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NO. 74033-4-1

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.

APPELLANTS' REPLY 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, Washington 98032
Ph: 253-850-6411
Fax: 253-850-3360

TABLE OF CONTENTS

	<u>Page</u>
I. Neither King County’s guardrail priority array nor discretionary immunity is at issue in this case.....	1
A. King County mischaracterized Appellants’ claim	1
B. Discretionary immunity does not apply to the failure to warn of or eliminate inherently dangerous conditions on a roadway	3
C. The <i>Evangelical</i> factors do not apply to the challenged “act, omission, or decision” of King County	5
D. The Legislature has not immunized the County from liability for the negligent construction, repair, or maintenance of its roadways	6
E. <i>McCluskey, Avellaneda and Jenson</i> are distinguishable and do not support King County’s arguments regarding discretionary immunity	8
F. The County’s arguments would improperly expand the “extremely limited” scope of discretionary immunity	11
II. It was an abuse of discretion to exclude evidence about the County’s duty and breach of that duty to correct an inherently dangerous condition by installing a guardrail or barrier at the accident site.....	13
III. Because of the erroneous interpretation and application of the law governing discretionary immunity, the trial court’s jury instructions did not allow Appellants to argue their theory of the case, and when read as a whole failed to properly inform the jury of the applicable law	14
IV. Appellants did not willfully violate discovery rules	16

V.	Appellants’ so-called “discovery violations” did not prejudice the County’s trial preparation	17
VI.	The sanctions imposed on Appellants’ counsel are not supported by the facts or the law	18
VII.	Cumulative error applies here	19
VIII.	Ms. Mundell’s conduct is not before this Court	20
	CONCLUSION	24

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Table of Cases</i>	
<i>Avellaneda v. State of Washington</i> , 167 Wn. App. 474, 273 P.3d 477 (2012).....	9
<i>Bechard v. Dalrymple</i> , 189 Wn. App 1044 (2015).....	24
<i>Berglund v. Spokane County</i> , 4 Wn.2d 309, 103 P.2d 355 (1940).....	11
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992).....	18
<i>Davidson v. Snohomish County</i> , 149 Wn.1d 109, 270 P. 422 (1928)	11
<i>Evangelical United Brethren Church v. State</i> , 67 Wn.2d 246, 407 P.2d 440 (1965).....	5, 12
<i>Godefroy v. Reilly</i> , 140 Wn. 650, 250 P. 59 (1926).....	22, 23
<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002).....	19
<i>Jensen v. Scribner</i> , 57 Wn. App.478, 789 P.2d 306 (1990).....	10
<i>Leber v. King County</i> , 69 Wn. 134, 124 P.397 (1912)	3
<i>McCluskey v. Handorff-Sherman</i> , 68 Wn. App. 96, 841 P.2d 1300, 1307 (1992), <i>aff'd</i> , 125 Wn.2d 1, 882 P.2d 157 (1994)	2, 8, 9
<i>McCluskey v. Handorff-Sherman</i> , 125 Wn.2d 1, 822 P.2d 157 (1994).	7, 9
<i>Overton v. Wenatchee Beebe Orchard Co.</i> , 28 Wn.2d 377, 183 P.2d 473 (1947).....	3
<i>Owen v. Burlington Northern and Santa Fe R.R. Co.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	15, 16
<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

Sage v. Northern Pacific Railway Co., 62 Wn.2d 6, 380 P.2d 856
(1963).....23

Stewart v. State, 92 Wn.2d 285, 597 P.2d 101 (1979).....2, 11, 25

Wuthrich v. King Cty., 185 Wn.2d 19, 366 P.3d 926 (2016).....3

Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 223 P.3d 1230
(2009).....12

ARGUMENT

I. Neither King County’s guardrail priority array nor discretionary immunity is at issue in this case.

This case has nothing to do with King County’s guardrail priority array or discretionary immunity. This case is about the common law duty of the County to maintain its roadways in a reasonably safe condition and its breach of that duty, which resulted in the drowning deaths of Appellants’ children.

As the County did in the trial court, it asserts in its Response Brief that its “budgetary policy decisions governed by a priority array based on an algorithm . . . are subject to discretionary immunity.”¹ Based on its own analysis of the *Evangelical* factors, this Court previously ruled to the contrary.² But even if discretionary immunity did apply to the County’s guardrail priority program, it would have no impact on this case because Appellants did not challenge any act, omission, or decision related to the creation or implementation of that budgetary program.³

A. King County mischaracterized Appellants’ claim.

The initial issue in determining whether discretionary immunity applies to a plaintiff’s claim is to define the “challenged act, omission, or

¹ Brief of Respondent King County, page 1.

² *Ruff v. County of King*, 72 Wn. App. 289, 965 P.2d 5 (1993), *reversed on other grounds*, 125 Wn.2d 697, 887 P.2d 886 (1995).

³ *See, e.g.*, CP 2072 - 2073.

decision” at issue.⁴ In its Response Brief, the County incorrectly identifies the challenged act in this case as the “formulation” or “establishment” of its guardrail priority array.⁵ Appellants’ claim against King County is not based on its decision to create a guardrail priority array, nor is Plaintiffs’ claim based on Mr. Posey’s 1994 decision to remove the accident site from the guardrail priority array. Appellants’ sole claim is that the County breached its common-law duty to maintain the Green River Road in a reasonably safe condition. Budgetary considerations do not excuse the County from this duty: “If resources are insufficient and a road is unreasonably hazardous, the State has several options. At a minimum, the State can place warning signs. In the most serious situation, the State can close the road.”⁶

What a county **cannot** do under Washington law is fail to adequately warn of or eliminate inherently dangerous conditions on its roadways simply because it uses a logarithm to prioritize guardrail projects for existing reasonably safe roads. King County mischaracterized the Appellants’ claim to escape liability for breach of its long-established duty by the improper application of discretionary immunity.

⁴ See, e.g., *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979).

⁵ Response Brief, page 41.

⁶ *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 108–09, 841 P.2d 1300, 1307 (1992), *aff’d*, 125 Wn.2d 1, 882 P.2d 157 (1994) (emphasis added).

B. Discretionary immunity does not apply to the failure to warn of or eliminate inherently dangerous conditions on a roadway.

The crux of the County’s arguments in the trial court and its Response in these proceedings is that “Plaintiffs cannot argue that the failure to construct a guardrail or other barriers was negligent without also contending the county’s policy decisions were negligent.”⁷

This assertion is contrary to Washington law: the County has no discretion to leave a roadway in a dangerous condition and no “policy decision” to make when a County road is inherently dangerous. For more than 100 years⁸, Washington courts have held that a government entity “may be chargeable with negligence in failure to maintain guard rails, barriers or warning signs if the situation along a highway is inherently dangerous or of such character as to mislead a traveler [.]”⁹

As recently as January of 2016, the Supreme Court affirmed that King County has “the overarching duty to provide reasonably safe roads for the people of this state to drive upon,” and that “[a]ddressing inherently dangerous or misleading conditions is simply ‘part of’ that duty.”¹⁰ This is so regardless of the fact -- well known to the Supreme Court -- that the County created and has implemented a guardrail priority array for more than

⁷ Response Brief, page 1.

⁸ See *Leber v. King County*, 69 Wn. 134, 135-136, 124 P.397 (1912).

⁹ *Overton v. Wenatchee Beebe Orchard Co.*, 28 Wn.2d 377, 383, 183 P.2d 473 (1947).

¹⁰ *Wuthrich v. King Cty.*, 185 Wn.2d 19, 26, 27, 366 P.3d 926, 929 (2016).

30 years. Creation and implementation of its guardrail priority array does not immunize the County from claims for breach of its common-law duty to maintain safe roads.

The County's assertion that "Plaintiffs ignore the *Evangelical* Factors on appeal"¹¹ is disingenuous. The County's lengthy discussion of the *Evangelical* factors to determine whether discretionary immunity applies to the creation and implementation of its guardrail priority array is irrelevant because Appellants did not challenge the County's creation and/or implementation of its guardrail priority array.

Appellants' single claim against King County is that the Green River Road was not reasonably safe for ordinary travel because the County negligently failed to warn of or eliminate inherently dangerous conditions. Lack of a guardrail or other barrier to deflect errant vehicles from sliding over a soft shoulder and down a nonrecoverable slope into the Green River was one of several factors that made the Green River Road accident site inherently dangerous.

The Comment to WPI 140.01 instructs that the County's duty to design, construct, maintain, and repair its public roads in a reasonably safe condition includes the duty to eliminate an inherently dangerous or misleading condition. The duty requires the County to reasonably and

¹¹ Response Brief, page 46.

adequately warn of a hazard and maintain adequate protective barriers where such barriers are shown to be practicable and feasible. The County nevertheless insists that its failures to adequately warn of the hazards or “maintain protective barriers” at the accident site are protected by discretionary immunity. The County has no authority to modify its common law duty by adopting a budgetary planning tool known as a guardrail priority array.

C. The *Evangelical* factors do not apply to the challenged “act, omission, or decision” of King County.

It certainly is not “remarkable” that Plaintiffs did not “evaluate the four *Evangelical* factors”¹² in their Opening Brief, because the County is not entitled to discretionary immunity for breach of its common-law duty to maintain safe roadways, which is the only challenged “act, omission, or decision”¹³ in this action. Appellants briefly discussed the *Evangelical* factors in their Opening Brief by referencing this Court’s own analysis of the issue in *Ruff*.

Contrary to the County’s assertion that reliance on *Ruff* is “misplaced,” this Court’s previous consideration of application of discretionary immunity to King County’s guardrail priority array in the context of an identical negligence claim is informative and highly relevant

¹² Response Brief, page 46.

¹³ *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965).

in these proceedings.¹⁴ The fact that Appellants wrote that the “decisions reached in creating the King County priority array were ‘discretionary policy decisions made by ‘high level executives (Haff and the Council)’”¹⁵ is also irrelevant, because the County’s decision to “create” a guardrail priority array is not the “act, omission, or decision” that Appellants challenged. While King County certainly had authority to create its priority array, it does not have authority to maintain a road in an unsafe condition based on the existence of that guardrail priority array. The lengthy discussion of *Evangelical* “factors” in the County’s Response Brief is irrelevant and should be disregarded.

D. The Legislature has not immunized the County from liability for the negligent construction, repair, or maintenance of its roadways.

At page 36 of the Response Brief, the County asserts that “[t]he trial court correctly ruled that discretionary immunity applies to the County’s decisions regarding where and when to construct guardrail on existing roads,

¹⁴ At page 49 of its Response Brief, the County mischaracterizes *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 76, 170 P.3d 10 (2007) as “noting that reversal by the Supreme Court on other grounds ‘cast[s] doubt’ on the ‘precedential value of the Court of Appeals’ decision.” What the Court actually wrote was this: “Indoor Billboard argues *Pickett I* is **analogous** because Integra called its surcharge by the same name as a charge regulated by the FCC when it actually was something else. **But this court subsequently reversed *Pickett I*, casting doubt on its precedential value for this case.** See *Pickett II*, 145 Wash.2d at 191, 35 P.3d 351.” Indoor Billboard relied on *Pickett I* to support its own argument on the same issue (causation) for which was *Pickett I* was reversed. See *Indoor Billboard*, 162 Wn.2d at 80-81, 170 P.3d 10.

¹⁵ Response Brief, page 49.

including removal of the accident site from the priority array in 1994.” However, discretionary immunity does **not** apply to Plaintiffs’ claim that the County’s failure to install a guardrail at the accident site to correct an inherently dangerous condition on the Green River Road was negligent, which is the issue in this case.

In 1991, at the request of DOT, Substitute Senate Bill 5721 was introduced. It would have immunized the State from liability for highway design, construction, or signing if such conformed to current engineering or design standards. However, the bill itself, in its declaration of legislative intent, stated: “However, it will not relieve government agencies, from meeting their public obligations to maintain safe roadways and facilities, nor to respond to public notice of unsafe conditions.” Substitute Senate Bill 5721, 52d Legislature (1991).

The Legislature did not enact DOT's request for limited immunity. One can only conclude that the Legislature did not intend to create a special immunity for highway defects, as the majority would appear to want. It is significant that when the Legislature intends to provide immunity, it does so specifically as in qualified immunity for certain recreational uses, RCW 4.24.210; certain actions regarding mental illness evaluation and treatment, RCW 71.05.120; and militia's federal activities, RCW 38.40.025. **The Legislature has not granted similar immunity for actions based on negligent highway design or maintenance; indeed, it has refused to do so.**¹⁶

Not surprisingly, no Washington appellate court has ever applied discretionary immunity to a claim for negligent highway design,

¹⁶ *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 15-16, 822 P.2d 157 (1994), Brachtenbach, J., (concurring in part, dissenting in part) (emphasis added).

construction, repair, or maintenance, which is the **only** claim Appellants have asserted against King County. The County’s “priority array” is not an issue in this case, in spite of the County’s valiant attempt to transform Appellants’ claim from failure to maintain the Green River Road in a reasonably safe condition into a claim of negligence in its budgetary planning.

E. *McCluskey, Avellaneda and Jenson are distinguishable and do not support King County’s arguments regarding discretionary immunity.*

King County relies on *McCluskey*, *Avellaneda*, and *Jenson* to support its argument that “discretionary immunity applies to tort claims challenging unfunded roadway improvements” and to “the County’s decisions regarding guardrail on Green River Road.”¹⁷ First, the *McCluskey* Court of Appeals specifically noted that the Legislature, by “enacting laws governing the priority of highway projects, RCW 47.05, did **not** grant the State immunity from liability for negligent design or maintenance of unfunded projects.”¹⁸ Second, these three cases provide no support for the County’s position that it is immune from Plaintiffs’ claim based upon its adoption of a schedule for prioritizing guardrail projects on existing reasonably safe roads.

The *McCluskey* plaintiff contended that the State was negligent in

¹⁷ Response Brief, page 38.

¹⁸ *McCluskey*, 68 Wn. App. at 106, 841 P.2d 1300 (emphasis added).

failing to make certain improvements on a stretch of road. The trial court excluded evidence regarding the State’s 1986 Priority Array, the 1987-89 Highway Construction Program, and the 1987-89 Transportation Appropriation Act, and properly instructed the jury “that the State has a duty to exercise ordinary care in the maintenance of its public roads and that inherent in this duty ‘is the alternative duty either to eliminate a hazardous condition, or to adequately warn the traveling public of its presence.’”¹⁹

The *McCluskey* Court of Appeals affirmed the trial court’s decision, noting that in “enacting laws governing the priority of highway projects, RCW 47.05, did not grant the State immunity from liability for negligent design or maintenance of unfunded projects.”²⁰ The *McCluskey* Supreme Court drew “no conclusions about discretionary immunity . . . because of the State’s abandonment of the theory at trial,” and affirmed the judgment of the trial court.²¹

The challenged act in *Avellaneda* was the Department of Transportation’s decision to exclude SR 512 project from its priority array during formulation and drafting of its budget proposal.²² No evidence was presented in *Avellaneda* that the highway was unsafe as it existed at the time

¹⁹ *McCluskey*, 125 Wn.2d at 5, 882 P.2d 157.

²⁰ *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 106, 841 P.2d 1300 (1992), *affirmed*, 125 Wn.2d 1, 822 P.2d 157.

²¹ *McCluskey*, 125 Wn.2d at 13, 882 p.2d 157.

²² *Avellaneda v. State of Washington*, 167 Wn. App. 474, 488, 273 P.3d 477 (2012).

of the accident. In contrast, the challenged acts in this case are the County's failures to warn of or eliminate inherently dangerous conditions on the Green River Road. *Avellaneda* does not apply to this action.

Jenson v. Scribner was cited by the *Avellaneda* court because in *Jenson*, as in *Avellaneda*, it was DOT's budgeting and prioritization of a project on a State road that was challenged. In *Jenson*, the plaintiffs argued that a median barrier should have been funded and constructed sooner at a particular location and that the State "negligently delayed construction"²³ of a median barrier and "was negligent in the manner in which it collected accident data for use in planning highway projects and reporting certain information."²⁴ There are no such claims in this action. The County's assertion that this case is "similar" to *Jenson* is simply wrong.

In *McCluskey*, the Court of Appeals wrote that RCW 47.05 does not grant the State immunity from liability for negligent design or maintenance of unfunded projects. *Avellaneda* and *Jenson* are distinguishable because those plaintiffs did not claim breach of a county's common-law duty to construct, repair, and maintain its roadways in a reasonably safe condition for ordinary travel. None of these cases supports the County's arguments regarding discretionary immunity in this case.

²³ 57 Wn. App.478, 481, 789 P.2d 306 (1990).

²⁴ *Id.* at 482-483, 789 P.2d 306.

F. The County’s arguments would improperly expand the “extremely limited” scope of discretionary immunity.

The County’s suggestion that there is no “inherently dangerous condition exception to discretionary immunity”²⁵ is nonsensical and turns Washington law on its head. In general terms, RCW 4.92.090 waived state immunity from tort claims. “Discretionary governmental immunity in this state is an extremely limited exception”²⁶ to that waiver of sovereign immunity. Even before the Legislature waived sovereign immunity in 1961, the Supreme Court recognized common law liability of a government entity for negligent highway design/maintenance,²⁷ and for decades, the Supreme Court has decided cases involving questions of road design and maintenance under ordinary negligence law.²⁸ Neither the Legislature nor any Washington court has granted discretionary immunity for negligence in designing, constructing, repairing or maintaining roadways in a reasonably safe condition. The trial court erred in doing so in this case.

“[M]unicipalities are generally held to the same negligence standards as private parties.” Thus, they are “held to a general duty of care, that of a ‘reasonable person under the circumstances.’” *Keller*, 146 Wash.2d at 243, 44 P.3d 845

²⁵ Response Brief, page 53.

²⁶ *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101, 106 (1979).

²⁷ *See, e.g., Berglund v. Spokane County*, 4 Wn.2d 309, 314-316, 103 P.2d 355 (1940); *Davidson v. Snohomish County*, 149 Wn.1d 109, 111, 270 P. 422 (1928) (“It is undoubtedly the law that it is the duty of a municipality to keep its bridges in a reasonably safe condition for travel.”).

²⁸ *Id.*

(quoting DAN B. DOBBS, THE LAW OF TORTS § 228, at 580 (2000)). Specifically with respect to individuals who travel on a municipality's roadways, a municipality owes a duty to all travelers to maintain its roadways in a condition that is reasonably safe for ordinary travel. **Our Supreme Court has explained that a municipality's duty to maintain its roadways in a reasonably safe condition includes the “duty to eliminate an inherently dangerous or misleading condition.”**²⁹

The County also makes the assertion that “discretionary immunity is not confined to the specific point in time that the protected decision was made.”³⁰ There was no “protected decision” made by King County in this case. Consideration and application of discretionary immunity is confined to the specific act, omission, or decision that is challenged by a plaintiff.³¹ Discretionary immunity does not apply wholesale to any and all acts, omissions, and decisions related to a government program.

In this case, in spite of the fact that Appellants did not challenge Mr. Posey’s 1994 County decision to remove the accident site from the County guardrail priority array or the underlying field measurements along the Green River Road, Judge Bowman applied discretionary immunity to those acts at the County’s urging. Judge Thorp then misinterpreted both Judge Bowman’s Order and the law governing discretionary immunity, and applied discretionary immunity to any and all

²⁹ *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009) (internal citations omitted; emphasis added).

³⁰ Response Brief page 53.

³¹ *Evangelical*, 67 Wn.2d. at 255, 407 P.2d 440.

acts, omissions, and decisions related to the priority array since the creation of the guardrail priority array in 1986 through the date of trial. The initial grant of discretionary immunity by Judge Bowman was error that was subsequently expanded and compounded by Judge Thorp.

II. It was an abuse of discretion to exclude evidence about the County's duty and breach of that duty to correct an inherently dangerous condition by installing a guardrail or barrier at the accident site.

The acts to which Judge Bowman applied discretionary immunity were the 1994 decision by County engineer Norton Posey to remove the accident site from the priority array and the field measurements upon which Mr. Posey based his decision.³² Based on her misinterpretation of Judge Bowman's Order and her own misinterpretation of the law governing discretionary immunity, "Judge Thorp ruled that Plaintiffs could not pursue guardrail claims barred by discretionary immunity[.]"³³

The fatal flaw in the County's argument that "all guardrail-related theories, evidence, and argument were properly excluded" is that it is based upon the County's mischaracterization of Appellants' common-law negligence claim against the County. In fact, Appellants raised **no** "guardrail claims barred by discretionary immunity," since discretionary immunity does not apply to a breach of a county's duty to maintain a

³² CP 3026.

³³ Response Brief, page 56.

county roadway in a reasonably safe condition, as decades of Washington law establish.

The County writes that Appellants “waived” any negligent design or construction claims, citing CP 2072.³⁴ This is an erroneous citation to the record and a mischaracterization of Appellants’ response to King County’s Motion in Limine No. 6b, which is included in the record at CP 2081 - 2085. Appellants certainly did not “waive . . . any negligent design or construction claims,” as asserted by the County. Appellants’ opposition to Motion in Limine No. 6(b) concludes, “King County’s Motion in Limine 6(b) should be denied.”³⁵

Appellants raised no “guardrail claims barred by discretionary immunity,” and did not waive any “guardrail claims.” Because Appellants defeated the County’s Motion for Summary Judgment on the issues of “lack of duty” and “lack of proximate cause,”³⁶ exclusion of “all guardrail-related theories, evidence, and argument” was an egregious abuse of discretion.

III. Because of the erroneous interpretation and application of the law governing discretionary immunity, the trial court’s jury instructions did not allow Appellants to argue their theory of the case, and when read as a whole failed to properly inform the jury of the applicable law.

³⁴ Response Brief, page 56.

³⁵ CP 2085.

³⁶ 11/24/14 VRP, page 57.

King County correctly writes that “Plaintiffs’ instructional arguments rise or fall on their challenges to the trial court’s grant of summary judgment on discretionary immunity.”³⁷ It was error to apply discretionary immunity to Mr. Posey’s 1994 field measurements and decision to remove the accident site. It was error for Judge Thorp to expand Judge Bowman’s very limited application of discretionary immunity to any and all decisions related to the County’s priority array and then to exclude all evidence about guardrails. As a result of multiple errors arising from mischaracterization of Appellants’ claim and the improper application of discretionary immunity, the jury instructions describing the County’s duty and the Appellants’ claim are also erroneous, as discussed in Appellants’ Opening Brief.

As in *Owen v. Burlington N. & Santa Fe R.R. Co.*,³⁸ “[w]hether the roadway was reasonably safe for ordinary travel is, in this case, a material question of fact.”³⁹ Judge Bowman denied the County’s motion for summary judgment on duty and proximate cause.⁴⁰ Whether the Green River Road was inherently dangerous was thus an issue for the jury to decide. If a jury finds that a roadway is “inherently dangerous or misleading, then the trier of fact **must** determine the adequacy of the

³⁷ Response Brief, page 57.

³⁸ 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

³⁹ *Id.* at 789, 108 P.3d 1220.

⁴⁰ 11/24/14 VRP, page 57.

corrective actions **under all of the circumstances.**”⁴¹ In this case, one of the circumstances that should have been considered by the jury was the absence of a guardrail or other barrier at the site where Ms. Mundell’s vehicle spun across the road, slipped across the soft shoulder, and slid down the unrecoverable slope into the Green River. Instead, the trial court surgically removed any mention of guardrails or barriers from the case, repeatedly instructing 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.⁴²

The erroneous application of discretionary immunity in this action resulted in an unfair trial and improper jury instructions that denied Appellants’ right to present their case to the jury and effectively directed the jury to enter a defense verdict.

IV. Appellants did not willfully violate discovery rules.

As an initial matter, Appellants did not challenge the trial court’s exclusion of “new opinions” of expert Gerald Apple. Any and all

⁴¹ *Owen*, 153 Wn.2d. at 789, 108 P.3d 1220 (emphasis added).

⁴² CP 2421.

references to Mr. Apple⁴³ should be disregarded because there is no issue on appeal involving Mr. Apple.

The “new” opinions of Plaintiffs’ experts Erickson and Hayes were submitted in response to the court’s June 29, 2015 Orders on King County’s Motions in Limine, which were inconsistent with previous orders and contrary to law. There were no “new” opinions presented by these experts: the so-called “new” opinions were verbatim duplicates of timely-filed witness disclosures, with the exception that the word “guardrail” was replaced by “barrier.” In its motion to exclude the “new” opinions, the County argued that barriers and guardrails “**are one and the same** and all part of the same **program** that the Court has already ruled is protected by discretionary immunity.”⁴⁴ Judge Bowman did not rule that the priority array “program” was protected by discretionary immunity, and replacement of the word “guardrail” by “barrier” did not create any “new” opinions.

V. Appellants’ so-called “discovery violations” did not prejudice the County’s trial preparation.

It is true that “[t]he notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed

⁴³ Response Brief, pages 26, 29, 66, 67, 70.

⁴⁴ CP 4023-4031.

information about the nature of a complaint.”⁴⁵ However, CR 8(a) “does not require parties to state all of the facts supporting their claims in their initial complaint.”⁴⁶ The Complaints in this action put King County on notice that Appellants’ claim was that a guardrail **or other type of barrier** was required at the accident site. King County had the “opportunity to learn more detailed information about the nature of” the Appellants’ claims through discovery, but failed to request “more detailed information” about the terms “guardrail” and “barrier” repeatedly used in the Complaints.

Appellants had no obligation to “develop [a] theory” regarding guardrails or other types of barriers or provide further information without any inquiry from the County, particularly where the County has insisted that a guardrail and another type of barrier are actually “one and the same.” While Appellants had the duty to respond to discovery requests, they had no duty to assist the County by “developing” information that was not sought by the County.

VI. The sanctions imposed on Appellants’ counsel are not supported by the facts or the law.

Appellants found no Washington case in which expert testimony was excluded for untimely disclosure where, as in this case, there was a

⁴⁵ *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099, 1106 (1992).

⁴⁶ *Id.*

reasonable excuse for the late disclosure and no prejudice to the other party. Appellants found no Washington case in which an attorney was sanctioned for a lay witness's unanticipated responses to questions that did not violate any previous order of the court, as Ms. Deutscher was sanctioned here. Appellants found no Washington case in which an attorney was sanctioned for inadvertently reading a word from a witness's deposition, as Mr. Dore was sanctioned here. The sanctions imposed on Appellants' counsel after trial were rooted in Judge Thorp's erroneous view of the law governing discretionary immunity and of the Civil Rules governing pleading and discovery. Judge Thorp's imposition of these sanctions constituted an abuse of discretion because the sanctions are manifestly unreasonable and based on untenable grounds and untenable reasons.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.⁴⁷

VII. Cumulative error applies here.

Appellants identified the following specific errors committed by

⁴⁷ *Grandmaster Sheng-Yen Lu v. King Cty.*, 110 Wn. App. 92, 99, 38 P.3d 1040, 1043 (2002).

the trial court: (1) application of discretionary immunity to the 1994 administrative decision of Norton Posey; (2) the trial court's continuous expansion of the application of discretionary immunity to the point that utterance of the words "guardrail" or "barrier" was prohibited at trial; (3) exclusion of all evidence related to the requirement for and failure to install a guardrail or barrier at the accident site; (4) jury instructions based on incorrect and incomplete statements of law and incomplete facts, which prevented Appellants from presenting their case to the jury and essentially directed the jury to enter a defense verdict; and (5) imposition of sanctions not supported by law or fact. Appellants discussed each of these errors in their Opening Brief. It is pure sophistry for King County to suggest that Appellants have not shown prejudice. In the event this Court does not find that any of these errors alone does not justify remand for a new trial, the Court should rule that cumulative error denied Appellants a fair trial and remand on that basis.

VIII. Ms. Mundell's conduct is not before this Court.

Appellants did not appeal the jury's finding that Ms. Mundell was not at fault for their injuries, and neither did the County. The County had the same opportunity as did the Appellants to appeal the jury's finding that Ms. Mundell was not at fault. "[A] respondent who seeks review is often treated as having the aggrieved status when the matters challenged might

have an adverse effect on the respondent if the appellant's appeal were to result in a reversal.”⁴⁸ The County failed to appeal from the jury’s verdict that Ms. Mundell was not at fault,⁴⁹ and should not be permitted now to inject that issue into these proceedings or in a new trial. The jury heard all of the evidence presented by the County and by Ms. Mundell on the County’s defense of contributory negligence against her, and was instructed by the trial court on the County’s claim that Ms. Mundell was contributorily negligent,⁵⁰ but decided that she was not at fault. The County fully litigated the issue of Ms. Mundell’s contributory negligence and was not successful, and then failed to seek review of this issue. It is not “unjust” to prohibit the County from re-litigating Ms. Mundell’s conduct where the jury found she was not at fault for Plaintiffs’ injuries and no appeal was taken from the jury’s decision.

Nevertheless, the County argues that if this Court remands for a new trial, it “should be permitted to assert its contributory defense based on Ms. Mundell’s fault[.]”⁵¹ The County bases its argument on the absurd allegation that Appellants “colluded” with Ms. Mundell in order to obtain

⁴⁸ Karl B. Tegland, 2A WASHINGTON PRACTICE, *Rules Practice*, RAP 3.1 (citing *Hilton v. Mumaw*, 522 F.2d 588, 603 (1975) (a party has standing to appeal where “the final order from which the direct appeal was taken was entirely favorable” to it because “[t]he risk that they might become aggrieved upon reversal on the direct appeal is sufficient.”).

⁴⁹ Response Brief, page 2 (“King County assigns no errors.”).

⁵⁰ CP 2418.

⁵¹ Response Brief, page 79.

an “ill-gotten judgment in favor of Mundell.”⁵² The Court is respectfully referred to Ms. Mundell’s Response to Plaintiffs’ Objection to Violations of Due Process, the Appearance of Fairness, and Code of Judicial Conduct Rules 2.2 and 2.3,⁵³ which makes perfectly clear that there was no “collusion” between Plaintiffs and Ms. Mundell in the proceedings below. The County presented all of the evidence it had amassed against Ms. Mundell, and her attorney ably defended her. The judgment in Ms. Mundell’s “favor” was the result of the jury’s analysis of the evidence, not of “collusion” between Appellants and Ms. Mundell.

The cases cited by the County do not support its argument that it should be allowed to re-litigate the issue of Ms. Mundell’s fault. In *Godefroy*,⁵⁴ the Court acknowledged

An appellate court may, no doubt, where the error in the trial relates to a particular issue only which does not depend for its proper understanding or trial on other issues presented, reverse and remand the cause for trial on the particular issue erroneously tried, and on that issue alone.

Neither the Appellants nor the County has claimed any error regarding the trial of Ms. Mundell. Here, the “particular issue erroneously tried” is an issue of law: whether the County is entitled to discretionary immunity from a claim that it breached its duty to maintain the Green River

⁵² *Id.*, page 80.

⁵³ CP 2444 - CP 2445.

⁵⁴ *Godefroy v. Reilly*, 140 Wn. 650, 657, 250 P. 59 (1926).

Road in a reasonably safe condition based upon the fact that the County has created a guardrail priority array. All of the errors assigned by Appellants arise from this issue of law. This issue does not depend upon evidence related to anything that Ms. Mundell did or might have done. A jury decided that she did nothing to cause the Appellants' injuries after hearing all of the evidence. The County did not assign error to any of the orders or rulings involving Ms. Mundell, and did not seek review of the jury's finding that she was not at fault. The errors assigned by Appellants relate solely to their claim against the County, and do not depend upon evidence related to Ms. Mundell for a proper understanding on the issue.

In *Sage v. Northern Pacific Railway Co.*,⁵⁵ the trial court gave a jury instruction incorrectly defining the emergency doctrine. The Supreme Court held that this error warranted "a new trial upon plaintiff's complaint and Northern Pacific's cross-claim" because "the issues of liability and damages, as between the defendants, are not clearly and fairly separable and distinct[.]"⁵⁶ In contrast, here the issues of liability and damages as between the defendants are separable and distinct. The verdict that Ms. Mundell was not at fault was based on all evidence presented: the verdict that King County was not at fault was based on incomplete facts, erroneous evidentiary rulings, and incorrect jury instructions, all resulting from the

⁵⁵ 62 Wn.2d 6, 380 P.2d 856 (1963).

⁵⁶ *Id.* at 16, 380 P.2d 856.

trial court's misinterpretation and misapplication of discretionary immunity. The Court should "reverse and remand the cause for trial on the particular issue erroneously tried, and on that issue alone." The particular issue erroneously tried is the application of discretionary immunity to the County's breach of its common-law duty, which does not involve any act or omission of Ms. Mundell.

In *Bechard*,⁵⁷ the jury awarded special damages for past medical care expenses, but awarded nothing for past or future general damages. The trial court entered a partial judgment on the special damages and ordered a new trial on general damages only. The Court of Appeals reversed the special damage award and remanded for trial on all issues, because "the issues of general and special damages are both subsets of the same category, damages, and do not appear separable in this case."⁵⁸

The Court should deny the County's request for permission to raise a defense of contributory negligence against Ms. Mundell in a new trial.

CONCLUSION

The trial court's orders applying discretionary immunity to a claim of negligence in maintaining the Green River Road in a reasonably safe condition are contrary to long-established law, constitute a judicial repeal of the Legislature's waiver of sovereign immunity, and improperly apply

⁵⁷ *Bechard v. Dalrymple*, 189 Wn. App 1044 at *4 (2015).

⁵⁸ *Id.*

this “extremely limited”⁵⁹ exception that to an act, omission, or decision that was not challenged by Appellants. In spite of 100 years of law to the contrary and being told in no uncertain terms by this Court in *Ruff* that its guardrail priority array does not entitle it to discretionary immunity from a claim of negligent maintenance of its roadway, the County raised that defense again in this case, wasting a huge amount of the scarce resources of the court, the Appellants, and the taxpayers.

This Court should rule that King County is not entitled to discretionary immunity in this action. This Court should reverse the jury verdict as to King County and remand with instructions that discretionary immunity does not apply and that the orders in limine, evidentiary rulings excluding evidence about guardrails, and the erroneous Jury Instructions are to be given no effect in a new trial. Finally, the Court should reverse the sanctions imposed by Judge Thorp on Appellants’ counsel.

Respectfully submitted this 7th day of November, 2016.

s/James J. Dore, Jr.
James J. Dore, Jr., WSBA No. 22106
Attorney for Appellants

⁵⁹ *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101, 106 (1979).

DECLARATION OF SERVICE

I declare that I served the foregoing Appellants' Reply 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 Resp. King County

Paul Lawrence
Matthew Segal
Jamie Lisagor
Pacifica Law Group
1191 2nd Ave., Ste. 2000
Seattle, WA 98101
Attorneys for Resp. 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 7th day of November, 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