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NO. 66333-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

TARA JEAN McMANUS,

Appellant,

v.

YONG KUN KIM,

STATE OF WASHINGTON,

Respondents

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

This case arises from a car accident at the intersection of State Route 99 (SR 99) and South Holden Street that occurred on August 25, 1990. Tara Jean McManus, then two years of age, was a passenger in a vehicle that was struck from the rear by a car that was negligently driven by Yong Kun Kim. This lawsuit was filed on May 28, 2009. Ms. McManus alleged that negligent design and inadequate signage of SR 99 by the State of Washington (State) caused the accident.

On the issue of signage, the undisputed facts demonstrated that as Mr. Kim approached the intersection, he would have observed two “Speed Zone Ahead” signs, two “35 MPH Speed Limit” signs, one “Arterial Speed Unless Otherwise Posted – 35 MPH” sign, two sets of traverse rumble strips on either side of the “35 MPH” signs, and had an unobstructed view of the approaching stoplight for at least one quarter of a mile. Expert testimony by signage engineer Mark Leth established that this signage exceeded all highway signage requirements, and that no additional signage was necessary or required. On the issue of design, the unrebutted evidence offered by highway design engineer Terry Berends was that the highway exceeded every design standard and was safe for ordinary travel. Eyewitness testimony indicated that Mr. Kim was driving

erratically, was possibly asleep behind the wheel, and was grossly exceeding the speed limit immediately before the collision; as a result, Mr. Kim pled guilty to criminally negligent driving.

Based on this evidence, the state moved for summary judgment. In opposition, Ms. McManus offered no expert testimony and no testimony from Mr. Kim to substantiate her claim that additional signage would have prevented the accident. The argument made in opposition to summary judgment was based on unfounded, lay testimony by Ms. McManus's counsel interpreting nonbinding technical manuals which were unauthenticated and adopted by other states 15 to 20 years after the accident. The State's motion to strike this inadmissible evidence was granted and has not been appealed. The trial court correctly concluded that Ms. McManus's argument was speculative and that she had failed to create a genuine issue of material fact on the issues of negligence and causation. The court granted the State's motion for summary judgment. This ruling, and a peripheral discovery ruling, should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly grant summary judgment when the plaintiff failed to produce any expert testimony in a roadway design case?

2. Did the trial court properly grant summary judgment when the plaintiff failed to provide any admissible evidence to support claims of inadequate signage?

3. Did the trial court properly grant summary judgment when the plaintiff failed to present any competent evidence that an offending driver would have avoided an accident had one, or even ten, more signs been erected?

This Court applies a *de novo* standard of review to the three preceding issues of law. *Lybbert v. Grant Cy., State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

4. Does CR 37 allow a court to order a plaintiff to stop inappropriate discovery-related behavior, and to cure discovery defects?

This Court applies a manifest abuse of discretion standard to trial court rulings concerning discovery. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 519, 20 P.3d 447 (2001).

III. COUNTERSTATEMENT OF THE CASE

A. Statement Of Relevant Facts Regarding The Negligence Issue

1. Mr. Kim Was Engaged In Criminally Negligent Driving At The Time Of The Accident

On August 25, 1990, Ms. McManus was riding in her mother's vehicle. CP at 1-6; 155-63. While stopped at a red light at the intersection

of SR 99 and South Holden Street, the McManus vehicle was rear ended by Mr. Kim. CP at 164-68. Eye witness to the accident, Mark Zell, observed Mr. Kim driving his brown, four-door Mercedes Benz in an erratic manner at and before impact. CP at 164-68.

Intending to head north on SR 99, Mr. Zell entered SR 99 approximately three miles south of the intersection with South Holden Street. CP at 164-68. After fully merging onto northbound SR 99, Mr. Zell accelerated to the posted speed limit of 55 miles per hour (mph). CP at 164-68.

Shortly after reaching the speed limit, Mr. Zell observed Mr. Kim race past him on his left; Mr. Kim was also heading north on SR 99, CP at 164-68, with his wife as passenger. CP at 155-63. Mr. Zell observed that Mr. Kim was driving at least 10-15 miles over the posted speed limit due to (a) the extreme speed at which Mr. Kim raced by him, and (b) the fact that Mr. Zell was cruising at 55 mph. CP at 164-68. Even Ms. McManus concedes that Mr. Kim was speeding. Br. Appellant at 4.

A few moments later, while still driving the 55 mph speed limit, Mr. Zell came upon Mr. Kim's vehicle – only now, Mr. Kim was travelling at approximately 35 mph (approximately 30-35 mph slower than the excessive speed previously witnessed by Mr. Zell only moments before). CP at 164-68. Mr. Zell was alarmed at this variance in speed,

and looked over at Mr. Kim's vehicle to see if he could observe why the driver had slowed to well below the speed limit. CP at 164-68. In so doing, Mr. Zell observed Mr. Kim slouched over in the driver's seat with his head hanging downward, possibly asleep. CP at 164-68. Mr. Zell then passed Mr. Kim. CP at 164-68.

Shortly thereafter, Mr. Zell slowed his speed as he approached the intersection of SR 99 and South Holden Street in accordance with changes to the posted speed limit (reducing from 55 mph to 35 mph, *see infra*), and because there was a clearly visible red light in front of him. CP at 164-68. The intersection had four lanes in the northbound direction; two lanes continued northbound, and two lanes were marked for left turns. CP at 164-68; 193. Mr. Zell came to a stop at the red light in one of two lanes that continued northbound. CP at 164-68. While stopped at the intersection, Mr. Zell observed two other vehicles stopped at the red light, with one in each of the two left turn lanes. CP at 164-68. The McManus vehicle was in the far left turn lane. CP at 155-63.

Just as the light for his northbound lane turned green, Mr. Zell looked in his rearview mirror and observed, to his amazement, the same erratically driven Mercedes zooming towards the stoplight and grossly exceeding the posted speed limit of 35 mph. CP at 164-68. Mr. Zell observed Mr. Kim's speed to be "at least 60 mph" as he drove rapidly

toward the stoplight, ultimately rear-ending the McManus vehicle. CP at 164-68. Ms. McManus concedes that Mr. Kim was driving approximately 60 mph as he approached the intersection. Br. Appellant at 4.

Immediately after impact, Mr. Zell, who has a background in law enforcement and was a Boeing security officer in a company vehicle at the time, pulled his car over and called Boeing dispatch and notified them of the collision. CP at 164-68. Boeing dispatch called for an ambulance and for police to assist at the scene. CP at 164-68. While waiting for police to arrive, Mr. Zell left his vehicle to check on those involved in the accident. CP at 164-68. Mr. Zell observed that Mr. Kim seemed confused. CP at 164-68. This did not surprise Mr. Zell, given Mr. Kim's irregular driving, and his observation of him slumped over in his vehicle prior to impact. CP at 164-68.

A similar observation was recorded by the police officer at the scene. CP at 155-63. The police report states: "the driver of veh. #1 [(driven by Mr. Kim)] states that he does not know what happened, or recall events leading up to the collision." CP at 155-63. The police report also states that Mr. Kim had been "erratically driving." CP at 155-63. Finally, the police report states that "apparently [Mr. Kim] did not plan to stop." CP at 155-63.

Due to the fact that Mr. Kim was operating his vehicle in willful or wanton disregard for the safety others, he was charged with criminally reckless driving. CP at 143-52; 155-63. Mr. Kim eventually pled guilty to criminally negligent driving in 1998. CP at 143-52. Mr. Kim settled his claim with the plaintiff and is not a party to this appeal. CP at 316-17; 319.

2. The State Met Or Exceeded Every Design Standard And Signage Requirement Regarding This Stretch Of Roadway

SR 99 is a highway maintained by the State of Washington. CP at 193. The August 25, 1990, collision occurred at approximately milepost (MP) 26.06. CP at 193. Approximately one mile south is MP 25. CP at 193. Approximately one mile north is MP 27. CP at 193.

South of the intersection with South Holden Street, northbound SR 99 was a four-lane, limited access freeway. CP at 193. Striping, pavement markings, and signage along the entire portion of the roadway at issue were consistent with the Manual on Uniform Traffic Control Devices (MUTCD) and Washington State Department of Transportation standards and guidance. CP at 193.

In the northbound direction, the two freeway lanes gradually transitioned into a multi-lane arterial roadway. CP at 193. The following four traffic control signs and devices notified motorists of the transition:

- 1) Two regulatory “Speed Zone Ahead” signs were posted approximately 1,530 feet before the intersection at MP 25.77. CP at 193.¹
- 2) Two regulatory “35 MPH Speed Limit” signs were posted approximately 790 feet from the intersection at MP 25.91. CP at 193.
- 3) Two sets of transverse rumble strips were located in advance of and following the posted “35 MPH Speed Limit” signs. CP at 193.

The rumble strips were raised pavement markers that provided motorists with a visual, audible, and physical warning of changes to the roadway condition. Although the MUTCD did not require any rumble strips whatsoever, these sets were placed at this particular location for additional enhancement. CP at 193.

Ms. McManus’s asserts that the rumble strips were paint, tape, or thin solid pavement markings that were eroded and provided no vibration. Br. Appellant at 5. This is inaccurate, as they were raised circular discs that were not eroded; they were appropriately functional. CP at 300-04.

- 4) The final warning device was a regulatory “Arterial Speed Unless Otherwise Posted – 30 MPH” sign, which was posted approximately 420 feet before the intersection at MP 25.98. CP at 193.²

The transition to arterial roadway ended with a conventional traffic signal located at the intersection with South Holden Street, which regulated the flow of four northbound lanes – two left turn lanes and two that continued straight. CP at 193. The approaching stoplight and

¹ The 1978 MUTCD stated that this sign is used “to inform the motorist of a reduced speed zone when an advance notice is needed to comply with the speed limit posted ahead.” CP at 193.

² This is a regulatory sign that notes the City of Seattle’s ordinance regarding regulatory speed limits. CP at 193.

intersection are clearly visible from at least 1,320 feet – or one quarter mile – away. CP at 193; 164-68. The road approaching the intersection is straight and completely flat from at least one quarter mile out, CP at 193, and there are no sight distance restrictions for approximately one half mile in advance of the signal. CP at 297; 302. As Ms. McManus observes, the stoplight “is not hidden from approaching freeway motorists.” Br. Appellant at 10.

Ms. McManus alleges that the State negligently designed SR 99, Br. Appellant at 8-13, but offers no expert opinion to support these claims. The only expert to opine on the design of SR 99 was the State’s highway design expert, Terry Berends. CP at 295-98. Mr. Berends declared that the State met or exceeded every binding standard and guideline in the design, construction, maintenance and operation of SR 99. CP at 295-98. Mr. Berends also declared that all sight-distance and decision sight-distance standards were met or exceeded, that the roadway design was not dangerous, and that the State violated no well-established design standard. CP at 295-98.

Ms. McManus also asserts that the signage in place did not adequately notify drivers of changes in the roadway condition. Br. Appellant at 13-18. However, she offered no expert testimony to support these assertions. The only expert to opine on the adequacy of signage was

the State's highway signage expert, Mark Leth. CP at 193; 300-03. Mr. Leth declared that the State met or exceeded every traffic design, operations, and maintenance standard and guideline applicable in 1990; this included meeting/exceeding MUTCD requirements. CP at 193; 300-03. He also declared that additional signage or flashing amber lights were not necessary or required by any technical manual, that the signage was adequate, and the roadway was safe. CP at 193; 300-03.

B. The Trial Court Properly Struck Assertions Ms. McManus Made In Response To The State's Motion For Summary Judgment That Were Not Supported By Admissible Evidence

In responding to the State's motion for summary judgment, an error she perpetuates on appeal, Ms. McManus attempted to create a factual dispute by arguing that Mr. Kim would have avoided the accident had SR 99 been designed differently, or if there had been additional signage. *See generally* Br. Appellant at 8-18; CP at 279-88. But because these assertions are not supported by admissible evidence, the State moved to strike them from the record. CP at 395-409; 424-32.

As discussed below, Judge Craighead granted the State's motion to strike in part, declining to consider the inadmissible evidence. CP at 305-06; RP at 14-15, 37-38. Ms. McManus has not challenged this decision on

appeal.³ As such, the following is not part of the record, and should not be considered on appeal: (1) the lay “testimony” of Ms. McManus’s counsel, which is not supported by an expert opinion, and (2) the unsupported “testimony” of Ms. McManus’s counsel on behalf of Mr. Kim. CP at 305-06; RP at 14-15, 37-38.⁴

1. Counsel’s Lay Testimony And Opinion Is Not Evidence, And Was Properly Stricken From The Record

In lieu of expert testimony, Ms. McManus’s attorney introduced, interpreted, and relied upon two categories of technical manuals in an attempt to substantiate claims of State-related negligence. *See generally* Br. Appellant at 4-24; CP at 210-46, 271-88, 424-32. First, in an attempt to substantiate claims negligent design, Ms. McManus argued that the State violated design standards found in the American Association of State and Transportation Officials (AASHTO), and that standards adopted by five states 15-20 years after the accident, which her counsel found on the internet and could not authenticate, created a factual dispute. CP at 210-46. Based on these materials, for example, Ms. McManus opines that

³ Ms. McManus has not made any specific challenge to the order granting the State’s motion to strike, and has not raised any issue in her opening brief that calls the order granting the motion to strike into question. As such, this Court should not consider any subsequent challenge by Ms. McManus. RAP 12.1(a); *see also Jones v. Stebbins*, 122 Wn.2d 471, 479-80, 860 P.2d 1009 (1993) (this Court is not required to review an issue that has not been raised by the appealing party).

⁴ Citing to this “evidence” on appeal is improper; it is not part of the record because it has been stricken. RAP 10.3(a)(5); *see also Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 160 P.3d 31 (2007) (it is improper to consider facts recited in briefs that are not supported by the record).

Mr. Kim's driving of 70 mph in a 60 mph zone was note excessive because he was driving within the "highway design speed." Br. Appellant at 4-5, 20. In addition, she offered photographs of how a highway in Duluth, Minnesota looked in 2010, to say that SR 99 should have been designed differently in 1990. Br. Appellant at 41-42.

The State objected to the admissibility of these items, and to counsel's lay interpretation of them. CP at 424-32. The State argued that the materials were not relevant because the State is not bound by AASHTO or the standards adopted by other states, and that their irrelevancy was compounded by the fact that the out-of-state materials did not even exist at the time of the accident (they are 15-20 post-accident). CP at 424-32. The State also objected because the materials were not properly authenticated, and because an attorney is not competent to testify or opine about matters requiring expertise in the field of highway design and maintenance. CP at 424-32. Finally, the State pointed out through undisputed expert opinion that, even though it was not bound by these regulations, the State exceeded their requirements, and that counsel misinterpreted and misapplied them. CP at 295-99.

Second, Ms. McManus failed to produce competent evidence to substantiate claims that the State did not adequately notify drivers of changes in the roadway condition. Without expert testimony, and based

solely on argument and opinion of counsel, Ms. McManus claimed that the State did not meet the standards of the MUTCD. *See generally* Br. Appellant at 4-24; CP at 254-67, 271-88. Although the MUTCD applies in Washington, CP at 300-04, the State objected to the admissibility of counsel's lay interpretation of it, CP at 424-32, noting that Ms. McManus's attorney was not qualified to testify on the subject, and that misinterpreted and misapplied the MUTCD. CP at 300-04. Contrary to counsel's lay testimony, the State pointed out through undisputed expert opinion that it met or exceeded MUTCD signage requirements. CP at 300-04.

Judge Craighead granted the State's motion to strike in part, saying that she did not consider counsel's lay opinion about matters requiring expertise, as such opinions were not supported by admissible evidence. CP at 305-06. Judge Craighead explained the importance of expert testimony in making allegations of negligent signage and design:

As for the items that were taken off the internet, I can accept Mr. [Cline]'s word that he took these off of various websites. But that's as far as it goes. There needs to be some evidence. Frankly, it's possible to find almost anything on the internet. There needs to be some evidence, that whatever the thing is, it is what it purports to be. And with respect to the evidence from foreign jurisdictions, I can take that evidence that this is what other states do. But that really doesn't matter if there isn't an expert witness who can explain that.

Even the documents that I know from my other roadway safety cases that I've done that I know are observed in Washington such as the MUTCD, it takes an expert to determine how to apply that. It's not like, you know, a cookbook, where if you follow the directions, you'll wind up with a blueberry muffin at the end. It requires judgment. You have to decide, given the actual conditions in the place, how do you do this, how do you mark something, how do you put a light up, how do you put a crosswalk up. So I really appreciate the role that experts play in interpreting even documents that I know are accepted in Washington.

RP at 14-15.

2. Counsel's Speculative And Unsupported Testimony On Behalf Of Mr. Kim Did Not Constitute Admissible Evidence, And Was Stricken From The Record

In lieu of actual testimony, Ms. McManus relied upon speculative assertions made by her attorney on behalf of Mr. Kim. For example, Ms. McManus asserts that, although Mr. Kim ignored every warning device, he would have perceived the traffic light in time to stop his car and prevent this accident had additional signage been present. Br. Appellant at 19; CP at 270. Ms. McManus also argued that it is "incontestable" that Mr. Kim would have noticed a large yellow warning sign with flashing beacons on it. CP at 287. Ms. McManus, however, submits no declaration from Mr. Kim to support these claims, and has not cited to an instance when Mr. Kim ever made such statements.

The State asked the trial court to strike the inappropriate, speculative, unsupported testimony of counsel. CP at 424-32. Judge Craighead granted the State's motion to strike in part, saying that any statements made on behalf of Mr. Kim were not considered, as such assertions were not supported by admissible evidence. CP at 305-06. Again, Judge Craighead explained the importance of backing up factual assertions with admissible evidence:

In this context we have to demonstrate that there was some type of dangerous or misleading condition.

There are a couple of things that I would look for to determine that. One would be evidence from Mr. Kim[.]

...

But here, I don't have any actual evidence from Mr. Kim because he hasn't been deposed, he hasn't given testimony, and he hasn't submitted a declaration, which is a sworn affidavit essentially saying that this is what the facts were. So I don't have any evidence from Mr. Kim.

RP at 37-38.

C. Statement of Relevant Facts Regarding The Discovery Issue

The formal discovery process began in May, 2010 when Ms. McManus disseminated two sets of ER 904 materials. CP at 13-15; 16-21. The State objected to the admissibility of these materials due to evidentiary and admissibility issues. CP at 25-26.

Later that month, the State informed Ms. McManus about the need to independently obtain her employment, educational, and medical records. CP at 26. Ms. McManus said that she would release the records, and invited the State to send release of information (ROI) forms. CP at 26. The State mailed standard ROI forms to Ms. McManus on June 9, 2010. CP at 26, 55-65. Several weeks went by, and Ms. McManus did not respond. CP at 55, 57. The State mailed a reminder letter on July 6, 2010. CP at 67.

Around this same time, both Defendants submitted interrogatories and requests for production. CP at 26. Ms. McManus did not comply with the discovery rules, as she failed to adequately respond to the interrogatories or to produce pertinent documents. CP at 24-92, 108-120.

On July 12, 2010, the State and Ms. McManus's attorney had a telephone conference; the State asked if Ms. McManus would be signing the ROI forms in accordance with his prior promise. CP at 27. For the first time, Ms. McManus's attorney said that Ms. McManus would not sign the ROI forms unless the State stipulated to the admissibility of the aforementioned ER 904 submittals in a *quid pro quo* arrangement. CP at 28. The State said that such an arrangement was inappropriate. CP at 28.

A two-day deposition of Ms. McManus began on July 13, 2010. CP at 28. At a break, the outstanding ROI forms were discussed.

CP at 28. Ms. McManus's attorney, once again, said that he would not have his client sign the ROI forms unless the State stipulated to the admissibility of the aforementioned ER 904 submittals in a *quid pro quo* arrangement despite the State's evidentiary concerns. CP at 28.

Both defense attorneys declined the proposed *quid pro quo*. CP at 28. The defense attorneys informed Ms. McManus's attorney that the trial date would have to be continued due to his position. CP at 28. Ms. McManus's attorney acknowledged this, yet refused to retreat from his position. CP at 28.

The discussion was terminated once the State informed all parties that it considered the discussions of July 12 and 14, 2010 to be CR 26(i) conferences, and that it would file a motion to compel with the superior court. CP at 28. Ms. McManus's attorney asserted that the superior court did not have the authority to compel his client to stipulate to anything. CP at 28.

Ms. McManus then sent the State a letter on July 15, 2010 in a continued effort to create the aforementioned *quid pro quo*. CP at 28, 41-43. In the letter, Ms. McManus's attorney admitted that it was common practice for him to sign such ROIs, and stipulated that his client waived the confidentiality of her medical records by putting her medical condition at issue. CP at 28, 41-43.

On July 19, 2010, the State mailed Ms. McManus a letter that, once again, repudiated the proposed *quid pro quo*. CP at 29, 45-46. Specifically, the State noted that it had been “explicitly clear . . . about the fact that what [Ms. McManus’s attorney] was trying to leverage (stipulating to the admission of said information) [was] wholly different than what [he was] ‘willing’ to release (information about [his] client that, [he] admit[ed], is discoverable).” CP at 29, 45-46.

Because Ms. McManus would not sign the ROI forms, the State initiated alternate means of obtaining her pertinent records. CP at 29, 56. At least one provider, however, would not release records without a ROI form signed by Ms. McManus or a court order in lieu thereof. CP at 56. As a result, the State filed a motion to compel Ms. McManus to release her records, or for the court to make any order as deemed just. CP at 73-86.

Judge Craighead considered the materials filed by all parties, including the declaration of a third party who observed Ms. McManus’s attorney withholding the ROI forms to leverage the aforementioned *quid pro quo*. CP at 121-22. Ultimately, Judge Craighead directed Ms. McManus to sign forms authorizing the holders of pertinent information to release information to the State. CP at 121-22. Judge Craighead also directed Ms. McManus to cure all other discovery-related defects. CP at 121-22.

IV. ARGUMENT

A. Standards Of Review

1. *De Novo* Standard For Summary Judgment

Ms. McManus appeals the order granting summary judgment. This Court reviews summary judgment orders *de novo*, and performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 860, 93 P.3d 108 (2004). It examines the pleadings, affidavits, and depositions before the trial court and “take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party.” *Ruff v. King Cy.*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)). Affirming the trial court’s award of summary judgment is proper if the record establishes “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Because the record contains no genuine issue of material fact to support Ms. McManus’s claims against the State, summary judgment is appropriate.

2. Abuse Of Discretion Standard For Evidentiary Rulings Made In Conjunction With A Summary Judgment Motion

The trial court excluded large portions of material offered by Ms. McManus as “evidence.” A trial court “may not consider

inadmissible evidence when ruling on a motion for summary judgment.” *Int’l Ultimate Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). When reviewing evidentiary rulings in a summary judgment order, such rulings are reviewed for manifest abuse of discretion. *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007) (citing *Int’l Ultimate Inc.*, 122 Wn. App. at 744). Although the order striking material from the record has not been challenged, this Court should affirm the order granting the State’s motion to strike because argument, opinion, and unsupported factual assertions made by counsel are not to be considered as “evidence” in opposition to a summary judgment motion, and Judge Craighead did not abuse her discretion in striking these items.

3. Abuse Of Discretion Standard For Issues Pertaining To Discovery Orders

Ms. McManus appeals an order directing her to abide by the rules governing discovery. The trial court has wide discretion in issuing pretrial discovery orders; such orders are reviewed for manifest abuse of discretion. *Demelash*, 105 Wn. App. at 519. Decisions on discovery requests are within the trial court’s discretion and will not be disturbed on appeal unless manifestly unreasonable or based on untenable reasons. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370

(1991). When Ms. McManus was exploiting the discovery process in a failed attempt to secure an inappropriate *quid pro quo* arrangement with the State, Judge Craighead did not abuse her discretion in compelling Ms. McManus to cease these dilatory tactics and adhere to the discovery rules, and to cure the discovery defects.

B. Summary Judgment Is Appropriate Because Ms. McManus Failed To Present Competent Evidence To Demonstrate That A Genuine Issue Of Material Fact Exists On The Existence Of Negligent Design Or Inadequate Signage

Although Ms. McManus alleges that the State was negligent, Ms. McManus has been unable to produce competent evidence to substantiate her claims. As such, summary judgment was appropriate.

When there are no genuine issues of material fact in dispute, a party moving for summary judgment is entitled to judgment as a matter of law. CR 56(c). A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the defendant makes this showing, the burden shifts to the plaintiff to bring forward competent evidence demonstrating that a genuine issue of material fact exists. *Id.* at 225. If the plaintiff fails to produce competent evidence to support a factual basis of an essential element to their case,

summary judgment is proper. *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986)).

As the nonmoving party, Ms. McManus was charged with bringing forth competent evidence to demonstrate that a genuine issue of material fact existed for the following elements of her negligence claim: (1) that the State owed Ms. McManus a duty; (2) that the State breached that duty; and (3) that the breach proximately caused Ms. McManus's injury. *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002); Restatement (Second) of Torts §§ 281, 284 (1965). Proximate cause has two elements: cause in fact and legal causation. *Hartley*, 103 Wn.2d at 777-78. Both elements must be satisfied. *Ayers By and Through Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991).

Legal causation is a question of law, not a question of fact. *See, e.g., Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006). For the remaining elements of a negligence case, “[i]f it can be said as a matter of law that reasonable persons could reach but one conclusion, after considering all of the evidence and the reasonable inferences there from most favorable to the nonmovant, summary judgment should be granted.” *Mejia v. Erwin*, 45 Wn. App. 700, 705, 726 P.2d 1032 (1986). This is because, “[w]hen reasonable minds could reach

but one conclusion, questions of fact may be determined as a matter of law.” *Hartley*, 103 Wn.2d at 775.

This Court should uphold summary judgment for two reasons. First, Ms. McManus presents no competent evidence to substantiate her claims that the State was negligent. Rather, Ms. McManus relies upon argument and opinion of counsel, as well as conclusory statements and speculative testimony on behalf of Mr. Kim. This is impermissible. *See, e.g., Int’l Ultimate, Inc.*, 122 Wn. App. at 744, (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1998)). Reliance on such “evidence” cannot defeat summary judgment. *See, e.g., Vacova Co. v. Farrell*, 62 Wn. App 386, 395, 814 P.2d 255 (1991) (unsupported conclusory allegations or argumentative assertions are not sufficient to defeat summary judgment); *see also Melville v. State*, 115 Wn.2d 34, 35, 793 P.2d 952 (1990) (CR 56 bars an attorney from offering personalized, declaratory statements to state “facts” about what various records, reports or files purport to say).

Because the proffered testimony and opinion of counsel cannot be considered in opposition to summary judgment, Judge Craighead did not abuse her discretion in excluding this inadmissible “evidence.” *See, e.g., Puget Sound Blood Ctr.*, 117 Wn.2d at 787 (citing *Grimwood*, 110 Wn.2d at 359). Since it has been stricken from the record, it cannot be cited to on

appeal. *See, e.g., Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615, 160 P.3d 31 (2007). Despite Judge Craighead's ruling, however, Ms. McManus continues to base arguments upon inadmissible "evidence" that has been stricken from the record. This is not appropriate, and the following assertions should not be considered on appeal:

1) Every statement made by Ms. McManus on behalf of Mr. Kim. Because Ms. McManus did not depose Mr. Kim, and because Ms. McManus secured no declaration from Mr. Kim, each and every declaratory statement made by Ms. McManus on behalf of Mr. Kim is inadmissible and was properly stricken from the record.

2) Every opinion proffered by Ms. McManus that the design of the roadway at issue was unsafe, or that the signage notifying drivers of changes in the roadway condition was inadequate. This includes any and all assertions that the State failed to meet standards adopted by different states, or standards contained in technical manuals like the MUTCD or AASHTO. Because Ms. McManus did not secure an expert to interpret or apply such technical manuals, counsel's lay interpretation and application thereof is inadmissible and was properly stricken from the record.

After excluding the inadmissible material offered by Ms. McManus, Ms. McManus cannot generate a genuine issue of material fact to support her claims that the State was negligent, and the remaining facts clearly justify summary judgment. These facts include: (1) eyewitness Mark Zell's declaration that Mr. Kim was driving recklessly and ignoring all traffic signs and devices; (2) Officer Dean Shirey's

declaration that Mr. Kim was cited for criminally reckless driving, and that Mr. Kim did not know what happened, and could not even recall the events leading up to the collision; (3) certified copies of court orders that Mr. Kim pled guilty to criminally negligent driving; and (4) the expert opinions of Mark Leth and Terry Berends, who opined that the roadway at issue was safe, that the signage was adequate, and that the State met or exceeded every design standard or signage requirement.

Second, even if this Court were to set aside Judge Craighead's ruling on the motion to strike, summary judgment was appropriate. As discussed below, there are no genuine issues of material fact when considering the evidence in a light most favorable to Ms. McManus. Rather, the evidence compels the conclusion that: (1) the State did not breach a duty because the roadway was safe, (2) neither the design of SR 99, nor the signage in place at the time of the accident, were the cause in fact of this accident because the State met or exceeded all requirements, and (3) the legal cause of the accident was the criminally negligent driving of Mr. Kim, and not the design of the road, or the abundant signage.

1. The State Did Not Breach A Duty Because The Uncontroverted Expert Testimony Was That The Roadway Design Was Safe, And That The Signage Was Adequate

Ms. McManus asserts that the State negligently designed SR 99 in its approach to South Holden Street. The State has a duty to exercise ordinary care in keeping its public roadways in a safe condition for ordinary travel. *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 786-87, 108 P.3d 1220 (2005) (citing *Keller*, 146 Wn.2d at 249). This is part of the overarching duty to provide reasonably safe roads for the people of this state to drive on. *Keller*, 146 Wn.2d at 249. In exercising ordinary care, however, there is no duty for the State to make a safe road safer. *Ruff*, 125 Wn.2d at 707.

Ms. McManus's allegation that the roadway at issue suffered from a design defect fails for two reasons. First, Ms. McManus produced no expert to substantiate claims that the State inadequately designed SR 99 in its approach to South Holden Street. Rather, Ms. McManus relied upon counsel's lay interpretation of AASHTO guidelines, and policies that other states adopted 15-20 years after the accident. AASHTO guidelines do not bind the State.⁵ Even if they did, Ms. McManus misinterpreted and misapplied AASHTO, and her conclusions that AASHTO required a

⁵ Additionally, the Washington State Supreme Court has dismissed attempts to create a genuine issue of fact by citing to AASHTO. *See, e.g., Ruff*, 125 Wn.2d at 705.

different design are inaccurate. Further, the out-of-state policies, which counsel found on the internet, and did not exist at the time of the accident, have no binding effect on the State either.

Second, the only expert to testify on the issue of whether a design defect existed came from the State's design expert, Terry Berends. Mr. Berends declared that the State met or exceeded every design requirement regarding this particular stretch of roadway. As such, Mr. Berends declared that the roadway was safe for ordinary travel and that Ms. McManus's assertions to the contrary are without merit – an expert opinion that has been uncontroverted.

Ms. McManus also argues that the stoplight, which was open and obvious from a quarter mile away, was a dangerous or misleading condition. If roadway condition is deemed to be inherently dangerous or misleading, the State has the duty to protect motorists by posting adequate and appropriate warning signs, and using other devices that place drivers on notice that they are approaching a dangerous or misleading condition.

Keller, 146 Wn.2d at 249.⁶

⁶ When a government entity brings forth expert testimony showing that a roadway is safe and that the safeguards in place are appropriate, the State Supreme Court has held that rebuttal expert testimony is required support claims of negligent design or that additional safeguards are necessary. *See, e.g., Ruff*, 125 Wn.2d at 706-07 (because no expert testified that the roadway was inherently dangerous or deceptive and because no expert opined that additional safeguards would have prevented the injury, there was no genuine issue of material fact to defeat the government's motion for summary judgment). Other jurisdictions consistently recognize the need for expert testimony in negligent

In adhering to this duty, the State is not required to anticipate and protect against all imaginable acts of errant drivers, because the state is not an insurer against accidents or the guarantor of public safety. *Keller*, 146 Wn.2d at 252 (citing *Stewart v. State*, 92 Wn.2d 285, 299, 597 P.2d 101 (1979)). As such, the level of caution exercised should be commensurate with the level of danger. *See generally Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957).

Ms. McManus argues that the State should have erected additional signs to notify Mr. Kim of the approaching stoplight. This particular argument is addressed in more detail in the Proximate Cause section, *infra*. Regarding the issue of whether the State breached its duty; however, this argument fails for two reasons. First, Ms. McManus produced no expert to substantiate claims that the signage was inadequate, or that additional signage was even necessary. Rather, Ms. McManus relies on counsel's lay interpretation the MUTCD in arguing that more

highway design and signage cases as well. *See, e.g., Dept. of Transp. v. Mikell*, 229 Ga. App. 54, 58, 493 S.E.2d 219 (1997) (average layperson is not familiar with design and function features of traffic control devices, and, therefore, expert testimony is required to support a claim of professional or engineering negligence with respect to placement of devices); *Thompson v. Coates*, 29, 333-CA (La. App. 2 Cir. 5/7/97); 694 So. 2d 599, 602 (in determining whether the condition of a highway is dangerous and creates a defective condition, the court should consider expert testimony); *Tennis v. Fedorwicz*, 140 Pa. Commw. 7, 9, 592 A.2d 116 (1991) (in personal injury action, expert testimony was required to prove that a highway was negligently designed); *Young v. Com., Dept. of Transp.*, 560 Pa. 373, 377-78, 744 A.2d 1276 (2000) (in action stemming from a collision, expert testimony is required to define Department of Transportation negligent in failing to adequately erect warning signs, and to establish a causal nexus between the alleged failure and the accident itself).

signage was required. In so doing, counsel misinterpreted and misapplied the MUTCD, and her conclusions that the MUTCD mandated the erection of additional signage are inaccurate.

Second, the only expert to testify on the issue of whether the signage was adequate came from the State's signage expert, Mark Leth. Mr. Leth recounted the numerous warning signs in place on August 25, 1990 that visually, audibly, and physically notified drivers of changes in the roadway condition. Drivers observed:

- 1) Two regulatory "Speed Zone Ahead" signs approximately 1,530 feet before the intersection.
- 2) Two regulatory "35 MPH Speed Limit" signs approximately 790 feet from the intersection.
- 3) A regulatory "Arterial Speed Unless Otherwise Posted – 30 MPH" sign approximately 420 feet from the intersection.
- 4) These safeguards were in addition to:
 - a. Two sets of rumble strips that gave drivers a physical, visual, and audible awareness to changes in the roadway condition, and
 - b. The stoplight itself, which was visible from over a quarter mile away.

As such, Mr. Leth declared that the roadway was safe for ordinary travel because the numerous signs and devices in place were adequate, and

that the State met or exceeded every signage requirement and standard. Mr. Leth also asserted that Ms. McManus's statements to the contrary were without merit – an expert opinion that has been uncontroverted.

Putting Ms. McManus's evidentiary defects aside, legal precedent supports summary judgment. For example, in *Selvig v. Caryl*, 97 Wn. App. 220, 983 P.2d 1141 (1999), the trial court was faced with a similar factual scenario.

In *Selvig*, the plaintiff was riding her bicycle, and attempted to make a left hand turn at an intersection without stopping. *Selvig*, 97 Wn. App. at 221. After entering the intersection, the plaintiff was seriously injured when she was hit by a truck traveling along the intersecting road. *Id.* The accident was the result of the plaintiff failing to stop at a stop sign prior to making the left hand turn. *Id.* The plaintiff claimed that the intersection was inadequately signed, despite the presence of the stop sign, and an additional sign notifying her of changes in the roadway condition (a singular "stop ahead" sign). *Id.* at 222.

The governmental agency in charge of the intersection successfully moved the trial court for summary judgment, and the sole issue on appeal was "whether [the governmental entity] breached its duty to exercise ordinary care in maintaining [the intersection]." *Selvig*, 97 Wn. App. at 221. This Court upheld the trial court's ruling, saying that the

governmental entity did not breach a duty of care to maintain a reasonably safe intersection by failing to have additional signage, as any expectancy that the plaintiff had regarding whether she was required to stop – that she was not on a “through” street – was dispelled by the presence of merely two signs: the stop sign, and the singular “stop ahead” sign. *Id.* at 225.

Selvig provides a great deal of guidance. Here, much like the plaintiff did in *Selvig*, Ms. McManus argues that inadequate signage led Mr. Kim to conclude that he was on a “through” street, and was not required to stop at the heavily signed and readily visible intersection. The governmental entity in the current case (here, the State) had in place numerous signs and devices that notified Mr. Kim of changes to the roadway condition. If the plaintiff in *Selvig* was on notice that she was not on a “through” street when only two signs warned her of changes in the roadway condition, Mr. Kim certainly was on notice that he was not on a “through” street due to the placement of two regulatory “Speed Zone Ahead” signs, two regulatory “35 MPH Speed Limit” signs, two sets of traverse rumble strips on either side of the “35 MPH” signs, one regulatory “Arterial Speed Unless Otherwise Posted – 30 MPH,” and, of course, the intersection that was visible from a quarter mile away.

This Court should uphold the order granting summary judgment, as the State did not breach a duty owed to Ms. McManus. The record

consists of overwhelming expert opinion that SR 99 in its approach to the intersection at South Holden Street was reasonably safe for ordinary travel. In fact, there is no expert testimony to the contrary. The State met, if not exceeded, all binding regulations to ensure that the roadway in question was not inherently dangerous, and in adequately notifying drivers of changes in the roadway condition.

2. Assuming, For Purposes Of Argument, That The State Did Breach A Duty, Its Breach Cannot Be The Cause In Fact Of The Accident Because Ms. McManus Cannot Show That Any Additional Signage Would Have Prevented The Accident

Ms. McManus did not show that the alleged negligence of the State was the cause in fact of the accident. Failure to warn, or a mistaken warning, is not the proximate cause of an accident where the negligent driver was not misled or deceived thereby. *Johanson v. King Cy.*, 7 Wn.2d 111, 121-23, 109 P.2d 307 (1941); *Nakamura v. Jeffery*, 6 Wn. App. 274, 276, 492 P.2d 244 (1972). The burden is upon Ms. McManus to establish that the alleged failures of the State did in fact deceive and mislead Mr. Kim, the at-fault driver. *Johanson*, 7 Wn.2d at 122. “Washington Courts have repeatedly held that in order to hold a governmental body liable for an accident based upon [an alleged failure] to provide a safe road-way, the plaintiff must establish more than that the

government’s breach of duty might have caused the injury.” *Miller v. Likins*, 109 Wn. App 140, 145, 34 P.3d 835 (2001) (emphasis original).

Ms. McManus did not show that Mr. Kim was in fact deceived or misled by the roadway condition at issue. Ms. McManus presented no evidence from Mr. Kim to substantiate such claims. Instead, Ms. McManus only offered unfounded and speculative assertions that Mr. Kim would have appreciated the stoplight if one more sign had been erected.⁷ But because Ms. McManus presented no evidence on behalf of Mr. Kim, nor any expert analysis on sight lines, reaction times, etc., any question that Mr. Kim was in fact misled remains speculative. Speculation and conjecture do not rise to the level of legitimate evidence. *Johanson*, 7 Wn.2d at 121-23 (because “[t]he jury may not enter into the realm of conjecture or speculation[,]” “the burden is upon [the plaintiff] to establish, by direct or circumstantial evidence, that the [alleged roadway design defect] did in fact deceive and mislead the [at-fault] driver[.]”). Speculation and conjecture cannot not defeat a motion for summary

⁷ Ms. McManus uses “inductive” and “deductive” logic in an attempt to overcome the threshold factual defect: nothing in the record suggests that Mr. Kim was in fact deceived or misled by the roadway condition. *See, e.g.*, Br. Appellant at 18-24; RP at 25-6. In oral argument, the State pointed out that there are competing explanations for how this accident occurred: it is equally possible that Mr. Kim appreciated the stoplight when it became visible from a quarter mile away, fell asleep shortly thereafter – which would be consistent with the testimony of Mr. Zell – but reemerged from his sleep moments before impact. RP at 35-36. As such, it is pure speculation to conclude that one more sign would have prevented this accident.

judgment. *Doe v. State, Dept. of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997).

A recent Division I case illustrates why summary judgment was appropriate. In *Moore v. Hagge*, 158 Wn. App. 137, 241 P.3d 787 (2010), a pedestrian sued the City of Seattle, alleging that it was negligent. *Id.* at 142. The plaintiff, a pedestrian, was injured when he jumped over a ditch and collided with defendant Hagge's moving vehicle. *Id.* at 140-142. The plaintiff alleged that the city should have deployed more signage and safeguards to make him more aware of the roadway conditions, and that the city's failure caused him to sustain injuries. *Id.* at 149.

The city moved for summary judgment, arguing that it could not be liable because there were competing explanations for how the injurious event occurred. *Moore*, 158 Wn. App. at 143. Specifically, no one saw the collision, and the plaintiff had no memory of the accident. *Id.* This Court granted the city's motion, saying that when "two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Id.* at 148, citing *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). As such, this Court upheld summary judgment when no evidence, direct or circumstantial, supported allegations that additional

safeguards would have made the plaintiff more aware of the roadway conditions, and when “the most that [the plaintiff] can show is that the accident might not have happened if the city had installed additional safeguards.” *Moore*, 158 Wn. App. at 151-52 (emphasis added).

As in *Moore*, Ms. McManus argues that additional safeguards would have prevented this accident. Also, as in *Moore*, Ms. McManus advances this theory without any factual evidence to substantiate such claims. Because of this factual defect, the State did what the City of Seattle did in *Moore*: it moved for summary judgment, arguing that it could not be liable because there were competing explanations for how the injurious event occurred. In fact, no evidence has been produced to support Ms. McManus’s claims that allegations of inadequate signage did in fact deceive or mislead Mr. Kim. As such, as in *Moore*, the most that Ms. McManus can show is that the accident might not have happened if the State had installed additional safeguards. Due to the ruling in *Moore*, such a position is without merit.

The burden of proof is upon Ms. McManus to establish that the alleged failures of the State did in fact deceive and mislead Mr. Kim. But because Ms. McManus can only speculate as to whether additional signage would have prevented this accident, however, the alleged negligent actions of the State cannot be the cause in fact of the accident.

Nothing indicates that additional signage would have led to a different result. This Court should utilize cases like *Moore*, and conclude that the State's alleged inaction was not the cause in fact of this accident.

3. The Legal Cause Of The Accident Was The Criminally Negligent Driving Of Mr. Kim

For Ms. McManus to prevail, she must also show that the State is legally responsible for her injuries. Legal causation is a question of law, not a question of fact. *See, e.g., Little*, 132 Wn. App. at 780.

In contrast to the "cause in fact" rule, *supra*, legal causation "rests on policy considerations as to how far the consequences of a defendant's act should extend." *Hartley*, 103 Wn.2d at 779. It also "involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* (emphasis added). Legal causation is to be determined on "mixed considerations of logic, common sense, justice, policy, and precedent." *Id.* at 779 (quoting *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974), overruled on other grounds). Washington courts have consistently held as a matter of law that, where the carelessness and/or recklessness of one driver causes injury to another, the design, maintenance or signage of the roadway is not the legal cause of the injury. *See, e.g., Klein v. City of Seattle*, 41 Wn. App. 636, 705 P.2d 806 (1985).

In *Klein*, a driver was crossing the West Seattle Bridge, where because of construction, the city had detoured westbound traffic to a lane that was usually one of two lanes of eastbound traffic. *Klein*, 41 Wn. App. at 637-38. Police later estimated that the errant driver was driving between 19 and 33 miles over the speed limit when he lost control, crossed the center line and collided head on with an oncoming car. *Id.* Framing its inquiry into legal causation after the *Hartley* decision, the court identified one simple question: “was the defendant under a duty to protect the plaintiff against the event which did in fact occur?” *Klein*, 41 Wn. App. at 639. The *Klein* court found that the City of Seattle was “under no duty to protect [the plaintiff] from the extreme carelessness of [the errant driver].” Specifically, the court held:

To impose liability on the City under these circumstances would . . . force the construction of our highways, not for the use and safety of the reasonably prudent motorist, but solely for the purpose of protecting that motorist from the depredations and negligence of the reckless [and] careless . . . operator. No such insurance policy has been or can be imposed upon the defendant.

Id. at p. 639.

The *Klein* rationale was followed in *Braegelmann v. Cy. of Snohomish*, 53 Wn. App. 381, 766 P.2d 1137 (1989), *rev. denied*, 112 Wn.2d 1020 (1989), overruled on other grounds. There, a driver going approximately 15 miles over the speed limit and travelling, for unknown

reasons, on the wrong side of the road, crested a hill in front of the plaintiff's oncoming car, causing a head on collision. *Id.* at 382. Although the county conceded both negligent maintenance and design of the highway for purposes of its motion, the trial court granted the county's summary judgment motion. *Id.* at 383. It held that, regardless of the county's negligence, its actions were not the legal cause of the accident.

The appellate court affirmed the dismissal:

Here, as in *Klein*, we have a head-on collision in which the at-fault driver was speeding, crossed the center line, and struck an oncoming vehicle. The present case also involves the additional factor of . . . the at-fault driver, being highly intoxicated at the time of the collision Therefore, the county met its burden of showing that it was entitled to summary judgment based on the doctrine of legal causation.

Id. at 386.

Absence of legal causation also dictated the result in *Medrano v. Schwenderman*, 66 Wn. App. 607, 836 P.2d 833 (1992). There, while driving some friends home, defendant Schwendeman lost control of his truck while going between 10 to 15 miles over the speed limit. *Id.* at 609. After losing control, the truck moved over the shoulder of the road, and slammed into a pole maintained by Puget Sound Power and Light, causing serious injuries to at least one of his passengers. *Id.* Prior to the civil suit, Schwendeman was tried and convicted of two counts of vehicular assault.

Id. at 609-10. During the civil trial; however, Schwendeman attempted to limit his responsibility for the collision by claiming that the roadway and/or placement of the power pole were contributing causes of the collision. *Id.* at 601. The appellate court found it unnecessary to determine the cause in fact of the crash. *Id.* Instead, it analyzed legal causation, finding that even if King County improperly maintained the roadway and/or Puget Power negligently placed the power pole, both of those actions were too remote to impose liability in the face of Schwendeman's reckless driving:

We conclude that neither logic, common sense, justice, nor policy favor a decision that would subject the County and Puget Power to legal liability on these facts. The County and Puget Power should not be required to protect against the consequences of criminally reckless drivers. The factual basis for this determination is undisputed, that being Schwendeman's conviction of vehicular assault which required a finding of recklessness.

The question is whether, as a matter of public policy, the connection between the defendant's acts and their ultimate result is "too remote or insubstantial to impose liability." Here it was Schwendeman's driving that was the legal cause of the accident. Considering his driving, the County's alleged improper maintenance of the road and/or shoulder and the possible negligent placement of the pole by Puget Power are too remote to impose liability.

Id. at 613-14 (internal citations omitted) (emphasis added).

The validity of the *Klein, Braegelmann* and *Medrano* line of cases was acknowledged in *Keller*. *Keller*, 146 Wn.2d at 252. Although the

Washington State Supreme Court held that a government entity owes a duty to all persons, whether negligent or fault free, *Id.* at 249, it also recognized that “municipalities are not insurers against accidents or the guarantors of public safety and are not required to anticipate and protect against all imaginable acts of negligent drivers[,]” and that “the court still retains its gatekeeper function and may determine that a municipality’s actions were not the legal cause of the accident.” *Id.* at 252.

These cases provide a great deal of guidance in concluding that Mr. Kim, not the State, was the legal cause of the accident. As in *Klein* and *Braegelmann*, Mr. Kim exhibited extreme carelessness and disregard for all warning devices. Mr. Kim grossly exceeded the speed limit when he sped by Mr. Zell, and he displayed erratic driving when, only moments later, Mr. Zell observed him to be driving well below the speed limit and hunched over, possibly asleep; even Ms. McManus concedes that Mr. Kim operated his vehicle in excess of the posted speed limit. Further, Mr. Kim ignored every visual, audible, and physical warning device when, for no apparent reason, he raced towards the stopped McManus vehicle. All observations indicate that nothing would have prevented Mr. Kim from slamming into the McManus vehicle, as the police report indicates that Mr. Kim “did not plan to stop” at the intersection, and that Mr. Kim could not even recall the events leading up to the collision.

Further, as in *Medrano*, Mr. Kim's driving was so egregious that it resulted in criminal liability. The responding officer cited Mr. Kim for criminally reckless driving because he exercised willful or wanton disregard for the safety of others. RCW 46.61.500; *see also Medrano*, 66 Wn. App. at 609-10 ("wanton disregard" means that the driver was "driving in a rash or heedless manner, indifferent to the consequences."). Mr. Kim later pled guilty to criminally negligent driving, thus admitting he engaged in conduct so negligent that it would likely endanger others. Former RCW 46.61.525, Laws of 1979, 1st ex. sess., ch. 136, § 86.

The *Klein*, *Braegelmann* and *Medrano* courts each found that, as a matter of law, the government has no duty to guard against the type of extreme carelessness exhibited by Mr. Kim. These cases establish that the governmental operator of a public highway simply cannot protect innocent parties from every egregious act of persons who are so careless that their actions are, by definition, random and unpredictable.

Summary judgment was appropriate in each case where the government met its burden and demonstrated that the errant driver's conduct rose to the level of extreme carelessness, therefore removing legal liability from the governmental entity. By applying the analyses employed in these cases to the undisputed facts, there is but one logical conclusion: the State's actions or inactions are not the legal cause of the

accident. Rather, the sole proximate cause of the accident at issue was the negligent driving of Mr. Kim.

C. Judge Craighead Did Not Abuse Her Discretion In Utilizing Civil Rule 37 To Compel Ms. McManus To Cure Discovery Defects, And To Discontinue Dilatory Discovery-Related Behavior

The issue – whether Judge Craighead was authorized to compel Ms. McManus to cure discovery defects and to sign authorizations and stipulations – is not complicated. The discovery process is governed by a mandatory spirit of cooperation and forthrightness so as to ensure the efficient functioning of modern trials. *Johnson v. Jones*, 91 Wn. App. 127, 132, 955 P.2d 826 (1998) (referencing *Washington State Physicians Ins. Exch. Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993)). Failing to adhere to the rules governing discovery can result in an order to compel adherence, or any other order that is just. CR 37.

Civil Rule 37 states, in pertinent part, the following:

(a) Failure of a Party to . . . Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party . . . fails . . . to serve answers or objections to interrogatories submitted under rule 33, . . . or . . . to serve a written response to a request for production of documents or inspection submitted under CR 34, . . . the court . . . may make such orders in regard to the failure as are just, and among others, it may take any action

authorized under CR 37. [F]or purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

KCLCR 37(d).

Ms. McManus abused the discovery process. She invited the State to send ROI forms so that the State could independently obtain her medical, educational, and employment records. Ms. McManus revoked this invitation in a failed attempt to obtain the following inappropriate *quid pro quo*: Ms. McManus was trying to use information that she admitted was discoverable in order to leverage the State into stipulating to the admissibility of items that had significant evidentiary defects.

Several months went by between Ms. McManus's first promise to sign the ROI forms and Ms. McManus's offer of the proposed *quid pro quo*. By the time that Ms. McManus made it clear that she would not sign forms that her attorney admitted were customary, court intervention was necessary. As such, the State told Ms. McManus that it would file a motion to compel. Instead of curing the discovery defect, Ms. McManus chose to challenge the court's authority.

The core problem in the late summer of 2010 was that trial was rapidly approaching, and Ms. McManus had outstanding discovery defects. Further, the State detrimentally relied on Ms. McManus's promise that she would sign ROI forms, and there was insufficient time to

obtain the requisite information through alternate means once the promise was revoked unless/until the State agreed to the inappropriate *quid pro quo*. Judge Craighead agreed with the State, and ordered Ms. McManus to cure all outstanding discovery defects, and to sign ROI forms so that independent discovery could take place.

Ms. McManus tries to frame the issue as concerns regarding the State's standard ROI form. Such complaints should be dismissed for three reasons. First, the State's standard ROI form is disseminated statewide at incalculable numbers per month, and has been accepted by an incalculable number of holders of information. Second, at no point until after the order to compel was issued did Ms. McManus provide an alternate form. Had the issue truly been the adequacy of the State's ROI form, and not the willful withholding of information in hopes that the State would acquiesce to the proposed *quid pro quo*, then Ms. McManus would have offered an alternative ROI form in lieu of court intervention. Finally, Judge Craighead did not order Ms. McManus to sign the State's ROI form. Rather, Judge Craighead ordered Ms. McManus to sign any ROI so that the holders of information would disseminate materials they possessed. The discovery defect was rendered moot once Ms. McManus provided her own form.

The discovery issue before this Court is straight forward. Ms. McManus deployed dilatory discovery tactics in a failed attempt to secure an inappropriate *quid pro quo*. The State rejected Ms. McManus's offer, and Ms. McManus failed to cure discovery defects. Because trial was rapidly approaching, the State utilized CR 37, and asked Judge Craighead to fashion any order that was just under the circumstances. Judge Craighead did not abuse her discretion when she ordered Ms. McManus to adhere to the rules governing discovery, to cure outstanding discovery defects, and to have Ms. McManus sign ROI forms.

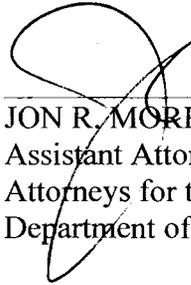
V. CONCLUSION

Summary judgment should be upheld for two reasons. First, Ms. McManus presents no competent evidence to support claims of State-related negligence. Instead, she continues to rely upon inadmissible evidence that was stricken from the record. The undisputed facts establish that the roadway was safe for ordinary travel, and that the accident was caused by the criminally negligent driving of Mr. Kim. Second, the discovery issue is straightforward: Judge Craighead did not abuse her discretion in ordering Ms. McManus to cure discovery defects, and to sign

releases of information. The State respectfully requests that the order granting summary judgment, as well as the discovery order, be affirmed.

RESPECTFULLY SUBMITTED this 6 day of April, 2011.

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CERTIFICATE OF SERVICE

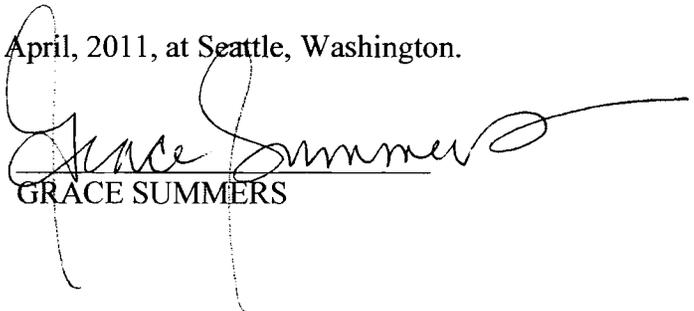
I certify under penalty of perjury in accordance with the laws of the State of Washington that on the undersigned date the original and one copy of the preceding Brief of Respondent State of Washington Department of Transportation and Certificate Of Service were filed in the Washington State Court of Appeals, Division I, by legal messenger, at the following address:

Court of Appeals of Washington, Division I
One Union Square
600 University Street
Seattle, WA 98101

And, I further certify that a copy of the preceding Brief of Respondent State of Washington Department of Transportation was served on counsel at the following addresses, by U.S. Mail, Certified:

Thomas Cline
2502 N. 50th Street
Seattle, WA 98103

DATED this 6th day of April, 2011, at Seattle, Washington.


GRACE SUMMERS