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No. 74033-4-I

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

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

Appellants,

v.

KING COUNTY, a municipal corporation;
LONI MUNDELL, a single person

Respondents.

BRIEF OF RESPONDENT KING COUNTY

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I. INTRODUCTION

Following more than four years of litigation and a nine-week trial, a jury found Defendant King County was not liable for an accident in which the driver, Defendant Loni Mundell, lost control of her car, resulting in the deaths of two passengers. The crux of Plaintiffs' argument for the County's liability on appeal is that the County was negligent in failing to construct a guardrail at the accident site. But the County's decisions on where and when to install guardrail on existing county roads are budgetary policy decisions governed by a priority array based on an algorithm. Such policy decisions are subject to discretionary immunity. Thus, the trial court correctly ruled on summary judgment that discretionary immunity applied to the County's decision not to construct a guardrail at the accident site.

The trial court then rightly rejected the efforts of Plaintiffs' counsel to circumvent this ruling and re-interject the issue of guardrail into the case. Simply put, 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. The trial court properly denied their attempts to "construe" the summary judgment order in a way that rendered discretionary immunity meaningless, to offer late-disclosed new expert testimony two court days before trial to avoid the exclusion of prohibited guardrail evidence, and to raise guardrail evidence during trial despite its exclusion in pretrial orders.

Although guardrail evidence was excluded, Plaintiffs were able to argue to the jury that the County negligently designed, constructed, and maintained the section of Green River Road where the accident occurred, including roadway width, striping, channelization, signage, and overhanging leaves/vegetation. The trial court correctly applied the law and accordingly instructed the jury. And the jury properly found the County was not liable.

Counsels' conduct in trying to end-run the trial court's discretionary immunity rulings resulted in multiple findings of willful violation of the discovery rules and the court's orders and misconduct before the jury. Based on this ongoing misconduct, the trial court acted within its discretion in imposing sanctions, including monetary penalties and exclusion of evidence.

Overall, the trial court admirably addressed the numerous issues on summary judgment, motions in limine, jury instructions, and the misconduct of Plaintiffs' counsel. King County respectfully requests that this Court affirm the trial court's orders and the jury's verdict.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

King County assigns no errors.

B. Counterstatement of Issues

1. Whether the trial court properly ruled on summary judgment that discretionary immunity applies to the County's policy decisions

regarding when and where to install guardrail on existing roads, including removing Green River Road from the priority array in 1994.

2. Whether the trial court properly ruled that discretionary immunity bars Plaintiffs' claim that the County should have installed guardrail at the accident site.

3. Whether the trial court acted within its discretion in excluding evidence related to guardrails because discretionary immunity bars the claim that the County should have installed guardrail at the accident site and Plaintiffs waived any other theory of liability based on guardrails.

4. Whether the jury instructions allowed the parties' counsel to argue their theory of the case, were not misleading, and when read as a whole properly informed the jury of the applicable law.

5. Whether the trial court acted within its discretion in excluding Plaintiffs' untimely expert opinions on barriers other than guardrails disclosed two court days before trial because this second untimely disclosure of expert opinions was willful and deliberate, the prejudice to defendants was beyond substantial, and lesser sanctions would not be effective.

6. Whether the trial court acted within its discretion in sanctioning Plaintiffs' counsel for willful misconduct before the jury.

7. Whether the jury's verdict should be affirmed because there was no prejudicial cumulative error.

III. COUNTERSTATEMENT OF THE CASE

A. The Accident

On November 7, 2008, 16-year-old Loni Mundell was driving her 2001 Volkswagen Turbo Beetle with two passengers, 13-year-old Austin Fuda (in the front passenger seat) and 2-year-old Hunter Beaupre (in the backseat buckled into a car seat). CP 808-10, 860, 875. Mundell has a familial relationship with both the Fudas¹ and the Beaupres². While driving northbound on the 29800 block of Green River Road, north of the Auburn Golf Course, Mundell lost control of the car. CP 877-78, 1156. The vehicle crossed the center line of the road and the oncoming traffic lane, and traveled through the grass and bushes on the shoulder and down an embankment into the Green River. CP 901, 3410. Mundell escaped from the car and swam to shore, but Austin and Hunter died. CP 3410. Moments after the accident, Mundell stated to a motorist who pulled over to offer assistance “it was all her fault” and she “first looked towards the back seat and then looked forward and the car went out of control, swerved the wrong way, losing control”. RP (Aug. 13, 2015) at 1107, 1135. A police officer cited Mundell for Speed too Fast for Conditions, but she was not charged with a crime. CP 206.

¹ James and Keleighn Fuda are Austin Fuda’s biological parents. CP 357. James and Keleighn Fuda were married and have since separated. *Id.* Keleighn Fuda and David Mundell (defendant Loni Mundell’s father) are longtime partners. *Id.* Defendant Loni Mundell and Keleighn Fuda have a step-mother/step-daughter relationship. CP 491, 496.

² Chad (now deceased) and Dorianne Beaupre are Hunter Beaupre’s biological parents. CP 357. Chad and Dorianne Beaupre were divorced. CP 265, 357. Dorianne Beaupre is David Mundell’s sister and, thus, the aunt of defendant Loni Mundell. CP 260, 357.

B. The Fudas and the Beaupres Sue the County and Mundell.

The Estates of Austin Fuda and Hunter Beaupre and other family members (“Plaintiffs”) filed eight separate lawsuits against the County and Mundell arising from the November 7, 2008 accident. *See* CP 358. Plaintiffs claimed that the County negligently designed, constructed, and maintained the section of Green River Road where the accident occurred, including roadway width, striping, channelization, signage, guardrails, and overhanging leaves/vegetation. CP 2463-64, 2499-501. Plaintiffs also asserted a negligence claim against Mundell. CP 2462, 2498-99.

In addition to denying liability, the County asserted that discretionary immunity barred Plaintiffs’ claim that the County should have installed guardrail at the accident site. CP 1-13. With respect to the non-guardrail negligence claims, the County denied that buildup of leaf debris caused the roadway to be unsafe for ordinary travel. CP 4-5. The County further asserted contributory negligence by Mundell, the driver. CP 12.

C. As Discovery Commences, Signs of Collusion Arise Between Plaintiffs and Mundell.

The Fudas filed the first of the eight lawsuits in June 2011. *See* CP 358. Discovery commenced and, on November 1, 2011, the County attempted to depose Mundell. CP 193. Attorney Justin Monroe represented Mundell. CP 194. During a break, Plaintiffs’ counsel summoned attorney Robert Meyers, who was described as Mundell’s private attorney. CP 196-

98. Meyers stated he would file a notice of appearance later that day and proceeded to advise Mundell in the deposition, state objections, and instruct her not to answer. CP 200-10. Meyers, however, never filed a formal notice.

Three days later, on November 4, 2011, attorney Meyers filed a separate lawsuit on behalf of the Beaupres against the County and Mundell, whom Meyers had just represented at deposition. CP 142-58. The Fudas also filed six additional lawsuits around the same time period. CP 358. In 2012, the seven Fuda lawsuits and the Beaupre lawsuit were consolidated. *Id.*

The County moved to disqualify Meyers for first representing Mundell and then suing her in a separate action arising out of the same incident. CP 98-109. The County argued Meyers' "side switching", which appeared collusive given the relationships between Plaintiffs and Mundell, violated the Rules of Professional Conduct. CP 104-07. The trial court granted the County's motion, and Meyers was disqualified. CP 2529-32.

Discovery continued in 2013 and 2014. Pursuant to King County Local Civil Rule ("KCLR") 26(k) and the scheduling order, the parties disclosed primary witnesses in June 2014, and additional witnesses in September 2014. CP 4245, 5246.

D. The Trial Court Grants the County's Motion for Summary Judgment on Discretionary Immunity.

Toward the close of discovery, the County moved for summary judgment on its discretionary immunity defense. CP 2533-58. The following

is a summary of the undisputed evidence the County presented regarding its guardrail priority program, the basis for discretionary immunity.

As required by RCW 36.75.050, the King County Council (the “Council”) adopts, and regularly updates, the King County Road Standards (“County Road Standards” or “Standards”) based on recommendations by the County Road Engineer. *See* CP 990-1030. The Standards apply to new construction but do not apply to existing roadways. CP 998, 1020.

The County does not have a statutory or regulatory obligation to retrofit existing county roads with guardrail to conform to present-day standards. *See* CP 998, 1020; *see also Ruff v. Cnty. of King*, 125 Wn.2d 697, 705, 887 P.2d 886 (1995) (describing the County’s priority program). Nevertheless, in 1984, the County began a programmatic approach to guardrail installation along existing roads countywide. CP 977; *Ruff*, 125 Wn.2d at 702. The policy objective was to use money allocated by the Council to construct guardrail at as many locations as possible, with the highest need (priority) areas constructed first. CP 1238.

To realize this goal, then-County Road Engineer Louis Haff established the guardrail priority program and formulated procedures and guidelines for the prioritization of potential guardrail projects in a priority array. *See* CP 977, 1238, 2579-80; *see also Ruff*, 125 Wn.2d at 702. First, King County Department of Transportation (“KCDOT”) determines whether

guardrail is warranted at potential sites based on the County Road Standards (e.g., minimum 10-foot shoulder), as well as other factors such as citizen requests, road damage due to storm events, and staff requests for review. *See* CP 977-78, 1237-38. If guardrail is warranted, KCDOT includes the location in the array. If not, KCDOT removes the location from the array so that other locations can be prioritized. CP 1238-39. Second, KCDOT ranks warranted locations based on an algorithm (a process that includes a mathematical formula for prioritizing need) that takes into account criteria such as historical crash data, posted speed limit, daily traffic volume, and physical characteristics. *See* CP 977, 986. Finally, KCDOT uses moneys allocated by the Council to the guardrail program to install guardrail at locations where it is warranted, with the highest priority locations addressed first. CP 1238.

In 1988, the County published a priority array ranking 563 roads where guardrail was warranted. CP 978; *Ruff*, 125 Wn.2d at 702. Since then, the Council annually allocated different levels of funding to continue the guardrail priority program. CP 1238-39, 5132-42. Pursuant to this directive from the Council, KCDOT continued to run the program based on procedures and standards established by Haff, periodically updating the priority array and dedicating funds for guardrail projects based on their position in the array. CP 977-78. Thus, the guardrail program has run in the same manner since it began, except for a modification to the ranking algorithm in 2003. CP 977.

In the 1988 priority array, Green River Road from 94th Pl. S to Auburn city limits was ranked 172nd out of 563 locations. CP 978. Based on the array and related funding considerations, the County installed guardrail on certain segments of Green River Road in 1990 and 1994. *Id.*

Norton Posey, the County's Roadway and Traffic Engineer, served as KCDOT's Supervising Engineer for the County's guardrail priority program from 1993 to 2003. CP 977. During this time, Posey ran the program based on the standards and procedures adopted by Haff. *See* CP 977-78. In 1994, Posey reviewed field data and performed a field visit that included the section of Green River Road where the accident in this case would later occur. CP 978. Posey determined that guardrail was not warranted at the accident location and other locations on Green River Road under the County Road Standards because adequate width (10 feet) existed between the fog line³ and the edge of the shoulder. CP 978-79. As a result, Green River Road was taken off the priority array in 1994. *Id.* Thus, KCDOT used funding to build guardrail at other areas in the County where it was warranted. CP 1238.

Importantly, even if Green River Road remained in the array, guardrail would not have been constructed at the accident site until at least seven years after the accident due to the site's low ranking in the array. CP 979 ("If King County had determined that the shoulder was less than 10 feet

³ The fog line is the white line on the edge of the roadway that marks the outside boundary of the travel way for vehicles. RP (July 27, 2015) at 752.

in 2003, the accident location would have ranked 67th out of a total of 107 on the priority array and the guardrail would not have been installed until approximately 2015.”). Plaintiffs never disputed or addressed this point.

Based on the above evidence, the County argued that discretionary immunity applied to its decisions regarding where and when to install guardrail, including the removal of Green River Road from the array in 1994. *See* CP 2552-56. In Washington, the government’s discretionary acts, omissions, and decisions are immune from tort liability. *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 253-54, 407 P.2d 440 (1965). In roadway liability cases, discretionary immunity may apply to a governmental entity’s decisions about where and when to install roadway improvements that are not otherwise required by law. *See McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 12-13, 882 P.2d 157 (1994); *Avellaneda v. State*, 167 Wn. App. 474, 480-81, 273 P.3d 477 (2012).

The County relied on *Avellaneda*, in which the Court of Appeals held that discretionary immunity applied to the State’s decision not to include a road barrier project in its funding priority array. CP 2553-54 (citing *Avellaneda*, 167 Wn. App. at 481-82). Specifically, the County argued that its Road Engineer, Haff, and the Council made basic policy decisions in establishing the priority program regarding how the County would prioritize its limited funds with respect to placing guardrails on older county roads,

including Green River Road, and, thus, these decisions were entitled to discretionary immunity. CP 2554-56. The County further argued decisions and actions taken under the guardrail priority array program (such as Posey's) were similarly entitled to discretionary immunity. *Id.* Finally, the County argued that regardless of whether Posey's shoulder-width measurements warranted guardrail at the accident site (which they did not), Plaintiffs' guardrail claims were barred because guardrail would not have been installed until years after the accident under the array established by Haff. *Id.*

In their opposition, Plaintiffs conceded that the County's decisions establishing the guardrail priority array "would be analogous to the [State's] decisions for including or excluding projects from its budgetary priority array." CP 2581 (citing *Avellaneda*). Further, Plaintiffs admitted that "[t]he discretionary policy decisions reached in creating the King County guardrail priority array were made by King County council and King County Road Engineer Louis Haff, a 'high-level executive' of King County, beginning in 1984, pursuant to his statutory powers and duties under RCW 36.75.050." CP 2579. Plaintiffs also did not dispute that even if Posey had not removed Green River Road from the array, guardrail would not have been built at the accident site until long after the accident. *See* CP 2578-82, 3026.

Plaintiffs argued, however, that Posey's removal of the accident site from the preexisting priority array in 1994 was not entitled to discretionary

immunity because his decision was operational, not a policy decision, and he was not a high-ranking county executive. *See* CP 2579-81. Plaintiffs also argued that the County’s duty to maintain the roadway in a reasonably safe condition trumped the discretionary immunity doctrine. CP 2582.

Following the above briefing and argument, Judge Bill Bowman ruled that discretionary immunity applied to the County’s decisions, including the 1994 decision to remove the accident site from the County’s guardrail priority array and Posey’s field measurements upon which that decision was based. Judge Bowman found *Avellaneda* “right on point”:

[*Avellaneda*] specifically said that that calculation of the cost to benefit ratio, that calculation as to whether a project or a roadway should be or should not be included in the array is subject to discretionary immunity. ...

The kind of decisions that would be outside the discretionary immunity would be negligent implementation of the program itself, which is a very different thing than determining what is included and what is not included.

And so the decision of Posey to evaluate and not to include this particular roadway in the array for construction of the guardrail I think is very much the same type of calculation that was made in the *Avellaneda* case, and I think is subject to the same discretionary immunity that Highway 512 was in *Avellaneda*. And, therefore, I will grant King County’s motion with regard to the guardrail construction.

RP (11/24/14) at 58.

Judge Bowman then ruled that “King County’s decision to remove the Green River Road from King County’s guardrail priority array program is

entitled to discretionary immunity”; “Posey’s shoulder measurements constitute data gathering which is part of the decision making process...entitled to discretionary immunity”; and 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.” CP 3026. Thus, “King County’s Motion for Summary Judgment regarding Plaintiffs’ guardrail claims [was] GRANTED.” *Id.*

Plaintiffs moved for reconsideration and also sought direct discretionary review to the Supreme Court. CP 3029-40, 3154-56. Judge Bowman denied reconsideration, and clarified his written order as follows:

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 those issues in its order. No other issues were before the Court.

CP 3162. Plaintiffs withdrew their request for review. CP 3310-11.

E. The Trial Court Denies Mundell’s Motion for Summary Judgment Amidst Further Concerns of Collusion.

In a separate summary judgment motion, Mundell contended that there was no competent evidence to support Plaintiffs’ claim that she caused or contributed to the accident. CP 4896-910. The County opposed, arguing that there was substantial evidence in the record upon which a jury could find

Mundell at fault, including her admissions moments after the accident that “It’s all my fault” and that she “first looked toward the back seat and then when she looked forward, the car went out of control and she swerved the wrong way, losing control”, evidence she was sleep deprived, and expert testimony. *See* CP 4961-65. The County also noted that Plaintiffs had failed to prosecute their claim against Mundell and contended that their sole purpose in naming Mundell as a defendant was to manipulate the joint and several liability statute to ensure recovery of 100% of any judgment from the County, regardless of any contributory fault by Mundell. *See* CP 4954-58.

Plaintiffs joined in Mundell’s motion the same day, November 10, 2014. CP 5004-11. But, just two days later, on November 12, 2014, Plaintiffs withdrew their joinder in Mundell’s motion and joined the County’s opposition. CP 5084-86. Plaintiffs admitted they were attempting “to preserve their right to obtain adequate compensation” under “Washington’s so-called tort reform laws.” CP 5084.

The trial court noted the “very interesting strategic shift of positions that have occurred over time” and declined to allow Plaintiffs’ counsel to present argument either for or against Mundell’s summary judgment motion. RP (Nov. 21, 2014) at 48-49 (emphasis added). The court denied Mundell’s motion and ruled that there were material factual disputes on Mundell’s contribution as a proximate cause of the accident. *Id.* at 56-57; CP 5091-95.

F. The Trial Court Reaffirms Dismissal of Plaintiffs' Claim based on Failure to Construct Guardrail.

Although discovery closed in December 2014, the following month Plaintiffs moved to reopen discovery for the purpose of taking depositions on their contention that a guardrail was necessary at the accident location. CP 3169-80, 4245. They argued that their guardrail claims remained, notwithstanding the court's discretionary immunity ruling. CP 3170, 3176-78. In opposition, the County argued Plaintiffs' guardrail claims were barred by discretionary immunity and, further, Plaintiffs had ample opportunity during the discovery period to explore these issues. CP 3231-39. The Discovery Master stated that the trial court would have to decide the implications of its summary judgment decision on guardrails. *See* CP 3627-28. In response, the County indicated that it would file a motion with the trial court to confirm the scope of the discretionary immunity ruling. CP 3628.

On March 4, 2015, the County filed the motion, seeking an order in limine excluding evidence or argument at trial related to guardrails. CP 3479-94. The County noted that "[t]he Court has twice ruled that King County has discretionary immunity for not having a guardrail at the location where Ms. Mundell's car left the road and entered the Green River. Therefore, the plaintiffs and Ms. Mundell should be barred from bringing these issues up before the jury in any manner." CP 3488. Plaintiffs again asserted that their

“claim that King County breached its duty to maintain a reasonably safe road because an inherently dangerous condition existed that required a guardrail at the accident site has certainly **not** been dismissed.” CP 3636.

The trial court (with the case now transferred to Judge Tanya Thorp) initially denied the County’s motion on procedural grounds. CP 3643-45. On reconsideration, however, Judge Thorp elaborated on the scope of discretionary immunity. CP 3701-05. She explained it protects “the decision to include a roadway in an array program”, but does not apply “retroactively” to claims that “the initial design and/or the initial construction of the roadway required installation of a guardrail at the time of the road’s inception”. CP 3703-04. But the court cautioned, “Whether negligent design or negligent construction of the roadway by failing to install a guardrail at inception claims are factually or legally viable here is not before this Court. Plaintiffs have had ample opportunity to explore those issues in discovery and if they have failed to do so their failure will not reopen discovery.” CP 3704.

Following Judge Thorp’s order, the Discovery Master denied in part and granted in part Plaintiffs’ request to reopen discovery. Consistent with Judge Thorp’s admonishment that Plaintiffs had “ample opportunity” to explore guardrail-related issues during discovery, the Discovery Master denied Plaintiffs’ request to take a new deposition of the County. CP 3912. The Discovery Master granted their request to reopen depositions of two

County witnesses, Posey and Dan Dovey, for three additional hours each. CP 3912-13. Although “somewhat dubious” of Plaintiffs’ contention that they were unable to complete their depositions due to time restrictions and Judge Bowman’s summary judgment ruling, the Discovery Master explained this was the “most prudent” course. CP 3913.

G. The County Files Pretrial Motions in Limine.

On June 1, 2015, the County filed pretrial motions in limine requesting, inter alia, exclusion of the following: certain evidence of emotional distress (Nos. 4d, 4e, and 4g); guardrail evidence based on discretionary immunity and discovery rules (Nos. 6a, 6b, and 13); and Plaintiffs’ expert Gerald Apple’s new opinions (No. 35). CP 1770-871. The trial court then issued a series of orders, CP 3718-36, as set forth below:

Motion in Limine Nos. 4d, 4e, and 4g. The County moved to exclude any reference to Plaintiffs’ emotional distress from the circumstances of the accident, emotional effects on the parents resulting from remaining near the accident scene until the car was recovered, and how the deaths affected other family members or friends. CP 1781-85. The trial court excluded references to how the deaths affected other family members or friends (4g). CP 2230. The court denied in part and reserved in part the motions to exclude evidence regarding Plaintiffs’ emotional distress (4d and 4e), noting such evidence was

admissible only “to the extent the evidence is sought to demonstrate the injury to or the destruction of the parent-child relationship”.⁴ CP 2229-30.

Motion in Limine Nos. 6a and 6b. The County moved to exclude any references to guardrails. The County cited the trial court’s April 7, 2015 order concluding (1) guardrail claims that fall within the protections of discretionary immunity were dismissed, and (2) guardrail theories “at inception” of the road remained for trial. CP 1787-88. In Motion in Limine No. 6a, with respect to the discretionary immunity prong, the County requested exclusion of any reference to the County’s failure to install guardrails from 1988 to the accident date. In Motion in Limine No. 6b, the County requested exclusion of any reference to the County not installing a guardrail at initial design or construction of the road because Plaintiffs failed to disclose any evidence or opinions to support these theories. CP 1788-94.

The trial court granted Motion in Limine Nos. 6a and 6b in full, excluding any reference to guardrails for (1) claims that fall within the protections of discretionary immunity, including references to guardrails from 1988 to the date of the accident, and (2) claims that the County was negligent for not installing guardrails during the initial design and construction of Green River Road. CP 2231.

⁴ Plaintiffs do not assign error to Order in Limine Nos. 4d, 4e, or 4g, but contend the trial court erred in sanctioning Plaintiffs’ lawyer for violating these orders. *See* section IV(F)(3), *infra*.

Motion in Limine No. 13. The County contended that if the court decided to grant Motion in Limine No. 6 in full, the court should also exclude Toby Hayes, one of Plaintiffs' experts, from testifying regarding the likelihood of death if a guardrail had been present based on discretionary immunity. CP 1802. The court granted this motion, referencing its ruling on Motion in Limine No. 6. CP 2233.

Motion in Limine No. 35. The County moved to exclude a new opinion by Plaintiffs' expert Gerald Apple regarding "road conditions to drive on", which Plaintiffs had untimely disclosed shortly after the trial court's April 7, 2015 order elaborating on discretionary immunity. CP 1853-54, 4245-46. As noted, the parties had long since disclosed primary witnesses in June 2014, and additional witnesses in September 2014. *See id.* The County argued that Apple's new opinion should be excluded on grounds that it was untimely, contained no substantive disclosure, and substantially prejudiced the County in preparing for trial. CP 1854, 4246. Plaintiffs admitted the late disclosure but claimed adequate time remained before the July 6, 2015 trial date. CP 2160-63.

The trial court applied the *Burnet* factors⁵ and found the untimely disclosure was deliberate and/or willful and prejudiced the County and

⁵ Under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), the trial court makes findings to show its consideration of lesser sanctions, willfulness, and substantial prejudice before excluding witness testimony.

Mundell. CP 2242. The court noted that Plaintiffs “provide[d] no reasonable explanation about how almost six years [after the accident] how facts just now are coming to light such that this information could not be provided to the parties before the discovery cutoff in December 2014.” CP 2241. The court also stated that “[t]he delay in this case is a tragedy” and that the July 6, 2015 trial date would not be changed. CP 2242. The court found, however, there may be time to address the issue before trial and ordered Plaintiffs to make Apple available for a deposition, to reimburse the costs for the same, and to provide a more complete disclosure about Apple’s proposed opinion on road conditions. CP 2242-43. The court reserved ruling on whether Apple’s new opinion would be excluded until after the deposition and supplemental disclosure. CP 2243.

The County Renews Motion in Limine No. 35. Pursuant to Order in Limine No. 35, Apple’s deposition was taken on June 26, 2015. *See* RP (Jul. 7, 2015) at 1594. During the deposition, Apple gave multiple additional new opinions, beyond the new opinion identified in Plaintiffs’ late April 2, 2015 disclosure. *Id.* at 1595; CP 4248-49. Plaintiffs’ counsel also engaged in obstructive behavior, including requests for breaks in the middle of questions, frequent discussion of counsel, and interjection to clarify an answer for the witness. *See* RP (Jul. 7, 2015) at 1600-01 (trial court’s description of “very concerning” conduct). After the deposition, the County renewed its Motion

in Limine No. 35, requesting complete exclusion of Apple as a witness based on untimely disclosures, improper deposition conduct, and failure to demonstrate Apple was qualified to speak to road conditions. CP 5155-90.

On June 29, 2015, despite the court's finding of willfulness with respect to Plaintiffs' late disclosure of Apple's new opinions, Plaintiffs disclosed additional new expert opinions on barriers other than guardrails. CP 4169-90, 4271-73. Specifically, Plaintiffs served revised reports and Power Point demonstratives from experts Toby Hayes and Mark Erickson that merely substituted the word "barrier" for "guardrail". *See id.*

On July 2, 2015, the County moved to exclude the new expert opinions, arguing that this was an improper attempt to circumvent the court's discretionary immunity rulings, and Plaintiffs should not be permitted to introduce this new theory on the eve of trial. CP 4271-80.

The court took up the County's renewed motion to exclude Apple's new opinions and its motion to exclude new opinions about other barriers on the second day of trial, as described in section III(I)(1), *infra*.

H. Trial Proceeds Before the Jury.

The trial court presided over a nine-week jury trial from July 6 through September 4, 2015.

Plaintiffs' claims against the County. At trial, Plaintiffs asserted that the County was negligent in failing to maintain Green River Road in a

reasonably safe condition for ordinary travel. *See* CP 4090. They further asserted that the conditions at the time and place of the accident—including hazards posed by the river and overhanging trees/leaves, the slippery road itself, the failure to warn, and substandard lane width and shoulder—made the road inherently dangerous and proximately caused Plaintiffs’ injuries. CP 4090; RP (Sept. 1, 2015) at 2585.

Plaintiffs called lay and expert witnesses in support of their claims against the County. Their witnesses testified that there was a steep, nonrecoverable slope from the road into the adjacent Green River and that the road shoulder was “soft” and lacked stability.⁶ Their witnesses also testified that, at the time of the accident, the roadway was slippery due to rainy and wet conditions and leaves on the road from overhanging trees.⁷

Plaintiffs’ experts opined that accumulated leaves and water caused Mundell’s vehicle to go out of control.⁸ Their experts testified that the County should have set up a program to sweep leaves off Green River Road; constructed a “crown roadway” to drain away water and leaf debris; provided curve roadway warning signs; provided a wider, firmer, and flatter shoulder

⁶ RP (Jul. 21, 2015) at 197-201; RP (Jul. 22, 2015) at 339-40, 375-79, 380-82; RP (Jul. 23, 2015) at 679-80; RP (Jul. 27, 2015) at 760-61, 765, 770, 776, 822-27, 835, 839, 840, 843-48; RP (Jul. 29, 2015) at 1071-72, 1146-47; RP (Aug. 13, 2015) at 1239-40, 1247.

⁷ RP (Jul. 23, 2015) at 669, 678-81; RP (Jul. 27, 2015) at 757-60, 829-31, 835-37; RP (Jul. 30, 2015) at 1232-33; RP (Aug. 3, 2015) at 1418-22; RP (Aug. 6, 2015) at 530-31; RP (Aug. 10, 2015) at 619-20; RP (Aug. 12, 2015) at 904; RP (Aug. 13, 2015) at 1234.

⁸ RP (Jul. 27, 2015) at 854-55, 861-62; RP (Jul. 29, 2015) at 1076-77, 1117-18, 1139-40; RP (Jul. 30, 2015) at 1233-35, 1241-42, 1280; RP (Aug. 3, 2015) at 1482-84, 1488-89.

to allow vehicles to recover before entering the river; and placed boulders or some type of car at the accident site to block vehicles from entering the river.⁹

Their experts also testified that the lanes were substandard width and the County should have widened the lanes during a 2007 resurfacing project.¹⁰

The County's defenses. In defense, the County contended that Green River Road was safe for ordinary travel on the date of the accident and was engineered and maintained properly. The County's experts testified that sweeping was not warranted the day of the accident; the road was properly "crowned" to allow it to shed rain and debris; curve warning signs were not warranted; and boulders would be improper under the applicable standards.¹¹ The County's experts further testified that the lanes and shoulder were of adequate width and did not violate any road standards, and that the 2007 resurfacing project was properly performed.¹²

Additionally, the County's witnesses testified that its road use investigator regularly drove county roads to investigate conditions and respond to citizen requests and that there was no history of accidents or complaints related to leaves on Green River Road where Mundell lost

⁹ RP (Jul. 27, 2015) at 760-61, 765, 770, 833-34, 840-48, 863; RP (Jul. 28, 2015) at 1012-14; RP (Jul. 29, 2015) at 1071-72.

¹⁰ RP (Jul. 27, 2015) at 851-60.

¹¹ RP (Aug. 13, 2015) at 1216-18, 1223, 1250-53; RP (Aug. 17, 2015) at 1270-75, 1330-32, 1340-41, 1346-60; RP (Aug. 18, 2015) at 1469, 1476-85; RP (Aug. 19, 2015) at 1626.

¹² RP (Aug. 17, 2015) at 1333-38, 1341-51, 1362-66, 1373-77; RP (Aug. 18, 2015) at 1465-68; RP (Aug. 19, 2015) at 1604-05.

control.¹³ Witness testimony also indicated that others—including responding officers, other rescue personnel, and Mundell herself—had no trouble driving on Green River Road at the accident site on the day of the accident and that there was no evidence the County received notice that leaves on Green River Road were causing motorists problems that day.¹⁴

The County also asserted as a defense that Mundell’s negligent driving was a proximate cause of Plaintiffs’ injuries. CP 4090. Testimony from both Plaintiffs’ and the County’s witnesses indicated that Mundell had stated to first responders and bystanders that the accident was her fault.¹⁵ The County presented expert testimony that Mundell’s age, her limited driving experience, and the fact that she was transporting two young children in her car without an adult present increased significantly the likelihood she would cause an accident.¹⁶ Trial testimony also indicated that Mundell exceeded the speed limit; her ability to drive safely was impaired by sleep deprivation and resulting fatigue; her inattention to the roadway and distraction caused by interaction with the children right before losing control was a contributing

¹³ RP (Jul. 21, 2015) at 247; RP (Jul. 22, 2015) at 327, 435-36, 463-69; RP (Jul. 28, 2015) at 978, 1037; RP (Aug. 4, 2015) at 100; RP (Aug. 13, 2015) at 1223; RP (Aug. 17, 2015) at 1274, 1361; RP (Aug. 18, 2015) at 1458, 1484.

¹⁴ RP (Jul. 21, 2015) at 233; RP (Aug. 5, 2015) at 307-08; RP (Aug. 12, 2015) at 987-89, 1003; RP (Aug. 13, 2015) at 1084; 1103; RP (Aug. 18, 2015) at 1478; RP (Aug. 25, 2015) at 2118-21, 2135-36.

¹⁵ RP (Jul. 21, 2015) at 213-14, 242, 250-51; RP (Aug. 13, 2015) at 1107, 1192.

¹⁶ RP (Aug. 19, 2015) at 1665, 1667-69, 1671-78.

factor in the accident; and physical evidence was most consistent with a steering overcorrection, not loss of traction on leaves as Plaintiffs claimed.¹⁷

Plaintiffs' "claim" against Mundell. Despite purporting to assert a negligence claim against Mundell, all Plaintiffs who appeared as witnesses testified that they did not believe Mundell was at fault.¹⁸ Their experts also testified that Mundell did nothing to cause the accident.¹⁹

Mundell's defenses. Mundell denied that her driving contributed to the accident. CP 4090. She testified she felt rested the morning of the accident.²⁰ She denied looking backward at Hunter prior to the accident but admitted it was possible she briefly looked sideways at Austin when asking him to be quiet.²¹ She testified "it was raining pretty hard"; she was driving below the speed limit; and leaves covered the centerline of the road.²² She testified, however, that she did not have a problem with the road or visibility until the accident, when she suddenly lost traction; nothing about the road had fooled her; and she did not know why she lost control of her car.²³

¹⁷ RP (Aug. 3, 2015) at 1512, 1521; RP (Aug. 18, 2015) at 1414-22; RP (Aug. 19, 2015) at 1665-66, 1678-1702, 1734, 1739-41; RP (Aug. 20, 2015) at 1790-92, 1839; RP (Aug. 25, 2015) at 2098, 2150-55, 2171, 2188--97; RP (Aug. 25, 2015) at 148, 157 (FTR recording); RP (Aug. 26, 2015) at 2210-16, 2229, 2248, 2306-07; RP (Aug. 27, 2015) at 2346-48.

¹⁸ RP (Aug. 10, 2015) at 622, 627-29 (Curt Beaupre); RP (Aug. 11, 2015) at 778, 780-81 (Dorianne Beaupre); RP (Aug. 12, 2015) at 904 (James Fuda).

¹⁹ See RP (Jul. 27, 2015) at 854-55, 861-62; RP (Jul. 29, 2015) at 1076-77, 1117-18, 1139-40; RP (Jul. 30, 2015) at 1233-35, 1241-42, 1280; RP (Aug. 3, 2015) at 1482-84.

²⁰ RP (Aug. 4, 2015) at 164; RP (Aug. 5, 2015) at 221, 247, 357.

²¹ RP (Aug. 5, 2015) at 243, 357, 361-62, 364.

²² RP (Aug. 4, 2015) at 187, 190-91; RP (Aug. 5, 2015) at 230.

²³ RP (Aug. 4, 2015) at 191-93; RP (Aug. 5, 2015) at 300, 329-30, 353.

I. The Misconduct of Plaintiffs' Counsel Escalates During Trial.

During trial, the court issued multiple orders sanctioning Plaintiffs and their attorneys for willful violation of discovery rules and court orders.

1. The trial court excludes two untimely expert disclosures by Plaintiffs.

On the second day of trial, the court considered and granted (1) the County's renewed Motion in Limine No. 35 to exclude Apple's new opinions, and (2) the County's motion to exclude Plaintiffs' new expert opinions on barriers other than guardrails. CP 4249-55. Regarding Apple, the court found the *Burnet* factors of willfulness, prejudice, and appropriateness of remedy were met, noting that "[u]p until June 26, 2015, King County had no notice that Mr. Apple would be offering such broad opinions on such divergent and new topics" and "exclusion of Mr. Apple's new opinions was the only appropriate remedy under these extreme circumstances." CP 4249-50. The court also expressed "great concerns" over Plaintiffs' counsel's obstructive behavior at the deposition. RP (Jul. 7, 2015) at 1600-01.²⁴

Regarding Plaintiffs' new expert opinions on barriers other than guardrails, the court ruled that such opinions were barred by its prior orders regarding guardrails, which orders "pertained to all types of barriers". CP 4253-54 (explaining "barriers" are "commonly understood as traditional

²⁴ On appeal, Plaintiffs do not assign error to the rulings with respect to Apple.

guardrails”). The court then excluded the new expert opinions under *Burnet*, finding that, to the extent “a legal distinction exists between barriers that are commonly understood as traditional guardrails and other types of barriers”, Plaintiffs’ prior disclosures did not give the County notice that their experts would be opining on these other types of barriers. CP 4252-53.

The court found the three *Burnet* factors were satisfied. First, the court found that Plaintiffs’ failure to disclose these new opinions was willful and deliberate. CP 4253; RP (Jul. 7, 2015) at 1620-24. The court described their latest tactics as “almost insulting to [the] court”:

The fact that we have arrived here and that there had to be so many subsequent orders I specifically find is because plaintiffs’ counsel have tried to end run around every, single one of those orders.

RP (Jul. 7, 2015) at 1620-21. The court rejected Plaintiffs’ argument that its denial of the County’s Motion in Limine No. 10, in which the County moved to exclude certain testimony by William Haro (Plaintiffs’ expert),²⁵ opened the door to evidence and testimony about barriers other than guardrails. *See* CP 4251-52, 4281-89. The court found that Motion in Limine No. 10 was “a specific motion at to Mr. Haro’s testimony only” and was consistent with the

²⁵ Specifically, in Motion in Limine No. 10 (which the court denied without comment, *see* CP 2232), the County had requested exclusion of any evidence or expert opinion that the County was required to install redirectional berms, rocks, or other barriers other than guardrails, explaining that Haro, Plaintiffs’ road design expert, eliminated placing rocks or redirectional berms at the accident site during his deposition. CP 1797.

court's order excluding evidence of guardrails. RP (Jul. 7, 2015) at 1618. In its written order, the court explained:

The Court's previous orders regarding guardrails are clear. There could be no misunderstanding that the orders pertained to all types of barriers, traditional or non-traditional. Even if Plaintiffs' counsel thought that the original orders only applied to traditional guardrails, they offer no reasonable excuse for their experts' failure to express opinions regarding other types of barriers within the period of discovery.

CP 4253-54.

Second, the court found that the prejudice to the County and Mundell in allowing these new theories, which were disclosed just two court days before trial, would be "beyond substantial." RP (Jul. 7, 2015) at 1621. The court found Plaintiffs' disclosures prior to June 29, 2015 pertained only to traditional guardrails. CP 4250-53. The court rejected Plaintiffs' reliance on a single reference to Jersey barriers in one deposition as putting defendants on notice of Plaintiffs' new theory:

[P]laintiffs have elected in their responses to discovery what their issues are. And to say or claim that one expert saying in a deposition something about Jersey barriers is sufficient somehow to change the entire standing of the case, without any updated disclosure from the plaintiffs, that somehow it's the onus of the opposing party to know that the theory of the case has changed when it should have been clear in November is beyond this court.

RP (Jul. 7, 2015) at 1624-25.

Finally, the court found lesser sanctions would not be effective:

Monetary sanctions would have only encouraged the gamesmanship Plaintiffs' counsel, Mr. Dore and Ms. Deutscher, have engaged in. They knew the Court had found virtually identical conduct with regard to Mr. Apple to be improper, willful, and deliberate [in the court's June 16, 2015 order]. In light of that previous conduct, the Court can only understand their improper, willful, and deliberate choice to proceed in almost exactly the same fashion with regard to these new opinions as involving a conscious choice to proceed, hoping the Court would impose a monetary sanction instead of exclusion. This conscious balancing of penalties indicated that the harshest penalty – exclusion of the new opinions – should be imposed.

CP 4254-55.

2. Plaintiffs' expert and lawyer violate the orders excluding guardrail evidence.

Undeterred, Plaintiffs violated the court's orders excluding guardrails (including Order in Limine No. 6) at least twice during trial. On July 27, 2015, Plaintiffs' expert Haro violated the guardrail orders during his trial testimony, resulting in "a substantial waste of court time and significant risk of unfair prejudice to King County" and requiring a curative instruction. CP 4259; *see also* RP (Jul. 27, 2015) at 777-821, 883-91. At that point, Judge Thorp warned counsel: "This does not continue.... Violations of my orders will be taken seriously.... You have had Judge Bowman's orders. You have had my orders. There should be no disclarity." RP (July 28, 2015) at 924.

Later in trial, however, Plaintiffs' counsel Dore again violated the court's orders excluding guardrail evidence during his cross-examination of the County's liability expert, Marlene Ford. Dore repeatedly asked Ford

about Posey (the County Supervising Engineer who removed the accident site from the guardrail priority array in 1994). RP (Aug. 18, 2015) at 1487. The County objected, arguing that Posey’s role in the case was limited to guardrails and that Dore should not be permitted to ask questions seeking to bring up the issue of guardrails. *Id.* at 1487-89. Dore made an offer of proof, after which the court ruled that because the physical characteristics of the road were open for inquiry, Ford could be asked about those topics to the extent Posey had relied on or considered those characteristics or the overall crash data. *Id.* at 1495-96. Dore and the court engaged in extensive back-and-forth regarding the meaning of the court’s ruling, during which the court explained that “it is incumbent upon counsel to ask questions that are narrowly tailored for the information that they are seeking.... I’m not going to tell you exactly how to phrase questions.” *Id.* at 1499 (emphasis added).

The court continued,

[T]here’s nothing opening the door about five miles of guardrail. The questions of this witness were not related to barriers on the roadway. They were related to conditions on the roadway and the overall crash data. You are free to inquire about that. But there’s nothing talking about the condition of this roadway with leaves and a soft gravel shoulder width overlay and constituent parts of the shoulder, and now doing a compare and contrast that somehow a guardrail would have prevented this accident.

Id. at 1500 (emphasis added). After more comment from Dore, the court concluded: “Counsel, I’m not frustrated. I’m simply repeating what’s been done. Hence, ‘guardrails’ are out.” *Id.* at 1501 (emphasis added).

Dore then resumed questioning of Ford. Despite the court’s admonishments, Dore read the following question from Ford’s deposition:

Okay, alright, it says that 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 signage, and the need for a guardrail placement. Is that what you are going to express opinions about?

Id. at 1510 (emphasis added). The County immediately objected to Dore reading into the record the question on whether Ford had expressed opinions about “the need for a guardrail placement.” *Id.* at 1510-11. The court ruled that Dore’s statement was a “clear violation” of its orders related to guardrails and that sanctions would be imposed at a later time. *Id.* at 1513-15. With Dore’s consent, a curative instruction was read to the jury. *See id.* at 1512, 1514-18.

3. Plaintiffs’ counsel violates orders excluding evidence of other family members’ emotional distress.

Plaintiffs’ counsel Ann Deutscher also violated the court’s orders in limine during her examination of Colette Peterson, Hunter’s stepmom, who was not a party to the case. Specifically, Deutscher repeatedly caused Peterson to violate the court’s orders excluding any reference to how the

deaths affected other family members or friends, including the emotional effects resulting from remaining at the accident scene until the car was recovered (including Order in Limine No. 4g). For example, the following exchange occurred near the beginning of Peterson's testimony:

Q. And we are all talking because Hunter is involved – are you okay?

A. Yes. Nothing has brought any happiness like those – it was about two years, I know, that it was good like that.

Q. Do you want to take a break?

A. No. It's all right because I can work through these tears. Things trigger tears once in a while. I usually try not to talk about all this stuff very often.

Q. Why?

A. Because life was so wonderful and it got just torn from all of us. Nothing was the same anymore. Going to church and having the boys and getting along with Dori and being welcomed into this Beaupre family, it was amazing. Just to see the sadness on everybody because of Hunter –

PORT: Objection, your Honor.

THE COURT: Sustained.

Q. I want to focus back to Chad [Hunter's father]. It's hard to do because you lived it, too, right?

A. Right.

Q. How long were you at the river that day?

A. Once I got to the river, I didn't leave until the car was pulled up five days later. I literally didn't leave the side of the river, slept next to it. We tried to figure out ways we could get them out. We were mad at the city for not jumping in.

PORT: Objection, your Honor.

THE COURT: Sustained.

RP (Aug. 6, 2015) at 403, 422-23 (emphasis added).

The County then requested a sidebar and asked for sanctions. *Id.* at 423-24. The trial court found Deutscher's questions violated the court's orders and indicated it would impose a monetary sanction in an amount to be determined at a later time. *Id.* at 425-27.

Violations by Deutscher and Peterson nonetheless continued after the ruling on sanctions. Deutscher even offered her own improper commentary:

Q. I hate to abbreviate this but we have to do it anyway, and I apologize. You have been through a lot.

PORT: Objection, Your Honor.

THE COURT: Sustained.

Id. at 449 (emphasis added); *see also id.* at 430, 434-35.

J. The Jury Renders a Defense Verdict.

The court instructed the jury on August 31, 2015. The jury instructions at issue on appeal are attached in the Appendix. Of note, the court rejected several instructions proposed by Plaintiffs referencing their

dismissed guardrail/barrier claims. CP 3806, 3809 (Plaintiffs' proposed instructions); CP 4090, 4092-93 (court's instructions).

On September 4, 2015, the jury found both the County and Mundell not negligent. CP 4122-24.

K. The Trial Court Imposes Sanctions.

On December 11, 2015, the trial court held a hearing for the purpose of determining sanctions for Plaintiffs' attorneys' violations of the court's orders. The court imposed monetary sanctions of \$2,000 against Dore for his violation of the court's orders excluding guardrail evidence. RP (Dec. 11, 2015) at 42-43. The court found Dore's violation was "intentional", noting Dore's violation had occurred despite the court's admonishment following violations during Haro's testimony and despite the court's "repeated and direct warnings on the record" immediately before the violation. CP 4261. The court also found a \$500 sanction under the contempt statute was insufficient and \$2,000 was the least severe sanction to deter Dore's behavior and redress a "blatant violation of the Court's orders." CP 4261.

The court sanctioned Deutscher \$1,000 for her improper questioning of Peterson. RP (Dec. 11, 2015) at 42-43. The court found that Deutscher and Peterson repeatedly violated the court's Order in Limine No. 4(g), and that the violations continued even after the court ruled on the record that it would sanction Deutscher. CP 4255-58. The court noted that Deutscher

“encouraged [Peterson] to violate the Order, even after being admonished by the Court” and that “[w]ith only one exception, [Peterson’s] violations were caused by the questions asked.” CP 4258. The court specifically found that the contempt statute was not sufficient to address Deutscher’s “intentional violation” and that sanctions in the amount of \$1,000 were the least severe sanction that would address the violation. CP 4258-59.

IV. ARGUMENT

On appeal, Plaintiffs assign error to (1) the summary judgment rulings on discretionary immunity; (2) Order in Limine Nos. 6a and 13 excluding evidence of guardrails based on discretionary immunity; (3) certain jury instructions; (4) the exclusion of new expert opinions on barriers other than guardrails as a discovery sanction; (5) the imposition of monetary sanctions against Dore for violating the court’s orders excluding evidence of guardrails; and (6) the imposition of monetary sanctions against Deutscher for violating Order in Limine Nos. 4d, 4e, and 4g excluding evidence of other family members’ emotional distress. *See* App. Br. at 2-5. Significantly, Plaintiffs do not assign error to (1) the disqualification of attorney Meyers; (2) Order in Limine No. 6b excluding guardrail claims not barred by discretionary immunity; (3) Order in Limine Nos. 4d, 4e, and 4g (which Deutscher was sanctioned for violating); (4) the exclusion of Apple’s new expert opinions as

a discovery sanction; or (5) the jury's verdict on all other aspects of its negligence claim against the County. *See id.*

A. Summary Judgment Based on Discretionary Immunity Was Proper.

The trial court correctly ruled that discretionary immunity applies to the County's decisions regarding where and when to construct guardrail on existing roads, including removal of the accident site from the priority array in 1994. This decision is reviewed de novo and should be affirmed. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

1. Discretionary immunity applies to tort claims challenging unfunded roadway improvements.

The doctrine of discretionary immunity has been well established in Washington for nearly 50 years. While acknowledging the statutory waiver of sovereign immunity from tort liability, Washington's appellate courts uniformly recognize that discretionary acts, omissions, and decisions within the framework of the legislative, judicial, and executive processes of government "cannot and should not...be characterized as tortious however unwise, unpopular, mistaken, or neglectful a particular decision or act might be." *Evangelical*, 67 Wn.2d at 253. In *Evangelical*, the Supreme Court established four factors governing application of discretionary immunity:

- (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, program, or

objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision 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 constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 255. As the Court explained, “in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability”. *Id.* at 254. In other words, “it is not a tort for government to govern.” *Id.* at 253 (quoting *Dalehite v. United States*, 346 U.S. 15, 57, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (Jackson, J., dissenting); see also *Bodin v. City of Stanwood*, 130 Wn.2d 726, 740, 927 P.2d 240 (1996) (local governments are not “suret[ies] for every governmental enterprise involving an element of risk” (quoting *Evangelical*, 67 Wn.2d at 253)).

In *McCluskey*, the Supreme Court addressed whether discretionary immunity applied to decisions not to fund certain roadway improvements as part of a legislatively authorized prioritization program. 125 Wn.2d at 12-13. Although the Court did not decide whether the State was entitled to immunity because the State had waived the argument, the Court stated that the *Evangelical* four-part test should apply. *Id.* Then, in *Avellaneda*, the Court of Appeals applied the *Evangelical* test to the State’s roadway improvement

priority program and concluded the State was entitled to discretionary immunity. *See Avellaneda*, 167 Wn. App. at 480-85.

Both *McCluskey* and *Avellaneda* addressed the State's priority program for highway improvements. *McCluskey*, 125 Wn.2d at 7; *Avellaneda*, 167 Wn. App. at 476. Under RCW 47.05.010, the State is required rationally to allocate highway improvement funding to the areas of greatest need. To realize this policy objective, the Legislature directed the Washington State Department of Transportation ("WSDOT") to establish and apply a prioritization process to rank potential improvement projects. *See McCluskey*, 125 Wn.2d at 7; *Avellaneda*, 167 Wn. App. at 476-77. In compliance with this mandate, WSDOT applies a formula to rank potential State highway improvements in a priority array, which the Legislature then uses in funding highway improvement projects. *See id.*

In *Avellaneda*, the Court of Appeals addressed whether the exclusion of an accident site on SR 512 from WSDOT'S priority array for highway projects (specifically median barriers) was entitled to discretionary immunity. 167 Wn. App. at 479. Prior to 2003, WSDOT had determined preliminary benefit/cost ratios for potential median barrier projects and calculated the benefit/cost ratio for the stretch of SR 512 at issue as zero. *Id.* at 476-77. WSDOT's proposed 2003-05 budget did not include a funding request for the SR 512 project because all projects for which WSDOT requested funding had

higher benefit/cost ratios. *Id.* at 477. Although the project was later combined with other stretches of SR 512 and added to the array, construction was not completed until after the accident. *Id.* at 477-78. The plaintiffs sued the State for negligently delaying construction of the barrier on SR 512. *Id.*

Applying *Evangelical*, the Court of Appeals held that discretionary immunity protected WSDOT's original decision not to include SR 512 on the priority array. The court held the first *Evangelical* factor (that the decision to exclude the barrier project necessarily involve a basic governmental policy, program, or objective) was "unequivocally satisfied", namely the "basic policy that highway funding decisions should be based on the rational selection of projects, evaluating the costs and benefits, leading to difficult trade offs." *Id.* at 482. The court next held the exclusion decision was essential to the realization or accomplishment of this policy, emphasizing that in creating its priority array, WSDOT "promulgated and followed guidelines for systematically ranking median barrier projects according to their benefit/cost ratios" and that this policy of systematic ranking was "indispensable" for the State to comply with its policy for allocation of limited funds. *Id.* at 483. The court further held that the decision "required a great deal of basic policy evaluation, judgment, and expertise" in that WSDOT collected data about accident history and the cost of possible median barrier projects and devised a system to analyze the data and rank potential projects.

Id. The court noted it was undisputed that WSDOT “had the requisite authority and duty to formulate the priority array”. *Id.* Finally, the court concluded that WSDOT’s decision rested with a high-level executive body and thus was not operational in nature, and was the outcome of a conscious balancing of risks and advantages.²⁶ *Id.* at 483-84.

The court also concluded that WSDOT’s actions such as assigning priority and calculating benefit/cost ratios were protected by discretionary immunity. *Id.* at 484-85. These actions were “part of the decision-making process going into formulating the priority array”. *Id.* at 484. The court noted that discretionary immunity would not insulate the State from liability for negligent implementation of its priority program, but there (as here) the plaintiffs identified “no evidence in the record that the WSDOT was negligent in determining that the SR 512 project had a benefit/cost ratio of zero.” *Id.* at 485 n.5.

2. Under the *Evangelical* factors, discretionary immunity applies to the County’s decisions regarding guardrail on Green River Road.

The application of the *Evangelical* factors to the record in this case confirms that the County’s decisions regarding installation of guardrail along the stretch of Green River Road where the accident occurred are entitled to

²⁶ “The record contains the guidelines WSDOT used to calculate the priority of projects, as well as declarations by WSDOT employees that higher priority projects were selected first....Accordingly, there is no genuine issue of material fact whether the WSDOT consciously balanced the risks and advantages of selecting the projects to fund.” *Id.* at 484.

discretionary immunity under *Evangelical* and *Avellaneda*. Of particular significance in this analysis are Plaintiffs' concessions below, *see* CP 2579, that the decisions establishing the guardrail priority program were discretionary policy decisions by high-level executives analogous to WSDOT's decisions in *Avellaneda*. *See Old City Hall LLC v. Pierce Cnty. AIDS Found.*, 181 Wn. App. 1, 14-15, 329 P.3d 83 (2014) (reviewing court will consider whether facts were uncontroverted or conceded at summary judgment); *Curtis v. Lein*, 169 Wn.2d 884, 893, 239 P.3d 1078 (2010) (relying on defendants' concession of one of the elements of *res ipsa loquitur* during their motion for summary judgment).

a.) Factor 1: Did the County's decisions involve a basic governmental policy, program, or objective?

At the outset, the County's decisions regarding where and when to install guardrail on county roads involved a basic governmental policy, program, or objective. *See Evangelical*, 67 Wn.2d at 255. Plaintiffs admit that the Council and then-County Road Engineer Haff made "discretionary policy decisions" in formulating the guardrail priority array in the 1980s. CP 2579. Since then, the Council annually renewed the program during its budgetary process, and KCDOT periodically updated the array and systematically applied funds allocated by the Council in order of ranking according to greatest need. CP 977-78, 1238-39, 5132-42. This process embodies the County's policy that roadway "funding decisions should be

based on the rational selection of projects, evaluating the costs and benefits, leading to difficult trade offs,” *Avellaneda*, 167 Wn. App. at 482. *See also* CP 1238 (priority program’s goal “is to use the yearly money allocated by the King County Council to construct guardrail at as many locations...as possible with the highest need first.”). The first *Evangelical* factor is satisfied.

b.) Factor 2: Were the County’s decisions essential to the realization of its policies, programs, and objectives?

Second, the County’s decision-making process in establishing and annually reauthorizing the guardrail priority program and periodically reviewing the priority array are essential to (1) the County’s ability to meet its statutory obligations under ch. 36.75 RCW regarding county roadways and (2) the Council’s policy objective to allocate limited funding to retrofit existing county roads with guardrail based on need. *See* CP 977-79, 1237-39. The *Avellaneda* court’s analysis of the second *Evangelical* factor is instructive. As the court explained, WSDOT’s priority program “embodies the basic policy” for allocation of limited funds. *Avellaneda*, 167 Wn. App. at 483. Consequently, the court concluded the systematic ranking of potential projects according to WSDOT’s guidelines—including the exclusion of a barrier project from the array—were “indispensible” for WSDOT to comply with this basic policy. *Id.*

Just like WSDOT, the County collected data about accident history and the cost of possible projects, and devised a system to analyze and rank

potential projects. CP 977; *see also Ruff*, 125 Wn.2d at 702 (describing Haff’s formulation of the priority array). The program, established by Haff and the Council, embodies the basic policy for prioritizing allocation of limited funds to retrofit existing county roads. CP 1238, 2579. To ensure funding decisions are made based on current need, the Council annually allocates a specific amount of funds to the guardrail program. *See* CP 1238-39, 5132-42. As required by the Council’s directive, KCDOT allocates these funds based on the priority array. CP 1238-39. KCDOT periodically reviews the array under the prioritization standards established by Haff, taking into account new data (e.g., accident reports) and changes in road characteristics (e.g., storm damage). CP 977-78. Thus, KCDOT’s review and re-ranking of potential guardrail projects pursuant to the program procedures—including removal of Green River Road from the array—were part of the decision-making process and “indispensable” to the realization of the County’s policy. *See Avellaneda*, 167 Wn. App. at 483. The second *Evangelical* factor is met.

c.) Factor 3: Did the County’s decisions require the exercise of basic policy evaluation, judgment, and expertise?

The third *Evangelical* factor is also met. *See Evangelical*, 67 Wn.2d at 255; *see also Taggart v. State*, 118 Wn.2d 195, 214-15, 822 P.2d 243 (1992) (discretionary immunity applies to basic policy decisions by high-level executives involving conscious balancing of risks and advantages, not ministerial or operational decisions). Plaintiffs admit that a “high-level

executive” (Country Road Engineer Haff) and the County’s legislative body (the Council) made basic policy decisions when they established the process for prioritizing guardrail locations. CP 2579. KCDOT developed a ranking algorithm in furtherance of the County’s objective to establish a rational and systematic approach. *See* CP 977, 986. The algorithm—which Plaintiffs’ experts have never challenged, *see* CP 2626-828, 2829-62, 2863-916—balances numerous considerations such as historical crash data, posted speed limit, daily traffic volume, and physical features to prioritize locations based on need. *See* CP 977, 986. For example, the algorithm would rank a heavily trafficked road above a less-traveled road, all other considerations being equal. *See* CP 986. Thus, like the State in *Avellaneda*, the County devised procedures to analyze relevant data and rank potential projects, a process requiring “a great deal of basic policy evaluation, judgment, and expertise.” 167 Wn. App. at 483.

Further, acting in its legislative capacity, the Council annually made discretionary budgetary decisions in allocating a portion of the County’s limited funds to the guardrail priority program as originally conceived. *See* CP 1238-39, 5132-42. Such decisions inherently balance the needs of protecting the public while ensuring other critical County functions and services are funded. *See* CP 1238.

In 1994, KCDOT properly applied the guardrail program procedures as directed by the Council when Posey removed Green River Road from the array. *See* CP 978-79, 1237-38. As part of the guardrail priority program's ongoing evaluation of whether guardrail was warranted on County roads, Posey measured the width of the shoulder at various locations on Green River Road. *See* CP 978-79. Because Posey's shoulder measurements met the County Road Standards (minimum 10 feet), Posey removed Green River Road from the array as required by the priority program. *Id.* Posey's proper application of the County's procedures as mandated by the Council was part of the decision-making process.²⁷ The third *Evangelical* factor is met.

d.) Factor 4: Did the County possess the requisite constitutional, statutory, or lawful authority and duty?

Plaintiffs do not dispute that the decisions establishing the guardrail priority program, allocating funding for the program, and removing Green River Road from the array were made with the requisite legal authority and duty, including RCW 36.75.020, RCW 36.75.050 (duty and authority to repair and maintain county roads shall be exercised under the supervision and direction of the County Road Engineer) and the County Road Standards. CP 977-79. The fourth *Evangelical* factor is therefore met.

²⁷ If Posey had not removed Green River Road from the array, the County could face a negligent implementation claim for building guardrail where it was not warranted (Green River Road) before places where guardrail was warranted.

e.) Plaintiffs Ignore the Evangelical Factors on Appeal.

Remarkably, Plaintiffs do not even purport to evaluate the four *Evangelical* factors.²⁸ They ignore the undisputed facts and, instead, focus solely on Posey's role in the decision-making process, arguing that Posey's decision to remove Green River Road from the array in 1994 was "merely operative or ministerial" and that Posey was not a "high-level executive". App. Br. at 27-29, 76. But this misses the point that the proper application of a priority array program—a program reflecting the County's basic policy decisions regarding funding guardrail improvements—falls within the protection of discretionary immunity.

The discretionary immunity doctrine does not require that every step in the decision-making process, including the application of program procedures, involve policy decisions by a high-level executive. Similar to Plaintiffs' argument here, the *Avellaneda* plaintiffs contended the decision to assign the accident site an initial benefit/cost ratio of zero, and thus to exclude the accident site from the priority array, was ministerial and made by lower-level WSDOT staff. 167 Wn. App. at 484-85. The court rejected this argument. *Id.* The court explained that the application of WSDOT's program standards, which had been adopted by high-level executives, was

²⁸ Because Plaintiffs failed to evaluate the four questions posed in *Evangelical*, they cannot do so on reply. See *DaVita Healthcare Partners, Inc. v. Wash. State Dep't of Health*, 192 Wn. App. 102, 119 n.8, 365 P.3d 1283 (2015).

part of the program's decision-making process and, thus, involved basic governmental policy. *Id.* This application included data collection and updating the ranking of projects on the priority array. *Id.*

Likewise, here, pursuant to the Council's annual directive to continue the guardrail priority program, Posey applied the KCDOT prioritization standards originally devised by Haff (a high-level executive) in updating the priority array in 1994. *See* CP 1237-39. Because guardrail was not warranted at Green River Road based on the County Road Standards and other considerations (e.g., citizen or staff complaints), Posey properly removed the project from the priority array. *See* CP 977-79, 1237-38. As a result, KCDOT applied the annual project funds allocated by the Council to build guardrail at locations in the County where guardrail was warranted. *See* CP 1238-39; *see also* CP 1246-58 (priority array lists prior to accident), 1267-78 (KCDOT Countywide Guardrail Installation Index of Projects for years prior to accident). Thus, the lack of guardrail at the accident site was the result of KCDOT's proper application of policy decisions made by the County's legislative body and the County Road Engineer.

Contrary to Plaintiffs' suggestion, the County does not contend its guardrail priority program insulates it from any possible tort claim concerning guardrails. *See* App. Br. at 25. The Supreme Court spoke to the scope of discretionary immunity in *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101

(1979), which involved an accident on a state highway bridge. The Court explained that discretionary immunity applied to the State’s decision about if and where to build a highway, but not negligent design when the highway was built. *Id.*

Similarly, here, the “negligent implementation” of the County’s policy decisions would fall outside the protection of discretionary immunity. *See Avellaneda*, 167 Wn. App. at 482. But Plaintiffs expressly waived any claim “that King County was negligent in formulating its ‘guardrail priority array’ or that Nathan Posey was negligent in removing the location of the subject accident from that ‘priority array’ in 1994”. CP 2072.²⁹ Moreover, as the trial court noted, Plaintiffs could assert a claim based on negligent design or construction for failure to include guardrail when Green River Road was initially built, CP 3703-04; but Plaintiffs also waived that claim, CP 2084.

Plaintiffs’ reliance on the Court of Appeals’ decision in *Ruff* is misplaced. *See* App. Br. at 23-25 (citing *Ruff v. Cnty. of King*, 72 Wn. App. 289, 295-96, 865 P.2d 5 (1993), *rev’d*, 125 Wn.2d 697, 887 P.2d 886 (1995)). Because the Supreme Court reversed the decision on other grounds and declined to decide the issue of discretionary immunity, the Court of Appeals

²⁹ Plaintiffs’ waiver is unsurprising. Although their expert Haro initially challenged Posey’s measurement of the shoulder width, CP 2870-71, Haro later admitted Posey’s methodology complied with applicable standards, RP (Jul. 28, 2015) at 1001-07.

decision is not controlling. *See Ruff*, 125 Wn.2d at 707.³⁰ But more importantly, the record in this case dictates a different result. In *Ruff*, the Court of Appeals held that discretionary immunity did not apply to the County's guardrail priority program based on the absence of evidence that the decision-making process satisfied the *Evangelical* factors. 72 Wn. App. at 296 (noting lack of evidence concerning involvement of the Council, the specific policy objective of the program, and whether Haff was a high-level executive). By contrast, those material facts are undisputed in this case. Plaintiffs themselves acknowledged that the "decisions reached in creating the King County guardrail priority array" were "discretionary policy decisions" made by "high-level" executives (Haff and the Council). CP 2579. *Ruff* is therefore inapposite.

The record in this case is more similar to *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990), where the plaintiffs claimed that the State negligently failed to install a barrier that would have prevented their accident. There, the plaintiffs conceded the State's decision concerning the installation of a barrier was a discretionary decision, but argued the manner in which WSDOT collected data was operational and, thus, outside the scope of the discretionary immunity privilege. *Id.* at 481, 482-83 (arguing WSDOT

³⁰ *See Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 76, 170 P.3d 10 (2007) (noting that reversal by the Supreme Court on other grounds "cast[s] doubt" on the "precedential value" of the Court of Appeals' decision).

should have collected data annually, rather than every two years). The court held that data collection was part of the decision-making process and, thus, also within the scope of discretionary immunity. *See id.* at 483. Here, Posey's acts are analogous to the data collection at issue in *Jenson* and are entitled to discretionary immunity.

Accordingly, the trial court properly ruled that discretionary immunity applies to the County's decisions regarding when and where to install guardrail on existing roads. Thus, lack of guardrail at the accident site when the accident occurred cannot form the basis for tort liability.

3. The County would not have installed guardrail prior to the accident even if Green River Road remained in the array because of its low priority ranking.

Even if the removal of Green River Road from the priority array in 1994 were not entitled to discretionary immunity (which it is), Plaintiffs' claims fail because guardrail would not have been installed at the accident site prior to the accident in any event. *See Ruff*, 125 Wn.2d at 704 (“For legal responsibility to attach to the negligent conduct, the claimed breach of duty must be the proximate cause of the resulting injury.” (quoting *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975))). Plaintiffs did not submit any evidence refuting Posey's sworn declaration that, if Green River Road remained on the priority array, the accident location would have ranked 67th out of a total of 107 based on KCDOT's algorithm and guardrail would not

have been installed until approximately 2015 based on the Council's budgetary decisions. CP 979. Plaintiffs thus cannot demonstrate causation, i.e., that there would have been guardrail at the accident site but for Posey's decision. Rather, the lack of guardrail dates back to the Council's and Haff's original decisions, which are undisputedly "discretionary policy decisions" by high-level executives. CP 979, 2579. The trial court properly ruled in favor of the County on this additional, alternative ground. *See* CP 3026.

B. Discretionary Immunity Precludes Plaintiffs' Inclusion of a Guardrail Claim as Part of a Duty to Maintain Roads.

Plaintiffs argue that even if the County is entitled to discretionary immunity regarding its decision to take the Green River Road out of its guardrail priority array, Plaintiffs were still entitled to argue that the failure of the County to construct a guardrail at the accident site breached the County's general duty to exercise ordinary care in the repair and maintenance of its roads, including eliminating inherently dangerous conditions. *See* App. Br. at 23-26. There is no Washington case law supporting Plaintiffs' argument. Allowing such a claim to proceed would, in fact, undermine the very concept of discretionary immunity.

Plaintiffs have pointed to no Washington case where, despite applying discretionary immunity, the court permitted a plaintiff to rely on the absence of an unfunded roadway improvement (e.g., guardrails) as part of a

claim based on the general duty to maintain roadways.³¹ To the contrary, courts applying discretionary immunity in roadway liability cases have typically affirmed dismissal on summary judgment of all negligence claims against the government. For example, in *Jenson*, the plaintiffs asserted negligent design, construction, and maintenance based on the State's failure to install a barrier at the accident location. 57 Wn. App. at 479. The court focused its attention on discretionary immunity because it was "determinative of th[e] appeal." *Id.* at 480 (declining to reach summary judgment ruling on proximate cause). The court then held the State was entitled to discretionary immunity and that immunity completely resolved the case. *Id.* at 481-83. That result is consistent with the *McCluskey* Court's analysis of the role of discretionary immunity in roadway liability cases, *see* 125 Wn.2d at 12-13 (discretionary immunity may apply where plaintiffs claimed the State maintained an unsafe roadway and should have installed a median barrier).

The Supreme Court's decision in *Ruff* did not hold otherwise. *See* App. Br. at 23. The Court specifically declined to decide whether discretionary immunity barred the plaintiffs' claim that the County breached

³¹ Plaintiffs cite a Minnesota case for the proposition that "the decision not to place a guardrail at the scene of the accident was not entitled to discretionary immunity". App. Br. at 25 n.92 (citing *Johnson v. Cnty. of Nicollet*, 387 N.W.2d 209, 212 (1986)). Because discretionary immunity is a creature of statute in Minnesota, the case should be disregarded. To the extent this Court is inclined to consider out-of-state authority, numerous states have held that failure to install guardrail or other road improvements is covered by discretionary immunity. *See McCluskey*, 125 Wn.2d at 12-13 (compiling cases).

its duty to maintain safe roadways by failing to install guardrail. *See Ruff*, 125 Wn.2d at 707. Instead, the Court held that summary judgment was proper because the plaintiffs failed to meet their burden of proof on duty, regardless of whether discretionary immunity applied. *Id.* In sum, Plaintiffs cite no authority for their theory that there is an “inherently dangerous condition” exception to discretionary immunity, and the trial court correctly declined to create such an exception.

Plaintiffs also argue that discretionary immunity cannot be applied “prospectively” to exclude claims based on the lack of guardrail from 1994 to the date of the accident. App. Br. at 33. As a preliminary matter, the County does not contend that it is entitled to immunity for all future acts relating to guardrails. As noted above, negligent implementation at any point in time would raise an issue distinct from the present case. *See supra* at 48. Further, discretionary immunity is not confined to the specific point in time that the protected decision was made, without regard to the future effects of that decision. For example, in *Avellaneda*, the court affirmed summary judgment even though the accident occurred after the State’s discretionary decisions about whether and when to install a median barrier at the accident site. 167 Wn. App. at 481-85. And finally, as discussed *supra* at 50-51, even if the County had not removed the accident site from its priority array in 1994, guardrail would not have been installed until long after the accident. CP 979.

That Plaintiffs do not challenge the discretionary decisions involved in creating the County's guardrail priority program and array (and, thus, the accident site's original position in the array) undermines their argument that discretionary immunity does not apply after 1994. *See* CP 2579.

Plaintiffs' "duty to maintain" claim would require the fact finder to reconsider the reasonableness of the County's discretionary decisions prioritizing the construction of guardrail on roadways throughout the county. Like the County did in establishing the guardrail program and determining the amount of money (if any) to allocate to the program, the fact finder would be asked to balance the improvement and maintenance of county roads with other critical County functions and services. *See* CP 1238. And like KCDOT's algorithm, the fact finder would have to reconcile numerous risks and benefits of constructing guardrails along county roads, taking into account issues of dangerousness as reflected by accident history, storm damage, and complaints. CP 977, 986. The judiciary is "not equipped with the resources or expertise to second-guess [legislative] funding decisions or the minutiae of [a transportation department's] planning decisions". *Avellaneda*, 167 Wn. App. at 486; *see also Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) ("The decision to create a program as well as whether and to what extent to fund it is strictly a legislative

prerogative...unless creation of a program and/or the funding thereof is constitutionally mandated.”).

As in *McCluskey, Avellaneda, and Jenson*, Plaintiffs assert a negligence claim based on failure to install a specific roadway improvement at the accident site. But the County’s policy decisions regarding where and when to install guardrail are entitled to discretionary immunity. The trial court properly determined that their breach of duty claim based on failure to install guardrail is barred because the County’s decision not to fund this project is entitled to discretionary immunity.

C. The Trial Court’s Exclusion of Plaintiffs’ Guardrail Evidence Was Not an Abuse of Discretion.

Because the trial court properly granted summary judgment on discretionary immunity, it did not abuse its discretion in excluding evidence related to guardrails. CP 2231, 2233 (Order in Limine Nos. 6(a) and 13). *See State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999) (standard of review). Plaintiffs mischaracterize the record in an attempt to create the appearance of conflict between Judge Bowman’s summary judgment orders on discretionary immunity and Judge Thorp’s evidentiary orders excluding argument regarding guardrails. *See* App. Br. 30-31. The orders were consistent. Judge Bowman ruled on summary judgment that discretionary immunity applied to the County’s decisions pursuant to the guardrail

prioritization procedures, i.e., removal of Green River Road from the priority array and the data gathering process that supported that decision. CP 3026. Judge Bowman's December 22, 2014 order denying reconsideration merely confirmed that those were the only issues before the court on summary judgment. CP 3162-63. Consistent with these orders, Judge Thorp ruled that Plaintiffs could not pursue guardrail claims barred by discretionary immunity, but could pursue any remaining guardrail claims, such as initial negligent design or construction of the roadway (if evidence of record actually supported such claims, which it did not). CP 3644, 3701-05.

Plaintiffs subsequently waived, and Judge Thorp excluded, any negligent design or construction claims. CP 2072, 2231 (Order in Limine No. 6b). Plaintiffs do not assign error to Order in Limine No. 6b. *See* CP 2072. Thus, ultimately all guardrail-related theories, evidence, and argument were properly excluded. *See* CR 2231.

D. The Trial Court's Jury Instructions Were Proper.

Plaintiffs challenge several of the court's jury instructions (Instructions 14, 15, 16, and 17). "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 law."

Bodin, 130 Wn.2d at 732.³² Although jury instructions are reviewed de novo for errors of law, an erroneous instruction is reversible error only if it is prejudicial. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Because the instructions here properly informed the jury of the law, allowed counsel to argue their case, were not misleading, and did not result in prejudice, Plaintiffs' arguments fail.

1. Plaintiffs' arguments based on guardrails and other barriers (Jury Instructions 14, 15, 16, and 17)

Plaintiffs primarily challenge the jury instructions on the grounds that the instructions prevented them from arguing their guardrail claims to the jury. *See* App Br. at 37-38, 41-42, 44-47. Like their arguments on exclusion of evidence, Plaintiffs' instructional arguments rise or fall on their challenges to the trial court's grant of summary judgment on discretionary immunity. Because those challenges fail for the reasons set forth in section IV(A), *supra*, this Court should reject Plaintiffs' efforts to inject their guardrail theories into Instructions 14, 15, and 16.

Likewise, the Court should reject Plaintiffs' challenge to Instruction 17, which instructed the jury not to use testimony on the presence or absence of guardrails or other re-directional devices in determining whether the County was negligent or whether an inherently dangerous condition existed.

³² When these conditions are met, it is not error to refuse to give detailed augmenting instructions or cumulative, collateral, or repetitious instructions. *Id.*

App'x at A-5; CP 2421. The Instruction was necessitated by Plaintiffs' misconduct in twice introducing the issue of guardrails before the jury in violation of the court's earlier rulings. *See supra* at 29-31 (describing violations by expert Haro and by Dore). Although Plaintiffs challenge the imposition of monetary sanctions against Dore, they do not assign error to the court's determination that Haro and Dore violated the orders excluding argument and evidence on guardrails. *See App. Br.* at 55-56. In fact, Plaintiffs agreed to a curative instruction after the second violation.³³ RP (Aug. 18, 2015) at 1512. And despite having already received a curative instruction, the jury specifically inquired about standards for guardrail placement. *See RP* (Jul. 28, 2015) at 926-27; RP (Jul. 29, 2015) at 1167, 1195-96. Instruction 17 was appropriate in light of these repeated violations and permitted Plaintiffs to argue their case within the bounds of the court's proper summary judgment and evidentiary rulings on guardrails.

2. Jury Instruction 15 – duty to maintain roadways

Jury Instruction 15 gave Washington Pattern Instruction (“WPI”) 140.01 regarding duty to maintain roadways, followed by the statement proposed by Plaintiffs: “This duty is owed to all persons whether those

³³ Because Plaintiffs agreed that the court should read an almost identical curative instruction to the jury after Dore violated the court's guardrail orders, RP (Aug. 18, 2015) at 1512, Plaintiffs are barred from challenging this curative instruction. *See State v. Gentry*, 125 Wn.2d 570, 645-46, 888 P.2d 1105 (1995) (party may not request an instruction, and later complain on appeal the requested instruction was given).

persons are negligent or fault free.” App’x at A-3; CP 2419. The Instruction further stated three limitations on this duty: “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.” *Id.*

Plaintiffs incorrectly contend that the court “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” and that “King County’s duty includes the duty to eliminate an inherently dangerous or misleading condition” and “to reasonably and adequately warn of a hazard”. App. Br. at 46. The court included Plaintiffs’ requested language on the duty to negligent drivers in Instruction 15 and the duty to eliminate inherently dangerous conditions in Instruction 16. App’x at A-4; CP 2419-20. Their argument here is essentially a disagreement with the sequencing of the instructions, which is not a basis for reversal. *See Ramirez v. Dimond*, 70 Wn. App. 729, 733, 855 P.2d 338 (1993) (individual instructions may not be singled out for consideration on appeal without reference to the entire set of instructions).

Plaintiffs’ challenge to the “limitations” on the County’s duty in the second paragraph of Instruction 15 also lacks merit. Plaintiffs do not claim

the Instruction incorrectly stated the law,³⁴ but contend that two out of the three limitations—(1) anticipating and protecting against all acts of negligent drivers and (2) updating every road to present-day standards—had “no application in this action.” App. Br. at 39. Plaintiffs are incorrect. First, the acts of a potentially negligent driver (Mundell) were at issue. *See supra* at 24-25 (summarizing trial evidence of Mundell’s alleged negligence). And second, there was substantial testimony and argument in the case regarding applicable road standards. For example, in closing, Plaintiffs’ counsel argued that the County should have widened the shoulder at the accident site when repaving the road in 2007 because the shoulder’s width violated the County’s 1993 road standards. RP (Sept. 1, 2015) at 2568-69. Their counsel then derided testimony from the County’s witness that these standards did not apply because the road was constructed in 1934. *Id.* at 2601-02.³⁵ Thus, it was important that the jury understand that the County did not have a duty to upgrade its roads to current standards. Moreover, Plaintiffs do not, and cannot, show prejudice in giving this accurate statement of the law. The instructions, “when read as a whole”, correctly stated the law and permitted Plaintiffs to argue their theory of the case. *See Bodin*, 130 Wn.2d at 732.

³⁴Nor could they; the Instruction correctly stated the law. *See Ruff*, 125 Wn.2d at 705.

³⁵ These closing arguments relied on extensive testimony from Plaintiffs’ expert Haro comparing the accident site to County, State, and federal road standards. *See, e.g.*, RP (Jul. 27, 2015) at 744--58, 763-64, 770, 776-77, 833, 840-41, 849-55; RP (Jul. 28, 2015) at 958-80, 1003-15, 1028-33; RP (Jul. 29, 2015) at 1046-56, 1074-96.

3. Jury Instruction 16 – inherently dangerous condition and notice

Instruction 16 set forth (1) the County’s duty to eliminate inherently dangerous conditions based on two paragraphs proposed by Plaintiffs, and (2) the County’s notice of unsafe conditions based on WPI 140.02, one paragraph from Plaintiffs, and one paragraph from the County. Plaintiffs raise three challenges to this Instruction, none of which establish error.

First, Plaintiffs contend Instruction 16 should have included their proposed language explaining that a “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.” App. Br. at 40. But the Comment to WPI 140.02 specifically advises against adding this type of separate instruction on when a notice requirement does not apply because the pattern instruction is “limited by its [own] terms to those situations in which there is no such participation on the part of the governmental entity”. See WPI 140.02 (“In order to find a county liable for an unsafe condition of a road that was not created by its employees...” (emphasis added)). Here, the court properly gave WPI 140.02 in Instruction 16 and, consistent with the Comment to the pattern instruction, declined to add redundant language about when the notice requirement does not apply. App’x at A-4; CP 2420.

Second, Plaintiffs challenge the trial court’s (a) inclusion of the statement, “A county cannot be found negligent if its only knowledge is that

an unsafe condition might, or even probably will, develop” and (b) exclusion of their proposed statement that a notice requirement does not apply if there was a duty to anticipate unsafe conditions. App. Br. at 40-43. Instruction 16 correctly stated the law given the nature of the conditions Plaintiffs relied upon to establish liability.

Plaintiffs contend the County had a duty to anticipate “decreased visibility of lane markings caused by overhanging tree branches and the accumulation of wet leaves and tree debris on the road surface”, even if the County did not have actual or constructive notice of an unsafe condition at the time and place of the accident. App. Br. at 41. But this Court has held there is no “duty to anticipate” that this type of weather-related or seasonal condition created an unsafe condition. In *Laguna v. Wash. State Dep’t of Transp.*, 146 Wn. App. 260, 264-65, 192 P.3d 374 (2008), the plaintiffs alleged weather conditions resulting in black ice (below-freezing temperatures and moisture) created a dangerous condition anticipated by the State. The plaintiffs urged that notice of black ice at the accident site at the time of the accident was not required for the State to have a duty to act. *Id.* Rejecting plaintiffs’ anticipation theory, the Court reiterated that “the State must have (a) notice of a dangerous condition which it did not create, and (b) a reasonable opportunity to correct it before liability arises for negligence from neglect of duty to keep the streets safe.” *Id.* at 263 (quotation omitted).

The Court concluded: “There is a difference between liability based on knowledge that a dangerous condition actually exists and knowledge that a dangerous condition might, or even probably will, develop. No Washington case has held that the State has a duty to act when weather conditions exist that are likely, or even certain, to produce icy roads.” *Id.* at 265.

Although Plaintiffs argue that the potential danger of ice formation is somehow different than the alleged danger in this case, they cite no authority for distinguishing between the natural occurrences of black ice and wet leaves. *See* App. Br. at 43. Nor is there reason to do so. Both are seasonal road conditions that come and go based on continuously changing factors, such as the weather, road features, and road usage. Thus, Instruction 16 reflects *Laguna*’s holding that foreseeability of harm—including “knowledge that a dangerous condition might, or even probably will, develop”—does not create a duty to prevent it where the governmental entity lacks actual or constructive notice of an existing unsafe condition “at the time and place of the accident” before the accident occurs. 146 Wn. App. at 264, 265.

Third, Plaintiffs challenge the portion of Instruction 16 that states, “A county has no duty to inspect its roads to satisfy its duty to provide roads that are reasonably safe for travel.” CP 2420. This is also a correct statement of the law. In *Nguyen v. City of Seattle*, 179 Wn. App. 155, 172, 317 P.3d 518 (2014), this Court explained that a local government’s “duty to persons using

public roads derives from its status as a municipality, not as a landowner.”

Id. As a result, the Court held that a local government does not have the additional duties owed by a landowner to invitees, such as inspecting its premises for dangerous conditions. *See id.* at 171-72. The court noted that there is no authority requiring inspection of street infrastructure as a component of the duty to provide streets that are reasonably safe for ordinary travel. *Id.* at 171. *Nguyen* is consistent with the reference in the Comment to WPI 140.02, cited by Plaintiffs, addressing when there is a duty to “inspect”, including upon constructive notice where “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.” WPI 140.02; *see also* App. Br. at 43-44. Instruction 16 properly advised that the County has a duty to keep its roads in a reasonably safe condition and to act where it has actual or constructive notice of an unsafe condition, but does not have a freestanding duty to inspect all of its roads in the absence of actual or constructive notice.

In sum, Plaintiffs were not prevented from arguing—and in fact did argue—that the County had constructive notice of an unsafe condition at the accident site, including that they should have known there would be leaves and leaf debris around that time of year. *See, e.g.*, RP (Sept. 1, 2015) at 2568, 2571-79, 2582, 2586, 2590, 2601-03; RP (Sept. 2, 2015) at 2742-43, 2761.

Instruction 16 was not unfairly biased toward the County and properly followed the law as set out by *Laguna* and *Nguyen*.³⁶ Plaintiffs, therefore, fail to establish an error of law, or any prejudice arising from the instructions, that would warrant retrial.

E. The Trial Court’s Exclusion of Plaintiffs’ New Expert Opinions Was Not an Abuse of Discretion.

As discussed in section IV(C), *supra*, in an effort to circumvent the trial court’s orders in limine excluding reference to guardrails, Plaintiffs served “updated” expert disclosures two court days before trial that replaced the word “guardrail” with “barrier”. But, as the trial court explained, there is no difference between “guardrails” and “barriers”, CP 4252; thus, their exclusion should be affirmed for the same reasons as the court’s discretionary immunity and evidentiary rulings. Further, the trial court acted within its discretion in excluding the untimely expert disclosures under *Burnet*. See *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009) (abuse of discretion review).

1. Applicable discovery rules

Pursuant to KCLR 26(k), parties must disclose primary and rebuttal witnesses according to the case management schedule. For experts, the

³⁶ Instruction 16 began with two paragraphs on inherently dangerous conditions proposed by Plaintiffs (which the court had discretion to omit, see *Cornejo v. State*, 57 Wn. App. 314, 321-23, 788 P.2d 554 (1990)). The Instruction then defined actual and constructive notice twice based on WPI 140.02 and an additional paragraph Plaintiffs proposed.

disclosure must include a “summary of the expert’s opinions and the basis therefore and a brief description of the expert’s qualifications.” KCLR 26(k)(3)(C). “This rule sets a minimum level of disclosure that will be required in all cases, even if one or more parties have not formally requested such disclosure in written discovery.” KCLR 26 Official Comment. “Failure to comply with this rule or the court’s Order Setting Case Schedule may result in sanctions, including the exclusion of witnesses.” KCLR 26(k)(4).³⁷ In imposing exclusion as a discovery sanction, *Burnet* requires the trial court to make and affirmatively state on the record (orally or in writing) findings of (1) willful violation, (2) substantial prejudice to the other party, and (3) consideration of lesser sanctions. *Burnet*, 131 Wn.2d at 494.

2. Plaintiffs’ discovery violations were willful.

The trial court committed no abuse of discretion in finding that Plaintiffs’ failure to disclose timely new expert opinions by Hayes and Erickson regarding barriers other than guardrails was willful and deliberate. Notably, Plaintiffs do not assign error to or otherwise challenge the court’s findings of willfulness with respect to their previous failure timely to disclose new opinions of another expert, Apple. CP 2242, 4246-47; RP (Jul. 8, 2015) at 32. Those findings are thus verities on appeal. *Robel v. Roundup Corp.*,

³⁷ Similarly, CR 26(e) requires supplementation of discovery responses, including the subject matter and substance of expert testimony. “Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.” CR 26(e)(4).

148 Wn.2d 35, 42, 59 P.3d 611 (2002). That Plaintiffs again chose to untimely disclose new expert opinions—two days before trial, six months after the discovery deadline, and despite the court’s recent ruling that virtually identical untimely disclosures with respect to Apple were willful—supports the court’s finding of willfulness. *See* RP (Jul. 7, 2015) at 1623; CP 4253.

The court’s willfulness finding was also properly informed by Plaintiffs’ history of attempting to circumvent the court’s orders on discretionary immunity.³⁸ Given Plaintiffs’ continued refusal to accept the court’s discretionary immunity rulings (as well as Order in Limine No. 6 with respect to guardrails), the court did not abuse its discretion in concluding that Plaintiffs’ deliberate, eleventh-hour “find and replace” strategy substituting “barrier” for “guardrail” met *Burnet*’s first criterion.

This Court should reject (as the trial court properly did) Plaintiffs’ proffered “reasonable excuse” that Judge Thorp’s Order on the County’s Motion in Limine No. 10 was somehow inconsistent with prior court orders and opened the door to additional theories regarding barriers other than guardrails. As discussed *supra* at 27-28, the trial court denied Motion in Limine No. 10 because it was “a specific motion to Haro’s testimony only”. *See* RP (Jul. 7, 2015) at 1618. The order did not open to door to any and all

³⁸ Continuing this approach, Plaintiffs’ *Burnet* argument repeatedly references and challenges Judge Bowman’s and Judge Thorp’s discretionary immunity rulings. App. Br. at 58, 60, 61-62, 69-70, 72. Those claims fail for the reasons discussed *supra*.

evidence regarding barriers and, more importantly, did not justify the extreme tardiness of the disclosures here.

3. Plaintiffs' discovery violations substantially prejudiced the County's trial preparation.

The trial court's finding of substantial prejudice was also not an abuse of discretion. Plaintiffs attempted to inject new expert opinions into the case two court days before trial. Plaintiffs argue that their "Complaints gave more than adequate notice" that their negligence theory included barriers other than guardrails and that the burden was on the County to "ask[] the questions necessary to elicit" their expert's opinions. App. Br. at 61, 69. But Plaintiffs cite no authority for their theory that "notice pleading" in a complaint excuses parties from complying with discovery rules on expert disclosures.³⁹ To the contrary, "the notice pleading concept inherent in the rules anticipates that the issues to be tried will be delineated by pretrial discovery." *Mose v. Mose*, 4 Wn. App. 204, 209, 480 P.2d 517 (1971) (emphasis added); *see also Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) (same). The trial court properly rejected Plaintiffs' argument that "what is alleged in the complaint is somehow priority over discovery responses that we know limit the issues for trial". *See* RP (Jul. 7, 2015) at 1621.

³⁹ Tellingly, none of the cases Plaintiffs even address discovery violations. *See Rockwell v. Peyran*, 172 Wash. 434, 20 P.2d 841 (1933); *Broadway Hosp. & Sanitarium v. Decker*, 47 Wash. 586, 92 P. 445 (1907); *Schoro v. Kannada*, 167 Wn. App. 895, 276 P.3d 319 (2012); *RTC Transport, Inc. v. Walton*, 72 Wn. App. 386, 864 P.2d 969 (1994).

Plaintiffs also contend that their untimely disclosures caused no prejudice because their experts previously made reference to other types of non-traditional barriers within the period of discovery. *See* App. Br. at 64-65 (citing scattered references in Hayes' deposition to a "Jersey barrier" and in Erickson's declaration to "roadside barrier" or "barrier system").⁴⁰ These references hardly qualify as expert "opinions" and were not sufficient to comply with Plaintiffs' discovery obligations. RP (Jul. 7, 2015) at 1621, 1624-25. Prior to untimely disclosing their new expert opinions on June 29, 2015, Plaintiffs' counsel did not develop any theory or give notice to the County that their experts would be expressing opinions about the need for or effect of barriers other than guardrails. *See* CP 4252-53. Plaintiffs went back to their experts to get these opinions on the eve of trial.

The purpose of the Civil Rules, Local Rules, and case scheduling order is to enable the parties to prepare for trial and to prevent surprise. *Loudon v. Mhyre*, 110 Wn.2d 675, 680, 756 P.2d 138 (1988); *Lampard v. Roth*, 38 Wn. App. 198, 201, 684 P.2d 1353 (1984); *see also Lancaster v. Perry*, 127 Wn. App. 826, 833, 113 P.3d 1 (2005) ("Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion."). Plaintiffs' *post hoc* excuses for their late disclosures seek to obscure the actual issue: Their

⁴⁰ To the extent Plaintiffs point to Haro's deposition testimony, that argument is irrelevant because the new expert disclosures involve Hayes and Erickson, not Haro.

undisputed and flagrant violation of the scheduling order and discovery rules on expert disclosures. As the trial court properly found, these violations substantially prejudiced the County in preparing for trial.

4. The trial court properly considered lesser sanctions and determined exclusion was justified under *Burnet*.

The trial court did not abuse its discretion in finding that exclusion of the new expert opinions was the only effective sanction. The court explicitly considered and rejected lesser sanctions as required under *Burnet*. The court determined that monetary sanctions would not suffice because Plaintiffs had again untimely disclosed expert opinions even after the court had previously “look[ed] at a more conservative option” with respect to Apple’s testimony. RP (Jul. 7, 2015) at 1623 (ordering deposition at Plaintiffs’ cost). The court also determined that it would not further postpone trial, explaining that the case had already been delayed, the parties had made significant efforts to prepare, “[w]e are on day two of trial”, and “[t]his is not a situation where we can break this trial for depositions and then break it even longer so that defense experts have an opportunity to respond”. *Id.* at 1621-22; CP 4254.

Discovery sanctions should be “proportional to the nature of the discovery violation and the surrounding circumstances” of the case. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 695, 41 P.3d 1175 (2002) (emphasis added); *Magana*, 167 Wn.2d at 590-91 (same; trial court considered “continued willful and deliberate failure to comply” with

discovery requests in determining sanction). Given the history of Plaintiffs' discovery violations and attempts to end-run the court's discretionary immunity orders, the extreme lateness of the new disclosures, and the delay in getting the case to trial, the trial court did not abuse its discretion in concluding that exclusion was the only effective remedy here. *See Applegate v. Wash. Fed. Sav.*, 182 Wn. App. 1001, 2014 WL 2916715, at *8 (2014) (nonbinding persuasive authority) (no abuse of discretion in excluding expert opinions after granting continuance due to prior discovery violation).

F. The Trial Court Properly Sanctioned Plaintiffs' Counsel for Violating Court Orders.

Plaintiffs dedicate ten pages of their brief to challenging the trial court's contempt order and sanctions, claiming there was no factual basis to sanction Dore and Deutscher and that the court abused its discretion in imposing sanctions in amounts greater than authorized in the civil contempt statutes. Plaintiffs' arguments find no support in the record or the law. Given counsels' repeated violations of court orders in the face of ad nauseam reminders and warnings, the court did not abuse its discretion in finding Dore and Deutscher in contempt and imposing sanctions.

1. The trial court has discretion to impose sanctions for violations of court orders.

Contempt is defined as intentional disobedience of a lawful court order, among other misconduct. RCW 7.21.010(1)(b). Orders in limine, like

those violated by Dore and Deutscher, are “designed to simplify trials and avoid the prejudice which often occurs when a party is forced to object in front of the jury to the introduction of inadmissible evidence.” *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976). The Evidence Rules impose on counsel the duty to keep inadmissible evidence from the jury, including evidence barred by the court’s orders in limine. *See* ER 103(c); *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012). Failure to do so can be grounds for contempt.⁴¹

“[T]he power to censure contemptuous behavior is inherent in a court of general jurisdiction.” *Nielsen v. Nielsen*, 38 Wn. App. 586, 587, 687 P.2d 877 (1984). “In addition, the power has been conferred upon the courts by the Legislature.” *Id.* at 587-88 (citing RCW 7.20.010; RCW 9.23.010). RCW 7.21.050 authorizes courts to impose monetary sanctions for contempt up to \$500 for each separate contempt of court. A court through its inherent powers may exceed statutory monetary limitations where it “determine[s] that reliance on the statutory basis would be inadequate.” *State v. Boatman*, 104 Wn.2d 44, 48, 700 P.2d 1152 (1985). Whether contempt is warranted, as well as the extent of punishment imposed, are matters within the trial court’s discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

⁴¹ *See, e.g., Spice v. Dubois*, 192 Wn. App. 1054, 2016 WL 899914, at *2 (2016) (nonbinding persuasive authority) (noting contempt for violation of order in limine).

2. The trial court properly exercised its inherent contempt authority to sanction Dore.

The trial court did not abuse its discretion in finding Dore in contempt of the court's orders in limine and discretionary immunity rulings for reading directly into the record a deposition question about whether the County's expert had formed opinions on, *inter alia*, "need for a guardrail placement". Plaintiffs' attempt to characterize Dore's action as inadvertent ignores the context in which his misconduct occurred. *See* App. Br. at 55-56. His statement came (1) after expert Haro's violations of the court orders excluding guardrails and the court's subsequent warning, *see* RP (Jul. 28, 2015) at 923-24; (2) in the context of Plaintiffs' counsel's protracted history of attempting to end-run the court's discretionary immunity and guardrail evidence orders; and (3) directly after Dore and the court's lengthy exchange on the meaning of the court's guardrail rulings, during which the court made clear "guardrails' are out". RP (Aug. 18, 2015) at 1501 (emphasis added).

Although Plaintiffs imply Judge Thorp was at fault for Dore's violation, a trial judge is not responsible for proactively preventing counsel from violating court orders. *See* App. Br. at 53 ("Judge Thorp did not stop [Dore] or warn him to consider the language he was about to read"). To the contrary, it is incumbent upon counsel to keep inadmissible evidence from the jury. *See* ER 103(c); *Teter*, 174 Wn.2d at 223. Judge Thorp reminded Dore of this duty directly before the violation. RP (Aug. 18, 2015) at 1499.

Further, the trial court did not abuse its discretion in sanctioning Dore \$2,000 for his contempt. The court properly entered written findings and conclusions supporting its sanctions award. *See Templeton v. Hurtado*, 92 Wn. App. 847, 853, 965 P.2d 1131 (1998). The court’s contempt order found Dore’s violations were intentional and significant and that “[t]he civil contempt statutes are insufficient to address these specific violations.” CP 4262 (emphasis added). Contrary to Plaintiffs’ claims, Judge Thorp explained why the statutory contempt remedies were insufficient to address Dore’s violations, specifically, that Dore acted intentionally in the face of repeated and direct warnings by the court and that \$2,000 was a reasonable sanction “given the gravity of the violation and the risk to the Defendants of a mistrial.” CP 4261 (emphasis added). Under these circumstances, the court did not abuse its discretion in exceeding the statutory sanction.

3. The trial court properly exercised its inherent contempt authority to sanction Deutscher.

The trial court did not abuse its discretion in holding Deutscher in contempt for repeated violations of its orders excluding evidence regarding how the deaths affected other family members. CP 2229-30. Plaintiffs do not meaningfully dispute that inappropriate statements occurred during Peterson’s testimony. Instead, they contend Peterson’s answers were “not intentional violations of court orders elicited or encouraged” by Deutscher.

App. Br. at 50-51.⁴² But the repeated and overt nature of Peterson’s and Deutscher’s remarks (quoted at length in the court’s order, App’x at A-22-26)—continuing even after the court indicated it would impose sanctions—shows Deutscher violated the court’s orders by eliciting improper answers, knowingly asking objectionable questions, and offering improper commentary.⁴³ Such blatant and repeated violations also indicate Deutscher failed adequately to prepare Peterson to avoid inadmissible topics.⁴⁴

Nor did the court abuse its discretion in sanctioning Deutscher \$1,000. As with Dore, the court found Deutscher’s violations intentional and significant and explained why the statutory contempt remedies were insufficient. *See* CP 4256 (court orders were “repeatedly violated”), 4259 (\$1,000 sanction reasonable given “other misconduct of counsel during the trial and the risk to Defendants of a mistrial.”).

G. Cumulative Error Does Not Apply.

Contrary to Plaintiffs’ assertion, the cumulative error doctrine does not warrant reversal in this case. *See* App. Br. at 73-75. For the reasons stated above, none of Plaintiffs’ assignments of error has merit. Further, even

⁴² This Court affirmed similar sanctions against Deutscher for her lack of candor to the trial court in *Deutscher v. Gable*, 149 Wn. App. 119, 136-37, 202 P.3d 355 (2009).

⁴³ *See Teter*, 174 Wn.2d at 223-24 (asking knowingly objectionable questions or attempting to elicit testimony on inadmissible subjects constitutes misconduct) (citing 14A Karl B. Tegland, *Washington Practice: Civil Practice* § 30:33 (2d ed. 2009)).

⁴⁴ A lawyer’s duty to prepare trial witnesses includes explaining “any orders in limine” and “the rules against speculation or expression of personal beliefs or opinions unless specifically requested.” *State v. Montgomery*, 163 Wn.2d 577, 592, 183 P.3d 267 (2008).

if error occurred, Plaintiffs' claim of cumulative error still fails because Plaintiffs have failed to demonstrate actual prejudice resulted from any alleged error, nor have they articulated with any specificity how the alleged errors combined to affect the outcome of their trial. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *State v. Saunders*, 120 Wn. App. 800, 826-27, 86 P.3d 232 (2004).

H. Alternatively, in the event of remand, the County should be allowed to assert a contributory negligence defense.

This Court should affirm the trial court's rulings and the jury's verdict of no liability for the reasons detailed above. In the event this Court reverses and remands for new trial, however, the County suspects that Plaintiffs would attempt to use the original jury's no-fault verdict as to Mundell to prevent the County from presenting the issue of Mundell's fault at trial. The law does not support such an unjust result. The County should be allowed to assert its contributory negligence defense based on Mundell's fault at any new trial, even if Mundell is no longer a party.

The "usual and general rule is that, upon reversal for a new trial, the whole case is open." *Godefroy v. Reilly*, 140 Wn. 650, 657, 250 P. 59 (1926) (emphasis added). A new trial should include "all issues between all parties" unless "such issues are clearly and fairly separable and distinct" and, further, "justice does not require the resubmission of the whole case to the jury."

Sage v. Northern Pac. Ry. Co., 62 Wn.2d 6, 15-16, 18, 380 P.2d 856 (1963);
see also State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304,
306, 57 P.3d 300 (2002) (relitigation of issues permitted despite final
judgment where preclusion would “work an injustice”).

The competing claims of contributory negligence by the County and Mundell are not “clearly and fairly separable and distinct”. Division Three of this Court recently distinguished between the types of issues that are separable—and those that are not—in an unpublished decision: “Where issues are properly separable, they tend to involve discrete portions of the case that are distinct from each other such as liability and damages or a cross-claim to a complaint. . . . In contrast, when competing claims address the same aspect of the case such as damages or liability, they generally are not separable claims.” *Bechard v. Dalrymple*, 189 Wn. App. 1044, 2015 WL 5022935, at *4 (2015) (nonbinding persuasive authority) (emphasis added); *see also Cramer v. Bock*, 21 Wn.2d 13, 18-19, 149 P.2d 525 (1944) (new trial for plaintiff on negligence issue required new trial on defendant’s cross-complaint for negligence); *Sage*, 62 Wn.2d at 15-16 (plaintiffs’ wrongful death claims against defendants not separable from defendants’ cross claims). Here, evidence and argument regarding the County’s and Mundell’s liability were inextricably intertwined. For example, Plaintiffs’ experts relied on road features and conditions at the time of the accident in opining that the County

was at fault but Mundell was not.⁴⁵ Retrying Plaintiffs' claims against the County alone without testimony as to Mundell's fault could lead to a different result than if both the County's and Mundell's fault remained at a new trial.

More importantly, allowing Plaintiffs to avoid allocation of fault (if any) between both defendants would be unjust given their collusion with Mundell throughout the proceedings below. Plaintiffs named Mundell as a defendant for the sole purpose of manipulating the joint and several liability laws so that they could collect 100% of any damages award from the County, even if Mundell was also at fault. If Plaintiffs had not named Mundell as a party but the jury found both the County and Mundell at fault, Plaintiffs would not have been able to collect from the County any damages attributable to Mundell. *See* RCW 4.22.030, 4.22.070.

The jury's verdict that Mundell was not liable was tainted by Plaintiffs' irreconcilable positions at trial. On the one hand, their counsel asserted a negligence claim against Mundell but, on the other hand, all testifying Plaintiffs and their experts unequivocally testified that Mundell was not at fault. The record provides other examples of Plaintiffs' and Mundell's collusion and "interesting strategic shifts" during pre-trial proceedings,

⁴⁵ *See, e.g.*, RP (Jul. 21, 2015) at 197-201; RP (Jul. 22, 2015) at 339-40, 375-82; RP (Jul. 23, 2015) at 669, 678-81; RP (Jul. 27, 2015) at 757-61, 765, 770, 776, 822-31, 835-40, 843-48, 854-55, 861-62; RP (Jul. 29, 2015) at 1071-72, 1076-77, 1117-18, 1139-40, 1146-47; RP (Jul. 30, 2015) at 1232-35, 1241-42, 1280; RP (Aug. 3, 2015) at 1418-22, 1482-84, 1488-89; RP (Aug. 6, 2015) at 530-31; RP (Aug. 10, 2015) at 619-20; RP (Aug. 12, 2015) at 904; RP (Aug. 13, 2015) at 1234, 1239-40, 1247.

including attorney Meyers' improper "side switching" from Mundell to Plaintiffs resulting in his disqualification; and Plaintiffs' about-face in initially joining in Mundell's summary judgment motion on liability but then, two days later, withdrawing and joining the County's opposition. Plaintiffs were unsuccessful in subverting the joint and several liability statute because of the trial court's vigilance and the jury's full defense verdict. But, in the event of reversal for a new trial as to the County, Plaintiffs should not be permitted to use their ill-gotten judgment in favor of Mundell as a sword to prevent the County from fully defending itself.

Accordingly, a new trial (if any) should include all issues as to all parties, including Plaintiffs' claims against the County and the County's defense based on Mundell's contributory fault. At a minimum, the County reserves the right to raise this issue with the trial court.

V. CONCLUSION

The trial court properly ruled on summary judgment that discretionary immunity applies to the County's decision not to construct a guardrail at the accident site. The trial court also correctly and consistently applied the law in ruling on the parties' motions in limine, instructing the jury, and sanctioning Plaintiffs' willful and deliberate violation of discovery rules and court orders and their counsels' misconduct before the jury. After a nine-week trial, the

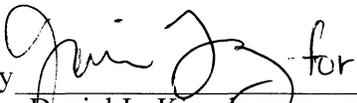
jury properly found the County was not liable. Thus, the County respectfully requests that this Court affirm the trial court's orders and the jury's verdict.

Alternatively, in the event of remand for new trial, the County should be permitted to assert a defense based on Mundell's contributory fault.

RESPECTFULLY SUBMITTED this 7th day of October, 2016.

KING COUNTY PROSECUTING
ATTORNEY'S OFFICE

PACIFICA LAW GROUP LLP

By  for

Daniel L. Kinerk, WSBA #13537
Cindi S. Port, WSBA #25191

By 

Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Jamie L. Lisagor, WSBA #39946

Attorneys for Respondent
King County

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. Court Orders

Order Granting King County's Motion for Summary Judgment
to Dismiss Plaintiffs' Guardrail claims.....A-6

Orders on Trial Rulings and Order Imposing Sanctions on Ann
Deutscher and James Dore, Jr.....A-11

Instruction No. 14

The following is merely a summary of the claims involved in this case. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

The Plaintiffs claim that Defendant King County was negligent in failing to maintain the Green River Road at the location of Defendant Loni Mundell's accident so that it was reasonably safe for ordinary travel and was not inherently dangerous. Plaintiffs also claim that Defendant Loni Mundell operated her vehicle in a negligent manner.

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;

Plaintiffs claim that one or more of the above acts by Defendant King County was a proximate cause of injuries and damages to plaintiffs. Defendant King County denies these claims.

Plaintiffs claim that Defendant Mundell's driving was a proximate cause of injuries and damages to plaintiffs. Defendant Mundell denies these claims.

Defendants King County and Loni Mundell deny the nature and extent of the injuries and damages claimed by plaintiffs.

Defendant King County claims that Defendant Loni Mundell operated her vehicle in a negligent manner.

Defendant King County claims that a proximate cause of Plaintiffs' damages was the negligence of Loni Mundell. Defendant Loni Mundell denies these claims.

Instruction 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.

Instruction 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 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 its duty to provide roads that are reasonably safe for ordinary travel.

Instruction No. 1

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 for ordinary travel or whether there was an inherently dangerous or deceptive condition at the accident location.

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CASE NUMBER: 11-2-19682-8 KNT

Honorable Bill Bowman

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES C. FUDA, as Personal Representative of)
the Estate of AUSTIN FUDA, deceased; JAMES)
C. FUDA, an individual; DORIANNE BEAUPRE,)
as Personal Representative of the Estate of)
HUNTER BEAUPRE, deceased; DORTIANNE)
BEAUPRE, an individual; and CHAD BEAUPRE,)
an individual,)

Plaintiffs,)

vs.)

KING COUNTY, a municipal corporation; LONI)
MUNDELL, a single person; JOHN and JANE)
DOE EMPLOYEES 1-25, husband and wife, a)
marital community; COMPANIES 1-25,)
companies doing business in the State of)
Washington,)

Defendants.)

CONSOLIDATED CAUSE
NO. 11-2-19682-8 KNT

ORDER GRANTING KING
COUNTY'S MOTION FOR
SUMMARY JUDGMENT TO
DISMISS PLAINTIFFS'
GUARDRAIL CLAIMS

ORDER

THIS MATTER came before the Court on Defendant King County's Motion for
Summary Judgment in the above entitled cause. The Court has heard oral argument and read and
considered the following pleadings and evidence submitted in support of and in opposition to the
motion:

ORDER GRANTING KING COUNTY'S MOTION TO
DISMISS PLAINTIFFS' GUARDRAIL CLAIMS - 1

003024

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1. Defendant King County's Motion for Summary Judgment filed October 24, 2014;
2. The Declaration of Cindi Port with exhibits;
3. The Declaration of Tony Ledbetter with exhibit;
4. The Declaration of Kathy Ooka with exhibit;
5. The Declaration of Bill Thomas;
6. The Declaration of Pablo Para with exhibits;
7. The Declaration of Randall Bailey;
8. The Declaration of Norton Posey with exhibits;
9. The Declaration of Mark Mitchell with exhibits; and
10. The Declaration of Nathan Rose with exhibits;
11. Plaintiffs' Response;
12. Declaration of James Dore with exhibits;
13. Declaration of Wilson C. "Toby" Hayes, Ph.D. with exhibits;
14. Declaration of Mark Erickson with exhibits;
15. Declaration of William Haro with exhibits;
16. Defendant Loni Mundell's Response;
17. Declaration of W. Sean Hornbrook;
18. Defendant King County's Reply;
19. Second Declaration of Norton J. Posey with exhibits; and
20. Second Declaration of Cindi S. Port with exhibits.

ORDER GRANTING KING COUNTY'S MOTION TO
DISMISS PLAINTIFFS' GUARDRAIL CLAIMS - 2

003025

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and the Court being fully advised in the premises, NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant King County's Motion for Summary Judgment regarding dismissal of Plaintiffs' guardrail claims is GRANTED as follows:

- 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. 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.

DATED this 26th day of November, 2014.

/s/ E-Filed
Honorable Bill Bowman
Superior Court Judge

Presented by:

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: /s/ DANIEL L. KINERK, WSBA #13537
By: /s/ CINDI PORT, WSBA #25191
Senior Deputy Prosecuting Attorneys

ORDER GRANTING KING COUNTY'S MOTION TO
DISMISS PLAINTIFFS' GUARDRAIL CLAIMS - 3

003026

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King County Superior Court
Judicial Electronic Signature Page

Case Number: 11-2-19682-8
Case Title: FUDA ET AL VS KING COUNTY ET ANO

Document Title: ORDER

Signed by: Bill Bowman
Date: 11/26/2014 10:21:29 AM

A rectangular box containing a handwritten signature in black ink, which appears to be "Bill Bowman".

Judge/Commissioner: Bill Bowman

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: E9ED7CBD7EDF7433C317C5717E0107723192F400

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Certificate expiry date: 7/29/2018 12:08:25 PM

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O=KCDJA, CN="Bill
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Page 5 of 5

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KING COUNTY
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KENT, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JAMES C. FUDA, as Personal Representative of)	
the Estate of AUSTIN FUDA, and JAMES C.)	
FUDA, Individually, DORIANNE BEAUPRE, as)	
Personal Representative of the Estate of HUNTER)	CONSOLIDATED CAUSE
BEAUPRE, and DORIANNE BEAUPRE,)	NO. 11-2-19682-8 KNT
Individually; CURT BEAUPRE, as Personal)	
Representative of the Estate of CHAD BEAUPRE,)	
Individually,)	ORDERS ON TRIAL RULINGS AND
)	ORDER IMPOSING SANCTIONS ON
)	ANN DEUTSCHER AND JAMES
Plaintiffs,)	DORE, JR.
)	
vs.)	
)	
KING COUNTY, a municipal corporation; LONI)	
MUNDELL, a single person,)	
)	
Defendants.)	

ORDER

This Court set a hearing for November 13, 2015, which was continued to December 11, 2015 by motion of plaintiffs, to enter findings and orders from rulings made during trial. The Court has considered the files and records herein, the pleadings submitted in support of and in opposition to sanctions being imposed, and heard argument of counsel. The Court incorporates its previous oral rulings and written orders and makes the following findings, rulings and orders.

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 1

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ORIGINAL 004214

1 **A. Sanctions pursuant to *Burnet* regarding plaintiffs' expert Gerald Apple.**

- 2 1. The accident underlying this case occurred on November 7, 2008.
- 3 2. This lawsuit was commenced on or about June, 2011.
- 4 3. The deadline to disclose possible primary witnesses was June 2, 2014.
- 5 4. The deadline to disclose possible additional witnesses was September 30, 2014.
- 6 5. Plaintiffs' counsel disclosed Mr. Apple as an expert witness on October 29, 2014, in

7 Plaintiffs' Third Supplemental Disclosure of Witnesses. Counsel represented that he "may
8 testify regarding Ms. Mundell's driving status, training and experience at the time of the tragic
9 event on November 7, 2008." Consistent with that disclosure, Mr. Apple's July 4, 2014
10 declaration only contains one, simple opinion: that on the day of the accident "Ms. Mundell was
11 in compliance with her intermediate license status by having Austin Fuda and Hunter Beaupre as
12 passengers in her car, as these individuals were members of her immediate family." There was
13 no reason for anyone to believe that Mr. Apple had additional opinions. And King County had
14 no reason to depose Mr. Apple because it did not dispute the opinion he gave in his July 4, 2014
15 declaration.

- 16 6. The deadline for completing discovery was December 12, 2014.

17 7. Before the discovery deadline expired, there was substantial investigation and discovery
18 about the condition of the roadway on November 7, 2008.

19 8. On April 22, 2015, over four months after discovery had closed, Plaintiffs' counsel
20 submitted a supplemental witness list that added that Mr. Apple would also testify regarding
21 "road conditions to drive on." On its face, this appears to be a completely new topic from that
22 about which Mr. Apple was previously disclosed to testify. Yet Plaintiffs disclosed no other
23 information to the parties about Mr. Apple's opinions on this new topic.

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 2

004245

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1 9. King County's subsequent Motion in Limine No. 35 sought to exclude Mr. Apple from
2 testifying at trial for two reasons: First, the opinions he was originally designated to testify on were
3 undisputed, and therefore his testimony would not be helpful to the jury under BR 702. Second, his
4 newly disclosed opinions were not timely disclosed, contained no substantive disclosure, and
5 substantially prejudiced King County in preparing for trial.

6 10. On June 12, 2015, the Court heard oral argument on King County's Motion in Limine
7 No. 35. At oral argument on this motion, Plaintiffs' counsel asserted that "road conditions to drive
8 on" was not a new topic for Mr. Apple. This flatly conflicted with their briefing that asserted that
9 Mr. Apple would also testify regarding "road conditions to drive on." This was, at best, a very
10 inartful description of Mr. Apple's new area of testimony. In fact, his new opinions were that, based
11 on the facts known about the Green River Road at the location of the accident, it was impossible for
12 Ms. Mundell to prepare for the dangerous road conditions present on the day of the accident. This
13 opinion was in no way disclosed in the 2014 disclosures.

14 11. On June 16, 2015, the Court ruled on King County's Motion in Limine No. 35,
15 reserving its decision until additional actions could be taken. The Court ordered two things: (1) that
16 Plaintiffs provide a far more complete expert disclosure within 48 hours of the Court's Order; and
17 (2) that King County be allowed to conduct Mr. Apple's deposition at Plaintiffs' expense and that
18 the deposition transcript be provided to the Court. The Court also allowed the parties to submit
19 additional briefing.

20 12. In making its ruling, the Court found that Plaintiffs' counsels' untimely disclosure of
21 Mr. Apple's opinions was willful and deliberate. That finding is affirmed here. Counsel provided
22 no reasonable explanation for how, almost six years after the accident, facts could just then be
23 suddenly coming to light such that the information could not have been provided to the parties

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 3

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1 before the discovery cutoff in December 2014. While Plaintiffs' counsel Mr. Dore provided an
2 explanation that their briefing was incorrect and Mr. Apple's new topic was in fact not a new topic,
3 that position was not credible. Also, Plaintiffs' counsel had still not disclosed any substantive
4 information about the scope of this new area of testimony to the Court or the parties except that
5 which was identified in the April 22, 2015 witness list. Further, there was nothing in Mr. Apple's
6 listed credentials that showed this new topic was within his area of expertise.

7 13. Prior to Mr. Apple's deposition, Plaintiffs' counsel provided the Court with two
8 completely different arguments regarding whether their failure to timely disclose Mr. Apple's new
9 opinions was willful. Neither argument supported a conclusion that their failure to disclose was not
10 deliberate and willful. The length of time this case has been pending, the number of times witnesses
11 were disclosed, the availability of the Discovery Master to address ongoing discovery issues, and
12 the Court's strict order that this case shall go to trial on July 6, 2014 to resolve these issues all
13 supported that the nondisclosure was a deliberate act on the part of the Plaintiffs' counsel.
14 Additionally, there was no factual support for their position that the failure to disclose was a mistake
15 or negligent act. In fact, the only factual explanation was that there are "facts now known" about
16 the Green River Road that apparently have not been discoverable for the last five years and five
17 months and are not known to any other party was not tenable. The only other explanation Plaintiffs'
18 counsel gave was that the Court should ignore their clear statements in their briefing and accept
19 their new argument that this was not a new area of testimony, but rather an extension of previously
20 identified testimony.

21 14. Regarding prejudice to King County, the Court found as follows. It has taken four
22 years for this case to come to trial. The tragic events that happened on November 7, 2008 need
23 closure for all involved. This could only happen if this matter finally goes to trial. The delay in this

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 4

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1 case is a tragedy. Substantial resources of the parties and the Court had come together to achieve
2 the goal of finally getting this case to trial. Defendants King County and Ms. Mundell would be
3 prejudiced because the trial date would not change for the foregoing reasons, and by virtue of this
4 late and incomplete disclosure, the Defendants did not have the opportunity to adequately engage in
5 discovery, obtain responsive evidence to present the full merits of the case, and adequately prepare.

6 15. Pursuant to the Court's order, Plaintiffs' counsel provided a supplemental disclosure
7 on June 18, 2015 and King County was allowed to, and did, conduct Mr. Apple's deposition on
8 June 26, 2015. King County subsequently provided the Court with a copy of the deposition and
9 additional briefing on July 6, 2015. Ms. Mundell filed a brief on July 7, 2015. At Plaintiffs'
10 counsels' request, they were given an additional day to file a brief and filed a responsive brief on
11 July 8, 2015. The Court reviewed all the briefing before hearing argument on July 8, 2015.

12 16. The deposition transcript reveals that Plaintiffs' counsel wanted Mr. Apple to testify
13 to the following five new opinions that were never disclosed until the deposition. First, that all
14 of the passengers in the car had their seatbelts on and were in an appropriate car seat. Second,
15 that the conditions of the roadway encountered by Ms. Mundell, as depicted on Officer
16 deChoudens' dash cam, represented a hazard requiring a form of warning of the upcoming
17 hazardous condition of the roadway. Third, that Ms. Mundell was not able to slow down in time
18 because there were no warning signs posted 300 feet before the curve, even though he could not
19 identify the source of his 300 foot opinion. Fourth, Mr. Apple testified that he would discuss the
20 extreme hazard posed for newly-trained drivers, as well as the hazard for other, more
21 experienced drivers, when encountering conditions as depicted on the dash cam and based on his
22 site visit, training, knowledge, and experience. Fifth, about the road conditions Ms. Mundell
23

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 5

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1 drove on the morning of the event and how they relate to her training, reactions, the outcome,
2 and other related issues, even though he testified that he was not able to testify to human factors.

3 17. Mr. Apple's deposition proved that he was asked by Plaintiffs' counsel to formulate
4 new opinions on multiple new topics in May of 2015, well after discovery had closed. These new
5 opinions were grossly untimely and were never provided to the Defendants until Mr. Apple's
6 deposition. It is even more troubling that Plaintiffs' counsel received a letter from Mr. Apple in
7 May of 2015 that contained some of these new opinions. Yet none of this information was
8 disclosed to the defendants or to the Court until his deposition.

9 18. The Court expressly considered all of the *Burnet* factors and found that King County
10 would be significantly prejudiced if Mr. Apple was allowed to testify to any of these new opinions
11 and found as follows: The matter came to the Court's attention on the second day of trial. The
12 Court and the parties have made substantial efforts to be prepared for trial. Jury summons have
13 been sent out. The Court has arranged to be in a specially assigned courtroom so it and the parties
14 have access to the technology needed for the case. Everyone was prepared to start trial. The length
15 of time this case already has waited for trial was profoundly disturbing. There was a need for
16 closure, a need for the issues to be addressed, and a need for a jury to decide this case. For these
17 reasons, the Court was determined not to continue the trial date again. Up until June 26, 2015, King
18 County had no notice that Mr. Apple would be offering such broad opinions on such divergent and
19 new topics. Responding to those new opinions would have required preparation of King County's
20 own experts to respond while trial is occurring. There was no reasonable way for King County to
21 meet that burden.

22 19. No sanction less than exclusion of the newly offered opinions would have been
23 effective. The Court found that Plaintiffs' acted willfully and deliberately in failing to timely

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 6

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1 disclose these new opinions. Plaintiffs' counsels' conduct is even more disturbing given the
2 untimely disclosure of Mr. Apple's new opinions and their previous assertions to the Court that
3 none of Mr. Apple's opinions were in fact new. The work needed for King County to respond to the
4 new opinions was too great for King County to accomplish during trial. Monetary sanctions would
5 in no way relieve King County of that work. Therefore, exclusion of Mr. Apple's new opinions was
6 the only appropriate remedy under these extreme circumstances.

7 20. The Court also found pursuant to ER 702 that Mr. Apple lacked the qualifications to
8 express the new opinions he finally disclosed at his deposition. The questions that were asked, and
9 the answers elicited in the follow-up, proved to this Court that Mr. Apple was not qualified to testify
10 to any of the new topics that he disclosed.

11 21. For these reasons, the Court excluded Mr. Apple's new opinions at trial for the
12 untimely disclosure of his opinions and ER 702. As previously ordered, plaintiffs' counsel are
13 ordered to pay King County's attorney's fees and costs for Mr. Apple's deposition in the amount of
14 \$2,780.52. Counsel for defendant Mundell has fourteen days from entry of this order to submit a
15 fee declaration for costs associated with Mr. Apple's deposition, if defendant Mundell chooses to
16 seek reimbursement.

17 B. Burnet sanctions regarding the supposed new expert opinions substituting the
18 word "barrier" for "guardrail".

19 1. On July 26, 2014, Judge Bowman granted King County's motion for summary
20 judgment based on discretionary immunity regarding Plaintiffs' claims that there should have been
21 a guardrail at the location of the accident. On December 22, 2014, he denied Plaintiffs' motion to
22 reconsider that order. Judge Bowman added clarification language to that order but did not grant
23 reconsideration or modify the order in any way. Plaintiffs' counsel sought, then withdrew,

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 7

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1 discretionary review in the Court of Appeals of those decisions. As of those dates, it was clear that
2 the issue of guardrails had been removed from the case.

3 2. If Plaintiffs' counsel believed the orders of July 26, 2014 and December 22, 2014
4 still allowed evidence regarding barriers or redirectional devices other than guardrails, they had
5 ample opportunity to seek and disclose any such evidence before the discovery cutoff or to seek an
6 extension of the discovery cutoff for that limited purpose. They did not do so.

7 3. Subsequent to these orders, this Court denied a motion in limine and a later motion
8 for reconsideration from King County which the Court interpreted as an untimely effort to clarify
9 the previous orders. These were not substantive decisions regarding the motions. As of the dates
10 the motions were made and the Court decided them, it was clear that the Court's previous orders
11 had not changed and the issue of guardrails had been removed from the case. Nothing in this
12 Court's orders on these motions changed the previous rulings by Judge Bowman in any way.

13 4. On June 16, 2015, this Court ruled on the parties' motions in limine. King County's
14 Motion in Limine No. 11 was a motion to exclude the testimony of Plaintiffs' traffic engineer
15 expert, William Haro. Mr. Haro was Plaintiffs' only expert that had opined about rocks,
16 redirectional berms or devices other than guardrails in his deposition. King County's Motions in
17 Limine Nos. 6 and 7 also sought to exclude all evidence of guardrails.

18 5. Consistent with the Court's orders of July 26, 2014 and December 22, 2014, the
19 Court granted King County's Motions in Limine Nos. 6 and 7. The Court denied King County's
20 Motion in Limine No. 10 seeking to exclude Mr. Haro from testifying. In denying Motion in
21 Limine No. 10, this Court simply declined to prohibit Mr. Haro from testifying. The decision was
22 not inconsistent with any other order made by the Court, and did not change or modify any other
23 order made by the Court. In particular, it did not limit or modify the Court's decision on King

ORDER IMPOSING SANCTIONS
ON ANN DEUTSCHER AND
JAMES DORE, JR. - 8

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1 County's Motions in Limine Nos. 6 and 7 to exclude all evidence of guardrails. As of July 26, 2014
2 and June 16, 2015, it remained clear that the issue of guardrails had been removed from the case.

3 6. On June 29, 2015, two court days before trial, Plaintiffs' counsel disclosed for the
4 first time that their previously disclosed experts, Mr. Haro, Mr. Erickson and Dr. Hayes who had
5 been prepared to express opinions on the need for and effect of guardrails, would be expressing
6 opinions on the need for and effect of a "barrier" rather than a "guardrail." These disclosures were
7 made two court days prior to the scheduled first day of trial. These "new" expert disclosures were
8 identical to their previous disclosures except that they substituted the word "barrier" for the word
9 "guardrail." In all material respects the disclosures were identical to the reports previously
10 prepared by the experts regarding the need for and effect of guardrails.

11 7. Prior to these disclosures, Plaintiffs' counsel had alleged in some of their complaints
12 that the failure of King County to erect barriers that might be considered different from guardrails
13 was among their theories of liability. However, Plaintiffs' counsel did not develop any such theory
14 during discovery or during the course of this protracted litigation. Plaintiffs' counsel had more than
15 ample opportunity to develop that theory well in advance of the discovery cutoff.

16 8. The opinions and information Plaintiffs' counsel disclosed prior to June 29, 2015,
17 focused solely on what is commonly understood as traditional guardrails which are, of course,
18 barriers. Even if a legal distinction exists between barriers that are commonly understood as
19 traditional guardrails and other types of barriers -- which Plaintiffs' counsel have called Jersey
20 barriers, berms, and rocks -- Plaintiffs' counsel's disclosures prior to June 29, 2015, did not give
21 notice to King County that Plaintiffs' experts would be expressing opinions about barriers other
22 than what is commonly understood as traditional guardrails. The first notice of those opinions came
23

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1 to King County with Plaintiffs' counsels' June 29, 2015, expert disclosures which merely
2 referenced "barrier" instead of "guardrail."

3 9. Plaintiffs' counsels' failure to disclose that their experts would be expressing
4 opinions about barriers other than what is commonly understood as traditional guardrails was willful
5 and deliberate. Counsel knew that these theories could be a part of their case as early as their initial
6 complaints. The case has been pending for years. Plaintiffs' counsel and their experts had ample
7 opportunity to develop the opinions during the period for authorized discovery. Offering new
8 opinions that simply substitute the word "barrier" for the word "guardrail" just days before trial was
9 a blatant effort to circumvent the Court's July 26, 2014 Order granting summary judgment and its
10 order granting King County's Motions in Limine Nos. 6 and 7. Plaintiffs' counsel offered no
11 support; and the Court is not aware of any, that simply pleading the theory that guardrails are
12 distinct from other types of barriers overcomes the party's discovery obligations and preserves the
13 theory for trial. Moreover, the Court had previously notified Plaintiffs' counsel that it considered
14 their failure to timely disclose other expert opinions – specifically those pertaining to Mr. Apple –
15 willful. Despite that previous order, Plaintiffs' counsel still willfully chose to get updated or revised
16 opinions well after the discovery cutoff and well after the witness disclosures deadline. Plaintiffs'
17 counsel then disclosed the new opinions under virtually identical circumstances as they disclosed
18 Mr. Apple's new opinions, but did so after the Court had already deemed their disclosure of Mr.
19 Apple's opinions willful.

20 10. The Court's previous orders regarding guardrails are clear. There could be no
21 misunderstanding that the orders pertained to all types of barriers, traditional or non-traditional.
22 Even if Plaintiffs' counsel thought that the original orders only applied to traditional guardrails, they
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1 offer no reasonable excuse for their experts' failure to express opinions regarding other types of
2 barriers within the period of discovery.

3 11. Prejudice to King County by allowing Plaintiffs' experts to express these new
4 opinions was extreme. The matter came to the Court's attention on the second day of trial. The
5 Court and the parties made substantial efforts over about five years to be prepared for trial. Jury
6 summons had been sent out. The Court had arranged to be in a specially assigned courtroom so it
7 and the parties have access to the technology needed for the case. Everyone was prepared to start
8 trial. The length of time this case already has waited for trial was profoundly disturbing. There was
9 a need for closure for all parties, a need for the issues to be addressed, and a need for a jury to
10 decide this case. For multiple reasons, particularly the extraordinary delay in getting this case to
11 trial, this Court would not continue the trial date. Until June 29, 2015, a mere two court days before
12 trial, King County had no notice that Plaintiffs' experts would be offering opinions about the need
13 for and effect of barriers other than those commonly thought of as guardrails. Responding to those
14 new opinions would require deposing Plaintiffs' experts and then preparation of King County's own
15 experts to respond, all while trial was occurring. There was no reasonable way for King County to
16 meet that substantial burden.

17 12. No sanction less than exclusion of the opinions would have been effective.
18 Monetary sanctions would have only encouraged the gamesmanship Plaintiffs' counsel, Mr. Dore
19 and Ms. Deutscher, have engaged in. They knew the Court had found virtually identical conduct
20 with regard to Mr. Apple to be improper, willful, and deliberate. In light of that previous conduct,
21 the Court can only understand their improper, willful, and deliberate choice to proceed in almost
22 exactly the same fashion with regard to these new opinions as involving a conscious choice to
23 proceed, hoping the Court would impose a monetary sanction instead of exclusion. This conscious

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1 balancing of penalties indicated that the harshest penalty -- exclusion of the new opinions -- should
2 be imposed. Moreover, the work needed for King County to respond to the new opinions was too
3 great for King County to accomplish during trial. Monetary sanctions would not have relieved King
4 County of that work. Given all of these circumstances, the Court found that exclusion of the
5 witnesses' new opinions was the only appropriate remedy under these extreme circumstances.

6 13. The Court has imposed one of the most severe discovery violation remedies of
7 exclusion of the new expert opinions pursuant to *Burnet*. Monetary sanctions are not sufficient to
8 address this violation and are not ordered.

9 **C. Sanctions for the violation of the Order in limine during Ms. Peterson's testimony.**

10 On August 6, 2015, the Court ruled on the record that it would be sanctioning plaintiffs'
11 counsel Ann Deutscher for her repeated violations of the Court's orders in limine during her
12 questioning of plaintiffs' witness Collette Peterson. Plaintiffs then filed an "Objection" to the
13 Court's rulings in this regard, arguing that Ms. Deutscher did nothing wrong, that King County
14 was partially at fault for the repeated violations, and that no authority supports sanctions for
15 violations of orders in limine. Plaintiffs' arguments are rejected and the Court will sanction Ms.
16 Deutscher for the reasons the Court stated on the record.

17 2. As stated by the Court on the record, the June 16, 2015 Orders at issue are
18 "simple." These orders provide there was to be no reference (1) "regarding how the deaths have
19 affected other family members or friends"; or (2) about how the deaths affected the plaintiffs,
20 except to the extent that it goes to the destruction of the parent-child relationship. The primary
21 reason the Court fully granted Order 4g is because the emotional effect of the deaths upon
22 anyone other than the parents was irrelevant to the compensable claims in this case and
23 obviously unfairly prejudicial to the defendants.

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1 3. During her testimony, Ms. Peterson and Ms. Deutscher repeatedly violated Order
2 4g prior to the Court ruling that sanctions would be imposed. For example:

3 Q. And we are all talking because Hunter is involved—are you okay?

4 A. Yes. Nothing has brought any happiness like those—it was about two
5 years, I know, that it was good like that.

6 Q. Do you want to take a break?

7 A. No. It's all right because I can work through these tears. **Things trigger
8 tears once in a while. I usually try not to talk about all this stuff very often.**

9 Q. **Why?**

10 A. **Because life was so wonderful and it got just torn from all of us.**
11 Nothing was the same anymore. Going to church and having the boys and getting
12 along with Dori and being welcomed into this Beaupre family, it was amazing.
13 **Just to see the sadness on everybody because of Hunter—**

14 MS. PORT: Objection, your Honor.

15 THE COURT: Sustained.

16 * * *

17 A. ...together. Losing a son destroyed him. And, in turn, **I couldn't let it destroy
18 me too, because I –**

19 MS. PORT: Objection, your Honor.

20 THE COURT: Sustained.

21 * * *

22 A. ...**Like my life as I had known it completely just stopped that
23 moment. Nothing was the same again.** We thought we lost all the boys.
Me and Chad thought Colter, Paul and Hunter were all dead. And it was
really traumatic. And we found out, no, Colter is at school.

24 * * *

25 Q. I want to focus back to Chad. **It's hard to do because you lived it too,
26 right?**

27 * * *

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1 A. Once I got to the river, I didn't leave until the car was pulled up five days
2 later. **I literally didn't leave the side of the river, slept next to it. We tried to**
3 **figure out ways we could get them out. We were mad at the city for not**
4 **jumping in.**

MS. PORT: Objection, your Honor.

THE COURT: Sustained.

MS. PORT: May we discuss something outside the presence of the jury?

THE COURT: Yes. Follow my bailiff. Do what my bailiff says.

6 This was in response to Ms. Deutscher's question about how long she spent at the river, a
7 question that was clearly meant to elicit the exact response that it did.

8 4. On page 36 of the attached transcript, the Court addressed at length the multiple
9 violations of "these simple orders," ruling that sanctions would be imposed and that the improper
10 testimony was a result of the improper questioning by Ms. Deutscher.

11 5. Remarkably, the violations continued after the Court's rulings. Once the
12 questioning of Ms. Peterson began again, she and Ms. Deutscher continued to violate the simple
13 orders in limine:

14 Q: Did you have other information?

15 A. Yes, because when we --

MS. PORT: Objection.

THE COURT: Overruled.

17 BY MS. DEUTSCHER:

18 Q. Go ahead.

19 A. Chad's phone rang for a third time and somebody clarified for him that it
20 was Hunter and Austin. So I remember when that happened, **that's when we**
21 **hugged each other and cried, because that's when it really hit.**

22 I feel like I'm going through it again and my mind is not --

MS. PORT: Objection, Your Honor.

THE COURT: Sustained.

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1 * * *

2 Q. The first night Chad stayed there, did he stay overnight beside the river?

3 A. Yes.

4 Q. Tell me how and where he slept.

5 A. He slept next to me in a sleeping bag next to the river, right next to the car.
6 I think somebody had put a tent over us, like one of those pop-up tents you stand
7 underneath. Put it down over us because it was raining. **That's where we were
8 the first night. And waking up was awful. It was like all over again.**

9 This improper testimony was the result of Ms. Deutscher again asking Ms. Peterson about her
10 camping with Chad Beaupre by the river and Ms. Peterson again explained how awful it was for
11 her emotionally, a response clearly sought by the question. Again, Ms. Deutscher made no effort
12 to interrupt Ms. Peterson once she began violating Order 4g.

13 6. The third violation after the Court's ruling was as follows.

14 Q. I have to abbreviate this but we have to do it anyway, and I apologize.
15 **You have been through a lot.**

16 MS. PORT: Objection, Your Honor.
17 THE COURT: Sustained.

18 7. Ms. Deutscher made no effort to prevent Ms. Peterson from violating Order 4g.
19 Instead, she encouraged her to violate the Order, even after being admonished by the Court.

20 8. With only one exception, Ms. Peterson's violations were caused by the questions
21 asked. Ms. Deutscher never made any effort to stop Ms. Peterson when she was violating Order
22 4g as previously instructed by the Court. Plaintiffs' counsel had a duty to educate Ms. Peterson
23 about the simple orders in limine that affected her. Plaintiffs' counsel argues that no sanctions
should be imposed because they cannot find any reported decision that imposed sanctions for
violations of orders in limine. Orders in limine are designed to prevent mistrials and are subject
to the inherent authority of the court. The contempt statute is not sufficient to address Ms.

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1 Deutscher's intentional violation of Order 4g. Sanctions greater than the civil contempt statute is
2 warranted here. Ms. Deutscher is personally sanctioned in the amount of \$1000.00. This is the
3 least severe sanction that will address this violation. This sanction is reasonable and narrowly
4 tailored in this situation when considering other misconduct of counsel during the trial and the
5 risk to the Defendants of a mistrial.

6 **D. Sanctions for Mr. Dore's violation of the order in limine regard guardrails.**

7 1. The issue of guardrails was vigorously contested pre-trial. Ultimately, well
8 before trial, the Court dismissed all claims related to guardrails and directly excluded any
9 reference to guardrails or the like at trial. Nevertheless, on July 27, 2015, Plaintiffs' traffic
10 engineering expert, William Haro, violated the Court's orders regarding guardrails, resulting in a
11 substantial waste of court time and significant risk of unfair prejudice to King County. The
12 Court ultimately denied King County's request for a mistrial and instructed the jury to disregard
13 the improper testimony.

14 2. On August 18, 2015, Mr. Dore was cross examining King County's liability
15 expert, Marlene Ford. During that cross, Mr. Dore repeatedly asked Ms. Ford about Norton
16 Posey. King County objected to all of these questions. Ultimately, the Court excused the
17 witness and King County argued that Mr. Posey's role in the case was in regards to guardrails,
18 that the Court had granted the County's motion to exclude guardrails, and that Mr. Dore should
19 therefore not be allowed to ask questions that sought to improperly bring up the issue of
20 guardrails. In response, Mr. Dore argued in essence that Mr. Posey had information about "all of
21 the characteristics of this road in relationship to it being reasonably safe" and asked to allowed to
22 make an offer of proof. The Court asked for the offer of proof after which it ruled as follows:

23 As I previously ruled, the physical characteristics of the road are open for inquiry.
The unique scenario here is the witness that's being used. To the extent that this

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witness relied on this information or considered this in reaching an opinion, that inquiry may be. The notes I have from the offer of proof reflect that the issue of berms and physical characteristics of the nine Maple trees was related to the overlay project, and specifically whether anyone contacted him who did the overlay project about these issues.

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

3. After Mr. Dore extensively argued with the Court about its clear ruling, the Court stated as follows:

... To the extent that it is incumbent upon counsel to ask questions that are narrowly tailored for the information that they are seeking, *they should know pursuant to orders that is admissible or inadmissible. That is on counsel. I'm not going to tell you exactly how to phrase questions.* ...

Mr. Dore than again extensively argued with the Court about its clear ruling. The Court's lengthy response included the following:

But there's nothing opening the door about five miles of guardrail. The questions of this witness were not related to barriers on the roadway. They were related to conditions on the roadway and the overall crash data. You are free to inquire about that.

But there's nothing talking about the condition of this roadway with leaves and a soft gravel shoulder with overlay and constituent parts of the shoulder, and now doing a compare and contrast that somehow a guardrail would have prevented this accident. The thing I understand is there was a condition on the roadway that caused Ms. Mundell to lose control of the vehicle. *Guardrail comes after that, which has been excluded and has been for some time.*

After Mr. Dore once again argued with the Court about these clear rulings, the Court stated as follows:

Counsel, I am not frustrated. I'm simply repeating what's been done. Hence, "guardrails" are out. There's been testimony about the conditions of this roadway to which I have cautiously guarded the issue of guardrails. *That door has not been opened.* ...

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1 4. Ultimately, after these and other lengthy exchanges on this issue, Mr. Dore's
2 questioning of Ms. Ford resumed and, shortly thereafter, Mr. Dore read Ms. Ford the following
3 question from her deposition:

4 Q. . . . Okay, alright, it says that the segment of the Green River Road that is the
5 focus of this lawsuit met or exceeded all known King County Road standards,
6 MUTC, AASHTO, Washington DOT guidelines for pavement, lane width,
7 striping, mile-per-hour, advanced curve warnings, *and the need for guardrail*
8 *placement*. Is that what you are going to express opinions on?

9 King County objected and the jury was again excused. The Court then found on the record "that
10 it is a clear violation of my order. Orders actually. . . ." The Court ruled that sanctions would
11 be imposed at a later date and that a curative instruction would be read to the jury (again).

12 5. Accordingly, a personal sanction in the amount \$2000.00 is assessed against Mr.
13 Dore. This is the least severe sanction to deter him from this sort of behavior and punish him for
14 his blatant violation of the Court's orders. The Court finds that sanctions should be assessed
15 against Mr. Dore for the intentional violation of the Court's Orders in limine and the Court's
16 repeated and direct warnings on the record. Mr. Dore repeatedly discussed and received
17 instruction on this issue prior to this violation. Orders in limine are designed to prevent mistrials
18 and are subject to the inherent authority of the court. Sanctions greater than the civil contempt
19 statute is warranted here. Mr. Dore is personally sanctioned in the amount of \$2000.00. This is
20 the least severe sanction that will address this violation. This sanction is reasonable and
21 narrowly tailored in this circumstance given the gravity of the violation and the risk to the
22 Defendants of a mistrial.

23 //

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1 CONCLUSIONS/ORDER

2 1. The actions described above by Ms. Deutscher and Mr. Dore regarding expert
3 witness disclosures were done willfully and deliberately as outlined in *Burnet*. The *Burnet*
4 factors were met here in this extraordinary circumstance.

5 2. The violations of orders in limine by Ms. Deutscher and Mr. Dore were done
6 intentionally and were significant to the issues presented at trial. Personal sanctions are
7 warranted. The civil contempt statutes are insufficient to address these specific violations.

8 3. Accordingly, total sanctions assessed personally against Ann Deutscher are in the
9 amount of \$1000.00 and against James Dore in the amount of \$2000.00. Because the violations
10 of the orders in limine were to the detriment of both Defendants, each lawyer shall pay 50% of
11 the personal sanction to Defendant King County and 50% of the sanction to Defendant Mundell
12 within 30 days of this order. Additionally, each of these lawyers will pay 1/2 of the attorney's
13 fees King County (and Defendant Mundell, if requested) incurred relating to Mr. Apple's
14 deposition. Payment of the attorneys' fees shall be made to the party within 30 days of this
15 order.

16
17 DATED this 17 day of December, 2015.

18 
19 _____
20 HON. TANYA L. THORP, JUDGE

21 PRESENTED BY:

22 By: /s/ DANIEL L. KINERK

23 Daniel L. Kinerk

WSBA #13537

Senior Deputy Prosecuting Attorney

By: /s/ CINDI PORT

Cindi Port

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