368, 848 P.2d 1298 (1993), the State did not breach its duty to maintain I-82 by calling out crews as soon as it learned of icy conditions and “thereafter engaged almost continuously in attempting to sand the highway, up to the moment of the accident. . . .”

This case, however, does not involve an allegation that the County failed to *prevent* icy conditions, but that it failed to *correct* a hazard on a steep and well traveled section of road that the County knew, or reasonably should have known, had existed since its road

crews had traveled it the previous day. The County's knowledge of this particular hazard, and the adequacy of its response, both present issues for the trier of fact.

**2. The County Had Constructive Notice That This Steep Section Of The Vantage Highway Was Hazardous To The Traveling Public.**

Here, a jury must determine whether the County had actual or constructive notice of compact snow and ice on a steep section of the Vantage Highway – a section that under the County's own policies, should have been "cleared of snow" as a "first priority." (CP 286) The County contends that it lacked constructive notice as a matter of law because there was no evidence of prior accidents or reports of hazardous conditions on the Caribou Cut, (Resp. Br. at 2, 5), and that a school bus driver and its road manager believed the conditions were "typical." (Resp. Br. at 6) However, this court may not rely solely on the evidence favoring the County's theory on summary judgment. See *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court . . .") (emphasis in original).

There is substantial evidence that the conditions existing on this stretch of roadway were not "typical" of other County roads in the Kittitas Valley. It was undisputed that Caribou Cut section of the Vantage Highway had a steep grade of over 5½%, a speed limit of 50 mph, and was shaded from the sun. (CP 98, 255, 260) The County road crews knew that sand in that precise location was essential for traction because its plowing combined with the traffic on this well traveled road to compress the initial layer of snow into a hard packed, and frozen surface. (CP 155, 255) Its own plow driver described road conditions on the previous day as ice that bonded to the highway pavement. (CP 274) The investigating State Trooper found that on the morning of Tuesday, November 28<sup>th</sup>, when Haley skidded into the oncoming lane, "the roadway was covered with ice with little sand," (CP 259), and that "both the east and westbound lanes of travel were covered with ice which had all lane lines covered at the time of the collision." (CP 260)

The County criticizes plaintiff's expert's testimony regarding the hazardous condition of this road as lacking "first-hand knowledge," (Resp. Br. at 6) but the fact witnesses support plaintiff's expert's opinion that the amount of sand on the "heavily frozen snow" was "inconsequential, which means there's not

enough to make a difference.” (CP 279) <sup>4</sup> While a jury may ultimately agree with the County that such conditions are “typical” and do not make the roadway unsafe for ordinary travel, the weight to be given to plaintiff’s fact and expert testimony is an issue for the trier of fact. See *Hill v. Sacred Heart Medical Center*, 143 Wn. App. 438, 177 P.3d 1152 (2008). The trial court erred in resolving the issue of whether the County knew or reasonably should have known that the Caribou Cut was covered with a layer of ice, and not sand, on the morning of November 28, 2006.

**3. A Jury Should Determine Whether The County’s Failure To Apply Sand With Sufficient Frequency Or To Use Deicing Agents In Order To Comply With Its Policy Of Clearing The Vantage Highway Of Snow Was A Breach Of Its Duty Of Reasonable Care.**

Haley does not argue, as the County asserts, that “road safety is always an issue only for the trier of fact.” (Resp. Br. at 24) However, where, as here, there is conflicting evidence regarding whether the County maintained its roads in a reasonably safe

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<sup>4</sup> The County argues that the photographs appended to its brief contradict plaintiff’s expert testimony as a matter of law because they show sand embedded in the snow and ice on the road surface. However, these photographs depict, on the left-hand side, sand on the uphill, eastbound lanes of the Caribou Cut and in fact confirm the testimony of the state trooper that there was hardly any sand at all in the downhill, westbound lane where Haley lost control of her car. (CP 198-200)

condition, that conflicting evidence must be assessed by the jury and not by the court as a matter of law. The County failed to apply sand with sufficient frequency or to use salt or other deicing agents to clear this steep and icy section of the Vantage Highway of snow and ice as a "first priority." (CP 286) Its breach of the duty of reasonable care, is a question for the trier of fact.

The County also claims that it satisfied its duty of reasonable care by sanding the Caribou Cut the previous day, Monday, November 27<sup>th</sup>. (Resp. Br. at 5-6) But the sand applied by the County provided only a temporary remedy for the icy conditions on this steep, but well-traveled section of the Vantage Highway:

All I can say is that, if you're going to sand, you have to do it with sufficient frequency to make sure that there's sufficient sand on the road for it to be effective.

...

... [T]he maintenance manager . . . needs to recognize that sand is short lived and to get sufficient material out there in a timely fashion to make sure that there's sand on the road, and he didn't do that.

(CP 281) It was undisputed that the County had not sanded this road for at least 15 hours. The County's decision to sand this steep and icy section of its arterial road only during working hours, and

not “before people start to commute,” was a breach of its duty of reasonable care. (CP 284)

Expert testimony also demonstrated the limitations of sand as a “friction enhancer,” particularly on well-travelled arterials, like the Vantage Highway, which the County had plowed down to a one inch layer of compact snow and ice the previous day. (CP 293) A jury could find that the County’s failure to use salt or other deicing agents, which is the only way to break up that resulting icy surface, is also a breach of its duty to make its road safe for ordinary travel.

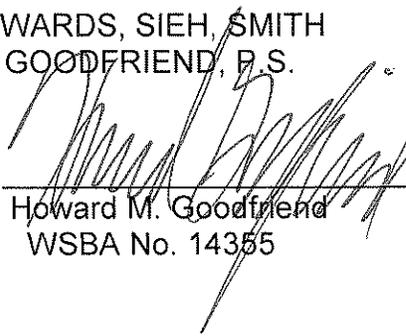
The County also argues that it should not be liable because “the snow and ice was open and apparent,” citing Haley’s and her mother’s testimony that they had previously driven this stretch of road after this and similar snow storms. (Resp. Br. at 2, 22) As Haley pointed out in her opening brief, these allegations raise issues of comparative fault that must be resolved by the trier of fact and do not absolve the County of its duty of care, or establish its compliance with that duty as a matter of law, as the County argues. *Keller*, 146 Wn.2d at 250 n.13. (App. Br. at 21)

**IV. CONCLUSION**

This court should reject the County's invitation to narrow the scope of its duty to exercise ordinary care to make its roadways safe for travel. For the reasons stated here, and in the opening brief, this court should reverse the trial court's dismissal of Haley's action and remand for trial.

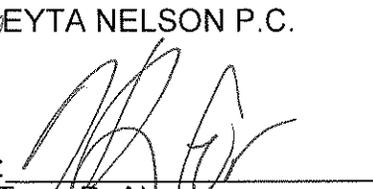
Dated this 23<sup>rd</sup> day of March, 2011.

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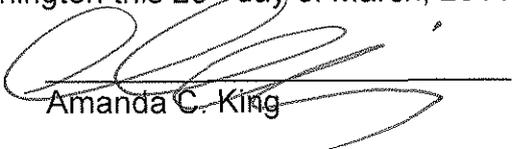
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 23, 2011, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 23<sup>rd</sup> day of March, 2011.

  
Amanda C. King