

NO. 74033-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JAMES C. FUDA, as Personal Representative of the
Estate of AUSTIN FUDA, et al.,

Petitioners,

v.

KING COUNTY, a municipal corporation;
LONI MUNDELL, a single person; et al.,

Respondents.

FILED
Jul 05, 2016
Court of Appeals
Division I
State of Washington

APPELLANTS' OPENING BRIEF

Appeal from the Superior Court of King County,
Cause No. 11-2-19682-8
The Honorable Tanya Thorp, Presiding Judge

DORE LAW GROUP, PLLC
James J. Dore, Jr., WSBA No. 22106
Attorney for Appellants
1122 West James Street
Kent, WA 98032
Ph: 253-850-6411
Fax: 253-850-3360

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
1. Did Judge Bowman err in finding that <i>Avellaneda</i> and the doctrine of discretionary immunity apply in this case?	3
2. Did Judge Bowman err in granting discretionary immunity to King County for the 1994 field measurements and decision made by traffic engineer Norton Posey to remove the accident site from the County guardrail priority array?	4
3. Did Judge Thorp err in expanding and applying Judge Bowman’s discretionary immunity Order to Plaintiff’s claim that King County negligently failed to correct an inherently dangerous condition on the roadway by, inter alia, installing guardrail or other barriers?4	
4. Did Judge Thorp err in excluding expert testimony regarding the need for, absence of, or presence of guardrails and/or other barriers along the Green River Road?	4
5. Did Judge Thorp err by mischaracterizing the Appellants’ claim and incorrectly stating law in jury instructions 14 through 17?.....	4
6. Did Judge Thorp err in imposing sanctions on Ms. Deutscher based upon a witness’ answers where Ms. Deutscher’ questions sought no information that would violate the orders in limine?.....	4
7. Did Judge Thorp err in imposing sanctions on Mr. Dore	

	for inadvertently saying the word “guardrail” while reading verbatim an excerpt from the witness’s deposition?	4
8.	Did Judge Thorp err in excluding Appellants’ expert witnesses’ testimony regarding barriers other than guardrails under <i>Burnet</i> where no discovery order was violated by disclosure of opinions that a barrier other than a guardrail was warranted and would have prevented the deaths of the Appellants’ children?	5
9.	Should the jury verdict be vacated where the jury instructions included incorrect statements of law and incomplete facts, and instructed the jury that it could not consider relevant, material, and probative evidence that would have supported Appellants’ claims?	5
10.	Did Judge Thorp err in imposing sanctions under <i>Burnet</i> and excluding Appellants’ expert witness testimony regarding barriers other than guardrails based upon the June 29, 2015 expert witness disclosures?.....	5
11.	Did cumulative error deny Appellants a fair trial where Judge Bowman’s initial erroneous Order applying <i>Avellaneda</i> to this case was expanded by Judge Thorp in a series of rulings excluding all evidence relating to any sort of roadside barrier at the accident site, culminating in jury instructions that denied Appellants the ability to present their theory of the case to the jury?....	5
IV.	STATEMENT OF THE CASE	5
A.	Facts	5
B.	Procedure Below.....	9
	Summary Judgment Proceedings.....	9
	Motion to Reopen Discovery	14
	King County’s Motion in Limine re Guardrail Evidence ..	14

King County’s Motion for Reconsideration and Alternative Relief.....	16
Motions in Limine.....	17
“New” Expert Witness Disclosures on June 29, 2015	18
Jury Instructions; Trial; Verdict.....	20
Post-Trial Order Imposing Sanctions.....	20
V. ARGUMENT.....	21
A. It was error to grant discretionary immunity to King County where Appellants’ claim was not that the County was negligent in making budgetary decisions, but that the County failed to maintain a road in a reasonably safe condition.....	21
1. <u>The existence of the King County guardrail priority array does not give rise to discretionary immunity from claims for failure to provide reasonably safe roads</u>	23
2. <u>Avelleneda is distinguishable from this case</u>	26
B. Discretionary immunity does not apply to Mr. Posey’s 1994 decision to remove the accident site from King County’s guardrail priority array.	27
1. <u>Mr. Posey was not a “high-level executive” of King County at the time he decided to remove the accident location from the guardrail priority array.</u>	27
2. <u>Mr. Posey’s decision was not the result of a conscious balancing of risks and advantages.</u>	28
C. Judge Thorp misinterpreted Judge Bowman’s Orders and based her evidentiary decisions on her erroneous	

	view of the law.....	29
D.	Judge Thorp’s erroneous view of the law and her prior evidentiary rulings resulted in jury instructions that misstated applicable law, included inapplicable law, omitted material facts, and misstated Appellants’ claim, preventing Appellants from arguing their theory of the case to the trier of fact.....	35
	<i>Jury Instruction No. 14</i>	37
	<i>Jury Instruction No. 15</i>	38
	<i>Jury instruction 16</i>	39
	Notice	39
	Duty.....	41
	Inapplicable law	42
	<i>Jury Instruction No. 17</i>	44
E.	There was neither a factual nor a legal basis to impose sanctions on Appellants’ counsel for violation of orders on King County’s motions in limine.....	47
	1. <u>There was no factual basis to sanction Ms. Deutscher</u>	49
	2. <u>There was no factual basis to sanction Mr. Dore</u> ...	52
	3. <u>Judge Thorp abused her discretion by failing to comply with Chapter 7.21 RCW and case law interpreting the civil contempt statutes</u>	56
F.	Neither Washington law nor the facts in this case support sanctions for “new” expert opinions submitted in response to the June 16 Orders in Limine.....	58
	<i>Paragraphs B.1., B.3., and B.5.</i>	59

<i>Paragraph B.2</i>	60
<i>Paragraph B.3</i>	61
<i>Paragraph B.4</i>	62
<i>Paragraphs B.6. and B.7.</i>	63
<i>Paragraph B.8</i>	65
<i>Paragraph B.9</i>	68
<i>Paragraph B.10</i>	69
<i>Paragraph B.11</i>	70
<i>Paragraphs B.12. and B.13.</i>	71
G. The verdict must be vacated because the jury was instructed with incorrect law, inapplicable law, and incomplete facts.	73
H. Cumulative error denied Appellants their right to a fair trial.	73
VI. CONCLUSION	75

APPENDIX

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289, 294 (2012).....	47
<i>Avellaneda v. State of Washington</i> , 167 Wn. App. 474, 273 P.3d 477 (2012).....	2, 26, 27
<i>Bering v. SHARE</i> , 106 Wn.2d 212, 721 P.2d 918 (1986).....	36
<i>Board of Regents of the Univ. of Wn. v. Frederick & Nelson</i> , 90 Wn.2d 82, 579 P.2d 346 (1978).....	36
<i>Broadway Hosp. & Sanitarium v. Decker</i> , 47 Wn. 586, 92 P. 445 (1907).....	68
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)....	59
<i>Dix v. ICT Grp., Inc.</i> , 160 Wn.2d 826, 833, 161 P.3d 1016, 1020 (2007).....	29
<i>Evangelical United Brethren Church v. State</i> , 67 Wn.2d 246, 407 P.2d 440 (1965).....	1, 32
<i>Feis v. King Cty. Sheriff's Dep't</i> , 165 Wn. App. 525, 267 P.3d 1022, 1029 (2011).....	23
<i>Fenimore v. Donald M. Drake Const. Co.</i> , 87 Wn.2d 85, 549 Pa.2d 483 (1976).....	31
<i>Gammon v. Clark Equip. Co.</i> , 38 Wn. App. 274, 686 P.2d 1102 (1984), <i>aff'd</i> , 104 Wn.2d 613, 707 P.2d 685 (1985).....	35
<i>Glenn v. Brown</i> , 28 Wn. App. 86, 622 P.2d 1279 (1980).....	36

<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	29, 30
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992).....	47
<i>In re Dependency of A.K.</i> , 162 Wn.2d 632, 174 P.3d 11 (2007)	48
<i>In re M.B.</i> , 101 Wn. App. 425, 3 P.3d 780, 795 (2000).....	49
<i>In re Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835, <i>clarified</i> , 123 Wn.2d 737, 870 P.2d 964, <i>cert. denied</i> , 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).....	73
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	35
<i>Laguna v. Washington State Dept. of Transp.</i> , 146 Wn. App. 260, 192 P.3d 37 (2008).....	42, 43
<i>Lewis v. Simpson Timber Co.</i> , 145 Wn. App. 302, 189 P.3d 178 (2008) ..	36
<i>Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)</i> , 85 Wn.2d 278, 534 P.2d 561 (1975).....	48, 49
<i>Miotke v. City of Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984), <i>abrogated on other grounds</i> , 107 Wn.2d 112, 727 P.2d 644 (1986).....	29
<i>Moreman v. Butcher</i> , 126 Wn.2d 36, 891 P.2d 725 (1995).....	49
<i>Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.</i> , 178 Wn. App. 702, 315 P.3d 1143 (2013), <i>review denied</i> , 180 Wn.2d 1011 (2014).....	29
<i>Nguyen v. City of Seattle</i> , 179 Wn. App. 155, 317 P.3d 518 (2014)	43
<i>Nord v. Eastside Ass'n Ltd.</i> , 34 Wn. App. 796, 664 P.2d 4, 5 (1983).....	59
<i>Owen v. Burlington Northern and Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).....	23, 45
<i>Rivers v. Washington State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175, 1181 (2002).....	59

<i>Rockwell v. Peyran</i> , 172 Wn. 434, 20 P.2d 841, 841 (1933).....	68
<i>RTC Transp., Inc. v. Walton</i> , 72 Wn. App. 386, 864 P.2d 969 (1994).....	69
<i>Ruff v. King County</i> , 72 Wn. App. 289, 865 P.2d 5 (1993), <i>rev'd on other grounds</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	1, 23, 24, 25, 67
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)	23, 24, 25, 34
<i>State v. Berty</i> , 136 Wn. App. 74, 147 P.3d 1004 (2006), <i>as amended</i> (Jan. 9, 2007).....	48, 49, 57
<i>State v. Hodges</i> , 118 Wn. App. 668, 77 P.3d 375 (2003), <i>review denied</i> , 151 Wn.2d 1031, 94 P.3d 960 (2004)	74
<i>State v. Munguia</i> , 107 Wn. App. 328, 26 P.3d 1017, 1021 (2001).....	59
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	26
<i>State v. Saunders</i> , 120 Wn. App. 800, 86 P.3d 232 (2004)	74
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	35
<i>Stewart v. State</i> , 92 Wn.2d 285, 597 P.2d 101 (1979).....	21
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243, (1992)	22, 28
<i>Thompson v. King Feed & Nutrition</i> , 153 Wn.2d 447, 105 P.3d 378 (2005).....	36, 73

Cases From Other Jurisdictions

<i>Johnson v. County of Nicollet</i> , 387 N.W.2d 209 (1986).....	25
---	----

1. INTRODUCTION

For the second time in 23 years, this Court is being asked whether, based upon the existence of its “guardrail priority array,” King County is entitled to discretionary immunity from claims of negligence for failing to maintain a roadway in a reasonably safe condition. In *Ruff v. King County*¹, this Court analyzed the origin and implementation of the County’s guardrail priority array under *Evangelical*² and answered, unequivocally, “no.”³

Neither the origin nor the implementation of the King County guardrail priority array by County engineering employees has changed in 23 years. Nevertheless, discretionary immunity was granted to the County for an engineering employee’s 1994 decision to remove the accident site from the priority array. This initial erroneous application of discretionary immunity was adopted, broadened and expanded multiple times throughout pretrial proceedings and trial, culminating in jury instructions containing clear misstatements of law that severely prejudiced Appellants, and resulting in the post-trial imposition of sanctions on appellants’

¹ 72 Wn. App. 289, 294 865 P.2d 5 (1993), *reversed on other grounds*, 125 Wn.2d 697, 887 P.2d 886 (1995).

² *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965).

³ *Ruff*, 72 Wn. App. at 294 865 P.2d (“King County asserts that its guardrail prioritization system shields it from liability based on discretionary immunity. We disagree.”)

counsel. Appellants seek vacation of the jury verdict and remand for a new trial with instructions to correct the errors identified herein.

II. ASSIGNMENTS OF ERROR

1. Judge Bowman erred in ruling that *Avellaneda*⁴ applies to this case.

2. Judge Bowman erred in ruling that, under *Avellaneda*, King County was entitled to discretionary immunity for 1994 field measurements on at the accident site and County traffic engineer Norton Posey's decision to remove the accident site from the County's "guardrail priority array" based upon those measurements.

3. Judge Thorp erred in ruling that *Avellaneda* applies in this case.

4. Judge Thorp erred in granting King County discretionary immunity for its failure to erect guardrail or any other type of barrier at the accident site where one was warranted and necessary.

5. Based upon her incorrect interpretation of Judge Bowman's Orders and her own incorrect view of the law governing discretionary immunity, Judge Thorp erred by granting King County's Motions in Limine Number 6, 10, and 13.

6. Judge Thorp erred by giving the jury Instructions No. 14, 15, 16, and 17, set out verbatim in the Appendix, which instructions misstate

⁴ *Avellaneda v. State of Washington*, 167 Wn. App. 474, 273 P.3d 477 (2012).

the law and omit material facts.

7. Judge Thorp erred in imposing sanctions on Ms. Deutscher based upon a witness's answers to her questions.

8. Judge Thorp erred in imposing sanctions on Mr. Dore for an unintentional violation of an order in limine while reading verbatim from an excerpt of a witness's deposition that included the word "guardrail."

9. Error is assigned to Paragraphs B-1 through B-13 in the Order Imposing Sanctions on Ann Deutscher and James Dore, Jr., set out verbatim in the Appendix.

10. Judge Thorp erred in imposing sanctions under *Burnet*, excluding Appellants' expert witness testimony regarding barriers other than guardrails, based upon the June 29, 2015 expert witness disclosures.

11. The jury verdict was based on instructions that misstated the law, omitted material facts, and prevented Appellants from presenting their theory of the case.

12. Cumulative error denied Appellants a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Judge Bowman err in finding that *Avellaneda* and the doctrine of discretionary immunity applied to this case? Assignment of Error No. 1 and 12.

2. Did Judge Bowman err in granting discretionary immunity

to the 1994 field measurements and decision made by traffic engineer Norton Posey to remove the accident site from the King County guardrail priority array? Assignment of Error No. 2 and 12.

3. Did Judge Thorp err in expanding and applying Judge Bowman's discretionary immunity Order to Plaintiff's claim that King County negligently failed to correct an inherently dangerous condition on the roadway by, inter alia, installing guardrail or other barriers?

Assignments of Error No. 3, 4, and 12.

4. Did Judge Thorp err in excluding expert testimony regarding the need for, absence of, or presence of guardrails and/or other barriers along the Green River Road? Assignment of Error No. 5 and 12.

5. Did Judge Thorp err by mischaracterizing the Appellants' claim and incorrectly stating the law in jury instructions 14 through 17?

Assignment of Error No. 6 and 12.

6. Did Judge Thorp err in imposing sanctions on Ms. Deutscher based upon a witness' answers to Ms. Deutscher's questions?

Assignment of Error No. 7 and 12.

7. Did Judge Thorp err in imposing sanctions on Mr. Dore for inadvertently uttering the word "guardrail" while reading verbatim an excerpt from the witness's deposition? Assignment of Error No. 8 and 12.

8. Did Judge Thorp err in excluding Appellants' expert

witnesses' testimony regarding barriers other than guardrails under *Burnet* where there was a reasonable excuse for the untimely witness disclosure?

Assignment of Error No. 9 and 12.

9. Should the jury's verdict be vacated where the jury instructions included incorrect and incomplete statements of law and omitted material facts, preventing Appellants from presenting their theory of the case even though there was substantial evidence to support it?

Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 11 and 12.

10. Did Judge Thorp err in imposing sanctions under *Burnet* and excluding Appellants' expert witness testimony regarding barriers other than guardrails based upon the June 29, 2015 expert witness disclosures? Assignment of Error No. 10 and 12.

11. Did cumulative error deny Appellants a fair trial where Judge Bowman's initial error in finding that *Avellaneda* applied to this case was compounded by Judge Thorp in a series of rulings excluding all evidence relating to any sort of barrier at the accident site and culminated in jury instructions that denied Appellants the ability to present their theory of the case to the jury? Assignments of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

//

//

IV. STATEMENT OF THE CASE

A. Facts

Appellants in this action are the parents of two minor children who drowned after the Volkswagen in which they were passengers slid across the Green River Road, across the narrow, soft shoulder and down the unrecoverable slope into the Green River. James Fuda is the father of Austin Fuda, who was 13 at the time of his death. Dorianne Beaupre and Chad Beaupre (now deceased) are the parents of Hunter Beaupre, who was 17 months old when he drowned. Loni Mundell, the driver of the Volkswagen at the time of the accident on November 7, 2008, was 16 years old.

On the morning of the accident, it was raining, and large mature maple trees that were over 16 inches in diameter and whose branches extended across both lanes had shed copious amounts of leaves onto the surface of the Green River Road.⁵ Photographs of the road near the scene of the subject accident show whole and crushed leaves scattered in the travel lanes and depict leaves and other debris collected in the center of the road and along the fog lines.⁶ Such leaves and debris caused “ponding” of water on the roadway in the vicinity of the accident.⁷ The tall

⁵ CP 608-610.

⁶ CP 608-610.

⁷ CP 612-613.

trees cast a shadow over the roadway, further diminishing the visibility of the pavement markings.⁸ What cannot be seen in the photographs is the superelevation of the roadway, which caused rainwater to flow across from the higher side of the road to the lower side of the road.⁹

The northbound lane, in which Ms. Mundell was traveling when she lost control, was 9'3" wide measured from the center of the double yellow line to the center of the fog line, and only 8-1/2' wide inside the lane stripes.¹⁰ The shoulder of the road abutting the Green River in the area of the accident measured 8 feet 5 inches, and was composed of poorly compacted gravel, soft soil and grass.¹¹ The slope from the shoulder down to the river at the accident site was 2 feet vertical to 1 foot horizontal (2V:1H), which is a "non-recoverable slope,"¹² meaning that an errant vehicle would inevitably continue downward to the bottom of the slope.¹³

The Green River at the bottom of the slope at the accident site was "extremely deep."¹⁴ In spite of the fact that guardrails had been placed at all other locations where the river approaches the shoulder along the Green River Road between the city limits of Auburn and Kent, there was

⁸ CP 612-613.

⁹ CP 2634, 2625.

¹⁰ CP 2870.

¹¹ CP 2876.

¹² CP 2876.

¹³ CP 2876.

¹⁴ CP 2869.

no guardrail or any other type of barrier to deflect vehicles away from the river at the accident site.¹⁵ There were no warning signs to alert drivers about the narrow lanes, the upcoming curve, the reduced visibility of pavement markings, the slippery surface created by leaves and debris, the soft, narrow shoulder, or the non-recoverable slope down to the Green River.¹⁶

There were no eyewitnesses to the subject accident. Ms. Mundell, who alone experienced the precise conditions on the road at the time, testified during her deposition that she had control of her car until she started into the curve beneath the large maple trees, where the conditions changed because there was debris and leaves on the roadway, which she stated was “the contributing factor of [her] losing control.”¹⁷ During her deposition, Ms. Mundell testified that when the car began to lose traction, “it felt like black ice.”¹⁸ She explained: “right before the accident, I had complete control of my car, and once I reached the leaves and, you know, the road was significantly more wet there, it felt -- . . . I just lost traction.”¹⁹

After Ms. Mundell lost control of the Volkswagen, the vehicle

¹⁵ CP 2878-2879.

¹⁶ CP 4237-4238; 4682

¹⁷ CP 2599-2600.

¹⁸ CP 2598.

¹⁹ CP 2599.

rotated, spinning across the oncoming traffic lane, then slid off the roadway onto the soft and narrow shoulder and down the steep embankment into the Green River.²⁰ Ms. Mundell was cited for driving too fast for the conditions.²¹

B. Procedure Below

Appellants filed suit against Ms. Mundell and King County, alleging that the County failed to design, construct, and maintain the Green River Road in a reasonably safe condition, that conditions in and on the roadway and its shoulder were deceptive and dangerous, that the condition of the road required warnings to drivers about the hazardous conditions and/or a guardrail or other barrier at the location of the accident, and that King County's negligence was a proximate cause of the deaths of the Plaintiffs' children.²²

Summary Judgment Proceedings - King County filed a Motion for Summary Judgment dismissing "all" of the Appellants' claims, segregating and characterizing the factual allegations of Appellants' Complaints as individual multiple "claims," including a so-called "guardrail claim."²³ Relying on the *Avellaneda* decision, King County argued that its "priority array program . . . [is] protected by discretionary

²⁰ CP 2868.

²¹ CP 4730; 8/4/15 VRP at page 50.

²² CP 2491-2511; CP 2454 - 2486.

²³ CP 2534.

immunity and the separation of powers doctrine,”²⁴ that it is “entitled to discretionary immunity for decisions and actions taken under that priority array program,”²⁵ and therefore, Plaintiffs’ “guardrail theory” should be dismissed.²⁶

Plaintiffs responded to the Motion with argument and supporting law showing that the existence of the County’s “priority array” does not trump or negate its long-established duty “to maintain a roadway in a reasonable safe condition [which] may require a county to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where maintenance of signs or barriers is prescribed by law.”²⁷ Appellants’ experts submitted opinions in support of opposition to the County’s Motion describing the inherently dangerous conditions on and alongside the Green River Road at the location of the accident.²⁸ William Haro, Appellants’ expert traffic engineer, opined that “[t]he below-standard lane width and other conditions of the Green River Road at the location and time of the accident led to a roadway that was inherently dangerous and deceptive and misleading to travelers along the

²⁴ CP 2535.

²⁵ CP 2552.

²⁶ CP 2556.

²⁷ CP 2578.

²⁸ CP 2625; 2633-2634; 2870-2876.

roadway.”²⁹ Dr. Toby Hayes, Appellants’ expert mechanical engineer, presented testimony establishing that a guardrail would have prevented the deaths of Appellants’ children.³⁰

Plaintiffs distinguished the *Avellaneda* case, in which the issue was whether the Department of Transportation’s decision to exclude a particular project during the formulation of its budgetary priority array was entitled to discretionary immunity based on *Evangelical*, and argued that discretionary immunity does not apply in this case because their claim against the County is “not related in any way to the guardrail priority array.”³¹

Judge Bowman denied the County’s Motion for Summary Judgment on the issues of “lack of duty” and “lack of proximate cause,”³² but agreed with King County’s argument that *Avelleneda* was “right on point.”³³ Judge Bowman ruled that under *Avelleneda* and *Evangelical*, the 1994 decision of County traffic engineer Norton Posey to remove the accident site from the County’s guardrail “priority array” and the field measurements upon which Mr. Posey relied to reach his decision were

²⁹ CP 2871.

³⁰ CP 2835 - 2836.

³¹ CP 2582.

³² 11/24/14 VRP, page 57.

³³ 11/24/14 VRP, page 57.

“subject to discretionary immunity.”³⁴

At the end of the hearing, Judge Bowman asked King County to “prepare the discretionary immunity order.”³⁵ King County misnamed the “discretionary immunity order” as “Order Granting King County’s Motion for Summary Judgment to Dismiss Plaintiffs’ Guardrail Claims,” which states:

1. King County’s decision to remove the Green River Road from King County’s guardrail priority array program is entitled to discretionary immunity.

2. Norton Posey’s shoulder measurements constitute data gathering which is part of the decision making process. Accordingly it is also entitled to discretionary immunity.

3. To the extent Mr. Posey’s actions could be characterized as implementing the priority array program, the undisputed testimony is that the guardrail still would not have been installed at the time of this incident given its position in the array.

2. [sic] For these reasons, Defendant King County’s Motion for Summary Judgment regarding Plaintiffs’ guardrail claims is GRANTED.

5. The Court incorporates by reference its oral rulings from November 24, 2014.³⁶

On December 8, 2014, Appellants filed a Motion for Reconsideration,³⁷ arguing:

³⁴ 11/24/14 VRP, page 57; page 58.

³⁵ 11/24/14 VRP, page 63 - page 64.

³⁶ CP 3026.

³⁷ CP 3029-3041.

If the Court's November 26th Order is intended to prevent Plaintiffs from presenting [their] evidence of the inherently dangerous condition and from arguing that King County was negligent in failing to remedy that condition by, inter alia, installing a guardrail, the Court's decision is contrary to more than 75 years of Washington law, including binding Supreme Court cases, and the Court has improperly relieved King County of its burden to prove that adequate corrective actions were taken to eliminate the dangerous condition described by Plaintiffs' experts.³⁸

On December 22, 2014, Appellants filed a Notice of Discretionary Review of Judge Bowman's Order by the Supreme Court.³⁹ Later that same day, Judge Bowman denied the Appellants' Motion for Reconsideration, but clarified his previous Order by stating:

To the extent the Plaintiffs seek clarification, the issues before the Court were **whether the County was entitled to discretionary immunity for its decision in 1994 to remove this accident site from its priority array and whether the data gathering process that supported that decision was entitled to discretionary immunity**. The Court addressed both of these issues in its order. **No other issues were before the Court.**⁴⁰

Appellants believed that this clarification narrowly limited the grant of discretionary immunity to a single 1994 decision by Mr. Posey and the underlying field measurements, conduct entirely unrelated to their claim against King County for failure to maintain a safe roadway. Accordingly, Appellants filed a Motion to Dismiss Notice of Discretionary

³⁸ CP 3039-3040.

³⁹ CP 3154-3156.

⁴⁰ CP 3162-3163.

Review, stating “Appellants voluntarily withdraw the case from review **in light of the order denying reconsideration and clarifying the order subject to appeal,**”⁴¹ which Motion was granted.⁴²

Motion to Reopen Discovery - Based upon Judge Bowman’s clarification of his November 26th Order, Appellants also filed a motion with the Discovery Master, Hon. Bruce Hilyer (ret.), on January 9, 2015, seeking permission to reopen two depositions he had reduced in length based upon Judge Bowman’s original Order.⁴³ During the February 13, 2015 hearing on Plaintiffs’ Motion to Reopen Discovery, the County argued that Judge Bowman had “dismissed” Appellants “guardrail claims in their complaint” “which means King County cannot be held negligent for failure to install a guardrail.”⁴⁴ Addressing Judge Bowman’s clarification of his November 26 Order by stating, the County argued “[j]ust because he gave some classification language that plaintiffs would like to say alter his original order, it doesn’t alter it. Their guardrail claims are still dismissed.”⁴⁵

King County’s Motion in Limine re Guardrail Evidence - On March 15, 2015, King County filed a “Motion in Limine re: Guardrail

⁴¹ CP 3603 (emphasis added).

⁴² CP 3610-3611.

⁴³ CP 3169-3180.

⁴⁴ CP 3620.

⁴⁵ CP 3621.

Evidence or Argument,”⁴⁶ urging Judge Thorp to “rule in limine on the evidentiary effects of the summary judgment dismissal of plaintiffs’ guardrail claims”⁴⁷ because it would “assist the Discovery Master in ruling on plaintiffs’ pending motion to reopen discovery on those dismissed claims.”⁴⁸ The County asked Judge Thorp to enter an “order in limine precluding plaintiffs and Ms. Mundell from putting forth any evidence, testimony, or reference by counsel at trial in any way related to guardrails.”⁴⁹

Appellants responded to the Motion in Limine, once again setting out governing law imposing a duty on King County to keep its roads in reasonably safe condition, including the subsumed duty to install guardrails or barriers where they are required to correct an inherently dangerous condition, regardless of the existence of a “priority array.”⁵⁰

Judge Thorp denied the County’s Motion in Limine, writing:

Judge Bowman’s December 22, 2014 Order Denying Reconsideration clearly identifies the **guardrail** issues that the court addressed and dismissed. **Any argument or theory relating to guardrails not included in the December 22, 2014 Order remains.**⁵¹

On May 22, 2015, the Special Master entered his order granting

⁴⁶ CP 3479-3490.

⁴⁷ CP 3487.

⁴⁸ CP 3487.

⁴⁹ CP 3488.

⁵⁰ CP 3630-3642.

⁵¹ CP 3644 (emphasis added).

Appellants' motion to reopen their depositions of Mr. Posey and Dan Dovey, King County traffic engineers, Judge Hilyer explained that he had previously reduced the deposition time "based upon the supposition that the issues had been substantially narrowed by Judge Bowman's Order of Dismissal of guard rail claims." Judge Hilyer added that "Judge Bowman clarified that his dismissal was more narrowly confined under the *Avellanedas* [sic] case than K[ing] C[ounty] had contended."⁵²

Based upon long-established Washington law governing the County's duty, Judge Bowman's clarification of his November 26th Order, Judge Thorp's March 13, 2015 Order, and Judge Hilyer's ruling reopening depositions, Appellants believed that their claim against King County for failure to keep the Green River Road in a reasonably safe condition, including the allegation that a guardrail or other barrier was required to correct the dangerous condition of the roadway at the accident site, had not been restricted or "dismissed" by Judge Bowman's November 26th Order on discretionary immunity. In fact, as stated by King County itself, the "guardrail issue" was not "finally resolved" until "June 16, 2015 when the Court granted King County's motions to exclude references to guardrails."⁵³

King County's Motion for Reconsideration and Alternative Relief -

⁵² CP 3912. (Emphasis added.)

⁵³ CP 4287.

King County filed a lengthy Motion for Reconsideration of Judge Thorp's Order Denying Motion in Limine re Guardrail Evidence or Argument, repeating its assertion that Judge Bowman's November 26th Order had "dismissed" the so-called "guardrail" claims, and adding a new argument that Judge Bowman's "'clarifying' provision of the Order is inaccurate."⁵⁴

Appellants filed their Response, once again discussing the origin of the so-called "guardrail claim," the inapplicability of *Avellaneda*, and presenting law that establishes the duty of King County to maintain its roadways in a reasonably safe manner, which requires installation of warning signs or erection of a guardrail or other barriers where required to eliminate a dangerous condition.⁵⁵

On April 7, 2015, Judge Thorp entered an Order Denying King County's Motion for Reconsideration, entering "Findings/Conclusions," including: "[t]he Court repeats Judge Bowman's order that Plaintiffs' guardrail claims that fall within the protections of discretionary [sic] immunity were and are dismissed, but **only** those guardrail claims."⁵⁶

Motions in Limine - In spite of her previous orders, on June 16, 2015, Judge Thorp **granted** King County Motion in Limine to exclude "specific references to guardrails," including "any reference for the claims

⁵⁴ CP 3650.

⁵⁵ CP 3659 - 3700.

⁵⁶ CP 3704 (emphasis added).

that fall within the protections of discretionary immunity” from 1988-1994; during 1994; and from 1994 through the date of the fatal accident,⁵⁷ and excluding the testimony of Appellant’s expert witness “as it relates to the probability of death as result of the Volkswagen hypothetically impacting a guardrail.”⁵⁸ However, Judge Thorp **denied** the County’s motion in limine to exclude “any reference that King County was negligent for not installing re-directional berms, rocks, or another type of barrier where Ms. Mundell’s car left the roadway.”⁵⁹

“New” Expert Witness Disclosures on June 29, 2015 - Upon receipt of Judge Thorp’s Orders on King County’s Motions in Limine prohibiting any “specific references to guardrails,” Appellants’ counsel immediately contacted their engineering experts Mark Erickson and Dr. Toby Hayes and asked them to “run their engineering programs” to determine whether their previously disclosed opinions would change if “Jersey barrier” were substituted for the term “guardrail” in those witness disclosures.⁶⁰ The engineers’ answer was “no”: “[t]he physics, the conclusions, the injuries, the biomechanics are all literally identical[.]”⁶¹ After getting confirmation from Mr. Erickson and Dr. Hayes that

⁵⁷ CP 3722.

⁵⁸ CP 3724.

⁵⁹ CP 3723.

⁶⁰ 7/07/15 VRP, page 1613.

⁶¹ *Id.*

substitution of the term “Jersey barrier” or “barrier” for the term “guardrail” would not change or affect their previously disclosed opinions, Appellants’ counsel “laboriously” examined every witness disclosure provided by Appellants since 2012 to be certain that “not a word changed in any of the five disclosures they have had of each witness, except for the word barrier, Jersey barrier, is now in there.”⁶² After substituting the word “barrier” for “guardrail” in an otherwise verbatim replica of previous disclosures of Mr. Erickson’s and Mr. Hayes’ opinions, Appellants submitted to King County their Witness Disclosure Pursuant to Order on Defendant’s Motions in Limine on June 29, 2015.⁶³

On July 2, 2015, King County filed Objections to Plaintiffs’ Experts’ New Opinions, arguing that “a guardrail *is* a barrier,”⁶⁴ and that the court should “not permit plaintiffs’ [sic] to put on evidence of guardrails simply by using a different word for the same thing.”⁶⁵ For the first time, the County explained to the court that its “priority array program” includes “barrier systems.”⁶⁶ The County argued that because “[t]he Court has already ruled that King County has discretionary immunity for its guardrail program,” and since barriers and guardrails “are

⁶² 7/07/15 VRP, page 1614.

⁶³ CP 4169 - 4190.

⁶⁴ CP 4289 (italics in original).

⁶⁵ *Id.*

⁶⁶ *Id.*

one and the same and all part of the same program that the Court has already ruled is protected by discretionary immunity,”⁶⁷ Appellants were precluded from presenting evidence regarding barriers. This Motion was granted.⁶⁸

Jury Instructions; Trial; Verdict - Over Plaintiffs’ objections,⁶⁹ the Court gave jury instructions numbered 14, 15, 16, and 17, set out in full in the Appendix. Jury selection began on July 8, 2015 and the jury verdict was read on September 3, 2015. The jury returned a defense verdict, finding that neither King County nor Loni Mundell were negligent.⁷⁰

Post-Trial Order Imposing Sanctions - On December 17, 2015, Judge Thorp imposed sanctions on Ms. Deutscher in the amount of \$1,000 based upon the answers given by a lay witness⁷¹ and sanctions on Mr. Dore in the amount of \$2,000 because he inadvertently uttered the word “guardrail” while reading an excerpt verbatim from a witness’s deposition.⁷² Judge Thorp also indicated in this Order that she had “imposed one of the most severe discovery violation remedies of exclusion of the new expert

⁶⁷ *Id.* at page 5.

⁶⁸ 7/07/15 VRP, page 1623.

⁶⁹ CP 4023-4031.

⁷⁰ CP 4121-4123.

⁷¹ CP 4258-4259.

⁷² CP 4261.

opinions pursuant to *Burnet*.⁷³

V. ARGUMENT

A. **It was error to grant discretionary immunity to King County where Appellants' claim was not that the County was negligent in making budgetary decisions, but that the County failed to maintain a road in a reasonably safe condition.**

“[D]iscretionary governmental immunity in this state is an extremely limited exception” to the general waiver of state immunity in RCW 4.92.090.⁷⁴ “Only if all [of] four questions can be clearly and unequivocally answered in the affirmative can the act, omission or decision be classified as a discretionary governmental process and nontortious.”⁷⁵ Those four questions are:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy . . . as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act . . . require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite . . . authority . . . ?⁷⁶

⁷³ CP 4255.

⁷⁴ *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Evangelical*, 67 Wn.2d at 255, 407 P.2d 44).

The discretionary governmental immunity described in *Evangelical* was “narrowed in later decisions.”⁷⁷ Since *Evangelical* was written, the Supreme Court has instructed “that discretionary immunity is narrow and applies only to basic policy decisions made by a high-level executive.”⁷⁸ In *King v. Seattle*, the Supreme Court “held that the State is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages.”⁷⁹

After *King*, the courts imposed further restrictions on discretionary immunity. Later cases stated that discretionary decisions must be made at a “truly executive level” rather than an operational level and that immunity could apply only to executive level policymaking decisions rather than “field” decisions. The effect of the new interpretation of discretionary immunity was to limit immunity to adoption of laws, regulations, and policies by legislative bodies, and elected or appointed officials. Unlike *Evangelical* and several relevant federal cases, **these new cases did not provide immunity when officials made decisions needed to implement policies.** Among the functions for which the court found had no immunity were: . . . (6) **the design of highways.** . . .⁸⁰

King County argued below that it was entitled to discretionary immunity from Appellants’ “guardrail claims” based on the existence of the County’s “guardrail priority array.” “Entitlement to immunity is a

⁷⁷ *Taggart v. State*, 118 Wn.2d 195, 214, 822 P.2d 243, (1992).

⁷⁸ *Id.*

⁷⁹ *Id.* at 215, 822 P.2d 243 (citing *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974)) (emphasis added).

⁸⁰ CP 3063 (Michael Tardif and Rob McKenna, 29 Seattle University Law Review 1 (2005), “*Washington States 45-Year Experiment in Government Liability*,” page 11).

question of law reviewed de novo on appeal.”⁸¹

1. The existence of the King County guardrail priority array does not give rise to discretionary immunity from claims for failure to provide reasonably safe roads.

King County has “a duty to provide reasonably safe roads and this duty includes the duty to safeguard against an inherently dangerous or misleading condition.”⁸² A “duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon.”⁸³ Promulgation and implementation of a “guardrail priority array” does not negate or modify this duty.⁸⁴

The creation of the County’s priority array was described by this Court in *Ruff*⁸⁵: “Louis Haff, King County’s road engineer” “hired a full-time professional engineer” “to gather data and develop” the King County guardrail “prioritization system,” which resulted in the creation of a

⁸¹ *Feis v. King Cty. Sheriff's Dep't*, 165 Wn. App. 525, 538, 267 P.3d 1022, 1029 (2011) (citing *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994)).

⁸² *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787-88, 108 P.3d 1220, 1223 (2005.)

⁸³ *Id.* at 788, 108 P.3d 1220.

⁸⁴ In *Ruff*, the Supreme Court discussed the King County guardrail priority array, but nevertheless wrote, “We recognize that the duty to maintain a roadway in a reasonably safe condition may require a county to post warning signs or erect barriers if the condition along the roadway makes it inherently dangerous or of such character as to mislead a traveler exercising reasonable care, or where the maintenance of signs or barriers is prescribed by law.” *Ruff*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995).

⁸⁵ 72 Wn. App. 289, 865 P.2d 5.

“priority list of 563 county roads selected to receive guardrails.”⁸⁶ Mr. Haff “was chiefly responsible for this program.”⁸⁷ In this case, Mr. Posey testified by Declaration that Mr. Haff “accurately described the creation and implementation of the King County Guardrail Program” in *Ruff*, and that the program “has run consistent with Mr. Haff’s explanation since its implementation up to today’s date, except for a modification of the algorithm in 2003 that is used to rank the priority of where guardrail will be constructed.”⁸⁸ Nothing about the creation or implementation of the County guardrail priority array has changed since this Court handed down its *Ruff* decision in 1993.

The *Ruff* facts and the *Ruff* claim against King County closely mirror the facts and claim against the County in this case. Mr. Ruff was injured when he drove off the road, then sued the County “for negligence in breaching its duty to provide reasonably safe roads and highways, including failure to properly design the road in accordance with applicable standards, failure to provide sufficient width of usable roadway at the shoulder, and failure to maintain the roadway’s surface and adjacent area.”⁸⁹ Mr. Ruff’s experts testified that “given the road’s shoulder width

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ CP 977. The creation of the King County priority array is set out in detail in *Ruff*, 125 Wn.2d at 702, 887 P.2d 886.

⁸⁹ *Id.*

and the hazard of the ditch, a ‘jersey barrier’ should have been in place along the roadway.”⁹⁰

King County asserted that “its guardrail prioritization system shields it from liability based on discretionary immunity,” but this Court disagreed.⁹¹ After considering the four *Evangelical* factors, this Court found that the County’s timing of installation of guardrails at a particular location was an operational decision rather than a “policy decision” and that “the creation and implementation of its guardrail prioritization program does not . . . immunize it from suit.”⁹² Although the Supreme Court reversed this Court’s *Ruff* decision because it found that no issue of fact had been raised regarding the safety of the subject roadway, it did not address the issue of discretionary immunity.⁹³ In fact, no Washington Court has considered the issue of whether the existence of a county’s guardrail priority array immunizes that county from suit for failure to maintain a reasonably safe roadway since this Court decided *Ruff*. This Court should rule once again that the existence of the King County

⁹⁰ *Id.*

⁹¹ *Ruff*, 72 Wn. App. at 294, 865 P.2d 5.

⁹² *Ruff*, 72 Wn. App. at 294-96, 865 P.2d 5. See also *Johnson v. County of Nicollet*, 387 N.W.2d 209, 212 (1986) (county’s decision not to place a guardrail at the scene of the accident was not entitled to discretionary immunity).

⁹³ *Ruff*, 125 Wn.2d at 707, 887 P.2d 886 (1995) (“[W]e conclude that no issue of material fact exists regarding the condition of the roadway. Since there is no duty to make a safe road safer, the trial court correctly granted King County’s motion for summary judgment. In view of the foregoing, **we need not reach King County’s arguments . . . that its decision regarding placement of guardrails is protected by discretionary governmental immunity.**”). Emphasis added.

guardrail priority array does not immunize the County from claims of failure to maintain a roadway in a reasonably safe condition.

2. Avellaneda is distinguishable from this case.

King County based its assertion that it was immune from “guardrail claims” on *Avellaneda*, and Judge Bowman erroneously found that *Avellaneda* was “right on point.” “Deciding what law applies and its interpretation and application are matters of law reviewed de novo.”⁹⁴

The *Avellaneda* plaintiffs asked the Court of Appeals “to invade the **executive prerogative** by permitting them to recover in tort based on the WSDOT's **decisions in drafting the budget proposal** that excluded funding for the SR 512 project.”⁹⁵ The Court wrote, “[w]e decline to commit such judicial overreach by assigning potential liability to a **budgetary decision** properly within the WSDOT's purview.”⁹⁶ In this case, the Appellants’ negligence claim against King County has nothing to do with the County’s budgetary decisions.

Directly contradictory to this Court’s findings and ruling in *Ruff*, the *Avellaneda* Court found that a “high-level executive body” made “the ultimate decision regarding funding of projects in the priority array,” and

⁹⁴ *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

⁹⁵ *Avellaneda*, 167 Wn. App. at 487, 273 P.3d 477 (emphasis added).

⁹⁶ *Id.* (emphasis added).

thus, that decision “was **not** an operational-level decision.”⁹⁷ The *Avellaneda* Court ruled that WSDOT was entitled to discretionary immunity for its priority programming decision because that decision “satisfied the tests set forth in *Evangelical* and its progeny.”⁹⁸

B. Discretionary immunity does not apply to Mr. Posey’s 1994 decision to remove the accident site from King County’s guardrail priority array.

During the hearing on King County’s Motion for Summary Judgment, Judge Bowman stated that “the real question is in what capacity was Mr. Posey operating when he made the decision to exclude that particular section of roadway” from the priority array.”⁹⁹ The *Avellaneda* Court wrote that “the decision must be a basic policy decision by a high-level executive.”¹⁰⁰ It is no wonder that King County dodged Judge Bowman’s question about Mr. Posey’s capacity.¹⁰¹

1. Mr. Posey was not a “high-level executive” of King County at the time he decided to remove the accident location from the guardrail priority array.

In 1993, Mr. Posey was hired as a Traffic Systems Engineer (Engineer IV) by the Road Services Division of the King County

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Avellaneda*, 167 Wn. App. at 484, 273 P.3d 477.

⁹⁹ 11/24/14 VRP, page 19.

¹⁰⁰ *Avellaneda*, 167 Wn. App. at 481, 273 P.3d 477.

¹⁰¹ *See* 11/24/14 VRP, pages 19 and 20.

Department of Transportation.¹⁰² Between 1993 and 2012, Mr. Posey supervised a group of engineers, prioritizing their work load and monitoring their performance; analyzing traffic and signal operations; making long range work plans; writing correspondence and technical reports; and reviewing road designs for traffic engineering elements.¹⁰³ Mr. Posey’s closest interaction with any King County executives was “conduct[jng] briefings, meetings and/or conferences with council members and higher management.”¹⁰⁴ Mr. Posey was not a member of the King County Council nor was he a “high level executive” when he decided to remove the accident site from the Green River Road.

2. Mr. Posey’s decision was not the result of a conscious balancing of risks and advantages.

In *King v. Seattle*, the Supreme Court “held that the State is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages.”¹⁰⁵ Mr. Posey testified by declaration that he compared field data from the accident site with the 1993 King County Road Standards and decided that no guardrail was

¹⁰² CP 976 - 977.

¹⁰³ CP 982 - 983.

¹⁰⁴ CP 982.

¹⁰⁵ *Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992) (citing *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974), *overruled on other grounds*, *City of Seattle v. Blume*, 134 Wn.2d 243, 259-260, 947 P.2d 223 (1997)) (emphasis added).

warranted in that location.¹⁰⁶ Mr. Posey’s decision had nothing to do with balancing risks and advantages. “[D]ecisions made by governmental officials in ‘the field,’ though involving discretion, fall short of immunized activity,” including decisions based on “technical engineering and scientific judgment.”¹⁰⁷ Judge Bowman erred in granting discretionary immunity to King County for Mr. Posey’s decision to remove the accident site from the guardrail priority array and for the field measurements upon which that decision was based.¹⁰⁸

C. Judge Thorp misinterpreted Judge Bowman’s Orders and based her evidentiary decisions on her erroneous view of the law.

A trial court's evidentiary rulings are reviewed for abuse of discretion,¹⁰⁹ which occurs when its decision is manifestly unreasonable or based on untenable grounds.¹¹⁰ “If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.”¹¹¹ A decision is an abuse of discretion if it is outside the range of acceptable choices, given the facts

¹⁰⁶ CP 978 - 979.

¹⁰⁷ *Miotke v. City of Spokane*, 101 Wn.2d 307, 336, 678 P.2d 803 (1984), *abrogated on other grounds*, 107 Wn.2d 112, 727 P.2d 644 (1986).

¹⁰⁸ *See* CP 3029-3041. Appellants adopt and incorporate the arguments set out in CP 3029-3041 as if set out herein.

¹⁰⁹ *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728, 315 P.3d 1143 (2013), *review denied*, 180 Wn.2d 1011 (2014).

¹¹⁰ *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

¹¹¹ *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016, 1020 (2007).

and the applicable legal standard; if the factual findings are unsupported by the record; or if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.¹¹²

Clarifying his November 26, 2014 Order, Judge Bowman wrote:

the issues before the Court were **whether the County was entitled to discretionary immunity for its decision in 1994 to remove this accident site from its priority array and whether the data gathering process that supported that decision was entitled to discretionary immunity.** The Court addressed both of these issues in its order. **No other issues were before the Court.**¹¹³

Nevertheless, in her March 13, 2015 Order, Judge Thorp stated:

“Judge Bowman’s December 22, 2014 Order Denying Reconsideration clearly identifies the **guardrail issues** that the court addressed **and dismissed.**”¹¹⁴ This was clear error. Judge Bowman’s November 26, 2014 Order “dismissed” no “guardrail issues.” In her April 7, 2015 Order, Judge Thorp correctly noted that “Judge Bowman’s oral ruling, Order on Summary Judgment, and Order on Reconsideration are clear and dealt with the applicability of discretionary immunity in the present case.”¹¹⁵ However, Judge Thorp’s next statement that Judge Bowman had reached “conclusions **dismissing the guardrail claims** that were governed by

¹¹² *Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 99, 38 P.3d 1040.

¹¹³ CP 3162.

¹¹⁴ CP 3644.

¹¹⁵ CP 3703.

Avellanedas [sic],”¹¹⁶ is erroneous. Appellants made no “guardrail claims that were governed by *Avellaneda*[],” and Judge Bowman did not dismiss any “guardrail claims.” Appellants brought a single claim against King County: negligence for failure to maintain its roadway in a reasonably safe condition.

Judge Thorp’s subsequent orders on King County’s Motions in Limine number 6 and 13 were rooted in her incorrect interpretation of Judge Bowman’s Orders as having “dismissed” nonexistent “guardrail claims” and her erroneous view of the law governing discretionary immunity and erroneous view of the law governing King County’s duty to maintain roadways in a reasonably safe condition.

The grant or denial of a motion in limine is reviewed for abuse of discretion.¹¹⁷

Motion in Limine No. 6 - Even though Judge Bowman explicitly clarified that he had granted discretionary immunity **only** to Mr. Posey’s decision **in 1994** to remove **the accident site** from the County guardrail priority array and to the field measurements underlying that decision, King County’s Motion in Limine No. Six asked the court to exclude “any reference to guardrails for the claims that fall within discretionary immunity” within “specific time periods” of 1988-1994, 1994, and 1994 -

¹¹⁶ *Id.*

¹¹⁷ *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 Pa.2d 483 (1976).

1998 and any reference to the County's placement of guardrail at other locations along the Green River Road "because of the protections of discretionary immunity."¹¹⁸ Based upon her misinterpretation of Judge Bowman's Order and upon her own erroneous view of the law, Judge Thorp granted this Motion.¹¹⁹

The County argued that "King County's guardrail priority array program is protected by discretionary immunity." Judge Bowman did not grant discretionary immunity to the entire King County guardrail priority array program, nor would that have been a correct ruling under Washington law. Discretionary immunity does not apply wholesale to government "programs." Discretionary immunity applies to specific acts, omissions and decisions.¹²⁰

King County also argued that "even if King County had placed the accident location back on the priority array, a guardrail would not have been installed until after the accident," and "[t]herefore, due to Judge Bowman's ruling and the prospective application endorsed by the appellate courts in *Avellaneda*, King County should be protected from liability due to discretionary immunity from 1994 until the accident date

¹¹⁸ CP 1788 - 1790.

¹¹⁹ CP 3722.

¹²⁰ *Evangelical*, 67 Wn.2d. at 255, 407 P.2d 440.

of November 7, 2008.”¹²¹ Neither Judge Bowman’s Order nor *Avellaneda* even hints at a “prospective application” of discretionary immunity. “Prospective application” of discretionary immunity for unknown future operational acts, omissions, or decisions would not only violate Washington law regarding discretionary immunity, but would negate the waiver of sovereign immunity codified in RCW 4.92.090. It was an abuse of discretion to grant King County’s Motion in Limine number 6.

Motion in Limine Number 13 - King County’s Motion in Limine No. 13 asked Judge Thorp to exclude expert testimony of Dr. Toby Hayes “regarding probability of death” “if a guardrail had been in place” **if** the County “prevail[ed] on Motion in Limine No. 6 and plaintiffs **no longer** have a viable guardrail claim.”¹²² Appellants responded that Motion in Limine No. 13 should be denied because it was a “conditional,” based upon King County’s incorrect argument that ‘plaintiffs no longer have a viable guardrail claim.’”¹²³ To Appellants’ surprise, Judge Thorp granted this Motion, adding the comment, “[s]ee ruling on motion number 6.”¹²⁴ As discussed above, the court’s ruling on Motion in Limine number 6 was an abuse of discretion.

Appellants’ Response to this Motion was based upon the plain

¹²¹ CP 1790.

¹²² CP 1802.

¹²³ CP 2115.

¹²⁴ CP 3724.

language of Judge Bowman’s Orders as well as Judge Thorp’s own previous denial of King County’s Motion in Limine Re: Guardrail Evidence or Argument, in which she stated “[a]ny argument or theory relating to guardrails not included in the December 22, 2014 Order **remains**,”¹²⁵ and her denial of King County’s Motion for Reconsideration of that decision, in which she reiterated, “Judge Bowman’s order that Plaintiffs’ guardrail claims that fall within the protections of discretionary immunity were and are dismissed, but **only** those guardrail claims.”¹²⁶ The County’s language that Motion in Limine number 13 was “conditional” on whether the Appellants no longer had a “viable guardrail claim,” making it very clear that the County **knew** that not all “guardrail claims” had previously been dismissed, in spite of its repeated insistence to the contrary.

In *Ruff*, one reason the Supreme Court reversed this Court’s decision was that “no expert opined that a guardrail would have prevented injury.”¹²⁷ In this case, Dr. Hayes presented expert testimony establishing that a guardrail would have prevented the deaths of Appellants’ children.¹²⁸ As in *Ruff*, such evidence was relevant and material to Appellants’ claim against King County, yet Judge Thorp excluded it,

¹²⁵ CP 3644.

¹²⁶ CP 3704.

¹²⁷ *Ruff*, 125 Wn.2d at 707, 887 P.2d 886.

¹²⁸ CP 2835 - 2836.

based upon her misinterpretation of Judge Bowman's Orders and her own erroneous view of Washington law.

D. Judge Thorp's erroneous view of the law and her prior evidentiary rulings resulted in jury instructions that misstated applicable law, included inapplicable law, omitted material facts, and misstated Appellants' claim, preventing Appellants from arguing their theory of the case to the trier of fact.

"Each party to a lawsuit is entitled to have his theories presented to the jury by proper instructions if evidence to support them exists."¹²⁹ A trial court is required to instruct the jury on a theory where there is substantial evidence to support it.¹³⁰ "When there is a request for an appropriate instruction that relates the principles of law involved to the specific factual issues of the case, it is not enough that the instructions set forth the law in a general way."¹³¹ Rather, "a party is entitled to an instruction as to the particular acts of negligence alleged if there is evidence to support them."¹³² "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable

¹²⁹ *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 283, 686 P.2d 1102 (1984), *aff'd*, 104 Wn.2d 613, 707 P.2d 685 (1985) (citing *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980))

¹³⁰ *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

¹³¹ *Id.*

¹³² *Id.* at 284, 686 P.2d 1102 (citing *Woods v. Goodson*, 55 Wn.2d 687, 689–90, 349 P.2d 731 (1960)).

law.”¹³³

A clear misstatement of law is presumed to be prejudicial.¹³⁴ An instruction that contains an erroneous statement of law is reversible where it prejudices a party.¹³⁵ Prejudicial error also occurs where the trial court instructs the jury on an issue that lacks substantial evidence to support it.¹³⁶ Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise.¹³⁷ The supporting evidence on which instruction is based must consist of more than speculation and conjecture.¹³⁸ This court reviews jury instructions de novo.¹³⁹

In this case, Appellants’ theory is that the County breached its duty to maintain the Green River Road in a reasonably safe condition because, *inter alia*, it failed to erect a roadside barrier at the accident site to prevent errant vehicles from going into the River. Appellants defeated King County’s Motion for Summary judgment by presenting sufficient expert testimony to raise issues of fact whether the Green River Road was inherently dangerous, whether a guardrail or other barrier was required to

¹³³ *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

¹³⁴ *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 318, 189 P.3d 178 (2008).

¹³⁵ *Lewis*, 145 Wn. App. at 318.

¹³⁶ *Glenn v. Brown*, 28 Wn. App. 86, 89, 622 P.2d 1279 (1980).

¹³⁷ *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

¹³⁸ *Board of Regents of the Univ. of Wn. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

¹³⁹ *Thompson v. King Feed & Nutrition*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

eliminate the danger, and whether the Appellants' children would not have died if a guardrail had been in place at the accident site. Appellants were thus entitled to instructions that allowed them to argue their theory related to the County's duty to eliminate a dangerous condition and breach of its duty to erect a guardrail or other barrier at the accident site.

Instead, due to Judge Bowman's initial erroneous order applying discretionary immunity in this action and Judge Thorpe's misinterpretation and aggressive expansion of Judge Bowman's initial erroneous ruling, Appellants were denied their right to have the jury properly instructed on their negligence theory.

Jury Instruction No. 14 stated that the Appellants' negligence claim against King County was based upon the County's allowing tree limbs to overhang the Road, failing to sweep or clean wet leaves from the roadway and pavement markings; failing to place warning signs prior to the curve; striping the northbound lane with a substandard width; and constructing the roadway with a soft shoulder.¹⁴⁰ Appellants' theory also included the County's failure to place a guardrail or other barrier at the accident site where one was warranted in order to maintain the road in a reasonably safe condition. Appellants objected to the Court's instruction and submitted a proposed instruction that more completely described the

¹⁴⁰ APPENDIX, page A-2; CP 4090.

basis of their negligence claim (without reference to guardrails based upon Judge Thorp's orders on King County's Motions in Limine).¹⁴¹

Jury Instruction No. 15 - Appellants proposed WPI 140.01 ("Sidewalks, Streets, and Roads -- Duty of Governmental Entity"), modified by the addition of language from the Comment on WPI 140.01 and cases cited therein discussing the scope of the county's duty, which additional language is underlined below:

The county has a duty to exercise ordinary care in the design, construction, maintenance, and repair of its public roads to keep them in a reasonably safe condition for ordinary travel. This duty is owed to all persons whether those persons are negligent or fault free.

This duty includes the duty to eliminate an inherently dangerous or misleading condition. The duty requires the County to reasonably and adequately warn of a hazard and maintain adequate protective barriers where such barriers are shown to be practicable and feasible.

If you find the Green River Roadway was inherently dangerous or misleading, you must determine the adequacy of the corrective actions under all of the circumstances. If you determine the County's corrective actions were adequate, then you must find the County has satisfied its duty to provide reasonably safe roads.¹⁴²

The Court refused to give the second and third paragraphs of Appellants' proposed instruction on the County's affirmative duty, and instead, added a single sentence setting out **limitations** on the County's

¹⁴¹ CP 4023 - 4029. (Jury Instruction No. 14 was derived from the Court's Proposed Instructions N and O. See CP 4047-4050).

¹⁴² CP 3855.

duty: “[a] county does not have a duty to (a) anticipate and protect against all imaginable acts of negligent drivers, (2) update every road and roadway structure to present-day standards, or (3) make a safe road safer.”¹⁴³ Two of these three identified circumstances in which a county does not have a duty, i.e. anticipating and protecting against all imaginable acts of negligent drivers and updating every road and roadway structure to present-day standards) are not in issue in this case.

Jury instruction 15 failed to inform the jury of the proper scope of the County’s duty in this case, focused the jury on law that is favorable to King County but which has no application in this action, and prevented Plaintiffs from arguing their theory of the case.

Jury instruction 16 presents an incomplete statement of law regarding notice of an unsafe condition on the roadway and the County’s duty, and gave instruction on law favorable to King County that is not applicable in this case.

Notice - Appellants proposed WPI 140.02 (“Sidewalks, Streets, and Roads -- Notice of Unsafe Condition”), modified with verbatim language from the Comment thereon, underlined below:

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

¹⁴³ APPENDIX, PAGE A-3; CP 4091.

reasonable opportunity to correct the condition or give proper warning of the condition's existence.

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

The notice required may be actual or constructive. Constructive notice arises if the condition has existed for such a period of time that the governmental entity should have known of its existence by the exercise of ordinary care.

The notice requirement does not apply to conditions that are created by the governmental entity or its employees or to conditions that result from their conduct. Nor does the requirement apply if there was a duty to anticipate unsafe conditions.¹⁴⁴

Judge Thorp did not include the last paragraph of Appellants' proposed instruction¹⁴⁵, which informed the jury of circumstances where no actual notice of a dangerous condition is required, even though both of the conditions identified in the Appellants' proposed instruction (conditions created by the governmental entity or its employees or conditions that result from their conduct and conditions which the government has a duty to anticipate) are at issue in this case.

Conditions created by King County or its employees include the substandard lane width, improper crown construction, improper and

¹⁴⁴ CP 3764.

¹⁴⁵ APPENDIX, page A-4; CP 4092.

deceptive fog-line striping, substandard sized recovery area, substandard width and construction of the shoulder, the nonrecoverable slope to the Green River, and the absence of a guardrail or other barrier at the accident site. Conditions which King County had a duty to anticipate include the decreased visibility of lane markings caused by overhanging tree branches and the accumulation of wet leaves and tree debris on the road surface at the location of the accident and during the time of year the accident occurred, and that errant vehicles would slide into the Green River in the absence of any deflective guardrail or other type of roadside barrier at the accident location.

Based on these facts, an accurate statement of the law regarding the County's notice of the dangerous condition and its corresponding duty required instruction regarding conditions created by or resulting from the conduct of County or its employees and the County's duty to anticipate unsafe conditions.

Duty - Judge Thorp incorporated only part of Appellants' proposed instruction on King County's duty (number 15, discussed above) to create Instruction No. 16, which purports to instruct the jury on the County's duty regarding inherently dangerous or misleading conditions on the roadway.

Appellants proposed the following language to be included in the

instruction on the duty of King County in this action:

This duty includes the duty to eliminate an inherently dangerous or misleading condition. The duty requires the County to reasonably and adequately warn of a hazard and maintain adequate protective barriers where such barriers are shown to be practicable and feasible.¹⁴⁶

Judge Thorp deleted “and maintain adequate protective barriers where such barriers are shown to be practicable and feasible” and instructed that the County’s duty only required it to “warn of a hazard.”¹⁴⁷ This is an incorrect statement of the law which only partially instructed the jury on King County’s duty.

Inapplicable law - the last paragraph of Jury Instruction No. 16 states: “[a] county cannot be found negligent if its only knowledge is that an unsafe condition might, or even probably will, develop. A county has no duty to inspect its roads to satisfy duty to provide roads that are reasonably safe for ordinary travel.”¹⁴⁸ The first sentence of this paragraph is derived from *Laguna v. Washington State Dept. of Transp.*¹⁴⁹ The *Laguna* plaintiff argued that “moisture combined with below-freezing air and ground temperatures” had created the dangerous condition on the road -- i.e., ice.¹⁵⁰ The *Laguna* Court disagreed: “these conditions

¹⁴⁶ CP 3763.

¹⁴⁷ CP 4092.

¹⁴⁸ CP 4092.

¹⁴⁹ 146 Wn. App. 260, 192 P.3d 37 (2008).

¹⁵⁰ *Id.* at 262, 264-265, 192 P.3d 37.

[moisture and below-freezing temperatures] do not make road travel treacherous. Moisture and freezing temperatures are only potentially dangerous.” In *Laguna*, it was “undisputed that the State lacked notice that ice had formed at the time and location of an accident,”¹⁵¹ and the Court held, “[t]he State's duty to maintain roads in a reasonably safe condition does not include the duty **to prevent ice from forming on the roadway.**”¹⁵² Appellants objected to this language, distinguishing *Laguna*, and pointed out that the inherently dangerous conditions in this case did not merely create a “potential” danger,” but created an existing danger that King County had actual knowledge would be present in the same location at the same time year after year.¹⁵³

The second objectionable sentence, which instructed the jury that a county has no duty to inspect its roads in order to satisfy its duty to provide roads reasonably safe for ordinary travel, is derived from *Nguyen v. City of Seattle*.¹⁵⁴ In their objection to this incorrect statement of law, Appellants distinguished *Nguyen*, which was based on a premises liability theory involving the street infrastructure (trees), and argued:

If a government entity had no duty to inspect its roadways, it would be dependent upon members of the public to discover and report dangerous conditions, which would place the duty to

¹⁵¹ *Id.* at 261, 192 P.3d 374.

¹⁵² *Id.*

¹⁵³ CP 4027.

¹⁵⁴ 179 Wn. App. 155, 317 P.3d 518 (2014).

keep public roads safe on the public. In this state, that duty has been squarely placed on the government. The Court is respectfully referred to the Comment on WPU 140.02, which states in part: ‘Rather than attempting to define constructive notice and thereby unduly confuse the jury, this instruction directly sets forth the time requirement **and the duty of a governmental entity to inspect its sidewalks, streets, and roads.**’ (Emphasis added.)¹⁵⁵

Instruction 16 incorrectly set out the law regarding King County’s duty, set out law that is not applicable in this case but that was favorable to King County, and deleted law that does apply in this case and was favorable to the Appellants.

Jury Instruction No. 17 instructed the jury that it could not use “testimony regarding the presence or absence of guardrails or re-directional devices at the scene of the accident or at other locations along the Green River Road in determining whether King County was negligent in designing, constructing, maintaining, and repairing the Green River Road in a reasonably safe condition for ordinary travel or whether there was an inherently dangerous or deceptive condition at the accident location.”¹⁵⁶

This instruction, read to the jury twice during trial, is antithetical to the long-established law of Washington, and ensured that Appellants’ theory of the case would not be considered by the jury. Whether King

¹⁵⁵ CP 4028-4029. The second sentence of Jury Instruction No. 16 originally was part of Proposed Instruction P. See CP 4051.

¹⁵⁶ APPENDIX, page A-5; CP 4093.

County was negligent in designing, constructing, maintaining, and repairing the Green River Road in a reasonably safe condition for ordinary travel and whether there was an inherently dangerous or deceptive condition at the accident location are both material issues of fact in this case, to be determined by the trier of fact.¹⁵⁷ Appellants defeated the County's Motion for Summary Judgment, raising genuine issues of material fact regarding whether the roadway was inherently dangerous, whether King County had breached its duty to warn of and/or eliminate those dangerous conditions, and whether a breach of that duty was the proximate cause of the drowning deaths of their children. Appellants were therefore entitled to present their evidence supporting their claim of negligence to the jury, including evidence about the presence or absence of guardrails or re-directional devices at the scene of the accident or other locations along the Green River Road.

Based on Judge Bowman's erroneous order granting discretionary immunity for Mr. Posey's 1994 decision to remove the accident site from King County's guardrail priority array and Judge Thorp's misinterpretation of Judge Bowman's order and vast expansion of the grant of discretionary immunity to every County decision related to the priority array between 1988 and 2008 and into the future, Appellants were

¹⁵⁷ *Owen v. Burlington Northern and Santa Fe R.R. Co.*, 153 Wn.2d 780, 788-789, 108 P.3d 1220 (2005).

prevented from presenting material facts and applicable, governing law to the jury and were thus denied the ability to present their theory of the case.

Jury Instructions 14, 15, 16, and 17 effectively instructed the jury that:

- Appellants' claim that King County failed to maintain the Green River Road in a reasonably safe condition did not include the County's failure to install a guardrail or other barrier at the accident site
- The inherently dangerous condition of the road did not include the absence of a guardrail or other type of barrier
- King County was not liable for Appellants' damages based on the absence of the guardrail or other type of barrier at the accident location
- King County was not liable for damages resulting from potentially dangerous conditions even though the dangerous conditions in this case were not merely potentialities but were actual, existing, and foreseeable conditions.
- King County had no duty to inspect its roads in order to satisfy its duty to maintain them reasonably safe for ordinary travel
- The presence or absence of guardrails or other barriers along the Green River Road could not be considered by the jury in determining whether King County had met its duty to maintain the road in a reasonably safe condition

Jury instructions 14, 15, 16, and 17 **failed** to inform the jury that:

- King County's duty to maintain a safe road was owed to negligent as well as fault-free drivers
- King County's duty includes the duty to eliminate an inherently dangerous or misleading condition
- King County's duty requires the County to reasonably and adequately warn of a hazard and maintain adequate protective

barriers where such barriers are shown to be practicable and feasible

- King County was not required to have actual notice of the dangerous conditions where the dangerous conditions were created by King County or its employees
- King County was not required to have actual notice of hazardous conditions that it had a duty to anticipate
- King County was required to maintain adequate protective barriers where such barriers are shown to be practicable and feasible
- Finally, the jury instructions failed to inform the jury that if it found there were inherently dangerous or misleading conditions at the accident site, it had a duty to determine the adequacy of the corrective actions under all of the circumstances.

Juries are presumed to follow the court's instructions.¹⁵⁸ “An erroneous instruction is reversible error . . . if it prejudices a party. . . . Prejudice is presumed if the instruction contains a clear misstatement of law[.]”¹⁵⁹ Jury instructions 14, 15, 16, and 17 misrepresent Appellants’ claim against King County, clearly misstate law, omit material facts, and include inapplicable law favorable to the County. These instructions greatly prejudiced appellants in the obvious manner of effectively instructing the jury to render a defense verdict. The jury verdict must be vacated.

E. There was neither a factual nor a legal basis to impose

¹⁵⁸ *Hizey v. Carpenter*, 119 Wn.2d 251, 269–70, 830 P.2d 646 (1992).

¹⁵⁹ *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289, 294 (2012).

**sanctions on Appellants’ counsel for violation of orders
on King County’s motions in limine.**

Judge Thorp imposed sanctions on Ms. Deutscher and Mr. Dore for “the intentional violation of court orders,” i.e., orders on motions in limine, during trial.¹⁶⁰ Contempt is defined as the “intentional ... [d]isobedience of any lawful . . . order . . . of the court[.]”¹⁶¹ “The authority to impose sanctions for contempt may be statutory, or under the inherent power of constitutional courts.”¹⁶² “Summary” punitive sanctions “are authorized for direct contempt,” i.e., “contempt within the courtroom if the judge certifies that he or she saw or heard the contempt.”¹⁶³ “The judge may impose such contempt sanctions at the end of the proceeding, and sanctions are only permitted “for the purpose of preserving order in the court and protecting the authority and dignity of the court.”¹⁶⁴

While a court does have inherent power to punish for contempt, “the legislature may regulate that power as long as it does not diminish it so as to render it ineffectual,”¹⁶⁵ and the legislature has done so by enacting Chapter 7.21 RCW, including RCW 7.21.050(2), which provides:

A court, after a finding of contempt of court in a proceeding under subsection (1) of this section may impose for each separate

¹⁶⁰ CP 4145-4151; CP 4255-4262.

¹⁶¹ “‘Contempt of court’ means intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court[.]” RCW 7.21.010(1)(b).

¹⁶² *State v. Berty*, 136 Wn. App. 74, 84, 147 P.3d 1004 (2006), *as amended* (Jan. 9, 2007).

¹⁶³ *Berty*, 136 Wn. App. at 84-85, 147 P.3d 1004 (quoting RCW 7.21.050(1)).

¹⁶⁴ *Id.* at 85, 147 P.3d 1004 (quoting RCW 7.21.050(1)).

¹⁶⁵ *Mead School Dist. No. 354 v. Mead Ed. Ass’n (MEA)*, 85 Wn.2d 278, 287, 534 P.2d 561 (1975). *See also In re Dependency of A.K.*, 162 Wn.2d 632, 647, 174 P.3d 11 (2007) (“We have long held that courts may not exercise their inherent contempt power “[u]nless the legislatively prescribed procedures and remedies are specifically found inadequate.”).

contempt of court a punitive sanction of a fine of not more than five hundred dollars or imprisonment for not more than thirty days, or both, or a remedial sanction set forth in RCW 7.21.030(2). A forfeiture imposed as a remedial sanction under this subsection may not exceed more than five hundred dollars for each day the contempt continues.

A trial court may not resort to its inherent contempt authority and impose greater sanctions than the applicable contempt statute allows unless it sufficiently explains why the statutory contempt procedures and remedies would impair its contempt authority.¹⁶⁶ “Otherwise, a resort to inherent powers effectively nullifies the statutes.”¹⁶⁷ Whether a finding of contempt is warranted and the sanctions imposed for contempt are reviewed for an abuse of discretion.¹⁶⁸

1. There was no factual basis to sanction Ms. Deutscher.

During Ms. Deutscher’s direct examination of Collette Peterson, Ms. Port asked the Court to impose sanctions on Ms. Deutscher for violations of order in limine 4g, arguing that Ms. Peterson’s **answers** violated orders in limine, and that Ms. Deutscher intentionally “invited” such responses by the questions she posed to Ms. Peterson. However, the transcript of Ms. Deutscher’s questions and Ms. Peterson’s answers does not support a conclusion that **any** of Ms. Deutscher’s questions “invited”

¹⁶⁶ *Id.*

¹⁶⁷ *In re M.B.*, 101 Wn. App. 425, 452, 3 P.3d 780, 795 (2000).

¹⁶⁸ *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); *State v. Berty*, 136 Wn. App. 74, 83, 147 P.3d 1004 (2006).

Ms. Peterson to violate the orders in limine.¹⁶⁹

Judge Thorp made the following findings: “Ms. Peterson and Ms. Deutscher repeatedly violated Order 4g”¹⁷⁰; after the Court’s initial oral ruling, “[Ms. Peterson] . . . and Ms. Deutscher continued to violate the simple orders in limine”¹⁷¹; “Ms. Deutscher made no effort to prevent Ms. Peterson from violating Order 4g. Instead, she encouraged her to violate the Order, even after being admonished by the Court”¹⁷²; and “with only one exception, Ms. Peterson’s violations were caused by the questions asked.”¹⁷³ Appellants assign error to each of these unsupported findings.

King County’s Motion in Limine No. 4g asked the court to “exclude any reference regarding how the deaths [of Appellants’ children] have affected other family members or friends.”¹⁷⁴ The transcript of Ms. Peterson’s trial testimony questions reveals no questions by Ms. Deutscher that invited an answer in violation of Motion in Limine No. 4g.¹⁷⁵ Any statements by Ms. Peterson that may arguably have “violated” the order on Motion in Limine No. 4g were innocent, spontaneous expressions of an emotional lay witness, not intentional violations of court orders elicited or

¹⁶⁹ See 8/6/15 VRP, pages 392 through 489.

¹⁷⁰ CP 4256.

¹⁷¹ CP 4257.

¹⁷² CP 4258.

¹⁷³ CP 4258.

¹⁷⁴ CP 1783.

¹⁷⁵ See 8/6/15 VRP, pages 392 through 489.

encouraged by Ms. Deutscher.

Before trial, Ms. Peterson had been given a color-coded chart prepared by Appellants' counsel indicating what evidence was "In," what evidence was "Out," and what evidence was "Provisional" under the orders in limine.¹⁷⁶ The chart was explained and discussed at length with Ms. Peterson, particularly how the orders in limine applied to her own anticipated testimony.¹⁷⁷

No matter how carefully counsel prepares a witness for trial, it is a common experience that lay witnesses like Ms. Peterson, testifying for the first time,¹⁷⁸ often give unanticipated answers. The facts do not support the finding of "intentional" violation of the order on Motion in Limine 4g, nor do the facts support imposition of sanctions on Ms. Deutscher where she had properly prepared and instructed Ms. Peterson regarding orders in limine, her questions did not violate the Court's order in limine, and Ms. Peterson's "improper" answers were not foreseeable. Sanctions are not justified simply because a lay witness makes an "improper" but unanticipated statement at trial, which is a fairly common phenomenon normally handled by a simple objection and an instruction to the jury to disregard the statement. This Court should reverse the imposition of

¹⁷⁶ CP 4154; CP 4231-CP 4243.

¹⁷⁷ CP 4154.

¹⁷⁸ 8/6/15 VRP, page 395.

sanctions on Ms. Deutscher because there is no factual basis for these sanctions.

2. There was no factual basis to sanction Mr. Dore.

On August 18, 2015, Mr. Dore cross-examined Marlene Ford. King County objected to any questions that referenced Norton Posey's deposition, complaining that "Norton Posey was endorsed to talk about guardrail issues. He deposed Mr. Posey about guardrail issues. And the Court has granted a motion in limine regarding guardrail issues."¹⁷⁹

Mr. Dore asked to make an offer of proof "in regards to what [he] would be doing with Ms. Ford," and was permitted to do so.¹⁸⁰ After more objections from King County, Judge Thorp gave further instruction, including the comment,

[t]o the extent that this witness has any ability to go further to the same questioning, to the extent that there is problematic questions or subsequent issues, we will address them as they come. The consequences are clear. People will make choices and they will have to live with the consequences of their actions.¹⁸¹

Mr. Dore responded:

Your Honor, there was a point made about consequences as a result of conduct. I don't want to violate any court order. And I'm going to say that again and again, and it's not my intent to. It's my intent not to. I'm very concerned that that comment is being directed to me in regards to this

¹⁷⁹ 8/18/15 VRP at page 1488.

¹⁸⁰ *Id.* at 1491-1492. (*See generally* 1491 - 1501).

¹⁸¹ *Id.*, page 1496.

witness.

This witness should be instructed that all of the motions in limine are in play. And I'm not asking questions that are going to elicit that. And I have no intention of doing so. I want to be very cognizant of the Court's ruling, and I want to make sure that I'm not doing anything that the Court thinks I'm trying to elicit facts from this witness that would violate motions in limine.¹⁸²

After eliciting testimony from Ms. Ford about the basis of her opinion that the Green River Road was reasonably safe, Mr. Dore stated that he would "like to read a section" of Ms. Ford's deposition, and gave the court a copy of the deposition with the excerpt intended to be read by Mr. Dore highlighted.¹⁸³ Mr. Dore also stated he was "going to start on page 43, line 17. I'm going to read the question," and asked Ms. Ford to then read her answer.¹⁸⁴ After receiving the highlighted copy of what Mr. Dore was going to read, Judge Thorp did not stop him or warn him to consider the language he was about to read.

Mr. Dore read verbatim: "the segment of the Green River Road that is the focus of this lawsuit met or exceeded all known King County Road standards, MUTCD, AASHTO, Washington DOT guidelines for pavement, lane width, striping, mile-per-hour, advanced curve warning signing, and the need for a guardrail placement," then asked Ms. Ford,

¹⁸² *Id.*, pages 1496-1497.

¹⁸³ *Id.* page 1509.

¹⁸⁴ *Id.*, page 1509-1510.

“[i]s that what you are going to express opinions about?”¹⁸⁵

At that point, Ms. Port objected and asked “for a very steep monetary sanction” and that the court “reread the curative instruction with the language that no placement of a guardrail, barrier, jersey barrier, berm, redirection berm, traffic appurtenance is not a claim in this lawsuit.”¹⁸⁶

Judge Thorp stated that Mr. Dore’s reading of the word “guardrail” “is a clear violation of my order. Orders actually. . . .”¹⁸⁷ Mr. Dore apologized profusely, explained that he did not intend to read the word “guardrail,” but did so inadvertently as a result of reading verbatim, and conceded that reading the “curative” instruction was “correct.”¹⁸⁸ For the *second* time, Judge Thorp read the following “curative” instruction to the jury:

You may not use testimony regarding the presence or absence of guardrails or redirection devices at the scene of the accident or at other locations along the Green River Road in determining whether King County was negligent in designing or maintaining the Green River Road in a reasonably safe condition for ordinary travel or whether there was an inherently dangerous or deceptive condition at the accident location.¹⁸⁹

Judge Thorp’s Order Imposing Sanctions includes a description of her rulings on Mr. Dore’s offer of proof as “clear” and the characterization

¹⁸⁵ *Id.*, page 1510.

¹⁸⁶ *Id.*, page 1510; page 1511.

¹⁸⁷ *Id.*, page 1513.

¹⁸⁸ *Id.*, page 1512.

¹⁸⁹ *Id.*, page 1518.

of Mr. Dore’s plea for clarification of her rulings as “extensive[] argu[ment].” The transcript reveals these statements do not correctly describe her rulings, which were certainly not “clear,” nor can Mr. Dore’s attempts to get clarification of Judge Thorp’s rulings be characterized as “extensive argument.”¹⁹⁰

Judge Thorp’s written Order includes the following findings that are not supported by the facts: Mr. Dore’s inadvertent reading of the word “guardrail” was a “blatant violation of the Court’s orders”; it was an “intentional violation of the Court’s Orders in limine and the Court’s repeated and direct warnings on the record”; that “sanctions greater than the civil contempt statute is warranted”; that the sanction of \$2,000 was “the least severe sanction that will address this violation”; and “this sanction is reasonable and narrowly tailored in this circumstance given the gravity of the violation and the risk to the Defendants of a mistrial.”¹⁹¹ Appellants assign error to all of these unsupported findings.

The transcript reveals that Mr. Dore inadvertently uttered the word “guardrail” while reading verbatim from a deposition excerpt that had previously been handed to the Court. This human error cannot be characterized as an “intentional” or “blatant” violation of Judge Thorp’s orders in limine. The \$2,000 sanction was not the “least severe sanction”

¹⁹⁰ See *id.*, pages 1495, 1496, 1498, 1499, 1500, 1501.

¹⁹¹ CP 4261.

that could have addressed the utterance of the word “guardrail.” In fact, Judge Thorp immediately read (for the second time) a “curative instruction.” The giving of this instruction was more than sufficient to sanction Mr. Dore’s unintended “error.” There was no “risk” of a mistrial to protect King County where court orders had effectively prohibited Appellants from presenting their case to the jury.

As previously discussed, Judge Thorp’s misinterpretation of Judge Bowman’s orders and her own erroneous view of the law were the bases for the orders in limine excluding references to guardrails. The sanction imposed by Judge Thorp for Mr. Dore’s reading of the word “guardrail” from a witness’s deposition excerpt is not supported either by the circumstances or by Washington law.

3. Judge Thorp abused her discretion by failing to comply with Chapter 7.21 RCW and case law interpreting the civil contempt statutes.

Without any explanation, Judge Thorp’s Order Imposing Sanctions, drafted by King County, states “the civil contempt statutes are insufficient to address these specific sanctions.”¹⁹² Judge Thorp did not offer any explanation why the statutory contempt remedies impaired her contempt authority aside from the bald assertion that the civil contempt statutes were “insufficient” to deal with the violations of orders in

¹⁹² CP 4262.

limine.¹⁹³ Washington law requires more than an unsupported conclusory statement before a court may resort to inherent powers to sanction contempt.

The sanctions Judge Thorp imposed for violations of orders in limine during trial were “summary” punitive sanctions under RCW 7.21.050 (1) because the “violations” took place within the courtroom and Judge Thorp saw and heard the “contempt.” Thus, Judge Thorp’s discretion to impose monetary sanctions for the “intentional violations” of the orders in limine was governed by RCW 7.21.050:

. . . RCW 7.21.050 also contains a limit on the amount a court may fine a contemnor. A court “may impose for each separate contempt of court a punitive sanction of a fine of not more than five hundred dollars.” RCW 7.21.050(2). In this case, the court imposed a \$750 fine for each of two incidents of contempt, which statutory law does not allow. Therefore, while we affirm the imposition of sanctions against Grissom, we reduce the amount of sanctions to \$500 per incident, for a total fine of \$1,000.¹⁹⁴

Even if Ms. Deutscher and Mr. Dore had “intentionally” violated Judge Thorp’s orders in limine, Judge Thorp failed to explain in her Order Imposing Sanctions why the statutory contempt remedies impaired her contempt authority. She was thus required to limit the punitive sanctions to \$500 per incident. Instead, she fined Ms. Deutscher \$1,000 and Mr. Dore \$2,000. Imposition of these sanctions should be reversed because

¹⁹³ CP 4262.

¹⁹⁴ *Berty*, 136 Wn. App. at 85-86, 147 P.3d 1004.

they are not supported by the underlying facts or by Washington law.

F. Neither Washington law nor the facts in this case support sanctions for “new” expert opinions submitted in response to the June 16 Orders in Limine.

Judge Thorp imposed “*Burnet* sanctions” for Appellants’ “new” witness disclosures, which were submitted in response to the June 16, 2015 orders that **granted** King County’s motion in limine to exclude all evidence regarding “guardrails” between 1988 and 2008¹⁹⁵, but **denied** the County’s Motion to “exclude testimony regarding “rocks, redirectional berms, rocks, or another type of barrier.”¹⁹⁶ As previously discussed, until receipt of the June 16 orders, Appellants believed that their negligence claim had not been affected by any court order. Judge Thorp’s order excluding all evidence regarding guardrails was inconsistent with previous court orders, and was received long after the deadline for witness disclosures had passed. After receipt of the orders, Appellants’ counsel quickly consulted with their experts, asking whether it would change anything in their opinions if “Jersey barrier” was substituted for “guardrail” in their witness disclosures, and the experts answered, “not a thing. We’ve run the model. The physics, the conclusions, the injuries, the biomechanics are all literally identical[.]”¹⁹⁷ Judge Thorp acknowledged:

¹⁹⁵ CP 3722.

¹⁹⁶ CP 3723.

¹⁹⁷ 7/17/15 VRP, page 1613.

These “new expert disclosures were identical to their previous disclosures except that they substituted the word “barrier” for the word “guardrail.” In all material respects the disclosures were identical to the reports previously prepared by the experts regarding the need for and effect of guardrails.”¹⁹⁸

Judge Thorp stated that she had imposed the “severe discovery violation remed[y]” of exclusion of the “new” expert opinions “pursuant to *Burnet*.”¹⁹⁹ Under *Burnet*, “it is an abuse of discretion to exclude testimony as a sanction . . . absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.”²⁰⁰ “A party’s disregard of a court order without reasonable excuse or justification is deemed willful.”²⁰¹ “A ruling on a motion in limine is reviewed for abuse of discretion.”²⁰² “Conclusional findings reached on an erroneous basis, and not supported by substantial evidence, are not binding on appeal.”²⁰³ Appellants assign error to Paragraphs B-1 through B-13 of the Order Imposing Sanctions on Ann Deutscher and James Dore.

¹⁹⁸ CP 4252.

¹⁹⁹ CP 4255.

²⁰⁰ *Burnet*, 131 Wn.2d at 494, 933 P.2d 1036 (quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wn. App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wn.2d 1041 (1985)).

²⁰¹ *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87, 41 P.3d 1175, 1181 (2002).

²⁰² *State v. Munguia*, 107 Wn. App. 328, 335, 26 P.3d 1017, 1021 (2001) (citing *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995)).

²⁰³ *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, 5 (1983) (citing *Schmechel v. Ron Mitchell Corp.*, 67 Wn.2d 194, 197, 406 P.2d 962 (1965)).

Paragraphs B.1., B.3., and B.5. state that “the issue of guardrails had been removed from the case” as of July 26 and December 22, 2014.²⁰⁴ This Finding is not supported by the facts, as set out above.

Paragraph B.2. states that Plaintiffs did not seek and disclose evidence “regarding barriers or redirectional devices other than guardrails.”²⁰⁵ The facts are contrary this statement. Plaintiffs’ Complaints put the County on notice that their theory included all types of “barriers or redirectional devices.” During his December 2014 deposition, Appellants’ traffic engineering expert, William Haro, responded to questions about other types of barriers. In response to King County’s question, “[i]f a decision were made not to put in a guardrail, should King County have put out boulders,” Mr. Haro responded:

Well, boulders are an obstacle so it's not a good solution. **But if that's the only thing you have to stop a car from going over into that river, it would be, you know, preferred over nothing, but would be an obstacle in itself that could create damages.**

But got to weigh what you think the damages would be. If you weighed one which is sudden death and no alternative to one that had 35 miles an hour, even hitting a boulder is not going to necessarily kill the occupants of a vehicle. **And then if that's the only thing you got, you probably should do it.** I'd park my city car out there if I had to and walk home. And that would do the job too, but it's not the preferred alternative. There's a lot of other things that they could have done that would have made it

²⁰⁴ CP 4250-4251; CP 4252.

²⁰⁵ CP 4251.

maybe a little safer.²⁰⁶

When asked, “what about a redirectional berm,” Mr. Haro stated:

That would be more acceptable. It's not the 100 percent solution because you could climb -- at enough speed you could climb a berm. **But you're looking for something that would redirect and if you're properly -- if you properly build a berm, you might be able to get away with that and . . . you . . . just make it -- it certainly would make it safer.**²⁰⁷

When asked whether he thought redirectional berms “are safe,” Mr. Haro responded, “Not as safe as other alternatives, but they’re safer than this one, nothing.”²⁰⁸ After the King County lawyer informed Mr. Haro that in 2003, WSDOT had “decided that redirectional berms are no longer safe to install,” Mr. Haro responded,

If the standard -- **if they adopted a standard against them, I wouldn't put them in. At least I'd weigh the next alternative a little higher.** Throw that one out or put it on the list of considered but not selected.
²⁰⁹

King County failed to elicit Mr. Haro’s opinions about Jersey barriers. If King County believed there were substantive differences in the effect of a guardrail as opposed to other types of barriers at the accident site, the County -- not Appellants -- should have asked the questions necessary to elicit those opinions.

Paragraph B.3. adds another statement that is not supported by the

²⁰⁶ CP 2098-2099.

²⁰⁷ CP 2096-2097.

²⁰⁸ CP 2098.

²⁰⁹ *Id.*

facts, i.e., “nothing in [Judge Thorp’s] orders changed the previous rulings by Judge Bowman in any way.”²¹⁰ In fact, Judge Thorp’s orders fundamentally “changed” Judge Bowman’s rulings. Judge Bowman’s orders granted a very specific and restricted application of discretionary immunity to Norton Posey’s 1994 decision to remove the accident site from the County priority array and to the field measurements upon which Mr. Posey based his decision. Judge Thorp misinterpreted Judge Bowman’s orders as a “dismissal” of non-existent “guardrail claims,” then expanded application of discretionary immunity to any and all decisions, acts, or omissions of the County related to the priority array from 1988 through 2008 and into the future. By the time of trial, Judge Thorp had excluded all evidence regarding guardrails or other types of roadside barriers and had prohibited utterance of the words “guardrail” or “barrier.”

Paragraph B.4. states that “Mr. Haro was Plaintiffs’ only expert that had opined about rocks, redirectional berms or devices other than guardrails in his deposition.” The facts do not support this Finding, as previously discussed. Dr. Hayes had also opined about “devices other than guardrails” during his deposition. Again, if the County wanted to obtain the opinions of Appellants’ other experts regarding devices other than guardrails, it could have and should have asked the questions during the

²¹⁰ CP 4251.

experts' depositions that would elicit those opinions.

Paragraphs B.6. and B.7. include Judge Thorp's acknowledgment that Appellants "had alleged in some of their complaints that the failure of King County to erect barriers that might be considered different from guardrails was among their theories of liability," as well as the statement that Appellants "had more than ample opportunity to develop that theory well in advance of discovery cutoff," but did not do so.²¹¹

This "finding" is based on an erroneous view of the law governing discovery and pleading and is not supported by the facts. First, all of Appellants' complaints referenced not just "guardrails," but other types of barriers, as previously discussed. Appellants' "theory," as clearly stated in their Complaints, was that King County was negligent for, *inter alia*, failing to erect "guardrails and/or other traffic attenuators," "barriers," "roadway barriers," and "a barrier *or* rail on the shoulder of the embankment parallel to the Green River that would stop or prevent the vehicle . . . from going into the Green River."²¹² The Complaints filed by the Appellants clearly informed King County that their negligence claims were based, *inter alia*, on the failure to erect not **only** a "guardrail," but the failure to erect any type of barrier that would have prevented Ms. Mundell's Volkswagen from sliding into the Green River, as was required

²¹¹ CP 4252.

²¹² See Discussion of Paragraph B-8, below.

by King County’s overarching duty to keep its roads maintained in a reasonably safe condition for ordinary travel.

Appellants’ “theory” regarding barriers was not confined to their Complaints. In July of 2014, one full year before the trial began, Appellants’ traffic engineering expert, William Haro, testified by declaration that King County failed to maintain the Green River Road at the accident site in a reasonably safe condition because of, among other identified deficiencies, a “lack of a warranted **traffic barrier protecting vehicles from entry into the Green River.**”²¹³ Mr. Haro also stated in his Declaration that, had King County properly measured the shoulder width, they “may have continued beyond 1994 to evaluate the need for a guardrail at the site . . . and **a guardrail or some other equivalent device** would have been in place” when the accident happened.²¹⁴

On November 10, 2014, eight months before trial, Appellants filed the Declaration of Mark S. Erickson, their accident reconstructionist. Mr. Erickson identified “a standard W-beam guardrail” as a “roadside barrier” and stated that “**any** barrier system that would have been installed at the subject accident location would have met the NCHRP performance criterion,” and opined that a guardrail at the accident site would have

²¹³ CP 2867.

²¹⁴ CP 2878.

prevented the Volkswagen from going into the Green River.²¹⁵

During the deposition of Dr. Toby Hayes on December 10, 2014, seven months before trial, he testified,

My opinions are that if a guardrail had been present at the location where it is currently located the interaction of the vehicle with the guardrail would have been benign. That's a conclusion from Mr. Erickson's vehicle accident reconstruction with the guardrail.²¹⁶

Dr. Hayes also testified that the result "would be the same" if there had been a **Jersey barrier** in the same location, and that he would be considering the results of impact with **other types of barriers** prior to trial.²¹⁷ King County failed to question Dr. Hayes any further regarding other types of barriers.²¹⁸

Mr. Haro testified during his December 11, 2014 deposition -- seven months before trial began -- that erecting berms and even placing boulders on the shoulder of the road would have been preferable to providing no deflecting device at all at the accident site, as previously discussed.

Paragraph B.8. states "[t]he opinions and information Plaintiffs' counsel disclosed prior to June 29, 2015, focused solely on what is

²¹⁵ CP 2635-2636 (emphasis added).

²¹⁶ CP 4284.

²¹⁷ CP 4274; 7/7/15 VRP, page 1591, lines 15-19; page 1593, lines 3 - 15; page 1594, lines 4-12.

²¹⁸ *Id.*

commonly understood as traditional guardrails[.]” There is no support in the record for this statement, as set out above. The Complaint filed by the Beaupre Appellants alleged that King County was negligent because the Green River Road was “designed, constructed and/or maintained . . . in such a way as to render it unsafe for traffic,” because of the failure to provide “signage, **guard rails and/or other traffic attenuators** on the roadway in question.”²¹⁹

The Complaint filed by the Fuda Appellants alleged that King County had “designed, constructed and maintained . . . **barriers**” in a deceptive and negligent manner;²²⁰ that Loni Mundell “lost control of the vehicle and entered into the Green River due to and because . . . **roadway barriers**” were “designed, constructed and maintained ... deceptively, wrongfully and negligently;”²²¹ and that the wrongfully, negligently and deceptively designed, constructed and maintained roadway, including “inadequate signage and **barriers**” deceived Ms. Mundell and resulted in her losing control of the car and traveling down the embankment into the Green River.²²² The Fuda Complaint alleged that King County was negligent in designing, constructing, repairing and maintaining, *inter alia*,

²¹⁹ CP 2461.

²²⁰ CP 2496.

²²¹ CP 2497.

²²² CP 2498.

“roadway barriers.”²²³ Finally, the Fuda Complaint alleged that King County was negligent for “failing to have designed, constructed and maintained **a barrier or rail** on the shoulder of the embankment parallel to the Green River that would stop or prevent the vehicle . . . from going into the Green River.”²²⁴

The Appellants’ Complaints alone gave more than adequate notice to King County that their negligence theory included “guardrails,” “barriers,” “roadway barriers,” and “a barrier or rail” as devices that should have been erected at the accident site to keep the vehicle in which their children died from going into the Green River. King County knew from the time this case was filed that Appellants’ negligence theory included the position that a guardrail **or other type of barrier** was required to eliminate the dangerous condition at the accident site.

King County also knew at all times the term “guardrail” is synonymous with “Jersey barrier.” In *Ruff*, the type of barrier recommended by the plaintiff’s expert was a Jersey barrier, defined by this Court as “a temporary concrete barrier frequently used in place of a guardrail.”²²⁵ Throughout the *Ruff* case, however, the term utilized by

²²³ CP 2499.

²²⁴ CP 2501.

²²⁵ *Ruff*, 72 Wn. App. at 293 and fn 3, 865 P.2d 5.

King County and the Court for Jersey barrier was “guardrail.”²²⁶

Paragraph 8 also states that Appellants “did not give notice” that their experts would be “expressing opinions about barriers other than what is commonly understood as traditional guardrails” “prior to June 29, 2015.”²²⁷ As discussed above, this Finding is not supported by the record.

Paragraph B.9. states that Appellants “offered no support, and the Court is not aware of any, that simply pleading the theory that guardrails are distinct from other types of barriers overcomes the party’s discovery obligations and preserves the theory for trial.”²²⁸ This “finding” is based on an erroneous view of the law governing the rules of pleading and discovery.

A party discloses his or her theory of the case in his **pleadings**,²²⁹ not in discovery. There is no law or rule that requires a party to “develop” its theory beyond CR 8, which requires “a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for

²²⁶ *Id.* at 289, 294 (“King County asserts that its guardrail prioritization system shields it from liability based on discretionary immunity.”), 295 (“We find that the timing of installation of guardrails at this location to be the exercise of operational discretion, not discretion as to basic policy.”), 296, 299, 865 P.2d 5.

²²⁷ CP 4252.

²²⁸ CP 4253.

²²⁹ See *Rockwell v. Peyran*, 172 Wn. 434, 435, 20 P.2d 841, 841 (1933) (“**Plaintiff's theory of this case, as disclosed by his complaint . . . Defendants' theory of the case, as disclosed by their answer and cross-complaint . . . See also *Broadway Hosp. & Sanitarium v. Decker*, 47 Wn. 586, 92 P. 445 (1907) (“In order that appellant's full theory of the case may be understood, we have stated extensively the substance of the complaint.”) (emphasis added); *Schorno v. Kannada*, 167 Wn. App. 895, 276 P.3d 319 (2012) (“Kannada's theory of the case was that Schorno “groom[ed]” him for sexual abuse[.]” quoting Kannada’s complaint.).**

judgment for the relief to which he deems himself entitled.”²³⁰

The current civil rules relating to pleadings were designed to accomplish the purpose of giving notice of a claim or defense. . . . If the adverse party needs a more definite statement for the purpose of responsive pleading, he may resort to CR 12(e). The burden of filling in the details is borne by the discovery process.²³¹

Based upon one party’s theory of the **case as described in that party’s pleading**, the adverse party is entitled to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]”²³² The discovery rules entitle a party to “**obtain** discovery” through depositions, interrogatories, and requests for production.”²³³ A party is obligated under the discovery rules to provide the discovery **requested** unless it is subject to privilege.²³⁴ However, there is no discovery rule that requires a party to “develop” a theory in order to provide information that the adverse party did not request. Such an obligation would utterly destroy the adversarial process and require adverse parties to proactively assist in their adversary’s preparation of his or her case.

Paragraph B.10. states “[t]here could be no misunderstanding” that the orders regarding guardrails “pertained to all types of barriers,

²³⁰ CR 8(a).

²³¹ *RTC Transport, Inc., v. Walton*, 72 Wn. App. at 390-391, 864 p.2d 969 (citing 5 C. Wright & A. Miller, *Federal Practice* § 1215 (1990)).

²³² CR 26(b)(1).

²³³ CR 26(a).

²³⁴ CR 26(b).

traditional or non-traditional.”²³⁵ The language of the court’s orders do not support this Finding. Finding 10 also states that Appellants offered “no reasonable excuse for their experts’ failure to express opinions regarding other types of barriers within the period of discovery.”²³⁶ As previously discussed, **all** of Appellants’ experts expressed opinions regarding other types of barriers within the period of discovery. King County had the opportunity and ample time during the discovery period, but did not engage in discovery about specific types of barriers beyond the cursory questioning of Mr. Haro during his deposition.

Paragraph B.11. states that “[p]rejudice to King County by allowing Plaintiffs’ experts to express these new opinions was extreme.”²³⁷ Any “prejudice” that might have resulted to King County would have been a result of their own choice not to conduct discovery regarding specific types of barriers. As previously discussed, the County **did** have notice that Appellants’ experts would offer opinions about the need for/effect of barriers other than guardrails. The length of time from filing of this action to trial, cited as “prejudicial” to King County, had nothing to do with Appellants’ “new” expert opinions. The “finding” that “[r]esponding to those new opinions would require deposing Plaintiffs’

²³⁵ CP 4253.

²³⁶ CP 4254.

²³⁷ *Id.*

experts and then preparation of King County’s own experts to respond, all while trial was occurring”²³⁸ ignores the fact that King County had already deposed Appellants’ experts, with plenty of time before trial to prepare its own experts to respond. It also ignores the fact that the County failed to seek any written discovery about specific types of barriers. Finally, it places the fault for King County’s own lack of diligence during discovery on the Appellants.

Paragraphs B.12. and B.13. discuss why exclusion of the “new” opinions was justified. Judge Thorp’s sanctions order makes no reference to Ms. Deutscher’s explanation for why the “new” disclosures were submitted on June 29, 2015, which explanation sets out a “reasonable excuse” or justification for the late witness disclosures.

Instead, Judge Thorp listed unidentified “gamesmanship” and her own speculation that Appellants “hop[ed] the Court would impose a monetary sanction instead of exclusion” as the bases for imposing “one of the most severe discovery violation remedies.”²³⁹ However, the “new” disclosures were identical to the timely-filed witness disclosures with the exception of substitution of the word “barrier” for guardrail. No prejudice would have resulted from permitting Appellants’ experts to testify regarding barriers other than “traditional” guardrails, because King

²³⁸ *Id.*

²³⁹ CP 4254.

County already knew what those expert opinions were, and knew that the term “guardrail” and “barrier” are synonymous when not distinguished as different types of devices. Such opinions would have conformed to Appellants’ theory of the case as plead in their Complaints.

The Court ruled that “monetary sanctions” were “not sufficient” to address the late disclosure of expert opinions. However, if the court believed King County needed time to prepare for the “new” opinions, it could have continued the trial, which would also have been a lesser sanction than exclusion of the “new” opinions. The only explanation for why no continuance was ordered was this: “[f]or multiple reasons, particular the extraordinary delay in getting this case to trial, this Court would not continue the trial date.”²⁴⁰

The exclusion of all evidence regarding guardrails was erroneous to begin with, as it was contrary to Washington law governing discretionary immunity and contrary to the law governing King County’s duty to maintain the Green River Road in a reasonably safe manner. It was an abuse of discretion to exclude the “new” opinions because while they were untimely, they were a result of Judge Thorp’s June 16 unexpected orders on King County’s motions in limine number 6 and 13, which were inconsistent with all previous court orders. This was a “reasonable

²⁴⁰ CP 4254.

excuse” for the untimeliness, and *Burnet’s* requirement of a “willful” violation, i.e., a violation without reasonable excuse, was not satisfied. The “*Burnet* sanction” of exclusion of Appellants’ experts’ so-called “new” opinions should be reversed.

G. The verdict must be vacated because the jury was instructed with incorrect law, inapplicable law, and incomplete facts.

As stated above, “an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party,”²⁴¹ and a clear misstatement of the law is presumptively prejudicial.²⁴² As discussed above, the jury instructions misstated the law applicable to Appellants’ claims, omitted material facts, included inapplicable law favorable to King County, and omitted law favorable to Appellants. Appellants were severely prejudiced by the erroneous instructions. The jury’s verdict should be vacated.

H. Cumulative error denied Appellants their right to a fair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was

²⁴¹ *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

²⁴² *Thompson*, 153 Wn.2d at 453, 105 P.3d 378 *Thompson*, 153 Wn.2d at 453, 105 P.3d 378.

fundamentally unfair.²⁴³ Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal.²⁴⁴ Rather, the combined errors effectively denied the defendant a fair trial.²⁴⁵ But if no prejudicial error occurred, then there can be no cumulative error that deprived the defendant of a fair trial.²⁴⁶ Though the doctrine of cumulative error has most often been raised in criminal appeals, it is available in civil cases as well.²⁴⁷

Here, as discussed above, Judge Bowman erred in granting discretionary immunity to King County under *Avellaneda* for the acts of Norton Posey in 1994. This error was compounded by Judge Thorp's expansion of the discretionary immunity to any and all past and future acts omissions, and decisions related to the County's guardrail priority array. Judge Thorp expanded the error further by first excluding all evidence about a specific type of roadside barrier (guardrail), then later expanding that exclusion to prohibit evidence of *all* types of roadside barriers. The

²⁴³ *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).

²⁴⁴ *State v. Hodges*, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004).

²⁴⁵ *Hodges*, 118 Wn. App. at 673–74, 77 P.3d 375.

²⁴⁶ *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).

²⁴⁷ 15A Wn. Prac., Handbook Civil Procedure § 88.16 (2015-2016 ed.), citing, e.g., *Rice v. Janovich*, 109 Wn. 2d 48, 742 P.2d 1230, R.I.C.O. Bus. Disp. Guide (CCH) P 6769 (1987) (owing to reversal on other grounds, court did not need to consider whether there was cumulative error on the part of the trial court); *Dean v. Group Health Co-op. of Puget Sound*, 62 Wn. App. 829, 816 P.2d 757 (Div. 1 1991) (court's conclusion notes that because no error had been demonstrated, claim of cumulative error was also without merit).

error made by Judge Bowman and enlarged by Judge Thorp culminated in jury instructions, given over Appellants' objections, that set out incorrect and/or incomplete statements of law, omitted material facts, prevented Appellants from arguing their theory of the case, and instructed the jury that it could not use

testimony regarding the presence or absence of guardrails or re-directional devices at the scene of the accident or at other locations along the Green River Road in determining whether King County was negligent in designing, constructing, maintaining, and repairing the Green River Road in a reasonably safe condition for ordinary travel or whether there was an inherently dangerous or deceptive condition at the accident location.²⁴⁸

This instruction was given to the jury in the instruction packet and was read to the jury twice during the course of trial.²⁴⁹

Should this court find that the errors discussed above do not individually warrant vacation of the jury verdict, this court should find that the cumulative prejudicial effect of the errors deprived Appellants of a fair trial and remand for a new trial.

VI. CONCLUSION

This Court should vacate the jury verdict and remand this case for a new trial with instructions to ensure that the errors identified herein will not be repeated.

²⁴⁸ APPENDIX, page A-5; CP 4093.

²⁴⁹ CP 4093; RP 7/28/15 VRP at 926-927; RP 8/18/15 VRP at 1512, 1518.

Judge Bowman’s interpretation and application of the *Avellaneda* case to support a grant of discretionary immunity to the County for Mr. Posey’s 1994 decision to remove the accident site from the King County guardrail priority array was contrary to Washington law. Mr. Posey was not a “high level executive,” and his decision was merely operative or ministerial, far removed from the making of any policy. Further, the County’s guardrail priority array has nothing to do with Appellants’ claim that King County breached its duty to maintain the Green River Road in a reasonably safe condition, including, *inter alia*, erection of a guardrail or other type of barrier to divert errant cars away from the Green River. *Avellaneda* does not apply in this case.

Judge Thorp’s misinterpretation of Judge Bowman’s November 2014 Order as “dismissing” nonexistent “guardrail claims” was erroneous. Judge Bowman neither dismissed any claims nor excluded any evidence in his orders. This misinterpretation resulted in subsequent orders that expanded Judge Bowman’s very narrow grant of discretionary immunity to a single 1994 decision to remove the accident site from the guardrail array into a global grant of immunity to any and all known or unknown acts, omissions, and decisions of King County related to its guardrail array between 1998 through 2008 and into the future, even forbidding the utterance of the words “guardrail” or “barrier” at trial.

Judge Thorp's erroneous view of the law resulted in exclusion of relevant and material evidence and prevented Appellants from arguing their theory of the case to the jury. Judge Thorp's misinterpretation of Judge Bowman's November 2014 Order and her erroneous view of the law permeated the proceedings below and guaranteed the resulting defense verdict. Finally, Judge Thorp abused her discretion by imposing sanctions on Appellants' counsel where there was no factual basis for sanctions.

The Court should reverse Judge Thorp's evidentiary rulings identified in this Opening Brief that prevented Appellants from presenting evidence related to guardrails and other barriers.

This Court should vacate the jury verdict, which was based upon only part of the material and admissible evidence regarding King County's duty and the existence of inherently dangerous conditions at the accident site. The verdict was also based upon jury instructions that included misstatements of law that relieved King County of its burden to show that it met its duty to maintain the Green River Road in a reasonably safe condition.

The Court should remand this case for a new trial with instructions that discretionary immunity does not apply in this action and that evidence related to the absence or presence of a guardrail or other types of barriers at the accident site is admissible. The Court should rule that, on remand,

the orders in limine and Jury Instructions entered by Judge Thorp will not be in effect. Finally, the Court should reverse the sanctions imposed by Judge Thorp for violations of the orders in limine and require that Ms. Deutscher and Mr. Dore be reimbursed for any amounts they have paid under the sanctions order.

Finally, this Court is requested to order that this case be transferred to a different judge due to Judge Thorp's personal animosity toward Appellants' counsel and extreme bias in favor of King County. Appellants do not believe they can receive a fair trial over which Judge Thorp presides. Throughout pretrial and trial proceedings, Appellants' counsel were treated with disdain and lack of respect, in sharp contrast to Judge Thorp's interactions with the County's attorneys. Appellants filed written objections to the violation of the appearance of fairness, which are included in the record before this Court.²⁵⁰

DATED this 5th day of July, 2016.

Respectfully submitted,

s/James J. Dore, Jr.

James J. Dore, Jr., WSBA #22106

Dore Law Group, PLLC

1122 W. James Street

Kent, WA 98032

253.850.6411

Fax: 253.850.3360

Email: jim@dorelawpllc.com

Attorney for Appellants

²⁵⁰ See 7/7/15 VRP, pages 1618 - 1625; CP 3880 - 3937; CP 3989 - 4014.

VII. APPENDIX

A. Court’s Instructions to Jury

Instruction No. 14 A-2
Instruction No. 15 A-3
Instruction No. 16 A-4
Instruction No. 17 A-5

B. Orders On Trial Rulings and Order Imposing Sanctions
on Ann Deutscher and James J. Dore, Jr.B-1 – B-20

• *Court's Instruction to Jury No. 14:*

The plaintiffs claim that Defendant King County was negligent in one or more of the following ways:

- a. Allowing mature maple tree limbs to overhang the Green River Road which affected visibility;
- b. Failing to sweep or clean wet leaves from the roadway and pavement markings;
- c. Failing to place warning signs prior to the curve;
- d. Striping the northbound lane with a substandard lane width;
- e. Constructing the roadway with a soft shoulder.²⁵¹

²⁵¹ CP 4090.

• *Court's Instruction to Jury No. 15:*

Counties have a duty to exercise ordinary care in the design, construction, maintenance, and repair of their public roads to keep them in a reasonably safe condition for ordinary travel. This duty is owed to all persons whether those persons are negligent or fault free.

A county does not have a duty to (1) anticipate and protect against all imaginable acts of negligent drivers, (2) update every road and roadway structure to present-day standards, or (3) make a safe road safer.²⁵²

²⁵² CP 4091.

• *Court's Instruction to Jury No. 16:*

The county has a duty to eliminate an inherently dangerous or misleading condition. The duty requires the county to reasonably and adequately warn of a hazard.

If you find the Green River Roadway was inherently dangerous or misleading, you must determine the adequacy of the corrective actions under all of the circumstances. If you determine the county's corrective actions were adequate, then you must find the county has satisfied its duty to provide reasonably safe roads.

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

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

The notice required may be actual or constructive. Constructive notice arises if the condition has existed for such a period of time that the governmental entity should have known of its existence by the exercise of ordinary care.

A county cannot be negligent if its only knowledge is that an unsafe condition might or even probably will, develop. A county has no duty to inspect its road to satisfy its duty to provide roads that are reasonably safe for ordinary travel.²⁵³

²⁵³ CP 4092.

• *Court's Instruction to Jury No. 17*

You may not use testimony regarding the presence or absence of guardrails or re-directional devices at the scene of the accident or at other locations along the Green River Road in determining whether King County was negligent in designing, constructing, maintaining, and repairing the Green River Road in a reasonably safe condition or whether there was an inherently dangerous or deceptive condition at the accident location.²⁵⁴

²⁵⁴ CP 4093

DECLARATION OF SERVICE

I declare that I served the foregoing Appellants' Opening Brief on
the attorneys below via electronic service:

Daniel L. Kinerk
Cindi Port
King County Prosecuting Attorney
500 Fourth Avenue, Ste. 900
Seattle, WA 98104
Attorneys for Respondent King County

Paul Lawrence
Matthew Segal
Jamie Lisagor
Pacifica Law Group
1191 2nd Ave., Ste. 2000
Seattle, WA 98101
Attorneys for Respondent King County

W. Sean Hornbrook
Kendra Comeau
Alfred E. Donohue
Wilson Smith Cochran Dickerson
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
Attorneys for Resp. Loni Mundell

Scott Blankenship
The Blankenship Law Firm, P.S.
1000 Second Avenue, Ste. 3250
Seattle, WA 98104
Attorney for Resp. Loni Mundell

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

Executed in this 5th day of July, 2016.

s/James J. Dore, Jr.
James J. Dore, Jr., WSBA #22106
Dore Law Group, PLLC
1122 W. James Street
Kent, WA 98032
253.850.6411
Fax: 253.850.3360
Email: jim@dorelawpllc.com